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## THIRD PARTY STANDING

*Henry P. Monaghan\**

Traditional constitutional theory posits a narrow conception of the issues that a litigant properly may assert. A litigant may invoke only his own constitutional rights or immunities; he may challenge a statute only in the terms in which it is applied to him; and, in the application process, courts have broad power to construe the relevant statutory language so as to avoid constitutional difficulties.<sup>1</sup> The *Yazoo* case<sup>2</sup> is perhaps the best known example of judicial adherence to these canons. There, a railroad claimed that a statute mandating speedy settlement of "all claims for lost or damaged freight" contravened the fourteenth amendment. The railroad urged that, whatever the evidence in the case at bar, the general language of the statute penalized even the failure to settle unjustifiable claims. Thus, the railroad contended, the statute brought within its terms constitutionally privileged conduct. But, said the Court,

it is not open to the railway company to complain on that score. It has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry has been pronounced just in every respect. Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now.<sup>3</sup>

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1. *United States v. Raines*, 362 U.S. 17, 21-22 (1960), contains the most elaborate modern statement of these principles. See also, e.g., *Ulster County Court v. Allen*, 442 U.S. 140, 154-55 (1979).

2. *Yazoo & M.V.R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912).

3. *Id.* at 219-20.

Developments in the last three decades have substantially eroded, if not completely decentered, the *Yazoo* model. Increasingly, litigants whose own activities are assumed to fall within a statute's valid applications are permitted to assert the statute's potentially invalid applications with respect to persons not before the court. The first amendment overbreadth cases are a familiar example.<sup>4</sup> So too are the *jus tertii* standing cases, in which litigants related to third parties in certain ways are permitted to raise the latter's rights.<sup>5</sup> Few judges or commentators seem inclined to scrutinize the premises of this expanding "third party standing":<sup>6</sup> So long as he suffers an injury in fact that is both fairly traceable to the challenged statute and likely to be redressable by a favorable judgment, the litigant has standing in the constitutional sense.<sup>7</sup> Once these requisites are established, it is assumed that the scope of the issues open to a litigant is simply a matter of remedial detail and, as such, governed by sound judicial discretion.<sup>8</sup> In sum, the *Yazoo* doctrine appears not only to be in eclipse, but, more significantly, to lack any important intellectual center of gravity.

But reducing third party standing to discretionary rules of judicial practice is very troubling. Serious problems of legitimacy are raised when the principles governing the power of courts to pass on the constitutionality of statutes are subject to unanalyzed and ungrounded notions of judicial "discre-

4. See Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). For a briefer discussion, see L. Tribe, *American Constitutional Law* § 12-24 (1978).

5. In differentiating *jus tertii* from overbreadth standing commentators have emphasized the relationship between the litigant and the third party right holders. In a *jus tertii* case, the litigant has a preexisting relationship with "real" third parties whose interests are implicated; in an overbreadth case, the litigant is permitted to raise the rights of "hypothetical" third persons. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 191 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]; Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 438-44 (1974) [hereinafter cited as *Harvard Note*].

6. This term has begun to take hold in the case law and academic commentary as a synonym for *jus tertii* standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 492 n.4 (1982) (Brennan, J., dissenting); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80 (1978). See generally Rohr, *Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in the Federal Courts*, 35 U. Miami L. Rev. 393 (1981). As the discussion in Part I, *infra*, indicates, the term might be used to include overbreadth standing as well. See also Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 612-16 (1962) (treating overbreadth as a facet of *jus tertii*) [hereinafter cited as *Sedler, Constitutional Jus Tertii*].

Use of the term "standing" to describe the scope of the issues that a litigant may raise can be faulted. A defendant in an enforcement proceeding, or a prospective defendant who initiates a suit for prospective relief, has standing in the constitutional sense; these litigants are threatened with injury in fact from application of the statute. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 Calif. L. Rev. 1308, 1315-19 (1982) [hereinafter cited as *Sedler, Substantive Jus Tertii*]. But I see no harm in retaining the traditional standing terminology to describe both the question of who has access to the courts and the separate question of the range of issues to be litigated.

7. E.g. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

8. *City of Revere v. Massachusetts Gen. Hosp.*, 103 S. Ct. 2979, 2982-83, 2985 (1983); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80-81 (1978); see also Rohr, *supra* note 6, at 394; *Harvard Note*, *supra* note 5, at 424-25.

tion," however "principled" their content. What, precisely, is the source of the posited judicial authority to permit third party standing in some cases and to deny it in others?<sup>9</sup> Do the Court's decisions permitting or denying third party standing bind Congress or the state courts? Our uncertainty about such rudimentary questions suggests that we lack a clear conception of third party standing.

It is inviting to view the confusion over the nature of third party standing simply as a subset of a still deeper confusion over the fundamental nature of constitutional adjudication. The *Yazoo* doctrine was not understood by the courts that applied it as resting upon discretionary remedial considerations. *Yazoo* reflected a powerful and pervasive view of the nature of constitutional adjudication, the animating premise of which denied that courts possessed a general commission to make pronouncements on the meaning of the Constitution or to enforce public norms. Law declaration and norm enforcement were seen as incidental by-products of the central judicial duty: protection of private rights.<sup>10</sup> Indeed, *Marbury* had categorically insisted that the "province of the court is, *solely*, to decide on the rights of individuals."<sup>11</sup> At bottom, this conception of the judicial role in constitutional litigation analogized constitutional to common law adjudication.<sup>12</sup> The resulting dominance in constitutional law of the categories of analysis drawn from private law in turn discouraged any judicial concern for the rights of strangers to the litigation.<sup>13</sup>

Constitutional adjudication has, of course, evolved beyond its private rights origins, and the common law analogy has lost much of its constraining force.<sup>14</sup> In fact, the process of constitutional adjudication now operates as one

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9. Compare *Rakas v. Illinois*, 439 U.S. 128, 132-38 (1978) (fourth amendment rights may only be asserted by the right holder), with Doernberg, "The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. Rev. 259, 294-97 & n.184 (1983) (expansive conception of fourth amendment rights requires broadened standing). Cf. *Pennhurst State School & Hosp. v. Halderman*, 52 U.S.L.W. 4155, 4159 n.12 (U.S. Jan. 24, 1984) (United States would have standing to sue for injunctive relief on federal claims but not to assert state-law claims of third parties).

10. That subject is by now too familiar to warrant more than brief consideration here. See generally Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1365-68 (1973) [hereinafter cited as Monaghan, *Constitutional Adjudication*]; Sunstein, *Judicial Relief and Public Tort Law* (Book Review), 92 Yale L.J. 749, 758 (1983). For some elaborations on the important history of this conception, see Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 14-20 (1983).

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added); see also *id.* at 162-64.

12. See *supra* note 10.

13. The private rights model invited us to understand the nature of constitutional adjudication through the categories of private law with its (then) heavy emphasis on concepts such as rights, duties, privileges, immunities, etc.—Hohfeld's "fundamental legal conceptions." W. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, and Other Legal Essays* (1919). For a brief but lucid treatment, see H. Hart & A. Sacks, *The Legal Process* 141-55 (tent. ed. 1958). Such a conceptual apparatus encourages one to think about the "personal" nature of the litigant's right.

14. The general disintegration of the conception that public law could be meaningfully understood through the prism of private law began with the emergence of the administrative state. The perception that modern government has enormous impact on existing contract and property

in which courts discharge a special function: declaring and enforcing public norms.<sup>15</sup> So viewed, constitutional adjudication is essentially a public action, bearing no real resemblance to common law adjudication.<sup>16</sup> Judicial protection of private rights has now become a by-product of—albeit an important one—not the justification for constitutional adjudication. Inevitably, a public action paradigm will generate judicial access doctrines different from and more relaxed than those obtaining under a private rights model.<sup>17</sup> The growing judicial tolerance of third party standing claims can be seen as one reflection of the new model's descriptive and normative power. It is, after all, no surprise that judicial willingness to lower the barriers with respect to those persons who could initiate challenges to statutes was matched by a corresponding willingness to broaden the range of assertable claims.

The paradigm shift is, however, far from complete.<sup>18</sup> While the emerging public action model is rapidly dissolving the way in which we previously

arrangements, and, moreover, is itself the source of considerable wealth, generated pressure to increase judicial control of administrative conduct beyond what could be fairly assimilated within the Hohfeldian framework. Monaghan, *Marbury* and the Administrative State, *supra* note 10, at 14–18. Judicial efforts to absorb and domesticate the administrative state inevitably reoriented public law thinking away from a right-based theory founded on the Hohfeldian model. For a penetrating examination, see L. Jaffe, *Judicial Control of Administrative Action* (1965). See, in particular, *id.* at 508–09, emphasizing increased focus on “interests” rather than rights. See generally J. Vining, *Legal Identity* (1978). Developments in constitutional adjudication followed apace.

15. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1, 29–30 (1979) (“[A]s pervasive a role as disputation may play in litigation, it is equally important to recognize that the *function* of the judge—a statement of social purpose and a definition of role—is not to resolve disputes, but to give the proper meaning to our public values.”).

16. The analogy of constitutional to common law adjudication broke down with the relaxation of standing requirements. See *infra* note 17. And it wholly collapsed with the emergence of “structural” litigation, where the conflict is, quite plainly, not between an individual and a specific government official charged with an identifiable and concrete wrong, but between large groups of individuals and major aspects of the governmental system in which the litigants allege systemic malfunction and sought system-wide relief. There is, as most readers are aware, considerable writing on this topic. For an especially lucid presentation of the difference between the premises of litigation seeking structural reform and older conceptions of the judicial task, see Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 *Harv. L. Rev.* 626 (1981).

17. This shift is most apparent in standing; the older requirement of a common law (Hohfeldian) plaintiff became mixed up with and then gave way to standing, see J. Vining, *supra* note 14, at 55–56 (discussing the late emergence of the concept of standing in public law). Standing in turn was reduced to a simple requirement of injury in fact—with injury being expansively construed to embrace economic and even aesthetic injuries. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). Indeed, on occasion the Court acknowledges as much. With increasing frequency, its opinions refer to the standing requirement in functional terms: its office, the Court tells us, is not to protect rights, but to maintain the conditions for sensible constitutional adjudication, including the avoidance of unwarranted conflict with the other branches of government. See *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220–22 (1974); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

18. For example, *City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983) (likelihood of future irreparable injury to victim of police chokehold held insufficient for federal equitable remedy),

understood constitutional law, the language and categories of analysis derived from the older paradigm continue to structure legal discourse. This is in part because adequate new conceptual tools have yet to be formulated, and in part because the protection of private rights still remains an important judicial concern. Not surprisingly, however, while the old categories formally obtain, they have been bent, distended, and reshaped to accommodate the imperatives of the public action. The consequence is doctrinal confusion and anomalous results,<sup>19</sup> a pattern likely to continue until the premises of the public action paradigm are directly confronted and fully embraced.<sup>20</sup>

We are, at a minimum, badly in need of a systematic rethinking of such access mechanisms as rights, implied rights of action, and standing. That task will require the elaboration of a distinctive conceptual apparatus for public law.<sup>21</sup> Pending that development, any analysis of the nature of third party standing in the current period of awkward transition is necessarily tentative. Still, some such effort seems worthwhile. At least part of the existing confusion seems unnecessary. Moreover, whatever the appropriate paradigm for constitutional adjudication, third party standing problems will not disappear. We are not yet ready to dispense with every rule rationing access to the courts or restricting the kinds of claims that can be presented once access is granted.<sup>22</sup> Nor are we ready to ignore entirely the autonomy interests of the states in structuring their own judicial processes in a rational, even-handed manner.<sup>23</sup>

demonstrates that the Court's views of "Our Federalism" make it reluctant to embrace openly a public action model. See The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 215, 222-23 (1983). See generally Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4 (1982) (cataloguing and decrying the Court's failure to see clearly the "public nature" of constitutional adjudication).

19. E.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

20. That process has begun. "Public action" commentators have had increasing impact on the lower courts. See, e.g., *Gray Panthers v. Schweiker*, 716 F.2d 23, 31 (D.C. Cir. 1983).

21. Professor Vining would go further. He believes that "we are witnessing . . . nothing less than the breakdown of individualism as a basis for legal reasoning." J. Vining, *supra* note 14, at 2.

22.

Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," . . . a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.

*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489-90 n.26 (1982) (citation omitted).

23. E.g., *Illinois v. Gates*, 103 S. Ct. 2317, 2323 (1983) (stressing "due regard for the appropriate relationship of this Court to state courts"). *Gates* went quite far in its avoidance of an issue "not pressed or passed upon below." Unless narrowed, it suggests that direct challenges to the authoritative character of Supreme Court decisions must initially be advanced in the state courts.

It is against this background that I want to consider third party standing, not with a view toward reordering the case law, but in an effort to clarify some of the more systemic problems. This paper seeks to establish two propositions. First, much third party standing law can be grounded in a premise shared by both the public and private rights paradigms—that the protection of individual rights is an important judicial concern. Many third party standing cases ought to be understood in first party terms: the litigant is simply asserting a violation of his own right to be regulated in accordance with a constitutionally valid rule. This seems true of overbreadth challenges. More importantly, I hope to show that it is also true of a great many *jus tertii* challenges. The litigant is asserting a substantive due process right to interact with a third party right holder free from unjustifiable governmental interference.

If this analysis is sound, important consequences follow. Claims founded upon such first party rights are not prey to open-ended invocations of judicial discretion; and, to the extent that the rights have a federal source, state courts are compelled to recognize these challenges—at least where a statute is being enforced in a judicial proceeding against a defendant.

Second, to the extent that a litigant is conceived of as presenting a genuine third party claim—one not susceptible of a first party formulation—the litigant is essentially a judicially licensed private attorney general. Talk of third party standing in these cases obscures the doubtful basis of federal judicial authority to create such private attorneys general. Except in very limited circumstances, that authority cannot comfortably be derived from a private rights model of constitutional adjudication, and its propriety under the public action model, while plausible, seems to be assumed, not demonstrated. Moreover, even if the Court can license such private attorneys general, it is not clear why such a determination should bind Congress or the state courts.

## I. OVERBREADTH AS FIRST PARTY STANDING

The conventional account of overbreadth cases—in which litigants whose own conduct is not constitutionally protected are nonetheless permitted to mount a constitutional attack premised on the rights of parties not before the court—was that a special third party standing rule had been established for first amendment cases. In contrast to other rights, the first amendment was thought to free litigants from the general limitations of as-applied challenges in permitting them to challenge the “facial” validity of a statute by raising the “rights” of “hypothetical” third parties.<sup>24</sup> An avowed speaker of “fighting words,” for example, would have “standing” to challenge a rule that purported to regulate both his unprotected expression and, say, speech that was merely “annoying” or “offensive.”<sup>25</sup>

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24. “[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.” *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 634 (1980).

25. See *Gooding v. Wilson*, 405 U.S. 518 (1972).

I see no a priori objection to a special first amendment standing doctrine.<sup>26</sup> But, as I have elsewhere argued,<sup>27</sup> the special standing doctrine asserted by overbreadth theorists has only fragmentary support in Supreme Court practice and is analytically unsound. My view is that overbreadth challenges can best be understood within the framework of conventional first party standing theory. The special status of first amendment claims reflects the high degree of means-end congruence required under substantive first amendment law, and not any distinctive standing concept.

While the point seems to have been frequently misunderstood, the essential attribute of an overbreadth challenge does not lie in its authorizing a facial challenge. Any litigant has the right to make a facial challenge to the constitutional sufficiency of the rule actually invoked against him,<sup>28</sup> without regard to whether his own conduct could validly have been regulated by a differently formulated rule.<sup>29</sup> To be sure, the "face" of the rule is itself the product of interpretation. As *Yazoo* makes plain, "when actually faced with the [constitutional] question, [a court] might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable."<sup>30</sup> In general, the interpretive process can operate so as to slice the legislative command to a permissible subrule general enough to cover the facts of the case before the court. Thus, *Yazoo* permits the interpreting court to

26. Various constitutional provisions, particularly the first amendment, have important remedial dimensions. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 43 (1975); Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). On eighth amendment due process, see, for example, *California v. Ramos*, 103 S. Ct. 3446, 3451 (1983) ("In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury . . .").

27. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1.

28. "As applied" challenges which are formulated as attacks on a rule rather than direct claims of privilege are included in the term "facial" challenge. On the overlap between "as applied" and "facial" challenges, see Hart & Wechsler, *supra* note 5, at 590-91.

29. In *New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982), the Court said:

Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face. See, e.g., *Terminello v. City of Chicago*, 337 U.S. 1, 5, 69 S. Ct. 894, 896, 93 L. Ed. 1131 (1949). See generally Monaghan, *Overbreadth*, 1981 Sup. Ct. Review 1, 10-14.

Cf. *Zant v. Stephens*, 103 S.Ct. 2733, 2744-46 (1983) (discussing the holding in *Stromberg v. California*, 283 U.S. 359 (1931), that a general guilty verdict must be set aside where it could have been based on either a statute's valid clauses or its invalid clauses). But see *United States v. Lemons*, 697 F.2d 832, 835 (8th Cir. 1983).

To avoid misunderstanding, I would note that the claim is not that the litigant can force the court to articulate any specific rule, but only that the rule actually invoked must be valid.

30. *Barrows v. Jackson*, 346 U.S. 249, 256 (1953); see also Monaghan, *Overbreadth*, *supra* note 27, at 8; Rohr, *supra* note 6, at 400-04.

At the margins, due process and first amendment considerations, as well as fundamental separation-of-powers issues at the federal level, place limits on judicial power to reshape statutes

defer consideration of possible challenges to future applications of a statute that would carry its scope beyond that necessary to sustain its immediate application: the interpretive process could operate *pro tanto*, so to speak.<sup>31</sup> But, whether comprehensively narrowed in terms of categorical subrules or narrowed *pro tanto*, the rule actually invoked against the litigant by the court must be facially sound—it must, in other words, track, or fall on the safe side of, the judicially prescribed boundary line separating protected from unprotected activity, without regard to where the particular litigant's conduct falls in relation to that line.<sup>32</sup>

The distinctive claim of conventional overbreadth theory is in asserting limits in the name of the first amendment on the otherwise generally acknowledged judicial power to narrow statutes in the process of applying them.<sup>33</sup> Overbreadth theorists argue that, at least in some circumstances, statutes regulating expression must be judged as written; they cannot be narrowed in the process of application, even prospectively.<sup>34</sup> But at this point deep, and to my eye intractable, problems surface. Despite admirable sophistication, overbreadth theorists seem wholly unable to specify satisfactory criteria for determining when, as a matter of constitutional law, courts should and should not be permitted to truncate statutes in the application process.<sup>35</sup> Nor do the

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in the application process, particularly if the restructuring occurs at the appellate level. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155–59 (1969); *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966).

31. Monaghan, *Overbreadth*, *supra* note 27, at 6–8.

*Yazoo* makes plain that the Supreme Court would indulge in a *presumption* that the state court will eliminate any objectionable features, at least so long as a valid and plausible construction of the statute is apparent in the case at bar. That case had come to the Court without any authoritative construction of the statute by the state courts. But the Court was undeterred. “How the state court may apply [the statute] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now.” *Yazoo & M.V.R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 220 (1912); see also *United States v. Raines*, 362 U.S. 17, 22 (1960). The *Yazoo* presumption is probably not important where there is an opinion by the state court, and in any event is not justifiable in cases of heightened scrutiny. Monaghan, *Overbreadth*, *supra* note 27, at 29–30 (discussing *Coates v. City of Cincinnati*, 402 U.S. 611 (1971)).

32. Monaghan, *Overbreadth*, *supra* note 27, at 8–12. Thus, for example, a bar owner might be indicted under a statute prohibiting topless dancing “in any public place.” The state court is free to give the statute a narrow construction limiting its applicability to bars. As so construed, the statute would survive a facial challenge. See *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). If, however, the state court construes the phrase “in any public place” more broadly, the resulting rule would be facially invalid. Cf. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975) (affirming district court's grant of preliminary injunction against enforcement of ordinance banning topless dancing “in any public place”).

33. Monaghan, *Overbreadth*, *supra* note 27, at 11–19.

34. *Id.* at 19.

35. Few commentators go so far as to insist that the state courts could *never* narrow statutes when they might have an impact on first amendment interests. *Id.* at 16. Complex distinctions are therefore needed. See, for example, the discussion of the impressive efforts to bar narrowing where no “determinate rule of [constitutional] privilege” exists to constrain the statute, in Note, *supra* note 4, at 882–90; see also Monaghan, *Overbreadth*, *supra* note 27, at 18–19.

Court's decisions indicate that such limits exist. Although it has had frequent occasion to point out that a state court has failed adequately to narrow a challenged statute,<sup>36</sup> the Court has, with an initial arguable exception,<sup>37</sup> never clearly imposed any distinctive first amendment limits on the power of state courts to narrow statutes affecting expression.<sup>38</sup> And recent decisions make clear that courts are free to construe statutes to avoid unconstitutionality. Thus, the Court now tells us that state courts need not entertain overbreadth challenges unless the statute "reaches a substantial number of impermissible applications,"<sup>39</sup> a limitation not only lacking significant bite, but one not peculiar to the first amendment.<sup>40</sup> In short, the first amendment comes into play *after* the scope of the rule has been set by independent tenets of construction.

In any event, whatever the limits on judicial power to reshape statutes affecting expression, overbreadth challenges are best understood as invoking the conventional principle that a litigant's conduct may be regulated only in accordance with a valid rule. Where the substantive constitutional standard is more stringent than the rational basis test, this demand translates into a requirement of significant congruence between the boundaries of the rule and constitutionally acceptable governmental ends.<sup>41</sup> A rule that proscribes significantly more conduct than is justified by the permissible governmental end may not be applied to the litigant, even though the litigant's own conduct could be prohibited. This is so not only in the first amendment area, but whenever significant means-ends congruence is required by the applicable substantive constitutional law.<sup>42</sup> In sum, overbreadth dispositions are simply determinations *on the merits* of the litigant's substantive constitutional claim.<sup>43</sup> What differentiates a first amendment case from other cases is not a special standing principle but the substantive content of the applicable constitutional law.<sup>44</sup>

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36. See, for example, *Gooding v. Wilson*, 405 U.S. 518 (1972), discussed in *Monaghan, Overbreadth*, supra note 27, at 22-23.

37. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (alternative ground). In *Thornhill*, it should be recalled, the state courts made no effort to narrow the broadly written statute.

38. *Monaghan, Overbreadth*, supra note 27, at 21; see also *United States v. Grace*, 103 S. Ct. 1702 (1983) (statute severed and severed part held invalid). But the truncating can come too late to be applied to a specific defendant. In those circumstances the narrowing construction has prospective application only.

39. *New York v. Ferber*, 458 U.S. 747, 771 (1982). The Court's earlier formulations of overbreadth doctrine are recounted in *Monaghan, Overbreadth*, supra note 27, at 22-23, 27-28.

40. A statute with a substantial number of invalid applications would be open to vagueness objections. *Kolender v. Lawson*, 103 S. Ct. 1855, 1859 n.8 (1983).

41. That requirement has little impact where the rational basis test is the constitutional standard. Anomalies aside, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982), the rational basis test has not been thought to require a close fit between means and ends. See *Monaghan, Overbreadth*, supra note 27, at 38-39.

42. *Monaghan, Overbreadth*, supra note 27, at 37-38.

43. In other words, the litigant's assertion always takes the following form: "I am being subjected to an invalid rule."

44. *Monaghan, Overbreadth*, supra note 27, at 37.

To be sure, overbreadth methodology, even as properly understood, requires consideration of the impact of a rule on third parties. In assessing the constitutional validity of the operative rule, the court's attention is drawn away from the litigant's conduct to the rule's reasonably foreseeable applications to persons not before the court. In that sense we have third party standing. But, rhetoric aside, the "rights" of third persons are not implicated.<sup>45</sup> Correctly understood, overbreadth challenges involve first, not third, party standing: "the [overbreadth] claimant is asserting his own right not to be burdened by an unconstitutional rule of law, though naturally the claim is not one which depends on the privileged character of his own conduct."<sup>46</sup> This analysis makes plain why courts *must* entertain overbreadth challenges in suits to enforce the statute against a defendant to the extent that the operative interpretation of the statute takes in more than the defendant's particular expression. In enforcement proceedings no issue of judicial prudence or discretion is implicated. The constitutional validity of the rule being applied to the litigant is directly in issue.<sup>47</sup>

The foregoing analysis of overbreadth challenges invites a closer look at *jus tertii* standing. To what extent is a *jus tertii* claimant, like the overbreadth claimant, best understood as "asserting his own right not to be burdened by an unconstitutional rule of law," rather than seeking the benefit of discretionary rules of judicial practice?<sup>48</sup>

## II. JUS TERTII STANDING

### A. Doctrinal Evolution

The rule that a litigant has standing to raise only his "own" rights has a long history. The early case law contains no suggestion that this limitation was understood to be simply a matter of judicial discretion. For example, in *Tyler v. Judges of the Court of Registration*,<sup>49</sup> the Court, invoking familiar principles, said:

45. Even if the third parties are participating as amici, they are not before the court in the sense that their rights are being adjudicated by the decree. For a recent discussion of *res judicata* principles, see generally *Nevada v. United States*, 103 S. Ct. 2906, 2917-25 (1983).

46. Note, *supra* note 4, at 848 (footnote omitted).

47. See Hart & Wechsler, *supra* note 5, at 88 (Supp. 1981) (A "defendant in a coercive proceeding . . . always has standing to challenge the validity of a statute in the terms in which it was applied to him."); Monaghan, *Marbury* and the Administrative State, *supra* note 10, at 17-24; cf. *Moore v. City of E. Cleveland*, 431 U.S. 494, 497 n.5 (1977) (criminal defendant need not exhaust inadequate administrative remedies as prerequisite to facial challenge to zoning ordinance). Suits for prospective relief raise different issues. Monaghan, *Overbreadth*, *supra* note 27, at 34-36.

48. In examining the issue, I will follow the Court's current practice of using the terms third party and *jus tertii* standing interchangeably. Analytically, either term might also embrace some conceptions of overbreadth challenges. See *supra* note 6.

49. 179 U.S. 405 (1900).

The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.<sup>50</sup>

*Tyler* was decided in 1900, and its principles found repeated application in ensuing decades.<sup>51</sup> But troublesome decisions began to crop up in the first decades of this century, a concomitant of that period's momentum toward judicial activism. *Pierce v. Society of Sisters*<sup>52</sup> and *Truax v. Raich*<sup>53</sup> are among the best known examples. *Pierce* apparently permitted schools to raise the rights of prospective pupils and their parents,<sup>54</sup> and *Truax*, an employee to raise the rights of his employer.<sup>55</sup> Although these cases are now widely understood as early illustrations of jus tertii standing, they were not so understood by the Courts that decided them, at least not in any clear sense. To be sure, in each case the Court considered the challenged statute's impact on third persons, but in the end it emphasized the rights of the litigants before it. In *Pierce*, for example, the Court said the litigants "asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate . . . ."<sup>56</sup> And in granting relief, the Court relied upon the "many . . . cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."<sup>57</sup> It is, indeed, difficult to find in the early case law any holding squarely supporting jus tertii standing.<sup>58</sup> The reason is not hard to find: third party standing seemed to contravene the fundamental axiom reflected in *Tyler* that the "duty of . . .

50. *Id.* at 406. The opinion of the Court reviews the prior decisions. *Id.* at 407-09. Four justices dissented, *id.* at 411-14 (Fuller, C.J., dissenting), but on the narrow ground that the litigant sufficiently alleged his own rights.

51. See Rohr, *supra* note 6, at 396-400 (collecting cases); Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 84-87 (1937) (same). The inseparability cases are *not* an exception to the rule that a litigant may assert only his own rights. See *infra* notes 75-78 and accompanying text.

52. 268 U.S. 510 (1925).

53. 239 U.S. 33 (1915).

54. 268 U.S. at 535-36; see also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (reversing the convictions of a teacher under a statute prohibiting teaching foreign languages but also noting that the statute interfered with the rights of pupils and their parents); *Bartels v. Iowa*, 262 U.S. 404 (1923) (same).

55. 239 U.S. at 38-39.

56. 268 U.S. at 536.

57. *Id.* The same first party standing approach is apparent in *Truax*, 239 U.S. at 38-39.

58. Most of the cases where such challenges were sustained seem premised on inseparability. See *infra* note 76; Sedler, Constitutional Jus Tertii, *supra* note 6, at 601-12.

every judicial tribunal" is "limited to determining rights of persons or of property, which are actually controverted in the particular case before it."<sup>59</sup>

Jus tertii standing as a distinctive legal theory begins in 1953 with the rationale proffered in *Barrows v. Jackson*.<sup>60</sup> In permitting a white vendor to raise a black vendee's rights as a defense in a suit charging the vendor with breach of a racially restrictive covenant, the Court's analysis worked a fundamental conceptual shift.<sup>61</sup> The earlier case law had largely insisted that a litigant assert his own rights, although *Pierce* and *Truax* left open a large question of what constituted such a claim. In contrast, *Barrows* explicitly endorsed the litigant's "standing . . . to vindicate the constitutional rights of some third party,"<sup>62</sup> insisting in the process that "our rule denying standing to raise another's rights . . . is only a rule of practice."<sup>63</sup> Along with *NAACP v. Alabama ex rel. Patterson*,<sup>64</sup> which permitted an organization to raise the first amendment privacy rights of its members,<sup>65</sup> *Barrows* generated a whole series of modern cases.<sup>66</sup>

Frequent efforts were made to confine, or rather restate, the "exceptions" to the *Yazoo* doctrine recognized by the emerging case law. At first it was believed that such extraordinary third party standing was proper only where "necessary" to prevent effective denial or material obstruction of the rights of third parties who could not reasonably be expected to assert them.<sup>67</sup> In time, "obstruction" was merged into "dilution";<sup>68</sup> still later, focused concern with the actual ability of the third party right holder to vindicate his claims diminished.<sup>69</sup> While it may be an overstatement to say, as does Justice Brennan, that in constitutional cases the Court now has "only rarely inter-

59. *California v. San Pablo & T.R.R.*, 149 U.S. 308, 314 (1893).

60. 346 U.S. 249 (1953).

61. *Id.* at 255-59. *Barrows* might have been viewed as a narrow exception to the normal rule, one needed to fill out the principles of *Shelley v. Kraemer*, 334 U.S. 1 (1948).

62. 346 U.S. at 255 (emphasis added).

63. *Id.* at 257.

64. 357 U.S. 449 (1958).

65. *Id.* at 458-60. *NAACP v. Alabama ex rel. Patterson* has never been treated as a case limited to the first amendment. See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 40 n.8 (1981) (challenge to Medicaid regulations); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-45 (1977) (discrimination against interstate commerce). On the limits of representational standing, see *Harris v. McRae*, 448 U.S. 297, 320-21 (1980) (organization denied standing because of divergent views of members).

66. Rohr, *supra* note 6, at 426-42, contains an exhaustive collection of the cases.

67. Harvard Note, *supra* note 5, at 425. Both *Barrows*, 346 U.S. at 257, and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 359, support this reading.

68. *Craig v. Boren*, 429 U.S. 190, 195 (1976). More frequently, commentators simply ignore the difference between the two ideas. See, e.g., Harvard Note, *supra* note 5, at 431-36; cf. Rohr, *supra* note 6, at 420 n.133 (reading commentators who speak of "impairment" and deprivation as supporting a "dilution" viewpoint).

69. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); see also Rohr, *supra* note 6, at 417 (discussing *Craig v. Boren*, 429 U.S. 190 (1976)).

posed a bar to 'third-party standing,'<sup>70</sup> it is plain that the strong bias against such claims presumed by *Tyler* and *Yazoo* has substantially dissipated.<sup>71</sup>

The depth of the conceptual shift worked by *Barrows v. Jackson* is made plain by *Craig v. Boren*.<sup>72</sup> There a vendor successfully challenged a gender-based discrimination in a prohibition of selling beer to minors. While the Court's analysis does not entirely ignore the rights of the vendor, its standing discussion emphasizes the rights of the customers, even though (unlike *Pierce*) the statute imposed a duty directly on the vendor, not on her customers.<sup>73</sup> The Court's discussion of the merits makes the shift even clearer; its focus is entirely upon the statute's impact on the customers, ignoring any separate claim by the vendor.<sup>74</sup>

The conceptual evolution from *Tyler* to *Barrows* has proceeded virtually without analysis of its fundamental premises by either the Court or commentators. Any continuation of the ad hoc accretion of exceptions tailored to particular cases that has characterized development of third party standing is unsatisfactory. This common law approach under the guise of "discretionary rules of practice" elides and distorts important legal principles. In order to identify the proper occasions for recognizing third party standing, it is critical to examine the sources of authority for the claimed power to grant or deny such standing. Moreover, the evident implications for federal-state relations and impact on the status of the private rights paradigm suggest that analysis must be sensitive to the possibility that a monolithic approach may be inadequate. Authority, scope, criteria, and limitations may differ depending on where the suit is brought, which parties hold rights and duties, and the nature of the claims. It is therefore necessary to disentangle the several issues that have been indiscriminately lumped under the general rubric of *jus tertii* standing.

## B. *Elaboration of the Central Problems*

1. *State Law Permitting Third Party Standing*. — Third party standing is on occasion no more than the consequence of conventional inseparability

70. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 493 n.4 (1982) (Brennan, J., dissenting); see also Harvard Note, *supra* note 5, at 427-28 ("[T]he Court seems never to have denied standing to assert *jus tertii* to litigants whose third party claims appear, as a matter of substantive constitutional law, likely to prevail.") (footnote omitted). But cf. *Gilmore v. Utah*, 429 U.S. 1012, 1014-16 (1976) (denying "next friend" standing to mother of convicted person who himself refused to appeal to the Supreme Court).

71. The Court appears quite willing to permit such challenges simply upon a showing of the existence of certain relationships between the litigant and the third party right holder, such as those between vendor and customer, or physician and patient. This has led commentators to conclude, for example, that, without more, either party to a regulated relationship may now assert the rights of the other. 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531, at 84 (Supp. 1980).

72. 429 U.S. 190 (1976).

73. *Id.* at 195-97.

74. *Id.* at 197-210.

doctrine. If the state court holds that a statute is inseparable, the Supreme Court will address its impact on third parties.<sup>75</sup> But the perception that statutes can be saved through standard principles of statutory construction has greatly diminished the frequency of inseparability holdings, and few modern<sup>76</sup> third party standing cases can even implicitly be placed upon such a ground. In any event, inseparability challenges are first party standing cases: the litigant insists upon his own right to be judged in accordance with a constitutionally valid rule.<sup>77</sup>

Federal court consideration of third party challenges grounded upon the inseparability of state statutes is readily harmonized with current understandings of "Our Federalism." In an important sense, the challenge rests upon state permission; the content of state law permits consideration of the statute's impact on third persons.<sup>78</sup> A closely analogous situation exists where the state court—not acting under any presumed federal compulsion—itself permits a litigant to assert third party rights. *City of Revere v. Massachusetts General Hospital*<sup>79</sup> is illustrative. There a hospital sued a municipality to recover for

75. Monaghan, *Overbreadth*, supra note 27, at 10. The root idea of inseparability is clear enough. Many statutes are susceptible to both valid and invalid applications. Sometimes, as a matter of construction, the statute is held to be "inseparable"—that is, a nullity unless good in all of its reasonable and foreseeable applications. In these circumstances the litigant is permitted to attack the statute without regard to the quality of his own conduct. A holding of inseparability occurs most typically when the court concludes that, given the nature or range of the act's invalid applications, the legislature would not want the statute to stand at all, and, less frequently, when the court is simply unable to restructure the statute so as to sever the valid from invalid applications. *United States v. Raines*, 362 U.S. 17, 22–23 (1960). Instances of judicial inability to reshape the statute aside, the core idea of the inseparability doctrine is one of legislative intent.

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

*Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932); see also Monaghan, *Overbreadth*, supra note 27, at 6–8. For a recent illustration of an inseparability holding at the federal level, see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982). Cf. *INS v. Chadha*, 103 S. Ct. 2764, 2774–76 (1983) (raising the related problem of whether interrelated sections in a general statutory framework may be severed from a constitutionally tainted provision).

76. Some, perhaps all, of the Court's *jus tertii* decisions prior to the 1940's might at least be rationalized on conventional inseparability principles: without being any too clear about what it was doing, the Court frequently assumed that the statute under consideration was inseparable. See Monaghan, *Overbreadth*, supra note 27, at 10–11. *Griswold v. Connecticut*, 381 U.S. 479 (1965), is explicable under similar principles: since the physicians and Planned Parenthood director were charged as accessories to an offense under state law, the validity of the underlying offense was necessarily drawn into question. *Id.* at 481.

77. Monaghan, *Overbreadth*, supra note 27, at 9–11.

78. Whether a state statute is separable is a matter for the state courts. See, for example, *Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2309 (1983); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 521 n.26 (1981). But see *City of Akron v. Akron Reproductive Center*, 103 S. Ct. 2481, 2501 n.37 (1983) (assuming, erroneously and without discussion, that it should decide the issue of separability).

79. 103 S. Ct. 2979 (1983). *Revere* is not a perfect example, because it seems clear that the Supreme Court independently believed *jus tertii* standing was a proper exercise of "judicial discretion."

medical services it rendered to a person injured while being taken into police custody. The state court was of opinion that the municipality was required by the eighth amendment both to offer the medical services and to reimburse the hospital for providing them. Before reaching the question of the injured person's right to treatment, the Court addressed a challenge to the hospital's standing to raise that issue.<sup>80</sup> After noting that the hospital's claim for reimbursement satisfied article III's requirement of "injury in fact," and asserting that the prudential reasons for denying third party standing were "much weaker" than in *Craig v. Boren*,<sup>81</sup> the Court said:

In this case, as in *Craig*, the plaintiff's assertion of *jus tertii* was not contested in the lower court, . . . and that court entertained the constitutional claim on its merits. Unlike *Craig*, this case arose in state court and the plaintiff, MGH, prevailed. The Supreme Judicial Court, of course, is not bound by the prudential limitations on *jus tertii* that apply to federal courts. The consequence of holding that MGH may not assert the rights of a third party . . . in this Court, therefore, would be to dismiss the writ of certiorari, leaving intact the state court's judgment in favor of MGH, the purportedly improper representative of the third party's constitutional rights. See *Doremus v. Board of Education*, 342 U.S. 429, 434-35 . . . (1952). In these circumstances, invoking prudential limitations on MGH's assertion of *jus tertii* would "serve no functional purpose." *Craig v. Boren*, 429 U.S., at 194 . . . .<sup>82</sup>

This analysis is inadequate. *Doremus*, after all, had permitted the state court's judgment to stand "intact."<sup>83</sup> Apparently, *Doremus* is to be distinguished because it rested upon the lack of an article III case or controversy, rather than upon the Court's self-imposed "prudential limitations." Such a distinction is not altogether satisfying. Both article III and the prudential limitations have been thought to be informed by a common purpose: shielding the Court from the decision of constitutional questions except when strictly necessary.<sup>84</sup> Indeed, the Court had specifically invoked that policy as a major justification for the general ban against *jus tertii* standing.<sup>85</sup> As it is formulated, this justification cannot be reduced solely to federalism concerns. Thus, it is not a

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80. The state court deemed the issue of the hospital's standing to raise the injured person's right to treatment to have been settled by the municipality's failure to object in briefs or argument. See *Massachusetts Gen. Hosp. v. City of Revere*, 385 Mass. 772, 776 n.7, 434 N.E.2d 185, 188 n.7 (1982), rev'd, 103 S. Ct. 2979 (1983). There is no indication that the state court felt its decision was compelled by federal, rather than state, standing principles. It cited *Barrows v. Jackson*, 346 U.S. 249 (1953), only to illustrate that "standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others." *Revere*, 385 Mass. at 776 n.7, 434 N.E.2d at 188 n.7 (emphasis added).

81. *Revere*, 103 S. Ct. at 2982.

82. *Id.* at 2982-83 (footnote omitted).

83. In *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), the Court dismissed an appeal from a state court decision that rejected an establishment clause challenge to the practice of distributing Bibles in the public schools.

84. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1947).

85. *United States v. Raines*, 362 U.S. 17, 21 (1960). But see Harvard Note, *supra* note 5, at 436-38, arguing that reliance on this policy to bar *jus tertii* challenges is misplaced.

sufficient response to say that, where a state court chooses to abandon protection against federal intrusion into its policymaking, the Supreme Court may review the judgment because any specific state autonomy interest has been dissolved and the federal interest in uniform interpretation of national laws may then be taken as paramount.

Nonetheless, there is considerable force to the argument that review is proper in *Revere*. Any policy grounded in the avoidance of unnecessary constitutional adjudication must be harmonized with fundamental assumptions about the role of the states in the federal system. This accommodation might well yield the inference that the states are free to create legal interests and to define their scope.<sup>86</sup> Broad grants of authority to challenge exercises of governmental power are but one type of legal interest. Thus, if the state court recognizes *jus tertii* standing in an otherwise genuine controversy, it is not clear why any general policy disfavoring Supreme Court consideration of "unnecessary" constitutional claims should operate to bar the challenge.<sup>87</sup> We may, therefore, assume that a bank should be able to raise the rights of its customers, or a hospital its patients, if the state law permits such challenges.<sup>88</sup>

2. *Federal Compulsion to Grant Third Party Standing.* — *Revere* emphasizes that "of course," the state court "is not bound by the prudential limitations" on third party standing "that apply to federal courts." But our main inquiry is of a different order: is the state court equally free to disregard Supreme Court decisions recognizing *jus tertii* standing? Is there any federal law compulsion underlying *jus tertii* doctrine? If so, what is its source? An imaginary opinion suggested by the abortion cases will serve to focus that inquiry.

*Doe v. Bolton*,<sup>89</sup> it will be recalled, permitted physicians to raise the rights of their patients in an anticipatory federal court challenge that invalidated a modern abortion statute.<sup>90</sup> *Doe* presented an appealing case for such standing;

86. Hart & Wechsler, *supra* note 5, at 160, strongly so suggests: "Why should Article III be regarded as placing any limits on the power of the states to create . . . legal interests, providing they are genuine?"

87. Such an analysis suggests that the Court's prudential rules have a strong federalism component, the "protection" of which the states are free to abandon, here as elsewhere. For example, states may waive the protection of sovereign immunity, e.g., *Pennhurst State School & Hosp. v. Halderman*, 52 U.S.L.W. 4155, 4157 (U.S. Jan. 24, 1984), and the protection of the *Younger* doctrine, see *Ohio Bureau of Employment Servs. v. Hodery*, 431 U.S. 471, 480 (1977). Cf. *Graddick v. Newman*, 453 U.S. 928, 934 (1981) (representative capacity of state attorney general under state law).

88. Cf. *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 51-52, 71-72 (1974) (declining to rule on whether bank may assert claims of depositors where such claims are themselves held to be premature). *Revere* may be thought to be a specific illustration of the more embracing proposition that, for purposes of Supreme Court review of a state judgment, a vendor (broadly conceived) may challenge a state statute on the basis of his customers' rights if the state law so permits. I leave to the side the question whether such state law could also be relied upon in the federal trial court.

89. 410 U.S. 179 (1973).

90. *Id.* at 188. For a narrower but unpersuasive reading, see Rohr, *supra* note 6, at 412.

the physicians not only suffered economic and professional harm from the statute's operation, but also (unlike the schools in *Pierce*) were placed by its terms under an enforceable legal duty.<sup>91</sup> Suppose that, following *Doe*, a physician in another state is convicted for violating an identically worded statute. The supreme court of the state renders the following opinion in *State v. Smith*:

Per Curiam. Defendant, a physician, stands convicted for performing abortions in violation of the state abortion statute. The state argues that as applied to this defendant the statute is a reasonable exercise of governmental power, that *Roe v. Wade*, 410 U.S. 113 (1973), is not to the contrary because the constitutional right of a woman to obtain an abortion does not measure the rights of her physician, and that, whatever the rule in the federal courts, our established doctrine is that the physician may assert only his own rights and not the rights of his patients. The argument must be rejected. The Supreme Court has frequently recognized *ius tertii* standing, specifically including the right of physicians subject to an abortion statute to raise the rights of their patients. *Doe v. Bolton*, 410 U.S. 178, 188 (1973); see also *Singleton v. Wulff*, 428 U.S. 106 (1976). Moreover, the Court assumes that its recognition of *ius tertii* standing binds the state, as well as the federal, courts without regard to the content of the state law. See, for example, *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972). *Doe v. Bolton* is, accordingly, controlling, and the judgment must be reversed.<sup>92</sup>

Such an opinion would scarcely be noticed. But I think that it raises difficult and complex issues in need of clarification. Ordinarily the litigant takes the procedural rules and remedial structures of the state courts as he finds them, unless those rules and structures are themselves unconstitutional or otherwise preempted.<sup>93</sup> Under the Supreme Court's apparent assumption

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91. In *Pierce*, the Society of Sisters might, in fact, have been placed under a legal obligation—the Society ran an orphanage, and the statute was addressed to all persons having custody of children. 268 U.S. at 530, n.\*. But the Court made no special mention of that fact.

92. The hypothetical may be faulted, perhaps, for ignoring the incomprehensible suggestions in the Court's opinions that a woman only *shares* her right with her physician. See *The Supreme Court*, 1982 Term, 97 *Harv. L. Rev.* 78, 84 (1983).

93. Professor Hart insisted that litigants asserting federal claims in the state courts take those courts as they find them. Accordingly, federal litigants are bound by all nondiscriminatory state laws not themselves independently unconstitutional. Hart, *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 508 (1954); see also *Southland Corp. v. Keating*, 52 U.S.L.W. 4131, 4140 (U.S. Jan. 24, 1984) (O'Connor, J., dissenting). I disagree with that formulation. In principle, some nondiscriminatory state rules could so burden the federal right or defense as to be preempted, even though the identical rule could be applied to state claims. *Williams v. Georgia*, 349 U.S. 375, 399 (1955) (Clark, J., dissenting). See generally Brillmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 *U. Chi. L. Rev.* 741 (1982). In practice, the difference between the nondiscrimination and the excessive-burden positions is not likely to be great. Few nondiscriminatory state rules will be held to be preempted.

that *jus tertii* standing turns largely upon its own notions of prudence and discretion, it is difficult to locate the source of any supposed compulsion on the state courts to adhere to such rules of practice.<sup>94</sup> If no affirmative federal law drives the doctrine, why is a state court's refusal to permit such a third party standing challenge not an adequate and independent state ground?<sup>95</sup> If it is not, is that because something special inheres in the physician-patient relationship? Must a criminal defendant be permitted to raise a greater range of *jus tertii* challenges than other litigants?<sup>96</sup> Would denial of third party standing constitute an adequate and independent state ground if it occurred (as in *Doe v. Bolton*) in a suit by the physician for prospective relief?<sup>97</sup> If so, what is the source for a distinction, as a matter of federal law, between offensive and defensive use of third party standing in the state courts? Or, at least in analogous cases where the state court denies third party standing, are all of these inquiries wide of the mark? Even if no third party challenge as such is required by federal law in such a case, is the state conviction invalid because the litigant is asserting his own rights, not those of his patient?<sup>98</sup>

94. Cf. *New York v. Ferber*, 458 U.S. 747, 767 (1982) ("[A state court] should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution."); see also *Chandler v. Florida*, 449 U.S. 560, 582-83 (1981) ("[B]ecause this Court has no supervisory authority over state courts, our review is confined to whether there is a constitutional violation.").

95. There are many illustrations of the efficacy of state procedural and remedial rules in barring Supreme Court review of federal claims. See *Hart & Wechsler*, *supra* note 5, at 544-46; *Brilmayer*, *supra* note 93, at 749-62. The suggestion that there is no difference between state and federal statutes regarding the scope of the issues open to a litigant, see, e.g., *Heald v. District of Columbia*, 259 U.S. 114, 123 (1922); *Sedler*, *Constitutional Jus Tertii*, *supra* note 6, at 605 n.34, fails to take into account not only the authority of the state courts to interpret state statutes, but also the adequate and independent state ground doctrine.

96. Professor Tribe asserts that "the target of a criminal prosecution should *always* have standing to argue that his compliance with the law would have deprived others of their constitutional rights . . ." L. Tribe, *supra* note 4, at 107 (emphasis in original).

97. State procedural grounds that result in a denial of due process will not bar Supreme Court review. E.g., *Reece v. Georgia*, 350 U.S. 85 (1955). But there is no general due process right to a declaratory judgment, although some federal rights require provision of an adequate state remedy. *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920); *Monaghan*, *First Amendment "Due Process," supra* note 25, at 547-49. Oddly, if prospective relief is a necessary concomitant of a federal right, availability of such relief in federal courts may not free the states from an obligation to provide it as well. Compare *Ex parte Young*, 209 U.S. 123 (1908), with *General Oil Co. v. Crain*, 209 U.S. 211 (1908).

98. The foregoing inquiries might be sharpened somewhat if we suppose that, in the context of denying a petition for rehearing in *State v. Smith*, the state supreme court were to add another paragraph to its opinion:

To deny *jus tertii* standing here would disserve the interests of "Our Federalism." Even if this conviction were to withstand reversal in the Supreme Court because it rested upon an adequate and independent state ground, defendant could then proceed to the federal district court, raise the rights of his patients in a class action, *Doe v. Bolton*, and enjoin future prosecutions under the statute. *Wooley v. Maynard*, 430 U.S. 705 (1977). That result having been obtained, defendant might then be entitled to federal habeas relief; under *Eisenstadt v. Baird*, *supra*, it seems that the Court's third party standing rules are applicable to federal habeas corpus. Moreover, the writ is generally available to one held

The propriety of Supreme Court review of state decisions denying third party standing depends upon whether, in fact, the state court is compelled under federal law to adhere to federal *jus tertii* principles. This determination in turn would seem to rest upon one of three different theories. The first, rooted in the constitutional text and the structure it creates, focuses upon the general duty of the state courts to enforce federal law. The latter two, based on substantive federal principles, take the form of claims that: (a) the litigant is asserting his own rights and not the rights of a third person and (b) the litigant acts as a federally licensed private attorney general when he asserts the rights of other persons. Each of these theories will be considered in turn.<sup>99</sup>

### III. THEORETICAL FOUNDATIONS FOR JUS TERTII STANDING

#### A. State Court Enforcement of Federal Law

Where, as in *Barrows v. Jackson*<sup>100</sup> and *NAACP v. Alabama ex rel. Patterson*,<sup>101</sup> denial of a *defense* by the state court would destroy or materially obstruct a third party's constitutional or federal statutory rights, state compulsion to recognize third party standing might be grounded on inferences having their source in the structure of government created by the Constitution.<sup>102</sup> The state courts have a vital role in the constitutional design, and an analysis of that role could yield a conclusion that the state courts must acknowledge *some* third party defenses.<sup>103</sup> Otherwise, the state judicial ma-

in custody pursuant to a statute subsequently held unconstitutional. *Ex parte Siebold*, 100 U.S. 371, 376-77 (1880).

Whatever the force or accuracy of these conclusions, they do not by themselves demonstrate that the state court is obligated to entertain third party challenges. Under current law, an adequate and independent state ground barring direct review exists even if it would not foreclose a later habeas action. *Fay v. Noia*, 372 U.S. 391, 399 (1963). But cf. *Wainwright v. Sykes*, 433 U.S. 72 (1977) (same standard on habeas and direct review involving contemporaneous objection rules); *Francis v. Henderson*, 425 U.S. 536 (1976) (same). Nor does a future injunction wipe out the prior convictions. Cf. *Wooley v. Maynard*, 430 U.S. 705 (1977) (affirming injunction against future, but not completed, prosecutions).

99. The discussion that follows has relevance for several cognate problems. Consider, for example, the problem of class actions, where the named plaintiff asserts not only his own rights, but those of third parties—other members of his class. Must the state courts also follow Supreme Court decisions on the scope of class actions asserting constitutional claims? See *H.L. v. Matheson*, 450 U.S. 398 (1981), in which both the majority and dissenting opinions proceed on such a premise. Must the state courts follow the Supreme Court as to when class actions remain viable even though the named plaintiff no longer has a personal interest in the case? Cf. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (expiration of named representative's substantive claim does not moot issue of class certification). See generally Rohr, *supra* note 6, at 442-54.

100. 346 U.S. 249 (1953).

101. 357 U.S. 449 (1958).

102. See generally C. Black, *Structure and Relationship in Constitutional Law* (1969).

103. See generally Hart & Wechsler, *supra* note 5, at 431-38, 517-26; *id.* at 119-20 (Supp. 1981).

chinery itself would work a denial of federal rights,<sup>104</sup> and the supremacy clause would be drained of significant meaning.<sup>105</sup>

The state courts' obligation to enforce federally created *rights of action* is more troublesome.<sup>106</sup> Some compulsion exists: "discrimination" against federal rights is prohibited,<sup>107</sup> a principle that, despite judicial hesitation,<sup>108</sup> seems fully applicable to section 1983 suits.<sup>109</sup> If the antidiscrimination principle is given wide enough scope, state court refusal to entertain *jus tertii* claims might be condemned on this ground. It might, for example, be argued that impermissible discrimination would exist in *State v. Smith* if the state court ordinarily permitted private parties to enforce zoning by-laws, or permitted third party beneficiaries to sue on contracts.<sup>110</sup> In sum, the antidiscrimination principle stands as a potentially important constraint against self-regarding state rules.<sup>111</sup>

104. Indeed, this analysis suggests that the state court must raise the issue *sua sponte*.

105. U.S. Const. art. VI. A distinction between constitutional and statutory *jus tertii* might at first blush seem both important and illuminating. Congress can limit enforcement of federal statutory duties to the federal courts, *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429-30 (1867), and it can limit and shape those duties. It seems plausible, therefore, that any state "duty" to enforce federal statutory defenses might stand on weaker footing, absent an explicit congressional requirement, than does the state courts' duty to enforce constitutionally based defenses. Congress cannot "unconstitutionally" regulate the jurisdiction of the state courts, and to the extent that *jus tertii* standing is constitutionally required, it must be given effect by the state court. Hart & Wechsler, *supra* note 5, at 359-60. But the distinction between statutory and constitutional defenses will not bear much weight: generally, it must be presumed that Congress intended to prohibit any state law that would materially obstruct the enforcement of federal statutory defenses.

106. That state courts "may" enforce federal rights has long been clear. See, e.g., *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). Jurisdiction over federal claims is ordinarily assumed to be concurrent. *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982). A question remains whether *if* a state chooses to enforce such federal rights, it must apply all the ancillary statutory and judicial baggage: federal procedural rules, attorneys' fees, nonexhaustion of administrative remedies, *jus tertii*, etc. Cf. *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980) (holding that § 1988's provision for attorneys' fees applies to claims of federal statutory violations brought in state courts under § 1983).

107. *Testa v. Katt*, 330 U.S. 386 (1947); see also *FERC v. Mississippi*, 456 U.S. 742, 760-63 (1982) (reaffirming and explicating *Testa*); cf. *id.* at 784-85 (O'Connor, J., dissenting) (*Testa* does not extend to state legislative bodies). We are dealing only with the duty of the state courts and perhaps other state adjudicatory bodies. The extent to which Congress can impose affirmative enforcement duties on state officials outside the adjudicatory context raises more complex issues, as *FERC v. Mississippi* makes plain.

108. See *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980).

109. 42 U.S.C. § 1983 (Supp. V 1981). By its own terms § 1983 does not require *jus tertii* standing; indeed, despite judicial assumptions to the contrary, *Rohr*, *supra* note 6, at 460 n.289, it is not clear that the statute even contemplates such actions.

110. An argument that such suits are sufficiently analogous to trigger application of *Testa* is at least plausible if enough emphasis is placed on *Testa's* premise that "state courts have a unique role in enforcing the body of federal law." *FERC v. Mississippi*, 456 U.S. 742, 760 (1982).

111. My own view is that *Testa v. Katt's* antidiscrimination principle does not state the outer limits of the state court duty to enforce federal substantive rights. To my mind Congress may, if it chooses, require the state courts to enforce federal rights regardless of whether they enforce analogous state claims. But see *Brown v. Gerdes*, 321 U.S. 178, 188-90 (1944) (Frankfurter, J., concurring). For me, *Testa's* central importance is as a working principle of "Our Federalism."

Nonetheless, an adequate general account of *jus tertii* standing cannot be derived solely from structurally grounded principles governing the duty of state courts to enforce federal law. That duty, such as it is, is a limited one—unless the antidiscrimination principle is given wide scope.<sup>112</sup> More importantly, no analysis grounded in the duty of state courts to enforce federal law can account for the principal font of *jus tertii* standing: the federal courts. What warrant justifies the Supreme Court and the lower federal courts in creating *jus tertii* “exceptions” to the normal rules of standing?<sup>113</sup> The need for a unified rationale of *jus tertii* standing impels one toward viewing the proponent of a *jus tertii* challenge as either asserting his own rights or acting as a federally licensed private attorney general.

## B. *Jus Tertii* as First Party Standing: Interactive Liberty

1. *Case Law Foundations*: *Buchanan v. Warley*. — *Pierce and Truax* make plain that many *jus tertii* claims might be understood to involve the litigant’s own rights, not those of third persons, even though the impact of the statute on third persons must be considered in order to adjudicate the litigant’s own claim. This insight becomes particularly clear with *Buchanan v. Warley*,<sup>114</sup> another decision from the same era. In *Buchanan*, a white vendor

Federal statutes ordinarily should be read to require no more than nondiscrimination. No federal statute purports to impose a general requirement of *jus tertii*. Indeed, while I recognize that *jus tertii* claims have been assumed to be appropriate in § 1983 cases, it is by no means evident from its terms that a litigant may invoke any rights other than his own. See *supra* note 109.

Wholly apart from Congress’s power to co-opt state adjudicatory machinery, it has long seemed to me that the state courts are required by the Constitution to provide adequate remedies for constitutional guarantees. I think that the state courts must give appropriate restitutionary relief for breach of federally imposed duties, see *Ward v. Board of County Comm’rs*, 253 U.S. 17 (1920), and that they must provide adequate injunctive relief to protect rights secured by the takings clause and the first amendment. See *Monaghan, First Amendment “Due Process,” supra* note 26, at 547–49. But even if this general premise is correct, it does not readily generate a corollary demand that the state courts permit *jus tertii* standing. I would add that the duty of the state courts to provide rights of action and remedies to implement constitutional obligations needs to be reassessed in light of two developments: (a) the expansion of § 1983 to include all statutory claims, see *Maine v. Thiboutot*, 448 U.S. 1 (1980), and (b) the widespread creation of causes of action based directly on the Constitution itself, see, e.g., *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

112. This conclusion is not altered if the issue of *jus tertii* standing arises in the context of the assertion of federal defenses. While the supremacy clause undoubtedly demands that state courts entertain federal defenses, it does not define the scope of that duty. It could be read to require no more than nondiscrimination. In any event, one cannot extract from that clause a general mandate that the state courts must permit a defendant to invoke the rights of third persons. Some source of federal law other than the supremacy clause itself must be invoked to trigger the applicability of the clause.

113. Reliance on the state courts’ duty to enforce federal substantive law as a source for federal court standing exceptions is particularly troublesome where no version of that duty would require a state court to generate a corresponding exception.

114. 245 U.S. 60 (1917), discussed in *Schmidt, Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 *Colum. L. Rev.* 444, 498–523 (1982).

sued to compel a black vendee to take title to property under a contract for sale. The contract expressly made the vendee's duty conditional upon his right to reside on the property, thus putting in issue the validity of a local Jim Crow ordinance that forbade occupancy (but not purchase) of the premises if the occupant's race did not predominate on his street. The highest court of the state sustained the ordinance against a fourteenth amendment challenge,<sup>115</sup> and the vendor obtained a writ of error from the Supreme Court.<sup>116</sup> That Court, in turn, unanimously held the ordinance invalid. It appears that Justice Holmes prepared, but did not file, a dissent. "It is possible," he wrote, "that the ordinance unduly abridges the constitutional rights of the blacks, but that question is not before us. The plaintiff is a white man and cannot avail himself of this collateral mode of attack, on the ground of a wrong to some one else."<sup>117</sup> The Court did not disagree with Holmes' anti-jus tertii premise, nor could it comfortably permit a white vendor to raise the rights of blacks when a specific black defendant was relying upon the ordinance. But the Court denied that a third party challenge was involved.

The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled, can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.

The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obli-

115. *Buchanan v. Warley*, 165 Ky. 559, 177 S.W. 472 (1915), rev'd, 245 U.S. 60 (1917). The court also had before it a challenge by a black defendant charged with violating the ordinance. *Harris v. City of Louisville*, 165 Ky. 559, 177 S.W. 472 (1915).

116. *Buchanan's* structure as a test case in the Supreme Court raises a question whether it contravened the rule against collusive suits. See Schmidt, *supra* note 114, at 498, 505-06. Since the municipality took over the defense of the ordinance before the case reached the Supreme Court, no insuperable article III problem seems to have existed. Compare *INS v. Chadha*, 103 S. Ct. 2764, 2778 (1983) (formal intervention by Congress ensured concrete adverseness), and *Richardson v. Ramirez*, 418 U.S. 24, 34-40 (1974) (joinder of adverse party avoided mootness), with *United States v. Johnson*, 319 U.S. 302 (1943) (suit held to be collusive despite intervention of United States).

117. Schmidt, *supra* note 114, at 512. Holmes did not consider whether, on the opinion of the court below, the ordinance was inseparable.

gated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved. See *Truax v. Raich*, 239 U.S. 33, 38.<sup>118</sup>

The Court's view was, in essence, that the due process clause of the fourteenth amendment protected the litigant against economic injury resulting from unjustified discrimination against third persons with whom he sought to interact. This also seems to be the precise point of the challenges sustained in *Pierce* and *Truax*.<sup>119</sup> Taken together, these cases establish a sweeping (and quite modern) proposition: a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction.<sup>120</sup> This proposition does not depend on any endorsement of the extraordinary protection accorded property during the *Pierce-Buchanan* era. But it does depend on a development that accompanied and served as an underpinning for that protection: the expansive range of interests subsumed under the "liberty" protected by the due process clauses.<sup>121</sup> In *Meyer v. Nebraska*,<sup>122</sup> the Court summarized that conception. "Liberty," the Court said,

118. *Buchanan*, 245 U.S. at 72-73.

119. *Truax v. Raich*, 239 U.S. 33 (1915), upon which *Buchanan* relies, supports this view. An alien employee brought suit to challenge restrictions on hiring aliens imposed by the state on employers.

It is further urged that the complainant cannot sue save to redress his own grievance; . . . that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employes to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

*Id.* at 38-39 (citations omitted).

120. See Lewis, Constitutional Rights and the Misuse of "Standing," 14 *Stan. L. Rev.* 433, 446 (1962). The result could be framed in terms of derivative or corollary rights. A constitutional right in *A* (women or blacks) generates a correlative right in *B* (physicians or whites). But this formulation seems to me to be vulnerable to Occam's razor; upon examination, its content inevitably reduces to the simpler *Buchanan* due process formulation. But see Harvard Note, *supra* note 5, at 434-35 (reading *Pierce* as a third party standing case, and arguing that such standing was appropriate because of a special circumstance: the deprivation of the third parties' (parents' and pupils') constitutional rights was caused by the severe impact of the statute on the private schools—whereas the existence of a relationship between the parents and the schools would not be enough to permit the third party challenge had the private schools been able to remain open).

121. The watershed was *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897). See Monaghan, *Of "Liberty" and "Property,"* 62 *Cornell L. Rev.* 405, 412-13 (1977).

122. 262 U.S. 390 (1923).

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>123</sup>

Under *Meyer*, protection against economic loss would be a sufficient condition for judicial intervention, but it would not be a necessary one. The core of the complaint is the damage done to the litigant's constitutionally protected "liberty" and "property" as a result of allegedly unjustified governmental interference with interactive private ordering.

So understood, the foregoing cases would cover the whole ground of *Barrows v. Jackson*<sup>124</sup> and *Craig v. Boren*.<sup>125</sup> Each would be seen as a first party—not a third party—standing case. In each case the patrons could assert a right to interact with the vendor free from unjustified governmental discrimination: the vendor in fact asserts a symmetrical right to freedom from that governmental interference. Indeed, the parallel between *Buchanan* and *Barrows* is striking. In both, a white vendor seeks to escape from injury as a result of illegal discrimination against blacks; moreover, in *Barrows* the vendor seeks to avoid a legal duty imposed upon her by state enforcement of the restrictive covenant.<sup>126</sup> Despite that parallel, and the fact that *Barrows* was argued in first party terms,<sup>127</sup> the Court assumed that the vendor's standing to obtain judicial consideration of the discrimination claim depended on permitting an exception to the normal first party standing rule.

But unlike *Shelley* . . . no non-Caucasian is before the Court claiming to have been denied his constitutional rights. May [the vendor], whom petitioners seek to coerce by an action to pay damages for her failure to honor her restrictive covenant, rely on the invasion of the rights of others in her defense to this action?<sup>128</sup>

123. *Id.* at 399.

124. 346 U.S. 249 (1953), discussed *supra* notes 60–74 and accompanying text.

125. 429 U.S. 190 (1976), discussed *supra* notes 72–74 and accompanying text.

126. Judicial enforcement of a racially restrictive covenant constitutes state action under *Shelley v. Kraemer*, 334 U.S. 1 (1948).

127. See Brief for Petitioners at 16–17 (“[T]he constitutionality of any state action is tested by the rights of the individuals before the court only.”). Respondent apparently agreed. See Brief for Respondents at 15–16.

128. 346 U.S. at 254–55. The Court may have been influenced by the third party analysis applied in the state courts:

The fact that the non-Caucasian is not a party to the action . . . does not affect the result. . . . [E]nforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages.

*Barrows v. Jackson*, 112 Cal. App. 2d 534, 553–54, 247 P.2d 99, 112–13 (1952) (footnote omitted), *aff'd*, 346 U.S. 249 (1953).

The *Barrows* approach generated a fundamental reorientation in our conception of the scope of the issues open to a litigant. Development of first party standing theory in relation to the scope of the litigant's right to interact with third persons aborted; in its place, the Court and commentators substituted an unanalyzed and indeterminate concept of third party standing. The root assumption of *Barrows* and the modern decisions seems to be that because the third party would have had standing to complain, first party standing could not be established for the litigant's own claim. The idea was lost that both parties to a contract, potential contract, or other interactive transaction are asserting symmetrical first party claims in objecting to governmental interference with the relationship.<sup>129</sup>

Despite the Court's general willingness to permit *jus tertii* challenges,<sup>130</sup> the difference between conceptualizing the litigant's claim in first party rather than third party terms has considerable potential importance beyond generating different results in marginal or limiting cases. Clarity of understanding is gained when organizing concepts are sorted out coherently. Moreover, a first party standing analysis undermines any notion that we are dealing with discretionary rules of judicial practice. Where the litigant is asserting his own rights, the judicial imperative to consider the claim is most pressing. Failure to do so, at least in an enforcement proceeding, would raise severe problems under the due process clauses, as well as under article III if the proceeding is in the federal courts.<sup>131</sup>

2. *Methodology*. — Given the potential importance of the distinction between first and third party claims, it is crucial to specify when it can be said that a litigant is asserting his own rights, not those of third persons. Quite obviously, analysis must begin with an eye fixed on the substantive reach of

129. The interactive analysis in the text, it should be noted, would permit a potential listener to challenge specific restrictions on speakers, even if it be assumed that the first amendment is itself concerned only with the rights of speakers. See Rohr, *supra* note 6, at 428–29 (discussing cases); cf. Board of Educ. v. Pico, 457 U.S. 853, 866–69 (1982) (first amendment is also concerned with right to receive information and ideas). Moreover, the analysis is not inconsistent with suspect class theory, even if it is viewed through Ely's legislative malfunction lens. See J. Ely, *Democracy and Distrust* (1980). Legislation that manifests process malfunctions in the form of discriminatory classifications is not less flawed when challenged by nonmembers of the target class. While at first glance the fact that *X* has been unconstitutionally victimized might not seem to generate a conclusion that *Y* can complain, the *Buchanan* line of decisions supports precisely such a conclusion: a litigant asserts his own interest in seeking escape from injuries to his substantive right to interact free of unjustifiable discrimination directed at others.

130. Even some of the decisions denying third party standing only postponed, but did not ultimately avoid, the constitutional issue. Compare Warth v. Seldin, 422 U.S. 490, 499 (1975) (sidestepping merits of challenge to exclusionary zoning), with Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1977) (reaching merits), and Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (finding standing to challenge "racial steering").

131. Exhaustive discussion of this point is beyond the compass of this article. See generally Hart & Wechsler, *supra* note 5, at 309–418; Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

the relevant constitutional or statutory provision. A constitutional provision need not be interpreted as having a single class of beneficiaries. The first amendment's protection could be interpreted to run independently to both speakers and listeners, the fourth amendment's to both property owners and their invitees, and the sixth amendment's jury trial guarantee against racial and gender discrimination to both would-be jurors and criminal defendants.<sup>132</sup> Similarly, in *Rogers v. Paul*,<sup>133</sup> the Court permitted students to challenge a racially based allocation of teachers on the ground that such an "allocation of faculty denies them equality of educational opportunity."<sup>134</sup> Issues of this character turn entirely on the substantive reach of the particular provision. Our concern, however, is not with the situation where there are two or more separate beneficiaries of a specific constitutional right. We are concerned with exploring first party challenges based solely on the general protection of liberty secured by due process.

When the litigant seeks escape from a legal duty or disability imposed on him, some measure of first party standing is necessarily involved. But, by itself, this proposition doesn't help much: it fails to illuminate the *scope* of the first party standing. Suppose, for example, that a statute precludes "blacks, aliens and women" from holding property.<sup>135</sup> An alien could, of course, challenge the disabilities placed upon his class, but (absent a conclusion of inseparability) he could not challenge the parallel disabilities imposed on the other excluded classes.<sup>136</sup>

More importantly, it would be a mistake to assume that first party challenges are *restricted* to instances in which the litigant challenges the imposition of a legal disability on him.<sup>137</sup> Any such limitation would correspond to no defensible constitutional policy.<sup>138</sup> Moreover, *Pierce*, *Truax*, and *Bu-*

132. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975) (male defendant challenges jury exclusion of women); *Peters v. Kiff*, 407 U.S. 493, 495 (1972) (white defendant challenges exclusion of blacks from juries). In *City of Revere v. Massachusetts Gen. Hosp.*, 103 S. Ct. 2979, 2983 n.5 (1983), the Court recognized this point, albeit somewhat obliquely. On the close relationship between the case or controversy doctrines and the merits of the underlying claim, see Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. Cal. L. Rev. 1139 (1977).

133. 382 U.S. 198 (1965).

134. *Id.* at 200.

135. Precisely the same situation occurs if the statute takes the form: "No person other than white males may own property."

136. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972); *Sprout v. City of South Bend*, 277 U.S. 163, 167 (1928); *Farmers & Mechanics Sav. Bank v. Minnesota*, 232 U.S. 516, 530 (1914).

137. Professor Tribe comes close to viewing situations where the litigant is under a legal restriction as involving first party standing claims. L. Tribe, *supra* note 4, at 104. But he then assumes that the absence of a legal restriction on the litigant means that a third party claim is involved. *Id.* at 107-08.

138. Attempts to limit standing in administrative law to those suffering direct legal restraint have long since collapsed. See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-56 (1970); J. Vining, *supra* note 14, at 34-56 (1978).

*chanan* decisively repudiate it: in each, the challenged prohibition imposed no legal restraint upon the litigant; the core of the injury was to the litigant's freedom to interact with a third person because of legal restrictions placed *on the third person*.<sup>139</sup> Thus, it seems plain that either party to a regulated transaction can challenge any limitation in first party terms, because for each party the claim takes the following form: the state has advanced no sufficient interest to justify prohibiting this interaction.<sup>140</sup>

The constitutional protection accorded to the litigant necessarily entails inquiry into the impact of the statute on third persons. Two general classes of claims are possible: those in which a third party holds independent constitutional rights or immunities that are threatened in a manner that impairs the interaction (for example, speech or freedom from racial discrimination), and those in which the *only* right jeopardized is the right to interact itself. A comparison of a race-based zoning statute with one limiting occupancy to residential uses illustrates the distinction. Although both statutes might prevent a sale to a black for use as his law office, the buyer has a strong claim to equal protection only regarding the former. The right to interact itself is, at best, a weak liberty; and, in light of recent curtailments of the federal content of "liberty," it may not be universally available.<sup>141</sup> Yet, when we turn to the litigant's (here, the vendor's) first party claim to a right to interact, the substantial resolving power of the concept is revealed—particularly where the third party's (here, the vendee's) right is a potent one.

Even though the right to interact deserves only the most tolerant level of scrutiny, the interference with it will not survive unless it serves a legitimate governmental end.<sup>142</sup> The stronger the third party's right, the less the likeli-

139. See *supra* notes 114–20 and accompanying text.

140. The conventional view is that these cases involve third party, not first party, challenges. E.g., 13 C. Wright, A. Miller & E. Cooper, *supra* note 71, § 3531; cf. L. Tribe, *supra* note 4, at 103–09. The Court itself has been unclear about the situation and simply has mixed concepts of first and third party standing. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683–84 (1977). But as *Carey* and *Craig v. Boren* make plain, see *supra* text accompanying notes 72–74, the Court seems to view these cases largely in third party terms, particularly in its discussions of the merits. See also *Runyon v. McCrary*, 427 U.S. 160, 175 n.13 (1976) (analyzing *Pierce* in third party standing terms).

141. See *infra* notes 149–59 and accompanying text.

142. See *Zobel v. Williams*, 457 U.S. 55 (1982). In *Zobel*, the Court invalidated an Alaska statute that provided for payments to state residents differentiated in amount on the basis of length of residence. The state attempted to justify the differential as a reward to citizens for their "past contributions." *Id.* at 61 n.8. But, in finding the statute to be without a rational basis, the Court held that the past-contributions objective was an illegitimate end. *Id.* at 63. This result was reached over a dissent that contended that such a state objective was impermissible only in the context of the right to travel—an analysis that the Court expressly eschewed. *Id.* at 82–83 (Rehnquist, J., dissenting). *Zobel* invites us to rethink some basic constitutional theory. Rational-basis review had seemed particularly empty because, among other things, its requirement of a legitimate state end was so undemanding. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1980). Indeed, like the dissenters in *Zobel*, I had thought that one of the principle features of higher-tier scrutiny was that it ruled out as permissible ends some state goals that would have been legitimate if only the rational-basis standard were implicated. *Zobel* disagrees;

hood that the state can advance any legitimate independent justification for regulating the interaction. *Carey v. Population Services International*<sup>143</sup> is instructive here. There a vendor challenged a statutory prohibition of the distribution of contraceptives to persons over sixteen by anyone other than a licensed pharmacist. The Court characterized the access limitation as a significant and insufficiently justified burden on the constitutionally protected decision "whether or not to beget or bear a child."<sup>144</sup> This broad definition of the third persons' "privacy" rights<sup>145</sup> in turn deprived the state of any permissible justification for barring the proposed interaction between them and the vendor.<sup>146</sup> This was also the reasoning in *Pierce*. The Court's spacious definition of a parental right to control the education of children undermined the state's asserted justification for interfering with the school-family interaction.<sup>147</sup> In general, it can be seen that the litigant's claim is dependent upon and symmetrical with the substantive reach of the third party rights.<sup>148</sup>

3. *The Limits of Interactive Liberty*. — First party standing premised on the right-to-interact approach embedded in *Pierce*, *Truax*, and *Buchanan* is not boundless. The litigant's claim is a substantive one, and its disposition is a disposition on the merits. In this section, I consider three matters bearing on the substantive reach of the right to interact: (a) recent decisions narrowing the "liberty" protected by due process; (b) the necessity and justification for restricting right-to-interact challenges to cases involving "direct" governmental interference; and (c) the significance of the Court's recent emphasis on "causation." The boundaries that these developments place on a liberty-based standing analysis may be uncertain in some cases, and some lines suggested in this section cannot be sharply drawn. Nonetheless, a principled theory that reflects current substantive legal concepts is to be preferred over the unreasoned "discretion" that now dominates *jus tertii* standing.

the particular benefits of higher-tier review are simply the requirements that (a) the legitimate goal be significant, i.e., compelling or substantial, and (b) any statutory classification satisfy the constitutionally specified level of congruence between ends and means.

143. 431 U.S. 678 (1977).

144. *Id.* at 685.

145. *Id.* at 685-89.

146. *Id.* at 690-91.

147. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-36.

Even where the core of the third person's objection is that the state's interest, while "legitimate," is not weighty enough, the litigant can still be seen as asserting that the interference with his own rights is not "legitimate," see *Zobel v. Williams*, 457 U.S. 55 (1982), because the state may not rest on a justification that is, for whatever reason, constitutionally invalid. One can, of course, treat the weight and consequence requirements as subsets of the inquiry into the legitimacy of state interests, but that seems to me to be something of a cheat; weight and consequence are concepts distinct from the idea of a valid legislative goal.

148. Sedler, *Substantive Jus Tertii*, *supra* note 6, at 1333-34, apparently reaches a similar conclusion, but through an approach that seems to me to lack analytic clarity. He argues that a litigant may assert only his own rights, but provides no methodological specification for what constitutes such a claim, and he reaches results at variance with my analysis. See *id.* at 1332, 1336-44.

a. *The Narrowing of Liberty*. — The right-to-interact approach advanced here has its ground in the expansive conception of “liberty” interests established by cases like *Meyer v. Nebraska*.<sup>149</sup> As is well known, the Court’s more recent decisions, most notably *Board of Regents v. Roth*,<sup>150</sup> *Meachum v. Fanno*,<sup>151</sup> and *Paul v. Davis*,<sup>152</sup> narrow the previously broad spectrum of interests falling as a matter of federal constitutional law within that “liberty.” *Roth* held that a nontenured teacher lacked a general federally rooted liberty interest in specific governmental employment, and *Meachum*, that when a prisoner was validly committed to jail, his federally guaranteed liberty interest was exhausted. Within their domain, these decisions would foreclose a right to interact with the government. And, since the third party has no threshold interest meriting constitutional protection against governmental invasion, it is hard to see that anything is added by focusing on the potential loss to those who would interact with him.<sup>153</sup> *Roth* and *Meachum* are narrow in compass; standing alone, they do not centrally threaten the broad aggregate of liberty interests established by our constitutional tradition. They have no pertinence to the whole area of private ordering, where private parties seek to interact free of governmental interference.<sup>154</sup>

149. 262 U.S. 390 (1923). Of course, some constitutional claims may not implicate an interactive right. In *Rakas v. Illinois*, 439 U.S. 128 (1978), for example, the defendant sought to exclude evidence on the ground that an automobile search was unconstitutional, and that, as a passenger, he had standing to object. After insisting that fourth amendment rights “are personal rights, which like some other constitutional rights, may not be vicariously asserted,” *id.* at 133–34, expressly denying third party standing, *id.* at 137–38, and concluding that standing and the merits were “invariably intertwined,” *id.* at 139, the Court rejected the challenge on the merits, *id.* at 138–39. Cf. *United States v. Payner*, 447 U.S. 727, 731–32 (1980) (defendant lacks standing to suppress evidence seized from another person’s brief case). See generally Adams & Nock, *Search, Seizure and Washington’s Section 7: Standing from Salvucci to Simpson*, 6 U. Puget Sound L. Rev. 1, 1–30 (1982). For our purposes, however, what is important is that the fourth amendment exclusionary rule has been justified only as a deterrent for police misconduct. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, *supra* note 26, at 2–10. The exclusionary rule does *not* protect the right of the passenger to interact with its owner. Nor, I would add, did the due process clause independently confer a right in these circumstances to exclude the evidence, given the Court’s view that exclusion of evidence is a judicially fashioned remedy designed to deter police misconduct. See also *Campbell Painting Corp. v. Reid*, 392 U.S. 286, 289 (1968) (corporation cannot raise its president’s privilege against self-incrimination). But see Sedler, *Constitutional Jus Tertii*, *supra* note 6, at 1343.

150. 408 U.S. 564 (1972).

151. 427 U.S. 215 (1976).

152. 424 U.S. 693 (1976).

153. Once the interests of either party to an interaction are declared to be a legal nullity, claims arising from their interactive rights lose any legal force. This conclusion follows from viewing interactive rights as reciprocal and essentially interdependent. A contrary view is not, however, entirely implausible. Perhaps the interaction itself can be taken to have some legal vitality independent of either party’s separate claim. In that case, the liberty to interact alone trigrers due process rights even absent any other liberty interests.

154. See Monaghan, *The Burger Court and “Our Federalism,”* *Law & Contemp. Probs.*, Summer, 1980, at 39, 47–49. Compare *Vitek v. Jones*, 445 U.S. 480, 489–90 (1980) (transfer of prisoner to mental hospital implicates liberty interest), with *Olim v. Wakinekona*, 103 S. Ct. 1741, 1745 (1983) (transfer of prisoner to another state prison does not implicate liberty interests).

The Court's 5-3 decision in *Paul v. Davis* is another matter altogether. *Paul* held that, standing alone, state defamation of an individual did not implicate the liberty or property protected by procedural due process. What is important here is the theory of the case. Broadly read, *Paul* denies eight decades of history; it establishes that there is no general liberty secured by the due process clause—that the *federal* content of liberty now includes only the bill of rights, the right of privacy, freedom from bodily invasion, and freedom of locomotion.<sup>155</sup> Quite plainly, if this theory is extended outside the area of procedural due process, it will undercut at least part of the analysis in this paper. Even interactive standing linked to a third party's claim that equal protection has been denied—a claim that would not require a preliminary finding that the third party has a liberty or property interest—is vulnerable.<sup>150</sup> The litigant would lack any independent due process "liberty" interest, and thus could not complain that the third party has been subject to an invalid regulation.

Whether *Paul* will have such a revolutionary impact remains to be seen. As yet, the Court seems reluctant to abandon a broad conception of both substantive and procedural liberty where the claim is a right to be free from governmental disabilities imposed on private conduct.<sup>157</sup> Even if full scope is given to *Paul's* premises, a considerable part of the analysis advanced herein could survive. Third party standing tied to federally grounded interests, such as the bill of rights and privacy, would still be permitted to the extent such rights engender corollary rights in the first party litigant.<sup>158</sup> Moreover, *Paul* would protect as "liberty" rights to interact founded upon state law, if new legal disabilities are imposed on previously recognized state law liberties.<sup>159</sup>

b. "Direct" Interference. — *Singleton v. Wulff*<sup>160</sup> permitted physicians to raise the rights of their patients in challenging state refusals to pay for certain abortions.<sup>161</sup> We surely may assume that the restriction on payment

155. 424 U.S. at 710 n.5, discussed in Monaghan, Of "Liberty" and "Property," supra note 121, at 411, 424-25.

156. Such a sweeping curtailment of due process may well create considerable pressure to allow the same claims to be reformulated in equal protection terms. See Monaghan, Of "Liberty" and "Property," supra note 121, at 416-17. For example a vendor could assert that his own right to equal protection is denied by the arbitrary classification in a statute forbidding sales to blacks. Even though the vendor's injury is economic and thus warrants only minimal scrutiny, it is doubtful that a purpose to discriminate against blacks could constitute a legitimate end. See *Zobel v. Williams*, 457 U.S. 55, 63 (1982) (discriminating against recent citizens not a legitimate end).

157. See, e.g., *Lehr v. Robertson*, 103 S. Ct. 2985, 2995 (1983) (state adequately protected putative father's "inchoate interest in establishing a relationship" with his daughter).

158. See supra notes 132-34 and accompanying text. For a similar view of equal protection claims, see supra note 156.

159. Monaghan, Of "Liberty" and "Property," supra note 121, at 425; see also *Hewitt v. Helms*, 103 S. Ct. 864, 870-71 (1983) (federal protection for state created property interest); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (same).

160. 428 U.S. 106 (1976).

161. *Id.* at 112-18.

discourages contact between physician and patient. Perhaps in an era of affirmative government and one in which abortions are performed in clinics where third party payments are a major source of funds, this should be viewed as presenting a first party interactive claim.<sup>162</sup>

Still, *Wulff* is not readily understood as a disguised first party claim.<sup>163</sup> The statute did not purport to regulate the interaction between the patient and her physician. To characterize such an indirect impact on the physician-patient relationship as within the *Buchanan* principle would make first party standing virtually boundless: while other constitutional rights have boundaries imposed by their language, interaction is the most pervasive of all human activity. The cases from *Pierce* on down concern a narrower situation, namely, where the state regulation has as its purpose a direct and meaningful interference with or restriction on the interactive transaction.<sup>164</sup> Of course, any formulation of a line in terms of direct-indirect categories is troublesome.<sup>165</sup> But here, as elsewhere,<sup>166</sup> some such division seems required, unless one is prepared to develop first party standing doctrine well beyond that supported by the *Pierce* line of decisions.<sup>167</sup>

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162. Such difficult cases are best resolved in actual litigation with full records. That difficult cases exist does not necessarily impeach the validity of the distinction between direct and indirect interferences with the liberty to interact. But if the general direct-indirect line is sound, denial of third party standing to challenge indirect interferences can be justified as a way of maintaining doctrinal coherence and stability.

163. *Wulff* is one of the few good examples of a genuine *jus tertii* case, and its correctness depends on the limits on judicial authorization of private attorneys general. See *infra* notes 179-203 and accompanying text. In light of the Court's current insistence on a special relationship between the litigant and a third party, it is not surprising that most cases allowing third party standing can be formulated in first party terms.

164. See *Maness v. Meyers*, 419 U.S. 449, 468 (1975) (regulation of lawyer-client relationship); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974) (regulation of landlord-tenant relationship). But see *United States v. Garrett*, 521 F.2d 444, 446 (8th Cir. 1975) (employer denied standing to raise privacy rights of prostitutes he employed).

165. "[A] great principle of constitutional law is not susceptible of comprehensive statement in an adjective." *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting) (objecting to a direct-indirect line in commerce clause cases).

166. See *Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2304-05 (1983) (distinguishing between direct and indirect interferences with contractual obligations). See also the "indirect purchaser" rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737 (1977), and its progeny.

167. On this analysis, a state statute suppressing gambling or any other business would involve first party standing in a suit by the customer, as well as by the owner, but a statute requiring that a business comply with labor or health codes would not, even if the result of compliance would be to close down a particular business. It might be argued that such a line is objectionable, not because of what it excludes, but in what it permits. Why should a customer be able to complain in first party terms about shutting down a business, or for that matter any restriction on its operation? Some case law looks askance at such standing. See, e.g., *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207, 220-21 (1903); *Williams v. Eggleston*, 170 U.S. 304, 309 (1898). But the position taken in these decisions is hard to defend. Two different considerations suggest themselves. First, it might be argued that the customer will be a second-best plaintiff, *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (plurality opinion), one who is unlikely "to assure that concrete adverseness which shapes the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S.

Even assuming the general workability of a direct-indirect line, however, what is its justification? That line might be plausible if third party standing were conceived of only as a purely in-court litigation mechanism. But the right-to-interact analysis advanced here posits a liberty interest that exists outside of the courtroom; litigation simply vindicates that antecedent right. When a litigant seeks to establish any other constitutional right, such as speech or religion, the "indirectness" of the interference may have pertinence to such issues as whether any material interference with the right has occurred, and perhaps, to the level of justification required to sustain the interference. But it has not been thought relevant to the preliminary question of whether the litigant is asserting a right. Any material burden—direct or indirect—is sufficient to trigger judicial inquiry.<sup>168</sup> Why, then, isn't the same analysis followed with respect to the right to interact? Indirectness may have relevance in ascertaining whether, on the merits, there has been a material interference with the right. Why should it be otherwise pertinent to the litigant's ability to present a first party challenge?

The argument has undeniable force. Whether it is ultimately persuasive is another matter. The direct-indirect line is unappealing from the perspective of a detached observer. From that vantage point, the effect—disruption of the interaction—is the same, whatever its origin. But the law's focus has generally been narrower: its concern has been with the person as he is situated in a social

186, 204 (1962). While not without force, a generalized bar based upon fear of this nature seems unsupportable. See Harvard Note, *supra* note 5, at 438 n.74. Moreover, it has long been clear that should *any* litigant fail to present the facts or law so as to provide a satisfactory record for constitutional adjudication, his suit can be dismissed on ripeness (not standing) grounds. Monaghan, *Constitutional Adjudication*, *supra* note 10, at 1371-73.

A second objection to permitting the customer to complain about regulation of a business is that the possessor of the right—the regulated business—may not wish to assert it. *Wulff*, 428 U.S. at 113-14 (plurality opinion). It is doubtful that this objection should be valued. See Rohr, *supra* note 6, at 405; see also *Director v. Perini North River Assocs.*, 103 S. Ct. 634, 640-41 (1983) (labor department official has standing to seek review of administrative ruling concerning injured employee). But see Rohr, *supra* note 6, at 458-59. The objection ignores the fact that the customer is asserting a distinct first party claim of his own: the opportunity to persuade others to interact with him. *L. Tribe*, *supra* note 4, at 96. To be sure, the business remains free to ignore the litigant's victory and proceed in voluntary compliance with the statute. Thus the real barrier here is likely to be *Warth's* insistence that the litigant demonstrate reasonable probability that he will benefit from a judgment on the merits. *Warth v. Seldin*, 422 U.S. 490, 504 (1975). Perhaps it should be presumed that identifiable businesses will willingly comply, and thus the causation doctrine should bar customer standing. But to my eye such a general presumption is unwarranted. In a competitive market, gratuitous compliance with a regulation that entails additional costs after the regulation has been held invalid would be the exception. Accordingly, unless it is clear ex ante that the business will voluntarily comply with the challenged statute, the customer-litigant should be held to satisfy the threshold causation requirement.

Where the litigant and third party both would have "first party" standing, their common injury is likely to result in alignment of their interests against the challenged rule. Thus both the schools and pupils in *Pierce* and the vendor and male vendees in *Craig* plainly had first party standing and parallel objections. Cf. *Gilmore v. Utah*, 429 U.S. 1012, 1016 (1976) (son's opposition to mother's challenging his execution defeated mother's standing); Rohr, *supra* note 6, at 457.

168. *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1251-55 (1980) (distinguishing between direct and substantial interferences).

context. From this perspective, it seems plausible to focus on the litigant's reasonable expectations outside the courtroom context.<sup>169</sup> He is likely to experience some conduct as an "interference" with his freedom to interact, and some as not. Thus, a statute barring physicians from performing abortions would be experienced as a direct interference with the patient's right to interact; a statute requiring all physicians to have indemnity insurance or special training would not. Similarly, statutes prohibiting *all* teachers from giving instruction in German would pass the directness requirement; statutes governing the dismissal of individual teachers for moral turpitude would not, even if in a particular instance it had the effect of removing the only available German teacher. A direct-indirect line seems a workable, albeit by no means a perfect, approximation of this distinction in perception, and a line of that nature seems to be implicit in the tort law's allowance of claims for interference with advantageous relationships.<sup>170</sup> It also seems implicit in the case law, which permits *jus tertii* standing so long as a sufficient "relationship" exists between the litigant and an identifiable third party right holder.<sup>171</sup> The relationship requirement both antedates and is apparently not thought to be reducible to the Court's current insistence that the litigant show that he is likely to benefit from any judgment.<sup>172</sup>

There is another reason for limiting the right to interact to cases of direct interference: article III. *Warth v. Seldin*<sup>173</sup> indicates that a generalized right-

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169. I recognize the danger here that I am not "describing" anything, but instead imposing my own normative concepts under the label of "description." That is a constant problem, as the Court's fourth amendment "no reasonable expectation of privacy" cases show. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 301 (1966).

170. W. Prosser, *The Law of Torts* § 129 (4th ed. 1972); Note, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. Chi. L. Rev. 1116, 1117-18 (1983).

171. Sedler, *Constitutional Jus Tertii*, *supra* note 6, at 633-45; Rohr, *supra* note 6, at 437-42. The relationship concept is, however, by no means problem-free. What counts as such a relationship now raises difficulties. See *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) ("advocate" of third party rights has standing); Harvard Note, *supra* note 5, at 441. Both the Court and commentators proceed on a largely intuitive basis, drawing upon normal patterns of social interaction, and being troubled by standing in cases of "unusual" relationships. See, e.g., *Cheaney v. Indiana*, 410 U.S. 991 (1973) (nonphysician who performed abortion could not raise claims of patient); *Gilmore v. Utah*, 429 U.S. 1012 (1976) (mother did not have "next friend" standing to challenge execution of son who had knowingly and intelligently waived right to appeal and who objected to mother's challenge); *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (residents could not raise rights of excluded low-income groups).

172. See *infra* text accompanying notes 177-178. In *Singleton v. Wulff*, for example, the physician would have benefited monetarily—or so we may presume—if he or she had been successful in invalidating the restrictions on reimbursement for abortions. It is at least plausible that *Wulff* presents a clearer case of judicially redressable injury in fact than that involved in an effort by physicians to challenge a statute concerning state wardship for live-born infants. *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 n.2 (1976). The Court has consistently refused to permit third party challenges to litigants who suffer no injury in fact. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982); Harvard Note, *supra* note 5, at 429-30.

173. 422 U.S. 490 (1975).

to-interact claim would not satisfy current understandings of the injury-in-fact requirement. The Court there expressed doubt that a generalized challenge to an exclusionary zoning ordinance could be maintained by local residents on a right-to-interact theory,<sup>174</sup> at least absent congressional sanction.<sup>175</sup> These doubts were reinforced when the Court denied standing to residents in part of a city to challenge illegal racial practices elsewhere in the city.<sup>176</sup> Whether these doubts are well placed is not material here. The crucial point is that they suggest a need to accommodate a right to interact with the injury-in-fact requirement. This, in turn, makes plausible the limitation of interaction challenges to those that constitute a material and direct interference with the right to interact.

c. *Causation*. — Even if a liberty to interact exists, a first party challenge may fail because there is no reasonable likelihood that a favorable judgment will promote interaction. Thus the Court's recent emphasis on the "causation" requirement—that a litigant demonstrate a reasonable likelihood that he will benefit from a favorable judgment<sup>177</sup>—could stand as an important barrier to first party claims based on a substantive right to interact. The causation requirement obviously permits the screening out of farfetched interactive claims. But I see no reason in principle why it should be erected into a formidable barrier, one that bars substantial right-to-interact standing challenges.<sup>178</sup> Thus, I see no reason why interactive claims should be limited to situations, as in *Buchanan*, where a valid contract exists. The case law evinces a more generous standard: so long as there is a reasonably plausible interactive claim, the causation requirement should be deemed satisfied, at least *prima facie*.

#### IV. JUS TERTII AND THE PRIVATE ATTORNEY GENERAL

In this Part, I want to proceed on the premise that a genuine *jus tertii* claim is involved—one that cannot properly be formulated in first party

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174. *Id.* at 514 (dealing with the claims of local residents complaining of the effects of exclusionary zoning practices). It is, however, important to note that the court did not rule on the propriety of an interactive-right-based claim, since the local residents had not argued that they had been denied any constitutional rights.

175. The Court, *id.* at 513–14, reaffirmed the authority of *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211–12 (1972), recognizing Congress's power to confer such a right. This means that the "interaction" interest is not too thin to satisfy article III. On the question of whether Congress has power to confer standing, see *Hart & Wechsler*, *supra* note 5, at 63 (Supp. 1981).

176. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372–79 (1982); see also LeBl, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 *Duke L.J.* 1013.

177. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42–46 (1976); *Warth v. Seldin*, 422 U.S. 490, 504–08 (1975); *Common Cause v. Department of Energy*, 702 F.2d 245, 250–51 (4th Cir. 1983). See generally Varat, *Variable Justiciability and the Duke Power Case*, 58 *Tex. L. Rev.* 273 (1980). For a brief but lucid account, see L. Tribe, *supra* note 4, at 92–97.

178. Some situations, see Rohr, *supra* note 6, at 258, may, however, strongly suggest that plaintiffs would not benefit by a judgment. See *supra* note 167.

terms. This premise can rest on a rejection of the right-to-interact approach previously outlined, as well as on a view that some appropriate third party standing cases in any event cannot fairly be understood in right-to-interact terms. To the extent that genuine *jus tertii* standing is involved, what can be said about its character?

We might begin by asking why the Court insists upon a "relationship" between the litigant and the third party as a condition to permitting the litigant to raise the rights of third parties.<sup>179</sup> Of course, some relationships evidence the presence of interactive rights or buttress the claim that interference with such rights is direct—but these are concerns of first party standing.<sup>180</sup> The existence of a relationship does not seem relevant to genuine *jus tertii* standing *per se*.

Indeed, in many other analogous contexts, no special relationship is felt to be necessary. The range of situations in which a litigant might be thought to be raising challenges not implicating his own rights is far wider than that embodied in the *jus tertii* case law. The competitor-standing cases from administrative law are illuminating. Following the tendency to assimilate public law to private law, the Court at first declined to recognize standing, since a competitor had no common law right to be free from competition.<sup>181</sup> As the need for adequate judicial control of administrative conduct became more insistently felt, this conception was replaced by one in which the competitor was increasingly seen as a "private attorney general."<sup>182</sup> Still later the competitor was seen as asserting an interest (competition) within the zone of statutory protection,<sup>183</sup> but the private attorney general flavor remained. The

179. The most elaborate explication of this requirement is stated in the plurality opinion in *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976):

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

. . . .

The other factual element to which the Court has looked is the ability of the third party to assert his own right . . . . If 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.

But see *Rohr*, *supra* note 6, at 404-16 (criticizing *Wulff*); *supra* note 167 (same).

180. See *supra* notes 132-48, 171 and accompanying text.

181. See *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 139-41 (1939).

182. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940) (competition vindicates the public interest); *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943). See generally L. Jaffe, *supra* note 14, at 505-31.

183. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

competitor's standing was not premised on a "right" to be free from competition, but on the quite different proposition that competitive impact was an "interest" that the regulatory body must take into account.<sup>184</sup> Moreover, the competitor's standing included the right to challenge aspects of the agency decision unrelated to its competitive impact.<sup>185</sup> Consider also the problem of class actions; a litigant is permitted to press for relief for his entire class, not just for himself, even though class-wide relief is not necessary to give him full relief.<sup>186</sup>

Challenges based upon the allocation of powers between the Nation and the states and among the branches of the national government provide other illustrations. The argument that a state law is preempted by either a federal statute or by the grants of unexercised authority to the national government can often be understood as permitting a private litigant to assert the institutional claims of the national government.<sup>187</sup> So too can many claims that federal statutes violate separation of powers, or exceed the federalism limits imposed on the national government.<sup>188</sup> Even if the litigant has "standing" to raise these claims because his "interests" are implicated, many of these structural challenges have been thought by some commentators not to involve the litigant's "rights" in any straightforward sense.<sup>189</sup>

The foregoing illustrations are all problematic, of course. Perhaps they can all be assimilated within a first party standing framework. For example, preemption cases may be thought to involve the litigant's own right to be regulated in accordance with a valid rule,<sup>190</sup> particularly given the Court's

184. See L. Jaffe, *supra* note 14, at 508; Sunstein, *supra* note 10, at 759.

185. See generally Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1732-33 (1975). For a briefer treatment, see L. Tribe, *supra* note 4, at 109-10. These dramatic changes are, in my view, not accounted for simply by referring to differences in statutory language. See J. Vining, *supra* note 14, ch. 3.

186. See, e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). Rohr rightly argues that these suits involve *jus tertii* claims. Rohr, *supra* note 6, at 444-54. This point has special force where it can be said confidently that adequate and full relief for the litigant is not dependent upon granting relief for the class.

187. The labor preemption cases are particularly illuminating in this respect. The *jus tertii* character of preemption seems most plausible when preemption is based upon the "arguably-protected, arguably-prohibited" rationale of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-47 (1959). Where preemption rests on a premise that federal law mandates that state law yield to the results of private ordering, the individual rights approach is more plausible. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), is an example of a litigant asserting his own rights. For a recent discussion of these two different kinds of labor preemption, see *Belknap, Inc. v. Hale*, 103 S. Ct. 3172 (1983).

188. See, e.g., Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 *Stan. L. Rev.* 603 (1975) (distinguishing between federalism and individual right objections).

189. See J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 195-205, 241-58, 263-72* (1980) (emphasizing that in many cases the litigant's right can be denied if the proper organ of government chooses to do so).

190. In *Rice v. Rehner*, 103 S. Ct. 3291 (1983), for example, a vendor, a federally licensed Indian trader, was permitted to challenge a state liquor statute on the ground that it interfered

conclusion that section 1983 gives a right of action for most state interferences with federal statutory and constitutional claims.<sup>191</sup> Moreover, the historical insight that the actual allocation of political power affects the dynamics of a system of civil liberties has contemporary relevance.<sup>192</sup> Still, these illustrations at least suggest that much existing law is in fact closely akin to third party standing. Recognition of that fact gives added force to the question of why in *jus tertii* cases we insist upon the existence of a relationship between the litigant and the third party.<sup>193</sup>

To my eye, the familiar "relationship requirement," whatever its justifications, obscures the fact that on the Court's premises recognition of *jus tertii* standing translates into judicial licensing of private attorneys general. Like any private attorney general, the litigant vindicates the public interest in bringing about compliance (here by public officials) with controlling public norms. Moreover, again like other private attorneys general, the litigant advances the concrete interests of identifiable third persons, or classes thereof.<sup>194</sup>

Congress could authorize private attorneys general under its article I powers, as well as under the enforcement clauses of the Civil War amendments.<sup>195</sup> But what is the source of judicial authority to license such suits on

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with tribal sovereignty protected by federal law. It is easy to think of such a challenge as one raising the "rights" of third parties, and surely Congress could restrict such claims to the tribe itself. But the case fits squarely within the *Pierce-Truax-Buchanan* mold.

191. See *Maine v. Thiboutot*, 448 U.S. 1 (1980). On the limits of the holding, see *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). See also Sunstein, Section 1983 and the Private Enforcement of Federal Law, 49 U. Chi. L. Rev. 394 (1982).

192. Monaghan, Book Review, 94 Harv. L. Rev. 296, 308-09 (1980). *INS v. Chadha*, 103 S. Ct. 2764 (1983), affords a good example of the tight connection between separation of powers and individual rights. See generally Monaghan, *Marbury* and the Administrative State, *supra* note 10.

193. In *Duke Power*, the Court quite correctly perceived that, in principle, cases recognizing third party standing are inconsistent with the suggestion that a connection between the injury and the specific right asserted by the litigant is constitutionally required. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78-79 (1978) (permitting a takings challenge to liability limits for nuclear accidents on the basis of environmental injury that would result from the construction and operation of a nuclear plant). The previous discussion suggests that the *jus tertii* cases do not stand alone in that regard. Professor Tribe seems to me entirely correct in viewing the general nexus requirement as simply another way of preventing third party standing. L. Tribe, *supra* note 4, at 100-01. *Contra* Rohr, *supra* note 6, at 441-42.

194. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). See generally Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983). Indeed in *jus tertii* challenges the litigant frequently advances the interests of a large number of vendees. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (interests of potential customers of distributor of contraceptives).

195. The Court, of course, continues to insist that Congress must limit its authorizing of litigants to entities suffering injury in fact. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). But it shows no real disposition to check congressional determinations that such injury exists. E.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). I have argued that the injury-in-fact requirement is not a limitation on Congress. Monaghan, *Constitutional Adjudication*, *supra* note 10, at 1375-79. But see Hart & Wechsler, *supra* note 5, at 63 (Supp. 1981).

the Court's own motion? Such authority does not seem to me derivable as an incident of the remedial powers inherent in the grant of equity and declaratory jurisdiction.<sup>196</sup> Moreover, such a basis, even if it existed, would not support application to the states of the rules regarding third party private attorney general standing. Some adequate source for the creation of private attorneys general must, therefore, be located.

That the Constitution itself could be read to generate some genuine *jus tertii* actions I do not doubt, given my belief that the substantive constitutional guarantees have important remedial consequences.<sup>197</sup> Indeed, the Constitution itself, not notions of judicial discretion, may be the source of the private attorneys general warrants in *Barrows* and *NAACP v. Alabama ex rel. Patterson*—where the effect of the judicial proceeding itself would be to destroy the rights of the third person.<sup>198</sup> But recognition of *jus tertii* standing as a constitutional imperative outside that limited framework seems to me far more problematic. Any such judicial power seems deeply inconsistent with the private rights model of *Tyler* and *Yazoo*. And while such judicial power may be more congruent with the root assumptions of the public action theory, the justificatory link has yet to be made, particularly in terms of the federalism interests of the state courts in structuring their own remedial frameworks.

Perhaps the Court has authority to license additional private attorneys general as a matter of constitutional common law, a theory of judicial law-making that seems reconcilable with both contending paradigms of constitutional adjudication. That theory posits judicial power to create a substructure of constitutionally inspired, but not constitutionally required, rules designed to implement constitutional guaranties.<sup>199</sup> No other theory seems to me to

196. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 572-73 & nn.40-41 (1947) (discretionary component of equitable and declaratory remedial doctrine is often exercised to avoid unnecessary constitutional adjudication even when the Court has jurisdiction).

197. See *supra* note 26.

198. See *supra* notes 26, 60-65, 100-02, 126 and accompanying text.

199. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, *supra* note 26. The theory seems to be responsive to the concerns of this Article. It recognizes that the source of the Supreme Court's authority to insist that the state courts follow any rule not required by the Constitution or authorized by some federal statute is not evident. As *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), makes plain, there is no general federal judicial power to displace state law. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 *Harv. L. Rev.* 1682 (1974). To the contrary, the courts must point to some authoritative source, such as a statute, as explicitly or implicitly authorizing judicial creation of substantive federal law. E.g., *DelCostello v. International Bhd. Teamsters*, 103 S. Ct. 2281, 2887 n.13 (1983). But there is no a priori reason to suppose that the Constitution itself should differ from statutes in providing a basis for the generation of an interstitial federal common law. Not surprisingly, therefore, a significant body of federal common law has been developed on the basis of constitutional provisions and the constitutional structure in areas where state interests are ultimately subordinated to interests of special concern to the national government within the reach of the plenary national legislative power. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, *supra* note 26, at 10-17.

The principle of these "federalism" cases does not by itself establish that the Court may fashion a common law based solely upon constitutional provisions framed as *limitations* on

account for the exclusionary rule cases, so long as the Court persists in its view that the introduction of the illegally seized evidence is not a separate violation of the defendant's fourth amendment rights, or a necessary remedy therefor.<sup>200</sup> On the Court's view, the defendant seems to be a private attorney general asserting the public (a third party) interest in confining police conduct within constitutional limits. But it is, I recognize, an open question whether, under our constitutional framework, the Court can be viewed as possessing authority to fashion a common law of civil liberties.<sup>201</sup> Moreover, special difficulties are present here. In suits by private attorneys general, a public attorney general exists. But it seems doubtful that without statutory authority the executive could institute a suit to vindicate fourteenth amendment rights.<sup>202</sup> Perhaps, however, given the long historical sanction of private enforcement of public norms, and the general conception that virtually all domestic executive power depends upon statutory authorization, this fact may not count much against an otherwise justified limited recognition of the private attorney general.<sup>203</sup>

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governmental power in order to vindicate civil liberties, such as the first and fourth amendments. Such a judicial rulemaking authority raises federalism issues of a different order, as well as separation-of-powers considerations at the national level. *Id.* at 34-40. Nonetheless, the Court's constitutionally based common law decisions in areas of plenary national legislative authority at least invite inquiry into whether the specific constitutional guaranties of individual liberty might also authorize the creation of a substructure of judicially fashioned rules to carry out the purposes and policies of those guaranties, while at the same time recognizing a coordinate and controlling authority in Congress. There has, however, been no significant judicial consideration of this theory apart from the en banc decision in *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978), vacated sub nom. *City of W. Haven v. Turpin*, 439 U.S. 974, on remand, 591 F.2d 426 (2d Cir. 1979) (en banc) (availability of § 1983 action against municipality precludes judicial creation of analogous remedy relying directly on fourteenth amendment).

200. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, supra note 26, at 2-10.

201. *Id.* Whatever its perceived advantages, a theory that posits a judicial competence to fashion a constitutionally inspired common law of civil liberties, see *id.*, must deal adequately with additional objections: development of such a body of law is inconsistent with the original intent of the framers; the line between true constitutional interpretation and constitutional common law is too indeterminate to be useful; the existence of such judicial power is inconsistent with the autonomy of the executive department in enforcing law as well as the rightful independence of the states in the federal system. See Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 *Harv. L. Rev.* 1117 (1978). The theory of constitutional common law bears a family resemblance to the views of those commentators who hold that the Court may legitimately engage in noninterpretive review—that is, the Court may properly impose values on the political branches not fairly inferable from the constitutional text or the structure it creates—but who insist that Congress may control those decisions by regulating the jurisdiction of the Supreme Court. E.g., M. Perry, *The Constitution, The Courts and Human Rights* (1982); L. Lusky, *By What Right?* (1975). Other differences aside, the constitutional common law view permits Congress to overrule the noninterpretive decisions directly, thereby bypassing the awkward theoretical and political problems associated with congressional attempts to manipulate jurisdiction for substantive ends.

202. *United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980).

203. See *Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972) (stressing historic preference for private enforcement of law). I assume, of course, that any private attorney general licensed by the Court will have suffered cognizable injury in fact.

## CONCLUSION

Third party standing doctrine has developed largely without examination of the fundamental issues that such standing implicates. The Court's invocation of prudential or discretionary limits, with a wavering overlay of special exceptions, obscures troublesome questions deserving of closer attention. To some extent third party standing cases reflect a larger movement from a private to a public action model of adjudication. But until the terms of such a model are more clearly articulated and are embraced by the courts, it is important to understand the sources of and limits on judicial power to control the issues a litigant may raise. Given the range of circumstances in which third party standing claims arise, it is not surprising that a monolithic approach is unsatisfactory. For example, the implications for federal-state relations when the Supreme Court reviews state court rulings premised on third party standing differ depending on whether state law permits such standing. More generally, some third party standing cases are best understood in first party terms. This seems so at least for overbreadth cases and *jus tertii* cases that can be grounded on a due process liberty to interact with the third party right holder. That standing in these cases rests on a federal right implies that state courts are not free to ignore the claim and that prudential concerns are out of place in federal courts. More troublesome are cases not properly reducible to first party analysis. Here traditional limits on the use of private attorneys general suggest that, absent congressional sanction or necessary implication from the Constitution, *jus tertii* standing is problematic. Whether or not any of the particular suggestions offered here are ultimately persuasive, we must begin to articulate the unspoken premises of third party standing.