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STANDING TO ASSERT CONSTITUTIONAL JUS TERTII IN THE SUPREME COURT

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INTRODUCTION

A COMPLEX body of precedent has evolved in response to the problem of when the power of judicial review should be exercised. These decisions to permit or deny review derive from two sources of authority. Those constitutional limitations on judicial review embodied in the case and controversy provision of Article III of the Constitution compose the first source. The second consists of those self-imposed and discretionary limits which the Court itself has developed in recognition that the values implicit in our federal system and tripartite division of power are often fostered by a refusal to exercise the awesome power of review.

Chief among the doctrines which the Court applies to limit the exercise of review is standing.[1] As a general principle, standing means that a party must be injured by the action he is assailing as unconstitutional.[2] On closer analysis, however, it is clear that there are at least two separate and distinct aspects of such standing. First, there is standing to sue: the party seeking relief must show that he is sufficiently affected by the action he is challenging to justify consideration by the Court of the validity of the action.[3] Secondly, there is standing to challenge the action on particular grounds, namely, that the action

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1. Among the other doctrines employed to limit judicial review are "ripeness" and "political question." For an insightful discussion of the evolving content of standing, case and controversy, ripeness and political question, see Bickel, *Foreward: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 42-51, 58-64, 74-79 (1961).

2. For a discussion of this principle and other self-imposed limitations on judicial review, see Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). This exposition remains classic even today.

3. Although standing to sue has always been a requirement, *e.g.*, Truax v. Raich, 239 U.S. 33 (1915); Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900), emphasis on this requirement is considered to date from Massachusetts v. Mellon, 262 U.S. 447 (1923).

violates the rights of the particular party who is attacking it and not of some third party. The present article deals with this second aspect of standing. Even though *A* is adversely affected by the action and thus has standing to sue, the Court, it is said, will not strike down the action on the grounds that it violates the constitutional rights of *B* who is not before the Court.

Standing to assert the constitutional rights of third parties (for which *jus tertii* is a convenient short-term expression) is not necessarily foreclosed, though at present it is far from clear when such standing is permissible. In part, this uncertainty can be attributed to the failure of the Court to articulate the grounds of its decision to permit standing in many of the cases in which the issue has been raised. More significant, however, is a failure to distinguish among the various contexts in which the issue arises, for the criteria which the Court applies in deciding whether to permit such standing will vary with the posture of the case. In general, the cases tend to conform to one of two postures: first, where a party asserts that a statute, though constitutional as applied to him, is unconstitutional as applied to third parties coming within its terms, and second, where a party asserts that the constitutional rights of third parties will be adversely affected by the outcome of his suit.

Consequently, to say that standing to assert the rights of third parties is denied more often than not sheds no real light on the problem. Instead, it is necessary to place the cases within meaningful groupings, examine the criteria which the Court applies and the factors which it finds controlling, and determine whether within such groupings there has been any consistency of result. Only then can one ascertain with some predictability whether a constitutional challenge will be entertained when the rights of third parties are asserted.[4] This article will attempt to delineate the present scope of such standing in this manner and will also formulate certain broadened principles of standing which have not been expressly accepted by the Court, though several are implicit in the Court's present doctrine.

STANDING TO ASSERT THE UNCONSTITUTIONAL APPLICATION OF STATUTES TO THIRD PARTIES

NON-EXPRESSION SITUATION

In the cases discussed in this section a party, whom we shall call the assailant,[5] claims that a statute, though constitutional as applied to him, is uncon-

4. Although the development of the substantive doctrine of constitutional law must be quite fluid to adapt to changing circumstances and conditions, a clarified policy of constitutional procedure, as indeed, any system of procedure, strengthens the process of adjudication.

5. "Assailant" will be used consistently throughout the article to refer to the party to the suit or prosecution who is challenging the statute applied to him or the action taken against him on the ground that the constitutional rights of third parties are or will be violated thereby. Conceivably, this issue could be raised by a plaintiff or defendant in a civil action or by a defendant in a criminal action. Therefore, the more common terms such as party, litigant, plaintiff, or defendant would be either inapplicable or misleading.

stitutional as applied to third persons coming within its terms.[6] For example, a party engaged in interstate commerce alleges that a federal statute applied to him also applies to transactions having no effect whatsoever on interstate commerce;[7] or a public official alleges that a statute regulating him also applies to private persons whose conduct, under these circumstances, the government cannot regulate. A special situation arises when the terms of the statute assailed in this manner abridge rights of expression guaranteed by the first and fourteenth amendments. Because the response of the Court is grounded on very different considerations, this situation will be discussed separately in a subsequent section.

Raines and Its Antecedents

The Supreme Court's most recent exposition on the subject of constitutional *jus tertii* in a non-expression situation occurred in *United States v. Raines*,[8] where the Court held that such a public official did not have standing to claim that a federal statute was unconstitutional because it would be unconstitutional as applied to private persons allegedly within its terms. In that case, the United States brought suit against a voting registrar of a Georgia county, charging that he had discriminated against Negro voters and seeking an injunction against such conduct.[9] The registrar prevailed in the district court which held the statute unconstitutional because it was susceptible of application beyond the scope permitted under the fifteenth amendment. The Supreme Court reversed, holding that the defendant lacked standing to assert that the statute was unconstitutional as applied to private persons.

More significant than its holding was the fact that the Court in *Raines* realized that it was not applying an automatic rule that there is never standing to attack a statute as violative of the rights of third parties. Prior to the *Raines* decision, there were two conflicting and unreconciled classes of cases. In one, standing was denied; in the other class, it was permitted. In some of the cases, the Court did not indicate that it realized that a question of standing was presented. Analysis of a selected number of these cases reflects the apparently contradictory approach that the Court has followed and provides a backdrop against which the significance of *Raines* is more clearly seen.

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6. We will assume that third parties are within its terms either expressly or by judicial construction. Where a federal statute is involved, there is no problem of determination, as the federal courts must construe such statutes. In the case of a state statute, if the issue is doubtful, the case can be remanded to the state courts. See Dorchy v. Kansas, 264 U.S. 286 (1924). Obviously, if the claimed application is too hypothetical or unlikely, the Court can refuse to consider the challenge on those grounds.

7. See Illinois Cent. R.R. v. McKendree, 203 U.S. 514 (1906), discussed at note 33 *infra* and accompanying text.

8. 362 U.S. 17 (1960). The decision of the district court is reported at 172 F. Supp. 552 (M.D. Ga. 1959).

9. Suit was brought under § 131 of the Civil Rights Act of 1957, 71 Stat. 637, 42 U.S.C. § 1971 (1958).

a. Standing denied

First we will consider the cases where such standing has been denied. In their admirable casebook,[10] Professors Hart and Wechsler use the case of *Yazoo & M.V.R.R. v. Jackson Vinegar Co.*[11] to demonstrate that one cannot attack a statute on the ground that it violates the rights of third parties. There a state statute imposed a penalty on carriers who failed to settle a claim for lost or damaged freight within a specified period after they had received written notice of the claim. Suit was brought against a railroad which defended on the ground that the statute, though properly applied to it, would be applicable even if the particular claim which a carrier refused to settle were unreasonable or groundless.[12] The Court ruling that it "must deal with the case in hand and not with imaginary ones,"[13] denied the railroad standing to assert the constitutional rights of other carriers.

At the time *Yazoo* was decided[14] there were two lines of cases on the subject, but the Court only cited those denying standing and said nothing about the others. Among those on which the Court in *Yazoo* relied was *New York ex rel. Hatch v. Reardon*,[15] in which a party who engaged in both interstate and intrastate commerce alleged that a state stamp tax imposed an unconstitutional burden on interstate commerce. However, the transaction upon which the tax was imposed was purely intrastate. The Court refused to entertain the challenge since the assailant did not belong to "the class for whose sake the constitutional protection is given . . . ."[16] In the same vein was *Lee v. New Jersey*,[17] holding that a defendant who used oyster dredges illegally could not assert that the statute under which he was convicted was unconstitutional because it could be construed as making it a crime merely to take an oyster dredge out on the waters. Further, in *Collins v. Texas*,[18] an osteopath convicted for practicing medicine without a license had no standing to allege that the statute could unconstitutionally infringe religious freedom of groups such as Christian Scientists, whose religious tenets concerned healing.

Similarly, there was a significant number of cases following *Yazoo* in which the Court enunciated the principle that a party has no standing to allege the unconstitutional application of a statute to third parties. Among these were *Standard Stock Food Co. v. Wright*,[19] holding that a manufacturer doing a

10. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

11. 226 U.S. 217 (1912).

12. Such an application would probably be held unconstitutional. See St. Louis, I. M., & So. Ry. v. Wynne, 224 U.S. 354 (1912).

13. 226 U.S. at 219.

14. *Yazoo* has been chosen as a reference point for the sake of convenience and because of its use in HART & WECHSLER, *op. cit. supra* note 10, as the basis for discussion of the problem. In no way, however, should it be considered a "landmark" case.

15. 204 U.S. 152 (1907).

16. *Id.* at 160.

17. 207 U.S. 67 (1907).

18. 223 U.S. 288, 295-96 (1912).

19. 225 U.S. 540 (1912).

large volume of business could not assert that a statute exacting inspection fees of a set amount was unconstitutional as applied to smaller businesses; the *Missouri Rate Cases*,[20] holding that carriers, who could not show that rates were confiscatory as to them, had no standing to allege that the statute could be applied to impose confiscatory rates on others; and *United States v. Wurzbach*,[21] holding that a candidate convicted for a violation of a corrupt practices act had no standing to assert that such a statute as applied to persons other than candidates would be unconstitutional.[21a]

b. Standing permitted

It is significant to note that in none of these cases did the Court acknowledge that there were cases in which standing to attack a statute on the ground that it violated the rights of others was permitted.

In *United States v. Reese*,[22] for example, the Supreme Court struck down as void *in toto* a federal statute dealing with voting rights. A provision of a federal statute prohibiting an election officer from preventing a qualified citizen from voting was applied to inspectors who refused to receive the vote of a qualified Negro elector in a Kentucky municipal election. The Court found that the power of Congress to legislate in this area was conferred by the fifteenth amendment and because two of the four sections of the statute were not confined to discrimination on account of race, Congress had exceeded its authority. Thus, the statute was void *in toto* and the conviction was reversed because there was no statute under which the defendant could be prosecuted.

Thus, in *Reese* the Court permitted a party to prevail by asserting the rights of third parties, contrary to the approach followed in *Yazoo*. The difference between the two decisions may be explained by the fact that the Court in *Yazoo* approached the problem primarily in terms of standing while the Court in *Reese* approached it in terms of severability of application. In *Reese*, the Court stated that it was unable to separate the constitutional from the unconstitutional applications.[23] Even though the Court spoke in terms of severability, it

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20. 230 U.S. 474 (1913).

21. 280 U.S. 396 (1930).

21a. See also Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Morf v. Bingaman, 298 U.S. 407 (1936); Heald v. District of Columbia, 298 U.S. 407 (1936); Arizona Employers Liability Cases, 250 U.S. 400 (1919); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915); Farmers & Mechanics Sav. Bank v. Minnesota, 232 U.S. 516 (1914).

22. 92 U.S. 214 (1875).

23. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section,

implicitly decided a standing question, that the defendant could challenge the validity of the statute despite the fact that as applied to him, it would be constitutional.

The void *in toto* doctrine enunciated in *Reese* was followed in other cases. Thus, in the *Trade-Mark Cases,*[24] the Court held that the legislation of Congress in regard to trade-marks was not limited to interstate or foreign commerce, and thus was unconstitutional. The defendant in one of these cases was charged with possessing counterfeits of the trade-marks of the Mumm Company, a maker of French champagne. The Court did not question his standing to claim that the statute applied to intrastate commerce and thus was void. However, it did consider whether the applications of the statute were severable and held that they were not.[25]

The same result was reached in *Illinois Cent. R.R. v. McKendree.*[26] Suit was brought to recover damages caused by an interstate shipment of cattle which were diseased. Liability was founded on a regulation promulgated by the Secretary of Agriculture. The Court held that the order purported to regulate both interstate and intrastate commerce and so was beyond the Secretary's power. There was no question of the standing of the interstate shipper to claim that the order also applied to intrastate commerce, but the entire decision depended on whether the applications were severable. So too, in the *Employers' Liability Cases,*[27] it was held that a statute dealing with injuries suffered by employees of railroads engaged in interstate commerce, but not limited to injuries occurring while the employees were engaged in work affecting interstate commerce, was beyond the power of Congress, though it did not appear that the employees involved were engaged in purely intrastate activity. The only question the Court considered was one of severability.[28]

The most striking case where the Court followed the *Reese* approach in the period after *Yazoo* was decided was *Wuchter v. Pizzutti,*[29] where the Court invalidated a state non-resident motorist statute on the ground that the statute did not provide adequate notice to the defendant. The statute required service on the non-resident through the Secretary of State, but the Court found that

> but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. . . . The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

92 U.S. at 221.

24. 100 U.S. 82 (1879).
25. See *id.* at 98.
26. 203 U.S. 514 (1906).
27. 207 U.S. 463 (1908).
28. The issue of severability may also have been raised in two New Deal cases, Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935) (invalidation of a federal compulsory retirement system) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (NLRA upheld). In both cases the standing issue related to one of the several grounds of attack.
29. 276 U.S. 13 (1928).

it did not contain provisions making it probable that the notice would be communicated to the out-of-state defendant. Here, the defendant had actual notice of the proceedings. The Court, however, considered the sufficiency of the notice provision of the statute and stated that it was immaterial that the defendant actually had notice, since it was not required by the statute, observing that "Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute . . . ."[30]

The statute was constitutionally infirm because a defendant might not receive notice of the suit. The defendant in this case, however, actually received notice. Since he was not prejudiced by the statutory weakness, there was no denial of due process as to him.[31] Thus, the statute was declared unconstitutional on the ground that other defendants might not receive notice under it.[32]

Reconciliation: The Raines Exceptions

In attempting to reconcile these apparently conflicting approaches, it must be noted that these cases were decided at closely related times, yet the Court consistently ignored cases reflecting the contrary approach. Moreover, in the *Reese* line of cases, the Court spoke exclusively in terms of severability, while in cases like *Yazoo* it spoke only about standing.

It does not help to assume that the Court used standing as a device to avoid deciding a case since the issues involved in some of the cases where it found standing were more controversial than those involved in some of the cases where it did not.[33] Nor can the cases be distinguished on the basis of whether a state or federal statute was involved.[34]

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30. *Id.* at 24.

31. This was emphasized by Mr. Justice Brandeis in his dissenting opinion. But Brandeis related the fact of actual notice to the substantive issue of due process and did not expressly say that the defendant should not have standing to attack the statute because of the lack of a notice provision. He would have remanded the case to the state court to determine whether actual notice was in fact required by the statute. *Id.* at 26-27.

32. After Carmichael v. Southern Coal Co., 301 U.S. 195 (1937) (an employer suing to enjoin enforcement of a state unemployment tax could only challenge the taxing provisions as applied to him and not those applicable to his employees), there appear to have been no cases squarely involving the issue of standing to allege unconstitutional application of a statute to third parties in a non-expression situation. Research has not disclosed any other cases in which such a matter could have been placed in issue. In *Raines*, the Court does not cite or analyze any, nor are any contained in the brief for either side. Professors Hart and Wechsler do not include any others in their casebook, *op. cit. supra* note 10. It appears then that the issue went into eclipse and that there was no attempt at clarification until *Raines*.

33. For example, the issues raised in *Reese* were far more significant than those involved in *Yazoo* and a finding of no standing would have enabled the Court to avoid resolving them. Similarly, compare *McKendree, supra* note 26, where the Court struck down a regulation of interstate commerce, with *Hatch, supra* note 15, where the Court refused to consider whether a state tax burdened interstate commerce.

34. If this was the basis for the distinction, it was never articulated. Moreover, if it was in fact the basis, the Court in *Raines*, which found no standing to attack a federal

Rather, the key to a reconciliation of these cases lies in the Court's actions and pronouncements in the *Raines* case. The actual holding, as indicated previously, was that a governmental official did not have standing to assert that a federal statute was unconstitutional because it would be unconstitutional as applied to private persons whom he asserted were within its coverage. In order to decide this point, however, the Court attempted for the first time to reconcile the apparently conflicting lines of cases.

As a result it took the position that as a general rule a party does not have standing to assert unconstitutional application of the statute to another, but admitted certain exceptions to the rule.[35] Through an examination of these exceptions, it is possible both to reconcile the two lines of cases and to construct a rule which reflects more clearly than the holding in *Raines* the availability of standing in this area.

One exception, analytically, does not present a question of standing. The Court noted that where a statute has previously been declared invalid in other applications, one against whom the statute has been applied can contend that it is non-severable and thus there is no statute to be enforced against him. This

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statute on the ground of unconstitutional application to third parties, would have had to expressly overrule these cases, which it did not do. More significantly, the Court applied the standing approach to a federal statute in Heald v. District of Columbia, 259 U.S. 114 (1922). It clearly stated that there was no distinction as regards standing between a case involving a federal statute and one involving a state statute. Mr. Justice Brandeis, speaking for the Court, observed as follows:

> 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 statute is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held.

Id. at 123.

35. See 362 U.S. at 22-23. The first two exceptions, exemplified by NAACP v. Alabama, 357 U.S. 449 (1958) and Thornhill v. Alabama, 310 U.S. 88 (1940), respectively, will be discussed in subsequent sections of this article. The third and fourth exceptions, exemplified by Winters v. New York, 333 U.S. 507 (1948) and Butts v. Merchants & Miners Trans. Co., 230 U.S. 126 (1913), respectively, will be discussed immediately.

A fifth exception involves the situation where the Court must determine whether the statute is constitutional as applied to a third party in order to ascertain whether it is constitutional as applied to the assailant. This also sheds no light on the problem of reconciling the previously discussed cases, but should be noted because it does represent a situation where one can prevail by effectively asserting the rights of third parties. The Court in *Raines* said it would permit standing where "a state statute comes conclusively pronounced by a state court as having an otherwise valid provision or application inextricably bound up with an invalid one. . . ." 362 U.S. at 23. For cases in which standing has been granted on the basis of this exception, see Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (where the Court held that an employer had standing to assert that a workmen's compensation statute violated the rights of his employees, since if the statute was not constitutional as applied to the employees, it was not intended to apply to him) and New York Cent. R.R. v. White, 243 U.S. 188 (1917). *But see* Virginia Ry. v. System Federation 40, AFL, 300 U.S. 515 (1937). *Cf.* Hawkins v. Bleekly, 243 U.S. 201 (1917).

type of situation was presented in the case of *Butts v. Merchants & Miners Transportation Co.*[36] where the Court held that the Civil Rights Act, which had been previously declared unconstitutional in the *Civil Rights Cases*[37] when applied to the acts of a private person committed within the states, was not intended to have application to acts occurring on the navigable waters of the United States. In such a situation the defendant prevails not because the statute was unconstitutional as to him—the Court does not reach that question—but because it was previously declared unconstitutional as applied to others and is not severable.[38]

The Court in *Raines* enunciated a second exception which it offered as a possible explanation of *Reese*—that a criminal statute may be assailed as unconstitutional as applied to third parties where an attempt to find severability of application would "necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited."[39] As another example of this exception the Court cited the case of *Winters v. New York*.[40] The reference to the *Winters* case was inapposite, since it involved a statute on its face restricting expression and, as will be pointed out in the next section, different considerations apply in such a situation. However, the recognition of this exception indicates that even in a non-expression situation a criminal defendant may be able to challenge a statute on the ground that others will be misled. As indicated in *United States v. Wurzbach*,[41] however, the fact that others may be misled is not an objection generally open, and the Court's language in *Raines* makes it clear that the statute must be quite broad and a limiting construction very tortuous.[42] For present purposes, though, it must be recognized that this is a situation where at least a criminal defendant can prevail by showing that the statute violates constitutional rights of third parties.

Nonseverability: Rule of Raines Recast

Much of the clarity and insight which the analysis in *Raines* brought to the area of standing may be sacrificed by the Court's formulation of a general rule

36. 230 U.S. 126 (1913).
37. 109 U.S. 3 (1883).
38. In speaking of this type of case in *Raines*, the Court states:

> And the rules' rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover.

362 U.S. at 23.

39. 362 U.S. at 22.
40. 333 U.S. 507 (1948) (cited 362 U.S. at 23).
41. *Supra* note 21.
42. In a non-expression context no other case has been found employing this approach. The cases have either taken the *Reese* position as to nonseverability, or, like *Wurzbach*, have denied standing to claim that others will be misled.

denying standing subject to the exceptions previously discussed. So as to dispel any tendency which might remain to perpetuate the view that such standing is foreclosed, it is suggested that the rule as to standing to assert constitutional *jus tertii*, in cases where freedom of expression is not involved, be recast as follows:

If a party against whom a statute is sought to be enforced can show preliminarily non-severability of application or that an attempt to sever would leave standing a statute that would be incapable of giving fair notice of its prohibitions, that party has standing to challenge the statute on the grounds that it infringes the rights of third parties coming within its application.

a. Precedent: a retrospective analysis

If this does represent the approach of the Court, then the cases following *Reese* are reconcilable with the *Yazoo* line of cases denying standing, assuming the latter can be shown to have involved, in the Court's opinion, severable statutes. An attempt to reconcile these cases individually will not be persuasive, as the standing and separability problems are not clearly articulated or even differentiated in many of them. Rather, what will be done is to demonstrate that there is evidence suggesting that the Court has followed the suggested approach.

In the first place, the Court has never held that even when a party against whom a statute was applied has made out a case for nonseverability of application, the Court would not consider whether the statute was unconstitutional as so applied. Moreover, it is noteworthy that the Court generally found standing where federal statutes were involved at least when the severability doctrine of *Reese* was in vogue, while at the same time, denying it in the case of state statutes. In the latter instances, the Court was properly of the view that the question of severability of application should be decided by the state court.[43] And the fact that the Court has not found standing, though a federal statute was involved, and has found it, though a state statute was involved, further indicates that severability may be the keystone.

In *Heald v. District of Columbia*,[44] for example, the Court held that a taxpayer could not challenge a District of Columbia taxing statute on the ground that it was unconstitutional as applied to others. Referring to the cases involving state statutes where standing was denied, Justice Brandeis observed that no different rule applied where an Act of Congress was involved.[45] The statement seems patently incorrect in view of the *Reese* line of cases, all of which were cited by the taxpayer in his brief and argued before the Court.[46] How-

43. It may be queried whether, if the state court in *Yazoo*, for example, had decided that the statute was non-severable in application, the Court would have found standing to assert the right of other carriers. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 177 (1953).

44. 259 U.S. 114 (1922).

45. *Id.* at 123.

46. *Id.* at 116.

ever, Brandeis also observed that "the District insists that . . . the whole act would not thereby be rendered void, as these provisions are clearly severable from the rest of the act."[47] If he meant that the Court never heard a challenge to an Act of Congress on the ground that it was unconstitutional as applied to others, he would have ignored completely the facts in the *Reese* line of cases. A more plausible explanation was that implicit in his statement was the acceptance of the government's contention that the applications of the taxing statute were severable. If this were so, then it was true that the Court had never permitted an Act of Congress to be challenged on those grounds, since the *Reese* decision and those that followed were based on the theory that the statutes were incapable of separate application.

An explanation of the decision in *Wuchter v. Pizzutti*[48] on the ground that the Court found the statute incapable of separate application is most realistic. Non-resident motorist statutes were universally adopted after the Court sustained the underlying basis of such statutes in *Hess v. Pawloski*.[49] It would seem more probable that a state would prefer to enact a statute containing adequate notice than to have the validity of the statute depend on whether a particular defendant actually received notice. The Court's reference in *Raines* to "validity on the basis of fortuitous circumstances"[50] in its explanation of *Butts v. Merchants & Miners Transportation Co.*[51] is equally appropriate in this context. If the Court found that the state did not wish the statute to be effective only in such circumstances, then its allowance of standing can be explained in terms of granting standing when nonseverability is shown. As indicated previously, the dissenting Justices in *Wuchter* would have remanded the case to the state court to obtain its interpretation on severability. Moreover, they wanted a determination as to whether such notice as the defendant received was settled practice, since this would bear on the question of whether separate application was intended.[52]

Severability may also have been a consideration before the Court in *Hatch v. Reardon*.[53] Justice Holmes observed when discussing standing to attack a state tax that the presumption was that the state wanted the tax to be valid wherever possible.[54] Thus, he implicitly found severability of application while denying standing to assert the rights of others. Similarly, in *Carmichael v. Southern Coal Co.*,[55] suit was brought by an employer to enjoin the enforcement of a state unemployment compensation act under which both employers and employees had to contribute. One of the grounds was that the tax

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47. *Id.* at 122-23.
48. 276 U.S. 13 (1928).
49. 274 U.S. 352 (1927).
50. 362 U.S. 17, 23 (1960).
51. 230 U.S. 126 (1913).
52. 276 U.S. 13, 26-27 (1928).
53. 204 U.S. 152 (1907).
54. *Id.* at 161. See also Packet Co. v. Keokuk, 95 U.S. 80 (1877) (municipal ordinance with broad provisions for collecting wharfage fees held severable).
55. 301 U.S. 495 (1937).

as applied to the employees was unconstitutional. The Court, noting the presence of a separability clause in the statute, held that the employer could not contend that the application of the statute to employees was unconstitutional.[56] There is every indication that if it found nonseverability of application, it would have examined the statute from the constitutional standpoint of the employees.[57]

Thus, adding the Court's reference to severability in *Raines* to the evidence culled from previous cases, one can reasonably conclude that the Court will hear an attack on a statute on the ground that it abridges the rights of third parties if the assailant can preliminary show nonseverability of application.

b. Policy basis

Such a rule is highly desirable, for the result in a given case should not depend on the time at which the case is presented to the Court. It may be asked, for example, whether the *Butts* case should have turned out any differently if it arose prior to the time the *Civil Rights Cases* had been decided. If the defendant had not been permitted to assert nonseverability and unconstitutional application to others, his conviction would have been upheld. A rule of standing that promotes such a condition is fundamentally unsound and may create actual injustice. Although it is desirable to avoid deciding constitutional questions unless absolutely necessary to the decision in the particular case, this should not be accomplished at the price of an anomalous and fortuitous result—one which depends upon the time at which the assailant's case arose in relation to another.[58]

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56. The Court stated:

> Appellees extend their attack on the statute from the tax imposed on them as employers to the tax imposed on employees. But they cannot object to a tax which they are not asked to pay, *at least if it is separable, as we think it is, from the tax they must pay.* The statute contains the usual separability clause . . . . The collection and expenditure of the tax on employers do not depend upon taxing the employees, and we find nothing in the language of the statute or its application to suggest that the tax on employees is so essential to the operation of the statute as to restrict the effect of the separability clause . . . .

301 U.S. at 513. (Emphasis added.)

57. An analogy may also be drawn to the Court's approach in cases where the assailant alleges that some provisions of a statute which have not yet applied to him are unconstitutional. The Court has preliminarily considered whether these provisions were severable; if it found that they were not, it could or would proceed to consider the provisions not yet applied on their merits. See Chicago Bd. of Trade v. Olsen, 262 U.S. 1 (1923) (provisions of federal statute regulating grain futures found separable and statute upheld); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (provisions applied to plaintiff found inseparable from provisions already held unconstitutional and thus injunction granted). See also Electric Bond Co. v. SEC, 303 U.S. 419 (1938), and United States v. Harriss, 347 U.S. 612 (1954).

58. This type of situation is distinguishable from the one where the claimant's case arose earlier, but he did not appeal and subsequently in another case the same statute was declared unconstitutional. Because he failed to appeal, he is barred from attacking the

Similarly, a prior declaration of nonseverability and unconstitutional application to third parties is neither shocking nor destructive of limitations on judicial review. We know that theoretically the Court never declares a statute unconstitutional, but only says that it cannot constitutionally be applied in the case before it.[59] But this justification as to the limited effect of judicial review is not always what actually happens. There are some statutes that are declared unconstitutional on grounds that make it clear that they can never be constitutionally applied. As the result of a decision in a particular case, it is as if the statute were excised from the statute book. Typical of such a case is *Lanzetta v. New Jersey*,[60] where the Court invalidated a statute making it an offense to be a "gangster" on the grounds that *no one* could ascertain the meaning of the term and thus it denied procedural due process to any person indicted under it. Another example would be *Brown v. Board of Education*,[61] where the Court held that segregation in the public schools on the basis of race invariably denied equal protection to Negro pupils. Also, in *Dahnke-Walker Milling Co. v. Bondurant*,[62] the Court recognized the distinction between holding a statute void for all purposes and merely holding that it cannot constitutionally be applied in a particular case. Similarly, in a *Butts* type situation, where the Court finds nonseverability of application, it is saying that insofar as enforcement is concerned the statute simply does not exist.

There are no practical difficulties in allowing such standing. In the first place, the burden is on the assailant to show non-severability of application. With the prevalence of severability clauses and the Court's willingness to apply them whenever possible,[63] this should not be a frequent occurrence. Nevertheless, it may occur sufficiently to justify challenges in those cases.[64] Moreover, when a federal statute is involved, the Court construes its applica-

statute in another suit. *E.g.*, Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). The time at which the case arose should not have independent significance as to the result unless the assailant is barred by principles of res judicata or the like.

59. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803).

60. 306 U.S. 451 (1939).

61. 347 U.S. 483 (1954).

62. 257 U.S. 282 (1921).

63. Despite the existence of a severability clause, the Court will still determine whether the statute is capable of being applied when the unconstitutional applications are considered. See Carter v. Carter Coal Co., 298 U.S. 238, 312-13 (1936).

64. See, *e.g.*, United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927 (D.C. Cir. 1958), in which the defendant, a civilian employee of the Department of the Army serving in Casablanca, was convicted of a non-capital offense by a military court. The statute, which applied to persons "employed by, or accompanying" the Armed Forces overseas, had previously been declared unconstitutional as applied to a defendant tried for a capital offense. Reid v. Covert, 354 U.S. 1 (1957). The statute contained the usual severability clause. The Court of Appeals, District of Columbia, held that since the severability clause was general, the court could not determine whether Congress intended it to apply in this case if it could not be applied in the others. Thus, it held that the statute was unconstitutional.

Although the court of appeals recognized its duty to apply the severability clause, it was unwilling to construe congressional intent as to severability of application where the

tion in any event; in the case of a state statute, if the issue is doubtful, the Court can remand to the state court for an interpretation as to severability. It must be clear that the third party to whom the statute is allegedly unconstitutional is within its terms; it is not suggested that the assailant be permitted to hypothesize highly unlikely applications. In many cases, the third party will be expressly within its terms; in others, the Court can construe the statute or remand, if it wishes, in the case of a doubtful state statute. And of course, if the constitutional issue as to the rights of the third party is not substantial, the Court can dismiss the case on that ground.

Therefore, it is submitted that where a party preliminarily shows nonseverability of application, he should have standing to assert that the statute is unconstitutional as applied to third parties coming within its terms. Such a policy as to standing is necessary to prevent an unjust result which would follow from too rigid an application of a basically sound principle of standing. It is believed that the rule of standing as stated herein represents the present approach of the Court. If it does not, then it is suggested that such an approach is desirable so that the values expressed by limitations on judicial review will not be employed to destroy the more fundamental values inherent in such a system.

Statutes by Their Terms Restricting Freedom of Expression

The question is now presented as to what approach the Court follows where a party, whose conduct is not entitled to constitutional protection, attacks a statute, which by its terms restricts freedom of expression as embodied in the first and fourteenth amendments. Rather than being confronted with statutes allegedly void *in toto*, as in the previous section, we deal here with statutes that are said to be "void on their face." This doctrine has a procedural as well as a substantive connotation.[65] Substantively, it means that the statute abridges

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clause was a general one and the prior holding of the Supreme Court as to unconstitutionality was in part predicated on the nature of the offense. The court of appeals said at 932:

> Neither the severability clause nor any other provision affords any standard to guide a constitutional decision in the instant case except the invalid standard of "persons . . . employed by" the Armed Forces outside the United States. We do not know how to subdivide this provision as Congress might have done if Congress had known it could not be upheld as written. The present severability clause shows only a very general intention to leave in effect all valid applications which are severable from invalid applications, giving no indication of what valid applications Congress thought would be severable . . . .

In other words, the court of appeals was insisting that the legislature be more definite as regards severability of applications as opposed to severability of provisions. The Supreme Court, in affirming, however, did find severability of application and proceeded to decide the case on the merits. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

65. For an excellent treatment of the substantive problems presented by the void for vagueness doctrine, see Comment, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Although he is accurate in relating standing to the under-

expression in such a way that it can never be constitutionally applied.[66] Procedurally, it relates to the standing of the assailant to claim, in effect, that though the statute is constitutional as applied to him, it is unconstitutional as applied to others coming within its terms.

Thornhill Standing Doctrine

It is submitted that the Court does not inquire into the character of the defendant's conduct when confronted with a statute that by its terms restricts freedom of expression. Thus, the procedural aspect of the void on its face doctrine permits an assailant to attack a statute by, in effect, asserting the constitutional rights of third persons. The Court's rule of standing in the case of such statutes can be stated as follows:

> *Where a statute by its terms prohibits the exercise of expression the Court will pass on the validity of the statute without reference to the quality of the conduct of the assailant.*

The technique then is to permit broader standing in instances where the words of the statute [67] are not narrowed by specific reference to the conduct of the assailant proscribed. Since the assailant can attack the terms of the statute without regard to whether the statute was constitutional as applied to the conduct in which he was engaged, he is, in effect, prevailing by asserting the rights of others, since the statute would be constitutional as applied to his conduct.[68] The Court has not intimated that it allows a challenge of greater

lying policy of preventing the inhibition of expression, the author does not always describe accurately the technique which the Court employs in determining whether standing should be permitted. This does not affect the general excellence of the article, but simply indicates that few writers have attempted to isolate and examine the technique as a means of ascertaining the significance of the underlying policy.

66. As indicated in the discussion in the previous section, there are instances where statutes are declared unconstitutional on grounds that make it clear they can never constitutionally be applied. Where this arises in an expression context, the Court refers to such a statute as void on its face. See, *e.g.*, Tally v. California, 362 U.S. 60 (1960) (Court invalidated as void on its face an ordinance prohibiting the distribution of written materials that did not disclose the names and addresses of the persons who prepared, distributed or sponsored them) and Staub v. City of Baxley, 355 U.S. 313 (1958) (Court struck down an ordinance requiring a license and payment of a large fee in order to solicit union membership). Often both procedural and substantive aspects of the void on its face doctrine are present in the same case.

67. This rule need not be restricted to statutes, although standing problems arise principally in statutory context. See, *e.g.*, AFL v. Swing, 312 U.S. 321 (1941) (common law of state prohibited all peaceful picketing) and Terminiello v. Chicago, 337 U.S. 1 (1949) (broad construction of a disorderly conduct ordinance by state court had effect of equating it with one restricting expression on its face).

68. If a rule of state law is not confined to the evil which may be dealt with but places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion, it must fail without regard to the facts of the particular case.

Bridges v. California, 314 U.S. 252 (Frankfurter, J., dissenting). The dissent was on the merits as no standing issue was raised in the case.

scope, that is, that the statute affects unconstitutional rights of others, merely because freedom of expression is involved. The situation where a statute by its terms restricting expression is at issue must be distinguished from the case where a statute not prohibiting expression as such is applied to the exercise of expression.[69]

The analysis of the question may be commenced with a consideration of *Thornhill v. Alabama*.[70] There the defendant was convicted of violating a statute that was construed, according to the Court, to prohibit all peaceful picketing. The Court did not consider the conduct of Thornhill, that is, whether as to him the statute invaded freedom of expression, but looked merely to the words and held that since they prohibited all peaceful picketing, the statute was unconstitutional.

One of the grounds for the holding was that the indictment and the verdict were general so that there was no occasion to go behind the face of the statute under which the indictment was founded.[71] However, an equally cogent reason according to the Court, for permitting him to attack the statute on its face, was that by its terms it prohibited all expression by way of picketing. The Court held that picketing involved speech and then proceeded to discuss the nature of the restriction. The subsequent delimitation of the substantive nature of the *Thornhill* doctrine,[72] should not obscure the holding as to standing. Since it is recognized that picketing involves expression, a statute that on its face prohibits *all* picketing is subject to attack on constitutional grounds without reference to the conduct of the particular assailant.[73]

Basis of Doctrine

Let us now analyze the basis of the doctrine and the policy underlying it. It is imperative that the technique the Court employs not be confused with this

69. See, *e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (anti-trust statute applied to picketing), United States v. Petrillo, 332 U.S. 1 (1947) (Communications Act of 1934 applied to picketing).

70. 310 U.S. 88 (1940).

71. *Id.* at 96.

72. For a discussion of the constitutional doctrine now applicable to picketing and a review of the cases on this point, see International Bhd. of Teamsters v. Vogt, 354 U.S. 284 (1957).

73. The Court spoke of striking down a statute which was inimical to free expression; it did not refuse to apply the statute because it invaded constitutional rights of the person against whom it was intended to apply.

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials . . . results in a continuous and pervasive restraint on all freedom of discussion . . . not any less pernicious than the restraint . . . imposed by the threat of censorship. An accused . . . under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him.

Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

policy. When the actions of the Court are explained in terms of the policy, its actions cannot adequately be analyzed, since standing is not permitted in every case where, for example, there is an overbroad statute,[74] or one that is vague,[75] but only where the statute involved by its terms prohibits expression.

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.[76] Where there is a conviction under an unconstitutionally vague statute, the conviction can be overturned; so too, can this be done in any situation where the statute is unconstitutionally applied. Thus it would not be necessary to strike down the statute at the behest of one who knew that his conduct was prohibited by the statute or one as to whom the statute was constitutional as applied. But there is no remedying the acts of expression made mute because of uncertainty as to whether they are prohibited or can constitutionally be by a statute restricting expression by its terms, usually in broad language. 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.

The Court has made the judgment that such an inhibitory danger is present in statutes which on their face restrict expression while it is not present sufficiently so as to justify the lowering of the standing bar in a case where a general statute is applied to acts of expression. Whether the rule should be extended to the latter situation will be discussed later in this section. The distinction in the Court's treatment of the two types of statutes is reflected in *United States v. Petrillo*.[77] There the defendant was indicted on a charge of violating the Federal Communications Act[78] by coercing a licensee of the FCC to employ more persons than were necessary to perform actual services. One of the counts alleged that he caused pickets to be placed in front of the licensee's place of business. On a motion to dismiss the district court held that the statute violated the first amendment by prohibiting peaceful picketing. On appeal the Supreme Court reversed and remanded the case for consideration

74. See Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261 (1951).

75. See Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539-40 (1951).

76. It must be remembered that right of the public to hear is as important as the right of the speaker to speak. This principle is implicit in the nature of the guarantee.

77. 332 U.S. 1 (1947).

78. 48 Stat. 1064, 1102 (1934), as amended, 60 Stat. 89, 18 U.S.C. § 682 (1946).

as to whether the statute was applied so that under the facts of the case it was unconstitutional.

Here the Court did refer to the facts of the particular case in passing on whether the statute violated the first amendment. Since the statute did not deal with expression as such, the Court treated the case as one involving the validity of the statute as applied rather than on its face. Similarly it did not consider whether the statute was capable of other unconstitutional applications to expression, though constitutional as to the acts of the defendant.[79]

Thus the Court explicitly drew the distinction between statutes which by their terms prohibit expression and those which do not, but which are applied to expression situations. The former are to be tested on their face; the latter only as applied to the facts of the particular case. Implicit in this distinction is the policy reason for it—that the former have a significantly inhibiting effect on expression to justify a departure from traditional standing principles and to allow the assailant to prevail without regard to the facts of his own case, while the latter do not.

Application of Doctrine

The Court has with complete consistency—once the technique it employs is properly analyzed—followed the *Thornhill* approach to standing where the statute involved by its terms restricts first amendment rights. In the cases that will now be discussed, had the Court considered whether the statute was constitutional as applied to the conduct involved, it may well have arrived at a different result on the merits. But since the conduct of the assailant plays no part in the Court's determination of the validity of the statute, the Court approaches the question in terms of the validity of the statute as applied to one other than the assailant. The standing issue, unfortunately, is often not discussed as such; the Court speaks in terms of the statute's being void on its face. But implicit in such a finding is the allowance of standing to assert rights of third parties.

The void on its face doctrine as regards standing is most frequently applied in two classes of cases: first, those in which a statute restricting speech by its terms is attacked on the ground that it is unconstitutionally vague and indefinite; and secondly, those in which a statute or ordinance requiring a license to engage in activities regarding expression is attacked for lack of adequate standards. A third situation may be where the government, in an attempt to reach obscenity, applies too broad a standard.

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79. The Court stated:

> It is important to note that the statute does not mention picketing, peaceful or violent. The proposed application of the statute to picketing, therefore, does not derive from any specific prohibition written into the statute against peaceful picketing . . . . Thus, rather than holding the statute as written to be an unconstitutional violation of the First Amendment, the District Court ruled on the statute as it was proposed to be applied . . . .

332 U.S. at 9.

a. Void for vagueness cases

When a statute is attacked on vagueness grounds under the due process clause of the fifth or fourteenth amendments, the theory of the attack is that the party against whom the statute is to be applied did not receive fair warning that his conduct was prohibited.[80] Thus, if his conduct was such that he could clearly tell that it was prohibited by the statute, it is immaterial that the statute may be broadly phrased and that another could be misled. Moreover, where wilfulness is an essential element of the crime, one convicted cannot allege that the statute was vague.[81] But when the statute by its terms prohibits expression a party can attack it on grounds of vagueness, even though it is clear that he knew his conduct was prohibited by it and in fact was not misled. He is, in essence, attacking the statute on the grounds that others can be misled, although he himself was not.

This principle was first applied in *Stromberg v. California*[82] where the Court struck down a statute prohibiting the raising of a red flag as a symbol of opposition to organized government. The defendant conducted a daily ceremony at which children saluted the flag of the Soviet Union and pledged allegiance to the "workers' red flag and to the cause for which it stands." The Court held the statute unconstitutional on the grounds that it was vague and indefinite rather than that as applied, it violated the expression rights of Miss Stromberg. But, we may ask whether the defendant was actually misled by the statute. Could she doubt that it prohibited the raising of the flag of the Soviet Union?[83]

It cannot be contended that what Miss Stromberg was doing constituted opposition to the party in power by a party out of power. This was not a case of a Democrat hoisting a red flag to show that the Republicans were incompetent. Indeed, such a Democrat might not know whether his conduct was prohibited by the statute; but Miss Stromberg was not raising the Red Flag for this purpose. This is not to say that the state could, consistent with first amendment guarantees as read into the fourteenth, punish such conduct as was involved here. But it can hardly be contended that the reason it could not punish it was that the defendant could not tell that her conduct was prohibited by the statute. It certainly appears that the Court acted on the theory that the statute would not give fair warning to the opposition Democrat or others in

80. See Jordan v. DeGeorge, 341 U.S. 223 (1951) and Connally v. General Constr. Co., 269 U.S. 385 (1926).

81. See United States v. Ragen, 314 U.S. 513 (1942). The Court in that case observed that "A mind intent upon wilful evasion is inconsistent with surprised innocence." *Id.* at 524.

82. 283 U.S. 359 (1931).

83. Where a criminal defendant attacks a statute on grounds that he could not tell whether his exercise of expression was prohibited by the statute, he may have a lesser burden of proof than one who alleges that he could not tell whether non-expression conduct was prohibited. See Smith v. California, 361 U.S. 147 (1959). This is another example of the preferred status given to first amendment rights by the Court.

his position rather than that it did not give fair warning to Miss Stromberg. Since Miss Stromberg could tell that her conduct, whether substantively permissible or not, was prohibited by the statute, it was not vague as to her; but it was struck down because others wishing to exercise their expression rights might not be able to tell whether their conduct was prohibited, and might decide not to exercise such rights. The *in terrorem* effect of the statute on first amendment rights justified a decision on the question of vagueness without regard to whether the assailant had, in fact, been misled. Thus the Court, in effect, permitted her to prevail by asserting the rights of others.

This technique was also applied in *Herndon v. Lowery*.[84] There a state statute punished as an attempt to incite insurrection any attempt to induce others to join in combined resistance to the authority of the state. The accused would have had to contemplate resistance by force, but this resistance might occur during any time in which he might reasonably believe his inducement to be operative. The Court held that the statute was unconstitutionally vague and indefinite. It stated:

> Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of the opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government, he may be convicted of the offense of inciting insurrection.[85]

The above-quoted language would indicate that the basis for the Court's decision was that one who engaged in academic discussion of governmental overthrow could not know whether his conduct was prohibited by the statute, since such conduct might sometime in the future lead to violent insurrection.

But Herndon was not engaged in any discussion of abstract doctrine. In his dissent Justice Van Devanter elaborately sets out his activities.[86] He was actively attempting to create a Communist Party group and to recruit members. He distributed pamphlets advocating violence. Many appeals were made to Negroes to rise up in rebellion against the unfair treatment which they were receiving. While it would be doubtful if under the circumstances his conduct created any "clear and present danger," or could otherwise be punished under the substantive law of free expression, nonetheless, it seems incorrect to say that he was unaware that his conduct could be classified as an attempt to incite an insurrection. Again, the statute was not vague as to him, but he was permitted to attack it on those grounds; if it was vague it was so as to those engaging in abstract discussion or the like. If the Court had followed traditional standing principles, Herndon would not have been able to attack the statute on vagueness grounds. By permitting such an attack, the Court indicated that a different rule of standing applied to statutes such as these.

Another application of the principle was demonstrated in *Winters v. New*

84. 301 U.S. 242 (1937).

85. *Id.* at 262.

86. *Id.* at 264-78.

York,[87] where this standing approach was applied to a statute despite a limiting construction given to it by the state court. There the statute, as construed by the state court, prohibited distribution of a magazine principally made up of news or stories dealing with criminal acts of bloodshed or lust "so massed as to become vehicles for inciting violent or depraved crimes against the person." The Court held that the statute was unconstitutionally vague and indefinite, saying:

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face . . . .[88]

The Court did not consider whether Winters himself was misled; nor did it examine the magazines in question to determine whether they were so clearly within the statutory ban that a distributor could not be misled as to those magazines. Justice Frankfurter, dissenting bitterly on this point, referred to the playing of " 'Hamlet' without Hamlet."[89] Thus, the overbreadth of the statute furnished the policy reasons for permitting such standing, but the substantive ground on which the defendant prevailed was that the statute was vague and indefinite as to others who would not be apprized of its prohibitions.

At first glance, *Dennis v. United States*[90] might appear to represent a contrary approach, but a closer analysis of the case reveals that it does not. There the defendants, indicted under the Smith Act,[91] attacked the statute on the grounds, *inter alia*, that it was vague and indefinite. Although the statute by its terms prohibited the exercise of expression, the Court limited its decision to whether the defendants were misled and held that since they were not, they could not contend that the language could mislead others.

When the Court considered the vagueness argument, however, it was of the opinion that it was no longer dealing with a statute restricting expression by its terms. Earlier the Court had applied a limiting construction to the statute, emphasizing that the statute did not prohibit abstract discussion. It expressly distinguished the posture of this case from the *Thornhill* line, observing:

> We are not here confronted with cases similar to *Thornhill v. Alabama* . . . where a state court has given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge . . . .
>
> The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that the petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas."[92]

87. 333 U.S. 507 (1948).
88. *Id.* at 509.
89. *Id.* at 527.
90. 341 U.S. 494 (1951).
91. 54 Stat. 670, 18 U.S.C. § 2385 (1940).
92. 341 U.S. at 501-02.

As was done in *Winters*, the statute was viewed in light of its interpretation. But in *Winters*, the statute by its terms restricted expression even after the limiting interpretation by prohibiting the dissemination of certain types of magazines. On the other hand, the Court in *Dennis* was of the opinion that the construction placed upon the statute made it one prohibiting action rather than expression.[93] If the statute only prohibited action and was being applied to alleged acts of expression, there was no reason to permit the defendants to attack its vagueness without regard to whether they had been misled. The statute is like that involved in *Petrillo*,[94] and the scope of review is correspondingly more narrow.

b. Licensing cases

Where a statute or ordinance[95] requires the obtaining of a license from a public official to perform an activity involving expression, a person seeking a license can attack the validity of the licensing provisions on the ground that the standards governing the issuance of licenses are improper without regard to whether he would be entitled to receive a license even under concededly proper standards. His own conduct which might justify the withholding of a license under the circumstances is not considered by the Court. Thus, the assailant is prevailing by asserting the rights of others.

The issue is presented most clearly in the case of *Kunz v. New York*.[96] Kunz was a minister who held religious meetings in the New York streets. Under the ordinance it was necessary to obtain a license to conduct such meetings. Kunz had obtained a license in 1946 and proceeded to hold street meetings. Justice Jackson in his dissent relates the tenor of such meetings:

> At these meetings Kunz preached among many other things of like tenor, that "The Catholic Church makes merchandise out of souls," that Catholicism is "a religion of the devil," and that the Pope is "the anti-Christ." The Jews he denounced as "Christ-killers" and he said of them, "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't."[97]

93. The soundness of such an interpretation is highly questionable. But here, it is significant to note that the Court limited the construction to avoid considering whether the statute would be constitutional if it prohibited academic discussion. Since the petitioners were not engaged in abstract discussion, the Court's considering the challenge on the merits —as it did when it construed the statute so as to avoid the constitutional question—indicated that it was not departing from the rule of broadened standing. It assumed that if the statute prohibited academic discussion, then the word "advocacy" made the statute one prohibiting expression on its face rather than one prohibiting action. As stated previously, the construction of "advocacy" to mean action rather than expression is questionable. But since it was so construed, it can be contended that then the Court was not dealing with a statute prohibiting expression, so there was no need to apply a broadened rule of standing. See the discussion of this point in note 68 *supra*.

94. See note 77 *supra* and accompanying text.

95. Most of these cases involve ordinances as they deal with ostensible attempts by municipalities to control public streets and parks.

96. 340 U.S. 290 (1951).

97. *Id.* at 296.

As might be expected, violence erupted at these meetings and the permit was revoked. In 1948 Kunz applied for another permit, which was denied on the basis of his prior conduct. Kunz continued his activities nonetheless, was arrested, and convicted by the trial court of holding a religious meeting on the streets without a permit.

During the term in which the Court decided this case, it also decided *Feiner v. New York.*[98] There the defendant in addressing a street meeting had uttered language as vituperative as that of Kunz, though it dealt with politics rather than religion. A crowd gathered, traffic was blocked and violence was threatened. When Feiner refused to leave after a police request to that effect, he was arrested for disorderly conduct and breach of the peace. The Court upheld the conviction on the ground that the police could prohibit his speaking because of the disturbance he was causing on the streets.[99]

In *Kunz* the Court paid no attention to the prior conduct of the defendant. It held that since the ordinance authorized the official to deny a permit to speak on the streets without prescribing any standards, the ordinance was unconstitutional and Kunz could not be convicted for holding a meeting without such a permit. The Court did not consider whether the official would have been justified in refusing Kunz a permit on the basis of his past conduct.[100] Perhaps he would not have been.[101] On the other hand, if the Court had extended the principles in *Feiner* to a prior restraint situation, a denial might have been justified since the speech of Kunz had as disruptive an effect as that of Feiner. In any event the nature of the defendant's conduct was not considered; the violence that had resulted from his preaching and could be expected to arise from future preaching was of no import. Instead, the basis of the decision was that the ordinance contained no standards to guide the administrative official.[102] Since the statute on its face purported to license ex-

98. 340 U.S. 315 (1951).

99. In *Feiner* the indictment was under an ordinance that did not prohibit expression, but was applied to conduct involving expression. The entire opinion was based on an analysis of his conduct. This indicates that often the substantive result may well depend on the type of ordinance involved, since the Court employs a different rule of standing depending on the terms of the prohibition.

100. We are here concerned only with the propriety of the action of the police commissioner in refusing to issue that permit. Disapproval of the 1948 permit application by the police commissioner was justified by the New York courts on the ground that a permit had previously been revoked "for good reasons." It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance.

340 U.S. at 293.

101. It may be that the government can punish subsequently certain activities that it cannot prohibit prior to their commission. See Near v. Minnesota, 283 U.S. 697 (1931).

102. The Court's approach was severely criticized by Mr. Justice Jackson in his dissent:

> This Court, however, refuses to take into consideration Kunz's "past" conduct or that his meetings have "caused some disorder." Nor does it deny that disorders

pression, the Court, following the technique employed in *Thornhill, Winters, Stromberg,* and *Herndon* passed on the validity of the ordinance on its face and did not limit the assailant's standing through consideration of nature of his conduct.

Other cases have employed the same technique. In *Saia v. New York*,[103] the Court invalidated an ordinance forbidding the use of sound amplification in public places without the permission of the Chief of Police on the ground that the ordinance prescribed no standards for the exercise of his discretion. The Court did not consider the argument that Saia had been refused a permit because of the revocation of his previous one on grounds that persons were annoyed by the sound. The details of the prior usage did not appear, but according to the Court's language, it would have been immaterial that, for example, he used it at 3:00 a.m. outside of a residential neighborhood.[104] On the other hand in *Kovacs v. Cooper*,[105] where the ordinance prohibited only amplifiers making "loud and raucous noises" the Court based its decision on the validity of the standards as applied to the defendant and did not consider possible unconstitutional applications.

In *Cantwell v. Connecticut*,[106] the Court declared unconstitutional a Connecticut statute requiring a permit to solicit for religious purposes where the issuing official had the power to determine whether the purpose was religious. The court did not preliminarily consider whether the person challenging the statute had engaged in fraudulent practices, though the stated purpose of the statute was to prevent fraud and it was contended that the statute could constitutionally be applied in such a case. So too, in *Hague v. CIO*,[107] the Court struck down as lacking proper standards an ordinance forbidding the leasing

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> will probably occur again. It comes close to rendering an advisory opinion when it strikes down the ordinance without evaluating the factual situation which has caused it to come under judicial scrutiny. If it were not for these characteristics of the speeches by Kunz, this ordinance would not be before us, yet it is said that we can hold it invalid without taking into consideration either what he has done or what he asserts a right to do . . . .
>
> * * * *
>
> We should begin consideration of this case by deciding whether the opportunity to repeat his vituperative street speeches is within Kunz's constitutional rights, and here he must win on the strength of his own right.

340 U.S. at 303-05.

103. 334 U.S. 558 (1948).

104. The Court observed that Saia previously had a permit, but that it was not renewed upon expiration because some persons were said to have found the sound annoying. It then went on to say:

> In the next [case] a permit may be denied because some persons may find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.

334 U.S. at 562.

105. 336 U.S. 77 (1949).

106. 310 U.S. 296 (1940).

107. 307 U.S. 496 (1939).

of a public hall to speakers who intended to advocate unlawful governmental change, without first securing a permit from the Director of Public Safety. The Court did not consider whether a permit could properly have been denied to the particular plaintiffs. And in *Joseph Burstyn, Inc. v. Wilson*,[108] the Court held that a statute prohibiting the showing of motion pictures without a license and permitting the withholding of a license on the ground that the film was "sacrilegious" did not prescribe adequate standards for the censor. It was not considered whether the distributor was misled or that he was unaware that this movie came within the ban. Nor was it considered whether the state could constitutionally have denied a license to the particular movie.

Admittedly in these cases the standing question was not raised as such. However, the Court's disposition of the substantive issues indicated its application of the broadened rule of standing. The Court looked to the terms of the statute itself and did not consider whether it was constitutional as applied to the conduct of the assailant. The fact that such conduct was not considered is evidence of the approach that the Court follows. That this approach is often demonstrated by negative inference—the Court does not interpose a standing objection, even though in view of the facts it would be justified in doing so on the basis of its approach in other types of cases—does not weaken its validity.

The point is reaffirmed in the cases where the Court has upheld the denial of a license. In such cases the distinction is clearly drawn between the procedural and substantive aspects of the "void on its face" doctrine. Where the standards are sufficient, the ordinance is not unconstitutional for all purposes. It can only be unconstitutional if the official applies it arbitrarily. However, the assailant has been permitted to attack the sufficiency of the standards themselves without reference to his own conduct. Thus the "void on its face" doctrine can support standing, though substantively it does not serve to invalidate the statute. The distinction was demonstrated in *Poulos v. New Hampshire*,[109] where the Court held that an ordinance which required a permit to use the public parks for an assembly, but which granted no discretion to withhold a license, was constitutional. There were provisions for review of the denial of a license at a particular time—the official could adjust schedules—and the defendant did not pursue them. This did not bar his standing to test the validity of the standards, which the Court considered on the merits.[110] Again, the defendant's conduct had no effect on the scope of review.

108. 343 U.S. 495 (1952).

109. 345 U.S. 395 (1953).

110. The Court held that his conviction for holding the meeting without a license even if arbitrarily denied did not offend due process because of the provision for review. It is significant to note that his failure to seek review barred him from testing whether the permit was properly denied, but did not bar him from testing the validity of the standards under which the official was authorized to act. If the standards had been insufficient, the conviction would have been reversed. At this juncture it should be noted that when a licensing statute by its terms restricts expression, one seeking to attack it need not exhaust his administrative remedies by applying for a license, though this is required in other instances.

c. Obscenity cases

A third area in which the application of this standing principle may be seen involves the situation where a state in an effort to reach obscenity and other similar matter has applied too broad a standard. There the person against whom the standard is to be applied may test the validity of the standard without reference to whether his material is obscene or is otherwise reachable by the state.

This was evidenced in *Butler v. Michigan*,[111] where the Court invalidated a statute prohibiting the publication of a book having a potentially deleterious effect on youth. The basis of the decision was that such a statute limited the adult public to reading only that which was suitable for children. The state had argued that the book in question was obscene and thus not entitled to the protection of the first amendment.[112] The Court did not consider this argument, but, assuming standing, proceeded to consider the validity of the statutory criteria. If the book was actually obscene, then the defendant prevailed by asserting the first amendment rights of others—publishers whose works though not obscene, might have a deleterious effect on youth—since under such circumstances he would possess no first amendment rights of his own.

This approach becomes important when we consider what type of cases may confront the Court when it seeks to apply the prurient interest test to state statutes regulating obscenity. If the statute is interpreted by the state as applying only to prurient matter, there will be no problem—the Court can consider the validity of the state's determination as to what is prurient.[113] But if the statute has a broader construction so that the state, in effect, has applied a different test, then the question is presented as to whether the defendant has standing to test the validity of the statutory criteria without reference to the quality of his writing, or whether the Court will first look to the material in question to determine whether it is obscene within the meaning of the prurient interest test and if so, deny him standing to allege that the statute would be unconstitutional as applied to material not prurient.

It is submitted that the Court will look to the statutory definition without regard to whether the material in question is obscene. This is exactly what it did in *Butler*, though the standing question was not discussed as such. The same policy reasons that justify a broader scope of standing in the vagueness

See Staub v. City of Baxley, 355 U.S. 313 (1958), and Lovell v. Griffin, 303 U.S. 444 (1938).

111. 352 U.S. 380 (1957).

112. Brief for the Appellee, pp. 26-32. See also the Brief of the State of Texas as Amicus Curiae urging affirmance at pp. 3-8. The argument was that the book was obscene generally rather than that it was obscene under any particular standard.

113. See Roth v. United States, 354 U.S. 476 (1957), where the Court enunciated the prurient interest test as the constitutionally acceptable definition of obscenity. See also Alberts v. California, 354 U.S. 476 (1957) (Court upheld the validity of a state statute as applied to an obscene publication) and Kingsley Corp. v. Board of Regents, 360 U.S. 684 (1959) (Court upset a state determination as to obscenity because the state court improperly applied the prurient interest test).

and license cases justify it here. The existence of too broad an obscenity statute may inhibit publication of material falling within the statutory ban, for one may not relish the time and expense entailed in securing a Supreme Court determination that the statute is unconstitutional as applied to his publication. The existence of an overbroad statute could have the effect of limiting publication only to matters that might not offend traditional mores and attitudes toward sex. The validity of such a statute should be subject to question by anyone affected by it irrespective of whether his publication is entitled to first amendment protection.

Thus, there can be no question that where a statute on its face restricting expression is involved, it may be challenged on grounds that it violates constitutional rights of others, though as applied to the particular assailant it might be constitutional.[114]

We may now consider this principle of standing still further and ask whether the same considerations that justify the lowering of the bar on standing where a statute by its terms restricts expression justify a departure where a statute dealing by its terms with other conduct is being applied to an act of expression. Let us suppose that in *Petrillo* [115] it had been held that the statute did apply to the type of picketing in which Petrillo was engaged, and that such application was constitutional. We may then inquire whether it would have been open to Petrillo to argue that in other applications to expression situations, which were within its scope, it would be unconstitutional, so that the Court should hold the statute unconstitutional as applied to any expression situation.

It must be remembered that the policy behind the lowering of the standing bar is to prevent the inhibition of expression rather than to prevent unconstitutional applications. Here the inhibiting factor is not as dangerous. One wishing to engage in expression, to the extent that he does examine applicable statutes to determine in advance the validity of his conduct,[116] would logically seem less likely to be deterred by a statute that does not by its terms prohibit expression, though capable of application to it, than one restricting expression on its face. Moreover, a statute restricting expression is far more likely to be publicized—by the conflicts between church groups, legislative committees, civil liberties organizations and the like.

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114. This exception was again recognized by the Court in the *Raines* case:

> This Court has indicated that where the application of these rules [no standing to assert constitutional rights of others] would itself have an inhibitory effect on freedom of speech, they may not be applied.

362 U.S. 17, 22 (1960) (citing *Thornhill* and *Smith*).

115. See note 77 *supra* and accompanying text.

116. As long as we punish people for violations of statutes, and assume knowledge, we must assume that they have read them and can understand what conduct is prohibited. Moreover, since statutes restricting expression are usually publicized, it may be more realistic to assume that such statutes and ordinances have been perused than in the case of other less controversial enactments.

In conclusion, the principle that a statute by its terms restricting expression is subject to attack, without regard to the conduct of the assailant, represents a technique employed by the Court to protect first amendment rights from undue inhibition. Such an approach reflects the Court's adjustment of competing values—those of judicial restraint and freedom of expression. Through this doctrine the Court also avoids the deleterious consequence which would result from too rigid an application of standing principles. Moreover, this technique circumvents the dangers of the advisory opinion which rules of standing were developed to prevent. The Court views the statute in application rather than in a vacuum; it sees the effects of such a statute on expression and can more readily determine how the statute can be applied unconstitutionally. It merely refuses to limit the scope of review to the statute's validity as applied to the assailant's conduct. For these reasons the *Thornhill* doctrine represents a wise policy of standing.

STANDING TO ATTACK ACTION AS VIOLATIVE OF CONSTITUTIONAL RIGHTS OF OTHERS

In the previous section, we have discussed cases in which a party, designated the assailant,[117] has sought standing to assert the constitutional rights of third parties coming within the terms of a statute which has been properly applied to him. In one instance, he claims that the exercise of constitutional *jus tertii* is presently inhibited by an overly broad statute which by its terms restricts expression; in another, he claims that these rights will be abridged in the future through the application to third parties of another but inseparable provision of the statute in question. In both instances, then, the case is postured around the present effect or future application of a *statute*. In the cases to be discussed in this section, on the other hand, it is the result of the *court action* itself and not of a statute, though one is usually involved, which is alleged to abridge constitutional *jus tertii*. Although the two situations are related, the criteria applied by the Court in determining whether standing should be permitted are distinct.

BEHIND THE TILESTON RULE—A FACTOR APPROACH

Whether an assailant may ask the Court to pass on the rights of third parties who are adversely affected by the action he is challenging—to vindicate their rights or, what is more likely, to protect his own—is considered to revolve around three significant cases among the number in which the issue has been raised directly or inferentially. The general rule is often thought to be stated in *Tileston v. Ullman*,[118] where a doctor was denied standing to attack a state anticontraceptive statute in a declaratory judgment action on the grounds that it endangered the lives of three of his patients. The principal exceptions to this rule are represented by *Barrows v. Jackson*,[119] where a white vendor had

117. See note 5 *supra*.
118. 318 U.S. 44 (1943).
119. 346 U.S. 249 (1953).

standing to claim that the entry of a judgment in damages against him for breach of a restrictive covenant based on race would deny equal protection to "unidentified, but identifiable" non-Caucasians, and *NAACP v. Alabama ex rel. Patterson*,[120] where an association had standing to refuse to produce membership lists on the ground that such disclosure would violate the rights of its members to freedom of association.

Although it is true that in the majority of these cases standing to assert the rights of others will not be found, it is inaccurate to speak of *Tileston* as embodying the general rule and the other two cases as representing an exception to it. Rather, it is submitted that there are four factors which the Court takes into account in determining the scope of standing to assert the rights of others—(1) the interest of the assailant, (2) the nature of the right asserted, (3) the relationship between the assailant and third parties, and (4) the practicability of assertion of such rights by third parties in an independent action—and that a decision to grant or to deny standing in a given case will depend on the relative presence or absence of the various factors.

Four Factors

The factor designated interest of the assailant is not determinative in its own right; rather it identifies the scope of examination to be given the other factors. For example, if the assailant has standing to sue in his own right, a consideration of the three other factors determines whether he should have standing to assert the constitutional rights of another. If he does not have standing to sue, then the issue to be resolved is whether he is the proper representative of the third party. Generally, the assailant is a defendant who is asserting that if threatened action is taken against him, rights of third parties will be violated in the process. Here, his interest is greatest. Less frequently, he is a plaintiff who is sufficiently affected by the action he is challenging to have standing to sue in his own right, but the ground on which he attacks the action is that it violates the constitutional rights of others. Occasionally, the assailant, a plaintiff, has no standing to sue. Here, his interest is least intense. Thus, the interest of the assailant is a function both of his standing to sue and his party position.

Secondly, there is the nature of the constitutional right asserted. It is not suggested that there is a rigid hierarchy of constitutional values susceptible of categorization. But it takes no great imagination to realize that certain constitutional guarantees inspire a greater sensitivity on the part of the Court than do others.[121] In the cases where the question of standing to assert the

120. 357 U.S. 449 (1958).

121. The sensitivity may vary from time to time. Certainly at present the Court is more concerned with protecting values such as freedom from racial discrimination and expression than it is with, let us say, property or contractual rights. The same might not have been true fifty years ago. This is not to attempt to predict the substantive nature of the Court's decision in a case involving these values, but merely to indicate the Court's concern with them. Therefore, it is relevant to consider whether the right asserted holds a high place in the Court's hierarchy of constitutional values.

rights of others has been raised, the nature of the right asserted can be placed roughly into five categories: (1) expression; (2) life, liberty and privacy; (3) procedural rights; (4) property and contractual rights; and (5) equal protection, which may be further classified into discrimination as to race and other discrimination. The cases should be considered in terms of which of these rights were involved.

Next, there is the relationship between the assailant and the person or persons whose rights he is asserting; to the extent that there is a pre-existing and substantive relationship, rather than a fortuitous one, the Court has indicated that it is more apt to grant standing. Here, too, there are perhaps five classes into which the relationships may be divided for purposes of analysis: (1) professional relationships; (2) race or class relationships; (3) commercial relationships; (4) the relationship between a defendant and others affected by the statute or process under which he is made liable; and (5) the relationship between an association and its members.

Finally, there is the practicability of assertion by third parties. Very often, where assertion by the injured party is impractical or unlikely, a party adversely affected may assert the former's rights. Although an analysis of the cases reveals that this factor is not conclusive, it is probably the most significant of the four factors.

It should be noted that no one factor is conclusive, though all are relevant, albeit in different degrees and with reference to the context of the case. It is merely submitted that to the extent a consideration of all justifies a finding of standing, to that extent the Court is more apt to permit such standing.

Analysis of the "Big Three": Tileston, Barrows, NAACP

Let us first analyze the so-called "Big Three" cases in light of these factors. In *Tileston v. Ullman*,[122] a physician instituted a declaratory judgment action in the state court,[123] alleging that the statute prohibiting the dissemination of contraceptive information[124] and the use of such devices endangered the life of one of his patients and thus constituted a deprivation of life without due process. He did not allege that the statute was an unreasonable interference with his liberty to practice medicine.[125] The Court held that this claim could only be raised by the patient and dismissed the appeal, stating:

122. 318 U.S. 44 (1943).

123. There was no question of standing under state law. 129 Conn. 84, 26 A.2d 582 (1942). But the fact that standing is permitted under state law in and of itself has no effect on the assailant's standing in the federal courts. See Doremus v. Board of Educ., 342 U.S. 429 (1952).

124. CONN. GEN. STAT. §§ 6246, 6562 (1930).

125. It is difficult to explain the failure to do so. Perhaps it was thought that a stronger case would have been presented if the challenge were based on a deprivation of life rather than on a deprivation of liberty to practice medicine. But even if this were the case, it would have been prudent to join the challenges. As will be indicated by the subsequent discussion, had the plaintiff demonstrated that he was adversely affected, he might have had standing to assert the rights of the patient.

> We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's . . . . His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf.[126]

Taking the holding on its face it would seem to state "black letter law" to the effect that there is no standing to assert constitutional rights of others. However, when the case is analyzed in terms of the various factors that, it is submitted, the Court considers, the holding does not appear so sweeping. In the first place, the assailant was the plaintiff in a declaratory judgment action and did not claim standing to sue in his own right, since he did not allege that his practice of medicine was being adversely affected. His standing to be in Court at all depended on his capacity as the representative of his patient. We may ask whether standing would have been denied if the case arose in a different posture. Suppose the doctor were a criminal defendant charged with a violation of the statute and he defended on the ground that the statute infringed the rights of his patient; or suppose that he showed he was adversely affected by the statute so that he had standing to sue, but alleged that the basis of unconstitutionality of the statute was that it infringed the rights of the patient. These questions, of course, are not answered by the case when limited to its *stare decisis* holding.

Concededly, the nature of the right asserted—the preservation of life as protected by the due process clause—ranks high in the hierarchy of constitutional norms. Moreover, the relationship between a doctor and a patient is a significant one[127] and one which imposes weighty duties upon the physician. It can be classified as a professional relationship in the classic sense. Further, the action assailed restricted an incident of the relationship, the right of the doctor to give and the patient to receive medical advice necessary to the patient's well-being.

However, there was no bar to the patient's asserting her rights on her behalf. She as well as the doctor could have instituted the action, as patients have now done.[128] Nor would the assailant be harmed by the denial of standing; contrast this with the situation where a criminal conviction would have been sustained. So the actual holding was, in terms of the factors involved, that despite the high value of the nature of the right asserted and the significant relationship between the assailant and the possessor, where the assailant had

126. 318 U.S. 44, 46 (1943).

127. This is evidenced by the growing tendency to protect confidential communications from disclosure at trial. Many states have created such a privilege by statute. See Rule 27(b), PROPOSED UNIFORM CODE OF EVIDENCE and the drafters' comments.

128. Buxton v. Ullman, Poe v. Ullman, 367 U.S. 497 (1961). This time the Court refused to pass on the merits on grounds that the issue was not ripe for adjudication because the statute had not been enforced.

no standing to sue in his own right and it was practicable to require the possessor to assert the right on his own behalf, standing would be denied. When viewed in this light, the decision seems correct.[129]

In view of an analysis of these factors, the decision to permit standing in *Barrows v. Jackson*[130] could have been readily predicted. There suit was brought by the convenantee of a restrictive covenant based on race against the covenantor, a white person, who had conveyed the property to a Negro. Previously the Court had held that the enforcement by a state court of such a covenant against the Negro vendee by enjoining his occupancy of the land was state action denying equal protection.[131] Here no Negro was a party to the suit; but the Court held that the white vendor had standing to assert that enforcement of the covenant against him by way of damages would deny equal protection to unknown non-Caucasian vendees and decided the merits in his favor. The Court then went on to say that the vendor was the proper person to assert the rights of the vendee, since the awarding of damages would be to give effect to the restrictive covenant, that is, to punish the vendor for not continuing to discriminate against Negroes in the use of property.[132]

Here, in contrast with *Tileston*, the assailant had standing to be in court in his own right.[133] A denial of standing would not have left him unscathed; rather he was about to be affected by a substantial money judgment against him. Thus there was no question of standing to sue as the representative of another, but of standing to raise the rights of another as a defense to an action against him. The interest of the assailant is the same as that of a doctor asserting the rights of his patient as a defense to a criminal action brought against him for violation of a statute.

The nature of the right asserted was equal protection—here, freedom from discrimination on account of race. Concededly the relative importance of constitutional rights may vary at different times. Whether freedom from such discrimination holds a high place in the hierarchy of values universally—and there is good reason to believe that it does—it certainly did at the time the case was decided and does presently.[134] That the Court was particularly concerned with the denial of such rights by means of restrictive covenants and with giving further scope to its previous decision denying enforcement of such covenants by way of injunction, is evident from its denunciation of such cove-

129. It is interesting to note that the precise situation presented in *Tileston* has not since arisen. The closest possibility would be the case of Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), discussed at note 194 *infra*. In that case Justice Jackson, in his concurring opinion, would have permitted an association standing to sue on behalf of its members. The other cases in this area have involved a party who had standing to sue or be in court in his own right and who was asserting the rights of others as the basis for voiding the action taken or threatened against him.

130. 346 U.S. 249 (1953).

131. Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).

132. 346 U.S. at 258-59.

133. *Ibid.* Where the assailant is a defendant, there is no question as to standing to sue.

134. See Brown v. Board of Educ., 347 U.S. 483 (1954) and its progeny.

nants throughout the portion of the opinion dealing with standing as well as that dealing with the merits.[135] Certainly the Court considered that it was protecting an important value by permitting standing in this context.

The most determinative factor was the inability of the Negroes whose rights were asserted to protect them effectively themselves. The victims of the possible discrimination would not be known;[136] it would be difficult to prove that the vendor's decision not to sell was due to his fear of being mulcted in damages. But even if the Negro vendee could show that this was the only basis of the vendor's refusal, it is difficult to see how, in the absence of a contract to sell, he could have an action. Moreover, there would be no way, even under broad intervention rules, that a Negro could become a party to any proceedings to protest that the awarding of damages to a vendee would impair his right to purchase property in the future. Therefore, if these rights were to be protected at all, it was imperative that the white vendor have standing to assert them. This explains why the Court considered the case as representing an exception based on the impracticality of assertion to the general rule expressed in *Tileston*. As will be indicated by the subsequent discussion, however, standing has been denied even where the possessor could not effectively assert the rights on his own behalf and has been granted even though he could.

The only factor that on the surface might not unquestionably serve to support a finding of standing would be the relationship between the parties. The relationship between a vendor and a vendee, a commercial one, is not considered of the type that would permit one to have standing to assert the rights of the other. However, the relationship between the vendor and potential vendees was something more. The Court emphasized the connection between the covenant and the state court's action, pointing out that the punishment of the defendant by the awarding of damages would be for his refusal to discriminate against persons because of their race. Herein lies the real nature of the relationship. The relationship is that between one whose actions protect the rights of a minority—irrespective of his motives for doing so[137]—and the minority itself. One who, in fact, acts to protect the rights of a minority should have standing to assert their constitutional rights when an attempt is made to call him to account for his actions.

Thus, the assailant in *Barrows* has standing to be in court on his own behalf and a right of high value in the hierarchy of constitutional norms, a significant relationship between the assailant and the persons whose rights he is asserting and the impracticability of assertion of the rights by the possessors

135. Note the Court's reference to the "unworthy covenant in its last stand." 346 U.S. at 259.

136. The Court refers to them as "unidentified but identifiable"—persons who might want to purchase a house, but could not do so because of racial restrictive covenants.

137. His motives well may have been to realize a higher profit. Throughout the various areas of substantive law, however, motive, as distinguished from intent, has never been very significant. We should look to the effect of conduct rather than the subjective reasons supporting it.

were present. The presence of all these factors indicates that this clearly was a proper case where one should have standing to assert constitutional rights of others.

By the same token, the decision to allow standing in *NAACP v. Alabama*,[138] was equally predictable. In that case the state sought to compel the NAACP, a foreign corporation, to produce its records, including the names and addresses of its members. It produced all the records save the names and addresses of its members.[139] For this refusal the NAACP was held in contempt. Before the Supreme Court the NAACP argued successfully that disclosure of the names of the members would violate the members' right of assembly embodied in the due process clause of the fourteenth amendment.

The Court noted that the association was asserting both its rights and those of its members, but said that the substantive basis of the argument was applicable to the members rather than the association.[140] It then discussed the necessity for permitting the association to raise the members' rights, for if the members were required to do so, their rights would be nullified by the very act of assertion.[141] Finally, the Court re-emphasized that the association was the proper party to assert the rights of its members and noted that the association was being adversely affected, a fact further justifying the allowance of such standing.[142]

Here, as in *Barrows*, the assailant had standing to be in court in his own right; the association was a criminal contemnor, and if it could not assert the rights of its membership, it would have suffered a heavy fine. Moreover, the Court observed that the association was likely to suffer diminished membership if production were compelled.[143] In view of the latter factor, it might have had standing to sue had it been a plaintiff and had it been seeking to enjoin enforcement of the state's action.[144] The nature of the right asserted was freedom of assembly and association, a constituent part of freedom of expression as protected by the first amendment and one that enjoys a very high place in the hierarchy of constitutional norms.[145]

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138. 357 U.S. 449 (1958).

139. It is not difficult to envisage why the organization would not wish to identify its members in Alabama. The action of the state in attempting to procure the identification of such members demonstrates how the processes of government can be used to enable private persons to exert extra-legal pressures on minorities and unpopular groups. As further discussion will indicate, an effective way of counteracting pressures designed to nullify the constitutional rights of others, may be to permit a third party—not subject to the same pressures—to assert them.

140. 357 U.S. at 458-59.

141. *Id.* at 459.

142. *Id.* at 459-60.

143. *Ibid.*

144. See the opinions of Justice Burton, Justice Black, Justice Douglas and Justice Frankfurter in Joint Anti-Fascist Refugee Comm. v. McGrath, *supra* note 129. Prospective withdrawal of patrons furnished grounds for standing in Pierce v. Society of Sisters, note 184 *infra*.

145. See note 76 *supra* and accompanying text.

The relationship involved was that between an association and its members. Furthermore the alleged constitutional violation related to an incident of such membership, the right to remain anonymous. The relationship was more than one of formal membership; the purpose of the association is to protect the rights of Negroes and its membership consists primarily of Negroes and those others who are interested in the welfare of members of that race. The Court emphasized that the association was the "medium through which its individual members seek to make more effective the expression of their own views."[146]

Finally, here there was even a stronger case on the question of practicability of assertion than there was in *Barrows*. The action of the state was claimed to be unconstitutional because it would have deprived the members of their right to remain anonymous and keep their membership in the association secret. Clearly, the only possible way that their rights could have been effectively protected was to permit the association to assert them.

Again, a consideration of all four factors justified a finding of standing. It is true that the question of practicability of assertion may have been paramount. But the Court throughout its discussion of standing emphasized the presence of the other three factors. This was certainly a proper case to have permitted standing.

Application of Factor Approach

Cases in Which Standing Was Denied

We may now examine the significance of these factors as found in the cases where standing to assert constitutional *jus tertii* has been denied. For purposes of analysis these cases have been divided into three categories according to the nature of the relationship between the assailant and the person or persons whose rights he is attempting to assert: (1) cases in which there is no pre-existing relationship between the assailant and third parties; (2) cases in which the assailant is asserting due process or equal protection rights of parties with whom he has an existing commercial relationship; and (3) cases in which a corporation is asserting the rights of its shareholders.

a. No pre-existing relationship

In the cases about to be discussed there is no pre-existing relationship between the assailant and the third party whose rights he is asserting as found in both *Barrows* and *NAACP*; analytically, the basis of the relationship is fortuitous. This is not to say that in a given case there may not be a close relationship between the assailant and the person whose rights he is asserting. But generically, the relationship is merely between a defendant and one affected by the statute or process being employed against him. In addition, since the assailant in these cases is a defendant, there is no issue as to standing to sue; the defendant is clearly adversely affected by the outcome of the suit.

146. 357 U.S. at 458.

The factors which may vary from case to case are the nature of the right asserted and the practicability of assertion by the possessor.

In *Blair v. United States*,[147] the Court held that a witness called before a grand jury investigating improper conduct in primary elections could not refuse to answer questions on the ground that the grand jury was operating under an unconstitutional statute and consequently had no jurisdiction to indict. Since the witness did not allege that he was subject to indictment under the statute in question, he was, in effect, asserting the rights of third parties to run for office in the absence of governmental interference, or relating to the ground of the challenge, the right not to be convicted in the absence of congressional power to regulate the activity. Here there was no question as to the ability of the third party to assert his own rights. If any one were indicted for violation of the statute, he could raise the question of congressional authority on a motion to dismiss the indictment or on review of his conviction. Even assuming that the right asserted was one of "high value," the fortuitous nature of the relationship and the practicality of assertion support the Court's refusal to permit standing.[147a]

In the same vein is *Blackmer v. United States*.[148] There, pursuant to statutory authority the United States ordered an American residing abroad to appear as a witness on behalf of the United States in a criminal trial, and upon his refusal, held him in contempt and sequestered his property in the United States. He contended unsuccessfully that the statute denied criminal defendants compulsory process to obtain witnesses residing abroad. The nature of the right involved was a procedural one. Most significantly, a criminal defendant denied the opportunity to subpoena such witnesses could raise the question of whether he was denied compulsory process on appeal from his conviction. So again, irrespective of the nature of the right asserted, the relationship and the practicability of assertion fully justify the denial of standing.

Other grounds of attack in such a situation have been that the statute involved denied equal protection to third parties. In *Rosenthal v. New York*,[149] the defendant was convicted of violating a statute prohibiting junk dealers from buying certain materials second-hand without first ascertaining whether the seller had a legal right to transfer title. Defendant claimed that the legislature had discriminated against those commercial interests outside the pale of the statute but whose property was subject to the same risk as that of the protected groups. It is extremely doubtful whether the allegedly "unprotected"

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147. 250 U.S. 273 (1919).

147a. For a more recent decision in which the fortuitous nature of the relationship and practicability of assertion by third parties led to a denial of standing, despite the presence of a "high value" right, see McGowan v. Maryland, 366 U.S. 420 (1961) (employees of a store who were convicted for violating a Sunday closing law were denied standing to allege that the statute infringed upon the religious freedom of those who kept sabbath on a day other than Sunday).

148. 284 U.S. 421 (1932).

149. 226 U.S. 260 (1912).

third parties could frame an action challenging the statute in their own right.[150] Yet, despite such impracticability of assertion by the third parties, standing was denied. This holding must be considered in light of the fortuitous, and indeed anomalous, nature of the relationship between defendant and the unprotected commercial interests and the relatively low value of the right asserted—equal protection of property in a criminal statute.[151] Furthermore, it indicates that impracticality of assertion alone does not automatically permit standing.

So too, in *Missouri, Kansas & Texas Ry. v. Cade*,[152] it was held that a corporate defendant could not object to the imposition of a compensatory damages clause in a civil action on the ground that the clause was for the benefit of individual plaintiffs only and did not extend to corporations. Here the relationship was not fortuitous. The assailant, a corporation and potential plaintiff in such an action, was a member of the class whose rights he was asserting. Apparently, the right to be included in the benefits of a compensatory damages provision is not sufficiently significant to justify the granting of standing to someone other than its possessor.

Another area in which it appears that there is no standing to assert the constitutional rights of third parties is where property belonging to one other than the criminal defendant has been the subject of an illegal search and seizure and this property is sought to be introduced against the defendant.[153] Such evidence is inadmissible in either federal or state prosecutions of the victim of the search because it violates his constitutional rights as protected by the fourth and fourteenth amendments.[154] The question then is whether a criminal defendant who is not the actual victim of the search has standing to suppress the evidence on the ground that the constitutional rights of another were infringed.

The Supreme Court has never expressly held that one does not have standing to assert the rights of the victim in such a context, but the lack of standing

150. The most that the court could do would be to declare that the statute was unconstitutional, since it discriminated against the other owners by not giving them the protection that it gave others similarly situated. And since the assailant would not benefit by the declaration of unconstitutionality, the Court would probably refuse to pass on his claim on that ground. See, *e.g.*, Tyler v. Judges, 179 U.S. 405 (1900), where in a similar situation the Court emphasized that the assailant could not benefit from a declaration of unconstitutionality nor claim that he was harmed by enforcement of the statute.

151. Compare this to a situation in which the state explicitly denied the protection of the criminal law to certain minority groups. There the basis of the classification would appear to be unreasonable and standing might be permitted. All this is intended to suggest that a change of one variable may cause a different result.

152. 233 U.S. 642 (1914).

153. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

154. Prior to the *Mapp* case there had been some dispute as to whether in the federal courts the exclusionary rule was required by the fourth and fifth amendments or whether it was a rule of judicial administration. See Wolf v. Colorado, 338 U.S. 25, 28 (1949). The Court in the *Mapp* case adopted the position that the origin of the rule was constitutional. 367 U.S. at 657.

seems clear. In the first place, to suppress evidence in the federal courts the defendant must be "a person aggrieved" under Rule 41(e) of the Rules of Criminal Procedure. Although the Court has interpreted this provision broadly,[155] the defendant must nonetheless show either a possessory interest in the property or presence at the time of the search. Secondly, the body of law developed prior to the adoption of the new rules defining the standing of a defendant to suppress such evidence [156] indicates that the Court would not permit suppression on the grounds that the rights of the victim have been violated.[157]

Assuming as we must that standing does not exist here, we may proceed to analyze the factors. The defendant has standing to be in court in his own right. The relationship between the defendant and the victim is not significant; it simply arises from the fact that the rights of the victim were infringed by the process in which the defendant was convicted. The right of privacy, however, rates particularly high in the constitutional scale of values. And of more significance, it is doubtful whether the victim of the search will challenge the legality of the search in his own right. He may move that the property be returned to him as illegally seized only if it is not contraband, which it may frequently be.[158] And if he claims ownership of contraband or even suspect property, he may be confessing his guilt to another crime or at least rendering himself suspect.[159]

Consequently, the nature of the right asserted and the impracticability of assertion by the possessor would tend to support standing on the part of the defendant to suppress the evidence. Only the analytical basis of the relationship between the assailant and the person whose rights he is asserting militates against this—and in practice there is often a personal relationship between them.[160]

A further area where standing to assert the rights of others appears denied is where a criminal defendant [161] has been tried by a jury from which certain classes have been improperly excluded by the state, but the defendant is not

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155. See Jones v. United States, 362 U.S. 257 (1960) and United States v. Jeffers, 342 U.S. 48 (1951).

156. For a discussion of these rules see Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U.L. Rev. 471 (1952).

157. The Court's inclination toward this position is evidenced in Goldstein v. United States, 316 U.S. 114, 121 (1942). The lower federal courts have unanimously denied such standing. See, *e.g.*, United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956).

158. As contraband it would be subject to confiscation.

159. See Jones v. United States, 362 U.S. 257, 261-64 (1960), for discussion of this in regard to the defendant-victim. The non-defendant victim should be put in no worse a position.

160. It is submitted that the Court should permit standing in such a situation, and this point will be developed more fully in that section of the article dealing with special problems of standing.

161. A party to a civil proceeding would be in the same position. As the cases usually involve a criminal defendant, it will be convenient to refer to the party in those terms.

a member of that class. Specifically, the issue is whether a white man, for example, who has been convicted by a jury from which Negroes were systematically excluded has standing to allege that the conviction should be reversed, not because of any prejudice to him, but because Negroes in that community were denied the same opportunity to participate in the governmental process as whites. It should be noted that the question will not arise in the federal courts which are subject to the Supreme Court's supervisory powers because improper jury selection necessitates a reversal of the conviction.[162]

To obtain a reversal of a conviction in a state court on the ground of improper jury selection the defendant must prevail on the basis of his own right. If he is a member of the excluded class, prejudice is presumed and his trial under such circumstances constitutes a denial of equal protection.[163] If he is not a member of the excluded class, his attack must be grounded on the denial of due process; he must show that he has been prejudiced by the exclusion of that group.[164]

A challenge on due process grounds was presented in *Fay v. New York*,[165] where the defendant, a union leader tried for extortion, claimed he was prejudiced by the exclusion of laborers and women from the "blue ribbon" jury. With respect to his various challenges the Court observed that:

> This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class . . . . Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment.[166]

The Court passed on defendant's claim that laborers were improperly excluded —there was an identity between defendant and the excluded group—but found the claim lacking in merit. It also passed on his objection that women were improperly excluded, even though he was a male. As to the exclusion of women the Court noted that there was no identity and assumed without deciding that defendant had standing to raise the issue.[167] In so ruling, the Court made it particularly clear that prejudice was not to be presumed by the mere showing that the jury is not representative of a cross-section of the community. It must be noted again that the Court did not expressly pass on the issue of standing. But to the extent *Fay* indicates that a showing of prejudice is required, and that the mere lack of proportional representation is not sufficient

162. See, *e.g.*, Ballard v. United States, 329 U.S. 187 (1946). For application of this principle in civil cases see, *e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

163. See, *e.g.*, Avery v. Georgia, 345 U.S. 559 (1953); Pierre v. Louisiana, 306 U.S. 354 (1939); Strauder v. West Virginia, 100 U.S. 303 (1879).

164. But the exclusion of a particular group may, of course, be prejudicial in itself. All he need show is that any defendant in his position would be prejudiced by such an exclusion.

165. 332 U.S. 261 (1947).

166. *Id.* at 287.

167. *Id.* at 289.

by itself to establish such prejudice, a defendant will probably be denied standing to assert that there has been a denial of equal protection to the members of the excluded class.

As in the case of standing to suppress evidence illegally seized from another the only factor justifying a denial of standing is the lack of a pre-existing relationship between the assailant and the persons whose rights he is asserting. The sole connection is that these rights have been violated in the process of his conviction. The right to participate fully in an aspect of the governmental process and, in so doing, to be protected from discrimination on the basis of race or class membership supports a lowering of the standing bar. Moreover, it is difficult to see how a member of an excluded class could frame an action in which he could enforce his right to serve on the jury. To the extent that one must assert his own rights and has no standing to institute an action on behalf of the class generally, he could not sue to compel the state to end the improper discrimination.[168] Assuming that members of the excluded class are on the jury lists but never called, it is difficult to see how an individual could compel the state agency to place his name on the panel called. Thus in order to maintain an action, he, an individual, would have the nearly impossible task of showing that he personally would have been called but for his membership in the excluded group, since he does not have the right to be called for jury duty but only the right not to be excluded because of race or class membership.

b. Commercial relationship

Another class of cases involves the situation where, on the basis of a commercial relationship, actual or potential, the assailant has asserted property, contractual or equal protection rights of the other party. In all these cases the assailant had standing to be in court in his own right either as a defendant or as a plaintiff adversely affected by the action. In each instance, he was denied standing to attack the statute on the grounds that it infringed the rights of the other party to the relationship.

Thus in *Davis & Farnum Mfg. Co. v. Los Angeles*,[169] assailant had contracted to deliver machinery to a gas works not yet constructed. Subsequent to the execution of this contract, the city enacted an ordinance prohibiting the erection of the gas works in the projected area. Assailant argued that the ordinance was invalid because it impaired the obligation created by his contract with the gas company and also because it deprived the latter of property without due process of law. The Court dismissed the bill on the grounds that the assailant had an adequate remedy at law against the gas company on the contract and indicated that he lacked standing to assert the property rights of the gas company. The right involved was due process protection of property, which at the time was receiving a great deal of protection. However, as the

168. See notes 222-24 *infra* and accompanying text. As that discussion will indicate, the result cannot be achieved by a class suit either.

169. 189 U.S. 207 (1903).

other relevant cases indicate, the Court has consistently denied standing to assailants to assert the property rights of third parties. Today with even less emphasis on the substantive protection of property rights, it certainly cannot be said to be one ranking high in the hierarchy of constitutional norms. As the other cases indicate as well, the Court is rarely persuaded by the presence of a commercial relationship to permit standing to assert the rights of the other party to the relationship.[170] Moreover, in this case the other party could sue to enjoin the municipality from enforcing the ordinance against him. Thus the Court's denial of standing is not difficult to understand.

Of like import is *Williams v. Eggleston*,[171] where a municipality alleged that the state's cancellation of a franchise to maintain a toll bridge, the cost of operating which now was to be borne by the municipality, impaired the obligation of the contract between the state and the holder of the franchise. Here the nature of the right asserted, freedom from impairment of the obligation of the contract, was of the same nature as the one involved in the *Davis* case, and the basis of the relationship, of course, was purely commercial. Here too, not only would the holder of the franchise be able to obtain redress if this was an obligation, but, as the Court emphasized, the state had already settled with him. So, standing should have been denied, if for no other reason, on the ground that the possessor of his rights did not wish them asserted.

In *Erie R.R. v. Williams*,[172] the solicitous employer who objected to a statute requiring him to pay some of his employees on a semi-monthly basis on the grounds that it denied equal protection to the other employees not included in its benefits fared no better in his challenge. It seems quite anomalous to hear such a challenge from an employer whose only interest was in avoiding such payments to any employees. However, it would not have been possible for the other employees to assert their rights, if any. It is difficult to see how one not included in the benefits of a statute could obtain a declaration of unconstitutionality on those grounds, since he would not benefit from such a decision.[173] Thus the factor of impracticability of assertion would tend to favor a finding of standing. But when weighed against the nature of the right asserted, the right to be included within the economic benefits of a statute, and the relationship involved, the denial of standing does not seem surprising.

Another case where the basis of attack was that the third party was not included within the benefits of the statute was *Sprout v. City of South Bend*.[174] There a motor carrier attacked a statute requiring it to take out insurance with a company authorized to do business in the state, on the ground that it

170. Note that the relationship in *Barrows* was not solely between a vendor and vendee, but between a person whose actions protected the rights of a racial minority and the minority itself.

171. 170 U.S. 304 (1898).

172. 233 U.S. 685 (1914).

173. The fact that the legislature might reenact another statute including them within its provisions would seem too tenuous a basis for inferring possible benefit.

174. 277 U.S. 163 (1928).

discriminated against insurance companies not authorized to do business in the state. Here the assailant had no actual commercial relationship with the third person whose rights he was asserting, but at most a potential one, and were his attack successful, he would not be required to enter into any relationship at all. Again, however, the out-of-state insurer could not frame an action in which he could attack the statute. As indicated before, the nature of the right asserted—equal protection as regards economic benefit—coupled with the nature of the relationship was more persuasive than the impracticability of assertion.[175]

c. Corporate relationship

Apart from the business relationship cases, another type of situation in which standing has been denied is where a corporation seeks to assert the rights of its security holders. In *American Power & Light Co. v. SEC*,[176] a corporation attacked a statute authorizing the SEC to dissolve holding corporations. The corporation raised constitutional objections in its own right and asserted further that the security holders were denied due process because there was no provision for notice of the proceedings to them. The Court held that the corporation had no standing to attack the statute on those grounds. It went on to note, however, that the security holders involved did receive actual notice, and that, in any event, the lack of notice would only void the particular proceedings and not the statute.

The right asserted was that of procedural due process. The relationship was one between a business association and its members. Arguably the relationship between a corporation and its members, despite its commercial overtones, is more conducive to justifying standing because of its fiduciary aspect. However, procedural rights, at least insofar as they relate to protection of property interests, do not seem to hold an especially high place in our scheme of constitutional values. The Court observed that the absence of notice would only serve to void the particular proceeding, and that actual notice would be sufficient, though not formally required.[177] Moreover, a security holder could have

175. The "easiest" cases consist of those in which the nature of the right and the relationship are the same as those in the preceding cases and, in addition, the third parties could have asserted their rights at the appropriate time. See, *e.g.*, Provident Institution for Sav. v. Malone, 221 U.S. 660 (1911) (bank challenged a statute dealing with presumably abandoned deposits on the ground that the lower rate of interest which the state allowed a discovered depositor or his heirs violated their rights); Arkadelphia Milling Co. v. St. Louis, S.W. Ry., 249 U.S. 134 (1919) (carrier attacked rates on the ground that they discriminated against small shippers).

176. 329 U.S. 90 (1946).

177. Compare the treatment with that in Wuchter v. Pizzutti, text accompanying notes 29-31 *supra*. There the fact that the assailant had actual notice did not prevent his challenging the statute as applied to another. Actual notice, though sufficient to satisfy due process, did not prevent a challenge that the statute denied due process to one not receiving such notice.

subsequently attacked a proceeding to the extent his rights were affected if he had not received notice. There was then no problem of impracticability of assertion.

Cases In Which Standing Was Permitted

Let us now turn our attention to the cases where standing to assert the rights of others was permitted.[177a] In one type of situation teachers and schools have been permitted to challenge interference by the state with the prerogatives of education by asserting the right of parents; similarly, the parents have been permitted to raise those of the teachers. Because the assailant has had standing to sue in his own right in these cases, the question has been whether standing exists to assert the rights of the other party to the professional relationship. In the second type of situation to be discussed, an organization has been permitted to assert the rights of its members.

a. Teacher-parent-pupil relationship

A group of cases came before the Supreme Court involving statutes passed in the aftermath of the First World War, prohibiting the teaching of a foreign language to school children. These were principally directed against the teaching of German in many Lutheran parochial schools.

177a. Certain cases in which standing to assert the rights of third parties is granted lie beyond the pale of the general approach. These are the cases in which the Court must adjudicate the rights of a third party in order to determine whether the rights of the assailant have been violated. There, if the action of the government is unconstitutional as applied to the third party, it will also be as to the assailant. For example, in Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944), a bank had standing to assert that a statute providing for the administration of abandoned bank deposits violated the rights of the depositors, since if the statute was unconstitutional as applied to the depositors or their heirs, the bank might not be discharged from its obligation to them. Unless it was discharged, it would be required to pay twice for the same obligation, which would be a denial of due process.

Another example is International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944), where a corporation had standing to assert that the rights of its stockholders would be infringed by a statute requiring the withholding of dividends, since the corporation would remain liable for the amount withheld if the statute was unconstitutional as applied to the stockholders. The same principle was applied in Alaska Steamship Co. v. Mullaney, 180 F.2d 803 (9th Cir. 1950), holding that an employer had standing to challenge the validity of the withholding tax provisions of an income tax statute as applied to its employees.

Finally, in Hanson v. Denckla, 357 U.S. 235 (1958), the court held that the beneficiaries of a trust had standing to assert that the procedural due process rights of a non-resident trustee were violated in a proceeding to void the trust, since he received only substituted service. The beneficiaries had a direct interest in the outcome of the litigation, and in a sense, the trustee was their representative in the proceeding, so that any violation of his rights was a violation of theirs.

These cases shed no light on the approach the court follows where the rights are not intertwined, but they furnish an example of where standing to assert the constitutional rights of third parties is permitted. Note the analogy between these cases and those discussed in note 35 *supra*.

Two of the cases, *Meyer v. Nebraska*,[178] and *Bartels v. Iowa*,[179] involved criminal prosecutions of teachers for violation of the statute, while another, *Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*,[180] involved an injunction proceeding brought by the synod against a state official. In *Bartels*, the state argued that the teacher could not attack the statute on the ground that it violated the rights of others,[181] but the Court, holding the statute unconstitutional, found it violated the rights of parents and pupils as well as the rights of the teacher under the fourteenth amendment.[182]

The rights asserted by the teacher in *Bartels* were the liberty of pupils to acquire knowledge and that of parents to control the education of their children. In view of the regard we have for education and for the freedom of the parent from governmental interference in the upbringing of the child,[183] these rights are clearly very significant. The relationship between parent and pupil on one side, and teacher, on the other, can be classified as a professional one. Here, however, there was no bar to the parents and pupils asserting their rights on their own behalf. They would have had standing to sue to enjoin the enforcement of the prohibition. This case and the one following indicate that standing may often be permitted, even though the possessor could effectively assert his own rights.

A more striking example is presented by *Pierce v. Society of Sisters*,[184] where suit was brought by corporations operating private schools to enjoin the operation of a statute prohibiting the attendance of children at such schools. There, the Court invalidated the statute on the ground that it constituted an unreasonable interference with the constitutional right of parents to direct the upbringing of their children. Although a question of standing was decided, it was one of standing to sue as opposed to standing to assert the rights of the parents. The Court found that the school's property rights were jeopardized in that the statute might inhibit attendance and force the schools out of business.[185]

178. 262 U.S. 390 (1923).

179. 262 U.S. 404 (1923).

180. *Ibid.* (companion case).

181. The argument by counsel has been summarized by the editors of the Supreme Court Reports, Lawyers Edition, as follows: "Plaintiff in error cannot insist that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether, in the case he presents, the effect of applying the statute is to deprive him of his property without due process of law." (Citations omitted.) 67 L. Ed. 1048.

182. 262 U.S. at 400-01.

183. See, *e.g.*, Board of Educ. v. Barnette, 319 U.S. 624 (1943), holding that a school board could not require the children of Jehovah's Witnesses to salute the flag and demonstrating that the powers of the state over children may be restricted despite the broad sweep of the *parens patriae* doctrine.

184. 268 U.S. 510 (1925).

185. It was also alleged that the case was not yet ripe for judicial review, since the statute was not to take effect for two years. But upon the schools' showing that pupils were presently dropping out because of the statute, the Court found the requisite ripeness.

The analysis of the factors in *Pierce* is the same as that in *Meyer*. The right asserted was liberty to educate children; the relationship was the professional one between a school and the parents of its pupils. The parents could have asserted their rights on their own behalf in a proceeding for injunctive relief or as a defense to an action instituted against them for violating the statute. Again, the standing of the schools to assert the rights of the parents was not questioned.

In *Adler v. Board of Education*,[186] the question presented was whether parents or pupils may assert the rights of the teacher. There, suit was brought by both parents and teachers to challenge the validity of a state statute making membership in organizations advocating the unlawful overthrow of the government grounds for a finding of ineligibility for employment in the public schools. The standing of the parents to sue was based on the fact that the children were adversely affected by inhibitions imposed on their teachers; standing of the teachers was grounded on the restriction of their liberty to belong to organizations of their choice, though none of them had violated the act.[187] However, plaintiffs argued solely that the constitutional rights of the teachers to free expression were violated. The standing of the parents to assert the rights of the teachers was not questioned, and the Court immediately proceeded to a consideration of the merits despite the fact that where one of two plaintiffs lacks standing, the Court will usually indicate that the suit is dismissed as to him.[188] Although Justice Frankfurter dissented on the question of standing to sue,[189] he did not question the standing of the parents to assert the rights of the teachers.

The right involved here was freedom of expression as well as freedom to teach free from such restrictions. The nature of the relationship is the same as that involved in the *Pierce* and *Meyer* cases. And here the teachers whose rights the parents were asserting were parties to the very suit, thus there could be no question as to practicability of assertion.

These cases would seem to indicate that where parents and teachers have standing to sue, each has standing to assert the rights of the other relating to the relationship and its incidents. In *Augustus v. Board of Public Instruction*,[190] however, a district court held that Negro pupils were not denied equal protection by the board's policy of assigning teachers on the basis of race and had no standing to claim that the policy also denied equal protection to the teachers. Either the district court was unaware of the standing policy of the Supreme Court in such cases or the standing of parents, pupils and teachers to assert each other's rights has not been fully clarified.

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186. 342 U.S. 485 (1952).

187. It is difficult to see how the teachers had standing to sue. See 342 U.S. at 504 (Frankfurter, J., dissenting).

188. See, *e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Hague v. CIO, 307 U.S. 496 (1939).

189. 342 U.S. at 502-04.

190. 185 F. Supp. 450 (N.D. Fla. 1960).

b. Organization-member relationship

The other class of cases where such standing has been found involves the assertion by an organization or its representative of the rights of its members. In *Kedroff v. St. Nicholas Cathedral*,[191] the Court held that a state statute transferring control from the Bishop of the Russian Orthodox Church appointed by Moscow to one appointed by the American synod violated the religious freedom of the bishop and of the members of the church. The bishop was a defendant in an ejectment action for possession of the church property and no member was a party to the case. The standing of the bishop to assert the rights of the members was not questioned. The right involved was freedom of expression. The relationship between the church as represented by the bishop and its members was certainly a close one. Moreover, it is doubtful to see how the members could have raised their rights independently. Perhaps they would have been able to intervene in the ejectment proceeding, but under traditional intervention policy this was unlikely.

In *American Communications Ass'n v. Douds*,[192] the union had been deprived of the services of the National Labor Relations Board because union officers had refused to execute prescribed non-communist affidavits. The union was granted standing to allege that the requirement violated constitutional rights of both the officers and of the members. Two cases were joined for decision. In one, the union was a complainant in an unfair labor practice proceeding and relief in its favor had been stayed until the officers would sign the prescribed affidavits; in the other, the union sought to enjoin the NLRB from refusing to service it. Thus the union had standing to be in court in its own right. The values involved were freedom of expression of both officers and members and the liberty of the members to elect Communists to office. The relationship between a union and its members is in many respects a fiduciary one; in any event the purpose of the union is to serve the needs of the members. As to practicability of assertion, perhaps the union members could have sought to enjoin the NLRB from denying the union access to the Board in the first case, but this would seem unlikely in the second since at such time the Board would not have refused to entertain the union's complaint. As to the utilization of the Board's services the real party in interest was the union rather than the members. Under the circumstances the union clearly seemed the proper party to assert the rights of its members.[193]

In *Joint Anti-Fascist Refugee Committee v. McGrath*,[194] an association brought suit to enjoin the Attorney-General from continuing to list it as a "subversive organization." Membership in such organizations was considered by the Loyalty Review Board as grounds for the dismissal of government em-

191. 344 U.S. 94 (1952).

192. 339 U.S. 382 (1950).

193. It is also interesting to note that whether the rights of either were violated would depend on the same substantive considerations. The Court weighed both the interest of the union and that of its members and officers against the same conflicting interest, that of the government to protect interstate commerce against political strikes.

194. 341 U.S. 123 (1951).

ployees as disloyal. The association contended that to list it as subversive without providing notice and a hearing constituted a denial of procedural due process. The immediate issue was whether the association was sufficiently affected to have standing to sue. Four Justices found standing to sue and ruled for the association on the merits.[195] Justice Jackson, however, was of the opinion that the organization was not sufficiently affected to have standing in its own right. But he asserted that the organization should have standing to sue to protect the rights of its members.[196] His emphasis on the identity of the association and the members as a factor in determining the standing of one to assert the rights of the other foreshadowed the language of the Court in *NAACP v. Alabama.*[197]

According to Justice Jackson both freedom of expression and the opportunity to be employed by the government without being subject to improper classification were involved. The right may also be analyzed in terms of procedural due process—the right of an organization to notice and hearing where the consequence of governmental action is to inhibit expression of its members. These rights are significant. The practicability of assertion would also justify a finding of standing. As was pointed out, the employee could not contest the correctness of the designation in a loyalty proceeding. He probably could not seek to enjoin the listing of the organization as "subversive" on the grounds that his rights were affected until he actually sought government employment or was in danger of discharge due to such membership.[198] Moreover, the relationship between the association and its members is particularly important when the fact of membership itself is made the subject of official action.[199] Justice Jackson contended that in such circumstances the relationship itself is sufficient to support standing to sue to support the members' rights.[200]

195. Justice Frankfurter noted that the organization would lose and was losing members, since the statute would affect the members' opportunity for government employment. He also pointed out that the organization could not secure meeting places, tax exemptions and the like. Justices Burton, Douglas and Black based standing on the right of an organization to carry on its work free from defamatory statements.

196. The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.

341 U.S. at 187.

197. 357 U.S. 449 (1958).

198. See United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), in which the Court observed that although no one had the right to government employment, it could not be denied on such arbitrary grounds as race, religion or political affiliation.

199. See also International News Serv. v. Associated Press, 248 U.S. 215 (1918), where, in a nonconstitutional posture, it was held that the Associated Press was the proper party to sue to enjoin the defendant from sending out news garnered from the Associated Press on the ground that the action was unfair to the member newspapers.

200. The extent to which an association should have standing to sue or otherwise assert the rights of its members will be discussed in the section of the article dealing with special problems of standing.

Reassessment of the Factors

We may now proceed to a final evaluation of the significance of the various factors. The interest of the assailant is not determinative in its own right; rather it serves to identify the scope of examination of the other factors. If the assailant has standing to sue, a consideration of the three other factors determines whether he should have standing to assert the constitutional rights of another. If he does not have standing to sue, then the question is whether under the circumstances he is the proper representative of the third party. In both *Tileston* and *Pierce,* for example, a significant constitutional right was asserted and the relationship involved was a professional one. They can be distinguished only on the ground that in *Pierce* the assailant had standing to sue in his own right while in *Tileston* he did not.

The Court is properly hesitant to permit standing where the assailant seeks to sue in a representative capacity. If standing is denied, presumably there will be no harm to the assailant. Furthermore, this is the type of case where officious intermeddling is possible. On the other hand, as Justice Jackson's concurrence in *McGrath* indicates, there may be times where a suit in a representative capacity on behalf of others is proper and an attempt to delineate such instances will be made in the section of the article dealing with the special problems of standing. But as regards an analysis of the various factors, the interest of the assailant indicates primarily the extent to which the other criteria must be explained; and when the assailant does not have standing to sue in his own right, he has a correspondingly greater burden of showing that he is the proper party to assert the rights of others than when he does have such standing and seeks to assert the rights of others to support his claim for relief.

Similarly, the nature of the right asserted, whatever its position in the hierarchy of values, does not compel a finding of standing. In *Tileston,* for example, standing was not permitted despite the fact that the right to life was involved. On the other hand, the nature of the right does have a negative effect. Where a right which does not rate "high" in the constitutional scheme is asserted, standing will not be permitted. The term, "high," as indicated previously, does not refer to the substantive disposition of the case, but to whether the Court evidences a special concern toward perpetuating the values inherent in the recognition of that right. In cases involving expression, standing has generally been permitted.[201] In cases involving property or contractual rights such standing has been denied even at a time when the Court was overly diligent, perhaps, in the substantive protection of those rights. Similarly, standing is rarely granted to assert the procedural rights of others, or the right to be included within the benefits conferred by a statute.[202]

There need not always be standing to assert the rights of others when a

201. Compare the broadened scope of review where statutes on their face restrict expression, as discussed in the second section of the article.

202. See notes 149-52 *supra* and accompanying text.

"high value" right such as expression is involved, but it would appear that the Court is more apt to grant standing to assert expression rights of others, for example, than it is property rights. To the extent that the Court is giving special protection to a particular right or value, it may be willing to take a broadened view of standing when that right is asserted, though it is the right of one other than the assailant. Moreover, despite protestations to the contrary, the Court may be eager to clarify the law in a particular area in order to prevent the inhibition of the values embodied in that right because of uncertainty as to its exact scope.[203] In summary, all that can be said is that a significantly stronger case for allowing standing is presented when the third party right that is asserted rates "high" among the constitutional norms than when it is of a neutral nature.

Although the presence of one type of relationship is not controlling in all contexts, it is evident that the nature of the relationship is quite important. To the extent that a significant rather than a fortuitous relationship can be shown, the Court is more readily disposed to permit standing. A commercial relationship and the relationship between a defendant and others who happen to be subject to liability under the same statute or process have never supported standing. On the other hand, where the parent-teacher-pupil relationship has been involved, the Supreme Court has invariably permitted standing, though it was not impractical to require the other party to assert its own rights. Indeed, standing has been permitted in every instance in which a professional relationship has been involved, with the exception of *Tileston*, and there the question was whether the relationship was sufficient to support standing to sue on behalf of the other party and not standing to assert his rights.

The more plausible the relationship, the more likely the Court is to permit standing. For example, the attempt of an association to assert the rights of its members when action is taken against them because of such membership receives more favorable consideration than the attempt of an employer to withhold benefits from some employees on the ground that others have been unfairly excluded from the scope of the statutory scheme. Thus the significance of the relationship is a major factor in determining whether there is standing to assert the rights of others, though, in all probability, very special circumstances must be shown in order for the Court to permit standing to sue on the basis of a relationship alone.[204]

Finally, there is practicability of assertion, perhaps the most important factor, though not by itself controlling. Since standing is "only a rule of practice,"[205] it would follow that the opportunity third parties possessed to assert their rights independently would weigh heavily in the Court's determinations. Where standing was denied despite the impracticability of assertion either the relationship was fortuitous, as in the cases involving illegal searches and jury

203. This is particularly evident in Barrows v. Jackson, 346 U.S. 249 (1953).

204. In the section dealing with special problems of standing we will examine some situations in which such circumstances exist.

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

discrimination, or was solely commercial, as in the statutory "benefit" cases —and in the latter instances, it was highly doubtful that any rights were actually violated by the statute.[206] In *Barrows* and *NAACP*, where the nature of the right asserted and the relationship were significant, the Court has emphasized impracticability of assertion as the primary basis for its granting of standing. Moreover, where the rights could effectively be asserted by the possessor, standing has usually been denied.[207] Since the allowance of standing to assert rights of others represents a departure from basic principles of judicial review, there must be strong necessity for making such a departure. Of the four enumerated factors the impracticability or impossibility of assertion by the possessor furnishes the strongest justification. It relates to the actual enforcement of rights rather than to the identity of the person asserting them. When impracticability or impossibility is not shown, standing is granted only if the action challenged impairs "high value" rights and the assailant's relationship to the possessor is particularly significant.

In summary, the Court has adopted a factor analysis, as discussion of the cases indicates, to determine whether it will permit standing to assert the rights of third parties, and a given case should be approached in light of this technique. Yet, the Court has rarely articulated its consideration of these factors as in *Barrows* and *NAACP*. Its failure to do so has obscured the process by which the scope of such standing is determined. This is unfortunate for the development of the factor technique has been wise. It can be applied to a particular case with more ease and certainty than can a general rule subject to numerous exceptions.

SPECIAL PROBLEMS OF STANDING

There are some problems of standing to assert the rights of others which deserve special attention. In adopting a flexible approach to the problems of standing to assert the rights of others, the Court has charted a wise course. Through these self-imposed limitations on judicial review, the Court preserves the balance of intergovernmental relations—both among the three branches of the federal government and between the states and the federal government—but does not use a principle of constitutional procedure to abdicate its funda-

206. To the extent that it seems there is no real substantive issue, the Court might be more likely to dismiss the question on standing grounds rather than go into a discussion of the substantive issue. On the other hand, it might be just as convenient to dispose of the issue summarily, assuming standing. But a finding of standing either express or implied does not always indicate that the Court will decide in favor of the assailant on the substantive issue, as the *Douds* and *Adler* cases indicate. Where the Court has gone into the standing question extensively as in *Barrows* and *NAACP*, it found for the assailant on substantive grounds. All that can be said is that where the Court denies standing where there is no real issue as to the merits, such a determination is perhaps entitled to less significance than where there is a real issue, as in *Tileston*.

207. The parent-pupil-teacher cases represent an exception. As will be demonstrated in the section dealing with special problems, perhaps the relationship itself is sufficient to support standing in these instances.

mental rule of adjusting rights through constitutional interpretation.[208] Yet, to accomplish both objectives more fully it may be necessary for the Court to broaden certain principles of standing and to develop certain corollaries to supplement the existing criteria. In this connection it is particularly important that the Court take into account the presence of various extra-legal factors which may vitally affect the enforcement of constitutional rights and use the device of standing to mitigate against their adverse effect. These special problems of standing to assert the rights of others will be discussed in the context of the development of proposed corollaries to the existing standing principles.

Corollary I. *Where a party to a professional relationship is adversely affected by action dealing with the subject matter of the relationship, he should have standing to assert that the constitutional rights of the other party to the relationship are infringed by such action.*

The purpose of this corollary is to clarify and effectuate the rule of the *Pierce* and *Meyer* cases and to insure that where the assailant has standing to be in Court in his own right, the existence of a professional relationship will support standing to assert the rights of the other party to the relationship. This in no way departs from *Tileston*, for it is not suggested that a professional relationship should support standing to sue on behalf of the other party. The interest of the assailant is the only way of distinguishing *Tileston* from *Pierce* and *Meyer*, and this distinction is significant. Where standing is denied in such a case as *Tileston*, neither the assailant nor the relationship will be adversely affected, since the other party can sue to protect his interest in the relationship.

Where action will be taken against one party to the relationship, however, the rights of the other in that relationship may be destroyed before he can initiate action to protect those rights. Let us suppose, for example, that in the *Pierce* case the statute was constitutional as applied to the schools, but unconstitutional as applied to the parents.[209] If, as a result of an adverse decision, the school had closed, the relationship between the school and the parent might be destroyed before the parent could challenge the statute as violative of its rights. This emphasizes the necessity of permitting standing to assert another's rights where the assailant is adversely affected and has standing to sue in his own right. Unless an initial injury to the relationship sufficient to give the assailant standing to sue is so required, the assailant not only obtains an opportunity to solicit an advisory opinion as to the rights of the other party, but may solicit it at a time when the other party has no interest in asserting his rights because they have not been endangered. This may lead to a situation in which the rights of the third party can not be presented adequately or fully

208. See Cooper v. Aaron, 358 U.S. 1 (1958), for a refreshing affirmation of the principle that it is the responsibility of the Supreme Court to interpret the Constitution when necessary to decide the rights of individuals affected by governmental action.

209. Note that the decision does not support this inference. The fact that the Court did not expressly pass on the validity of the statute as applied to the schools is inconclusive.

and may very well be imposed upon rather than protected. This distinction between the disposition of cases in which standing to sue does or does not exist and the reasons for it are implicit in the *Tileston* and *Pierce* cases.

The next requirement is that the relationship be a professional one as distinct from a purely commercial one. A professional relationship implies a fiduciary or trust concept—that of a doctor-patient, lawyer-client, teacher-pupil-parent—that is lacking in a purely commercial relationship. Therefore, a party to such a relationship seems logically a more proper party to assert the rights of the other than a party to a commercial one. Moreover, a consideration of the cases indicates that where professional relationships are involved the right asserted is generally one rating high in the constitutional scale—freedom of expression or the right of the parents to control the education of the child. Such rights are rarely asserted in the cases involving non-professional relationships.

The basis for the proposed corollary is that since the action challenged deals with the nature of the relationship itself, it may be more realistic, both procedurally and with a view toward extra-legal considerations, to permit one party to assert the rights of the other. Consider, for example, *Brewer v. Hoxie School Dist.*[210] There a court of appeals held that a school board had standing to sue under the Civil Rights Act[211] to enjoin defendants from interfering with the operations of the schools on a desegregated basis. The board claimed that such interference deprived the newly-admitted Negroes of equal protection, since the interference was calculated to force the board to rescind its desegregation order. It seems clear that the interference of the defendants did not violate any constitutional rights of the board, but the board was adversely affected by it, since it could not carry on its work. Such interference did violate the rights of the pupils, but they would have had to show that the board was considering rescinding the order, which it was not, in order to have standing to enjoin the action.[212] Thus, unless the board had standing to assert the constitutional rights of the pupils, it could not proceed under the statute. In this instance the rights of the pupils could be protected more effectively by giving the board standing to assert them than if the pupils had asserted them on their own behalf.

Another case where one's rights with respect to a professional relationship could be protected more effectively by the other party was *NAACP v. Patty.*[213] In that case the NAACP challenged the constitutionality of a number of state statutes directed against it, one of which dealt with the improper practice of

210. 238 F.2d 91 (8th Cir. 1956).

211. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13 (1871), 42 U.S.C. § 1985(3) (1952).

212. For a consideration of the necessity of showing adverse action against a third party, an employer, where the government action against him is alleged to infringe the rights of the assailant, an alien employee, see Truax v. Raich, 239 U.S. 33 (1915).

213. 159 F. Supp. 503 (E.D. Va. 1958), *rev'd on other grounds sub nom.* Harrison v. NAACP, 360 U.S. 167 (1959) (Court should have applied the doctrine of equitable abstention.).

law. The district court held that insofar as the NAACP was engaged in rendering legal assistance, it had standing to assert that the rights of actual or potential users of that service were also infringed by the statutes. Absent a showing that the service would be withdrawn, it is doubtful whether actual users of the services could challenge the statutes in their own right. Certainly potential users would have no standing to challenge the statute prior to the formation of the relationship;[214] their position would seem akin to that of the "unknown but identifiable" non-Caucasian vendees referred to in *Barrows*. Thus by permitting the NAACP to assert the rights of its clients, actual or potential, the Court followed the procedure by which those rights could be most practically asserted.

Another factor to be considered is that one party to a professional relationship who is particularly vulnerable to extra-legal sanctions may be inhibited from asserting his own rights while the other may not be. It is not difficult to envisage situations where teachers would not wish to challenge such legislation, as was involved in *Adler,* lest they be suspect. Parents and pupils are less likely to be so inhibited. Similarly, a doctor might be reluctant to challenge an abortion statute on grounds that it interfered with his liberty to practice medicine. Thus, it may be desirable to permit the party who is not vulnerable to extra-legal sanctions to assert the rights of the other where an aspect of a professional relationship is threatened by official action. As noted previously, *Augustus v. Board of Public Instruction*,[215] demonstrates the need for clarification of the Court's standing policy in this area. The court held that the practice of assigning teachers to schools on the basis of the race and color of the students attending did not deny Negro students equal protection and the students had no standing to assert that the practice violated the constitutional rights of the teachers. It stated:

> Plaintiffs cite the familiar and clear doctrine that one can raise the constitutional rights of another not a party to the suit if "its nexus with them is sufficient to permit that it act as their representative before this Court." It seems too obvious for belaboring that no such standard of mutuality can be established between pupils and teachers . . . .[216]

The court's observation as to "too obvious for belaboring" overlooks the Supreme Court's position in *Pierce* and its factual holding in *Adl*er. In any event, it takes no great imagination to see that had the teachers, either white or Negro, asserted their own rights in such a context, they might well have jeopardized their positions and future chances for advancement. Such standing is necessary to extend full protection to professional relationships where one party cannot, or, perhaps due to extra-legal pressures will not effectively assert his own rights prior to the time such rights in the relationship are destroyed.

214. This would seem to follow from *Mitchell, supra* note 188.

215. 185 F. Supp. 450 (N.D. Fla. 1960).

216. *Id.* at 454.

Corollary II. *Where the rights of members of a non-commercial association are affected because of their membership in the association or with respect to an incident of such membership, the association should have standing to assert the rights of the members.*

Where membership is made the subject of special consequences or an incident of such membership is sought to be reached by official action, it is submitted that the association is the proper party to protect the rights of the members so infringed. One of the purposes for which people join non-commercial associations is to advance their views and interests jointly [217] and to utilize the benefits of collective action. Since the association is the collective embodiment of the individual members, it is not unreasonable for the members to expect the organization to protect those rights which derive from membership. Moreover, by permitting the association to sue, especially an unpopular one, the danger that extra-legal sanctions will be imposed on the members by the community is reduced.[218]

In *NAACP v. Alabama,* the association was granted standing to assert its members' rights to anonymity. Such anonymity would have been impaired if the members had been required to sue in their own right, since they would be admitting their membership by such assertion. Anonymity should be protected when other incidents of the membership relation are threatened by state action. Let us say, for example, that a statute punished membership in the Communist Party. If a member sought to enjoin the enforcement of such a statute, he would be admitting the crime [219] as well as subjecting himself to the extra-legal sanctions which have often been applied to such persons. Moreover, suppose a state prohibited a membership corporation from engaging in the advocacy of certain ideas. It is questionable whether a non-publishing corporation can assert its freedom of expression;[220] members might have to sue in their own right.

This case would differ from *NAACP v. Alabama* in that assertion by members of the right involved may not destroy the right itself, but the assertion would effectively destroy the right of anonymity. As the tenor of the opinion in the *NAACP* case indicates, anonymity is an important and significant right —it protects the member against extra-legal sanctions—and should not be sacrificed in order to protect other rights of membership.

217. This was recognized in NAACP v. Alabama, 357 U.S. 449, 459 (1958), where the Court referred to the "identity of interest" and in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 183-87 (1951) (Jackson, J., concurring).

218. This principle of standing would be limited to non-commercial associations, since where commercial ones are involved the enumerated conditions are rarely present. Moreover, in the latter context, the nature of the right asserted would generally not involve rights accorded a high place within the constitutional hierarchy of values.

219. For an example of the Court's sensitivity to this situation, see, *e.g.*, Jones v. United States, 362 U.S. 257 (1960).

220. See Hague v. CIO, 307 U.S. 496 (1939). Moreover, in NAACP v. Alabama, where expression rights were involved, the Court noted that the association "was more properly asserting the rights of its members." 357 U.S. 449, 458-59 (1958).

Where specific consequences are attributed to membership in an association, there is further reason to permit the association to assert the rights of the members. When the government has equated membership with certain prescribed conduct, it has created an identity between the association and its members. Since the government has treated the association and its members as identical for one purpose, it should be estopped from objecting when the association reasserts this identity for another.[221] If the organization cannot assert the rights of the members in such a context, the government can harass the members of the organization by imposing restrictions on the organization's activities and membership relations and force the member to institute action to protect the very rights which he joined the association in order to express more effectively.

In view of these considerations, it is submitted that the standing of the association to assert the rights of the members with respect to the relationship itself and the incidents of such membership is necessary.

Corollary III. *Where the rights of members of a class are affected because of their membership in that class, an organization which has as a purpose the protection of the interests of the class, should have standing to assert the rights of the class members.*

The purpose of this corollary is to enable an organization which is representative of a class to assert the rights of individual members of the class when governmental action deals with them not as individuals, but as members of that class. In *McCabe v. Atchison, Topeka & Sante Fe Ry.*,[222] for example, suit was brought by a group of Negroes to require a railroad company to provide equal facilities for Negroes as well as whites.[223] By statute the railroad was permitted to provide sleeping cars and other facilities for whites, but was not required to do so for Negroes. The basis of the distinction was that there was a limited demand for such facilities by Negroes. The Court first passed on the validity of the statute and held that it constituted a denial of equal protection. Nonetheless, it then went on to hold that the plaintiffs must assert their rights as individuals, not as members of the excluded class, and thus had no standing to secure an injunction against such discrimination because they had not been harmed by the action of the railroad. As *McCabe* indicates,

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221. This procedure is appropriate here where the Government has lumped together all the members' interests in the organization so that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring).

222. 235 U.S. 151 (1914).

223. The theory was based on the separate but equal concept of Plessy v. Ferguson, 163 U.S. 537 (1896). The argument was that equal facilities were not furnished.

sometimes an individual cannot frame an action to vindicate such rights until they have been violated initially or, until he risks criminal prosecution. Moreover, because of extra-legal pressures which can be expected to be brought against members of an unpopular class, individuals may not assert their own rights. Assuming that an individual should not have standing to sue on behalf of the class,[224] we may inquire whether standing to sue should be denied to an organization that has as its purpose the protection of the interests of the class. In view of the fact that it may be difficult for an individual to have standing to sue to protect his own right before it is violated in such a context as *McCabe*, it would seem that the rights could be asserted more effectively by permitting a group such as the NAACP to challenge the statute as discriminating against Negroes, whose interests the organization exists to protect.[225]

An attempt at such a representative suit occurred in *United Pub. Workers v. Mitchell.*[226] There suit was brought by a union representing governmental workers and by individual workers to test the validity of the provisions of the Hatch Act prohibiting governmental workers from engaging in partisan activity. The standing of the union to sue to protect the rights of the workers was challenged in the district court.[227] The court, however, did not decide the issue, and, apparently, it was not argued before the Supreme Court which took the position that only those members who had violated the statute had standing to test its validity.

Thus, in order to attack a statute that restricted the rights of a class of persons, government workers, an individual would have to risk criminal prosecution. Since the Court was unwilling to let individuals challenge the statute on the basis of their membership in the class—here the Court followed the same rationale as in *McCabe*—we may inquire whether it should have, had the issue been presented to it, permitted the organization representative of the

224. Under the theory of *McCabe* and all the equal protection cases the assailant must demonstrate that he has been denied rights because of his membership in the class.

225. As the substantive holding of *McCabe* indicates, it is immaterial that the demand for the exercise of the right by the class as a whole is small. Just as an individual must show that his own rights are violated, in reverse, his rights are violated by the class discrimination, though only a small proportion of the class wants that right. See also McCoy v. Greensboro City Bd. of Educ., 179 F. Supp. 745 (M.D.N.C. 1960), for an example of the requirement of individual interest carried to an extreme position. There the school board, after assigning Negroes to an all-white school, reassigned white students to other schools and replaced white faculty members at that school with Negroes. In a suit to enjoin the board from continuing to operate a segregated school system the court held that since the Negroes were admitted to that school and since they could not assert the rights of their race generally, they had to reapply to another school and be denied admission before they could claim a denial of equal protection. The decision was fortunately reversed on the ground that because the non-segregated school had since become segregated, they could attack this action without reapplying for admission to another school. 283 F.2d 667 (4th Cir. 1960).

226. 330 U.S. 75 (1947).

227. 56 F. Supp. 621, 624 (D.D.C. 1944).

interests of such workers to assert their rights. Granted, it may be necessary in some instances to force individuals to take the risk of criminal prosecution before they can assert their rights,[228] but if avoidable, and consistent with standing principles, this risk should be mitigated if possible. Where action is directed against individuals as a class, the presence of an organization, representative of the class, should be utilized by the Court to avoid the placing of undue restriction on the assertion of constitutional rights by the individual members.

Moreover, where action is directed against persons because they are members of a particular class, just as where it is directed against persons because of their membership in a particular association, more often than not, it is directed against an unpopular class or minority group. To that extent it can be assumed that extra-legal pressures can and will be directed against members of the class who attempt to vindicate their rights through individual action.[229] For example, integration would proceed more effectively in the southern states if individual school children and their parents did not have to initiate action against the operation of segregated schools.[230] If a group such as the NAACP could commence the action on behalf of Negro parents and pupils generally, there would be less danger that a suit would be withdrawn because of pressures exerted upon the litigants or that the specific pupils would be harassed on seeking admission on the basis of the court order. The necessity for such representative action in the field of voting rights was recognized by Congress when it authorized suits by the Attorney-General under the Civil Rights Act of 1957.[231]

In *NAACP v. Patty*, where the standing of the association to speak for its members and the users of its services was upheld, the district court observed that it would also consider the rights of "the members of the colored race in whose interests the plaintiffs carry on their work."[232] This is the only instance where a court has recognized a basis for standing on those grounds.

In determining whether an organization should have such standing, the Court should apply an empirical and pragmatic test—whether it is satisfied that the organization before it is an appropriate one to act as the representative

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228. This was, in effect, the substantive holding of *Mitchell.*

229. This is evidenced by the suit of the United States to prevent the eviction of Negro sharecroppers in Hayward County, Tennessee. It is the contention of the Negroes that they were ousted because they registered to vote. Irrespective of whether this is true, it demonstrates that opportunities exist for the application of such pressure. See the N.Y. Times, Dec. 12, 1960, p. 13, col. 4.

230. Witness the reprisals taken against white families who refused to participate in a boycott of the New Orleans schools, at which token integration had taken place.

231. Section 131, 71 Stat. 637 (1957), 42 U.S.C. § 1971 (1958). Whenever there are reasonable grounds to believe that any person is about to engage in an act which would deprive another of the right to vote on account of race, the Attorney-General may institute a proceeding for preventive relief. See the discussion of the constitutionality of this statute in United States v. Raines, 362 U.S. 17 (1960).

232. 159 F. Supp. 503, 529 (E.D. Va. 1958).

of the class whose rights it is asserting. For example, it is not difficult to envisage the NAACP as the representative of Negroes generally, as the court did in the *Patty* case. Where certain workers are dealt with as a class, it seems proper to permit a craft-type union or association representing such workers to assert their rights.[233] The same might be true as regards the standing of the American Bar and American Medical Associations to attack restrictions on lawyers or doctors as a class.

Finally, it may be asked why such standing should be extended to an organization rather than allowing an individual to sue on behalf of the class. The answer is that where a group which is representative of the class sues, there is more likelihood that the decision to assail the action represents a greater consensus of opinion of the class members than when an individual, not affected by the action, sues on behalf of the class. Contrast the situation where the NAACP sues to enjoin segregation in the schools of a Mississippi town and where a person having no children eligible to attend school brings the suit on behalf of the Negro school children generally. It is reasonable to assume that before an organization that can be said to be representative of the class acts, the action challenged sufficiently affects enough members of the class to justify the initiation of the suit and, under the circumstances, the time is judicious for such a suit.

In view of these factors, it is submitted that an appropriate representative association should have standing to assert the rights of the individual members of the class where such persons are affected by action because of their being members of that class.

Corollary IV. *Where evidence has been illegally seized from another, a criminal defendant should have standing to suppress the evidence on the ground that the illegal search violated the constitutional rights of the victim.*

The purpose of this corollary is to prevent the use of the doctrine of standing to negate substantive doctrine. The Court's insistence on standing to suppress illegally seized evidence has weakened the rationale behind the exclusion of such evidence and casts doubts on whether the policy objectives sought to be achieved by the exclusionary rule are effectively attained.

There are two reasons for employing the exclusionary rule: first, admission of illegally seized evidence demeans the judicial process,[234] and secondly, ex-

233. Thus standing of the union to assert the rights of federal employees should have been allowed in United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). To the extent that the Court considered only the standing of the members, it drew a distinction between those who violated the statute and those who did not. If an organization was permitted to sue on behalf of the members, such a distinction would not have been necessary. The presence of the organization should mitigate against the necessity of requiring the individual to violate the statute before having standing to attack it.

234. This factor is not emphasized in Mapp v. Ohio, 367 U.S. 643 (1961), since the Supreme Court does not exercise supervision over the administration of the state courts in the manner it does over the lower federal courts.

clusion of the evidence is the most effective way to deter unlawful invasions of privacy.[235] The injury to these values is the same whether or not the actual victim of the search is a criminal defendant. When one of the reasons for the rule relates to the position of a court in the process of administering justice, it is self-defeating to correct the harm to that process only where the rights of the particular defendant have been violated. The Court's concern with the protection of its process is demonstrated by its holding in *Elkins v. United States*,[236] which was rendered at a time when such evidence was not constitutionally inadmissible in the state courts. The Court held that evidence obtained by state officers during a search which would have violated the defendant's rights if conducted by federal officers is likewise inadmissible in the federal courts.[237] In such a case there is no question of deterring federal officers, since they are not the ones who have made the search; but the tainted character of such evidence renders it inadmissible. By the same token, the evidence is equally tainted whether the defendant was or was not the victim of the illegal search.

Denial of such standing to the defendant often cuts off the only means by which the victim's rights can be asserted. The Court has taken the position that the victim has no effective redress against an illegal search and seizure if the evidence is not excluded.[238] If this is so, then it is equally true where the victim is one other than the defendant. Law enforcement officials would not be deterred from conducting such searches, since the defendant could not prevent its reception into evidence and the victim could only obtain return of the property where it was not contraband. Moreover, the victim may often be reluctant to obtain the return of non-contraband for fear of prosecution for possession of evidence relating to the commission of a crime. Clearly, the most effective way to deter an illegal search and seizure is to prohibit the introduction of its fruits into evidence irrespective of who raises the question.

The broadening of standing in this area would not conflict with the principles discussed in the previous sections. The assailant will be adversely affected by the introduction of the evidence. The right asserted is a significant one, tracing its origin to English constitutional development.[239] There are often practical difficulties to its assertion by the possessor. All that is lacking is a close relationship between the assailant and the possessor. In view of the other factors, particularly the significance of the exclusionary rule, the absence of the relationship should not be controlling.[240]

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235. See notes 152-54 *supra* and accompanying text.

236. 364 U.S. 206 (1960).

237. This expanded the holding of Lustig v. United States, 338 U.S. 74 (1949). In that case federal officers joined in the search before it was completed.

238. See notes 152-54 *supra* and accompanying text.

239. For a general discussion of the provision see LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

240. It may be considered at this juncture whether the standing requirement is the court's way of avoiding the full implications of the exclusionary rule. The rule itself rep-

In view of these considerations, the Court should permit standing to assert the constitutional rights of a victim of an illegal search and seizure to a defendant when such evidence is sought to be used against him. If necessary, Rule 41(e)[241] should be amended to insure this result in federal prosecutions.

Corollary V. *Where a class has been improperly excluded from jury service by a state, a party adversely affected by a verdict of such jury, either grand or petit, should have standing to assert the rights of the class improperly excluded from such service.*

The purpose of this corollary is to use standing as a device to insure that the rights of members of the excluded class to participate in this important phase of the governmental process will be effectively protected. As indicated by the previous discussion,[242] this right cannot effectively be asserted by the possessor. Where a conviction is obtained against a member of the excluded classes, the conviction will be reversed as to him, but other convictions and verdicts remain in effect despite the unlawful exclusion of the class from juries. To the extent that the standing proposition of Corollary III is accepted, an association representing the class could sue to protect this right, but for some classes that are excluded, women, for example, no such group may exist and some classes excluded may be of such a nature that there could be no group, such as women. It must be noted that in some instances the excluded group may be an unpopular one in the particular context, such as Negroes in Mississippi. Moreover, if it were possible for members of the excluded group to frame such an action procedurally, they might be subject to the extra-legal sanctions which are often imposed upon minority groups when they seek to participate in the governmental process.[243]

But the most important reason for permitting standing here is that such discrimination goes to the essence of the jury system itself and endangers the

resents an adjustment of two conflicting values—freedom from privacy as opposed to the necessity for the admission of logically relevant evidence irrespective of the legality of its procurement. The Court, it might be said, has decided in favor of privacy as against admissibility, but uses the standing device as a buttress against giving too full weight to privacy and as a means of preserving the value of admissibility. The use of standing to limit substantive doctrine in such a context would seem to be self-defeating. As noted previously, the injury to judicial administration is the same where the evidence is illegally procured from another as it is when procured from the defendant. This is equally true with respect to the policy of deterrence as a basis for the rule. Standing is especially valuable in itself as a policy to limit judicial review upon valid considerations. But when it is used to limit the effect of substantive doctrine, such use may destroy the very policy the substantive doctrine is intended to promote. This effect is clearly evident if this purpose forms the basis of the Court's denying standing to assert the rights of others in the present context.

241. FED. R. CRIM. P. 41(e).

242. See note 168 *supra* and accompanying text.

243. To the extent that the Attorney-General is authorized to initiate actions to protect voting rights, we find that in this area it has been determined that they should not be subject to such hazards. See note 231 *supra*.

values which such a system seeks to promote. Systematic exclusion of class or race destroys the representative aspect of a jury—a body of peers deciding questions of fact affecting the rights and liabilities of their fellow citizens.[244]

At present, the defendant must first show prejudice before he can challenge the selection of the jury. This generally means that the defendant be a member of the excluded class. There is nothing to prevent the state then from placing a member of the excluded class on the jury panel whenever a member is involved in a trial.[245] While this would not deny equal protection to the party affected by the verdict, it would constitute a more flagrant denial of the rights of members of the class itself since they would be limited, in effect, to serving only when one of their class is a defendant.

If a conviction or judgment coming from a state court in which members of certain classes are excluded is subject to reversal, the state has no alternative but to end the systematic exclusion or abolish trial by jury.[246] Only then can the rights of such persons be protected fully and the jury system not debased. Therefore, it is submitted that one adversely affected by the verdict of a jury drawn from a panel in which persons were improperly excluded should have standing to assert that the systematic exclusion denied equal protection to the members of the excluded class.

Conclusion

In this article an attempt has been made to define the process by which the Court determines whether it will permit one party to assert the constitutional rights of others. The technique followed will depend on whether the assailant claims that the statute involved is unconstitutional as applied to third parties within its terms—and in that connection, whether the statute by its face re-

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244. The words of Justice Douglas in Ballard v. United States ring particularly true here:

> The systematic and intentional exclusion of women, like a racial group or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society .... The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our court.

329 U.S. 187, 195 (1946).

245. See, *e.g.*, Akins v. Texas, 325 U.S. 398 (1945), where the name of one Negro appeared on the list and the commissioners testified that they thought this was adequate representation. The Court held that the defendant did not sustain the burden of proving discrimination. *A fortiori* if a Negro were called on the particular jury and actually sat, the defendant could not obtain a reversal, even though Negroes in practice were only called when Negroes were tried.

246. And in most states this would be prohibited by the state constitution as well as popular resistance to such a move. Where the state discriminates in offering its facilities or the opportunity to participate in governmental functions, the Court's presentation to the states of the alternatives of ending the discrimination or abolishing the function may well serve to insure full enjoyment of those rights. The state often will be prevented by its own constitution or resistance of the electorate from taking such action.

stricts expression—or whether he is asserting that the constitutional rights of others will be affected by the outcome of his suit. Moreover, it is submitted that the Court should permit standing in certain instances where it is presently denied or where the existence of such standing is not clear. Recognition of standing in those instances will insure protection of constitutional rights without jeopardizing the values that the requirement of standing is intended to protect.

It must be realized that it is generally wise to limit standing to assert rights to those persons whose rights have been violated by the action in question. However, there are instances where in order to perpetuate other significant values, there must be a relaxation of the standing requirement. In such instances it is highly imperative that the Court develop and apply well-defined criteria so that neither conflicting set of values is diminished. Standing to assert the constitutional rights of others must become a carefully defined principle of adjudication so as to preserve both the policies developed by discretionary limits on judicial review and the values protected by a constitutional system and effectuated by judicial review itself.

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