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The Merits of Third-Party Standing

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ABSTRACT

When can a litigant assert someone else’s rights in federal court? The courts currently purport to adhere to a “prudential” justiciability rule barring such “third-party standing.” But the Supreme Court has devised exceptions—jus tertii standing and First Amendment overbreadth—under which courts can ignore that rule. The Court has never explained the source of that remarkable judicial power to choose what rights litigants can assert. The doctrine of third-party standing is, in short, an under-theorized muddle. Thankfully, the Court suggested in its 2014 decision in Lexmark International, Inc. v. Static Control Components, Inc., that it might soon try to bring order to its third-party standing jurisprudence.

Drawing on Lexmark, this Article offers a fresh and timely account of third-party standing doctrine. It argues that the rule barring assertion of third-party rights has nothing to do with prudence and justiciability. Rather, it is best understood as going to the merits of the parties’ dispute, in that it concerns the substantive issue of whether a litigant can establish the grounds of a claim or defense. As a merits doctrine, the rule barring assertion of third-party rights appropriately requires courts to defer to limits placed on substantive rights by the lawmakers who created them. That conclusion raises serious questions concerning the viability of the jus tertii standing and overbreadth exceptions. This Article argues that jus tertii standing doctrine can survive, but only if cabined to situations in which recognition of an implied right belonging to the litigant is necessary to effectuate the design of the lawmakers who created the asserted third-party right. The overbreadth doctrine, however, has no place in a world in which courts must defer to lawmakers concerning the scope of substantive rights. But the long-dormant doctrine of jus tertii inseverability, which is grounded in lawmakers’ intentions, could fill some of the void left by the overbreadth doctrine’s demise.

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INTRODUCTION

Say you are injured by the operation of a statute that violates someone else’s rights. Can you assert that third person’s rights in court? It turns out that the doctrines that answer such third-party standing questions are an undertheorized muddle. As things stand now, the federal courts purport to adhere to a general rule prohibiting litigants from asserting rights that “belong to” someone else. But the Supreme Court has developed exceptions that often permit courts to ignore that general rule. Thus, under the “jus tertii standing” exception, the Court has held that a law firm could challenge a criminal forfeiture statute on the ground that it impermissibly limited the ability of defendants to retain their desired counsel, even though the firm’s client consented to the forfeiture order.1 The Court also has held, however, that attorneys could not challenge a law barring the appointment of appellate counsel for some indigent defendants, even though the attorneys had long engaged in state-paid appellate

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representation of indigent defendants and affected defendants supported the attorneys’ suit. And, under the “overbreadth” exception, the Court routinely permits litigants to argue that a statute cannot be applied to them because it would violate the First Amendment rights of third parties if applied to them. But the Court has refused to authorize such a challenge where commercial speech is at issue and generally will not allow such a challenge “outside the limited context of the First Amendment.” In short, sometimes the Court allows litigants to assert “third-party” rights, and sometimes it does not. That power to choose the rights a litigant is allowed to assert can make all the difference: a court can pick winners and losers simply by deciding whether the litigant has “standing” to assert the right of a person not before the court.

Where does this power come from? Surprisingly, the Supreme Court has never paused to offer a serious answer. The Court has insisted, without further explanation, that the rule barring assertion of others’ rights is a matter of “prudential standing”—that is, “a rule of practice” and “self-restraint” developed by the Court—that may be either applied or ignored as the Court sees fit. The resulting difficulties are not hard to spot. As Professor Monaghan has observed, “[s]erious problems of legitimacy are raised” when courts exercise an “unanalyzed and ungrounded” discretion to pick and choose the arguments that they will entertain and, thus, to ration access to the courts.

Thankfully, the Court might soon try to bring order to its third-party standing jurisprudence. In its 2014 decision in Lexmark International, Inc. v. Static Control Components, Inc., the Court reframed aspects of its prudential standing doctrine. In the process, it suggested that it might re-examine whether the rule barring assertion of third-party rights is a true matter of judicial “prudence,” a matter of judicial power under Article III, or a matter concerning the merits of a litigant’s claim or defense. No less important, the Court expressed unease with the concept of prudential standing

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4 See Bd. of Trs. v. Fox, 492 U.S. 469, 481–82 (1989).
6 Both overbreadth doctrine and jus tertii standing doctrine involve issues of third-party standing. Jus tertii inseverability is a superficially similar doctrine that has been described as involving issues of third-party standing, though it is more accurately described as a matter of first-party standing. See infra notes 75–96 and accompanying text. For clarity’s sake, this Article will refer, where applicable, specifically to overbreadth doctrine, jus tertii standing doctrine, and jus tertii inseverability doctrine. The “third-party standing” formulation will be used where the discussion focuses on either the general ability of litigants to assert legal rights belonging to others, or the Court’s current, prudential framework for evaluating a litigant’s assertion of third-party rights.
10 See id. at 1386–88.
11 See id. at 1387 n.3.
doctrines.\(^\text{12}\) *Lexmark* suggests that the Court wants to clean up this area of the law. Otherwise, the Court presumably would not have discussed third-party standing in that case, which presented no such issue.\(^\text{13}\) In short, the Court seems poised to reconsider the third-party standing “doctrine’s proper place in the standing firmament” sooner rather than later, and that reconsideration will occur against the backdrop of the Court’s discussion of prudential standing in *Lexmark*.\(^\text{14}\)

This Article seeks to provide guidance on the issues that will take center stage when that day comes. Specifically, this Article offers a comprehensive account of third-party standing doctrine, including both the current default rule barring assertion of third-party rights and the exceptions to that rule. Though the need for a coherent theory of third-party standing has been evident for at least fifty years,\(^\text{15}\) scholars only intermittently have given the matter sustained attention, and none have done so in the wake of the Court’s pivotal decision in *Lexmark*. Moreover, those scholars who have addressed the matter at greatest length—Professors Richard Fallon, Henry Monaghan, Robert Sedler, and Marc Rohr—all endorse a robust conception of the ability of litigants to assert the rights of third parties.\(^\text{16}\) The appraisal offered here, in contrast, advocates a cautious judicial approach—an approach in keeping with the teachings of *Lexmark*.

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12 See id. at 1386–88.
13 See infra notes 38–52 and accompanying text.
To develop a comprehensive account of third-party standing, this Article undertakes two inquiries. First, it asks whether the current default rule barring assertion of third-party rights is best understood as an appropriate exercise of judicial prudence, a result of constitutional constraints on federal court jurisdiction, or a matter of substantive law governing the merits of particular disputes. That inquiry is necessary because its resolution will dictate whether and when third-party standing issues must be addressed—for instance, whether they can be waived and whether they must be resolved before any rulings on the merits. Moreover, it will impact the continuing viability of the currently accepted exceptions to the rule barring assertion of third-party rights, which must be judged against and justified by reference to the background rule against which they operate.

I therefore offer the first thorough examination of the possible ways of understanding the bar against asserting others’ legal rights. I argue that the rule is best understood as going to the merits of a litigant’s claim or defense. To see why, consider an example. Assume that a newly enacted state law forbids aliens from purchasing firearms. Assume further that a firearms dealer in a largely immigrant neighborhood files a federal lawsuit in which it claims that the law violates aliens’ Second Amendment rights and has caused it to lose business. Nothing in Article III precludes the court from adjudicating that lawsuit: the dealer’s financial losses constitute remediable “injury in fact” caused by the new law, and the suit “call[s] for the application of,” and thus “aris[es] under,” federal law for purposes of Article III. If the court dismisses the lawsuit on “third-party standing” grounds, that holding would be based on a conclusion concerning the substantive scope of the Second Amendment right—that is, that the Framers of the Second Amendment created a personal right that protects individuals, as individuals. That is a merits determination concerning the validity of the dealer’s Second Amendment claim, not an exercise of judicial prudence.

18 U.S. CONST. art. III, § 2, cl. 1.
19 Now-Judge William Fletcher connected third-party standing doctrine to the merits of the parties’ dispute in the course of making a broader argument that all standing issues should be reconceived as merits questions. See Fletcher, supra note 16, at 243–47. Professor Todd Brown has done the same in the course of arguing that prudential standing doctrines should be abandoned. See S. Todd Brown, The Story of Prudential Standing, 42 HASTINGS CONST. L.Q. 95, 130–32 (2014). Because Judge Fletcher and Professor Brown do not focus on third-party standing doctrine, they understandably do not address important aspects of the third-party standing issue that are explored in this Article. As an example, neither Judge Fletcher nor Professor Brown considers whether Article III’s restriction of federal court jurisdiction imposes limits on third-party standing, even though the Supreme Court formerly held that Article III limits the ability of litigants to assert third-party rights in federal court. See infra notes 53–74, 191–226 and accompanying text. Similarly, neither Judge Fletcher nor Professor Brown explores the implications of their conclusions for the future of third-party standing doctrine and, particularly, its overbreadth and jus tertii standing exceptions. Professor Brown does not discuss those matters at all, see Brown, supra, at 130–32, and Judge Fletcher appears to assume that both exceptions can be understood in terms of first-party rights, see Fletcher,
Second, I assess whether the overbreadth and *jus tertii* standing exceptions can survive once it is recognized that third-party standing doctrine concerns the substance of asserted rights. Time and again, in a variety of contexts, the Supreme Court has stressed that federal courts generally lack law-making authority, and that they therefore must defer to the designs of others when it comes to the content of substantive law.\(^20\) As a corollary, federal courts must defer to, and enforce, limitations placed on rights by the lawmakers who created them. The upshot is that a litigant should be permitted to assert the rights of third parties only when it can be said that a substantive lawmaker has extended to the litigant a first-party right to do so.

As will be shown, that framework requires that *jus tertii* standing doctrine be narrowed—but not abandoned—to reach only those situations in which recognition of an implied right belonging to the litigant is necessary to effectuate the design of the lawmakers who created the asserted third-party right. On the other hand, overbreadth doctrine, with its sweeping allowance of third-party standing in the First Amendment context, cannot survive in a world in which courts must defer to lawmakers concerning the scope of the rights that they create. That said, the long-standing *jus tertii* inseverability doctrine could be reinvigorated to fill at least part of the void left by the (urged) demise of overbreadth doctrine. *Jus tertii* inseverability doctrine allows a litigant to argue that a law cannot be applied to her because: (1) other provisions or applications of the law would violate the rights of third parties; and (2) the lawmakers who created the challenged law intended that it not apply to anyone if those provisions or applications were invalid. The litigant, in other words, is claiming that a substantive lawmaker has authorized her to assert rights that belonged in the first instance to third parties. The litigant is making, in short, a first-party overbreadth challenge.

The Article proceeds in four parts. Part I sets the stage. The first Subpart summarizes the two now-accepted aspects of standing doctrine—Article III standing and prudential standing. The second Subpart discusses the Court’s *Lexmark* decision. Part II seeks the best understanding of the rule barring assertion of third-party rights. The first Subpart offers a historical account of third-party standing law. Building on this history, the second Subpart identifies the different ways in which the rule barring third-party standing might be understood: as going to judicial prudence, constitutional jurisdiction, or the merits of the parties’ dispute. I argue that the third-party “standing” bar is best conceptualized as involving the merits of the parties’ dispute, supra note 16, at 243–47; see also William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 Ala. L. Rev. 277, 282–87 (2013) (suggesting that the Supreme Court should enjoy flexibility in determining who may assert a right). But a comprehensive account of third-party standing doctrine must grapple with those issues. I therefore consider them in this Article. In the process, I make arguments regarding the continuing viability of the overbreadth and *jus tertii* standing exceptions that differ dramatically from the positions suggested by Judge Fletcher’s treatment of third-party standing. See infra Part III.\(^20\) See infra notes 174–90, 227–46 and accompanying text.
in that it derives from, and requires courts to defer to, limitations placed on the asserted third-party right by the lawmakers who created that right.

Part III examines whether the overbreadth doctrine can survive once it is recognized that the bar on third-party standing is in reality a merits doctrine. It rejects past attempts by academic commentators to recast the overbreadth rule in terms of first-party rights, but also suggests that a reinvigorated judicial attentiveness to *jus tertii* inseverability might fill part of the doctrinal void created by abandonment of overbreadth doctrine.

Part IV considers the continuing vitality of *jus tertii* standing doctrine. It posits that the current court-driven, freewheeling approach to *jus tertii* standing is at odds with the obligation of courts to defer to lawmakers’ designs concerning the scope of legal rights. That said, courts should recognize that allowance of *jus tertii* standing will effectuate the design of the lawmakers in two narrow situations: (1) when the first-order right-holder faces a justiciability barrier to securing his right through the judicial process; and (2) when the government has chosen to regulate the litigant directly as a means of indirectly regulating the first-order right-holder. In these two situations, allowance of *jus tertii* standing vindicates a right—properly inferred from the legal provision creating the asserted third-party right and the design of the lawmaker who created that provision—that belongs on a first-party basis to the litigant. Part IV concludes by analyzing—and rejecting—academic attempts to recast *jus tertii* standing doctrine more broadly in first-party, substantive-due-process terms.

I. A SUMMARY OF STANDING

Third-party standing law is one piece of a much larger jurisprudence that treats constitutional and subconstitutional limits on the federal courts’ power to act. This Part launches the effort to understand third-party standing by offering an overview of the Supreme Court’s standing doctrine. Subpart A describes the Court’s treatment of both constitutional and prudential standing. Subpart B turns to the Court’s recent and potentially seminal *Lexmark* decision.

A. The Two Aspects of Standing Doctrine

“Standing” refers to the right of a particular litigant “to have the court decide the merits of the dispute or of particular issues.” As defined by the Court, standing doctrine is independent of the merits—which is to say that it is independent of the correctness or incorrectness of a litigant’s claim or defense. There are currently two categories of standing doctrine: constitutional standing and prudential standing.

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22 Id. at 500.
The first aspect of standing is the doctrine of constitutional standing. The Supreme Court claims that it has "deduced a set of requirements that together make up the ‘irreducible constitutional minimum of standing’"23 from Article III’s limitation of the judicial power to “cases” and “controversies.”24 According to the Court, these requirements limit the federal courts to “adjudication of actual disputes between adverse parties.”25

To establish Article III standing, a litigant must show three things: “(1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likelihood’ that the injury ‘will be redressed by a favorable decision.’”26 The Court views these requirements as serving two interrelated goals. First, they keep the federal courts within the proper scope of their Article III power by preventing them from issuing advisory opinions.27 Second, they enforce “separation-of-powers principles” by “prevent[ing] the judicial process from . . . usurp[ing] the powers of the political branches.”28 In both respects, the Article III standing doctrine serves to keep the federal courts from exceeding their constitutional role.29 Despite widespread scholarly criticism,30 the Court’s constitutional standing framework is well established.31

The second aspect of standing concerns prudential, rather than constitutional, limits on judicial action. The Supreme Court has described prudential standing as comprising “a series of rules under which [it] avoid[s] . . . [some] questions pressed upon [it] for decision,” “[e]ven in cases concededly within [the Court’s] jurisdiction under Article III.”32 The Court avoids those questions because it deems the party pressing them to be “ill-suited to litigate the claims they assert.”33 Although the

24 U.S. CONST. art. III, § 2, cl. 1.
31 See, e.g., Elliott, supra note 29, at 165. I take the current constitutional standing doctrine as a given in this Article.
Court purports not to have “exhaustively defined” prudential standing doctrine, it once described this body of law as “encompassing . . . at least three broad principles”:

[1] “the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked”;

[2] “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches”;

[3] “the general prohibition on a litigant raising another person’s legal rights.”

Recently, however, important shifts have occurred in the law of prudential standing. As a result, under current law, the Court views only the last of these limits—the limit on third-party standing—as prudential in nature.

B. Lexmark and the Narrowing of Prudential Standing

In its 2014 Lexmark decision, the Court took it upon itself to reshape the law of prudential standing. It did not need to do so. The case required application of the zone-of-interests standing limit—a limit sometimes described in terms of “statutory standing.” As litigated by the parties and decided by the lower courts, the case involved only the issue of whether a counter-claimant—Static Control—had statutory standing to assert a false advertising claim under the Lanham Act. The question presented asked the Court to resolve a circuit split concerning “the appropriate analytic framework for determining a party’s [statutory] standing to maintain an action for false advertising under the Lanham Act.”

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35 Id. at 1386 (quoting Elk Grove, 542 U.S. at 11).
36 Id.
37 Id.
38 Id. at 1386–88.
42 Petition for Writ of Certiorari, Lexmark, 134 S. Ct. 1377 (No. 12-873).
Lexmark thus presented only a narrow issue. The Court, however, seized the opportunity to “clarify [...] the nature of the question at issue” by broadly re-examining the law of standing. Specifically, the Court, upsetting forty years of precedent, declared that the statutory standing doctrine did not involve a prudential limit on judicial action; rather, it involved an aspect of the merits of the plaintiff’s claim. According to the Court, “[w]hether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires [a court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” The Court, in answering that question, went on to hold that courts are to defer to the governing body that created the law at issue, which in Lexmark was Congress. As the Court put it, a court “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates” such outcome, “[j]ust as [it] cannot apply its independent policy judgment to recognize a cause of action that Congress has denied.”

In addition to reclassifying statutory standing, the Court engaged in a broader discussion of prudential standing. Of particular significance, it observed that prudential standing limits are “in some tension with [the Court’s] recent reaffirmation of the principle that ‘a federal court’s “obligation” to hear and decide’ cases within its jurisdiction ‘is “virtually unflagging.”’” And, even though it had nothing to do with the case at hand, the Court clarified that the bar on generalized grievances involves a constitutional limit, rather than a prudential standing rule.

The Court then briefly turned its attention to the lone remaining core prudential standing doctrine—the bar on third-party standing. The Court acknowledged that the limitation on asserting third-party legal rights is difficult to classify, and that most of the Court’s cases have treated it as an aspect of prudential standing. The Court also noted, however, that it had in the past described the third-party standing issue as “closely related to the [merits] question whether a person in the litigant’s position will have a right of action on the claim.” In the end, the Court concluded that the third-party standing rule’s “proper place in the standing firmament can await another day.”

With respect to the law of third-party standing, Lexmark brings two key points into focus. First, the Court has declared its readiness to re-examine—and perhaps

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43 Lexmark, 134 S. Ct. at 1386.
44 See id. at 1387 & n.4.
45 Id. at 1387 (citations omitted).
46 See id. at 1387–88.
47 Id. at 1388. The Court ultimately held that Static Control’s allegations stated a claim under the Lanham Act. Id.
48 Id. at 1386 (quoting Sprint Commc’ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)).
49 See id. at 1387 n.3.
50 Id.
51 Id. (quoting U.S. Dep’t of Labor v. Triplett, 494 U.S. 715, 721 n.** (1990)).
52 Id.
to rework—the basic principles of third-party standing. Second, that re-examination will unfold against the backdrop of the Court’s reframing of the law of prudential standing in the *Lexmark* opinion itself. In the pages that follow, I offer a fresh account of third-party standing law that pays heed to the teachings of *Lexmark*.

II. UNDERSTANDING THE BAR ON THIRD-PARTY STANDING

This Part seeks to unpack what it means for a court to stay its hand because a litigant lacks “standing” to assert third-party rights. I argue that issues of so-called third-party standing are best understood as going to the merits of a litigant’s claim or defense. Subpart A discusses the Supreme Court’s evolving approach to the ability of litigants to assert rights belonging to others. Subpart B both discusses the various ways in which the third-party standing bar might be understood and argues that it is best conceptualized as involving the merits of the litigant’s claim or defense.

A. The Supreme Court’s Evolving Approach to Third-Party Standing

To fully understand the third-party “standing” doctrine, we must consider how similar issues have been treated in the past. Litigants have long sought to assert others’ legal rights in the course of determining what it meant for a case to “arise[s] under” federal law within the meaning of Article III. To read broadly, that language could have given the federal courts jurisdiction over every case in which federal law might play any role. As relevant here, the “arising under” language can plausibly be read as extending the federal judicial power to cases in which a litigant seeks to assert a third party’s rights under federal law. The Court, however, rejected that reading of Article III in its 1809 decision in *Owings v. Norwood’s Lessee*.55

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53 U.S. CONST. art. III, § 2, cl. 1.
55 9 U.S. (5 Cranch) 344, 348 (1809).
Owings was an ejectment action. The plaintiff claimed a right to possession under state law pursuant to a patent issued by Maryland, after it confiscated the land under a state statute that stripped British citizens of their property interests. The defendant (Owings) argued—as permitted under Maryland law—that there was “an existing title out of the plaintiff” because British mortgagees retained a lien on the property, which was protected from state confiscation by a provision of the Treaty of Paris. In other words, Owings invoked the British citizens’ rights under a federal treaty in an attempt to defend his possession of the property. The Maryland courts rejected that argument. Owings sought review on writ of error to the Supreme Court. He based jurisdiction on Section 25 of the Judiciary Act, which permitted review of state court decisions “where is drawn in question the construction of any clause of a treaty, and the decision is against the right claimed under such clause of the treaty.”

In an opinion by Chief Justice Marshall, the Supreme Court dismissed for lack of jurisdiction. According to the Court, the case presented an issue concerning the meaning of Article III: “Whether the present case [was] a case arising under a treaty, within the meaning of the constitution.” The Court held that the case did not “arise[s] under a treaty,” even though Owings would have defeated the plaintiff’s ejectment claim had his interpretation of the treaty prevailed. As the Court explained, treaties create rights, and, “[w]henever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected” by the federal courts. By its text, however, the treaty at issue created, as relevant, rights only in British subjects with “any interest in confiscated lands.” Thus, Owings’s “title [could not] be protected by the treaty,” because he did “not contend that his right grew out of the treaty.” The Court therefore dismissed, holding that Owings could not rely on the treaty rights of a third party to invoke “arising under” jurisdiction.

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56 Id. at 344.
58 Id.
59 Id.
60 Id. (paraphrasing 1 Stat. 73, 85–86 (1789)).
61 Id. at 350.
62 Id. at 347. The Court interpreted Section 25 of the Judiciary Act in light of its interpretation of Article III. See id.
63 Id. at 348.
64 See Definitive Treaty of Peace, U.S.-Gr. Brit., art. 5, Sept. 3, 1783, 8 Stat. 80, 83. Although the treaty refers here to “all persons,” the context supports the Court’s apparent conclusion that it protected British subjects and those who sided with Britain during the War.
65 Id. at 347–48 (emphasis added).
66 Id. at 349–50.
The Court repeatedly relied on *Owings* and its progeny throughout the nineteenth century and into the early twentieth century. In doing so, the Court applied the Judiciary Act, as limited by the Court’s interpretation of Article III’s “arising under” clause in *Owings*, to hold that a litigant seeking Supreme Court review of a state judgment must assert his own rights—not a third party’s rights—under a provision of the federal Constitution or of a federal statute or treaty. These cases thus reveal the Court’s early recognition that sources of substantive law extend rights to a limited set of individuals—for instance, British creditors under the treaty in *Owings*. And, because the phrase “arising under” does not self-evidently preclude a litigant’s assertion of rights belonging to a third party, the Court’s refusal to entertain a litigant’s assertion of third-party rights suggested that it recognized a need to defer to the limited scope accorded rights by the lawmakers who created them.

The Court, however, has now abandoned this narrow reading of Article III’s “arising under” language. The Court sowed the seeds for this expansion of Article III “arising under” jurisdiction in its 1824 decision in *Osborn v. Bank of the United States*. In *Osborn*, the Court held that a case “arises under” federal law within the meaning of Article III whenever an issue of federal law “forms an ingredient of the original cause.”

More recent Supreme Court opinions have observed that *Osborn* “reflects a broad conception of [Article III] ‘arising under’ jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law.” Although those opinions have neither endorsed nor rejected that broadest conception of Article III’s “arising under” clause, they have determined that Article III “arising under” jurisdiction exists, at a minimum, whenever a case necessarily involves a question of federal law.

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69 22 U.S. (9 Wheat.) 738 (1824).
70 Id. at 823.
72 See, e.g., id. at 493.
73 As a result, a federal trial court may exercise Article III jurisdiction if a litigant has raised a claim or defense necessarily involving a question of federal law. See, e.g., Gunn v. Minton, 133 S. Ct. 1059, 1064 (2013); Mesa v. California, 489 U.S. 121, 136–37 (1989) (case falls within scope of Article III “arising under” clause where defendant asserts defense involving question of federal law); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807 (1986); *Verlinden B.V.*, 461 U.S. at 493; see also Mims v. Arrow Fin. Servs., 132 S. Ct. 740, 749 n.9 (2012) (explaining that a state-law claim may “arise under” federal law for purposes of jurisdictional statute “if the claim requires resolution of significant issues of federal law”). And the Supreme Court may exercise Article III “arising under” jurisdiction to review a state court decision addressing an issue of federal law embedded in a state-law claim. See Ohio v.
Under either of those conceptions of Article III “arising under” jurisdiction, a federal court may adjudicate a case when a litigant’s request for federal court relief is premised on an assertion of third-party federal rights, as such a case necessarily involves a question of federal law. For confirmation of that point, one need only survey the many cases in which the Court has adjudicated a petitioner’s *jus tertii* standing challenge to state action.74

2. *Jus Tertii* Inseverability Cases

Long after the Founding, another line of cases arose that has been described as involving third-party standing issues. I will refer to these cases as “*jus tertii* inseverability” cases because they are part of a larger body of rulings addressing questions of severability—that is, whether an unconstitutional provision or application of a law is severable from the remaining provisions or applications, such that the remaining provisions or applications can continue in effect.75 Given recent cases, one might think of severability as a remedial matter: a litigant shows that an application of a law to her violates the Constitution, and the court then explains whether, in light of that fact, the remainder of the law can still be applied, either to the litigant or to anyone else.76 However, severability issues can also arise in a way that presents issues closely related to third-party standing.77 In these cases, a litigant argues that a law cannot be applied to her because: (1) certain of its other provisions or applications would be invalid as applied to third parties; and (2) the remainder of the law cannot stand without the invalid provisions or applications.

For some eighty years following the Constitution’s ratification, the Court did not take a focused look at severability issues. Instead, it operated under the assumption that, where only some parts of a statute were invalid, the remainder would be given “full effect.”78 Only with the rise of complex legislation in the late 1800s79 did

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the Court begin paying serious attention to severability issues, including issues of \textit{jus tertii} inseverability.

The end result of that process was the adoption of an approach that looked to legislative intent to resolve issues of severability. As the Court stated in 1880, “
The point to be determined in all [severability] cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.”\textsuperscript{80} That statement was an early formulation of the long-established rule: a court must look to the intent of the legislature when determining whether valid aspects of a statute can be severed from allegedly invalid aspects.\textsuperscript{81}

As a result, a court must consider the intent of the body that created the challenged law in adjudicating a \textit{jus tertii} inseverability argument. Successful \textit{jus tertii} inseverability arguments therefore involve a judicial conclusion that the law-making body intended the challenged statute not to apply to anyone if certain of its provisions or applications were invalid. Stated differently, successful \textit{jus tertii} inseverability arguments entail a conclusion that the law-making body that created the challenged law intended for challengers to be able to assert rights belonging to others in the first instance.\textsuperscript{82} These \textit{jus tertii} inseverability cases thus “are first party standing cases,”\textsuperscript{83} in the sense relevant here, because the litigant challenging the law is asserting legal rights that a relevant law-making body has authorized him to assert.

Even as it solidified the legislative-intent-focused doctrine of severability, the Court remained largely skeptical of \textit{jus tertii} inseverability arguments. The Court’s decision in \textit{Clark v. Kansas City}\textsuperscript{84} is typical. In that case, a railroad challenged the constitutionality of a Kansas statute under which its lands had been incorporated into, and then taxed by, a city.\textsuperscript{85} As relevant here, the law excepted lands used for agricultural purposes, but only if they were not owned by a corporation.\textsuperscript{86} Though it owned no agricultural land, the railroad argued that the act violated the Equal Protection Clause in discriminating against corporations that owned agricultural lands and that the act therefore could not be applied to it.\textsuperscript{87} The railroad, in other words, argued that the act was wholly void because it violated the equal protection

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\item Allen v. City of Louisiana, 103 U.S. 80, 84 (1880).
\item In a \textit{jus tertii} inseverability challenge to a state law, the state’s severability law—which may not look to the legislature’s intent—will determine whether a litigant can assert “third-party” rights. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996). The key point, though, is that for purposes of the challenge, those rights belong to the litigant; he is making a first-party claim by asserting rights that state law has authorized him to assert. See Monaghan, \textit{supra} note 8, at 290.
\item Monaghan, \textit{supra} note 8, at 290.
\item 176 U.S. 114 (1900).
\item \textit{Id.} at 115.
\item See \textit{id}.
\item See \textit{id.} at 117–18.
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The rights of other corporations—a *jus tertii* inseverability argument.—The Court rejected that argument, quoting the Supreme Court of Kansas’s decision to the effect that “[a] court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it.” In short, the Court rejected the railroad’s *jus tertii* inseverability argument, but it did so without discussing severability.

Clark, and cases similar to it, can be read in two ways. They can be read as applying a hard-and-fast rule—the precise basis for which is unclear91—categorically barring litigants from asserting rights that belong to others in the first instance. That reading, however, does not accurately capture the Court’s view during this period. The proof lies in the fact that the Court seriously entertained,92 and sometimes

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88 Id.
89 See id. at 118.
90 Id.; see also Heald v. District of Columbia, 259 U.S. 114, 122–23 (1922) (taking a similar approach to a *jus tertii* inseverability challenge to an act of Congress).
91 Some of the cases from the late nineteenth and early twentieth centuries intertwined their rejection of a *jus tertii* inseverability argument with the jurisdictional principle announced in *Owings*, but without engaging in an independent discussion of Article III. See supra notes 61–68 and accompanying text. That is, where the litigant asserted a *jus tertii* inseverability argument, the Court rejected the argument and dismissed the writ of error in relevant part based on the principle that a litigant could not rely on another’s federal right to invoke the Supreme Court’s jurisdiction. See, e.g., Smith v. Indiana, 191 U.S. 138, 148 (1903); Tyler v. Judges of the Court of Registration, 179 U.S. 405, 407–10 (1900); Austin v. The Aldermen, 74 U.S. (7 Wall.) 694, 698–99 (1868). However, in other cases from the era, including *Clark*, the Supreme Court rejected *jus tertii* inseverability arguments without reference to the principle of *Owings*, holding only that the litigant could not succeed in challenging a statute on the ground that it violates others’ rights. See, e.g., Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576 (1915); Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 220–21 (1912); Citizens Nat’l Bank v. Kentucky, 217 U.S. 443 (1910); Waters-Pierce Oil Co. v. Texas, 177 U.S. 28, 43 (1900); Bd. of Supervisors v. Stanley, 105 U.S. 305, 306–15 (1881). In cases fitting the latter description, the Court did not suggest that its decision was based on a prudential determination that a party should not be permitted to assert another’s rights in pursuit of his own interests, as opposed to a determination on the merits—that is, a conclusion that the litigant’s argument failed because he had no claim or defense under the legal provision creating the asserted third-party right. See also Winter, supra note 16, at 1425–33 (arguing that the rule against third-party standing emerged around the beginning of the twentieth century as a clearly independent, non-Article III doctrine divorced from the *Owings* line of cases).
92 By “seriously entertained,” I mean that the Court gave explicit consideration to the issue of severability in resolving the *jus tertii* inseverability challenge. See, e.g., Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 433–39 (1938); Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937); Dorchy v. Kansas, 264 U.S. 286, 288–91 (1924); Bd. of Trade v. Olsen, 262 U.S. 1, 42 (1923); N.Y. Cent. R.R. v. White, 243 U.S. 188, 197, 208 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917); El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 92–98 (1909); N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 496 (1909) (“[T]he case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions.”); The
accepted.\textsuperscript{93} \textit{jus tertii} inseverability arguments during the late nineteenth and early twentieth centuries. For example, in \textit{New York Central Railroad Co. v. White},\textsuperscript{94} the Court held that a railroad company could challenge the entirety of New York’s Workmen’s Compensation Law on the ground that one of its provisions violated the Fourteenth Amendment rights of employees, because that provision was “an essential part of”—and thus inseverable from—the statutory scheme.\textsuperscript{95}

Given the Court’s willingness during this era to entertain \textit{jus tertii} inseverability arguments, cases like \textit{Clark} are best read as turning (albeit implicitly) on a conclusion of severability.\textsuperscript{96} It is not that the litigant is categorically barred from making an inseverability argument based on rights belonging in the first instance to third parties. Rather, it is that the \textit{jus tertii} inseverability argument \textit{fails on the merits} because the statute is severable; the legislature that enacted the challenged statute did not authorize the litigant to challenge it on the asserted ground. Without \textit{that} basis for a first-party challenge, the litigant can only assert whatever first-party rights she might have by virtue of laws external to the challenged statute.

To be sure, the Court has long\textsuperscript{97} applied a presumption of severability, pursuant to which courts assume that a legislature intends maximum severability\textsuperscript{98} in the absence

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  \item Employers’ Liability Cases, 207 U.S. 463, 494, 499–502 (1908); Ill. Cent. R.R. v. McKendree, 203 U.S. 514 (1906); James v. Bowman, 190 U.S. 127 (1903); Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 617 (1903); \textit{Stanley}, 105 U.S. at 306; Trade-Mark Cases, 100 U.S. 82, 98–99 (1879); United States v. Reese, 92 U.S. 214, 221–22 (1875). The Court presumably would not have done so if the \textit{jus tertii} inseverability argument could have been rejected on the basis of a categorical rule that the litigant could not assert rights belonging to another in the first instance.
  \item 243 U.S. 188 (1917).
  \item Id. at 197.
  \item To be sure, the Court often did not explicitly engage in reasoning of this sort, though it occasionally did so. See \textit{supra} notes 92–95 and accompanying text. Nevertheless, the Court’s decision to “enforce[ ] the valid application against the” litigant making the \textit{jus tertii} inseverability argument while “refrain[ing] from adjudicating the constitutionality of applications other than those at bar. . . . rests necessarily (if implicitly) on a judgment that the statute is severable.” Adrian Vermeule, \textit{Saving Constructions}, 85 Geo. L.J. 1945, 1951 (1997). \textit{But see Hill}, \textit{The Puzzling First Amendment Overbreadth Doctrine}, supra note 16, at 1082–83 (arguing that the Court’s rejection of claims premised on invalid applications of statutes to third parties did not turn on issues of severability).
  \item There may be an outer limit to the presumption. The Court appears not to have definitively settled on the proper standard for assessing facial challenges—including \textit{jus tertii} inseverability challenges—outside of the First Amendment “overbreadth” context. See infra notes 122–38 and accompanying text. In his opinion for the Court in \textit{United States v. Salerno}, 481 U.S. 739 (1987), Chief Justice Rehnquist wrote that a litigant must show “that no set of
of an indication of legislative intent to the contrary. As a practical matter, this presumption of severability greatly limits the utility of *jus tertii* inseverability arguments. Because courts presume that a statute’s valid aspects are severable from its invalid aspects, a litigant generally will not succeed in arguing that a statute cannot be applied to him because its application to third parties would be invalid. Indeed, the presumption of severability would permit a court to reach a conclusion of severability quickly—sometimes, as in *Clark*, without stopping for discussion of the issue—and thereby throw the litigant back upon assertion of his own rights.

3. The *Lochner* Era and Faux *Jus Tertii* Standing

Up until the late 1930s, the Court rarely addressed what we would today call “*jus tertii* standing” arguments—that is, a litigant’s claim that she is entitled to relief because a government action that would injure her impairs the rights of others. When faced with those arguments, however, the Court rejected them on the ground that a litigant could not challenge government action by asserting that it violated someone else’s rights. If the Court viewed that rule as a discretionary, judge-made doctrine, it never said so.

circumstances exists under which [a challenged] Act would be valid” to succeed in a facial challenge. *Id.* at 745. *Salerno* rests on an extraordinarily strong presumption of severability. Justice Stevens insisted that a litigant could succeed in a facial challenge by showing that the challenged statute “lack[ed] any ‘plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments)). That standard would set a lower default threshold for a conclusion of inseverability. Given Justice Stevens’s departure from the Court, the *Salerno* approach may now stand unchallenged. It suffices for purposes of this Article to note that the presumption of severability is robust under either approach.

99 See *Vermeule*, supra note 96, at 1950. Often, a statute will contain a severability clause, which amounts to an explicit call for a presumption of severability. However, even when the statute at issue contains no express severability clause, such a presumption is implicit in the Court’s frequently repeated formula for determining severability: “Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” *Id.* at 1950 n.28 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992), in turn quoting the formula articulated in *Champlin Ref. Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932)).

100 See *Sprout v. City of South Bend*, 277 U.S. 163, 167 (1928); *Rosenthal v. New York*, 226 U.S. 260, 270–71 (1912); *Cronin v. Adams*, 192 U.S. 108, 114 (1904); *Davis & Farnum Mfg. Co. v. City of Los Angeles*, 189 U.S. 207, 220 (1903); *Williams v. Eggleston*, 170 U.S. 304, 309 (1898). Occasionally, the Court rejected a *jus tertii* standing argument on the ground that the third parties’ rights were not violated, while making clear that the litigant could not, in any event, succeed in asserting third-party rights. See *Merchs. Mut. Auto. Liab. Ins. v. Smart*, 267 U.S. 126, 130–31 (1925); *Hawkins v. Bleakly*, 243 U.S. 210, 214 (1917); *Holden v. Hardy*, 169 U.S. 366 (1898). These cases suggest that the limitation on asserting third-party rights was not perceived as a jurisdictional matter, but they do not sanction the doctrine of *jus tertii* standing.
When read in modern light, a few of the Court’s Lochner-era cases might seem to sanction *jus tertii* standing. These cases would play a role in the development of *jus tertii* standing doctrine in later years. At the time, however, they were not understood to involve *jus tertii* standing.\(^{101}\) In these cases, litigants challenged laws that they claimed violated their “paramount” substantive due process rights to property and economic and contractual autonomy.\(^{102}\) A litigant’s assertion of his own fundamental rights did not end the analysis, however, as the State could abridge those rights through a valid exercise of its police powers.\(^{103}\) Thus, the Court considered third-party rights in these cases only in the course of determining whether the statute was invalid because it limited the litigant’s economic rights in a manner that was “arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”\(^{104}\)

* Buchanan v. Warley*\(^ {105}\) provides a good example. That case involved a specific performance action by a white property vendor against an African American vendee.\(^{106}\) The vendee argued, and the state courts held, that the contract could not be enforced because a Louisville city ordinance prohibited minorities from moving onto blocks occupied predominately by whites.\(^ {107}\) The Supreme Court held that the vendor could challenge application of the ordinance because it “necessarily impaired” his “right . . . to sell his property.”\(^ {108}\) The Court went on to hold that the ordinance unlawfully interfered with the vendor’s own property rights in violation of the Due Process Clause because the manner in which it limited his ability to dispose of his property contravened the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1870 in its discrimination against minorities.\(^ {109}\)

* Pierce v. Society of Sisters*\(^ {110}\) is similar. In *Pierce*, a pair of private schools challenged a law that required parents to send their children to public school and, thus, indirectly harmed the private schools.\(^ {111}\) The Court held that the private schools could succeed in challenging the law on the ground that it unlawfully interfered with the schools’ “business and property” rights under the Fourteenth Amendment by compelling “present and prospective patrons of their schools” to attend public schools

\(^{101}\) See Monaghan, *supra* note 8, at 287.


\(^{103}\) See Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

\(^{104}\) See id.

\(^{105}\) 245 U.S. 60 (1917).

\(^{106}\) Id. at 69–70.

\(^{107}\) Id. at 70.

\(^{108}\) Id. at 72–73; see also Terrace v. Thompson, 263 U.S. 197, 215 (1923) (citing Buchanan, 245 U.S. at 74, for the proposition that “property rights in the land include the right to use, lease and dispose of it for lawful purposes”).

\(^{109}\) See Buchanan, 245 U.S. at 75–82.

\(^{110}\) 268 U.S. 510 (1925).

\(^{111}\) Id. at 530.
instead. The Court, in other words, held that the private schools’ own substantive due process rights were violated by the indirect harm caused by the challenged law’s invasion of rights belonging to parents and pupils.

Thus, the Court in Buchanan and Pierce considered the effect of challenged statutes on third parties in the course of adjudicating the litigants’ rights. The Court did not purport to articulate anything like the modern exceptions to the bar on third-party standing.

4. The Modern, Prudential Doctrine of Third-Party Standing

In the middle of the twentieth century, the Court began treating the bar on “invoking the rights of others” as a “rule of self-restraint” developed by the Court “for its own governance” and the governance of the federal courts. The Court justified the now-prudential rule on policy grounds. Some of those policies invoked the interests of the nonlitigant right-holder. For instance, members of the Court expressed a fear that the third party would be bound by unfavorable precedent if the litigant failed in its assertion of her rights. More often, the prudential bar on third-party standing was justified on institutional grounds. One justification focused on the value of avoiding unnecessary constitutional adjudications, which supported the idea that a court should not pass on the constitutional rights of nonlitigants because they “may . . . not wish to assert [their rights], or [may] be able to enjoy them regardless of whether the in-court litigant is successful.” Another justification reflected concern for quality advocacy, the reasoning being that “third parties . . . usually will be the best proponents of their own rights.” The Court also referred to the desirability of not speculating on “every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.”

Of course, a prudential rule is susceptible to exceptions based on countervailing policies. The bar on third-party standing is no different. For instance, the Court has characterized the jus tertii inseverability doctrine as an exception to the background rule barring third-party standing. Moreover, beginning in the 1940s, the Court began

112 Id. at 535. Among other cases, the Court cited Truax v. Corrigan, 257 U.S. 312 (1921), which held that “business is a property right” protected by the Fourteenth Amendment. Id. at 327–28.
113 See Pierce, 268 U.S. at 535; Buchanan, 245 U.S. at 72–73.
115 For criticism of the Court’s policy rationales, see Rohr, supra note 16, at 405–06.
117 Id. at 113–14.
118 Id. at 114.
120 See, e.g., id. at 22.
crafting additional exceptions to the prohibitory default rule.\textsuperscript{121} This Article will focus on the two most important exceptions: the doctrine of overbreadth and the doctrine of \textit{jus tertii} standing.

The overbreadth doctrine is an exception\textsuperscript{122} that applies in some First Amendment contexts.\textsuperscript{123} When the overbreadth doctrine applies, a court can wholly block enforcement of a statute if the statute has a substantial number of unconstitutional applications “judged in relation to the statute’s plainly legitimate sweep,” even though application of the law to the litigant before the court would be “consistent with the Constitution.”\textsuperscript{124} In other words, courts in overbreadth cases “disregard the normal rule” prohibiting third-party standing so that a litigant may assert the free speech rights of third parties.\textsuperscript{125} As articulated by the Court, the doctrine is a judicially devised prophylactic rule, in that it rests not on a determination of the intended scope of First Amendment rights, but instead on “a judicial prediction or assumption that the [challenged] statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”\textsuperscript{126}

As others have perceptively observed, one can conceptualize the overbreadth doctrine as involving a special rule of inseverability applicable in some free speech contexts.\textsuperscript{127} In other words, in cases triggering the overbreadth doctrine, the Court

\textsuperscript{121} See infra note 132 and accompanying text.


\textsuperscript{123} In the past, overbreadth challenges occasionally were entertained outside the First Amendment context, including in cases involving abortion rights and the right to travel. See Dorf, \textit{supra} note 16, at 272; Fallon, \textit{Making Sense of Overbreadth}, \textit{supra} note 16, at 859 n.29; \textit{see also} \textit{Sabri v. United States}, 541 U.S. 600, 609–10 (2004) (collecting cases). This Article focuses on the First Amendment context with which overbreadth challenges are most commonly associated.


\textsuperscript{126} \textit{Broadrick}, 413 U.S. at 612. The phenomenon described in the text is often referred to as the “chilling effect.” Others have questioned whether—or how effectively—the overbreadth doctrine serves to alleviate this chilling effect. See, e.g., \textit{Fallon, Making Sense of Overbreadth}, \textit{supra} note 16, at 885–87; \textit{Hill, The Puzzling First Amendment Overbreadth Doctrine}, \textit{supra} note 16, at 1074–75.

implicitly has replaced the presumption of severability with a rule of inseverability, under which the intent of the legislature as to severability is beside the point. As a result, a litigant can prevail by showing that the challenged statute would violate the free speech rights of third parties if applied to them even absent a conclusion that the legislature that created the challenged statute intended that result. The First Amendment itself, however, does not impose a rule of inseverability. Any contention to the contrary would be in serious tension with the Court’s repeated recognition that the right to free speech is personal. It also would be inconsistent with the Court’s recognition that a state court may affirm a conviction obtained under an overbroad statute after narrowing (and, in effect, severing) the statute to eliminate the overbreadth. Thus, the overbreadth doctrine’s inseverability implications seem to be only a necessary result of the Court’s policy-driven relaxation of the third-party standing bar in some First Amendment contexts. That is, when the Court allows a litigant to succeed in challenging a law on the ground that it would violate the free speech rights of third parties if applied to them, it necessarily renders the challenged statute inseverable. The upshot is that no rule of inseverability requires the overbreadth doctrine; rather, application of the overbreadth doctrine results in inseverability.

Since the Court first applied the overbreadth doctrine in 1940, it has refined the doctrine in ways that illustrate its judge-made, prudential nature. Specifically, the Court has held the overbreadth doctrine inapplicable where circumstances leave the Court unconcerned about the possible chilling of third-party speech. Thus, the Court has declined to apply overbreadth doctrine where something about the third-party speech or speaker makes the Court less concerned about the “chilling” of speech. For example, the Court has held that the overbreadth doctrine does not apply to third-party commercial speech because “commercial speech is more hardy, less likely to be ‘chilled,’ and not in need of surrogate litigators.” The Court also


See Note, Inseparability in Application of Statutes Impairing Civil Liberties, 61 HARV. L. REV. 1208 (1948).

See Monaghan, Overbreadth, supra note 16, at 15–22 (explaining that the overbreadth doctrine cannot be understood as a special rule of inseverability applicable in the free speech context).

See supra note 125.

See Osborne, 495 U.S. at 115–16.


See Davenport, 551 U.S. at 191 n.5; Fox, 492 U.S. at 481.

Fox, 492 U.S. at 481; see also Clements v. Fashing, 457 U.S. 957, 972 n.6 (1982) (rejecting overbreadth argument with an unexplained observation that “[t]he First Amendment will not suffer if the constitutionality of [the challenged law] is litigated on a case-by-case
has suggested that the overbreadth doctrine might be similarly inapplicable where the third parties affected by the statute are private-sector unions, which "are sufficiently capable of defending their own interests in court that they will not be significantly 'chilled.'"\textsuperscript{136} And the Court has held that a state court may narrowly construe a statute to eliminate its overbreadth and then apply that statute to the litigant making the overbreadth challenge.\textsuperscript{137} Once the statute has been narrowed, the reasoning goes, "there is no longer any danger that protected speech will be deterred and therefore no longer any reason to entertain the defendant’s [overbreadth] challenge."\textsuperscript{138} These exceptions confirm that the overbreadth doctrine is a matter of judicial discretion.

The second major exception to the third-party standing bar is the \textit{jus tertii} standing doctrine. That doctrine allows a litigant in some circumstances to succeed in challenging government action on the ground that it infringes the rights of a third party.\textsuperscript{139} The Court first applied a \textit{jus tertii} standing theory in its 1953 decision in \textit{Barrows v. Jackson}.\textsuperscript{140} In \textit{Barrows}, the Court allowed a white landowner to assert the equal protection rights of minority "would-be users of restricted land" to defeat her neighbors’ lawsuit, which sought to recover damages for the landowner’s breach of a restrictive covenant.\textsuperscript{141} The Court held that the case before it presented a “unique situation,” which called for the “relaxation” of the “rule of practice” under which a litigant “cannot challenge [the] constitutionality [of government action] unless he can show that he is within the class whose constitutional rights are allegedly infringed.”\textsuperscript{142} The Court thought the case unique in several ways. First, the litigant landowner necessarily controlled whether minority would-be users of the property could as a practical matter enjoy their constitutional right to be free of the discrimination engendered by judicial enforcement of racially restrictive covenants.\textsuperscript{143} Second, the minority property users whose rights were at stake would find it “difficult if not impossible . . . to present their grievance[s] before any court.”\textsuperscript{144} Third, the Court relied on the importance of the constitutional rights at stake.\textsuperscript{145}

Following \textit{Barrows}, the Court struggled to clearly define the basic purpose of the \textit{jus tertii} standing exception. The Court at times described this exception as

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  \item \textsuperscript{136} See \textit{Davenport}, 551 U.S. at 191 n.5.
  \item \textsuperscript{138} \textit{Id.} at 115 n.12.
  \item \textsuperscript{139} See \textit{Craig v. Boren}, 429 U.S. 190, 192–95 (1976).
  \item \textsuperscript{140} 346 U.S. 249 (1953).
  \item \textsuperscript{141} \textit{Id.} at 251–52, 259–60.
  \item \textsuperscript{142} \textit{Id.} at 256–58. In reaching this conclusion, the Court recharacterized \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925), as a \textit{jus tertii} standing case and included a string cite of Supreme Court cases, none of which endorsed the doctrine of \textit{jus tertii} standing. See \textit{Barrows}, 346 U.S. at 257–58.
  \item \textsuperscript{143} See \textit{Barrows}, 346 U.S. at 258.
  \item \textsuperscript{144} \textit{Id.} at 257, 259.
  \item \textsuperscript{145} \textit{Id.} at 258–59.
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serving what might be called an “advocate-enabling” function, in that it freely allows litigants to advocate third-party rights.146 Despite that occasional rhetoric, the Court’s early cases were narrower. Those cases applied the exception to serve a “fail-safe” function, in that it allowed *jus tertii* standing “where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself . . . .”147 Notably, these cases also allowed litigants to assert the rights of others defensively.148 For instance, the landowner in *Barrows* asserted the rights of minorities in an effort to avoid damages liability, the threat of which would make it either impossible or more expensive for minorities to exercise their right to rent or use property free of discrimination.149 And in *NAACP v. Alabama ex rel. Patterson*, the Court held that the NAACP could resist an adjudication of contempt for failure to comply with a court order requiring it to reveal its membership lists by asserting the right of its members not to reveal their association.150 Had the NAACP complied with the order, the asserted right would have been lost.151 In these cases and others like them, the *jus tertii* standing doctrine operated to serve both a fail-safe function and an additional, “anti-evasion” function—in that it prevented government actors from interfering with third parties’ rights through the expedient of regulating others. Had the Court limited *jus tertii* standing to such cases, the exception would have remained narrow.

In time, however, the Court allowed wider use of *jus tertii* standing. In *Singleton v. Wulff*, Justice Blackmun articulated the rubric ultimately adopted by the Court.152 Under that test, a litigant may assert the rights of a third party if: (1) the litigant has a close relationship with the third party, which touches upon the asserted third-party right; and (2) there “is some genuine obstacle” to the third party’s assertion of her own rights.153 On its face, that approach—and especially its insistence on a “genuine obstacle”—appears to follow a moderate fail-safe view of the *jus tertii* standing

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146 See *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (“[T]he relationship between [the litigant] and those whose rights he seeks to assert is . . . that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.”).


148 See *Eisenstadt*, 405 U.S. at 443–46; *Barrows*, 346 U.S. at 254, 258.

149 See *Barrows*, 346 U.S. 249.


151 See id. at 458–60.


155 *Singleton*, 428 U.S. at 114–18.
doctrine. The Court, however, has been “quite forgiving” in applying the test, and, as a result, litigants have been permitted to assert third-party rights on a regular basis.\(^{156}\)

The paradigmatic circumstance satisfying the “relationship” prong is the doctor-patient relationship.\(^{157}\) The Court also has held that the attorney-client relationship is sufficiently close to allow an attorney to assert his clients’ rights.\(^{158}\) The same is true of the relationship between a litigant\(^{159}\) and third parties discriminatorily excluded from service on a jury or grand jury because “[t]hey share a common interest in eliminating discrimination, and the [litigant] has an incentive to serve as an effective advocate.”\(^{160}\)

The Court also has held that a vendor may assert the rights of her vendees\(^{161}\) or potential vendees.\(^{162}\) And the Court occasionally has gone further, suggesting that an “advocate” relationship between the litigant and the third party would suffice.\(^{163}\)

The Court also has taken a relaxed approach to the “genuine obstacle” prong of the Singleton test, refusing to insist that it be “in all practicable terms impossible” for the third party to assert her rights.\(^{164}\) Thus, for instance, the Court has stated that jus tertii standing is justified where there is a possibility that the third party would be “chilled” from asserting her rights by “the publicity of a court suit,” even though it is possible to litigate using a pseudonym.\(^{165}\) And in Miller v. Albright,\(^{166}\) seven members of a fractured Court agreed that a sufficient “hindrance” existed where the first-party right holder failed to take an appeal after being dismissed from the suit on motion of the opposing party.\(^{167}\) The Court has even held that a sufficient “hindrance” exists when the third party would have little financial incentive to assert her

\(^{156}\) See Kowalski, 543 U.S. at 130; see also Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights, 92 VA. L. REV. 633, 673 (2006); Sedler, The Assertion of Constitutional Jus Tertii, supra note 16, at 1312, 1319 n.36.


\(^{160}\) Campbell, 523 U.S. at 398–400 (citation omitted).


\(^{164}\) See id. at 126 (Powell, J., concurring in part and dissenting in part).

\(^{165}\) See Carey, 431 U.S. at 684 n.4 (citation omitted); Singleton, 428 U.S. at 117 (plurality opinion).


\(^{167}\) See id. at 433 (opinion of Stevens, J.); id. at 454 n.1 (Scalia, J., concurring in the judgment); id. at 473–74 (Breyer, J., dissenting).
right in court because of “the economic burdens of litigation and the small financial reward available.”168 Moreover, the Court on occasion has permitted a litigant to assert the rights of a third party without stopping to consider whether that third party faced any “genuine obstacle” at all.169

B. The Third-Party Standing Bar as Substantive Law

As discussed in Subpart A, the Court’s understanding of the bar on asserting third-party rights has evolved over time. In Owings and its progeny, the Court treated the rule as a matter of constitutional jurisdiction.170 And the Court treated the rule as a merits question during the late nineteenth and early twentieth centuries.171 Now, however, the Court has deemed the bar to be a matter of judicial prudence.172 Thus, although history offers clues as to how courts might understand and apply third-party standing doctrine,173 it provides no definitive answers. In light of that fact and Lexmark’s questioning of the status quo, fresh analysis is appropriate. This Subpart undertakes that analysis. Specifically, it considers each of the three ways in which the rule barring assertion of third-party rights might be understood: as going to judicial prudence, constitutional jurisdiction, or the merits of the parties’ dispute. It argues that the rule barring assertion of third party rights is best understood as a merits rule, in that it concerns the substantive validity of the litigant’s claim or defense.

1. The Rule Barring Assertion of Third-Party Rights Is Not a Prudential Doctrine

Should courts continue to treat the rule against the assertion of third-party rights as a prudential standing doctrine? Prudential standing doctrines share one defining characteristic: they derive not from an extrajudicial source, but instead are judicially created rules174 designed to allow courts to duck issues in cases falling within their jurisdiction so that those issues can be decided either by “other governmental institutions” or, possibly, in another case.175 Because prudential standing rules are self-imposed

170 See supra notes 53–68 and accompanying text.
171 See supra notes 75–100 and accompanying text.
172 See supra notes 114–69 and accompanying text.
173 See infra notes 200–23, 227–32, 345–70 and accompanying text.
rules of practice, courts can ignore them when they think it prudent to do so.\textsuperscript{176} Given that flexibility, deeming the third-party standing bar a prudential rule likely would ensure the continued existence of the overbreadth and \textit{jus tertii} standing exceptions, which the Court views as serving salutary goals.

Nevertheless, to understand the rule barring assertion of third-party rights as a prudential doctrine requires acceptance of one of two conclusions, both of which are in deep tension with an oft-lauded policy behind the law of justiciability—ensuring that the federal courts serve, but do not exceed, their proper role in our constitutional scheme.

First, the prudential understanding could rest on an assumption that there are no extrajudicial limits on who enjoys the protection of a given legal right. On that assumption, any such limits are imposed by the courts themselves to further the courts’ view of sound judicial administration.\textsuperscript{177} But the premise of that argument is wrong: it is a “cardinal principle” that legal rights come prepackaged by their creators with limitations on who can assert them, and when.\textsuperscript{178} Even putting that fact aside, serious constitutional concerns would be raised if federal courts deprived litigants of the ability to enforce legal rights that substantive lawmakers have authorized them to invoke. In doing so, courts would allow their own preference (to impose a limit on who can assert the right) to override the design of the body that created the right (without imposing such a limit). If that is how the bar on asserting “third-party” rights operates, it seems inconsistent with our constitutional structure.\textsuperscript{179}

An example helps to make the point. Assume that the Second Amendment imposes no limits on who may assert the rights it creates and that a plaintiff comes into federal court claiming that her local sheriff violated the Second Amendment by taking away guns belonging to members of her neighborhood watch. And suppose the plaintiff alleges that she was injured by an assailant who attacked her while she was having a conversation with the leader of the (now-gunless) neighborhood watch. What if the court dismisses the case on the ground that the plaintiff cannot invoke the Second Amendment because she did not own the guns in question? If all jurisdictional requirements have been met, the court’s decision would amount to a refusal

\textsuperscript{176} United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (citing Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 333 (1980)); see also id. at 2701 (Scalia, J., dissenting) (“Relegating a jurisdictional requirement to ‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”).

\textsuperscript{177} On this view, the rule barring assertion of third-party rights might be seen as an exercise of the “passive virtues” to avoid difficult or divisive issues, for example, Alexander M. Bickel, \textit{The Supreme Court 1960 Term—Foreword: The Passive Virtues}, 75 Harv. L. Rev. 40, 40–51 (1961), or to put off deciding a case where a “mo[re] interested plaintiff” exists, for example, Richard M. Re, \textit{Relative Standing}, 102 Geo. L.J. 1191 (2014).

\textsuperscript{178} New York v. Ferber, 458 U.S. 747, 768 (1982); see \textit{Warth}, 422 U.S. at 509 (plaintiffs lacked “prudential standing” where they did not assert “personal rights” under statute).

\textsuperscript{179} \textit{See} Brown, supra note 19, at 100–01.
by the court to adjudicate rights assertable by the plaintiff. The court will have turned the litigant out of court based on its sense of prudence.

The court, in making that decision, would fail to fulfill the role assigned it by the Constitution—exercise of the “judicial power.” As the Supreme Court has long recognized, that constitutionally assigned role carries with it an obligation of the federal courts to decide those cases over which they have jurisdiction. And, as the Court recently acknowledged in *Lexmark*, “prudential” justiciability doctrines are “in . . . tension” with that constitutional obligation to the extent they allow courts to refuse to adjudicate cases falling within the jurisdiction lawfully conferred by Congress. In *Lexmark*, the Court resolved that tension in favor of the courts’ constitutional obligation when it abandoned the concept of “prudential” statutory standing. The same result seems appropriate with respect to the third-party standing bar, to the extent that it is viewed as a judicial refusal to allow litigants to assert rights that substantive lawmakers have authorized them to assert.

To be clear, more is at stake here than judicial administration. The federal courts’ refusal to exercise lawfully conferred jurisdiction harms individuals who are deprived of a forum in which to settle their disputes and to vindicate their rights. Moreover, it aggrandizes the courts’ power at the expense of the bodies that generally

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180 U.S. CONST. art. III, § 1.
181 See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”). More recently, the Court has described the federal courts’ obligation to exercise jurisdiction as “virtually unflagging.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (emphasis added). As that more relaxed formulation reflects, the Court over time has developed some “exceptions” to the federal courts’ obligation to adjudicate cases over which Congress has given them jurisdiction. *Id.* at 813–19. I plan to explore those exceptions in a future project, but I make two observations here. First, any “exceptions” are justifiable only if consistent with the obligation of the federal courts to exercise jurisdiction lawfully conferred by Congress. Because that obligation results from fundamental principles of separation of powers and constitutional structure, it must prevail over an inconsistent “exception.” *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). Second, some of the seeming “exceptions” might actually be consistent with the obligation to exercise jurisdiction. For instance—and this is a tentative view—the Supreme Court may be correct in asserting that some abstention decisions involve only a court’s exercise of common-law-derived and congressionally approved “discretion” to withhold equitable relief in deference to related state proceedings. *Id.* No similar reasoning supports the third-party standing bar, conceptualized as a judicial refusal to allow litigants to assert rights that substantive lawmakers have authorized them to assert based on a judicial perception that there exist “better” proponents of the right.

183 *See Lexmark*, 134 S. Ct. at 1386–87.
184 *See Brown, supra* note 19, at 100–01.
possess law-making power under our constitutional arrangement. For instance, by refusing to exercise jurisdiction lawfully granted to them by Congress, courts undermine Congress’s power to define the jurisdiction of the federal courts. And by erecting otherwise non-existent standing barriers to the assertion of legal rights, courts effectively destroy, diminish, or (at a minimum) alter those rights. In the process, courts diminish the constitutional power of lawmakers to make effective law. The Court acknowledged as much in *Lexmark*, observing that courts inappropriately intrude on the law-making domain when they impose prudence-based limits on who may assert legal rights. In at least these respects, a court’s refusal to adjudicate a right based on judicially imposed limits on who may assert it would contravene the structural framework of our Constitution.

Second, and more realistically, the prudential understanding of the bar on asserting third-party rights might be based on: (1) a recognition that legal rights are limited, personal, and private, in that they belong to a pre-set class of right-holders, as individuals; and (2) an accompanying willingness to permit judges to disregard those limits when they see fit. But if that is the case, the background rule lacks the hallmark of a prudential rule, in that it derives not from the judiciary, but rather from the design of lawmakers who create limited, personal rights.

Of course, it could be argued that the exercise of judicial prudence comes by way of the exceptions to the rule barring assertion of third-party rights. And that is true: the exceptions to the third-party standing bar are judge-made. But, if the “prudential” label rests on the judge-made exceptions to the third-party standing bar, the question arises whether courts legitimately may ignore, based on their perception of sound judicial administration, limits established by the lawmakers who created an asserted right.

Separation-of-powers and federalism principles would seem to require a negative answer. The Court repeatedly has insisted that justiciability doctrines exist to “prevent the judicial process from being used to usurp the powers of the political branches.” To allow courts, under the guise of “prudential” standing, to disregard congressionally imposed limitations on the scope of congressionally created rights would appear to contravene that purpose. As the Court stated in *Lexmark*, “a court cannot apply its independent policy judgment to recognize a cause of action that

185 See id. at 124.
186 See 134 S. Ct. at 1388.
187 A “private right” is “[a] personal right, as opposed to a right of the public or the state.” *Private Right*, BLACK’S LAW DICTIONARY (10th ed. 2014). The point here is that legal provisions often sweep broadly in the sense that they provide rights to a large class of people, while at the same time protecting each member of that class only as an individual. For instance, the Fourth Amendment protects “the people,” U.S. CONST. amend. IV, but only in the sense that it provides each person with an individual right, Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014).
Congress has denied. And, outside of the horizontally oriented context of federal separation of powers, it would run contrary to the purpose of justiciability doctrine to allow courts to ignore limitations placed on state created rights by state lawmakers or on constitutionally created rights by the relevant Framers. In all three scenarios—whether involving constitutional rights, federal statutory rights, or state-law rights—the court would be exercising an essentially legislative power by expanding the scope of legal rights in a manner divorced from the design of the lawmakers who created those rights, despite the Supreme Court’s repeated insistence that our Constitution allocates no such authority to the federal courts. In so doing, the court would be depriving the body that created the right of its authority to define and limit the right that it created. Justiciability doctrines exist to prevent such judicial interference with the authority of other constitutional actors, not to facilitate them. In sum, if third-party standing doctrine is founded on judicial prudence, it appears to be a prudence that is at odds with the constitutionally assigned role of federal courts.

2. The Rule Barring Assertion of Third-Party Rights Is Not a Matter of Constitutional Jurisdiction

The constitutional limitations on federal court jurisdiction create no blanket rule barring assertion of third-party rights. Article III establishes inflexible outer limits on the federal courts’ power. As relevant here, Article III imposes two requirements on a federal court’s exercise of jurisdiction: (1) a “case” or “controversy” must be present so as to establish Article III standing; and (2) the “case” or “controversy” must fall into one of the jurisdictional categories listed in Article III, section 2.

First, Article III’s “case” or “controversy” limitation says nothing about whether a proper litigant can assert legal rights belonging to someone else. If a litigant shows the requisite injury-in-fact and also makes the required showings of causation and redressability, he has satisfied Article III’s “case” or “controversy” requirement. For that litigant, the Article III standing requirement limits neither the arguments he can make nor the rights he can invoke. Indeed, the Court’s current third-party standing case law assumes as much, as it sometimes permits litigants with Article III standing to assert rights belonging to others.
However, the “case” or “controversy” requirement is relevant to the third-party standing issue in one respect: a litigant who has no injury-in-fact of her own cannot assert a third party’s injury to establish Article III standing. The Court’s recent decision in Hollingsworth v. Perry is instructive. In that case, proponents of California’s Proposition 8—but not state officials—sought to appeal a district court order holding Proposition 8 unconstitutional. The Court recognized that the district court’s order had caused the State injury-in-fact by striking down a state law, and that the State had authorized the proponents to assert that injury. The Court nevertheless held that the proponents could not rely on the State’s injury to satisfy Article III because Article III requires the litigant to assert “a personal, particularized injury.”

The upshot is that a litigant without a cognizable injury cannot satisfy the constitutional standing requirements by pointing to another’s injury. But that just restates the basic rule that a litigant must show that he has suffered an injury-in-fact to invoke federal court jurisdiction. It does not support a general ban on the assertion of third-party legal rights even by a litigant who has himself suffered a remediable injury caused by the other party.

Second, Article III’s limitation of federal court jurisdiction to certain types of “cases” and “controversies” does not require a blanket rule barring litigants from asserting third-party rights. Broadly speaking, Article III gives “[j]urisdiction . . . to the [federal courts] in two classes of cases,” with each class containing multiple types of cases. To come within the federal courts’ Article III jurisdiction, a case need only fall into one of the enumerated categories.

In one “class” of cases listed in Article III, “[federal court] jurisdiction depends entirely on the character of the parties” to the litigation. This class of Article III cases includes controversies: “to which the United States shall be a party”; “between two or more States”; “between Citizens of different States”; and “between a State, or the


195 133 S. Ct. 2652 (2013).
196 See id. at 2668.
197 See id. at 2665, 2668.
198 Id. at 2652, 2667.
199 This may be what Professor Brown had in mind when he wrote that, “[l]ooking to the case and controversy question, the third-party rights inquiry is clearly not independent,” but rather “is a reformulation of Article III standing principles.” Brown, supra note 19, at 131.
201 Id.
Citizens thereof, and foreign States, Citizens or Subjects. In cases falling into this class, the “parties have a constitutional right to come into the Courts of the Union,” without regard to “the subject of [the] controversy.” Thus, in those cases, Article III concerns itself neither with the arguments made by the litigants nor with the legal rights asserted by them.

A caveat is warranted here. The Supreme Court has made clear that federal courts should not countenance the use of third parties to effect “frauds upon [federal court] jurisdiction.” Thus, for instance, the Court has held, at least as a matter of statutory law, that diversity jurisdiction does not lie where a nondiverse, would-be plaintiff arranges for a diverse entity to sue on its behalf, with the diverse plaintiff having only a feigned interest in the matter. Similarly, the Court has held that listing a state as a plaintiff will not give rise to federal court jurisdiction where the suit seeks to remedy private injuries—that is, where the state has not suffered an injury to its own “sovereign or quasi-sovereign” interests.

Those rules impose a limit of sorts on the assertion of third-party rights. Specifically, they prohibit right-holders from using sham arrangements to assert their claims in federal court via other parties, who are enumerated in Article III but who, in reality, are uninjured by the defendants’ activities. In this respect, these rules prohibiting “frauds upon [federal court] jurisdiction” resemble the limitation discussed above in connection with constitutional standing doctrine: they prevent a litigant without a constitutionally cognizable injury from establishing jurisdiction on the basis of

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202 U.S. CONST. art. III, § 2. The second section of Article III also extended federal judicial power to controversies “between a State and Citizens of another State.” Id. Due to the Eleventh Amendment, a state can no longer be subjected against its will to federal jurisdiction in such a suit, or in a suit by citizens or subjects of a foreign country. See U.S. CONST. amend. XI. Also, there is one “type” of controversy in which the existence of jurisdiction depends on both the citizenship of the parties and the substance of the dispute. Specifically, the federal judicial power extends to controversies “between Citizens of the same State claiming Lands under Grants of different States.” U.S. CONST. art. III, § 2. This rarely used Land Grants Clause does appear to impose some limitation on the ability of a litigant to assert a third party’s rights, in that it premised jurisdiction on the nondiverse litigant’s “claim” to the land. Of course, that limitation serves only to make the Land Grants Clause unavailable as a source of federal jurisdiction in certain circumstances; it does not support a general bar on the assertion of third-party rights.

203 Cohens, 19 U.S. (6 Wheat.) at 378.

204 Miller & Lux, Inc. v. E. Side Canal & Irrigation Co., 211 U.S. 293, 297 (1908).

205 Compare id. at 296–97, 300–06 (1908) (no statutory diversity jurisdiction over suit against a California defendant, where a California corporation gave its interest in property to the nominal plaintiff, a Nevada shell corporation created for the purpose of litigation), with Cross v. Allen, 141 U.S. 528, 532–33 (1891) (diversity statute satisfied where debt was transferred to a diverse bona fide purchaser in exchange for consideration, even though the transfer was for the purpose of invoking jurisdiction).


207 See supra notes 194–99 and accompanying text.
someone else’s injury or an infringement of someone else’s rights. They do not, however, support a general ban on assertion of third-party rights in a case where a party who is injured in fact litigates to remedy that injury.

In the second class of cases listed in Article III, the existence of Article III jurisdiction “depends on the character of the cause, whoever may be the parties.” This class of cases includes all cases: “affecting Ambassadors, other public ministers and Consuls”; “of admiralty and maritime Jurisdiction”; and “arising under th[e] Constitution, the Laws of the United States, and Treaties made . . . under their authority.”

One of those clauses appears to envision the assertion of third-party rights in some circumstances. Specifically, the Ambassadors Clause extends federal jurisdiction over “all Cases affecting Ambassadors” and other enumerated officials, rather than merely over cases in which enumerated officials are parties. The First Congress so understood the Clause, as it by statute gave the Supreme Court exclusive jurisdiction over “proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants.” The goal of the Ambassadors Clause was to protect the interests of the listed foreign officials and, thereby, to protect our relations with foreign countries.

Where an enumerated official is not a party to an Ambassadors Clause suit drawing in question his rights or interests, that goal would be accomplished only if the litigant—for instance, a domestic or domestic servant named as a defendant—could assert the rights or interests of the foreign official. Thus, the Ambassadors Clause suggests that the Constitution affirmatively envisions that litigants may assert third-party rights in some circumstances.

Neither of the remaining subject-matter-focused clauses of Article III appear to place limits on the ability of litigants to assert rights belonging to others. Most obviously, the Admiralty Clause creates no such limits, as it focuses entirely on the connection of the dispute to maritime matters.

That leaves only the Arising Under Clause, which serves as the constitutional basis for jurisdiction over most suits involving an assertion of third-party rights. A

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208 Cohens, 19 U.S. (6 Wheat.) at 378.
210 Id. (emphasis added).
211 Judiciary Act of 1789, § 13, 1 Stat. 73, 80 (1789) (emphasis added); see Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 855 (1824) (“[J]urisdiction does not depend on the party named in the record.”).
213 See Osborn, 22 U.S. (9 Wheat.) at 854–55 (“The minister does not, by the mere arrest of his secretary, or his servant, become a party to th[e] suit, but the actual defendant pleads to the jurisdiction of the Court, and asserts his privilege.”).
214 The existence of jurisdiction under the Admiralty Clause depends entirely on the connection of the suit to: (1) navigable waters, for example, The Propeller Genesee Chief v. Fitzhugh, 53 (12 How.) 443, 454–57 (1851); and (2) traditional maritime activities, for example, Norfolk S. Ry. Co. v. Kirby Eng’g, 543 U.S. 14, 24 (2004); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 532–33, 538–43 (1995).
general rule prohibiting the assertion of third-party rights cannot be grounded in the Arising Under Clause as currently interpreted by the Court. As already noted, recent Supreme Court opinions interpret Article III as extending the federal judicial power to, at a minimum, every case that necessarily involves a question of federal law. Where a litigant’s request for relief depends on a third party’s federal rights, the case necessarily involves a question of federal law because the litigant, in order to prevail, must show that the third party’s federal rights were, or would be, violated by the challenged action. That explains why federal courts often adjudicate cases in which litigants assert third-party federal rights to challenge state action.

One question is whether the Court would, or should, return to the restrictive reading of the Arising Under Clause articulated in Owings. As we saw earlier, the Court in that case held that a case does not “arise under” federal law within the meaning of Article III when the litigant seeking to invoke federal jurisdiction relies on the federal rights of third parties to do so. As a practical matter, a return to that long-abandoned understanding of federal court authority is unlikely. Were it to return to the Owings approach, the Court would not only foreclose lower federal courts from exercising “arising under” jurisdiction to adjudicate claims premised on third-party federal rights, but also would, contrary to long-standing precedent, foreclose itself from doing so in proceedings arising out of state court. And, as a normative matter, it is difficult to understand why the Court should return to Owings’s reading of Article III, which was not self-evidently correct. The language of the Arising Under Clause is capacious enough to encompass suits premised on the federal rights of third parties, and Chief Justice Marshall’s opinion offered little in the way of historical (or other) support for its narrow reading of the Clause. Moreover, that narrow reading created a risk that state courts would issue unreviewable and conflicting decisions regarding the meaning of federal law, a risk that Article III was designed to minimize. In light of these considerations, it seems safe to assume that the

215 See supra notes 69–74 and accompanying text.
216 Cf. Gunn v. Minton, 133 S. Ct. 1059, 1065 (2013) (recognizing that resolution of a federal question was “necessary” to the case where one element of plaintiff’s claim required resolution of a question of federal law).
217 See supra note 74 and accompanying text.
218 See supra notes 55–68 and accompanying text.
219 See supra notes 55–66 and accompanying text.
220 See supra note 91 (noting the silent abandonment of the jurisdictional principle of Owings).
221 See supra note 74 and accompanying text.
222 See Owings v. Norwood’s Lessee, 9 U.S. (5 Cranch) 344, 347–48 (1809). In contrast, Luther Martin—ironically, an Anti-Federalist—relied on the intent of the Framers and the “cotemporaneous exposition given to the constitution by the first congress” in arguing for a broad reading of the Arising Under Clause. Id. at 349–50.
Arising Under Clause will not be read as imposing a restriction on the assertion of third-party rights.

In any event, to hold that a party may not invoke Article III “arising under” jurisdiction on the basis of someone else’s federal rights does not impose a categorical bar on the assertion of third-party rights in federal court. A court could adjudicate a litigant’s assertion of third-party rights in a diversity case. Or, a federal court could exercise supplemental jurisdiction to adjudicate claims premised on third-party rights where the litigant has properly invoked “arising under” jurisdiction by asserting claims premised on her own federal rights. For instance, a litigant might claim that application of a law to her would violate both her rights and the rights of third parties; those two claims would arise out of a “common nucleus of operative fact”—that is, application of the challenged law to the litigant. Thus, even under Owings, Article III does not impose a blanket bar on the assertion of third-party rights in federal court.

3. The Rule Barring Assertion of Third-Party Rights Concerns the Merits of the Claim or Defense

The rule barring assertion of third-party rights goes to the merits of the parties’ dispute in that it concerns “the substantive” issue of whether a litigant can establish the “grounds of a claim or defense.” To see why, consider what it means for a court to reject a claim or defense on the ground that the litigant cannot assert another’s rights. The court is holding that the asserted right has a limited scope, that the litigant falls outside of that scope, and that his claim or defense fails as a result. That sort of reasoning has lain at the core of all of the Court’s decisions refusing to allow a litigant to assert third-party rights. As examples: Owings necessarily involved a determination of the scope of rights created by the asserted treaty; Clark necessarily involved a determination that equal protection rights are personal; and the Court’s modern cases necessarily begin with an assessment of whether a litigant is

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224 Doing so would be most obviously appropriate if state law authorized the litigant to assert the third-party rights. See infra notes 302–08 and accompanying text (discussing the possibility that state law would authorize assertion of third-party rights via jus tertii inseverability challenges); infra note 312 (same, with respect to jus tertii standing).
227 Merits, BLACK’S LAW DICTIONARY (10th ed. 2014).
228 See Stern, supra note 193, at 1201; see also Fletcher, supra note 16, at 244 (in course of arguing that all standing doctrine goes to the merits, stating: “In third party standing cases, . . . the issue is a question of law on the merits: Does the plaintiff have the right to enforce the legal duty in question?”); Wayne McCormack, The Justiciability Myth and the Concept of Law, 14 HASTINGS CONST. L.Q. 595, 607–10 (1987) (similar).
229 See supra notes 55–66 and accompanying text.
230 See supra notes 84–90 and accompanying text.
asserting rights that belong to her—that is, rights that extend to her without being expanded by the judiciary.231 When a court applies the bar on third-party standing to reject a litigant’s claim or defense, it necessarily resolves a merits question concerning the scope of the substantive right asserted by the litigant.232

It might be illuminating to consider the bar on asserting third-party rights alongside the “zone of interests” test, which *Lexmark* reclassified as a “merits” doctrine.233 The “zone of interests” test, remember, instructs courts to use “traditional tools of . . . interpretation”234 to ascertain whether a litigant’s interests are “within the zone of interests protected or regulated by the statutory provision or constitutional guarantee” that he seeks to invoke.235 As the Court explained in *Lexmark*, the test is a method for determining whether the litigant “falls within the class” to whom the relevant lawmaker has extended the asserted right.236 The goal, in other words, is to effectuate the right-creator’s design regarding the line between those who enjoy the protection of the right and those who do not.237

The rule against asserting third-party rights works toward the same goal.238 Specifically, the rule prevents a litigant from end-running the line between protected right-holders and unprotected non-right-holders through the simple expedient of asserting rights belonging to a protected right-holder.239 Following the Court’s lead in *Lexmark*, a court faced with a third-party standing issue will apply standard interpretive methodologies to determine whether a litigant belongs to the class to whom the relevant lawmaker extended the asserted right.240 If the litigant falls outside the

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231 See supra notes 114–69 and accompanying text.
232 The Supreme Court has already reached this conclusion in the context of the Fourth Amendment. See *Rakas v. Illinois*, 439 U.S. 128, 140 (1978).
234 *Id.* at 1387.
236 *Lexmark*, 134 S. Ct. at 1388.
237 See *id.* at 1387–88.
238 See *Tribe, supra* note 16, at 446.
239 See *id.*
240 This question will sometimes be answered expressly by the text of the right-creating provision. For instance, “[t]he Constitution protects the privileges and immunities only of citizens, Amdt. 14, § 1; see Art. IV, § 2, cl. 1, and the right to vote only of citizens. Amdts. 15, 19, 24, 26.” *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976). In other circumstances, the inquiry will not be so simple. As Professor Llewellyn famously showed, even well-accepted canons of construction can be used to reach differing conclusions regarding the meaning of a text. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399–406 (1949).

A court must also consider relevant judicial decisions when determining whether a litigant falls within or without the right-holding class. The need to consider judicial decisions is perhaps most obvious when constitutional provisions are at issue, given that such provisions often are generally framed and must be expounded by courts. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). For example, the Supreme Court has long
protected class, his claim fails on the merits under the rule barring assertion of third-party rights. In that respect, the rule barring assertion of third-party rights effectuates the design of the right-creating lawmaker.

The rule also effectuates the right-creator’s design when the litigant belongs to the right-holding class. As noted above, most rights are personal in that lawmakers granted them to right-holders as individuals. The rule against asserting third-party rights enforces that limitation. For instance, assume that Congress passes a statute providing that “all citizens shall enjoy a personal right of online privacy,” which includes “freedom from governmental examination of internet browsing activities in the absence of a warrant issued upon probable cause.” Assume further that the statute provides that “information obtained in violation of a citizen’s right under this statute shall not be admissible against that citizen in legal proceedings in a court of law.” If John is a citizen accused of a crime, he cannot assert the statute to exclude evidence of Jane’s internet browsing activities, even if the government obtained that information without a warrant. Both John and Jane belong to the class protected by the statute, but John’s argument fails on the merits because Congress created a personal right.

recognized that the Constitution’s separation-of-powers, checks-and-balances, and federalism principles protect, and thus may be asserted by, injured individuals, even though the constitutional provisions bearing on those principles do not explicitly indicate that they create individual rights. See Bond v. United States, 131 S. Ct. 2355, 2363–67 (2011); Kent Barnett, Standing For (and up to) Separation of Powers, 91 IND. L.J. (forthcoming 2016) (defending this traditional view). Similarly, the Court has interpreted some constitutional provisions—most notably, the Due Process Clauses—to protect rights that are not specifically identified in the text. See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (Due Process Clauses protect “a woman’s decision whether or not to terminate her pregnancy”). And, where state-law rights are at issue, the court will of course need to consider state judicial decisions. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

The point here is not that it will be easy in every instance to determine the class of individuals to whom lawmakers extended a given right. Imprecise language, conflicting or ambiguous historical sources, differing views as to which sources are appropriately considered, broader differences concerning appropriate methods of interpretation, and other complicating factors all might lead to good faith disagreements concerning whether a litigant falls within or without the right-holding class. But these difficulties are inherent in adjudication. They do not call into question the legitimacy of judicial efforts to delineate the scope of substantive rights any more than they call into question the legitimacy of judicial efforts to determine their content.

Because arguments on the merits may be forfeited, a court generally should decline to address the third-party standing issue if the party opposing assertion of a right failed to raise the issue in a lower court. See Greenlaw v. United States, 554 U.S. 237, 243 (2008).

If a litigant seeks to assert a right that belongs in the first instance to someone else, a court must also determine whether Congress or a state has authorized the litigant to assert the right. In the most familiar scenario, lawmakers authorize corporate shareholders in some circumstances to assert a corporation’s rights on behalf of the corporation. See, e.g., Gollust v. Mendell, 501 U.S. 115 (1991); Nedler v. Vaisberg, 427 F. Supp. 2d 563 (E.D. Pa. 2006). Also, Congress has codified the “next friend” doctrine in the habeas corpus context, see
In sum, issues of third-party “standing” present a merits question: whether a litigant has a valid claim or defense under the asserted right. And the no-third-party-standing rule requires courts to defer to the design of the lawmakers who created the asserted right in answering that question. That is the proper approach for resolving merits issues. As the Court reaffirmed in *Lexmark*, federal courts must defer to the design of the lawmakers who created the substantive law—Congress, when a federal statute is at issue; a state, when state law is at issue; and the Framers, when a constitutional provision is at issue. To override the lawmakers’ design would be to violate the constitutional principle of separation of powers where a federal statute is at issue; the constitutional principle of federalism where a state law is at issue; and the will of the people where the Constitution itself is at issue. The rule barring assertion of third-party rights is just a specific application of these principles to the merits question of whether a litigant is a proper claimant of the right she asserts. Thus, recognition that the issue of “third-party standing” in fact goes to the merits of the dispute in no way will disturb the general rule that a litigant cannot succeed in asserting rights belonging to another. However, the same may not be true of the exceptions to that rule. The following Parts therefore consider the continuing vitality of the doctrines of overbreadth and *jus tertii standing*.

U.S.C. § 2242 (2012), thereby allowing a third party to pursue a habeas corpus action on behalf of a prisoner in some circumstances, for example, Whitmore v. Arkansas, 495 U.S. 149, 161–66 (1990). In addition, states now widely permit the assignment of claims, and the resulting assignees may assert in federal court the claims, and thus rights, that belonged in the first instance to their assignors. See *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275–85 (2008). Similarly, Congress, in the False Claims Act, has authorized private litigants to assert the federal government’s rights. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). And, under a long-standing tradition incorporated into statutory law, certain litigants may pursue the surviving claims of a decedent. See *Hodel v. Irving*, 481 U.S. 704, 711–12 (1987). Under the current framework, these examples, to the extent that they involve congressional action, might be considered illustrative of Congress’s ability to modify the “prudential rules” against assertion of third-party rights. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 120 (1979) (Rehnquist, J. dissenting) (citation omitted). They are more accurately described, however, as involving an assertion of first-party rights, as in each example a relevant lawmaker—whether Congress or a state—has authorized the litigant to assert a legal right that is either shared with the first-order right-holder or that originally belonged to the first-order right-holder. The Supreme Court has recognized as much when it comes to assignees, explaining that an assignee asserts what are, by virtue of a valid assignment, “legal rights of [her] own.” See *Sprint Commc’ns*, 554 U.S. at 290.


245 See U.S. CONST. pmbl. (“We the People . . . do ordain and establish this Constitution . . . .”).

246 See supra notes 188–90 and accompanying text (explaining that these principles should preclude courts from ignoring limits that lawmakers place on rights they create).
III. THE CONTINUING VIABILITY OF OVERBREADTH DOCTRINE

This Part assesses whether the overbreadth doctrine can survive if the Court accepts that issues of third-party “standing” go to the merits. As currently articulated, overbreadth doctrine is inconsistent with the idea that courts must defer to the decisions of nonjudicial lawmakers concerning the scope of legal rights. In the First Amendment, the Framers created a personal right.247 If that decision is accorded deference, a litigant’s attempt to assert someone else’s rights under the First Amendment would fail on the merits. Yet, the overbreadth doctrine allows litigants to succeed in asserting the First Amendment rights of third parties.248 If the bar on third-party standing goes to the merits, the overbreadth doctrine, as a judge-made, prudential disregard of the limited scope of First Amendment rights, must fall.

That raises the question whether there is such a thing as a “first-party” overbreadth challenge. That is, are there grounds on which a court could accept something like an overbreadth argument, while at the same time respecting lawmakers’ decisions regarding the scope of legal rights? The following Subparts evaluate two theories under which that question might be answered in the affirmative.

A. The “Valid-Rule” Approach to Overbreadth Doctrine

Advocating what I will call the “valid-rule approach,” some have suggested that all overbreadth challenges are really first-party challenges. Although the details differ, these arguments generally go as follows: under the substantive constitutional standards applicable where free speech rights are at stake, a law must be narrowly tailored to serve a sufficiently important government interest.249 When a litigant makes an overbreadth argument, she is arguing that the challenged statute is not a constitutionally valid rule because it impacts protected speech and lacks the regulatory precision required under substantive First Amendment law. The litigant is, in other words, asserting her own “right to be judged in accordance with a constitutionally valid rule of law.”250 Thus, this argument depends on the premise that every litigant has a first-party right to be judged in accordance with a law that satisfies an applicable narrow-tailoring requirement—that is, a law that could be applied validly to others.251 The First Amendment could supply that right, in which case the overbreadth doctrine would remain limited to the First Amendment context. Or, some other constitutional source

247 See supra note 125.
248 See supra notes 122–26 and accompanying text.
249 See Monaghan, Overbreadth, supra note 16, at 3.
251 See Monaghan, Overbreadth, supra note 16, at 8.
could supply a \textit{freestanding} right to be judged only in accordance with “a valid rule of law,” in which case overbreadth doctrine would extend to every context involving rights to which the Court has attached a narrow-tailoring requirement.\textsuperscript{252}

The problem with the valid-rule approach is that no provision of the Constitution creates the requisite right to a valid rule—that is, a rule that would not violate the rights of third parties if applied to them. The First Amendment itself creates no such right. Rather, it creates a “personal right” shielding the individual from the application \textit{against him} of laws that would curtail his speech without sufficient justification.\textsuperscript{253} Were it otherwise, the Court’s oft-repeated statements that the overbreadth doctrine is an exception to the traditional rule that “one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that” its application to others would be unconstitutional\textsuperscript{254} would make little sense.

\textsuperscript{252} Whether derived from the First Amendment or from an independent source, recognition of the requisite right to a valid rule would extend overbreadth doctrine beyond the free speech contexts in which it generally applies. See supra notes 122–23, 132–38 and accompanying text; see also United States v. Salerno, 481 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”). For instance, even if derived from the First Amendment, a right to a valid rule would allow a litigant to make overbreadth arguments where the challenged law would restrict third-party commercial speech, see Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 248 (2010) (explaining that restrictions on commercial speech must be “n[o] more extensive than is necessary to serve” the government’s interest (alteration in original)), and where a conduct-regulating law allegedly restricts third-party expressive conduct, see United States v. O’Brien, 391 U.S. 367, 377 (1968) (“[I]ncidental restriction[s] on alleged First Amendment freedoms” must be “no greater than is essential to the furtherance of” government interest). And, under the freestanding right to a valid rule advocated by proponents of the valid-rule approach, the overbreadth doctrine would extend to every context involving rights to which the Court has attached a narrow-tailoring requirement. See Dorf, supra note 16, at 262–77; Fallon, Making Sense of Overbreadth, supra note 16, at 884 n.192; Metzger, supra note 250, at 888–89; Monaghan, Overbreadth, supra note 16, at 4, 36–39; Roosevelt, supra note 16, at 1010. For example, a litigant could make overbreadth arguments where a law allegedly infringes third parties’ Second Amendment rights. See District of Columbia v. Heller, 554 U.S. 570, 628–29, 628 n.27 (2008) (stating that the Second Amendment requires heightened scrutiny). Indeed, under this articulation of the valid-rule approach, the overbreadth doctrine would apply whenever a law would infringe on third parties’ enumerated rights, see United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938) (suggesting that heightened scrutiny applies whenever legislation transgresses “a specific prohibition of the Constitution”), or unenumerated rights that are fundamental, see Reno v. Flores, 507 U.S. 292, 301–02 (1993) (noting that the government may not “infringe certain ‘fundamental’ liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest.”). Of course, that the valid-rule approach would require an extension of overbreadth doctrine does not prove that there is no (yet unrecognized) right to be judged by a valid rule. But it does suggest that advocates of the valid-rule approach have a tough row to hoe in showing that such an alteration is required.

\textsuperscript{253} See supra note 125.

\textsuperscript{254} See, e.g., United States v. Raines, 362 U.S. 17, 21 (1960). In Board of Trustees v. Fox, 492 U.S. 469 (1989), the Supreme Court described the overbreadth doctrine as a “necessary
Nor can the right-to-a-valid-rule be derived from the First Amendment’s narrow-tailoring requirements. Those requirements, as aspects of the substantive standards for judging the validity of applications of law in the First Amendment context, serve to protect, and are tied to, personal constitutional rights. For instance, the First Amendment generally protects a right not to have one’s speech regulated on the basis of its content, but the government may regulate speech based on its content if it can show that doing so is necessary to serve a compelling government interest. The narrow-tailoring requirement applicable to content-based speech regulations protects the right not to have one’s speech regulated on the basis of its content by sniffing out improper government motivations and insufficient government interests. For instance, as the Court explained in *R.A.V. v. City of St. Paul*, the fact that “content-neutral alternatives” would serve the government’s asserted interests “cast[s] considerable doubt on the government’s [claim] that” it is pursuing the asserted interests, rather than censoring the litigant. Similarly, a statute’s underinclusiveness—its failure to regulate other speech that harms the government’s asserted interest—can suggest either that the government is engaged in censorship or that the government’s interest is insufficiently important to justify restricting the litigant’s speech. None of these applications of the narrow-tailoring requirement, however, involve a litigant’s assertion of third-party rights.

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256 Id. Alternatively, the existence of content-neutral alternatives can be viewed as indicating that content-based regulation of the litigant’s speech is unneeded, and thus violative of the litigant’s right not to have her speech regulated on the basis of its content.
More to the point here, a litigant also can argue that a law fails a narrow-tailoring requirement because it is “overinclusive.” In this respect, too, the narrow-tailoring requirement protects the litigant’s personal right. These arguments typically go as follows: a litigant shows that her speech falls within the scope of First Amendment protection, and, as a result, the government can apply a law curtailing her speech only if doing so is sufficiently tied to achieving an important or compelling interest. Thus, as Justice Scalia explained for the Court in *Board of Trustees v. Fox*, “[t]he person invoking . . . [a] narrow-tailoring rule asserts that the [constitutionally protected] acts of [hers] that are the subject of the litigation fall outside what a properly drawn prohibition could cover.” The law, she claims, cannot constitutionally extend to her. But, because the narrow-tailoring requirement serves to protect personal constitutional rights, “[a] successful attack upon a . . . speech restriction on narrow-tailoring grounds . . . does not assure a defense to those whose own [speech] can be constitutionally proscribed.”

The narrow-tailoring analysis is tied to the litigant’s personal right to freedom of speech. When so employed, the narrow-tailoring requirement could allow the litigant to rely on the fact that the law reaches hypothetical third-party speech to which it should not extend.

259 *Fox*, 492 U.S. at 482; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 565 & n.8 (1980) (distinguishing between narrow tailoring and overbreadth on this basis); *cf.* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502–04 (1985) (distinguishing between as-applied and overbreadth First Amendment challenges, and insisting that a litigant should be able to assert third-party rights via an overbreadth challenge only after an as-applied challenge has failed).

Relatedly, a litigant might argue that, even if her speech can be regulated, the government’s chosen regulation fails the narrow-tailoring test because the government could pursue its interests through regulations that would be less restrictive of her speech. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128–31 (1989). In this context, too, the narrow-tailoring analysis is tied to the litigant’s personal right to freedom of speech.

260 *Fox*, 492 U.S. at 482–83.

Even this use of a narrow-tailoring test would not reflect a First Amendment right to be free of laws that would violate the free speech rights of third parties if applied to them. Instead, it would serve only to protect the litigant’s personal right to free speech. In other words, the litigant could rely on the law’s overinclusive application to third parties only if the nature of the overinclusiveness—the mismatch between the law’s scope and the government’s asserted interests—indicated that the government was engaging in impermissible content-based regulation of the litigant’s speech. Thus, someone engaged in speech falling within an unprotected category would be unable to challenge a generally applicable law, or a law generally aimed at the unprotected speech, on the ground that it could be applied to third parties who engaged in protected speech. For example, a speaker of fighting words could not challenge a breach of the peace statute or a statute barring abusive language on the ground that it could be applied to those who did not utter fighting words, and a purveyor of child pornography could not challenge a statute aimed at outlawing child pornography on the ground that it could be applied to movies or books dealing with adolescent sex. These challenges would fail because the government may regulate categorically unprotected speech based on the content element that renders it unprotected, and because nothing about the laws’ application to related, but protected, speech suggests that the government is targeting the litigant’s speech on some other basis.

A litigant engaged in fully protected speech would face a similar barrier in mounting a challenge based on a statute’s overinclusive application to third parties. If application of the law to the litigant is sufficiently tied to the government’s interest—that is, if her actions fall within the scope of what a properly drawn statute would cover—she could succeed in relying on the statute’s overinclusiveness only if something about the mismatch between the government’s asserted interest and the law’s scope indicated that the government was not actually pursuing its asserted interest, but instead was engaged in impermissible content discrimination. Such circumstances likely would arise infrequently, but they can be imagined. For instance, if a law forbid “all visual, aural, or written depictions of criminal activity,” an admitted criminal who sold his story for profit might succeed in arguing that the government sought to stifle depictions of criminality, rather than to pursue an asserted interest in ensuring that criminals do not profit from their crimes. A litigant, however, could not rely

263 But see, e.g., Gooding v. Wilson, 405 U.S. 518 (1972) (finding a statute barring “opprobrious words or abusive language, tending to cause a breach of the peace,” overbroad at the behest of a litigant who threatened to kill police officers).


266 This example is loosely based on Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105 (1991). The Court in that case, however, did not suggest that the challenged law’s overinclusive scope cast doubt on the government’s asserted interests, which the Court accepted as compelling. See id. at 118–19; see also infra note 267.
on a law’s overinclusive application to third parties—even a substantial number of third parties—if that overinclusiveness suggested only that the government pursued proper interests zealously, or with insufficient precision. In that scenario, in other words, the litigant could not succeed in arguing that application of the law to third parties would fail narrow tailoring and, thus, violate their free speech rights. The statute’s lack of narrow tailoring, in short, would not show that the litigant’s own free speech rights were being violated.

In sum, the First Amendment protects personal rights, and the various narrow-tailoring requirements serve to protect those rights. Neither the First Amendment nor its associated narrow-tailoring requirements create the sort of right on which the valid-rule approach is premised. Given that fact, the valid-rule approach can work only if some other source creates a freestanding right-to-a-valid-rule that extends to First Amendment cases.

No other provision of the Constitution supplies that sort of right. To be sure, the Due Process Clauses have been held to create a personal right to freedom from arbitrary or irrational applications of law, but that minimally protective personal right cannot serve as a basis for the valid-rule approach. After all, application of a law can be entirely rational and nonarbitrary even if the law includes within its sweep, a great deal of third-party conduct that is protected by the Constitution. For instance, assume that a law prohibits the transmission of obscene or indecent materials to one known to be a minor. Application of that law to some people—say

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267 To be sure, the Court has not been clear on these points. Some of its opinions indicate that application of an insufficiently tailored law to a litigant violates that litigant’s First Amendment rights, even absent a showing that a narrowly-tailored law would not reach the litigant or that the law is overinclusive in a way that suggests that the government is actually targeting the speaker based on hostility to the content of her message. See, e.g., Simon & Schuster, Inc., 502 U.S. at 121–23; see also Sec’y of State v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) (equating narrow-tailoring requirement and overbreadth doctrine); Grayned v. City of Rockford, 408 U.S. 104 (1972) (treating narrow-tailoring requirement as touchstone in overbreadth case). Given the existence of overbreadth doctrine, this lack of clarity is unsurprising. Because overbreadth doctrine allows litigants to challenge a law on the ground that it could be applied to violate the free speech rights of third parties, courts have little reason to consider whether a statute’s overinclusive application to third parties indicates a violation of the litigant’s own free speech rights. In short, overbreadth doctrine has infected the Court’s application of the narrow-tailoring standards. See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (relying on overbreadth doctrine to conclude that litigants had standing to rely on challenged statute’s overinclusive application to third parties). When the narrow-tailoring standards are understood on their own and without the influence of overbreadth doctrine, however, it becomes clear that those standards do not create a broad, first-party right to object to statutes on the ground that they could be applied to violate the rights of third parties. Were it otherwise, the Court’s repeated insistences that First Amendment rights are personal, and that the overbreadth doctrine is a special rule of standing that allows litigants to assert the free speech rights of others, would make no sense. See supra notes 122–26 and accompanying text.

those who transmitted indecent materials to minors with the permission of the minor’s parents—might violate the First Amendment. But if the government showed that a defendant transmitted obscenity to someone he knew to be a minor, it would be rational to apply the law to the defendant. Doing so would serve the government’s legitimate interest in protecting children.

Others, most notably Professor Monaghan, have sought to justify the valid-rule approach as a long-standing principle reflected in the Supreme Court’s cases. But none of the relied-upon cases recognize a freestanding right to be judged only in accordance with a rule that could be applied constitutionally to others. Most of these cases involve as-applied challenges in which the Court was forced to evaluate the facial validity of an arguably overbroad law due to circumstances that made it impossible for the Court to determine whether the defendant had been convicted for constitutionally protected conduct. In other words, the Court evaluated the challenged law on its face out of necessity, and not because the litigant had a right to insist that the law be valid as applied to others.

In other cases, the Court simply deemed a statute broadly invalid in the course of holding that it was invalid as applied to a litigant in the case at hand. For instance, in Marbury v. Madison, the Supreme Court rejected Marbury’s request


270 Contrary to Professor Dorf’s novel suggestion, the Supremacy Clause does not create a right to be judged only in accordance with a rule that can be validly applied to others. See Dorf, supra note 16, at 248. The Supremacy Clause says only that federal law is “supreme” when it applies. U.S. CONST. art. VI. It creates no freestanding constitutional right, see Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 613 (1979), and says nothing about the substance of the federal rights that it makes supreme.


272 See Dorf, supra note 16, at 243 n.31 (discussing Bachellar v. Maryland, 397 U.S. 564 (1970) (multiple potential bases for conviction, conflicting evidence, and jury returned general verdict); Williams v. North Carolina, 317 U.S. 287 (1942) (two theories of prosecution, conflicting evidence, and jury returned general verdict); Termiello v. City of Chicago, 337 U.S. 1 (1949) (multiple possible bases for conviction, and jury returned general verdict); Ulster Cty. Court v. Allen, 442 U.S. 140 (1979) (defendant may challenge a mandatory presumption even if there was sufficient evidence to support conviction, because it is impossible to tell whether the defendant was convicted on the basis of the unconstitutional presumption); Thornhill v. Alabama, 310 U.S. 88, 96 (1940) (basing decision to entertain facial challenge on two rationales, one of which was that the charging document tracked language of overbroad statute, and the court returned a general verdict that did not specify the testimony on which it relied)). Professor Monaghan also relies on Thompson v. City of Louisville, 362 U.S. 199 (1960), but in that case the Court held only that the challenged conviction “violated due process because there was no evidence of the defendant’s guilt.” Dorf, supra note 16, at 243 n.29.

that the Court exercise its original jurisdiction to grant him a mandamus because Congress had no power to authorize him to make that request to the Supreme Court. To be sure, the Court’s opinion made sweeping statements concerning the invalidity of the statutory provision that purported to authorize Marbury’s request. But the case itself involved a straightforward as-applied assessment of Madison’s argument that the statutory provision could not constitutionally give the Court jurisdiction to direct a mandamus to him in the specific proceedings initiated by Marbury. Given stare decisis, it is unsurprising that the Court would recognize that the basis for its decision that a law violates a litigant’s rights can effectively render the law invalid in other applications. Such decisions do not, however, support the position that a litigant can resist application of a law to him on the ground that it would violate the rights of third parties if applied to them.

In still other cases, the Court held only that a specific constitutional right—the right to procedural due process—required facial evaluation of the law creating the procedure. In these cases, including Wuchter v. Pizzuti, the Court took the view that the Due Process Clauses created an individual right to be deprived of property only pursuant to an established regulatory scheme that, as written, provided sufficient procedural guarantees. The reasoning was that due process could not be provided through an exercise of extra-statutory “favor or discretion.” That articulation of the due process right required the Court to evaluate challenged laws on their face without regard to whether the individual litigant had actually received adequate notice or an opportunity to be heard. Whatever their merit, these cases

1331–32 (relying on Marbury in arguing that the valid-rule requirement “lie[s] in the history and structure of the Constitution and in the deeper values that the Constitution serves”).


275 See id. at 177 (“If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?”).

276 See supra note 240 (noting that structural provisions of the Constitution may be asserted by individuals). Similarly, in Smith v. Cahoon, 283 U.S. 553 (1931) (cited in Monaghan, Overbreadth, supra note 16, at 12), the Court held that a private motor carrier could not be convicted under a state statute because the statute, depending on how it was interpreted, either unconstitutionally interfered with his business or unconstitutionally failed to give him any notice of its requirements. Id. at 563–64. The Court deemed the statute “invalid upon its face,” but that conclusion was only the necessary result of the basis for the Court’s holding that the statute violated the carrier’s constitutional rights. Id. at 562, 567.

277 See Sedler, supra note 15, at 611 (“There are some statutes that are declared unconstitutional on grounds that make it clear that they can never be constitutionally applied.”).

278 Wuchter, 276 U.S. 13 (1928).


280 Roller, 176 U.S. at 409 (“The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.”).

281 See Wuchter, 276 U.S. at 18–19; Coe, 237 U.S. at 424–25; Roller, 176 U.S. at 398, 407–09.
reflect only the Court’s substantive interpretation of the individual right to procedural due process. That is, they are not reflective of a general right to be judged under laws that could be applied validly to others. For proof of that point, one need only look to Clark and the myriad other cases from the same era in which the Court rejected litigants’ arguments that a law could not be applied to them because its application to others would be invalid.

In sum, the valid-rule approach depends on the existence of a right to be free of laws that are unconstitutional as applied to others. The First Amendment itself creates no such right. And neither the Constitution nor the Court’s cases create an independent right to a valid rule. Thus, the valid-rule approach cannot serve to recharacterize the overbreadth doctrine as a doctrine premised on the assertion of first-party rights.

B. Jus Tertii Inseverability Doctrine as a Surrogate for Overbreadth

Under the preceding analysis, are we left without a means of achieving results similar to those now generated by overbreadth doctrine? Not necessarily, because jus tertii inseverability doctrine provides a possible avenue for doing so. Unlike overbreadth doctrine, jus tertii inseverability doctrine grounds judicial decision-making in the design of a substantive lawmaker—that is, the lawmakers who created the challenged statute. Specifically, a holding of inseverability amounts to judicial recognition of—and deference to—a decision by the lawmakers to confer on every person to whom the statute applies a right to challenge it on the asserted

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282 Marc Isserles has identified cases that involve what he refers to as “valid rule facial challenge[s],” in which a litigant argues that the terms of a challenged statute “contain[ ] a constitutional infirmity that invalidates the statute in its entirety.” Isserles, supra note 16, at 387. In most of those cases, the Court reached a substantive conclusion that the content of the personal constitutional right asserted by the litigant altogether barred application of the type of law challenged by the litigant. See id. at 390–94, 405 n.205, 411–12 (identifying, inter alia, cases involving laws that imposed prior restraints or licensing schemes without required safeguards were entirely vague, or imposed a poll tax). (In other cases identified by Isserles, the Court combined the overbreadth doctrine and the concept of narrow tailoring, see supra note 267, or applied the overbreadth doctrine outside of the First Amendment context, see supra note 123.) Like the procedural due process cases discussed in the text, these valid-rule-facial-challenge cases turned on the Court’s conclusion that the substance of a particular constitutional right rendered certain sorts of laws inherently invalid. See Isserles, supra note 16, at 396 (contrasting valid-rule facial challenges with overbreadth challenges by noting that “the valid rule facial challenge . . . necessarily includes the claim that the statute is unconstitutional in its application against the litigant”). They did not, however, recognize a free-floating right to be judged only in accordance with a rule that could be applied validly to others.

283 Clark v. Kansas City, 176 U.S. 114 (1900).

284 See supra notes 84–90, 100 and accompanying text.

285 See supra notes 75–99 and accompanying text.

286 See supra notes 80–83 and accompanying text.
grounds. Long before the rise of the prudential conception of third-party standing, the Supreme Court considered such challenges, and there is no reason why courts could not do so once again.

A court faced with such a challenge would enjoy flexibility in its decisional sequencing. In most cases, the court first should address whether the statute’s allegedly invalid applications are in fact inseverable from its application to the litigant and should only go on to address the validity of challenged third-party applications if they are inseverable. A conclusion that the creator of the challenged law intended its allegedly invalid aspects to be severable would amount to a holding that the creator of the law did not authorize the litigant to assert the rights on which her jus tertii inseverability argument is based. As a result, the litigant’s claim would fail on the merits. In taking that severability-first approach, the court would be following long-standing precedent. In Presser v. Illinois, for instance, the Court rejected an inseverability-based argument on severability grounds. As the Court put matters, it was not “necessary to consider or decide the question . . . raised as to the validity of the entire [challenged law], for . . . the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the [challenged law] were invalid.”

That severability-first approach has much to commend it. For instance, where a jus tertii inseverability argument is premised on a statute’s alleged conflict with the federal Constitution, the severability-first approach honors the general policy of the federal courts not “to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.” And, no matter the basis for the jus tertii inseverability argument, a severability-first decisional sequencing would serve the policy interests that animate the current prudential rule against third-party standing better than a severability-second sequencing. First, a severability-first decisional sequence avoids unnecessary adjudication of third-party rights, thereby minimizing the “premature interpretation[ ] of statutes in areas where” the validity of “their . . . application might be cloudy.” Second, a severability-first decisional sequencing minimizes the possibility that a jus tertii inseverability adjudication would unnecessarily create adverse, and potentially erroneous, precedent that might

287 See supra notes 92–95 and accompanying text.
288 116 U.S. 252 (1886).
289 Id. at 263–64.
290 Id. at 263; see also, e.g., Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937); Champlin Ref. Co. v. Corp. Comm’n of Okla., 286 U.S. 210, 234–35 (1932); Bd. of Trade v. Olsen, 262 U.S. 1, 42 (1923); Marshall Field & Co. v. Clark, 143 U.S. 649, 695–96 (1892); In re Penniman, 103 U.S. 714, 716–17 (1880).
Prejudice third-party right-holders. Third, if it is true that “third parties . . . usually will be the best proponents of their own rights,” a severability-first approach will align with courts’ “prefer[ence] to construe legal rights only when the most effective advocates of those rights are before them.”

On the other hand, nothing would require a court to address the severability issue first. The question of severability and the question of whether the allegedly invalid aspects of the challenged law are in fact invalid both go to the merits, and they therefore need not be rigidly sequenced. Indeed, a severability-second decisional sequence might be appropriate in some circumstances. A court could gauge the advisability of a severability-second sequencing by considering several factors, including, at least, the following: (1) the ease with which the validity of third-party applications can be resolved; (2) the difficulty of resolving the severability question; and (3) whether the opposing party has disputed the challenger’s assertion of inseverability. In short, a court would enjoy the flexibility to structure its decisional sequence in a manner appropriate to the case before it.

There remains the question of whether jus tertii inseverability doctrine would fill the void created by overbreadth’s demise in any meaningful sense. In at least one respect, jus tertii inseverability doctrine offers more opportunities for litigants to succeed in challenging statutes on the ground that they would be invalid as applied to others. Specifically, jus tertii inseverability arguments can be made even outside the First Amendment context in which the overbreadth doctrine generally applies. That is so because jus tertii inseverability doctrine focuses on the intent of the lawmakers who created the challenged law. A lawmaker’s intent concerning the severability of its handiwork likely will not turn on the source of the right resulting in partial invalidity, as opposed to the extent of invalidity or the importance of the invalid aspects to the statutory design. Thus, jus tertii inseverability arguments


See, e.g., id. at 114.

See Sedler, supra note 15, at 612.

See Pearson v. Callahan, 555 U.S. 223, 236–42 (2009) (stating that similar considerations should guide courts in deciding which of the two aspects of qualified immunity analysis should be addressed first).

It is possible that a lawmaker’s desire for severability would vary according to the source of the rights allegedly violated by its statute. For instance, perhaps a lawmaker would be more inclined toward inseverability if its law invaded constitutional, as opposed to statutory, rights. Cf. Michael Coenen, Constitutional Privileging, 99 Va. L. Rev. 683 (2013) (discussing ways in which courts have afforded constitutional claims greater protection than is afforded to other claims). That possibility seems unlikely, or at least likely unusual, and it thus seems normatively preferable to treat constitutionally based and non-constitutionally based jus tertii inseverability arguments identically, absent a showing of legislative intent to the contrary. It is worth noting, though, that jus tertii inseverability doctrine would operate similarly to the current overbreadth doctrine if courts were to assume that lawmakers will be more inclined toward inseverability when free speech rights are at stake. Under that approach, jus tertii inseverability doctrine would amount to a special presumption of inseverability in the free
can be premised on any constitutional right or on rights created by a federal statute or a state’s constitution or laws.

Nevertheless, there is reason to fear that the jus tertii inseverability doctrine will serve as only a weak surrogate for overbreadth doctrine. For more than a century, jus tertii inseverability arguments have rarely succeeded, a state of affairs almost certainly attributable to the robust presumption of severability. As long as the Court adheres to that presumption, most jus tertii inseverability arguments are sure to fail.

That said, the Court’s adherence to its current articulation of the presumption is not a foregone conclusion. The Constitution does not mandate the presumption of severability, much less the extreme form of the presumption that has taken hold in the Court’s decisions. Moreover, it is at least arguable that a legislature would not want its statute to stand simply because one, a few, or even a substantial number of its provisions or applications would be valid. And the Court need not fear that a relaxation of the presumption would trench irrevocably on congressional or state authority. The presumption is merely a default, and Congress or a state, therefore, could make its desire for severability known through the simple expedient of a strongly worded severability clause. Perhaps these considerations would lead the Court to relax the presumption of severability in the absence of overbreadth doctrine. Perhaps not, as the Court’s current posture of extreme restraint has its own virtues, including maximized preservation of the handiwork of Congress and the states. The point here is that the Court will need to address these issues if it abandons the overbreadth doctrine and would like some other doctrine to fill the resulting void.

speech context. See supra notes 129–31 and accompanying text (noting that application of overbreadth doctrine results in inseverability). This approach to jus tertii inseverability, however, would differ from overbreadth doctrine in at least one material respect: because jus tertii inseverability doctrine turns on legislative intent, a legislature could rebut any special presumption of inseverability.

299 See supra notes 97–99 and accompanying text.

300 See Bd. of Trade v. Olsen, 262 U.S. 1, 42 (1923) (refusing to decide validity of provisions of challenged statutes that affected third parties where strongly worded severability clause made plain that those provisions were severable); see also Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 432–39 (1938); Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937). Because courts would be required to defer to these severability clauses, legislatures would be able to insulate their handiwork from jus tertii inseverability challenges. For that reason, jus tertii inseverability doctrine might prove much less potent than the current overbreadth doctrine.

301 In this paragraph, I have put aside the possibility that state law might independently impose a higher or lower threshold of severability. In that circumstance, a federal court should defer to the state severability law, as it would determine the scope of rights assertable by the litigant making the jus tertii inseverability argument. A state, therefore, could minimize the likelihood that jus tertii inseverability challenges to its laws would succeed by adopting a strong presumption of severability. In contrast, a state can avoid a federal court overbreadth challenge to its statute only by adopting an authoritative narrowing construction before the federal challenge. See Dombrowski v. Pfister, 380 U.S. 479, 490–91 (1965). Insofar as it allows states greater flexibility to insulate their laws from facial challenge, jus
Another hurdle may exist when it comes to *jus tertii* inseverability challenges to state laws in federal court. Because the severability of state statutes is a matter of state law, a litigant making a *jus tertii* inseverability argument would, in effect, be asserting a state-law right. To be sure, it might *look* like the litigant is asserting a federal right if the *jus tertii* inseverability argument is premised on the federal rights of third parties. But that right would be his to assert only because state law authorized him to assert it. That raises the question whether a case involving a *jus tertii* inseverability challenge to a state law—premised on the federal rights of third parties—would “aris[e] under” federal law within the meaning of Article III’s jurisdictional grant.

That concern is unfounded. As earlier observed, the Court has held that Article III’s Arising Under Clause encompasses (at least) those cases that necessarily involve a question of federal law. More specifically, the Court has recognized that a case involving a state-law right of action arises under federal law within the meaning of Article III if the state-law claim requires resolution of federal-law issues, and, relatedly, that it has “arising under” jurisdiction to review federal questions that crop up in the course of a state court’s resolution of a state-law claim. *Jus tertii* inseverability challenges to state statutes premised on federal rights of course require resolution of federal-law issues—that is, whether the challenged statute violates federal rights—and they therefore “arise under” federal law within the meaning of Article III. It is possible that some *jus tertii* inseverability challenges to state laws might not arise under federal law within the Court’s current, more stringent interpretation of 28 U.S.C. § 1331. But that obstacle is surmountable: the Court

*tertii* inseverability doctrine might prove a less potent litigating tool than overbreadth doctrine for challengers of state laws.


303 Id.

304 Even if *jus tertii* inseverability challenges to state laws were held not to “arise under” federal law, a litigant could assert such a claim in federal court in a diversity case, under another party-based font of jurisdiction, or as a matter of supplemental jurisdiction in a case where the litigant asserted his own federal rights in challenging the state law. See supra notes 224–26 and accompanying text.

305 See supra notes 71–74 and accompanying text.


307 See Merrell, 478 U.S. at 816; see also, e.g., Moore v. Chesapeake & Ohio R.R., 291 U.S. 205, 214 (1934). Of course, if the Supreme Court were to review a *jus tertii* inseverability challenge to a state law, it should respect the state court’s decision regarding the severability of the challenged state statute in undertaking that review. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996). A lower federal court adjudicating a *jus tertii* inseverability challenge to a state statute likewise would be required to respect any state law of severability.

308 Compare Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308 (2005) (state-law claim arose under federal law within meaning of jurisdictional statute where it involved significant issue of federal law), with Merrell, 478 U.S. 804 (holding that state-law
could relax its interpretation of § 1331—perhaps by bringing it in line with its interpretation of Article III’s Arising Under Clause—or Congress could enact a statute specifically granting federal district courts jurisdiction over *jus tertii* inseverability challenges premised on federal rights.

The takeaway is that the Court—perhaps with some help from Congress—can reinvigorate *jus tertii* inseverability doctrine. And a reinvigorated *jus tertii* inseverability doctrine would serve policies that animate overbreadth doctrine while remaining grounded in the designs of substantive lawmakers.

IV. THE CONTINUING VIABILITY OF *JUS TERTII* STANDING DOCTRINE

Can *jus tertii* standing survive in a post-prudential-standing world? This Part argues that it can, but only if it is appropriately limited to function as a necessary means of implementing the designs of right-creating lawmakers. When so limited, application of *jus tertii* standing doctrine amounts to recognition of an implied first-party right belonging to the litigant. Subpart A offers a proposed approach for identifying those instances in which an assertion of *jus tertii* standing can be justified in first-party terms. Subpart B considers, and rejects, academic attempts to recast *jus tertii* standing more broadly in first-party terms through the medium of substantive due process.

A. Jus Tertii Standing Doctrine and the Limited Recognition of Implied Legal Rights

As explained above, two competing views of the *jus tertii* standing doctrine’s function—a fail-safe view and an advocate-enabling view—are at play in the Court’s cases.309 Though obscured by the *Singleton* test’s facially fail-safe orientation, the broad advocate-enabling view frequently manifests in the Court’s relaxed application of the *Singleton* test, particularly its requirement that the third-party right-holder face some “genuine obstacle” to assertion of her rights.310 In effect, the advocate-enabling view works behind the scenes, leading the Court to freely allow litigants to assert the rights of third parties.

The problem is that the advocate-enabling view is divorced from the designs of right-creating lawmakers. Indeed, when it serves a purely advocate-enabling function, *jus tertii* standing doctrine runs contrary to those designs because it allows litigants

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309 See supra notes 146–69 and accompanying text.
to assert third-party rights even absent circumstances demonstrating that an assertion of *jus tertii* standing is needed to effectuate the lawmaker’s design. In short, the advocate-enabling view expands judicial power at the expense of the nonjudicial power to define rights. For those reasons, the advocate-enabling view of the *jus tertii* standing doctrine’s function is inconsistent with an understanding that issues of so-called third-party standing go to the merits of the litigant’s claim or defense and, accordingly, require deference to the law-making body that created the claim or defense.

None of this means that *jus tertii* standing doctrine is poised for interment. It can serve two other functions—a fail-safe function and an anti-evasion function—that effectuate, rather than subvert, the designs of right-creating lawmakers. When confined to serve those functions, *jus tertii* standing involves a judicial conclusion that the legal provision creating the asserted third-party right creates an implied right belonging to the litigant. And, because that implied right is grounded in the legal provision creating the asserted third-party right and the design of the lawmakers who created that provision, judicial enforcement of the implied right is consistent with courts’ obligation to respect the designs of right-creating lawmakers.

The difficulty lies in imposing strict limits that will confine *jus tertii* standing doctrine to its proper fail-safe and anti-evasion functions. I endeavor below to define those functions, with a view toward mapping the circumstances in which an assertion of *jus tertii* standing would serve one of them.

311 I agree that “the presence or absence of” a specific relationship of interdependence between the litigant and the right-holder should not “matter for third-party standing except as it bears on the causal link” between “derivative injury to the litigant and impairment of the third party’s rights.” Tribe, supra note 16, at 440 & n.38. Assuming the existence of that causal link and of the circumstances discussed in the text, the *jus tertii* standing doctrine serves its fail-safe and anti-evasion functions whether or not the litigant has a preexisting relationship with particular third-party right-holders, and whether or not that relationship can be described as “special.” But see Kowalski v. Tesmer, 543 U.S. 125, 131–32 (2004) (denying *jus tertii* standing based in part on litigants’ lack of a current relationship with right-holders); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989) (suggesting that the relationship must be of “special consequence”).

312 The following discussion assumes that the litigant is seeking to assert the rights of third parties under federal law. Whether the litigant enjoys an implied right under the provision creating the asserted third-party right is a substantive question of federal law. Therefore, the standards discussed below would bind both state and federal courts, taking away any ability to permit or deny *jus tertii* standing as a matter of “prudence.” See U.S. Const. art. VI, § 2. A state court would err in allowing a litigant *jus tertii* standing where those standards were not met, if the court based its decision on federal law. However, a state could allow broader *jus tertii* standing as a matter of state law. In that circumstance, the non-right-holding litigant would be asserting a state-law claim or defense, which might be premised on federal rights belonging in the first instance to third parties. The Supreme Court questioned the propriety of that practice in *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 721 n.** (1990), but it did not explain why states would be barred from creating such state-law rights, and basic principles of federalism dictate that they have authority to do so. The ability of litigants to assert in federal court state-law *jus tertii* standing claims premised on federal rights would track the ability of litigants to assert in federal court state-law *jus tertii* inseverability claims.
First, the *jus tertii* standing doctrine serves a fail-safe function when the judicial process does not offer a route through which right-holders can secure their own rights. The operative premise is that, when a lawmaker grants a legal right to specified right-holders, it intends for those right-holders to be able to enjoy that right if they so choose. As a corollary, the lawmaker does not intend for right-holders to be denied enjoyment of the right simply because some inherent feature of the judicial system makes it impossible for right-holders to vindicate the right through the courts. Thus, the key to confining *jus tertii* standing doctrine to its proper fail-safe role lies in identifying those situations in which the judicial system does not offer third-party right-holders an avenue to protection of their rights.

In my view, the answer sounds in justiciability doctrine. Specifically, courts should allow a litigant to invoke the *jus tertii* standing doctrine’s fail-safe function only where the litigant can show that a justiciability barrier would prevent an individual right-holder from securing his right through the judicial process of trial and appeal. In that circumstance an allowance of *jus tertii* standing would effectuate the lawmakers’ design by ensuring that individual right-holders will not lose out on their rights simply because they cannot secure them through the courts. But if no justiciability obstacles prevent individual right-holders from effectively securing their rights through the court system, application of the *jus tertii* standing doctrine undermines the right-creating lawmakers’ decision to create a personal right belonging to third parties.

What does it mean for individual right-holders to face justiciability barriers that prevent them from securing their own rights through the court system? Individual right-holders would face justiciability barriers where the asserted right is time-bound, such that an individual right-holder’s claim as a practical matter would be mooted—and the right lost—during the course of litigation. For instance, in *Craig v. Boren*, the asserted right was the right of eighteen- to twenty-year-old males to be treated equally with their female peers. Because an individual male’s claim would become moot when he turned twenty-one, he would have only three years from the date the challenged law became applicable to him to vindicate his right in court—not long enough for his suit to work its way through the legal system. An allowance of anti-evasion *jus tertii* standing would also have been appropriate in *Craig*. See infra notes 329–45 and accompanying text.

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premised on federal rights. See supra notes 303–08 and accompanying text. No matter the basis for jurisdiction, a federal court should not revisit a state’s decision to allow a litigant *jus tertii* standing, as to do so would be to override without warrant the state’s decision regarding the scope of rights available to the litigant as a matter of state law. See supra note 307 (in discussing state-law *jus tertii* inseverability claims, noting that federal courts should respect the state’s law governing severability).

313 429 U.S. 190 (1976).

314 See id. at 192 (noting that the male plaintiff’s claim was mooted when he turned twenty-one). An allowance of anti-evasion *jus tertii* standing would also have been appropriate in *Craig*. See infra notes 329–45 and accompanying text.
could enjoy their rights. An individual woman asserting her right to obtain an abortion would face similar barriers, as her claim would not be ripe until she became pregnant, and her right to obtain an abortion would be lost within nine months of that date. And because no legal doctrine can change the limited duration of pregnancy, neither the possibility of a class action nor the capable-of-repetition-yet-evading-review exception to mootness would help an individual woman to secure her right through the courts. In situations like these, granting jus tertii standing to a non-right-holding litigant who does not face similar justiciability barriers ensures that individual right-holders can enjoy the rights they have been granted by the right-creating lawmaker.

As just shown, some of the Court’s decisions are consistent with the suggested approach. That said, the suggested approach would require the Court to revisit much of its jus tertii standing case law. Most obviously, the suggested approach is inconsistent with the Court’s decision in Caplin & Drysdale, Chartered v. United States, in which the Court allowed a law firm to assert its client’s right to counsel despite recognizing that criminal defendants faced no obstacle that would prevent them from securing that right in court. The suggested approach also would require the Court to revisit its reasoning in Powers v. Ohio, Edmonson v. Leesville Concrete, Georgia v. McCollum, and Campbell v. Louisiana, in which the Court held that litigants could assert the equal protection rights of excluded jurors because those jurors would have little financial incentive to vindicate their own rights in court. And, under the suggested approach, the contraceptive provider in Carey v. Population Services, International would not have been permitted fail-safe jus tertii standing to assert the rights of its potential customers, as those customers could have secured

318 See Campbell v. Louisiana, 523 U.S. 392, 398–400 (1998); Georgia v. McCollum, 505 U.S. 42, 56 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991); Powers v. Ohio, 499 U.S. 400, 414–15 (1991). I do not mean to suggest that the litigants in these cases should have failed on the merits of their arguments. I mean only to say that the claims in these cases should have been evaluated, and accepted or rejected, in first-party terms. See Rohr, supra note 16, at 427–28 (suggesting that a claim of discriminatory jury selection should be understood as the defendant’s assertion of his own constitutional rights).
320 A grant of jus tertii standing to the contraceptive provider would have served an anti-evasion function. See infra notes 329–45 and accompanying text.
321 One caveat. The distributor arguably should have been permitted to assert the rights of its potential customers who were not yet sixteen years of age. Had an individual right-holder attempted to assert his right to obtain contraceptives despite his age, he might have found his claim mooted, and his right lost, through the simple passage of time. If that is so, allowance of jus tertii standing would have served a proper fail-safe function. The discussion in the text refers to those customers who were over the age of sixteen and thus subject to the provision of the challenged law prohibiting anyone other than a licensed pharmacist to distribute contraceptives to persons who were sixteen years old or older. See Carey, 431 U.S. at 681.
their rights by challenging the allegedly unconstitutional law themselves.\footnote{322} Although the Court concluded that circumstances made it unlikely that the right-holders in Powers, Edmonson, McCollum, Campbell, and Carey would assert their rights in court, those circumstances did not prevent the right-holders from securing their rights through the judicial process. Rather, they were the sort of practical factors that regularly influence a potential plaintiff’s decision to file suit, the adjustment of which our system entrusts to Congress, and not the federal courts.

This approach will narrow the circumstances in which a litigant can assert third-party rights to challenge a law in a pre-enforcement suit. That might raise concerns that the non-right-holding litigant would suffer derivative harm while waiting for a right-holder to challenge the problematic law and that the harm to the litigant would, eventually, injure the right-holders themselves. Though the Court that decided it did not treat it as a jus tertii standing case,\footnote{323} Pierce has been used to illustrate this concern: the private school litigants in that case were facing declining enrollment due to the law prohibiting parents from sending their children to private schools, and the private schools, therefore, might have been forced to close before parents or pupils challenged the law.\footnote{324} The schools would suffer harm, and, as a result, parents and pupils who wished to exercise their right to access a private school would also suffer harm.\footnote{325}

That policy consideration, though understandable, is both beside the point and overstated. As an initial matter, to allow concern for derivatively injured litigants to shape jus tertii standing doctrine would be inconsistent with the principle that judges must defer to lawmakers’ decisions to create personal rights and with the corresponding principle that courts should respect right-holders’ choices regarding whether to assert their rights or risk their loss or impairment.\footnote{326} And the argument that derivative harm to the non-right-holding litigant might redound to right-holders through deprivation of the litigant’s services does not change that conclusion, so long as the right-holders do not face justiciability barriers to securing their rights through the judicial process. If right-holders choose not to assert the personal rights that they have been granted despite the availability of judicial relief—a choice given them by the law-making body that created the right—courts must respect that decision.\footnote{327}

\footnote{322} See id. at 683–84 & n.4.
\footnote{323} See supra notes 110–13 and accompanying text.
\footnote{324} See supra notes 110–13 and accompanying text.
\footnote{325} See supra notes 110–13 and accompanying text.
\footnote{326} See supra notes 110–13 and accompanying text.
\footnote{327} See supra notes 110–13 and accompanying text.
In any event, the concern for derivatively injured, non-right-holding potential litigants is overstated. If the right in question is valued by right-holders, it is safe to assume that at least one right-holder will seek to protect her right in court. Even if no right-holder immediately steps forward, the non-right-holding, would-be litigant should have little difficulty locating a right-holder—such as a current or potential customer—willing to challenge the problematic law. By executing an affidavit making clear that it would supply that right-holding plaintiff with the requested products or services, the non-right-holding potential litigant could obviate any concerns that the right-holding plaintiff might fail to satisfy the Article III requirements of causation and redressability. Moreover, the non-right-holding, would-be litigant should be free to help fund the right-holder’s litigation. In addition, once a right-holder decided to file a lawsuit challenging the problematic law, the non-right-holder could participate as amicus curiae. Although this process might seem formalistic, that formalism is the natural result of judicial respect for the operative rules that right-creating lawmakers have created.

Second, jus tertii standing serves an anti-evasion function whenever the government directly regulates the litigant and, thereby, indirectly interferes with the rights of third parties. Thus, jus tertii standing doctrine serves an anti-evasion function when it allows a litigant to resist government action that operates on him and seeks to: (1) prevent him from, or punish him for, participating in a third party’s exercise of her rights; or (2) require him to interfere with a third party’s rights. In both scenarios, the jus tertii standing doctrine bars the government from evading limitations placed on its actions by third-party rights through direct regulation of non-right-holders.

Consider an example. Assume that a state prosecutes a vendor who sells contraceptives to an unmarried woman in violation of a state law that prohibits the sale of contraceptives to anyone except individuals who are married. In that context, the government’s decision to punish the vendor for refusing to discriminate against

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328 The ability to fund the right-holder’s litigation could in some states be limited by prohibitions on maintenance, the giving to a litigant of “[i]mproper assistance in prosecuting or defending a lawsuit . . . by someone who has no bona fide interest in the case.” Maintenance, BLACK’S LAW DICTIONARY (10th ed. 2014). It seems there is a strong argument that a derivatively injured non-right-holder has a “bona fide interest” in a right-holder’s challenge to the law that harms them both. See McIntosh v. Harbour Club Villas Condo. Ass’n, 421 So. 2d 10, 11–12 (Fla. 1982) (non-right-holders had sufficient interest where they would suffer “adverse consequences” if the suit failed). Moreover, where the purpose of the litigation is to vindicate civil rights, application of prohibitions on maintenance arguably would violate the First Amendment. See NAACP v. Button, 371 U.S. 415 (1963) (so holding, where non-profit entity was accused of maintenance).

329 As to the possibility of required interference, indulge the farfetched assumption that an ordinance requires all city residents to take down any pro-atheism signs that they observe within the city limits. Because the law operates directly on the litigant and requires him to interfere with the rights of a third party, allowance of jus tertii standing would serve an anti-evasion function.

the unmarried woman amounts to an attempt to evade the equal protection rights of
the woman and others like her by operating against them indirectly.\(^{331}\) In short, the
government in our hypothetical is attempting to use indirect means to subvert the
development of the lawmakers who created the asserted third-party right. By allowing the
vendor to assert the right, the \textit{jus tertii} standing doctrine prevents that subversion
and thereby effectuates the lawmakers’ design.\(^{332}\) And because the \textit{jus tertii} standing
docline’s anti-evasion function aims to prevent indirect subversion of third-party
rights, it would allow the vendor to assert the right-holder’s right, even if right-holders
could have secured their own rights by challenging the problematic law in court. By
choosing to take action directly against the vendor, the government has placed the
focus squarely on that vendor, rather than on the right-holders and their ability, or
inability, to assert their rights.

\textit{Jus tertii} standing doctrine most clearly serves this anti-evasion function when
asserted defensively by a litigant who faces liability based on her participation in, or
refusal to interfere with, a right-holder’s exercise of his rights. \textit{Barrows v. Jackson},\(^{333}\)
\textit{NAACP v. Alabama ex rel. Patterson},\(^{334}\) \textit{Griswold v. Connecticut},\(^{335}\) and \textit{Eisenstadt
v. Baird}\(^{336}\) all fit that mold.

\textit{Buchanan v. Warley}\(^{337}\) also can be conceptualized as involving the defensive
use of \textit{jus tertii} standing to serve an anti-evasion function.\(^{338}\) In that case, remember,
the white property vendor sought specific enforcement of his contract with an African
American vendee, who asserted a discriminatory city ordinance in defense.\(^{339}\) True,
the white property owner did not face liability based on his contract to sell land to
an African American.\(^{340}\) He did, however, face in-court, legal action—in the form
of a defense grounded in a local ordinance—that sought to bar him from carrying
out a contract through which he would participate in an African American’s exer-
cise of his legal right to acquire property on equal terms.\(^{341}\) Had the city asserted the
ordinance in an action to enjoin the property owner from performing the contract,

\(^{331}\) This sort of evasion through indirect regulation usually will take the form of govern-
ment action directly against the litigant. However, it could also take the form of a private
party’s assertion of a state-created claim or defense against the vendor.

\(^{332}\) Cf. \textit{Terry v. Adams}, 345 U.S. 461 (1953) (holding that the government may not nullify
the constitutional right to be free from racial restrictions in voting by allowing a private
organization to run its electoral process).

\(^{333}\) 346 U.S. 249, 256–59 (1953).


\(^{335}\) 381 U.S. 479, 481 (1965).

\(^{336}\) 405 U.S. 438 (1972).

\(^{337}\) 245 U.S. 60 (1917).

\(^{338}\) I do not mean to suggest that the Court decided \textit{Buchanan} on a \textit{jus tertii} standing basis.
Rather, as discussed above, the Court treated \textit{Buchanan} as involving the vendor’s assertion
of his own substantive due process rights. \textit{See supra} notes 105–09 and accompanying text.

\(^{339}\) \textit{Buchanan}, 245 U.S. at 60–61.

\(^{340}\) Id. at 71.

\(^{341}\) Id. at 73.
application of the *jus tertii* standing doctrine to serve an anti-evasion function would plainly have been appropriate. It should make no difference that the other party to the contract effectively sought the same result through application of the same ordinance by a state court.

A harder question is whether allowance of *jus tertii* standing can be justified on anti-evasion grounds in a pre-enforcement challenge. For instance, if a law makes it a crime to sell beer to males, but not females, a regulated distributor be permitted to assert the rights of males before he is haled into court for violating the law? Arguably, it is not necessary to allow the regulated, non-right-holding litigant to assert third-party rights in that situation, given that no legal action has yet been taken against him and the right-holders can assert their own rights in court. Application of *jus tertii* standing doctrine in this context thus could be seen as an unjustifiable deviation from the right-creating lawmaker’s decision to create a personal right.

The better position, though, is that a directly regulated litigant should be permitted *jus tertii* standing in a pre-enforcement challenge. The government’s decision to directly regulate the litigant squarely raises the central concern animating the anti-evasion function—that is, that the government is impermissibly regulating third-party right-holders indirectly through direct regulation of the litigant. And by directly regulating the litigant, the government has made it less likely that individual right-holders will know of and challenge the law that results in interference with their rights, at least if the law does not also operate directly on the right-holders. Moreover, assuming the directly regulated litigant demonstrates that his pre-enforcement case is justiciable—which generally means that there is a reasonable threat of enforcement—it would be odd to say that he can assert the right-holders’ rights after enforcement is attempted, but not before. That sort of dividing line might make sense if the *jus tertii* standing doctrine is to remain a matter of judicial prudence, but it is difficult to justify once it is recognized that issues of *jus tertii* standing require the development of clear principles by which courts can answer the merits question of whether, and when, a “constitutional or statutory provision . . . implies a right of action [or defense] in the [litigant].”

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343 See, e.g., Truax v. Raich, 239 U.S. 33 (1915) (alien successfully challenged law that regulated his employer on the ground that it violated alien’s constitutional rights).
344 If the challenged law applies directly to both right-holders and the non-right-holding litigant, a viable *jus tertii* inseverability challenge might be open to the litigant. See Monaghan, *supra* note 8, at 292 n.88 (suggesting that *Griswold v. Connecticut*, 381 U.S. 479 (1965), can be explained on this basis).
345 Generally speaking, the federal courts do not require parties to expose themselves to liability before bringing suit to challenge threatened action. See MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 (2007).
B. The “Valid-Rule” Approach in the Jus Tertii Standing Context

We have seen that scholars have sought to recast the Court’s existing overbreadth doctrine in first-party-rights terms. So too with the Court’s jus tertii standing doctrine. The central premise of this “valid-rule approach” to jus tertii standing is the existence of a freestanding “substantive due process” right either to be “free from . . . harm”—that is, the loss of liberty or property—caused by “invalid government action,” or to interact with others “free from unjustifiable governmental interference.” According to adherents of this approach, litigants may raise third-party rights so as to vindicate their own substantive due process rights. The leading theory, put forward by Professor Monaghan, posits that challenged government action flunks rational basis review if it violates the rights of third parties, in that the action would not serve a legitimate interest because a violation of protected rights cannot qualify as legitimate. Thus, a litigant asserting her own substantive due process rights would be permitted to base her claim on an argument that the challenged government action would violate the rights of third parties, and her odds of success would increase with the strength of the asserted third-party right.

This valid-rule approach would allow litigants to assert third-party rights with greater liberality than the approach proposed in this Article. The two approaches would lead to the same result when the government has directly regulated the litigant—that is, in the anti-evasion context. But the two approaches would lead to different results in many cases in which the challenged law does not directly regulate the litigant. The valid-rule approach would allow a litigant to assert third-party rights whether or not the first-order right-holder faced obstacles to assertion of her rights. In contrast, the approach suggested in this Article would authorize a fail-safe grant of jus tertii standing only when individual first-order right-holders would face justiciability barriers to securing their rights through the courts.

That greater restrictiveness seems justified. To be sure, two strands of Supreme Court case law offer support for Professor Monaghan’s approach. First, in Lochner-era decisions such as Buchanan and Pierce, the Court analyzed the challenged laws’ impact on the rights of third parties in the course of holding that the laws violated the litigants’ economic and property rights under the Due Process Clause, and, in

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347 See supra notes 249–52 and accompanying text.
350 Monaghan, supra note 8, at 282.
351 See id.
353 See Monaghan, supra note 8, at 302–03.
354 See id.
355 245 U.S. 60 (1917).
Pierce, it did so despite the fact that the challenged law did not apply directly to the litigant. Second, the Court has defined the Due Process Clause’s protection of “liberty” broadly; as a result, a law must be rationally related to a legitimate governmental interest, even if it does not impinge the litigant’s fundamental rights. Putting those lines of cases together, it is not implausible to argue that an unregulated litigant should be able to assert third-party rights in support of a substantive due process challenge to governmental action that harms her and allegedly infringes those third-party rights.

The problem lies with Pierce. In that case, the Court allowed unregulated litigants to succeed in claiming that a law was unreasonable, and thus violative of due process, because it infringed the rights of third parties and indirectly caused harm to the unregulated litigant in the process. The Pierce Court’s conclusion on that

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357 In support of this point, Professor Monaghan also relies on Truax v. Raich, 239 U.S. 33 (1915), and Buchanan, 245 U.S. 60. See Monaghan, supra note 8, at 302–03. Raich is inapposite, as it was a straightforward first-party standing case: the litigant, an alien, successfully argued that a statute that would force his employer to fire him on account of his alienage violated his (the litigant’s) equal protection right to be free of discrimination and his substantive due process right to pursue his occupation. See Raich, 239 U.S. at 39. Buchanan is harder to categorize because the Court did not make clear whether it viewed the white vendor as directly regulated by the challenged government action. That said, the state courts in Buchanan had applied the challenged ordinance directly to the vendor by holding that the law barred him from enforcing his contract. Thus, Buchanan is best understood as involving the vendor’s effort to avoid direct regulation. See Buchanan notes 337–41 and accompanying text.

358 See Washington v. Glucksberg, 521 U.S. 702, 728 (1996); see also Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (“Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.”).

359 The valid-rule approach, notably, would be inconsistent with the Court’s recognition that a criminal defendant “lacks [third-party] standing under the Fourth Amendment to suppress” evidence “illegally seized from” a third party, United States v. Payner, 447 U.S. 727, 731–32 (1980), and under the Fifth Amendment to suppress another’s reliable but unlawfully obtained confession, see Rakas v. Illinois, 439 U.S. 128, 140 n.8 (1978). See Sedler, The Assertion of Constitutional Jus Tertii, supra note 16, at 1340–44 (arguing based on the valid-rule approach that the Court “has improperly focused on the ‘personal’ nature of the privilege against self-incrimination”). In scenarios raising those issues, the litigant’s liberty is surely at stake. Under the valid-rule approach, then, she should be able to argue that the government had no legitimate interest in violating the third party’s rights. But see Monaghan, supra note 8, at 304–10 (proposing limitations that would prevent the valid-rule approach from reaching such cases).

360 268 U.S. 510.

361 I take no position on whether the private school litigants in Pierce should have won the case. Given the legal environment during the Lochner era, they might have succeeded on the ground that the challenged law inevitably would destroy their property interest in their businesses, which were of a sort enjoying the sanction of history. See Norwood v. Harrison, 413 U.S. 455, 463 (1973) (“In Pierce, the Court affirmed the right of private schools to exist and operate.”).
point was unprecedented. Indeed, it was in substantial tension with the Court’s earlier recognition that the Due Process Clauses “ha[d] never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.” Moreover, the Pierce Court did not explain its unprecedented conclusion; the Court did not grapple with whether, and, if so, why the Due Process Clauses should entitle an unregulated litigant to invalidate a law on the ground that it violates the rights of regulated third parties and, in so doing, indirectly causes him injury.

The rule of Pierce was also short-lived. In its 1928 decision in Sprout v. City of South Bend, the Court, without mentioning that case, again declined to allow even a regulated litigant to assert the rights of third parties with whom he wished to interact. And when it later developed exceptions to that rule, the Court tellingly declined to base those exceptions on the litigants’ own substantive due process rights. In Barrows, for instance, the Court discussed only whether a damages award against a white landowner based on violation of a racially restrictive covenant violated the equal protection rights of African American land users, even though the landowner asserted her own substantive due process rights. And, in Griswold, the Court expressly declined to link its decision to the substantive due process rights of the appellants, even though the appellants argued that the challenged law violated their substantive due process rights to liberty and property because it violated their patients’ rights. In short, the vision of first-party, substantive-due-process standing suggested in Pierce has long since been abandoned. As the Court stated in a Fourth Amendment standing case, “The limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the defendant.”

362 Legal Tender Cases, 79 U.S. 457, 551 (1870).
363 Eschewing any such discussion, the Court instead proceeded straightaway to hold that the statute violated the parents’ and pupils’ rights. See Pierce, 268 U.S. at 573. And although the Court cited cases in which injunctions had issued to protect businesses “against interference with the freedom of patrons or customers,” in none of those cases did an unregulated litigant obtain an injunction based on the rights of regulated third parties, whether directly or through the litigant’s invocation of its own substantive due process rights. See id. at 535–36 (citing cases).
364 277 U.S. 163 (1928).
368 See generally Brief for Appellants, Griswold, 381 U.S. 479 (1965) (No. 496), 1965 WL 92619; see also Sedler, The Assertion of Constitutional Jus Tertii, supra note 16, at 1330 & nn.69–70 (noting that the Griswold appellants argued that the challenged law violated their substantive due process right to practice their profession).
Even more important, the Court’s abandonment of the Pierce approach was, and is, correct. Nothing in the text of the Due Process Clauses suggests that their Framers created a personal right to be free of indirect harms to “property” or “liberty” caused by the government’s regulation of third parties in a manner that violates the third parties’ rights.\textsuperscript{370} That the Due Process Clauses create no such right is reinforced both by the lack of decisions resting on the Pierce theory during the eighteenth and nineteenth centuries and the Court’s steadfast refusal during that era to allow litigants to succeed in asserting the rights of third parties outside of the \textit{jus tertii} inseverability context. These facts should be dispositive if courts are to defer to substantive lawmakers concerning the content of rights that they create.

The Due Process Clauses, in sum, do not create a right to be free of harm to “liberty”—including liberty of interaction—or “property” caused indirectly by government action violating the rights of third parties. That is, they are not a vehicle for asserting third-party rights. A contrary conclusion would go far toward undermining two fundamental and interrelated principles of our legal order: (1) the “cardinal principle[]” that rights are personal;\textsuperscript{371} and (2) the corresponding idea that a litigant may not rely on the legal rights of third parties, “even when the very same allegedly illegal act that affects the litigant also affects [the] third party.”\textsuperscript{372} If courts are to allow litigants to assert rights belonging in the first instance to third parties, deference to substantive lawmakers dictates that they should do so only where necessary to effectuate the design of the lawmakers who created the asserted third-party right. The approach to \textit{jus tertii} standing advocated in this Article would achieve that result.

\textsuperscript{370} See O’Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 789 (1980) (in procedural due process case, recognizing that the Due Process Clauses “do[ ] not apply to the indirect adverse effects of governmental action”). Because a directly regulated litigant would always have anti-evasion \textit{jus tertii} standing under the approach suggested in this Article, I do not focus on whether the Due Process Clauses create a first-party right to be free of direct regulation that violates the rights of third parties. Others have suggested that the Clauses create such a right. See Roosevelt, \textit{supra} note 16, at 1020; see also Bond v. United States, 131 S. Ct. 2355, 2367–68 (2011) (Ginsburg, J., concurring); Fallon, \textit{As-Applied and Facial Challenges and Third-Party Standing}, \textit{supra} note 16, at 1369. That direct-regulation-only version of the valid-rule approach is problematic for many of the same reasons that the Pierce approach is problematic. First, there is a lack of textual and historical support: the Supreme Court appears to have first allowed a directly regulated litigant to assert third-party rights via her own substantive due process rights during the \textit{Lochner} era. See \textit{supra} notes 100–13 and accompanying text; see also, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923). Second, there is the fact that the Court apparently has abandoned that conception of substantive due process; in modern cases involving directly regulated litigants, the Court has not adverted to the litigants’ own substantive due process rights in holding that the litigant could assert third-party rights. See \textit{supra} notes 365–68 and accompanying text. There thus is reason to be skeptical of this direct-regulation-only view of the valid-rule approach.


by limiting *jus tertii* standing to those situations in which its allowance is necessary to serve a fail-safe or anti-evasion function. A more freewheeling approach to *jus tertii* standing—like the valid-rule approach—would give courts needless license to ignore lawmakers’ decisions to create limited, personal rights.

**CONCLUSION**

Professor Monaghan had it absolutely right when he observed that “we must begin to articulate the unspoken premises of third party standing.”373 Unfortunately for the Court’s modern doctrine, those premises, when spoken, turn out to be false: issues of third-party standing should not be understood as matters of judicial prudence. Rather, they go to the merits of the parties’ dispute and, accordingly, call for judicial deference to lawmakers’ decisions concerning the scope of the rights that they create. Recognition of that fact raises serious questions concerning the viability of judicially devised exceptions to the bar on third-party standing. This Article has attempted to answer some of those questions. Whether or not one agrees with the specific answers that I have proposed, we must think seriously about those questions as we consider third-party standing “doctrine’s proper place in the standing firmament.”374

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373 Monaghan, *supra* note 8, at 316.