WHY THIRD-PARTY STANDING IN ABORTION SUITS DESERVES A CLOSER LOOK

*Stephen J. Wallace**

INTRODUCTION

Scholarship abounds on the confused and confusing nature of standing law in general, and third-party standing in particular.[1] While formulations of the general rule flow effortlessly from the pens of judges and Justices everywhere,[2] contrary results follow just as effort-

* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.A., History and Computer Information Science, Franciscan University of Steubenville, 2006. Thanks to Professor Anthony Bellia and Jordan Lorence for their help and ideas, and to my wife Meta for her patience and encouragement. This Note is dedicated to Job Tobias Wallace.

1 *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing the standing doctrine as "a word game played by secret rules"); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969) ("Confusion twice-confounded reigns in the area of federal jurisdiction described as 'standing to sue.'"); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22–23 (1982); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1989) ("The structure of standing law in the federal courts has long been criticized as incoherent."); Robert Allen Sedler, *The Assertion of Constitutional* Jus Tertii*: A Substantive Approach*, 70 CAL. L. REV. 1308, 1315 (1982) (criticizing the Court's treatment of *jus tertii* questions as "analytically unsound").

2 *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." (citing U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990))); Craig v. Boren, 429 U.S. 190, 195 n.4 (1976) ("'[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.'" (quoting United States v. Raines, 362 U.S. 17, 21 (1960))); Singleton v. Wulff, 428 U.S 106, 113 (1976) (plurality opinion) ("Federal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons not parties to the litigation."); Barrows v. Jackson, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.").

lessly only a few pages later.[3] Academics have attempted to reconcile or reconstruct the U.S. Supreme Court's disparate efforts into a coherent doctrinal framework,[4] but until the Court adopts such reconceptions or clarifies the doctrine, federal judges and litigators have to deal with the law as it "stands."[5] This Note aims to help those judges and lawyers apply standing doctrine correctly in a small but important area of litigation: suits brought in federal courts by abortion providers and abortion-performing doctors who assert the interests of their patients, often in addition to their own.[6] Courts need to reexamine their application of standing precedent in this area. Indeed, if lower courts actually believe what the Court has said, most

3 *See, e.g.*, *Powers*, 499 U.S. at 416 (allowing a criminal defendant to raise the rights of jurors excluded from service); *Craig*, 429 U.S. at 192–97 (allowing a beer vendor to raise the rights of her male customers); *Singleton*, 428 U.S. at 114–18 (plurality opinion) (arguing that an abortion provider should be able to assert the rights of welfare patients to state monies to pay for their abortions); *Barrows*, 346 U.S. at 257–59 (permitting a white seller to assert the rights of black buyers of land against racially restrictive covenants).

4 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 178–80 (5th ed. 2003) (cataloguing various approaches); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 464–68 (1974) ("[T]hird-party standing . . . is often a decision on whether the litigant in his own right has protected interests derived from a policy favoring others. As such, it is not preliminary but a decision on the merits of a litigant's claim."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331–32 (2000) (recharacterizing many third-party rights as first-party claims); Louis J. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 270 (1961) (arguing that the claim that gets the plaintiff into court "need not be of the same character or dimension as that on which he ultimately succeeds"); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 299 (1984) (arguing that third-party standing should be reconceptualized as presenting first-party claims); Sedler, *supra* note 1, at 1329 (same); Note, *Standing to Assert Constitutional* Jus Tertii, 88 HARV. L. REV. 423, 431–36 (1974) (arguing for a less restrictive *jus tertii* regime).

5 Third-party standing is a prudential doctrine and not a constitutional requirement from Article III. *See* City of Chicago v. Morales, 527 U.S. 41, 56 n.22 (1998) (citing Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984)). Congress, therefore, may change this area of standing law by statute, though there has been little indication that Congress wants to do so. *See* Warth v. Seldin, 422 U.S. 490, 509 (1975); Courtney C. Stirrat, Note, *Which One Here Is Not Like the Other? No Third-Party Standing for Lawyers to Assert Indigent Criminal Defendants' Right to Counsel on Appeal*, 70 MO. L. REV. 1355, 1362 n.50 (2005).

6 For the sake of simplicity I will refer to this group collectively as "abortion providers" for the remainder of this Note, as providing abortions and abortion-related services is the essence of what distinguishes those in that field from similar providers of health services.

abortion providers should not be able to assert the claims of their patients.

Part I lays out the current state of standing law in both Article III and prudential aspects. Part II sketches the history and purpose of standing law—how this doctrine developed and what purposes it is supposed to serve. Part III traces the line of relevant *jus tertii* precedent before *Kowalski v. Tesmer*[7] to determine the state of the law, such as it was, before that case. Part IV compares *Singleton v. Wulff*,[8] which is generally (and incorrectly) considered the controlling decision on abortion provider–*jus tertii* standing, and *Kowalski*, a decision that is more consistent with modern standing doctrine and more applicable to abortion cases than *Singleton*. Finally, Part V addresses some practical implications for litigators if *Kowalski* is adopted as the standard in abortion standing jurisprudence. If successful, the reader, and perhaps some judges, should see that abortion providers, in the general case, fail to meet the prudential requirements for asserting the claims of their patients and should be left, like everyone else, with only their own rights to "complain" about.

I. Current Standing Doctrine

A. *Article III Standing Requirements*

Standing is a preliminary jurisdictional requirement applied to every claim in federal court. With it, courts attempt to limit themselves to hearing only the "Cases" and "Controversies" given them by both Article III of the Constitution and Congress.[9] The Supreme Court has historically been concerned in this area with whether the plaintiff has made out an actual "case" or "controversy" between himself and the named defendant within the understanding of that article.[10] Article III judicial power exists only to redress or otherwise protect against injury to the complaining party, and can only be invoked when the plaintiff himself has suffered some actual or threatened injury resulting from the putatively illegal action.[11]

While trying to administer this cryptic mandate, the Court has formulated three elements as the "irreducible constitutional mini-

7 543 U.S. 125 (2004).

8 428 U.S. 106 (1976).

9 *See* U.S. Const. art. III, § 2; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

10 *See* Clinton v. City of New York, 524 U.S. 417, 429–30 (1998) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); Warth v. Seldin, 422 U.S. 490, 498 (1975).

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

mum."[12] First, there must be an "injury in fact," which is "an invasion of a legally protected interest."[13] That invaded interest must be "(a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'"[14] Second, "'there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party.'"[15] Third, "it must be 'likely,' as opposed to 'speculative,' that the injury will be 'redressed by a favorable decision.'"[16] Stated succinctly, a federal court must ask whether a plaintiff "has suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by a decision in the plaintiff's favor."[17]

These Article III elements must be satisfied at each stage in the litigation[18] and the court may raise standing issues sua sponte at any time or level of appellate review.[19] Furthermore, the "party invoking federal jurisdiction bears the burden of establishing" each standing element.[20] These elements are "an indispensible part of the plaintiff's case," and must be established to the level of specificity required by each stage of litigation.[21] Therefore, in the complaint, the plaintiff must plead "general factual allegations of injury resulting from the defendant's conduct"; but to survive an opposing summary judgment motion the plaintiff cannot rest on the "mere allegations" in the complaint, "but must 'set forth' by affidavit or other evidence 'specific facts'" to prove each part of the standing test.[22] Finally, at trial the facts from summary judgment, if not stipulated to, must be "'supported adequately by the evidence adduced at trial.'"[23] If at any stage

12 *Lujan*, 504 U.S. at 560.

13 *Id.* (citing *Warth*, 422 U.S. at 508).

14 *Id.* (footnote and citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

15 *Id.* (alterations in original) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

16 *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

17 Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 779 n.5 (2003).

18 *See Lujan*, 504 U.S. at 561.

19 *See* Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998)).

20 *Lujan*, 504 U.S. at 561.

21 *Id.*

22 *Id.* (quoting FED. R. CIV. P. 56(e)).

23 *Id.* (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 115 n.31 (1979)).

the plaintiff fails to prove these elements, a federal court is bound to dismiss the case.[24]

These procedural requirements—injury in fact, but-for causation by the defendant, and redressability—serve Article III's fundamental limitation that the federal judicial power be exercised only "'as a necessity in the determination of real, earnest and vital controversy.'"[25] Because these requirements are an "irreducible constitutional minimum,"[26] a plaintiff's failure to establish them results in a dismissal.

Finally, it is important to emphasize what the standing inquiry does not involve. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and *not on the issues he wishes to have adjudicated.*"[27] Standing is not meant to operate one way when judges and Justices believe a claim will succeed and another when they believe it will fail.[28] Rather, standing is "defined as distinct from the fitness of the issue presented for judicial resolution."[29]

B. Jus Tertii *Standing*[30]

First, some terminology. In third-party suits, the "first party" is the person who actually files suit. In these cases, that person—the

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24 *See, e.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546–47 (1986).

25 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

26 *Lujan*, 504 U.S. at 560.

27 Flast v. Cohen, 392 U.S. 83, 99 (1968) (emphasis added).

28 *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ."). *But see* Fallon, *supra* note 4, at 1361 n.202 (arguing that in nearly all cases in which the Supreme Court "has . . . upheld third-party standing[,] . . . [an actual or potential defendant's] claim of third-party rights appeared likely to prevail on the merits").

29 FALLON ET AL., *supra* note 4, at 128.

30 It is important in the beginning to distinguish third-party standing from overbreadth. *Jus tertii* standing is properly restricted to "cases in which the litigants claim that the application of a law against them will, as one of its natural or intended consequences, harm the very third parties whose rights the litigants seek to raise." *Id.* at 173. Overbreadth challenges, however, "involve both the application of the challenged law to the claimant and a different, hypothetical application of the law to third parties." Note, *supra* note 4, at 424; *see also* Fallon, *supra* note 4, at 1326–27 ("Facial challenges occur . . . when a party claims that a statute fails an applicable constitutional test and should . . . be deemed invalid in all applications. By contrast, third-party standing cases arise when one party maintains that a governmental action . . . simultaneously harms her (the first party) and violates the rights of a specifically identifiable third-party."); Fletcher, *supra* note 1, at 244 ("Someone who

plaintiff—is asserting a right that is not his or her own. The plaintiff comes as a representative of the party who actually suffered the alleged wrong. The actual holder of the alleged right in question is the "third party."

The *jus tertii* standing inquiry focuses on the plaintiff. It is all about "who": is the plaintiff the right person to assert this alleged right in federal court?[31] If the plaintiff is not the rightholder, then the general rule is no: a party may assert only his own rights and not those of a third party.[32]

In order to defeat the general rule, whether the plaintiff is asserting just the third party's claims or his own as well, the plaintiff must satisfy two "prudential" or "judge-made" requirements in addition to the general standing inquiry.[33] The plaintiff must demonstrate some combination of (1) a "close relationship" between the plaintiff and the right-holder (third party) and (2) some genuine obstacle or "hindrance" to the right-holder's ability to protect his own interests in court.[34] It has been difficult to know whether this test is meant to be

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makes an overbreadth challenge to a statute is arguing that a properly drawn statute could prohibit or regulate the conduct, but that the actual statute at issue is not properly drawn because it sweeps within its scope conduct that cannot be forbidden. . . . A person seeking standing to assert the rights of a third party, on the other hand, is challenging the application of a statute that is invalid as to her regardless of how it is drafted, as well as invalid to third parties." (footnote omitted)); Monaghan, *supra* note 4, at 282 ("[O]verbreadth cases [are those] in which litigants whose own conduct is not constitutionally protected are nonetheless permitted to mount a constitutional attack premised on the rights of parties not before the court . . . ."). Robert Sedler has articulated a good framework for keeping these two sets of rules in perspective. *See* Sedler, *supra* note 1, at 1310–12. It is helpful to keep this basic distinction in mind while approaching the rules.

31 Sedler, *supra* note 1, at 1316.

32 *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 410 (1991); U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984); *Warth*, 422 U.S. at 499–500 (citing Tileston v. Ullman, 318 U.S. 44, 46 (1943)); Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); United States v. Raines, 362 U.S. 17, 21 (1960); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535–36 (1925); Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219–20 (1912).

33 *See infra* Part II.A.

34 Kowalski v. Tesmer, 543 U.S. 125, 130 (2004) (citing *Powers*, 499 U.S. at 411). It is often stated that the *jus tertii* test has three prongs instead of two, inserting an "injury in fact" requirement as the first element. *See* Stirrat, *supra* note 5, at 1363 (discussing the *Powers* test and its application by the *Kowalski* court). This is no longer a correct statement of the law. The *Kowalski* court recognized the redundant nature of the injury in fact question in relation to the constitutional injury in fact question. The "essential question" in the prudential injury in fact test was whether the "plaintiff has 'a sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy.'" *Id.* at 1365 (alteration in original) (quoting Singleton v. Wulff, 428

used as a balancing test, a checklist, or as a legal fiction that allows a court to hide basing its decision on the merits under the cloak of an amorphous standing analysis.[35]

II. The History and Purposes of Standing Doctrine

A. *History: From Forms of Action to a Civil Action*

At common law there was no doctrine of standing as it exists today.[36] Instead, the role that standing plays today was performed by the basic structure of each lawsuit.[37] Article III "case" or "controversy" requirements were essentially a nonissue because the forms of action at law and requirements in equity defined what was a "case" or "controversy." A federal court could hear a suit if the plaintiff "had a cause of action for a remedy under one of the forms of proceeding at law or in equity."[38] So, if borrower Able refused to pay his debt to lender

U.S. 106, 112 (1976) (plurality opinion)). There is no difference between that and the Article III inquiry into a concrete injury. *See Kowalski*, 543 U.S. at 129 ("In this case, we do not focus on the constitutional minimum of standing, which flows from Article III's case-or-controversy requirement. Instead, we shall assume the [plaintiffs] have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others." (citation omitted)).

35 Fallon et al., *supra* note 4, at 176 (arguing that the court has nearly "'always upheld third-party standing in cases in which [an actual or potential defendant's] claim of third-party rights appeared likely to prevail on the merits.'" (alteration in original) (quoting Fallon, *supra* note 4, at 1361 n.202)); *see infra* Parts III.A & III.B (discussing the varying relative importance of each element to the overall inquiry).

36 *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1418–19 (1987) (arguing that references to "standing" by courts in the nineteenth century was often an inquiry into the merits, not the justiciability, of the claim).

37 *See* Bellia, *supra* note 17, at 817–18; Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 170 (1992) ("[W]hat we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue. To have standing, a litigant needed a legal right to bring suit." (footnote omitted)). This is not, perhaps, the majority scholarly position on this subject, but it is the most compelling and complete explanation for the doctrine. Alternative opinions can be found in Berger, *supra* note 1, at 827 (arguing that standing doctrine arose primarily from a misunderstanding of the British law of justiciability); Fletcher, *supra* note 1, at 225 (arguing that the growth of the administrative state and an increase in litigation to enforce public, primarily constitutional, values were the main motivators of the standing doctrine's development); and Winter, *supra* note 36 (arguing that standing law was shaped largely by its power as and growth from a "natural metaphor for when the court will consider a litigant's claim"). Each of these alternatives, however, fails to take adequate account of the changes in the judicial system as a result of the Rules Enabling Act.

38 Bellia, *supra* note 17, at 817.

Baker, Baker could only bring an action if he could satisfy the requirements of a specific form of action. Baker could file a writ of assumpsit for the legal remedy he wanted—forcing Able to pay his debt. Satisfying the requirements of the forms ensured a structural adherence to the "case" or "controversy" elements of Article III. Baker could only satisfy the terms of the writ by presenting a personalized injury in fact, caused by the defendant, and redressible by the court, though not couched in those terms.[39]

Congress abolished the forms of action in 1934 with the Rules Enabling Act,[40] and with the change the preexisting structural adherence to the "case" or "controversy" requirement was lost.[41] Plaintiffs could bring only one cause of action in the new system, the "civil" action, which lacked by design the formulaic nature of the old writs. In order to preserve a federal government of enumerated and not plenary powers and the federal courts' proper place within that government, limitations emerged that reined in the use of federal judicial powers. Standing, a "judicial construct," was brought forward to fill the void.[42]

In the Rules Enabling Act, Congress prohibited the Court from making the migration to the new "civil" action "in a way that would affect 'substantive rights' as they existed before the federal merger of law and equity."[43] The Court was not to "abridge, enlarge, nor modify the substantive rights of any litigant."[44] If the new Federal Rules of Civil Procedure allowed a litigant to compel a private person or the government to comply with any federal law, treaty, or constitutional provision under the new civil action that was not permitted under the old forms, then the "substantive rights" of that plaintiff would have been impermissibly "affected." Without this safeguard, the gains made in leaving behind the forms of action would be at the cost of a greatly expanded federal judicial power.[45]

Justice Felix Frankfurter is widely credited for introducing standing doctrine[46] in his opinions in *Coleman v. Miller*[47] and *Joint Anti-*

39 *See supra* Part I.A.

40 Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)).

41 Bellia, *supra* note 17, at 855.

42 Berger, *supra* note 1, at 818.

43 *See* Bellia, *supra* note 17, at 855.

44 § 1, 48 Stat. at 1064 (current version at 28 U.S.C. § 2072(6)).

45 Bellia, *supra* note 17, at 856 ("Presumably, [the Rules Enabling Act] meant that the Court could not conceive of its 'civil action' as a form of proceeding that increased or decreased the kind of rights that could be enforced pursuant thereto.").

46 FALLON ET AL., *supra* note 4, at 127 n.3; Bellia, supra note 17, at 857; Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme*

Fascist Refugee Committee v. McGrath.[48] According to Professor Raoul Berger, Justice Frankfurter grounded the concept in Article III:

> In endowing the Court with "judicial Power," . . . Article III "presupposed an historic content for that phrase," and in limiting the sphere of judicial action to "Cases" and "Controversies" the Framers had reference to "the familiar operations of the English judicial system," whereunder "[j]udicial power could come into play only in matters that were the traditional concern of the courts in Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'"[49]

In an argument consistent with this interpretation, Professor Anthony Bellia has asserted that Justice Frankfurter's approach in *Coleman* and *Joint Anti-Fascist Refugee Committee* was an attempt to distill the "nature or essence" of what made up the cause of action at law or equity. This approach is consistent with the limitations in the Rules Enabling Act and remains the foundation of standing doctrine today.[50]

B. Purposes of Standing Law

The purposes of standing law include both systemic and institutional values.

> *Systemic*
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> (1) Separation of powers: preventing the antimajoritarian federal judiciary from usurping the policymaking functions of the popularly elected branches;[51]

Court's Theory that Self-Restraint Promotes Federalism, 46 WM. & MARY L. REV. 1289, 1291–92 (2005) ("In the late 1930s, Franklin Roosevelt's judicial appointees, most notably Felix Frankfurter, began to develop various 'justiciability' principles to determine the appropriate occasions for the exercise of federal question jurisdiction. These doctrines rested on the debatable notion that Article III's extension of 'judicial Power' to 'Cases' and 'Controversies' had always confined the judiciary to adjudicating live disputes between adverse parties with private law interests at stake."); Sunstein, *supra* note 37, at 179 ("[I]t should come as no surprise that the principal early architects of what we now consider standing limits were Justices Brandeis and Frankfurter."); Winter, *supra* note 36, at 1418 ("From those ashes we will see Justice Frankfurter single-handedly raise the phoenix of standing.").

47 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

48 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring).

49 Berger, *supra* note 1, at 816 (second alteration in original) (quoting *Coleman*, 307 U.S. at 460 (Frankfurter, J., dissenting)).

50 *See* Bellia, *supra* note 17, at 857.

51 *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have

(2) Structural adherence: ensuring as a part of each lawsuit that the federal courts remain within the bounds of the "cases" and "controversies" given them in Article III;[52]

Institutional

(3) Adverseness: ensuring that litigants are truly adverse and therefore likely to present the case effectively;[53]

(4) Ownership: ensuring that the people most directly concerned are able to litigate the questions at issue;[54] and

(5) Concreteness: ensuring that a concrete case informs the court of the consequences of its decisions.[55]

"[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."[56] Standing doctrine helps preserve the separation of powers by narrowing the universe of cases that come before the judiciary to those that are properly within its constitutional purview. Standing rules thereby reduce the occasions where the Court could overturn (or craft) policy which is given by the Constitution to the two elected branches.[57] Second, the standing rules were crafted to provide structural adherence to the "cases" and "controversies" requirement in Article III after the merger of law and equity.[58] Third, "adverseness" tries to ensure that the parties will litigate vigorously and seek the best legal arguments to advance their interests. The fourth purpose implicates preclusion doctrine: if party *A* has a weak attachment to the controversy, but litigates instead of *B*, who was directly injured, and loses, *B* might be precluded from asserting her claims. Fifth and finally, "concreteness" aids the court in doing what courts do: deciding particular cases based on the vindication of individual rights.[59] This principle is in tension with the "public rights"

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grown up to elaborate that requirement are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.' . . . The Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

52 *See supra* Part II.A.

53 *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

54 *See Warth*, 422 U.S. at 498–99.

55 *See Baker*, 369 U.S. at 204.

56 *Allen*, 468 U.S. at 752.

57 *See* Scalia, *supra* note 51, at 894.

58 *See supra* Part II.A.

59 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals . . . ."); *see also Warth*, 422 U.S. at 499 ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.").

model of constitutional adjudication, whereby the Court "declar[es] and enforc[es] public norms."[60] Concreteness also helps the court avoid rendering advisory opinions.

C. Purposes of Third-Party Standing

Justice Powell summarized the purposes of third-party standing rules in *Warth v. Seldin*[61]: "Without [third-party standing] limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[62] In that statement, Justice Powell highlighted several of the same general purposes as standing law, including adverseness, concreteness, and the separation of powers. Similarly, the Court in *Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*[63] refused to consider the railroad's hypothetical future damages due to "concreteness" concerns. *Yazoo* emphasized that a court "must deal with the case in hand and not with imaginary ones."[64]

Besides serving the general systemic goals of standing law, third-party standing is also undergirded by its own specific rationales, namely:

(1) The third party may not wish to assert his rights.

(2) The third party's enjoyment of his rights may remain completely unaffected by what happens to the litigant.

(3) The court should hear from only the most effective advocate, who generally will be the third party.

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60 Monaghan, *supra* note 4, at 279–80. There is a rich debate on this topic, and it cannot be taken up in within the scope of this Note. For treatment of the subject, see, for example, Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 161 ("But in so many areas the Supreme Court today views constitutional litigation as a means of settling the great conflicts of the social order. Given its level of aspiration, the 'concreteness' of a factual situation may well prove to be an embarrassment . . . , for the details of a case could well reveal narrow grounds for a decision on the merits."); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29–30 (1979) ("[T]he function of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values." (emphasis omitted)); *see also infra* Part II.D (discussing private versus public rights models).

61 422 U.S. 490.

62 *Warth*, 422 U.S. at 500; *see also infra* Part II.D (discussing the public and private rights models of judicial review).

63 226 U.S. 217 (1912).

64 *Id.* at 219.

> (4) A decision adverse to the litigant who asserts the rights of third parties will constitute unfavorable precedent that may impair the ability of the third party to assert his own rights later.[65]

Professor Marc Rohr, however, has criticized each presented purpose as unpersuasive.[66] On the first he argues that no one has the right to not have his or her rights asserted by someone else.[67] Rohr dismisses the second purpose by arguing that, typically, the third party would be a real victim who would benefit by a victory for the litigant. Consequently, the court should not worry about the rare case in which a plaintiff's claim that survives Article III requirements would not actually affect the interests of the third party.[68] Next, Rohr points out that Justice Powell's dissent in *Singleton* considers the third purpose to be already satisfied by Article III injury in fact requirements.[69] Thus, if a plaintiff had a sufficient injury in fact, he would be a sufficient advocate in the eyes of the court to bring not only his own claim, but those of others as well. Finally, Rohr finds the concern about preclusion unconvincing because third-party member *A* could not stop third-party member *B* from asserting *B*'s rights despite the bad effects it might have on *A*. Therefore, as long as the claimant has a sufficient interest to provide "concrete adverseness," Rohr argues that the plaintiff should be able to press the third-party claim.[70]

Despite these criticisms, each of the presented purposes of *jus tertii* standing has merit. If the purpose of the federal judicial power is the vindication of individual rights, then the wishes of the individual third party or the collective choices of the class of individual third parties are important and should be respected. There could be any number of legitimate reasons why a rightholder would choose not to

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65 Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 405 (1981).

66 *Id.* at 405–06; *see also* Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) (plurality opinion) ("The reasons are two. First, the courts should not adjudicate such [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*." (citation omitted)).

67 Rohr, *supra* note 65, at 405.

68 *Id.* at 405–06.

69 *Id.* at 406 (citing *Singleton*, 428 U.S. at 124 n.3 (Powell, J., concurring in part and dissenting in part)).

70 *Id.*

assert his rights in a given instance, including bad timing, bad facts, a balancing against other interests, or even a belief that the right does not actually exist and should not be claimed. The rightholder may decide to resolve the situation out of court, without lawyers, or, perhaps, "turn the other cheek" and let the offense pass.[71] Disregarding the individual and collective choices of a class of rightholders places the court squarely in the realm of deciding public norms—a role decried by the separation of powers purpose of Article III standing.[72]

Rohr's criticisms of the second purpose similarly fall short due to the individual nature of federal judicial power and the Court's expressed desire not to rule on hypothetical claims.[73] If the litigant wants to assert the claims of a third party who would not receive a remedy from a court's favorable disposition of the case, then the plaintiff has essentially asked the court to render an advisory opinion—declaring a right but giving no remedy.[74] Rohr's criticism of the third purpose is generally unpersuasive for the same reasons, but it is a closer issue. There is an inferential leap between allowing a plaintiff to assert reasonable arguments in support of his rights and allowing him to assert the rights of others in support of them.

Finally, Rohr's critique of the fourth purpose of third-party standing falls short because he is comparing apples to oranges. When a different rightholder presents the right it is simply not the same situation as when a nonrightholder seeks to supplement his claims with the rights of others. From a global, societal-centric view it may turn out the same, but when the model for courts is individual case adjudication, *who* brings a lawsuit is as important as whether it is brought at all. This draws on the historical understanding of the forms of action and the mandate of the Rules Enabling Act not to increase the substantive rights of litigants when creating the new "civil" action.[75]

D. A Note on the "Public Rights" Versus "Private Rights" Models

The debate over judicial review can be broadly characterized as a choice between a "private rights" and "public rights" model of judicial action.[76] These two models provide competing justifications for limi-

71 *See Matthew* 5:39; *Luke* 6:29.

72 *See supra* Part II.B.

73 *See, e.g.*, Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912).

74 *See also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007) ("It is therefore familiar learning that no justiciable 'controversy' exists when parties . . . ask for an advisory opinion . . . .").

75 *See supra* Part II.A.

76 *See* FALLON ET AL., *supra* note 4, at 67–68.

tations of, and visions for, judicial review. Standing rules powerfully shape the role of the courts by either allowing or denying access to the judicial process to broad swaths of plaintiffs (and defendants)[77] and types of claims.[78] The private rights, or "dispute resolution,"[79] model asserts that the power of judicial review comes from, and is limited by, the power to decide "cases."[80] This model states that: (1) the types of "cases" justiciable by the federal courts should be restricted to the types of cases historically decided by courts of law, (2) courts should generally respect and reinforce the system of separated powers by refusing to be a "general overseer" of government action, and (3) judicial review is largely incompatible with democratic self-government and "is tolerable only insofar as necessary to the resolution of cases."[81] This model draws strong support from historical sources surrounding the Founding, the separation of powers, multiple axioms of constitutional decisionmaking, and the Court's own language in standing cases.[82]

The "public rights" model has emerged in the last half-century, and it envisions the Court as "an institution with a distinctive capacity to declare and explicate public values—norms that transcend individual controversies."[83] In its broadest form, this model would allow any citizen to bring a civil action against the government for any unlawful activity, regardless of his stake in the matter. The model grows out of the twentieth century's increase in governmental regulation, the explosion of substantive constitutional rights in the Warren Court,

77 *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 612–22 (1989) (granting third-party standing to a law firm to assert the rights of its client as a basis for protecting its own right to payment).

78 Although standing is supposed to be unconcerned with the merits of a particular claim, it is in no way blind to the type of claim or right asserted. By definition, standing law rejects any type of claim where there is no injury in fact, direct causation, or redressability. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The determination between the public and private rights models makes a significant difference in the types of "injuries" courts would be willing to accept and a much broader conception of the power courts have to redress them. Standing law, therefore, while playing a critical role in determining which rights can be vindicated in federal courts, is itself strongly affected by which model is accepted by the federal courts.

79 FALLON ET AL., *supra* note 4, at 67.

80 *Id.*

81 *Id.* at 67–68; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the Court is, solely, to decide on the rights of individuals . . . .").

82 FALLON ET AL., *supra* note 4, at 67–68, 71.

83 *Id.* at 68.

and the conception of constitutional rights as "swords" granting affirmative relief to violations of constitutional rights.[84]

While the Court has never explicitly adopted the public rights model and has many times spoken in "dispute resolution" language, both models appear to do some work in justiciability jurisprudence in general and standing law specifically.[85] The private rights model, however, has much stronger support in the Court's own language,[86] and should, arguably, be considered the default position until the Court says otherwise. Federal courts following this model should focus on the determination of concrete, individual cases, and not engage in the broad articulation of public norms. Federal courts applying standing doctrine should generally refuse claims asking the courts to declare new public norms and conscientiously require all the elements of first and third-party standing to be satisfied throughout the litigation. In this way, courts will help preserve the limits of Article III authority and the broader system of separated powers.

III. *Jus Tertii* Developments Before *Kowalski*

A plaintiff asserting the rights of a third party must satisfy a court that (1) there is a "close relationship" between the plaintiff and the right holder (third party), and (2) that there is some genuine obstacle or "hindrance" to the right holder's ability to protect his own interests in court.[87] This has been a test with shifting standards as the Court has applied various meanings to a "close relationship" and a "hindrance." This Part outlines the development of the Court's definition and weight of both elements in a selection of cases— *Griswold v. Connecticut*,[88] *Eisenstadt v. Baird*,[89] *Craig v. Boren*,[90] *Powers v. Ohio*,[91] and

84 *Id.* at 69.

85 *Id.* at 71 ("The Supreme Court has never explicitly embraced the public rights model of the judicial role or disavowed the dispute resolution model. Indeed, its formal pronouncements have been consistently to the contrary.").

86 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) ("The several doctrines that have grown up to elaborate [the case or controversy] requirement are 'founded in concern about the proper—and properly limited—role of the courts in democratic society.'" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)); *id.* at 752 ("These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" (quoting first Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892), then Flast v. Cohen, 392 U.S. 83, 97 (1968))).

87 *See supra* Part I.B.

88 381 U.S. 479 (1965).

89 405 U.S. 438 (1972).

Barrows v. Jackson[92]—leading up to *Kowalski*. The "relationships" involved often had little closeness about them, and what "hindrances" were present, if any, appear to be little more than straw men, unable to stand up to close scrutiny. These decisions, while leaving the Court vulnerable to criticisms of having based its standing decisions on outcome, at least illustrate that the Court's rhetoric regarding third-party standing and its holdings have often been in conflict.

A. A "Close Relation" Before Kowalski

The "close relation" prong tests whether the first party is an appropriate proxy for the third party. It comprises two factors: (1) the nature of the relationship and (2) the alignment of interests between the third party and the plaintiff.[93] In theory, the former ensures that "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue."[94] The latter examines the interests of both the first and third parties to determine whether they are the same, or whether there is an inherent conflict of interest between them. Such a conflict could prevent the plaintiff from vigorously presenting the third party's claims, or from presenting them as the third party would. The cases below demonstrate that, prior to *Kowalski*, the Court's use of the "relationship" element often lacked the rigor and seriousness demanded by the Court's own rhetoric on the important purposes of third-party standing.

Although only two paragraphs long, *Griswold*'s third-party standing analysis demonstrates the lack of rigor and logical consistency characteristic of results-based decisionmaking. *Griswold* found that a doctor had standing to assert the rights of the married people he had advised on the use of contraceptives.[95] Justice Douglas' majority opinion did not specify the prongs of the third-party inquiry and, indeed, did not mention "hindrances" as a consideration at all. Instead, Justice Douglas stated that the "professional relationship" between the doctor, who brought the suit, and the married couple, the third parties, was sufficient to grant *jus tertii* standing to assert the married couple's claims.[96] Justice Douglas' own reasoning, however, belies this assertion. Brushing aside conflicting precedent from *Tileston v. Ull-*

90 429 U.S. 190 (1976).
91 499 U.S. 400 (1991).
92 346 U.S. 249 (1953).
93 Singleton v. Wulff, 428 U.S. 106, 114–15 (1976) (plurality opinion).
94 *Id.* at 114.
95 Griswold v. Connecticut, 381 U.S. 479, 481 (1965).
96 *Id.*

man,[97] Justice Douglas claimed that concerns about "blurring" the case or controversy requirements of Article III were "removed" in *Griswold* because the doctor himself had been charged and convicted as an accessory for providing the married couple contraceptives in violation of Connecticut's aiding and abetting statute.[98] "Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime."[99] Thus far, the analysis appears to hold that because the plaintiff had standing to assert his own rights (convicted as an accessory), he may assert the married couple's rights as well.

Justice Douglas, however, had further support. In an attempt to give some muscle to the "professional" or "confidential" relationship he asserted, Justice Douglas cited a series of cases in which the Court had allowed third-party standing, including *Truax v. Raich*,[100] *Pierce v. Society of Sisters*,[101] and *Barrows v. Jackson*.[102] However, only one of the cited cases, *NAACP v. Alabama*,[103] even arguably involved a "professional" or "confidential" relationship. Concluding that "[t]he rights of husband and wife . . . are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them,"[104] the Court allowed standing. On the merits Justice Douglas relied almost entirely on the married couple's right to privacy for "intimate relation[s]" and the

97 318 U.S. 44, 46 (1943) (per curiam) (holding that a physician seeking a declaratory judgment against a statute prohibiting advice on contraceptives had no standing to assert his patient's right not to be deprived of life without due process of law, even when pregnancy might endanger the lives of his patients and the physician wished to advise them on the use of contraceptives).

98 *Griswold*, 381 U.S. at 480–81 ("Section 54-196 provides: 'Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.'" (quoting CONN. GEN. STAT. § 54-196 (1958 rev.))).

99 *Id.* at 481.

100 239 U.S. 33, 38–39 (1915) (allowing an employee to assert the rights of a nonparty employer).

101 268 U.S. 510, 535–36 (1925) (allowing the owners of a private school to assert the rights of nonparty parents of potential pupils).

102 346 U.S. 249, 255–56 (1953) (allowing a white seller who was party to a racially restrictive covenant to raise the rights of nonparty prospective African American purchasers).

103 357 U.S. 449, 458–59 (1958) (allowing the NAACP to assert the associational rights of its members in refusing to provide its membership lists to the court since forcing them to do so would "result in nullification of the right at the very moment of its assertion").

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

inviolability of the "sacred precincts of marital bedrooms,"[105] to find the restriction on the use of contraceptives unconstitutional.[106] Without the rights of the married couple to put forward it is still possible that the doctor would have prevailed, but the opinion would likely have been far different.

Griswold stands as an example of the Court allowing a party with a strong Article III standing claim to skirt the rules regarding third-party standing in order to supplement that party's claim with another that the Court is sympathetic to on the merits.[107] While observers may agree or not with the opinion's policy choices, circumventing the standing rules is a disservice to the role of the Court in the constitutional system and violates the separation of powers and structural adherence purposes of standing law.

The *Eisenstadt* opinion provides another instructive example. In *Eisenstadt*, William Baird was convicted in Massachusetts for lecturing on contraceptives to students and giving away a package of contraceptive foam to one of them.[108] The doctor challenged the validity of the law and asserted the rights of third-party single persons in doing so. The Court ruled that he had standing to do so, characterizing the relationship between the doctor and the recipient of the foam as "not simply that between a distributor and potential distributers, but that between an advocate of the right of persons to obtain contraceptives and those desirous of doing so."[109] The Court, per Justice Brennan, examined the "nature of the relationship" of the advocate and rightholder. Justice Brennan, drawing an analogy to *Barrows*, found that the connection "between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so" was a sufficiently "close relationship."[110] The majority highlighted this advocacy by noting that "[t]he very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives."[111]

Relying on the rights of the unmarried third parties, Justice Brennan went on to find that the statute violated the Equal Protection

105 *Id.* at 485.

106 *Id.* at 486.

107 For a comparison, see *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam), which rejected a doctor's third-party standing to challenge the same Connecticut contraception law at issue in *Griswold*.

108 Eisenstadt v. Baird, 405 U.S. 438, 440 (1972).

109 *Id.* at 445.

110 *Id.*

111 *Id.*

Clause.[112] Once again, the Court granted third-party standing to a plaintiff who possessed strong Article III standing and whose third-party claims were attractive but whose third-party standing appears shaky against the general rule.

Craig v. Boren further expanded the universe of possible "relationships" by allowing a beer vendor to assert the rights of Oklahoma men aged eighteen to twenty-one.[113] In *Craig*, an Oklahoma beer seller and a man under twenty-one sued to challenge Oklahoma's law establishing a minimum age of eighteen for women and twenty-one for men to drink beer with 3.2% alcohol content. The young man turned twenty-one before the case was decided at the Supreme Court, so his claim was deemed moot.[114] That left the beer vendor as the only party, but she continued to argue the rights of Oklahoma men under twenty-one under the Equal Protection Clause.[115] This peculiar factual situation influenced the Court's decision:

> These prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here, where the lower court already has entertained the relevant constitutional challenge and the parties have sought—or at least have never resisted—an authoritative constitutional determination. In such circumstances, a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and "cogently," the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose.[116]

Even without this special consideration, however, the Court would have found *jus tertii* standing for the beer vendor.[117] Because she was the target of the legislation, she clearly satisfied Article III requirements.[118] Relying solely on that Article III standing and *Griswold*, Justice Brennan declared that the beer vendor was "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the

112 *Id.* at 454–55.

113 429 U.S. 190, 197 (1976).

114 *Id.* at 192.

115 *Id.* at 192–93.

116 *Id.* at 193–94 (citation omitted).

117 *Id.* at 194 ("In any event, we conclude that appellant Whitener has established independently her claim to assert *jus tertii* standing.").

118 *Id.*

statutes remain in force."[119] Justice Brennan, leaning on this vendor-vendee relationship, found that the law violated the Equal Protection Clause.[120]

In *Powers v. Ohio*, the Court found another "close relationship," this time between a white defendant and the black prospective jurors who were preemptively struck before his trial.[121] The Court acknowledged the general rule[122] and the conditions for granting an exception.[123] Justice Kennedy then recognized, at length, Powers' own Article III standing to challenge racially discriminatory jury practices both because "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,'"[124] and because of the importance of the jury system.[125] Addressing the third-party tests themselves, Justice Kennedy declared that "[*v*]*oir dire* permits a party to establish a relation, if not a bond of trust, with the jurors."[126] This "relation" was "as close as, if not closer than, those [the Court] recognized to convey third-party standing" in *Griswold*, *Craig*, and *Triplett*.[127] Because of the "bond of trust" formed by the voir dire, the "'litigant . . . is fully, or very nearly, as effective a proponent of the right as the [third party].'"[128]

Justice Kennedy also addressed possible conflicts of interest between the defendant and the third party. He found that they had common interests against racial discrimination in the courtroom, and, as proving such discrimination could lead to a dismissal for the defendant, Powers was strongly motivated to press the third party's interests.[129]

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119 *Id.* at 195 (quoting Griswold v. Connecticut, 381 U.S. 479, 481 (1965)).

120 *Id.* at 210.

121 499 U.S. 400, 415 (1991).

122 *Id.* at 410 ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." (citing U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990); Singleton v. Wulff, 428 U.S. 106, 115 (1976) (plurality opinion)).

123 *Id.* at 410–11 ("This fundamental restriction on our authority admits of certain, limited exceptions. We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute, the litigant must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests." (internal quotation marks and citations omitted)).

124 *Id.* at 411 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

125 *See id.* at 411–13.

126 *Id.* at 413.

127 *Id.*

128 *Id.* (quoting Singleton v. Wulff, 428 U.S. 106, 115 (1976) (plurality opinion)).

129 *Id.* at 414.

Reaching the merits of the case, Justice Kennedy relied on the asserted rights of the excluded black jurors to hold that the Equal Protection Clause prohibited this activity.[130] *Powers*, therefore, stands as another instance of solid Article III standing and a sympathetic third-party claim overwhelming the *jus tertii* inquiry.

The "close relationship" prong, therefore, grew to include a number of relationships that were merely legal fictions. In these cases, the nature of the relationship aspect was often invoked, though further investigation into the underlying reasoning reveals that the invocation is unable to bear the weight assigned to it. The alignment of interests analysis, rarely seen, gave merely a cursory glance to the interests of both parties, and did not seem to seriously respect possible conflicts of interest between parties. Whatever the reason, whether it was an oblique embrace of the public rights model[131] or something else, it does not appear that the Court made its decisions based on the closeness of the relationship between the first and third parties, if any relationship ever even existed. Rather, these decisions were driven by the strength of the first party's own Article III standing, the sympathetic nature of the third-party claims, and the party's likely success on the merits. As explained below,[132] this weakness in the Court's doctrine has been corrected by *Kowalski*.

B. "Genuine Obstacle" or "Hindrance" Before Kowalski

The second prong of the *jus tertii* analysis is the "genuine obstacle" or "hindrance" prong. It focuses on any obstacles to the third party asserting her own rights and her ability to do so. It has been difficult to determine if the Court will take this requirement seriously from case to case, as it has, on various occasions, not mentioned it, ignored it, considered it with other factors, and, seemingly, allowed it to control the result. There has also been a spectrum of results on how burdensome a "hindrance" is required. Whether an absolute bar or a slight inconvenience is sufficient has depended on the case. This subpart traces both of these spectra through a few representative cases to demonstrate the state of the hindrance prong before *Kowalski*. As with the close relationship standard, the Court's application of the hindrance test was not a model of fidelity to the purposes of standing.

130 *Id.* at 409 ("We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race . . . .").

131 *See supra* Part II.D.

132 *See infra* Part IV.B.

In *Barrows v. Jackson*, the Court laid down a high standard for the hindrance element: "It would be difficult *if not impossible* for the persons whose rights are asserted to present their grievance before any court."[133] The white homeowner in the case was sued for breaching a racially restrictive covenant (of the kind declared unconstitutional in *Shelley v. Kraemer*[134]) when the homeowner sold the house to a black family. Because the black family was a party to neither the contract nor the suit, it was prevented from asserting its own rights. The homeowner had *jus tertii* standing to add the claims of black prospective purchasers to his own because he was "the only effective adversary of the unworthy covenant in its last stand."[135] *Barrows* protection of societal values proved to be more influential than its strong hindrance language.

The unmarried recipients of contraceptives in *Eisenstadt* were not subject to prosecution (as recipients) under the law denying access to contraceptives in Massachusetts. Because of the resultant difficulty in challenging this statute, the Court found that Baird's *jus tertii* claim was even stronger than the doctor's in *Griswold*, where the married couple themselves might be subject to prosecution as users.[136] The unmarried persons in *Eisenstadt* were "denied a forum in which to assert their own rights," and this "advocate," who gave away the contraceptive foam for the sole purpose of challenging the statute, therefore had standing to assert their rights along with his own.[137]

The hindrance present, according to Justice Brennan, was the difficulty for the single persons to bring a suit when they were not subject

133 346 U.S. 249, 257 (1953) (emphasis added).

134 334 U.S. 1, 20 (1948).

135 *Barrows*, 346 U.S. at 259.

136 Eisenstadt v. Baird, 405 U.S. 438, 446 (1972); *see also* Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (quoting the Connecticut statute that allowed prosecution of both users and providers of contraceptives). It is noteworthy that the *Griswold* Court did not even consider the clear lack of legal hindrances that would have prevented married couples from bringing their own claims as a factor in its decision to grant third-party standing to the doctor. *See* Stirrat, *supra* note 5, at 1370 n.111 (citing *Griswold* and *Pierce* as cases where the Court did not require the plaintiffs to establish that the third-parties could not assert their own claims).

137 *Eisenstadt*, 405 U.S. at 446. The Court has also allowed *jus tertii* standing when the very assertion of the right by the third party would render the right a nullity. In *NAACP*, the association refused to provide its membership lists in the face of a contempt order from the state court. Instead, it asserted the right of its members to free association and the Supreme Court recognized its standing to do so. Requiring that the right be claimed by the individual members themselves "would result in nullification of the right at the very moment of its assertion." NAACP v. Alabama, 357 U.S. 449, 458–59 (1958); *see also* Hodel v. Irving, 481 U.S. 704, 711–12 (1987) (allowing deceased parents' rights to be asserted by their children).

to prosecution themselves.[138] This is clearly not, however, the "absolute bar" *Barrows* described. Ruling on the basis of the third-party rights, the majority found that the law violated the Fourteenth Amendment. If the unmarried persons had come as plaintiffs, they could have, at least arguably, satisfied Article III standing themselves. They had an injury in fact in the unavailability of contraceptives in Massachusetts and whatever harmful effects that could be alleged to be attributed thereto. That injury was directly traceable to the statute, and it was redressable by the type of opinion the Court gave anyway. *Eisenstadt*, then, stands as a more permissive standard on the hindrance spectrum than *Barrows*.[139]

Another variant on the hindrance spectrum focuses on "the likelihood and ability of the third parties . . . to assert their own rights."[140] In *Powers*, the Court took a more "realistic" view of the hindrance prong. The Court granted third-party standing to Powers largely because "[t]he barriers to a suit by an excluded juror are daunting."[141] While persons in the jury pool had the right to bring suit on their own behalf when excluded because of race, such suits were rare because of several disincentives. Potential jurors were not parties to the suit in question and were therefore unable to challenge their exclusion during the trial.[142] There were also difficulties of proof and the potentially large cost of litigating a suit the juror may have had little interest in.[143] These realistic hindrances formed "considerable practical barriers to suit."[144] "The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights."[145] This "reality" was sufficient to satisfy the hindrance prong for the *Powers* court. The Court's determination on practical grounds that the suit would never otherwise be brought and its willingness to delve into circumstances that may or may not surround

138 This recalls the debate over public versus private rights models. *See supra* Part II.D. While the private rights model would require such rights to be vindicated through political action in the legislature or the third party's own suit, the public rights model finds the Courts to be a suitable forum for such rights to be upheld.

139 *See* Craig v. Boren, 429 U.S. 190, 196–97 (1976) (citing *Eisenstadt* as controlling authority while granting third-party standing to a beer vendor to assert the rights of Oklahoma men aged eighteen to twenty-one).

140 Powers v. Ohio, 499 U.S. 400, 414 (1991).

141 *Id.*

142 *See id.*

143 *See id.* at 415.

144 *Id.*

145 *Id.*

such a juror make this decision an even more permissive understanding of the hindrance prong than *Eisenstadt*.

Craig is even further along the permissive end of the spectrum. The Court in *Craig* allowed a beer vendor to assert the rights of all Oklahoma men aged eighteen to twenty-one.[146] It did so despite the Court's explicit admission that "'a class could be assembled, whose fluid membership always included some [Oklahoma males] with live claims.'"[147] In fact, this case only came to the Court because an Oklahoma man between the ages of eighteen and twenty-one was a party and then turned twenty-two before the suit came to the Court. The Court brushed that fact aside, arguing that such a class would itself be essentially "representative" in nature, and there was not an important difference between this beer vendor representing Oklahoma men and a class of such men doing so themselves.[148] By granting *jus tertii* standing in a situation where only ordinary coordination and litigation problems existed[149] and where a member of the class was previously a party, the Court pushed the hindrance prong to its furthest extreme.

This sample of cases involving the hindrance prong paints a picture of third-party standing similar to that seen in the close relationship context. By granting standing to assert third-party rights to plaintiffs in situations where far less than an absolute bar stood between the third-parties and asserting their own rights for themselves, the Court distanced its holdings from the purposes of standing law: adverseness, ownership, concreteness, separation of powers, and structural adherence. Instead, third-party standing became a vehicle for plaintiffs who had compelling Article III standing and a claim the Court was sympathetic to on its merits to bring their cases before the Court.

IV. *SINGLETON* VERSUS *KOWALSKI*

With these cases in mind, this Part turns to the specific context of claims brought by abortion providers seeking third-party status to assert the rights of their patients in addition to their own. While *Singleton v. Wulff* has been read by many lower courts to control the disposition of such cases, that conclusion is belied by a close reading of

146 Craig v. Boren, 429 U.S. 190, 197 (1976).

147 *Id.* at 194 (quoting Singleton v. Wulff, 428 U.S. 106, 117–18 (1976) (plurality opinion)).

148 *See id.*

149 For example, in *Craig* the problems were assembling a rotating class and paying for the expenses of a lawsuit.

the case itself.[150] On its own terms, *Singleton* does not control the disposition of this issue in the vast majority of these cases. Furthermore, the change in the Court's jurisprudence on third-party standing in *Kowalski* has significantly affected the landscape of *jus tertii* standing. *Singleton* should not have controlled these cases before *Kowalski* was decided, and most decidedly should not control them afterward.

This Part describes both cases and the *jus tertii* holding in each. It then applies the new *Kowalski* rubric to the facts in *Singleton* to demonstrate the change in methodology *Kowalski* wrought. This Part concludes by cataloguing the changes in *jus tertii* law from *Kowalski*.

A. The Myth of Singleton

Many lower courts have applied *Singleton* in suits where abortion providers seek to assert the rights of their patients as if the case decides the issue.[151] It does not. Other courts, recognizing *Singleton*'s weakness as a plurality opinion, have nonetheless followed nearly identical reasoning to reach the same result.[152] A close inspection of the opinion, however, shows that it was a narrow decision by a Court sharply divided (4-1-4) on the very issue of third-party standing. This subpart examines the factual situation in and legal reasoning of the case and argues that *Singleton* should be read narrowly to apply only to its specific facts.

Singleton's facts and procedural posture are straightforward. A Missouri statute restricted Medicare funding such that it "'shall not

150 *See* Aid for Women v. Foulston, 441 F.3d 1101, 1112 n.13 (10th Cir. 2006) ("*Singleton*'s discussion of third-party standing was joined only by a four-member plurality. . . . Many cases nonetheless speak of the court in *Singleton* as having "held" that the physician had third-party standing.").

151 *See, e.g.*, Okpalobi v. Foster, 190 F.3d 337, 350–53 (5th Cir. 1999) (granting third-party standing rights to abortion provider because in *Griswold* and *Singleton* "[t]he Supreme Court . . . has carved out an exception to [the general third-party standing] rule in the context of physicians claiming to assert their patients' rights to a pre-viability abortion"); Volunteer Med. Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 223 (6th Cir. 1991) ("We rested our analysis in *Planned Parenthood* largely on [*Singleton*], where the Supreme Court held that, given the nature of the right involved, 'it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." (citation omitted)); N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1347–48 (2nd Cir. 1989) (citing *Singleton* with no discussion of third-party standing test); Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, 822 F.2d 1390, 1394, 1396 (6th Cir. 1987) (following *Singleton*'s "holding" to allow operator of abortion clinic to assert the rights of its patients against a city fetal disposal ordinance); Women's Med. Ctr. of Providence, Inc. v. Roberts, 512 F. Supp. 316, 319 (D.R.I. 1981) (summary citation allowing *jus tertii* standing).

152 *See Aid for Women*, 441 F.3d at 1111–14.

include abortions unless such abortions are medically indicated.'"[153] Two Missouri-licensed abortion providers filed suit in federal district court seeking an injunction against the statute and a declaration that it was invalid both on its face and as applied to them. Each claimed that they had performed abortions for welfare patients eligible for Medicaid funding, planned to do so in the future, and that all their requests for reimbursement from the state program had been denied by the defendant, the state official responsible.[154] Furthermore, they alleged that these refusals to pay them for doing these abortions "chill[ed] and thwart[ed] the ordinary and customary functioning of the doctor-patient relationship."[155] The abortion providers' claims were grounded in vagueness, equal protection, and privacy rights.[156]

The district court dismissed the case for lack of standing. The Court of Appeals for the Eighth Circuit reversed on standing and went on to reach the merits, holding the statute "obviously unconstitutional."[157] The Supreme Court reversed the decision of the Eighth Circuit, finding that, while it had jurisdiction, the court should not have reached the merits of the case.[158]

The Court's holding on standing was razor-thin and unremarkable: the doctors had Article III standing because their economic interest in the outcome gave them an injury in fact.[159] That was the extent of the majority holding on standing in *Singleton*. On the issue of third-party standing the Court split, with Justice Blackmun writing for the four-member plurality and Justice Powell writing for the four-

153 Singleton v. Wulff, 428 U.S. 106, 108–09 (1976) (plurality opinion) (quoting MO. REV. STAT. § 208.152 (Supp. 1975)).

154 *Id.* at 109.

155 *Id.* at 110.

156 *See id.* ("A number of grounds were stated, among them that the statute, 'on its face and as applied,' is unconstitutionally vague, '[d]eprives plaintiffs of their right to practice medicine according to the highest standards of medical practice'; '[d]eprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children'; '[i]nfringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment'; and '[d]eprives plaintiffs and their patients, each in their own classification, of the equal protection of the laws.'" (alterations in original)).

157 *Id.* at 112 (quoting Wulff v. Singleton, 508 F.2d 1211, 1215 (8th Cir. 1974)).

158 *See id.* at 119 ("On this record, we do not agree, however, with the action of the Court of Appeals in proceeding beyond the issue of standing to a resolution of the merits of the case.").

159 *See id.* at 113 ("If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense.").

member dissent,[160] while Justice Stevens' concurrence in part did not join Justice Blackmun's *jus tertii* analysis.[161]

Justice Blackmun began the plurality's analysis with a statement of the general rule and capably articulated the reasons for it.

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.[162]

He then laid out the conditions that indicated an exception should be granted. The Court, he said, had looked in the past to two elements: (1) the relationship between the plaintiff and the third party and (2) "the ability of the third party to assert his own right."[163] Blackmun explained the relationship prong: "[i]f the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," the court can be sure the "construction of the [third party's] right is not unnecessary."[164] Also, the relationship "may be such that the [litigant] is fully, or very nearly, as effective a proponent of the right as

160 *See id.* at 122–31 (Powell, J., concurring in part and dissenting in part).

161 *See id.* at 122 (Stevens, J., concurring in part) (refusing to join Justice Blackmun's *jus tertii* analysis).

162 *Id.* at 113–14 (plurality opinion) (citation omitted); *see also supra* Part II.B (discussing the purposes of the general rule).

163 *Singleton*, 428 U.S. at 115–16 (plurality opinion).

164 *Id.* at 114–15; *see also* Rohr, *supra* note 65, at 413 ("[I]s Mr. Justice Blackmun's statement about the necessity of adjudication any different from requiring simply that there be a real . . . victim of the allegedly unlawful conflict?"). Furthermore, there is reason to doubt that any real doctor-patient relationship existed here. Justice Powell's dissent criticized the "ease with which the plurality would allow assertion of such standing . . . based on nothing more substantial than a professional (*or perhaps only an abortion clinic*) relationship . . . ." *Singleton*, 428 U.S. at 130 n.7 (Powell, J., concurring in part and dissenting in part) (emphasis added). This could be explained by the procedural posture of the case, as the Court reviewing a motion to dismiss will take all the plaintiff's claims as true, but it raises interesting questions: How much "doctoring" needs to be done before a doctor-patient relationship sufficient for the purposes of *jus tertii* is established? Does a brief abortion procedure, set up in advance by a clinic worker, suffice?

the [third party]."[165] He then cited *Griswold*, *Eisenstadt*, *Barrows*, and *Doe v. Bolton*[166] as supporting authority.[167]

On the hindrance prong, the plurality stated:

> Even where the relationship is close, *the reasons for requiring persons to assert their own rights will generally still apply.* If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.[168]

Applying this test to the facts, Justice Blackmun found two obstacles to a woman bringing her own claim: (1) protecting the privacy of her abortion from publicity in a lawsuit; and (2) because of the "imminent mootness" of any individual woman's claim, as her pregnancy will end long before her suit is over.[169]

Neither of these obstacles is a "genuine obstacle," as the plurality itself recognizes. "It is true that these obstacles are not insurmountable," Justice Blackmun concedes, as women have frequently brought similar suits under pseudonyms[170] and women who were pregnant but are no longer with child "retain the right to litigate the point because it is 'capable of repetition yet evading review.'"[171] Despite the apparent ease with which these hindrances can be overcome, Justice Blackmun maintained that "if the assertion of the right is to be

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165 *Singleton*, 428 U.S. at 114–15 (plurality opinion).

166 410 U.S. 179 (1973). Professor Rohr notes that the reference to *Doe* is "rather surprising" given the differences in the facts of the case and the complete lack of any third-party standing discussion in the case. Rohr, *supra* note 65, at 413 n.89.

167 See *supra* Part III.B for a discussion of the weaknesses of the "close relationship" prong in *Griswold* and *Eisenstadt*.

168 *Singleton*, 428 U.S. at 116 (plurality opinion) (emphasis added). Justice Blackmun relied on *Eisenstadt*, *NAACP*, and *Barrows* for this proposition. See also *supra* Part II.B.3 for a discussion of the hindrance decisions in *Eisenstadt* and *Barrows*. These decisions required a far more substantial obstacle to the third party bringing his or her own claim than the plurality does in *Singleton*. *See Singleton*, 428 U.S. at 126 (Powell, J., concurring in part and dissenting in part) (arguing that the *NAACP*, *Barrows*, and *Eisenstadt* hindrances were far more difficult to overcome than those asserted as satisfactory by the plurality).

169 *Singleton*, 428 U.S. at 126 (Powell, J., concurring in part and dissenting in part).

170 *Id.* at 117 (plurality opinion); *see also, e.g.*, Roe v. Wade, 410 U.S. 113, 124 (1973) (allowing the use of a pseudonym); *Doe*, 410 U.S. at 184 (same). *But cf.* Epstein, *supra* note 60, at 161 ("[T]he abortion cases leave the distinct, if undocumented, impression that the nameless plaintiffs were parties to the case only because the persons and organizations that wished to overturn the abortion statutes sought them out as a means to mount their challenge.").

171 *Singleton*, 428 U.S. at 117 (plurality opinion) (quoting *Roe*, 410 U.S. at 124–25).

'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician."[172] Therefore, "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."[173] This dicta ignores the basic distinction that the woman would have brought suit as a first party, and would not be "representative" in any real way. It is her own current or future rights at stake, not those of third parties.

Despite a strong recitation of the purposes of standing law, the *Singleton* plurality found, as the majorities did in *Eisenstadt*, *Griswold*, *Craig*, and *Powers*, that third-party standing was appropriate. Justice Blackmun came to this conclusion even though there was no evidence of any close relationship existing between the abortion providers and their current or future patients. Furthermore, Justice Blackmun ruled contrary to his own explanation of the hindrance prong. The plurality stated that the general rule of no third-party standing would apply, even if there was a close relationship, if there were no "genuine obstacles." Justice Blackmun was, however, unable to articulate a hindrance or obstacle for which the Court itself had not already provided a solution. With no hindrances to stand on, it is no surprise that five members of the Court refused to endorse this portion of the opinion.

Aside from the flaws in the plurality's argument, however, there are a few practical points that deserve emphasis. First, the sweeping general statement of open *jus tertii* standing for all abortion providers of all female patients is beyond *Singleton*'s facts. Second, the entire discussion comes from a plurality opinion, was not a holding of the Court, and was the subject of a vigorous dissent by Justice Powell and three other Justices.[174] Third and finally, the sweeping general statement of abortion provider standing and the specific applications of law to fact have never been adopted by a majority of the court.[175] *Sin-*

172 *Singleton*, 428 U.S. at 117–18 (plurality opinion). The suit would be "representative" because a woman who was no longer pregnant would be arguing the side of pregnant women.

173 *Id.* at 118.

174 *See id.* at 122–31 (Powell, J., concurring in part and dissenting in part).

175 Portions of the plurality have been cited in majority opinions, but no majority has adopted the *Singleton* plurality's specific law-to-facts arguments or the statement of abortion provider standing. *See* Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 479 (2006) (citing general purposes of *jus tertii* doctrine); Campbell v. Louisiana, 523 U.S. 392, 397 (1998) (citing the three-part *jus tertii* test in general terms only); Powers v. Ohio, 499 U.S. 400, 410, 413–14 (1991) (citing three-part test); Whitmore v. Arkansas, 495 U.S. 149, 156 (1990) (citing Article III requirements); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 (1989) (citing standing prong, relationship test); Hodel v. Irving, 481 U.S. 704, 711 (1987) (citing Article III requirements);

gleton should be taken not as a strong precedential decision on third-party standing, but rather as a limited holding on Article III standing requirements. Even if the plurality's opinion were adopted as binding precedent, the *jus tertii* holding can easily be distinguished on the facts of the case—an abortion provider asserting his own right to get paid and the right of his patient for medical coverage of an abortion that has already taken place.[176]

Based on *Singleton*'s own facts and circumstances, besides the weakness of the *jus tertii* analysis from the plurality, this case should not control current abortion provider *jus tertii* decisions. A plurality opinion, strongly opposed or questioned by five members of the Court, whose underlying rationale is open to sharp criticism, is not a precedent that should be applied blindly into the future. Instead, *Kowalski* provides a better vision of third-party standing for the lower courts to adopt.

B. Kowalski

In *Kowalski v. Tesmer*, the Court returned to a serious application of *jus tertii* standing principles. *Kowalski* separated out the Article III standing issue and proceeded to apply the close relationship and hindrance prongs with rigor equal to the language of the general rule. Focusing on the actual and not abstract nature of the "relationship," the Court found "no relationship at all" between the attorneys and the hypothetical indigent defendants.[177] Similarly, the burden to indigent appellants having to bring their appeals pro se was not enough to amount to a hindrance because of the practical experience of such

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (citing general prudential rule); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 954 (1984) (citing Article III requirements); South Carolina v. Regan, 465 U.S. 367, 380 (1984) (citing general rule that third-party standing is the exception rather than the rule); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 474 (1982) (citing general prudential rule and purposes); Rakas v. Illinois, 439 U.S. 128, 133 (1978) (discussing Article III standing requirements in relation to Fourth Amendment rights); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 80 (1978) (citing prudential reasons to limit extensions of third-party standing); Craig v. Boren, 429 U.S. 190, 193–94 (1976) (citing Powell's dissent, Article III holding, and hindrance requirement).

176 Even this "holding" would be on shaky ground today, since it has since been held that women are not entitled to state money to pay for their abortions. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 508–13 (1989) (holding that a state refusing to fund abortions does not violate *Roe v. Wade*); Harris v. McRae, 448 U.S. 297, 325 (1980) (upholding the most restrictive version of the Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979)).

177 Kowalski v. Tesmer, 543 U.S. 125, 130 (2004).

pro se appellants succeeding in similar cases.[178] The Court ruled against *jus tertii* standing despite the fact that it would uphold the substantive claims of these indigent defendants in another case that very Term.[179] *Kowalski*, therefore, represents a striking departure from the previous practices of (1) allowing a strong Article III claim to prop up a weak *jus tertii* claim and (2) granting third-party standing if the "underlying claim of third-party rights would appear to be substantively meritorious."[180] Both of these changes represent a return to the black-letter principles of *jus tertii* law and the more fundamental purposes of standing law.

Kowalski involved a "constitutional challenge to Michigan's procedure for appointing appellate counsel for indigent defendants who plead guilty."[181] Two attorneys, claiming to represent future unrepresented indigent defendants, brought the suit based on third-party standing to challenge this practice. A 1994 amendment to the Michigan constitution eliminated the "as of right" appeal for criminal defendants who pled guilty or nolo contendere. Instead, any appeal would be "'by leave of the court'" only.[182] Judges began to deny court-appointed counsel for such defendants and the legislature codified the practice soon afterwards. Barring a few exceptions, the statute prohibited appointing appellate counsel for the poor who plead guilty.[183]

A month before the law took effect, three poor criminal defendants and two lawyers filed suit in federal district court to enjoin the practice, naming the Michigan Attorney General and three Michigan judges as defendants and claiming violation of their due process and equal protection rights.[184] The district court held the statute unconstitutional.[185] Although the Sixth Circuit initially reversed,[186] the panel's decision was subsequently reversed by the Sixth Circuit en banc.[187] Both the Sixth Circuit panel and the court en banc found that the attorneys had standing to assert the claims of the indigent

178 *Id.* at 132.

179 *See* Halbert v. Michigan, 545 U.S. 605, 610 (2005) (holding that the Due Process and Equal Protection Clauses require appointment of counsel for indigent defendants seeking access to first-tier review in the Michigan Court of Appeals).

180 FALLON ET AL., *supra* note 4, at 17 (5th ed. Supp. 2008) (arguing that *Kowalski* represents a "clear departure" from the practice).

181 *Kowalski*, 543 U.S. at 127.

182 *Id.* (quoting MICH. CONST. art. I, § 20).

183 *See id.* at 128; Stirrat, *supra* note 5, at 1357.

184 Stirrat, *supra* note 5, at 1358.

185 Tesmer v. Kowalski, 114 F. Supp. 2d 622 (E.D. Mich. 2000).

186 Tesmer v. Granholm, 295 F.3d 536 (6th Cir. 2002).

187 Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003) (en banc).

defendants, which had been dismissed due to abstention doctrine concerns.[188] The Supreme Court, in a 6-3 decision written by Chief Justice Rehnquist, reversed and remanded, finding that the lawyers did not have *jus tertii* standing.

Chief Justice Rehnquist's majority opinion began by assuming that the lawyers had Article III standing and laying out the general *jus tertii* rule.[189] He explained that parties must rely on their own rights and not "'on the legal rights or interests of third parties.'"[190] This rule ensured the "necessary zeal and appropriate presentation" of claims and helped the court to avoid being "'called upon to decide abstract questions of wide public significance . . . even though judicial intervention may be unnecessary to protect individual rights.'"[191] Chief Justice Rehnquist then framed the analysis for exceptions: the party must show (1) a "close relationship" between the litigant and the rightholder and (2) a "hindrance" to the rightholder's ability to protect his own interests.[192] After recognizing that a class of exceptions has existed where the "'Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights,'" the Court turned to the two required prongs.[193]

The Chief Justice's opinion focused on the hypothetical nature of the "relationship" between the lawyers and their prospective indigent clients. The opinion distinguished the existing lawyer-client relationships in *Caplin & Drysdale, Chartered v. United States*[194] and *United States Department of Labor v. Triplett*,[195] cases where the Court allowed law firms third-party standing to assert the interests of their existing clients. The *Kowalski* plaintiffs, however, did "not have a 'close relationship' with their alleged 'clients'; indeed, they ha[d] no relationship at all."[196] In *Caplin* and *Triplett*, the law firms were representing actual clients, existing persons with whom they had established relationships. Unlike the *Kowalski* plaintiffs, they were not merely resting on an

188 *Kowalski*, 543 U.S. at 128.

189 *See id.* at 129. The lawyers' injury in fact was the future loss of revenue from defending these types of clients, which was assumed without deciding whether it was enough to sustain Article III standing. *Id.* at 129 n.2.

190 *Id.* at 129 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

191 *Id.* (quoting *Warth*, 422 U.S. at 500).

192 *Id.* at 130 (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)).

193 *Id.* (quoting *Warth*, 422 U.S. at 500).

194 491 U.S. 617 (1989).

195 494 U.S. 715 (1990).

196 *Kowalski*, 543 U.S. at 131.

abstraction of the attorney-client relationship with hypothetical future claimants.

Turning to the hindrance prong, the Court took notice that the indigent defendants could challenge the denial of counsel themselves pro se in the Michigan court of appeals, the Michigan Supreme Court, and on writ of certiorari in the Supreme Court of the United States.[197] The plaintiffs argued vigorously that the indigent defendants would be unable to satisfy the procedural requirements without counsel's assistance. Chief Justice Rehnquist, however, noted that "[t]hat hypothesis . . . was disproved" by judicial experience.[198] He highlighted two cases in which pro se plaintiffs took appeals of the debated system to the Michigan Supreme Court and another that reached the U.S. Supreme Court.[199] Each of those cases were brought by indigent appellants without the assistance of counsel. Despite the fact that the attorney's assistance would be "valuable," the majority found that it was not a sufficient hindrance to grant third-party standing.[200]

Furthermore, the plaintiffs failed to satisfy the hindrance prong on an independent ground. The Chief Justice expressed a concern that this § 1983 claim was filed in federal court because "the attorneys and the three indigent plaintiffs . . . did not want to allow the state process to take its course."[201] While the three indigent plaintiffs were properly dismissed below on *Younger* doctrine[202] grounds, granting the attorney's third-party standing would allow them to "circumvent[]" the *Younger* doctrine and use "a federal court to short circuit the State's adjudication of this constitutional question."[203] Concern for the federal scheme, therefore, provided an "additional reason to deny the attorneys third-party standing."[204]

Justice Ginsburg, writing for herself and two other Justices, argued in dissent that the threat of economic loss alone was enough to satisfy third-party standing requirements and protested the distinction between hypothetical and existing relationships when the Court

197 *See id.*

198 *Id.* at 132.

199 *See id.*

200 *See id.* at 132–33.

201 *Id.*

202 *See* Younger v. Harris, 401 U.S. 37, 53–54 (1971) (preventing a state criminal defendant from asserting ancillary challenges to ongoing state criminal procedures in federal court).

203 *Kowalski*, 543 U.S. at 133.

204 *Id.* Justice Thomas authored a short concurring opinion as well as joining the majority. He stated a desire to reexamine the precedent allowing such frequent use of third-party standing, largely with an eye towards voting much of the doctrine off the constitutional island. *See id.* at 134–36 (Thomas, J., concurring).

had previously allowed something as simple as a buyer-seller connection to suffice in the past.[205] She also emphasized the difficulties faced by the indigent defendants, claiming that the barriers are high enough to pass even a hindrance test "with more starch" than that used in many previous decisions.[206]

Thus, *Kowalski* standing doctrine marked a significant departure from the prior trends in third-party standing law in three ways. First, the test was articulated as two necessary elements instead of three possible factors of unknown and changing necessity. This reduces the redundancy of dealing with the Article III standing question twice and should reduce the window of opportunity for litigators and courts to hide behind strong Article III standing to rescue a weak *jus tertii* position.[207]

Second, both prongs of the test were applied with new rigor. The close relationship prong was strengthened by a refusal to recognize a merely hypothetical, abstract idea of an attorney-client relationship as sufficient. Instead, an actual relationship with an actual client had to be demonstrated. Similarly, the argued hindrance was not enough of an obstacle, both because of practical evidence that the same type of first parties were able to bring their own claims in similar cases, and, alternatively, because of respect for the federal scheme and the Court's suspicion that this claim was merely an attempt to circumvent the state's process.

Third, for years it seemed that the Court would grant third-party standing if the "underlying claim of third-party rights . . . appear[ed] to be substantively meritorious."[208] Instead, the *Kowalski* Court denied the *jus tertii* standing of two lawyers challenging the Michigan practice that effectively denied the appointment of appellate counsel for certain poor defendants despite the fact that the Court recognized and enforced those same rights in *Halbert v. Michigan*,[209] a case the Court decided the very same Term as *Kowalski*.[210] This demonstrates

205 *See id.* at 138–39 (Ginsburg, J., dissenting).

206 *Id.* at 140; *see also* FALLON ET AL., *supra* note 4, at 15 (5th ed. Supp. 2007) (arguing that the burdens faced by the *Kowalski* defendants would have passed previous hindrance tests). For a good discussion of Justice Ginsburg's dissent see Stirrat, *supra* note 5, at 1375–79.

207 *Kowalski*, 543 U.S. at 129 (majority opinion) ("[W]e shall assume the attorneys have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others." (citing Rohrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999))).

208 FALLON ET AL., *supra* note 4, at 15 (5th ed. Supp. 2007) (arguing that *Kowalski* represents a "clear departure" from the practice).

209 545 U.S. 605, 610 (2005).

210 *See* FALLON ET AL., *supra* note 4, at 17 (5th ed. Supp. 2008).

dedication to the black-letter principle that standing is about the parties, not about the merits.

Kowalski, therefore, represents a significant break from past application of the two prongs of the analysis and a new commitment to the general rule in *jus tertii* standing. By strengthening the test, *Kowalski* demonstrated a commitment to the systemic purposes of standing law: protecting separation of powers and ensuring structural adherence to Article III's restrictions. It also reinforced a "private rights" view of the function of courts—deciding concrete cases between truly adverse parties who exercise ownership over their own claims.

C. Applying Kowalski *to* Singleton

To illustrate the change in third-party standing doctrine *Kowalski* wrought, it is instructive to apply its rubric to *Singleton*'s facts to determine the probable result if that decision were made today. As this subpart demonstrates, the outcome would have been very different.

Singleton's facts, as laid out above,[211] were straightforward. Two licensed abortion providers filed suit in federal court for injunctive and declaratory relief against the Missouri statute restricting Medicare funding only to such abortions that are "medically indicated."[212] Both abortion providers claimed that they had performed abortion for otherwise eligible patients and would do so again, and that this law impermissibly interfered with the "doctor-patient" relationship.[213]

As in *Kowalski*, the plaintiffs' Article III standing is clearly satisfied, so the modern Court considering the case could set that aside and move on to *jus tertii* standing. On the close relationship prong, the same hypothetical client concerns from *Kowalski* would apply to *Singleton*'s plaintiffs. The abortion providers did not bring these claims on behalf of any particular patients who had been denied care because of the statute. They did aver actual denials of payment, but that is closely analogous to the relationship between the three indigent plaintiffs whose claims were dismissed because of the *Younger* doctrine and the plaintiff attorneys in *Kowalski*. The fact that the three indigent plaintiffs had been involved in the suit with the lawyers previously was not enough to satisfy the close relationship prong. In fact, the Court said that the attorneys had "no relationship at all" with the relevant first parties.[214] Similarly, it is likely that the *Singleton* plaintiffs' hypothetical relationships with Medicare-eligible women

211 *See supra* notes 151–53 and accompanying text.
212 Singleton v. Wulff, 428 U.S. 106, 108–09 (1976) (plurality opinion).
213 *See id.* at 109.
214 *Kowalski*, 543 U.S. at 131.

patients would be inadequate to satisfy the requirement for an existing, actual relationship. This conclusion is confirmed by Chief Justice Rehnquist's concluding remark that "'it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring . . . the claims of future unascertained clients.'"[215] The Court will not grant *jus tertii* standing merely because a recognized archetype of relationship can be imagined, such as attorney-client (or doctor-patient). It requires instead an actual relationship with the relevant first party.

The hindrance prong provides a starker contrast between the two cases' results. The *Singleton* plurality put forward two obstacles: (1) the woman's desire to remain anonymous and (2) the "imminent mootness" of the individual woman's claims.[216] As the plurality itself all but conceded, these were not serious obstacles then, and they are not now. *Kowalski* makes that clear. The majority in *Kowalski* looked to practical judicial examples of similar first-party plaintiffs bringing their own suits as conclusive evidence that there was no qualifying hindrance. That would almost certainly be the case here as well, where courts even before *Singleton* allowed women to bring such suits under pseudonyms[217] and after the pregnancy was over because it was a condition "'capable of repetition yet evading review.'"[218] The first-party women imagined in *Singleton* simply do not face the obstacles faced by the indigent defendants imagined in *Kowalski*, who could not even benefit from the assistance of counsel when bringing their suits. The hindrance prong would therefore also fail, and the suit would be dismissed on both close relationship and hindrance grounds.[219]

This straightforward analysis avoids the missteps of allowing Article III standing to cloud the inquiry and ruling for the party that would likely prevail on the merits. Instead, *Singleton*'s plaintiffs would have to satisfy third-party standing requirements on their own terms. Under the facts given, it is highly unlikely they would do so.

The analysis above could, however, be altered if this situation represented an area where the Court had been "quite forgiving" on

215 *Id.* at 134 (first omission in original) (quoting Tesmer v. Granholm, 333 F.3d 683, 709 (6th Cir. 2003) (en banc)). Compare this remark to Justice Powell's dissent in *Singleton*, 428 U.S. at 130 n.7 (Powell, J., concurring in part and dissenting in part).

216 *Singleton*, 428 U.S. at 117 (plurality opinion).

217 *See supra* note 170.

218 *Singleton*, 428 U.S. at 117 (plurality opinion) (quoting Roe v. Wade, 410 U.S. 113, 124–25 (1973)).

219 There are insufficient facts available to determine if there could have been a *Younger* doctrine concern as well. On different facts, such as a simultaneous state court case, this could have also been a problem for the plaintiffs.

standing in the past.[220] These include First Amendment cases, as well as those cases where the "'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'"[221] While citing other cases as examples—*Doe*, *Griswold*, *Barrows*—the Court did not include *Singleton*. Clearly *Singleton* is not a First Amendment case. It is more difficult to determine whether the facts place it within the second category. It is unclear, for example, whether under the statute the woman was denied payment or abortion providers were.[222] Even assuming that the abortion providers were denied payment, it is unclear if that would qualify as "enforcement" against the plaintiffs that "result[ed] indirectly in the violation of third parties' rights."[223] The Court, applying this test in such uncertain waters, might be swayed by two additional arguments weighing against granting standing. First, this is not a situation like that present in *Doe*, *Griswold*, or *Barrows* where the law was not applied against the first party such that their own standing would be in jeopardy. Women affected by the Missouri statute would certainly have Article III standing to challenge it themselves. Second, the Court's recent decision in *Gonzales v. Carhart*[224] provides strong weight to the proposition that the rights involved in abortion decisions do not require special judicial consideration to sustain them. The *Gonzales* Court explicitly rejected the facial challenge to the Partial Birth Abortion Ban,[225] stating that "[t]he latitude given facial challenges in the First Amendment context is inapplicable here."[226] These two factors counsel strongly, perhaps definitively, against reducing the level of rigor employed in evaluating the third-party standing of *Singleton*'s plaintiffs.

D. Lessons from the Kowalski *Shift*

After comparing *Kowalski* to *Singleton*, several important shifts, both in doctrine and application, come into focus. First, by abandoning the first prong from the *Powers* test, the Court removed the distraction in reasoning caused by dealing with the injury in fact question twice. This narrows the opportunities for courts to "hide the ball" by using an element of Article III standing—which had to be estab-

220 *Kowalski*, 543 U.S. at 130.
221 *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 510 (1975)).
222 *See Singleton*, 428 U.S. at 109 (plurality opinion).
223 *Kowalski*, 543 U.S. at 130.
224 127 S. Ct. 1610 (2007).
225 Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).
226 *Gonzales*, 127 S. Ct. at 1638–39.

lished before the court reached prudential standing—along with the other two prudential factors, to prop up an otherwise lacking *jus tertii* claim. The injury in fact requirement is now cabined to its proper place as gatekeeper of Article III standing.[227]

Second, the Court applied much stronger versions of the two *jus tertii* prongs. *Kowalski* rejected the "hypothetical relationship" between the litigants and future possible poor defendants and focused on whether there were any "existing" relationships that would be affected. Hypothetical relationships were relied upon, at least in part, in many of the Court's previous rulings allowing third-party standing, including *Singleton* and other doctor-patient relationship cases.[228] Similarly, the hindrance prong got some muscle. Despite the real and challenging obstacles faced by indigent defendants attempting to represent themselves (as laid out ably in the dissent by Justice Ginsberg), the majority held that there was no hindrance if the opportunity to appeal pro se remained open to the defendants. The Court showed that, when conducting the hindrance test, a court must examine the factual and legal impediments to the rightholder asserting his own claim. This is a clear departure from the level of scrutiny at work in *Singleton*, where even the plurality didn't consider the obstacles they put forward to be persuasive.[229]

Third and finally, the Court showed that it means business when it says that standing is about the parties and not about the underlying merits of the third party's claim. Rejecting the claim of parties whose same rights are vindicated later in the same Term sends that message about as clearly as it can be sent.

V. Lessons and Applications to Current Abortion Provider Suits

Given the discussion above, what should an attorney do when defending a state law against a challenge by an abortion provider seeking to assert the claims of his patients? There are several practical points to consider when applying *Kowalski* as the standard instead of *Singleton*.

First, counsel should be diligent in requiring the plaintiff to assert or prove, at every stage of the litigation, the elements of Article III and prudential standing. It may be a simple thing to plead around the more rigorous *Kowalski* standards to defeat a 12(b)(6) motion to dismiss, but more is required to survive a summary judgment motion,

227 *See supra* notes 13–16 and accompanying text.
228 *See* Stirrat, *supra* note 5, at 1380–81, 1381 n.191.
229 *See supra* notes 168–73 and accompanying text.

particularly now that hypothetical plaintiffs no longer satisfy the close relationship prong. If a hypothetical attorney-client relationship was found to be insufficient in the face of strong prior judicial recognition of its importance, a strong argument can be made that the doctor-patient relationship should follow in the same mold.

Second, investigate the nature of the relationship to determine whether it actually exists, and then whether it is close. Justice Powell's dissent in *Singleton* raises doubts that a brief clinic visit actually establishes a doctor-patient relationship in the same way that the counseling and examinations did in *Griswold*. Was the only time the woman saw that doctor when she was on the operating table for the abortion, or was he a family physician? The Court has not given much guidance on how such factors should be assessed, but the level of interaction certainly appears relevant to determining whether a relationship actually exists and whether the abortion provider would be able to properly assert the interests of particular female patients.

Third, test the proffered hindrances against the *Kowalski* test, not the *Singleton* test. *Kowalski* is a recent, majority opinion of the Court on a substantially similar issue, while *Singleton*'s hindrance analysis is from a poorly reasoned plurality opinion in a factual situation that would not arise again today.[230] The hindrances raised in *Singleton*—the risk to the woman's privacy and imminent mootness—are simply not strong enough to survive the level of scrutiny employed in *Kowalski*.[231] The abortion provider must plead that the particular women they seek to represent face some hindrance beyond the substantial obstacles that confronted the indigent defendants trying to navigate the murky waters of appellate review with no counsel in *Kowalski*. If there are other women similarly placed who have brought suits challenging abortion regulations, that should be a powerful counterargument under the *Kowalski* approach.

Fourth, explore and expose divergent interests. Statutes which give women rights of action in tort against abortion providers have exposed a significant conflict of interest between the abortion provider's interests and the interests of a woman seeking an abortion. If an abortion provider succeeded in a challenge to such a law, the women affected (particularly the significant percentage of women who have resultant medical complications from abortions) have lost a right to recover damages against the doctor. "Right to know" laws operate in a similar fashion, requiring doctors to provide women with

230 *See supra* note 170 and accompanying text.

231 *See supra* notes 169–73 and 216–19 and accompanying text.

certain information before the abortion decision can be made.[232] Since the information is generally, though not exclusively, about the possible risks of having an abortion, providing that information to women deciding whether or not to have an abortion will have the tendency to decrease the number of abortions by a marginal number. While women have an interest in making a well-informed medical decision, the abortion provider has a financial interest in resisting changes to their practices that will reduce the gross numbers of patients they serve. This does not presuppose any dishonesty on the part of the abortion provider, but merely the economics of information in this situation. Generally, the more abortions abortion providers perform, the more money they make. Divergent interests argue powerfully against a close relationship existing between the abortion provider-litigant and woman-rightholder, and any conflicts of interests should be fully explored before the court allows an abortion provider, or anyone else for that matter, to represent the interests of their patients as third parties.[233]

Finally, it may be an effective tactic to remind the judge that the Supreme Court in *Gonzales v. Carhart* rejected special treatment of abortion law when dealing with facial overbreadth challenges.[234] It may be analogous to suggest that there are no special rules on abortion in any area of law, including standing.

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232 *See, e.g.*, Florida Medical Consent Law, FLA. STAT. § 766.103 (West Supp. 2008).

233 *See generally* Brief of Amicus Curiae of the Horatio R. Storer Foundation, Inc. in Support of Petitioners, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (No. 04-1144) (arguing that abortion providers did not have third-party standing to assert the rights of minors while challenging state regulation); Brief of Amicus Curiae, Family Research Council in Support of Appellants, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008) (No. 05-3093) (arguing that abortion providers did not have third-party standing to assert the rights of women seeking abortions against state regulation); Brief of Amici Curiae Seventy-Six Oklahoma State Legislators, in Their Capacity as Individuals, in Support of Defendants/Appellants Seeking Reversal of the District Court, Nova Health Sys. v. Gandy, No. 02-5094 (10th Cir. Dec. 27, 2002) (arguing that abortion providers challenging imposition of tort remedies for injuries to minors from abortions on such providers should not have third-party standing to assert the rights of their minor patients). In the interest of full disclosure, I had the pleasure of working for Professor Teresa Collett, the author of the *Ayotte* and *Gandy* briefs, in the summer of 2007. I did not work on either of these briefs. The remaining brief was authored by the Alliance Defense Fund. I participated in the Blackstone Fellowship, a scholarship program run by ADF, in the summer of 2007.

234 Gonzales v. Carhart, 127 S. Ct. 1610, 1638–39 (2007).

Conclusion

Standing rules play a very important role in the federal system and deserve careful attention in each civil action in federal court. The content and application of those rules are critical to the preservation of both systemic and institutional values found in both the Constitution and our common law heritage. *Kowalski* represents a major step by the Court toward a serious application of third-party standing rules. It stands in stark relief against the background of previous rulings that appeared to ignore the general rule and allow third-party standing whenever the plaintiff had strong Article III standing and a sympathetic claim. *Singleton v. Wulff* was one such case. Requiring parties to assert only those rights they hold themselves serves both the institutional and systemic purposes of federal standing doctrine: adverseness, ownership, concreteness, separation of powers, and structural adherence to Article III.

With a properly limited *Singleton* and the revitalized doctrine of third-party standing in *Kowalski*, a defense lawyer has the tools to challenge claims of third-party standing that go beyond the narrow scope of what *jus tertii* doctrine properly allows into federal court. Judges and lawyers would do well to reexamine their assumptions, specifically in abortion provider cases, in light of *Kowalski*'s new precedent and the important purposes standing law serves in our federal system. While it is certainly possible that abortion providers may continue to represent the interests of their patients using *jus tertii* standing after *Kowalski*, to do so they ought to be required to satisfy all the elements of both general and third-party standing. If there is no actual close relationship or hindrance within *Kowalski*'s heightened understanding, then abortion providers ought to be left to sue on only their own claims. If *Kowalski* is taken seriously, women would of course remain free to assert or not assert their claims themselves, and without as high a risk that the claims would instead be brought through the lens of another party whose interests may or may not be aligned with their own. Applying *Kowalski* with a close attention to factual detail and an eye toward the systemic and institutional purposes of standing law will go a long way to clearing up this "confused and confusing" area of federal law.