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The Assertion of Constitutional Jus Tertii: A Substantive Approach

Robert Allen Sedler†

Some years ago I undertook to investigate constitutional jus tertii, a party's ability successfully to challenge a law or government action on the ground that it violated third parties' constitutional rights.[1] At that time, the Supreme Court purported to prohibit the assertion of jus tertii, with very limited exceptions.[2] My research disclosed, however, that in a number of cases parties had in fact been able to prevail by claiming that the challenged law or government action violated the rights of others not before the Court. I therefore concluded that at least in practice the Court sometimes allowed the assertion of constitutional jus tertii.

My intent in beginning this Article was to update my earlier work. My impression was that the results of the Court's decisions since that time confirmed my earlier conclusions. The Court has explicitly promulgated as doctrine the factor approach outlined in my earlier article: a party's ability to assert constitutional jus tertii depends on (1) the nature of the relationship between the litigant and the third party and (2) the practicability of the third party's assertion of his own rights.[3]

A review of the cases, however, and particularly of the most recent

† Professor of Law, Wayne State University. A.B. 1956, J.D. 1959, University of Pittsburgh.

1. Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962) [hereinafter cited as *Jus Tertii*].

2. *See generally* United States v. Raines, 362 U.S. 17, 21-23 (1960). As the Court long ago stated: "It has been repeatedly held that one who would strike down a state statute as violative of the federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." Heald v. District of Columbia, 259 U.S. 114, 123 (1922).

3. *See* Singleton v. Wulff, 428 U.S. 106, 114-16 (1976).

ones, led me to conclude that the Court's decisions are not consistent with the general prohibition against the assertion of jus tertii and the factor approach to the prohibition's exceptions that the Court purports to accept. In fact, the Court has allowed litigants to assert third-party rights both where the relationship between the litigant and the third party was not a close one under the standards developed in prior cases,[4] and where the third parties' assertion of their own rights in an independent action was not at all impracticable.[5] Given this apparent inconsistency, I think it appropriate to consider anew the entire question of constitutional jus tertii.

My reconsideration has led me to a very different position.[6] I now believe that as a general proposition, a party should be able to prevail in constitutional litigation only if he can show some violation of his own rights. I have also concluded that the Court has in fact acted consistently with this general rule.

The first Part of this Article begins by tracing the development of the Supreme Court's jus tertii doctrine. It then shows that the Court's approach is analytically unsound because it considers the question of constitutional jus tertii in terms of "standing," and that this unsoundness contributes to the inconsistencies in current doctrine. Part I concludes that parties who are not themselves injured by a given rule or action should not be able to challenge it by asserting third parties' rights, and that the Court's approach has therefore been improper.

Part II of the Article argues that the results reached by the Supreme Court in the cases in which it has viewed jus tertii in terms of standing are consistent with my present thesis. Part II demonstrates that in the cases in which the assertion of constitutional jus tertii was permitted, the application of the challenged law or government action to the party asserting jus tertii was itself unconstitutional or otherwise invalid. Conversely, in the cases in which the assertion of jus tertii was not permitted, any possible violation of third party rights was irrelevant to a determination of the constitutionality of the law as applied to the litigant. Finally, Part III of the Article shows why it is necessary to

4. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (vendor of beer held entitled to assert right of male minor vendees).

5. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (landlord allowed to assert rights of tenants).

6. This reversal may in part be due to the fact that in my earlier article I did not take a normative approach to the subject. In other words, I was not trying to develop a consistent analytical framework within which it could be determined whether the assertion of constitutional jus tertii *should* be recognized. Rather, I took an "empirical" approach, analyzing the results that the Court reached in order to determine whether the Court recognized a legal right to assert constitutional jus tertii; and if so, under what circumstances it would be permitted.

reconcile results with doctrine and to remove the assertion of jus tertii from constitutional litigation.

I
THE ANALYTICAL FRAMEWORK

A. The Supreme Court's Articulated Jus Tertii Doctrine

1. General Principles

This Subsection defines the basic principles and distinctions underlying the Supreme Court's jus tertii doctrine. The cases in which questions of the assertion of jus tertii have arisen fall into two categories. In the first type of case, parties want to assert that a given law, although constitutional as applied to their own conduct, would be unconstitutional as applied to the conduct of third parties coming within its scope. Cases in this category are facial challenges, in which parties attack a law not because of a specific application of it to their own conduct, but because its terms include constitutionally unreachable conduct of third parties. An example would be a case in which the director of a contraceptive clinic sues to invalidate a state law prohibiting the use, but not the distribution, of contraceptives: the director herself is not disadvantaged by the operation of the law, but would-be users of her clinic are. I will hereafter refer to this kind of challenge as a Category I case.

In the second type of case, litigants want to base claims or defenses either wholly or partly on the ground that denial of the claim, or rejection of the defense, will violate third parties' rights. The appropriate example here is a doctor who has been prosecuted under a state law prohibiting the performance of abortions: the doctor will argue that enforcement of the law against her implicates not only her rights, but the rights of her would-be patients as well. These will be referred to as Category II cases.

The Supreme Court has treated these two kinds of cases differently. In Category I cases, in which the litigant before the Court concedes that the challenged law is constitutional as to him, the Court has found the substance of the challenged law important, and has distinguished between ordinary criminal and regulatory laws and laws that "by their terms restrict expression."[7] First amendment laws are singled out for special treatment because a "chilling effect upon the exercise of First Amendment rights" may result from prosecution under an invalid statute.[8] Where the challenged law by its terms restricted expression,

7. *Jus Tertii*, *supra* note 1, at 612-26.

8. Lewis v. New Orleans II, 415 U.S. 130, 133-34 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

the Court would determine the validity of the law "on its face" regardless of the law's constitutionality as to the party actually before the Court.[9]

Where the challenged law did not on its face restrict expression, the Court has decided whether a litigant could challenge its constitutionality as applied to a third party by looking to severability. A severable law is one that may be constitutionally applied to at least some persons, even if it is unconstitutional as to others. If a party before the Court could show that the challenged law was in fact nonseverable—that is, incapable of differential application—he could include in his challenge the contention that the law violated third parties' constitutional rights.[10] For our purposes, it is significant that in both of these Category I situations, even if the party before the Court conceded that the challenged law was constitutional as to him, he could prevail by asserting third parties' constitutional rights.

In the more common Category II cases, in which a party asserts that the rights of third parties would be violated by application of the challenged law to him, the Court has stated that litigants generally will not be allowed to strengthen their claims by asserting third-party rights in addition to or in lieu of their own. In developing exceptions to that rule, the Court has taken four factors into account: (1) the interest of the party before the court; (2) the nature of the right asserted; (3) the relationship between the litigant and the third party; and (4) the practicability of the third party's assertion of his own rights in an independent action.[11]

The two most important factors were the relationship between the litigant and the third party, and the third party's ability to bring suit to assert his own rights.[12] The Court purported to require a close relationship, such as a professional or associational tie, between the party in court and the third party.[13] Furthermore, the Court claimed that it

9. *Jus Tertii*, *supra* note 1, at 613.

10. *Id.* at 608.

11. *Id.* at 626-27.

12. The first factor, the challenger's own interest, was a threshhold requirement: the party before the court had to be either a proper plaintiff or a defendant, in order to satisfy the article III "case or controversy" requirement. Once this factor was established, consideration of the other factors was warranted.

In retrospect, the second factor, the nature of the right asserted, was not very significant. I included it as a factor in my earlier article only because the Court had been refusing to allow the assertion of property or contractual rights of third parties even when it was extending a good deal of substantive protection to those rights. *See Jus Tertii*, *supra* note 1, at 641.

13. *See id.* at 647. In Barrows v. Jackson, 346 U.S. 249 (1953), the Court allowed a white seller of land against whom a racially restrictive covenant was sought to be enforced to assert the equal protection rights of the black buyers. I explained the relationship as being something more than that of seller and buyer, namely that of a person who acted to protect the rights of a minority and the minority itself. *Jus Tertii*, *supra* note 1, at 631. The Court subsequently accepted my

would not allow litigants to assert third-party rights unless it is impracticable for the third parties to assert their own rights in a separate action.[14] The Court stated that the interaction of these factors may create exceptions to the general rule against allowing litigants to assert third parties' rights.[15]

2. *Recent Cases and the Factor Doctrine*

With these general principles in mind, I proceed to a discussion of *Singleton v. Wulff*[16] and *Craig v. Boren*,[17] two cases that typify the Supreme Court's present use of the factor doctrine. The results of these cases show that in Category II cases, the Court does not generally prohibit assertions of third parties' rights, which is contrary to the purported rule. In short, these cases show that the Supreme Court does not use the factor doctrine it has articulated.

Both *Singleton* and *Craig* were cases of the second category described above: litigants claimed that applying a law to them would infringe third parties' constitutional rights.[18] *Singleton*, decided first,[19] was a suit brought by physicians which challenged the constitutionality of a state's refusal to pay for nonmedically indicated abortions. The plaintiffs, both of whom had performed such abortions, alleged that the state's action violated their constitutional right to practice medicine, because it interfered with the physician-patient relationship and prevented them from practicing medicine in the way they considered most beneficial to their patients.[20] The physicians tried to strengthen their claim by alleging that the refusal to fund the abortions violated their patients' constitutional rights as well.[21] A plurality of the Court, in an

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explanation of the relationship involved in *Barrows*. *See* Eisenstadt v. Baird, 405 U.S. 438, 445 (1972).

14. *Jus Tertii*, *supra* note 1, at 647-48. Where impracticability of assertion had not been shown, the Court allowed standing to assert jus tertii only if the challenged action impaired "high value" rights, and the litigant's relationship to the third party was "particularly significant." *Id.* at 648.

15. The Court consistently reiterated the general rule. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 80 (1978).

16. 428 U.S. 106 (1976).

17. 429 U.S. 190 (1976).

18. Cases in this category demonstrate one instance of the Court's inconsistency with the rule it purports to follow. I do not deal in this Section with the facial challenge cases that fall into the first category; the rules in that area, and their proper application, are dealt with elsewhere in the Article. *See infra* notes 45-63 and accompanying text.

19. *Singleton* was decided during the 1975 Term, *Craig* during the 1976 Term.

20. 428 U.S. at 109-110. As to the substantive rights of the physicians in this case, see *infra* notes 80-82 and accompanying text.

21. 428 U.S. at 110. The district court had dismissed the case for lack of standing. The Eighth Circuit held that the physicians had standing both in their own right and to assert the rights of their patients, and invalidated the restriction on Medicaid benefits for abortions as violative of the patient's rights. *Id.* at 111-12. The Supreme Court remanded the case with directions

opinion by Justice Blackmun, held that the physicians could assert their patients' rights as well as their own.[22]

Justice Blackmun first discussed the reasons for a general prohibition against the assertion of third-party rights. He said that unnecessary adjudication of such rights is undesirable because (1) the third parties might not wish to assert their rights or might be able to enjoy them regardless of the outcome of the adjudication; and (2) the third parties, who usually would be the best proponents of their own rights if they did choose to assert them, would be bound by an unfavorable decision under principles of stare decisis. But Justice Blackmun then departed from the general rule and held that in this case, an exception to the general rule was warranted because there was a close relationship between the physicians and their patients, and because it would be impracticable for patients who needed abortions to assert their own rights. Justice Blackmun's reiteration of the general rule prohibiting assertion of jus tertii in the context of a holding allowing an exception to the rule, as well as the fact that his analysis did not command a majority of the Court, indicated that the Court's jus tertii doctrine was in flux.

In *Craig v. Boren*,[23] decided six months after *Singleton*, the plaintiffs challenged an Oklahoma law that prohibited the sale of beer to males under age 21 and females under age 18. The only plaintiff before the Supreme Court was a bartender licensed to sell beer.[24] The Court saw the issue as whether "the licensed vendor of 3.2 percent beer, who has a live controversy against enforcement of the statute, may rely upon the equal protection objections of males 18-20 years of age to

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that the district court determine the constitutionality of the restriction in the first instance. *Id.* at 119-21. The Supreme Court subsequently held in another case that the state's refusal to provide payment for nontherapeutic abortions was not unconstitutional. Maher v. Roe, 432 U.S. 464 (1977). *See also* Harris v. McRae, 448 U.S. 297 (1980).

22. Justice Stevens, concurring, took the position that because the physicians had standing to sue and had alleged a violation of their own rights, the Court could also consider arguments "based on the effect of the statute on the constitutional rights of their patients." 428 U.S. at 121-22 (Stevens, J., concurring in part). Four dissenters, in an opinion by Justice Powell, maintained that the physicians should not be able to assert their patients' rights. *Id.* at 126-31 (Powell, J., dissenting).

Justice Powell contended in dissent that in the prior cases where the assertion of jus tertii had been permitted, the Court had not emphasized the nature of the relationship between the litigant and the third party, and that in any event, the challenged action in those cases directly interfered with the relationship itself, which was not so here. *Id.* at 128 (Powell, J., dissenting). Justice Blackmun insisted that the prior cases did not go off on this point. *Id.* at 118 n.7. Justice Powell also contended, in sharp disagreement with Justice Blackmun, that in the prior cases a suit by the third party was "in all practicable terms impossible." *Id.* at 126 (Powell, J., dissenting). Justice Blackmun argued that the test was one of impracticability, not impossibility. *Id.* at 116 n.6.

23. 429 U.S. 190 (1976).

24. Originally, a male under age 21 had also been a plaintiff. By the time the case reached the Supreme Court, he had turned 21, so the case was moot as to him. *Id.* at 192.

establish her claim of unconstitutionality of the age-sex differential."[25] It held that she could, relating the seller's position as a vendor to her ability to assert her potential customers' rights.[26] Because the Oklahoma law explicitly regulated the sale rather than the consumption of 3.2 percent beer, and because the seller's failure to prevail would have materially impaired the underage males' ability to obtain 3.2 percent beer, the Court said that the seller was the "obvious claimant" to challenge the constitutionality of the law.[27]

Craig v. Boren also departs from the Court's prior doctrine. It was the first case in which the Court explicitly allowed one party to a purely commercial relationship to assert the constitutional rights of the other party to the relationship. It was also the first case in which the Court explicitly allowed a litigant to assert third-party rights even though it would not have been impracticable for the affected males to assert their own rights. *Craig* suggests that a party to almost any actual or potential relationship may assert the other party's constitutional rights to challenge injurious restrictions upon the relationship. The case indicates that the factor doctrine was no longer being strictly applied, as the need for the two most important factors once required for the assertion of jus tertii was being relaxed greatly.

The results in *Singleton* and *Craig* show that it is now unrealistic to find a general prohibition against the assertion of jus tertii in Category II cases. There is, in fact, a tension between the general rule against assertion of jus tertii and the results in these cases. This tension is important, even though it is only manifest in Category II cases, because it indicates that the Court's jus tertii doctrine cannot satisfactorily

25. *Id.* at 192-93.

26. Justice Brennan, writing for the Court, stated:

> As a vendor with standing to challenge the lawfulness of §§ 241 and 245, appellant Whitener is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should her constitutional challenge fail and the statutes remain in force. Otherwise, the threatened imposition of governmental sanctions might deter appellant Whitener and other similarly situated vendors from selling 3.2 percent beer to young males, thereby ensuring that enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights.' Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.

Id. at 195 (citations omitted).

27. *Id.* at 196-97. Justice Brennan drew an analogy to Eisenstadt v. Baird, 405 U.S. 438 (1972), in which a distributor of contraceptives had standing to assert the unmarried persons' rights to receive contraceptives. *See infra* notes 73-79 and accompanying text.

In dissent, Chief Justice Burger emphasized that there was no barrier whatsoever to the third parties' assertion of their own constitutional rights, as evidenced in *Craig* by the presence of an 18 to 20 year old male as plaintiff, so that "[t]here is thus no danger of interminable dilution of those rights if appellant Whitener is not permitted to litigate them here." 429 U.S. at 216 (Burger, C.J., dissenting).

answer all jus tertii questions. In the next Section, I will explain what I think is the reason for the present doctrine's shortcomings.

B. The Fallacy of "Standing" to Assert Constitutional Jus Tertii

The Supreme Court has couched all jus tertii questions in terms of standing. In both Category I and Category II cases, it has asked whether the litigant has "standing" to assert the rights of third parties not before the court.[28] My quarrel with the Supreme Court is that this is analytically unsound; it is not possible to decide all jus tertii questions by referring only to standing doctrine.[29] Standing rules help a court determine whether the party before it is the proper person to challenge a particular law or government action.[30] A litigant's desire to include in his claim or defense issues relating to third parties' rights presents different analytical questions, relating to the issues that a party who is properly in court may raise in order to prevail on the merits.[31] A more detailed look makes this clear.

The doctrines of standing were developed to answer the question, "Can this particular plaintiff challenge this particular law?" If the answer is yes, the court may proceed to the merits of the plaintiff's claim. If the answer is no, the case will be dismissed. Several features of this inquiry should be noted here. First, standing rules are designed to make judicial review available only to those parties who can demonstrate a clear causal connection between an injury to their rights and the validity of the challenged law.[32] Second, the rules exist because only a plaintiff who can show such a causally-connected injury presents a case or controversy within the constitutional jurisdiction of the fed-

28. *See, e.g.* Singleton v. Wulff, 428 U.S. 106, 112-13 (1976) (Category II); United States v. Raines, 362 U.S. 17, 25-26 (1960) (Category I).

29. *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 102-14 (1978), relating the assertion of jus tertii to standing to sue.

30. Flast v. Cohen, 392 U.S. 83 (1968); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978). My own view questions both the soundness of standing as a limitation on judicial review, Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 511-12 (1972) [hereinafter cited as *Standing, Justiciability and All That*], and the correctness of the Supreme Court's current standing doctrine, Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 873-76 (1977) [hereinafter cited as *Standing and the Burger Court*].

31. The only possible relationship between standing and jus tertii is that the Supreme Court could allow would-be litigants who are unable on their own to assert an interest sufficient to give them standing, to assert the requisite interest by claiming the rights of third parties. As I later demonstrate, however, the Supreme Court has never endorsed such a blanket proposition. *See infra* note 35 and accompanying text.

32. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218-19 (1974); Warth v. Seldin, 422 U.S. 490, 498-99 (1975). The test for standing to seek review of administrative action is generally the same as the test for standing to sue in constitutional litigation. *See Standing, Justiciability and All That*, *supra* note 30, at 489.

eral courts.[33] Third, the rules of standing necessarily distinguish between plaintiffs and defendants. Defendants have no standing problems. The required injury caused to the party by the challenged law necessarily exists.

The operation of jus tertii doctrine is quite different. The crucial question here is not "Is this the proper party to challenge this law?" Rather, it is "May this party strengthen his claim on the merits of the case by raising third parties' rights?" If the answer is yes, the party, plaintiff or defendant, has a better chance of prevailing on the merits. If the answer is no, the result depends upon which category of case it is. If the party is a plaintiff or defendant in a Category II case who seeks simply to augment his claim, he will remain in court but will have to rely on his own rights. If, on the other hand, the party is a plaintiff in a Category I action who does not contest that the law he challenges is constitutional as to him, refusing to allow him to assert third-party claims must result in dismissing his case because he has no rights of his own to assert. Finally, if the party is a Category I defendant asserting nonseverability of a law's application, refusing to allow jus tertii assertion means his defense will fail.

Several differences beyond the basic jus tertii inquiry and the effects of the answers to it are apparent as well. First, courts do not answer the crucial jus tertii question by examining the relationship between the party and the challenged law, as they would do in standing cases. Rather, they look to severability and substance in Category I cases and to the factors the Supreme Court has deemed important in Category II cases. Second, the constitutional rationale for jus tertii rules differs from the rationale for standing doctrines. The general principle in the jus tertii area is that because constitutional rights are individual, litigants must assert their own rights. Standing rules, as explained above, exist to ensure that litigants present justiciable cases or controversies. Finally, jus tertii doctrine does not differentiate between plaintiffs and defendants: the question asked and the way of arriving at the answer are the same regardless of whether the third-party claims are raised from an offensive or a defensive posture.

These are substantial differences. The Supreme Court's present jus tertii doctrine, with its continued emphasis on standing, is based on a failure to look systematically at the similarities and differences between standing and jus tertii doctrines. That failure, in turn, has led to the vagueness and confusion which surround jus tertii questions. The

33. The Court has held that "injury in fact" is required for standing purposes by article III's case or controversy provision. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974); *see also Standing and the Burger Court, supra* note 30, at 874-76.

rest of this Section attempts to explain the specific source of the problem.

The confusion in current doctrine stems from the fact that despite the many differences between them, standing and jus tertii rules sometimes overlap. Where this occurs, the doctrines look similar. The overlap occurs when plaintiffs seek to assert others' rights in Category I cases. In these situations, like answers to standing and jus tertii questions will yield like results, creating a seeming similarity between standing and jus tertii. The similarity, however, is only illusory.

When plaintiffs in Category I cases want to assert only rights of third parties, they may be dismissed for lack of standing if they cannot show that there is a causal connection between the injury to their rights and the challenged law. Their cases may also be dismissed according to jus tertii rules if the law is found both constitutional as to the plaintiff and severable, so that enforcing the law against the plaintiff will not implicate either his or third parties' rights. Thus, negative answers, either to the standing or to the jus tertii questions, will have the same result—dismissal of the suit. The criteria for answering the question, however, are quite different.

Similarly, in Category I plaintiffs' cases, affirmative answers to both standing and jus tertii questions will also yield like results. If the court looks to standing and decides that the plaintiff has demonstrated the proper relationship between the injury to himself and the challenged law, the case proceeds to a determination on the merits. If the court instead asks the quite different jus tertii question, and decides that because the law is nonseverable the plaintiff can assert third parties' rights, the plaintiff can similarly remain in court for a determination on the merits.

An example will make the apparent similarity clear. Assume the existence of a state law that is challenged as an unconstitutional regulation of interstate commerce. A local merchant who concedes that the law is constitutional as applied to her brings suit seeking to enjoin enforcement of the law on the ground that it is nonseverable and violates the rights of interstate merchants.

The court will first ask whether she has standing to challenge the law. If the answer is no, because plaintiff has not demonstrated an injury to herself resulting from the challenged law, her claim will be dismissed for lack of standing. If the court instead had asked whether the uninjured plaintiff could assert the rights of the interstate merchants, and had decided that she could not because the law was severable and was constitutional as to her, the result would be the same. Because plaintiff had no rights of her own to assert, her case would be dismissed if she could not assert the rights of others.

Observe further that in this situation, affirmative answers to both standing and jus tertii questions would have yielded like results. That is, if the court answers yes to either question, finding either the required injury or a nonseverable law, the plaintiff can remain in court to assert her claim on the merits.

This, I think, is the source of the confusion. In Category I plaintiffs' cases, standing and jus tertii may appear the same because affirmative and negative answers in both areas produce the same result—proceeding to the merits (affirmative), or dismissal (negative). But even if the results are the same, the questions asked and the ways the answers are arrived at remain different.

The impossibility of expecting standing doctrine to answer all jus tertii questions becomes clear when we look at defendants' Category I claims. Assume that a defendant seeks to avoid enforcement of a law providing that all films be subjected to censorship before they are shown. The defendant shows obscene films. These are not protected by the first amendment, so the defendant cannot claim that the law is invalid as to her. She does claim that the law on its face restricts expression and that it should be invalidated because it violates legitimate filmmakers' rights.

In this case, asking standing questions gets us nowhere. Because the party is a defendant, her standing to make the challenge is incontrovertible. The court will have to decide whether assertion of the particular claim is permissible according to jus tertii criteria, not standing rules. Furthermore, answering yes to the jus tertii question does not here have the same effect as answering yes to the standing question. An affirmative decision as to jus tertii would only mean that the defendant would be more likely to prevail on the merits than she would be without jus tertii. Standing rules, by contrast, do not speak to questions involving the merits.

Standing doctrine is similarly useless in Category II cases. There, plaintiffs and defendants assert an injury to themselves, clearly fulfilling standing requirements. They seek to assert others' rights as well, however, in addition to or in lieu of their own, and to prevail on that basis. In Category II cases, similar answers to standing and jus tertii questions will not have the same effect. As in the Category I defendant's case, because the standing question is always answered in the affirmative, the party is properly in court. This is true even if the jus tertii question is answered in the negative, because the parties are also asserting injury to their own rights. The only effect of answering the jus tertii question will be deciding whether the litigant can strengthen his claim on the merits and possibly prevail by asserting third parties' rights. There is no relation, however, between the question of whether

a party can appear in court and that of how strong his claim is once he is there.[34]

This explanation shows that expressing jus tertii rules in standing terms usually results in equating two dissimilar questions. Moreover, it muddles attempts to separate factors relating to a would-be plaintiff's ability to get into court from factors relating to the issues a party once in court could raise. The result is that jus tertii has been seen as a procedural, not a substantive, doctrine. The principle has not been that any litigant challenging a law or government action could prevail only by showing that its operation violated his own rights. Rather, it has been that ordinarily litigants did not have standing to assert third-parties' rights. Because this limitation was a prudential rule of practice[35] rather than a substantive limitation, exceptions could be developed which would permit "standing to assert third-party rights" in certain cases. This is exactly what has happened; the Supreme Court has developed a set of rules relating to "constitutional jus tertii standing."[36]

Because those rules were born of confusion, they serve only to beget further confusion. The attempt to answer jus tertii questions by looking to prudential procedural limitations, rather than to substantive constraints, may explain the inconsistency between the Supreme Court's decisions and the limiting doctrine that the Court purports to apply. The next Section argues that the Court should discard the procedural approach and make the substantive determination that litigants may never prevail by asserting others' rights.

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34. The analytical unsoundness of approaching the assertion of jus tertii in terms of "standing" is further demonstrated by the fact that using standing terms in the jus tertii context solves nothing. That is, "standing" considerations would work equally toward permitting the assertion of jus tertii and toward denying it. On the one hand, if the gravamen of standing is to ensure that a party always has an interest in challenging the validity of a particular law or governmental action, arguably there will always be "standing" to assert third parties' rights because any litigant who will prevail if the challenge is successful always has an interest in making any claims that will help him win. By the same token, it is equally arguable that there should never be "standing" to assert third parties' rights, because the litigant as to whom the application of the challenged law or government action is constitutional has no interest in claiming that it is unconstitutional as applied to third parties.

This tautology surfaces in Barrows v. Jackson, 346 U.S. 249 (1953), where the Court noted that the basis of the general rule against the assertion of jus tertii was that "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation." *Id.* at 255. In the next sentence, however, the Court added that "[t]his principle has no application in the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her." *Id.* at 255-56. The plaintiff in *Barrows* was concededly injured; the Court failed to see that standing doctrine could not answer any of the jus tertii questions that followed a finding of injury in fact.

35. Barrows v. Jackson, 346 U.S. 249, 257 (1953).

36. The Supreme Court's application of the rules in practice have caused these exceptions to swallow up the general rule.

C. *The Absence of Justification for the Assertion of Constitutional Jus Tertii: The Inadequacy of the Factor Doctrine*

Once the analytically unsound concept of "standing to assert constitutional jus tertii" is set aside, the question becomes whether a litigant should ever be able to take advantage of the fact that a law or government action may violate some third parties' rights and prevail on that basis. Should a plaintiff whose own business is entirely intrastate be allowed to win a challenge to a law on the ground that it unconstitutionally affects interstate commerce? Should a defendant whose own claim would not permit him to avoid sanction be able to avoid enforcement of a statute by claiming that it would be invalid as applied to others? I submit that both answers are no: to allow litigants to prevail in constitutional litigation by asserting others' rights is theoretically unjustifiable.[37]

In Category I cases, allowing parties to use others' rights as swords or as shields flies in the face of our knowledge that laws affect different individuals differently: a law or government action may be invalid as applied to some persons or activities, but valid as to others.[38] Because of this, a court's resolution of a constitutional challenge is properly limited to determining if and how the challenged law or government action violates the rights of the party who is before the court. If it does not, the party should not be entitled to escape the challenged law's effect. If a state law violates the commerce clause as applied to an interstate carrier, for example, but is constitutional as applied to a local merchant, the merchant should not be able successfully to challenge the law.

The same rule should hold true in Category II cases. Even if the party before the court can demonstrate that he is damaged by the operation of the law or action he challenges, he should not be able to strengthen his claim or his defense by asserting other claims that third parties might raise. Again, the scope of the challenge should be limited to the rights of the party before the court. The seller in *Craig v. Bo-*

37. *But see* Note, *Standing to Raise Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

38. That principle is illustrated clearly in United States v. Raines, 362 U.S. 17 (1960), where the Supreme Court held that an act of Congress prohibiting interference with the right to vote on racial grounds was "clearly constitutional" under the fifteenth amendment as applied to the actions of governmental officials, while the lower court had held that the same act would be unconstitutional as beyond Congress' fifteenth amendment power when applied to the actions of private persons. *See also* Clements v. Fashing, 102 S. Ct. 2836, 2845 n.3 (1982), in which four Justices noted that a justice of the peace challenging a state law prohibiting justices of the peace from running for the legislature during their term of office could not argue that the law "may not be applied to restrict a Justice of the Peace's candidacy for the legislature because the State's interests in restricting candidacy by a different class of officeholders are insufficient to survive constitutional scrutiny." Because the law was constitutional as applied to bar the justice of the peace's candidacy, he was not entitled to relief against its enforcement.

ren,[39] for example, should have been able to assert only the claims stemming from the Oklahoma law's adverse impact on her right to do business, and not any different claims that might be made by 18 to 20 year old males.

The Supreme Court has set forth the rule that a court should hear only the claims of parties actually before it, but it has diluted the rule with exceptions so that the exceptions overrun the rule. Thus, the Supreme Court's present doctrine needs reformulation. The theory I will set forth allows for constant application of the rule. It also demonstrates how the cases in which the Supreme Court has allowed the assertion of jus tertii have actually been cases in which the litigants' own rights were violated.

The rules the Court applies in Category I cases, as I shall explain below, are properly focused and are consistent with my theory. The Court's "factor doctrine," however, is the wrong approach because it uses the wrong criteria. Claims of a close relationship between the litigants and third parties, or of the impracticability of a third party's assertion of his own rights, are not enough. No relationship, however close, transfers one party's constitutional rights to another,[40] and if the law or government action can constitutionally be applied to a litigant it should not matter that it cannot constitutionally be applied to a third party with whom the litigant has a close relationship.

Nor should it matter that it might be "impracticable" for third parties to assert their own rights in an independent action. Impracticability does not substitute one party for another, and does not furnish a reason why any litigant should be able to avoid the application of a law or government action that is constitutional as to him.[41]

My argument, then, is that as a general proposition there is no

39. 429 U.S. 190 (1976).

40. I do not, of course, speak here of situations in which an individual, such as a minor or an incompetent, is unable to defend his or her own rights and relies upon some related party to assert them instead.

41. There is one theoretical circumstance in which it would be justifiable to permit the litigant to prevail by asserting the rights of third parties. If the practical effect of the enforcement of the challenged law or governmental action against the litigant would be to violate the third parties' rights *and* if it would be impossible for the third parties to vindicate their own rights in an independent suit, the court is justified in permitting the party before the court to assert the rights of third parties. This is because the enforcement of the challenged law or governmental action against the party before the court in this circumstance is tantamount to allowing the rights of the third parties to be violated.

An example of this rare kind of case is NAACP v. Alabama, 357 U.S. 449 (1958), in which it was held that compelling the NAACP to produce its membership lists would violate the members' right to freedom of association and the accompanying right to privacy in group association. *Id.* at 462. If the members had sought to vindicate their own rights in court, they would have lost the privacy the lawsuit would have been designed to protect. Because enforcement against the NAACP would violate the members' rights, and because the members could not retain their rights

justification for allowing litigants to stand on other parties' rights. Adjudication must turn on the validity of a challenged law or government action as to the challenger himself. And if this is true, the Supreme Court's "factor doctrine" should be replaced by a substantive rule that ascertains the rights of the party before the Court, and the Court should acknowledge that its rules as to facial challenges are grounded in litigants' own substantive rights.[42]

II

THE ASSERTION OF THIRD-PARTY RIGHTS IN RETROSPECT: A SUBSTANTIVE HYPOTHESIS

This Part argues that in fact the assertion of jus tertii has not been allowed by the Supreme Court. That is, the Court has not really permitted a party as to whom a challenged law is constitutional to prevail by asserting third parties' rights. I posit, then, that the results of the decided cases are consistent with the thesis I have stated that in constitutional litigation, parties may prevail only by asserting their own rights.[43] The purpose of this Section is to show that what has appeared as a matter of "standing to assert jus tertii" is in fact a matter of substance, and that where the Court has thought it was permitting the assertion of third-party rights, the challenged law actually violated the

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if they appeared in Court to assert them, the NAACP was properly allowed to assert the rights of its members.

This circumstance, however, is rare and is different from the "impracticability of assertion" factor that the Court has been using. In Singleton v. Wulff, 428 U.S. 106 (1976), for example, the Court's holding did not itself allow the patients' rights to be violated. Moreover, the patients could have brought their own suit contending that they were entitled to have the state make payment to the physicians on their behalf. The same is true of Griswold v. Connecticut, 381 U.S. 479 (1965): the persons desiring to obtain access to contraceptives could have brought suit in their own right, using a fictitious name to maintain their privacy. Assuming that the third parties can vindicate their own rights in an independent suit, albeit with some difficulty, there can be no justification for permitting the litigant to prevail by asserting their rights.

42. In a recent article, Professor Rohr, using a "standing" analysis with respect to the assertion of jus tertii, contends that "for the sake of clarity, economy, and consistency of approach, federal courts should grant third-party standing to any litigant who appears reasonably likely to give adequate representation to the interests of the third parties whose rights the litigant wishes to assert." Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 MIAMI L. REV. 393 (1981). The rather fundamental defect in Professor Rohr's position is that despite his disclaimer in this regard, the assertion of jus tertii would turn out to be an aspect of "representational standing," in which the party who is before the court is "fighting for the rights of others." The reason that the litigant is asserting jus tertii, however, is so that he can prevail on the assailant's own claim or defense. Professor Rohr does not fully explain what the justification is for permitting a party as to whom the application of the challenged law or governmental action is presumably constitutional, to prevail on the ground that such law or governmental action violates the rights of third parties.

43. *See* Heald v. District of Columbia, 259 U.S. 114, 123 (1922) (suggesting that general rule is that one who challenges constitutionality of state statute must show membership in class with respect to whom act is unconstitutional and that the statute's unconstitutional feature injures him).

litigant's own constitutional or substantive right to be free from invalid government action.[44] Although questions of jus tertii come up most often in the form of Category II cases, I analyze both Category I and Category II cases here to demonstrate that my substantive hypothesis covers all jus tertii questions. I deal first with Category I facial challenges to laws, and then with Category II cases in which litigants before the court alleged that application of a challenged law to them would disadvantage some third party as well.

A. Challenges to Laws "On Their Face"

The Supreme Court in certain circumstances has allowed parties before it to challenge laws that are valid as applied to them on the ground that they are invalid as applied to some third parties. I call these suits "facial" challenges because they go to the actual terms of the law, not simply to its application to the party in court. The Supreme Court has viewed these suits as presenting jus tertii questions. In fact, however, in these cases the litigants themselves have had substantive rights to be free from the laws in question.

1. The Non-Expression Situation

The Supreme Court has traditionally differentiated between facial attacks on laws that by their terms restrict expression and facial assaults on other regulatory and criminal laws that do not by their terms restrict first amendment expression. I deal here first with the latter. The Supreme Court's rule as to assertion of jus tertii in attacks on such laws is as follows: If a litigant can show preliminarily that the law he challenges is not severable, in that it cannot apply differently to different situations so that a defect when it is applied to others will render it invalid as applied to everyone, including himself, then he may challenge the law on the ground that it violates third parties' rights.[45]

This rule is not inconsistent with my thesis that allowing litigants to prevail by asserting others' rights is unjustifiable. For here, there is a clear substantive basis for permitting such a challenge even if it is brought by a party as to whom the application of the law is constitutional. If a law is nonseverable, and if it is unconstitutional in some of its applications,there will be no valid law that could ever apply to the litigant's conduct. This is by definition; a nonseverable law which is unconstitutional as to some cannot ever be validly applied. The liti-

44. The term "substantive right to be free from invalid government action" refers to the circumstance where a nonseverable federal law is "void on its face," with the result that no substantive liability can be imposed against the litigant before the Court.

45. *Jus Tertii*, *supra* note 1, at 608.

gant, in turn, has a substantive right to avoid sanction or the possibility of sanction under an invalid law.

This point is illustrated by *Aptheker v. Secretary of State*.[46] In *Aptheker*, plaintiffs challenged a federal law that prohibited any member of an organization required to register as a "subversive organization" by the Subversive Activities Control Board from applying for or using a passport. The suit was brought by top-ranking leaders of the Communist Party who had been notified that their passports had been revoked because the Communist Party had been designated as a "subversive organization."

The Court held that the law on its face violated the fifth amendment's due process guarantee.[47] It rejected the government's argument that the Court should find the law severable, because even if Congress could not prohibit all members of the Communist Party from obtaining passports, it could impose such a prohibition on top-ranking leaders, who happened to be the only parties before the Court. The Court held instead that the law was nonseverable because applying the narrow interpretation proposed by the government would distort the meaning of the statute, which was intended to apply to all Communists.[48]

Given this nonseverability, and given that any denial of passports must be authorized by a valid statute,[49] the issue of the law's overbreadth and its unconstitutionality as applied to other members of the Party was relevant to the determination of plaintiffs' own substantive claim. Because the law was unconstitutional as applied to third parties, there was no valid law to be invoked as to the plaintiffs, and they could not be denied passports. The plaintiffs thus prevailed on the basis of their own substantive rights to be free from sanctions based on an invalid law.[50]

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46. 378 U.S. 500 (1964).

47. *Id.* at 514.

48. *Id.* at 515-16.

49. Kent v. Dulles, 357 U.S. 116, 129-30 (1958).

50. This situation was also presented in older cases in which the Court allowed facial challenges to a law by a party as to whom application of that law was assumedly valid. For example, in Butts v. Merchants & Miners Transp. Co., 230 U.S. 126 (1913), the Court held that the federal Civil Rights Act of 1875, previously invalidated in the Civil Rights Cases, 109 U.S. 3 (1883), when applied to the acts of a private person within a state, was not intended to apply to acts occurring on the navigable waters of the United States. Because the law was unconstitutional in some of its applications and was nonseverable, Congress had not created a substantive right of recovery against the defendant for practicing racial discrimination in coastal waters.

Similarly, in United States v. Reese, 92 U.S. 214 (1875), the Court struck down as "void in toto" a federal voting rights law. Therefore, there was no valid law to be invoked against the party who was before the Court. While the defendant was charged with violating a section of the law prohibiting interference with the right to vote on grounds of race, two of the law's four sections prohibited interference with the right to vote on other grounds, and at that time the Court was of the view that the power of Congress to protect voting rights was limited to acting under the

Where the law challenged by the party before the Court is severable, on the other hand, there is no issue of its constitutionality as to third parties. Even if the law would be invalid as to others, it remains valid as to the litigant in court. This is also consistent with my thesis. The litigant cannot assert unconstitutionality as to third parties, not because he lacks "standing" to assert third-party rights, but because when the statute is severable, the litigant's substantive claims can be decided without reference to third-party issues.[51]

For example, in *United States v. Raines*,[52] the Court found that Congress intended that the challenged law,[53] which prohibited "any person" from interfering on racial grounds with another's right to vote, should be applied to acts of governmental officials without regard to whether it could constitutionally be applied to acts of private persons.[54] It therefore held that a government official charged with a violation of the law could not defend on the ground that the law could not reach private persons.

The *Raines* Court clearly intimated that the law's constitutionality as to private persons was not relevant in a prosecution against state officials. This is correct, as the official before the Court could assert no right of his own derived from the rights of those to whom the law might someday be unconstitutionally applied.[55]

The rule regarding facial challenges in the non-expression context,

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fifteenth amendment to prevent racial discrimination. *Id.* at 217-19. The Court found that the law was not capable of severable application. *Id.* at 221. Because the law sought to be invoked against the defendant was both nonseverable and unconstitutional (at least in part), there was no valid law that could be invoked against the defendant, and his conduct could not be subject to criminal sanction. Given the Court's holding as to the nonseverability of the law, the issue of the constitutionality of all of the sections was necessarily relevant to the determination of whether the law could, as a matter of federal substantive law, be invoked against the defendant. In both of these cases, then, the assailants prevailed on the basis of their own substantive rights.

51. Thus, a party who constitutionally can be subject to the government's taxing power would have no basis for challenging a taxing statute on the ground that it would be unconstitutional as applied to others. Heald v. District of Columbia, 259 U.S. 114, 122-23 (1922). Likewise, a defendant as to whom a severable criminal statute is not impermissibly vague would have no basis for asserting that it would be impermissibly vague in other possible situations to which it could be applicable. This claim is frequently made in practice and rejected on "lack of standing" grounds. *See, e.g.*, United States v. Alfonso, 552 F.2d 605, 615-16 (5th Cir. 1977), *cert. denied*, 434 U.S. 857 (1979); United States v. Chew, 540 F.2d 759, 761 (4th Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977); United States v. Persky, 520 F.2d 283, 287-88 (2d Cir. 1975); Big Eagle v. Andera, 508 F.2d 1293, 1297 (8th Cir. 1975).

52. 362 U.S. 17 (1960).

53. 42 U.S.C. § 1971(c) (1976).

54. *Raines*, 362 U.S. at 23 n.4.

55. *See* the discussion in *id.* at 25-26. In Craig v. Boren, 429 U.S. 190, 195 n.4 (1976), the Court explained *Raines* as a case in which the interests of the assailant and the third party were not "mutually interdependent," so that a successful prosecution against Raines "did not threaten to impair or diminish the independent private rights of others." While this is true, it should not have prevented Raines from challenging the law "on its face" if the law were in fact nonseverable.

according to my substantive hypothesis, is as follows. If there is a valid severability clause, any challenge to a federal law which is based on an assertion that it is unconstitutional as applied to third parties not before the Court should be dismissed, because third-party rights are irrelevant to a determination of the litigant's substantive rights. Where the law is not severable and where it is unconstitutional in its application to third parties, a litigant's challenge will succeed because the litigant may assert his own substantive right not to be subject to sanction under an invalid law.[56] The results are the same as those obtained by the Supreme Court's rule, but the basis for the distinction is different. Thus, my conclusion based on substantive rights is sounder than a conclusion that is based on a loose notion of standing to assert third-party rights.

2. *The Expression Situation*

Where a litigant mounts a facial challenge to a law that restricts expression, the Court will determine the validity of the law by looking only to its terms, without reference to whether the litigant's expressive conduct was itself unconstitutionally restrained.[57] The Court has explained that the policy basis for this rule is that it wants to prevent the existence and threatened enforcement of vague and overbroad laws

56. This rationale would not justify allowing a party to mount a facial challenge to a state law in the non-expression situation. In the federal context, the Court must decide questions of substantive liability as well as constitutional questions, and must determine whether there is a valid federal law to be invoked against the litigant. In the state context, however, the only question for the federal court is whether the state has violated the litigant's federal constitutional or statutory rights. If the challenged state law can constitutionally be applied to the litigant, and such application is not prohibited by federal law, the inquiry of the federal court is at an end. Whether a state law is capable of severable application is a question of state law, and the application of a nonseverable state law to a party whose activity the state can constitutionally reach does not violate any federal constitutional rights of that party.

This proposition is illustrated by the case in which a nonphysician challenges a state anti-abortion law that would be unconstitutional if applied to prohibit the performing of abortions by physicians. If the state can constitutionally prohibit nonphysicians from performing abortions, the conviction of a nonphysician under the statute, whether the statute is severable or not, violates no federal constitutional rights of the defendant. For this reason, the federal court in this case cannot properly consider the constitutionality of the state statute "on its face". The Court in effect reached this result in Cheaney v. Indiana, 410 U.S. 991 (1973), *denying cert. to* 259 Ind. 138, 285 N.E.2d 265 (1972), although it couched its decision in terms of the defendant's "want of standing" instead of in terms of the substantive constitutionality of the application of the state anti-abortion law to this defendant. Although the Court has in the past allowed facial challenges to some state laws in the non-expression situation, *see, e.g.*, Berger v. New York, 388 U.S. 41 (1967); Wuchter v. Pizzutti, 276 U.S. 13 (1928), it has more recently refused to permit such challenges, *see* County Court v. Allen, 442 U.S. 140 (1979); Sibron v. New York, 392 U.S. 40 (1968); *cf.* H.L. v. Matheson, 450 U.S. 398 (1981) (appellant lacked standing to make facial challenge because neither she nor any member of her class was demonstrably affected).

57. *Jus Tertii*, *supra* note 1, at 613.

from having a chilling effect on exercise of first amendment rights.[58] Reasoning that a finding of facial invalidity would mean that the law "abridge[d] expression in such a way that it [could] never be constitutionally applied,"[59] the Court has allowed litigants to claim that though a statute may be constitutional as applied to them, it would be unconstitutional as applied to others.[60]

This rule, too, is consistent with my substantive hypothesis. While the Court has expressly discussed the "void on its face" doctrine in terms of "jus tertii standing,"[61] and although a litigant may prevail even though his own first amendment expression may not be unconstitutionally affected, the doctrine is substantive. This is because the litigant has a substantive first amendment right to be free from the sanctions, real or feared, of a law that is void on its face. The Court has recognized this right by stating: "Any enforcement of [such a] statute . . . is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[62]

It follows that the "void on its face" doctrine does not allow unaffected litigants to prevail by asserting third-party rights. Even if a litigant himself was not deterred by the chilling effect of a restrictive statute, as would seem to be the case if he faces legal proceedings for violating the statute, his rights would not remain untouched. It may be the potential chilling effect upon others' expression that makes the statute invalid, but the litigant has his own right not to be subject to the operation of an invalid statute. Thus, the rule does not contravene my thesis that litigants must prevail on the basis of their own rights, not the rights of third parties.[63]

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58. As I explained in my earlier article:

> The Court has taken the position that to permit a statute which by its terms restricts expression to withstand attack, because as applied to the facts of the particular case it would be constitutional, would leave standing a statute susceptible of having a severe *in terrorem* effect on expression. The real danger with which the Court is concerned is not that persons will be convicted because they could not know that their expression was prohibited by the statute or that the statute will be unconstitutionally applied, but that because of the risk of such conviction or application, such persons will not exercise their rights of expression and the public interest in that exercise will be impaired. . . . This danger justifies standing to attack the statute on its face, as it were, without reference to the particular conduct involved—in effect, permitting an attack on the grounds that the statute violated the constitutional rights of others.

Id. at 615.

59. *Id.* at 612-13.

60. *Id.* at 613.

61. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

62. *Id.* at 613. The statute must be capable of being so construed. The state court cannot satisfy the constitutional requirement by construing the statute so as to operate "within constitutional limits," if the language of the statute does not reasonably lend itself to such a construction. *See* Lewis v. New Orleans, 415 U.S. 130 (1974).

63. The substantive nature of the "void on its face" doctrine is clearly illustrated by Lewis v.

B. *Adverse Effect on Third-Party Rights from the Challenged Law or Governmental Action: Category II Cases*

This Section applies my thesis to the far more common Category II situation, in which a party claims that application of a law or government action to him would have an additional adverse effect on third parties' rights. I will demonstrate that in all of the cases in which the assertion of jus tertii was permitted and the party before the Court prevailed, the challenged law or governmental action in fact violated that party's constitutional rights. This Section will also demonstrate that in the few recent cases where the Court has refused to allow a litigant to assert other parties' claims, the law or government action did not violate the litigant's rights, and the alleged violation of third-party rights was irrelevant to the determination of the litigant's own constitutional claim.

1. *The Cases in Which the Assertion of Jus Tertii Was Permitted*

In the cases where the Court thought it was allowing the assertion of jus tertii,[64] the results can be explained by referring to the litigant's

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New Orleans, 415 U.S. 130 (1974). In striking down a city ordinance making it an offense for any person to "curse or revile or to use obscene or opprobrious language toward" a police officer, the Court stated:

> In sum, § 49-7 punishes only spoken words. It can therefore withstand appellant's attack upon its facial constitutionality only if, as authoritatively construed by the Lousiana Supreme Court, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. Since § 49-7, as construed by the Louisiana Supreme Court, is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid.

Id. at 134 (citations omitted).

> The dissenting justices, bitterly assailing the doctrine, also recognized its substantive basis: The "overbreadth" and "vagueness" doctrines, as they are now being applied by the Court, quietly and steadily have worked their way into First Amendment parlance much as substantive due process did for the "old Court" of the 20's and 30's. These doctrines are being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech.

Id. at 136-37.

As *Lewis* makes clear, there is a substantive first amendment right on the part of persons engaging in acts of expression not to be subject to sanction under a law that is "void on its face." *See also* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

64. We are limiting our consideration here to the cases decided after 1962 and the "classic" jus tertii case of Barrows v. Jackson, 346 U.S. 249 (1953). Pre-1962 cases not discussed in this Article, in which the assertion of jus tertii was permitted, generally involved an organization asserting the rights of its members. *Jus Tertii*, *supra* note 1, at 644-45.

In some older cases, decided before the concept of "standing to assert constitutional jus tertii" had been firmly recognized and at a time when the doctrine was in terms of a general prohibition against the assertion of jus tertii, the Court considered the rights of third parties on the ground that those rights were intertwined with the rights of the litigant. In cases involving challenges to workers' compensation laws by employers, the Court expressly considered the constitutionality of the laws from the perspective of both the employer and the employee, noting that while the liti-

own rights. As regards the interaction between the violation of third-party rights and the violation of litigants' own rights, three operative principles emerge from these cases. Violation of third-party rights will implicate the litigants' own rights when: (1) the litigants and the third parties have some relationship; (2) the relationship is the source of the deprivation of the third parties' rights by the invalid law; and (3) for the same reason that the invalid law violates the rights of third parties, it violates the rights of the litigants. In cases meeting this description, the litigant has been sufficiently injured by the operation of the invalid law that he may assert substantive due process rights to be free from the harm caused by the invalid law. The gravamen here is that the litigant must assert his own rights.

Consider first *Griswold v. Connecticut*[65] and *Eisenstadt v. Baird*.[66] In both cases, dispensers of contraceptives were permitted to strengthen their claims against enforcement of state anti-contraceptive laws by asserting the constitutional rights of would-be contraceptive users.

In *Griswold*, the Court held that the operators of a birth control clinic, charged as accessories to a violation of a Connecticut law prohibiting the use of contraceptives, could assert their married patients' constitutional rights to birth control. This was not permitting the clinic owners to prevail by asserting third parties' rights: it is clear that the prohibition against prescribing contraceptives for married persons implicated the defendants' own due process rights. In this case, the doctors were asserting the same due process rights their patients would

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gant was an employer and could not prevail unless his own rights were violated, "the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer." New York Cent. R.R. v. White, 243 U.S. 188, 197 (1917); *see also* Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917).

Similarly, in Meyer v. Nebraska, 262 U.S. 390 (1923), and companion cases, in which the Court invalidated a state law prohibiting the teaching of a foreign language to school children, only a teacher or a school was before the Court. The Court, however, invalidated the laws on the ground that they violated the rights of the parents and studeuts as well as the rights of the teachers and the schools. In fact, the Court considered these sets of rights to be inseparable and did not see the cases as involving any attempt to assert constitutional jus tertii. It took the same approach in Pierce v. Society of Sisters, 268 U.S. 510 (1925), in which it invalidated on due process grounds a state law requiring parents to send their children to public schools instead of private ones. There the plaintiffs were operators of private schools, and the Court found that the law was both an unreasonable interference with the liberty of parents and guardians to direct the education of children under their control, and an interference with the property interests of the schools by preventing them from enrolling students.

In *Meyer* and *Pierce*, the violation of the rights of the students and parents was directly relevant to the determination of the litigants' constitutional claim. If the state could not interfere with the rights of parents and children to receive foreign language instruction or attend private schools, there could be no justification for the interference with the liberty or property interests of the parties who were before the Court. Ultimately, however, the litigants' claims stood or fell on the basis of their own rights.

65. 381 U.S. 479 (1965).

66. 405 U.S. 438 (1972).

assert, and the harm alleged stemmed from the doctor-patient relationship.

This state law under which the clinic's operators were charged compels this conclusion. The statute was a general criminal accessory law making the clinic owners chargeable as principals in the crime of their patients' use of contraceptives. Due process doctrine requires that a state have legitimate justification for its actions, and citizens have a due process right to be free from laws that criminalize their activity absent such justification.[67] If criminalizing use of contraceptives was unjustified, the criminalization of being an accessory to that use must also have been improper.

The defendants made the due process argument in their brief. They contended that they had a liberty and property interest in the practice of their profession,[68] that their rights were "assimilated" with the rights of their patients, and that the anti-contraceptive laws were "arbitrary and capricious and had no reasonable relationship to a proper legislative purpose."[69] The Court did not face these arguments squarely,[70] but it did recognize that the clinic owners, charged as accessories, could assert that the prohibition of their patients' contraceptive use violated their own constitutional rights.[71] This is the proper result, because the state was unjustifiably interfering with the defendants' liberty to prescribe contraceptives for the use of their married patients. The clinic operators, then, were asserting their own rights,[72] and the *Griswold* result is consistent with my substantive hypothesis.

In the *Eisenstadt* case, Baird, a nonphysician, had been convicted of violating a Massachusetts law that prohibited distribution of contraceptives except by licensed physicians or pharmacists to married patients. In Baird's habeas proceeding, the Court allowed him to assert the unmarried persons' equal protection right of access to contraceptives.[73] The Court held that the law violated unmarried persons' equal protection rights, and invalidated it. I submit that the holding could—

67. Meyer v. Nebraska, 262 U.S. 390 (1923).

68. Practicing one's profession is a protected liberty and property interest for due process purposes. *See, e.g., In re* Ruffalo, 390 U.S. 544 (1968) (per curiam).

69. *See* Brief for Appellant, Griswold v. Connecticut, 14 L. Ed. 2d at 987.

70. This is probably because a majority of the Court was unwilling to revive substantive due process. Only Justices White and Harlan, in concurring opinions, took the position that the anti-contraceptive law violated any substantive due process right. The majority opinion by Justice Douglas found a "right of privacy" in the penumbrae of specific constitutional guarantees, while the concurring opinion of Justice Goldberg found it in the ninth amendment.

71. The Court stated that "the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime." 381 U.S. at 481.

72. This is true even though the physician's right to prescribe contraceptives derived from his patients' right to use them; the derivative nature of the right does not destroy its validity.

73. Only seven members of the Court participated in the decision of the case. Justices Stewart, Marshall, and Douglas joined Justice Brennan's opinion of the Court, although Justice Doug-

and should—have been based on the rights of the party before the Court, because the challenged law violated Baird's own rights.

Because the distributor Baird was not a licensed physician or pharmacist, this case may look like a Category I facial challenge. In fact, it was not. Baird asserted that the law was unconstitutional as to him because it was not justifiable as a health measure, and therefore its discrimination between health professionals and others was invalid. The Court agreed, finding no valid state public health interest behind the law and rejecting the state's severability argument that the law could at least be constitutionally applied as to Baird, because he was not a health professional. The majority held that the state could not legitimately distinguish between health professionals and other contraceptive distributors.[74] This holding meant that the statute could not be applied differently to Baird than to health professionals, and allowed the Court to reach the question of the legitimacy of distinguishing between married and unmarried contraceptive users. The Court then decided that Massachusetts had no legitimate state interest in distinguishing between married and unmarried contraceptive users, and invalidated the law on the assumption that Baird was asserting unmarried persons' rights.

The case could have been decided on the basis of the distributor's own rights. If unmarried persons have the same right of access to contraceptives as married persons,[75] the state, which recognized the married patients' right of access[76] and therefore could not deny it to unmarried persons, similarly could not interfere with the distributor's liberty to give contraceptives to those unmarried persons.[77] If the original distinction may not be constitutionally made, any law resulting from that distinction must be unconstitutional as well. Note that again, the harm stemmed from the distributor-distributee relationship, and, for the same reason that it violated the unmarried persons' rights, it also violated Baird's rights.

The concurring Justices, White and Blackmun, agreed with the thesis advanced here, that litigants must prevail on the basis of their own rights, not the rights of third parties. They took the position that the petitioner had a constitutional right to distribute contraceptives to at least some persons.[78] The perception underlying this position must

las also filed a concurring opinion. Justices White and Blackmun concurred in the result. Chief Justice Burger dissented.

74. 405 U.S. at 444.

75. This was the substantive holding of the majority in *Eisenstadt*. 405 U.S. at 453-55.

76. The state was compelled to do so under the restrictions of *Griswold*.

77. This is true given the finding that it could not require that all contraceptives be prescribed by a physcian. 405 U.S. at 450.

78. 405 U.S. at 464.

have been that the petitioner's action in distributing the contraceptives was a part of the liberty protected by substantive due process,[79] and could be restricted only when such restriction would advance a legitimate governmental interest. In this case, there was no such governmental interest, the petitioner Baird was entitled to prevail on his own rights because he had some liberty interest in distributing contraceptives. *Eisenstadt*, then, is also consistent with my substantive hypothesis.

Singleton v. Wulff[80] should also be considered. In that case the plaintiff-physicians asserted that the state's refusal to pay for nontherapeutic abortions unconstitutionally interfered with their ability to practice medicine in the way they considered most beneficial to their patients. This contention is unsound. Just as there is no constitutional requirement that the state fund any medical procedures for indigents,[81] there is no constitutional requirement that the state facilitate a physician's practice of medicine by funding any medical procedure for the physician's indigent patients.

But what about the physicians' rights to equal protection? If the physicians could have established that indigent women are entitled to payment for abortions by virtue of their equal protection rights, they could have claimed that they were similarly entitled to receive payment for performing the abortions. In other words, if the state could not, as a matter of equal protection, justify distinguishing between abortions and other medical procedures, for the same reason it would have no constitutional justification for refusing payment to the physicians. In actuality then, the physicians in *Singleton* could have asserted their own equal protection right to receive payment for performing abortions, just as physicians were being paid for performing other medical procedures.[82] *Singleton* is therefore also consistent with my substantive hypothesis.

A look at *Craig v. Boren*,[83] using principles analogous to those discussed above, shows that this case also fits my thesis. In *Craig*, the Court held that the challenged law contained an impermissible gender-

79. The "liberty" protected by due process has been said to include "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, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted). *See also* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

80. 428 U.S. 106 (1976).

81. Maher v. Roe, 432 U.S. 464, 469 (1977).

82. In *Singleton*, the plaintiffs probably believed that the denial of Medicaid funding for abortions would be subject to a greater degree of scrutiny if they claimed it violated the constitutional rights of the woman. While this may have been so, the denial of Medicaid funding for abortions was nonetheless upheld in *Maher* and in Harris v. McRae, 448 U.S. 297 (1980).

83. 429 U.S. 190 (1976).

based classification that violated the equal protection rights of the plaintiff's underage male customers.[84] But that case could have been decided on plaintiff's claims alone. If, when Oklahoma prohibited the seller from selling beer to males under age 21, it acted without justification as to infringe the rights of underage males, it unjustifiably interfered with the plaintiff's liberty and property interests as well. Therefore, the plaintiff was entitled to challenge such interference as violating her own due process rights.

It is true that because the challenged restriction contained a gender-based classification, the state was required to show more than minimal justification for the law. It was under this higher standard that the law failed.[85] But this does not mean that the plaintiff would have been less able to prevail by asserting her own rights. The reasons justifying heightened scrutiny of gender-based classifications[86] are the same regardless of the challenger's gender, regardless of whether the challenge is made by the seller or the buyer, and regardless of whether the challenge is on due process or equal protection grounds. Therefore, if the law was found to be insufficiently tied to a legitimate government interest under this heightened scrutiny, it was equally invalid as to the plaintiff seller and as to her potential customers. In other words, if the state could not validly prevent eighteen- to twenty-year-old males from buying beer, it could not validly prevent the plaintiff from selling it to them. The invalidity of the gender-based classification underlay both the seller's and male customers' rights, and related to the vendor-vendee relationship. Thus, the seller was entitled to prevail on her rights alone, and the *Craig v. Boren* result can be explained consistently with my substantive hypothesis.

Finally, similar analysis also explains the result in the classic jus tertii case of *Barrows v. Jackson*.[87] There, suit was brought against a white seller for breach of a racially restrictive covenant covering land that the defendant sold to a black puchaser. The seller was able successfully to challenge the covenant by asserting the equal protection rights of actual and prospective black purchasers.

The proper rationale once again focuses on the litigant's own rights. As a matter of due process, a state's imposition of damages, like any governmental act, must advance a legitimate governmental interest. Ordinarily, protecting contractual expectations and enjoyment of property through enforcement of restrictive covenants would be sufficient justification for imposing damages for breach of the covenant.

84. *Id.* at 204.
85. *Id.* at 200-04.
86. *See* 429 U.S. at 197-99.
87. 346 U.S. 249 (1953).

But awarding damages for breach of the racially restrictive covenant would have involved the state in impermissible racial discrimination.[88] When enforcement of contractual expectations and enjoyment of property works to involve the state in constitutionally prohibited discrimination, the state has no legitimate governmental interest in awarding damages for breach of contract. In *Barrows*, as a result, enforcement of the racially restrictive covenant by awarding damages would have violated the plaintiff seller's own due process right to be free from unjustified governmental action.[89] *Barrows*, therefore, is also consistent with my substantive hypothesis.[90]

This review of the cases where the assertion of jus tertii was permitted demonstrates that the results in all of these cases can be explained by looking to the substantive rights of the litigant before the Court. In the cases in which the Court invalidated the challenged law

88. Shelley v. Kraemer, 334 U.S. 1 (1948). This was also the substantive holding of *Barrows*.

89. As noted in connection with Craig v. Boren, 429 U.S. 190, 195 (1976), the violation of the prospective buyers' rights by the enforcement of the racially restrictive covenant against the seller would be relevant to show a lack of justification for the interference with the seller's liberty and property interests. But it would not be necessary for the Court to consider the violation of the rights of the prospective buyers as such in order to hold that the awarding of damages would violate the rights of the seller.

90. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), a landlord and some of his former tenants challenged the constitutionality of a village ordinance prohibiting more than two unrelated persons from living together. They asserted their own rights and the rights of all unrelated persons wanting to live together on the ground that the prohibition violated the "right to privacy" of the tenants. The Court upheld the ordinance. Because the unrelated persons did not have a constitutional right to live together, and because the restriction on unrelated persons living together advanced what the Court found to be valid "environmental concerns," the village could assert a legitimate interest in the ordinance, and therefore could constitutionally restrict the landlord's use of his property in this manner.

Belle Terre is unusual in that while the Court apparently allowed the plaintiff to assert third parties' rights, the plaintiff's attempt to augment his claim failed because the Court then decided that the challenged action did not violate the third parties' constitutional rights. In retrospect, the result here can also be explained on the ground that the challenged action did not violate the rights of the party before the Court either.

In *Belle Terre*, as in *Craig v. Boren*, the ordinance directly interfered with the property interests of the party before the Court. As a matter of due process, again, the state had to assert a legitimate governmental interest to justify such interference. If unrelated persons did have a constitutional right to live in the same dwelling, and if the state could not justify infringing that right by asserting some legitimate governmental interest, the state by definition would have no legitimate interest in interfering with the landlord's ability to rent the premises to whomever he chose. The landlord was therefore a proper plaintiff. But because the use restriction was constitutional, the result can be explained on the ground that the challenged ordinance did not violate the plaintiff landlord's due process rights.

Justice Brennan, in dissent, stated that the challenge was premised solely on the alleged infringement of the tenants' constitutional rights, so that in his view, the determination of the mootness question depended on whether the landlord could assert their constitutional rights. He maintained that the assertion of jus tertii should not be permitted, since there was no impracticability of assertion of the rights by the tenants themselves, as indicated by the fact that the former tenants had joined as plaintiffs. 416 U.S. at 10-12. The majority did not directly respond to Justice Brennan's argument in this regard.

or governmental action, it could have done so on the ground that it violated the litigant's own constitutional rights. And in the cases in which the challenged law or governmental action did not violate the rights of some third party,[91] it did not, for the same reasons, violate the litigant's constitutional rights. Thus, the results of these cases are consistent with my thesis that a party may prevail in constitutional litigation only by asserting a violation of his own rights.

2. *The Cases in Which the Assertion of Jus Tertii Was Not Permitted*

This Subsection will consider the relatively few recent cases in which the assertion of jus tertii was not permitted. In these cases, after refusing to allow litigants to supplement their claims by asserting third parties' rights, the Court found that the challenged law or governmental action did not violate the litigant's constitutional rights. This result is consistent with my hypothesis of substantive rights. In these cases, violation of third-party rights was irrelevant to the determination of the litigants' constitutional claims.

In *Moose Lodge No. 107 v. Irvis*,[92] a black who had been denied service at a private club brought suit challenging the club's policy of refusing service to members' black guests. The Court held that he could not also challenge the club's policy of denying membership to blacks by asserting the rights of blacks wishing to become members.[93]

This is the proper result under my thesis that the litigant's substantive rights should be the only ones considered, because the court could not have decided both questions using the same substantive criteria. The constitutionality of the club's refusal to permit blacks to become members was analytically dissimilar to whether its policy of refusing to serve members' black guests was unconstitutional. Even if both the litigant and the third party had equal protection claims, no relation existed between the two which involved the alleged harm. Therefore, even if the club's membership policy did infringe black would-be members' rights, the plaintiff, not wishing to become a member himself, suffered no detriment from the policy and therefore could not challenge it. The Court properly restricted the scope of the case to the constitutionality of the club's service policy, for the plaintiff's rights were infringed by that policy alone.

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91. This was the situation in *Belle Terre* and *Singleton*. The reference to the result in *Singleton* is in light of the subsequent decisions in *Maher* and *Harris*.

92. 407 U.S. 163 (1972).

93. Justice Douglas, in dissent, argued that the plaintiff should be able to challenge the statutory scheme which authorized the club to practice racial discrimination because the scheme caused "cognizable injury" to all black residents of the state. 407 U.S. at 183-85 & n.4 (Douglas, J., dissenting).

In *California Bankers Association v. Shultz*,[94] banks and depositors challenged federal recordkeeping and reporting requirements. The banks based some of their challenges on alleged violation of the depositors' rights, although the depositors before the Court also asserted their own rights. The Court refused to allow the banks to strengthen their claims by asserting depositors' rights.[95]

This is the proper result, because it is clear that the rights of the depositors had to be judged by different substantive standards than the rights of the banks. Thus, the banks' own rights could not have been violated; even given a harm based on the depositor-bank relationship (which appears not to be the case), the bank was not asserting the same claims the depositors would have asserted had they been in court. For example, the banks had tried to argue that requirements that they maintain records of their customers' identities and make microfilm copies of checks drawn in excess of one hundred dollars undercut a depositor's right effectively to challenge a third-party summons issued by the Internal Revenue Service. The Court held that these requirements did not violate the banks' due process rights,[96] saying that "whatever wrong such a result might work on a depositor, it works no injury to his bank."[97] The Court thus forced the banks attempting to avoid the application of the requirements to assert only their own rights—a proper limitation, because the banks' rights were not similar to their depositors' rights.

How is this case different from *Craig v. Boren*,[98] where the plaintiff should have prevailed on the ground that if the state could not constitutionally keep eighteen to twenty year old males from buying beer, it could not constitutionally keep her from selling it to them? Why could the banks not make the case here that the state's imposition of the requirement was unjustified as to the depositors, and that therefore the state could not force the banks to keep the records in the first place? The answer is that the banks could not argue that all the depositors had a substantive constitutional right to be free from the required recordkeeping. At most, individual depositors might be able to defend successfully against future IRS summonses by challenging the recordkeeping requirement on due process grounds. Even if some individual depositor were able to prevent the summons, however, it would still be constitutional to require the banks to maintain the records generally. This is because the banks, not being subject to the possibility of

94. 416 U.S. 21 (1974).

95. The Court recognized that most of the claims asserted on behalf of the depositors were premature at that time. *Id.* at 51-52.

96. *Id.* at 49.

97. *Id.* at 51.

98. 429 U.S. 190 (1976).

an IRS summons, did not even have a claim that the requirements might in some future action be declared invalid as to them. It follows that because the banks themselves could never be subject to proceedings against them or to adverse consequences as a result of the records they were being required to keep, they had no due process claim to challenge the requirement. The Court's holding was consistent with my proposed rule that litigants may stand only on their own rights.

In *Warth v. Seldin*,[99] plaintiffs challenged the zoning practices of Penfield, a suburb of the City of Rochester. Some of the plaintiffs were Rochester taxpayers, who alleged that they were injured by Penfield's exclusionary zoning practices because those practices forced Rochester to provide more low and moderate income housing, which in turn reduced the city's tax base and required its taxpayers to assume an increased tax burden in order to finance essential public services. Another plaintiff, an association whose members were Penfield residents, alleged that the exclusionary zoning practices deprived its members of the benefits of living in a racially and ethnically integrated community.

The Court held that these plaintiffs were attempting to assert third-party rights, and that they could not do so. The Court said that the Rochester taxpayers could not challenge the exclusionary zoning practices, because they had no right to be free from the incidentally damaging practices of neighboring towns,[100] and that there was no basis for permitting them to assert the rights of the excluded low-income persons.[101] As to the Penfield residents, the Court noted that they had not alleged the statutory or constitutional right to live in a racially and ethnically integrated community,[102] so that their contention was only that they had been harmed "indirectly" by the exclusion of others. Further, no protected contractual or other relationship existed between Penfield residents and those allegedly excluded from the town, so that no impermissible interference with such a relationship could be shown.[103] The Court concluded that these plaintiffs were "attempt[ing] to raise putative rights of third parties," and that "none of the exceptions that allow such claims is present here."[104]

Once again, the result is consistent with a rule that parties must prevail by asserting their own rights. The litigants failed because they could not assert sufficient rights of their own. Even if third-party rights

99. 422 U.S. 490 (1975).
100. *Id.* at 509-10.
101. *Id.* at 512-14.
102. 422 U.S. at 513.
103. *Id.* at 514 n.22.
104. *Id.* at 514.

were affected by the Penfield scheme, the violation of such rights would have been immaterial to a determination of plaintiffs' claims, because the plaintiffs' claims and the third-party claims they sought to assert had to be judged by different substantive criteria. The Rochester taxpayers had no substantive right to be free from any adjoining municipality's action that could increase their tax burden, so that the exclusion of low-income people from Penfield, even if unconstitutional, was not relevant to a determination of any claims of the Rochester taxpayers. The association representing Penfield residents did not allege that it had a statutory or constitutional right to live in a racially or ethnically integrated community,[105] so to litigate the question of whether the Penfield ordinance would have violated that right would have been inappropriate.

The results of the cases in which litigants could not assert third-party rights, then, can be explained simply by my substantive hypothesis. Because the litigants' and the third parties' rights were either dissimilar or unrelated, in none of these cases was the alleged violation of third parties' constitutional rights relevant to the determination of the litigants' constitutional claims.[106] The substantive dissimilarity or unrelatedness of the litigants' and the third parties' claims meant that the litigants did not suffer violations of their own constitutional rights as a result of the challenged laws' applications, regardless of their effects on third parties.

A summary of this lengthy Section is in order. I have argued that in all of the cases in which litigants sought to assert third-party rights, the results can be explained in terms of the substantive hypothesis advanced here. First, the Court's rules as to facial challenges are congruent with a theory of substantive rights: a party will succeed if he can show that he has a substantive right to be free from the application of the law.

Second, in the cases in which litigants want to assert that third parties will be hurt by application of the law to the party in court, the

105. The Penfield residents who were members of the plaintiff association probably could have alleged a statutory right to interracial associations in the housing context, see Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 95 (1979); but if they had done so, they could have challenged the practices only on the ground that the practices constituted racial discrimination.

106. It did not seem worthwhile to test all of the older cases where jus tertii standing was denied. A review of at least some of them, however, does support the hypothesis. For example, in Missouri, K. & T. Ry. v. Cade, 233 U.S. 642 (1914), and in Rosenthal v. New York, 226 U.S. 260 (1912), *discussed in Jus Tertii*, *supra* note 1, at 634-35, parties subject to criminal and civil liability respectively under state laws contended that the laws denied equal protection to potential subjects of the laws who were not included within their coverage. But even if the laws denied equal protection (which was highly unlikely), they would not necessarily violate the constitutional rights of the defendants. The defendants still could constitutionally be subject to liability for the harm that they caused.

results may similarly be seen in terms of substantive rights. Where the Court thought it was permitting the assertion of jus tertii and invalidated a challenged law or government action, the law actually violated the rights of the party before the Court. In the cases where a perceived assertion of jus tertii was permitted, but the challenged law or governmental action was held not to violate the rights of the third parties, for the same reasons it did not violate the litigant's rights either. And in the few cases where the Court did not allow the assertion of jus tertii, the challenged law or government action did not violate the litigant's right. Because the litigant's and the third parties' rights were substantively dissimilar or unrelated, the alleged violation of third-party rights was irrelevant to a determination of the litigant's constitutional claim.

It is proper, therefore, to maintain that in practice the Court has not permitted the assertion of jus tertii. The operative principle is in fact that a litigant can prevail only when the challenged law or governmental action actually violates his own rights or is otherwise invalid as applied to him.

III

THE RECONCILIATION OF DOCTRINE AND RESULTS

It is appropriate to ask here whether this analysis really signifies anything. I have first undertaken to demonstrate that the Court's approach to the assertion of jus tertii in terms of "standing" is analytically unsound, and that as a general proposition there is no reason to allow a party to prevail in constitutional litigation by asserting third-party rights. I have then turned around and argued that in retrospect the Court has not really permitted the assertion of jus tertii, and that the results of the cases can be explained consistently with the thesis of substantive rights advanced here. If the Court has really reached the right results, even if for the wrong reasons, is there any need to reformulate doctrine so as to reconcile doctrine with results?

I submit that there is. First, if the Court accepted my thesis, it could stop viewing the assertion of jus tertii as a mere procedural hurdle in constitutional litigation. There would no longer be any issue as to whether litigants could prevail by asserting third-parties' rights, and the focus would be solely and properly on each litigant's own constitutional claims.

Second, because of the analytical unsoundness of the Court's present approach, there is no guarantee that the Court, or the lower federal courts,[107] will continue to reach the right results.[108] The principle that a party must prevail in constitutional litigation only by asserting his

107. I have not investigated the results reached by the lower federal courts in cases involving

own rights is important,[109] and should be expressly recognized without qualification. As a noted constitutional scholar has observed in another context, it is "critically important that we get the questions right and the answers right, because constitutional law is written in concrete and is not easily washed out by rain or tears."[110]

Reformulating doctrine in the manner that I have suggested will help us get the question right. If there is no reason for permitting a party to prevail in constitutional litigation by asserting violation of third-party rights, constitutional doctrine should not be structured in such a way that would even theoretically allow such a result. As long as there is a recognized possibility that a litigant may assert others' rights by falling into one of the exceptions that the Court has created, there is also the danger that in some particular case a litigant will fail to assert his own rights or that the Court, by refusing to look at some issues of third-party rights in Category I cases, will fail to invalidate a law or governmental action that in fact violates the litigant's rights.[111] Incorporating my thesis into constitutional doctrine will eliminate these dangers, and will make it more likely that the Court will continue to reach sound results that can be explained in an analytically and doctrinally consistent manner.

Relevant examples of unsound results produced by not getting the questions right are presented by cases in which the Court has improperly focused on the "personal" nature of the privilege against self-incrimination, and therefore has failed to relate a potential violation of a third party's self-incrimination rights to the constitutional challenge presented by the party before the Court.

In *Communist Party v. Subversive Activities Control Board*,[112] in which the Court first considered the constitutionality of registration requirements imposed against the Communist Party and its members, the plaintiff party contended that the registration requirements could not be imposed consistent with the privilege against self-incrimination, be-

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the assertion of constitutional jus tertii and have no opinion on whether the lower federal courts, like the Supreme Court, generally reach the right result for the wrong reason.

108. In Singleton v. Wulff, 428 U.S. 106 (1976), for example, the Court split five to four on the question of whether the physicians should have been able to assert their patients' rights (which in actuality were their own equal protection rights). And if the dissenting viewpoint of Chief Justice Burger had prevailed in Craig v. Boren, 429 U.S. 190 (1976), the Court would not have invalidated the statute in that case.

109. As evidenced by the fact that the Court continues to insist that the assertion of jus tertii is narrowly limited. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 80 (1978).

110. Dixon, Bakke: *A Constitutional Analysis*, 67 CALIF. L. REV. 69, 70 (1979).

111. In *Singleton v. Wulff*, for example, it was not apparent to the Court that the physicians were really relying on their own equal protection rights; and in *Craig v. Boren*, it did not seem as though the seller was relying on her own due process rights. In both cases, there were dissents to the Court's allowance of the assertion of jus tertii.

112. 367 U.S. 1 (1961).

cause filing a registration statement forces the incriminating admission that the registrant is a party member.[113] The Court held that as to the Communist Party itself, the self-incrimination question was prematurely raised, because the privilege could only be claimed by an affected individual in an enforcement proceeding for failing to register.[114] The Court also refused to look to the party's claims regarding potential party members, ostensibly on the same prematurity ground.

The dissenting Justices, however, related the members' self-incrimination claim to the Communist Party's constitutional claim. As Justice Douglas stated: "[A]n attack is properly made on the incriminating features of the statute by the petitioner, who is commanded to register."[115] This was the proper approach, because the party was not trying to assert potential members' privilege against self-incrimination for the sole purpose of protecting the potential members' rights. The party was challenging the registration requirements as violative of its own rights, and one of its grounds of attack dealt with the relationship of the privilege against self-incrimination to those requirements. The fact that no person would be able to register without violating his own privilege against self-incrimination showed that the regulatory scheme was unreasonable and violated due process. The party therefore should have been able to assert the claims based on the effect of the registration requirement on an individual's privilege against self-incrimination.[116]

The subsequent history of the case confirms this conclusion. The party did not register, and proceedings were brought against persons alleged to be party members to require them to register under the "membership registration" provisions of the Act. In *Albertson v. Sub-*

113. The Court had previously held that such an admission was incriminating. Blau v. United States, 340 U.S. 159 (1950).

114. 367 U.S. at 106-10.

115. *Id.* at 188 (Douglas, J., dissenting). Similarly, as Justice Brennan noted, "[A] party has been allowed to assert the constitutional rights of another person not before the Court as a named party in a variety of situations where the effect of the challenged action on himself is derivative from the impact on the other person." *Id.* at 193 (Brennan, J., dissenting in part).

116. *Communist Party* looks at first blush like California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). How can I criticize *Communist Party* while I defend *California Bankers*? *See supra* notes 94-97 and accompanying text. The answer is that the Communist Party itself was subject to sanction for failure to register, and therefore had a right of its own to assert that it should be free from the registration requirement. The Court recognized this right, but found that it was prematurely raised. In *California Bankers*, by contrast, the banks were not subject to actions against them based on the contents of the records they were required to keep. The banks therefore had no right to claim that in the event of such actions, the requirements they challenged would work to violate their rights. My judgments of the two cases are consistent, as they both look to the substantive rights of the party before the Court.

versive Activities Control Board,[117] decided in 1965, the Court held that the registration requirement violated party members' privilege against self-incrimination. This set the stage for a federal court of appeals' 1967 decision in *Communist Party of the United States v. United States*.[118] The party had been convicted below for failing to register as required, and was heavily fined. The previous cases dictated that the party had a duty to register, but that no individual could be required to file the necessary registration statement because of the privilege against self-incrimination.[119] The circuit court recognized that something was constitutionally wrong with this regulatory scheme, and invalidated the registration requirements. The court noted that "the legislative scheme has a flavor of irrationality in the due process sense,"[120] but grounded its holding on the interaction of the privilege against self-incrimination with the first amendment's guarantee of political association.[121]

I submit that the "flavor of irrationality in the due process sense" furnished the proper basis for holding the registration requirements constitutionally invalid. Because no individual could be compelled to register as a member of the Communist Party consistent with the privilege against self-incrimination, the party as an organization could not, consistent with due process, be punished for having failed to register. The same issue was presented in *Communist Party of the United States v. Subversive Activities Control Board*,[122] but the Supreme Court did not deal with it at that time. Focusing on the inability of the party to assert prematurely any self-incrimination rights, it failed to see the connection between the self-incrimination rights of the party's members and the question of whether the regulatory scheme violated the due process rights of the party itself.[123] If the Court had considered this question in 1961, and had held that the registration provisions could not be complied with by any individual consistent with the privilege against self-incrimination, the irrationality and unconstitutionality of the regulatory scheme would have been as abundantly clear then as it was to the District of Columbia Circuit in 1967.

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117. 382 U.S. 70, 77-79 (1965).

118. 384 F.2d 957 (D.C. Cir. 1967).

119. As the circuit court stated: "It [the Party] has been commanded by the Congress, on pain of criminal punishment, to come forward and reveal its affairs, but the Court has said that, in the climate of criminality created by other legislation, the persons who could accomplish those revelations need not do so by reason of the Fifth Amendment." *Id.* at 965.

120. *Id.*

121. *Id.*

122. 367 U.S. 1 (1961).

123. Although the officers had not yet refused to register the Party, because the Party itself was already under an order to register, the constitutionality of the regulatory scheme would seem to have been ripe for determination at that time. See the discussion of this point by Justice Brennan, 367 U.S. at 194 (Brennan, J., dissenting).

Another case in which the Court's emphasis on the "personal" nature of the privilege against self-incrimination and the resulting inability of a litigant to assert another's self-incrimination rights may have obscured the real issue is *Campbell Painting Corp. v. Reid*.[124] In *Campbell Painting*, a family-owned painting corporation sought to challenge a five-year suspension of public contracts as an unconstitutional restraint on the privilege against self-incrimination. The suspension had been imposed pursuant to statute when the corporation's president refused to waive the privilege prior to testifying before a grand jury investigating bid-rigging of contracts. In refusing to pass on the corporation's constitutional claim, the Court noted that the privilege against self-incrimination could not be invoked by a corporation and concluded that "[i]f a corporation cannot avail itself of the privilege against self-incrimination, it cannot take advantage of the claimed invalidity of the penalty imposed for refusal of an individual, its president, to waive the privilege."[125]

In a later case, however, the Court held that same law to be unconstitutional when applied to deny a public contract to an individual who had invoked the privilege while testifying before the grand jury.[126] If it is unconstitutional for the state to deny public contracts to an individual who has invoked the privilege while testifying, it is unconstitutional for the state to deny a public contract to a corporation whose officer had invoked the same privilege. While a corporation may not have self-incrimination rights, it does have due process and equal protection rights, and a state cannot arbitrarily deprive a corporation of the opportunity to contract with public authorities. The question in *Campbell Painting* should properly have been seen as whether the disqualification of the corporation was arbitrary and hence unconstitutional. The fact that the basis for the disqualification was the officer's assertion of the privilege against self-incrimination was relevant to the constitutional inquiry. The Court's misperception of the issue caused it to deny relief to a deserving litigant.

In both *Communist Party* and *Campbell Painting*, the Court, by viewing the litigants' claims as attempts to assert the substantively different rights of third parties and by refusing to allow their assertion, let stand laws that clearly violated the constitutional rights of the party before the Court. If there had been no procedural concept of the assertion of jus tertii, the Court would have been in a better position to

124. 392 U.S. 286 (1968).

125. *Id.* at 289. The dissent argued that by penalizing the family corporation for the former president's invocation of the privilege, the state was penalizing the former president and thus was doing indirectly what it could not do directly. *Id.* at 291-92 (Douglas, J., dissenting).

126. Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973).

assess the relationship between the violation of third-party rights and the litigants' own constitutional claims. In both of these cases, the violation of third-party rights was directly relevant to establish that the challenged law violated the litigant's constitutional rights as well.

As these examples indicate, it is indeed necessary to reformulate doctrine and to reconcile doctrine with results. Eliminating a procedural concept of the assertion of jus tertii will ensure that in constitutional litigation, the focus will be where it belongs—on the substantive rights of the party who is before the Court.

CONCLUSION

I have argued that assertion of constitutional jus tertii should not be permitted. To allow a party to prevail on the ground that the challenged law or government action violates third parties' rights is inconsistent with the principle that the rights guaranteed by the Constitution are applied to individuals and may be interpreted differently in different situations. A party should be able to prevail in constitutional litigation only if the challenged law or government action violates his own rights.

I have further argued that, despite the development of rules sometimes allowing the assertion of constitutional jus tertii, the results of the Court's "standing to assert jus tertii" cases can be explained in terms of the substantive thesis of this Article. It is time both to reformulate doctrine and to reconcile doctrine with results. It is time for the Court to abandon the concept of the standing to assert jus tertii and to make it clear that in constitutional litigation a party must stand on his own rights alone.