

# When May Parties Litigant Assert Constitutional Rights of Others? - Barrows v. Jackson

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

*When May Parties Litigant Assert Constitutional Rights of Others? - Barrows v. Jackson*, 14 Md. L. Rev. 90 (1954)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol14/iss1/9>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## WHEN MAY PARTIES LITIGANT ASSERT CONSTITUTIONAL RIGHTS OF OTHERS?

### *Barrows v. Jackson*<sup>1</sup>

In addition to the substantive constitutional law issue discussed in the preceding note, this case brought forth sharp argument as to whether that question was properly before the court. It was argued that the respondent who was being sued for money damages for her breach of a restrictive covenant was relying on the rights of prospective Negro purchasers as a defense, and thus that she was not claiming an abridgement of any constitutional right of her own, but was asserting the rights of others not parties to the action. Mr. Justice Vinson accepted this argument and wrote a vigorous dissent asserting that the Court "by a unique series of arguments has developed a unique exception to an otherwise easily understood doctrine".<sup>2</sup>

The six justice majority opinion, apparently disturbed by the argument, acknowledged that as a general rule a party has no standing in the court to vindicate the constitutional rights of a third party, but that under the peculiar facts of this case a departure from the rule was warranted. The Court then broke down its precedents into: (a) those that supported the constitutional doctrine that in order to have a "case" or "controversy", there must be a party with a direct legal interest at stake in a real (not moot or hypothetical) controversy<sup>3</sup> and (b) the self imposed doctrine of the Court that it will not try constitutional issues at the behest of one whose constitutional rights are not at stake.<sup>4</sup> As to the former, the Court said:

"This principle has no application to the instant case in which the respondent has been sued for damages totaling \$11,600 and in which a judgment against respondent would constitute a direct, pocketbook injury to her."<sup>5</sup>

---

<sup>1</sup> 346 U. S. 249 (1953) — discussed on its merits in the preceding note and with the facts sufficiently set forth therein to support the procedural point which is discussed herein.

<sup>2</sup> *Ibid.*, dis. op. 260.

<sup>3</sup> *Muskrat v. U. S.*, 219 U. S. 346 (1911); *Chicago &c. Railway Co. v. Wellman*, 143 U. S. 339 (1892); *Coleman v. Miller*, 307 U. S. 433 (1939).

<sup>4</sup> See *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, conc. op. 149-154 (1951); *Ashwander v. Valley Authority*, 297 U. S. 288, conc. op. 341, 347-348 (1936).

<sup>5</sup> *Supra*, n. 1, 255-6.

As to the latter, the Court said:

“This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another’s rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.”<sup>6</sup>

In the present case, the defendant to the damage claim would suffer a direct legal injury, if not allowed to plead the unconstitutionality of the Court’s imposition of damages even though such unconstitutionality arises primarily to protect others.

It has long been established that in order to have access to the Supreme Court, a party must have adequate standing as a bona fide party litigant with a direct legal interest in a real (not moot) case.<sup>7</sup> This doctrine is generally recognized to be part of the constitutionally imposed limitation that the jurisdiction of the court is restricted to “Cases” and “Controversies”.<sup>8</sup>

Mr. Chief Justice Marshall in speaking of the judicial power conferred by Article III of the Constitution said:

“The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to ‘a case in law or equity’, in which a

<sup>6</sup> *Ibid.*, 257.

<sup>7</sup> See *Coleman v. Miller*, *supra*, n. 3, 460, 464, 467, Mr. Justice Frankfurter’s concurring opinion:

“The Constitution further explicitly indicated the limited area within which judicial action was to move — however far-reaching the consequences of action within that area — by extending ‘judicial Power’ only to ‘Cases’ and ‘Controversies’.

“ . . .  
“No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all.

“ . . .  
“We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it.”

<sup>8</sup> *Supra*, n. 3.

right, under such law, is asserted in a court of justice. If the questions cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article."<sup>9</sup>

In order to gain standing in the court, the plaintiff and defendant must be adverse parties with a genuine controversy; that is, it must not be merely a friendly suit. The basic purpose of this constitutional doctrine (namely to restrict the Court to acting judicially) is satisfied in the instant controversy for the respondent is about to suffer a direct pocketbook injury.

The Supreme Court has also developed for its own governance in cases within its jurisdiction, other rules under which it has avoided passing upon a large part of all the constitutional questions before the court.<sup>10</sup> The court will not decide a constitutional problem before it has to,<sup>11</sup> nor will it pass upon a constitutional question, if there is another ground upon which the case may be disposed of.<sup>12</sup> Where the validity of a statute is in question, the court will ascertain whether a construction of the statute is possible under which the question may be avoided.<sup>13</sup> Also the court will not adopt a rule of constitutional law broader than is required by the precise facts of the case.<sup>14</sup>

Along with the other rules adopted for its own governance, the Supreme Court early adopted what the court called a "complementary rule of self-restraint",<sup>15</sup> which it was claimed the court deviated from in the instant case, setting up the requirement that a person challenging a statute must show that he himself is injured by its operation and is in the class to be protected.

There have been many cases reaffirming this principle. In *Tileston v. Ullman*,<sup>16</sup> a doctor sought to have a state statute prohibiting the use of, or counselling in the use of, contraceptives declared unconstitutional as a deprivation of life without due process of law. The court held that the doctor had no standing in the court as he was asserting the

<sup>9</sup> *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 405 (1821).

<sup>10</sup> *Ashwander v. Tennessee Valley Authority*, *supra*, n. 4, conc. op. 341, 346-348.

<sup>11</sup> *Abrams v. Van Shaick*, 293 U. S. 188 (1934); *Wilshire Oil Co. v. U. S.*, 295 U. S. 100 (1935). See n. 10, *supra*.

<sup>12</sup> *Berea College v. Kentucky*, 211 U. S. 45 (1908); *Light v. United States*, 220 U. S. 523 (1911). See n. 10, *supra*.

<sup>13</sup> *Crowell v. Benson*, 285 U. S. 22 (1932); *Lucas v. Alexander*, 279 U. S. 573 (1929). See n. 10, *supra*.

<sup>14</sup> *Steamship Co. v. Emigration Commissioners*, 113 U. S. 33, 39 (1885). See n. 10, *supra*.

<sup>15</sup> *Supra*, n. 1, 255.

<sup>16</sup> 318 U. S. 44 (1943).

rights of his patients and not his own. In *Tyler v. The Judges*,<sup>17</sup> the petitioner sought to have a land registration act declared unconstitutional on the grounds that the rights of parties might be foreclosed without actual notice to them. The court held that since the petitioner did have actual notice, and had not proceeded to assert his rights before the land registration board and then by way of appeal therefrom, he had not shown that *his* property was being taken from him without due process of law under the Act. The Court reasoned that it could not pass upon the general question of whether the statute would deprive others of their property without due process of law.<sup>18</sup>

The recent case of *Doremus v. Board of Education*,<sup>19</sup> is another example of the requisite standing necessary to challenge a statute. A New Jersey statute provided for the reading of verses from the Bible at the beginning of each school day. The statute was sought to be declared unconstitutional in an action by a parent, as such and as a taxpayer, because it amounted to an establishment of religion as prohibited by the First Amendment and made applicable to the states by the Fourteenth Amendment. The Supreme Court dismissed the action for want of jurisdiction. The court felt that the parent's action, based on harm to the child had become moot by the child's graduation, and that the taxpayer's action showed no measurable appropriation of school funds for the purposes complained of.

This rule of the Court on taxpayers' actions stems from *Frothingham v. Mellon*,<sup>20</sup> where the right of a federal taxpayer to challenge a federal statute establishing a grant-in-aid program involving the appropriation of federal revenues in assistance of state programs fostering maternity health, was involved. The Court held that the petitioner could not raise the issue; her interest in the money of the treasury was so infinitesimal and she could make no showing that

---

<sup>17</sup> 179 U. S. 405 (1900).

<sup>18</sup> The court recognized that there would have been a different problem before it had the petitioner sought to challenge the constitutionality of the act before the Board of Land Registration, so that he would have exhausted his state court remedies before seeking Supreme Court relief, and had that proceeding resulted in denial of his substantive claim. *Cf. Wuchter v. Pizzutti*, 276 U. S. 13 (1928), where a non-resident motorist act which provided for service upon the non-resident through the Secretary of State was involved. The act made no provisions for notice to be sent to the non-resident defendant, although in this case, the defendant did have notice. The statute was declared unconstitutional as a denial of due process, even though the petitioner was not harmed. He was however in the class to be protected. The constitutional validity of notice provisions is not tested by what has been done, but by what may be done under the provisions.

<sup>19</sup> 342 U. S. 429 (1952).

<sup>20</sup> 262 U. S. 447 (1923).

any of her tax funds were directly used for the program in question. Thus, in order for one assailing a statute to prevail, it was generally believed that one must show not only that the statute was invalid, but that he had suffered or was about to suffer some *direct* injury as a result of its enforcement, and not that he might suffer in some manner with the people generally. The court did however limit its result to a taxpayer seeking to enjoin the execution of a federal appropriations act, for the interest of a taxpayer of a municipality in the use of its money had previously been held to be sufficiently direct to sustain his standing to sue.<sup>21</sup>

The court in *Barrows v. Jackson*,<sup>22</sup> justified its departure from the normal rule (if departure there was) by stating that in other unique situations in the past, the court had done the same.<sup>23</sup> It cited in particular the case of *Pierce v. Society of Sisters*.<sup>24</sup> In that case an Oregon statute required all parents to send their offspring to public schools. A private military academy and a Catholic school sought to enjoin the enforcement of the statute as a violation of the Due Process Clause of the Fourteenth Amendment. The court held for the private schools stating:

“. . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>25</sup>

The Court thus rested its decision upon the constitutional rights of the parents in a suit brought by others and thus seemingly departed from the general rule. However, the denial of the constitutional rights of the parents did threaten the existence of property of the private schools, and also to a degree interfered with the schools liberty to teach.<sup>26</sup> As such, although the schools were asserting the rights of others, it was apparent that the unconstitutional infringement of the parent's rights likewise involved a taking of the property of the private schools as well as an interference with their liberty.

---

<sup>21</sup> *Crampton v. Zabriskie*, 101 U. S. 601 (1879). Also the prevailing view is that a state taxpayer may also enjoin an improper expenditure of state funds, *Page v. King*, 285 Pa. 153, 131 Atl. 707 (1926).

<sup>22</sup> *Supra*, n. 1.

<sup>23</sup> *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Truax v. Raich*, 239 U. S. 33 (1915); *Wuchter v. Pizzutti*, *supra*, n. 18; *Columbia System v. U. S.*, 316 U. S. 407 (1942).

<sup>24</sup> *Supra*, n. 23.

<sup>25</sup> *Ibid.*, 534.

<sup>26</sup> *Ibid.*, 535. Also *Cf. Meyer v. Nebraska*, 262 U. S. 390, 400 (1923).

In *Truax v. Raich*,<sup>27</sup> the Court was concerned with an Arizona statute which required an employer to have at least 80% of his employees native born citizens. An alien employee, about to be discharged sought to have the statute enjoined. The state contended that the servant was complaining for his master, for the employer was subject to prosecution, not the employee. But the Court dismissed this contention saying that the act operated directly upon the employment of aliens and therefore it was "idle to call the injury indirect or remote".<sup>28</sup>

In *Buchanan v. Warley*,<sup>29</sup> a white vendor who had contracted to sell to a Negro was seeking to have a zoning ordinance, prohibiting Negroes from living in a certain district, declared unconstitutional. Although he was not a member of the class, to which the ordinance was directed, the Court held that the white vendor had standing to attack the statute, because the statute unconstitutionally abridged the vendor's right of alienation.

In all three of these cases last discussed, the complainant was not a member of the class against which the language of the statute was directed, but he did have a traceable personal or property interest directly affected by the application of the statute, which interest he was asserting in the proceeding. Careful analysis of the *Pierce* case,<sup>30</sup> along with those others cited as precedent by the majority opinion for departing from the usual rule, makes it clear that the complaining party in each instance had himself suffered or would suffer a legal wrong by the enforcement or application of an unconstitutional statute, even though the unconstitutionality flowed from a denial of the rights of others.

The instant case is no different except that the unconstitutional action of the state is not legislative (statutory) action, but the state sanction of a damage suit (court action) enforcing a common law validity for a racial restrictive covenant. If that was to be permitted, there was no doubt that the respondent would suffer a direct legal injury by being obliged to pay damages in the instant suit. There was no moot problem, no request for an advisory opinion, nor was there an attack upon a statute (or state imposed common law rule) by one not directly affected by it. It was a simple case of a defendant to a law suit saying that if the state court should hold him for damages, that would be state action in unconstitutional enforcement of a racial re-

<sup>27</sup> *Supra*, n. 23.

<sup>28</sup> *Ibid.*, 39.

<sup>29</sup> 245 U. S. 60 (1917).

<sup>30</sup> *Supra*, n. 23.

restrictive covenant. Since the respondent could show a direct injury, she could assert the rights of the parties who would be discriminated against by enforcement of the restrictive covenant and who could in no way assert their own rights.

There have been numerous cases in the state courts which hold that a party may attack the constitutionality of a statute which discriminates against a certain class of citizens, where the citizens discriminated against could not assert their own rights.<sup>31</sup> In *Greene v. State*,<sup>32</sup> a Defendant, convicted under a statute which made it a penal offense to commit blackmail against citizens or residents of Nebraska, successfully attacked the statute as being unconstitutional by reason of the fact that it protected only Nebraskans, and therefore discriminated against citizens or residents of other states under Article 4, Section 2.<sup>33</sup> The court recognized the general rule, but held it inapplicable where the persons discriminated against had no means of bringing the question before the court for its determination.

It would seem therefore that when a party is before the court in a proper "case" or "controversy" asserting a legal interest which is being infringed upon as of the present moment, it is proper for him to assert the constitutional right of others, the denial of which constitutes the claimed infringement.

With reference to the Court's stated willingness to depart from any self-imposed limitation in order to face an important issue that might otherwise be left undecided, there is little doubt that the case deserved to be heard upon its merits and that the court acted wisely in not applying its rule of practice. However, instead of the instant case being treated as a departure from the rule against asserting the rights of others, it might be regarded as a clarification of the rule, emphasizing that the rule can be properly applied only (1) to cases where there is lack of a "case" or "controversy" within the constitutional meaning of that term<sup>34</sup> or else (2) to situations where, in applying the rule as a self-imposed limitation to protect against a docket over-crowded with unnecessary litigation, the Court can

---

<sup>31</sup> *Quong Ham Wah Co. v. Industrial Acc. Comm.*, 184 Cal. 26, 192 P. 1021, 12 A. L. R. 1190 (1920); *Van Camp Sea Food Co. v. Newbert*, 76 Cal. App. 445, 244 P. 946 (1926); *State v. Shady*, 100 Vt. 193, 136 A. 26 (1927).

<sup>32</sup> 83 Neb. 84, 119 N. W. 6 (1908).

<sup>33</sup> Cl. 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

<sup>34</sup> Where, of necessity, the Court must apply it because of the absence of a "case" or "controversy" for want of a person or party in interest. See *circa, supra*, ns. 3, 7, 8, 9.

withhold relief without causing immediate monetary or other direct injury to the party raising the constitutional issue as previously suggested.<sup>35</sup> All cases previously discussed herein where the self-imposed rule excluding standing to raise another's rights has been applied were cases of a plaintiff volunteering the constitutional rights of others as a basis for injunctive or declaratory relief (and without showing threat of immediate harm to plaintiff for which he had no other remedy). In the instant case, there was a "case" or "controversy" before the tribunal so as to satisfy the constitutional rule, and the respondent was not volunteering an attack upon state action but was *asserting* a *defense* in order to avoid a direct pocketbook injury. This would seem to distinguish the situation from the other cases where the rule was applied and to eliminate the need for concluding that the Court was making any serious exception to the rule.

---

<sup>35</sup> *Supra*, n. 26.