

THE YALE LAW JOURNAL

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Unpacking Third-Party Standing

ABSTRACT. Third-party standing is relevant to a wide range of constitutional and statutory cases. The Supreme Court has said that, to assert such standing, a litigant must ordinarily have a close relationship with the right holder and the right holder must face obstacles to suing on their own behalf. Yet the Court does not seem to apply that test consistently, and commentators have long critiqued the third-party standing doctrine as incoherent. This Article argues that much of the doctrine's perceived incoherence stems from the Supreme Court's attempt to capture, in a single principle, disparate scenarios raising distinct problems of both theory and practice. The Article "unpacks" third-party standing in two respects. First, it identifies true third-party standing problems by distinguishing them from first-party claims, largely by reference to the "zone-of-interests" concept. If litigants fall within the zone of interests of the substantive right they wish to invoke and they have an injury in fact, they may establish first-party standing based on their own rights. If they do not fall within the zone of interests, then they must rely on the rights of third parties. Second, the Article distinguishes among three types of parties invoking third-party standing: directly regulated parties, collaterally injured parties, and representative parties. The results in the Court's third-party standing cases tend to track these distinctions, and we argue that it is time for the Court to recognize them in doctrine. The Article also rejects prior efforts by scholars to posit a general "valid rule" requirement as a way of reconciling the cases, an approach that we contend is both under and overinclusive. The Article concludes by highlighting aspects of modern litigation practice that may need revision in light of the unpacked third-party standing doctrine.

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INTRODUCTION

The Supreme Court has said that third-party standing is generally not allowed. A litigant normally “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”¹ But this rule seems to be honored in the breach. The Court has described the third-party standing doctrine as a “prudential” limitation that can be overcome based on various considerations,² and has on many occasions allowed such standing. The Court has said that litigants invoking third-party rights must have a close relationship to the right holders, and that the right holders must face obstacles to suing on their own behalf.³ But the Court often fails to apply this “relationship-plus-obstacle” test. It has not done so, for example, in some cases involving vendors of goods and services who assert violations of their customers’ rights.⁴ To make matters more uncertain, the Court has in recent years questioned the very idea of prudential standing limits.⁵ Unsurprisingly, commentators have long doubted the coherence, and even lawfulness, of the third-party standing doctrine.⁶

Controversy over third-party standing doctrine intensified in 2020 in connection with the *June Medical Services* case before the Supreme Court.⁷ In that case, abortion doctors in Louisiana challenged a state law requiring them to have admitting privileges at a nearby hospital. Louisiana argued that the doctors

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1. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).
 2. *See, e.g., Craig v. Boren*, 429 U.S. 190, 193 (1976) (“[L]imitations on a litigant’s assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary ‘rule of self-restraint’ designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.”).
 3. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976) (plurality opinion).
 4. *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 682-84 (1977) (permitting third-party standing for a seller of nonmedical contraceptive devices challenging the constitutionality of state laws governing the sale and distribution of contraceptives); *Craig*, 429 U.S. at 193-97 (permitting third-party standing for a vendor of alcohol challenging the constitutionality of gender-based differentials in state liquor laws).
 5. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014) (suggesting that prudential standing limits are “in some tension with . . . the principle that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging’” (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013))).
 6. *See, e.g., William A. Fletcher, The Structure of Standing*, 98 *YALE L.J.* 221, 243 (1988) (describing “[t]he apparent lawlessness of so-called third party standing” as “an enduring and notorious problem”); *see also* Brian Charles Lea, *The Merits of Third-Party Standing*, 24 *WM. & MARY BILL RTS. J.* 277, 280 (2015) (“[T]he need for a coherent theory of third-party standing has been evident for at least fifty years.”).
 7. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020).

lacked third-party standing to raise the abortion rights of their clients.⁸ A majority of the Court upheld the doctors' third-party standing, but its decision did nothing to clarify the doctrine.⁹ There was no majority opinion on the issue. A plurality relied, in part, on Louisiana's failure to raise the standing argument until it reached the Supreme Court, and did not explain how the traditional relationship-plus-obstacle test was satisfied.¹⁰ Several Justices dissented on the standing issue.¹¹

Despite their disagreements, all the Justices who addressed the issue in *June Medical Services* wrote as if a unitary doctrine governed third-party standing. The plurality acknowledged a "rule" against third-party standing, but said that this rule was "hardly absolute."¹² Similarly, Justice Thomas's dissent referred (critically) to "our prudential third-party standing doctrine,"¹³ and Justice Alito's dissent invoked "our established test for third-party standing."¹⁴

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8. See Brief for the Respondent/Cross-Petitioner at 25-26, *June Med. Servs.*, 140 S. Ct. 2103 (No. 18-1323).
 9. See *June Med. Servs.*, 140 S. Ct. at 2118-19 (plurality opinion); *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment).
 10. See *id.* at 2118-19 (plurality opinion). Chief Justice Roberts did not join the plurality opinion, but stated that he agreed with its reasoning on standing. See *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment).
 11. See *id.* at 2142-49 (Thomas, J., dissenting); *id.* at 2167 (Alito, J., dissenting, joined in relevant part by Thomas & Gorsuch, JJ.).
 12. *Id.* at 2118 (plurality opinion).
 13. *Id.* at 2142 (Thomas, J., dissenting).
 14. *Id.* at 2165 (Alito, J., dissenting); see also *id.* at 2174 (Gorsuch, J., dissenting) (stating that the relationship-plus-obstacle test must always be met in order to establish third-party standing). Texas's enactment in 2021 of a controversial abortion restriction once again implicated third-party standing issues—but this time with a different ideological valence. See Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html> [<https://perma.cc/L7C7-SJAK>]. In addition to banning abortions after six weeks of pregnancy, the law allows private citizens to sue anyone who helps a woman obtain an abortion in violation of the ban, while at the same time disallowing enforcement of the ban by state government officials. In other words, the law relies on enforcement by private parties whose rights are not implicated by the law; those plaintiffs must effectively invoke third-party standing to assert the sovereign rights of the state. These suits can be brought in state courts, where somewhat different state law standing doctrines will control. Neither of those features of the law is especially unusual. But what is unusual is that they are employed entirely in place of public enforcement, a move that appears to be aimed at making it more difficult to challenge the abortion ban in federal court. Commentators who are normally supportive of a broad approach to standing were highly critical of the Texas approach. See, e.g., Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System with Its Abortion Law*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law>

In this Article, we argue that much of the third-party standing doctrine's incoherence stems from the attempt to capture, in a single principle, disparate scenarios raising distinct problems of both theory and practice. The third-party standing doctrine needs to be unpacked. We do not maintain that this will solve *all* of its problems. But unpacking the general question will resolve many issues and provide a more helpful frame to understand those that remain. Our approach also suggests that third-party standing problems may lurk in areas not previously considered to be within the doctrine's scope.

We propose to unpack the doctrine in two respects. First, we identify true third-party standing problems by distinguishing them from first-party claims. True third-party standing problems arise only if the underlying law confers no right on the litigant wishing to invoke it. There seems to be general agreement on this point, but neither courts nor scholars have identified with precision the nature of the right required for standing. We argue—reviving an insight that Professor Tribe offered decades ago¹⁵—that the answer lies with the familiar “zone-of-interests” test. If litigants fall within the zone of interests of the substantive right they invoke and they have an injury in fact, they may rely on their own first-party rights for standing. If they fall *outside* the zone of interests, they must rely on the rights of third parties. That move, we suggest, helps resolve ambiguities across standing doctrine in both constitutional and statutory cases.

By relying on the zone-of-interests concept to distinguish first- and third-party claims, we reject two prominent alternative approaches. One is the leading suggestion in the literature, often echoed in judicial dictum, that parties lack first-party rights unless they have a “cause of action” to enforce those rights.¹⁶ But as we explain, standing doctrine frequently asks who may assert a right in contexts in which no cause of action is necessary. It makes little sense, for example, to demand that a party establish an affirmative cause of action in order to assert a right or claim as a defense to someone else's lawsuit.

-reward.html [<https://perma.cc/WH8G-AXXQ>]. We discuss below the standing issues arising when the government seeks to delegate its enforcement authority, *infra* Section III.C. In September 2021, after the U.S. Supreme Court declined to enjoin enforcement of the law, the federal government sued Texas, contending that the law was unconstitutional. See Katie Benner, *The Justice Dept. Sues Texas Over Its New Restrictive Abortion Law*, N.Y. TIMES (Sep. 9, 2021), <https://www.nytimes.com/2021/09/09/us/politics/texas-abortion-law-justice-department-lawsuit.html> [<https://perma.cc/WEJ4-LJ9L>].

15. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19, at 446 (3d ed. 2000).

16. See *infra* Section II.A.

We also reject an argument, which has been made by a number of leading scholars and endorsed by others, that inconsistencies in the case law can be reconciled by positing a general right not to be subject to an invalid rule.¹⁷ While we accept that some constitutional provisions provide universal rights against enforcement of rules that are invalid in certain ways, we reject the valid rule hypothesis as an account of third-party standing. This hypothesis, we argue, is both under and overinclusive as an account of third-party standing doctrine and inconsistent with the Supreme Court's effort in modern standing decisions to reconcile public and private models of adjudication.

The second element of our approach unpacks true third-party standing problems by distinguishing three classes of litigants:

1. *Directly Regulated Parties*: The litigant is directly regulated by the challenged law or conduct, but invokes rights held by others as the basis of their challenge. The doctors in *June Medical Services* fell into this category because they were regulated by the abortion law, but challenged it on the basis of their patients' right to choose.¹⁸

2. *Collaterally Injured Parties*: The litigant is *not* the regulated entity, but the challenged law or conduct causes the litigant injury in fact. The litigant challenges the law or conduct on the ground that it violates rights held by others. Criminal defense lawyers challenging a state court's refusal to appoint counsel for indigent defendants furnish an example.¹⁹

3. *Representative Parties*: The litigant is a representative party who may or may not have an injury in fact of their own, but seeks to redress injuries to others as well. Many established mechanisms allow one party to stand in for others who cannot litigate their own claims or are too numerous to litigate them efficiently. Parents seeking to sue as "next friends" of their children fall into this category,²⁰ as do class actions and other forms of representative and aggregate litigation.

The results in the Supreme Court's third-party standing cases tend to track these distinctions, but the Court's explanations rarely acknowledge them. Unpacking these categories focuses attention on the questions peculiar to each, the implications of which have yet to be fully considered by either courts or scholars. Our goal is to identify more explicitly the tendencies in the case law, suggest

17. See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 246-48 (1994); Richard H. Fallon, Jr., *As Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1360-61 (2000); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282 (1984); see also Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 887 n.60 (2005) ("Scholars generally agree that the valid rule requirement is a basic constitutional principle.").

18. See *June Med. Servs.*, 140 S. Ct. at 2119.

19. See *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004).

20. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

some friendly amendments, and consider how some of the problems lurking just beneath the surface should be addressed. This unpacking, we contend, yields not only greater doctrinal coherence, but also a better alignment of standing doctrine with the constitutional and prudential functions that the doctrine is intended to serve.²¹

Third-party standing is relevant to a wide range of constitutional litigation. It arises, for example, when providers of goods or services seek to raise the rights of their customers or clients—for example, in claims by sellers of beer and firearms,²² doctors prescribing contraceptives,²³ criminal defense lawyers,²⁴ and homeowners seeking to sell to African American purchasers in violation of a restrictive covenant.²⁵ Similar issues also lurk on the structural side of constitutional law. They emerge when individuals subject to government action invoke the separation-of-powers prerogatives of particular government institutions—such as the President’s removal authority²⁶ or limitations on legislative vetoes²⁷—or when particular persons or entities seek to represent the interests of government institutions.²⁸ Third-party issues likewise appear in federalism

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21. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1064 (2015) (urging scholars of standing to “attempt to identify how generally stated rules or principles apply differently in coherently distinguishable contexts”).
 22. See, e.g., *Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (upholding third-party standing for a beer vendor challenging an age restriction that discriminated as to gender); *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 216 (4th Cir. 2020) (holding that a gun vendor “has third-party standing . . . on behalf of potential customers”).
 23. See, e.g., *Tileston v. Ullman*, 318 U.S. 44, 45-46 (1943) (per curiam) (denying standing to a doctor seeking to raise their patients’ right of access to contraceptives).
 24. See, e.g., *Kowalski*, 543 U.S. at 134 (2004) (denying standing to lawyers seeking to be appointed to represent indigent defendants).
 25. See *Barrows v. Jackson*, 346 U.S. 249, 255-59 (1953) (holding that homeowners sued for selling their home to an African American family in violation of a racial covenant could raise the buyer’s equal-protection rights in defense).
 26. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (holding that persons subject to actions taken by an agency have standing to assert a separation-of-powers challenge to the agency’s composition).
 27. See *INS v. Chadha*, 462 U.S. 919, 935-36 (1983) (allowing an individual subject to a deportation order due to the operation of a legislative veto to challenge the practice on separation-of-powers grounds).
 28. See, e.g., *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) (holding that a single house of the state legislature lacked standing to represent the entire legislature in defending the legality of a district map); *Hollingsworth v. Perry*, 570 U.S. 693, 707-13 (2013) (holding that proponents of a state constitutional amendment barring same-sex marriage lacked standing to assert the state’s right to defend that amendment on appeal); *Bognet v. Sec’y of Pa.*, 980 F.3d 336 (3d Cir. 2020) (holding that individuals lacked standing to litigate the prerogatives of a state legislature concerning the method of conducting an election).

cases when individuals invoke limits on Congress's enumerated authority²⁹ or states assert the rights of their citizens.³⁰

Prior scholarship on third-party standing has focused on constitutional litigation. We suggest, however, that scholars should also pay attention to statutory claims, which raise third-party standing issues of their own. Our third category of third-party problems (involving representative parties) demonstrates, moreover, that important aspects of modern federal procedure, such as class actions, multidistrict litigation (MDLs), and nationwide injunctions, can usefully be seen as raising third-party standing issues.³¹ These issues of representation and remedial scope have not generally been part of the conversation about third-party standing, but they should be—and some aspects of representative and aggregate litigation should be reconsidered in light of general concerns about third-party standing.

Part I of this Article traces the relevant doctrines and their history—in particular, the clash between “private-rights” and “public-law” models of adjudication. We also address whether the third-party standing rule is best viewed as constitutional or prudential in nature. Part II establishes the outer bounds of the third-party problem by distinguishing those cases that actually involve first-party claims. Once we have identified true third-party problems, Part III unpacks them into three distinct categories. We show that the Supreme Court's decisions have, in fact, generally distinguished among these categories of cases, although they have not always done so very clearly. The doctrine would work better and be easier to justify theoretically if the Court made these distinctions explicit. Unpacking the doctrine into these categories, moreover, reveals aspects of the doctrine in need of reform, especially with respect to cases involving representative parties.

I. SITUATING THIRD-PARTY STANDING

Current standing doctrine insists on an “irreducible constitutional minimum” consisting of (1) an injury in fact that is (2) fairly traceable to the challenged conduct and (3) likely to be redressed by the requested relief.³² The injury

29. See, e.g., *Bond v. United States*, 564 U.S. 211, 220 (2011) (holding that individuals have standing to raise enumerated powers challenges to federal statutes).

30. See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (discussing states' authority to raise their citizens' rights as *parens patriae*).

31. See *infra* Section III.C.

32. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (first quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); and then citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. Inc.*, 528 U.S. 167, 180–81 (2000)).

must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”³³ Even though the Supreme Court has endorsed these requirements in a number of decisions, they remain controversial, with many commentators questioning their historical support,³⁴ intellectual coherence,³⁵ and legal (as opposed to political) grounding.³⁶ Our aim here is not to reassess the basic validity of this constitutional framework for standing. We accept it as a given for our purposes, and we seek to better understand how the doctrine of third-party standing does and should fit within that framework.

To that end, this Part begins by briefly describing the rise of modern standing doctrine. That historical account relates to our project in four ways. First, it surfaces a clash between public and private models of adjudication that now underlies debates about third-party standing. Second, it shows that early discussions of third-party standing were driven by particular constitutional claims, while the modern cases point to the need for a theory that also embraces statutory rights. Third, the recent history of standing doctrine demonstrates that modern limits, while still controversial in theory, have not been all that constraining in practice. Debates about public adjudication have shifted to the problem of *aggregating* claims, and we seek to shift standing doctrine’s attention to that problem as well. Finally, the history reveals how the political valence of standing doctrine has changed over time – and may well change again.

We then assess the role of prudential rules and arguments in third-party standing doctrine. With one narrow exception, we reject suggestions that the third-party rule should either be elevated to constitutional status or, along with all prudential rules, be abolished altogether.

A. *The Rise of Modern Standing Doctrine*

The Constitution does not mention “standing,” but the Supreme Court has insisted that the principle is “rooted in the traditional understanding of a case or

33. *Lujan*, 504 U.S. at 560; *see also, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (laying out the same injury-in-fact requirements).

34. *See, e.g.*, Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 222-23 (1992).

35. *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 501-07 (2010).

36. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?* 77 N.C. L. REV. 1741, 1742 (1999).

controversy” under Article III.³⁷ That claim is controversial.³⁸ Although the Court occasionally acknowledged that standing had a constitutional aspect in the nineteenth century, most of the cases it heard during that period focused on whether the relevant common or statutory law provided the right kind of legal right or entitlement to review.³⁹

As Professor Sunstein has noted, the roots of modern standing doctrine emerged as “part and parcel of the heated struggle, in the 1920s and 1930s, within the country and the courts about the constitutional legitimacy of the emerging regulatory state.”⁴⁰ Progressives in that era pursued reform through legislative and executive action; the courts, by contrast, had primarily intervened to block progressive measures.⁴¹ Hence, in the 1930s, Justices like Louis Brandeis and Felix Frankfurter led an effort to tighten standing requirements for judicial review of government action.⁴² By midcentury, parties wishing to challenge government action generally had two options. First, some statutes—such as the Communications Act of 1934—provided a right to judicial review to persons “aggrieved or whose interests are adversely affected” by particular kinds of government action.⁴³ Plaintiffs suing under these statutes were not required to allege an invasion of a legal right and could assert the public’s general interest in requiring government compliance with the law.⁴⁴ Second, absent such a statutory

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37. *Spokeo*, 136 S. Ct. at 1547; *see also* *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (explaining that Article III’s terms “have virtually no meaning except by reference” to the “traditional, fundamental limitations upon the powers of common-law courts”).
38. Compare James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLAL. REV. 170, 204-12 (2018) (arguing that contemporary standing jurisprudence does not reflect understandings in the Founding Era), and John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1004 (2002) (asserting that “no one seriously believes that the Framers chose [the words ‘cases’ and ‘controversies’] with anything like the Supreme Court’s doctrinal framework in mind”), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?* 102 MICH. L. REV. 689, 732 (2004) (“[S]tanding doctrine has a far longer history than its modern critics concede.”).
39. *See generally* Woolhandler & Nelson, *supra* note 38, at 712-18 (describing nineteenth-century standing law); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1136-39 (2009) (describing the legal-wrong test).
40. Sunstein, *supra* note 34, at 179.
41. *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Lochner v. New York*, 198 U.S. 45 (1905).
42. *See* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591 (2010).
43. Communications Act of 1934, ch. 652, § 402(b)(2), 48 Stat. 1064, 1093 (1934) (codified as amended at 47 U.S.C. § 402(b)(6) (2018)).
44. *See* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940); Magill, *supra* note 39, at 1139-41.

provision, parties could seek review of government action only if government officers had committed “an invasion of recognized legal rights’ (or legally protected interests) that the law conferred upon the plaintiff in particular.”⁴⁵

The political valence of standing soon changed, however. After 1940, liberals tended to favor broad standing and conservatives tended to oppose it.⁴⁶ Professor Ho and Erica Ross have suggested several reasons for this shift: a sense that the Administrative Procedure Act (APA) and its judicial review provisions (enacted in 1946) could help block efforts to roll back the administrative state; a shift in the focus of judicial review from agency action to other issues, such as the Warren Court’s expansion of individual rights; and, by the 1960s, the enactment of statutory citizen-suit provisions and the emergence of a public-interest bar that made litigation an attractive alternative to political action as a reform strategy.⁴⁷ Reformers who had once defended administrative discretion also began to worry about agency capture by regulated industries; they thus embraced public-law litigation as a way of forcing recalcitrant administrators to implement statutory mandates.⁴⁸

Progressives in the 1960s and 1970s thus advanced a broad “public-rights” model of adjudication.⁴⁹ That model emphasized that, as Professor Jaffe put it, “those judges who do have qualities of leadership may have the opportunity of solving a problem which other responsible lawmaking bodies have not been able to solve, often because of the obstruction of minorities or the indifference of the citizenry.”⁵⁰ The centerpiece of the public-rights model was the “public action,” which would permit plaintiffs to assert “broad and diffuse interests—such as those of consumers or users of the ‘environment’—which do not involve the litigants’ individual status.”⁵¹ Congress seemed to endorse this model by enacting broad “citizen suit” provisions in statutes like the Clean Air Act and the Consumer Product Safety Act.⁵² Writing in 1973, Professor Monaghan asserted that

45. Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 716 (2019) (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940)).

46. Ho & Ross, *supra* note 42, at 632.

47. *See id.* at 645-47.

48. *See* Sunstein, *supra* note 34, at 183-84.

49. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

50. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1038 (1968).

51. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1369 (1973); *see also* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281-318 (1990) (describing and defending the public-rights model).

52. *See* Magill, *supra* note 39, at 1186-89.

“[t]he ‘public’ action . . . has fully surfaced.”⁵³ Considering Justice Frankfurter’s suggestion that “no ‘case or controversy’ existed where the substantive assertion is simply that ‘the frame of government is askew,’” Monaghan asked simply, “why not?”⁵⁴

The Supreme Court, however, never fully embraced the public action.⁵⁵ In 1970, in *Association of Data Processing Service Organizations v. Camp*,⁵⁶ the Court broadened standing by replacing the old “legal interest” test with the more permissive “zone-of-interest” formula.⁵⁷ But *Data Processing* required not only an invocation of a statutory or constitutional right, but also an “injury in fact, economic or otherwise.”⁵⁸ That requirement rejected the public action’s premise that *any* concerned citizen could vindicate the public interest in government legality, demanding instead that some concrete harm set the plaintiff apart as particularly affected. Likewise, two years after *Data Processing*, the Court in *Sierra Club v. Morton* rejected the notion that a public-interest organization may litigate a public-law question based simply on its longstanding interest and expertise in the subject area.⁵⁹ Despite the changing legal landscape around it, the Court thus

53. Monaghan, *supra* note 51, at 1369.

54. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 299 (1962) (Frankfurter, J., dissenting)).

55. *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.* 454 U.S. 464, 482-83 (1982) (“This Court repeatedly has rejected claims of standing predicated on ‘the right, possessed by every citizen, to require that the Government be administered according to law.’” (quoting *Baker*, 369 U.S. at 208)); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.”).

56. 397 U.S. 150 (1970).

57. *See id.* at 154 (emphasizing that “[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action”); *see also* Magill, *supra* note 39, at 1162-63 (noting that *Data Processing* liberalized standing); Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450, 452-53 (1970) (same). For an example of the more restrictive prior test, *see Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137-39 (1939), which held that competing power companies lacked the ability to challenge the constitutionality of the Tennessee Valley Authority because they had no “legal right” to be free from competition.

58. *Data Processing*, 397 U.S. at 152; *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154 (1993) (“The injury in fact test was designed to simplify and liberalize the standing inquiry” by making “[l]ayman’s injury . . . rather than legal or ‘lawyer’s’ injury . . . the linchpin.”).

59. 405 U.S. 727, 738-40 (1972).

held onto at least the conceptual form of an older “private-rights” model of adjudication.⁶⁰ In doing so, the Court insisted that even public-law litigation must retain the basic elements of a traditional dispute between private litigants, asserting interests personal to them.⁶¹

Modern standing doctrine crystallized in the two decades between *Data Processing* in 1970 and *Lujan v. Defenders of Wildlife* in 1992. *Lujan* was a suit brought under the broad citizen-suit provisions of the Endangered Species Act by environmentalists concerned about the impact of federal aid to foreign construction projects affecting threatened species.⁶² The decision was the first to employ constitutional standing principles to limit an act of Congress conferring broad public rights to sue, and it became a lightning rod for criticism of the Court’s “new” doctrine. Critics charged, among other things, that *Lujan* intruded on Congress’s authority and was likely to unduly constrict modern public-law litigation.⁶³ But all the elements of the Court’s doctrine, including designation of injury in fact as a “minimum constitutional mandate” and recognition of various additional prudential rules, had already appeared in earlier decisions such as *Warth v. Seldin*⁶⁴ and *Allen v. Wright*.⁶⁵ Cases in this period also married traditional separation-of-powers concerns about confining adjudication to a traditional conception of the judicial power with a newer concern about protecting the enforcement discretion of the Executive.⁶⁶

The Court’s efforts to maintain contact with the old private-rights model have proven less restrictive than its early critics predicted. Post-*Lujan* decisions have made clear, both implicitly and explicitly, that the invasion of intangible interests unknown to the common law can suffice for injury in fact.⁶⁷ Nor has

60. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73-76 (7th ed. 2015) [hereinafter HART & WECHSLER].

61. See *id.* at 73-74.

62. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

63. See, e.g., Nichol, *supra* note 58, at 1142; Sunstein, *supra* note 34, at 164-65.

64. 422 U.S. 490, 499-500 (1975).

65. 468 U.S. 737, 750-51 (1984).

66. See, e.g., *Lujan*, 504 U.S. at 576-77; *Allen*, 468 U.S. at 761; see also Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 J. CONST. L. 781, 783 (2009) (arguing that limits on standing help enforce an Article II nondelegation principle “by curtailing private prosecutorial discretion”).

67. See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-05 (2021) (“Various intangible harms can also be concrete.”); *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.”); see also *Allen*, 468 U.S. at 755 (“There can be no doubt that this sort of noneconomic injury [arising from racial stigma] is

the Court's insistence that plaintiffs allege *something* giving them a closer connection than most persons to the challenged action proven much of an obstacle. *Lujan*, for example, suggested that the environmentalist plaintiffs might have prevailed if they had purchased plane tickets to visit the endangered animals at a particular future time.⁶⁸ Likewise, the Court in *Sierra Club v. Morton*⁶⁹ insisted that the plaintiff Sierra Club could not challenge federal proposals for development in the Sequoia National Forest without identifying at least one particular member who had visited the forest, but that this posed no serious impediment to litigation.⁷⁰ In *FEC v. Akins*,⁷¹ the Court upheld a very broad citizen-suit provision of the Federal Election Campaign Act, notwithstanding that the plaintiff's alleged injury (denial of information relevant to a voting decision) was very widely shared. And just this past Term, the Court approved rights violations involving only nominal damages as sufficient to establish standing for litigants seeking to establish the unlawfulness of government conduct.⁷² These holdings suggest that the Court has gone to considerable lengths to reconcile the two competing models of adjudication, rather than simply choosing one over the other.⁷³

Although the modern doctrinal framework, and particularly the injury-in-fact requirement, remains controversial among commentators,⁷⁴ it is well entrenched in the courts. In recent years, all the Justices have appeared to accept the basic standing framework, although they sometimes disagree on how to apply it.⁷⁵ The more interesting questions to our minds thus concern the ways in

one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.”).

68. See *Lujan*, 504 U.S. at 563-64; see also *id.* at 579 (Kennedy, J., concurring) (suggesting that the acquisition of airline tickets to visit the sites in question would have been enough to establish standing).
69. 405 U.S. 727 (1972).
70. See *id.* at 735 n.8 (noting that an amicus brief filed by another group had asserted that the Sierra Club had many members who regularly visited the Mineral King Valley and would be affected by the challenged government policy, but that the Club had expressly declined to rely on injuries to those specific members).
71. 524 U.S. 11 (1998).
72. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).
73. See HART & WECHSLER, *supra* note 60, at 75.
74. See, e.g., F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 299-306 (2008); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 176-79 (2012); Sunstein, *supra* note 34, at 185-86.
75. See, e.g., *Uzuegbunam*, 141 S. Ct. at 797; *id.* at 803-07 (Roberts, C.J., dissenting) (disagreeing with the majority's application of the redressability requirement to claims for nominal damages); see also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1554-55 (2016) (Ginsburg, J., dissenting)

which the old controversy over the public action continues to influence open doctrinal questions *within* the modern framework. Four central observations are important to the remainder of this Article.

First, third-party standing doctrine sits at the heart of these debates because it follows directly after questions concerning the scope of first-party rights. There are, in other words, two ways to approximate the “public action” advocated by proponents of broad public-law litigation. One can define first-party rights broadly by conferring rights on anyone who becomes aware of a violation of law, or one can broadly authorize litigants to raise the rights of a more narrow class of persons with first-party rights at stake.⁷⁶ Professors Monaghan and Fallon, for example – both critics of the private-rights model of adjudication – have also both embraced broadly permissive approaches to third-party standing.⁷⁷ This is evident in their support of a broad “valid rule” basis for asserting standing, an approach that we criticize below. Conversely, the separation-of-powers arguments that have traditionally constrained the public action also counsel against broad exceptions to the rule against asserting third-party rights. That point becomes especially relevant, as we will explain, in cases involving parties who claim mere collateral injuries from the violation of third-party rights.⁷⁸

Second, the academic literature on standing has reflected the shifting salience of different constitutional claims over time, and those trends have shaped how scholars think about third-party standing. Much of the early commentary on standing focused on First Amendment overbreadth challenges and the related distinction between facial and as-applied challenges.⁷⁹ Later entries reflected the emergence of structural claims about federalism and separation of powers as pre-occupations of the Rehnquist and Roberts Courts.⁸⁰ But the central modern

(accepting the legal framework of the Court’s standing analysis and disagreeing only as to whether a remand was necessary to determine the adequacy of the plaintiff’s allegations).

76. See, e.g., Bandes, *supra* note 51, at 314-18; see also TRIBE, *supra* note 15, § 3-19, at 443 (stating that a litigant asserting third-party standing “is essentially asking to be treated as a ‘private attorney general’”).
77. See Fallon, *supra* note 17, at 1364-67; Monaghan, *supra* note 17, at 282.
78. See *infra* Section III.B.
79. See, e.g., Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 4; Fallon, *supra* note 17, 1360-61.
80. See, e.g., Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1448-80, 1480-1520 (2013). These structural cases often featured institutional litigants, and thus the rights of these institutions to sue became part of the structural debate. See, e.g., Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 617-18 (2019).

standing cases, including *Data Processing*, *Lujan*, *Akins*, and *Spokeo*, have demonstrated the importance of statutory claims.⁸¹ In the next Part, we seek to develop a framework in which statutory claims are not an afterthought to constitutional ones.

Third, experience with public-law litigation has demonstrated that it is generally not difficult to find a plaintiff who is more directly affected by the challenged action than most.⁸² Debate has thus shifted to other aspects of the public action. In particular, as we discuss in Section III.C, attention outside of constitutional law has focused on various methods for aggregating the claims and interests of diffuse right holders, including class actions, MDLs, actions by membership organizations, and nationwide injunctions.⁸³ Many of these representative mechanisms are actually instances of third-party standing and thus need to be considered alongside, and integrated into, any satisfactory account of the third-party problem.⁸⁴

Finally, the shifting ideological valence of standing doctrine over time demonstrates that relationships between theories of judicial review and models of adjudication, on the one hand, and substantive political commitments, on the other, are highly contingent. Competing models of standing have had different political valences in different eras, and in the present era of both left- and right-wing public litigation, they have no clear valence at all.⁸⁵ Third-party standing cases range across the political spectrum, from abortion rights, to gun rights, to economic regulation, to election disputes, to race relations. Judges or litigants deciding whether to frame standing rules broadly or narrowly would not want

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81. For a very recent example, see *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), which addresses which members of a broad plaintiff class had the requisite Article III injury in fact to pursue claims under the Fair Credit Reporting Act.
82. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and in the judgment) (describing the “minimal requirements” of Article III); *Sierra Club v. Morton*, 405 U.S. 727, 740 & n.15 (1972) (emphasizing that requirements of injury to individuals would not foreclose litigation).
83. See, e.g., Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006).
84. Cf. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) (“In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so.”).
85. See, e.g., *California v. Texas*, 141 S. Ct. 2104 (2021) (rejecting Texas’s challenge to the Affordable Care Act on standing grounds); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 45-47 (2018) (noting extensive public-law litigation by both red states and blue states).

to place any large bets on whether the resulting precedent would benefit particular political causes or partisan worldviews over the long term. This predictive difficulty should encourage both courts and commentators to think about standing on its own terms, and to pay less attention to the expected political consequences of particular approaches.⁸⁶

B. Prudential or Constitutional?

Beyond the Article III requirements for standing, the Supreme Court has also recognized a distinct category of prudential requirements grounded in the judiciary's own power of "self-governance."⁸⁷ The rule against third-party standing has traditionally been the most important of these rules. Other prudential principles have barred parties from asserting "generalized grievances" and required them to be in the zone of interests of the substantive law on which they rely.⁸⁸ In *Lexmark International, Inc. v. Static Control Components, Inc.*, however, the Court questioned the very notion of prudential standing limits.⁸⁹ That decision moved the zone-of-interest requirement out of the standing category altogether, and it suggested that the rule against generalized grievances stems from Article III.⁹⁰ But the Court acknowledged that the third-party rule was "harder to classify"; "consideration of that doctrine's proper place in the standing firmament," the Court concluded, "can await another day."⁹¹

In *June Medical Services*, all but one of the Justices seemed content to leave the third-party standing rule in the prudential category. The plurality reasoned that the third-party rule "is 'prudential,'" "does not involve the Constitution's

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86. Cf. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16-20 (1964) (insisting that Article III principles, like other constitutional principles, must be developed and applied in a principled way).
87. *Warth v. Seldin*, 422 U.S. 490, 509-10 (1975); see also *Allen v. Wright*, 468 U.S. 737, 751 (1984) (explaining that, in addition to "a core component derived directly from the Constitution," "[s]tanding doctrine embraces several judicially self-imposed limits"); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (describing prudential doctrines as "complementary rule[s] of self-restraint" that the Court has "developed . . . for its own governance").
88. See, e.g., *Allen*, 468 U.S. at 751; *Warth*, 422 U.S. at 499-501.
89. See 572 U.S. 118, 125-26 (2014); see also S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 99 (2014) (proposing "the total dismantling of the prudential branch of standing"); Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CON. L. 213, 225-27 (2015) (discussing the history of criticisms of prudential standing doctrine leading up to *Lexmark*).
90. See *Lexmark*, 572 U.S. at 127 & n.3.
91. *Id.* at 127-28 & n.3.

‘case-or-controversy requirement,’” and therefore “can be forfeited or waived.”⁹² Only Justice Thomas disagreed.⁹³ Subject to one qualification that we note below, we conclude here that categorizing the limits on third-party standing as prudential makes sense. This Section also clarifies the function of prudential reasoning in standing doctrine and the extent to which the *Lexmark* decision called such reasoning into question.

One confusing aspect of the terminology should be noted at the outset. “Prudential” may refer both to the status and provenance of a rule, on the one hand, and to the underlying rationale offered in a rule’s support, on the other. The most frequently remarked difference between rules enjoying constitutional and prudential *status* is that Congress may override the latter by conferring statutory rights to sue on particular parties.⁹⁴ Prudential limitations also appear to be subject to party waiver, whereas Article III limitations are not.⁹⁵ Relatedly, some (but not all) courts of appeal have held prudential standing rules to be nonjurisdictional.⁹⁶ Finally, courts sometimes set the prudential rules aside in particular cases for reasons of efficiency—for example, if the third-party standing issue has developed only late in the litigation.⁹⁷

The *arguments* invoked in support of standing rules are also often prudential in nature. This fact, however, does not by itself distinguish these rules from constitutional limits on standing. Although the Court grounds the latter in a formal conception of separated powers,⁹⁸ that conception shades very quickly into notions of “the proper—and properly limited—role of the courts in a democratic

92. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion).

93. *See id.* at 2144 (Thomas, J., dissenting).

94. *See Warth v. Seldin*, 422 U.S. 490, 509 (1975). Such legislation may also affect the application of the constitutional requirements for standing by creating interests, the invasion of which may produce constitutional injury in fact, but statutes may not eliminate Article III’s “irreducible minimum” altogether. *See FEC v. Akins*, 524 U.S. 11 (1998) (upholding broad individual standing under the Federal Election Campaign Act by construing the Act to create a right to information, the denial of which constituted a constitutional injury in fact).

95. *See, e.g., June Med. Servs.*, 140 S. Ct. at 2117; *Craig v. Boren*, 429 U.S. 190, 193–94 (1976).

96. *See generally* Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RESV. L. REV. 413 (2013) (collecting decisions).

97. *See Craig*, 429 U.S. at 193 (noting that the prudential objectives of the third-party standing doctrine “cannot be furthered here, where the lower court already has entertained the relevant constitutional challenge”).

98. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”).

society.”⁹⁹ Likewise, as Professor Fallon has noted, “[j]usticiability doctrines reveal a deep, systemic antipathy to judicial coercion that is unnecessary to protect rights actually in danger.”¹⁰⁰ And in constitutional cases, “[e]qually established policies urge courts to avoid unnecessary constitutional decisionmaking.”¹⁰¹ All of these ideas are recognizable as prudential forms of argument.¹⁰²

Another set of prudential arguments focuses on judicial craft rather than decisional consequences or legitimacy. Standing doctrine, like other justiciability requirements of ripeness and mootness, seeks to ensure that litigation maintains the “functional requisites of informed adjudication” necessary for courts to do their job.¹⁰³ Professor Fallon has explained that “[a] specific and concrete injury helps frame issues in a factual context suitable for judicial resolution,” limits “the scope of a judicial decision,” and promotes the “adverse interests and arguments [that] sharpen ‘the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’”¹⁰⁴ Although these pragmatic values are often associated primarily with prudential standing rules, the Court also invokes them in support of constitutional requirements.¹⁰⁵

The Court has justified the third-party standing rule in terms of both these pragmatic decisional concerns as well as broader notions of the judicial role in the separation of powers. The rule “assures the court that the issues before it will be concrete and sharply presented.”¹⁰⁶ It “assumes that the party with the right

99. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth*, 422 U.S. at 498); see also *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (noting standing doctrine’s “separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not”).

100. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 29 (1984); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-70 (1803) (acknowledging that “any legal investigation of the acts of [executive] officers [is] peculiarly irksome,” and that “[t]he province of the court is, solely, to decide on the rights of individuals”).

101. Fallon, *supra* note 100, at 29; see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (cataloguing doctrines of constitutional avoidance).

102. See Neil S. Siegel, *Prudentialism in McDonald v. City of Chicago*, 6 DUKE. J. CONST. L. & PUB. POL’Y 16 (2010) (developing two broad conceptions of prudential argument).

103. See Fallon, *supra* note 100, at 13-14.

104. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

105. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (“The requirement of ‘actual injury redressable by the court’ . . . tends to assure that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 39 (1976))).

106. *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984).

has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.”¹⁰⁷ And the Court has worried that without the third-party rule, “courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”¹⁰⁸ One cannot classify the third-party rule as prudential or constitutional based on the type of arguments employed to justify it; rather, it rests on arguments similar to those supporting other aspects of standing.¹⁰⁹

The crucial consideration for classifying the third-party standing rule as constitutional or prudential, we contend, is the relationship between that rule and the “irreducible constitutional minimum”¹¹⁰ of injury in fact. In evaluating this relationship, it is important to keep in mind that parties must meet standing requirements not only to initiate a lawsuit, but also to seek particular remedies, assert particular defenses, or appeal adverse rulings.¹¹¹ Sometimes parties have standing to take some actions in a case but not others; for instance, a party may have standing to contest certain procedural or jurisdictional questions even if they lack standing to assert their underlying claims on the merits.¹¹² The key point—often overlooked—is that standing principles may limit the assertion of

107. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

108. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

109. See *Joseph H. Munson Co.*, 467 U.S. at 955 n.5 (observing that the third-party rule’s rationale “is not completely separable from Art. III’s requirement that a plaintiff have a ‘sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy’” (quoting *Singleton v. Wulff*, 428 U.S. 106, 112 (1976))).

110. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

111. See *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); see also *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645 (2017) (holding that an intervenor in a suit must satisfy Article III standing requirements in order to pursue relief different from that sought by a party); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)) (“[S]tanding ‘must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.’” (quoting *Arizona v. Gonsky*, 520 U.S. 43, 64 (1997))).

112. See *Int’l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 76–78 (1991) (holding that state-court plaintiffs had standing to contest the removal of their claims to federal court whether or not they had Article III standing to pursue their claims on the merits); *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980) (holding that a named plaintiff in a class action whose substantive claim has become moot retains standing to litigate the denial of class certification).

particular claims or defenses even if a party otherwise has standing to participate in the case.¹¹³

The third-party rule is particularly likely to come up in two circumstances in which Article III injury in fact is not in question. A plaintiff with a clear injury to his or her own interests may nonetheless wish to construct a more effective legal claim by raising the rights of others. As we discuss in Part II, the doctors in *June Medical Services* are one example.¹¹⁴ Or a defendant in a lawsuit—in which the plaintiff has already established the injury requisite to an Article III case or controversy—may wish to assert a third party’s rights as a defense.¹¹⁵ In many third-party standing cases, the crucial question is not whether a party may participate at all, but rather what claims or defenses it may assert.¹¹⁶ That question is a function of the underlying law, which may be constitutional, statutory, or common law depending on the claim, as well as of prudential considerations about the functional requisites of adjudication. But it will not ordinarily implicate Article III.

Once we understand standing as implicating the claims or defenses a party may raise rather than their right to initiate litigation, the third-party standing doctrine’s prudential status becomes easier to understand.¹¹⁷ If a party has an injury in fact caused by the defendant’s action and redressable by the requested relief, then we have a “case or controversy” and the federal court may constitutionally hear the dispute. Other considerations—particularly those meant to ensure that issues are teed up for the court by parties who can adequately present them—have been treated more flexibly under the prudential label.¹¹⁸

This understanding of the third-party rule suggests, however, that some third-party claims do raise constitutional as well as prudential questions. As we

113. See *Int’l Primate Prot. League*, 500 U.S. at 77 (“Standing does not refer simply to a party’s capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents.”).

114. See *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2117 (2020).

115. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (involving a criminal defendant seeking to exclude evidence based on an illegal search of another person’s premises or property).

116. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 500 n.12 (1975) (explaining that “there is no Art. III standing problem” when “the litigant asserts the rights of third parties defensively, as a bar to judgment against him,” but that prudential considerations may nonetheless limit the litigants’ ability to invoke the rights of third parties (first citing *Barrows v. Jackson*, 346 U.S. 249 (1953), and then citing *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961))).

117. See *Warth*, 422 U.S. at 500 n.12.

118. See, e.g., *United States v. Windsor*, 570 U.S. 744, 757-59 (2013) (holding that the rule requiring adverse parties was prudential in nature, and that the government’s refusal to provide the requested relief was sufficient to preserve an Article III “case or controversy” despite the government’s agreement with the plaintiff’s claim).

discuss further in Section III.C, our last category of third-party problems involves cases in which one party is allowed to “represent” another and rely not only on that third-party’s rights but also on its injury in fact. When one person sues on behalf of another as a “next friend,” for example, the person initiating the litigation often claims neither rights nor injury of their own. Likewise, a membership organization suing on behalf of its members ordinarily asserts injury to one or more members, not to itself. Because the plaintiff in these situations asserts no injury in fact of its own,¹¹⁹ the third-party standing rules governing such suits plainly raise constitutional as well as prudential concerns.

In his dissent in *June Medical Services*, Justice Thomas disputed the prudential status of the third-party standing rule for a different reason. He argued that, under the common law, even when plaintiffs had an injury in fact, they were still required to allege a “legally protected interest,” and he contended that this common law requirement is necessary for an Article III “case or controversy.”¹²⁰ Scholars have disagreed sharply about whether these common-law limitations were understood historically as Article III requirements.¹²¹ The ambiguity of the early cases is understandable because the constitutional status of such requirements did not really matter until Congress started to incorporate broad citizen-suit provisions into federal regulatory statutes in the 1970s.¹²² In any event, the Court clearly held in *Data Processing* that the legal-interest test (understood as whether the plaintiff has a valid cause of action) “goes to the merits,”¹²³ thus

119. Sometimes these representational plaintiffs do assert their own injuries. Parents suing as next friends of their children, for example, may assert their own interest in associating with the child or in controlling the child’s upbringing. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9 (2004). Likewise, membership organizations sometimes assert direct harms to their own institutional interests. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). Those injuries will generally satisfy Article III, leaving only prudential concerns about raising third-party rights. But under current doctrine, representational standing does not *depend* on the existence of these first-party injuries, and many next friends or organizations will not have them.

120. See *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2143-46 (2020) (Thomas, J., dissenting). Justice Thomas maintained that when there is a legally protected interest, an injury in fact is required for standing only when the litigant was asserting public rights, not private rights. See *id.* at 2145-46; see also *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217-19 (2021) (Thomas, J., dissenting) (making a similar argument).

121. See sources cited *supra* notes 38-39.

122. Justice Thomas cited, for example, *Clark v. City of Kansas City*, which held 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.” 176 U.S. 114, 118 (1900) (citing THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 196 (6th ed. 1890)). But neither “standing” nor “Article III” appears in the opinion. See also *Lea, supra* note 6, at 291-94 (arguing that *Clark* should not be read as applying a categorical bar against asserting third-party rights).

123. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

excluding it as a requirement—constitutional or otherwise—of standing. Just as it is not our project in this Article to question the validity of the modern Court’s constitutional injury-in-fact requirement, it is likewise outside our scope to consider whether the *Data Processing* framework should be replaced with something else. We seek to make the best sense we can out of the Court’s third-party standing decisions within the broad framework laid out by *Data Processing*, *Lujan*, and their progeny.

Justice Thomas also suggested that the third-party rule cannot be prudential because, in his view, *Lexmark* rejected prudential standing generally.¹²⁴ The Court in *Lexmark*, however, specifically reserved judgment on the third-party standing rule,¹²⁵ and lower courts have not interpreted the decision as affecting the prudential status of that rule.¹²⁶ Nor, as noted above, did the majority appear to interpret *Lexmark* that way in *June Medical Services*. More broadly, prudential doctrines limiting the powers of the federal courts pervade the field of federal jurisdiction, from the act-of-state doctrine¹²⁷ to *Younger* abstention.¹²⁸ Much of ripeness and mootness doctrine, which are inextricably linked to standing by a common focus on the presence and persistence of an injury in fact, is widely acknowledged to be prudential.¹²⁹ Other examples include doctrines recognizing

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124. See *June Med. Servs.*, 140 S. Ct. at 2143-44 (Thomas, J., dissenting). Commentators have likewise read *Lexmark* as signaling a general rejection of prudential rules. See, e.g., Joel S. Nolette, *Last Stand for Prudential Standing? Lexmark and Its Implications*, 16 GEO. J.L. & PUB. POL’Y 227, 232-33 (2018) (“For good reason, courts and commentators in the wake of *Lexmark* have read the decision as heralding the end of prudential standing, third-party standing included. The Court, too, has hinted at as much.”); *id.* at 233 n. 43 (citing, *inter alia*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (questioning “the continuing vitality of the prudential ripeness doctrine”)); Leading Case, *Lexmark International, Inc. v. Static Control Components, Inc.*, 128 HARV. L. REV. 321, 328 (2014) (“*Lexmark* has abruptly upended prudential standing doctrine.”); Brown, *supra* note 89, at 132 (similar).
125. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014).
126. See, e.g., *Hill v. Warsewa*, 947 F.3d 1305, 1309 (10th Cir. 2020); *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118 n.9 (9th Cir. 2015).
127. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); Ernest A. Young, *The Story of Banco Nacional de Cuba v. Sabbatino: Federal Judicial Power in Foreign Relations Cases*, in *FEDERAL COURTS STORIES* 415, 434-38 (Vicki C. Jackson & Judith Resnik eds., 2010) (analogizing the act-of-state doctrine to other prudential rules limiting federal judicial power).
128. See *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (limiting federal courts’ power to enjoin state criminal proceedings in order to protect comity and federalism). See generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (documenting how “discretion [in the exercise of federal court jurisdiction] is much more pervasive than is generally realized, and . . . has ancient and honorable roots at common law as well as in equity”).
129. See, e.g., *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (agreeing with Chief Justice Rehnquist that “the ‘yet evading review’ portion of our ‘capable of repetition, yet evading review’ test [for overcoming mootness] is prudential” (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982))); Shapiro, *supra* note 128, at 553-54.

courts' prudential discretion not to grant equitable relief,¹³⁰ the *forum non conveniens* doctrine,¹³¹ the Supreme Court's prudential discretion to decline to exercise its original jurisdiction,¹³² and arguably the current interpretation of the general federal-question statute.¹³³ Regardless of whether such prudential doctrines are justified as "constitutional common law,"¹³⁴ exercises of the federal courts' inherent power over procedure in cases before them,¹³⁵ or as interpretations of statutory or equitable limits on judicial power,¹³⁶ we seriously doubt that *Lexmark* ruled out all such prudential limitations.¹³⁷

In any event, the Court's core objection in *Lexmark* to prudential standing limits—that federal courts have a "virtually unflagging" obligation to hear cases

130. See Shapiro, *supra* note 128, at 548–50.

131. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); Shapiro, *supra* note 128, at 555–57.

132. See, e.g., *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (noting the Court's discretionary power to decline to exercise its original jurisdiction); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971) (same). *But see Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., dissenting from denial of motion for leave to file an original complaint) (criticizing the Court's discretionary policy along lines similar to Justice Scalia's reasoning in *Lexmark*).

133. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (permitting federal "arising-under" jurisdiction over federal elements in state causes of action when the federal issue is "actually disputed and substantial," and "a federal forum may entertain [it] without disturbing any congressionally approved balance of federal and state judicial responsibilities"); Shapiro, *supra* note 128, at 566–70 (characterizing this sort of approach as an exercise of prudential discretion).

134. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

135. See, e.g., Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 325 (2006); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984).

136. See, e.g., *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 717–19 (1996) (grounding the various abstention doctrines in the courts' equitable discretion); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–54 (1967) (grounding much of ripeness doctrine not in Article III but in the Administrative Procedure Act (APA) and Declaratory Judgment Act and in limits on the courts' equitable powers).

137. We do not mean to endorse every one of these prudential doctrines; our point is simply that at least some of them are probably here to stay. For an argument that efforts to eliminate prudential limits on the exercise of jurisdiction tend to result in the recategorization of these limits as part of substantive law, including constitutional law, and that this is problematic from the perspective of representative democracy, see Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017). We suspect, however, that reports of the death of prudential doctrines (by recategorization or otherwise) are exaggerated.

within their jurisdiction¹³⁸ – has little application to the third-party rule.¹³⁹ That rule, after all, does not deny that courts may (and perhaps must) hear cases before them when the plaintiff has a concrete injury in fact. Rather, the third-party rule restricts the *arguments* that such a plaintiff (or other parties) can raise. To our knowledge, no one thinks that a court with jurisdiction over a case has an “unflagging” obligation to hear every possible argument that a litigant might raise. If the doctors in *June Medical Services* had been prosecuted under Louisiana law, and a court had refused to allow them to raise their patients’ rights as a constitutional defense, we doubt that anyone would have seen that decision as a refusal to exercise jurisdiction. Likewise, when a court dismisses a plaintiff’s lawsuit on the ground that the plaintiff lacks third-party standing to raise the claim upon which the suit depends, that court is *exercising* its jurisdiction, not withholding it.

For these reasons, *Lexmark* should not be understood as fundamentally changing the law with respect to third-party standing. It should cast no doubt on either the validity of the third-party standing rule or its generally prudential status. Nevertheless, *Lexmark* is relevant to our effort to unpack third-party standing. As the next Part shows, considerations of the *scope* of rights that lay at *Lexmark*’s heart – and which the Court rightly identified with the substantive law underlying a lawsuit – play a crucial role in defining the bounds of the third-party problem.

II. WHO IS A RIGHT HOLDER? THIRD-PARTY VERSUS FIRST-PARTY CLAIMS

Third-party standing problems arise only if and to the extent that a litigant cannot rely on his or her own (first-party) rights. For example, the doctors in *June Medical Services* could have asserted their own rights not to be regulated in a wholly arbitrary manner and, possibly, their rights to practice medicine.¹⁴⁰ Alternatively, they might have asserted equal-protection claims if they believed that

138. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

139. Ironically, the Court derived the proposition that federal courts’ obligation to exercise their jurisdiction is “virtually unflagging” from *Colorado River Water Conservation District v. United States* – a case recognizing a notoriously discretionary prudential abstention doctrine. 424 U.S. 800, 817 (1976); see Shapiro, *supra* note 128, at 545.

140. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 766 (1997) (Souter, J., concurring in judgment) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)) (noting that due process “would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational”); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (plurality

they were regulated more strictly than other sorts of doctors without adequate justification.¹⁴¹ But none of these claims was likely to win on the merits; understandably, the doctors wanted to assert the more fundamental rights of their patients to choose an abortion. To the extent that the Court's abortion jurisprudence confers rights only on pregnant women, not their doctors, we take the doctors' claim to be a classic form of third-party standing.

The law of standing encompasses two distinct sets of questions: who has the right to invoke the power of a court (by filing a lawsuit, for example, or taking an appeal), and what arguments or legal principles a party can raise as a claim or defense. Article III standing doctrine addresses the former; third-party standing usually concerns the latter. And as *June Medical Services* illustrates, the boundaries of first-party rights turn out to be crucial in determining litigants' need to assert rights held by other parties. That means that notwithstanding our ultimate focus on third-party standing, we initially must consider when litigants have *first-party* rights.

Courts and commentators widely acknowledge that the rights a litigant can assert depend on the nature and scope of the underlying law,¹⁴² but ambiguity remains concerning the appropriate framework for translating substance into standing. We locate the answer in the familiar "zone-of-interests" concept. Two decades ago, Professor Tribe recognized that "to say that a particular plaintiff's claim does not fall within the zone of interests of a given constitutional provision is another way of saying that the right claimed is one possessed not by the party asserting it, but rather by others."¹⁴³ His insight linking the zone-of-interests concept with the issue of first-party versus third-party rights has been largely ignored since. We suggest that it is a missing piece of the doctrinal puzzle. Litigants within the zone of interests of a statute or constitutional provision may invoke their own rights; others must rely, if they can, on third-party standing.

opinion) ("The Court of Appeals adverted to what it perceived to be the doctor's own 'constitutional rights to practice medicine.' . . . We have no occasion to decide whether such rights exist. Assuming that they do, the doctors, of course, can assert them.").

141. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-48 (1985) (holding that the government may not regulate similarly situated parties differently absent a rational basis for doing so).

142. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (acknowledging that standing "often turns on the nature and source of the claim asserted"); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 428 (1974) ("Standing, in looking to injury or recognizable harm, quite obviously deals with an essential element of a claim."); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 47 (making a similar point); Fletcher, *supra* note 6, at 223 (arguing more broadly that "standing should simply be a question on the merits of plaintiff's claim").

143. TRIBE, *supra* note 15, § 3-19, at 446.

The Court's *Lexmark* decision dominates contemporary discussions of the zone of interests, but that decision's significance is often misunderstood. Although *Lexmark* rejected the zone of interests as a freestanding doctrine of prudential standing, it also made clear that the zone of interests "always applies" in construing the scope of legal rights.¹⁴⁴ The concept thus remains, in our view, crucial to framing the boundaries of the third-party standing problem. In the course of explaining its usefulness, we reject two other ways of framing that problem. First, courts and commentators have sometimes suggested that first-party rights should be limited to those who have a private right of action. And second, several prominent scholars have endorsed an approach that turns most third-party problems into first-party claims by postulating a right to be judged by a valid rule of law. Although both approaches may be useful in particular contexts, neither provides a general organizing principle for third-party standing cases.

We begin with statutory rights, because the zone-of-interests approach is most developed there. We then turn to constitutional rights. The final section addresses the valid rule argument.

A. The Scope of Statutory Rights

Efforts to invoke the *constitutional* rights of third parties have received the lion's share of academic attention, but most litigation involves statutory or common-law claims. In these latter settings, it seems quite natural to acknowledge that the underlying law shapes who has a first-party right to invoke a statutory or common-law principle. But this is just the beginning of the inquiry. Congress is often unclear as to the scope of statutory rights, and the common law is often no clearer.¹⁴⁵ The widely used zone-of-interests test exists alongside other more field-specific doctrines of statutory standing. And confusion has long existed concerning the relationship between a statute's zone of interests and whether the plaintiff has a "cause of action."¹⁴⁶ Defining the circumstances in which litigants

¹⁴⁴. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).

¹⁴⁵. See, e.g., Alan Schwartz & Robert E. Scott, *Third-Party Beneficiaries and Contractual Networks*, 7 J. LEGAL ANALYSIS 325, 330 (2015) (observing that "courts have not clarified the factors that do and should generate the conclusion" that someone is a third-party beneficiary to a contract).

¹⁴⁶. Compare STEPHEN BREYER & RICHARD STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* (2d ed. 1985) (tending to equate the two), and Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144-54 (1977) (same), with Fletcher, *supra* note 6, at 236 ("'[C]ause of action' is an awkward term because it includes within its scope the two distinct questions of defendant's duty and plaintiff's right to enforce that duty.").

must rely on third-party rights requires some initial effort to clean up the “largely unexplored” law of statutory standing.¹⁴⁷

Standing to invoke a statutory right, we contend, concerns simply whether a litigant has *first-party* rights to assert under a statute, not whether the litigant has a cause of action to seek particular remedies under that statute. The zone-of-interests idea captures this principle¹⁴⁸: one must be within the statute’s zone of interests to have a cause of action under it, but the zone may also include people who *do not* have a cause of action – who, for instance, sue under some other more general cause of action, sue under state law, or invoke the statute as a defense.¹⁴⁹ Other, local statutory standing doctrines are simply versions of the zone-of-interests idea that have developed in particular areas.¹⁵⁰ Litigants outside a statute’s zone of interests may still assert statutory rights, but only if they can fit into an exception to the general prohibition on third-party standing.¹⁵¹ But in either case, litigants should not have to establish a cause of action as a predicate to standing.

147. Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 89 (2009).

148. See Lee & Ellis, *supra* note 74, at 223 (“[T]he zone of interests test has greater potential utility than merely as an adjunct to the injury, causation, and redressability requirements of Article III. The zone of interests test connects the statute’s objective to the class of plaintiffs permitted to sue.”).

149. “Statutory standing” strikes us as largely synonymous with “zone of interests,” but seems to be used primarily when the question is who is entitled to pursue a particular cause of action that a statute clearly does create. Such a statute might well circumscribe the scope of its entitlement to sue more narrowly than those who are entitled, say, to invoke the statute as a defense or pursuant to a different, more general cause of action. See *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment) (observing that “compliance with . . . the ‘zone-of-interests’ test” is “another element of statutory standing”); Pathak, *supra* note 147, at 97-98 (discussing how the zone of interests relates to statutory standing).

150. See, e.g., *Ass’n of Battery Recyclers v. EPA*, 716 F.3d 667, 676 (D.C. Cir. 2013) (Silberman, J., concurring) (“[W]hat is involved in the zone-of-interest analysis is more properly described as ‘statutory standing.’”).

151. In other words, we understand the zone-of-interests inquiry as speaking to the issue of who has first-party rights, without limiting who may raise *other* people’s rights. Cf. *FAIC Secs., Inc. v. United States*, 768 F.2d 352, 358 (D.C. Cir. 1985) (Scalia, J.) (“We have been unable to find any case in which the Supreme Court has relied upon the plaintiff’s failure independently to meet the zone of interests test as the basis for its refusal to accord standing for the assertion of third-party rights.”). But see *Am. Psychiatric Ass’n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 360 (2d Cir. 2016) (interpreting *Lexmark* as “teach[ing] that we cannot expand the congressionally-created statutory list of those who may bring a cause of action by importing third-party prudential considerations”).

The zone-of-interests test appeared at the same moment that the Supreme Court bifurcated constitutional and statutory standing.¹⁵² *Data Processing* replaced the relatively strict “legal interest” requirement with a factual injury requirement (as a constitutional minimum) combined with a statutory standing rule that litigants must be “arguably within the zone of interests to be protected or regulated” by the substantive laws they invoke.¹⁵³ In that case, data processing companies sued under the APA to challenge a ruling by the Comptroller of the Currency permitting national banks to sell data-processing services. They claimed that the ruling would damage their businesses by subjecting them to more competition. That injury sufficed to allow the plaintiffs to invoke statutory limits on national banks’ activities, but it did *not* mean that they had a valid cause of action or were entitled to a remedy.¹⁵⁴ Rather, the Court viewed standing “as a preliminary issue, distinct from whether the plaintiffs actually have the kind of interest that would support a claim for relief.”¹⁵⁵

Ambiguities persist concerning the zone-of-interests test’s provenance and its relation to doctrines of statutory standing. The Court’s general discussion in *Data Processing* suggested that zone of interests was a construction of the judicial review provisions of the APA.¹⁵⁶ But the language of the test itself suggested a broader application,¹⁵⁷ it was later applied outside the APA context,¹⁵⁸ and the Court described it as a “requirement[] of general application.”¹⁵⁹ Nonetheless, the zone-of-interests test continues to exist alongside other species of statutory standing doctrines unique to particular regulatory regimes. Antitrust plaintiffs,

152. See, e.g., Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 319 (2004).

153. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 153 (1970); see *supra* text accompanying notes 56–60.

154. See *Data Processing*, 397 U.S. at 158 (“Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a ‘legal interest’ that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.”).

155. Nelson, *supra* note 45, at 738; see also *Bond v. United States*, 564 U.S. 211, 219 (2011) (reaffirming this point).

156. See *Data Processing*, 397 U.S. at 153–54; see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (noting this origin); *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987) (stating that the zone-of-interests test “is not a test of universal application”).

157. See *Data Processing*, 397 U.S. at 153 (examining “the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question” (emphasis added)).

158. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (applying the test to citizen-suit provisions of the Endangered Species Act); *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320 n.3 (1977) (applying the test to the dormant Commerce Clause).

159. *Bennett*, 520 U.S. at 163 (1997); see HART & WECHSLER, *supra* note 60, at 157; Siegel, *supra* note 152, at 328.

for example, “must show both constitutional standing and antitrust standing.”¹⁶⁰ And Employee Retirement Income Security Act (ERISA) plaintiffs must establish statutory standing by showing that they are plan “participants” or other entities entitled to sue.¹⁶¹

The Supreme Court directly addressed the zone-of-interest test’s relation to other statutory standing doctrines in *Lexmark*.¹⁶² This may be the most important, albeit neglected, aspect of *Lexmark*. That case addressed whether a company alleging that it had lost customers due to false or misleading advertising by another company fell within the zone of interests of the false advertising provision in the Lanham Act.¹⁶³ Justice Scalia’s opinion for a unanimous Court said that “[w]hether a plaintiff comes within the ‘zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”¹⁶⁴ The Court had little trouble determining that the plaintiff fell within the Lanham Act’s zone of interests. And it answered the scope question by making clear, as Professor Nelson put it, that “the zone-of-interests test operates as an implied limitation on ‘all statutorily created causes of action’ that do not opt out of it.”¹⁶⁵

Thus, contrary to the claim of some commentators, *Lexmark* neither “delivered a *coup de main* to the zone-of-interests test,”¹⁶⁶ nor undermined that test’s importance. Rather than a free-standing rule of prudential standing, zone of interests serves as a switching principle that determines which parties may assert

160. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 770 (2d Cir. 2016); see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) (“Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.”).

161. See, e.g., *Bridges v. Am. Elec. Power Co.*, 498 F.3d 442, 444-45 (6th Cir. 2007); Pathak, *supra* note 147, at 110. Common-law rights likewise have their analogs to statutory standing, such as the rules governing third-party beneficiaries in contract. See, e.g., Schwartz & Scott, *supra* note 145, at 330.

162. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

163. 15 U.S.C. § 1125(a) (2018).

164. *Lexmark*, 572 U.S. at 127 (internal quotation marks omitted).

165. Nelson, *supra* note 45, at 799 (quoting *Lexmark*, 572 U.S. at 129). Or, as Justice Scalia explained, “[i]t is ‘perhaps more accurat[e],’ though not very different as a practical matter, to say that the limitation *always* applies and is never negated, but that our analysis of certain statutes will show that they protect a more-than-usually ‘expan[sive]’ range of interests.” *Lexmark*, 572 U.S. at 129-30 (quoting *Bennett v. Spear*, 520 U.S. 154, 164 (1997)).

166. Brannon P. Denning & Sarah F. Bothma, *Zone-of-Interests Standing in Constitutional Cases After Lexmark*, 21 LEWIS & CLARK L. REV. 97, 133 (2017).

first-party rights and which, in turn, must rely on third-party standing.¹⁶⁷ This does not mean that the zone-of-interests analysis will be the same for each statute. Put differently, zone of interests is not so much a test of general applicability as a concept of universal relevance.¹⁶⁸ “Zone of interests” describes a question that must be asked in considering who may invoke a statute, but the doctrinal formula for answering it will depend upon the content of the particular statute at issue.

Lexmark’s analysis demonstrates that, although every provision of federal law may have a zone of interests, no single test will define that zone for all such provisions. “[T]he breadth of the zone of interests varies according to the provisions of the law at issue,” the Court explained, “so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the ‘generous review provisions’ of the APA may not do so for other purposes.”¹⁶⁹ Hence, APA plaintiffs need only be “arguably” within the zone of interests of the statute they invoke,¹⁷⁰ but other plaintiffs may have a tougher row to hoe.¹⁷¹ In *Lexmark*’s wake, it seems best to view requirements like “antitrust standing” or “ERISA standing” as simply interpretations of the zones of interests protected by those particular statutes.¹⁷²

167. See *TRIBE*, *supra* note 15, § 3-19, at 446.

168. We would thus qualify statements like “Congress can relax or even eliminate the zone of interests requirement.” Siegel, *supra* note 152, at 342. Congress can modify the scope of any given statute’s zone of interests, and it could perhaps provide remedies even to persons who fall outside the zone (subject to Article III’s requirement of an injury in fact). See Adam N. Steinman, *Lost in Transplantation: The Supreme Court’s Post-Prudence Jurisprudence*, 70 *VAND. L. REV. EN BANC* 289, 294-95 (2017) (flagging the latter issue). But that legal provisions *have* zones of interests defining the scope of rights that they confer is, in our view, simply a quality of legal rules. Cf. *supra* note 165 (explaining that the zone-of-interests limitation is always implicitly present).

169. *Lexmark*, 572 U.S. at 130 (quoting *Bennett*, 520 U.S. at 163).

170. See, e.g., *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (explaining that, in APA cases, “[t]he test forecloses suit only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit’” (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987))).

171. See, e.g., *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995) (discussing statutory standing under the antitrust laws).

172. See, e.g., *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) (asking, when evaluating whether there is antitrust standing, “[1] have appellants suffered antitrust injury? [2] are appellants efficient enforcers of the antitrust laws?”).

It is crucial, however, not to misread *Lexmark*'s statements connecting zone of interests with a plaintiff's cause of action under a statute.¹⁷³ The two concepts are related, but they differ in two key respects.¹⁷⁴ First, as a preliminary screen, *Data Processing*'s "arguably-within-the-zone-of-interests" test imposes a considerably more permissive standard than a plaintiff would have to meet to establish a cause of action on the merits.¹⁷⁵ Although *Lexmark* holds that zone of interests is not part of standing and (arguably) suggests that it is not jurisdictional,¹⁷⁶ it nonetheless remains subject to decision at the threshold. Like proximate causation, zone of interests is "an element of the cause of action under the statute" and "must be adequately alleged at the pleading stage in order for the case to proceed."¹⁷⁷ Because plaintiffs must later prove their allegations in order to prevail, *Lexmark* effectively retains much of the two-tier structure of the original *Data Processing* decision.

Second, the zone-of-interests analysis may apply in contexts where rights to sue are not relevant. In *Lexmark*, the Court used zone-of-interests analysis to determine whether the plaintiff fit within a cause of action that Congress had established.¹⁷⁸ But rights are often asserted in postures that do not require a right of action. The Court held in *Bond v. United States*, for example, that a criminal defendant had prudential standing to raise a Tenth Amendment challenge to the law under which she was prosecuted, rejecting prior authority suggesting that she would lack such standing absent a cause of action to enforce an affirmative Tenth Amendment claim.¹⁷⁹

Similar situations can arise in civil cases. Imagine a breach-of-contract suit in which the defendant seeks to argue that the contract was illegal under the

173. See *Lexmark*, 572 U.S. at 127-28; see also *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017) (stating that the zone-of-interests "question" is "whether the statute grants the plaintiff the cause of action that he asserts").

174. Cf. *Bond v. United States*, 564 U.S. 211, 219 (2011) (cautioning against conflating prudential standing requirements with the existence of a cause of action).

175. See John H. Garvey, *A Litigation Primer for Standing Dismissals*, 55 N.Y.U. L. REV. 545, 568 (1980) ("[A]rguably having a protected interest is a very different thing from actually having one, so winning against a standing objection is no guarantee against losing on the merits."); Nelson, *supra* note 45, at 737, 759.

176. See *Lexmark*, 572 U.S. at 128 n.4 (observing that the label of "statutory standing" is "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction'" (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002))).

177. *Id.* at 134 n.6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)).

178. See also *Bank of Am.*, 137 S. Ct. at 1303-05 (employing zone-of-interests analysis to determine whether plaintiffs fit within a statutory cause of action).

179. See *Bond*, 564 U.S. at 217-20 (disapproving contrary statements in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939)).

federal antitrust laws.¹⁸⁰ It is not obvious that only those parties upon which the antitrust laws confer a private right of action should be allowed to invoke that defense. Or consider a defendant sued under state tort law who defends on the ground that the suit is preempted by federal regulatory law. No private federal right of action exists to enforce drug-safety requirements under the federal Food, Drug, & Cosmetics Act (FDCA), for example, and yet drug manufacturers routinely assert FDCA preemption defenses against state tort claims.¹⁸¹ The law governing when that defendant might have an affirmative cause of action to assert preemption is complex and turns on a variety of considerations not relevant when preemption is asserted as a defense.¹⁸²

Much the same could be said of litigants in other postures, such as plaintiffs resting on some omnibus cause of action—state tort law,¹⁸³ for instance, or a general federal remedial statute like the APA or 42 U.S.C. § 1983.¹⁸⁴ In such cases, where the plaintiff already has both an injury in fact and a right of action, the remaining question is whether they have “statutory standing” to invoke a particular statutory right as part of their claim.¹⁸⁵ Our point is simply that the right to *initiate* a lawsuit is not the same thing as the right to invoke a legal right within the context of a lawsuit where the basic right to sue is not in question. Contemporary judicial skepticism about *implying* rights to sue where Congress has not explicitly created them, for example, should not color consideration of

180. *Cf.* *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (involving this underlying issue, but dismissed for lack of subject-matter jurisdiction).

181. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) (considering and rejecting the preemption argument).

182. *See generally* *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015) (acknowledging an equitable right of action to enjoin state officers from enforcing preempted state law, but noting that this may be unavailable when the underlying federal statute provides an administrative remedy); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) (discussing when a claim of preemption may be brought under § 1983).

183. *See, e.g., Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986) (involving plaintiffs’ incorporation of a violation of a federal regulatory standard into their state-law tort claim). *Merrell Dow* illustrates that even if the plaintiff has standing to raise a federal claim, it might not be presented in a way that will satisfy statutory requirements for federal jurisdiction. But no one thought in that case that the lack of a federal cause of action in itself disqualified the plaintiffs from having standing to sue.

184. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (recognizing that plaintiffs may sue state and local officials for violations of federal statutory rights under § 1983).

185. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (holding that a federal statute creating a conditional-spending agreement between the federal government and a private university conferred no rights on individuals enforceable under § 1983); *Blessing v. Freestone*, 520 U.S. 329, 349-50 (1997) (Scalia, J., concurring) (observing that whether individuals may enforce federal conditional-spending statutes under § 1983 is akin to determining whether a contract confers rights on third-party beneficiaries).

whether a litigant may invoke a statutory right as a *defense*.¹⁸⁶ Critically, the Court's implied-right-of-action cases have explicitly distinguished the two questions.¹⁸⁷

None of this is to deny that *Lexmark* speaks to cases in other postures. At bottom, *Lexmark* is about the primacy of congressional intent.¹⁸⁸ Our point is simply that Congress's intent may differ depending on the posture of litigation. Congress may not intend to create a private remedy to enforce a federal principle, but it may well wish for that principle to be assertable as a defense (or at least not intend to foreclose such a defense).¹⁸⁹ Analysis of legislative intent must thus be context-sensitive — that is, courts should ask whether Congress would have wanted litigants to be able to invoke a statutory principle in the way that the litigant actually invokes it, not simply whether Congress would have conferred on that litigant a private right to sue. We suggest that *Data Processing's* original formulation — “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question”¹⁹⁰ — is a good starting point for that inquiry, although particular statutes may warrant more specific analyses.

186. Compare *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (stating that, absent explicit textual evidence of Congress's intent to create a private right of action, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute”), with Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 477-79 (2013) (arguing that this skepticism should not be imported into standing doctrine).

187. Under *Cort v. Ash*, whether a statute “create[s] a federal right in favor of the plaintiff” is necessary but not sufficient to establish a private right of action. 422 U.S. 66, 78 (1975). The Court has made clear that “the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Sandoval*, 532 U.S. at 286; see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 740 (1979) (Powell, J., dissenting) (“Asking whether a statute creates a right in favor of a private party . . . begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right.”).

188. See *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

189. Cf. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (noting that, “once a case or controversy properly comes before a court, judges are bound by federal law” and that “if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted,” but also observing that “[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations”).

190. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). The third-party-beneficiary doctrine in contract law may offer a useful analogy. See, e.g., Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2381 (2020) (“The general rule is that the parties' intended beneficiaries may enforce contracts, but mere incidental beneficiaries may not.” (emphasis added)).

We acknowledge that “the zone-of-interests test is a doctrine of uneven application and uncertain meaning.”¹⁹¹ That is inevitable, given its connection to the particular substantive law in a given case. Standing law cannot operate without some sort of switching principle identifying who can assert first-party rights and who must rely on third-party standing. And it would be hard to imagine a formula under which a party’s ability to assert a first-party right is not a function of the substance of that underlying right.¹⁹² That means there cannot be any single, determinate “test” for statutory zones of interests. Rather, courts will necessarily have to do what the Court did in *Lexmark* – that is, develop a statute-specific measure of who falls within the zone of interests for any given statutory right.¹⁹³ Courts have and will continue to develop different formulations for Lanham Act cases, antitrust cases, banking cases, and so on.

Focusing on the zone-of-interests concept as our switching principle thus makes two contributions to standing doctrine. First, it addresses the right question. Judicial decisions determining who can assert statutory rights in various ways have asked two distinct questions that are sometimes conflated: Whom does a statute *protect* or *benefit*? And whom does a statute *empower to sue*? Any case in which a statutory right is asserted must ask the first question, but the second arises only if the right is asserted by a plaintiff, and only if that plaintiff is relying on the underlying statutory right (rather than on state law or an omnibus federal remedial statute) to furnish the cause of action. As *Data Processing* said, the first question goes to the zone of interests; the second goes to the merits of the suit. This leads to the second contribution, which is *Data Processing*’s insistence that the zone of interests is a preliminary screen. Even after parties establish standing to invoke a right, their rights claims remain limited by the need to prove them on the merits and, in many cases, to fit them into a cause of action. Courts can thus afford to be generous in tracing the boundaries of the zone of interests.

B. The Scope of Constitutional Rights

As with statutory rights, we must identify who has a first-party right to invoke constitutional claims before considering issues of third-party standing to raise such claims. Again, the ability to assert first-party standing depends on the underlying substantive law. As originally formulated, the zone-of-interests test

191. TRIBE, *supra* note 15, § 3-19, at 446; *see also* Siegel, *supra* note 152, at 319 (describing the doctrine as “confused”).

192. *See* Fletcher, *supra* note 6, at 229.

193. *See Lexmark*, 572 U.S. at 134-40.

applied not only to statutes, but also to “constitutional guarantee[s].”¹⁹⁴ Although the Court does not often use the zone-of-interests terminology in constitutional cases,¹⁹⁵ the basic concept—that legal provisions extend their protections to classes of persons or interests that must be defined in order to determine who may invoke those provisions—certainly still applies.¹⁹⁶ The practical difficulty is that the zone can no longer be defined by Congress’s intent, and the appropriate sources for determining constitutional zones of interests are likely to be both disputed and frequently indeterminate. Nevertheless, the substance of the underlying law defines the limits of first-party rights in constitutional cases—and hence the boundaries of the third-party problem—just as it does in statutory cases.

Some constitutional principles confer enforceable rights on all persons and some do not. Most federalism and separation-of-powers principles, for example, have been interpreted to embody an institutional strategy of protecting individual liberty through a system of vertical and horizontal checks and balances;¹⁹⁷ hence, any individual subject to an act of the federal government (and suffering injury in fact) will generally have an enforceable interest in seeing those checks

194. *Data Processing*, 397 U.S. at 153.

195. *But see* *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320 n.3 (1977) (employing zone-of-interest terminology in a dormant Commerce Clause case).

196. Professors Chemerinsky and Tribe have both suggested that the zone-of-interests test “is superfluous in constitutional litigation” because it will be met whenever the litigant has an injury in fact. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3.6, at 116 (8th ed. 2020) (citing *TRIBE*, *supra* note 15, at 446). As we discuss in Part III, however, a variety of situations involve litigants who have injuries in fact but do not fall within the zone of interests of particular constitutional provisions, and in those cases their claims depend on invoking the rights of others.

197. *See, e.g.*, *THE FEDERALIST* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (stating that federalism and separation of powers provide “a double security . . . to the rights of the people” (emphasis added)). Professor Huq denies that this is so, and this is not the place to fully address his elaborate argument. But we think Huq is wrong to frame the question as whether structural provisions create “individual rights” analogous to, say, rights of free speech. *See, e.g.*, Huq, *supra* note 80, at 1448–52 (addressing “Why Structural Constitutional Rules Are Not Individual Rights”). The correct question, we have argued, is whether individuals injured by a violation of structural principles fall within the class of persons those principles are designed to protect—not whether those principles are “granular individualistic” ones that operate in the same way as individual rights. *See id.* at 1450. Huq invokes the Federalists’ early skepticism about bills of rights to show that they differentiated rights from structural principles, but we read these statements—like Madison’s in *Federalist* 51—to show that the structural principles upon which Federalists preferred to rely were designed to protect and benefit individuals who might otherwise be injured by oppressive government action. That is enough to secure our point.

and balances observed. Consider *Bond v. United States*,¹⁹⁸ which held that an individual prosecuted under a federal criminal statute has standing to challenge it on the ground that the statute exceeds Congress’s enumerated powers, notwithstanding that the limits on Congress’s powers seem primarily to protect the rights of states. *Bond* invoked *INS v. Chadha*,¹⁹⁹ which upheld an individual’s right to challenge the constitutionality of a legislative veto provision on the ground that it encroached on the power of the Executive.²⁰⁰ Although structural claims most directly protect the prerogatives of institutions, courts generally accord individuals standing to raise these claims without any talk of third-party standing.²⁰¹ Indeed, both the case law and the academic literature seem to prefer individual suits to suits on behalf of the affected institutions.²⁰²

198. 564 U.S. 211, 222 (2011).

199. *Id.* at 223 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

200. See *Chadha*, 462 U.S. at 935-36. Professor Huq argues that cases like *Bond* and *Chadha* are unique to the twentieth century, and that before that “there was no American judicial tradition of enforcing structural constitutionalism.” Huq, *supra* note 80, at 1466. But our constitutional canon is replete with cases in which individuals were accorded standing to invoke structural constitutional principles in order to prevent or remedy their own particular injuries. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (the cashier of the Bank of the United States defended against an action for debt on behalf of the State of Maryland by invoking the supremacy of federal law and the intergovernmental immunity doctrine); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (a holder of a federal license to operate steamboats defended against suit by competing operator to enforce exclusive state license on grounds of the dormant Commerce Clause and federal preemption).

201. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (“Our precedents have long permitted private parties aggrieved by an official’s exercise of executive power to challenge the official’s authority to wield that power while insulated from removal by the President.”). In criticizing individual standing to raise structural constitutional claims, Professor Huq suggests that these claims involve mere “generalized grievances” about compliance with the law. See Huq, *supra* note 80, at 1437. A crucial difference, however, is that in these cases the litigant is subject to government action and has a concrete, individualized injury stemming from the constitutional violation (being criminally prosecuted in *Bond* or deported in *Chadha*), which is not true when litigants assert a general interest in government law compliance. Cf. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992) (describing a generalized grievance as one “seeking relief that no more directly and tangibly benefits [the claimant] than it does the public at large”). More fundamentally, the basic “template” that Huq sees as organizing all standing doctrine – that “Article III aims to . . . exclude from justiciability [those] disputes with non-trivial spillover effects onto unrepresented parties,” Huq, *supra* note 80, at 1466 – appears in neither Article III itself nor the caselaw interpreting it. And such a template would seem to us to exclude not only structural cases but most rights cases, as well. Does anyone doubt that the decision in *Roe v. Wade*, 410 U.S. 113 (1973), had spillover effects far beyond the actual parties to the lawsuit – or that a decision overruling *Roe* would have far-reaching effects as well?

202. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 833-34 (1997) (Souter, J., concurring); Grove, *supra* note 80, at 612. We do not argue that institutional suits *should* be disfavored. See, e.g., Ernest A.

Other constitutional rights are personal to someone experiencing a particular type of harm from the constitutional violation. For example, the Court has construed the Fourth Amendment's protection against unreasonable searches as a "personal right"; hence, "only defendants whose Fourth Amendment rights have been violated [can] benefit from the [exclusionary] rule's protections."²⁰³ "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property," the Court explained, "has not had any of his Fourth Amendment rights infringed."²⁰⁴

Still other constitutional principles may have both general and personal aspects; some aspects protect everyone, while others protect only members of a particular class. Under the Eighth Amendment, for example, all criminal defendants seem to have an interest in a procedural system that reserves the death penalty for only the worst offenders and evaluates factors of aggravation and mitigation in a fair way, and even someone who clearly falls into the death-eligible category may enforce those requirements.²⁰⁵ But we expect that the Eighth Amendment's ban on capital punishment for juvenile offenders²⁰⁶ is limited to such offenders and that others cannot enforce it even when subjected to a law that allows for such punishment. One could, perhaps, quibble with our assertions about the substantive constitutional law on particular points. But it is hard to deny that constitutional principles vary in the extent to which they convey personal interests.

Carefully interpreting the scope of first-party rights in constitutional cases can, as in statutory cases, narrow the set of cases raising third-party problems. *Powers v. Ohio*,²⁰⁷ for example, held that a white criminal defendant had third-party standing to challenge the prosecution's use of peremptory challenges to exclude potential African American jurors. Although the prosecution's action violated no equal-protection right of the defendant, the Court reasoned, "[t]he jury acts as a vital check against the wrongful exercise of power by the State and

Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1916-21 (2019) (arguing in favor of institutional litigation by state governments).

203. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978).

204. *Id.* at 134; see also *United States v. Payner*, 447 U.S. 727, 731 (1980) ("[T]he defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party."). For a dispute among the Justices over whether an equal-protection challenge should have been viewed in first-party or third-party terms, see *Miller v. Albright*, 523 U.S. 420 (1998). See also TRIBE, *supra* note 15, at 436 (discussing *Miller*).

205. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

206. See *Roper v. Simmons*, 543 U.S. 551 (2005).

207. 499 U.S. 400 (1991).

its prosecutors” and “[t]he intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee.”²⁰⁸ Hence “the discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice.”²⁰⁹ While the Court framed its account as one involving the application of third-party standing doctrine, the Court’s reasoning could be read to suggest that the constitutional rule against race-based juror challenges is a structural protection, akin to that in *Bond*. If so, Powers might have had a *first-party* claim and no need to invoke third-party standing.²¹⁰

To be sure, determining the scope of a constitutional provision’s zone of interests will not always be easy. The exercise involves all the difficulties that make constitutional interpretation, in general, more controversial than statutory interpretation, including the usual debates about whether and to what extent it is proper to consider materials other than the constitutional text. Difficult or not, however, there is no getting around the need to determine who is covered by a constitutional right and who is not. The Court has had to consider it, for example, in determining whether a given constitutional principle creates personal rights enforceable under 42 U.S.C. § 1983.²¹¹ And a long line of Fourth Amendment cases shows that courts have to face difficult questions about who may assert rights against unreasonable searches – whether or not they label that inquiry one of “standing.”²¹²

As with statutes, it would be a mistake to equate the zone of interests of constitutional provisions with the extent to which those provisions confer rights of action on litigants. The Supreme Court has used the zone-of-interests concept, for example, to describe who may assert rights under the dormant Commerce

208. *Id.* at 411-12.

209. *Id.* at 411.

210. *Cf.* *Georgia v. McCollum*, 505 U.S. 42, 56 (1992) (reasoning that the state “suffers [an] injury when the fairness and integrity of its own judicial process is undermined”). Professor Fallon doubts there is any constitutional right to be tried by a jury untainted by racial discrimination and thus views *Powers* as necessarily involving third-party standing. *See* Fallon, *supra* note 17, at 1363. As he notes, the Supreme Court had held a year before *Powers* that a prosecutor’s use of peremptory challenges to strike African American jurors did not violate the Sixth Amendment rights of a white defendant. *See* *Holland v. Illinois*, 493 U.S. 474 (1990). Our point is simply that first-party standing was plausible in *Powers*, which thus illustrates the importance of unpacking first-party and third-party claims.

211. *See, e.g.*, *Dennis v. Higgins*, 498 U.S. 439, 447-50 (1991) (considering whether § 1983 confers a right of action for dormant Commerce Clause violations).

212. *See* cases cited *supra* notes 203-204.

Clause.²¹³ But dormant Commerce Clause claims are generally asserted as defenses to the enforcement of a state law,²¹⁴ as part of either a state declaratory judgment action or a federal equitable action to enjoin enforcement of such a law,²¹⁵ or under 42 U.S.C. § 1983.²¹⁶ To our knowledge, the Court has never had occasion to consider whether the Commerce Clause itself confers a private right of action—and given the settled availability of the other remedial vehicles, it probably never will.

One reason to decouple the protective scope of constitutional principles from private rights of action in order to enforce them is that the enforcement of constitutional rights through private lawsuits based on those rights is a comparatively new phenomenon. For much of our history, constitutional rights have been enforced in court in one of two ways. If the government initiates an action against a private actor, then that actor might raise a constitutional defense to the government's action.²¹⁷ Or, a private party might bring suit against a government official under the common law—typically in an action for trespass—and the official might raise their governmental authority as a defense to the action. The unconstitutionality of the official's action would then come in as an answer to this defense of authority.²¹⁸ Either way, the invocation of constitutional rights would not depend upon the existence of a private “right of action” to enforce those rights. Certainly, the ability of contemporary litigants to invoke constitutional principles as defenses or in other contexts wherein they need not rely on those principles as the basis of a lawsuit should not depend on their entitlement to a private right of action.

213. *See* *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *see also* Denning & Bothma, *supra* note 166, at 125 (noting that “the lower courts have applied zone-of-interests standing in [dormant Commerce Clause] cases with some frequency”).

214. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 324 (1979).

215. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 24–25 (1990) (state-law suit for a refund of taxes paid under an unconstitutional statute); *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 86 (1984) (federal equitable action). The latter action would rest on the federal courts' traditional equitable powers to enjoin state enforcement of an unconstitutional law, *not* an implied right of action under the Constitution itself. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–26 (2015).

216. *See Dennis*, 498 U.S. at 451.

217. *See, e.g., Nelson*, *supra* note 45, at 712.

218. *See, e.g., HART & WECHSLER*, *supra* note 60, at 881.

The history of constitutional enforcement has several further implications. Most constitutional provisions became part of the document prior to the conceptual development of “causes of action” in American law.²¹⁹ Rights to sue in the early Republic were provided by the common-law forms of actions, not legislatively created causes of action tailored to particular positive legal rights and obligations.²²⁰ The Framers of these provisions thus had no occasion to consider, in the way that modern Congresses *must* consider, whether to provide new rights of action to enforce the rights they created. Courts tasked with seeking the original understanding of a plaintiff’s “right of action” to enforce the First Amendment, à la *Lexmark*, would be searching for something that does not exist.

For related reasons, the development of private rights to enforce constitutional principles has been complex and variable depending on the remedy being sought.²²¹ Under the *Ex parte Young* doctrine, someone subject to an allegedly unlawful regulation may sue to enjoin its enforcement.²²² Drawing on “a long history of judicial review of illegal executive action, tracing back to England,” the Court has generally held that “federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.”²²³ The Court recognized an implied right of action for damages against federal officials for constitutional violations much later,²²⁴ perhaps because the more urgent need for a comparable right against *state* officials had been answered during Reconstruction.²²⁵ More recently, the Court’s *Bivens* line of

219. With some justice, Professor Monaghan has observed that “‘cause of action’ is a term thought to possess such intractable difficulties that it was banished from the Federal Rules of Civil Procedure,” although “the term persists in the working vocabulary of lawyers and judges with the tenacity of original sin.” Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249 (1991).

220. See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 780 (2004).

221. See generally Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RESRV. L. REV. 396, 414-77 (1987) (describing this history).

222. See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (“As we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.”); *Ex parte Young*, 209 U.S. 123 (1908).

223. *Armstrong*, 575 U.S. at 326-27.

224. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

225. See Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at § 1983); HART & WECHSLER, *supra* note 60, at 986.

cases has become very restrictive,²²⁶ but these cases rest on skepticism about judicial creation of rights to sue for damages and should have little bearing on assertion of rights in other contexts.

The zone-of-interests inquiry on the statutory side has generally been concerned with the interests Congress sought to protect, not with distinguishing among particular remedies. For constitutional issues, we contend that courts should similarly focus on whether a litigant's claim falls within the general set of interests protected by a particular constitutional principle – interests that are to be ascertained by reference to whatever materials the courts consider appropriate for constitutional interpretation (such as text, structure, and history).²²⁷ As we have demonstrated, some constitutional provisions protect general interests and some do not. Faithful application of the zone-of-interests test will yield a variety of different outcomes across the range of diverse constitutional provisions and principles.²²⁸ Where no first-party right is available, some constitutional arguments will have to be asserted as third-party claims.

C. A Critique of the “Valid Rule” Idea

Some commentators would analyze constitutional cases quite differently. They might say that, in a case like *June Medical Services*, the doctors have a first-party right to be regulated by a valid law in this and in all situations, and that a law is invalid if it violates the abortion rights of their patients. Formulations of this “valid rule” idea differ, but the basic contention is that, as Professor Monaghan has stated, “a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.”²²⁹ Professor Fallon has similarly argued

226. See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (“[F]or almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.”).

227. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (listing “modalities” of constitutional argument). Courts, lawyers, and scholars will of course disagree about the right approach for deriving constitutional zones of interest. Our framework neither presupposes a particular approach to these interpretive debates nor purports to resolve them. The point is simply that, as with any view of standing in which the substance of the underlying right plays a key role, see sources cited *supra* note 142, the class of persons holding first-party rights to invoke a particular constitutional principle will depend on the substantive meaning of that principle, however derived.

228. See, e.g., *Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 154 (2d Cir. 2019) (discussing standing in the Emoluments Clause suit against President Trump), *vacated as moot*, 141 S. Ct. 1262 (2021).

229. Monaghan, *supra* note 79, at 3; see also Monaghan, *supra* note 17, at 285 (referring to the “conventional principle that a litigant’s conduct may be regulated only in accordance with a valid rule”).

that “everyone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her.”²³⁰ Under the valid rule hypothesis, however formulated, many of the cases recognizing third-party standing could be understood not as third-party standing cases at all, but rather as first-party standing cases involving a constitutional right of the claimant not to be subject to the rule. Professors Litman and Vladeck, for example, argue that *June Medical Services* should be understood as involving first-party standing, not third-party standing, because the doctors had a “right to be free from an unlawful statute.”²³¹

To the extent that this valid rule hypothesis would expand the class of litigants who may challenge invalid government action, it reflects early enthusiasm for a public-rights model of adjudication never fully embraced by the Supreme Court.²³² In any event, as we discuss below, the hypothesis is difficult to reconcile with the Court’s more variegated approach to constitutional rights, and it is both too narrow and too broad to explain the third-party standing doctrine. It is too narrow in the sense that it only applies to situations where the litigant is subject to or regulated by the allegedly invalid rule.²³³ As we explain in Part III, however, third-party standing is sometimes proper even when this is not the case. The valid rule hypothesis is also too narrow because it seems to apply only to constitutional claims; it offers no explanation for the operation of the third-party standing doctrine in *statutory* cases. On the other hand, the hypothesis is too broad in the sense that it ascribes to all constitutional claims a quality that is true only of a subset of them. To proceed, the valid rule argument, too, needs to be unpacked.

To begin, it is not true as a general doctrinal matter that a law that is invalid as applied to *some* persons can necessarily be challenged by *all* persons that it governs. Consider a murder statute providing that anyone committing first-degree murder is subject to the death penalty (if sufficient aggravating factors are found) without regard to age. That statute is plainly unconstitutional as applied

230. Fallon, *supra* note 17, at 1327.

231. Leah Litman & Steve Vladeck, *June Medical Services and the Future of Article III Standing in Abortion Cases*, SCOTUSBLOG (Feb. 3, 2020, 2:56 PM), <https://www.scotusblog.com/2020/02/symposium-june-medical-services-and-the-future-of-article-iii-standing-in-abortion-cases> [<https://perma.cc/E6J7-9E7W>]; *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioners at 17, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) (citing to the “valid-rule principle”).

232. *See supra* Section I.A.; *see also, e.g.*, Dorf, *supra* note 17, at 244-46 (identifying opposition to the valid rule hypothesis with traditional private-law values of separation of powers and concrete judicial decisionmaking).

233. *See* Kermit Roosevelt III, *Valid Rule Due Process Challenges: Bond v. United States and Erie’s Constitutional Source*, 54 WM. & MARY L. REV. 987, 1020 (2013) (“[A] regulated individual can mount a valid rule due process challenge, while an unregulated individual cannot.”).

to minors.²³⁴ But does anyone think that someone who committed their murder at the age of thirty-five can challenge the statute on that ground of invalidity? The personal scope of Fourth Amendment rights presents a similar difficulty: a criminal defendant may not block the introduction of evidence obtained through a violation of some other person's Fourth Amendment rights merely by claiming a right to be tried based on validly obtained evidence.²³⁵

To be sure, there are situations in which a rule (or action) is invalid as applied to everyone. For example, if Congress fails to follow the Article I process when enacting a federal criminal statute, the statute could not be validly applied to anyone.²³⁶ But this would be because Article I is viewed as conferring first-party rights, as discussed above in Section II.B. The same can be said for statutes invalidated under the void-for-vagueness doctrine: a statute cannot be applied even to constitutionally regulable conduct if it is unduly vague, but this is because the statute gives insufficient notice to guide law enforcement, even with respect to persons engaged in constitutionally unprotected conduct.²³⁷ Moreover, some constitutional tests – for example, tests that focus on the motive behind the enactment of a statute – may themselves require invalidation of a statute

234. See *Roper v. Simmons*, 543 U.S. 551 (2005).

235. See *supra* notes 203-204 and accompanying text. The Fourth Amendment example brings two additional difficulties to mind. That Amendment tends to be violated not by statutes or legislative rules but by executive acts amounting to an illegal search. Such acts are not obviously “rules” at all, and, in any event, it is not obvious that an illegal search of person *A*'s property that yields evidence against person *B* has subjected person *B* to any invalid action at all. It is not clear the valid rule hypothesis can explain the operation of standing doctrine in such cases. Right holders may waive their Fourth Amendment rights, and so a second difficulty concerns how to think about such waivers in relation to the valid rule hypothesis. Professor Roosevelt, for example, says that a waiver by the right holder can transform an invalid rule into a valid one. See Roosevelt, *supra* note 233, at 1016. But if the right holder can obviate any valid rule claim for other affected parties, in what sense do those parties have a personal, first-party right to be judged by a valid rule? To be sure, some important and general rights – like the right to be free of national actions falling outside of Congress's constitutional authority – are not subject to waiver. See *New York v. United States*, 505 U.S. 144, 182 (1992). We do not understand valid rule proponents to say that all constitutional rights have that quality, however. Yet the waivability of most constitutional rights suggests serious limitations on the valid rule hypothesis. Professor Dorf, for example, contends that “[t]he Constitution does not create, in so many words, an individual right to be judged only by a constitutional law. But the Constitution certainly forbids a court from enforcing an unconstitutional law.” Dorf, *supra* note 17, at 248. In reality, though, courts may enforce unconstitutional rules in any case in which the person subject to the rule fails to challenge the rule or otherwise waives their rights.

236. Cf. *INS v. Chadha*, 462 U.S. 919 (1983) (allowing an individual to contest the operation of a legislative veto that was alleged to violate the process set forth in Article I, Section 7).

237. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 71-72 (1999) (Breyer, J., concurring in part and concurring in the judgment).

as applied to everyone.²³⁸ We have already suggested that these situations can be explained by reference to specific first-party rights without the need to hypothesize a general constitutional right not to be subjected to an invalid rule.²³⁹ But in any event the law recognizes no *general* principle that every constitutional provision operates in conformity with the valid rule hypothesis. As Professor Fallon observes, “[c]onstitutional rights are diverse.”²⁴⁰

Rather than insisting that every constitutional principle creates a right to be free from an invalid rule, proponents of the hypothesis tend to describe this requirement as an independent, freestanding right. But the constitutional source of the purported right to be subject to a valid rule is unclear. Professor Fallon has suggested, variously, that the valid rule idea stems from “the history and structure of the Constitution” and its “deeper values”;²⁴¹ that it arises from *Marbury v. Madison* and the rule of law;²⁴² and that it could “easily” be grounded in the Due Process Clause.²⁴³ Professor Monaghan has invoked a right of “interactive liberty” – a “freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction” – as a basis for at least some applications of the valid rule idea.²⁴⁴ While describing Fallon’s and Monaghan’s arguments as “conclusory,” Professor Dorf concludes that the valid rule idea can be grounded in *Marbury*.²⁴⁵

238. See Fallon, *supra* note 17, at 1338.

239. See *supra* Section II.B. In a sweeping account of the structure of American constitutional law, Professor Adler has argued that constitutional rights are “rights against rules” – that is, “[a] constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls.” Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998). On Adler’s account, courts should invalidate even proper applications of a rule if some applications of the rule would be unconstitutional, although courts have some remedial authority to revise rules so that they do not have such improper applications. See *id.* at 6. If accepted, his account would substantially change the law of standing – for example, eliminating the idea of as-applied challenges and substantially relaxing the injury requirement for Article III standing. See *id.* at 166-68. Although there is much that we admire in Adler’s analysis, we agree with Professor Fallon that “there is no reason to adopt a position so discordant with settled ideals and understandings.” Fallon, *supra* note 17, at 1335.

240. Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 241 (2020).

241. Fallon, *supra* note 17, at 1331.

242. *Id.* at 1332 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

243. *Id.* at 1333; see also Roosevelt, *supra* note 233, at 989 (relying likewise on substantive due process).

244. Monaghan, *supra* note 17, at 299, 304. We think these cases are better explained as protecting the third-party right holders’ rights. See *infra* Section III.A.

245. See Dorf, *supra* note 17, at 243, 246-48 (citing *Marbury*, 5 U.S. (1 Cranch) 137).

We doubt that the Supreme Court is eager to recognize a new constitutional right to justify its approach to third-party standing, whether derived from constitutional structure, the rule of law, due process, or the freedom of association.²⁴⁶ Nor, contrary to Dorf's argument, does the valid rule idea follow from *Marbury*. While *Marbury* did state that "a law repugnant to the [C]onstitution is void; and that courts, as well as other departments, are bound by that instrument,"²⁴⁷ the question implicated by the valid rule idea is whether a law that is validly applied to a litigant is in fact "repugnant to the Constitution" merely because it may violate the rights of third parties not before the court. That issue was not presented in *Marbury*. And, in fact, *Marbury* emphasized that, in providing remedies "for the violation of a vested legal right," "[t]he province of the court is, solely, to decide on the rights of individuals."²⁴⁸ The *Hart and Wechsler* casebook thus reads *Marbury* as an exemplar of the private-law model of adjudication, observing that "Chief Justice Marshall's opinion . . . treats the law declaration power as incidental to the resolution of a concrete dispute occasioned by *Marbury's* claim to a 'private right' to take possession of the office."²⁴⁹ That decision did *not* establish a general judicial obligation to strike down unconstitutional laws, and we are unaware of any Supreme Court decisions recognizing any such power.²⁵⁰

Supporters of the valid rule idea typically qualify it by reference to the doctrine of severability.²⁵¹ Although no one can be sanctioned based on an invalid rule, they contend, a rule that appears to sanction both constitutionally protected and unprotected conduct can sometimes be subjected to a narrowing construction and therefore lawfully applied to the unprotected conduct. The "narrowed"

246. See Lea, *supra* note 6, at 316 ("The problem with the valid-rule approach is that no provision of the Constitution creates the requisite right to a valid rule . . ."); Dorf, *supra* note 17, at 243 (criticizing Monaghan's and Fallon's accounts of the source of the rule).

247. *Marbury*, 5 U.S. (1 Cranch) at 180 (emphasis omitted).

248. *Id.* at 163, 170.

249. HART & WECHSLER, *supra* note 60, at 73; see also Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) ("Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison* was all about." (footnote omitted)).

250. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.")

251. See, e.g., Dorf, *supra* note 17, at 249-51; Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 953-59 (2011); Fallon, *supra* note 17, at 1331-35; Monaghan, *supra* note 79, at 5.

rule, in other words, would now be valid. Whether such a narrowing construction is available, it is said, turns on principles of severability. Adding severability doctrine into the analysis reduces the gap between the valid rule idea and modern judicial practice. But this qualification, at bottom, illustrates why third-party standing can be understood without recourse to a free-standing valid rule principle.

The most familiar form of severability analysis asks whether an unconstitutional *provision* within a statute may be severed from those other provisions raising no constitutional difficulty.²⁵² In terms of our discussion, such cases ask when valid rules may be severed from invalid ones when valid and invalid rules are packaged within a common enactment. Proponents of the valid rule idea have instead focused on a different form of severability analysis involving the *applications* of a statute. If a single statutory provision has both valid and invalid applications, can the statute be treated as “valid” with respect to the constitutional applications by severing the unconstitutional ones? Existing law treats this as a question of statutory interpretation, and the Court has said that there is “a strong presumption of severability” for a statute’s constitutionally valid applications.²⁵³ But the law regarding these sorts of situations, which involve claims of “facial” invalidity and “overbreadth,”²⁵⁴ is littered with inconsistencies. The Court has said that facial challenges are disfavored,²⁵⁵ but it often seems to allow them.²⁵⁶

252. See, e.g., *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (considering whether, if the individual-mandate portion of the Affordable Care Act is unconstitutional, the rest of the Act’s provisions must be struck down as well); cf. Fallon, *supra* note 240, at 233 (“The concept of statutory severability . . . can apply to denominated provisions of a statute, to linguistic subunits within a provision, or to a single provision’s various applications.”). See generally HART & WECHSLER, *supra* note 60, at 170-74 (discussing the severability and “separability” of statutes).

253. *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2350 (2020).

254. For discussion of potential distinctions between overbreadth challenges and other facial challenges, see Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 375-85 (1998). See also Fallon, *supra* note 251, at 965 (“[N]ot all facial challenges depend on determinations of overbreadth.”).

255. See, e.g., *United States v. Raines*, 362 U.S. 17, 22 (1960) (“The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.”); *Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912) (“[T]his Court must deal with the case in hand and not with imaginary ones.”).

256. See generally Dorf, *supra* note 17, at 251-64 (canvassing the doctrine); Fallon, *supra* note 251, at 935-42 (same).

Moreover, it has said that overbreadth challenges are limited to claims under the First Amendment,²⁵⁷ but it appears to allow them in other contexts as well.²⁵⁸

We will not try to clean up these confusions here. Our point is simply that they do not offer a useful lens for considering third-party standing. We thus offer two observations. The first is that the Court's allowance or disallowance of such challenges appears to turn on a variety of factors – including the relevant constitutional standards, principles of statutory interpretation, the way that particular cases are litigated, the remedial authority of the courts, and the level of generality of the Court's constitutional reasoning – rather than on any general valid rule concept.²⁵⁹ Positing such a general right, derived from the Constitution and inhering in individuals, would both depart from and presumably change the nature of current practice significantly.

The second point is that allowing for severability may give away the valid rule store, at least insofar as it relates to third-party standing. As we understand it, the essential point of the valid rule argument is that each individual has a right to be judged or regulated only according to a valid rule of law, and that rules are not valid if they violate any of the constitutional constraints on the government's exercise of its powers, with respect to any individual. Much turns, however, on what it means for a rule to be “valid” or “invalid.” Professor Roosevelt, for example, rejects the notion that “any invalid application dooms a statute”; he thus recognizes a “severability bar” under which “the fact that a law might be unconstitutional as applied to individual *A*, whose conduct is protected, will not prevent it from being applied to individual *B*, whose conduct is not.”²⁶⁰ A rule is valid, in other words, in situations where no one's rights are violated.²⁶¹

If this is right, then the only situations in which a litigant whose first-party rights are not violated by a rule could nonetheless successfully challenge that rule

257. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (citing *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”); cf. Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 859 (1991) (“Outside the First Amendment context, the problem of when someone should be able to argue that a statute is ‘facially invalid,’ because it reaches constitutionally protected conduct that might be engaged in by parties not before the court, typically is treated as one of ‘third-party standing’ or ‘jus tertii.’”).

258. See, e.g., Fallon, *supra* note 251, at 944-45 (giving examples of structural constitutional decisions that in effect invalidated laws on overbreadth grounds).

259. See, e.g., Dorf, *supra* note 17, at 238 (“The proper disposition of a facial challenge is intimately bound up in questions of substantive constitutional law, institutional competence, and statutory interpretation.”); Fallon, *supra* note 17, at 1324 (“[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable *substantive* tests of constitutional validity.”).

260. Roosevelt, *supra* note 233, at 1006-08.

261. See *id.* at 1008.

as invalid would be situations in which application of the rule to the litigant violates the rights of a third party. Other applications, in which the litigant is regulated by the rule but that regulation implicates no one else's constitutional rights, would be severable and valid. We would agree, as we explain in the next Part, that a litigant should be allowed to assert third-party standing in cases where enforcement of the challenged rule against the litigant would violate the third party's rights. But we think such standing can be justified simply by the need to enforce those rights, without recourse to any general valid rule principle.

Even its supporters acknowledge that "it is hard to identify direct judicial affirmations of the valid rule requirement."²⁶² Notably, not a single Justice suggested the valid rule idea in *June Medical Services*. Rather, all assumed that the case presented an issue of third-party standing, not first-party standing. We think their assumption was correct. There is simply no need to hypothesize a previously unrecognized constitutional right to explain the decisions in which the Court has allowed third-party standing by directly regulated parties. Conversely, a right to be regulated only by a valid rule does nothing to explain cases where nonregulated parties are allowed to invoke third-party rights. We try to develop a more helpful set of principles in the next Part.²⁶³

III. THREE TYPES OF THIRD-PARTY PROBLEMS

This Part lays out three categories of parties who assert third-party standing: directly regulated parties, collaterally injured parties, and representative parties. The Court's third-party standing doctrine does not overtly distinguish between these categories. Nevertheless, the categories tend to track not only the results in actual cases, but also the specific reasons given to support those results. These categorical differences are more important, we contend, than the basic relationship-plus-obstacle test that the doctrine emphasizes. However, as we will explain, that test does continue to be relevant in many third-party standing cases.

²⁶² Fallon, *supra* note 17, at 1333. However, two Justices seemed to endorse the idea in *Bond v. United States*. See 564 U.S. 211, 226 (2011) (Ginsburg, J., joined by Breyer, J., concurring) (citing Fallon and Monaghan for the proposition that "Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law").

²⁶³ For additional criticism of the valid rule argument, see Adler, *supra* note 239, at 160; Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1396-1402 (2000); and Huq, *supra* note 80, at 1453-57.

A. Directly Regulated Parties

The case law has mostly been kind to regulatory subjects asserting third-party claims like the ones in *June Medical Services*.²⁶⁴ It is hard to explain this pattern in terms of the traditional requirement that parties show a close relationship to the right holders and identify an obstacle preventing the right holders from litigating their own rights. For example, abortion doctors may or may not have much of a relationship with their patients (especially not their *prospective* patients), and the impediments to patients asserting their own claims are not always clear. Some scholars have argued that a regulatory subject *always* has standing to challenge a law restricting their actions.²⁶⁵ These arguments are often simply explicit or implicit restatements of the valid rule idea discussed above.²⁶⁶ But as the general ban on overbreadth challenges outside the First Amendment context illustrates, criminal defendants are typically not allowed to argue that, although a law is constitutional as applied to them, it should be disregarded on the ground that it is unconstitutional as applied to others.²⁶⁷

When litigants are directly regulated, they can generally show a concrete injury sufficient to satisfy Article III; the only question is what rights they can invoke.²⁶⁸ Our thesis is that the key consideration in deciding whether those subject to regulation can assert third-party standing is whether enforcement of the challenged rule or policy against the litigant *would itself plausibly violate the third party's rights*. As we have already discussed, the bar to invoking third-party rights should be understood as prudential in such a case, and it can be relaxed in the

264. We use the label “directly regulated party” for convenience, as it describes the majority of the cases. But some parties are subject to a challenged action in a way that “regulated” does not capture well. Examples include a person placed in a chokehold by police, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 97-99 (1983), and a criminal defendant denied counsel, *see Kowalski v. Tesmer*, 543 U.S. 125, 127-29 (2004). Because these persons are on the receiving end of the action they challenge, we use “regulated parties” to describe all of them in speaking of this category.

265. *See, e.g., Litman & Vladeck, supra* note 231.

266. *See, e.g., id.* (drawing on Monaghan and Fallon); Roosevelt, *supra* note 233, at 1015 (“The Court has frequently entertained challenges from regulated individuals that the statute governing their conduct is void, even if the reason for voidness is not a right personal to them. This argument is a standard valid rule due process claim.” (footnote omitted)).

267. *See, e.g., United States v. Raines*, 362 U.S. 17, 21 (1960) (“[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.”).

268. As we have noted, they will nearly always be able to allege the violation of *some* first-party right, but they may have a better chance to prevail if they can invoke the particular rights held by others. *See supra* text accompanying notes 140-142.

service of other important values. Preventing a violation of the third party's rights should generally be sufficient reason to relax that bar.

This rationale helps explain why third-party standing is tolerated in some settings but not others. The Court in *NAACP v. Alabama ex rel. Patterson*,²⁶⁹ for example, allowed the NAACP to resist a state subpoena for its membership lists by invoking its members' right to freedom of association; production of the lists, under the circumstances, would have vitiated those members' rights. Similarly, some legal restrictions on the ability of doctors to perform abortions may well amount to an undue burden on a woman's right to obtain one, which helps explain why doctors are often allowed to raise their patients' abortion rights.²⁷⁰ It seems likely that some, but not all, restrictions on the manufacture of firearms would impose an unconstitutional burden on the individual right to keep and bear arms.²⁷¹ Executing an adult murderer for crimes committed as an adult, on the other hand, has no bearing on the right of another murderer not to be executed for a crime committed as a minor. There will be any number of intermediate cases. Thus, contrary to the contention of some scholars, the "direct regulation" cases should *not* be understood as reflecting any general right not to be subject to an invalid rule.

Our position on this point is similar to one advocated in a 1974 student note attributed to the late Professor Meltzer.²⁷² That note argued that third-party standing was appropriate whenever compliance with a challenged regulation presents a "risk of dilution" of third-party rights. "In order to avoid the possibility of dilution," it said, a litigant "should always be granted standing to claim that the imposition of a duty on him affects his behavior in such a way that the constitutional rights of third parties are impaired."²⁷³

269. 357 U.S. 449, 462-63 (1958).

270. *See, e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2118-20 (2020) (plurality opinion).

271. *See, e.g.*, *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) ("Teixeira, as the would-be operator of a gun store, thus has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers."). The retail market for firearms may well be more robust than that for abortion services, although conditions will no doubt vary from jurisdiction to jurisdiction. And we can certainly imagine sales restrictions sufficiently draconian as to meaningfully burden the right to possess a gun.

272. Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 425, 431-36 (1974). For attribution of this note to Meltzer, see Vickie C. Jackson, *Honoring Dan Meltzer – Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective*, 91 NOTRE DAME L. REV. 1783, 1783 n.1 (2016). Professor Tribe agrees that "the target of a criminal prosecution should *always* have standing to argue that his compliance with the law would have deprived others of their constitutional rights." TRIBE, *supra* note 15, § 3-19, at 439.

273. *Standing to Assert Constitutional Jus Tertii*, *supra* note 272, at 432 (footnote omitted); *see also* TRIBE, *supra* note 15, § 3-19, at 437 (endorsing Meltzer's reasoning).

While we agree with the thrust of this argument, we offer three friendly amendments. First, “dilution” is unduly vague; the focus should instead be on whether the challenged regulation plausibly *violates* the third party’s rights (for example, by imposing a potentially undue burden on women seeking to have an abortion). Second, although Professor Meltzer’s note spoke only of constitutional rights, we would make clear that the same analysis applies to *statutory* rights as well. Finally, we think it is an overstatement to say that third-party standing is “always” appropriate in this setting, although we agree that the presumption should be in its favor.

Consistent with our argument, the Supreme Court has sometimes suggested the centrality of the effect of the challenged regulation or conduct on the third party’s rights.²⁷⁴ But the implications and limits of this approach have remained largely unexplored. It offers, for example, a more parsimonious explanation of the third-party standing cases that Professor Monaghan ascribed to “interactive liberty.”²⁷⁵ *Barrows v. Jackson*,²⁷⁶ for example, was a suit for breach of a racially restrictive covenant against homeowners who had sold their home to an African American family. The Court held that the white defendants could assert the equal-protection rights of the African American buyers, notwithstanding the general rule against third-party standing.²⁷⁷ Monaghan would recast *Barrows* as a case in which both the seller and the buyer have a right “to interact . . . free from unjustified governmental discrimination.”²⁷⁸ But we think it more straightforward to view *Barrows* as the Court in fact viewed it—as a case in which enforcing the discriminatory covenant against the litigant would violate the rights of the African American right holders.²⁷⁹

274. See, e.g., *June Med. Servs.*, 140 S. Ct. at 2118–19; *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (noting that “this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties’ rights” (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)) (emphasis in *Kowalski*)); cf. *U.S. Dep’t of Lab. v. Triplett*, 494 U.S. 715, 720 (1990) (“When . . . enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist.”). In other instances, the Court has referred to the effect of the litigation on third-party interests as simply another factor in the third-party standing analysis. See, e.g., *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989).

275. See Monaghan, *supra* note 17, at 297–301.

276. 346 U.S. 249 (1953).

277. See *id.* at 257–58.

278. Monaghan, *supra* note 17, at 300.

279. The Court stated, for example:

One trouble with our approach is that analyzing whether enforcement of the challenged law against the litigant violates a third party's rights tends to collapse standing into the merits of the underlying claim.²⁸⁰ In *June Medical Services*, for instance, the likelihood that Louisiana's restrictions on which doctors may perform abortions would so restrict access to the procedure as to unduly burden the rights of women seeking abortions simply *was* the question on the merits. Such overlap between standing and the merits is quite common, although it is not often forthrightly addressed.²⁸¹ That the defendant *caused* the plaintiff's injury, for example, is both an element of most causes of action and a requirement of Article III standing.²⁸² In theory, a toxic-tort plaintiff who cannot prove that a polluter's discharge of a chemical into the groundwater caused the plaintiff's cancer²⁸³ should lose on standing grounds as well as on the merits. In practice, this sort of overlap is most often ignored.²⁸⁴ Collapsing the standing question entirely into the merits would be inconsistent with that question's role as a screening mechanism, and it would sacrifice the practical benefits of resolving

If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment.

346 U.S. at 254.

280. See, e.g., *Standing to Assert Constitutional Jus Tertii*, *supra* note 272, at 427-28 (noting the extent to which the Court's rulings granting or denying third-party standing dovetail with the success – or likely success – of the claims on the merits).
281. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181-86 (2000) (dancing around the overlap between causation on the merits and causation for traceability and redressability purposes).
282. See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (“[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.”).
283. Cf. JONATHAN HARR, *A CIVIL ACTION* (1995) (illustrating the causation difficulties associated with adjudicating mass tort claims).
284. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 347 (2d Cir. 2009) (noting the overlap but concluding simply that a difficult causation issue was “best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing”), *rev'd on other grounds*, 564 U.S. 410 (2011); Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1415-17 (2014) (discussing the potential overlap between causation problems at the standing and merits phases of litigation).

standing problems early in litigation.²⁸⁵ To avoid this problem, we suggest that the violation of the third party's rights need only be *plausible*.²⁸⁶ In *June Medical Services*, for example, the abortion providers should not have had to prove that the Louisiana law constituted an undue burden on the right of women to obtain an abortion in order to have standing to raise that argument.²⁸⁷

Standing doctrine has never come up with a wholly satisfactory way to reconcile the need to resolve jurisdictional questions at the threshold with the reality that the doctrine often turns on complex and hotly contested factual questions.²⁸⁸ Courts frequently muddle through this problem by classifying some factual assertions as too speculative to support standing,²⁸⁹ while deferring to plaintiffs' allegations or government findings in other cases.²⁹⁰ We think that courts should continue to take the plaintiffs' *legal* theory as a given as long as it is plausible – it is perfectly coherent to say that a particular plaintiff is the right party to assert a wrong proposition of law – but that some perusal of the facts is inevitable.²⁹¹ Abortion doctors might be so plentiful in a particular state that re-

285. See, e.g., Redish & Joshi, *supra* note 284, at 1399-1403 (noting the burdens upon defendants of having to conduct discovery of complicated factual issues of standing).

286. Cf. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (stating that whether the plaintiff could *actually* prove a statutory violation “goes to the merits”).

287. Cf. *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”).

288. See, e.g., Redish & Joshi, *supra* note 284 (exploring the problem). Standing is hardly unique in this regard. See, e.g., *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (recognizing that determining whether the requirements for class certification have been met “will frequently entail ‘overlap with the merits of the plaintiff’s underlying claim’” (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011))); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 282-83 (2014) (holding that a securities fraud defendant may seek to defeat class certification by proving that its statements had no impact on the stock price, notwithstanding the fact that price impact is also an element on the merits).

289. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410-14 (2013) (emphasizing “our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors”); *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990) (rejecting standing theory predicated on the probability of future judicial proceedings because “[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case”).

290. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181-86 (2000).

291. By plausibility on the *law*, we mean something like the “substantiality” standard under *Bell*, 327 U.S. at 682-83, which bars jurisdictional dismissals of a plaintiff’s claim simply because it is a loser on the merits unless the claim is “wholly insubstantial and frivolous.” See also HART & WECHSLER, *supra* note 60, at 818-19 (discussing this standard). Problems arise even with

restrictions that affect only some of them would not plausibly affect women's overall access to abortion, for example. In that case, the excluded doctors might lack standing to assert their patients' rights.²⁹² Importantly, federal pleading standards have become more demanding in recent years, and the threshold determination of a claim's factual plausibility that those standards require ought to suffice for our purposes.²⁹³

For this category of cases, the traditional relationship-plus-obstacle test will generally not be relevant. In fact, the Court often seems not to apply that test to regulated parties. But being law professors, we can imagine some hypotheticals where the traditional criteria may still play a valuable role. The Court in *Craig v. Boren* allowed a vendor of alcohol to raise the equal-protection rights of her male customers to purchase beer on the same terms as female customers.²⁹⁴ But consider, for example, a local prohibition on alcohol sales that arguably violates the rights of Catholic residents wishing to celebrate communion with the traditional wine. An alcohol vendor could certainly establish an injury in fact from the law, and limiting Catholics' ability to buy wine plausibly burdens their free exercise rights. Nonetheless, a court might worry that the wine vendor can shed little direct light on the central issues in the case: the nature of the right holders' religious practice, the possibility that the churches can obtain communion wine in other ways, and whether the law makes enough exceptions for other parties that it cannot be considered "generally applicable."²⁹⁵

assuming the plaintiff's legal theory is correct. *See, e.g.,* *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 770 n.10 (2d Cir. 2016) ("When assessing antitrust injury, we assume that the practice at issue is a violation of the antitrust laws, and are, thus, in the difficult position of positing a rationale for the antitrust laws' prohibition of conduct that may, in fact, not be prohibited." (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 76 n.9 (2d Cir. 2013))).

292. The patients would likewise have a standing problem, since they might struggle to show that a restriction on a certain subset of doctors would cause any injury to them. But when right holders sue, the Court has often fudged this sort of causation problem by reframing the necessary injury. *See Friends of the Earth*, 528 U.S. at 181-82 (holding that plaintiffs' perception that environments they valued and used had been injured was sufficient even if defendants' activities had not actually caused any damage). In such an abortion case, a perceived narrowing of the plaintiffs' access or deterrence from exercising their right to choose might be sufficient.
293. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).
294. Citing Dan Meltzer's note, *supra* note 272, the Court reasoned that enforcement of the restriction against the vendor would undermine the rights of the third-party male customers. *See Craig v. Boren*, 429 U.S. 190, 193-96 (1976).
295. *Compare Emp. Div. v. Smith*, 494 U.S. 872 (1990) (holding that generally applicable laws imposing incidental burdens on religious exercise are subject only to rational basis review), *with Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (applying strict

We would leave the door open for a court to conclude that a particular plaintiff was so distant from the third parties whose rights it sought to assert that it could not adequately litigate those rights, even if the defendant's action against the plaintiff were alleged to violate them. Likewise, particularly where the right holders are *also* subject to the challenged law, there might be so little impediment to a suit by those right holders themselves that allowing third-party standing would needlessly expand access to federal court. Precisely because the limitation on third-party standing is generally prudential rather than mandated by Article III,²⁹⁶ the doctrine has room to account for such considerations in appropriate cases, even those involving regulated parties. But the strong presumption should be that a party subject to a challenged action and suffering an injury in fact should have standing to raise a third party's rights if the challenged action against the first party plausibly violates those rights.

B. Collaterally Injured Parties

Some third-party standing cases involve litigants who are not subject to the challenged regulation or act, but who are nonetheless injured by it. Consider a somewhat far-fetched example that one of us uses in class: a manufacturer of flags loves flag-burning protesters because they require a constant supply of new flags to burn. A new state law banning flag burning causes flag sales to drop sharply. Assuming that the manufacturer can demonstrate an economic injury in fact, can the manufacturer challenge the law by raising the free-speech rights of the flag burners?²⁹⁷ Or consider a statutory case under the Sherman Act, in which a supplier of goods to a business experiences injury when its customer

scrutiny to a local ban on slaughtering animals that burdened religious sacrifice because the law made so many exceptions for secular activities). *See also* *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961) (concluding that store employees lacked standing to challenge Sunday closing laws on free-exercise grounds, even though the employees were subject to the laws, because they "allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing" and "[t]hose persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights").

²⁹⁶. *See supra* Section I.B.

²⁹⁷. *Cf.* *Texas v. Johnson*, 491 U.S. 397, 418-20 (1989) (striking down a state law prohibiting flag burning under the First Amendment). For a real-life example, see *Warth v. Seldin*, 422 U.S. 490, 508-09 (1975), in which residents of a neighboring community claimed that a Rochester, New York suburb's exclusionary zoning practices discriminated against low-income persons, thereby forcing such persons into the plaintiffs' community and bringing about higher taxes there. The Court characterized this claim as "an ingenious academic exercise in the conceivable." *Id.* at 509.

falls victim to anticompetitive conduct. Can the supplier invoke antitrust laws in a suit against its customer's competitor?²⁹⁸

We think the answer in this class of cases should generally be “no.” The courts do, in fact, tend to deny third-party standing in such cases.²⁹⁹ In general, the rule against third-party standing “assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.”³⁰⁰ As we have discussed, the concern that a litigant asserting the rights of third parties may not be capable of adequately presenting those rights in a concrete factual setting is less compelling when the application of the challenged law or government action against the litigant would itself plausibly violate those rights. Requiring such a violation ordinarily ensures that the litigant and the right holder will be tied somewhat factually, as well as legally. But that is much less likely when the litigant is neither the right holder nor directly subject to the action he wishes to challenge. Our flag manufacturer can present facts about the flag-burning law's damage to his business, but may not be able to tell us much about the specific factual context in which his customers want to burn a flag.³⁰¹

These concerns about concrete presentation are typically viewed from the *court's* perspective – that is, will the court get the information it needs to do a good job resolving the case? But allowing a collaterally affected litigant to stand in for the actual right holder also raises a fairness concern. As Professor Brilmayer has explained, “we do not want the concerned citizen to litigate abstract principles of constitutional law when the precedent established will govern someone else's . . . rights.”³⁰² Although *res judicata* will not bind the actual right

298. See *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995) (Boudin, J.).

299. See *Warth*, 422 U.S. at 514; *SAS*, 48 F.3d at 44 (observing that “[i]n general such a supplier . . . is held not to have suffered ‘antitrust injury’; while there may be a violation and causal harm to the supplier, the failed business is the immediate victim and the preferred plaintiff”).

300. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

301. See, e.g., *Johnson*, 491 U.S. at 408 (examining the record for evidence that flag burning might have provoked a breach of the peace). We take it that most, if not all, proponents of the valid rule idea would not think the flag manufacturer has a claim in our scenario. Those proponents generally speak in terms of a right not to be “judged” by, Monaghan, *supra* note 79, at 3, “regulated” by, Monaghan, *supra* note 17, at 282, or “subjected to,” Fallon, *supra* note 17, at 1331, an invalid rule of law. Our flag manufacturer is experiencing economic losses traceable to the invalid anti-flag-burning law, but he is not judged by, regulated by, or subjected to that law. We have not seen anyone argue that everyone has a right not to be *injured* in any way by legally invalid action.

302. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 308 (1979).

holder in future litigation, the preclusive effect of *stare decisis* is also significant.³⁰³ The general bar on third-party standing thus protects actual right holders from having their rights undermined by possibly irresponsible or inept litigants.

Extending to collaterally injured parties the standing to raise third-party rights would also threaten broader separation-of-powers values. Proliferating the set of persons who can challenge any given action makes challenges to government action more likely, with the concomitant risk of interbranch clashes. As the Court has observed, broad third-party standing increases the risk that “the courts might be ‘called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.’”³⁰⁴ This sentiment is similar to John Marshall’s observation, when he was serving in the House of Representatives, that “[i]f the judicial power extended to every *question* under the [C]onstitution” or “to every *question* under the laws and treaties of the United States,” then “[t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary.”³⁰⁵

Given all this, the interesting question in collateral-injury cases may well be whether such litigants should *ever* have standing to raise the rights of third parties. Put differently, should the traditional relationship-plus-obstacle test continue to provide an exception to the general ban on third-party standing in collateral-injury cases? We conclude that it should, because there will sometimes be circumstances in which violations of federal law are likely to persist unless those suffering collateral injuries are allowed to sue.³⁰⁶ But we think these situations are likely to be rare and that the general presumption should be against this sort of standing.

Some cases are likely to be close calls under the relationship-plus-obstacle test. Consider, for example, *Pierce v. Society of Sisters*,³⁰⁷ which allowed a private

303. Cf. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012 (2003) (“[W]hen viewed from the perspective of an individual litigant, *stare decisis* often functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases.”).

304. *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 500).

305. 4 PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen & Leslie Tobias eds., 1984).

306. Cf. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1197 (2014) (“Relative standing . . . fulfills a practical purpose consistent with deeply rooted principles of judicial legitimacy: federal courts may adjudicate a dispute when doing so is necessary to remedy a violation of law.”).

307. 268 U.S. 510 (1925).

school to assert the rights of parents to control their children's education in challenging a state criminal law requiring all parents to send their children to public school. The law regulated the parents, not the school; the school's injury was collateral, albeit concrete. Justice McReynolds's terse opinion offered no reason to believe that the parents could not sue on their own, and any parent prosecuted under the law could certainly raise their constitutional rights as a defense. The best argument for third-party standing emphasizes that individual parents' suits might establish a right to send their children to private school in vain, if the law succeeded in putting all such schools out of business.³⁰⁸ But that problem could potentially be solved by a more limited authorization of third-party standing, which might allow the parent to seek an injunction against enforcement of the law throughout the state.³⁰⁹

The case for third-party standing in *Singleton v. Wulff*³¹⁰ is similarly debatable. That decision allowed abortion providers to challenge the denial of Medicaid benefits to their patients for abortions, even though the law did not regulate the doctors' conduct.³¹¹ Moreover, the Medicaid patients themselves could well have pursued their own claims (including through a class action) and could have shielded their privacy through the use of pseudonyms, as in *Roe v. Wade*.³¹² Notably, only a plurality of the Court signed on to the third-party standing analysis. That said, even the dissenting Justices in that case accepted that third-party standing should *sometimes* be allowed for collaterally injured parties; they simply argued for limiting it to situations in which the right holder is unable, as a practical matter, to vindicate his or her own rights.³¹³

308. See TRIBE, *supra* note 15, § 3-19, at 439.

309. See *infra* text accompanying notes 389-395 (explaining how broad injunctions can implicate third-party standing doctrine).

310. 428 U.S. 106 (1976).

311. Because the law limited the reimbursement payments that doctors could receive for their services, however, they were arguably more "subject to" the regulation than in most collateral-injury cases. As this case illustrates, there may be situations in which the line between regulated-party situations and mere collateral-injury situations becomes less distinct.

312. 410 U.S. 113 (1973); see TRIBE, *supra* note 15, § 3-19, at 444-45 (noting these options in *Singleton*). No decision cited by the *Singleton* plurality had allowed standing based on a mere collateral injury. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Doe v. Bolton*, 410 U.S. 179 (1973), the laws operated directly against the plaintiffs, and enforcement arguably would violate others' constitutional rights. The same can be said for *Barrows v. Jackson*, 346 U.S. 249 (1953), in which an owner of real estate subject to a racially restrictive covenant was allowed to defend against a suit for breach of the covenant on the ground that enforcing it would violate the equal-protection rights of African American purchasers.

313. See *Singleton*, 428 U.S. at 126 (Powell, J., dissenting).

A potentially better example of appropriate, collateral-injury-based third-party standing is *Powers v. Ohio*.³¹⁴ The Court there allowed a white criminal defendant to raise the rights of African Americans excluded from jury service. Critically, *Powers* featured strong arguments that constitutional injuries would persist if third-party standing were not allowed. As the Court explained:

Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges. . . . And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation.³¹⁵

Because of situations like this one, third-party standing for collaterally injured parties should not be completely disallowed. But such cases are not likely to be common. We can also imagine cases in which the relationship between the litigant and the right holder is so strong by itself as to make a persuasive case for third-party standing. But cases where this relationship is the central consideration in the standing analysis are best viewed under our third category of third-party standing cases, to which we now turn.

C. Representative Parties

Perhaps because they tend to fall more within the expertise of civil procedure scholars rather than federal courts or constitutional law scholars, representative-standing cases have not generally been part of the third-party standing conversation, but they should be. We consider two kinds of representative standing here. In the first category, one party stands in for another, litigating the same claim that the other party might have pursued. Examples include parents suing as next friends for their children and organizations suing on behalf of their members. In the second category, one or more persons with first-party claims of their own seek to aggregate their claims with those of many others. Class actions are the obvious instance, but others include MDLs and broad injunctions extending beyond the parties to a lawsuit. All of these scenarios raise third-party problems because they ask a court to adjudicate the rights of persons who are not, at least as a practical matter, actually before it. And they raise concerns similar to those raised by more familiar forms of third-party standing regarding the courts' abil-

314. 499 U.S. 400 (1991).

315. *Id.* at 414-15.

ity to decide disputes effectively and to safeguard the rights and interests of absent persons. Most generally, representative standing displays the continuing tension between the private-dispute-resolution and public-rights models of adjudication.

There are, nonetheless, important differences between representative standing and our other two categories. One difference is that some representatives seek to assert not only a third party's rights, but also their injury in fact. In this scenario, as we have already discussed, third-party standing takes on a constitutional as well as a prudential dimension.³¹⁶ The law has not fully come to grips with this difference, and Article III may warrant further limits on third-party standing in such circumstances. A second difference is that, in the aggregation scenario, the litigants generally (but not always) assert their own rights and injuries that parallel those of the parties they seek to represent. We contend that one litigant's effort to represent another raises third-party concerns even if that litigant has a similar claim of their own. And finally, well-developed frameworks already exist for handling some of the forms of representation – such as Rule 23 of the Federal Rules of Civil Procedure governing class actions – wholly outside the framework of standing. In some areas, such as next-friend status, those frames essentially replicate the traditional standing criteria of relationship plus obstacle. But in others, such as organizational standing and broad injunctive relief, we contend that the existing doctrine needs to take better account of third-party standing concerns.

1. *Direct Stand-Ins*

Take the stand-ins first. As with all potential third-party standing problems, it will help to begin by unpacking who has first-party claims and who must rely on a third-party's rights. Consider, for example, the Court's discussion of qui tam suits under the False Claims Act in the *Stevens* case.³¹⁷ In an opinion by Justice Scalia, the Court discounted the notion that qui tam relators could rest their standing on the fact that they stood to benefit financially if the claim prevailed.³¹⁸ Rather, the Court invoked “the doctrine that the assignee of a claim has standing

³¹⁶. See *supra* Section I.B.

³¹⁷. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Qui tam statutes authorize a private party (the “relator”) to bring suit on behalf of the public and receive a portion of the government's recovery. The False Claims Act is the most prominent modern example, but qui tam litigation dates back to the Founding. See *id.* at 768-69 & n.1.

³¹⁸. The Court noted that “the same might be said of someone who has placed a wager upon the outcome.” *Id.* at 772. Hence, “an interest that is merely a ‘byproduct’ of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.” *Id.* at 773.

to assert the injury in fact suffered by the assignor.”³¹⁹ It was thus sufficient that the False Claims Act “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”³²⁰ The Court cited a variety of cases in which it had “routinely entertained” suits brought by assignees.³²¹

Stevens fits comfortably with other aspects of American law treating rights to sue as transferable property interests. Some rights of action pass to a decedent’s heirs, for example, and existing causes of action belonging to a debtor are considered property belonging to the bankruptcy estate.³²² In all these situations, transferring the underlying property interest gives the assignee a *first*-party right to litigate the case arising under it. But focusing on what is assigned and what is not can help unravel difficult questions about assignments’ scope and implications. The False Claims Act, for instance, both assigns the government’s underlying right to be free from fraud (and the corresponding injury in fact caused by the defendant’s actions) and creates a statutory right for the *qui tam* relator to pursue a remedy.³²³ But such assignments do not confer the assignor’s *status* on the private litigant. This suggests not only that the government may not transfer its sovereign interest in enforcing the law, but also that other advantages that the United States has as a litigant—such as exemption from any sovereign-immunity defense when it sues a state government—generally do not convey.³²⁴

319. *Id.* at 773.

320. *Id.*

321. *See id.* at 773-74 (first citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 465 (1962); then citing *Automatic Radio Mfg. Co. v. Hazeltine Rsch., Inc.*, 339 U.S. 827, 829 (1950); and then citing *Hubbard v. Tod*, 171 U.S. 474, 475 (1898)); *see also* *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008) (“Assignees of a claim, including assignees for collection, have long been permitted to bring suit.”).

322. *See, e.g.*, *Diaz v. Westphal*, 941 S.W.2d 96, 98-100 (Tex. 1997) (discussing the survival of tort claims); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 54 (1982) (noting that causes of action belonging to a debtor are treated as property of the bankrupt estate).

323. *See* 31 U.S.C. § 3730(b), (d) (2018).

324. *See Stevens*, 529 U.S. at 787 (leaving this question open). The Supreme Court did recently hold, in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), that the federal government’s delegation of its eminent-domain power to a private company also confers the government’s right to disregard state sovereign immunity when that company seeks to condemn property belonging to the state. But the majority opinion in that case focused so resolutely on the unique history and structure of the federal eminent domain power, *see id.* at 2254-57, 2259-61, that we doubt *PennEast* can be read as a general holding that the federal government can delegate its exemption from state sovereign immunity to private litigants. Such a holding would, after all, provide an easy end-run around the holdings of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Allen v. Cooper*, 140 S. Ct. 994 (2020), among other cases, which stated that state sovereign immunity ordinarily bars damages suits against state governments by private litigants asserting federal statutory claims.

Nor do cases like *Stevens* suggest that one can assign one's right to raise particular *arguments* in a lawsuit. We doubt, for instance, that the doctors in *June Medical Services* could have avoided any third-party problems by obtaining a formal assignment of their patients' right to invoke their abortion rights. One can assign certain proprietary interests and thus the right to raise legal claims arising from injury to those interests, but no blanket right exists for any party to pass any claim or argument that they have standing to raise to any other party, simply by executing an assignment.³²⁵ Otherwise the third-party standing doctrine would become a matter of paperwork.

Existing doctrine rightly treats two other representative relationships—next friends and agents—as raising third-party rather than first-party rights. Next-friend status has generally been limited to situations in which someone is representing either a minor or a person who is alleged to lack sufficient mental capacity or other ability to represent themselves. One context in which claims of next-friend status arise with some frequency is habeas corpus litigation on behalf of detained prisoners.³²⁶ The common law permitted next-friend suits for prisoners as far back as the seventeenth century, and the federal habeas statute now explicitly authorizes them.³²⁷ In theory, next friends do not assert third-party standing because they are not parties at all; “[a] ‘next friend’ does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest.”³²⁸ But this is just a legal fiction. In practice, the next friend initiates the suit, asserts the prisoner's rights, and controls the litigation. Indeed, many

325. The closest the Court has come to endorsing such a broadly permissive assignment rule is the 5-4 decision in *Sprint*, which held that a party contractually bound to return the entire recovery to the assignor nonetheless has standing to pursue the claim. See 554 U.S. at 271. The majority relied entirely on the common-law practice of exercising jurisdiction over such claims. See *id.* at 274-85. Chief Justice Roberts's dissent found this practice equivocal and contested. See *id.* at 302 (Roberts, C.J., dissenting) (“We have never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court.”). *Sprint's* reasoning was too closely tied to specific historical practice in a narrow class of debt-collection suits to establish any general principle applicable to, say, claims for other remedies, assignments of sovereign interests, or transfers of rights to raise particular legal arguments.

326. See *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990). Next-friend standing issues have also arisen in habeas cases relating to the “war on terror,” when individuals or groups have sought to litigate the rights of detainees, many of whom are held in locations that make litigation impracticable. See Caroline Nasrallah Belk, Note, *Next Friend Standing and the War on Terror*, 53 DUKE L.J. 1747, 1759-67 (2004).

327. See *Whitmore*, 495 U.S. at 162; 28 U.S.C. § 2242 (2018). The 1948 revision “follow[ed] the actual practice of the courts.” Revisers' Notes to 28 U.S.C. § 2242 (2018). Rule 17 of the Federal Rules of Civil Procedure also allows next friends to sue on behalf of minors and those who lack competence. See FED. R. CIV. P. 17(c).

328. *Whitmore*, 495 U.S. at 163.

next-friend cases involve litigants wishing to prevent the execution of death row inmates against the inmates' own expressed wishes.³²⁹

Although the Court does not explicitly treat next friendship as third-party standing, the doctrine replicates traditional third-party standing requirements—only with greater rigor:

First, a “next friend” must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the “next friend” must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and . . . a “next friend” must have some significant relationship with the real party in interest.³³⁰

There must, in other words, be an *obstacle* to the third party asserting their own rights, and a *relationship* between the third party and the litigant. But both prongs seem to be enforced considerably more strictly than in standard third-party cases.

The agency cases, by contrast, show less explicit concern for obstacles, but insist on legally sanctioned relationships ensuring the accountability of an agent to its principal. In *Stevens*, the Court mused that “[i]t would perhaps suffice to say that the relator . . . is simply the statutorily designated agent of the United States.”³³¹ The Court quickly concluded however, that “[t]his analysis is precluded . . . by the fact that the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery.”³³² The government’s ability to designate private agents to assert the government’s rights came up again thirteen years later in *Hollingsworth v. Perry*.³³³ California law permitted the proponents of a successful ballot initiative to step in and defend that initiative’s validity in subsequent litigation if state officials were unwilling to do so.³³⁴ Nonetheless, when state officials decided not to appeal a federal-court judgment striking down Proposition 8 (a state constitutional amendment bar-

329. See, e.g., *id.* at 152; *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990); *Gilmore v. Utah*, 429 U.S. 1012, 1012-13 (1976).

330. *Whitmore*, 495 U.S. at 163-64.

331. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

332. *Id.*

333. 570 U.S. 693 (2013).

334. See *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (so construing the California state constitution and elections code).

ring same-sex marriage), the Supreme Court held that the amendment’s proponents lacked Article III standing to appeal that judgment.³³⁵ California’s delegation of a right to defend ballot propositions to their proponents was missing “the most basic features of an agency relationship,” including “the principal’s right to control the agent’s actions.”³³⁶ The most recent agency case, *Virginia House of Delegates v. Bethune-Hill*,³³⁷ likewise found that no agency relationship had been created, but the Court acknowledged that a state government may designate an agent to stand in for its interests.³³⁸

The Court thus recognizes the legitimacy of representation by agents in principle, and it plainly understands agency relationships as raising third-party standing concerns.³³⁹ So far, the Court has focused on the relationship between principals and agents, insisting that the delegation be reflected in positive law and include mechanisms for holding agents accountable for their conduct of the litigation. It has not addressed whether there must also be some obstacle to principals suing in their own right, perhaps deferring to implicit legislative judgments in the statutes creating such relationships that they are necessary to protect the government’s interests.³⁴⁰ Nor has the Court addressed the extent to which governments may delegate their interests to purely *private* litigants or whether private actors can delegate their own rights to other persons. The potential scope of this exception to the third-party rule, as well as that exception’s potential to broadly ground public-rights litigation, thus remains much in doubt.³⁴¹

335. *Hollingsworth*, 570 U.S. at 715.

336. *Id.* at 713 (quoting 1 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. L. INST. 2005)).

337. 139 S. Ct. 1945 (2019).

338. *See id.* at 1951.

339. *See Hollingsworth*, 570 U.S. at 708 (invoking the principle that “a litigant . . . cannot rest a claim to relief on the legal rights or interests of third parties” and inquiring as to the applicability of “certain, limited exceptions” where courts “have allowed litigants to assert the interests of others” (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991))).

340. As Justice Kennedy pointed out in *Hollingsworth*, for example, California’s delegation of authority to defend a ballot proposition to its proponents reflected concerns that elected officials would have strong incentives *not* to defend such propositions – which are, after all, designed to bypass those same officials. *See* 570 U.S. at 716 (Kennedy, J., dissenting) (noting that California “deems such an appearance essential to the integrity of its initiative process”).

341. *See, e.g.,* Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 360-67 (2001) (suggesting that agency representation has broad potential to support public-law litigation). If the new Texas abortion statute mentioned in the introduction to this Article, which confers a right on private parties to enforce the state’s substantive restrictions on abortion, *see supra* note 14, is defended on an agency

The more fundamental question regarding agents, next friends, and other representative parties is whether they can invoke not only a third party's rights, but also its *injury*. As already discussed, this scenario implicates not only prudential concerns but constitutional ones as well. Injury in fact is, after all, part of the "irreducible constitutional minimum" of Article III standing.³⁴² We are unaware of any traditional third-party standing cases in which the Court has permitted a litigant to assert a third party's injury as well as its own rights. And in *Hollingsworth*, the Court doubted that "mere authorization to represent a third party's interest is sufficient to confer Article III standing on private parties with no injury of their own."³⁴³ This worry reflects an important difference between the assignment and agency theories in *Stevens*: an assignment transfers an underlying interest, denial of which may create Article III injury in fact, whereas an agency relationship confers only the principal's right to enforce a legal claim, not that underlying interest. But the Court has never really focused on the distinction.

The Court should make clear that the third-party standing doctrine, and its exceptions, are prudential precisely because they address the rights, claims, and arguments that parties may assert in litigation – not the irreducible minimum of constitutional injury. The latter is a separate requirement, and even a party who can show a strong relationship to a third party and a formidable obstacle to that party's assertion of their own rights must nonetheless have an injury in fact of their own. Insisting that representative litigants have their own injuries would

theory, its validity may turn on the extent to which state officials retain oversight over enforcement actions. But since the statute provides for suits in *state* court, applicability of the analysis offered here will depend on the extent to which the Texas courts choose to interpret the state constitution's standing requirement in line with cases like *Hollingsworth*. See, e.g., *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444, 446-48 (Tex. 1993) (stating that a standing requirement "is implicit in the open courts provision" of the Texas Constitution, and adopting several aspects of federal standing law in construing that requirement (citing TEX. CONST. art. I, § 13)); see also *Grossman v. Wolfe*, 578 S.W.3d 250, 256-57 (Tex. App. 2019) (noting that Texas cases recognize broad legislative authority to exempt plaintiffs from the standing requirement when creating a statutory right of action). Whether the substantive abortion restrictions in the law violate the Federal Constitution is, of course, a federal question upon which the U.S. Supreme Court would have the final say. And whether or not a private plaintiff enforcing the Texas law would have standing to carry an appeal of that issue before the U.S. Supreme Court, see *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (*per curiam*), a state-court *defendant* would surely have standing to seek U.S. Supreme Court review of an adverse state-court judgment upholding the Texas law, see *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612-24 (1989); HART & WECHSLER, *supra* note 60, at 158-59.

342. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

343. *Hollingsworth*, 570 U.S. at 710; see also *id.* at 715 ("States cannot alter [the federal courts' limited] role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.").

not entail a large practical change in the law, but it would have some important implications.

First, next-friend standing should be limited to those whose relationship to the right holder is sufficiently close such that the alleged infringement of that person's rights causes the litigant injury in fact. As a practical matter, this covers most successful next friends.³⁴⁴ A parent, family member, or close friend of a person unlawfully imprisoned or facing execution, for instance, can generally assert an injury to their own valuable relationship with the right holder.³⁴⁵ An injury requirement *will* tend to weed out putative next friends whose motivations are primarily moral or ideological, but the courts have generally rejected those claims anyway.³⁴⁶ More fundamentally, screening out such “non-Hohfeldian” plaintiffs has been a central thrust of modern standing doctrine.³⁴⁷

Second, insisting on injury would not prevent delegations such as the one in *Hollingsworth*, so long as they meet the rigorous criteria for an actual agency relationship set out in that opinion. The California law should be understood as conferring the functional equivalent of a right of action on proponents of ballot initiatives (albeit one to be exercised in a defensive capacity). This would overcome prudential objections to third-party standing, and in any event it creates the requisite relationship to support an exception to that doctrine. Contrary to the majority's suggestion that *Hollingsworth* lacked a “personal stake” in the litigation,³⁴⁸ his stake compares rather favorably to what the Court has found suf-

344. See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 n.3 (1955) (evaluating a habeas petition brought by the sister of a civilian ex-serviceman held in Korea).

345. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9 (2004) (recognizing parents' first-party interests in associating with the child or in controlling the child's upbringing).

346. See, e.g., *Hamdi v. Rumsfeld*, 294 F.3d 598, 607 (4th Cir. 2002) (rejecting the effort of a public defender and a private citizen who had never met the detainee to serve as detainee's next friends); *Coal. of Clergy, Laws., & Professors v. Bush*, 310 F.3d 1153, 1162-63 (9th Cir. 2002) (rejecting a similar effort by a coalition of law professors and other professionals); see also *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990) (“It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.” (citing *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921))). Some lower courts, however, have been more permissive. See, e.g., *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 91 (1st Cir. 2010) (holding that “a significant relationship need not be required as a prerequisite to Next Friend status”).

347. “Hohfeldian” plaintiffs seek to litigate rights that are personal to them, whereas “non-Hohfeldian” plaintiffs seek to litigate societal interests. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); cf. WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1923) (developing influential terminology for describing legal rights and related concepts).

348. *Hollingsworth*, 570 U.S. at 707.

ficient in other cases, such as the “informational injury” in *Akins*. Both cases involved litigants invoking a broadly held interest, but whose personal activities had established a uniquely close connection to the controversy that set them apart from the general public.³⁴⁹

The most important change, however, might be to a well-established standard: organizations and associations that sue on behalf of their members. Under longstanding doctrine, an association or membership organization may sue on behalf of its members so long as “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”³⁵⁰ The third requirement tends to rule out claims for damages relief, as individual members will generally need to appear as parties to establish their damages.³⁵¹ Germaneness means simply that the Sierra Club, for example, generally may not bring cases about abortion and the National Abortion Rights Action League cannot bring cases about the environment. Hence, organizations can generally assert the rights of their members whenever any member would have standing to sue.³⁵²

The *Wright & Miller* treatise describes organizational standing as a “clear illustration” of the notion that “[s]pecial relationships to an injured person” may justify representational standing.³⁵³ But some relationships between organizations and their members may be more special than others. The American Association of Retired Persons has nearly thirty-eight million members – roughly the

349. Compare *FEC v. Akins*, 524 U.S. 11, 21 (1998) (noting the plaintiff’s particular connection to the controversy over whether the specific disclosures at issue should be made), with *Hollingsworth*, 570 U.S. at 719 (Kennedy, J., dissenting) (observing that initiative proponents “have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure” (quoting *Perry v. Brown*, 265 P.3d 1002, 1152 (Cal. 2011))).

350. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

351. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

352. See *Warth*, 422 U.S. at 511 (“Even in the absence of injury to itself, an association may have standing solely as the representative of its members.”). For a decision allowing a psychiatric organization to invoke the third-party standing of its member psychiatrists to assert the rights of their patients, see *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 293 (3d Cir. 2002). See also *Tacy F. Flint, A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037, 1039-41 (2003) (discussing the decision).

353. 13A RICHARD D. FREER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.9.1 (3d ed. April 2020).

same size as the State of California.³⁵⁴ The National Rifle Association has millions of members, as does the Sierra Club.³⁵⁵ It seems a stretch to conclude categorically that organizations always have a sufficiently “special” or “close” relationship to their members to represent their interests adequately .

The more fundamental problem, however, is that organizations need show no injury in fact of their own.³⁵⁶ They must identify a particular member who has an injury, but nothing requires any particular participation by that member, and it is far from clear that members are bound by any adverse judgment against the organization.³⁵⁷ It is unclear why, in these circumstances, an organization should be able to rely on its member’s injury to establish Article III standing. The Court has rejected other challenges to organizational standing on the ground that “an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital”; moreover, “organizations often have specialized expertise and research resources . . . that individual plaintiffs lack.”³⁵⁸ But such prudential advantages cannot overcome a constitutional objection.

One may ask how different letting a vast public-interest organization designate one of its millions of members who could have sued in their own right is

354. *Compare Social Impact*, AM. ASS’N RETIRED PERS., <https://www.aarp.org/about-aarp/company/social-impact> [<https://perma.cc/362Y-GFS3>] (claiming “nearly 38 million members”), with *Quick Facts, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA/PST045219> [<https://perma.cc/GK84-2QQ7>] (estimating that the population of California was 39,512,223 as of July 1, 2019).

355. See *Membership*, NAT’L RIFLE ASS’N, <https://membership.nra.org/FAQ> [<https://perma.cc/5AHU-YR2E>] (claiming that the NRA “is made up of nearly five million members”); *Who We Are*, SIERRA CLUB, <https://www.sierraclub.org/about> [<https://perma.cc/26PP-LGP7>] (estimating that Sierra Club includes 3.8 million members and supporters).

356. Membership organizations sometimes do assert direct harms to their own institutional interests. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). Those injuries will generally satisfy Article III, leaving only prudential concerns about raising third-party rights. But organizational standing does not *depend* on the existence of these first-party injuries.

357. See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (noting the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process” (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))); 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4456 (3d ed. 2021) (“The decisions that recognize [organizational] standing have not yet grappled with the preclusion questions that are bound to follow. . . . [G]reat care should be taken before binding all members to an association loss.”).

358. *Int’l Union v. Brock*, 477 U.S. 274, 289 (1986) (quoting Dale Gronemeier, Note, *From Net to Sword: Organizational Representatives Litigating Their Members’ Claims*, 1974 U. ILL. L.F. 663, 669).

from simply allowing well-resourced litigants to sue on behalf of the public interest.³⁵⁹ By largely replicating the public action, organizational standing puts pressure on separation-of-powers principles limiting the role of courts. To be sure, it is unlikely that much would change if organizations were required to join at least one member as an actual party. Presumably, that change would also entail a requirement that the individual plaintiff play a meaningful role in the litigation.³⁶⁰ It would probably be easy, in most cases, for a large advocacy organization to find some member willing to serve and participate as a named plaintiff. Nonetheless, the law of standing has often imposed requirements that seem to make little practical difference in the interests of maintaining contact between the realities of modern litigation and the private-law model that has, in our tradition, justified the courts' power of judicial review.³⁶¹ Consistent with that effort, organizational standing should be brought more firmly in line with the rest of the Court's case law.

2. *Aggregation Mechanisms*

In contemporary litigation, the problem of representation often marches arm in arm with the problem of aggregation. Public-law litigation challenging government practices frequently seeks to join thousands of similarly situated persons rather than just a few interested litigants. And private-law litigation — such as tort litigation over tobacco or opioids — takes on a public cast as it aggregates many thousands of individual claims.³⁶² It seems fair to say that the efficient, fair, and effective aggregation of diffuse interests is the central problem of modern procedure.³⁶³ The law has developed a wide array of mechanisms to address this problem, including class actions, MDLs, and nationwide injunctions.

Aggregate cases differ from the stand-in scenarios already discussed in an obvious respect: at the center of each is a plaintiff with a first-party claim. Named

359. See *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) (recognizing that “once review is properly invoked, [a litigant] may argue the public interest”); Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329, 1383 (2020) (questioning whether associational standing can be squared with contemporary standing doctrine).

360. Cf. *United States v. Johnson*, 319 U.S. 302, 305 (1943) (rejecting jurisdiction where the plaintiff's lawyers had no meaningful contact with their client).

361. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (indicating that plaintiffs could have established an injury in fact if they had only alleged “concrete plans” to visit the animals threatened by the challenged action); *Morton*, 405 U.S. at 735 (suggesting that the Sierra Club need only identify a member who had visited the threatened wilderness area).

362. See, e.g., PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 24 (2015) (discussing the public regulatory effects of state governments' tort suits against tobacco companies).

363. See, e.g., Lemos & Young, *supra* note 85, at 109; Nagareda, *supra* note 83, at 1872-79.

plaintiffs in class actions, cases joined in an MDL, and lawsuits seeking broad injunctive relief all begin with the experiences of one or more first-party claimants whose claims are supposedly similar to those of many other litigants. But each mechanism effectively allows that set of first-party claimants to assert the rights, and thus represent the interests, of those other litigants. The rights of these others – absent class members, MDL plaintiffs not chosen for the plaintiffs’ steering committee or bellwether trial, and persons covered by injunctive relief that they are not parties to – may be identical in substance to those the primary plaintiffs assert on their own behalf. The fact remains, however, that they are not the *same* claims, and the various parties may have quite diverse circumstances, interests, and intentions. These mechanisms can thus fruitfully be viewed as raising problems of third-party standing.

Start with class actions. Professor Monaghan observed a half-century ago that, “[p]erhaps more than any other single development, the mushrooming of class actions has rendered the private rights model largely unintelligible.”³⁶⁴ In a sense, a properly certified class action raises no third-party problem. Under the commonality and typicality requirements of Rule 23 of the Federal Rules of Civil Procedure,³⁶⁵ the named plaintiff has the same injury in fact and asserts the same rights on his own behalf that other class members assert. But the fact remains that class members other than the named plaintiffs are not *actually* present, and the named plaintiffs litigate the suit on their behalf. And even if the named plaintiffs have precisely the same claims as their absent compatriots, those injuries and claims are typically differentiated rather than collective.³⁶⁶ Named plaintiffs assert first-party standing as to their own claims, and third-party standing as to the claims of the rest of the class.

If we think of class actions as raising a third-party standing problem, then we can also think of Rule 23’s requirements as an echo of the traditional relationship-plus-obstacle test. The numerosity requirement of Rule 23(a)(1), as well as the requirements of inconsistencies arising from individual adjudications in Rule 23(b)(1) or the superiority requirement of Rule 23(b)(3), all speak to why the absent class members cannot reasonably be expected to sue in their own right. And Rule 23(a)(4)’s requirement that “the representative parties will fairly and adequately protect the interests of the class,” as well as the various notice and opt-out provisions in Rule 23(c), tend to ensure that named plaintiffs (and their

³⁶⁴. Monaghan, *supra* note 51, at 1383.

³⁶⁵. See FED. R. CIV. P. 23(a)(2)-(3).

³⁶⁶. See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2202 (2021) (involving a class action aggregating claims of breaches of the Fair Credit Reporting Act as to particular individuals); *Allen v. Wright*, 468 U.S. 737, 743-45 (1984) (involving a class action aggregating claims that lax enforcement of tax rules had hindered the ability of particular African American families to receive a nonsegregated education in public schools).

lawyers) have and maintain the right sort of relationship with the rest of the class.³⁶⁷ As with the rules limiting next-friend and agency standing, these requirements tend to be considerably more rigorous than their family relations in the traditional law of third-party standing.

The third-party problem becomes more acute in two scenarios. One arises when a class action includes absent parties whose claims are actually quite different from those of the named plaintiff. For example, in *TransUnion LLC v. Ramirez*,³⁶⁸ the named plaintiff experienced significant actual damages from a breach of the Fair Credit Reporting Act, but the district court certified a broad class of persons, including thousands who suffered a similar breach but, on the evidence presented, no similar harm. The Supreme Court held that Article III standing was appropriate only for those class members who had been concretely harmed by the breach – in particular, by having false credit reports concerning them disseminated to third-party businesses – a group that constituted less than one-fourth of the total class.³⁶⁹ By eliminating from the class those absent plaintiffs whose claims differed in kind from Ramirez’s, the Court obviated the most dramatic third-party problem. But questions about the propriety of third-party standing may remain where differences within the class implicate goals or strategy rather than the ability to sue at all.³⁷⁰

The second scenario arises if, as current doctrine permits, named plaintiffs continue to represent the class even after their own claims become moot.³⁷¹ In that circumstance, named plaintiffs piggyback on third-parties’ injury in fact, as well as their legal rights. The Court has advanced prudential arguments for letting such a named plaintiff continue to litigate on the class’s behalf.³⁷² But as in the next-friend context, it is far from clear that such arguments can suffice without a *constitutional* injury in fact.

Notwithstanding these concerns, the relatively elaborate safeguards of Rule 23 make class actions, in comparison with other mechanisms, the gold standard of aggregate litigation. In recent years, however, class actions have been eclipsed

367. See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 405-07 (1980) (observing that current doctrine “shift[s] the focus of examination from the elements of justiciability to the ability of the named representative to ‘fairly and adequately protect the interests of the class’” under Rule 23(a) (quoting *Sosna v. Iowa*, 419 U.S. 393, 403 (1975))).

368. 141 S. Ct. 2190 (2021).

369. See *id.* at 2209-13.

370. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (arguing that the African American community was divided between those who wished to emphasize integration and those stressing improving educational quality for African American schoolchildren).

371. See, e.g., *Geraghty*, 445 U.S. at 404; *Sosna*, 419 U.S. 393.

372. See *Geraghty*, 445 U.S. at 403-04.

in many settings by MDLs.³⁷³ Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation can create an MDL whenever “civil actions involving one or more common questions of fact are pending in different districts.”³⁷⁴ In so doing, the Panel transfers all the cases raising those common questions to a single district (that it selects) “for coordinated or consolidated pretrial proceedings,” so long as “transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”³⁷⁵ This sort of consolidation has created cases of tremendous national significance. The MDL consolidated before Judge Polster in the Northern District of Ohio, for example, has become the central venue in which the American legal system seeks to deal with the national crisis of opioid addiction.³⁷⁶

In 2018, MDLs accounted for 51.9 percent of all pending federal civil cases.³⁷⁷ In theory, MDLs are comprised of individual lawsuits involving individual plaintiffs that are simply consolidated for purposes of conducting pretrial proceedings.³⁷⁸ But in reality, MDL judges view their central mission as facilitating settlement of all the claims; consolidated cases almost never return to their original districts for trial.³⁷⁹ Presiding judges create plaintiff steering committees to represent the interests of all plaintiffs, and they hold “bellwether” trials to allow the

373. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 79 (2015) (observing that “multidistrict litigation [has] become the primary means for resolving aggregate litigation”); see also Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 778-79 (2019) (discussing the decline of class actions); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2247-48 (2008).

374. 28 U.S.C. § 1407(a) (2018).

375. *Id.*

376. See Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [<https://perma.cc/YY4S-3JZ5>].

377. Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, AM. BAR ASS’N (Feb. 19, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket> [<https://perma.cc/QSW4-5U9Y>].

378. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34-35 (1998).

379. See, e.g., Edward F. Sherman, *When Remand Is Appropriate in Multidistrict Litigation*, 75 LA. L. REV. 455, 462 (2014) (“As seen by the myriad ways that a transferee court can . . . avoid immediate remand, the percentage of remanded cases remains low.”); *id.* at 466 (“[S]ettlement is a primary goal of an MDL judge.”); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 128 (2015) (observing that “[a]pproximately 97% of MDL cases terminate in transferee districts” and that “[p]arties to MDL cases and the transferee judges who preside

parties to test the general strength of representative claims as a prelude to settlement negotiations.³⁸⁰

Like class actions, MDLs create a third-party standing problem to the extent that the litigation is driven and controlled by one group of parties – those parties directly represented on the plaintiffs’ steering committee – who assert the right to represent the interests of many others who take no direct part. To be sure, MDLs are unlike class actions in that parties are not legally bound by the aggregate resolution; if the steering committee negotiates a settlement with defendants, for example, individual claimants may still opt out. But given the practical objective of reaching a global settlement, MDL settlements are often structured to maximize pressures for individual plaintiffs to accept the deal.³⁸¹ Individuals are taxed for the steering committee’s expenses, and they are effectively bound by the aggregate resolution whether or not they have any opportunity to participate in guiding the litigation.³⁸²

From this perspective, then, MDLs allow a subset of litigants to assert the rights of third parties without either a formal mechanism to ensure a close relationship to those parties³⁸³ or, typically, a conventional determination that the third parties could not litigate their claims on their own.³⁸⁴ So long as the consolidated cases involve “one or more common questions of fact,”³⁸⁵ there is no legal requirement that the claimants driving the litigation through the steering committee, or those selected for “bellwether” trials, be “typical” as in class actions. The opioid MDL, for example, is primarily composed of cities, counties, and states asserting claims for medical expenditures, but it also includes class-

over them face tremendous pressure to settle”); see also David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 440 (2019) (comparing MDL to an administrative agency process, but one that lacks the “structures that Congress and courts implemented to improve the transparency, accountability, and accessibility of the administrative process”).

380. See Sherman, *supra* note 379, at 458–59 (describing bellwether trials); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 791 (2012) (noting that in an MDL, “the litigation is run in many ways by a relatively small number of counsel appointed to the case-management committees established by the court”); Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 508–09 (2011) (“Presently, plaintiffs in nonclass aggregation have few opportunities for participation, voice, and control.”).

381. See S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 403–05 (2013).

382. See Redish & Karaba, *supra* note 379, at 114–15.

383. See, e.g., Burch, *supra* note 373, at 81–92 (describing problems with ensuring that plaintiffs’ steering committees represent all plaintiffs in the MDL).

384. Redish & Karaba, *supra* note 379, at 140 (noting that “MDL applies only to claimants who have already chosen their own attorney and already filed suit” on their own).

385. 28 U.S.C. § 1407(a) (2018).

action claims brought on behalf of infants born addicted.³⁸⁶ Although an extensive body of “lore” on best practices has built up around MDLs,³⁸⁷ no binding rules analogous to Rule 23 for class actions exist to ensure that third-party rights are adequately represented.³⁸⁸ This is true notwithstanding that MDL outcomes are far more binding, as a practical matter, than the litigation outcomes of ordinary representation of third-party rights. If the doctors had lost in *June Medical Services*, for instance, that would have constituted a bad precedent for their patients, but those patients would have remained free to challenge the law in subsequent litigation.

A final example, which we can only sketch the outlines of here, concerns nationwide injunctions. Such injunctions became a common feature of high-profile public-law litigation challenging policies of both the Obama and Trump Administrations,³⁸⁹ and they show no signs of slowing down under the Biden Administration.³⁹⁰ Debate about such injunctions has focused on their history (or lack thereof) in American precedent,³⁹¹ their grounding in historical equity practice,³⁹² and their practical necessity.³⁹³ But they can also be viewed through the lens of third-party standing. The Court insists that “‘a plaintiff must demonstrate standing for each claim he seeks to press’ and ‘for each form of relief’ that

386. See Amanda Bronstad, *Panel Rejects Separate Opioid MDL for Addicted Babies*, LAW.COM, (Dec. 7, 2018, 6:26 PM), <https://www.law.com/2018/12/07/panel-rejects-separate-opioid-mdl-for-addicted-babies> [<https://perma.cc/VG36-B8EV>].

387. See, e.g., Bolch Jud. Inst., *Guidelines and Best Practices for Large and Mass-Tort MDLs*, DUKE L. SCH. (2d ed. 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf> [<https://perma.cc/L9AD-DBN9>].

388. See Tidmarsh & Welsh, *supra* note 373, at 781 (noting that the Judicial Panel on Multidistrict Litigation has “decided to take a hands-off approach to the management and progress of transferred actions,” effectively “leav[ing] the transferee judge as a virtually unchecked force in the pretrial phase”).

389. See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 677-78 (S.D. Tex.) (enjoining Obama Administration immigration policy), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.).

390. See, e.g., *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010, at *22 (W.D. La. June 15, 2021) (issuing a nationwide injunction against the Biden Administration’s pause of new oil and natural gas leases on public lands and offshore waters); *Texas v. United States*, No. 6:21-CV-00003, 2021 WL 2096669, at *51-52 (S.D. Tex. Feb. 23, 2021) (issuing a nationwide injunction against the Biden Administration’s 100-day pause on deportations).

391. See, e.g., Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020).

392. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

393. See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

is sought.”³⁹⁴ This suggests that, although plaintiffs may seek an injunction protecting themselves from unlawful conduct, they may need to establish a distinct basis for seeking an injunction to protect others – especially the entire universe of persons affected by the challenged policy. Absent the use of a class action, standing to protect those other persons would depend, at least in part, on the law of third-party standing.³⁹⁵ It may well be that some nationwide injunctions could be defended in these terms, and we lack space here to explore the issue in any depth. Our point is simply that the law of aggregate remedies intersects with third-party standing and representative litigation.

As class actions decline, MDLs and suits for nationwide injunctions have come to dominate American public litigation. Unlike class actions, next friends, or agency relationships, MDLs and broad injunctions are largely creatures of discretion. The barebones MDL statute and the broad powers of traditional equity leave judges with little guidance or constraint in permitting some parties to represent others with whom they may have no relationship and little common interest. This is not the place for a comprehensive discussion of how any of these representative mechanisms should be governed, and it may be that some reforms will need to come from Congress rather than from the courts. We do submit, however, that understanding these situations as raising third-party standing problems and applying the principles developed here can help. In particular, considering the strength of the relationship between litigants and other right holders, the extent to which innovative mechanisms are necessary to overcome obstacles to parties asserting their own rights, and the extent to which actions affecting the primary litigant may also violate the rights of others are valuable starting points in areas lacking many other legal landmarks.

CONCLUSION

We have offered a framework that we hope will make the third-party standing doctrine more useful and coherent, for both statutory and constitutional claims, while remaining faithful to modern standing doctrine’s effort to reconcile the public and private models of adjudication. The first element is to determine more clearly the boundaries of first-party rights, something that is often blurred in the cases and commentary. As we have explained, that determination must attend to the distinction between the ability to invoke a right in litigation and a

394. *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

395. *See, e.g., Casa de Md., Inc. v. Trump*, 971 F.3d 220, 258–59 (4th Cir.) (reasoning that nationwide injunctions “are incompatible with the well-recognized bar against litigants raising the rights of others”), *reh’g en banc granted*, 981 F.3d 311 (4th Cir. 2020).

private right of action. The zone-of-interests test, we contend, offers a useful guide for determining the scope of the former, and part of our aim is to rescue that concept as a switching principle post-*Lexmark*. Those who do not fall within the zone of interests will need to rely on third-party standing in order to invoke the right.

Once “true” third-party standing is identified, we have argued that it is a mistake to try to rationalize it as a unitary doctrine – such as by insisting that it is always subject to the obstacle-plus-relationship test or by positing a general right not to be subject to an invalid rule. Our inquiry instead unpacks third-party standing cases into three categories. In the first, litigants are regulated by or subject to the action that they challenge, but seek to invoke the rights of third parties who have a stronger legal claim against it. In these cases, we contend that litigants should normally be allowed to raise third-party rights when the enforcement of the law against them plausibly violates the rights of those third parties. The second category involves litigants who are not regulated by or subject to the challenged action, but collaterally injured by it. These litigants, we argue, should presumptively lack third-party standing, unless they can make a particularly strong showing under the obstacle-plus-relationship test.

We have also identified a third category that the existing literature on third-party standing has largely ignored. These are cases in which a litigant represents another party whose rights have arguably been violated. Cases in this category usually turn on well-developed and specific rules guaranteeing a close relationship between the representative and the right holder, and they generally demand a strong showing that right holders cannot easily litigate on their own account. Yet some forms of representation – such as organizational standing and MDLs – lack such safeguards. This state of affairs should be reconsidered, we suggest, in light of general concerns about third-party standing. These concerns may also be relevant to controversies, like nationwide injunctions, with which the legal system is just beginning to grapple. Because third-party standing doctrine provides a framework for assessing who may assert rights for whom, it can potentially shed light on a wide range of pressing legal questions.