Third Party Standing Is Not for Sissies

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Curtis Bradley & Ernest Young, *Unpacking Third Party Standing*, __ **Yale L. J.** __ (forthcoming), available at SSRN.

Justice Scalia once famously said: “Administrative Law is not for sissies.” His colorful rhetoric undoubtedly was based on the combination of opacity, complexity, ambiguity, and internal inconsistency that characterizes the field of administrative law. The law governing third party standing has similar characteristics. Curtis Bradley and Ernest Young do an excellent job of “unpacking” third party standing in *Unpacking Third Party Standing*, but it too would not be a good candidate for casual reading by “sissies.” I have read it twice now, and I am far short of having a complete understanding of the intricate analysis in the article. The quality of the analysis is so good, however, that I plan to read it several more times.

The article is extremely ambitious. It is an attempt to “unpack” and explain a doctrine that many fine scholars have been unable to explain in a coherent manner. The reasoning the Supreme Court has used when it has addressed the doctrine is often inconsistent, unhelpful, and incomplete. The authors attribute the failure of the Court and scholars to describe and explain the doctrine in a coherent manner to their attempt to describe it as a single doctrine.

The authors use the general patterns of the Court’s decisions and one test that the Court has long used for a particular narrow purpose—the zone of interests test—in their effort to explain third party standing doctrine. In their view, the doctrine should be understood to refer to three discrete circumstances in which third parties should or should not have standing—parties that are directly regulated, parties that are collaterally injured, and parties that are representing other parties. Before they can complete that ambitious project, however, the authors must first “unpack” first party standing and identify the existence and scope of many of the substantive rights that are frequently invoked in third party standing cases. After taking those two preliminary steps, the authors use the results as inputs in the process of identifying the three circumstances in which a party should or should not have standing to assert the rights of another and the prerequisites to standing that a party should be required to establish to qualify for third party standing in each of the three classes of cases.

The authors argue that standing should be relatively easy to demonstrate in cases in which the party that is asserting the rights of a third party is directly regulated by the rule that is being challenged. In such cases, the only possible limit on standing is prudential rather than constitutional. The petitioner should have standing to assert the third party’s rights if the challenged rule could plausibly violate the rights of the third party. The traditional requirements to establish third party standing—demonstrating that the petitioner has an adequate relationship with the third party and that the third party confronts obstacles to its participation—should not be prerequisites to standing in this category of cases.

By contrast, in the second category of cases, a party that is only collaterally injured by the challenged rule should be denied standing except in the rare cases in which the party can satisfy the relationship plus obstacle test.

The third category of cases—where a party is representing a third party—raises serious Article III

questions. In that category of cases, the court must decide whether the party can invoke the injuries to the third party caused by the challenged rule as the basis for standing. The authors argue that courts should apply agency law rigorously to determine whether the relationship between the representing party and the third party is sufficient to allow the representing party to rely on injuries to the third party as the basis for its standing to assert the rights of the third party.

After they identify the three classes of cases in which courts should or should not grant third party standing, the authors apply the prerequisites to the availability of third party standing in each of those three classes of cases to four types of actions that courts have long entertained without seriously considering the propriety of allowing third party standing—class actions, actions by organizations on behalf of their members, multi-district litigation, and attempts to obtain injunctions with nationwide scope. They argue that the Court should reconsider the permissibility and scope of each of those common practices to ensure that it is applying the normatively defensible prerequisites to the availability of third party standing in each of the four contexts in which the Court has routinely allowed third parties to assert the rights of others.

I don’t know whether I agree with the authors. I would have to reread the article with care several more times and reread some of the many authorities they cite to decide whether I agree with them. I plan to undertake that daunting task, however. The article is well-written, well-reasoned and well-researched. The authors have cited every important scholarly article that is relevant to their project. Their discussion of the sources they cite provides solid evidence that they understand each. This is a must-read article for any scholar, judge, or practitioner who wants to try to understand third party standing.

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