Pace Law Review

Volume 18
Issue 2 *Spring 1998*

Article 4

April 1998

Lewis v. Casey: Tightening the Boundaries of Prisoner Access to the Courts?

David Steinberger

Note

Lewis v. Casey: Tightening the Boundaries of Prisoner Access to the Courts?

I. Introduction

The Supreme Court recently decided *Lewis v. Casey*,[1] concerning the right of prisoners' access to the courts. *Lewis* follows a long line of cases regarding state interference with inmates' ability to file claims and grievances in the courts.[2]

From the relatively innocuous foundation of requiring the unhindered ability of inmates to file habeas corpus petitions, the Court's access decisions have evolved roughly along two separate constitutional lines.[3] Under the first line, the Court has used Equal Protection[4] analysis[5] to hold that although there is no constitutional right to an appeal, if a State opts to afford its convicted felons an appeal, the state must provide it on an equal basis, so as not to deny indigent defendants that right.[6] From these Equal Protection cases a doctrine evolved requiring the States to affirmatively aid indigent inmates in obtaining access to the courts.[7] Such affirmative action has generally included the provision of adequate legal libraries in prisons for inmate use.[8] By providing these facilities, indigent inmates who are ineligible to receive the aid of free counsel are given the means with which to formulate their own legal arguments necessary

1. 116 S. Ct. 2174 (1996).
2. *See Ex Parte* Hull, 312 U.S. 546 (1941), *infra* note 81 and accompanying text.
3. *See infra* Section II Part B(1)(a)-(b).
4. *See* U.S. CONST. amend. XIV, § 1.
5. *See infra* notes 122-144 and accompanying text.
6. *See infra* notes 122-144 and accompanying text.
7. *See infra* notes 122-144 and accompanying text.
8. *See* Bounds v. Smith, 430 U.S. 817 (1977).

for the vindication of their claim. In turn, the ability to form these arguments allows inmates to meet any technical requirements of getting a claim heard in court.

The second line of access cases has its support in Due Process[9] analysis.[10] Within this line of prisoner access jurisprudence, the right of access has often been referred to as a fundamental right.[11] In other words, this line of cases has defined a free standing right of access to the courts.[12]

These two fairly disparate lines of prisoner access jurisprudence merged in the landmark case of *Bounds v. Smith*.[13] In *Bounds*, which has remained the benchmark case to date, the Court held that states have the affirmative duty to provide legal libraries, or their reasonable equivalent, to prisoners so as to effectuate prisoners' ability to have meaningful access to the courts.[14] *Lewis v. Casey* marks the first drastic attempt[15] to limit the concededly constitutional right of inmates to meaningful court access by restricting inmate filings to habeas corpus petitions or civil rights actions.[16]

While *Lewis* was an unnecessary attempt at limiting the access precedents, the more disturbing aspect of the case was how the Court constricted this well recognized constitutional right. Specifically, the Court found that the prisoners had no standing to bring the suit in the federal courts, having shown insufficient actual injury resulting from the complained of shortcomings of the Arizona Department of Corrections' prison law libraries.[17] In an unnecessarily twisted analysis, the Court, while finding the prisoners had no standing, nonetheless proceeded to reach the merits. The finding that plaintiffs lacked standing should have ended the Court's discussion of the case.

---

9. *See* U.S. CONST. amend. XIV, § 1.

10. *See infra* notes 79-122 and accompanying text.

11. *See infra* notes 79-122 and accompanying text.

12. *See infra* notes 79-122 and accompanying text.

13. 430 U.S. 817 (1977).

14. *See id.* at 828. *See also infra* notes 145-168 and accompanying text.

15. It must only be considered an attempt, because any discussion by the Court in *Lewis* of limiting the scope of *Bounds* was necessarily dicta.

16. *See Lewis*, 116 S. Ct. at 2181.

17. *See id.* at 2178-83.

Instead the Court overreached its jurisdiction in the case when it elaborated on the scope of access to the courts.[18]

This case note will argue that the Supreme Court has misread, misapplied, and somewhat twisted precedent in reaching its conclusions. Section II describes the background of the Court's standing jurisprudence as well as its access to the courts jurisprudence. Section III will discuss Justice Scalia's opinion for the Court in *Lewis v. Casey*. Section IV argues that the Court took a fairly common and improper course in deciding the case upon the plaintiffs' lack of standing and improperly discussed the merits of the underlying claim. Section V concludes that, although the Court launched a discussion of the proper scope of prisoners' access to the courts, any such discussion was necessarily dictum, given the Court's ultimate holding that the plaintiffs were without standing to sue.

II. Background

A. *Standing*

1. *Generally*

The doctrine of standing is a truly confused area of the law.[19] "We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency."[20] Many commentators have suggested that this con-

---

18. Standing is a jurisdictional requirement of Article III of the Constitution. Any finding that a plaintiff is without standing is necessarily a determination that the court is without jurisdiction to consider the merits of the case. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1983).

19. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1 (2d ed. 1994), where the author states:

> Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law. Justice Douglas remarked at one point that "[g]eneralizations about standing to sue are largely worthless as such." Professor Vining wrote that it is impossible to read the standing decisions "without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate." Thus, it is hardly surprising that standing . . . has been identified as one of the most criticized constitutional doctrines.

Id. at 54 (citations omitted).

20. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982). Of this quotation, Professor Nichol commented: "[w]hen Justice Rehnquist penned this quotation, he employed no false sense of modesty. To the contrary, describing the law of standing as less than

fusion has led to abuses of the standing doctrine.[21] Specifically, these critics argue that the Court often invokes the standing doctrine as a means of avoiding the merits of a particularly unappealing case; the Court will use standing simply as a vehicle for avoiding cases it does not wish to decide.[22]

In an often quoted passage regarding the nature of standing, Chief Justice Warren, speaking for the Court stated that:

> The jurisdiction of federal courts is defined and limited by Article III of the Constitution. . . . [T]he judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government.[23]

What can safely be said of the standing doctrine is that it finds as its source both constitutional requirements and pru-

---

consistent reflects a talent for understatement not often associated with the controversial Justice." Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 68 (1984). Justice Rehnquist's statement has been understood to be the Court's own admission that it has not articulated a uniform, cohesive test for standing. *See* CHEMERINSKY, *supra* note 19, at 54. Justice O'Connor, in *Allen v. Wright*, 468 U.S. 737 (1984), wrote that "[a]ll of the doctrines that cluster about Article III . . . relate . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about constitutional and prudential limits to the power of an unelected . . . judiciary." *Id.* at 750 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

21. *See* Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985).

22. *See id.*, where the author stated:

> The Burger Court's treatment of standing requirement has been, at best, erratic. Access has, on occasion, been liberally granted. More often, the doctrine has been employed without consistent rationale to fence out disfavored federal claims. This vacillation has created a body of Article III decisions that ranks among the most uniformly criticized of the entire Burger Court legacy.

Id. at 635 (footnotes omitted).

23. Flast v. Cohen, 392 U.S. 83, 94(1968). In *Flast*, the Court remarked:

> In part those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

Id. at 95.

dential concerns, such as judicial self-restraint.[24] The prudential concerns, which are judicially imposed limitations based upon "prudent judicial administration,"[25] are generally considered to entail three factors.[26] First, the plaintiff, and hence the claim, must be within the "zone of interest" of the statute or constitutional provision invoked as the source of the injury or of the protection.[27] Second, there is a general bar to a party litigating the interests of third persons.[28] Finally, the injury complained of must be a limited one, rather than a generalized type of injury shared by the public as a whole.[29] Because these prudential considerations are the offspring of the judiciary's

24. *See* WRIGHT, ET AL, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531 (2d ed. 1984) (stating that standing requirements come from two sources, constitutional and prudential); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) ("The Supreme Court has . . . split[ ] the doctrine into two separate parts. The first part consists of the so-called 'prudential limitations of standing,' . . . [and] [t]he second part is the constitutional 'core' of standing, that is, a minimum requirement . . . "); *Valley Forge Christian College*, 454 U.S. 464, 471 (1982) ("[I]t has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Art III *ex proprio vigore*, or whether they are requirements that the Court itself has elected and which were not compelled by the language of the Constitution.").

25. CHEMERINSKY, *supra* note 19, at 57.

26. *See* WRIGHT, *supra* note 24.

27. WRIGHT, *supra* note 24; *see also* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

28. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975); WRIGHT, *supra* note 24; CHEMERINSKY, *supra* note 19, § 2.3.4. There are, however, other exceptions. The first exception entails the situation wherein a third party, for some reason is unable to assert and represent their own interests, and the party before the Court can properly represent that third parties' interests. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953) (where the white plaintiff, who was a party to the contract in question, was able to assert the rights of black citizens, who, not being party to the contract, had no right to challenge a restrictive racial covenant therein). A second exception to this prudential standing barrier exists where there is a close relationship between the third party and the litigant. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (a vendor had standing to assert the rights of his customers). The final exception to the prudential prohibition against litigating the interests of third parties not before the court occurs primarily in the context of First Amendment challenges. In this situation, a litigant may challenge a statute, which though constitutional as applied, is, nonetheless, alleged to be unconstitutional as applied to others not before the Court. In other words, a party can challenge a statute as being overbroad as applied to those other persons. *See, e.g.*, Secretary of State of Maryland v. J.H. Munson, Co., 467 U.S. 947 (1984). *See also* CHEMERINSKY, *supra* note 19, § 2.3.4.

29. *See* WRIGHT, *supra* note 24.

"mind," with no real, concrete basis in the Constitution, they are subject to congressional alteration or rejection.[30]

Prudential limitations can be considered of lesser importance[31] when compared to the constitutional standing requirements, which are ultimately derived from Article III case or controversy[32] limitations to the jurisdictional reach of the federal courts.[33] This constitutional basis of standing is said to create the "core" demarcation of standing.[34] As the core element of standing, a party seeking redress in the federal courts has the burden of establishing that there is in fact a case or controversy for the judiciary to decide.[35]

2. *The Infusion of Notions of Separation of Powers into Standing Doctrine*

One of the earliest discussions of standing by the Supreme Court came in *Massachusetts v. Mellon*.[36] In *Mellon*, the plaintiff alleged that an appropriations act passed by Congress was unconstitutional.[37] The plaintiff based her ability to bring the suit upon her status as a taxpayer.[38] The Court did not reach the merits of the case but found it had no jurisdiction because the plaintiffs lacked standing.[39] The plaintiffs lacked standing for two reasons. First, there was a policy consideration. By allowing anyone to bring a claim against the government solely by their status as a taxpayer,[40] the litigation "flood-gates" into

30. *See* Scalia, *supra* note 24, at 885.

31. In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982), the Court stated that "neither the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves. Satisfaction of the [prudential requirements] cannot substitute for a demonstration" that the Art. III requirements are satisfied. *Id.*

32. *See* U.S. CONST. art. III, § 2.

33. *See infra* part II(A)(3).

34. *See* Scalia, *supra* note 24, at 885.

35. *See* WRIGHT, *supra* note 24.

36. 262 U.S. 447 (1923).

37. *See id.* at 479-80.

38. *See id.* at 486.

39. *See id.* at 480. "We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional question." *Id.*

40. *See id.* at 487.

the federal courts would burst open.[41] Second, the Court recognized that affording the plaintiff standing based upon her status as a taxpayer would be an affront to a coequal branch of government in our tripartite federal system.[42] In other words, there is a separation of powers component to be considered when determining standing.[43] It was this division of authority that the Court was trying to maintain by refusing to consider what it thought to be a non-justiciable question.[44]

In discussing this division of governmental power, the *Mellon* Court articulated for the first time the requirements for

---

41. If paying taxes were the only requirement necessary to challenge a governmental action, anyone could have standing to so challenge a governmental action. The Courts would in essence become soap-boxes from which citizens could voice their opposition to any governmental actions, as well as "judicial versions of college debating forums." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982). "If one taxpayer may champion and litigate [a claim,] then every other taxpayer may" file suit to complain of any "appropriation act and statute whose administration requires the outlay of public money." *Mellon*, 262 U.S. at 487.

42. *Mellon*, 262 U.S. at 488-89; *see also* Allen v. Wright, 468 U.S. 737 (1984).

43. It has been argued that the injection of separation of powers concerns as a major element of standing analysis is inappropriate. In discussing *Allen*, Professor Nichol argued that "[w]ithout explanation, and unsupported by . . . decisions and commentary, the *Allen* Court has ruled that the requirements of standing are to be interpreted with a substantial view towards 'separation of powers principles.'" Nichol, *supra* note 21, at 636 (citation omitted). Nichol went on to state that "this infusion of separation of powers analysis . . . departs sharply from standing law as we have come to know it." *See id.* at 642. In his discussion of how the Court seemingly adds the notion of separation of powers as an important element of standing, out of nowhere, there was a distinct absence of any discussion of *Massachusetts v. Mellon*. *See id.* It seems rather untenable to argue that the Court, in 1984, added this component to the standing doctrine when the Court had explicitly mentioned such separation of powers concern as being an important element of standing in 1923. *See Mellon*, 262 U.S. at 488.

44. In *Mellon*, the Court elaborated on the separation of powers element of standing when it stated:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. . . . We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.

Id.

standing. Specifically, the Court stated that any party seeking to invoke the jurisdiction of the federal courts must demonstrate that the statute or law in question was invalid.[45] Further, he must also demonstrate "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement."[46] It is insufficient for a person to simply claim an injury in common with the general public.[47]

In 1968, the Court revisited the issue of taxpayer standing in *Flast v. Cohen.*[48] In *Flast*, the question again before the Court was whether the federal courts had jurisdiction to hear a suit when the plaintiffs' only basis for standing was their status as taxpayers.[49] In discussing the "amorphous"[50] concept of standing, the *Flast* Court stated:

> [t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issue he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.[51]

However, the *Flast* Court departed from *Mellon* with respect to the separation of powers issue. In *Mellon*, separation of powers considerations were an essential element which led the

---

45. *See id.* at 488.

46. *Id.*

47. *See id.*

48. 392 U.S. 83 (1968).

49. *See id.* at 88-91. *Flast* thereby raised the issue of taxpayer standing essentially to determine the scope of the limitation on such standing, based upon *Mellon*, which held that status as a taxpayer did not alone give a person the right to seek redress from the government in federal courts. *See Mellon*, 262 U.S. at 487.

50. *Flast*, 392 U.S. at 99 (citations omitted). *See also* Cass R. Sunstein, *What's Standing After Lujan? Citizen Suits, "Injury," and Article III.*, 91 MICH. L. REV. 163, 186-88 (1992).

51. *Flast*, 392 U.S. at 99-100 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

Court to hold the plaintiffs' complaint non-justiciable.[52] The *Flast* court, by contrast, stated that:

> [t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an *adversary context* and in *a form historically viewed as capable of judicial resolution.*[53]

Thus, a plaintiff must be able to demonstrate a "nexus" between the "status asserted" as someone injured by the law or action in question, and the substantive claim.[54]

In *United States v. Richardson*,[55] a case similar to *Mellon* in that the plaintiff based his standing on his status as a taxpayer, the Court reiterated the two-prong standing test announced in *Flast*.[56] As part of this inquiry, the plaintiff must show "(a) a 'logical link' between the status as a taxpayer and the challenged legislative enactment . . . and (b) a 'nexus' between the plaintiff's status and a specific constitutional limitation imposed on the taxing and spending power."[57] The Court repeated that while the substantive claim is not important in determining standing, it must nonetheless be looked at in the limited context of the second prong of the *Flast* standing test.[58]

Read together, *Mellon*,[59] *Flast*,[60] and *Richardson*[61] stand for the proposition that an individual's taxpayer status alone is insufficient to confer upon that individual standing to challenge the constitutionality of congressional acts. Article III's case or controversy requirement is rather pragmatic. There must sim-

52. *See Mellon*, 262 U.S. at 488.
53. *Flast*, 392 U.S. at 100-01 (emphasis added).
54. *See id.* at 102.
55. 418 U.S. 166 (1974).
56. *See id.* at 170.
57. *Id.*
58. *See id.* at 174.
59. 262 U.S. 447 (1923).
60. 392 U.S. 83 (1968).
61. 418 U.S. 166 (1974).

ply be some type of dispute between the parties; there must be "concrete adverseness."[62]

Another watershed decision on standing came in *Allen v. Wright*.[63] There the Court essentially reaffirmed *Mellon's* holding regarding the prominence of separation of powers analysis in any standing determination.[64] In *Allen*, the parents of black school children alleged that the Internal Revenue Service and Treasury Department's failure to follow policy requiring the denial of tax-exempt status to segregated schools caused them injury.[65] The suit essentially claimed the government's policy was illegal.[66] In discussing the petitioner's standing, Justice O'Connor, writing for the Court, reiterated the statement that standing is "derived directly from the Constitution."[67] After discussing the need for a plaintiff to satisfy the three constitutional standing elements,[68] the Court went on to state that "the law of Article III standing is built on a single basic idea - the idea of separation of powers."[69] The upshot of *Allen v. Wright* has been the renewed ascension of separation of powers analysis into standing analysis. Not only must a plaintiff establish that there is an actual dispute with an adversary, but the plaintiff must also demonstrate that judicial interference in the matter will not insult a coequal branch of government.

---

62. Baker v. Carr, 369 U.S. 186, 204 (1961). *See also* Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1973), where the Court stated that:

> [S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution . . . Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

Id. at 220-21.

63. 468 U.S. 737 (1984).

64. *See id.* at 750-52.

65. *See id.* at 739.

66. *See id.* at 743-46.

67. *Id.* at 751.

68. *See infra* Part II(A)(3).

69. *Allen,* 468 U.S. at 752.

3. *Constitutional Standing Requirements*

The Court has articulated the "irreducible constitutional minimum of standing"[70] to sue in federal court as consisting of three elements. First, the plaintiff must be able to demonstrate that he or she has suffered, or will imminently suffer, an actual injury resulting from the complained of activity.[71] The second element requires the potential plaintiff to show that there is a causal connection between the complained of activity or law and the actual injury.[72] The final element is that the court must be able to redress the plaintiff's injury. The latter two standing requirements were articulated as distinct elements in *Allen*.[73]

The injury component of the standing test requires that a plaintiff must have suffered, or will imminently suffer, an injury as the result of the complained of action. "[T]he plaintiff must . . . suffer[ ] an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"[74] Further, when seeking to enjoin an activity, a plaintiff must prove that the injury complained of is likely to occur again to that plaintiff.[75]

---

70. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

71. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982). A potential plaintiff must "'show he has personally suffered some actual or threatened injury.'" *Id.* at 472 (quoting Gladstone Realtors v. Village of Bellwood, 444 U.S. 91, 99 (1979)). *See also Lujan*, 504 U.S. 555; Sierra Club v. Morton, 405 U.S. 727 (1972); CHEMERINSKY, *supra* note 19; WRIGHT, *supra* note 24, § 3530, *et seq.*

72. *See Valley Forge Christian College*, 454 U.S. at 472.

73. *See* CHEMERINSKY, *supra* note 19, § 2.3.3.

> The "fairly traceable" and redressability components of the constitutional standing inquiry were initially articulated by this court as two facets of a single causation requirement. To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the "redressability" component is to focus on the requested relief.

Allen, 468 U.S. at 753 n.19 (citations omitted).

74. *Lujan*, 504 U.S. 555, 560 (1992) (citations omitted).

75. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Thus in *Lyons*, the plaintiff was found to lack standing to enjoin the Los Angeles Police Department from using choke holds, because he could not predict that he would again be subject to a choke hold by the police. *See id.*

The causation component of the standing test is "relevant because if the defendant is the cause of the plaintiff's injury, then it is likely that halting the defendant's behavior will stop the injury."[76] Causation has been held to exist where the alleged injury is "'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[77] The final constitutional standing requirement is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[78]

B. *Access to the courts*

1. *The Rise of Bounds v. Smith*[79]

a. *A Fundamental Right of Access to the Courts*

Ex Parte Hull[80] is the foundation of prisoners' right of access to the courts.[81] In *Hull*, the petitioner challenged the Michigan prison system policy requiring inmate habeas corpus petitions to be approved by prison officials.[82] In an often quoted

---

76. CHEMERINSKY, *supra* note 19, § 2.3.3, at 72.

77. *Lujan*, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)); *see also* CHEMERINSKY, *supra* note 19 § 2.3.3, at 72.

78. *Lujan*, 504 U.S. at 561 (citing *Simon*, 426 U.S. at 38, 43). The surprisingly broad construction of this element of the standing test can be seen in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Here, the plaintiff, an unwed mother, filed suit against her child's father for child support, as required by Texas State policy; her requested relief was to have the defendant prosecuted for his failure to pay child support. *See id.* The Court reasoned that there was no basis for the plaintiff's standing, as there was no assurance that if the plaintiff was successful in requiring the prosecution of the child's father, the plaintiff would receive the desired child support payments. *See id.* at 618. In other words, there was no assurance that the potential plaintiff's injury would be redressed by the courts.

79. 430 U.S. 817 (1977).

80. 312 U.S. 546 (1940).

81. *See* Josephine R. Potuto, *The Right of Prisoner Access: Does Bounds Have Bounds,* 53 IND. L. J. 207, 207 (1977-78) ("*Ex Parte Hull* is generally singled out as the first case in which the Supreme Court found a right of access by prisoners to the federal courts." (footnotes omitted)); MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS, § 11.01 (2d ed. 1993) ("Fittingly, the first prisoner's rights issue addressed by the Supreme Court involv[ing] the right of access to courts" was *Ex Parte Hull.*); JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS, § 7.1 (4th ed. 1991) ("The right of an inmate to exercise this basic constitutional right [of access] was established in the 1940 case of *Ex Parte Hull.*").

82. *See Ex Parte Hull*, 312 U.S. at 549. The Michigan prison warden had allegedly promulgated an unpublished regulation stating that:

passage, the *Hull* court stated that a "state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[83] That one phrase is the foundation for all subsequent cases which considered the rights of prisoners to access the courts. According to Professor Millemann,[84] *Ex Parte Hull* marks the first of three distinct phases in the evolution of prisoners' right to access the courts.[85] In the first phase, the Supreme Court "invalidated restrictions that literally denied prisoners the ability to lodge legal papers in a court of law."[86]

The next major decision in the access to the courts arena was *Johnson v. Avery*,[87] wherein the Court held unconstitutional a restriction on the use of "jailhouse lawyers," finding that such restrictions tended to burden primarily illiterate and indigent prisoners.[88] In *Johnson*, the Court was asked to deter-

---

'[a]ll legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals will first have to be submitted to the institutional welfare office and if favorably acted upon be then referred to [the] legal investigator of the Parole Board . . . . Documents submitted to [the legal investigator], if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate.'

Id. at 548.

83. *Id.*

84. Professor of Law, University of Maryland School of Law.

85. *See* Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 459-60 (1989).

86. *Id.* at 460. *See also* Cochran v. Kansas, 316 U.S. 255 (1941), decided in the term following the *Ex Parte Hull* decision, where the Court reexamined a state prison administration's interference with an inmate's ability to file a habeas petition. *See id.* at 255-56. The Court reversed the Kansas Supreme Court's denial of petitioner's habeas petition. *See id.* at 258. Cochran, the *pro se* petitioner, claimed, *inter alia*, that the prison official enforcing "rules there in effect had suppressed appeal documents he had prepared, thereby making it impossible for him to perfect an appeal" within the statute of limitations for such an appeal. *Id.* at 256. In discussing this claim, "[t]he State properly concede[d] that if the alleged facts pertaining to suppression of Cochran's appeal 'were disclosed as being true before the Supreme Court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth amendment.'" *Id.* at 257. Because the State failed to properly dispel the claim that the state burdened his ability to file his petition, the Court concluded that the action had to be remanded to determine if petitioner's rights under the Fourteenth Amendment were violated. *See id.* at 258.

87. 393 U.S. 483 (1969).

88. *See id.* at 487. "There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners

mine whether Tennessee prison authorities, pursuant to their prison regulations, could constitutionally prevent jailhouse lawyers from aiding fellow inmates in the preparation of their legal paperwork.[89] Specifically, *Johnson* dealt with the ability of inmates, acting as legal assistants, to help other inmates file petitions for habeas corpus.[90] In discussing the "Great Writ,"[91] the Court stated that "[s]ince the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is *fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.*"[92]

Tennessee argued that prohibiting jailhouse lawyers was necessary as part of its penalogical interest, and stated that such a prohibition was "part of the State's disciplinary administration of its prisons."[93] The Court disagreed, finding that such a penalogical interest was an insufficient interest to overcome an inmate's constitutional rights.[94] The Court did not go so far as to require that Tennessee allow an unlimited legal practice by jailhouse lawyers.[95] Tennessee could legitimately impose some restrictions, such as the time and location when the jailhouse lawyers would be available.[96] Further, Tennessee could altogether eliminate jailhouse lawyers so long as it provided a reasonable equivalent.[97]

---

to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that." *Id.* Without the aid of the jailhouse lawyer, many indigent inmates would be unable to effectively and meaningfully file habeas corpus petitions.

89. *See id.* at 484.

90. *See id.*

91. *Johnson,* 393 U.S. at 485.

92. *Id.* at 485 (emphasis added).

93. *Id.* at 486.

94. *See id.* The *Johnson* Court stated that:

> [t]here is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional . . . rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

Id. In so stating, the Court seemed to implicitly recognize the existence of a fundamental, constitutional right of access to courts.

95. *See Johnson,* 393 U.S. at 490.

96. *See id.* at 490.

97. *See id.*

Justice Douglas, in a concurring opinion, stated that:

> [t]he plight of a man in prison may [with regard to dealing with the legal system] be even more acute than the plight of a person on the outside. He may need collateral proceedings to test the legality of his detention or relief against management of the parole system or against defective detainers lodged against him which create burdens in the nature of his incarcerated status. He may have grievances of a civil nature against those outside the prison. His imprisonment may give his wife grounds for divorce and be a factor in determining the custody of his children; and he may have pressing social security, workman's compensation, or veteran's claims.[98]

Hence, the Court recognized the well established principle that imprisonment does not dissolve *all* the rights that the inmate formerly enjoyed as a free citizen.[99] "While at least one 19th-century court characterized the prison inmate as a mere 'slave of the State,' in recent decades this Court has repeatedly held that the convicted felon's loss of liberty is not total."[100]

Professor Millemann has stated that *Johnson v. Avery* marks the beginning of the second "phase" of access cases, wherein "the Court [has] held that the access right guarantees more than the literal right to file documents in court."[101] *John-*

---

98. *Id.* at 492-93 (Douglas, J., concurring).

99. *See* Alvin J. Bronstein, *Prisoners' Rights: A History*, *in* LEGAL RIGHTS OF PRISONERS 20 (Geoffrey P. Alpert ed., 1980). "In the main, prisoners' rights issues revolve around this question: Does the Constitution follow a person into prison? The answer given by most cases today seems to be 'yes, to some extent.' This is in marked and comforting contrast [to previous answers, wherein] . . . prisoners were left to the not-so-tender mercies of their keepers." *Id.* *See also* Wolff v. McDonnell, 418 U.S. 539 (1974), where the Court stated that:

> [i]f the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.' But though his rights might be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . They retain right of access to the courts.

Id. at 555-56 (citations omitted).

100. Lewis v. Casey, 116 S. Ct. 2176, 2206 (1996) (Stevens, J., dissenting) (quoting Ruffin v. Commonwealth, 63 Va. 790, 796 (1871)).

101. Millemann, *supra* note 85, at 460.

son thus established a rule that a state could not even indirectly impede an indigent inmate's access to the courts. "Unless the state or some other source provides legal help to indigent prisoners, the state may not *indirectly* obstruct access by preventing prisoner 'writ writers' from [aiding] 'other indigent prisoners.'"[102]

The constitutional right of prisoner access to the courts by filing habeas corpus petitions was expanded in *Wolff v. McDonnell*[103] to include the filing of civil rights actions.[104] In *Wolff*, the State argued, *inter alia*, that *Johnson* was limited solely to "assistance in the preparation of habeas corpus petitions."[105] The Court rejected that argument, finding that the State took too narrow a view of the *Johnson* holding.[106] In so holding, the Court noted that "the demarcation line between civil rights actions and habeas petitions is not always clear."[107] The Court stated that the primary difference between habeas petitions and civil rights actions was that the habeas petitioner could potentially win his freedom.[108] However, "it is more pertinent that both actions serve to protect basic constitutional rights. *The rights of access to the courts, upon which [Johnson v.] Avery was premised, is founded in the Due Process Clause* and assures that no person will be denied [access to the courts]."[109] The Court went on to declare that the constitutional rights which prisoners retain during their incarceration "would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts."[110]

---

102. *Id.* at 460.

103. 418 U.S. 539 (1974).

104. *See id.* at 542-43. Inmates here filed a civil rights action alleging the unconstitutional conditions of their confinement. *See id.*

105. *Id.* at 579.

106. *See id.*

107. *Wolf,* 418 U.S. at 579.

108. *See id.* at 578-79.

109. *Id.* at 579 (emphasis added).

110. *Id.*

The third phase[111] of the access to courts jurisprudence came in a per curiam opinion, *Younger v. Gilmore*,[112] where the Court explicitly upheld a prisoners' access case decided by the Northern District of California.[113] In *Gilmore v. Lynch*, plaintiffs, who were inmates in California prisons, alleged that prison regulations concerning their access to legal materials effectively denied them meaningful access to the courts.[114] The State responded that prisoners' access to legal books "is a matter of governmental grace, i.e. a privilege to be withheld or conditioned as the State chooses."[115] The Court noted that the State's use of the term "privilege" rather than the use of "right" would not alter the essential element of the case.[116] The Court went on to state:

> Reasonable access to the courts is a constitutional imperative which has been held to prevail against a variety of state interests.

---

111. *See* Millemann, *supra* note 85, at 460, where Professor Millemann stated that the Court's decision:

> [in] *Younger v. Gilmore* marked the beginning of phase three. In *Younger*, the Court cryptically indicated that the access right is not satisfied by state inaction or alleged neutrality, *i.e.*, when the state refrains from interfering - either directly or indirectly - with prisoner access to the courts. Instead, the access right requires, in some circumstances, that states provide affirmative help to indigent prisoners.

Id.

112. 404 U.S. 15 (1971).

113. *See* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

114. *See id.* at 108.

115. *Id.* The state answered with reference to dicta in *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961), a decision by a three-judge court of this Circuit. While affirming the right of the incarcerated not to be unreasonably hindered in making use of the courts, *Hatfield* added that "'[s]tate authorities have no obligation . . . to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform.'" *Id.* at 640 (citations omitted).

116. *See Gilmore*, 319 F. Supp. at 108, where the court noted that:

> The Courts have used various linguistic formulae to describe the limits to prison rule-making authority, sometimes speaking of constitutional rights which are so preeminent that they cannot be alienated no matter what the need of penal administration might be, and at other times voiding regulations which confer or withhold "privileges" so arbitrarily as to constitute unequal protection of the laws to certain classes of prisoners. In most cases, however, the basic test remains the same: the asserted interests of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule.

Id. at 108-09.

> *Similarly*, the right under the equal protection clause of the indigent and uneducated prisoner to the tools necessary to receive adequate hearing in the courts has received special reenforcement by the federal courts in recent decades.[117]

Thus, *Younger*'s affirmation of the lower court's decision suggests that states may not interfere[118] with a prisoner's access to courts, and may even be required to shoulder affirmative burdens in effectuating this right for prisoners.[119]

There appear to be two distinct foundations upon which the general "right of access" for prisoners is based.[120] The first basis for the right is a fundamental right of access with its foundation in the Due Process Clause of the Fourteenth Amendment, as discussed above.[121] Commingled with this Due Process line of cases is a separate line of prisoner access cases based on the Equal Protection Clause of the Fourteenth Amendment.[122]

---

117. *See id.* at 109 (citations omitted) (emphasis added).

118. *See Ex Parte* Hull, 312 U.S. 546 (1940).

119. *See Gilmore*, 319 F. Supp. at 110, where the Court stated:

> 'Access to the courts' . . . encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him. In some contexts this has been interpreted to require court-appointed counsel for indigents. *Gideon v. Wainwright* [372 U.S. 335 (1963)] and *Douglas v. California* [372 U.S. 353 (1963)]. In other situations, the State might be obligated to provide free transcripts, process-serving facilities, and *in forma pauperis* filing privileges.

Gilmore, 319 F. Supp. at 110 (citations omitted).

120. *See Gilmore*, 319 F. Supp. at 109. "Plaintiffs argue, then, that at stake here are two principles of recognized importance, i.e. their rights to reasonable access to the courts, and to equal protection of the laws." *Id.*

121. *See* Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgement Rule*, 55 FORDHAM L. REV. 1115, 1116 (1987); Note, *Constitutional Law: Prisoner "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L. J. 343, 354 (1968) ("Vindication of the right to petition for the writ necessarily requires *access to the courts*, a privilege secured against state intrusion by the due process clause of the fourteenth amendment.") (emphasis added); David Gerald Jay, *The Rights of Prisoners While Incarcerated*, 15 BUFF. L. REV. 397, 414-15 (1965).

122. *See* U.S. CONST. amend. XIV, § 1. Justice Clark disapprovingly described this equal protection line of decisions, dealing with the equality of treatment for indigents, as being a "new fetish for indigency" with which "the Court piles an intolerable burden on the State's judicial machinery." Douglas v. California, 372 U.S. 353, 359 (1963) (Clark, J., dissenting).

b. *The Requirement of Equal Access to the Courts*

In *Griffin v. Illinois*,[123] the petitioners challenged a state policy wherein trial transcripts, which the State conceded were necessary for a meaningful appellate review,[124] would not be provided, free of charge, to indigent defendants.[125] Under the State's policy, transcripts were only provided when there was a constitutional issue; mere "trial errors such as admissibility and sufficiency of evidence" were insufficient to warrant the provision of a free trial transcript.[126] Petitioners alleged this policy denied them Due Process and Equal Protection under the Fourteenth Amendment.[127] The Supreme Court agreed, holding that where a state affords appellate review, it must do so equally.[128] The Court noted that the State's refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection.[129] To so hinder indigent prisoners "means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."[130] While the Court held that it was unconstitutional for the State to deny transcripts to indigent defendants solely because of their poverty, the Court did not require that a state furnish such indigents a transcript, leaving the option open for a state to devise an alternative "means of affording adequate and effective appellate review."[131] While the petitioners couched their claim in both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment, the Court clearly based its decision upon the Equal Protection violation.

123. 351 U.S. 12 (1956).

124. *See id.* at 16.

125. *See id.* at 22. "Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court." *Id.* (Frankfurter, J., concurring).

126. *Id.* at 15.

127. *See Griffin*, 351 U.S. at 13.

128. *See id.* at 18. There is no question that the States have no affirmative, constitutional obligation to afford such appellate review. *See id.*; *see also* Long v. District Court of Iowa, 385 U.S. 192 (1966).

129. *See Griffin*, 351 U.S. at 18.

130. *Id.* at 19.

131. *Id.* at 20.

The Court held that it was improper to make a classification in this situation based solely upon an indigent's wealth.[132]

In *Douglas v. California*,[133] the petitioners challenged a California rule of criminal procedure which did not provide an indigent defendant a state appointed attorney free of charge for that convicted defendant's first and only appeal of right.[134] Under this procedure, the California Court of Appeals would make an *ex parte* review of the trial records to determine if an appeal was warranted; if so, the court would provide the indigent defendant with counsel.[135] Relying on the reasoning of *Griffin*,[136] the Supreme Court held that such a policy violated the Equal Protection Clause[137] of the Fourteenth Amendment.[138] "Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either the situa-

132. *See id.* at 18. *See also* Smith v. Bennett, 365 U.S. 708, 710 (1961) ("The gist of [*Griffin* and Burns v. Ohio, 360 U.S. 252 (1959)] is that because '[t]here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants . . . '[t]here can be no equal justice where the kind of trial a man gets depends upon the amount of money he has' . . . and consequently that '[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.'") (quoting *Burns*, 360 U.S. at 257-58; *Griffin*, 351 U.S. at 19).

133. 372 U.S. 353 (1963).

134. *See id.* at 355-56.

135. *See id.* at 354-55.

136. 351 U.S. 12.

137. Justice Harlan, dissenting, disapproved of the Courts use of Equal Protection analysis, stating that the appropriate analysis should have been under the Due Process Clause. "The sole classification established by [the California] rule is between those cases that are believed to have merit and those regarded as frivolous." *Douglas*, 372 U.S. at 362 (Harlan, J., dissenting). Rather, the appropriate inquiry is "the narrow one [of] whether the State's rules with respect to the appointment of counsel are so arbitrary or unreasonable, *in the context of the particular appellate procedure that it has established*, as to require their invalidation." *Id.* at 365.

138. The Court stated that under the California policy:

> [t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefits of counsel's examination into the record, research of the law, and marshaling arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 357-58.

tion of this case or that addressed in *Griffin*, the evil is the same: discrimination against the indigent."[139]

The holding of *Douglas* was restricted several years later in *Ross v. Moffitt*,[140] where the Court refused to expand the *Douglas* requirement of free counsel for indigents in an initial appeal of right, to provide free counsel for additional discretionary appeals. The Court fully recognized the scope and applicability of *Douglas*, yet chose not to expand that doctrine.[141] While the Court seemed to be uncertain as to the constitutional source of the *Griffin* and *Douglas* holdings, the Court analyzed the case under both equal protection and due process theories.[142] In its bifurcated analysis, the Court first found that the State's failure to provide counsel in discretionary appeals did not violate due process.[143] The Court then rejected petitioners' claim under the equal protection analysis by stating:

> The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages' . . . [i]n this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.[144]

2. *Bounds v. Smith*[145]

The due process and equal protection lines of cases were incorporated in the seminal prisoners' access case of *Bounds v. Smith*. At issue was "whether States must protect the right of

---

139. *Id.* at 355.

140. 417 U.S. 600 (1974).

141. *See id.* The *Moffitt* Court stated that:

> [t]he court in *Douglas* concluded that a State does not fulfill its responsibility towards indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee on order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right.

Id. at 607.

142. *See id.* at 608-09.

143. *See id.* at 611. "The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." *Ross*, 417 U.S. at 611.

144. *Id.* at 612 (citations omitted).

145. 430 U.S. 817 (1977).

prisoners' access to the courts by providing them with law libraries or alternative sources of legal knowledge."[146] The Court stated quite clearly that such a requirement had in fact already been required of the states by *Younger v. Gilmore*.[147]

The Court next discussed the line of cases dealing with equal access to the courts. The Court noted that many of its recent decisions in this field required that states provide "adequate, effective, and meaningful" access to the courts for inmates.[148] The Court then cited examples of decisions[149] where it invalidated requirements that indigent inmates pay docket fees,[150] that states provide free transcripts,[151] and that counsel be appointed for appeals of right.[152] Finally, the Court discussed the other line of cases, which declared the right of access as a free standing right under the Due Process Clause.[153]

Petitioners claimed, however, that the *Johnson*[154] line of cases held that "as long as inmate communications on legal problems are not restricted, there is no further obligation to expend state funds to implement affirmatively the right of access."[155] The Court found that petitioners misinterpreted the cases.[156] The Court referred to cases like *Gideon v. Wainwright*[157] and *Douglas v. California*[158] as examples of the requirement that states take affirmative steps toward ensuring indigent inmates' access to the courts.[159]

---

146. *Id.*

147. 404 U.S. 15 (1971); *see also Bounds*, 430 U.S. at 821-22 ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts. . . [t]his Court recognized that right more than 35 years ago [in *Ex Parte* Hull, 312 U.S. 546 (1940)].").

148. *Bounds*, 430 U.S. at 822-23.

149. *See id.*

150. *See* Burns v. Ohio, 360 U.S. 252, 257-58 (1959).

151. *See* Griffin v. Illinois, 351 U.S. 12 (1955).

152. *See* Douglas v. California, 372 U.S. 353 (1963).

153. U.S. CONST. amend. XIV, § 1.

154. *See supra* Part II(B)(1)(a). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974); Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969); *Ex Parte* Hull, 312 U.S. 546 (1940).

155. *Bounds*, 430 U.S. at 823.

156. *See id.* at 823-25.

157. 372 U.S. 335 (1963).

158. 372 U.S. 353 (1963).

159. *See Bounds*, 430 U.S. at 824-25.

The Court reasoned that a legal library is critical to an indigent prisoner's ability to file meaningful court papers, stating that the prisoner "must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action."[160] Further, without access to legal materials, it is quite unlikely that a *pro se* prisoner will be able to adequately respond to the prison authorities' responsive pleadings.[161]

Finally, the Court rejected petitioner's claim that under *Ross v. Moffitt*,[162] legal "libraries or other forms of legal assistance are unnecessary to assure meaningful access" to the courts.[163] The *Bounds* Court distinguished *Ross* by noting that there, the question before the Court concerned an indigent prisoner's rights pertaining to discretionary appellate review.[164] The *Bounds* Court, however, was "concerned in large part with original actions seeking new trials, release from confinement, *or vindication of fundamental rights*. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues."[165] Further, in these cases, "the prisoners' petitions [ ] are the first line of defense against constitutional violations."[166] In a discretionary post conviction appeal, there is often less need for rigorous legal research, since the legal issues are likely sifted out in the initial post-conviction appeal of right. However, in litigating new claims, the prisoner has no such benefit. Without access to legal materials, the inmate may stand virtually no chance of successfully raising the claim.

---

160. *Id.* at 825. The *Bounds* Court further stated that:

> [i]f a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. Indeed, despite the "less stringent standards" by which a *pro se* pleading is judged, it is often more important that a prisoner compliant set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing of *in forma pauperis* and may dismiss the case if it is deemed frivolous.

Id. at 825-26 (citations omitted).

161. *See id.* at 826.

162. 417 U.S. 600 (1974).

163. *Bounds*, 430 U.S. at 827.

164. *See id.*

165. *Id.* (emphasis added).

166. *Id.* at 828.

The Court, however, did repeat a common current in access to courts jurisprudence when it held that legal libraries are not the only means of vindicating the constitutionally protected access to the courts, and that the states are free to create alternatives to legal libraries.[167] The one caveat is that a state's alternative must, like legal libraries, be reasonably likely to result in inmates' ability to exercise their right to access the courts.[168]

There were three noteworthy dissents in *Bounds*.[169] Chief Justice Burger stated that "[t]he Court leaves us unenlightened as to the source of the 'right of access to the courts' which it perceives or of the requirement that States 'foot the bill' for assuring such access for prisoners who want to act as legal researchers and brief writers."[170] Justice Rehnquist added "[t]here is nothing in the United States Constitution which requires that a convict serving a term of imprisonment . . . ha[s] a 'right of access'" to the courts.[171] Justice Stewart questioned the Court's reliance on *Younger v. Gilmore*, noting that "[f]rom th[e] basic principle [of *Johnson v. Avery*,] the Court over five years ago made the quantum jump to the conclusion that a State has a constitutional obligation to provide law libraries for prisoners in custody."[172]

III. *Lewis v. Casey*[173]

A. *Facts and Procedural History*

In January 1990, twenty-two inmates of the Arizona Department of Corrections ("ADOC") filed suit under 42 U.S.C. §1983 claiming, in part, that they were denied their constitutional right of access to the courts as a result of ADOC policies.[174] After a three month trial, the United States District

167. *See id.* at 830-32. "Nevertheless, a legal access program need not include any particular element . . . and we encourage local experimentation. Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards." *Bounds,* 430 U.S. at 832.

168. *See id.* at 830-32.

169. *See id.* at 837.

170. *Id.* at 833-34.

171. *Id.* at 838.

172. *Bounds,* 430 U.S. at 836.

173. 116 S. Ct. 2174 (1996).

174. *See* Casey v. Lewis, 43 F.3d 1261, 1265 (9th Cir. 1994).

Court for the District of Arizona ruled in favor of the plaintiff class, finding, *inter alia*, that the condition of the ADOC's legal libraries, in effect, denied inmates access to the courts.[175]

After finding a constitutional violation of the inmates' access to the courts, the district court appointed a special master to fashion an appropriate injunctive remedy.[176] On October 13, 1993, the district court accepted the special master's recommendation and granted the permanent injunction.[177]

Petitioners, officials of the ADOC, appealed the district court's issuance of the injunction to the Ninth Circuit.[178] The Ninth Circuit refused to stay the district court's injunction.[179] The Supreme Court stayed the injunction and remanded the case to the Ninth Circuit to hear petitioners' appeal.[180] After the court of appeals affirmed the district court's decision,[181] certiorari was granted.[182]

B. *Majority Opinion*

While petitioners raised many issues on appeal,[183] "their most fundamental contention [was] that the District Court's findings of injury were inadequate to justify the finding of *system-wide* injury and hence the granting of system-wide relief."[184] There were two facets to petitioners' argument.[185] First, petitioners argued that a prisoner, in order to establish a *Bounds* violation, must demonstrate that he was actually in-

175. *See id.* The District Court found the following aspects of the ADOC's facilities to result in constitutional violations; "the contents of the library; the access to the library; the legal assistance for prisoners who are illiterate or who do not speak English; library staffing; the indigency standards for receiving legal supplies . . . ." *Id.*

176. *See id.*

177. *See id.*

178. *See* Casey v. Lewis, 43 F.3d at 1265.

179. *See id.*

180. *See* Lewis v. Casey, 115 S. Ct. 1997 (1995).

181. *See* Casey v. Lewis, 43 F.3d 1261 (9th Cir. 1994).

182. *See* Lewis v. Casey, 115 S. Ct. 1997.

183. *See* Lewis v. Casey, 116 S. Ct. 2174, 2178 (1996). These challenges "included renewed attacks on the [district] court's findings of the *Bounds* violations with respect to illiterate, non-English-speaking and lockdown prisoners, and on the breadth of the injunction." *Id.*

184. *Id. See also* Brief for Petitioners, Lewis v. Casey, 1995 WL 490050 (No. 94-1511).

185. *See Lewis*, 116 S. Ct. at 2178.

jured by the alleged inadequacies at the prison facility: "– that is, 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'"[186] While respondents claimed that petitioners did not raise this argument before the lower courts, and hence had waived their ability to assert this argument,[187] the Court noted that respondent's claim, even if true, was irrelevant.[188] Because standing is jurisdictional in nature, it cannot be waived by a party, and may be raised at any time, *sua sponte*, by the Court.[189] The second element of petitioner's argument was that there was insufficient actual injury to warrant the district court's granting of system-wide relief.[190]

The Court, in addressing these issues, held that respondents were in fact required to demonstrate system-wide actual injury in order to receive system-wide relief.[191] The Court stated that the lower court's inability "to identify anything more than isolated instances" of injury precluded the courts from issuing the system-wide relief it did in the injunction.[192] In other words, plaintiffs were without standing to raise a claim of system-wide injury resulting from inadequate libraries.[193]

The Court reasoned that its refusal to find the respondents had the requisite standing was required because of separation of powers considerations.[194] "It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; *it is not the role of the courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.*"[195] The federal courts are not the regulators of state prisons. Compliance with applicable standards for ensuring adequate prisoner access to the courts is more properly the provence of the

186. *Id.*

187. *See* Brief for Respondent at 25-26, Lewis v. Casey, 1995 WL 577632 (No. 94-1511).

188. *See Lewis*, 116 S. Ct. at 2179 n.1 (citations omitted).

189. *See id.*

190. *See id.* at 2179.

191. *See id.*

192. *Id.*

193. *See Lewis*, 116 S. Ct. at 2179 n.1.

194. *Id.* at 2179 (emphasis added).

195. *Id.*

political branches of government.[196] Thus, unless a prisoner could show "actual injury,"[197] the alleged constitutional violation is not for the courts to decide.[198]

The Court, in framing the question, asked what actual injury a plaintiff must establish in order to demonstrate a *Bounds* violation.[199] *Bounds* "did not create an abstract, free-standing right to a law library or legal assistance. . . . "[200] Rather, it simply reaffirmed the right of prisoners to access the courts.[201] Thus, regarding alleged *Bounds* violations,[202] "'meaningful access to the courts is a touchstone,' . . . [yet] the inmate . . . must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."[203] The Court stated that such a burden is satisfied if a prisoner can demonstrate, for example, that his complaint was dismissed, with prejudice, because of his failure to comply with any technical requirements, of which he was unaware due to the inadequate legal research facilities at his prison.[204] Likewise, such injury would also be established when a prisoner could demonstrate that he had "suffered [an] arguabl[y] actionable harm[,]" yet in pursuing the claim "was so

196. *See id.*

197. *See supra* notes 71-76 and accompanying text.

198. *See supra* notes 71-76 and accompanying text.

199. *See Lewis*, 116 S. Ct. at 2180-81. "Although Bounds itself made no mention of an actual-injury requirement," it could not have eliminated this constitutionally required element necessary to invoke federal court jurisdiction. *Id.* at 2180.

> Moreover, the assumption of an actual-injury requirement seems to us implicit in the [*Bounds*] opinion's statement that 'we encourage local experimentation' in various methods of assuring access to the courts . . . [for] [w]e hardly think that what we meant by 'experimenting' with such an alternative was simply announcing it, whereupon suit would immediately lie to declare it theoretically inadequate and bring the experiment to a close.

Id. at 2180-81. Only after an inmate can show injury resulting from the alternative practice can that inmate demonstrate the requisite standing.

200. *Id.* at 2180.

201. *See id.* at 2179 (citations omitted).

202. *See* Lewis v. Casey, 116 S. Ct. at 2180.

203. *Id.* at 2180 (citing Bounds v. Smith, 430 U.S. 817, 823 (1977)) (quotations omitted).

204. *See Lewis*, 116 S. Ct. at 2180.

stymied by inadequacies of the law library that he was unable to even file a complaint."[205]

With an eye toward determining whether the plaintiffs here had standing, the Court then discussed the rights reaffirmed in *Bounds*.[206] The Court stated that prisoners have no right to have legal libraries or legal assistance in order to discover potential claims.[207] Therefore, when a prisoner fails as a result of an inadequate library to discover a claim he might have had, there can be no injury and hence no standing.[208]

In further discussing the requisite injury a prisoner must demonstrate to prove standing to claim a *Bounds* violation, the Court determined what types of claims are important enough to require the availability of legal research resources.[209] There is a limit to what prisoners may or may not do with respect to the right of access to the courts. The Court stated that *Bounds* was unfaithful to precedent, and hence wrong, in its elaboration of the boundaries of access to the courts.[210] There is nothing in the

---

205. *Id.* One question of great moment to the Court was whether the loss of a frivolous law suit could serve as the basis for establishing actual injury resulting from a *Bounds* violation. The Court answered this question in the negative, stating that the loss of frivolous suits will not establish standing. *See id.* at 2180 n.2.

Justice Scalia, for the majority, rebutted Justice Souter's assertion to the contrary. Justice Souter claimed that there is standing to bring a frivolous suit, because the disputed claim "'will be presented in an adversary context, and in a form historically viewed as capable of judicial resolution.'" *Id.* at 2181 n.3 (quoting Flast v. Cohen, 393 U.S. 83, 101 (1968)). Justice Scalia responded to the effect that cases subsequent to *Flast* pointed out the *Flast* Court's error in not "recogniz[ing] that [the standing] doctrine has a separation-of-powers component, which keeps the courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from." *Id.*

Therefore, any reliance on *Flast* by Justice Souter was misplaced; the *Flast* conception of standing was no longer the current view of the standing doctrine by the Court. In rejecting the *Flast* Court's reliance on the presence of "concrete adverseness," *Flast*, 393 U.S. at 101, Justice Scalia stated that not everyone who can demonstrate concrete adverseness "can call in the courts to examine the propriety of "executive action." *Lewis*, 116 S. Ct. at 2181 n.3. "Depriving someone of an arguable . . . claim inflict actual injury because it deprives him of something of value — arguable claims are settled, bought and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Rule 11 sanctions." *Lewis*, 116 S. Ct. at 2181 n.3.

206. *See Lewis*, 116 S. Ct. at 2179.

207. *See id.* at 2195-96.

208. *See id.*

209. *See id.* at 2180.

210. *See Lewis*, 116 S. Ct. at 2190.

access case law to suggest that "the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court."[211] Any claim to the contrary is "now disclaim[ed]."[212] In other words, *Bounds* does not require the State to provide legal libraries or their equivalent so that the prisoners can go to court for any grievance they might have. Rather, the cases preceding *Bounds* found that prisoners have a right to access the courts for the sole purpose of fighting their incarceration generally or "to challenge the conditions of their confinement."[213] *Bounds* could not have intended "to guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims."[214]

Although this case was a class action, the named plaintiffs nonetheless needed to demonstrate actual injury to themselves.[215] Such a showing would have at least ensured the survival of the claim upon a motion to dismiss. However, this case reached the Court long after the pleadings, and therefore a more stringent analysis of standing was required.[216]

The district court found that only two named plaintiffs suffered actual injury by being denied the capability of filing viable claims.[217] This finding of standing, with regard to the two

---

211. *Id.* at 2181.
212. *Id.*
213. *Lewis*, 116 S. Ct. at 2182.
214. *Id.*
215. *See id.* at 2183.
216. *See id.*

> Since [elements of standing] are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for the purpose of the summary judgement motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Id. at 2183 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

217. *See Lewis*, 116 S. Ct. at 2182. In so holding, the Court rejected:

> [p]etitioners' conten[tion] that 'any lack of access experienced by these two inmates is not attributable to unconstitutional State policies,' because

named plaintiffs, the Supreme Court held, was not enough to warrant the district court's injunctive order:

> The actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established.[218]

Even disregarding the separation of powers problem, there was still a question of whether the district court's finding of two instances of injury warranted the system-wide relief found in the its injunction.[219] The Court reasoned that to receive system-wide relief, there must be a showing of a system-wide *Bounds* violation.[220] The Court held that "[t]hese two instances were a patently inadequate basis for a conclusion of systemize violations and imposition of systemize relief."[221] While:

> the District Court also noted that "the trial testimony . . . indicated that there are prisoners who are unable to research the law because of their functional illiteracy," . . . the Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts – a more limited capability that can be produced by a much more limited degree of legal assistance.[222]

> ADOC 'has met its constitutional obligations' . . . The claim appears to be that all inmates, including the illiterate and non-English speaking, have a right to nothing more than 'physical access to excellent libraries . . . .' This misreads *Bounds*, which we have said guarantees no particular methodology but rather the conferral of a capability – the capability of bringing contemplated challenges to sentences and conditions of confinement before the courts. When any inmate . . . shows that an actionable claim of this nature . . . has been lost or rejected, or that the presentation of such a claim is currently being prevented, . . . he demonstrates that the State has failed to furnish adequate law libraries or adequate assistance from persons trained in the law.

Id. (citations omitted).

218. *Lewis*, 116 S. Ct. at 2183 (citing Missouri v. Jenkins, 115 S. Ct. 2038, 2048-50 (1995)).

219. *See Lewis*, 116 S. Ct. at 2184.

220. *See id.*

221. *Id.*

222. *Id.*

C. *Justice Souter, concurring in part and dissenting in part*

Justice Souter, while agreeing that there was an insufficient factual predicate to support the district court's sweeping injunction, nonetheless disagreed with the Court's treatment of standing in this case.[223] The question for review before the Court was a challenge to the district court's remedy of a constitutional violation, "not whether proof of actual injury is necessary to establish standing to litigate a *Bounds* claim."[224] He pointed out that even the petitioners conceded the inmates had met all the requirements of the standing doctrine.[225] The petitioners' disagreement lay with the lower courts' finding, on the merits, that the ADOC had in fact unlawfully hindered inmate access to the courts.[226] Therefore, there was no reason for the Court to enter into a discussion of the "difficult conceptual question" of standing.[227] He noted such an inquiry was "unnecessary to resolution of this case, was never addressed by the District Court or Court of Appeals, and divided what would otherwise presumably have been a unanimous Court."[228]

While there may have been no standing for non-English speaking and lockdown prisoners,[229] the same could not be said for the class of illiterate inmates. "One class representative [Barthholic] has standing, as the Court concedes, and with the right to sue thus established, standing doctrine has no further part to play in considering the illiterate prisoners' claims."[230]

---

223. *See id.* at 2200-01.

224. *See Lewis*, 116 S. Ct. at 2200.

225. *See id.* at 2201.

226. *See id.* While admitting that the Court is "certainly free . . . to raise [*sua sponte*] an issue of standing as going to Article III jurisdiction, and must do so when we would lack jurisdiction[,]" here, there was simply no reason for the court to reach that issue. *Id.* (citations omitted).

227. *Id.* at 2201.

228. *Id.*

229. *See Lewis,* 116 S. Ct. at 2201. "A determination even at the end of trial that the court is not prepared to award any remedy that would benefit the plaintiff[s] may be expressed as a conclusion that the plaintiff[s] lac[k] standing." *Id.* (citing WRIGHT, *supra* note 24, § 3531.6).

230. *Id.* The finding that one class representative, the named representative, had standing is sufficient to allow that named plaintiff to obtain relief for the whole class. *See id.*

Justice Stevens, dissenting, was also somewhat puzzled by the Court's discussion of standing. "As I understand the record . . . the State appears to have conceded standing with respect to most claims in the Court of Appeals. Yet the

In fact, the Court stated "that the standing of at least one of the class-action plaintiffs suffices for our jurisdiction and [there is] no dispute that standing doctrine does not address the principal issue in the case."[231]

Justice Souter next questioned the Court's approach to the case. He stated that:

> Justice Scalia says he is not applying a standing rule when he concludes (as I also do) that systematic relief is inappropriate here . . . he also makes it clear . . . that he does not rest his conclusion (as I rest mine) solely on the failure to prove that in every Arizona prison . . . the State denied court access to illiterate prisoners. . . . Instead, he explains that a failure to prove more than two illiterate prisoners suffered [injury] is the reason for reversal. Since he does not intend to be applying his standing rule in so saying, I assume he is applying a class-action rule.[232]

Justice Souter reminded the majority that this approach is as unnecessary as the invocation of the standing doctrine.[233] The proper decision should simply have been based upon the fact that "the state of the evidence simply left the District Court without an adequate basis for the exercise of its equitable discretion in issuing an order covering the entire system."[234] Respondents simply failed to prove *system wide* injury, and therefore system-wide relief was unwarranted.[235]

Though it was unnecessary for the Court to reach the standing issue, its analysis of standing was nonetheless contrary to the approach Justice Souter would have taken.[236]

---

majority chooses to address these issues unnecessarily and, in some instances, incorrectly." *Id.* at 2207. Justice Stevens went on to note the irony in the majority's position regarding the injury requirement, and the finding of injury in this case. "[E]ven the majority finds on the record that at least two of the plaintiffs had standing in this case which should be sufficient to satisfy any constitutional concerns. Yet the Court spends 10 pages disagreeing" with the claim that Respondents had standing. *Id.* Justice Stevens also surmised that because the ADOC had conceded to respondent's standing, that issue was never litigated. *See id.* at 2207. There would not have been a need to fill the record with all the instances of inmates suffering actual injury; therefore, there were likely more instances of actual injury than were placed on the record. *See id.*

231. *Lewis*, 116 S. Ct. at 2207.
232. *Id.* at 2202.
233. *See Id.*
234. *Id.*
235. *See id.*
236. *Lewis,* 116 S. Ct. at 2203.

While the Court's opinion would require district courts to determine the merits of a plaintiff's underlying claims in determining if that plaintiff has standing, Justice Souter "would go no further than to require that a prisoner have some concrete grievance or gripe about the conditions of his confinement, the validity of his conviction, or perhaps some other problem for which he could seek legal redress."[237]

D. *Justice Thomas, concurring*

Justice Thomas wrote separately to, *inter alia*, demonstrate the flaws of *Bounds v. Smith*.[238] "[W]hile the Constitution may guarantee State inmates an opportunity to bring suit to vindicate their federal constitutional rights, I find no basis in the Constitution – and *Bounds* cited none – for the right to have the government finance the endeavor."[239] He declared that never before *Bounds* had the Court found a "fundamental constitutional right" of access to the courts for inmates.[240] "Although our cases prior to *Bounds* had occasionally referenced a constitutional right of access to the courts, we had never before recognized a freestanding constitutional right that requires the States to 'shoulder affirmative obligations,' in order to 'insure

237. *Id.* Justice Souter offered three reasons why his analysis was the proper approach to any standing questions raised. First, the merit of an inmate's claim should play no part in the standing inquiry. *See id.* Rather, the simple existence of a proper grievance will ensure "concrete adverseness" and hence adversarial litigation. Flast v. Cohen, 392 U.S. 83 (1968). Second, *Bounds* did not require the provision of legal research materials only to those inmates likely to succeed. *See Lewis*, 116 S. Ct. at 2203-04. An inmate's likelihood of success should be of no moment regarding his ability to research legal claims. Finally, the Court's requirement of a nonfrivolous claim only serves to create a great amount of prelitigation litigation. *See id.* at 2204. There will be in effect a pre-trial inquiry into the merits of the case to determine whether there is a viable case on the merits. *See id.* at 2102.

238. 430 U.S. 817 (1977).

239. *Lewis*, 116 S. Ct. at 2186. "This case is not about the right of 'access to the courts.' There is no proof that Arizona has prevented even a single inmate from filing a civil rights lawsuit or submitting a petition for a writ of habeas corpus. Instead, this case is about the extent to which the Constitution requires a State to finance or otherwise assist a prisoner's efforts to bring suit against the State. . . ." *Id.* at 2187.

240. *See id.*

that inmates' access to the courts is adequate, effective, and meaningful.'"[241]

Justice Thomas then described the two distinct lines of precedent which formed the basis of the *Bounds* decision.[242] "One of these lines, rooted largely in the principles of equal protection, invalidated state filing and transcript fees and imposed limited affirmative obligations on the States to ensure that their criminal procedures did not discriminate on the basis of poverty."[243] In discussing this equal protection line, Thomas first cited *Griffin*[244] as standing solely for the proposition that a state cannot deny access to appellate review solely on the basis of indigency.[245] Next, Justice Thomas cited *Douglas* as another case articulating the principle that states may not discriminate on the basis of wealth. He further refuted any claim that the *Douglas* Court's "passing reference to 'fair procedure'"[246] implicated the due process clause as the constitutional source of the Court's holding:

> It is difficult to see how the due process clause could be implicated in these cases, given our consistent reaffirmation that the States

---

241. *Id.* (citations omitted). Furthermore, Justice Thomas noted that *Bounds* failed to cite even a single constitutional basis for its holding. "But the majority in *Bounds* failed to identify a single provision of the Constitution to support the right created in that case, a fact that did not go unnoticed in strong dissents by Chief Justice Burger and then-Justice Rehnquist." *Id.* Justice Thomas cited Ross v. Moffitt, 417 U.S. 600, 608-09 (1974) as support for his argument:

> The weakness of the Court's constitutional analysis in *Bounds* is punctuated by our inability, in the 20 years since, to agree upon the constitutional source of the supposed right. We have described the right articulated in *Bounds* as a 'consequence' of due process, as an 'aspect' of equal protection, or as an "equal protection guarantee."

Lewis, 116 S. Ct. at 2187 (citation omitted).

242. *See id.* at 2188.

243. *Id.*

244. 351 U.S. 12 (1955) "In light of the *Griffin* Court's unanimous pronouncement that a State is not constitutionally required to provide *any* court access to criminals who wish to challenge their convictions, the *Bounds* Court's description of *Griffin* as ensuring 'adequate appellate review,' is unsustainable." *Lewis*, 116 S. Ct. at 2189 (citation omitted).

245. *See Lewis*, 116 S. Ct. at 2189. "Justice Frankfurter . . . confirmed in a separate writing that it was invidious discrimination, and not the denial of adequate, effective, or meaningful access to the courts, that rendered the Illinois regulation unconstitutional." *Id.* (citing *Griffin*, 351 U.S. 12, 23 (1955)).

246. *Lewis*, 116 S. Ct. at 2189 n.3 (citing Douglas v. California, 372 U.S. 353, 357 (1963)).

> can abolish criminal appeals altogether consistently with due process. The fact that a State affords some access 'does not automatically mean that a State then acts unfairly,'and hence violates due process, by denying indigents assistance 'at every stage of the way.' Under our cases, '[u]nfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty,' a question 'more profitably considered under an equal protection analysis.'[247]

Justice Thomas stated, however, that *Bounds* went far beyond the reasoning of *Griffin* and *Douglas*, when "the Court created a new and different right" for prisoners.[248] In other words, *Bounds* failed to follow the boundaries of the equal protection analysis upon which these two cases were founded. Additionally, even "assuming that *Bounds* properly relied"[249] upon these cases, the Court critically failed to take into account the equal protection cases which "rejected [the] disparate impact theory of the Equal Protection Clause."[250] Such a holding does not deprive an inmate of the ability to file claims as an indigent inmate who, "[l]ike anyone else seeking to bring a suit without the assistance of the State . . . can seek the advise of an attorney, whether *pro bono* or paid, and can turn to family members, friends, other inmates, or public interest groups" for the aid they need.[251] Thus Justice Thomas stated:

> the *Bounds* Court's reliance on our transcript and fee cases was misplaced in two significant respects. First, those cases did not stand for the proposition for which *Bounds* cited them: they were about *equal* access, not access *per se*. Second, the constitutional

---

247. *Lewis*, 116 S. Ct. at 2190 n.3 (citations omitted).

248. *Id.* at 2190. "Only by divorcing our prior holdings from their reasoning, and elevating dicta over constitutional principle, was the [*Bounds*] Court able to [effect] [t]he unjustified transformation of the right to nondiscretionary access to the courts into the broader, untethered right to legal assistance generally." *Id.* This circuitous route "would be reason enough for [Justice Thomas] to conclude that *Bounds* was wrongly decided." *Id.*

249. *Id.*

250. *Lewis*, 116 S. Ct. at 2191. Thomas relies upon *Rodriguez* indicating the refutation of the disparate impact theory of equal protection analysis, wherein "wealth discrimination alone [does not] provid[e] an adequate basis for involving strict scrutiny." *Lewis,* 116 S. Ct. at 2191 (citing San Antonio Indep. Sch. Bd. v. Rodriguez, 411 U.S. at 29). *See also* Washington v. Davis, 426 U.S. 229 (1976) (rejecting the disparate impact theory of equal protection).

251. *Lewis,* 116 S. Ct. at 2191 n.4.

basis for *Griffin* and its progeny had been seriously undermined in the years preceding *Bounds*.[252]

Justice Thomas next discussed the "second line of cases" wherein "we invalidated state prison regulations that restricted or effectively prohibited inmates from filing habeas corpus petitions or civil rights lawsuits in federal court to vindicate federally protected rights."[253] Justice Thomas cited to the *Ex Parte Hull*,[254] *Johnson v. Avery*,[255] and *Wolff v. McDonnell*[256] line of decisions.[257] While recognizing these cases as based upon access in its own right,[258] Justice Thomas noted that "they imposed no affirmative obligations on the States to facilitate access, and held only that States may not 'abridge or impair'" an inmate's ability to enter the courts.[259]

Justice Thomas next discredited the *Bounds* Court's fusion of the two disparate lines of cases. "[T]he equation of these two lines of cases allowed the *Bounds* Court to preserve the 'affirmative obligations' element of the equal access cases . . . by linking it with *Ex Parte Hull*, which had not been undermined by later cases but which imposed no affirmative obligations."[260]

In conclusion, Justice Thomas declared that there is a limited, constitutionally protected right of access to the courts, one "rooted in the Due Process Clause and the principle articulated in *Ex Parte Hull*."[261] This right is the "right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court."[262] Nonetheless, there is no constitutionally

252. *Id.* at 2193.

253. *Id.* at 2188.

254. 312 U.S. 546 (1940).

255. 393 U.S. 483 (1969).

256. 418 U.S. 539 (1974).

257. Noticeably absent from Justice Thomas' analysis was any discussion of Younger v. Gilmore, 404 U.S. 15 (1971), which was a critical precedent in the *Bounds* decision.

258. *See Lewis*, 116 S. Ct. at 2193.

259. *Id.* at 2188 (quoting *Ex Parte* Hull, 312 U.S. at 549).

260. *Lewis*, 116 S. Ct. at 2194 (citations omitted). "By detaching *Griffin*'s right of equal access and *Ex parte Hull's* right to physical access from the reasoning on which each of these rights was based, the *Bounds* Court created a virtually limitless right." *Id.* at 2195.

261. *Id.*

262. *Id.*

mandated requirement that the state affirmatively expend resources in providing prisoners' access to the courts.[263]

IV. Analysis

In analyzing *Lewis v. Casey*,[264] it is worth asking what the undercurrents are. The most likely answer is the Court's frustration with the flood of prisoner-initiated lawsuits into the courts throughout the nation.[265] One often hears something to the effect that prisoners are simply filing lawsuits in order to get a free day away from their jail. Thus, when confronted with a class action, where the class is effectively the entire prison population of Arizona, there is cause for concern. Next, consider that this class of prisoners is going to court to claim that they are *denied their fundamental right*[266] of access to the courts, or more precisely that they are hindered from airing their grievances in the courts, and there is cause for panic.

Against this backdrop, the *Lewis* Court offered no principled basis for its decision and arguably dismissed the Arizona prisoners' claim[267] based on fear of increased prisoner litigation. The failure of the prisoners' complaint, in and of itself presents no major doctrinal problems. The lower courts would have been well within their jurisdiction to exercise their equitable powers by not issuing the sweeping injunction. However, the lower courts, in a sense, succumbed to the fear of opening the prison litigation flood-gates even wider.[268] The problems arise, however, when one begins to examine the Court's opinion and try to parse out the doctrinal basis for its decision.

The Court has once again demonstrated the uncertainty of the standing doctrine and shown that it is fully capable of manipulating standing to effectively reach the merits of a case through a back door.[269] In *Lewis*, the Court further obscured the standing doctrine by discussing both the respondent's

263. *See id.*

264. 116 S. Ct. 2174 (1995).

265. *See, e.g.*, Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21 (1994).

266. *See supra* Part II, Section B(1)(a).

267. *See* 116 S. Ct. at 2200.

268. *See Id.*

269. *See* Nichol, *supra* note 20.

standing to sue and the merits of the case. "The judicial eye appears to be peering beyond preliminary access issues to take into account a variety of interests traditionally considered irrelevant to the standing determination."[270] One truly cannot come away from this opinion without a "sense of intellectual crisis."[271]

Therein lies the major flaw in *Lewis*. There was no basis for the Court to hold that plaintiffs had no standing to sue, yet then proceed with a discussion of the merits as related to the underlying constitutional standard for inmate access to the courts, as articulated in *Bounds v. Smith*.[272] With respect to merits, the Court proceeded to restrict the scope of prisoner access to the courts as defined in *Bounds*.[273] An inmate now has no ability to claim that he was injured by a *Bounds* violation where the source of that injury stems from an inability to file any suit other than a habeas corpus petition or a civil rights action related directly to the condition of his confinement.[274] Regardless of whether this is the correct interpretation of the right espoused in *Bounds*,[275] the Court should never have considered that issue. Because the Court decided the case based upon the plaintiffs' lack of standing, the analysis should have ended there.[276]

Putting aside the decision regarding the merits for the moment, the standing analysis itself seems to miss the mark, further confusing the law of standing, specifically as it relates to class actions. It has generally been understood that in a class

---

270. Nichol, *supra* note 20, at 69. Professor Nichol, ever critical of the standing doctrine in its current guise, stated that the doctrine "is a schizophrenic body of law in which the Court announces that one set of interests are dispositive (the plaintiff's stake in the litigation), while in the bulk of the major cases other factors appear to prevail (separation of powers, federalism concerns, the desirability of the claim on the merits, etc.)." *Id.* at 70.

271. *See* CHEMERINSKY, *supra* note 19.

272. 430 U.S. 817 (1977).

273. *Lewis*, 116 S. Ct. at 2181.

274. *See supra* notes 214-219 and accompanying text.

275. There is good reason to believe that this is an incorrect interpretation of *Bounds*. *See supra* Section II(B). Additionally, it is even arguable that any restrictions or limitations by the Court stated in dicta, with respect to *Bounds*, will not be applied by the lower courts.

276. A finding that the plaintiffs had no standing is equivalent to a finding that the courts had no jurisdiction to even hear the case; standing is, after all, jurisdictional. *See supra* notes 236-238. Without jurisdiction to hear the case, there can be *no* basis for any authoritative discussion of the merits.

action, the class' standing is established when the named plaintiffs, the class representatives, can demonstrate that they have personally suffered an actual injury.[277] Therefore, as a practical matter, as soon as it has been demonstrated that a class representative has individual standing, the case should proceed to a determination on the merits.[278]

In *Lewis*, the Court, however, takes a different and somewhat unclear approach to this issue. The Court concedes that in the record, the lower courts clearly found two instances of actual injury to the named plaintiffs.[279] Having identified the existence of those two instances of injury, the Court next "turn[ed] to the question whether those injuries . . . support[ed] the injunction ordered in this case."[280] The clear import of this statement is that, once standing has been established, the Court will then proceed to the merits. Nonetheless, the need to proceed to the merits, in light of the finding of injury, seems to be supported by the Court's own assertion:

> that a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."[281]

It seems rather remarkable that the Court would assert that the plaintiffs failed to demonstrate standing. This passage clearly supports the claim that there was class standing, as the

---

277. *See* 1 HERBERT NEWBERG & ALABA CONTE, NEWBERG ON CLASS ACTIONS, § 2.01 at 2-3 (3rd ed. 1992). "Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense." *Id.* § 2.05 at 2-29. This view of class action standing law was echoed in Justice Souter's concurring opinion. "More specifically, the propriety of awarding class-wide relief (in this case, affecting the entire prison system) does not require a demonstration that some or all of the un-named class could themselves satisfy the standing requirements for named plaintiffs." Lewis v. Casey, 116 S. Ct. 2174, 2201 (1996).

278. *See Lewis*, 116 S. Ct. at 2201 (Souter, J., concurring)

279. *See id.* at 2182.

280. *Id.* at 2183.

281. *Id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976), quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)).

plaintiffs did "allege and show"[282] an actual personal injury, and therefore were proper representatives of the class. Indeed, the Court conceded as much.[283]

However, "[s]ince [the standing requirements] are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element" necessary to establish standing must be fully proved at trial.[284] In discussing the plaintiffs' proof adduced at trial regarding standing, the Court noted that the district "court found actual injury on the part of only one named plaintiff, . . . and the cause of that injury . . . was failure of the prison to provide the special services that [were] needed, in light of [the inmates] illiteracy."[285] This is essentially a failure in the class certification rather than a failure to prove standing.[286] In other words, it is apparent that the Court has found the plaintiff class without standing because of a failure to prove injury to all class members.

---

282. *Lewis*, 116 S. Ct. at 2183 (citing Simon, 426 U.S. at 40 n.20 (1976), quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)).

283. "The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation. . . ." *Lewis*, 116 S. Ct. at 2183.

284. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

285. *Lewis*, 116 S. Ct. at 2183.

286. *See id.* at 2208. "If the named class plaintiffs have standing, the standing of the class members is satisfied by the requirements for class certification. Because the State did not challenge that certification, it is rather late in the game to now give it the advantage of a conclusion that the class was improper." *Id.* at 2208 n.4 (Stevens, J., dissenting) (citations omitted).

Justice Scalia responded to Justice Steven's claim by stating that the Court was not concluding that the class certification was improper, rather "[t]he standing determination is quite separate from certification of the class." *Id.* at 2184 n.6. The Court was simply declaring that the standing of one inmate, Bartholic, who based his standing upon the alleged injury resulting from inadequate legal research facilities for illiterate inmates, was not enough for that inmate to then sue on behalf of other inmates with different injuries. *Id.* Thus, Bartholic could only represent a class of illiterate inmates, and not, for instance, a class of non-English speaking inmates. Of course, behind the Court's rhetoric was the inescapable conclusion that the class was simply not proper. Clearly if the class was proper, and Bartholic was a properly named representative of that class, then he should have been afforded the opportunity to represent the unnamed constituency of that class.

V. Conclusion

Have the boundaries of *Bounds v. Smith*[287] in fact been restricted by *Lewis v. Casey*?[288] The answer must be a resounding no. Justice Scalia explicitly reversed the lower courts based upon a finding that the plaintiffs lacked standing to sue in the federal courts.[289] Such a conclusion by the Court is tantamount to finding a non-justiciable issue. In other words, at the very outset of analysis, the Court concluded that it was without the constitutional authority to begin to address the issues raised by the plaintiffs. There was no constitutionally recognized case before the Court.

There can be no doubt, therefore, that any discussion of the scope of *Bounds* was unnecessary to the ultimate disposition of *Lewis* holding that plaintiffs had not presented a cognizable claim in the federal courts. In the context of access to courts litigation, *Lewis* imposes a painstakingly detailed consideration of the representative plaintiffs' standing. While this is essentially the equivalent standard previously required by the Court, *Lewis* seems to "up" the "pleading ante" with regards to the necessary showing of standing. Quite simply, class representatives will need to demonstrate that they have clearly suffered an injury with regard to the constitutional right in question. Because the standing requirements are essentially unchanged by *Lewis*, only time will tell how the lower federal courts will interpret this case, and what prisoners must do to satisfy standing in the context of access to the courts challenges.

David Steinberger

287. 430 U.S. 817.
288. 116 S. Ct. 2174.
289. *See id.* at 2185.