

ACCESS TO JUSTICE: PROCEDURE, POLITY, AND POLITICS

H W PERRY, JR*

The role of procedure in the evolution and activity of political institutions has been little heeded by political scientists...the formalities and modes of doing business, which we characterize as procedure, though lacking in dramatic manifestations, may, like the subtle creeping of the tide, be powerful force in dynamic process of government...

The story of...momentous political and economic issues lies concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts.

Professor Felix Frankfurter, 1928¹

Professor [later Justice] Felix Frankfurter's quotation is quite dated in one sense and not another. First, the indictment of political science. In studies of legislatures, bureaucracies, international relations, political systems and other things, political science has long been attuned to procedural detail. Mid-twentieth century scholarship on institutions contains detailed descriptive accounts of rules and procedures, and present day scholarship often involves sophisticated mathematical modeling based on the understanding of institutional rules and procedures.² Indeed some critics argue that social scientists have become so enamoured by elaborate models and theory premised on procedural details that what has emerged has led to less understanding about how the institutions actually work. Worse, according to some critics, the work eschews dealing with normative implications, particularly at the broader societal level. Defenders argue that research has become more scientific and theory driven allowing broader understanding and applicability; and it enables more cross discipline research. Those debates are for another place, but few would argue that modern political science does not understand the significance of rules and procedure in institutions. What is less dated about Frankfurter's comments is their application to the study of *judicial* procedure by political scientists – especially the type of procedure that Frankfurter was referring to. To be sure, scholars have focused

* Associate Professor of Law and Associate Professor of Government, The University of Texas at Austin.

¹ Felix Frankfurter and James M Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (Macmillan, 1928) vi-vii.

² As one example, see Kenneth A Shepsle and Barry R Weingast, 'When Do Rules of Procedure Matter?' (1984) 46(1) *Journal of Politics* 206.

ACCESS TO JUSTICE: PROCEDURE, POLITY, AND POLITICS

on some aspects of rules and procedure to explain how judges and justices behave on collegial courts, how cases are selected for appellate review, or how the Supreme Court and Congress at times are in power struggles seeking to find (or not) pareto optimal solutions. Less has been done, however, in wrestling with procedure in the ways that lawyers typically think about procedure. Political scientists who care so much about issues such as representation, responsiveness, access, participation, the allocation of power, the distribution of goods in society, etc rarely venture into the arcane world of legal procedure, though they are highly attuned to how other governmental and societal institutions afford access.

As opposed to political scientists, lawyers, judges, and law students are steeped in procedure and deal with it daily. Much of the law school curriculum is about rules and procedure as is much legal scholarship. Entire treatises are written about procedure. Legal academics, as do judges and justices, discuss practical and some of the normative effects of procedures; but for all of the focus, there seems to be far less attention paid to bigger and more systemic questions. Indeed, the last sentence of Frankfurter's quotation seems applicable to lawyers as well as political scientists. Furthermore, there is a tendency in much legal scholarship not to place procedure, or for that matter many aspects of the law, in the context of a political system. Perhaps one of the more dramatic examples of this is when US law professors trotted around the globe trying to export American legal institutions and procedures to developing democracies. Many such instances failed because of ignorance of culture, history, and political systems. Legal academics would have benefited from taking some political scientists along with them, not to mention the benefits from taking a healthy dose of modesty. Despite the failures, it at least encouraged some attention to the interaction of the broader political forces with legal reforms. More often, however, legal rules and procedures are still discussed in very insular ways. Not only are they seen as country specific, but also procedure is an increasingly specialised area of the law. One of the big courses in most US law schools is 'Federal Courts.' It is taught in addition to courses on civil procedure and constitutional law. A main focus of 'Fed Courts' is access to federal courts. At one time, issues involving access to federal courts were simply a part of constitutional law, but no more. The complexity of the material may justify another course, but the division from constitutional law can have the effect of masking the profound systemic implications that technical procedures bring about.

Frankfurter is certainly right in suggesting that we need to focus on procedure and understand that seemingly technical rules can have huge implications for the access to justice in a society. It is for this reason that I find this conference so interesting. I am also pleased that the conference has a comparative component for reasons beyond my good fortune to have been invited to Australia. Societies governed by the rule of law have many things in common, and we can learn from one another. The

flip side is the problem I have alluded to about globetrotting constitutionalists. Unless we are willing to learn about some of the nitty-gritty details, our comparisons will be superficial for the reasons Frankfurter proffered. I believe that what helps bridge this dilemma is to try to place the esoteric rule of procedures in a broader context of a constitutional or legal order. This becomes essential if we are trying to make normative judgments, either comparatively or for our own systems. I have tried to do little bit of both in what follows. I begin with some of the nitty-gritty of American politics and procedure.

The Basics

Article III of the US Constitution authorises a federal judiciary and defines its constitutional powers and limits. It consists of three very short sections.³ Section 3 is

³ **Section 1.** The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;-- between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person

only three sentences long and deals entirely with the topic of treason. Section 1 is even shorter. It consists of only two sentences. The first states: 'The judicial power of the United States⁴ shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.' The second sentence effectively grants life tenure to federal judges, contingent upon 'good behaviour.' Note that the Constitution does not require the establishment of any federal courts other than the US Supreme Court. The wording of Section 1 reflects a compromise. At the constitutional convention, some believed that state judiciaries were all that were needed to adjudicate federal law (which includes the Constitution), while others felt that a separate system of federal courts was needed. Ultimately, it was agreed that a Supreme Court would sit atop the system, but it was left to Congress to decide whether or not to create a separate federal judiciary. (This arrangement takes on great importance for some of our later discussion.) Congress did not take long to decide. In one of its first acts, the *Judiciary Act of 1789*, it created a federal judiciary. There have been changes over time, but the act established the basic structural system that we have today: federal district courts, which are trial courts for both civil and criminal cases, and federal circuit courts of appeals. Currently there are 94 federal districts including at least one district in each state, and districts are wholly within states.⁵ The districts are organised into 11 regional circuits, each of which has a US Court of Appeals. The Circuit Courts of Appeals hear appeals from the district courts located within their circuits, as well as appeals from decisions of federal administrative agencies. In addition to the regional circuits, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialised cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

attainted.

⁴ Use of the term 'United States' can be confusing. In the Constitution it is referring to national institutions as opposed to state institutions. So references to 'courts of the United States' would mean federal (national) courts only, not state courts.

⁵ Included in the 94 are district courts for the District of Columbia and Puerto Rico. Three territories of the United States – the Virgin Islands, Guam, and the Northern Mariana Islands – have district courts that hear federal cases. Bankruptcy courts are separate units of the district courts. Federal courts have exclusive jurisdiction over bankruptcy cases. There are two special trial courts that have nationwide jurisdiction: (1) The Court of International Trade which handles cases involving international trade and customs issues; and (2) The United States Court of Federal Claims which has jurisdiction over most claims for money damages against the United States, disputes over federal contracts, unlawful 'takings' of private property by the federal government, and a variety of other claims against the United States.

Federal issues may also be adjudicated in state courts. The typical path is for a case to work its way through the state system, and after judgment in the highest court of the state,⁶ the case may be appealed to the US Supreme Court.

Section 2 establishes the jurisdiction for federal courts. It states: 'The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . .' It goes on to list some other situations that invoke federal authority. It then says that in a few categories 'the Supreme Court shall have original jurisdiction.' In all other cases it has appellate jurisdiction 'as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make.' Nowhere in the Constitution does it give the judiciary the power to review acts of Congress and declare them unconstitutional or state that the Supreme Court has the final say on constitutionality. The power of 'judicial review'⁷ was declared by Chief Justice John Marshall in the famous case *Marbury v Madison*.⁸ The establishment of this momentous power was done in the context of a fairly technical debate about original vs appellate jurisdiction. Chalk one up for Frankfurter.

There are a few more basics that one must understand about the US before any sense can be made of the technical procedural doctrines that govern access to constitutional justice in the US. We have just touched on one—the extraordinary power of the judiciary as a result of judicial review. I am unaware of any democratic system that contains such a powerful judiciary *vis-a-vis* other political institutions. The second important factor is the federal nature of the US. Many countries have federal systems,

⁶ The names of state courts often vary and can be confusing. For example, in some states a Supreme Court is not the highest court in the state.

⁷ The concept of judicial review encompasses more than overturning a law; but in the US the term is often used as a shorthand designation for the power to declare acts of the other branches unconstitutional. Concomitantly it is used to convey that Supreme Court has the final word on what the Constitution means. For a very long time, it had been generally assumed that the power of judicial review established in *Marbury* implied that the Supreme Court had the final say on constitutionality. In context of civil rights struggles of the 1950s, the Court chose to remove all doubt. In *Cooper v Aaron*, 358 US 1 (1958) Warren CJ said, 'This decision [*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system.'

⁸ Thousands of words have been written about whether or not the founders of the Constitution intended for the court to exercise judicial review or if judicial review logically proceeds from the wording. Academic discussions aside, even the most 'originalist' or 'textualist' judges accept today the ultimate authority of the Supreme Court to determine the meaning of the Constitution.

but few share the structure or the psyche that is the American version. Anyone who has studied US constitutional law or indeed the history of the United States knows that the single most important constitutional debate has been the nature and the power of the federal government *vis-a-vis* the states.⁹ The federal government is a government of limited and enumerated powers. The federal government is supreme in those powers, but it has only those powers.¹⁰ As the Tenth Amendment declares, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The Constitution is a relatively short document, and not that many powers are delegated. John Marshall showed the way to more national power through the 'necessary and proper clause,' which allows the use of means to achieve the exercise of delegated powers,¹¹ and he offered an expansive interpretation of the Commerce Clause, which today is the major constitutional source of national power. But struggles over the extent of national power are a constant theme in American history—constitutional and otherwise. Our Civil War, a war in which more Americans were killed than in all our other wars combined, was about the power of the federal government against the states. The proximate cause was the expansion of slavery, but the underlying battle was state vs federal power. The Civil War, however, did not end the struggle. Franklin Roosevelt's infamous battle with the Court revolved around whether or not the Federal government had the power to enact much of his New Deal program. He eventually won, and the power of the federal government changed fundamentally as a result, but battles over federal power continue, and some issues of federal power thought to be well established were recently undone by the Rehnquist Court. Whatever the future outcome of some of those battles, the role and power of the states in our federal system is unique, and understanding access doctrines requires understanding American notions of federalism.

A final aspect of the American polity that is deeply ingrained in our psyche and governs much of our constitutional order is the idea of separation of powers within the federal government. It is hard to overstate the perceived importance of maintaining appropriate 'checks and balances' among the legislature, executive, and

⁹ A possible contender for importance is the Constitutional struggle to ban racial segregation, but even that issue was inextricably tied to the issue of federalism.

¹⁰ The 'Supremacy Clause' in Article VI reads, 'The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'

¹¹ *McCulloch v Maryland*, 17 US (4 Wheat.) 316 (1819).

judiciary. To be sure, different players often see what is appropriate quite differently, but the worry is omnipresent.

I now turn to what Frankfurter referred to as ‘the surface technicalities governing the jurisdiction of the Federal Courts.’

Access to Federal Courts

As mentioned earlier, entire courses exist in American law schools with huge and complicated casebooks that detail the intricacies of practice in federal courts. The most important questions involve access to federal courts.¹² The operative word is justiciability. The main obstacles to bringing a case to federal court are governed by the justiciability doctrines fashioned by the Supreme Court. They include: prohibitions against advisory opinions, standing, ripeness, mootness, and the political question doctrine. The Supreme Court has distinguished between *constitutional* and *prudential* requirements for justiciability. Most all of the constitutional limitations grow out of the language of Article III, Section 2: describing the judicial power as one that extends to cases and controversies.¹³ To understand the justiciability doctrines that have emerged from that simple language, however, requires understanding the broader context of the American constitutional order, especially the ideas of separation of powers and a judiciary with extraordinary powers. The distinction between constitutional and prudential limitations is an important distinction because if the source of the limitation is the Constitution, Congress cannot alter it; if it is a prudential doctrine, Congress can override it. The distinction seems clear enough, but in reality it is far more complicated. The supposed constitutional limitations exist because of judicial interpretation and are therefore the subject of debate. Also, some of the doctrines such as standing can have

¹² To help me summarise this gargantuan topic for purposes of this paper, I have relied greatly on Professor Erwin Chemerinsky’s summaries in his excellent *Constitutional Law: Principles and Policies* (Aspen Publishers, 3rd ed, 2006). I do not cite every instance where he has informed my comments, but I hereby acknowledge the overall debt. I also especially appreciate the tutelage of two colleagues who teach Federal Courts—Ernest Young and Stefanie Lindquist. I have learned much from them and many of my comments reflect ideas that they have given me. It is also impossible for any discussion on federal courts not to consult the classic *Hart and Wechsler’s The Federal Courts and the Federal System*, currently in its 6th ed, and now edited by Professors Richard H. Fallon, Jr, John F. Manning, Daniel J Meltzer and David L Shapiro (Thompson Reuters/Foundation Press, 2009).

¹³ There is no meaningful distinction between the two. See *Aetna Life Insurance Co v Haworth*, 300 US 227, 239 (1937) where “The term “controversies,” if distinguishable at all from “cases,” is so in that it is less comprehensive than the latter, and includes only suits of a civil nature’: *In re Pacific Railway Commission*, 32 Fed. 241, 255 (1887) (Field J), citing *Chisholm v Georgia*, 2 US (2 Dall.) 419, 431-2 (1793).

both constitutional and prudential justifications, and there is often debate over which is at play. Finally the justiciability doctrines themselves are intertwined. I address the two most important justiciability doctrines, advisory opinions and standing and will only briefly mention others.

Advisory opinions

Very early in American history President George Washington sought the Supreme Court's advice on some complicated treaty issues. The US was trying to stay neutral in the war between France and England and had treaties with both countries. Washington wanted to fashion legal responses in order to live up to the treaty obligations without taking sides. He asked his Secretary of State, Thomas Jefferson, to write a letter to the Supreme Court to seek advice, and Washington's cabinet prepared at least twenty-nine specific questions for the Court to answer. The Court said no. Writing for the Court, Jay CJ answered:

...The lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other—and our being judges of a court in the last resort—are considerations which afford strong arguments against the propriety of our extrajudicially deciding the question alluded to; especially as the power given by the Constitution to the President of calling on the heads of department for opinions, seems to have been purposely as well as expressly limited to the executive departments.¹⁴

Historically there is some evidence that justices, including Jay, had previously advised the president on legal matters, at least privately. Nevertheless, this response to President Washington has become canonical. Federal courts must not give advisory opinions. More importantly, this response and subsequent justifications for not rendering advisory opinions underpin other justiciability doctrines. Note that the justices gave a constitutional (not a prudential) response related to separation of powers. One can imagine many prudential reasons for courts not playing an advisory role, but the justification has largely relied on Constitutional limitations. Taken literally, Jay's response might seem to prevent the president from seeking the written advice of a senator. That cannot be the case, so it seems that the response is based not only on separation of powers but also on something unique about courts. Constitutional justifications for limiting access with this and other doctrines emphasise the importance of resolving concrete cases and for having rulings be final.

¹⁴ *United States Constitution* art II § 2 gives the President the power to 'require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.'

One can argue that many presidents would have been better served had they sought the advice of the Supreme Court in advance on issues such as detaining enemy non-combatants on foreign soil, but that cannot happen in US federal courts. Incidentally, American states, too, have structures of government that are premised on separation of powers, and yet some state judiciaries are permitted to render advisory opinions. As such, it is difficult to argue that separation of powers and the nature of courts require a ban on advisory opinions.

One important complication has arisen given the Court's position on advisory opinions. One might see declaratory judgments as advisory opinions, and early on some justices even said as much. However in 1933, the Court held that requests for declaratory judgments were justiciable.¹⁵ Justice Stone wrote that what constituted a case or controversy depended upon substance and not form and a case was justiciable 'so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy.'¹⁶ In 1934, Congress passed the *Declaratory Judgment Act* authorising federal courts to issue a declaratory judgment in a 'case or actual controversy,' and the Supreme Court upheld the Constitutionality of the Act.¹⁷

Standing

Not to put too fine a point on it, standing doctrine is a mess. When Professor Patrick Keyzer said to me that it would be helpful if in my paper I would try to elucidate the American doctrine of standing, he could probably hear me groan halfway around the globe. I often teach my students what the Court has said, but I confess that I often cannot understand the logic; or given the logic, I cannot understand the distinctions being drawn. This is not simply the observation of one grumpy law professor. The academic literature on standing is vast and much of it is critical. University of Michigan Law Professor Joseph Vining has written that it is impossible to read standing decisions 'without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate.'¹⁸ Even the Court itself has acknowledged the problem: 'We need not mince words when we say that the concept of 'Art. III standing' has not been defined with

¹⁵ *Nashville, C & St L Ry v Wallace*, 288 US 249 (1933).

¹⁶ *Ibid* 264.

¹⁷ *Aetna Life Insurance Co v Haworth*, 300 US 227 (1937).

¹⁸ Joseph Vining, *Legal Identity* (1978), quoted in Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Aspen Publishers, 3rd ed, 2006) 60.

complete consistency in all of the various cases decided by this Court which have discussed it.’¹⁹

Central to the Court’s explanation of its standing doctrine is that separation of powers imposes constitutional barriers to judicial action. In an important case, *Allen v Wright*, the Court said standing is ‘built on a single basic idea—the idea of separation of powers.’²⁰ Americans’ dedication to the concept of separation of powers generally seems almost fetishistic, especially to those who are used to parliamentary systems or systems with disciplined political parties. But the idea is central to American political thought. Closely related to the separation of powers concern is the concern for the proper role of the judiciary given its extraordinary counter-majoritarian powers in our system. As the Court pointed out in *Warth v Seldin*, standing ‘is founded in concern about the proper—and properly limited role—of the courts in a democratic society.’²¹

Standing doctrine has both a constitutional basis and a prudential basis. The constitutional basis, or constitutional core as Professor Ernest Young prefers to call it, has 3 parts: (1) there must be a concrete injury in fact; (2) the injury must be fairly traceable to the allegedly unlawful conduct; and (3) the injury is likely to be redressed by the requested relief. The last two are sometime linked together under the rubric of ‘causation.’ The prudential components of standing are: (1) a rule barring a litigant from raising the rights of a third party; (2) a rule disfavouring generalised grievances; and (3) a zone of interests requirement, which requires that a plaintiff be within the ‘zone of interests’ protected by the law being invoked. These components will be discussed below. Again, the important difference between ‘constitutional’ and ‘prudential’ is that Congress can override prudential requirements but not constitutional ones. It is not always easy to tell, however, where the constitutional requirements end and the prudential requirements begin.

In many ways, the opinion in *Allen v Wright*²² summarises current doctrine. The Internal Revenue Service (IRS) had a policy that prohibited tax exempt status for racially discriminatory private schools. The plaintiffs, who were parents of black schoolchildren and were part of a class-action suit, complained that the IRS was not doing enough to enforce the rule and that many racially discriminatory private schools were in fact getting tax-exempt contributions. The injuries asserted by the

¹⁹ *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 US 464, 475 (1982).

²⁰ 468 US 737, 752 (1984).

²¹ 422 US 490, 498 (1975). See also Antonin Scalia, ‘The Doctrine of Standing as an Essential Element of the Separation of Powers’ (1983) 17 *Suffolk Law Review* 881.

²² Again I am indebted to Professor Young for his insights on this case.

plaintiffs were that (1) they were harmed directly by government aid to discriminatory private schools; and (2) that tax exemptions to racially discriminatory private schools in their communities impair their ability to have the public schools successfully desegregated. The Court in an opinion by O'Connor J held that the plaintiffs had no standing:

This Court has repeatedly held that an asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court...."

Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination...Our cases make clear...that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct...

If [an] abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups...regardless of the location of that school...A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."

In addressing the issue of traceability and causation, the Court said:

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. . .

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain the respondents' standing.

As always, separation of powers was cited:

. . . the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch "the duty to take Care that the Laws be faithfully executed." We could not recognize respondents' standing in this case without running afoul of that structural principle.

There were vigorous dissents to this opinion based on many different points including a response to worries about separation of powers, but perhaps the

objection that is of a more general complaint about the Court's current standing doctrine was offered by Brennan J:

More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims. The Court does nothing today to avoid that criticism.

Let us now look at the constitutional and prudential standing requirements referenced above in more detail.

Concrete injury (constitutional)

The Court has said that 'the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'²³

The rule is clear enough, but the application is confusing. In *Sierra Club v Morton*,²⁴ the national environmental organisation tried to prevent the construction of a ski resort in Mineral King Valley, California. The Court denied standing because the club failed to allege that any of its members used the area or that their activities would be affected by the development. A year later, however, in *United States v Students Challenging Regulatory Agency Procedures (SCRAP)*,²⁵ students protested a hike in railroad freight rates because it would add to the cost of recycling, which in turn uses more natural resources and causes more pollution. They claimed that their enjoyment of the forests, streams, and mountains in their vicinity would be diminished. The Court granted standing claiming that environmental and aesthetic injuries were sufficient since they claimed personal harm. In *Lujan v National Wildlife Federation*,²⁶ however, plaintiffs challenged a government policy that lessened environmental protection of certain federal lands. Members of the group submitted affidavits that they used the land in the vicinity and that increased mining activity would destroy the area's natural beauty. Nevertheless, the Supreme Court denied standing claiming that the allegation was too general to establish a particular injury. There are distinctions among the cases, but one wonders if there are real differences. In principle, the rule requiring a concrete injury is understandable, but in series of cases it is hard to predict when and how that will be determined.

²³ *City of Los Angeles v Lyons*, 461 US 95, 101 (1983).

²⁴ 405 US 727 (1972).

²⁵ 412 US 669 (1973).

²⁶ 497 US 871 (1990).

One of the most contentious standing cases arose in the context of the Los Angeles Police Department's use of chokeholds to subdue suspects. The LAPD has a long and difficult history particularly with regard to its relationship to the black community. Justice Thurgood Marshall, in dissent, laid out the facts:

Respondent Adolph Lyons is a 24-year-old Negro male who resides in Los Angeles. According to the uncontradicted evidence in the record, at about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his tail-lights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.²⁷

In a 5-4 decision, the Court ruled that Lyons did not have standing to seek injunctive relief because he could not demonstrate that he personally had a high likelihood of being choked in the future. (He could seek damages). The opinion was criticised on many grounds. Notably, it has been used by lower courts to prevent judicial review of alleged unconstitutional government policies.

Traceability and Redressability (constitutional)

Even if a plaintiff can demonstrate injury, that is not enough for standing. It must be shown that the injury is traceable to the unlawful conduct and that the injury is likely to be redressed by the requested relief. These were originally seen as one problem referred to as causation, but now the Court has held that they are both required, along with a concrete injury, to garner standing. In a case from my own state, an unwed mother protested as unconstitutional Texas' policy of prosecuting fathers for not paying child support for legitimate children while not prosecuting them for support of illegitimate children. The court ruled no standing because it was unlikely that the mother would receive any child support if the father were prosecuted. He

²⁷ 431 US 95, 115 (1983).

ACCESS TO JUSTICE: PROCEDURE, POLITY, AND POLITICS

would simply be put in jail. On the other hand, in *Duke Power Co v Carolina Environmental Study Group, Inc*,²⁸ standing was granted. The constitutionality of the *Price-Anderson Act*, which limited the liability of utility companies for nuclear reactor accidents, was challenged as an unconstitutional violation of the due process clause because it allowed injuries without compensation. The Court found that construction of a reactor exposed plaintiffs to injuries such as thermal pollution and fear of a major accident. Traceability and redressability were met because *but for* the Act, the plaintiffs would suffer the harms. As with concrete injury, cases are all over the place. The debate about these requirements is intense. A common objection is that redressability is a factual question that should not be made at the outset. Criticism ranges from technical complaints to suggestions that the Court grants standing based upon its attitude toward the ultimate outcome on the merits. We now turn to prudential limitations.

Third party standing (prudential)

As a matter of prudence, standing is generally not granted to raise the interests of a third party. The Court has offered many reasons for this including the argument that interested parties are best at asserting their own rights, which in turn improves litigation, and it also avoids rights being asserted that parties would not wish to assert. There are exceptions, however. It may be done when it would be difficult or impossible for the person to present his grievances before a court. Another exception is when there is a particularly close relationship between the plaintiff and the third party such a doctor asserting the rights of her patient. The Court has even allowed vendors to assert the rights of their customers. Organisations can sue on behalf of an organisation or its members. A particularly broad and important exception exists in First Amendment (freedom of speech) jurisprudence that is referred to as the overbreadth doctrine. If a prohibition of speech sweeps too broadly, it may be struck down. The reasoning has to do with a fear of chilling speech, which by definition refers to third parties.

Zone of Interests (prudential)

A plaintiff must be part of a group that was intended to be covered by a statute in order to assert a statutory or administrative claim.

Generalised Grievances (prudential now constitutional)

Another barrier that started as a prudential one has recently become a constitutional one. Standing is denied when the asserted harm is a generalised grievance, which is

²⁸ 438 US 737 (1984).

'shared in a substantially equal measure by all or a large class of citizens.'²⁹ Typical examples are if the only injury is as a citizen or a taxpayer. In *Lujan v Defenders of Wildlife*,³⁰ Scalia J held for the Court that standing was barred *constitutionally* when it was based on generalised grievances. Such a change is not trivial. Congress, can and does authorise standing in all sorts of instances that overcome prudential arguments. It remains to be seen what the implications of *Lujan* are for the many statutes where Congress has created standing. Justice Scalia based much of his argument on separation of powers arguments. There is some irony here. The separation of powers argument is used to assure that the Court does not overstep its bounds *vis-a-vis* the other branches, but *Lujan* might work to restrain Congress' ability to assure standing, which has its own separation of powers implications.

We now mention briefly some other barriers to access.

Ripeness, Mootness

Ripeness refers to when review is appropriate. It seeks to avoid speculative injuries, and it also seeks to avoid premature judgment. Mootness requires that an actual controversy is present. Though these two doctrines seem straightforward, they are anything but. Indeed, the decisions in these areas often make standing decisions look clear. Given the length of this paper, I cannot go into them any further except to say that some would argue that they are simply extensions of the concerns expressed in standing with the strong desire to make sure that courts are only dealing with real cases and controversies.

Political Question Doctrine

The Court has claimed that some issues are inappropriate for judicial review and belong to the other branches of government even though all of the other justiciability requirements are met. Space prohibits a meaningful discussion of it here, but many commentators suggest that the political question doctrine is the most confused and bewildering of all the justiciability doctrines. Indeed, many believe that claims by the Court notwithstanding, the doctrine no longer exists, especially after *Bush v Gore*. That is probably an overstatement. If Congress impeached and convicted the President, it is doubtful that the Court would entertain a case by the ousted President seeking recourse in the courts. Nevertheless, many things previously considered to be political questions are now frequently adjudicated by federal courts. Most notably, the Constitution says that 'The United States shall guarantee to every state in this Union a republican form of Government' (Article IV, Section 4). Determining what

²⁹ *Warth v Seldin*, 422 US 490, 499 (1975).

³⁰ 504 US 555 (1992).

constitutes such a government was traditionally seen as the quintessential political question that was to be resolved in places outside the courts. Courts today essentially decide such cases, but they do so based upon claims by individuals of a denial of equal protection or due process. For the most part, the demise of the political question doctrine has increased access. However, it is still used, and many observers feel its use is often simply an excuse to avoid a case rather than the application of a meaningful, coherent doctrine. This feeling is reinforced by the ease with which the political question doctrine can be overcome when the court wants to do so.

The Constitutional Avoidance Canon

There are other prudential doctrines that are not technically about access, but stand for the proposition that the Court should not decide. One comes from Brandeis J in his famous concurrence in *Ashwander v Tennessee Valley Authority*.³¹ It is referred to as the 'Constitutional Avoidance' canon. It takes the form of 7 rules. According to Brandeis J, the Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act': *Chicago & Grand Trunk RR v Wellman*, 143 US 339, 345 (1892).
2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it': *Wilshire Oil Co v US*, 295 US 100 (1935). In particular, 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of a case': *Burton v US*, 196 US 283, 295 (1905).
3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied': *Liverpool N.Y. & P.S.S Co v Emigration Commissioners*, 113 US 33, 39 (1885).
4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found

³¹ 297 US 288, 346 (1935).

(2010) 22.3 BOND LAW REVIEW

most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter: *Light v US*, 220 US 523, 538 (1911).

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation: *Tyler v The Judges*, 179 US 405 (1900). Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right.
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits: *Great Falls Mfg Co v Attorney General*, 124 US 581 (1888).
7. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v Benson*, 285 US 22, 62 (1932).

As can be seen, many of these principles shaped the justiciability doctrines. These rules have been criticised, but they have become important in American constitutional law, and they raise questions about access to justice especially given the fact that application of them varies.

Passive Virtues

A different though related argument comes from Professor Alexander Bickel. Bickel famously put forth the idea of the counter-majoritarian difficulty, and he touts 'passive virtues as a response.'³² Because the Court must act on principle and, at times, reject majoritarian preferences, the Court needs the ability to avoid some Constitutional issues as a matter of prudence, often using tools such as the justiciability doctrine. Much has been written about Bickel's ideas, often critical, but it would be hard to disagree that as an empirical matter the Court often finds the virtue in being passive.

Certiorari

Access to justice is not the same thing as access to the US Supreme Court, but given the importance of the Court, access to it is worth thinking about. Justice Murphy said years ago, writs of certiorari are matters of grace. The US Supreme Court receives about 8000 petitions a year. It only accepts about 70-80 for review. Though no one

³² Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill, 1962).

would expect access to the highest court for most cases (except the petitioners), and most litigants would have had their day in court, the virtually complete discretion of the Supreme Court to set its own agenda has profound implications. I have written about this extensively elsewhere.³³

Congress and Jurisdiction

Going back to where we started, Article III says that Congress has the power to make exceptions and regulations to the Supreme Court's appellate jurisdiction. This has been interpreted to mean that it is up to Congress to govern jurisdiction (except for the holding in *Marbury* that says it cannot add to the Court's original jurisdiction). In other words, so long as it does not violate the Constitution, Congress can regulate jurisdiction. The Supreme Court has held that federal courts may only hear cases when they are authorised to do so by statutes or the Constitution. Congress does not always grant such access. The authority to do this derives from the premise that it is up to Congress to create federal courts, which they need not do at all, and as such they have the authority to regulate their functioning, again subject to the Constitution. Notice I keep using the caveat 'subject to the Constitution.' There is a huge debate about something referred to as jurisdiction stripping. In a few instances, particularly around the Civil War, Congress removed the Supreme Court's jurisdiction to hear a case. The removal was clearly done to obtain a particular result. From time to time, there have been movements in Congress to strip jurisdiction from federal courts around controversial policy issues such as abortion or school busing to achieve desegregation. These movements have failed, but the idea makes for lively debate among constitutional law scholars. Most feel that the guarantees of due process require the ability to have a constitutional claim reviewed in some court, but whether Congress could remove the authority from the US Supreme Court is more contentious. A recent case upheld a congressional law prohibiting repeated appeals to the Supreme Court for habeas corpus review in certain situations. The court upheld the statute, but because habeas can be sought as an original matter in the Supreme Court, the Court did not object.³⁴ As a practical matter, however, the Court has not granted an original petition for habeas since 1925.

Obviously, I have had to treat very complicated issues in a very truncated form. Nevertheless, I hope my representation has been sufficiently fair and detailed enough to raise questions about how very technical issues can have momentous effects

³³ HW Perry, Jr, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1991).

³⁴ *Felker v Turpin*, 518 US 651 (1996).

regarding access to justice. I now try to step back a bit and think about them in a broader context.

Jurisdiction and Procedure in Broader Perspective

We all know the truth of the old saying that ‘not to decide is to decide.’ We all know that institutions cannot decide everything presented to them nor can there be endless appeals. We can come up with hundreds of reasons to justify the lack of action on the part of governmental institutions, and many of those reasons are persuasive and just. And yet, one sometimes feels that we are so comfortable with justifications for not deciding that we fail to step back and question if the denial of access to justice is the right decision and if the justification is still persuasive. I cannot begin to answer whether Professor Patrick Keyzer’s diagnosis and cure for the Australian system is correct.³⁵ I do believe that he is asking the right questions. I also believe that too often we talk about access to justice in grand terms and that, again, Frankfurter is right to note that often in the subtleties of procedure lie momentous implications for governing.

First, I want to ruminate about one of the main justifications in the American system for denying access that I referred to throughout, separation of powers, and then I want to turn to some broader issues of democratic governance. The separation of powers situation in the United States today is a far different one from that faced by the Founders; indeed it is far different from what it was 15 years ago. For much of our history, the separation of powers issue was about the powers of the executive and the legislature. To be sure, the court was a coordinate branch, but it was, in Alexander Hamilton’s words, ‘the least dangerous branch.’ As an early democracy, America was carrying on the evolution to democracy in England that was largely about moving power from the crown to parliament. Democracy at that time was largely equated with representation in the legislature. In America, the balance that needed to be achieved was energy in the executive given that most power rested with the legislature. How things have changed. The story of 20th century politics in America is largely about the growth of the power of the presidency and the modern administrative state and the decline of Congress. In the 21st century, the story has gone into warp speed. Because of the nature of our electoral system with single member districts and lack of national party control of candidates, Congress remained a significant if diminishing check on the ever-growing power of the presidency. But even the structural issues that lend power to the legislature are not as robust as they were just a few years ago. In the United States today, we have witnessed an extraordinary polarisation of the congressional political parties such that the

³⁵ Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010).

institutional struggle between the legislature and the president is driven far more by political party than ‘pride of place’ or institutions ‘jealously guarding their prerogatives.’ Though I do not want to overstate the case, the main check on the executive these days about issues of great constitutional moment is coming from the Court rather than the legislature. The Congress has often been feckless in checking presidential power, especially in matters of national security which often are related to Constitutional rights. Congress could use some checking, too. There was once a time when legislators often felt that a major part of their role was to make constitutional judgments about the things that they were trying to do. Increasingly, determinations of constitutionality have been left to the courts. Often the attitude these days is that we will pass something and we will leave the constitutional questions to the judges. Since courts are largely reactive, they need cases to be brought to them. Concern for a functioning check and balance system might require more access to the courts than less; more functionalism than formalism. I can argue this both ways, but the Court’s constant paeans to separation of powers views the concept in a context that arguably no longer exists.

Attendance at this conference has also raised questions in my mind about much of the Court’s structuralist arguments. As I listened to experts from Australia describe their rules of standing and other access doctrines, they sounded remarkably similar to those of the US. If I understood correctly, then the question is how could that be? Much of America’s access jurisprudence is premised on the notion that it had to be that way given the nature of separation of powers in the US along with other structural aspects of our system. And yet, the Australian system is very different from ours especially with regard to separation of powers issues. Though Australia’s governing system is not fully a Westminster system, it is much more that than American. Moreover, the supremacy of parliament *vis-a-vis* courts is very un-American. How can it be that if access rules are justified in response to governmental structure and function that Australia and the US wound up in such a similar spot? Perhaps I do not fully understand the Australian access doctrines—all the more reason for me to make more visits to Australia. But if I am basically right, then it seems that much of the access doctrines of the two countries is largely *ex post* justifications. One could imagine that the limited access in both systems is desirable, but to suggest that it is essentially inevitable, or that its desirability rests on basic structural arrangements, seems problematic.

There are other reasons to question America’s crabbed notion of access. As more and more of the decisions that govern the daily lives of citizens have moved to Washington away from state capitals and city councils; and as elections have become unbelievably expensive and media driven affairs; and as citizens are removed in other ways from their representatives, courts might be seen to be among the most democratic of institutions. Indeed in developing countries, efforts at establishing the

'rule of law' often centre on efforts to make sure that courts are politically responsive. Much is being written about the need to use courts not only to challenge authoritarian regimes, which rarely succeeds, but also to help build civil society. Courts are one of the few institutions where individuals can push their needs without a great deal of mediation. Analogies between developed democracies with a long history of the rule of law and developing democracies are problematic, but the idea of access is a crucial one to democratic theory.

The issue of access, however, does not only apply to individuals seeking governmental responsiveness. In the United States, the importance of legal institutions has long been noted as captured by Tocqueville's famous quote that, 'there is hardly a political question in the United States which does not sooner or later turn into a judicial one.' If that was true in the early 1800s, it is even more so today. Many of society's most difficult issues of public policy are being decided in courts—affirmative action, personal lifestyles, environmental policies, the taking of private property in new and questionable ways, access to health care, standards for education, and so on. Policy making by courts in the US is the reality. The idea that courts are simply resolving cases and controversies where there are concrete injuries with traceability and redressability is almost laughable in some contexts. There is a very legitimate debate to be had about whether courts should be less involved in policy making. Are courts undercutting other democratic institutions? Is policy making better done elsewhere? Are there fundamental democratic theory problems with the role that courts are playing? Does increased access actually enhance justice? But to hide behind, or get lost in procedure talk in the face of descriptive realities is problematic. If courts, for good or ill, are *de facto* becoming more and more policy makers, and if courts are becoming more and more places of democratic access, then limiting access to these institutions based on textbook notions about the role of institutions is a topic that needs serious attention. In short, it seems that many of the debates about access to justice are at either too high a level or too low a level and are often carried on within the legal academy and the judiciary often out of context of the broader political system.

In policy making, we need policy wonks and grand thinkers. In law, we need procedural gurus and legal philosophers. We also need them to talk to each other and learn from each other. It is also why we need Centres for Law, Governance and Public Policy.