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[While Chapter 2 sketched the three Bills of Rights and presented the strands of literature against which this book unfolds and with which it engages, and while Chapter 3 depicted the judicial role in the Commonwealth, including review of legislation,] the present chapter advances the book's descriptive ambition to connect judges' development of procedure in cases under the Bill of Rights with the theoretical literature on rights instruments. In addition to enriching the existing accounts of how judges carry out their role under a Bill of Rights, this chapter will help to lay the groundwork for Chapter 7's normative arguments in favour of a more traditional adjudicative role.

Two currents of legal scholarship are relevant. On the one hand is work, such as Fuller's and more recently Allan's, sensitive to the distinctive procedures of adjudication as a source of its legitimacy. Bickel's praise for the US Supreme Court's evasion of constitutional rulings via procedural doctrines – the 'passive virtues' – belongs here too. Although relatively neglected in the contemporary literature on Bills of Rights, procedural doctrines provide an important means by which the judiciary 'keeps political issues open, constructively interacts with other branches, and manages political disagreement'.¹ Those who focus on procedure understand delay in judicial treatment of a question as potentially constructive. An implication of this procedural perspective is that, on a view of the courts as primarily resolvers of disputes, a restrictive approach to standing and mootness cannot be dismissed as hollowly formalist or technical. It has instead a claim to be recognized as functional and purposive.

On the other hand stand those liberal legal scholars who, their eyes fixed on the substance of human rights, appear eager, if not impatient, to have rights questions adjudicated now. There is a broadly shared assumption that constraints on access to adjudication are bad and that

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¹ Tom R. Hickman, "In Defence of the Legal Constitution" (2005) 55:4 University of Toronto Law Journal 981 at 1021-1022.

relaxing such constraints is good. Sometimes advocacy for having rights cases heard despite a procedural constraint is based on reducing the ‘social costs of continued uncertainty in the law’.² A related notion is that uncertainty might ‘chill the exercise of Charter rights’.³ Strictly speaking, such a concern does not require confidence that judges will decide rights cases liberally. But a sense is discernible that lowering the hurdles to judicial access will not only reduce uncertainty, it will also vindicate rights. The advocacy for easing judicial access for rights cases is also at times explicit in its optimism that hearing more rights cases is good for rights claimants (and, conversely, that conservatism about the procedure of rights is tantamount to conservatism about their substance). For example, Roach is confident that it is preferable for the Supreme Court of Canada to hear moot Charter cases and that ‘[p]rocedural conservatism will only aggravate the considerable difficulties’ of disadvantaged individuals and groups in having their claims heard.⁴ Thus a refusal of public-interest standing may be seen as akin to an adverse ruling on the merits. As for decisions on mootness, they may be barely separable from decisions on the merits.⁵ In general, criticisms of procedural constraints on rights litigation rest on confidence in the current judiciary.

In political science, the hardest-line attitudinal scholars would expect judges to relax constraints on litigation so as to translate their policy preferences into law in individual cases or over time in a body of jurisprudence. The politics of substantive outcomes aside, the loosening of procedural constraints, or their refashioning as sites for the exercise of judicial discretion, might be viewed as a power grab by the judiciary. Such a move might further augment the judges’ power and constitutional role under a Bill of Rights.

Bearing these strands in mind, this chapter will review the treatment, by enacted and judge-made rules, of two revealing restrictions on access to the judicial process. The first part defines the selected doctrines of standing and mootness. It also presents their traditional justifications and the ideas advanced for departing from them. The second, third, and fourth parts address Canada, South Africa, and the United Kingdom, respectively, in relation to standing. This doctrine is especially rich, given the variation in its treatment by the drafters of the Bills of Rights in the three jurisdictions. More briefly, the fifth part will address the doctrine of mootness in the three jurisdictions.

A textured story will emerge from this chapter’s engagement with legal procedure. The judicial elaboration of discretion in relation to access to the courts shows relatively little attention to matters of legitimacy or of the court’s role, and a focus on the importance of deciding rights cases. The chapter’s data include cause for tempering the expectations of liberal legal scholars and of attitudinal political scientists. For one thing, the mixed results of cases heard as a result of liberalized access to adjudication hint that procedure and substance are separable. For another, the Bills of Rights do not seem to have inspired judges to boldness by their mere entry into force: in the UK and South Africa the new text seems to have directed judges, while in Canada judicial agency preceded the Charter.

² *Borowski v. Canada (Attorney General)* [1989] 1 SCR 342, 361.

³ Kent Roach, *Constitutional remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994).at [5.860]

⁴ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 144.

⁵ *Ibid*; Roach, *Constitutional remedies in Canada*.at [5.800]

I. Restrictions on Access to Adjudication

The doctrine of *standing* (or *locus standi*) concerns whether a person who approaches the court with a matter is a suitable party to present the matter for adjudication.⁶ To invoke the judicial process, the litigant must generally have a sufficient stake in the outcome.⁷ In principle, this question is determinable at the outset. Standing is distinct from justiciability, understood as concerning whether a dispute – whoever brings it to court – is amenable to judicial resolution.⁸

Issues of standing rarely arose in private matters at common law, because the question of the plaintiff's standing merged with the legal merits.⁹ In matters of public law, the rules from private law traditionally provided the point of departure. As in private law, the individual's role was to vindicate her private rights. Accordingly, individuals had standing to bring claims against public bodies or to challenge an enactment's validity only where their interests were directly affected. Where a constitutional issue arose in ordinary civil or criminal litigation bearing on an individual, standing was rarely controversial. A party directly affected by an impugned action or law was generally entitled to standing.¹⁰ Standing becomes controversial where an individual or group, not the subject of any enforcement proceedings, initiates litigation for the sole purpose of challenging a statute's constitutionality.¹¹ The traditional standing rules did not take account of aggregates such as trade unions and associations.¹² If individuals were limited to protecting their own interest, protecting the public interest fell to the Attorney General.¹³

By contrast with standing's focus on the relationship between the applicant and the relief sought, *mootness* concerns whether the proceedings bear on a live dispute. A case becomes moot where the dispute has dissipated subsequent to the parties' launch of proceedings.¹⁴ Different scenarios are distinguishable. A legal question may become moot as regards the world at large, or a given community, as a result of a legal change. For example, the legislature may repeal the statute in issue. A question may also become moot as between the parties. It may do so procedurally, if the parties settle their dispute. Or it may become moot as a result of a factual occurrence in the world: a party dies, a minor reaches the age of majority, a baby is born. When parties ask a court to render judgment in a moot case, they are not seeking an executable remedy. They may be seeking the court's legal opinion. Where a law's validity is in issue, they may be

⁶ Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012) at 10.

⁷ Peter W. Hogg, *Constitutional law of Canada*, vol. 2 (Scarborough, Ont.: Thomson/Carswell, 2007).at 59-3

⁸ Paul Craig, *Administrative law*, 6th ed. (London: Sweet & Maxwell, 2008).at [24-001; compare treatment of standing as falling under the umbrella category of justiciability in Iain Currie & Johan De Waal, *The Bill of Rights handbook*, 5th ed. (Lansdowne: Juta & Co., 2005) at 79.

⁹ Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harvard Law Review 1281 at 1290.

¹⁰ Dale Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2005) 1321-1398 at 1326.

¹¹ Hogg.at 59-4

¹² See generally Joseph Vining, *Legal identity: the coming of age of public law* (New Haven: Yale University Press, 1978).

¹³ Craig.at [24-029]

¹⁴ Stuart Woolman, Michael Bishop & Jason Brickhill, eds., *Constitutional Law of South Africa*, 2nd ed. (Cape Town: Juta, 2012).at 7-18

seeking a declaration of invalidity relevant to others.¹⁵ The general rule is that a court should not decide a case that has become moot.¹⁶ In the United States, the proposition that courts may not decide moot cases has a basis in constitutional text, namely a reference to the judicial power in relation to a ‘case or controversy’.¹⁷ There is, however, no equivalent constitutional provision in Canada, South Africa, or the United Kingdom.

Scholars and judges cite a number of considerations to justify the doctrines of standing and mootness in constitutional or public law. Most of them are pragmatic and consequentialist. Prudently allocating scarce judicial resources is one justification for restrictions on standing. Screening out the mere busybody is another. Yet another is ensuring that courts, as they resolve issues, benefit from the contending points of view of those most directly affected and from a real factual matrix. A final one is avoiding prejudice to persons potentially affected but who are not before the court. Similar concerns are raised respecting mootness. That being said, a matter that has become moot may blunt the charge of abstractness if it was initially framed by adversarial litigants in a factual context.¹⁸ Still, in departure from the adversarial model, no risk to their direct personal interests motivates the parties to an appeal that has become moot.

A less consequentialist consideration relates to the judiciary’s legitimacy. A concern for legitimacy may point to the need for maintaining the courts’ proper role and their constitutional relationship with the other branches of government during judicial review. From the view of the courts’ function as deciding disputes, judicial pronouncements on the constitutionality of laws or practices arise incidentally to the resolution of concrete cases. Any decision absent a live controversy involving affected parties would thus exceed the proper sphere of judicial intervention and disturb the separation of powers.¹⁹

Whatever their justifications, standing and mootness have come under increasing strain. As it developed in the late nineteenth and twentieth centuries, the administrative state gave rise to government action affecting many people, but not necessarily any individual directly enough to satisfy the narrow, traditional approach to standing. Moreover, the aims of litigation against the state have changed. In contemporary public law, the applicant often brings an issue before the court not for personal gain, but out of a conviction that public authorities should not be allowed to act unlawfully.²⁰ Furthermore, litigants often turn to constitutional litigation in furtherance not of short-term financial interest but of long-term political or social goals.²¹ To countervail the traditional justifications for restricting access to the courts, such litigants may

¹⁵ Robert J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 327-356 at 331.

¹⁶ Hogg.at 59-18

¹⁷ Constitution of the United States, Art III, s 2(1). See e.g. Laurence H. Tribe, *American constitutional law*, vol. 1, 3rd ed. (New York: Foundation Press, 2000) at 385.

¹⁸ Is the concern about abstractness exaggerated? Even where a live dispute subsists, by the time a matter reaches the higher appellate levels, ‘almost all trace of the original flesh-and-blood right-holders has vanished’, while argument focuses abstractly on the right in dispute. Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115:6 *Yale Law Journal* 1346 at 1380.

¹⁹ On these considerations, see Hogg.at 59-; Sharpe, at 329; Sossin, at 152.

²⁰ Louis L. Jaffe, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" (1968) 116:6 *University of Pennsylvania Law Review* 1033.

²¹ Carol Harlow, "Public Law and Popular Justice" (2002) 65:1 *Modern Law Review* 1.

appeal to related ideas of constitutionalism, the rule of law, and legal accountability for governmental authority. From this stance, the government's failure to abide by the Constitution ought to entail a remedy, without regard to a directly affected plaintiff or an ongoing live dispute.²²

Despite their air of technicality, the doctrines affecting access to adjudication in constitutional or public-law matters are important. Rules on standing provide incentives for litigants to frame their claims in some ways rather than others. Consider rules that allow broader access to those who challenge a law's compatibility with rights than to those who contest a law's individualized application by the executive.²³ Moreover, the doctrine of standing has 'significant constitutional connotations',²⁴ offering a lens into understandings of the judicial role, expectations of citizens, and conceptions of rights.²⁵ Different approaches to standing can be read as conceiving of rights as protecting individual interests or as vindicating the 'broader public interest in lawful government'.²⁶ Similarly, they may be understood as representing different roles and ethics for the courts – dispute resolution with an aim to achieving corrective justice, say, or regulation of government behaviour with an aim to carrying out expository justice.²⁷

This chapter's chosen examples are not, of course, the only revealing procedural matters. Although it has not figured substantially in Bill-of-Rights litigation in the three jurisdictions, ripeness concerns the possibility that it may be premature to litigate a matter.²⁸ Another procedural site is the question of third-party interveners. The granting of such leave is usually a matter of judicial discretion, often without articulated criteria or reasons in individual cases.²⁹ As such, although an important site for the exercise of judicial power, this issue generates less 'law' than other procedural matters. Others include judicial treatment of the costs of litigation³⁰ and rules on evidence admissible in Bill-of-Rights cases.³¹ While a technically grounded and

²² Hogg, at 59-; Sossin, at 153.

²³ See Roach, *Constitutional remedies in Canada*, at [5.265], discussing the challenge to the legislated prohibition on private medical insurance as facially invalid in *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35, [2005] 1 SCR 791.

²⁴ Carol Harlow & Richard Rawlings, *Law and Administration*, 3rd ed. (Cambridge: Cambridge University Press, 2009) at 694.

²⁵ David Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55:1 *Modern Law Review* 44 at 51.

²⁶ Joanna Miles, "Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication" (2000) 59:1 *Cambridge Law Journal* 133 at 150.

²⁷ Roach, *Constitutional remedies in Canada*, at [5.20]; see also Peter Cane, *Administrative Law*, 5th ed. (Oxford: Oxford University Press, 2011) at 295.

²⁸ On ripeness and birth control in American jurisprudence, see Alexander M. Bickel, *The least dangerous branch: The Supreme Court at the bar of politics*, 2nd ed. (New Haven: Yale University Press, 1986) at 143-156.

²⁹ Benjamin R.D. Alarie & Andrew J. Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3 & 4 *Osgoode Hall Law Journal* 381.

³⁰ The Supreme Court of Canada has changed the rules regarding costs in the context of constitutional litigation, occasionally ordering the Crown to pay advance costs to the applicant, irrespective of the eventual outcome. *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71, [2003] 3 SCR 71.

³¹ See e.g. Brian G. Morgan, "Proof of Facts in Charter Litigation" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 159-186.

theoretically informed study of Bill-of-Rights adjudication might include these other issues, the chapter turns now to the Supreme Court of Canada's treatment of standing.

II. Standing Liberalized by Judges

Canada is recognized internationally for having generous rules in relation to standing to bring proceedings in the public interest. Although the traditional doctrine would preclude standing, the Supreme Court of Canada has repeatedly asserted the discretion to grant standing to a private plaintiff who seeks to vindicate the public interest. Beginning in the mid-1970s, the Supreme Court of Canada overhauled the rules for standing in constitutional matters in a trilogy of cases. The trilogy involved challenges to a declaratory law that created no penalties for its breach,³² a film censorship law brought by a member of the public rather than an exhibitor,³³ and exculpatory provisions that derogated from the prohibition on abortion.³⁴ The Court expressed the concern that the traditional standing constraints would immunize the laws from review.³⁵

The trilogy provided that courts would grant standing as a discretionary matter to a plaintiff who establishes that the action raises a serious legal question, that she has a genuine interest in resolving the question, and that there is no other reasonable and effective manner in which the question might be brought to court. In a later case, the Supreme Court of Canada has shown that public-interest standing may extend the scope of proceedings. Thus an individual who has private standing in respect of some provisions of a statute may obtain public-interest standing to challenge others that were not enforced against him.³⁶ The upshot of these cases is 'a very liberal rule for public interest standing'.³⁷ The courts' discretion, given these criteria, is 'immense, if not limitless'.³⁸ Accordingly, the pre-Bill of Rights baseline is not that of the traditional approach at common law.

This major exercise of judicial agency having preceded the Charter's arrival, the Supreme Court of Canada's developments of standing in protected rights cases have been less bold. A party whose rights or freedoms are infringed by government action has a right to standing under section 24.³⁹ This provision is understood as contemplating that the infringement or denial bear on the applicant's rights, not those of another person.⁴⁰ The courts have taken a different approach to standing in respect of a law's invalidity. An individual who is 'exceptionally

³² *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.

³³ *Nova Scotia Board of Censors v. McNeil* (1975), [1976] 2 SCR 265.

³⁴ *Minister of Justice (Can.) v. Borowski* [1981] 2 SCR 575.

³⁵ A fourth case affirmed that public-interest standing could arise absent a constitutional challenge, on facts concerning the legality of a federal public expenditure: *Finlay v. Canada (Minister of Finance)* [1986] 2 SCR 607.

³⁶ *Vriend v. Alberta* [1998] 1 SCR 493 (challenge to under-inclusiveness of human-rights statute excluding protection from discrimination on basis of sexual orientation: plaintiff who had been fired was granted public-interest standing to challenge discrimination in sectors other than employment).

³⁷ Hogg, at 59-9

³⁸ Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville, Quebec: Yvon Blais, 2008) at 999.

³⁹ Subsection 24(1) states: 'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

⁴⁰ Hogg, at 40-29

prejudiced' by a statute has been held entitled to bring a declaratory action to challenge its validity under the supremacy clause, section 52 of the Constitution Act, 1982.⁴¹ Significantly, any plaintiff, including a corporate one, has standing under section 52 to question the constitutionality of the laws under which it is charged. In such circumstances – and it is the result of a determination by the Supreme Court of Canada that was not inevitable – the plaintiff may allege a law's unconstitutionality on the basis of a right enjoyed only by others. For example, although a corporation has no right to freedom of religion, it may resist the enforcement against it of a law that unreasonably limits that right as enjoyed by natural persons.⁴² This determination exemplifies the objective theory of constitutionality. That is the view by which a law's collision with protected rights produces effects not only on the part of the individual whose rights it infringes, but also on the part of others subject to the law. The sense that governmental action or legislation which infringes someone's rights generates a broader social stake is consistent with the justifications underlying broad recognition of standing in the public interest. It might be expected to have implications for remedies, a matter to which discussion returns in Chapter 5.

Neither the Canadian Charter nor the Constitution Act, 1982, of which it is part, says anything about access to courts in the public interest. Absent express direction, the Supreme Court has used its earlier jurisprudence on public-interest standing in Charter cases. Given that a majority of the Court had found public-interest standing in all three cases of the trilogy, it is notable that public-interest standing is not automatic in Charter cases. For example, the requirement that there be no other reasonable manner for bringing a question to court has stymied a public-interest group's efforts to secure standing where directly affected individuals could challenge legislation or where some had already done so. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, a corporation comprising churches sought public-interest standing to challenge the refugee determination process under the Charter.⁴³ The Supreme Court of Canada refused standing on the basis that it was probable that a private litigant would attack the measures in question.

More recently, however, the Supreme Court of Canada appears to have further relaxed its approach to public-interest standing. It has done so by adapting the inquiry as to whether there is no other reasonable and effective manner of bringing the question to court. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* concerned a Charter challenge to criminal provisions regarding prostitution.⁴⁴ The Court reformulated that criterion as bearing on whether the proposed suit is, all things considered, 'a reasonable and effective means' of bringing the challenge to court.⁴⁵ The Court insisted that in order to block public-interest standing, the alternative means – including suits by those entitled to personal

⁴¹ Ibid. at 59-5

⁴² Gibson, at 1329. See *R v. Big M Drug Mart* [1985] 1 SCR 295.

⁴³ [1992] 1 SCR 236. For another rejection of public-interest standing on the basis that there were other means by which the matter might reach court, see *Hy and Zel's Inc v. Ontario (Attorney General)*; *Paul Magder Furs Ltd v. Ontario (Attorney General)* [1993] 3 SCR 675.

⁴⁴ 2012 SCC 45, [2012] 2 SCR 524.

⁴⁵ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [44]. See also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 [43].

standing – must be ‘realistic’.⁴⁶ Alternative plaintiffs had to be considered not theoretically, but ‘in light of the practical realities’.⁴⁷ Applying the softened, reformulated factor of alternative proceedings to the facts, the Court recognized public-interest standing on the part of an interest group, even though individual sex workers could theoretically have brought a challenge as private litigants.

On an early assessment, the elaborated test is complicated and arguably ‘less certain’.⁴⁸ It may require a potential public interest litigant to advance substantial material to justify its claim to discretionary standing, perhaps more than on the prior test.⁴⁹ In any case, the shift from a question as to whether there is an alternative, directly affected potential plaintiff towards the question as to whether the proposed public-interest litigant will be reasonable and effective confirms a broadened scope of access. The concern about not immunizing a law from challenge (one which implicitly takes courts as the only forum for review) has given way to an assessment of the public-interest litigant’s potential for effective advocacy.

To sum up, the Canadian developments so as to facilitate constitutional litigation in the public interest amount to a significant exercise of judicial agency. Judges brought about a major departure from the restrictive approach at common law. A move from resolving the dispute when government impinges on an individual’s rights to a broader mission of keeping government in line – enforcing constitutionalism or the rule of law – is discernible in the concern that a restrictive approach to standing would ‘immunize’ a law from judicial review. If such a law does not affect an individual enough to generate standing under the traditional rules, it is problematic only on a broader conception of the government’s or legislature’s subjection to the constitution. Moreover, the judicial concern in discussions of standing focuses on the social effects of granting or not granting public-interest standing. The impact of increased standing on the judicial role itself has little place.

Some commentators understand the Canadian judges’ easing of access to the courts as ‘part of a move over the last few decades to accumulate policy-making power’.⁵⁰ In his discussion of procedural features as having contributed towards the Supreme Court of Canada’s changed role, a political scientist rightly notes that the Court’s new mandate was ‘to a large extent imposed on it by external political actors and new constitutional duties’.⁵¹ He maintains, however, that ‘the depth, style, and intensity with which the Court proceeded into this new era were very much dependent on choices made by the justices’,⁵² what this book would characterize as instances of judicial agency. While the judges’ motives are not easily traced, the effect of judicial agency in this context has been to broaden potential access to adjudication and to

⁴⁶ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [51].

⁴⁷ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [51].

⁴⁸ Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st student ed. (Markham: LexisNexis, 2013).at para 19.16

⁴⁹ *Ibid.* at para 19.16

⁵⁰ Emmett Macfarlane, *Governing from the bench: The Supreme Court of Canada and the judicial role* (Vancouver: UBC Press, 2013) at 46.

⁵¹ *Ibid.*, at 43.

⁵² *Ibid.*

increase the measure of discretion. In any event, given the focus in the literature on the impact of a Bill of Rights, standing is revealing as Canadian judges had transformed their approach before the Charter entered the constitutional landscape. This example will contrast with the South African context, in which changes to standing are traceable to provisions in the new constitutional text.

III. Standing Liberalized by Constitutional Drafters

South African courts traditionally adopted a restrictive attitude to standing. They generally insisted that only a party adversely affected might seek relief respecting an alleged wrong.⁵³ A plaintiff could not approach the court on the basis that the defendant was contravening the law and that the public interest called for the court to grant relief. That approach left almost no room for group litigation or public-interest litigation on the American model.⁵⁴ An exception was that the Appellate Division had adopted a wider approach to standing where individuals' liberty was in issue.⁵⁵

In sharp departure from the traditional common-law approach, liberal provisions on standing formed part of the 'legal revolution'⁵⁶ that occurred with the interim Constitution's entry into force. The final Constitution includes substantially the same rules for standing in respect of the Bill of Rights:

38. Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

⁵³ Cheryl Loots, "Standing to Enforce Fundamental Rights" (1994) 10:1 South African Journal on Human Rights 49 at 49.

⁵⁴ W le R de Vos, "The Impact of the New Constitution upon Civil Procedure" (1995) 6:1 Stellenbosch Law Review 34 at 37.

⁵⁵ *Wood v. Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

⁵⁶ Tembeka Ngcukaitobi, "The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice" (2002) 18:4 South African Journal on Human Rights 590 at 602.

The ‘expansive and generous’⁵⁷ approach to standing under the Bill of Rights contrasts ‘radically’ with the common-law approach to standing.⁵⁸ A chief reason for relaxing the restrictions on standing in the South African context was that the individuals whose fundamental rights are infringed may not, practically speaking, be in a position to seek judicial relief. Reasons for such inaptitude include their lack of sophistication, poverty, and fear of the judicial process.⁵⁹ Lack of faith in the judiciary provides another reason for enacting generous rules on standing.

Since the interim Constitution, the courts have accepted the appropriateness of a generous approach to standing for enforcing fundamental rights.⁶⁰ While concerned to avoid dealing with abstract or hypothetical issues and sensitive to scarce resources, Chaskalson P saw no good reason to adopt a narrow approach to standing in constitutional cases. A broad approach would align with the Court’s mandate and ensure that constitutional rights enjoyed their full measure of protection.⁶¹ O’Regan J called for interpreting the standing provisions in the interim Constitution in the light of the courts’ special role in South Africa’s constitutional democracy.⁶² Her comments have been adopted as applicable to the final Constitution.⁶³

Judicial interpretations have determined that for an applicant to succeed in invoking section 38, two elements must be established. First, there must be an allegation that a right in the Bill of Rights has been infringed or threatened. In a departure from the textual indication that it is the person invoking section 38 who must allege that infringement, an allegation by someone else may suffice.⁶⁴ Second, with reference to the categories listed in sections 38(a) to (e), the applicant must demonstrate a sufficient interest in obtaining the remedy sought. What constitutes a sufficient interest will depend on the category relied on. Under section 38(a), a party may have a sufficient interest of its own for litigating even where the alleged infringement only affects someone else’s constitutional right.⁶⁵ For example, where it had been alleged that a municipality’s differential treatment of white and black ratepayers amounted to unfair discrimination, a municipality had standing to seek an order clarifying that such was not the case.⁶⁶ Although the allegation touched on the protected right of ratepayers, not of the municipality, the municipality was held to have a sufficient interest in the question. As in Canada, an objective theory is here discernible insofar as the infringement of one person’s rights may give rise to another’s legal claim.⁶⁷

⁵⁷ Sandra Liebenberg, *Socio-economic rights: adjudication under a transformative constitution* (Claremont, South Africa: Juta, 2010) at 87.

⁵⁸ Currie & De Waal, at 80; Woolman, Bishop & Brickhill, eds. at 7-; John C. Mubangizi, *The protection of human rights in South Africa: a legal and practical guide* (Lansdowne, South Africa: Juta, 2004) at 61.

⁵⁹ Liebenberg, at 88.

⁶⁰ *Ferreira v. Levin* 1996 (1) SA 984 (CC).

⁶¹ *Ferreira v. Levin* 1996 (1) SA 984 (CC) [165], Chaskalson P.

⁶² *Ferreira v. Levin* 1996 (1) SA 984 (CC) [233], O’Regan J.

⁶³ *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (4) SA 125 (CC) [17], Yacoob J.

⁶⁴ *Port Elizabeth Municipality v. Prut NO & Another* 1996 (4) SA 318, 325 (E).

⁶⁵ *Ferreira v. Levin* 1996 (1) SA 984 (CC) [163]–[168], Chaskalson P.

⁶⁶ *Port Elizabeth Municipality v. Prut NO & Another* 1996 (4) SA 318 (E).

⁶⁷ Melunksy J observed that the municipality would not have a right to standing under s 24(1) of the Canadian Charter. *Port Elizabeth Municipality v. Prut NO & Another* 1996 (4) SA 318, 325 (E).

The constitutional drafters' boldest innovations appear in paragraphs (c) and (d), relating to a group or class of persons and the public interest. Paragraph (c) lays the foundation for a representative or class action to enforce fundamental rights.⁶⁸ Paragraph (d) introduces even more far-reaching change by inaugurating what, on its face, is 'an unrestricted public interest action'.⁶⁹ A person who relies on public-interest standing under section 38(d) must show that she is acting in the interest of the public and that the public has an interest in the remedy that is being sought.⁷⁰ In a minority judgment in *Ferreira v. Levin*, O'Regan J held that the Court would be 'circumspect' in granting public-interest standing under the interim Constitution, requiring an applicant to establish that he or she is genuinely acting in the public interest. She identified the following factors as relevant: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the scope of its application; and the range of persons or groups directly or indirectly affected by any order made by the court and their opportunity to present evidence and argument to the court.⁷¹ In a later case, Yacoob J affirmed O'Regan J's factors, adding to them the degree of vulnerability of the people affected, the nature of the right said to be infringed, and the consequences of the infringement.⁷²

By contrast with the Supreme Court of Canada's developments absent any enacted authorization, the Constitutional Court of South Africa has exercised less judicial agency. The arrival of a Bill of Rights unquestionably figured prominently in the changes to standing, which include a large place for proceedings brought in the public interest. Given a textual warrant for change, the Constitutional Court has not sought to preserve the traditional, dispute-resolution model associated with the common law. Subscribing to an objective theory of unconstitutionality is significant, but consistent with the Constitution. As in Canada, the factors conditioning the Constitutional Court's approach to public-interest standing relate to outcomes, such as the impact on affected individuals and their vulnerability. The shift in the judicial role does not figure amongst them, although the drafters' inclusion of section 38 may diminish such considerations. The Constitutional Court enjoys a robust discretion regarding who has access, but the constitutional text may answer questions of legitimacy. That the Constitutional Court has not taken up the scholarly calls to apply the broad approach to standing beyond its formal scope of application, viz. the Bill of Rights, suggests a sense of constraint by the constitutional text.⁷³ In the chapter's next part, the South African challenge of grappling with constitutional drafters' transformative enlargement of standing will contrast with the experience, in the UK, of responding to a legislated narrowing.

IV. Standing Narrowed by Parliament

As in Canada, inquiry into the extent of judicial agency on the law of standing must take into account significant judicial development undertaken prior to the arrival of a Bill of Rights. The example of the United Kingdom shows an exercise of judicial agency in response to an open

⁶⁸ Liebenberg, at 88-89, discussing the leading case of *Ngxuzza v. Secretary, Dept of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E)

⁶⁹ Woolman, Bishop & Brickhill, eds. at 7-11

⁷⁰ Ngcukaitobi, at 609.

⁷¹ 1996 (1) SA 984 (CC) [234], O'Regan J.

⁷² *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (4) SA 125 (CC) [18], Yacoob J.

⁷³ Woolman, Bishop & Brickhill, eds. at 7-1; Currie & De Waal, at 81.

legislative text. The starting point for the pre-Bill-of-Rights position in the UK is the law of standing in administrative law. An applicant for judicial review must have ‘a sufficient interest in the matter to which the application relates’.⁷⁴ That legislative provision is unspecific and could have supported wide or narrow readings.⁷⁵ Given ‘more or less unfettered discretion to rewrite the standing rules’⁷⁶, the judiciary staged ‘a small but significant procedural revolution’.⁷⁷ The House of Lords ‘inaugurat[ed] the current era of rampant judicial discretion’⁷⁸ in an appeal decided in 1982. Although rejecting the claim to standing on the part of a group objecting to the Inland Revenue’s leniency regarding other taxpayers, the lords reformulated the approach to standing.⁷⁹ They rejected the view of standing as primarily a preliminary issue to be decided at the earliest stage of an application for judicial review. Rather, they viewed the question of sufficient interest as rightly combined with the legal and factual context of the application, including the latter’s strength and seriousness.

While there are varying assessments of the cases determining whether a claimant has a sufficient interest, the prevailing view is that the courts had devised an approach that was ‘very liberal’, without need for a direct interest.⁸⁰ The approach moved significantly ‘towards the point where a reputable claimant with a plausible legal argument’ could supplement the political process via an action for judicial review and the attendant publicity.⁸¹ Without demarcating associational from public-interest standing, the UK courts’ development of standing for judicial review appreciated that public law’s development may benefit from actions by public-interest groups and representative bodies.⁸²

Against that backdrop of judicially developed openness to proceedings in the public interest, Parliament enacted narrower specifications into the Human Rights Act. The Human Rights Act addresses standing in relation to the acts of public authorities which under section 6(1) are unlawful in virtue of being incompatible with a Convention right. A person may bring such proceedings only if she is or would be a ‘victim’ of the unlawful act (s 7(1)). Addressing proceedings brought via an application for judicial review, in which the ‘sufficient interest’ test would ordinarily apply, section 7(3) narrows that term’s meaning by specifying that the applicant will have a ‘sufficient interest’ only if she is or would be a ‘victim’ of that act. Finally, section 7(7) states that a person is a ‘victim’ of an unlawful act only if she would be a ‘victim’ for the purposes of Article 34 of the European Convention on Human Rights. The combined effect of sections 7(1) and (3) is that the Human Rights Act cannot be used to bring proceedings if the

⁷⁴ Supreme Court Act (Senior Courts Act) 1981 s 31(3); CPR r 54.4.

⁷⁵ Mark Elliott & Robert Thomas, *Public law* (Oxford: Oxford University Press, 2011) at 549.

⁷⁶ Cane, at 282.

⁷⁷ Harlow & Rawlings, at 696.

⁷⁸ *Ibid.*, at 697.

⁷⁹ *R v. Inland Revenue Commissioners Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

⁸⁰ Gordon Nardell, "The Human Rights Act: Procedure, Standing and Remedies" in Frances Butler, ed., *Human rights for the new millennium* (The Hague: Kluwer Law International, 2000) 65-84 at 71.

⁸¹ Ian Loveland, *Constitutional law, administrative law, and human rights: a critical introduction*, 6th ed. (Oxford: Oxford University Press, 2012) at 653.

⁸² Nathalie Lieven & Charlotte Kilroy, "Access to the Court under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance" in Jeffrey Jowell & Jonathan Cooper, eds., *Delivering Rights: How the Human Rights Act Is Working* (Oxford: Hart, 2003) 115-146 at 119; Elliott & Thomas, at 552-553.

person is not, or would not be, a ‘victim’ of the violation, even if she would otherwise have standing as a party to proceedings for judicial review.

The ‘victim’ test is ‘much more restrictive’ than the ‘sufficient interest’ test.⁸³ By Strasbourg case law, to be classified as the victim of a violation, an applicant must show that she is or has been directly affected or runs the risk of being directly affected by the impugned act or omission.⁸⁴ A victim may also be an ‘indirect victim’, claiming to be a victim of a breach of a Convention right affecting another person such as a spouse or family member.⁸⁵ On the face of the applicable authoritative texts, there is no room to recognize standing on the part of individual ‘public defenders’ of human rights, even public-interest groups which had in the preceding decades been allowed to bring judicial review proceedings in appropriate cases.⁸⁶

Parliament’s intentional adoption of the ‘victim’ test, interpretable by reference to Strasbourg case law, has provoked numerous criticisms. It has been said to ‘individualise harm’⁸⁷ and to undervalue the representative plaintiff in challenging abuses of power which result in widespread harm.⁸⁸ The contrast between the concreteness of a victim’s case and the abstractness of interest groups has been questioned on the basis that the latter would draw on real-life examples.⁸⁹ In any event, while the legislated approach may signal an intention for the Human Rights Act to be substantially less transformative than South Africa’s Bill of Rights, this approach’s defenders are scarce.⁹⁰ The criticisms attest to the perceived power of a legislatively narrowed test: it was expected to have effects.

The experience under the Human Rights Act indicates that the grave results anticipated have not materialized. The courts have considered the ‘victim’ requirement in section 7 of the Human Rights Act in only a limited number of cases and the House of Lords and Supreme Court have not yet done so.⁹¹ On an early assessment, there was ‘little evidence’ that the need to find a victim has excluded challenges,⁹² although it is difficult to measure the dampening effect on those who did not bother to attempt litigation. The courts appeared to have taken a ‘fairly pragmatic approach’, avoiding rejecting cases on the apparent technicality of a lack of a victim.⁹³ Applicants held not to be victims under section 7 have included a public authority, on its own

⁸³ Elliott & Thomas, at 766.

⁸⁴ Jack Beatson *et al.*, *Human rights: judicial protection in the United Kingdom* (London: Sweet & Maxwell, 2008).at [4–11]

⁸⁵ Richard Clayton & Hugh Tomlinson, eds., *The law of human rights*, 2nd ed. (Oxford: Oxford University Press, 2009).at [22.46]

⁸⁶ John Wadham *et al.*, *Blackstone's guide to the Human Rights Act 1998*, 6th ed. (Oxford: Oxford University Press, 2011).at [4.23]

⁸⁷ Danny Nicol & Jane Marriott, "The Human Rights Act, representative standing and the victim culture" (1998) 6 *European Human Rights Law Review* 730 at 739.

⁸⁸ Loveland, at 654.

⁸⁹ Miles, at 147.

⁹⁰ Ian Leigh & Laurence Lustgarten, "Making Rights Real: The Courts, Remedies, and the Human Rights Act" (1999) 58:3 *Cambridge Law Journal* 509 at 521.(Human Rights Act intended ‘to improve the position of real people, rather than to allow vicarious assertion of another person’s human rights or to create an avenue for raising moot legal points’)

⁹¹ Clayton & Tomlinson, eds.at [22.48]

⁹² Lieven & Kilroy, at 146.

⁹³ *Ibid.*, at 124.

behalf or on behalf of inhabitants of its area;⁹⁴ a discretionary life prisoner whose sentence was to be reviewed by a panel in several months;⁹⁵ a prisoner whose correspondence had been inadvertently opened but who had received apologies, explanations, and assurances;⁹⁶ and an applicant seeking to rely on ‘hypothetical facts’.⁹⁷ In an unspectacular exercise of judicial discretion, an alternative procedural path – a relaxed approach to third-party interventions and amicus briefs – may have mitigated the anticipated problem of restrictive standing by facilitating consideration of the public interest.⁹⁸

Other provisions in the Human Rights Act may further relativize section 7’s victim test. It has been argued that ‘victim’ standing under section 7 is not necessary for invoking sections 3 or 4.⁹⁹ Indeed, section 3 announces a freestanding requirement that courts interpret legislation, including any grant of discretion, compatibly with Convention rights where possible.¹⁰⁰ Nothing in the text of section 3 limits its application to ‘victims’ cases; nor, it can be argued, does any other provision in the Human Rights Act.¹⁰¹ In *R (Rusbridger and another) v. Attorney General*, Lord Steyn indicated that when the question is a compatible interpretation under section 3, victim status is not essential.¹⁰² Such an approach is akin to the objective theory of law applied to standing in Canada and South Africa, although it is not a law’s validity that is in issue under the Human Rights Act. Furthermore, if a public interest group is denied standing under section 6(1) of the Human Rights Act, it might argue that the challenged action was ultra vires in accordance with the common-law protections for fundamental rights.¹⁰³ While non-victims cannot invoke the Human Rights Act directly, they might benefit from administrative law’s ‘inevitabl[e]’ development under the incorporated Conventions’s influence.¹⁰⁴

The example of the UK shows a legislative override of judicial agency before the Human Rights Act. While standing and ‘victim’ status have not figured prominently in appeals before the House of Lords and now the Supreme Court, the possibility that the courts are compensating for narrower standing requirements under the Human Rights Act by generous recognition of third-party interveners bespeaks a broader view of rights than furnished by the legislative text. It is also a reminder of the potential play within the space of legislated specifications and the manifold elements of judicial procedure. Having treated three different approaches to standing by constitutional drafters – silence, enlargement, retrenchment – the chapter turns to a matter that none of this book’s chosen Bills of Rights addresses.

⁹⁴ *R (Westminster City Council) v. Mayor of London* [2003] BGLR 611; *R (Medway Council) v. Secretary of State for Transport* [2003] JPL 583.

⁹⁵ *R (Hirst) v. Secretary of State for Home Department* [2002] EWHC Admin 1592.

⁹⁶ *Francis v. Secretary of State for the Home Department* [2006] EWHC 3021 (QB).

⁹⁷ *R (Trailer & Marina (Leven) Ltd v. Secretary of State for Environment* [2005] 1 WLR 1267.

⁹⁸ Wadham *et al.* at [4.18; Beatson *et al.* at [4–71; Lieven & Kilroy, at 146.

⁹⁹ Beatson *et al.* at [4–64; Clayton & Tomlinson, eds. at [22.53]

¹⁰⁰ Mark Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review" (2001) 60:2 Cambridge Law Journal 301 at 329.

¹⁰¹ Cane, at 292.

¹⁰² [2003] UKHL 38, [2004] 1 AC 357 [21], Lord Steyn. Compare Lord Rodger’s insistence that it is only in ‘a very exceptional case’ that a court should make a declaration where the challenged law has not been enforced against the applicant: [56]–[57].

¹⁰³ Craig at [18-029; Nicol & Marriott, at 739; Loveland, at 654.

¹⁰⁴ Elliott, at 328.

V. Impatience to Decide?

This part takes up the signs of judicial eagerness to decide rights cases in the face of the traditional constraint providing that courts should not rule where the parties' dispute has evaporated. Mootness figures little in the UK public-law literature and the Human Rights Act is silent on it. It has been suggested that the House of Lords has discretion to hear an appeal in public law even if there is no longer a live dispute directly affecting the parties.¹⁰⁵ Commentators have argued that the courts should, if justified by the public interest, hear a human-rights case involving academic issues. They note, however, that Parliament's imposition of the 'victim' test may encourage the courts to require the involvement of a continuing victim, except in the most exceptional cases.¹⁰⁶

The doctrine of mootness does not seem to have been applied in South African law prior to the advent of the interim Constitution.¹⁰⁷ The Constitutional Court may render appeal in a matter that has become moot as between the parties.¹⁰⁸ It has stated, though, that mootness may be a bar to relief where a constitutional issue is not only moot as between the parties, but also relative to society at large, absent countervailing considerations of compelling public interest.¹⁰⁹ It has refused to adjudicate on the basis of mootness where challenges concerned the constitutionality of two laws, both subject to repeal by legislation that had been tabled although not yet brought into effect.¹¹⁰ Nevertheless, absent an explicit textual basis in the Constitution, the Constitutional Court has held that it has the discretion under section 172(2), which recognizes the judicial power in constitutional matters, to confirm the order of a lower court invalidating legislation that had been subsequently repealed.¹¹¹ In doing so, it held that a key consideration is whether any order would have a practical effect for the parties or others.¹¹² Other relevant factors include the issue's importance and complexity as well as the fullness of the argument presented.¹¹³ These considerations are utilitarian, concerned with whether ruling on a case would be a good use of court resources and whether the court could rule well. The Constitutional Court's recognition of discretion to pronounce on moot matters has expanded the scope of potential judicial activity.

In Canada, the Supreme Court has exercised discretion so as to resolve a significant number of moot appeals under the Charter. As with the case of standing, however, the observation that the Supreme Court of Canada 'frequently' decided moot constitutional cases before that rights instrument's arrival may trouble assumptions that the Charter has unleashed an era of judicial agency.¹¹⁴ Still, it was in a Charter case that the Court set out three considerations

¹⁰⁵ *R v. Secretary of State for the Home Department Ex p Salem* [1999] 1 AC 450, 456, Lord Slynn.

¹⁰⁶ Lieven & Kilroy, at 126-127.

¹⁰⁷ Woolman, Bishop & Brickhill, eds.at 7-20

¹⁰⁸ *Moise v. Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC).

¹⁰⁹ *President of the Ordinary Court Martial NO v. Freedom of Expression Institute* 1999 (4) SA 682 (CC).

¹¹⁰ *J T Publishing (Pty) Ltd & Another v. Minister of Safety and Security & Others* 1997 (3) SA 514 (CC).

¹¹¹ *President of the Ordinary Court Martial NO v. Freedom of Expression Institute* 1999 (4) SA 682 (CC).

¹¹² *President of the Ordinary Court Martial NO v. Freedom of Expression Institute* 1999 (4) SA 682 (CC) [16].

¹¹³ *President, Ordinary Court-Martial and Others v Freedom of Expression Institute and Others* 2001 (3) SA 925 (CC) [11] Yacoob J.

¹¹⁴ Roach, *Constitutional remedies in Canada*.at [5.710]

to condition the exercise of its discretion to hear a moot case.¹¹⁵ One is whether the parties retain an adversarial stake in the issues. The second is whether the issues are important enough to justify the judicial resources necessary for resolving the case. The third is whether by deciding the case the Court would depart from its traditional role of adjudicating disputes.

The Supreme Court has insisted that its ‘general rule’¹¹⁶ leans against deciding moot cases. It declined to issue judgment on the merits in the case on which it set out its three considerations. Borowski’s case – discussed above in connection with his claim for standing – had become moot when, after leave to appeal to the Supreme Court was granted, the Court in separate proceedings struck down all the criminal provisions regarding abortion.¹¹⁷ The plaintiff wished to continue his proceedings to obtain a ruling that would shape any new abortion law. Nevertheless, at least in constitutional cases, the Supreme Court ‘usually’ exercises its discretion in favour of rendering judgment in the appeal.¹¹⁸ Some of the moot appeals decided have concerned challenges to the validity of legislation.¹¹⁹ Other moot appeals decided by the Court concerned judicial or administrative action.¹²⁰ A commentator describes the principles laid out in *Borowski (No. 2)* as ‘a cafeteria at which judges pick and choose the aspects which suit them without troubling about the rest’.¹²¹

The Supreme Court of Canada appears to take mootness towards the world at large as a bar to judgment more than mootness as between the parties. It has held that, so long as the legislation or governmental action underpinning a dispute remains in place, a case may be moot but ‘not abstract’.¹²² Such a distinction explains the unwillingness to rule where the abortion law had been struck down and the willingness to rule on the injunction against an abortion. This distinction is consistent with the South African Constitutional Court’s decision not to rule on

¹¹⁵ *Borowski v. Canada (Attorney General)* [1989] 1 SCR 342.

¹¹⁶ *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 SCR 46 [41].

¹¹⁷ *R v. Morgentaler (No 2)* [1988] 1 SCR 30.

¹¹⁸ Hogg, at 59-1; see also Henry S. Brown, *Supreme Court of Canada Practice 2013* (Toronto: Carswell, 2012) at 25-28; Sossin, at 117. (‘surprisingly rare for a case not to be heard on the grounds of mootness’)

¹¹⁹ *Law Society of Upper Canada v. Skapinker* [1984] 1 SCR 357 (law graduate’s challenge to citizenship requirement for Bar admission after he became a citizen and obtained entry); *M v. H* [1999] 2 SCR 3 (claim that provincial failure to extend right and obligation of maintenance to same-sex, as to different-sex, cohabitants discriminatory, although the lesbian couple in question having settled their dispute); *Nova Scotia (Attorney General) v. Walsh* 2002 SCC 83, [2002] 4 SCR 325 (claim that provincial family legislation discriminated by excluding unmarried couples, the challenged legislation having been modified to a degree and the parties having settled their dispute).

¹²⁰ *Tremblay v. Daigle* [1989] 2 SCR 530 (challenge to injunction against a woman’s getting an abortion when she had already done so); *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62, [2003] 3 SCR 3 (challenge to order for judicial supervision of school construction, even though construction completed); *Maranda v. Richer* 2003 SCC 67, [2003] 3 SCR 193 (challenge to police search and seizure as ‘unreasonable’ where Crown having acknowledged the unreasonableness, returned the seized evidence, and announced that charges would not be laid); *Multani v. Commission scolaire Marguerite-Bourgeoys* 2006 SCC 6, [2006] 1 SCR 256 (challenge to school board’s refusal to allow Sikh student to wear kirpan after student having changed schools); *Canadian Broadcasting Corp. v. Canada (Attorney General)* 2011 SCC 2, [2011] 1 SCR 19 (challenge to constitutionality of mid-trial publication ban although trial having ended).

¹²¹ Sossin, at 158; see also Sharpe, at 330. (the courts having defined their discretion ‘in wide and flexible terms’)

¹²² *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 SCR 46 [48] (question of Charter right to state-funded legal counsel in child-protection proceedings; the case became moot as the complainant recovered custody of her children).

laws set for repeal. The concern not to pronounce on a legal context that no longer exists – where the legislature may be considering its options – reflects a measure of respect for the legislature’s role. But the willingness to rule on a case that has become factually moot merits scrutiny. It shows a shift in the judiciary’s role from resolving disputes towards expounding the law for the world at large. Because an appeal that has become moot was already granted leave, the social importance factor consistently favours proceeding to judgment.¹²³ The presence of an evidentiary record from the trial grounds the analysis and staves off abstractness. The factors are thus weighted in advance towards ruling on the appeal. If the Supreme Court had decided moot appeals prior to the Charter, its repeated exercise of its discretion so as to hear such cases when they concern protected rights is nevertheless a significant exercise of agency.

Yet the expanded discretion to hear cases cannot be seen purely as a judicial power grab. It is true that the asserted power to hear cases brought in the public interest or that have become moot has expanded the set of possible cases available to the apex courts. But at times, the executive branch of government has intervened in the shifting contours of access to the courts. The Supreme Court of Canada has twice rendered judgment in Charter appeals that were moot between the original parties, but in which a provincial Attorney General pressed the Court to proceed.¹²⁴ Further instances of pressure from government for a court to depart from its traditional procedure or techniques will be discussed in Chapter 5. That a government sometimes wishes the Court to proceed to judgment should qualify readings of Bill-of-Rights litigation as a power struggle between the judiciary and the other branches of government. It supports the hypothesis that elected politicians may prefer to have the judiciary address controversial matters for them.

While those calling for liberalizing access to rights litigation generally presume that greater access is good for rights claimants, such assumptions are questionable. From the perspective of the rights claimant, the moot appeals decided by the Supreme Court of Canada represent mixed results.¹²⁵ In two of the rights ‘defeats’, the Court reversed decisions having found for the rights claimant.¹²⁶ Two of the rights defeats rendered in moot appeals followed Roach’s book. Would he maintain his view of the connection between procedural and substantive conservatism in their light and in the presence of a bench less receptive to rights claims? As for certainty, concerns are identifiable. Balancing the economics of judicial involvement against the (unquantifiable) social costs of continued legal uncertainty may be

¹²³ Hogg.at 59-19 n80a

¹²⁴ *Forget v. Quebec (Attorney General)* [1988] 2 SCR 90; *M v. H* [1999] 2 SCR 3 [43].

¹²⁵ In blunt terms, the Court gave a Charter ‘victory’ in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 SCR 46; *M v. H* [1999] 2 SCR 3; *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62, [2003] 3 SCR 3; *Maranda v. Richer* 2003 SCC 67, [2003] 3 SCR 193; it rejected the Charter claim in other moot appeals: *Law Society of Upper Canada v. Skapinker* [1984] 1 SCR 357; *Nova Scotia (Attorney General) v. Walsh* 2002 SCC 83, [2002] 4 SCR 325; *Canadian Broadcasting Corp. v. Canada (Attorney General)* 2011 SCC 2, [2011] 1 SCR 19. *Tremblay v. Daigle* [1989] 2 SCR 530, the appeal concerning the injunction against a woman’s obtaining an abortion, merits mention: if not a ‘pro-rights’ decision insofar as it rejected the Charter claims asserted on the fetus’s behalf, the judgment effectively affirmed women’s constitutional liberty in relation to abortion in a way typically associated with a liberal rights decision.

¹²⁶ *Law Society of Upper Canada v. Skapinker* [1984] 1 SCR 357; *Nova Scotia (Attorney General) v. Walsh* 2002 SCC 83, [2002] 4 SCR 325.

‘highly subjective’.¹²⁷ Beyond that, uncertainty may, beneficially, promote negotiation and allow the advancement of rights claims in the political forum. Those potential benefits find, though, no place in the typical balancing exercises under courts’ procedural discretion.

Whatever view of mootness is adopted, it effects a division of labour. Unlike the debate about rights protection and judicial review which concerns the division of labour as between the judiciary and legislature, the approach to mootness implicitly distributes labour as between judges in the present and judges in the future. Allowing more cases to proceed to judgment arguably reflects a confidence regarding the relative merits of a case’s being heard now, by those judges presently sitting, than by their successors, years from now. To be sure, other considerations are likely in play. Judges may think that it is urgent that certain Bill-of-Rights cases be heard now, on account of their sense that a rights-infringing law is perpetuating injustice.¹²⁸ The distinctive conditions of South Africa might be expected to intensify such a perception. But a judicial practice of relaxing the usual constraints on litigation seems to assume that today’s judges are as well placed as tomorrow’s, that the advantages of addressing a question now versus in the future outweigh the disadvantages. There is little sense that society’s attitudes are changing and that a case might be decided differently in the future. Deciding a moot case now is seen as essentially the same exercise as deciding it later. This sense of the significance of the present is arguably a departure from the classical ideal of common-law adjudication, which traditionally includes modesty and willingness to leave matters for another day.

* * *

While this chapter has focused on restrictions to judicial review, procedural rules are not the only factors that condition the supply of cases to an apex court. The extent of sustained litigation on rights is also a factor of the ‘political economy of litigation’, dependent on a support structure for legal mobilization.¹²⁹ Moreover, given the role of apex courts in granting leave to appeal, they substantially control the supply of cases. It would be methodologically unsound, then, simply to subtract the cases decided in virtue of relaxed procedural constraints and to imagine that the remainder would compose the jurisprudence that a more procedurally restrained court would have decided during the same period. If the courts cleaved to restrictive doctrines of standing and mootness, they would not necessarily decide fewer Bill-of-Rights cases. But they might decide different ones. The judicial willingness to remold these doctrines has enlarged the set of cases from which they might choose. Moreover, the considerations set out to condition the exercise of discretion reveal a changed understanding of the courts’ role.

From this chapter’s complex story, three strands are worth highlighting. The first is that, when exercising judicial discretion in relation to standing and mootness, courts primarily consider consequentialist and capacity-oriented factors. For example, the South African Constitutional Court’s factors for determining public-interest standing and the Supreme Court of

¹²⁷ Roach, *Constitutional remedies in Canada*.at [5.770]

¹²⁸ Chapters 5, 6, and 7 will study the question of the remedial relief given: a sense of urgency in hearing cases is not always matched by a sense of urgency to remedy the plaintiff’s problem in the past.

¹²⁹ Charles R. Epp, "External Pressure and the Supreme Court's Agenda" in Cornell W. Clayton & Howard Gillman, eds., *Supreme Court Decision-Making* (Chicago: University of Chicago Press, 1999) 255-279 at 256.

Canada's mootness analysis focus on outcomes and alternative paths to judgment. Admittedly, the South African constitutional text provides a basis for bracketing such concerns. In Canada, however, the judiciary's proper role is 'arguably the most important dimension of the mootness analysis',¹³⁰ but has received the least attention. Those who point to the court's institutional capacity in order to advocate judgment in the face of procedural constraints too often do not acknowledge that different visions of the judiciary are in contention. If the court's constitutionally legitimate role is to resolve disputes, then a moot case or one with no directly involved plaintiff presses it outside its role.¹³¹ If an intervention is illegitimate, its utility is arguably irrelevant. It is notable that, while constitutionalism or the rule of law is a prominent justification for expanding access to the courts – holding the government and the legislature to their constitutional confines – there is little sense that the judiciary has constitutional confines within which it should stay. Nor can one discern any sense that declining jurisdiction on the basis of procedural constraints might uphold the rule of law by respecting those confines. Chapter 7 will develop this idea.

The second is the assumption that judicial discretion to depart from traditional procedural constraints is good for rights claimants – that procedural conservatism in rights cases entails substantive conservatism. Challenging this assumption, the example of moot appeals decided by the Supreme Court of Canada unfavourably to the rights claimants begins this book's effort to disentangle process and substance. That disentanglement will continue in the next chapter. While this chapter does not advocate for a restrictive approach to procedural doctrines conditioning access to the courts, loosening the presumed link between procedural and substantive lenience may make more space for exploring the merits of a more traditionally conceived judicial role, even on questions of protected rights.

The third is that, on procedural terrain, the effect of a new Bill of Rights on the courts' development of their role is mixed. No simple story of the arrival of a Bill of Rights as emboldening courts to expand their reach emerges so as to apply across the three jurisdictions. If the new Charters are said to have revolutionized the judicial role in inviting judges to test legislation against protected rights, the procedural changes cannot be chalked up entirely to the overweening judges. Judicial and scholarly confidence in a robust role for the courts emerges, one by which they do not simply resolve disputes but articulate public values and hold government to constitutional standards.

Importantly, a Bill of Rights has not necessarily been the writ for expanding the judicial role. To be sure, judges in South Africa altered standing only when a constitutional basis for doing so was put before them. In contrast, though, at roughly the same time, the Supreme Court of Canada revolutionized its approach to public-interest standing before the Charter and the UK's judiciary revolutionized its approach to standing under an imprecise statutory provision nearly twenty years before the Human Rights Act. Attention to procedural doctrines often

¹³⁰ Sossin, at 151.

¹³¹ Roach argues that the Canadian tradition of 'abstract and politicized references' 'dumped' on the Court by governments 'arguably, should make the Court somewhat more willing to hear cases brought by citizens who also represent a vision of the public interest'. Roach, *The Supreme Court on Trial* at 108. It is unclear, though, that the fact of legislative authorization for adjudication of a class of abstract cases – on referral by the executive – implies the legitimacy of the courts' adjudicating other, similarly abstract cases that are not legislatively authorized.

neglected by political scientists who study Bills of Rights, then, can draw out shifts in conceptions and exercise of the judicial role – such as broader developments in administrative law – that do not track the advent of a Bill of Rights. That is why scholars of Bill of Rights should take a longer view, across different legal areas, beyond litigation under the new instrument.