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STANDING ON A SPECTRUM: THIRD PARTY STANDING IN THE UNITED STATES, CANADA, AND AUSTRALIA

Gwendolyn McKee[1]

Comparative analysis shows that the more a legal regime embraces rights, the more that regime must create exceptions to the traditional standing requirements in order to allow third party standing. Looking at the United States, Canada, and Australia, only Australia has completely retained the traditional prohibition on third party standing. Australia is also the only one of the three countries without a written guarantee of rights. However, while the United States and Canada have both expanded standing in order to better protect rights, they have done so in different ways. The United States has adopted a piecemeal approach, creating specific third party exceptions to address problems with particular rights, while Canada has covered these areas and more with a single broad exception, public interest standing. The Canadian approach offers much greater predictability and stability. Applying a single test to all third party cases allows broader and more coherent development of the case law because the law is formed from a single much larger body of cases. It also prevents standing on particular issues from undergoing dramatic changes every time the judicial makeup of the Court changes. The United States should replace the current system of exceptions to the standing requirements with a universal exception styled after Canadian public interest standing. Doing so would ensure that the rights protections already present in American standing are retained and allow coherent future evolution of the field.

INTRODUCTION

Standing, one of the basic justiciability requirements a plaintiff must demonstrate to bring a lawsuit in the United States, acts as a gateway to the courthouse. Many common law countries have similar standing requirements.[2] These requirements are designed to do one thing: determine whether the plaintiff

1. LL.M., Yale Law School 2010; J.D., American University 2007; B.A., Dartmouth College 2003. I would like to thank Professors Stone Sweet and Noah Messing for comments on earlier drafts.

2. Stephen J. Wallace, *Why Third-Party Standing in Abortion Suits Deserves a Closer Look*, 84 NOTRE DAME L. REV. 1369, 1375-76 (2009). While standing has been traced by at least one commentator to the introduction of liberal pleading standards in the United States, it is a basic requirement to bring a lawsuit not only in the United States, but other common law countries as well. *Id.*

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bringing a suit can demonstrate a sufficient personal interest in the matter. The reasons suggested for this requirement include preventing vexatious lawsuits and ensuring that cases are brought by only those people with the greatest interest in the matter. In the vast majority of cases, identical results will be reached in all countries. Differences begin to appear when a plaintiff brings suit claiming a violation not of the plaintiff's own rights, but the rights of a party who is not before the court. Such cases require an exception to the traditional standing requirements, and are referred to as third party standing cases.

This article examines third party standing cases in the United States, Canada, and Australia. It demonstrates that third party standing can only be understood with reference to the role of modern courts in broad-based, constitutional style rights protection. This type of protection has been the main factor driving courts to create exceptions to the traditional standing requirements. It is only once these exceptions have been established that a court begins to consider allowing third party standing in cases that do not involve rights. The effects of this theory can be seen in the three countries examined in this article.

Canada developed a coherent and unified third party exception in rights cases for public interest standing. This broad public interest standing was then applied to cases that did not involve rights, such as administrative cases. This, in turn, led to the robust environmental standing now seen in Canada. In the United States, however, rights protection efforts by the Supreme Court have led to the creation of a number of different standing exceptions. In contrast to the general exception created in Canada, the standing exceptions in the United States have been kept very specific and strictly limited to their corresponding rights. Likely for this reason, third party standing is not allowed in cases that do not implicate rights, such as cases brought to protect the environment. Association standing, which exists only in the United States, can be explained as an attempt to compensate for the lack of a coherent third party standing doctrine in many of these cases, and is another way that standing law in the U.S. has been fragmented. Finally, Australia, where the lack of a written bill of rights has resulted in limited rights protection and accompanying limited case law, has not yet faced the types of rights cases that led courts in Canada and the United States to expand standing. The Australian High Court has also been reluctant to expand standing in administrative cases, such as environmental cases, despite calls to adopt Canadian style public interest standing. This result can be explained by the lack of rights-driven standing exceptions in Australian law. Australia and Canada therefore represent opposite ends of the standing spectrum.

In a third party standing case, the plaintiff may be attempting to bring the suit on behalf of a known party who would be able to demonstrate the requisite interest in court but who is unable or unwilling to bring the suit, or the suit may be brought on behalf of one or more unknown parties who have been or may be injured by the actions of the defendant. As Shapiro and Stone Sweet have noted, third party standing to protect the rights of unknown plaintiffs generally presents a form of

abstract review, a type of review that courts in common law countries are traditionally uncomfortable allowing.[3] It is possible that the greater willingness to create a unified third party standing doctrine in Canada has also been driven by a greater willingness to acknowledge and embrace the role abstract review plays in rights determinations.

In Part I, this article begins by describing the basis for standing in the three countries studied. In Part II, it looks at standing in rights cases, both at the different ways the U.S. and Canada have adapted standing to allow broader rights protection and at the lack of similar cases in Australia. In Part III, it examines some of the repercussions of the methods chosen, including expanded administrative standing in Canada, more robust association standing in the United States, and little third party standing at all in Australia. The article concludes by discussing the differences in approach among the three countries examined, and urges that the United States and Australia acknowledge the changing role of courts in modern society and accept broader standing criteria.

I. THE BASIS OF STANDING IN THE UNITED STATES, CANADA, AND AUSTRALIA

Standing, a basic element of common law jurisprudence, has been traced to "the posture traditionally required of advocates."[4] However, despite the prevalence of the concept in a variety of common law countries, the three countries examined in this article derive their standing requirements from different legal authority. The United States and Australia both now claim a constitutional origin for the requirement. Canada, in contrast, views the matter as falling entirely within the control of the courts, subject only to a duty to ensure citizens are able to protect their rights, and has relied on its Constitution to expand standing rather than to restrict it. Canada is also the only one of the three countries in which a court will allow standing based solely on the public interest.

A. The Basis of Standing in the United States

The United States Constitution grants federal courts jurisdiction over "[c]ases" and "[c]ontroversies."[5] These vague words have led to the creation of a number of baseline requirements that must be met before a case is considered justiciable and allowed to proceed. These justiciability factors include: standing, mootness, ripeness, and the political question doctrine.[6] This article focuses exclusively on standing and, more specifically, on the small subgroup of third party standing.

3. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 352 (2002).
4. N. Australian Aboriginal Legal Aid Service Inc. v. Bradley, (2001) 192 A.L.R. 625 (Austl.) (citing Truth About Motorways Pty Ltd v. Macquarie Infrastructure Investment Management Ltd, (2000) 200 C.L.R. 591 (Austl.)).
5. U.S. CONST. art. III, § 2, cl. 1.
6. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).

As the Supreme Court has interpreted the case or controversy provision of the U.S. Constitution, standing requires injury, causation, and redressability.[7] These three consolidated requirements were set forth in *Lujan v. Defenders of Wildlife*.[8] The *Defenders of Wildlife* Court required that injury be both (a) "concrete and particularized" and (b) "actual or imminent."[9] The injury analysis therefore has both a substantive and temporal component. Substantively, a concrete and particularized injury is an injury that affects the plaintiff in a "personal and individual way."[10] While cases have not established that the plaintiff must be the only person to suffer injury, the injury at issue must be distinguishable from that suffered by the general public.[11] Temporally, the court must be satisfied that the plaintiff is facing a real and immediate threat, rather than attempting to prevent a future hypothetical harm.[12] Causation requires a showing that the injury has been directly caused by the person or entity sued, rather than a party that is not before the court.[13] Finally, redressability requires a sufficient level of certainty that a court decision in favor of the plaintiff will remedy the injury.[14]

Standing in the United States is, however, not limited solely by the Constitution. In addition to the constitutional requirements, the Court has also placed prudential limitations on standing.[15] One of these prudential bars, which is the focus of this article, is a general prohibition against third party standing.[16] In a third party standing case, the plaintiff is seeking to raise issues related to an injury suffered by someone else, whether real or imaginary.[17] The court must then decide whether to allow the plaintiff to make arguments on behalf of the injured party. Generally, such arguments are not allowed.

However, with every rule comes exceptions. This article examines a number of the exceptions used in the United States to circumvent the prohibition on third party standing. Unlike Canada, which has generally accepted broader standing in rights cases brought in the public interest, the United States has only created exceptions for particular rights. Fallon has noted that many third party cases

7. Sprint Communs. Co., L.P. v. APCC Servs., 554 U.S. 269, 273 (2008).
8. 504 U.S. 555 (1992).
9. *Id.* at 560.
10. *Id.* at 560 n.1.
11. The requirement that the plaintiff can truly be considered to have suffered a particularized injury is questionable in certain third party standing exceptions, particularly in taxpayer standing.
12. *Id.* at 560.
13. Causation was not demonstrated in Allen v. Wright, 468 U.S. 737 (1984). Black parents sued the IRS claiming that tax deductions used by racially discriminatory schools prevented their children from being educated in an integrated environment. *Id.* at 739-40. The Court held that a chain of causation that traced through white parents deciding to send their children to segregated schools to the discriminatory schools that took advantage of the exemption and back to a government agency was too far attenuated. *Id.* at 757-58.
14. The plaintiffs in Allen v. Wright also failed to demonstrate redressability, because it was not clear that even if the tax exemption was at stake the private schools would admit black students, or that if the school gave up the tax exemption and were forced to raise tuition, white parents would choose to send their children to public school rather than pay the increased fee. *Id.* at 758.
15. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985).
16. *Id.*
17. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99-100 (1979).

merely reflect the evolution of the law on a "doctrine-by-doctrine basis."[18] However, Fallon also considers the idea that such tests implicate third party standing to be question-begging.[19] In this, Fallon is wrong. While third party standing in many rights cases has emerged independently, it has been driven by a broader purpose - the need to protect rights. Fallon is correct, however, that the distinct and limited basis of each exception has ensured that these exceptions remain firmly constrained within the limited areas chosen by the Court.

B. The Basis of Standing in Canada

Canada, unlike the U.S., does not derive its standing limitations from direct constitutional language. Canada's standing jurisprudence is instead entirely common law-based, although it can be specifically restricted by statute. The Canadian Constitution has played a central role in pushing the evolution of third party standing, but it has had the opposite effect seen in the United States. Unlike the U.S., where the Constitution forms the first limitation of the standing requirement, the Constitution in Canada has been the basis for expanding standing. As described in Part II.B *infra*, in a trilogy of cases beginning in the pre-constitutional era, the Supreme Court of Canada expanded the notion of who could properly come before a court to allow public interest standing in rights cases.[20] The doctrine was later expanded to include administrative challenges through direct reference to the Constitution.[21] The broad range of public interest standing has simplified the case law, at least when compared to the United States, as in most cases, the party either has direct standing or has public interest standing. The all encompassing nature of public interest standing in Canada has, however, resulted in relatively poorly developed case law on association standing.

C. The Basis of Standing in Australia

Like the United States, Australia also derives its standing requirement from constitutional text. In Australia, standing is limited by the constitutional constraint that the court consider only "matters."[22] Initially, the term matters seems similar to the cases or controversies that United States courts are limited to.[23] However, the Australian Law Reform Commission has said that matters, as used in the Australian Constitution, is not equivalent to the case or controversy restriction in the United States Constitution, stating "[t]he term 'matters' was chosen as the broadest available, by the drafters of the Constitution, who in other respects drew heavily on the language of Article III."[24] Likely for this reason, the term appears to

18. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327 (2000).
19. *Id.* at 1348.
20. Canadian Council of Churches v. R., [1992] 1 S.C.R. 236 (Can.).
21. Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607(Can.).
22. Australian Constitution §§ 75-77.
23. Australian Constitution §§ 75-77.
24. AUSTRALIAN LAW REFORM COMMISSION, STANDING IN PUBLIC INTEREST LITIGATION 40 (1985).

be less important in Australia than the United States, and Australian standing cases generally rely more on the common law of standing. The Australian Law Reform Commission has called for broad standing reforms in the country, including a presumption of standing in suits brought to vindicate a public interest, defined in terms of the remedy sought rather than the purpose of the claim.[25] However, these recommendations have not yet resulted in changes to Australian standing law on a national level in third party standing cases. One reason for this is likely the comparative lack of rights protecting cases, which has prevented the Australian High Court from being forced to expand standing to ensure the protection of rights.

II. THIRD PARTY STANDING EXCEPTIONS TO VINDICATE RIGHTS

Much of the expansion in standing law that has occurred in the last few decades has been due to courts opening the door to allow challenges brought to protect rights.[26] Australia, lacking a written bill of rights, has faced little of this type of pressure in rights cases, and has therefore retained the traditional standing requirements. In contrast, both the United States and Canada, countries in which the courts are charged with making final rights determinations,[27] have witnessed an expansion in their respective standing doctrines. However, while both countries have expanded standing, they have done so in very different ways. In the United States, this expansion has occurred through the invention of a number of different exceptions to traditional standing, each created to vindicate particular rights. Taxpayer standing, for instance, has evolved as a particular response to the problems presented by the Establishment Clause, while the complete removal of the standing requirement in overbreadth cases has expanded the number of challenges that can be brought based on free speech and abortion rights. Canada, in contrast, has approached standing in rights cases in a more coherent and transparent manner, allowing public interest standing when necessary in any case to protect rights. These differences are elaborated in this section, while the implications of these differences are addressed in the next section.

A. Rights-Based Challenges in the United States

The United States Supreme Court has created multiple exceptions to the traditional standing requirements in order to vindicate rights. However, these have evolved on an issue by issue basis, and the Supreme Court has shown little interest in developing a more unified approach. This section, like United States standing doctrine itself, is organized according to the specific right at issue. The first part of this section addresses civil challenges to rights and includes taxpayer standing for

25. AUSTRALIAN LAW REFORM COMMISSION, BEYOND THE DOOR-KEEPER: STANDING TO SUE FOR PUBLIC REMEDIES §§ 1.14-1.16 (1996), *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html. The Australian Law Reform Commission had previously called this concept "an open door, but with a pest screen." AUSTRALIAN LAW REFORM COMMISSION, STANDING IN PUBLIC INTEREST LITIGATION xii (1985).

26. As rights have been conceptualized in the United States.

27. The notwithstanding clause in Canada excepted.

Establishment Clause violations, overbreadth in free speech and abortion cases, and the general restriction on all other rights challenges in *United States v. Salerno*.[28] The second part of this section addresses standing in response to a criminal charge or conviction. In contrast to Canada, where a criminal defendant is granted broad standing to challenge the statute under which the person was convicted, in the United States, the defendant remains bound by the same standing requirements that apply in all cases and is merely granted the privilege of bringing the challenge after having been charged. The difference in the United States is therefore one of timing, not degree. This extreme criminal constraint is a consequence of the way in which standing and remedy have become intertwined in overbreadth cases and through the restrictions placed on other facial challenges in *Salerno*. *Salerno* reinforces the inability of American courts to acknowledge the role of abstract review in modern rights cases.

1. Vindication of Rights in the Civil Context in the United States

a. Taxpayer Standing and Establishment Clause Violations

Taxpayer standing is an example of a particular exception to traditional standing in that it is applicable only in limited circumstances and was created to protect a particular right. It has been so narrowly defined that it is restricted to the narrow Establishment Clause challenge at issue in *Flast v. Cohen* in 1968.[29]

In *Flast*, the appellants (plaintiffs below), all of whom claimed their status as federal taxpayers as the basis for the complaint, challenged a federal act granting money to religious schools to help finance instruction in secular subjects such as reading and math.[30] The appellants contended that the agency implementing the act violated the Establishment and Free Exercise Clauses because the money directed toward religious institutions was in effect "compulsory taxation for religious purposes."[31]

In granting standing, the Court overturned a prior decision prohibiting federal taxpayer suits, but did so under the condition that the taxpayer meet two separate requirements. First, the taxpayer was required to establish a connection between the payment of taxes and the challenged legislative act, meaning that the challenge had to fall "under the taxing and spending clause of Art. I, § 8, of the Constitution."[32] This restriction meant that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[33] Second, the taxpayer had to demonstrate that Congress had

28. 481 U.S. 739 (1987).
29. 392 U.S. 83 (1968).
30. *Id.* at 85-86. Specifically, in order to be eligible for this funding, which was aimed at assisting in the education of underprivileged schoolchildren, an institution was required to submit an education plan to a state agency for approval. *Id.* at 86. Approval was conditioned on the plan's compliance with criteria established by the federal education secretary. *Id.*
31. *Id.* at 87.
32. *Id.* at 102.
33. *Id.*

gone beyond a specific constitutional prohibition, not merely that the congressional action was beyond the tax and spend power.[34]

This test, when first set forth, appeared to grant standing to any taxpayer alleging both a violation of the Taxing and Spending Clause and a violation of another constitutional right. However, restrictions have been continually placed on the original requirements, most recently in the 2007 case, *Hein v. Freedom from Religion Found., Inc.*,[35] narrowing the exception to direct Establishment Clause challenges only.

Hein was the product of a split Court. Justices Scalia and Thomas favored a complete overthrow of *Flast*.[36] The controlling opinion, however, which was authored by Justice Alito, merely constrained *Flast* to its original facts. *Hein* was brought as a challenge to the creation of "the White House Office of Faith-Based and Community Initiatives," which was tasked with "eliminating unnecessary bureaucratic, legislative, and regulatory barriers that could impede [religious] organizations' effectiveness and ability to compete equally for federal assistance," as well as other executive branch organizations charged with ensuring that religious groups were able to compete for federal dollars.[37] The critical fact was that all challenged organizations and policies were entirely executive branch products.[38] No congressional dollars had been earmarked for either the goals or the organizations themselves.[39]

The Court held that the respondents had failed to show standing, as the action they challenged was not a congressional appropriation, as *Flast* had required, but rather a decision lying entirely within the executive branch.[40] In so holding, the Court noted that *Flast* had become confined to its facts, applicable only in challenges to congressional spending under the Establishment Clause.[41]

Hein, therefore, merely solidified what had been generally understood to that point, that taxpayer standing was only available to challenge congressional expenditures alleged to be in violation of the Establishment Clause. An Establishment Clause exception is necessary because the nature of the Establishment Clause means that violations are usually too general to meet the necessary test for standing. In contrast to the Free Speech Clause, which prohibits the government from interfering with an individual's expression, or the Free Exercise Clause, which again prohibits the government from interfering with the activities of an individual, the Establishment Clause prohibits the government from

34. *Id.* at 103. Holding that the appellants had satisfied both conditions, the Court held they should be granted standing. *Id.*

35. 551 U.S. 587 (2007).

36. *Id.* at 618.

37. *Id.* at 593-94.

38. *Id.* at 595.

39. *Id.* Taxpayers and an organization representing the taxpayers brought suit claiming that the government had violated the Establishment Clause through conferences put on by the organizations. *Id.* These conferences allegedly singled out religious organizations as favored members of the political community, showed members of religious communities that they were favored insiders in the political community, and made clear to nonbelievers that they were not favored members of the political community. *Id.* at 595-96.

40. *Id.* at 608-09.

41. *Id.* at 609.

granting a benefit to a particular group. In such a transaction, neither of the two parties involved, the government and the religious group, have any reason to contest the action. Instead, the harm is felt by people who are not parties to the contract, and are therefore not quantifiably different than the rest of the population in the way that traditional standing has long demanded. In short, the nature of the right demands a particular exception if the right is to be enforced. Taxpayer standing provides a direct contradiction of the alleged constitutional requirement that a plaintiff must suffer an individual injury. The Court acknowledges that there is no way to demonstrate this type of injury in an Establishment Clause case.

The diffuse harm suffered in Establishment Clause challenges is very similar to the diffuse harm suffered in many environmental cases. However, because taxpayer standing has been so closely tied to Establishment Clause challenges, rather than created as a more general exception for cases that would otherwise never be possible to bring, no extension of the doctrine is allowed. Fear of abstract review cannot be used as an explanation for the tight restriction on taxpayer standing, as many taxpayer standing cases challenge specific action, and the alleged violation caused by that action can be analyzed under the applicable law. (Taxpayer standing could, however, also be used in a more traditional abstract manner.) Taxpayer standing is therefore an example of a right-based exception allowed in concrete circumstances to correct a diffuse wrong. Overbreadth, in contrast, is an exception allowing an abstract challenge to correct a (hypothetical) individual wrong.

b. Overbreadth Challenges in the United States

Standing in rights protecting cases cannot be understood in the United States without an overbreadth examination. Overbreadth challenges allow the court to protect a particularly vulnerable or favored part of the population by allowing others to bring claims on their behalf. Overbreadth is essentially an implicit acknowledgement that the traditional adversarial system is insufficient to protect certain rights for certain people.

In an overbreadth challenge, the plaintiff claims to be protecting the rights of a particular group with a highly stylized injury, a form of abstract review. Whether overbreadth will be allowed in a particular context therefore depends on whether the court believes that the injury of the fictional party is sufficiently stylized to allow a general determination without facts, and that the right is important enough to subvert traditional standing rules. Overbreadth is well established in the free speech context and is also used in the abortion context, although support there has wavered. These are the two areas in which it has been traditionally and most consistently applied.

c. Overbreadth and Abortion in the United States

Overbreadth has been used in abortion cases since *Roe v. Wade*.[42] In abortion cases, the protected groups have included minor girls afraid to speak to their parents and married women in abusive relationships with their husbands. It is not difficult to construct prototypical narratives for these groups.

In *Ayotte v. Planned Parenthood*, abortion providers challenged a New Hampshire law that required pregnant minors to undergo a two day wait while a parent was notified that an abortion would be performed, unless the minor opted for a judicial bypass.[43] While the judicial bypass option guaranteed access to the courts twenty-four hours a day and seven days a week, both the trial and appellate court were granted a week to rule on the application.[44] An explicit exception was granted for the life, but not the health, of the mother.[45] New Hampshire did not contest that abortion statutes were required to create exceptions to preserve both the health and life of the mother.[46] The question was not whether the case could be heard at all (the third party standing of the abortion providers was never questioned), but whether the court of appeals had properly vacated the entire statute.[47]

Ayotte demonstrates the power of third party standing in overbreadth cases. Abortion providers were able to bring a challenge to protect the rights of a teenager facing a pregnancy that threatened her health. While *Ayotte* would likely be viewed as unsuccessful by those looking to apply overbreadth in a substantive manner, since the statute was not invalidated entirely, it demonstrates how effectively overbreadth functions as an alternative method of allowing third party standing. No pregnant teen from New Hampshire with a health condition was involved in the case, despite the fact that the case revolved around exactly this type of fictional plaintiff. Nor is *Ayotte* the only case demonstrating the importance of third party standing to an understanding of overbreadth.

In *Planned Parenthood v. Casey*, the Court invalidated a portion of a Pennsylvania law that forbade a married woman from undergoing an abortion without the consent of her husband.[48] *Casey*, like *Ayotte*, was brought exclusively by abortion providers.[49] The *Casey* Court also went further than the *Ayotte* Court substantively, and struck down the offending provision in its entirety.[50] This result was reached without a single woman coming before a court to explain why she

42. Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, U.S. LEXIS 7350 at *2-3 (Scalia, J., dissenting from a denial of a petition for certiorari).

43. 546 U.S. 320, 323-24 (2006). Other exceptions were allowed if death were imminent or if a parent certified that he or she was already aware of the impending abortion. *Id.* at 324.

44. *Id.*

45. *Id.*

46. *Id.* at 328. The question, therefore, was merely one of remedy. *Id.*

47. *Id.* at 332. The Court in the end sent the case back to the court of appeals to determine whether the statute should be struck down entirely or merely enjoined from being enforced in an unconstitutional manner. *Id.*

48. 505 U.S. 833, 898 (1992). The law provided only limited exceptions. *Id.*

49. *Id.* at 845.

50. *Id.* at 898 (bidding an end to the days when married women were considered the property of their husbands).

should not be required to notify her husband before undergoing an abortion. The important facts about women in abusive relationships were inferred through expert testimony rather than personal experience.[51] In this case, the overbreadth doctrine was successful not only in getting the third person standing case heard, but in striking down the offending portion of the statute to protect the rights of a particular and vulnerable population.

Nor does it appear that the use of overbreadth in abortion cases is likely to go away any time soon, despite calls by some commentators that *Gonzales v. Carhart* has signaled to the contrary.[52] The *Gonzales* Court refused to invalidate the Partial-Birth Abortion Ban Act of 2003, holding that there was insufficient evidence that the procedure outlawed by the Act would affect the health of the mother.[53] The Court's admonition that the case should have been handled in an as applied manner is better understood as a limited conclusion that no need for a health exception had been established in that particular case rather than as a complete retreat from all facial challenges to abortion statutes.[54]

Overbreadth involves an important interplay between the right and the fictional plaintiff seeking protection for that right. What abortion cases have really shown about overbreadth is not that it is no longer allowed, but that it is allowed when the fictional plaintiffs are particularly vulnerable members of the population. Under this reasoning, the fictional plaintiff in *Gonzales*, a woman facing a health crisis necessitating an abortion through the banned procedure, was therefore not sufficiently helpless, given the alternative abortion options available.[55] In contrast, the abused wives in *Casey* and the pregnant minors in *Ayotte* were more compelling fictional plaintiffs. A minor in *Ayotte* facing a threat to her health seemed both more plausible and of greater concern than the grown woman facing a threat to her health in *Gonzales*.

d. Overbreadth and Free Speech in the United States

A fictional plaintiff in a free speech case undergoes far less scrutiny than one in an abortion case.[56] Even more so than the right to an abortion, the right to free

51. *Id.* at 890. The facts included "[a] woman in a shelter or a safe house unknown to her husband is not 'reasonably likely' to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidentally disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances" and "[i]t is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief." *Id.*

52. 550 U.S. 124, 168 (2007).

53. *Id.* at 166-67 ("The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.").

54. *Id.* at 154-156. The Court was similarly unconvinced that the behavior prohibited by the act would be confused with legal alternative means of abortion, thereby making the act overbroad by applying it to procedures not intended to be criminalized. *Id.*

55. It is easier to create a fictional plaintiff in a free speech case than in an abortion case.

56. Hypothetical plaintiffs played a central role in Reno v. ACLU. 521 U.S. 844 (1997). In *Reno*, free speech groups challenged the Communications Decency Act of 1996 claiming that the Act was overbroad. *Id.* at

speech is viewed as so critical, and yet at the same time so fragile, that all members of society are called forth to protect it providing a great deal of leeway for fictional plaintiffs.[57] With logic like this, the Supreme Court has admitted that the right to free speech cannot be adequately protected under the traditional standing framework. However, overbreadth itself still retains a limited scope when carried over to criminal cases.

2. Standing in Criminal Cases in the United States

Both the United States and Canada allow a criminal defendant to challenge the constitutionality of the law under which he has been charged. However, this right is far more limited in the United States than in Canada, and far more limited than many American commentators currently believe. In Canada, a defendant is granted a broader right to challenge legislation on behalf of a third party if the challenge occurs in connection with a criminal case than would be allowed in an unrelated civil case. The United States does not grant criminals this same broad protection. A criminal seeking to challenge a law must meet the same third party standing test that would be required in a civil context. Leniency in the United States merely means allowing the criminal to challenge the law under which he has been charged in a separate case or as a defense. The United States therefore only allows the challenge to take place at a different time, whereas Canada differs not merely in time but in scope, allowing a broader range of challenges than would otherwise be allowed in a traditional civil case.

Many American commentators take it as a given that a defendant has standing to challenge the constitutionality of the law under which the defendant was convicted. While this is certainly true when the defendant is alleging that the statute violated a personal right of the defendant, such as in *Lawrence v. Texas*,[58] it is greatly diminished when the defendant is asserting the rights of other people.

In the United States, a defendant is restricted to the same types of claims that could be brought as facial challenges in civil suits. This restriction was cemented in *United States v. Salerno*.[59] While *Salerno* dealt with the merits of the case, it is also important for third party standing because the connection between overbreadth and standing means the case also severely restricts the available arguments for a criminal defendant. After *Salerno*, a criminal defendant raising a third party standing defense that does not rely on overbreadth in the First Amendment or

862 nn. 27-28. In reaching a conclusion that the Act improperly prohibited constitutionally protected speech, the Supreme Court examined the effect of the Act on sexually explicit speech between adults, teens researching prison rape, and a parent sending information on birth control to a seventeen-year-old college freshmen. *Id.* at 876-78 (examining among other implications the chilling effect on speech of knowledge that a minor was present in a 100 person chatroom). *Id.*

57. Osborne v. Ohio, 495 U.S. 103, 116 n.12 (1990) ("We normally do not allow a defendant to challenge a law as it is applied to others. In the First Amendment context, however, we have said that '[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser.'").

58. 539 U.S. 558 (2003) (striking down a statute criminalizing homosexual sodomy).

59. 481 U.S. 739 (1987).

abortion context must prove not only the alleged violation of the third party's rights, but a violation of the defendant's rights as well. As it is pointless for a defendant to simply add an additional requirement to a case, a criminal defendant has no reason to ever raise potential violations of a third party's rights.

Salerno involved a facial challenge to the Bail Reform Act of 1984, which allowed the government to detain a person without bail before trial "if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"[60] Two high ranking members of the Genovese crime family who had been arrested and held without bail pursuant to the Act brought the challenge.[61] In analyzing the case, the Court claimed that no overbreadth doctrine had been accepted in cases outside of the First Amendment.[62] The Court then said this meant that "the challenger must establish that no set of circumstances exists under which the Act would be valid."[63] Under this exceptionally stringent no set of circumstances test, the Court held that the Act could not be considered in violation of substantive due process or the Eighth Amendment protection against excessive bail. By reasoning that the detention was not punitive, but rather regulatory, as it was aimed to prevent crime rather than to punish those charged with violent crimes, the Court held that there was no violation of substantive due process.[64] This result was aided by the numerous safeguards present in the Act, as well as the fact that the Court was only attempting to determine whether the procedures in the Act were "adequate to authorize the pretrial detention of at least some [persons] charged with crimes."[65] The Act was also held not to violate the Eighth Amendment prohibition against excessive bail because the Court decided that the amendment only required that the amount of bail be balanced against the evil the government sought to regulate.[66] No bail was necessary when the government interest was something other than risk of flight.[67] The Act was therefore upheld against the facial challenge.[68]

Through *Salerno*, the Court dramatically changed facial challenges in both the criminal and civil context.[69] The general view that third party standing must be allowed to contest the validity of criminal charges has little meaning in a

60. *Id.* at 741.
61. *Id.* at 743.
62. *Id.* at 745. As discussed in the section on abortion, overbreadth is in fact recognized in both First Amendment and abortion challenges.
63. *Id.* This in effect shifts the power of the hypothetical from the person bringing the claim where a single hypothetical plaintiff means the case can be heard to the government, which can completely stop the challenge with one hypothetical plaintiff for which the law could be valid.
64. *Id.* at 748. The Court saw little difference between the type of detention at issue and other instances of detention without criminal conviction including the detention of dangerous individuals before deportation and the detention of dangerous individuals who are proven incompetent to stand trial. *Id.* at 748-49.
65. *Id.* at 751 (quoting Schall v. Martin, 467 U.S. 253, 264 (1984)).
66. *Id.* at 754.
67. *Id.* at 755.
68. *Id.*
69. Anderson v. Edwards, 514 U.S. 143, 155 (1995), provides an example of *Salerno* applied to a civil case. In *Anderson*, the Court determined that California was free to determine how to compute families when determining welfare benefits. *Id.* at 147.

post-*Salerno* world. Criminal charges are harder under a *Salerno* standard than they would have been in a civil facial challenge, as the criminal defendant must prove that the defendant's specific crime constitutes a violation as well (otherwise at least one instance would exist where the law had been applied in a constitutional manner). There is therefore no reason for a defendant to seek third party standing to challenge the constitutionality of a law, as a personal constitutional violation must nevertheless be proved.[70] The only exceptions to this requirement are overbreadth in First Amendment (and presumably abortion) cases, where universal unconstitutionality is not required.

Cases challenging convictions are therefore highly focused on the First Amendment, one of the few remaining areas of law where a statute must not be shown to be invalid in every possible application. An example of such a case is *Virginia v. Black*, where the Court held invalid a Virginia statute that prohibited cross burning with the intent to intimidate but did not require separate proof of the intent to intimidate.[71] The statute therefore failed to distinguish between cross burning intended to intimidate and cross burning intended as political speech or artistic expression.[72]

Were the United States to take seriously the command that one should not be punished under an unconstitutional law or based on unconstitutional activity, a great deal more litigation would be required. For instance, it would be necessary to allow criminal defendants to challenge unconstitutional searches and seizures regardless of whether the defendant possessed a Fourth Amendment right to privacy in the area and to allow the person charged to defend the constitutional rights of the person illegally searched—a result the Supreme Court has explicitly rejected.

While *Salerno* has stopped nearly all third party challenges by criminal defendants to the statute under which the criminal was convicted, a few scattered standing exceptions remain. Unconstitutional conduct during jury selection is one remaining challenge a criminal defendant can make invoking the rights of others. This category is epitomized by *Powers v. Ohio*, in which a white defendant was able to challenge black exclusions from the jury pool.[73] However, the logic behind *Powers*, that one should not be convicted based on unconstitutional procedures, has not led to an exception outside jury selection. *Powers* is best thought of as another issue specific hole in the traditional bar to third party standing created by courts to vindicate a specific constitutional right. It does not mean that criminals are allowed to challenge other procedural constitutional violations leading to their conviction or, as described, much Fourth Amendment law would need to be thrown out. *Powers* merely created a small opening to challenge juror selection, and is another typically American exception for a challenge in a specific type of case.

70. It would therefore be foolish to make an overbreadth argument since the criminal defendant would need to prove a personal violation in addition to counteracting any hypothetical person produced by the government.
71. 538 U.S. 343, 367 (2003).
72. *Id.* at 366.
73. 499 U.S. 400, 416 (1991).

American rights cases are therefore categorized by very limited circumstances in which the rights of others can be protected in both the civil and criminal context, with issue specific exceptions having arisen in each. While the Court repeatedly states that the Constitution in fact prohibits one from bringing a case claiming to protect the rights of others, the Court's actions indicate that the Constitution merely prefers that one bring a case to protect one's own rights. The exceptions in American law could not exist were the Constitution the extreme ban it is claimed to be. The problems caused by the American approach, and the additional standing exceptions it has required, are dealt with later. Now, it is time to contrast the scattered American approach with the coherent approach adopted by the Canadians for standing in rights protecting cases.

B. Rights-Based Challenges in Canada

In contrast to the United States, which has a number of different approaches through which plaintiffs seek standing for third party claims, civil rights-based challenges in Canada all now follow the same analytical framework. If the plaintiff cannot show individual injury sufficient to provide standing, the court will analyze whether public interest standing should be granted. Public interest standing is explicitly discretionary, as the test asks the court to determine whether a particular plaintiff should be allowed to make the argument, but it has nevertheless opened Canadian courts to a broad range of challenges while consolidating and unifying the case law on standing. Similarly, standing has also been broadened and standardized for criminals to defend against allegedly unconstitutional statutes. Standing in criminal cases, does not rely on the same test used in general civil suits, granting defendants broader standing to challenge the statute under which they were convicted than they would be under traditional public interest standing and in a more coherent manner than the way in which overbreadth is used in the United States.

1. Public Interest Standing in Civil Cases in Canada

Canadian rights protection through public interest standing evolved over three cases that predate the Canadian Charter of Rights and Freedoms, which was enshrined as the initial part of the Canadian Constitution in 1982.[74] The bill of rights relied on before this point was far weaker than the Charter and many rights were still determined through the common law. Given the importance the courts played in acknowledging and determining these rights, these cases demonstrate how broader rights protection leads to broader standing. In each case, the Court noted that the right the plaintiff sought to protect would be virtually impossible to

74. A fourth case, discussed in the section on administrative challenges in Canada and decided after the Charter of Rights and Freedoms, made the doctrine applicable to administrative challenges as well, *see infra* note 173 and accompanying text.

protect through traditional standing requirements and expanded standing accordingly.[75]

The first case, *Thorson v. Canada (Attorney General)*, was brought as a taxpayer suit.[76] Thorson brought suit seeking a determination that the Official Languages Act[77] and the appropriations provisions providing for it were unconstitutional.[78] The Ontario Court of Appeal denied standing, holding that a taxpayer suffered no greater injury than other members of the population and, accordingly, did not have the requisite special injury required for standing.[79] The Canadian Supreme Court, in contrast, was more concerned with "whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute."[80] Rather than decide the broader questions governing such suits, the Court chose to retain discretion both with regard to whether to grant the initial request for standing and whether to issue the declaratory order that had been sought.[81]

The Court also drew a distinction between the role of courts in enforcing disputes related to the public that occur between two private parties, such as a public nuisance action, where the constitutional validity of legislation is not in doubt, and suits seeking to ensure that the legislature itself has acted in accordance with constitutional requirements.[82] While the Court analyzed a number of prior taxpayer standing suits, the case appeared to break from that tradition stating "[i]t 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."[83]

The second case, *MacNeil v. Nova Scotia (Board of Censors)*,[84] concerned a free speech challenge.[85] MacNeil challenged the Theatres and Amusements Act[86] as well as regulations promulgated under the Act as being beyond the powers of the legislature.[87] The suit was brought after the plaintiff was informed that the Nova

75. While this is also what happened in the United States, the Canadian Court differed from the U.S. in using cases addressing different rights to form a single coherent doctrine for this new and expanded standing, rather than creating the piecemeal exceptions seen in the United States.

76. [1975] 1 S.C.R. 138, ¶ 10. Canadian courts no longer reference the concept of taxpayer suits as the idea has been subsumed within public interest standing.

77. 1968-69 (Can.), c. 54 (declaring both English and French to be the official languages of Canada and regulating that both languages be available wherever warranted by sufficient population size).

78. *Thorson*, 1 S.C.R. 138, ¶ 10.

79. *Id.* ¶ 11.

80. *Id.* ¶ 12. The Court also noted that the Attorney General had declined as request to litigate the validity of the tested legislation. *Id.* ¶ 13. This does not appear decisive, however, as the Court questioned whether it was proper to require that a potential litigant first seek assistance from a body charged with enforcing Parliamentary legislation. *Id.* ¶ 14.

81. *Id.* ¶ 15.

82. *Id.* ¶¶ 19-20.

83. *Id.* ¶ 39.

84. [1976] 2 S.C.R. 265 (Can.).

85. The plaintiff sought to challenge action that could be considered both legislative and administrative, however, all challenges concerned the right to free speech, and the Court did not distinguish between the two when evaluating whether standing had been demonstrated. I therefore consider this a rights case rather than an administrative case. *Id.*

86. R.S.N.S. 1967, c. 304.

87. *MacNeil*, 2 S.C.R. 265.

Scotia Board of Censors had determined that the film the "Last Tango in Paris" would not be permitted to be shown in Nova Scotia.[88] The Court noted that the Act could, in one sense, be interpreted as regulating only the movie theaters and other businesses subject to direct control under the Act.[89] However, the interest of the theaters would not necessarily be the same as the interest of the general public, and the public deserved the opportunity to protect its right to free speech.[90] While the theaters undoubtedly possessed standing to challenge decisions under the Act, this did not exclude ordinary citizens from challenging the power of the Board to exert almost complete control over what was shown in the province.[91] As the case had come up only on the procedural question, the Court did not address the merits of the case, holding only that the plaintiff appeared to have standing sufficient to bring the suit.[92]

The third case in the trilogy was *Borowski v. Canada (Minister of Justice)*.[93] *Borowski* was brought by a taxpayer to challenge a statute that decriminalized certain abortions.[94] The suit was for the protection of the right to life of the fetus and was the first public interest standing case brought under the Canadian Bill of Rights.[95] The Court examined the prior two cases before noting that, in this case, since the legislation had decriminalized certain types of abortions that previously would have been subject to penalty, the Court could not expect to find "any class of person directly affected or exceptionally prejudiced by it who would have cause to attack the legislation."[96] The Court also noted that, while "the issue as to the scope of the Canadian Bill of Rights in the protection of the human right to life is a matter of considerable importance," a fetus itself could not be expected to be a party to a court proceeding.[97] The Court summarized the prior two cases as stating that:

> to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation

88. *Id.* ¶ 5.
89. *Id.* ¶ 10.
90. *Id.* The Court viewed the businesses directly regulated by the Act as potentially being subject to "administrative law features" of the Act. *Id.* ¶¶ 8-9.
91. *Id.* ¶ 10. The Court also noted, again, that the Attorney General had decided not to pursue a challenge to the legislation, believing it to be within the power of the legislature, although this statement does not appear to have affected the reasoning. *Id.* ¶ 5.
92. *Id.* ¶ 13.
93. [1981] 2 S.C.R. 575 (Can.).
94. *Id.* ¶ 31.
95. *Id.*
96. *Id.* ¶ 50. The Court had also already noted, however, that the theater owners specifically affected by the challenged legislation in *MacNeil* had not been expected to show a prohibited movie and challenge the statute in a resulting criminal action, so the lack of a negatively affected class does not appear to be a deciding factor in the decision. *Id.* ¶ 48. The Court also noted that, even were the husband of a wife affected by the legislation and who did not want the abortion to proceed to attack it, the length of a court case was much longer than the length of a pregnancy. *Id.* ¶ 52.
97. *Id.* ¶ 53.

> and that there is no other reasonable and effective manner in which the issue may be brought before the court.[98]

Finding this test met, the Court granted standing.[99]

All three cases were then summarized in *Canadian Council of Churches v. R.*,[100] a post-Charter case and the currently cited case on public interest standing, as requiring a three part test:

> First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?[101]

The *Churches* Court considered, and rejected, an argument to expand public interest standing further.[102] Instead, the Court focused on the third requirement of the test.[103]

The case was brought by the Council of Churches, an organization that assisted churches with the resettlement of refugees.[104] The Council brought a challenge to revised immigration laws passed by Parliament that changed the procedure used to determine whether a person qualified as a refugee.[105] This facial challenge was brought the day the Act went into effect, "seeking a declaration that many if not most of the amended provisions violated the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*."[106]

While the Court accepted that the issue was serious, and the Council of Churches had a genuine interest in the subject matter, it was not convinced that the issue was required to be brought by the Council.[107] The Court noted "[t]he challenged legislation . . . directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the *Charter*."[108] The Council had argued that potential refugees would have a difficult time challenging the regulation, but the Court disagreed, taking judicial notice of the fact that refugee applicants had in fact appealed decisions under the law being challenged.[109] Noting that the basis for granting public interest standing was to ensure that legislation could not remain

98. *Id.* ¶ 56.
99. *Id.*
100. [1992] 1 S.C.R. 236 (Can.).
101. *Id.* ¶ 37.
102. *Id.* ¶ 36.
103. *Id.* ¶ 40.
104. *Id.* ¶ 2.
105. *Id.* ¶ 3.
106. *Id.*
107. *Id.* ¶ 38-40.
108. *Canadian Churches*, 1 S.C.R. 236, ¶ 40.
109. *Id.*

unchallenged and preferring "a clear, concrete factual background upon which the decision of the court could be based," the Court denied standing to the Council.[110]

Together, these cases set forth a clear test that a civil plaintiff must meet to be granted public interest standing. In particular, a plaintiff seeking public interest standing must demonstrate that it is unlikely a plaintiff with direct standing will be able to bring the case. The plaintiffs in *Churches* failed this test because immigrants were already challenging immigration laws. The case would have come out differently if immigrants were unable to challenge the law. It is unclear, however, how Canadian courts would handle a civil equivalent of *Powers v. Ohio*,[111] the jury case in the United States where the Court reasoned that black prospective jurors were unlikely to challenge their dismissal. Canadian courts, like all common law courts, prefer cases presenting concrete facts brought by those most affected. However, were a similar civil case to arise, it is likely that a demonstration that any party directly affected would have no reason to come forward would still be sufficient to demonstrate that it was neither reasonable nor effective to wait for such a challenge. *Powers* would unquestionably be allowed in the criminal context, as Canada now has automatic third party standing in criminal cases.

2. Rights-based Challenges in Criminal Cases in Canada

The broadened Canadian approach to civil standing in rights cases has been further expanded in the criminal context. In contrast to the American Constitution, which is generally said to form an outer limit to permissible standing, the Canadian Constitution has been used to broaden standing in both criminal and administrative cases. In the criminal context, the Constitution requires that a criminal defendant be allowed to defend against a charge by claiming a violation of the rights of a third party, thus ensuring that no one can be convicted under an unconstitutional law.

In 1988, in *R. v. Morgentaler*,[112] this expanded standing requirement forced the Canadian Supreme Court to address the constitutionality of an abortion law. When abortion had been previously raised in 1975, parliamentary supremacy remained the guiding rule. The Court had therefore deferred to Parliament and avoided the issue.[113] However, when the issue arose again in 1988, the Canadian Constitution was in force, and it was the Court, rather than Parliament, that had the final duty to ensure all laws were constitutional.

The appellants in the 1988 *Morgentaler* case were abortion providers who had set up an abortion clinic together.[114] At this clinic, abortions were performed

110. *Id.* ¶¶ 40-42.
111. 499 U.S. 400, 416 (1991).
112. [1988] 1 S.C.R. 30 (Can.).
113. Morgentaler v. The Queen, [1976] 1 S.C.R. 616, 671 (Can.). The Canadian Court at the time was therefore not acting as the type of final rights determining court that has pushed the standing barriers to protect rights.
114. *Morgentaler*, 1 S.C.R. 30 at 50.

without the statutorily required preapproval certificate.[115] The three providers were charged with violating the applicable abortion statutes.[116] After an acquittal at trial, the crown appealed. The acquittal was overturned by an appellate judge, and a new trial was ordered.[117] In the appeal, the Court held that the abortion procedures specified in the law did "not comport with the principles of fundamental justice" as required in section 7 of the Charter.[118] In doing so, the Court made a determination of the validity of the abortion statutes on third parties as part of the criminal process for the doctors charged with violating that law.

A similar result was reached in *R. v. Big M Drug Mart Ltd.*.[119] In *Big M*, a corporation was allowed to challenge a Sunday closing law after having been charged with a violation of such a statute. The corporation claimed the law infringed upon the right to freedom of religion in the Canadian Bill of Rights.[120] In allowing the appeal, the Court relied on section 52 of the Constitution, which states "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[121] In response to the argument that Big M., as a corporation, could not hold a religious belief, the Court answered:

> The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases but that was not the reason for its appearance in Court. Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect. Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant.[122]

115. *Id.*
116. *Id*.
117. *Id.* at 51.
118. *Id.* at 73. The Court went on to hold that these procedures were not saved by a proportionality analysis under s.1 of the Charter. *Id.* at 75-76. These findings were echoed by another judge in the plurality opinion. *Id.* at 81-82 (Beetz., J., concurring).
119. [1985] 1 S.C.R. 295 (Can).
120. *Id.* ¶ 2.
121. Constitution Act, 1982, s. 52.
122. [1985] 1 S.C.R. ¶ 39.

The Court went on to hold that the Sunday closing law had a religious basis and, therefore, violated the right to freedom of religion.[123] This result was cited approvingly in a concurrence by the Chief Justice in *Ontario v. Canadian Pacific Ltd*,[124] where the Court allowed a corporation to argue that an environmental law the corporation had been charged with was vague and overbroad.[125] Neither argument was ultimately successful, but the Court did allow the appeal to be heard, which it might not have were a criminal prosecution not at issue.[126]

Both Canada and the United States have created exceptions to the traditional standing rules in order to protect rights. Australia, which does not have the same tradition of strong rights protection by the High Court, has not seen the type of rights cases that led courts in the U.S. and Canada to expand rights, and has therefore retained the traditional standing requirements.

C. Rights-based Challenges in Australia

Australia has no written bill of rights, resulting in far fewer rights than the United States and Canada at the federal level. Australia has recognized at least a limited right to free speech, but the right is generally litigated in the defamation context, which does not present a third party standing issue. While the existence of a right to abortion has been mentioned in the Australian High Court, legislation regarding abortion has been left to the states, as have challenges. A federal court denied standing in one of the few challenges related to abortion. However, the challenge was brought not by a group seeking to increase access to abortions, but by a group seeking to prevent the importation into the country of a drug used for abortions.[127] The rights of those seeking an abortion were therefore not at risk were standing to be denied, a similar instance to one of the few times a United States court has denied standing in an abortion case.[128] Faced with no significant challenge to a right, and no need to expand standing to protect that right, it is of little surprise that Australia has yet to expand beyond the traditional standing requirements.

D. Rights-based Challenges Conclusion

Both the United States and Canada have recognized the need to broaden standing to ensure the protection of certain rights. As a consequence, the traditional bar against third party standing has not remained solid in either country. However, the approaches taken to deal with this issue have differed dramatically.

123. *Id.* ¶ 151. The Court also held that the provision failed a section 1 proportionality analysis. *Id.* at 353. While the Court struck down the law at issue, it did note that a similar law enacted for a secular purpose, such as providing a day of rest, would be permissible. *Id.* at 354.

124. 1995 Can. Sup. Ct. LEXIS 22 (Lamer, C.J., concurring).

125. *Id.* at 53-54.

126. *Id.* at 108-09.

127. Right to Life Association (NSW) Inc. v. Secretary, Department of Human Services and Health, (1995) 37 A.L.D. 357 (Austl.).

128. *Id.*

American courts have remained satisfied with a right by right approach, creating specific exceptions where deemed necessary given the nature of the particular right at stake, aided by a reliance on the hypothetical injured parties created by attorneys. In Canada, by contrast, standing is far more uniform. Standing in Canada has also remained distinct from the merits, in contrast to overbreadth analysis in the United States where the two are often combined. This distinction between the merits and standing has also allowed Canada to grant greater leeway to those charged with a crime to challenge the constitutional basis of their charge, setting a lower threshold for standing to challenge an offense with which one has been charged than to make a general facial challenge to a statute. The United States refuses to grant expanded standing to criminal defendants, effectively making it impossible for a criminal defendant to argue that a statute violates the right of a third party rather than the defendant, and allowing convictions under laws that might be unconstitutional but cannot be challenged. Australia, in contrast, demonstrates the stability of traditional standing when the Court is not the predominant rights protecting body in the government. The implications of these differences are explored in Part III.

III. IMPLICATIONS OF THE RIGHTS-DRIVEN NATURE OF STANDING

The rights-driven exceptions discussed in the previous section have had an impact in a wide variety of third party cases. In Canada, the broad standing accorded to rights challenges opened the door to similarly broad standing in administrative law challenges. In contrast, in the United States, the issue by issue approach to expanded standing has failed to create a coherent doctrine. This has affected rights cases by reducing the number of rights accorded such protection and has also affected administrative cases. Standing in environmental cases in particular has gone through a dramatic expansion and retraction. While prior rights exceptions made the earlier environmental expansion possible, the lack of a coherent doctrine meant that there was nothing to secure the gains made. All standing exceptions in the United States can be removed at any time; environmental standing was simply a victim of this fragility. This lack of coherence has also resulted in the creation of association standing in the United States, allowing many cases to be brought that would qualify under public interest standing in Canada. Like the United States, Australia has virtually no third party standing, despite calls to create Canadian style public interest standing in administrative cases. Such a proposal has had difficulty gaining traction because there is no established third party standing doctrine developed through rights cases from which to expand. This section first explores the issues faced in environmental standing before addressing the issue of association standing.

A. Implications for Administrative Challenges

In commonwealth systems, when plaintiffs challenge a statute passed by the legislature, the plaintiffs generally argue that the statute violates fundamental rights, whether enshrined in a written constitution or established through prior case

law. Once it has been established that the judiciary, rather than Parliament, is the guarantor of rights, courts must accept rights-based challenges, and the only question becomes how far to extend the rules of standing to ensure that rights are protected.

Administrative challenges are different. The challenge is generally a failure of the administration to follow proper procedures, or an argument that an administrative interpretation of a law is not consistent with the interpretation intended by the legislature when it drafted the enabling statute. In this area, as in rights cases, Canada uses the broad and uniform doctrine of public interest standing. American courts, in contrast, generally reject challenges seeking to vindicate the administrative interests of a third party. Australia follows a similar approach to the U.S.; the Australian High Court has essentially retained the original standing requirements. This is despite calls in Australia for the same type of broad public interest administrative standing used in Canada. The reluctance of the Australian High Court to expand administrative standing can be explained by the lack of prior rights cases that pushed the standing barriers, as happened in both the U.S. and Canada.

1. Administrative Challenges in the United States

In the United States, as in the other countries examined, third party standing in administrative cases has become most contentious in environmental challenges. In the 1970s, standing in environmental cases was easy to achieve based on vague potential harm claimed by the plaintiff. However, since then, and particularly from the time Justice Scalia joined the Court, standing has required increasingly concrete injury displays and has faced an increasing overlap with ripeness. At this point, administrative cases can no longer proceed unless the plaintiff (or members of the plaintiff, if the plaintiff is an organization) can demonstrate concrete personal injury, eliminating the possibility of many challenges to diffuse harms.[129]

Environmental standing first gained prominence in the early 1970s in *Sierra Club v. Morton*.[130] The Sierra Club, a national environmental protection organization, brought suit to challenge a National Forest Service decision to allow the development of a ski resort in a mountainous area of California.[131] Access to the resort would require the construction of a twenty mile highway, a portion of which would cross the Sequoia National Park, as well as a high voltage power line for the resort.[132] As the Sierra Club was suing under the Administrative Procedure Act, which had already been held to grant very broad standing to those challenging administrative actions, the Court "d[id] not question" that the road and powerline

129. Such cases are, however, still properly considered third party standing cases because it is understood by all parties that the goal is broader protection rather than a specific grievance complained of by the plaintiff, because the plaintiff is generally seeking to make an abstract claim against the government, such as a procedural challenge against a regulation, and because such cases could, alternatively, be viewed as third party standing cases as they are in Canada.

130. 405 U.S. 727 (1972).

131. *Id.* at 728-29.

132. *Id.* at 729.

slated for construction through the Sequoia National Park could cause harm, creating "an 'injury in fact' sufficient to lay the basis for standing."[133] The Court in fact noted that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[134]

Standing was not granted, however, because the Sierra Club had not shown that the organization itself had suffered this type of injury.[135] More specifically,

> The alleged injury will be felt directly only by those who use [the areas under development], and for whom the aesthetic and recreational values of the area[s] will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development. Nowhere in the pleadings or affidavits did the Club state that its members use [the ski resort area] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.[136]

While standing was therefore denied in *Sierra Club*, the Court provided a clear roadmap for future cases to follow. Broad environmental concerns could create standing, provided the plaintiffs alleged a specific personal connection to the environment being harmed. This roadmap was followed in *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*) in 1973.[137]

SCRAP was brought by students from George Washington Law School to protest a decision of the Interstate Commerce Commission not to suspend a 2.5% increase in railroad freight rates.[138] Specifically, the students in *SCRAP* contended that the decision could not have been made without an environmental impact statement, as required by the National Environmental Policy Act of 1969.[139] Such a statement was required for all "[f]ederal actions significantly affecting the quality of the human environment."[140] The Commission had not included a statement, because it found that the rate increase would not have a significant effect on the environment.[141] The students, in contrast, claimed that increased freight rates on

133. *Id.* at 734.
134. *Id.* This would no longer be the case today.
135. *Id.* at 734-35.
136. *Id.* at 735.
137. 412 U.S. 669 (1973).
138. *Id.* at 673-78. The school is located in Washington, D.C.
139. *Id.* at 679.
140. *Id.* (citing 42 U.S.C. § 4332 (1969)).
141. *Id.* at 677.

recycled materials would drive down recycling rates, which would in turn adversely affect the environment.[142]

When the standing of the students was challenged, the Court noted that "all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury."[143] The Court then noted that, in contrast to the plaintiffs in *Sierra Club*, the *SCRAP* plaintiffs had alleged that they personally had been injured.[144] The *SCRAP* Court found the following statement sufficient to demonstrate standing:

> a general rate increase would allegedly cause increased use of non-recyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.[145]

While some wiggle room remained because the case had dealt with a motion to dismiss, for which the Court was required to accept all facts in the statement as true, after *SCRAP*, the courthouse door seemed wide open. However, in 1992, in *Lujan v. Defenders of Wildlife*, the Court began to very clearly shut that door.[146]

The plaintiffs in *Defenders of Wildlife* challenged an administrative decision by the Secretary of the Interior that the consultation requirements of the Endangered Species Act did not apply in foreign countries.[147] This rule contradicted a previous understanding between the Fish and Wildlife Service and the National Marine Fisheries Service that the consultation requirement did extend to foreign countries.[148] The plaintiffs brought suit, claiming that this lack of consultation caused harm to endangered species overseas.[149] Two affidavits became critical to establishing the standing of the organization.[150] Both affidavits claimed that the authors had traveled to foreign countries and observed endangered species habitat, that this habitat was threatened by U.S. financed construction projects abroad, and that the authors hoped to be able to return and see the endangered species in the future.[151] These statements would have been sufficient under the *SCRAP* standard.

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142. *Id.* at 681 n.9.
143. *Id.* at 687.
144. *Id.*
145. *Id.* at 688.
146. 504 U.S. 555 (1992).
147. *Id.* at 557-58. The rule had been promulgated by the Secretary of the Interior. *Id.* More specifically, the rule stated that the Endangered Species Act would only apply in the United States or on "the high seas." *Id.*
148. *Id.* at 558.
149. *Id.* at 562.
150. Following the association standing requirements discussed in the next section, in which an association can demonstrate standing by showing that a member of that organization can show standing.
151. *Id.* at 563.

The Court summarized its prior standing cases in a three-prong test requiring: that the alleged harm violate a "concrete and particularized" legally protected interest that is "actual or imminent,"[152] that the injury be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . [a] third party not before the court,"[153] and that the injury will "'likely'. . . be 'redressed by a favorable decision.'"[154] The affidavits, the Court found, failed "at least" the injury and redressability prongs.[155]

The Court found no imminent injury, as the affiants had provided no concrete statements about when they would return to the overseas endangered species habitat, and "'some day' intentions" were insufficient.[156] The Court also found a lack of redressability because the organization was challenging a general government decision not to require consultation rather than individual projects alleged to be damaging the environment.[157] This strict focus on the constitutional requirements has redefined much of the standing analysis in the United States today.

This decision has had serious consequences. Requiring that a plaintiff demonstrate a concrete harm prevents many systematic challenges from being brought while simultaneously making clear to agencies how to moot the few cases that are brought. This serves to virtually grind abstract challenges to agency action to a halt, even though such challenges are still allowed in First Amendment cases in the United States. This can be seen in the recent Supreme Court case of *Summers v. Earth Island Institute*,[158] which was brought by a number of environmental organizations to challenge a decision by the Forest Service to "exempt small fire-rehabilitation and timber-salvage projects from the notice, comment, and appeal process used by the Forest Service for more significant land management decisions."[159] The nearly impossible position plaintiffs now find themselves in is demonstrated by the organization members in this case.

Ara Marderosian, the first affiant, alleged that he had visited a specific Forest Service area covered by the new policies, had imminent plans to do so again, and "that his interests in viewing the flora and fauna of the area would be harmed if the [salvage project] went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment."[160] The government had conceded this was sufficient to establish standing in the district court.[161] The case was even considered strong enough for the district court to grant a temporary injunction.[162] However, after the injunction had been issued,

152. *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
153. *Id.* (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).
154. *Id.* (quoting *Simon*, 426 U.S. at 38, 43).
155. *Id.* at 562.
156. *Id.* at 564.
157. *Id.* at 568.
158. 129 S. Ct. 1142 (2009).
159. *Id.* at 1147.
160. *Id.*
161. *Id.*
162. *Id.* at 1149.

the parties settled.[163] This settlement resolved the dispute over the particular area, and in so doing removed Marderosian's standing.[164]

The other affiant was Jim Bensman, who alleged past injury from development on Forest Service land and predicted harm from future development occurring under the challenged regulations.[165] Neither allegation was sufficient. The past harm was insufficient, because the development was not connected with the challenged regulations.[166] The future harm was insufficient because it was not specific enough.[167] As to Bensman's claim that "he has visited many National Forests and plans to visit several unnamed National Forests in the future," the Court found the statement to be too vague, because he had not specified which particular projects he felt were "unlawfully subject to the regulations."[168] As to Bensman's claim that "a series of projects in the Allegheny National Forest" were unlawfully subject to the regulations, the Court found the statement insufficient because it failed to demonstrate when Bensman planned to return to the area.[169] This relied on the same "some day" insufficiency as *Defenders of Wildlife*.[170] The dissent, in contrast, noted that Bensman specifically described areas of concern, including "a salvage-timber sale scheduled for the Hoosier National Forest—an area Bensman had visited 'multiple times' and to which he planned to return in the coming weeks."[171]Regarding the Allegheny National Forest, in the dissent's version of the facts:

> Bensman [stated that he] has visited 70 National Forests, that he has visited some of those forests "hundreds of times," that he has often visited the Allegheny National Forest in the past, that he has "probably commented on a thousand" Forest Service projects including salvage-timber sale proposals, that he intends to continue to comment on similar Forest Service proposals, and that the Forest Service plans in the future to conduct salvage-timber sales on 20 parcels in the Allegheny National Forest—one of the forests he has visited in the past.[172]

As the dissent noted, Bensman's claim comes very close to that of the other affiant in specifying the detail of the injury.[173] The dissent felt that the fact that the Forest Service had conceded that thousands of projects would be exempt from notice and comment in the future should be sufficient to show a likelihood of

163. *Id.*
164. *Id.* at 1149-50.
165. *Id.* at 1150.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 1150-51.
170. *Id.*
171. *Id.* at 1158 (Breyer, J., dissenting).
172. *Id.* at 1157 (Breyer, J., dissenting).
173. *Id.*

injury—a policy utterly inconsistent with the high level of specificity demanded by the majority.[174] Under the majority's rule, there is virtually no way to present an abstract challenge to an administrative regulation, even where, as in this case, the claim made against the regulation does not regard the particular parcel at issue but is instead a procedural challenge to the issuance of the regulation, for which the specifics of any particular parcel are irrelevant.

While the Court was essentially correct in noting that there was no precedent for allowing a suit to continue after the sole injury used to grant standing had been resolved,[175] this situation was created only because the Court required such a specific description of the problem rather than examining the case through the eyes of a fictional plaintiff. Were the problem viewed through the eyes of a fictional plaintiff, as many First Amendment and abortion challenges are, the Court would have addressed the real action being challenged, the agency decision, rather than forcing the discussion to specific relatively inconsequential actions based on that decision which, when resolved, will then disappear.

It is generally good policy for cases to conclude when an agreement has been reached between the parties. However, what might make sense when the issue is a contractual dispute makes far less sense when what is at issue is an agency action with a number of consequences. In addressing each consequence individually, the Court misses the forest for the trees. What matters in these cases is the original agency action, far more than any particular repercussion. Ignoring this fact means many agency actions can never be fully challenged. The diffuse harm suffered in environmental cases is little different than the diffuse harm suffered in Establishment Clause violations. However, because American standing exceptions have become increasingly tightly bound to particular rights, the gains made in older environmental standing cases have been lost. A more coherent standing doctrine would simplify the cases for both rights challenges and administrative challenges. An example of this type of doctrine can be seen in Canada.

2. Administrative Standing in Canada

In contrast to the United States, Canada has taken a broad approach to third party standing that requires rights-based challenges and administrative challenges to follow the same public interest standing analysis. Canada also shows how a court system can build on rights-based exceptions to expand standing to administrative challenges as well.

Canada has the most consistent and liberal approach to third party standing of the three countries surveyed, applying public interest standing to both rights challenges and administrative challenges. The decision to apply public interest standing to administrative cases was made by the Supreme Court in *Finlay v.*

174. *Id.*

175. This type of showing is not required in voting cases, as the injury generally has been mooted, but the likelihood that the same injury could occur again and be mooted before resolution is sufficient to allow the initial case to proceed. This is another particular exception to the supposed constitutional requirements. A similar concern is raised in the abortion context if a pregnant woman brings the challenge.

Canada (Minister of Finance) in 1986.[176] *Finlay* was brought by a Manitoban disability recipient.[177] Before receiving state provided aid, Finlay had received municipal assistance, which was considered a loan rather than a gift.[178] In consequence, when the state assistance began, five percent of Finlay's disability benefits were deducted to repay this loan.[179] Finlay claimed that this deduction was contrary to the statutory requirement that disability benefits be sufficient to meet a recipient's basic requirements, because the repayment caused the amount received to fall below the amount determined to meet the basic requirements.[180] The difference from prior public interest cases was that Finlay was not challenging the payment deduction as contrary to a constitutional right, but rather as contrary to the statute[181] under which the payment plans operated.[182] Finlay sought a declaration that the federal payments to Manitoba were illegal, as Manitoba was not complying with all requirements, and an injunction ordering the federal government to stop the payments, which would force Manitoba to comply with the requirements.[183]

Analyzing the standing issue, the Court first considered whether Finlay met the special interest requirement allowing a party other than the Attorney General direct standing to seek declaratory and injunctive relief.[184] Despite the fact that Finlay was conceded to currently be receiving an amount of benefits below that considered necessary for survival, Finlay was denied direct standing.[185] Analogizing to *Simon v. Eastern Kentucky Welfare Rights Organization*,[186] the Court found it insufficiently clear that a declaration that the federal payments were illegal would cause Manitoba to revise its payment policies.[187] However, rather than stop there, as the U.S. Court had, the Canadian Court moved on to a determination of whether to extend the public interest analysis, noting that:

> This question raises again the policy considerations underlying judicial attitudes to public interest standing, and in particular, whether the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this Court in *Thorson*, *McNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority.[188]

176. [1986] 2 S.C.R. 607 (Can.).
177. *Id.* at 611.
178. *Id.*
179. *Id.*
180. *Id.* at 612.
181. The Canada Assistance Plan, R.S.C. 1970, c. C-1.
182. 2 S.C.R. at 612.
183. *Id.* at 621-22.
184. *Id.* at 621.
185. *Id.* at 623-24.
186. 426 U.S. 26 (1976) (denying standing to plaintiffs because they had failed to demonstrate that the injury complained of was attributable to the defendants rather than to a third party).
187. 2 S.C.R. at 623-24.
188. *Id.* at 631.

The answer was a resounding yes. The Court saw no reason to treat administrative and legislative challenges differently, the issue was sufficiently serious, there did not appear to be any other way to get the matter before a court, and there could be no one with a more direct interest in the matter than Finlay.[189] Finlay was accordingly granted standing.[190] Public interest standing in Canada followed a very clear path from rights-based challenges to administrative challenges. In contrast, Australia, lacking the strong rights protections present in the United States and Canada, has never been forced to move away from the stringent standing requirements originally used in all three countries, and has yet to expand standing in administrative cases in the High Court, although possible signs of change have been noted in a lower level court.

3. Administrative Standing in Australia

Because Australia has much weaker rights protections than the U.S. and Canada, current standing doctrine in Australia has been driven by administrative cases rather than rights-based cases. With no rights cases forcing the High Court to expand standing, there has not yet been a notable expansion in standing. The cases laying the basic foundation of current standing in Australia are *Australian Conservation Foundation Inc v. Commonwealth*[191] and *Onus v. Alcoa of Australia Ltd*.[192] That both of these cases are administrative also reflects the statutory basis of many challenges, which leads to a more statute-centered standing analysis, and arguably offers less opportunity for expansion.

The first of the two decisions, *Australian Conservation Foundation Inc. v Commonwealth*, a 1980 case, concerned a challenge to a proposed resort in Queensland.[193] The case was brought by the Australian Conservation Foundation, an environmental organization, claiming that the resort had been approved by the administration without reviewing a final environmental impact statement and the approval was therefore in violation of environmental laws and regulations.[194]

Justice Gibbs began by reviewing the standing law in England as stated in *Boyce v. Paddington Borough Council*:[195]

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . . ; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special

189. *Id.* at 633-34.
190. *Id.* at 634. The Court also noted that there was no reason to distinguish between public interest standing to seek declaratory relief and public interest standing to seek injunctive relief. *Id.* at 635.
191. (1980) 146 C.L.R. 493 (Austl.).
192. (1981) 149 C.L.R. 27 (Austl.).
193. (1980) 146 C.L.R. 493 (Austl.).
194. *Id.*
195. [1903] 1 Ch. 109, at 114.

> damage peculiar to himself from the interference with the public right.[196]

While Gibbs attempted to remain faithful to *Boyce*, he also tried to clarify the language of the first exception by interpreting "special damage peculiar to himself" to mean "having a special interest in the subject matter of the action."[197] Gibbs also noted that the Australian courts operated under a different constitutional requirement than the Case or Controversy Clause in the United States, but that the approach he supported aligned with that used in the United States in *Warth v. Seldin*.[198] Gibbs summarized his views as follows:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.[199]

Using this test, Gibbs was confident the Association had failed to show a special interest, and denied standing.[200] Other judges agreed with Gibbs' conclusion, although some effort was made to leave open the potential for a broader basis for standing in constitutional challenges.[201]

The year after *Australian Conservation Foundation*, the Court further clarified standing in a private environmental suit in *Onus v Alcoa of Australia Ltd*.[202] *Onus* was brought by two Australians of aboriginal descent seeking an injunction to prevent Alcoa of Australia, an aluminum company, from building an aluminum smelter on land containing aboriginal artifacts.[203] The plaintiffs claimed that Alcoa was operating in violation of a statute passed in the state of Victoria to protect

196. 146 C.L.R. 493 (Austl.).
197. *Id.*
198. 422 U. S. 490 (1975). Gibbs did not, however, address the trial court's examination of Sierra Club v. Morton, 405 U.S. 727 (1972) and U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).
199. 146 C.L.R. 493.
200. *Id.*
201. *See id.* opinions of Stephen J., and Mason J.
202. (1981) 36 A.L.R. 425 (Austl.). (no pinpoint cites in Lexis or Westlaw from the Court)
203. *Id.*

"Archaeological and Aboriginal Relics."[204] When the standing of the plaintiffs was challenged, the Court looked to the enhanced understanding of standing in *Australian Conservation Foundation*.[205] Chief Justice Gibbs, in analyzing the decision, first noted that the rule was flexible and based on the subject matter at issue.[206] As the plaintiffs had not shown that any personal right of theirs had been infringed, Gibbs looked to whether they had a special interest in the subject matter.[207] Gibbs found such an interest, noting that the plaintiffs were not merely aborigines, but "members of the Gournditch-jmara people," the group that had historically lived in the area.[208] The Gournditch-jmara were also custodians of their relics according to their local laws.[209]

Gibbs then addressed whether a mere "intellectual or emotional concern" was sufficient injury to create standing.[210] His implicit statement to the contrary in *Australian Conservation Foundation* had been the basis for the denial of standing in the lower court.[211] While not stepping back from the previous statement, Gibbs explained why the plaintiffs' interest in this case went beyond a mere emotional concern as follows:

> The present is not a case in which a plaintiff sues in an attempt to give effect to his beliefs or opinions on a matter which does not affect him personally except in so far as he holds beliefs or opinions about it. The appellants claim not only that their relics have a cultural and spiritual significance, but that they are custodians of them according to the laws and customs of their people, and that they actually use them. The position of a small community of Aboriginal people of a particular group living in a particular area which that group has traditionally occupied, and which claims an interest in relics of their ancestors found in that area, is very different indeed from that of a diverse group of white Australians associated by some common opinion on a matter of social policy which might equally concern any other Australian.[212]

The High Court therefore continued to require the type of particular injury at issue in traditional standing. *Australian Conservation Foundation* and *Onus* have formed the basis of Australian standing law for nearly thirty years.

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204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* Justice Stephen agreed in substance with Gibbs, but noted that it would be rare for a plaintiff demonstrating a special interest to not also have an intellectual and emotional interest in the case. *Id.* (Stephen J, concurring).

Commentators, perhaps frustrated with the age of the High Court cases still being cited, have questioned whether *Australian Conservation Foundation, Inc. v. Minister for Resources*,[213] a trial court decision, could signal a more modern approach to standing, possibly creating a form of Australian public interest standing.[214] While the case does expand standing considerably beyond that previously allowed by the High Court, it is nevertheless a trial court case, and should not be considered a new approach for the country as much as a signal of the frustration felt by an individual judge.

The trial court viewed the issue, preventing the export of woodchips from Australian forests, as being "one of the major environmental issues of the present time," and noted that (at that time) a decade had passed since the High Court decision in *Australian Conservation Foundation*.[215] Viewing standing as a decision made with community perceptions in mind, the court stated:

> In my opinion, the community at the present time expects that there will be a body such as the [Foundation] to concern itself with this particular issue and expects the [Foundation] to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation.[216]

Convinced that the Foundation was not merely a busybody, but was rather the body paid by the government to be particularly concerned with the South East forests, the court was convinced the Foundation had met the test for standing.[217] Or, as the court said, "[i]f the [Foundation] does not have a special interest in the South East forests, there is no reason for its existence."[218]

While the case might have resulted in a broader approach to environmental standing in Australia, there is little evidence that this case has changed Australian standing laws in the two decades since it was decided.[219] Australian public interest

213. (1989) 19 A.L.D. 70 (Austl.).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* While the case would represent a broader ability for organizations to challenge standing, and a broader version of standing than that available in the United States, Mark Squillace also questions the court's decision to deny standing to an individual who complained:

> that he had personally suffered damage to the windshields on his motor vehicles from logging trucks, that he was personally disturbed by the noise from the loading of chip boats at night, and that he was personally upset by the loss of trees and the destruction of plant and animal habitat as a result of logging, was denied standing. Surprisingly, the court denied Harewood standing because "[his] interest in the National Estate [was] little more than that of any ordinary member of the community." [While he] plainly would have been granted standing in a U.S. court since he alleged to have suffered specific, personal injuries that might be redressed by a favorable ruling on the merits.

Mark Squillace, *An American Perspective on Environmental Impact Assessment in Australia*, 20 COLUM. J. ENVTL. L. 43 (1995)(citing Australian Conservation Found., 19 A.L.D. 70).

standing therefore appears to still require that the plaintiff demonstrate a specific interest, and cannot be said to allow general public interest standing.

Some commentators have argued that Australian standing law is far more flexible than standing law in the United States.[220] However, such a position has never been adopted by the High Court. While the Australian High Court is not operating under the same constitutional constraint as the U.S. Supreme Court, both courts currently show a great reluctance to expand standing in the absence of congressional mandates. This reluctance demonstrates the extent to which both Courts are very protective of the resources of the court system. Neither the Australian nor American Courts currently allow a significant expansion of standing to challenge administrative grievances.

4. Administrative Standing Conclusion

Both Australia and the United States severely limit the ability of plaintiffs to obtain third party standing to challenge administrative actions. The United States, however, previously embraced broad administrative standing, a likely consequence of the prior expansion in standing in rights cases. Canada, like the United States, broadened public interest standing in administrative cases after expanding the doctrine in rights cases, but unlike the United States it has retained this expanded standing, perhaps because it relies on the same basis as standing in rights cases, rather than the more tenuous issue-specific approach used in the United States. Third party standing in administrative cases presents many of the same issues as third party standing in rights cases, and it is not surprising that Canada has chosen to analyze both types of cases using the same test. Both cases rely on an individual to protect the rights of others. However, a different situation arises when an organization brings suit on behalf of its members. In Canada and Australia, the cases are analyzed using the standing tests developed in individual cases. In the United States, however, where courts protect rights and yet strongly limit standing in third party cases, association standing has evolved as a stop gap measure for many of these cases.

B. Association Standing

Association standing is the term used in the United States when an association (or other organization) brings suit on behalf of one or more of its members.[221] In association standing cases, there is generally no reason an individual member of the association could not bring suit, even together with the association, because only one plaintiff in a case is required to demonstrate standing. This is frequently

220. *See* Carl Bruch, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 211 (2001); David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV 301, 331 (2007).

221. International Union, United Auto. Workers v. Brock, 477 U.S. 274, 276-77 (1986). The standing of the association is not at issue if the association itself can demonstrate injury and qualify for direct standing, and the term association standing, as it is used here, does not apply to such cases.

not done, however, and association standing, which exists as a settled doctrine only in the United States, allows the association to bring suit in place of one or more of its members. This happens even when the members individually would have no impediment to suit.[222] In contrast, when an association brings suit in both Canada and Australia, each case is analyzed relying on ordinary standing requirements. Association standing likely developed in the United States due to a combination of rigid standing rules and an acceptance of the increased quality of representation in suits brought by associations.

1. Association Standing in the United States

Association standing allows an association to sue as long as it can demonstrate that at least one of its members has standing.[223] The history of this doctrine was traced by the Supreme Court in *United Food & Commercial Workers Union Local 751 v. Brown Group*.[224] Hints of it first emerged in 1958, in *NAACP v. Ala. ex rel. Patterson*, when the Court declared that the association "and its members are in every practical sense identical."[225] However, *NAACP* was complicated because the association sought to challenge a requirement that it release its membership lists.[226] Therefore, while the Court did hold that the association had a sufficient nexus with its members to allow it to act as their representative, the Court also noted that the association itself faced harm from the same challenged conduct.[227] While this fact was simply noted as "a further factor pointing towards our holding that petitioner has standing," the case left courts unclear how to separate the interests of the members of an association from those of the association itself, as well as whether the members' interests were required to relate directly to their ties to the association.[228]

Modern association standing emerged through three cases: *Warth v. Seldin*;[229] *Hunt v. Washington State Apple Advertising Commission*;[230] and *International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v. Brock*.[231]

In 1975, *Warth v. Seldin*, the first of the three cases, established that an association could qualify for standing by showing that at least one of its members had suffered an injury sufficient to confer Article III standing, and that the personal presence in the case of the individual members with standing was not necessary to

222. In this sense, it contradicts Fallon's rule that when suit is brought on behalf of a specific person that person must have some impediment to bringing suit personally.
223. 477 U.S. at 276-77.
224. 517 U.S. 544, 551-53 (1996).
225. 357 U.S. 449, 459 (1958).
226. *Id.* at 458.
227. *Id.* at 458-60 (noting the association could expect ever decreasing membership rolls as a consequence of the membership disclosure requirement).
228. *Id.* at 460.
229. 422 U.S. 490 (1975).
230. 432 U.S. 333 (1977).
231. 477 U.S. 274 (1986).

resolve the issue.[232] However, in that case, the association, Metro-Act of Rochester, was unable to demonstrate that a member of the organization had standing and therefore was not granted standing.[233] Metro-Act was a non-profit organization operating in the Rochester, New York area, committed to increasing housing for low and moderate income residents.[234] It brought suit challenging a 1962 zoning ordinance that allocated ninety-eight percent of the vacant land in Penfield to single family housing, and required conditions that would put these homes out of reach of low income residents.[235]

Metro-Act argued that it should receive association standing because nine percent of its members lived in Penfield.[236] These members were alleged to have suffered harm under the 1968 Civil Rights Act because the zoning policies of the town, which discriminated against low income residents, had a disproportionate effect on the exclusion of racial minorities.[237] This, in turn, resulted in the Penfield residents living in a less diverse town.[238] This indirect harm, that a rule intended to restrict low (and moderate) income residents effectively excluded members of minority racial groups, was held to be too tenuous to maintain standing for any of the Penfield residents.[239] As the association had failed to show that at least one of its members had standing, the association itself could not demonstrate standing.[240]

The association standing requirements were further clarified two years later, in *Hunt v. Washington State Apple Advertising Commission*.[241] The case was brought over a North Carolina requirement that all apples shipped into the state identify the grade of apples using only federal standards or state that no grading standard had been used.[242] Compliance with the North Carolina requirement necessitated either separate boxes for all apples shipped to North Carolina, or a covering for the Washington grades, giving the apples a damaged appearance.[243]

The Court summarized prior case law as requiring an association to demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's

232. 422 U.S. at 512.
233. *Id.* at 512-14.
234. *Id.* at 494.
235. *Id.* at 495. These conditions included required minimum setbacks, floor space, and lot space. *Id.* Even the small percentage of multifamily housing was alleged to be out of reach for low income residents due to density requirements. *Id.*
236. *Id.* at 512. Metro-Act made both individual and association arguments regarding standing. *Id.* While neither type was ultimately successful, only the association standing arguments are relevant to this discussion. *Id.*
237. *Id.* at 514 n.21.
238. *Id.*
239. *Id.* The Court noted, however, that it was specifically deciding only the argument it understood the association to be making, that the zoning was intended to exclude low and moderate income residents, and that the outcome could have been different had the zoning instead been shown as an attempt to directly exclude minority residents. *Id.*
240. *Id.* The Court also noted that, even were harm demonstrated under these circumstances, prudential consideration could hold against granting the association or its members standing, because it was unclear that the interests of the excluded minorities in court would best be served by Metro-Act or one of its members. *Id.* at 514.
241. 432 U.S. 333 (1977).
242. *Id.* at 337. State grading systems, like the one in Washington that was alleged to be superior to the federal system in all respects, were explicitly not allowed. *Id.*
243. *Id.* at 338.

purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[244] Given that the regulation placed increased costs on Washington apple growers, the interest of the Commission in protecting Washington apple growers aligned with the focus of the case, and no individual proof was required, the association standing requirements were met.[245]

The final association standing case did not occur until 1986, when the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America challenged regulations issued by the Secretary of Labor under the Trade Act of 1974, which provided "benefits to workers laid off because of competition from imports."[246] The Court reiterated the association standing rule as announced in *Hunt*, and held that the workers had an injury sufficient to confer standing on the association.[247] This was despite the fact that all individual claims were required to be adjudicated in state court, as standing could be granted to anyone to challenge the validity of federal regulations in federal court, even if the results reached under those regulations were relegated to state courts.[248]

The case did little to clarify association standing, but is important because it reiterated the firm support of the Court for the doctrine. The Secretary had challenged not only whether the union met the requirements of the association standing test, but also whether association standing should be abandoned in favor of class actions.[249] The Secretary argued that class actions were superior to association standing cases in protecting the interests of the plaintiffs.[250] The main basis for this argument was that a court is required to ensure that the class representative will properly represent the interests of the class, while no such explicit test is required in association standing.[251]

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244. *Id.* at 343.

245. *Id.* at 344. In fact, the Court acknowledged that under these standards the case was straightforward except that it was not immediately clear that the Washington State Apple Advertising Commission should qualify as an association. *Id.* The Commission was not a voluntary organization but a state agency, supported by dues required of all apple growers in Washington. *Id.* at 337. Despite this fact, the Court found the Commission sufficiently similar to a traditional association to grant standing. *Id.* at 344. Of importance to this finding, the Commission was composed entirely of apple growers, was governed entirely by apple growers, and was financed entirely by apple growers, including the costs of the lawsuit. *Id.* The Court was therefore willing to equate the Commission with a traditional trade organization. *Id.* While the Court also noted that the Commission itself might be considered to have suffered harm, as its fees were dependant on the number of apples sold as "Washington apples" and if the North Carolina requirement resulted in a decrease in the number of apples sold, the fees obtained by the Commission would also decrease. *Id.* at 345. The Court continued saying "[t]his financial nexus between the interests of the Commission and its constituents coalesces with the other factors noted above to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," and standing was explicitly granted as association standing, not standing due to any direct injury suffered by the Commission. *Id.*

246. 477 U.S. 274, 276-77 (1986).

247. *Id.* at 288.

248. *Id.* at 287-88.

249. *Id.* at 288-89.

250. *Id.*

251. *Id.* The Secretary also put forth other concerns including that the association "might lack resources or experience or might bring lawsuits without authorization from its membership. In addition, the litigation strategy selected by the association might reflect the views of only a bare majority -- or even an influential minority -- of the full membership." *Id.* at 289.

While the Court noted that association standing was not perfect, it felt that any problems were more than made up for by the benefits of association standing.[252] "While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital."[253] The Court also noted that the ability to bring association suits was one of the major benefits of belonging to an organization: "'The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.'"[254]

The Court did express concern about protecting individual members from harm caused by association standing, noting that, were a judgment that could be shown to have been deficient obtained against an agency, further claims by individual association members might not be precluded "without offending due process principles."[255] The Court also noted that, were such issues brought to the attention of the court while the association was still a party, the court might be forced to find a solution.[256] Notably, however, the Court did not add an additional prong to the association standing test requiring a showing that the action was supported by a majority of the members of the association or that the association had sufficient funds to see the case through.[257] The Court did note, however, that no such specific allegations had been made regarding the union at issue.[258]

While the benefits listed by the Court are no doubt true, they do not fully explain why association standing should exist. One potential explanation is that such cases present an effective way of performing more abstract review. As in the Washington State apple case, enough facts still remain that the Court was not required to see the issue as an abstract facial challenge, but removing the individual and corresponding individual facts allowed the Court to better understand the broader issue, that the statute had been enacted to prevent Washington apples from being sold in North Carolina, without having to delve into the details of a particular Washington grower. It was also a level of abstraction that made it easier to find the statute invalid, and to do so on behalf of the large number of growers affected by the statute. However, despite the benefits noted by the Court, as well as the moderately abstract level of review made possible, American style association standing is a uniquely American phenomenon, and is not seen in either Canada or Australia.

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252. *Id.*
253. *Id.*
254. *Id.* at 290 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring).
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*

2. Association Standing in Canada

In Canada, as in the United States, an association can sue directly if it can demonstrate a direct interest in the case. However, an association does not necessarily have standing if it can demonstrate that a member has standing. The issue has not been addressed by the Supreme Court, and lower court opinions appear on both sides. The Supreme Court has not needed to address it because many of the cases in which an association brings suit qualify for public interest standing. It therefore appears that public interest standing, which was discussed in Part II.B.1, has subsumed at least part of the void filled by association standing in the United States.

The current uncertain state of association standing in Canada is demonstrated by *Canadian Generic Pharmaceutical Association v. Canada*, a federal trial court case.[259] In this case, the court discussed both sides of the association standing argument before avoiding the issue and deciding to allow standing under the public interest standing exception.[260] The court cited only federal cases when discussing why an association could not obtain standing based simply on the standing of a member, but it included provincial cases on the opposite side, evidently swayed at least somewhat by the association's argument that the cases showed the "winds of change are blowing."[261]

The first case cited to describe why an association cannot obtain standing based solely on the standing of a member was *Independent Contractors & Business Ass'n v. Canada (Minister of Labour)*, a federal appellate case.[262] The association, a group of non-unionized shop contractors, and some individual members of the association brought suit challenging regulations establishing the minimum wage rate for qualifying projects in British Columbia.[263] It was established that the individual contractors had previously bid on such projects, and intended to do so in the future, which was sufficient to confer standing.[264] However, despite this decision, the court also held that the association did not have standing.[265] This was because the association "is not itself in the construction business and is therefore in no position to bid on federal government contracts in British Columbia."[266] The association was therefore not directly affected by the action or departmental decisions relating to the action.[267] While the association had sought review of the

259. [2007] F.C. No. 202 (Can.).
260. *Id.* ¶¶ 9-20.
261. *Id.* ¶ 15.
262. 1998 N.R. LEXIS 112 (Can. F.C.A. 1998).
263. *Id.* ¶¶ 5-6.
264. *Id.* ¶¶ 13-14.
265. *Id.* ¶ 30. The association's standing appears to have been addressed, despite having already determined that at least one petitioner had standing, because the association sought leave to file a response to the administrative decision. *Id.*
266. *Id.*
267. *Id.*

decision, the court felt that the association's true interests were "'merely indirect or contingent.'"[268]

In contrast, in *Alberta Liquor Store Ass'n v. Alberta (Gaming and Liquor Commission)*,[269] an Alberta trial court granted standing to an association without demanding that the association demonstrate independent injury.[270] At issue was an administrative decision to grant liquor licenses to companies with connections to large grocery store chains.[271] This decision was challenged by independent liquor stores as well as an association of independent liquor stores that did not itself operate any stores.[272] Again the issue for the association was whether it could qualify for standing even though it could not demonstrate any individual harm.[273] After acknowledging that case law seemed to go against granting standing in such a situation, the court nevertheless granted it, noting:

> The refusal of the court to recognize the standing of collective organizations, on the basis that only the members of the organization are "aggrieved", is somewhat formalistic. The courts increasingly recognize the validity, and indeed the desirability, of collective action. The law recognizes the legitimacy of a number of entrepreneurs combining their resources to carry on a business. There is no reason why the court should refuse to recognize the legitimacy of a number of aggrieved citizens combining together to form a collective entity to advance their grievances. In more recent years, standing has been granted to a number of these organizations, often the "Friends of" something, or the "Concerned Citizens" of some type, even if the association was formed solely to engage the particular issue before the tribunal. The granting of standing to collective organizations avoids multiplicity of lawsuits. It allows a number of concerned persons to combine their resources, which leads to a better ability to marshal evidence, to retain counsel, and generally to provide the kind of input that leads to sound decisions by administrative tribunals and the courts. There is therefore no reason to refuse standing to a society like the Alberta Liquor Store Association, particularly where that Association is a long-standing representative of members of the industry, and can be expected to have the expertise and resources

268. *Id.* ¶ 31 (citing Canadian Transit Co. v. Public Service Relations Board (Can.), [1989] 3 F.C. 611, 614 (Can. Fed. App. Ct.). In this case, review was sought on a statutory basis, but there is no reason to believe the "directly affected" requirement of the Federal Courts Act would narrow the traditional standing rules.

269. [2006] A.R.J. No. 1597 (Alberta Ct. Queen's Bench).

270. *Id.* ¶ 24.

271. *Id.* ¶ 4 (as well as other unrelated businesses).

272. *Id.* ¶ 6.

273. *Id.* ¶¶ 16-18. The economic harm suffered by independent stores was found sufficient to provide standing for them. *Id.*

> to mount a responsible challenge to the questioned administrative acts.[274]

While the federal law in Canada still appears to prohibit the broad type of association standing currently seen in the United States, at least in federal court, there is some hint that this could change in the future. However, massive change is unlikely because public interest standing solves many of the close cases that would otherwise push the judiciary to expand the current standing limits for associations. The abstract review available through public interest standing also lessens the need for courts to resort to association standing to add a layer of abstraction to a case.

3. Association Standing in Australia

Australia, like Canada, does not have the doctrinally defined association standing seen in the United States. However, because Australia also does not have the liberal public interest standing that Canada has, it has been forced to confront the issue of association standing on a more frequent basis. However, while the issue has arisen in multiple cases, Australian courts have yet to issue a definitive statement. Association standing has never been addressed in the High Court, although at least one lower court incorrectly believed that it had been.

The High Court failed to address the issue in 1995, in *Shop Distributive & Allied Employees Ass'n v. Minister for Industrial Affairs*.[275] In this case, a union sought to protest a decision by the Minister for Industrial Affairs establishing limited trading hours on Sundays in stores that had previously been closed.[276] The decision had been made under a law granting the Minister authority to determine what hours shops were permitted to be open, including whether Sunday openings were permitted.[277] Such a change was permitted on a permanent basis after the Minister had ascertained that a majority of "interested persons" desired the change, but could be made on a limited basis unilaterally, as long as the change did not last more than a month.[278] The union brought suit alleging that the Minister lacked the authority to set hours that had not been fixed by the legislature.[279] The union members included shop assistants in the affected areas.[280] However, while standing was challenged in the case, the Minister did not contest that the interests of the union mirrored that of its members.[281] The Court had no difficulty finding that the shop assistants had a greater than average interest in the hours the stores they worked in were open.[282] As the Court itself chose not to address the standing of the union as distinct from its members, the union's standing was not directly at

274. *Id.* ¶ 20, 24.
275. (1995) 129 A.L.R. 191 (Austl.).
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*

issue.[283] This cannot be considered sufficient to establish association standing in Australia.

Association standing should have been addressed anew in 2001 in the lower court case of*North Australian Aboriginal Legal Aid Service Inc v. Bradley*.[284] The case was brought by an aboriginal legal aid association to protest the allegedly invalid appointment of a new Chief Magistrate for the Northern Territory.[285] In an attempt to demonstrate a special interest and thereby secure standing, the association stated that it had represented a number of aboriginal defendants, many of whom had previously come before the newly appointed Chief Magistrate prior to his elevation.[286] The Northern Territory disputed that anyone other than the individual coming before the magistrate could have a special interest in the matter and that the association's interest was instead "an 'intellectual or emotional' concern."[287] The court said that the starting point for an association standing analysis was to determine the association's "status and the functions which it performs."[288] The association received public funding to allow it to carry out its mission, and it existed entirely to provide legal assistance to some of the most disadvantaged members of the community.[289] Commenting that the association had "the same interest in the matter as would any of its members," the court granted standing to the association.[290] However, even though the court individually analyzed whether association standing could be granted based on the interests of the members, the court erroneously cited *Shop Distributive & Allied Employees Ass'n* as holding that the interests of an association included those of its members.[291]

Had the case been brought in the U.S., many of the same concerns would have been addressed (would a member of the association have standing[292] and does the association have an interest in the subject matter at issue). However, the Australian court did not address whether it was necessary for the complaint of an individual member to be heard—a necessary component of association standing in the United States. It is therefore possible that a form of association standing is evolving in Australia, but if this is the case, it does not yet have the formal structure seen in the United States and cannot be used reliably in place of individual standing. This situation will continue until the High Court confronts the issue directly.

283. *Id.*
284. (2001) 192 A.L.R. 625 (Austl.).
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* It is questionable, therefore, why it still completed the full analysis.
292. With member being defined in this case to include customer or person for whom the agency advocates.

4. Association Standing Conclusion

The United States is the only one of the three countries with an established doctrine of association standing. Such a result could be considered surprising, as the United States has such a strong insistence on individually demonstrated injury. This could be an attempt by American courts to seek a more abstract form of review or could simply be a result of the larger case volume present in the United States and the harmless injury caused when an association represents a member who would otherwise unquestionably have standing. It is also understandable that a similar doctrine has not evolved in Canada, as public interest standing covers many of the situations in which association standing is used in the United States. Australia, however, has neither Canada's broad public interest standing nor the rigidly defined association standing of the United States. This cannot simply be explained by a comparative lack of cases, as the opportunity has arisen to address the issue in Australia. However, it does demonstrate the extent to which standing exceptions for rights allow other exceptions to follow. Association standing has not been addressed in Australia because the High Court has yet to confront a necessary exception, particularly in a case implicating rights. Cases in which it could be at issue have also been brought by individuals with standing. Association standing has therefore never been critical to addressing the case the way the issue arises in rights cases. The U.S. and Canada have both created a number of exceptions to traditional standing. The two approaches are not equal, however, as the next section explains.

IV. DISCUSSION—PROBLEMS WITH THE UNITED STATES' APPROACH TO STANDING IN RIGHTS CASES

To this point, this article has described how American and Canadian courts used different methods to ensure cases vindicating certain rights could be brought in court, despite failing to meet traditional standing requirements. It has also discussed the effects of the different methods chosen to achieve this goal. The article will now detail why these two methods, the Canadian and American approaches, should not be considered equally valid methods of rights vindication. An issue by issue approach, like that used in the United States, would not necessarily compare less favorably to the broad general approach adopted by the Canadian court. However, the particular approach used by the U.S. Supreme Court has generally failed to acknowledge and accept the problems inherent in traditional standing. While the Court at least acknowledged that traditional standing was still at issue in taxpayer standing, by combining standing with the merits in overbreadth it has essentially just created a secret backdoor entrance to the Court that it now zealously guards. Expanded standing in the cases currently analyzed using overbreadth is necessary to protect rights, but by not acknowledging the conflict this creates with the Case or Controversy Clause, the Court has failed to fully step up to its role as the final rights protector in American society. Free speech rights are preserved, but many others are not. There has also never been a good explanation given as to why constitutional constraints can be ignored in certain

areas. To the extent the Court is holding this door open in taxpayer standing, it is trying to hold it open by only one inch. This is an untenable position over the long term. That exceptions exist at all in the American system is evidence that the American constitutional constraints cannot be absolutes, particularly when confronted by other constitutional requirements.[293]

American courts claim to be shackled by the Constitution when addressing rights cases in which explicit exceptions have not already been created. Whatever role the Constitution may play when determining how American courts should approach administrative challenges, whether because of the Case or Controversy Clause or the notion of separated powers, cases brought to determine rights must be able to sidestep constitutional shackles.[294] A case brought to vindicate a right, whether the right is personal or shared by society, is inherently different than a dispute between two private parties over a contract. Constraints created to limit the latter should hold far less sway when rights are at issue, particularly when the rights did not even exist when the Case or Controversy Clause was adopted.

Rights enshrined in the Constitution have no less authority of law than the Case or Controversy Clause. With the decision in *Marbury v. Madison*[295] should have come a realization that courts are the ultimate protectors of the rights so recently enshrined in the Bill of Rights, and that access to the courts must be ensured to maintain this judicial oversight. This result is only heightened by the fact that the rights protected in the Bill of Rights came later in time than the Case or Controversy Clause, and would therefore ordinarily be assumed to trump based on traditional canons of interpretation, whether of law or contract. To the extent that the Constitution can be considered a contract between the government and the American people, the people must be allowed to vindicate their promised rights, and this should include access to the courthouse when necessary to protect these rights.

Little could be more effective at insulating the workings of government from the people than to completely bar access to the courthouse. Violations that cannot be challenged cannot be corrected, and the most effective way for the government to win a case is to prevent the case from being heard at all.

The American and Canadian Supreme Courts both already acknowledge that traditional standing cannot protect all rights. An injury is created in every member of the community when the government does not protect rights. A plaintiff should

293. It is no response to point out that the exceptions are necessary because otherwise the right could not be protected. That is the point. If American courts were truly prohibited from hearing any cases that did not present a concrete case or controversy, free speech and abortion statutes would only be able to be challenged through the specific factual scenario presented by volunteers willing to face criminal punishment. That does not make sense in those circumstances, just as it does not make sense in other circumstances that a questionable law with the possibility of a clear hypothetical plaintiff can only be challenged by those willing to face criminal prosecution. Free speech may be central to our society, but so is due process.

294. Although I believe administrative cases also require greater standing, I believe broader standing in administrative cases would likely be embraced were the Supreme Court more open about the limitations of the Case or Controversy Clause to preventing unchecked abuse by the government.

295. 5 U.S. (1 Cranch) 137 (1803).

not need to prove the rarity of the injury in order to gain courthouse access in rights protecting cases. Broad injuries should not be able to go unchallenged.

Broader court access in rights cases would not necessarily result in more cases. The safeguards employed by Canada, and proposed in Australia, could also be used to ensure that wider courtroom access did not result in a deluge of cases—as could case consolidation and class action lawsuits. The real change, however, would be the true acceptance of the fact that American courts are the final rights protectors, and the decision to act in accordance with this realization. The notion of parliamentary supremacy is fading in many parts of the former British Empire. With this comes an acknowledgment that courts must take the place of the legislative bodies as the guardians of rights. Such a change can be seen in the two Canadian abortion cases. Before the Constitution was enacted, the Canadian Supreme Court shied away from abortion determinations, something it could no longer do once parliamentary supremacy had crumbled.

In contrast, American courts effectively elevate Congress to a position of legislative supremacy when they refuse to hear rights cases. Separation of powers issues are better addressed openly, once a case has reached the courtroom.

CONCLUSION

A common law system, whether parliamentary or presidential, cannot function as the final arbiter of rights under the traditional restrictive concept of standing. In recognition of this fact, both Canada and the United States have expanded their traditional standing requirements to allow broader standing in certain rights cases. Australia, in contrast, does not face the same rights issues and has not expanded standing. In Canada, a wide variety of rights can be vindicated through third party standing, provided the plaintiff is able to convince the court that the case at issue is a public interest case. In contrast, third party standing exceptions in the United States are comparatively rare and are specifically carved out for particular rights. The method chosen by a country to expand rights protection is important not only for rights cases, but for administrative cases as well, as the choices courts must make when confronting rights open the door for other types of standing expansions.

The broad approach used in Canada allowed the Canadian Supreme Court to incorporate administrative cases within public interest standing. In contrast, with no general concept to extend, standing in the United States has been fought issue by issue in administrative law as well. However, in administrative law, American courts have returned to strictly enforcing the constitutional standing requirements; requirements that are explicitly ignored in overbreadth cases and trivialized in taxpayer standing cases. Australian proponents of increased standing have faced a different type of problem. With no rights-based exceptions to fall back on, Australian courts have no precedent for expanded standing, and have not yet expanded standing to include administrative complaints. Changes in Australia will therefore likely need to come from outside the judiciary. Looking at the other countries discussed in this article, the United States would benefit from

acknowledging the role of courts in rights protection and correspondingly increasing access to courts to ensure that rights can be fully protected.