A NEW STANDING REQUIREMENT FOR FIRST AMENDMENT LITIGANTS?: BAR OWNERS RESTING ON THEIR OWN BOTTOMS *OR STILL RESTING ON THE BARE BOTTOMS OF NUDE DANCERS*

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I. INTRODUCTION

It is one thing to expand the application of the First Amendment to new situations or circumstances as they develop with the changing times. It is another thing to extend the First Amendment's realm of intended beneficiaries to those with no constitutionally protected rights at stake and, then, to allow them to rest their alleged First Amendment claims not on their own bottoms, but on the bare bottoms of others.

Perhaps the government should limit First Amendment protections to those who have suffered injury to First Amendment rights. Consider the following scenario: An entrepreneur opens the community's only topless bar just outside of a

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I am thankful for the diligent and thorough work of my students. This paper is the result of a collaborative, and enjoyable, effort. One of my former students, co-author Leslie P. Barry, originated the ideas presented here in our First Amendment class in the fall of 1997. Leslie developed these ideas further in the spring of 1998.

Another former student, co-author Mark D. Fijman, also helped develop these ideas in the spring of 1998. In addition, Mark received the Best Examination Paper Award in our First Amendment class in the fall of 1996. I appreciate, too, the additional research assistance of former student Meta Swain. Meta received the Best Examination Paper Award in our First Amendment class in the fall of 1997. She is presently employed as an associate with the law firm of Brunini, Grantham, Grower & Hewes, P.L.L.C., in Jackson, Mississippi.

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Southern university town.[1] While county supervisors deny any intent to put the bar out of business, citing only concern for secondary effects, they pass an ordinance prohibiting the sale of alcohol in any topless dancing establishment. This ordinance substantially cuts into the bar's profits.[2] The bar owner complains about the ordinance, but says his only motivation is to make money and to become a "Southern Hugh Hefner."[3] The dancers, also complaining, say their only motivation is to make money. They make up to four-hundred dollars a night from their on-stage performances as well as private "lap dances."[4] Should the bar owner or dancers have First Amendment standing to challenge the ordinance when neither assert an intention to communicate a message?

Arguably, the dancers have First Amendment standing, although their real interests are in money and not expression. The First Amendment standing for the bar owner, however, should be far more questionable. In *Berner v. Delahanty, II*,[5] the First Circuit states that to have standing before a federal court, "courts generally insist that every complainant's tub rest on its own bottom."[6]

One goal of this article is to examine how local bar establishments providing nude entertainment have bootstrapped their economic interests onto a nude performer's interest in, arguably, protected expression. Business establishments, in other words, rest their First Amendment claims on the bare bottoms of their dancers instead of resting their tubs on their own bottoms.

The First Amendment unequivocally states that a person's freedom of speech is protected from government curtailment.[7] People may express their freedom of speech, of course, in a number of different ways. A person may utter words,[8]

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[1] *See* Mario Rossilli, *Hattiesburg Bar Owner Slakes Patrons Thirst for Beer with Fully Nude Dancers,* CLARION LEDGER, Nov. 10, 1997, at 1A.

[2] *See id.*

[3] *See id.* To compensate for the lost revenues from not selling alcohol, the bar owner now has his dancers perform totally nude. He hopes that will attract more patrons, even if they cannot drink on the premises, and thus keep his revenues up. *See id.*

[4] *See id.* As opposed to the customary on-stage performance of an "exotic dancer" or "stripper" for the entire audience of an adult club, a lap dance is more of a "command performance" for an individual customer. In a Michigan case, dealing with the issue of nuisance, lap dancing is described as:

> For a fee of $20 for one song, or $30 for two songs, the female employees would perform a "lap dance" for a customer. During these lap dances a dancer would straddle a customer's legs and move herself about the customer's legs and groin area while holding onto either the customer or a pair of handles mounted on the wall. Although some touching of dancers by patrons was observed, an employee hired for security testified that it was a rule that customers were not supposed to "get too friendly" with their hands during lap dances.

State v. Dizzy Duck, 511 N.W.2d 907, 909 (Mich. Ct. App. 1994).

[5] 129 F.3d 20 (1st Cir. 1997).

[6] *Id.* at 24.

[7] U.S. CONST. amend. I.

[8] *See, e.g.*, Terminello v. Chicago, 337 U.S. 1 (1949) (granting First Amendment protection for man orally criticizing political groups).

write and print thoughts,[9] wear expressive clothing,[10] or conduct oneself in a manner deemed expressive in nature.[11]

For a governmental action to constitute the injury required for standing, the speech or conduct proscribed or restricted must fall within the ambit of protected expression. There is no injury from governmental action against unprotected speech. While the First Amendment affords expressive conduct varying degrees of protection,[12] it does not protect pure conduct.[13] Perhaps expressive conduct is infinite. Some limits are essential, however, lest the First Amendment have no meaning at all. Here, it is not our goal to argue whether or not nude dancing should continue to be protected expression under the First Amendment (likely, the co-authors disagree on that point); rather the focus will be on who should have standing to challenge governmental action that seeks to curtail this type of activity.

This article will also examine, generally, the doctrine of standing emanating from the "case" or "controversy" requirement found in Article III of the Constitution.[14] This article, furthermore, questions whether First Amendment standing ought to be made more stringent to better protect the meaning of First Amendment constitutional rights.

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[9] *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (granting First Amendment protection for printed advertisement allegedly defaming public official).

[10] *See, e.g.,* Cohen v. California, 403 U.S. 15 (1971) (granting First Amendment protection for man visiting courthouse and wearing jacket bearing the words "F___ the draft").

[11] *See, e.g.,* Texas v. Johnson, 491 U.S. 397 (1989) (granting First Amendment protection for flag burning).

[12] For example, commercial speech receives less protection than other forms of protected speech, *see, e.g.,* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), and lawyer speech receives even less protection, *see, e.g.,* Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978). The First Amendment, furthermore, does not fully protect indecent speech, as the Court has stated, "few of us would march our sons and daughters off to war" to protect it. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976). Obscene speech is afforded no protection at all.

[13] *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993). Physical assault is pure conduct and is "not by any stretch of the imagination expressive conduct protected by the First Amendment" even when the assailant intends to express an idea, in this case, bigoted thought. *Id.* Likewise, the First Amendment does not offer protection for illegal activity promulgated through an otherwise protected channel of free speech. *See also* Arcara v. Cloud Books, 478 U.S. 697 (1986) (finding that the sale of books in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating the illegal uses of the establishment); Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376 (1973) (denying First Amendment protection for a newspaper publishing gender categorized employment ads in violation of anti-discrimination statute); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992) (denying First Amendment protection for publication of advertisement for a "gun-for-hire").

[14] U.S. CONST. art. III, § 2.

While in many respects the First Amendment is unclear,[15] perhaps protected expressive conduct should be limited to the person making the expressive declaration. This calls into question whether the government should continue to afford standing to bar, lounge, and restaurant owners, and whether the government should allow them to maintain suits under the First Amendment for the bare expressive claims of their dancers.

II. BASIC REQUIREMENTS TO STAND BEFORE THE COURT

The doctrine of standing is one limitation on the federal courts.[16] Article III restricts matters before the courts to actual "cases" and "controversies."[17] The goal is to limit matters before the federal courts to those where the litigants have stakes in the matter so substantial and personal as to guarantee fierce and thorough advocacy.[18] The Supreme Court has defined the boundaries of the federal courts' authority to hear and adjudicate cases. The Supreme Court requires that the claimant allege: "(1) that plaintiff has suffered an "injury in fact;" (2) that there is a causal connection between the injury and the challenged conduct; and (3) that it is likely, not speculative, that the injury will be redressed by a favorable decision."[19]

Applying the standing doctrine in its classical sense, a plaintiff may only attempt to enforce a constitutional right on her own behalf.[20] This use of the standing doctrine means that the plaintiff must establish a personal injury in fact. To support an injury in fact, the plaintiff must show that there has been "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' "[21] A particularized injury is one which "affect[s] the plaintiff in a personal and individual way."[22] A plaintiff who fails to allege a specific and materialized injury simply does not have the requisite standing essential to maintain a case.[23]

Aside from the core elements of standing, the courts also consider various prudential concerns when exercising federal jurisdiction.[24] These concerns essen-

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[15] *See, e.g.*, Reno v. American Civil Liberties Union, ___U.S.___, 117 S. Ct. 2329 (1997) (finding unclear what version of First Amendment law will apply to cyberspace).

[16] *See* Association of Data Processing Org., Inc. v. Camp, 397 U.S. 150, 151-52 (1970) (citing Flast v. Cohen, 392 U.S. 83, 101 (1968)).

[17] *See id.*

[18] *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

[19] National Council for Improved Health v. Shalala, 122 F.3d 878, 881 (10th Cir. 1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[20] *See Shalala*, 122 F.3d at 882; Laird v. Tatum, 408 U.S. 1, 13-14 n.7 (1972).

[21] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing Whitmore v. Arkansas 495 U.S. 149, 155 (1990)). *See also* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (requiring plaintiff to show "actual or threatened injury").

[22] *Lujan*, 504 U.S. at 560 n.1.

[23] *See Shalala*, 122 F.3d at 884.

[24] *See Berner* 129 F.3d at 24 (citing United States v. AVX Corp., 962 F.2d 108, 114

tially ensure that the plaintiff's "tub rest on its own bottom."[25] Of importance here are two of the prudential doctrines.[26] The first requires that the plaintiff's claim "fall within the zone of interests protected by the law invoked."[27] The second emphasizes that the plaintiff is, for the most part, only eligible to "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[28]

Courts over the years have created and applied tests for federal standing which in some instances make it more challenging to obtain standing and in others make it more attainable. On fundamental issues such as free speech, an individual can file suit on behalf of others.[29] A third party, for example, may attack a regulation if it is overly broad.[30] This is justified because an overly broad statute regulating speech might have a chilling effect on individuals not personally appearing before the court.[31] The rationale for the doctrine is the fear that an overbroad law that is constitutional against the litigant might be unconstitutional as to another and chill the protected speech of another.[32]

The 1988 Supreme Court case of *Virginia v. American Booksellers Association*[33] illustrates this doctrine. The case focused on a Virginia statute that made it unlawful to "knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse visual or written material that depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles."[34] Although the law applied primarily to adult book stores, the plaintiffs claimed the broad statute applied to half of the stock in an average book store, including "classic literature, health texts, poetry, photography, and pot-boiler novels."[35] The Supreme Court held that the plaintiffs, a booksellers association and two non-adult book stores, had pre-enforcement standing to challenge the law.[36] The Court also found that the plaintiffs had "alleged an actual and well-founded fear that the law would be enforced against them. Further, the

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(1st Cir. 1992)).

[25] *Id.*

[26] Although these doctrines do not emanate directly from Article III, they do constitute additional criteria that courts may require before federal jurisdiction is granted. *See* New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996).

[27] Allen v. Wright, 468 U.S. 737, 751 (1984). *See also New Hampshire Right to Life*, 99 F.3d at 15.

[28] Warth v. Seldin, 422 U.S. 490, 499 (1975). *See also New Hampshire Right to Life*, 99 F.3d at 15.

[29] *See Shalala*, 122 F.3d at 882.

[30] *See id.*

[31] *See* Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 129 (1992). *See also* Alexander v. United States, 509 U.S. 544, 555 (1993).

[32] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 81, 87 (1994).

[33] 484 U.S. 383 (1988).

[34] *Id.* at 386 (citing VA. CODE ANN. § 18.2-391(a) (Supp. 1987)).

[35] *Id.* at 390-91.

[36] *See id.* at 393.

alleged danger of the statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."[37]

Courts, however, also reject such overbreadth challenges. In a challenge to the criminal forfeiture provisions of the federal Child Protection and Obscenity Act of 1988, the District of Columbia Circuit Court of Appeals held that the same plaintiff as in *American Bookseller's Association*, joined by other library and literary organizations, did not have standing to challenge the statute.[38] The Court of Appeals reasoned that the activity addressed by the Act, child pornography, was clearly criminal and not something that an establishment would have any difficulty defining.[39] In addition, the Court of Appeals held that "subjective chill" alone is not enough of an injury to confer standing, but that a plaintiff must also have "suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself."[40]

Even if the regulation is, in fact, overly broad, the challenging party must still satisfy the requirement that an injury in fact has been suffered.[41] Where bar owners have no First Amendment interest in expression and no First Amendment injury, the challenging of an overbroad ordinance on First Amendment grounds is questionable. Consequently, the bar owner does not appear to be a "speaker" entitled to standing.

III. WHO HAS ENOUGH BOTTOM TO BE CONSIDERED A SPEAKER

The language found in the First Amendment is clear regarding the protection of speech. The free-speech facet is predominately "communicator-oriented."[42] It grants an inherent right of protection to speakers and, essentially, modes of communication.[43] Thus, the logical beneficiary of First Amendment protection is the speaker or the communicator.

In the context of nude dancing, presumably there is only one speaker - the dancer. There is also only one mode of communication - the dance (or expression). Even if a bar, lounge or restaurant provides a good place to transmit the

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[37] *Id.*

[38] *See* American Library Assoc. v. Barr, 956 F.2d 1178 (D.C. Cir. 1992).

[39] *See id.* at 1192.

[40] *Id.* at 1193. On occasion, the Court has also "permitted First Amendment claims by those who did not themselves intend to engage in speech, but instead wanted to challenge a restriction on speech they desired to hear." Renne v. Geary, 501 U.S. 312, 319 (1991).

[41] *See Shalala*, 122 F.3d at 882 (citing Phelps v. Hamilton, 122 F.3d 1309, 1326 (10th Cir. 1997)). Additionally, standing is not a simple determination, but depends on a complex mix of constitutional and prudential considerations. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). Furthermore, standing is unwaivable and may be challenged at any stage of litigation. *See* United States v. Hays, 515 U.S. 737, 742 (1995).

[42] Rene L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171 (1990).

[43] *See id.*

dancer's message,[44] it is not the only forum available. The actual establishment which provides this type of entertainment, furthermore, is only an indirect channel. The direct channel is through the individual on stage and, theoretically, this individual could transmit the same "nude" message at other locations of his or her own choosing.[45] In *Barnes v. Glen Theatre, Inc.*,[46] nude performers brought suit under the First Amendment when the state of Indiana passed an indecency law requiring them to wear pasties and G-strings thus foregoing complete nudity while they performed.[47] The Kitty Kat Lounge and Glen Theatre, the employers, also filed suit with the dancers.[48] Claiming the statute violated the First Amendment, the parties brought suit to enjoin its enforcement.[49]

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[44] Again, this article takes no stance on whether there should continue to be a form of protected expression in nude dancing. The co-authors are possibly in disagreement on this point.

[45] A viable argument against the idea proposed here concerns bookstores. Why give bookstore owners First Amendment standing to challenge prohibitions on certain books and not allow owners of nude or topless dancer bars the same standing?

One possible response rests on the argument that the bar owners are not solely in the business of providing nude dancing. If the motivations behind the bars were solely to provide access to speech and information, the analogy may have more force. Those establishments providing nude entertainment can be distinguished from bookstores in that they capitalize on selling cocktails, enhanced by human anatomy. Unlike a bookstore, which is in the sole business of selling the thoughts and words of others, the financial success of the bar establishments at issue here comes from selling things other than speech or information. If a particular book is banned, then the bookstore has a definite argument that the ban is an infringement on the First Amendment. When restrictions are placed on nude dancing at local establishments, however, the argument is less definite and less direct. The less direct First Amendment argument is that because the arguably protected dance expression of an employee has been restricted, the establishment will sell less cocktails and make less money. A prime example can be found in a newspaper article, where a bar owner was quoted as saying that ". . . the whole point [of his enterprise] was t— and beer." Rossilli, *supra* note 1, at A6 (quoting Chris Couty, owner of the Outer Limits in Forrest County, Mississippi).

[46] 501 U.S. 560 (1991).

[47] *See id.* at 563 (1991).

[48] *See id.*

[49] *See id.* at 563-64. The Supreme Court applied the four-part O'Brien test, which will uphold a government regulation

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 567 (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). The Court held that although the statute placed "incidental limitations on some expressive activity," it did not exceed the constitutional authority of the state. *See id.* Furthermore, the Court held that "Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose." *Id.* at 572. The

Without regard to the merits or outcome of the case, the question is: why were the bar owners, who potentially lacked standing, allowed to pursue this challenge at the district court level, continue through the appeal, argue their stance on remand, carry it through another appeal and a subsequent hearing en banc, and argue it yet again at the Supreme Court?[50] The district court and the contending parties only briefly raised and addressed the standing issue.[51] Grouping the establishments and the performers together as eligible parties,[52] the district court concluded, with little standing analysis, that the parties had standing based on a "reasonable fear of prosecution."[53]

According to the traditional principles of standing, and even affording a claimant some leniency, the standing of the establishments deserved a harder look. Considering the constitutional and prudential concerns required, the court arguably should have dismissed the establishments from this lawsuit at its onset. At a minimum, the court should have distinguished the standing of the establishments from the standing of the dancers — as the statute directly affected their expression. The establishments lacked standing because: (1) they did not fall within the protected zone of interests under the First Amendment; (2) they did not suffer a First Amendment injury in fact; and (3) they were unnecessary participants for an overbroad statutory challenge since the dancers were already plaintiffs in the action.

Moreover, the bar owners' money making conduct is, arguably, just conduct and not expression. Mindful of limits to the First Amendment, the Supreme Court refuses to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[54] The Court, in *Spence v. Washington*,[55] devised a test to determine if conduct contains a message protected by the First Amendment. The *Spence* Court stated the test as "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[56]

Court determined that the State's compelling governmental interest was to protect "societal order and morality." *Id.* at 568.

[50] Glen Theatre v. Civil City of South Bend, 726 F. Supp. 728 (N.D. Ind. 1985), *rev'd*, Glen Theatre v. Pearson, 802 F.2d 287 (7th Cir. 1986), *on remand,* Glen Theatre v. Civil City of South Bend, 695 F. Supp. 414 (N.D. Ind. 1988), *rev'd*, Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), *vacated* Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), *rev'd,* Barnes v. Glen Theatre, 501 U.S. 560 (1991).

[51] *See* Glen Theatre v. Civil City of South Bend, 726 F. Supp. 728, 730 (1985).

[52] *See id.*

[53] *Id.*

[54] O'Brien, 391 U.S. at 376 (1968).

[55] 418 U.S. 405 (1974) (The defendant was convicted under a statute prohibiting "improper exhibition or display" of the American flag. The defendant, a college student, attached a peace sign onto a flag with tape as a sign of protest at the time of the Cambodian invasion and the Kent State incident.).

[56] *Id.* at 410-11.

In a later case, *City of Dallas v. Stanglin*,[57] the Court required the expressive element to be more than minimal, or more than a kernel.[58] Other language in the case is troubling and further suggests the need for a heightened standing requirement. The Court states that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[59] Arguably, a teenager walking in a mall may be seeking to convey a particularized message of "coolness" to the teenager's friends and any others present. This might indeed be the "particularized message" that under the circumstances would be understood by those who viewed it, especially other teenagers. However, if this is not expressive conduct, then how can the conduct of a bar owner who wants to be seen by others as a southern "Hugh Hefner" be expressive conduct either?[60]

In a case similar to the bar owner scenario set out above, the Supreme Court applied the test to nude dancing. In *Barnes v. Glen Theatre, Inc.*,[61] the Court held that nude dancing, as opposed to other forms of dance such as ballroom or aerobic dancing, was expressive conduct within the protection of the First Amendment, albeit "only marginally so."[62] In a concurring opinion, Justice Souter related how the performances given at The Kitty Kat Lounge and the Glen Theatre met the test described in *Spence* by conveying an "erotic message":

> . . .[D]ancing as a performance directed to an actual or hypothetical audience gives expression at least to a generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.[63]

Lower courts have misinterpreted the Supreme Court's cases, resulting in the expansion of the definition of who is a First Amendment speaker. In *Loper v. New York City Police Dep't.*,[64] the plaintiffs were two full time beggars representing a class of "all needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City."[65] The plain-

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[57] 490 U.S. 19 (1989).

[58] *See id.* at 25.

[59] *Id.*

[60] *Cf.* Rossilli, *supra* note 1, at 1A.

[61] 501 U.S. 560 (1991).

[62] *Id.* at 566.

[63] *Id.* at 581. However, although this dancing is expressive conduct, the Court had no problem finding that Indiana's "statutory requirement that the dancers in the establishments involved in this case wear pasties and G-strings does not violate the First Amendment." *Id.* at 565. Under the fourth prong of the *O'Brien* test, the Court also found the additional covering did little to stifle the erotic message. *See id.* at 587.

[64] 999 F.2d 699 (2d Cir. 1993).

[65] *Id.* at 701.

tiffs, on First Amendment grounds, enjoined enforcement of a statute prohibiting loitering for the purpose of begging or panhandling.[66] The statute was one of the tools employed as part of the city's new focus on "community policing."[67] This effort at battling problems with negative impacts on the quality of life in the city included the "intimidating and coercive"[68] conduct of panhandlers. On appeal, the New York Police Department argued that begging had no expressive element that would warrant First Amendment protection.[69]

The Second Circuit Court of Appeals in *Loper*, 999 F.2d 699 (2nd Cir 1993), however, affirmed the district court, holding that begging constituted protected speech or expressive conduct. The court relied on three Supreme Court cases that held that solicitation was protected speech: *Village of Schaumburg v. Citizens for a Better Environment*,[70] *Secretary of State of Md. v. Joseph H. Munson Inc.*,[71] and *Riley v. National Federation of the Blind of N.C. Inc.*[72] In her article on the case, Fay Leoussis argues that in all three cases, the First Amendment protected the informational speech imparted with the solicitation and the solicitation itself.[73] Leoussis contends that the solicitation "is shorthand for what the Court has previously said—when a person is soliciting for a charity, political organization, religion, or other cause and is imparting information during the act of solicitation, that informational speech is protected by the First Amendment" and not the solicitation itself.[74] In the cases relied upon by the Second Circuit, the Supreme Court granted protected status because the solicitation was "inextricably intertwined with some specific idea, belief, social message, or information being conveyed."[75] While acknowledging that a panhandler is seeking only money, the *Loper* court seems to have disregarded the decisions it relies on by the following statement:

> We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed.

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[66] *See id.*

[67] *Id.*

[68] *Id.*

[69] *See id.*

[70] 444 U.S. 620 (1980) ("Soliciting financial support is subject to reasonable regulation, but such regulation must be undertaken with due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues . . . and that without solicitation the flow of such information and advocacy would likely cease.").

[71] 467 U.S. 947 (1984) (finding that a professional fundraiser is paid to disseminate information on behalf of charities does not in itself render the activity outside the protection of the First Amendment).

[72] 487 U.S. 781 (1988) (finding that protected speech includes solicitation of charitable contributions).

[73] *See* Fay Leoussis, *The New Constitutional Right to Beg - Is Begging Really Protected Speech?*, 14 ST. LOUIS U. PUB. L. REV. 529, 537-38 (1995).

[74] *Id.* at 538.

[75] *Id.*

> The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.[76]

Leoussis argues that the distinction is an important one, and that the Second Circuit ignored the distinction clearly made in the three Supreme Court decisions. A solicitation for a cause or organization necessarily involves the exchange of information, the "kernel"of expression required by prior Supreme Court decisions; whereas "the mere fact that panhandlers use words to demand money does not convert their conduct into speech that conveys a message."[77] Leoussis uses the term "performative utterance" in describing language "that essentially was an action rather than an expression of an idea."[78] Furthermore, she believes that, despite the Second Circuit's decision, the loitering and begging proscribed by New York's statute was a proper regulation of pure conduct.

The Second Circuit's decision in *Loper* is, perhaps, a prime example of the need for tougher First Amendment standing requirements. The *Loper* Court should have held that the begging was unprotected because: (1) the begging was arguably mere conduct; (2) begging had generally been illegal in New York since 1791; and (3) the First Amendment does not apply to the same extent to illegal activity.[79]

Under a theoretical tougher standard, where plaintiffs must more affirmatively prove an intent to convey a protected message, the nude dancers would probably still have standing. Bar owners, on the other hand, would most likely lack standing to launch challenges based on the First Amendment.

From the facts, the "aspiring Hugh Hefner"[80] could urge that he seeks to convey a message, albeit a message of a lifestyle already promulgated and commercialized by the real "Hefner." With a glance backwards at the nation's sexual revolution of the late Sixties and early Seventies, the statement that he wanted to be a "Southern Hugh Hefner" could be viewed as a shorthand message espousing that type of lifestyle. The *Spence* test, however, requires that such a message must be clearly understood by those who view or hear it. The aspiring Hefner would have a hard time proving that his customers are receptors of his lifestyle message as opposed to receptors of cheap thrills.

Conversely, according to the holding in *Barnes v. Glen Theatre, Inc.*, the dancers themselves would seem to have no problem affirming their particularized erotic message.[81] The fact that they perform primarily for money would

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[76] *Loper*, 999 F.2d at 704.

[77] Leoussis, *supra* note 73, at 536-37.

[78] *Id.* at 537 n.63 (quoting the Oxford philosopher John Langslow Austin).

[79] *See id.* at 543-44.

[80] Rossilli, *supra* note 1, at 1A.

[81] *See* Barnes, 501 U.S. at 560. The bar owner and dancers would hardly seem to have any protection at all under the "original intent" school of thought. It is unlikely that even such a renaissance man as Thomas Jefferson would see the connection between "lap dances" and self governance. However, under the idea of a societal safety valve that promotes stability in government, the concept takes on more merit, depending, of course, on

hardly be a bar, since most of the world's greatest singers also perform for compensation, yet likely no one would consider denying them First Amendment protection for their particularized messages.[82]

Tougher standards, however, would have little effect upon a court unable or, as could be argued by *Loper*, unwilling to apply them. A more stringent standing requirement for First Amendment cases also raises the specter of which Justice Brennan warned, that courts could use the requirements dishonestly to cover their hostility to the merits of a claim.[83] With the explosion of communication technology, such as the Internet, now is possibly not the time to adopt a new standing requirement. The Internet has already begun to generate slander, defamation and libel lawsuits against so called "Net Journalists."[84] The standing re-

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an individual's opinion of adult entertainment. One could argue that human beings all have a certain inherent appetite for vice. Many people enjoy strip clubs, alcohol, smoking, or any number of habits that are not in themselves beneficial. Where a government curtails one of these vices, it fosters hostility toward the government, thus promoting instability. For a historic example, one could look to the Eighteenth Amendment, which created the prohibition on alcohol. Prohibition, in turn, lead to more than a decade of violence between competing bootleggers and rampant corruption among elected officials nationwide. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend XXI.

[82] *But cf.* Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992); Blake D. Morant, *Restraint of Controversial Musical Expression after Skyywalker Inc. v. Navarro and Barnes v. Glen Theatre, Inc.: Can the Band Play On?*, 70 DENV. U. L. REV. 5 (1992).

[83] *See* Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting). The "market place theory" of the First Amendment has the most merit in this hypothetical: If strip clubs are indeed a bad message of falsehood, the truth will eventually overcome that message. Taking into account the rapidly growing adult entertainment industry, perhaps there is a truth involved, related to the idea of a societal safety valve. *Cf.* Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 44 ("Americans now spend more money at strip clubs than at Broadway, off-Broadway, regional, and nonprofit theaters, at the opera, the ballet, and jazz and classical music performances—combined.").

As to the "human dignity" school of thought, one could argue that the dancers' spirit of self-expression is enough justification for First Amendment protection. One could more forcefully argue, however, that basic concepts of human dignity rarely, if ever, enter the world of adult clubs.

[84] *Is AOL Liable for Drudge's Libel? If So, "News on Net" May Vanish*, NAT'L L. J., Sept. 15, 1997, at B7. Matt Drudge writes The Drudge Report, a compendium of unconfirmed gossip available from his Web site and e-mailed to 85,000 people. *See id.* In July of 1997, America Online ("AOL") announced it had hired Mr. Drudge and was giving him "a home" on its service, whose subscribers now number 9 million. *See id.* Rumor has it (as Mr. Drudge might say) that AOL is his sole source of income. *See id.* Mr. Drudge broadcast in August 1997 that a then new adviser to the President, writer and former journalist Sidney Blumenthal, had a history of spousal abuse that had been concealed. *See id.* Mr. Drudge later retracted the item. Mr. Blumenthal and his wife have sued both Mr. Drudge and AOL in federal district court in Washington, D.C., for $30 million, alleging 21 counts of libel, defamation, false light invasion of privacy, intentional infliction of emotional distress, and slander (from spoken remarks Mr. Drudge gave to

quirement arguably might need to become more flexible in order to adapt to the new technology. Furthermore, a tougher standard, such as an elimination of third party standing under the overbreadth doctrine or requiring the plaintiff to more affirmatively prove and meet the "intent to convey a particularized message" test of *Spence,* might eliminate more worthy claims than avoid meritless ones.

IV. BAR OWNERS' BOTTOMS ARE PROBABLY NOT IN FIRST AMENDMENT ZONE AND, EVEN IF BRUISED, FIRST AMENDMENT CAN'T HEAL THEM

The standing inquiry into the "zone of interests" asks whether the constitutional guarantee, or in some cases a specific statute, was intended to afford a person the right to bring an action.[85] It has already been suggested that perhaps protection of free speech under the First Amendment goes to the speaker or the communicator. It seems that the nude performers are the only ones to speak or communicate a message through their movement, so the protection should be theirs and theirs alone. To borrow the words of the First Circuit, the dancers have enough "bottom" to support their own "tub" of First Amendment claims.[86] What possible message could the establishments be trying to convey through the movement and expression of the nude dancers whom they employ? If the establishments fall within the zone of interests in this context, then arguably so do patrons and anyone else who can find a connection.

The establishments must allege more than that the restrictive legislation violates the First Amendment.[87] At the very least they must demonstrate that they have suffered a First Amendment injury in fact.[88] For an injury in fact to survive the standing analysis, however, the harm must be specific and realized, not merely alleged.[89] Injury in fact includes certain economic, aesthetic, and conservational injuries.[90] However, in the context of the First Amendment's guarantee of free speech, arguably, the cognizable injury should rest on the suppression of expression. Limiting the injury in fact to suppression, the only possible claimants would be the dancers. This certainly would eliminate free-rider claims, while strictly enforcing the integrity of Constitutional protections. The true injury to the establishments providing nude entertainment would be economic. Assuming this constitutes a sufficient type of injury in fact, it is still an incidental result of a direct injury to another party. This type of linkage could become never-ending and potentially poses the risk of creating superficial claims based on superficial injuries. Also, this type of economic injury is possibly too speculative. The regulation in *Barnes* only required pasties and a G-string to be worn

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newspaper reporters). *See id.*

[85] *See* Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 811 (D.C. Cir. 1987).

[86] *See Berner,* 129 F.3d at 24.

[87] *See City of Edmond,* 116 S.Ct. at 1703 (Rehnquist, C.J., dissenting).

[88] *See id. See also Valley Forge,* 454 U.S. at 485.

[89] *See Shalala,* 122 F.3d at 884.

[90] *See Data Processing,* 397 U.S. at 154 (citing Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965)).

by the otherwise nude dancers.[91] Arguably, the Kitty Kat Lounge and Glen Theatre could still provide the bare entertainment that they promoted - but, just a little bit less of it.

One of the more fundamental concepts under the standing doctrine is that an individual is only entitled to assert his own rights and not those of another.[92] Although this is not a mandatory restriction under Article III, it is one of the prudential concerns that the courts take into consideration.[93] However, there are exceptions which allow third party standing. One in particular is when the case involves constitutional protections.[94] The court essentially balances the interest behind prohibiting standing to a third party and the protection of the fundamental rights at issue.[95]

Courts should take certain factors into consideration when determining whether to allow third party or jus tertii standing. First, the individual must have suffered an injury in fact, which satisfies Article III's "case-or-controversy requirement."[96] Second, the court must take into account any prudential concerns.[97] As a part of its prudential analysis, the court must focus on the relationship of the individual filing suit and the interested third party; whether the third party is capable of asserting his own rights; and what the impact will be on the third party if the court allows litigation to ensue.[98] Whether any economic injury is concrete or particular enough to satisfy the essential criteria is questionable. For instance, the Court's restrictions on nude dancing in *Barnes* were minimal. From an objective standpoint, one could still view more nudity than cover. That case hardly paints a picture of businesses that would fail due to Indiana's indecency restrictions. The claimant's injury must be something more than speculative for the court to recognize it.[99]

The prudential considerations present even more questions as to the jus tertii standing of nude dancing establishments. The problem does not lie so much in the well developed relationship between the establishment and its employees. Nor does it lie with the possible impact that the litigation would have on the in-

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[91] *See Barnes*, 501 U.S. at 563.

[92] *See* Powers v. Ohio, 499 U.S. 400, 410 (1991); Gladstone v. Village of Bellwood, 441 U.S. 91, 100 (1979) (noting that "a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part"); Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in Federal Courts*, 35 U. MIAMI L. REV. 393, 394 (1981) (noting that "a litigant may not argue that the governmental conduct that causes him harm should be enjoined or declared illegal simply because the conduct infringes on the rights of a third party").

[93] *See* Hodel v. Irving, 481 U.S. 704, 711 (1987) (referring to third party standing as a prudential limitation); Craig v. Boren, 429 U.S. 190, 193 (1976) ("limitations on a litigant's assertion of jus tertii are not constitutionally mandated").

[94] *See* Barrows v. Jackson, 346 U.S. 249, 257 (1953).

[95] *See id.*

[96] Caplin & Drysdale v. United States, 491 U.S. 617, 623-24 n.3 (1989).

[97] *See id.*

[98] *See id.*

[99] *See Lujan*, 504 U.S. at 560.

terested third party. The problem exists with the ability of the interested third party to assert her own claim.

Often the primary concern with a restriction placed on fundamental rights is that it is defined too broadly and will jeopardize the rights of others.[100] However, in the context of laws placing restrictions on nude dancing the restricted parties are well-defined - they are the nude dancers. It would probably be unnecessary for someone else to assert First Amendment rights for them. Even more difficult to explain is why courts would allow any other party, like bar owners, standing to pursue a claim based on the dancers rights, when the dancers themselves are parties to the suit. This is exactly what transpired in *Barnes*.[101] Thus, it seems the establishments in *Barnes* were actually asserting their own distinguishable claims based upon the First Amendment rights of the dancers.

In a society where people tend to protect only their own interests, one should scrutinize the motivations of persons claiming to voice the rights of others. With all the requirements for standing, the sincerity of a claim should have a place in the analysis. Although it is acknowledged that this criterion could easily be circumvented, there certainly are times when false motivations are evident. An example is when an establishment complains of a First Amendment violation because legislation prohibits a dancer from performing completely nude. The establishment's only concern is that it might lose money.

Perhaps it is naive to believe that the establishment is concerned that restrictions limit performers from conveying their complete message. Even if they are concerned, that alone does not qualify them to be a legitimate party in a challenge for free speech. Arguably, the only comprehensible injury to the right of free speech is suppression, and the only appreciable remedy is freeing speech. The injury to the bar owner's establishment is financial. The remedy it seeks is money, profits and patrons. The bar owners' interests are only indirectly related to, if not completely in conflict with, the guarantees of the First Amendment.

V. CONCLUSION

Writing the conclusion to this article is difficult. Three different co-authors producing three different conclusions is a likely result considering that the First Amendment is at issue.

Leslie Barry

The issue presented here questions the standing of establishments that provide nude entertainment to initiate and maintain a claim based on First Amendment free-speech rights. The courts as well as the commentators have criticized the

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[100] *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992); Alexander v. United States, 509 U.S. 544, 555 (1993).

[101] *See Barnes*, 501 U.S. at 562-63. Chief Justice Rehnquist began his opinion by introducing the establishments and the dancers as respondents and specified that the respondents' claim rested on the First Amendment's guarantee of free speech (expression). *Id.*

lack of respect given to the concept of standing.[102] Generally, the courts manipulated the standing doctrine to avoid unpleasant issues and address more desirable ones.[103] Commentators note that courts commonly abuse both the injury in fact requirement and the zone of interest requirement.[104] Scholars criticize the courts for convoluting standing through interpretations that define the zone of interests too broadly or too narrowly[105] or hinder the plaintiff's asserted injury.[106] These arguments still shed no light on why the court allowed the establishments in Glen Theatre to be parties to that particular First Amendment challenge. Even if we were to give the utmost deference to the possible exceptions, it makes no sense to allow the establishments to cry "First Amendment violation" because they had an independent reason for being there. The whole standing analysis focuses on the legitimacy of the party or parties filing suit.[107]

Even where the plaintiff has a sufficient injury pursuant to Article III, the complaint must still fall "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[108] This is perhaps the strongest and most compelling argument against allowing the establishments to bootstrap merely incidental claims onto arguably legitimate interests. There is no other way to articulate the interest of the First Amendment's protection of free speech but to say that it protects speech (and consequently the speaker) from suppression.

If a claimant does not seek to reopen the channel for his own speech, then he has no standing in an ongoing lawsuit concerning someone else. What some argue as extra protection for a First Amendment guarantee is really false protection that chips away at the integrity of a person's Constitutional rights. Courts should not allow establishments providing nude entertainment to use their incidental economic interests to clothe the bare claims of their nude performers.

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[102] *See* Colleen T. Sealander, *Standing Behind Government-Subsidized Bipartisanship*, 60 GEO. WASH. L. REV. 1580 (1992) (referring to Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting), and describing standing as "a word game played by secret rules"); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) ("[t]he structure of standing law [is] incoherent."); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41 (standing is a "troublesome subject").

[103] *See* Sealander, *supra* note 102, at 1581.

[104] *See id.* at 1582.

[105] *See id. See also* Stephen M. Kahaner, Chapter, *Separation of Powers and the Standing Doctrine: The Unwarranted Use of Judicial Restraint*, 56 GEO. WASH. L. REV. 1074, 1078 (1988) (stating that Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987), is a prime example of a court manipulating the standing principles to avoid deciding the issue).

[106] *See* Sealander, *supra* note 102, at 1582. *See also* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 79 (1984) ("[t]he injury concept has suffered from judicial manipulation[.]").

[107] *See* Flast v. Cohen, 392 U.S. 83, 99 (1968).

[108] *Data Processing*, 397 U.S. at 153.

Mark Fijman

"Patriotism is the last refuge of a scoundrel."[109] But, on the other hand, "I [may] disapprove of what you say, but I will defend to the death your right to say it."[110]

During the eighteenth century, the English poet Samuel Johnson astutely noted the inclination of villains to wrap themselves in the flag for their own advantage. If we transported Dr. Johnson to America on the eve of the twenty-first century, he might note that the modern scoundrel forgoes the flag and seeks shelter under the First Amendment to the Constitution. Some legal commentators, as well as members of the public-at-large, have argued that allowing the First Amendment to be a safe harbor for any conduct or expression, however tenuously or remotely linked to speech, serves only to dilute the protection afforded "true speech." Is speaking out to protest oppression and injustice at the hands of the state to be considered no more deserving of protection than the right to panhandle and ask passerbys for spare change?[111]

Some perceive that those who use the First Amendment's guaranteed right of free speech as a last resort to validate pornography,[112] racist hate speech,[113] and a host of offenses that weaken the fabric of society, subvert that right. In light of all these perceived "abuses" of the First Amendment, it is vital to remember, however, that the First Amendment is not intended to solely protect those things that we personally find fitting and proper. The First Amendment also serves as the shield for that speech or expressive conduct that may irritate and grate upon the sensibilities of the vast majority of Americans. Indeed, that may be the most valuable protection of all.

Those calling for more stringent First Amendment standing requirements are quick to bifurcate the artistic strippers from the mercenary bar owners in *Barnes* or the hypothetical scenario described earlier in this work.[114] The "theoretical" assertion that a stripper could transmit the same "nude" message at some other location of his or her own choosing is unrealistic at best. As a bookstore sells books, the adult clubs equally sell the same message of eroticism as the dancers themselves, by serving as vehicles of expression. As the late Marshall McLuhan

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[109] JAMES BOSWELL, LIFE OF JOHNSON, 615 (R.W. Chapman ed., Oxford Univ. Press 1980) (1775).

[110] JOHN BARTLETT, FAMILIAR QUOTATIONS 305 (Justin Kaplan ed., 16th ed. 1992). The quote commonly attributed to the French writer and Philosopher Voltaire is in fact S.G. Tallentyre's summary of Voltaire's attitude towards Helvetius following the burning of the latter's *De L'Esprit* in 1759).

[111] *See Loper*, 999 F.2d at 699 (affirming a lower court decision enjoining enforcement of an anti-begging ordinance on the grounds that begging and panhandling constituted protected speech).

[112] *See, e.g.*, Catherine Mackinnon, *Pornography, Civil Rights and Speech,* 20 HARV. C.R. C.L. L. REV. 1 (1985).

[113] *See, e.g.*, Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* 1990 DUKE L.J. 431 (1990).

[114] *See supra*, text accompanying notes 46-84.

might have noted, "the medium is the message."[115] If one removes protection for the medium of expression, however distasteful, one renders the protection given the speaker meaningless.

One other problem with imposing an additional "First Amendment standing" requirement is that standing will then be used as an excuse for a court to refuse to consider certain cases on their merits. While standing supposedly does not concern the merits of the case itself, some claim that judges would wield the standing requirement like a weapon, tossing "out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional."[116] Critics claim that such conduct "can be explained only by an indefensible hostility to the claim on the merits."[117] It seems impracticable and imprudent to tinker with First Amendment standing requirements in an effort to make the price of admission beyond the average plaintiff. While we are living in the so-called "Information Age," the freedom guaranteed by the First Amendment could be facing even greater threats because of the growing centralization of control over the bank of information.

With apologies to Dr. Johnson, it is infinitely more tolerable for a few scoundrels to wrap themselves in the First Amendment in order to insure that it will be equally available to the hero and the victim.

Angela Kupenda

The First Amendment rules are so complex partly because the courts have determined that some forms of protected speech are more deserving of protection than other forms of protected speech. The results are numerous, often unintelligible, rules with even more, often nonunderstandable, exceptions. While courts must protect First Amendment freedom of speech, some litigants simply have no First Amendment interests or injury at stake.

On the other hand, a heightened standing requirement, even if limited to the First Amendment area, may be dangerous to constitutional rights. In some cases, the courts have used standing as an excuse to avoid addressing the merits and remedying claims full of merit.[118] While its imposition is potentially troublesome, for the sake of obtaining some predictability and consistency in First Amendment jurisprudence, the courts should at least explore a new, heightened standing requirement. This paper's purpose is to begin that exploration.

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[115] MARSHALL MCLUHAN, UNDERSTANDING MEDIA 7 (1964).

[116] Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting).

[117] *Id.*

[118] *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984) (denying standing to black parents who sought to challenge Internal Revenue Service's granting of tax exempt status to racially discriminatory private schools); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) (denying standing to poor people who sought to challenge Internal Revenue Service ruling giving favorable tax treatment to hospitals that refused to fully treat poor patients).