STANDING TO LITIGATE CONSTITUTIONAL RIGHTS AND FREEDOMS IN CANADA AND THE UNITED STATES

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I. INTRODUCTION

The issue of standing, or entitlement to bring a matter before the courts, recently arose in two cases, one Canadian and the other American. In each, government action was alleged to violate a constitutionally protected right. The courts in both cases addressed the preliminary issue of the plaintiffs' standing, as citizens and taxpayers, to bring their complaints before the courts. The facts of these cases are as follows:

A. *The Canadian Case: Minister of Justice of Canada v. Borowski*[1]

The Canadian Criminal Code permits the performance of therapeutic abortions in certain situations where the continuation of a pregnancy is thought to endanger the life or health of the pregnant woman.[2] One Joseph Borowski, believing that these provisions infringed a foetus' right to life, undertook to have them repealed. After a vain attempt to induce politicians to take action,[3] he took his arguments to court. His right to

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[1] [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 (S.C.C. 1981).

[2] R.S.C. 1970, c. C-34, subs. 251(4) - (7).

[3] *Supra* note 1, at 590-91, 130 D.L.R. (3d) at 600-01. Borowski pursued his interest in protecting foetuses while he was a Member of the Manitoba Legislative Assembly and a Cabinet Minister, canvassing both the federal and provincial governments to repeal the therapeutic abortion provisions. He resigned his position as Cabinet Minister in protest. He made a speech to the Legislative Assembly opposing a provincial budget that allocated funds for abortion. He refused to pay income tax on the ground that tax money was used to fund abortions and was subsequently jailed. He corresponded with the Premier and Prime Minister and their Cabinet Ministers requesting that they take legal action to protect foetuses' rights. He requested Manitoba's Official Guardian to bring legal action on behalf of foetuses. Finally, he fasted in protest, all to no avail.

litigate the case was challenged on the grounds that he lacked standing.[4] His own life was not endangered nor was the life of any foetus to whom he was related. He was not trying to save the life of any particular foetus but rather all future foetuses who might be aborted. He was a concerned citizen challenging a law that he believed violated a fundamental right.[5] The Supreme Court of Canada granted Borowski standing to argue the issue.

B. *The American Case: Valley Forge Christian College v. Americans United for Separation of Church and State*[6]

After the Vietnam War, various properties owned by the government of the United States and formerly used for military purposes were declared to be surplus. The Act which authorized this[7] permitted the Department of Education to give the property to non-profit, tax-exempt educational institutions for educational purposes. In 1976, a large property in Philadelphia was given to Valley Forge Christian College for the purpose of training priests and lay persons to provide church-related services. An organization calling itself "Americans United for the Separation of Church and State" objected to the gift on the grounds that it violated the Establishment Clause[8] of the First Amendment of the American Constitution. It sued the College and requested that the Court compel the College to return the property to the government.[9] The College challenged the organization's right to bring the case. Neither the organization nor any of its members had been deprived of any property; it had not been refused a grant of property nor suffered any infringement of its property rights. No religion had been imposed upon it by the government's gift, nor had its freedom of religion been denied. The organization was a group of concerned citizens challenging what they regarded as an unconstitutional action on the part of a government

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[4] *Id.* at 591, 130 D.L.R. (3d) at 601. His standing was not challenged until the case came before the Supreme Court. The dispute in the lower courts was concerned with whether the case should have been litigated in the Federal Court rather than the provincial courts.

[5] At the time the standing issue was decided, the right to life was not constitutionally protected. Borowski's challenge was pursuant to the Canadian Bill of Rights, R.S.C. 1970, App. III. Section 2 stipulates that this Act is paramount to other federal statutes such as the Criminal Code. Part I of the Constitution Act, 1982, *enacted by* the Canada Act, 1982, U.K. 1982, c. 11, was proclaimed subsequent to the *Borowski* decision. It is this author's understanding that the merits of the case will be argued under the Charter.

[6] 454 U.S. 464 (1982).

[7] Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U.S.C.S. § 471.

[8] "Congress shall make no law respecting an establishment of religion."

[9] The organization had originally sued the Secretary of State but the latter did not participate in the appeal to the Supreme Court on the standing question.

department. The Supreme Court of the United States denied the organization standing to bring the case.

Neither case involved a fundamental departure from existing law. The majority in both cases purported to outline and clarify standing principles and to apply them to the case at hand. However, neither the principles nor the purposes which they were meant to serve were analyzed in any depth, nor were the Justices in agreement on their application to the facts before them.[10] The disagreement of the Justices suggests that there are unresolved problems with standing that need further study. However, before discussing these, it is necessary to outline the principles applied by each Supreme Court.

II. The Present Standing Principles

A. *Canada*

Standing is discretionary. The Supreme Court of Canada has developed principles to guide the exercise of that discretion. Generally standing will not be granted unless the plaintiff shows that he is directly affected by the legislation he alleges to be unconstitutional.[11]

In *Smith v. Attorney General of Ontario*,[12] the requirement of a direct effect was construed quite narrowly, so that only a person whose activities were directly regulated by a law could challenge it. Smith had wanted to import and sell alcoholic beverages in Ontario contrary to the Canada Temperance Act[13] and challenged the validity of this Act before

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[10] In *Borowski*, *supra* note 1, Martland J. wrote the majority decision in which Ritchie, Dickson, Beetz, Estey, McIntyre and Chouinard JJ. concurred. Laskin C.J.C. wrote the dissenting opinion in which Lamer J. concurred. In *Valley Forge*, *supra* note 6, Rehnquist J. wrote the majority decision with Burger C.J. and White, Powell and O'Connor JJ. concurring. One dissent was written by Brennan J. with Marshall and Blackman JJ. concurring, and the other was written by Stevens J.

[11] *Borowski*, *supra* note 1, at 597-98, 130 D.L.R. (3d) at 606; Thorson v. A.G. Can., [1975] 1 S.C.R. 138, at 148, 43 D.L.R. (3d) 1, at 8. In the latter case, Laskin J. (as he then was) stated that the principle originates from public nuisance cases in English tort law. The principle, however, has more in common with the standing rules in administrative law, as applied in Dyson v. A.G. Can., [1911] 1 K.B. 410 (C.A. 1910) and adopted in Smith v. A.G. Ont., [1924] S.C.R. 331, [1924] 3 D.L.R. 189. Nevertheless, His Lordship said that tort standing principles could not be transferred wholesale to constitutional litigation and presumably he would maintain the same position with respect to Charter litigation. He stated that nuisance cases involved no question as to the constitutional validity of legislation; the Attorney General "would be sensitive to public complaint about an interference with public rights" and would intervene to guard the public interest. However, he doubted whether in constitutional cases, the Attorney General would be as sensitive to the public interest due to his role as "legal officer of a Government obliged to enforce legislation enacted by Parliament": *id*. at 150, 146, 43 D.L.R. (3d) at 10, 7.

[12] *Id*.

[13] R.S.C. 1906, c. 152.

proceeding with his plans. However, he was denied standing because his challenge was supported by hypothetical facts and was characterized as a request for an advisory opinion which the Court would not give to a private individual.[14] To gain standing, he would have had to break the law and risk the consequences.[15]

The first exception to this strict requirement was created in *Thorson v. Attorney General of Canada*.[16] The law challenged was the Official Languages Act[17] which was declaratory in nature and affected all members of the public alike.[18] A concerned citizen was permitted to challenge the Act since there was some risk that it would escape judicial review because no one person was directly affected by it.[19] Mr. Justice Laskin (as he then was) said that the standing of a concerned citizen in a constitutional case was analogous to the standing enjoyed by a stranger in administrative law to challenge jurisdictional excesses committed by government agents which might otherwise go unchallenged.[20] He made it clear, however, that this was merely an exception to the general principle that one must be directly affected to be granted standing.[21]

The requirement that the plaintiff be directly affected was relaxed in *Nova Scotia Board of Censors v. McNeil*.[22] A member of the viewing public was granted standing to challenge the censorship of a film as the public's interest in the films it might view was directly affected.[23] The challenged legislation[24] was regulatory in its application to cinemas and film dealers, but declaratory in that it empowered the Board of Censors to decide what films the public would be permitted to view. Chief Justice Laskin said that legislation directly affecting the general public in one of its central aspects may be challenged by a member of that public provided there is "no other way, practically speaking, to subject the challenged Act to judicial review".[25]

The statutory provision challenged in *Borowski*[26] did not affect any individual adversely by regulating his behaviour. Nor did it contain any declarations as to personal rights and thereby affect the general public.

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[14] *Supra* note 11, at 333, [1924] 3 D.L.R. at 190 (Idington J.).

[15] Smith had actually attempted to import liquor into Ontario. He had placed his orders with dealers in Montreal but was thwarted by their refusal to break the law: *id.* at 333, [1924] 3 D.L.R. at 189.

[16] *Supra* note 11.

[17] R.S.C. 1970, c. O-2.

[18] Query whether civil servants were not more directly affected than the general public.

[19] *Supra* note 11, at 145, 43 D.L.R. (3d) at 7.

[20] *Id.* at 162, 43 D.L.R. (3d) at 18. Americans have also noted that a stranger could apply for a prerogative writ: *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA L. REV. 1033, at 1035 (1968).

[21] *Supra* note 11, at 147, 43 D.L.R. (3d) at 8.

[22] [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632 (1975).

[23] *Id.* at 271, 55 D.L.R. (3d) at 637 (1975).

[24] Theatres and Amusements Act, R.S.N.S. 1967, c. 304.

[25] *Supra* note 22, at 271, 55 D.L.R. (3d) at 637.

[26] *Supra* note 1.

Rather it removed in certain cases the penal consequences otherwise attaching to abortion. The only beings adversely affected by the provisions were foetuses who were unable to challenge them.[27] Applying *Thorson* and *McNeil*, the Supreme Court of Canada granted Borowski standing to challenge the legislation.

A plaintiff not directly affected by the law or action he challenges must first show that there is a serious question as to the constitutional validity of the law or action.[28] This cannot mean that a plaintiff must show some likelihood that his argument will succeed.[29] Rather the cases seem to suggest that a court need only be convinced that the issue is worthy of consideration.

The plaintiff must also show that the issue is justiciable.[30] Although it is not clear from the cases what this term means,[31] Mr. Justice Laskin (as he then was) stated in the *Thorson* case that the justiciability of the

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[27] Women denied abortions and doctors and nurses forced to perform abortions may also have been adversely affected.

[28] *Borowski*, *supra* note 1, at 597, 130 D.L.R. (3d) at 606. In *Thorson*, *supra* note 11, and *McNeil*, *supra* note 22, it was either assumed or conceded that a serious constitutional issue had been raised as this requirement was not explicitly stated.

[29] The *Thorson*, *McNeil* and *Borowski* decisions were rendered before the Charter came into force. The plaintiffs' arguments therefore cannot be said to have enjoyed a likelihood of success.

[30] In *Borowski*, *supra* note 1, at 598, 130 D.L.R. (3d) at 606, Martland J. did not use the term "justiciable"; rather he required that "a serious issue as to . . . [the statute's] invalidity" be raised. However, His Lordship quoted extensively from *Thorson*, *supra* note 11, where the requirement of justiciability is stated clearly at 593, 130 D.L.R. (3d) at 602-03.

[31] Laskin C.J.C. has used the word "justiciable" to mean two different things:

(a) The Court's exclusive, non-derogable power to determine the constitutional validity of legislation: *Thorson*, *supra* note 11, at 151, 43 D.L.R. (3d) at 11:

> The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied. . . .

See also Borowski, *supra* note 1, at 584, 130 D.L.R. (3d) at 596:

> I would not draw any distinction between a declaratory action to obtain a decision on validity under the *British North America Act* and a declaratory action to obtain a decision on operative effect in the face of the *Canadian Bill of Rights*. Justiciable issues are presented in both situations.

(b) The Court's ability effectively to decide a particular issue: *Thorson*, *supra* note 11, at 161, 43 D.L.R. (3d) at 17-18:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised. . . .

See also Thorson, *id.* at 163, 43 D.L.R. (3d) at 19:

> It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

issue was relevant to the court's discretion with respect to the "effectiveness of process".[32] Although he has not entirely explained what is meant by this phrase, His Lordship has stated that the court's role is to resolve disputes involving contested rights or claims of persons and not to answer "questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law".[33] He would require an alleged violation of a particular person's rights[34] unless the constitutionality of the legislation in question would otherwise be immune from judicial review.[35] Mr. Justice Martland, however, stated that where there is a serious issue as to the validity of the challenged legislation, there are two alternate standing requirements. The plaintiff must show either that he is directly affected by the legislation or that "he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court".[36]

It is assumed by both Justices that persons directly affected by the law or action could more effectively litigate the issue of its unconstitutionality. To discover who might be more directly affected than the plaintiff, the court looks to the terms of the legislation.[37] If it would be "difficult to find any class of persons directly affected or exceptionally prejudiced", the interested plaintiff may be granted standing for no one else "would have cause to attack the legislation".[38]

Before the court will allow a concerned citizen to commence an action, it may require him to attempt a resolution of the issue by other means. Plaintiffs in recent standing cases have engaged in political protests and lobbying, launched appeals of administrative decisions as provided for by the challenged statute, and requested Attorneys General to refer the law to the appropriate courts for consideration of its validity. These alternate procedures, however, proved ineffective.[39]

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[32] *Id.* at 161, 43 D.L.R. (3d) at 17-18. In *Borowski*, *supra* note 1, at 594, 130 D.L.R. (3d) at 603, Martland J. ignored Laskin J.'s (as he then was) concern for the effectiveness of process and described the *ratio* of *Thorson* as follows:

> In substance, the case was decided on the basis that the validity of the legislation raised a serious constitutional issue and there was no reasonable way to have its validity tested unless an individual citizen could proceed in the manner sought by the plaintiff.

[33] *Borowski*, *id.* at 579, 130 D.L.R. (3d) at 592.

[34] *Id.* at 578-79, 130 D.L.R. (3d) at 591-92.

[35] *Thorson*, *supra* note 11, at 145, 43 D.L.R. (3d) at 7.

[36] *Borowski*, *supra* note 1, at 596, 130 D.L.R. (3d) at 606.

[37] *Thorson*, *supra* note 11, at 161, 43 D.L.R. (3d) at 18.

[38] *Borowski*, *supra* note 1, at 596, 130 D.L.R. (3d) at 605.

[39] *See*, *e.g.*, *Borowski*, *id.*; *Thorson*, *supra* note 11; and *McNeil*, *supra* note 22. In the *Thorson* case at 146, 43 D.L.R. (3d) at 7, Laskin J. expressed his doubts concerning the requirement that a plaintiff request the intervention of the Attorney General as this would conflict with the latter's duty to enforce the legislation. Moreover, a government doubting the validity of its laws would likely refer them to a court before proclaiming them in force. References are generally with respect to prospective legislation, rather than legislation which has been enacted for some time.

These standing principles were formulated in the context of litigation concerning division of powers and the Bill of Rights.[40] The Supreme Court of Canada has held that they remain the same regardless of the context[41] and it may extend this holding to include the Canadian Charter of Rights and Freedoms.[42] However, the standing principles may be affected by subsection 24(1) of the Charter which provides that a person "whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied[43] may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

If interpreted restrictively, this provision could preclude concerned citizens such as Borowski from litigating Charter cases; only persons whose personal rights and freedoms have been infringed or denied would be granted standing. However, subsection 24(1) is not worded as a limitation. Its words are positive. It constitutionally guarantees those individuals whose personal rights and freedoms have been infringed or denied a right to go before a court of competent jurisdiction for redress. The court no longer has discretion to turn such an individual away.[44] However, the provision does not expressly preclude a court from hearing a person who, like Borowski, is not personally aggrieved. A court may still have discretion with respect to persons whose right to be heard is not constitutionally guaranteed.

This interpretation is supported by subsection 52(1) of the Charter which stipulates that "[t]he Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with [it] is, to the extent of the inconsistency, of no force or effect". Where a law does not infringe personal rights or where a law infringes the rights of persons unable to challenge it, how is a court to give effect to this provision unless it grants standing to a concerned citizen to challenge its constitutionality?[45] Subsection 52(1), however, refers only to laws and may, by its terms, preclude the challenge to an action of a government agent.[46] Subsection 24(1), on the other hand, refers to rights or freedoms that have been

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[40] R.S.C. 1970, App. III.

[41] *Borowski*, *supra* note 1, at 584, 130 D.L.R. (3d) at 596 (Laskin C.J.C. dissenting) and *id.* at 596, 130 D.L.R. (3d) at 605 (Martland J. for the majority).

[42] Constitution Act, 1982, Part I, *enacted by* the Canada Act, 1982, U.K. 1982, c. 11.

[43] It has been stated that this reference to past infringements is an accident of drafting and that sub. 24(1) can be read to include impending infringements which usually have present consequences: Gibson, *Enforcement of the Canadian Charter of Rights and Freedoms (Section 24)*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS — COMMENTARY 499-500 (W. Tarnopolsky & G. Beaudoin eds. 1982).

[44] Gibson, *id.* at 496.

[45] P. HOGG, CANADA ACT 1982 ANNOTATED 64-66 (1982). *See also* Gibson, *supra* note 43.

[46] This kind of challenge was attempted in *Valley Forge*, *supra* note 6.

infringed regardless of whether by law or action. Any person suffering such infringement would have standing.[47]

B. *United States*

In the United States, as in Canada, standing is discretionary. However, the principles under which it is granted differ. The United States Supreme Court does not give standing to concerned citizens who claim no more than a genuine interest even though such a denial might cause certain laws or actions to escape judicial review altogether.[48] On one occasion, taxpayers were granted standing to challenge congressional expenditures made for religious purposes allegedly in violation of the Establishment Clause.[49] The standing rule was expressed sufficiently broadly to permit taxpayers to challenge any expenditure by Congress for an unconstitutional purpose.[50] However, no taxpayers since that case have been granted standing to challenge allegedly unconstitutional acts.[51] Taxpayers who have attempted to challenge expenditures as violations of a constitutional provision other than the Establishment Clause have consistently been denied standing, either because the challenge was with respect to an act that did not involve an expenditure[52] or because the taxpayer's injury was regarded as too minute.[53]

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[47] An action taken by a government agent might also be challenged by a concerned citizen under the administrative law rules permitting a stranger to apply for a prerogative writ; *see, e.g., Thorson, supra* note 11, at 162, 43 D.L.R. (3d) at 18.

[48] *See, e.g.*, Schlesinger v. Reservists to Stop the War, 418 U.S. 208, at 227 (1974): "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *See also Valley Forge, supra* note 6, at 489:

> This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are non-existent simply because they have not joined respondents in their suit. The law of averages is not a substitute for standing.

This position is criticized in Bogen, *Standing up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 KY. L.J. 147, at 162 (1978).

[49] In Flast v. Cohen, 392 U.S. 83 (1968), taxpayers were granted standing to challenge a disbursal of federal funds to finance instruction and to purchase materials for subjects such as reading and arithmetic in religious and sectarian schools. In Everson v. Bd. of Educ., 330 U.S. 1 (1947), Tilton v. Richardson, 403 U.S. 672 (1971), and Lemon v. Kurtzman, 403 U.S. 602 (1971), for example, taxpayers' challenges to government expenditures for religious purposes were decided on the merits without comment on the taxpayers' standing. Jaffe, *supra* note 20, at 1036, says that until Doremus v. Bd. of Educ., 342 U.S. 429 (1952), taxpayer suits commenced in State courts and appealed to the Supreme Court were generally allowed.

[50] *Flast, supra* note 49, at 102-03.

[51] *See, e.g.*, U.S. v. Richardson, 418 U.S. 166 (1974); *Schlesinger, supra* note 48; and *Valley Forge, supra* note 6.

[52] *See, e.g., Richardson* and *Schlesinger, id.*

[53] Taxpayers claim to suffer an economic injury in the form of higher taxes as a result of the costs incurred by the government through the implementation or enforcement of the challenged law or action. Usually, the burden is shouldered equally

Concerned citizens have, on occasion, succeeded in fitting themselves within the confines of the more limited general standing rules. These rules are derived from Article III of the Constitution[54] which restricts the Federal Courts to rendering decisions in respect of "cases" or "controversies".[55] A "case" or "controversy" is defined by the Supreme Court as a situation where the plaintiff has suffered an actual or threatened redressable injury resulting directly or indirectly from an alleged unconstitutional act by government.[56] Although it is unclear what exactly constitutes an "injury", administrative cases have held that it includes injury to economic interests as well as to aesthetic and recreational interests.[57] It does not include a "special interest" in the issue nor a "generalized grievance" shared by many citizens.[58]

In addition, a plaintiff must meet the "prudential" standing requirement. A plaintiff must show that the interest he asserts is within the zone of interests protected by the constitutional guarantee in question.[59] For example, it is not enough that the plaintiff allege an economic loss resulting from the application of a statute. He must also show that injury results from an infringement of his personal constitutional rights rather than the rights of some third party.[60]

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by all taxpayers, each individual paying at most a few cents. For example, in *Valley Forge*, *supra* note 6, at 481, n. 17, the majority said that "any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst non-existent". *See also* Frothingham v. Mellon, 262 U.S. 447, at 486-88 (1923); *Doremus*, *supra* note 49, at 433-35; and Warth v. Seldin, 422 U.S. 490, at 508-09 (1975). However, Douglas J., concurring in *Flast*, *supra* note 49, at 108, said:

> It does not do to talk about taxpayers' interest as "infinitesimal". The restraint on "liberty" may be fleeting and passing and still violate a fundamental constitutional guarantee. The "three pence" mentioned by Madison may signal a monstrous invasion by the Government into church affairs, and so on.

[54] This provides as follows:

> §1: The Judicial Power of the United States shall be vested in one Supreme Court and such inferior Courts . . .
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> §2, cl. 1: The Judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution — . . . to Controversies to which the United States shall be a Party. . . .

[55] *See*, *e.g.*, *Warth*, *supra* note 53, at 498, and *Flast*, *supra* note 49, at 94.

[56] *Warth*, *id.* at 499; *Valley Forge*, *supra* note 6, at 758, 768. It is interesting to note that the Court in both cases cited as sources for the rules cases concerning standing in the context of applications for review of administrative acts rather than cases concerning constitutional challenges.

[57] Sierra Club v. Morton, 405 U.S. 727, at 738 (1972); Data Processing Service v. Camp, 397 U.S. 150, at 154 (1969).

[58] *Sierra Club*, *id.* at 739; *Warth*, *supra* note 53, at 449.

[59] *Data Processing*, *supra* note 57, at 153. Although this case concerned administrative law, it is commonly cited as the source of the zone-of-interests requirement.

[60] *Warth*, *supra* note 53, at 499; *Valley Forge*, *supra* note 6, at 759-60. In *Sierra Club*, *supra* note 57, at 737, the Court said that once standing has been granted, a plaintiff is entitled to assert public interest in support of his claim. Davis, *Standing:*

There is, however, a broad exception to the prudential rule[61] known as the *jus tertii* exception. Where the infringement of a third party's rights results in direct injury to the plaintiff, the plaintiff can assert that party's rights.[62] However, the plaintiff must first satisfy several requirements. He must allege personal injury resulting from the infringement of a third party's rights. This usually is the plaintiff's inability to provide a service to the third party because of the third party's inability to exercise his right to that service.[63] Secondly, the plaintiff must show that the activity he is prevented from pursuing is inextricably bound up with the third party's enjoyment of his right. Finally, he must show some genuine obstacle to the third party's assertion of his own rights.[64] These requirements are less onerous than they appear. For example, they have been satisfied where the plaintiff showed the unlikelihood of an action by the rightholder due to the latter's desire for privacy;[65] where he was liable to criminal prosecution for having assisted the third party in the exercise of his rights;[66] and in cases where he has suffered a direct injury arising from the infringement of the third party's rights, even without showing the unlikelihood of the latter's bringing an action.[67] In one case, a plaintiff was even permitted to assert the rights of a third party who was a party to the action and who objected to his rights being asserted.[68] In all instances, the underlying concern is whether the rights will be more effectively advocated by the plaintiff or by the rightholder.[69] The *jus tertii* rules aid the court in this determination.

As a result of this exception, concerned citizens have been granted standing to litigate matters that deeply concern them. For example, doctors have asserted their patients' rights to contraception and abortion, thereby litigating these issues generally.[70] A tavern owner has been

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Taxpayers and Others, 35 U. CHI. L. REV. 601, at 630 (1967-68), argues that once standing has been granted, the plaintiff "should be allowed to argue the interest of other private parties and the interest of the public".

[61] *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, at 425: "[T]he Court has allowed so many exceptions to its rule . . . that the rule seems honoured only in the breach." The Court has been criticized for using the *jus tertii* rule as a *de facto* merits lever: *id.* at 427-28.

[62] Singleton v. Wulff, 428 U.S. 106, at 112-16 (1976).

[63] *See, e.g., Singleton, id.*; Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Crail v. Boren, 429 U.S. 190 (1976).

[64] *Singleton, supra* note 62, at 112-16.

[65] *Singleton, id.* at 117; *Griswold, supra* note 63, at 481; NAACP v. Alabama, *ex. rel.* Patterson, 357 U.S. 449, at 459 (1958).

[66] *Eisenstadt, supra* note 63, at 481; *Craig, supra* note 63, at 196-97.

[67] *Pierce, supra* note 63; Barrows v. Jackson, 346 U.S. 249 (1953); *Griswold, supra* note 63; Peters v. Kiff, 407 U.S. 493 (1972).

[68] Buchanan v. Warley, 245 U.S. 60 (1917).

[69] *Singleton, supra* note 62, at 114-16.

[70] *E.g., Eisenstadt, supra* note 63; Doe v. Bolton, 410 U.S. 179 (1973); *Singleton, supra* note 62. In an earlier case, doctors were denied standing to assert their patients' rights: Tileston v. Ullman, 318 U.S. 44 (1943). This case was distinguished in *Griswold, supra* note 63, and not cited in *Eisenstadt, Singleton* or *Doe*.

permitted to litigate sex-differentiated drinking age rules by asserting the rights of her customers.[71] Blacklisted political organizations have been granted standing to assert their members' rights to freedom of association and speech.[72] In all cases, the plaintiffs alleged that they suffered economic injury or actual or threatened criminal prosecution resulting from the infringement of the third party's rights. A plaintiff who does not claim such personal injury will not be granted standing under the *jus tertii* exception.[73]

In *Valley Forge*, the Court accepted without discussion that Americans United would have had standing to assert its members' interests if each had had standing.[74] Associations therefore have standing provided their members have suffered actual or threatened injuries as a result of an unconstitutional action and provided "the nature of the claim and of the relief sought [do] not make the individual participation of each injured party indispensable to proper resolution of the [case]".[75] The majority of the Court did not mention the *jus tertii* exception as it was not relevant given the facts.[76]

III. Underlying Concerns that Affect Standing Decisions

There are basically two underlying concerns implicit in the decisions concerning standing: the nature of the court's proper role and the need for informed judicial decisions.

A. *The Court's "Proper" Role*

It has been said that the critical question underlying the issue of citizen standing is "whether the citizen's desire to have the government conform to constitutional commands is most effectively secured by judicial review".[77] The Supreme Court of the United States has said that

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[71] *Craig*, *supra* note 63.

[72] Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951); *NAACP*, *supra* note 65, at 458. *But see* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, at 79-81 (1961), where the Court said that the Communist Party would be a proper party to assert its members' rights but that it had not shown that these rights had actually been infringed or that the Party itself had suffered any injury, for example, the withdrawal of any of its members.

[73] *See*, *e.g.*, *Warth*, *supra* note 53, at 510.

[74] *Supra* note 6, at 476, n. 14.

[75] *Warth*, *supra* note 53, at 511. An association may also be granted standing under the *jus tertii* exception where the association itself is injured by the infringement of its members' rights: *see NAACP*, *supra* note 65, at 458-59.

[76] The dissent mentioned *jus tertii* in a footnote: *Valley Forge*, *supra* note 6, at 769, n. 4. Americans United probably did not argue this exception as there was no individual third party whose rights had been infringed.

[77] Bogen, *supra* note 48, at 152.

the standing principles are "founded in concern about the proper — and properly limited — role of the courts in a democratic society".[78] Indeed, the decisions reflect this concern.

The issue turns on the extent to which the court should limit itself to its traditional role of resolving disputes between private parties and the extent to which it may properly act as an enforcer of constitutional norms.[79] Borowski and Americans United did not request the resolution of private disputes, but rather the enforcement of constitutional norms. The Supreme Court of the United States emphasized its role as the arbiter of private disputes. As a result, it regarded the plaintiff's inability to show personal injury as determinative of the standing issue.[80] By contrast, the Supreme Court of Canada adopted a more enforcement-oriented role and focused on the possibility that the matter might escape judicial review altogether if a citizen were denied standing.[81] The decision is therefore affected by which role the court adopts. Americans appear to be far more concerned with this issue than Canadians. At the risk of oversimplification, the essence of the opposing views is as follows.[82]

Those who emphasize the courts' role as enforcer of constitutional norms say it is the duty of the courts to protect citizens generally from government's violation of the Constitution. The Constitution prohibits Congress and the President from doing certain things with regard to citizens. If citizens are to be protected from these encroachments, the courts must not be timid. The drafters of the Bill of Rights understood and expected that the courts would become the body to which citizens would turn for the protection of their rights.[83]

Those emphasizing the courts' traditional dispute-resolving role are concerned about the courts' role *vis-à-vis* the political branches of government. They say that a court is not the sole enforcer of the Constitution; the other two branches of government are equally capable of protecting the rights and liberties of the people.[84] They believe that unnecessary confrontations with the political branches may, in the long run, weaken the courts' power to check unconstitutional behaviour by those branches, resulting in a less effective judiciary and a loss of public

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[78] *Warth*, *supra* note 53, at 498.

[79] Wildsmith discussed the "Enforcement Model" and the "Dispute-Settling Model" of civil adjudication in the contexts of non-Constitutional class actions in *An American Enforcement Model of Civil Process in a Canadian Landscape*, 6 DALHOUSIE L.J. 71 (1980). *See also*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[80] *Valley Forge*, *supra* note 6, at 470-73.

[81] *Thorson*, *supra* note 11, at 145, 163, 43 D.L.R. (3d) at 7, 19.

[82] For further discussion of the role of the courts, *see* Wildsmith, *supra* note 79; Chayes, *supra* note 79; and Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976).

[83] *Flast*, *supra* note 49, at 109-10, 112 (Douglas J. concurring in result); and *Valley Forge*, *supra* note 6, at 494 (Brennan J. dissenting).

[84] *Flast*, *supra* note 49, at 131 (Harlan J. dissenting).

confidence in the courts.[85] Furthermore, the diversion of the courts' limited resources to public interest actions would impair their ability to protect individuals and minority groups from oppressive or discriminatory government action.[86] There is a fear that power may shift from a democratically elected form of government to the unelected, non-representative and insulated judicial branch.[87]

1. *The Non-Confrontationist Argument*

Whatever the merits of the non-confrontationist viewpoint, its proponents appear to have forgotten its historical reasons and, in recent cases,[88] have applied it in the abstract.

The reluctance to confront government stems from unpleasant memories of the battles between the judiciary and the government during the Lochner era. The Supreme Court then took a confrontationist stance in its use of "substantive due process to determine the wisdom or reasonableness of legislation".[89] The Court struck down many social and economic reforms which had been implemented in response to popular demand during the Depression.[90] After being widely criticized for these decisions[91] the Court backed off and took a more passive stance.[92]

In many cases where legislation has been struck down for violating the right to privacy, a right not expressly protected by the Constitution, the Court's reluctance to confront the elected branches has been

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[85] *Richardson*, *supra* note 51, at 188, 192 (Powell J. concurring). *See also Valley Forge*, *supra* note 6, at 473-74. Brennan J., who dissented in *Valley Forge*, nonetheless accepted that courts must avoid unnecessary intrusion into the functions of the legislative and executive branches: *id.* at 499. Warren C.J. agreed in *Flast*, *supra* note 49, at 98, but added at 100-01, that problems of improper judicial interference with the other branches of government were not relevant to the standing issue.

[86] *See Richardson*, *supra* note 51, at 192; *Valley Forge*, *supra* note 6, at 473. This floodgates argument was rejected by Laskin J. (as he then was) in *Thorson*, *supra* note 11, at 145, 43 D.L.R. (3d) at 6.

[87] *See Flast*, *supra* note 49, at 130 (Harlan J. dissenting); *Richardson*, *supra* note 51, at 188 (Powell J.).

[88] *E.g.*, *Schlesinger*, *supra* note 48; *Richardson*, *supra* note 51; *Valley Forge*, *supra*, note 6. *See also* Jaffe, *supra* note 20, at 1040.

[89] *Flast*, *supra* note 49, at 107 (Douglas J. concurring in result); *Richardson*, *supra* note 51, at 191. Powell J. said that the Court is now more reluctant to confront the political branches, because of past public reaction to the substantive due process holdings. Jaffe has said that "nothing quite equals in extent and significance the Court's quarter-century veto of welfare legislation" but that, nonetheless, the Court should not cringe from an activist role "given our Constitution with its scheme of federal government and The Bill of Rights": *supra* note 20, at 1040.

[90] Jaffe, *id.*

[91] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 446-49 (1978) for examples of widespread criticism during that era.

[92] *See generally* Cox, *supra* note 82; L. TRIBE, *supra* note 91.

curiously absent.[93] In *Roe v. Wade*,[94] for example, the Supreme Court imposed its own view concerning abortion, even though it placed itself in direct confrontation with many States' anti-abortion policies. The issue of the Court's role in a democratic society was only briefly addressed.[95] One would expect the Court to have been much more wary of confronting the elected representatives when enforcing implied, rather than express, rights.[96]

In adopting a non-confrontationist approach, the court does not consider whether a decision on the merits in favour of a particular plaintiff would, in fact, seriously shift power away from elected government to the courts.[97] Nor does the court examine whether such a decision would involve it in a confrontation of sufficient gravity to weaken its effectiveness. A failure to confront government may, on occasion, effectively permit a government to act in callous disregard of the Constitution.[98] However, much litigation concerning fundamental rights and freedoms does not involve the court in major confrontations concerning government policy. In *Valley Forge*, for example, no party disputed an act or policy of Congress or the power of the Secretary of State to give away surplus government property. The only issue in dispute was the decision to give government property to a religious institution, a decision arguably beyond the department's authority. The Court would not have upset any Congressional policies for social and economic reform by declaring the grant of property void. Yet, wariness

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[93] *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Whalen v. Roe, 429 U.S. 589 (1977); *Griswold*, *supra* note 63; Doe v. Bolton, *supra* note 70. The Court also takes a very confrontationist stance when it imposes major reforms on the practices of large institutions such as schools and prisons. Thousands of people are affected by these decrees: *see generally* Cox, *supra* note 82.

[94] *Supra* note 93.

[95] *Id.* at 222 (White J. dissenting). The issue was entirely ignored by the rest of the Court.

[96] In *Griswold*, *supra* note 63, at 507-22, Black J., in his dissenting opinion, compared decisions concerning the right to privacy with those arising during the Lochner era. In both, he said, the majority invalidated laws it considered arbitrary, capricious, unreasonable or oppressive.

[97] When the American Constitution was drafted, it was proposed that the Court be empowered to act as a Council of Revision to review the wisdom and constitutionality of legislation and to veto that which did not meet with its approval. This proposal was rejected. Several justices have since argued that unlimited citizen standing would result in the exercise of a power denied by the framers. Further, such power would be exercised sporadically and the quality of the review would depend on the resources and skill of the plaintiff: *see Richardson*, *supra* note 51, at 189-91 (Powell J.) and *Flast*, *supra* note 49, at 130 (Harlan J. dissenting). Bogen, *supra* note 48, at 158-59, has pointed out the weaknesses of this argument. Citizen suits challenge the constitutionality of legislation, not its wisdom. In such suits, the volume of legislation to be reviewed is considerably less than it would be if the Court were a Council for Revision, and the review of constitutional deficiencies is more effective and focused.

[98] For example, as a result of *Valley Forge*, *supra* note 6, a government is free to grant surplus property to religious institutions without ever being challenged.

of confronting the political branches was a reason given for denying standing.[99]

From the non-confrontationists' perspective, the court enforces the Constitution against its constitutional equals and, therefore, does so only when absolutely necessary. This belief is predicated on the American Constitution's separate provisions for the establishment of the Legislative Branch (Article I), the Executive Branch (Article II), and the Judicial Branch (Article III), and on the express stipulation of the powers that may be exercised by each branch. The non-confrontationists attempt to observe this separation of powers strictly by keeping the Court within the powers they perceive to be contemplated by Article III.[100] The political branches are considered equally capable of enforcing the Constitution.[101] However, in the context of constitutional rights and freedoms, the Court cannot be seen as one of three co-equal branches of government. The Constitution reserves certain rights to citizens by precluding government from infringing upon those rights.[102] When a government does infringe, the Court acts as a mediator between the opposing groups and not as the co-equal of one group. Furthermore, the Court and not the government is the final interpreter of the Constitution.[103]

The standing principles derived from Article III are based on a very restrictive interpretation. Section 2 empowers the judiciary to decide constitutional cases and controversies to which the United States is a party. Although positively worded, it has been construed to include only

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[99] *Supra* note 6, at 471.

[100] *Flast*, *supra* note 49, at 96. *See also* L. TRIBE, *supra* note 91, at 52-53, 56-57.

[101] *Flast*, *supra* note 49, at 131 (Harlan J. dissenting).

[102] In *Schlesinger*, *supra* note 48, at 232-33. Douglas J., in his dissent, said:

> We tend to overlook the basic political and legal reality that the people, not the bureaucracy, are the sovereign. Our Federal Government was created for the security and happiness of the people. Executives, lawmakers, and members of the Judiciary are inferior in the sense that they are in office only to carry out and execute the constitutional regime.
>
> The Preamble of the Constitution states that "We the People" ordained and established the Constitution.

[103] Broderick says that the Court's perception of itself as one of the three co-equal branches of government is clearly wrong, and that its "function under the Constitution as mediator between the citizens and either of the other two branches when 'governmental' action impinges on constitutional rights . . . is the basic raison d'être of the courts in a democratic constitutional system": *The Warth Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 CATH. U.L. REV. 467, at 518 (1976). Monaghan also says that "[t]oday there is virtually unanimous agreement that the Court has a 'special function' with regard to the Constitution because it is the final authoritative interpreter of constitutional text" and that Americans take it for granted that the Court will exercise its power of judicial review and "[i]t is, accordingly, today, simply unacceptable for the Court to dismiss as *beyond judicial competence* . . . a case of far-reaching national importance, simply because the particular litigants no longer have a 'personal interest' in the outcome": *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, at 1370 (1973).

cases where the adversity between the parties involves a plaintiff who has suffered injury as a result of unconstitutional conduct.[104] Article III, however, permits the court to hear any cases arising under the Constitution and is capable of broad interpretation. The American Constitution therefore cannot be relied upon as authority for the restriction of standing.

In summary, the non-confrontationist view does not offer acceptable reasons for a court's refusal to mediate disputes between citizens and government and to enforce the Constitution. A non-confrontationist argument may, however, support stricter standing requirements where an implied right is allegedly violated or where a law of an elected government, rather than an action of a government agency, is challenged.

2. *The Activist Canadian Court and the Restrained American Court*

In decisions concerning standing, the Canadian Supreme Court, traditionally perceived as passive, appears willing to act as a forum for the debate of controversial political and moral issues. The American Supreme Court, on the other hand, has traditionally been perceived as activist, yet appears less willing to permit such debate. The difference is a curious one considering that the Supreme Court of Canada was not constitutionally created[105] but rather was established by an Act of Parliament[106] which, at the time its standing decisions were rendered, theoretically could have been repealed at any time.[107] The Supreme Court of the United States, on the other hand, has always been constitutionally guaranteed and the tenure of judges constitutionally protected[108] and it has always been the final court of appeal for the United States.[109] There are, however, several explanations for this difference in approach.

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[104] *Warth*, *supra* note 53, at 498-99; *Valley Forge*, *supra* note 6, at 472; *Flast*, *supra* note 49, at 95. Cases lacking an injured plaintiff are deemed not to be cases or controversies: *e.g.*, *Valley Forge*, *supra* note 6. Likewise, plaintiffs who request protection from apprehended future denial of rights or from a perceived chill on their rights are denied standing on the ground that the court is not empowered to give advisory opinions: United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947); Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

[105] Section 101 of the B.N.A. Act permits, but does not require, Parliament to create a general Court of Appeal for Canada.

[106] The Supreme and Exchequer Court Act, S.C. 1875, c. 11.

[107] The Supreme Court of Canada became the final court of appeal in 1949 under An Act to Amend the Supreme Court Act, S.C. 1949 (2d sess.), c. 37, s. 3 (*amending* R.S.C. 1927, c. 35), now R.S.C. 1970, c. S-19, s. 54. The last appeal heard by the Judicial Committee of the Privy Council was in 1959. The Supreme Court was constitutionally entrenched in 1982 under the Constitution Act, 1982, para. 41(*d*).

[108] *U.S. Const.*, art III, § 1.

[109] The Supreme Court also has original jurisdiction in rare cases: *U.S. Const.*, art III, § 2(2).

First, the difference is only apparent. In constitutional adjudication, the American Supreme Court is more activist than ever in decisions concerning the right to privacy and in granting remedies that involve major reform of institutions. For example, in *Roe v. Wade*,[110] it willingly acted as a forum for the abortion debate having found that the plaintiff met the restrictive standing requirements. The Supreme Court of Canada, in its substantive constitutional decisions, has not yet shown such activist inclinations. The new Charter of Rights presents the Court with its first real opportunity to limit government power,[111] although as yet the Court has not had to consider how far it may go.[112]

Secondly, and most importantly, there are historical reasons for the Canadian Supreme Court's greater willingness to act as a debating forum. Unlike the American Supreme Court, it has never fretted over its jurisdiction to declare a law invalid for violating the Constitution; jurisdiction was simply assumed.[113] Also, unlike the United States Supreme Court, the Supreme Court of Canada is required by statute to

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[110] *Supra* note 93.

[111] The resolution of division of powers disputes merely involved the allocation of power as between provincial and federal governments rather than the restriction of government power. The Canadian Bill of Rights was merely a statute which Parliament could repeal; Parliament could also avoid its effect by including override clauses in statutes. The Supreme Court of Canada did not use it as actively as many had hoped in order to overrule legislation. *See* P. HOGG, CONSTITUTIONAL LAW OF CANADA 442 (1977).

[112] Professor B. Strayer (as he then was) in his book, JUDICIAL REVIEW OF LEGISLATION IN CANADA 123 (1968), advocated that Canadian courts take a bold stance:

> The Canadian courts have a unique freedom to introduce rationality into the whole problem of standing. They are not bound by any a priori concept of the judicial function. . . . [T]here are no constitutional barriers to Canadian courts deciding matters beyond the realm of the "case or controversy." They have long had non-judicial advisory functions thrust on them. Through reference proceedings, . . . through the rights of intervention generously bestowed in constitutional cases, the courts have been drawn into activities not strictly judicial. There is no constitutional reason why they should not take a generous view of their functions and entertain proceedings even where the initiating party is not asserting a legal right of his own.

[113] The B.N.A. Act, now the Constitution Act, 1867, prevailed over any legislation enacted by the Canadian Parliament or by any provincial legislature by virtue of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63. The applicability of the Colonial Laws Validity Act to Canada was continued by s. 129 of the B.N.A. Act and until 1931 any Canadian legislation enacted by Parliament or a provincial legislature was invalid if it was inconsistent with any imperial act. Thereafter, such legislation was invalid only if inconsistent with the B.N.A. Act; Statute of Westminster, 1931, 22 & 23 Geo. V., c. 4. *See generally* P. HOGG, *supra* note 111, at 15 and 44. The Judicial Committee of the Privy Council, as a final court of appeal for all of Britain's colonies, assumed the power to declare invalid any colonial legislation that was inconsistent with imperial legislation. After Confederation in 1867, the Judicial Committee, together with the provincial superior courts and, after 1875, the Supreme Court of Canada, continued to decide the validity of legislation under the B.N.A. Act. They did so without questioning the source of their authority. *See generally* B. STRAYER, *supra* note 112, at 10-21.

answer requests for advice from Parliament.[114] One-third of all constitutional cases decided by the Supreme Court of Canada have been references.[115] Thus, it has often been used as a mediator of debates on the constitutionality of proposed legislation.[116] However, there is no such procedure enabling Congress or the Executive to require the Supreme Court of the United States to render advice.[117]

In contrast, the Supreme Court of the United States in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which was a case involving an action of the Executive, the Court, prior to assuming it had the power to declare an Act of Congress invalid for violating the Constitution, first questioned the source of its power. The Court said that when confronted by two inconsistent laws, one being the Constitution and the other an Act of Congress, it must decide which was in truth the law. At 178, the Court declared that because the Constitution was the superior law, the Court must apply it in preference to any ordinary act. That the Court has the power to declare laws unconstitutional is no longer questioned. It is the scope of that power that is now hotly debated and standing is one of the key tools for those on the bench who would restrict its scope.

[114] Supreme Court Act, R.S.C. 1970, c. S-19, sub. 55(2). There are also procedures whereby the provincial superior courts are required to hear references from the provincial governments: *see, e.g.*, Constitutional Questions Act, R.S.O. 1980, c. 86. This reference procedure was upheld by the Privy Council in A.G. Ont. v. A.G. Can., [1912] A.C. 571 (P.C.).

[115] B. STRAYER, *supra* note 112, at 182; P. HOGG, *supra* note 111, at 78.

[116] Under the Supreme Court Act, R.S.C. 1970, c. S-19, subs. 55(4) and (5), the Court has the power to direct that persons having an interest in the issues raised by the reference be given notice and a right to be heard and, if they do not appear, the Court may appoint counsel to present arguments on their behalf. Subsection 55(3) also requires that notice be given to any province that has a "special interest" in the issues. The Privy Council has said that it would not render an answer where the question had been framed in such a manner as to make it impossible to answer the question satisfactorily. It said:

> Nevertheless, under this [reference] procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class Their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies.

A.G.B.C. v. A.G. Can., [1914] A.C. 153, at 162 (P.C.). The Supreme Court of Canada on hearing a reference of a broad question restricted its answer to narrower issues on which it heard argument in Reference *re* Milk Industry Act of B.C., [1960] S.C.R. 346, at 347, 22 D.L.R. (2d) 321, at 332. The Court has also refused to answer questions with respect to hypothetical legislation, the exact contents of which are not adduced, *Re* B.N.A. Act and The Federal Senate, 30 N.R. 271, at 291 (S.C.C. 1979), [hereafter cited as the *Senate Reference*].

[117] Some states have procedures for referring constitutional questions to state supreme courts: *see generally*, Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302 (1956). The Supreme Court of the United States refuses to give advisory opinions with respect to the constitutional validity of proposed legislation, *see Flast*, *supra* note 49, at 96. Jaffe says that widespread desire for judicial pronouncement on an issue is a variable that ought not to be ignored, *supra* note 20, at 1043. When the Constitution was being drafted, proposals that the Court be given powers to act as a Council of Revision reviewing all legislation before it became law were rejected, *see* note 97 *supra*.

The powers of the Court and government *vis-à-vis* each other offer a third reason for the Canadian Court's greater willingness to hear controversial debates. Both the Canadian and American Supreme Courts are the final and decisive arbiters of constitutional questions.[118] It may be argued that as a non-elected body, the Court ought to avoid unnecessary interference with the public will as expressed by democratically elected governments. However, this argument carries little weight. The Court is not as insulated from public influence as it would sometimes have us believe. Judges are required to give reasons for their decisions and are aware of public criticism. The American Supreme Court's retrenchment after the Lochner era is evidence of a willingness to change course when popular opinion is unfavourable. The more important issue is the ability or inability of elected governments to override court decisions. When a court renders a non-constitutional decision with which the government disagrees, the latter can enact legislation embodying its contrary view. The ability of government to do this with respect to constitutional decisions is limited or non-existent.[119]

Until the proclamation of the Charter of Rights, the Supreme Court of Canada merely allocated power between provincial and federal governments. It could not deny government a power altogether. Now, under the Charter, it can. However, with respect to most matters, when it strikes down laws for violating fundamental freedoms, legal rights or equality rights, Parliament and the provincial legislatures have the power to re-enact and enforce those laws simply by declaring, pursuant to section 33, that the laws are to operate notwithstanding the Charter.[120] Such a clause precludes the courts from reviewing the legislation and declaring it invalid.[121] Admittedly a government would be reluctant to use this power in the absence of popular support. However, where there is a general disagreement with a court's decision, the procedure offered by this section is much simpler than constitutional amendment and more easily reversed if public opinion changes.

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[118] No Canadian government may preclude the superior courts from reviewing legislation for validity, *see* Thorson v. A.G. Can., *supra* note 11, at 151, 43 D.L.R. (3d) at 11; B.C. Power Corp. v. B.C. Electric Co., [1962] S.C.R. 642, at 644-45, 34 D.L.R. (2d) 196, at 275-76 (Kerwin C.J.C.), *rev'g* 34 D.L.R. (2d) 196 (B.C.C.A. 1962) (Norris J.A. dissenting). *See also* B. STRAYER, *supra* note 112, at 39-71. *But see* note 120 and discussion of s. 33 of the Charter *infra*. No American government may preclude the courts from reviewing the constitutional validity of legislation, Monaghan, *supra* note 103, at 1368.

[119] *See* J. ELY, DEMOCRACY AND DISTRUST 4-5 (1980).

[120] According to subs. 33(3), (4) and (5), the declaration lapses every 5 years and must be re-enacted to continue in effect. Section 33 does not permit governments to override the mobility, language and education rights of the Charter, and any court decision under those provisions may only be overridden by constitutional amendment. *See generally* P. HOGG, *supra* note 45, at 79-80.

[121] Slattery in his Note, *Legislation*, 61 CAN. B. REV. 391 (1983) argues that s. 33 of the Charter precludes governments from using s. 33 to enact legislation that unreasonably limits rights and freedoms.

The Supreme Court of the United States has always[122] had the authority to deprive governments of powers pursuant to the Constitution. Short of a constitutional amendment, there is nothing a government can do to get around decisions with which it disagrees. Therefore, the United States Supreme Court must be more wary of rendering unpopular decisions in constitutional cases.[123]

B. *The Need for Informed Judicial Decisions*

Issues to be adjudicated require adequate presentation to ensure judicial appreciation of the consequences of a decision. Courts have been criticized for a failure in this regard. However, they are not entirely to blame. The adversary system does not require a court to investigate a case itself. Parties to the action are relied on to adduce the relevant information and the arguments necessary for a competent decision. If the parties have failed to inform the court of a countervailing argument or of an interest that may be affected but which is not represented, the court may never learn of it. When a court decides a case on the basis of inadequate information, it may create an unhappy precedent inhibiting individual conduct and affecting future litigation.[124] To ensure a properly informed judiciary, several needs must be met.

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[122] At least since Marbury v. Madison, *supra* note 113.

[123] It is curious that the United States Supreme Court applies the same standing principles in administrative law cases involving no constitutional issues. *E.g.*, in *Valley Forge*, *supra* note 6, at 758, 759, 760, 766, 768 & 771, the following administrative law cases were cited as authorities for the standing rules: Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) [hereafter cited as *United States v. S.C.R.A.P.*]; *Sierra Club*, *supra* note 57; *Data Processing Serv.*, *supra* note 57. One might expect more relaxed standing principles in cases where the court's decision may be overruled by the government than in cases where this is impossible. J. Vining in his book on standing for judicial review of administrative actions, declined to discuss standing in constitutional litigation, noting the finality of constitutional decisions as opposed to the lack of finality in administrative law decisions. He also noted that constitutional questions present greater incentives not to render decisions on the merits in order to avoid confrontation with governments and defeated interests and to avoid questions it does not know how to answer. J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 9-10 (1978). *See also* Frieber, *Americans United for Separation of Church and State, Inc. v. HEW: Standing to Sue Under the Establishment Clause*, 32 HASTINGS L.J. No. 1, 975, at 996 (1981-82) and Broderick, *supra* note 103, at 528. Moreover, the government may restrict standing of applicants for judicial review, Judicial Review Act, 5 U.S.C. §702, n. 15. In Canada, governments may not preclude judicial review altogether, Crevier v. A.G. Que., 38 N.R. 541, 127 D.L.R. (3d) 1 (S.C.C. 1981). Also, they may not restrict standing in constitutional cases for to do so may permit it to usurp powers denied to it by the Constitution. For debate on this point, *see* Monaghan, *supra* note 103, at 1377-79, and Broderick, *supra* note 103, at 526-27.

[124] B. STRAYER, *supra* note 112, at 124.

1. *Specificity of the Issues*

The issue must be framed with sufficient specificity to ensure that the relevant information is before the court.[125] The Constitutional provisions are worded generally and will permit broadly phrased questions to be raised with respect to the validity of many laws and actions. However, the amount of relevant information will vary according to the generality of the question. A court can effectively cope with only so much. Moreover, the availability of factual information supporting many Charter arguments may be limited.[126]

The type of law or action challenged is the main factor affecting the precision with which an issue can be framed. Much modern legislation is phrased generally and its constitutional status is not apparent on its face but rather depends upon its impact. For example, pension laws entitling a person to benefits on his retirement, provided he has worked a specified number of years, do not appear discriminatory. However, they may have this effect on women who take time off work to raise children. A court must therefore assess the relative impact of the legislation on men and women generally to determine whether it is in "pith and substance" constitutionally valid or invalid.[127] The issue necessarily cannot be framed precisely.

Many general statutes delegate discretionary powers to agents to make decisions regarding specific applications of the law. A challenge to such a decision does not require a challenge to the constitutionality of the entire statute. In *Valley Forge*,[128] for example, the plaintiff did not challenge the constitutionality of the Act authorizing the grant of government property nor the discretionary power given to the department. Rather, it challenged a single exercise of that power. The issue was therefore framed with enough specificity that a decision need not affect the validity of the Act nor other applications of it. The department's powers could simply be read down[129] to exclude gifts to religious organizations.

In *Borowski*,[130] the challenge was to a specific law the intended impact of which was clear on its face. It delegated to certain committees

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[125] Monaghan, *supra* note 103, at 1372 said, "It is necessary only that the constitutional question be presented in a manner sufficiently concrete for resolution of the problem. This requires adequate factual information. . . ." He failed to elaborate further on this point.

[126] A constitution enshrines our ideals. Constitutional litigation gives rise to occasional argument as to the extent to which those ideals are absolute and the extent to which they ought to give way to other values or needs. Litigation over censorship or abortion, for example, is likely to give rise to some ideological debate in a courtroom.

[127] *See* P. HOGG, *supra* note 111, at 86 for a brief discussion of this process.

[128] *Supra* note 6.

[129] *See* P. HOGG, *supra* note 111, at 90, for a general discussion of "reading down" legislation. This principle appears to be foreign to American courts.

[130] *Supra* note 1.

the power to authorize abortions in situations where pregnancy would be likely to endanger the life or health of the woman. This clearly requires the application of medical criteria to each case and does not permit abortion on demand.[131] The court must decide whether an abortion to save a woman's life or health is a reasonable limitation on a foetus' right to life.[132] The issue can therefore be framed with greater specificity than can a challenge to the general impact of a general law. As the intended effect of the law is clear, its actual impact need not be studied.

The United States Supreme Court believes that an issue not raised in the context of concrete facts is too general to be effectively decided by the court.[133] The critical factor is the injury alleged. If a plaintiff asserts that a law is unconstitutional only as it is applied to him, the question may be narrowly framed. However, often plaintiffs state that they have suffered injury because the legislation as it is generally applied is unconstitutional.[134] For example, in *Roe v. Wade*,[135] a woman who had been denied an abortion was granted standing as a nominal plaintiff, and advocates on all sides of the abortion debate were permitted to challenge the abortion laws in their entirety. Her injury did not narrow the scope of the inquiry nor permit the issue to be framed with any more precision than it was framed in *Borowski*, where the plaintiff alleged no injury. In *Valley Forge*, the issue was framed with as much precision as one could possibly hope for in constitutional litigation, despite the lack of a plaintiff with a recognizable injury. An injured plaintiff is therefore no guarantee that the issue will be specifically framed. No fact peculiar to the plaintiff is relevant to whether the issues are framed with sufficient specificity.[136]

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[131] If committees are permitting abortion on demand they are breaking the law. Breach of the law does not affect its validity. If Borowski's objection is that abortions on demand are being performed, his complaint concerns inadequate enforcement of the law rather than its constitutional validity.

[132] It is assumed for the sake of argument that the Charter protects foetuses' right to life.

[133] In *Valley Forge*, *supra* note 6, at 758, the Court said that an issue must be raised "in a concrete factual context [so as to be] conducive to a realistic appreciation of the consequences of judicial action, [ensuring that] a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court". *See also Schlesinger*, *supra* note 48, at 220-21.

[134] *See, e.g.*, Nova Scotia Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1; Craig v. Boren, *supra* note 63; McGowan v. Maryland, 366 U.S. 420 (1961); Roe v. Wade, *supra* note 93.

[135] *Id.*

[136] *Accord* Bogen, *supra* note 48, at 157-58. He notes further that the remedy may be at least as difficult and complex, if not more, in cases where the plaintiff alleges the requisite injury as in cases of political injury brought by citizens. Davis, *supra* note 60, at 635.

The courts have always had the power to refuse to hear an issue that is too generally framed to be effectively decided.[137] Similarly they may refuse to hear issues that are hypothetical,[138] political in nature,[139] moot,[140] or not ripe.[141] How an issue is framed determines the facts and arguments that will be relevant. Therefore, the next inquiry is how this information is to be presented to the court and by whom.

2. *Presentation of All the Relevant Facts and Arguments*

All the facts and arguments relevant to a determination of the issue must be presented. How can the court tell in advance, before a case has been presented, whether this will be done in the action brought by the self-appointed plaintiff? What things must it know about the plaintiff to answer this question? Before discussing who is best suited to the task of adducing relevant information, the task itself must be assessed.

The litigant must first explain exactly what it is that he challenges. This will be apparent only where the complaint concerns the intended impact of a specific law as it is written. A challenge to the impact of a general law, such as the pension laws mentioned above, must be supported by statistical and sociological evidence of such impact. A challenge to a specific action of a government agent requires factual proof that the action took place. The difficulty of the first task of the litigant varies depending on the law or action that is challenged.

Argument must then be presented as to the scope of the right or freedom asserted and whether the challenged law or action contravenes it. As most constitutional provisions are vaguely worded, they are capable of varied interpretations. For example, American courts have read freedom of contract into due process, and right to privacy into the First, Fifth and Fourteenth Amendments.[142] How the Canadian courts will interpret the Charter provisions is yet to be seen.

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[137] *Re* Court of Unified Criminal Jurisdiction, 46 N.B.R. (2d) 219, at 222-26, 48 N.R. 228, at 231-35 (S.C.C. 1983). *See also* note 116 *supra* and *Valley Forge*, *supra* note 6, at 160.

[138] *E.g.*, Smith v. A.G. Ont., *supra* note 11; United Public Workers v. Mitchell, *supra* note 104, at 90.

[139] *E.g.*, Baker v. Carr, 369 U.S. 186 (1962). *See also* B. STRAYER, *supra* note 112, at 138-45.

[140] *E.g.*, *Doremus*, *supra* note 49; Roe v. Wade, *supra* note 93. B. STRAYER, *supra* note 112, at 136-37 says that the Canadian courts are willing to decide constitutional issues even though they have become moot.

[141] *E.g.*, *Communist Party*, *supra* note 72, at 71 and 79; Smith v. A.G. Ont., *supra* note 11. *See also* B. STRAYER, *supra* note 112, at 135.

[142] *See* notes 88-90, 93 *supra*.

Although the onus then shifts to the defending government[143] to prove the reasonableness of any limitation,[144] the plaintiff would be wise to adduce evidence in rebuttal. In *Borowski*, for example, historical and medical evidence of the impact of anti-abortion laws would be relevant to the issue of reasonableness. Similarly, medical and philosophical arguments would be necessary to prove or disprove a foetus' right to life. Where a critical fact cannot be proved, or where a decision requires the court to assume a fact not assumed by the government, it may be wise for a court to refuse to decide the issue. Indeed, there is nothing to prevent a court from adopting this course of action.[145]

3. *Who May Present the Necessary Evidence*

What factors peculiar to a particular plaintiff would make him better suited than others to the task of adducing relevant information? It is presumed by the United States Supreme Court that only an injury-in-fact will create the requisite adversity necessary to ensure complete presentation of all the facts and arguments. The "gist of the question of standing" is said to be whether the plaintiff asserts "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions".[146] However, constitutional issues tend to involve diverse interests. Simple adversity may not guarantee that the injured plaintiff is best able to represent these.[147] In one case, the American Supreme Court implied that all it need know is the effect of the law or action upon the plaintiff:

> [A] particular injury caused by the action challenged as unlawful . . . [provides the] personal stake [that] . . . enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance.[148]

This may be so in private disputes in tort or contract where the facts are usually within the parties' personal knowledge, but this is not often the

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[143] P. HOGG, *supra* note 45, at 10-11.

[144] Section 1 of the Canadian Charter guarantees rights and freedoms "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In the United States the courts require the government to prove that a limitation on personal liberties "is necessary to protect some compelling public interest not to be secured by less restrictive means"; Cox, *supra* note 82, at 795.

[145] *Senate Reference*, *supra* note 116; *see also* Monaghan, *supra* note 103, at 1373-75.

[146] *Baker*, *supra* note 139, at 703.

[147] *See* Monaghan, *supra* note 103, at 1373-74.

[148] *Schlesinger*, *supra* note 48, at 221; Bogen, *supra* note 48, at 157, criticized this quote noting that an abstract injury can present a factual context and that a citizen can ensure "the presentation of 'a complete perspective upon adverse consequences' to the courts".

case in constitutional litigation. Moreover, many constitutional decisions, notably those concerning a law of general application, affect people whose interests are not represented by the individual plaintiff. Should these persons later attempt to litigate the same issue, they will bear the additional burden of distinguishing the court's prior decision or of proving that it was wrong.[149] To avoid this result, a court ought to be informed of all the interests which its decision will affect. The more specifically the issue is framed, the more easily this can be done. For example, in *Valley Forge*,[150] the issue was framed narrowly. As a result, the persons involved in the grant of the property and whose interests would be necessarily affected by the Court's decision were before the Court. Other interests would not be inadvertently affected. The Court's decision could easily be restricted in its application to gifts of surplus property to religious institutions. However, a decision with respect to abortion laws may affect many interests not represented by either Borowski or the Minister of Justice. The problem of how these interests are to be brought to the court's attention may be resolved through the intervention of interested parties if they are aware of the litigation and have the resources and organization to do so. However, the problem of how the court is to balance the competing interests remains. The more varied the interests, the more difficult this task becomes. If an issue is framed more precisely so as to encompass fewer interests, the possibility of unanticipated negative consequences is decreased.

Another factor relevant to standing is the remedy requested. This will affect the significance a court will attach to certain facts. If damages are sought, the plaintiff must prove his entitlement. The focus then is on his injury. If a declaration is requested, the conduct of the defendant is more relevant than who the plaintiff will be. In class action cases where institutional practices are challenged, American courts emphasize the defendant's practices rather than the injury to any particular member of the class. The risk that diversity of opinion within the class may be concealed appears not to be a serious concern.[151] Whether the remedy is intended primarily to enforce the Constitution against the institution or to redress the grievances of its inmates and employees is relevant to the appropriateness of a class action.[152] If the aim is to redress grievances, the court might prefer that each individual member of the class be present in court to explain his grievance. Where the remedy is to be imposed on the defendant, rather than granted to the plaintiff, standing requirements

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[149] Brilmayer argues that for these reasons ideological plaintiffs should always be denied standing. Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement*, 93 HARV. L. REV. 297, at 308-09 (1979); *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U.L. REV. 807, at 824 (1977).

[150] *Supra* note 6.

[151] Cox, *supra* note 82, at 812.

[152] Wildsmith, *supra* note 79, discussed the court's enforcement role and dispute-settlement role in the context of non-constitutional class actions.

may be more relaxed because inquiry as to the plaintiff's entitlement is unnecessary. Moreover, a broad remedy such as the complete overhaul of the practices of an institution would require the court to have intimate knowledge of the day-to-day practices of the institution. The very quantity of facts may be too overwhelming to permit a decision as to the substantive issues and the remedy. In such cases, the precision with which the issues are framed is critical.

The Supreme Court of Canada prefers that the plaintiff be directly affected by the challenged legislation.[153] Why? Is it because such a plaintiff is believed to be better motivated when litigating the challenge? One would think that anyone willing to incur the trouble and expense of litigation would be sufficiently motivated.[154] However, strong motivation alone has not been accepted as a substitute for injury[155] or for a more direct interest in the challenged legislation.[156] Plaintiffs who litigate solely because of a genuine interest in the issues may in fact be too well-motivated for the court's liking. In *Borowski*, Chief Justice Laskin, dissenting, stated that the plaintiff should not be permitted to bring his obsessive interest in abortion before the Court.[157] In *Valley Forge*, the American Supreme Court accused Americans United of roaming the country in search of government wrongdoing and said "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy".[158] Presumably then the motivation of a directly affected plaintiff, as opposed to a non-affected plaintiff, is not a factor relevant to standing.[159]

However, the plaintiff who is directly affected offers the court certain advantages. First, in cases involving the action of a government

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[153] Jaffe, *supra* note 20, at 1037-38, believes that as far as effective advocacy and ability to inform the judiciary goes, there is no difference between affected plaintiffs and non-affected plaintiffs.

[154] *Accord* Hoffman & McCutcheon III, *Standing to Sue in Federal Court: The Elimination of Preliminary Threshold Standing Inquiries*, 51 TULANE L. REV. 119 (1976).

In Canada, the costs rule may inhibit a plaintiff from bringing an action that he is unlikely to win. If he loses, he will probably be required to pay not only his own costs in the action but also the winner's costs. In the United States cases are often litigated on a contingency fee basis and the loser is rarely required to pay the winner's costs: *see* G. WATSON, S. BORINS & N. WILLIAMS, CANADIAN CIVIL PROCEDURE 2-3 - 2-6 (2d ed. 1977).

[155] Even motivation together with expertise in the issue will not entitle a litigant to standing: *Sierra Club*, *supra* note 57, at 736. *See also Doremus*, *supra* note 49, at 434-35; *Schlesinger*, *supra* note 48, at 226; and Baker v. Carr, *supra* note 139, at 204.

[156] *Borowski*, *supra* note 1, at 585, 130 D.L.R. (3d) at 597.

[157] *Id.* at 587, 130 D.L.R. (3d) at 598.

[158] *Supra* note 6, at 765-66.

[159] The existence of direct effect does not guarantee that a plaintiff will have the proper motivation. In A.G. Man. v. Manitoba Egg and Poultry Ass'n, [1971] S.C.R. 689, 19 D.L.R. (3d) 169, the Manitoba government had referred its own legislation to the Court ostensibly to argue its validity, but in reality, to have it declared unconstitutional so that similar legislation in Ontario and Quebec would be rendered invalid. For a discussion of the case, *see* P. WEILER, IN THE LAST RESORT 156 (1974).

agent or the specific application of a general law, the plaintiff's personal knowledge may enhance the court's understanding of what precisely is being challenged. However, where the challenge is to a general law as it is generally applied, personal knowledge will be of limited value. For example, in *Roe v. Wade*,[160] the plaintiff could show only that, because of the anti-abortion laws, she had been denied an abortion on demand. She could not show whether those laws affected women whose life or health was endangered by pregnancy. Moreover, the often necessary admission of intervenors in these cases requires the court to consider interests other than those of the plaintiff and defendant. The issues may broaden as a result. In such cases, an affected plaintiff may be no better at presenting the facts and arguments than a non-affected plaintiff.

Second, a plaintiff who is directly affected by the challenged action or law is more likely to be affected by a judicial decision with respect to that law, and for that reason alone he ought to have a say.[161] He will be able to inform the judiciary of the consequences, at least to him, of any decision it makes. Though a non-affected plaintiff may obtain a court declaration concerning a matter about which he cares deeply, the declaration will not affect his activities. It is the interest of those most affected by the decision of which the court must be apprised in order to render an informed decision reflecting an appreciation of its consequences.

A declaration as to the validity of a law as it is applied generally may sometimes affect a plaintiff who is affected by the law no more than it affects citizens generally. For example, in *Roe v. Wade*, the plaintiff's pregnancy had passed and the decision permitting abortions in the first trimester[162] did not affect her any more than it affected other women capable of getting pregnant. Likewise, if a woman who had been denied a pension were to challenge the pension laws, a declaration as to their

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[160] *Supra* note 93.

[161] It is curious that the same liberal standing principles are thought to apply to division of powers cases as in Charter cases; *see Borowski*, *supra* note 1, at 584-85, 130 D.L.R. (3d) at 596 (Laskin C.J.C. dissenting), 605 (Martland J.). Any decision with respect to Charter rights and freedoms affects both citizens and government. Any decision with respect to division of powers directly affects only the provincial and federal governments. Any effect on citizens is only incidental in that one level of government may choose to exercise the power in a manner different from that in which the other may have exercised it. I have argued elsewhere that more restrictive standing rules ought to be imposed on private litigants in division of powers cases than in Charter cases; *see* Blake, *Minister of Justice v. Borowski: The Inapplicability of the Standing Rules in Constitutional Litigation*, 28 McGILL L.J. 126, at 138-41 (1982). Paul Weiler, *supra* note 159, argues that not only should standing be restrictive but also that courts should adopt a more limited role in division of powers disputes. American writers also believe that citizens should be denied standing in division of powers cases: *see* Bogen, *supra* note 48, at 164. In *Flast*, *supra* note 49, at 105, the Court said that in the *Frothingham* case, *supra* note 53, the taxpayer plaintiff was "in essence, . . . attempting to assert the States' interest in their legislative prerogatives", and was properly denied standing.

[162] *Supra* note 93.

validity would affect all women retiring from the work force in the same way as it would affect the plaintiff. The size of the class affected by the decision would preclude the court from hearing every member. An adequate representative would have to be found.

The Supreme Court of Canada will grant standing to a person not affected by the challenged law where there is no one who is more directly affected and likely to commence litigation.[163] When considering this, a court should distinguish those who are beneficially affected from those who are adversely affected. The former group would be unlikely to challenge the law or action. If there is no one adversely affected, then the only likely challenger would be an interested citizen. In *Valley Forge*,[164] for example, the college was unlikely to challenge the powers by which it was granted government property. Moreover, there was no one adversely affected in any tangible way. The existence of a person more directly affected by the law should be relevant only if litigation by that person would narrow the scope of the inquiry, ensure a more adequate presentation of the issues and enlighten the court as to the consequences of its decision. One can envisage many persons, adversely affected by the provisions Borowski challenged, who might have themselves brought an action, for example, doctors and nurses forced to perform abortions against their moral principles or women denied abortions because their life or health was not endangered. However, finding such an adversely affected plaintiff would not likely have altered the scope of the issues or the number of intervenors.

If standing is to be generally limited to those persons whose rights or freedoms have been adversely affected, the court should still want to hear from those persons who have been beneficially affected. A decision will have an impact on such persons. Moreover, they may be able to present facts which those adversely affected would not present, and to argue the reasonableness of the impugned legislation. They should also be heard when standing is granted to interested citizens.

If the court is to hear from those who will be affected by its decision, how are they to be represented? Both the Canadian and American Supreme Courts permit intervenors to argue on behalf of interests not otherwise represented by the parties.[165] In Canada they are permitted to

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[163] *Borowski*, *supra* note 1, at 596-97, 130 D.L.R. (3d) at 605.

[164] *Supra* note 6.

[165] Rule 18 of the Supreme Court of Canada provides that any person interested in the issues may intervene with leave of a judge on such terms and conditions as set by the judge. Rule 13 permits the Court on its own motion to appoint counsel to present argument on behalf of any interest that may be affected but is not represented. The provincial superior courts also permit intervenors; *see*, *e.g.*, *Ont. R.P.* 504(a).

Rule 36.2 of the Supreme Court of the United States permits briefs of *amicus curiae* to be filed with the consent of the parties. If the consent is refused, Rule 36.3 permits the *amicus curiae* to apply to the Court for leave, stating its interest in the case and the facts or questions of law that it believes will not be adequately presented by the parties, and their relevancy to the disposition of the case. There are specific rules as to the timing for filing briefs and their contents.

present written and oral argument[166] while in the United States they may only file written briefs.[167] Intervenors assist the court by presenting helpful factual information that would not otherwise be available, and by presenting arguments that would not otherwise be heard. On a motion to intervene, the court must assess the relevance of the intervenor's arguments and consider whether they will be adequately presented by the parties or by other intervenors.[168] If no representative appears on behalf of an interest, the court can appoint an *amicus curiae*.[169]

As class action plaintiffs and intervenors are self-appointed, questions as to their representative capacity may arise but in either case this issue does not seem pressing. Whether a constitutional case is brought as a class action or as a personal action does not seem to affect the standing principles or the scope of a court's review.[170] Intervenors tend to be organizations whose *raison d'être* is to represent their members' interest in a particular issue. When that issue arises in litigation, the organization attempts to intervene.[171] Presumably, people who feel strongly about a particular issue support an organization which best represents their interests. The number of its members would be a fair indication of an organization's ability to represent the interest it

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[166] Levy, *Amicus Curiae*, 20 CHITTY'S L.J. 135 (1972).

[167] Under Rule 38.7, the *amicus curiae* may present oral argument with the consent of the party on whose side it argues. Otherwise the Court will only grant leave to present oral argument in extraordinary circumstances.

[168] Where the issues are fully covered by the parties and submissions by an intervenor would serve no useful purpose, leave to intervene will be denied: *see Re* Clark and A.G. Can., 17 O.R. (2d) 593, at 596-98, 81 D.L.R. (3d) 33, at 36-38 (H.C. 1977).

[169] *S.C.C.R.* 13.

[170] The following cases were brought as class actions: Roe v. Wade, *supra* note 93, at 120; Laird v. Tatum, *supra* note 104, at 2; Warth v. Seldin, *supra* note 53, at 493 no. 1; *Schlesinger*, *supra* note 48, at 211; and Thorson v. A.G. Can., *supra* note 11. In Brown v. Bd. of Educ., 347 U.S. 483 (1954), though the plaintiffs had brought their action in their personal capacity as students who desired admission to specific schools, the Court's decision desegregated all the schools of the nation. The Court, at 495, refers to the action as a class action, but it was actually a consolidated action: *id.* at 486, n. 1. In *McGowan*, *supra* note 134, the Court considered the Sunday closing laws generally, even though the appellants litigated in their personal capacities as store employees who had been fined for selling goods on a Sunday. In *McNeil*, *supra* note 22, the Court considered the censorship laws generally, even though McNeil had sued in his personal capacity as a member of the viewing public who had been prevented from seeing a particular film. Monaghan's assertion that class actions preclude the "cushioning effect" of case by case adjudication of private rights of private individuals, *supra* note 103, at 1383, does not withstand scrutiny when the individually litigated cases do not cushion the fashioning of law any better than class actions.

[171] *E.g.*, the intervenors in *Flast*, *supra* note 49, at 84, were Americans for Public Schools and Baptist General Association of Virginia. The intervenors in Morgentaler v. The Queen, [1976] 1 S.C.R. 616, at 620, 53 D.L.R. (3d) 161, at 164 (1975) were: the Foundation of Women in Crisis, Canadian Civil Liberties Association, Alliance for Life, Association des médecins du Québec, Front Commun pour le Respect de la Vie, Fondation pour la Vie.

asserts.[172] The problem of representativeness may be overrated.[173] As many of the facts and arguments are not likely to be within any affected person's personal knowledge, the best representative would be a qualified expert with adequate financial and organizational resources to take the case to court.

4. *Adequacy of the Present Standing Principles*

In my view neither Supreme Court has articulated rules that satisfy the judiciary's need to be fully informed of all matters bearing on its decision. The American requirement that the plaintiff prove some injury does not ensure that the issue will be narrowly framed, nor that the relevant facts and arguments will be within his personal knowledge. The Canadian requirement that the plaintiff be directly affected may, depending on the type of law or action challenged, restrict the issues and ensure a plaintiff who has at least some personal knowledge of the facts but it will not always do so. Nor will granting a concerned citizen standing in cases where a challenged law or action would otherwise escape judicial review ensure that the issues will be precisely framed or that all the relevant facts and arguments will be presented. Further guidelines are necessary for the satisfaction of these needs.

IV. CONCLUSION

It is my recommendation that the needs and concerns of the court be given the following priorities.

First, the paramount need is to protect the rights and freedoms expressly protected by the Constitution. Standing ought always to be granted to persons whose rights or freedoms have been adversely affected by a law or action. Indeed, subsection 24(1) of the Canadian Charter guarantees this. Other tactics may be used to ensure judicial cognizance of all information relevant to the issues. If the plaintiff has phrased his challenge more generally than is necessary to redress the violation of his rights, the court may direct him to amend his claim and thus avoid deciding issues not relevant to his grievance. If there are other persons who may be affected by the decision, the court may permit them to intervene or appoint an *amicus curiae* to represent them. By explaining why the legislation is a reasonable limitation on the plaintiff's rights,

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[172] In *Valley Forge*, *supra* note 6, Americans United had 90,000 members and the Court did not question its ability to represent the interest asserted. At 761, n. 14 the Court noted that, as a party, Americans United would only have standing if its members had standing, but its ability to represent its members was not questioned.

[173] Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, at 681 (1973).

they can apprise the court as to how a decision may affect them. Even if the information presented to the court is not complete, a person whose rights or freedoms have been violated should not be denied standing. He deserves redress. Any lack in the information or any assumptions of fact ought to be mentioned in the reasons for decision and serve only to reduce the decision's scope as precedent.

The court's second duty should be to enforce the Constitution.[174] If the Constitution is violated and there is no one whose personal rights or freedoms are adversely affected, an interested citizen ought to be permitted to challenge the violation, once the court's need to be fully informed is met. The court should require the issues to be framed as specifically as possible so as to restrict the scope of the decision, to ensure that the quantity of information is manageable and to reduce the risk of overlooking some relevant fact. It should permit intervention by those who are beneficially affected by the challenged law or action, for these intervenors may be able to persuade the court that the legislation is a reasonable limitation on the constitutional guarantee that is allegedly transgressed.

Whenever there is doubt as to whether standing ought to be granted, it should be conferred. As with any discretionary bar to judicial review, there is a risk it will be used on occasion as a *de facto* merits lever.[175] To avoid this, a concerned citizen should be denied standing only when it is clear that the court will be unable to make an informed decision on the merits. Where, after standing has been granted, the court does not receive adequate information, there is nothing to prevent the court from declining to grant the requested declaration of invalidity.

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[174] Bogen, *supra* note 48, at 162 asserts that "the underlying concern should be whether judicial review will best ensure that the Constitution is followed . . . [and a] substantial consensus appears to favour litigation and judicial review as the ultimate assurance of constitutional obedience". Therefore, at 163-69, he says that when deciding standing the Court should ask itself whether the particular constitutional provision that has been invoked can best be enforced by citizen suits. Those provisions aimed at protection of individual rights should only be invoked by individuals whose rights have been infringed, while those designed to protect the democratic process or prevent government support of religion should be enforceable by all citizens.

[175] The courts have been accused of using the present standing rules as a *de facto* merits lever. In *Warth*, *supra* note 53, at 520, Brennan J. (dissenting) said:

> [The Court's] opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved . . ., and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to. . . .

Hoffman and McCutcheon, *supra* note 154, at 142-43, listed a number of cases in which, they allege, the standing rules were used to dismiss cases on the merits.