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***City of Los Angeles v. Lyons*: How Supreme Court Jurisprudence of the Past Puts a Chokehold on Constitutional Rights in the Present**

Peter C. Douglas*

ABSTRACT

*The United States today has refocused its attention on its continuing struggles with civil rights and police violence—struggles that have always been present but which come to the forefront of the collective consciousness at inflection points like the current one. George Floyd—and uncounted others—die at the hands of the police, and there is, justifiably, outrage and a search for answers. Although the reasons why Black and Brown people are disproportionately subject to unconstitutional police violence are manifold, one reason lies in the Supreme Court’s 1983 decision in *City of Los Angeles v. Lyons*. While many scholars have criticized the Burger Court’s *Lyons* decision from a variety of valuable vantage points, this Note takes a different approach, considering the extent to which *Lyons* was the product not of a single Court, but of generations of jurists. Through an extensive historical case study, this Note hopes to provide a new perspective on why the *Lyons* decision was wrong and why the majority opinion failed to support its holding. With the *Lyons* ancestry laid bare, this Note then uses that historical understanding to advocate for greater transparency in federal jurisprudence. Specifically, this Note argues that decisions like *Lyons* are, in part, made possible by obfuscatory jurisprudential approaches to “saying what the law is.” Regardless of the precise nature of the federal judiciary’s systemic problems, certain jurisprudential methodologies tend to reinforce and preserve those problems. To begin addressing systemic issues in the federal judiciary, we must embrace some modest, but powerful, adjustments to how jurists “say what the law is.”*

Keywords: jurisprudence, police violence, civil rights, race, legal history, *Lyons*, constitutional rights, Supreme Court, federal judiciary

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INTRODUCTION

George Floyd was murdered.¹ The Minneapolis Police choked him to death.² And his grave is not a lonely one.³ Alongside Floyd lie many others who were wrongfully choked to death by the police.⁴ Many have died from chokeholds, but there are many more who—like Floyd—were strangled beneath an officer’s knee. And while myriad factors surely contributed to their deaths,⁵ they might all still be alive if the Supreme Court had not rejected the attempt of one man—Adolph Lyons—to stop the use of police chokeholds in non-life-threatening situations.⁶

The Court’s 1983 decision in *City of Los Angeles v. Lyons* now stands in the way of those who seek to enjoin not only chokeholds, but any practice employed by local law enforcement.⁷ *Lyons* has all but closed the courthouse doors to those who would challenge

¹ Verdict, Count II, *State of Minnesota v. Chauvin*, No. 27-CR-20-12646, 2021 WL 1559174 (Minn. Dist. Ct. Apr. 20, 2021).

² For nine minutes and twenty-nine seconds, a Minneapolis Police officer held the handcuffed Floyd face down on the pavement by pressing his knee between Floyd’s head and neck. *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (Jul. 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726>; Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds – Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html>. Bodycam footage showed that Floyd told the officers “more than 20 times [that] he could not breathe . . .” BBC NEWS, *supra*. After about six minutes, Floyd “fell silent[.]” *Id.*

³ Monika Evstatieva & Tim Mak, *How Decades of Bans on Police Chokeholds Have Fallen Short*, NPR (June 16, 2020, 5:11 AM), <https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short>.

⁴ See *infra* note 46, and accompanying text. As Paul Butler argues, “the Court has created the legal platform for black lives not to matter to police.” PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 56 (The New Press ed. 2018). It has “given the police unprecedented power, with everybody understanding that these powers will mainly be used against African Americans and Latinos.” *Id.* at 57.

⁵ When I write “myriad factors,” I do not mean to give credence to any argument that Floyd died as a result of anything other than unconstitutional and racist police violence as a direct and proximate cause. Rather, I mean to acknowledge that, while there are many societal factors that converge to explain unconstitutional police violence directed at Black and Brown individuals and communities, the Supreme Court’s role should not be forgotten. See ERWIN CHEMERINSKY, *PRESUMED GUILTY*, xi–xiii (2021) (noting that, while “much attention is focused on the enormous problems of police violence and racism in law enforcement, . . . too often that attention fails to place the blame where much of it belongs: on the Supreme Court”). For discussions of such factors, ranging from social and cultural racism and gender violence to property discrimination and the carceral industrial complex, see, e.g., Jonathan Andrew Perez, *Rioting by a Different Name: The Voice of the Unheard in the Age of George Floyd, and the History of the Laws, Policies, and Legislation of Systemic Racism*, 24 J. GENDER RACE & JUST., 87, 88–89, 92 (2021); *Justice in America Episode 20: Mariame Kaba and Prison Abolition*, THE APPEAL (Mar. 20, 2019), <https://theappeal.org/justice-in-america-episode-20-mariame-kaba-and-prison-abolition/>; *Ruth Wilson Gilmore Makes the Case for Abolition*, THE INTERCEPT (Jun. 10, 2020, 5:02 AM), <https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition/>.

⁶ See, e.g., Ian Millhiser, *How the Supreme Court Helped Make it Possible for Police to Kill by Chokehold*, THINKPROGRESS (Dec. 4, 2014, 7:09 PM), <https://archive.thinkprogress.org/how-the-supreme-court-helped-make-it-possible-for-police-to-kill-by-chokehold-d9f17a773190/>.

⁷ See CHEMERINSKY, *supra* note 5, at 4 (noting that “the kind of chokehold that killed George Floyd remains in use in most of the United States because of the Supreme Court’s ruling” in *Lyons*, which “dramatically constrains the ability of the federal judiciary to stop police from using unconstitutional and racist practices like the chokehold”). See generally Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257 (2020); Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute’s*

systemic police violence in their communities.⁸ And the ramifications of the *Lyons* decision are not limited to the direct effects of unbridled police violence; indirectly, the decision may have contributed to the (justifiable) violence that erupts as a reaction to unconstitutional and racist police violence.⁹

Over the past four decades, legal scholars have widely criticized the *Lyons* decision.¹⁰ Broadly speaking, what is unsettling about *Lyons* is that it “remove[d] an entire class of constitutional violations from the equitable powers of a federal court.”¹¹ And, indeed, as

Misuse of Lyons’s Realistic Threat of Harm Standing Test, 42 ARIZ. ST. L.J. 837 (2010); Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815 (2000); Laura E. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933 (1993); Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1085 (1987).

⁸ See ERWIN CHERMERINSKY, CLOSING THE COURTHOUSE DOOR 98 (2017).

⁹ As Vicki Jackson has suggested in the context of the Rodney King incident, the subsequent rioting might have been avoided had *Lyons* not precluded “earlier injunctive relief and related judicial monitoring.” Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 134 (2014). “Of course, whether or not allowing standing [in *Lyons*] would have led to further relief against the LAPD, and if so, whether it would have been effective in disrupting the culture of racism and violence [in the LAPD], are uncertain; but the failure to allow the possibility of such relief raises haunting questions of what might have been.” *Id.*; See also Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 206–07 (1952) (“[T]he defense of civil rights by the courts is a force not only for democratic values but for social order. If repressed by those who control the local police, the social and political aspirations of the people would often spill over into rioting . . . Nothing has destroyed the essential solidarity of a people more effectively than policies of repression imposed by the strong on the weak.”).

¹⁰ See *infra* notes 11, 14–23, and accompanying text.

¹¹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 137 (1983) (Marshall, J., dissenting). See CHERMERINSKY, *supra* note 8, at 95 (arguing that the most important reason the *Lyons* “decision is wrong” is that now “no one could sue the LAPD and the City of Los Angeles to stop this practice”); Jackson, *supra* note 9, at 136 (arguing that *Lyons* suffered from “triple error” in that first, “members of political or racial minorities[] were remitted to the very majoritarian processes of whose results they complained[,]” second, “the predictable failures of the political processes to remedy the complained-of conduct . . . may have contributed to very adverse developments for bona fide social interests in peace, order, and security[,]” and third, “continuing to close the doors to litigants pressing the kinds of constitutional claims on which the courts have a particularly significant role to play in a democratic constitutional society is inconsistent with the long term institutional interests of the judiciary in being seen as a forum for protecting the rights of all of the people”); Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 808–09 (2016) (In *Lyons*, “the Supreme Court strongly curtailed the ability of private litigants to challenge police brutality and abuse at a structural level.”); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1398–99 (2000) (“The [*Lyons*] Court’s application of this ‘equitable standing’ bar has ensured that victims of police brutality will rarely, if ever, be allowed to enjoin injurious police practices.”); Little, *supra* note 7, at 936 (“The rule of *Lyons* . . . is particularly treacherous. It is not only a seemingly neutral procedural instrument for crafting a desired substantive outcome, but it also terminates litigation before the true nature of the dispute has come to full view.”); Michael J. Schmidtberger, *No Holds Barred in City of Los Angeles v. Lyons: Standing to Seek Injunctions in Federal Court against Municipalities*, 15 COLUM. HUM. RTS. L. REV. 183, 196 (1984) (*Lyons* “constructs a scenario in which arbitrary unconstitutional behavior becomes self-immunizing.”). See also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1381 (1988). In similar tenor, critics have likewise assaulted standing doctrine more generally. See Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 322 (2002) (“The standing doctrine has already rendered the Accounts Clause, the Incompatibility Clause, the Emoluments Clause, and part of the Establishment Clause unenforceable. It is difficult to understand, though, why the

this Note will discuss, one of the problems with the majority opinion in *Lyons* is that it sweeps too broadly, all but precluding even narrowly tailored federal remedial action. Such a sweeping holding was neither necessary under the facts nor supported by the opinion. To everyone today who feels “wrath and outrage”¹² over each new incident of unconstitutional police violence, the decision’s substantive effect speaks for itself. But as a matter of law, the majority opinion demands further explication. By creating a form of remedial standing¹³—whereby standing must be found for each form of requested relief—the *Lyons* holding forecloses, even at the pleading stage, a federal court’s power to enjoin recurring unconstitutional police violence. And for many, it is not just *Lyons*’s holding that is disturbing; the majority’s rationale is also unsettling.¹⁴ The several failures of that rationale

small, confused tail of the standing doctrine wags such a large, important pack of dogs.”); Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57, 76 (1985) (arguing that “the current standing model creates a class of cases where government may, with impunity, violate the Constitution”). See also Suzanna Sherry, *Issue Manipulation by the Burger Court*, 70 MINN. L. REV. 611, 624 (1986); Kenneth E. Scott, *Standing in the Supreme Court – A Functional Analysis*, 86 HARV. L. REV. 645, 684 (1973).

¹² *Lyons*, 461 U.S. at 137 (1983) (Marshall, J., dissenting).

¹³ See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984).

¹⁴ In dissent, Justice Marshall argued that, “[s]ince no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy.” *Lyons*, 461 U.S. at 113. “Under the view expressed by the majority today,” Marshall continued, “if the police adopt a policy of ‘shoot to kill,’ or a policy of shooting one out of ten suspects, the federal courts will be powerless to enjoin its continuation.” *Id.* at 137. To Marshall, as to others, the majority’s fragmentation of the standing inquiry on the basis of the relief sought was unequivocally contrary to Supreme Court precedent: “Standing has always depended on whether the plaintiff has a personal stake in the outcome of the controversy . . . not on the precise nature of the relief sought.” *Id.* at 114. Precedent only required “an allegation of ‘threatened or actual injury.’” *Id.* at 124 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 493 (1974)) (emphasis in original). See also Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 329 (2002) (questioning the majority’s assumption that *illegal* individual conduct was necessary to trigger the challenged official conduct); Winter, *supra* note 11, at 1374–75, 1489, 1510–11 (noting that *Lyons* “disaggregated individuals who shared an important, life-or-death interest”); ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR* 95 (2017) (arguing that *Lyons* represents “a substantial departure from prior practice[]” because the Supreme Court had “[n]ever before . . . determined standing on the basis of the remedy sought”); Jackson, *supra* note 9, at 165 (“In bifurcating the injury from the remedy as the Court did, it acted in an unprecedented manner, going beyond the holdings of the principal cases on which it relied.”); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1339–40 (1999) (discussing how the *Lyons* Court’s “retreat to mechanistic formalism and . . . ascription of responsibility elsewhere” allowed the Court “both to disaggregate systemic conduct and to avoid dealing with its ugly consequences[,]” which took the form of both fragmenting the standing inquiry and “fragmenting Lyons’ own interests into individualized rather than communitarian concerns”); Laura E. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 936 (1993) (arguing that the Court’s collapsing of the jurisdictional analysis and “remedial concerns into a single threshold enterprise . . . [is] unnecessarily severe . . . [and] unwisely obscures the concerns at the heart of the decision whether to issue an injunction”); Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1085, 1100 (1987) (arguing that *Lyons*’s standing determination was “not warranted by the purpose underlying the standing doctrine . . . [nor] by the purpose underlying Section 1983”); Sherry, *supra* note 11, at 628 (noting that the majority’s rationale was “peculiar” because, “[b]y fragmenting the general standing inquiry into separate inquiries for each of the plaintiff’s claims, the Court created for itself a before-the-fact ‘line item veto’ power that may undercut the utility of the broad discretion courts have to fashion appropriate equitable relief[,]” and because “for the purpose of determining Lyons’ standing, the Court separated the damage claim from the injunctive claim, but for the

and the inadequacies of the majority opinion form much of this Note’s substance. And the necessity of jurists providing transparent, thorough opinions to support their holdings forms much of this Note’s recommendations.

Many scholars have focused their critiques of *Lyons* on the 1983 Court that rendered the decision.¹⁵ Critics have charged the Burger Court with engaging in a “project”—epitomized by decisions like *Lyons*—“to expand the power of the police against people of color.”¹⁶ They have charged the Court with “willful color-blindness”;¹⁷ with engaging in a “supermajoritarian” paternalism to “save the majority from its own excesses”;¹⁸ with protecting the interests of the powerful, the White, and the privileged at the expense of the vulnerable—those who are members of political and racial minorities;¹⁹ with lacking

purpose of determining mootness, the Court considered the two claims together”); Fallon, *supra* note 13, at 51–52 (arguing that it is dangerous to apply mootness concerns in the standing inquiry because standing is a threshold matter while mootness is generally addressed after greater factual development); Schmidtberger, *supra* note 11, at 194 (“*Lyons* neglects the distinction between an unharmed plaintiff who seeks only equitable relief and a harmed plaintiff who seeks damages and injunctive relief in a fragmented suit.”); Harvard Law Review Association, *Standing to Seek Equitable Relief*, 97 HARV. L. REV. 215, 219–24 (1983) (“The Court’s fragmented approach to standing in *Lyons* departs from the Court’s previous practice of focusing the standing inquiry on the individual litigant’s right to invoke the jurisdiction of the court.”). *But see* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1218–19 (2014) (arguing that the majority “was right to insist on testing . . . [*Lyons*] standing as to each form of relief”).

¹⁵ See, e.g., Sherry, *supra* note 11; Schmidtberger, *supra* note 11.

¹⁶ Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246 (2010). To Butler, this project, which extends through the Rehnquist and Roberts Courts, includes cases like *Terry v. Ohio*, 392 U.S. 1 (1968), where “police got the power to stop and frisk . . . [which is] the most visceral manifestation of the state in” the lives of African American men, *Scott v. Harris*, 550 U.S. 372 (2007), where the police were granted the super power to kill to enforce a traffic infraction, *Atwater v. Lago Vista*, 532 U.S. 318 (2001), where the police were given the super power to arrest “for any crime—no matter how minor and even if punishment for being found guilty of the crime does not include prison time,” and *Whren v. United States*, 517 U.S. 806 (1996), where the use of racial profiling in pretextual traffic stops was “blessed” by the Supreme Court. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 57–59, 82–83 (The New Press ed. 2018). Butler argues that the *Lyons* decision epitomizes how the Court empowers police to preserve the racial order: “The United States Supreme Court decided a case about chokeholds that tells you everything you need to know about how criminal ‘justice’ works for African American men.” *Id.* at 56.

¹⁷ In cases like *Lyons*, the Court rarely mentions race. Butler, *supra* note 16 at 247. See also Harvard Law Review Association, *supra* note 14, at 223 (“The *Lyons* Court belittled—by ignoring—the seriousness of the police brutality faced by blacks in this country.”).

¹⁸ In cases like *Lyons*, “the Court’s concern with community interests is even greater than that objectively evinced by the community itself. When the Court takes a narrow reading of statutes enacted for the benefit of the politically disadvantaged, it engages in a sort of ‘supermajoritarianism’ that goes beyond the expressed community interest in order to save the majority from its own excesses.” Suzanna Sherry, *Issue Manipulation by the Burger Court*, 70 MINN. L. REV. 611, 660, 663, n.101 (1986). See also Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1425, 1476 (1995) (noting that the “Court has even invalidated *majoritarian* efforts to protect minority rights when those efforts have failed to comport with the Court’s conception of majority self-interest” and that the Court’s own vision of its “job is to prevent the tyranny of the minority and to ensure that the majority is not disadvantaged by its own shortsightedness”).

¹⁹ Footnote Four in *United States v. Carolene Products Co.* states that “Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” 304 U.S. 144, 152 n.4 (1938). The themes at play in Footnote 4 “ask us to focus . . . on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77 (Harvard

empathy for those who run in sharply different socioeconomic circles than do the Justices;²⁰ with hyper-valuing monetary relief and assuming that Lyons sued only out of self-interest,

University Press 1980). Gene Nichol argues that the Court’s injury analysis “systematically favors the powerful over the powerless” and in so doing “turns the theory of *Carolene Products*’ famed footnote neatly on its head.” Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U.L. REV. 301, 322 (2002) “[T]he power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government” while “historically victimized groups . . . must prove greater consequential harms, must show closer causation links, and must surmount greater redressability hurdles.” *Id.* at 333. Specifically writing of *Lyons*, Nichol argues that, “[w]hen litigants complain of run-ins with the Los Angeles police department,” the Supreme Court’s “predictable tendency lodges standing law squarely on the side of privilege.” *Id.* at 327. Nichol captures this favoritism most succinctly when he notes that the federalism concerns that counseled restraint in *Lyons* “melted away” in *Bush v. Gore* because “George W. Bush is not Adolph Lyons.” *Id.* at 328. This penchant is not surprising since the Court “has revealed itself over the last 220 years to be an institution that favors the rule of social elites[,]” from “Federalist elite[s]” and “slave-holding elite[s]” to “business elites” and “cultural elites.” Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 544 (2012). See also Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 133, 174 (2014) (questioning whether the Court has lived up to the duty ascribed to it by Judge Antonin Scalia, who argued that standing doctrine “roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions by the majority”) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983)); Spann, *supra* note 18, at 1423–24 (arguing that “the institutional function of the Supreme Court in American culture has consistently been to facilitate the subordination of racial minority interests to white majority interests”).

²⁰ Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U.L. REV. 301, 328 (2002).

rather than out of altruism;²¹ with judicial activism masquerading as judicial restraint;²² and with abdicating the Court's constitutional duty.²³ All of these critiques may possess

²¹ As Steven Winter argues, standing doctrine “allows only the possibility that we act out of self-interest; it ignores the fact that we often act out of concern for others” and thus “devalues the social importance of altruism.” Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1503, 1511 (1988). To some, this denial of the individual as defender of the public flies in the face of our constitutional trust, for, if the Constitution is viewed as a trust through which the public collective, acting as settlor, empowers the government to act as trustee, then the beneficiaries of that trust share a “clear collective societal interest in having the government behave in strict accord with the Constitution.” Donald L. Doernberg, *“We the People”*: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 96 (1985). See also Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1338 (1999) (discussing anecdotalism in the police brutality cases and arguing that the “common law paradigm” at work in cases like *Lyons* “is based on the notion of each litigant as an autonomous actor, impelled by rugged, even heartless, individualism[]” and that this “paradigm dictates that a plaintiff charging police brutality will be seen as motivated solely by greed or fear for his own well-being, that he can easily be bought off with money, that he has no long term concerns for good government or community, and that his adversary is an individual like him, of equal power and similar motivations”); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) (arguing that the Court acts “on the unarticulated, reflexive assumption that a case is an even contest between private individuals for material stakes . . . [and this] unstated acceptance of the private rights model leads to a refusal to recognize the cognizability of collective rights and collective harms”). For discussions of how the particularization requirement of standing is of relatively recent vintage, see generally James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170 (2018); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004); Robert J. Pushaw Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PENN. L. REV. 1033 (1968); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961).

²² Suzanna Sherry argues that the *Lyons* Court “combined notions of restraint with procedural activism to restrict the scope of a statutory right.” Suzanna Sherry, *Issue Manipulation by the Burger Court*, 70 MINN. L. REV. 611, 649 n.166 (1986). Sherry more broadly contends that the Burger Court “maintained its posture of judicial restraint when doing so denie[d] protection to individual rights, while simultaneously expanding its jurisdiction in order to decrease the protection afforded individual rights by Congress and the states.” *Id.* at 619 n.19. “Although putatively espousing a theory of judicial restraint premised on constitutional arguments, the Court is engaging in an activism that effectively restricts individual and minority rights.” *Id.* at 615. *Lyons* “exemplifies . . . the [Court’s] hostility to the phenomena of public law litigation, and the unrestrained reworking of doctrine to obtain a ‘restrained’ result.” Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 34 (1984). See also Paul Butler, *“A Long Step Down the Totalitarian Path”*: *Justice Douglas’s Great Dissent in Terry v. Ohio*, 79 MISS. L.J. 9, 32 (2009).

²³ *Lyons* “itself shows that it is possible to abdicate essential judicial obligation . . .” Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 338 (2002). See generally *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) (“[W]here wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.”). Two years after *Flast*, Justice Brennan penned a concurrence in *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*—in which Justice White joined—in which he argued against a standing inquiry that “involve[s] a determination on the merits.” 397 U.S. 159, 177 (1970). Brennan concluded by quoting Justice Douglas on the abdication of the courts. *Id.* at 178. Interestingly, as Kenneth E. Scott has noted, Brennan trimmed the quote a bit, writing

some explanatory power over why the Burger Court chose to silence, rather than listen to, Adolph Lyons.²⁴ Certainly the five Justices who formed the majority bear some direct responsibility, for rejecting Lyons's claim for injunctive relief required an unprecedented fragmentation of the standing inquiry.²⁵ The Burger Court did, indeed, break new ground—even in its equitable-restraint and federalism dicta²⁶—so the *Lyons* decision did not ineluctably flow from precedent. And, if parts of the majority decision could be supported, the Court failed to do so. But the Burger Court cannot, alone, bear the weight of the *Lyons* decision. For *Lyons*—like all Supreme Court decisions—was the product of generations of Supreme Courts. And, in this sense, our modern focus on the political leanings and normative biases of sitting Justices fails to account fully for the multi-generational character of the Court.

It is the nature of our jurisprudence that jurists (at least theoretically) largely rationalize their judicial opinions via existing caselaw.²⁷ Supreme Court jurisprudence is cumulative, with each Court approaching the cases of the present with the tools of the past. When the Court sits down “to say what the law *is*[,]”²⁸ the Justices begin with what the law *has been*. While the political branches often pass legislation or take executive action for which there is no historical predicate, the judiciary does not act so unencumbered by history. Supreme Court decisions are not merely the work of those Justices currently sitting on the bench; rather, they are the products of generations of jurists. Holding a particular Justice or Court singularly responsible for rendering a particular (and possibly wrong) decision is akin to blaming the tip of the iceberg for the sinking of the Titanic. To understand why the Titanic foundered, we must look beneath the surface. And to understand why *Lyons* came out the way it did, we must dig into its ancestry.

This Note argues, first, that the *Lyons* decision is emblematic of this larger jurisprudential truth. *Lyons* was not the work of the Burger Court alone. And focusing too narrowly on that Court's contributions to the *Lyons* rationale obscures the extent to which the majority opinion is the work of Justices who had passed long before Justice White

only that “where wrongs to individuals are done . . . it is abdication for courts to close their doors.” Kenneth E. Scott, *Standing in the Supreme Court – A Functional Analysis*, 86 HARV. L. REV. 645, 689 (1973). Brennan “found the restriction [by violation of specific guarantees] altogether unnecessary.” *Id.* See also *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (“With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”). See also Bandes, *supra* note 21, at 285 (“By keying cognizable injury to the number of people who share it, the Court increasingly abdicates its role as the power of the political branches grows.”); Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1059–60 (1985).

²⁴ Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1460 (1988)

²⁵ See, e.g., Harvard Law Review Association, *supra* note 14, at 219–24; *Lyons*, 461 U.S. at 114 (Marshall, J., dissenting).

²⁶ See *Lyons*, 461 U.S. at 134, 135 (Marshall, J., dissenting).

²⁷ This is not to suggest that individual opinions are always supported by precedent or that individual jurists are not subject to their own biases when deciding cases or exercising their jurisprudential discretion. However, for the purposes of this Note, the focus is on how jurists *rationalize* their opinions rather than on what motivates them.

²⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added).

constructed “his” opinion.²⁹ If we want to understand why the Court refused to listen to Adolph Lyons—if we want to understand the Court’s role in the deaths of those like George Floyd—then we must read the case’s history, the myriad lines of cases—the lineages—that came together and manifested in the Burger Court’s majority opinion. Studying those lineages reveals that Adolph Lyons was denied standing not only because of the normative biases³⁰ and judicial activism³¹ of the Burger Court, but also because of the normative biases and judicial activism of *past* Courts. Studying the *Lyons* lineages exposes a long-standing, multi-generational bias in our jurisprudence. It shows how the very nature of Supreme Court jurisprudence allows the (arguably unprincipled) principles of our ancestors to determine our fate today. And it helps to demonstrate how (unintentional or intentional) obfuscation in jurisprudence sets the table for bad opinions and worse decisions. Justice Robert Jackson, dissenting from the Court’s ignominious decision in *Korematsu v. United States*, wrote that “once a judicial opinion rationalizes [a racially discriminatory] order to show that it conforms to the Constitution . . . [t]he principle then lies about like a loaded weapon Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”³² This Note explores what “loaded weapons” earlier Courts left lying about for the Burger Court to “expand . . . to new purposes” in *Lyons*.

Second, this Note argues for greater transparency in jurisprudence. Over time, jurisprudence reduces the factual and political contexts of cases and controversies to *seemingly* neutral principles. When jurists state a principle without identifying its factual origins, they obscure the law. And with each generation repeating the principle—and sometimes further obscuring both its meaning and import—“the original understanding is increasingly distorted[,]” just as in a game of telephone.³³ For the law is not doctrine *derived from* cases and controversies; the law *is* cases and controversies. Over generations of Courts, the cumulative effect of such a reductionist approach to “say[ing] what the law is” cloaks modern decisions in the illusion of historical legitimacy. It is far easier to write opinions like that of the majority in *Lyons* when jurists do not feel the need to acknowledge the factual origins or jurisprudential development of the principles on which they rely. The factual context from which the original principle sprouted must be incorporated into later

²⁹ See, e.g., Ian Millhiser, *How the Supreme Court Helped Make it Possible for Police to Kill by Chokehold*, THINKPROGRESS (Dec. 4, 2014, 7:09 PM), <https://archive.thinkprogress.org/how-the-supreme-court-helped-make-it-possible-for-police-to-kill-by-chokehold-d9f17a773190/> (arguing that Lyons’s story is “the story of how arcane legal doctrines can reshape decades of police practices”).

³⁰ For thorough discussions of how normative biases play out in Supreme Court jurisprudence, see Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1068–70 (2015) (discussing how standing doctrine has fragmented along normative lines); Andrew Hessick, *Probabilistic Standing*, 106 NW. L. REV. 55, 58 (2012) (discussing how all of standing’s elements that involve probability are prey to the biases of the jurist); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1155 (1993) (discussing how normative biases infect determinations of injury cognizability); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231–32 (1988) (arguing that the injury-in-fact requirement cannot be applied neutrally).

³¹ See Suzanna Sherry, *Issue Manipulation by the Burger Court*, 70 MINN. L. REV. 611, 649 n.166 (1986).

³² *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

³³ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 264–65 (1986) (Brennan, J., dissenting) (describing how the Court’s result in that case was “the product of an exercise akin to the child’s game of ‘telephone,’ in which a message is repeated from one person to another and then another [, and] after some time, the message bears little resemblance to what was originally spoken”).

reliance on the principle, and every change in the principle must, likewise, be acknowledged. With this in mind, that the majority opinion in *Lyons* fails to adequately contextualize and justify its holding is one of this Note's primary critiques.

While transparency will not, alone, undo bad decisions or cure systemic problems, it should enhance the federal judiciary's legitimacy in the eyes of the public and shift the conversation away from the political leanings of the current judges and Justices and toward the historical leanings of the judiciary as a whole. Only by investing in transparency can we begin to understand *how* the biases of our ancestors influence the opinions of the current Court. Only through a historical understanding of systemic issues can we hope to reform the third branch.³⁴ We must confront and interrogate our principles, not stripped of their facts, but fully clothed in them. Then, and only then, can we make informed decisions about whether to keep or discard those principles. Only then can we begin to reconcile the disconnect between what our law is and what we want it to be, regardless of political ideology. While such factual origins *may* be readily apparent to legal scholars and jurists, they are not so clear to the people who are practically affected by judicial decisions. Some jurists already put forth the (sometimes marginal and sometimes substantial) effort to transparently contextualize the principles on which they rely for the benefit of the parties involved,³⁵ but it is a project in which all must engage for it to have meaningful effects. And it is essential that jurists make this effort, for the legitimacy of a branch that has "neither FORCE nor WILL, but merely judgment[.]" depends upon the nature and strength of its opinions.³⁶ Regardless of whether the *Lyons* decision is legally supportable, the *Lyons* opinion is not.

Section I of this Note reviews the *Lyons* decision, emphasizing how Justice White deployed certain legal principles to build his opinion and deny *Lyons* standing for injunctive relief. Section II then explores the lineages of those legal principles. This means tracing each principle back through both time and jurisprudence to its original source, not within its broader doctrinal development, but within *Lyons*'s particular ancestry. Section III then summarizes what the research into those lineages reveals and discusses the implications for federal jurisprudence. Finally, Section IV offers recommendations for heightened jurisprudential transparency as a necessary first step in judicial reform.

I. LYONS

A. *What Happened on the Street*

In 1976, Adolph Lyons was pulled over by two Los Angeles Police officers because one of his taillights was out.³⁷ Guns drawn, the officers ordered Lyons to face his car,

³⁴ As Richard Fallon has suggested, "good doctrinal Realist scholarship might help to trigger reform by exposing concealed biases." Fallon, *supra* note 30, at 1116.

³⁵ See, *infra* IV. Recommendations.

³⁶ THE FEDERALIST NO. 78 (Alexander Hamilton). See also Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 861 (2010) (citing Hamilton and arguing that "[f]orce of reasoning is all there is to preserve the public's trust in the judiciary").

³⁷ *City of Los Angeles v. Lyons*, 461 U.S. 95, 114 (1983) (Marshall, J., dissenting). It must be noted that while the burned-out taillight was the stated *justification* for stopping Lyons, that justification does not necessarily account for *why* Lyons was stopped. As David A. Harris points out, to assert that traffic-code violations will be used by police as pretexts to disproportionately pull over racial minorities may seem bold and unsupported by data "because virtually no one—no individual, no police department, and no other

spread his legs, clasp his hands, and place them on his head.³⁸ Lyons complied.³⁹ Following a pat-down, Lyons dropped his arms.⁴⁰ An officer then “grabbed Lyons’s hands and slammed them onto his head.”⁴¹ Lyons was still clutching his keys, so they, too, slammed into his head.⁴² When Lyons complained of the pain this caused him, the officer began choking him.⁴³ “As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated.”⁴⁴ The officers cited Lyons for the taillight and released him.⁴⁵ Today, Lyons’s story is all too familiar, but, in 2021, that Lyons *survived* his encounter with the police is tragically unfamiliar.⁴⁶

What is also unfamiliar to us in 2021 is the relative ease with which Lyons was able to challenge the LAPD in federal court. Today, those subjected to police violence must show that 1) their own conduct was “innocent,” 2) the police have repeatedly violated their

government agency—has ever kept comprehensive statistics on who police stop.” David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1996-1997). But what data there is supports the unexceptional revelation that “police use traffic regulations to investigate many innocent citizens; these investigations, which are often quite intrusive, concern drugs, not traffic; and African-Americans and Hispanics are the targets of choice for law enforcement.” *Id.* African Americans do not need data to tell them what they “understand quite well already”—that they will very often be pulled over for “driving while black.” *Id.* at 546, 560.

³⁸ *Lyons*, 461 U.S. at 114 (Marshall, J., dissenting).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 115.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ “Black people in this country are acutely aware of the danger traffic stops pose to Black lives.” Jamison v. McClendon, 476 F. Supp. 3d 386, 414 (S.D. Miss. 2020). Today, we are all too accustomed to seeing on the news that the police, somewhere in America, have killed again. But these well-publicized killings, and the rage they naturally elicit, are only the tip of the iceberg. Data describing the full extent of police violence is impossible to find. In spite of legislative efforts like the Death in Custody Reporting Act of 2013, it remains unlikely that state and local law enforcement are accurately self-reporting. *About the Data, MAPPING POLICE VIOLENCE*, <https://mappingpoliceviolence.org/aboutthedata> (last visited Aug. 28, 2020). As Paul Butler suggests, “in general government officials do not seem to think the public needs to know how many people our law enforcement officers—public servants paid by tax dollars—kill every year.” PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 54 (The New Press ed. 2018). The inconsistency of the data that is available and the lack of meaningful specificity in that data means that only the broadest statistical strokes are possible. Between 2013 and 2019, for example, the average number of police killings per year was 1091, and nearly all of the victims died by shooting. In that same time frame, there were 66 deaths from beatings or restraint, including neck restraints. Of the 1147 people killed by police in 2017, 640 were either suspected of a non-violent offense or no offense whatsoever. 149 people—only a third of whom were white—were unarmed when the police killed them. 89 people were killed by police after being stopped, like Lyons, for a traffic violation. *National Trends, MAPPING POLICE VIOLENCE*, <https://mappingpoliceviolence.org/nationaltrends> (last visited Aug. 28, 2020). Although the available data paints an incomplete picture of the extent and nature of police violence, disturbing patterns are easily discernible. Indeed, the fact that the picture is intentionally incomplete is in itself disturbing. “The information about itself that a society collects—and does not collect—is always revealing about the values of that society. We know, as we should, exactly how many police officers are killed in the line of duty. But we do not know, as we should, exactly how many civilians are killed by the police.” BUTLER, *supra*, at 54.

rights, and 3) the risk of future injury is not too speculative.⁴⁷ Lyons was the last plaintiff to challenge such police violence without having to overcome these barriers to court access that the *Lyons* decision erected.⁴⁸

B. The Case in Court

In February 1977, Lyons sued both the individual police officers and the City of Los Angeles under 42 U.S.C. § 1983 for violations of the Fourth, Eighth, and Fourteenth Amendments.⁴⁹ To remedy these violations, Lyons sought monetary damages, as well as declaratory and injunctive relief.⁵⁰ Initially, the district court entered partial judgment for Los Angeles regarding injunctive and declaratory relief.⁵¹ But the Ninth Circuit reversed, holding that Lyons had standing to pursue these claims because “the threat of future injury to not only Lyons, but to every citizen in the area” was “much more immediate” than in distinguishable precedent on which the district court had relied.⁵² In support, the court called on the “long-standing rule of equity that a case does not become moot as to the specific petitioner . . . even if the complained-of conduct has ceased, if there is a possibility of a recurrence”⁵³ Under the doctrine of “capable of repetition, yet evading review,”

⁴⁷ See Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2272–75 (2020).

⁴⁸ Although it is beyond the scope of this Note to address fully *Lyons*’s progeny, a brief summary may demonstrate how consequential the decision has been. Just twelve days after *Lyons*, the Court decided *Kolender v. Lawson*, where it established a “credible” or “realistic” threat standard for cases in which, unlike in *Lyons*, the challenged conduct is repeated. See Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1101 (1987); Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1820–21 (2000); Mank, Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute’s Misuse of Lyons’s Realistic Threat of Harm Standing Test*, 42 ARIZ. STATE L.J. 837, 851 (2010). Still, Sunita Patel—UCLA professor and former trial counsel for the plaintiffs in *Floyd v. City of New York*—describes in detail how, in America today, *Lyons* maintains its control over attempts to enjoin abusive and brutal police practices. Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2272–75 (2020). Patel points out that, even as attempts are made to understand the fallout of *Lyons* and other cases that are critical to structural reform litigation—*Monell v. Dep’t of Soc. Servs. of New York* and *Wal-Mart Stores, Inc. v. Dukes*—it remains impossible to know how many suits have failed in the face of the barriers these decisions have erected. *Id.* at 2263. Today, in actual practice, *Lyons* presents three such barriers: the relative innocence of the plaintiff, whether the challenged conduct has been repeated, and whether future injury appears too speculative. *Id.* at 2272. Yet, if the government has targeted a minority group, all three barriers—innocence, repetition, and speculation—will be more easily overcome. Mank, *supra*, at 850, 853, 873; Garrett, *supra*, at 1827 (discussing *Honig v. Doe*, where the Court distinguished *Lyons* because “individuals [were] targeted by a government policy”). But the successes are few and far between. Patel, *supra*, at 2264. *Lyons*’ effects have been “pervasive, extending beyond the civil rights context in which [they were] developed,” to include “alleged victims of voter intimidation, police brutality, unjustified body-cavity searches, employment discrimination, abortion clinic violence, [and] religious discrimination.” Little, Laura E. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 952, 935 (1993). Particularly in cases where “the Eleventh Amendment and absolute immunity rules . . . prohibit money damages[,]” *Lyons* has “obliterate[d] not only the most effective remedy”—injunctive relief—“but the sole remedy.” *Id.* at 952–53. “The intersection of *Lyons* and qualified immunity rules . . . creates an impasse not only for many victims of official misconduct, but also for the development of the law itself.” *Id.* at 953.

⁴⁹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 115 (1983) (Marshall, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.* at 98–99 (White, J., majority).

⁵² *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1246 (9th Cir. 1980) (cleaned up).

⁵³ *Id.* at 1248 (internal quotation marks omitted).

Lyons’s claims for injunctive and declaratory relief had to be heard in court.⁵⁴ Otherwise, the court concluded, “it is difficult to see how anyone can ever challenge police or similar administrative practices, since usually no one can know definitely if he is going to be subject to police scrutiny in the future.”⁵⁵ Emphasizing the significance of denying standing, the court finished by acknowledging that chokeholds may be legal, “but as long as we refuse to allow anyone to attack their constitutionality . . . we tell the citizen that there is no guardian of his constitutional rights.”⁵⁶

The Supreme Court denied certiorari in what would become known as *Lyons I*,⁵⁷ and on remand, the district court determined that the City’s policy—authorizing the LAPD to use chokeholds—must be constrained by the Fourteenth Amendment’s Due Process Clause.⁵⁸ Concluding that the City could not “constitutionally authorize the use of such force in situations where death or serious bodily harm is not threatened,” the district court issued a preliminary injunction.⁵⁹ After the Ninth Circuit affirmed, Los Angeles asked the Supreme Court to stay that injunction until the Court could decide on a second petition for certiorari.⁶⁰ Justice Rehnquist—who had dissented in *Lyons I*—granted the stay, noting that it was substantially likely that “an additional Member of th[e] Court would now join” with the three Justices who had dissented a year earlier.⁶¹ Indeed, it is substantially likely that Rehnquist was referring to Justice Sandra Day O’Connor, who—recently appointed by President Reagan—had joined the Court just four days before Rehnquist penned the stay order.⁶² A few months later, the Court granted the City’s second request for certiorari.⁶³

On April 20, 1983, the Court issued its opinion, holding that Lyons lacked standing to seek injunctive relief.⁶⁴ Lyons did not have the right to be heard.⁶⁵ In effect, if *life-threatening* chokeholds violated a constitutional right, the Article III judiciary would not

⁵⁴ *Id.* at 1249.

⁵⁵ *Id.* at 1250.

⁵⁶ *Id.* (cleaned up).

⁵⁷ *City of Los Angeles v. Lyons*, 449 U.S. 934 (1980). In dissent, Justice White, joined by Justices Powell and Rehnquist, allowed that Lyons had a “right to damages for an alleged past violation of his constitutional rights[,]” but contended that the “threat of future injury” to Lyons was too “abstract . . . to create the personal stake *required* by Art. III.” *Id.* at 936–37 (White, J., dissenting) (internal quotation marks omitted) (emphasis added). Because Lyons’s “position” could not “be distinguished from that of any other person who may at some future date have a confrontation with the Los Angeles police[,]” White argued, Lyons lacked “standing to press his claims for equitable relief.” *Id.*

⁵⁸ *City of Los Angeles v. Lyons*, 461 U.S. 95, 118–19 (1983) (Marshall, J., dissenting).

⁵⁹ *Id.* at 119–20 (cleaned up).

⁶⁰ *City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981).

⁶¹ *Id.* at 1310.

⁶² *See Justices 1789 to Present*, SUPREMECOURT.GOV,

https://www.supremecourt.gov/about/members_text.aspx (last visited Aug. 13, 2020).

⁶³ *City of L.A. v. Lyons*, 455 U.S. 937 (1982).

⁶⁴ *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

⁶⁵ “The question is not what you have to say, but whether you can be heard to say it (that is, are you ‘standing?’)” Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1460 (1988). “What gave Mr. Lyons the ‘right’ to speak for others and insist on legality in others’ behalf?” *Id.* at 1510.

participate in protecting that right. In *Lyons*, the Supreme Court did indeed “tell the citizen that there is no [federal judicial] guardian of his constitutional rights.”⁶⁶

On one level, this is an over-simplification. Writing for the majority, Justice White did allow *Lyons* to pursue a damages remedy for past injuries.⁶⁷ So *Lyons* did have a right to be heard regarding the humiliating and degrading violence to which he had previously been subjected. If the courts found that his constitutional rights had been violated, *Lyons* would get paid.⁶⁸ But *Lyons* did not have a right to be heard if he wanted to stop the police from putting him or any other person in an *unwarranted* and *potentially lethal* chokehold in the future.⁶⁹ Nor did *Lyons* have a right to be heard if he did not want to live in continual fear of repeated police brutality. And if the police wanted to keep operating under policies that allowed such arbitrary use of lethal force, they were free to do so.⁷⁰ As Justice Thurgood Marshall noted at the conclusion of his vigorous dissent:

We now learn that wrath and outrage cannot be translated into an order to cease the unconstitutional practice, but only an award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate The federal judicial power is now limited to levying a toll for such systematic constitutional violations.⁷¹

⁶⁶ *Lyons v. City of L.A.*, 615 F.2d 1243, 1250 (9th Cir. 1980). Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 213 (1952) (arguing that “when all the facts and arguments are before a court, in a suitable case and on a suitable record, it must decide, and invariably does decide, since a refusal to do so is a decision in favor of the constitutionality of the action being reviewed”).

⁶⁷ *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

⁶⁸ *Id.* at 111, 113 (“Nor will the injury that *Lyons* allegedly suffered in 1976 go unrecompensed; for that injury, he has an adequate remedy at law.”).

⁶⁹ *Id.* at 111. But, as Paul Gowder argues, “legal injuries both supporting and stemming from stigmatized racial identities should be understood as continuing, not isolated, injuries to every member of the class potentially subjected” to them, and cases like *Lyons*, “which denied standing for injunctive relief to the victim of a seemingly racially discriminatory chokehold, should be overruled.” Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 330 (2014).

⁷⁰ *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting). Yet, again, as Paul Gowder contends, “if hierarchical race *itself* is an injury, then all persons ascribed subordinated racial status are subject to a continuing injury . . . [and] any standing concerns are eliminated.” Gowder, *supra* note 69, at 392. *Lyons*, Gowder argues, “could simply have shown that he suffered a continuing injury from being a member of a class seen as fair game for police violence—the injury of degraded status as well as its real-world consequences, such as living in fear of the police and the social and economic consequences of disparate criminal attention.” *Id.*

⁷¹ *Lyons*, 461 U.S. at 137. Perhaps Thurgood Marshall, as the only African American on the Court, and the only justice to mention race in his opinion, was more readily able to empathize with *Lyons*. Justice Sandra Day O’Connor offers some insight into this proposition that goes beyond scholarly arguments of normative bias: “Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice. At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal arguments but also to the power of moral truth.” Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992). As Harry T. Edwards suggests, in some cases, “particularly those in areas involving equal opportunity and discrimination, standing, and criminal law . . . black judges may sometimes bring a unique vision to the judicial deliberative process. Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of

Without a doubt, the *Lyons* decision toed the literal line when it comes to Chief Justice John Marshall’s “settled and invariable principle, that every right, when withheld, must have a remedy,” but it seems far astray from Marshall’s further admonition that “every injury [must have] its *proper* redress.”⁷² The *Lyons* decision permits the government to provide a monetary remedy that falls far short of *properly* redressing the injury (if such injuries can ever, truly, be redressed). It is to apply Oliver Wendell Holmes’s “bad man” vision of contracts—where a contract is simply a promise to pay for breaking it⁷³—to the protections afforded the American people as beneficiaries of the constitutional trust.⁷⁴

blacks grow up with a heightened awareness of the problems that pertain to these areas of law.” Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 328 (2002). “There is a human tendency to understand and empathize with those most like us. Judges are not exempt from this tendency, which often leads them to best understand and appreciate the motivations of those who share their defining attributes, such as class, gender, race, and prestige.” Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1319 (1999). “The divide between the upstanding officer, often from the same class and race as the judge, and the marginalized victim, is typical in police brutality cases . . .” *Id.* at 1325. Marshall may have presciently understood the fallout from this judicial validation of a violate-now-pay-later philosophy, for, in America today, “police brutality is so widespread, and so predictable,” that many cities purchase insurance policies to pay damages to victims of police abuse, and police departments are “less likely to encourage their officers to act responsibly because paying for brutality is already included in the budget.” PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 55 (The New Press ed. 2018). See also Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815–17 (2000) (“Obtaining equitable relief is a critical goal of litigation where police departments are willing to ignore large damage awards rather than alter pervasive practices of police brutality or racial profiling.”); Bandes, *supra*, at 1337 (noting that this focus on monetary damages in cases like *Lyons* has “forced police brutality plaintiffs to file damage claims instead of seeking the appropriate system-wide declaratory and injunctive relief”).

⁷² *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (emphasis added). See Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1205 (2014) (noting that these principles relied on in *Marbury* “are in tension with nonjusticiability doctrines, for the notion that federal courts should entirely abstain from remedying particular violations of law is tantamount to saying that judges should treat the law in question as null and void”); John C. Jeffries Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 83 (1989) (arguing that “[t]he assumption of compensation as a universal desideratum of the law governing official misconduct seems . . . misguided”).

⁷³ “But what does it mean to be a bad man? Mainly . . . a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

⁷⁴ “The public, the collective body, has a stake in the outcome whenever the issue is whether government has violated its charter. Each person in our society is one of the settlers and beneficiaries of the trust which is civil government under the Lockean model. When the trustee violates the trust, each person is aggrieved. A standing doctrine consistent with the political philosophy so important to our constitutional system cannot fail to permit judicial challenge when the trust is broken.” Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 118 (1985). See also Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) (writing of Chief Justice Burger’s dissent in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and suggesting that Burger’s proposal “[t]o abolish the exclusionary rule and replace it with an action for damages” would allow “the government to buy itself out of having to comply with constitutional commands”).

C. Justice White's Opinion

i. Legal Principles: The Opinion's Foundation

Under Article III a party must “alleg[e] an actual case or controversy.”⁷⁵ The plaintiff must have a “personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions.”⁷⁶ “Abstract injury is not enough”; rather, “the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.”⁷⁷

However, when equitable relief is requested, the “case or controversy considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief.”⁷⁸ So, even where a case or controversy exists, there must still be an “adequate basis for equitable relief[,]” which requires a “likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”⁷⁹ And “past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.”⁸⁰ In the absence of a “sufficient likelihood” of future injury, federal courts “may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement are unconstitutional.”⁸¹

ii. The Argument: How Justice White Built on These Principles

a. An Existing Case or Controversy

Justice White began his opinion by rejecting the notion that Lyons's claim for injunctive relief satisfied Article III's case or controversy requirement.⁸² Any future injury to Lyons “was not sufficiently real and immediate” to establish standing.⁸³ Analogizing to *O'Shea v. Littleton*, where a class of mostly Black plaintiffs charged two judges with “discriminatory enforcement of the criminal law,”⁸⁴ White suggested that Lyons, like the plaintiffs in *O'Shea*, would “conduct [his] activities within the law and so avoid . . . the

⁷⁵ *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983) (citing *Flast v. Cohen*, 392 U.S. 83, 94–101 (1968); *Jenkins v. McKeithen*, 395 U.S. 411, 421–25 (1969)).

⁷⁶ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (internal quotation marks omitted).

⁷⁷ *Id.* at 101–02 (quoting *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–91 (1947); *Md. Casualty Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)) (cleaned up).

⁷⁸ *Id.* at 103 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)) (cleaned up).

⁷⁹ *Id.* (quoting *O'Shea*, 414 U.S. at 499 (1974)) (internal quotation marks omitted).

⁸⁰ *Id.* (quoting *O'Shea*, 414 U.S. at 495–96 (1974)) (cleaned up).

⁸¹ *Id.* at 111 (citing *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974)).

⁸² *Id.* at 101.

⁸³ *Id.* at 103 (quoting *O'Shea*, 414 U.S. at 496 (1974)) (internal quotation marks omitted).

⁸⁴ In *O'Shea*, “a class of plaintiffs claim[ed] . . . discriminatory enforcement of the criminal law . . . [when] a county magistrate and judge were accused of . . . sentencing members of [the] class more harshly than other defendants.” *Lyons*, 461 U.S. at 102.

challenged course of conduct”⁸⁵ Because any future injury to Lyons could occur only via an attenuated causal chain in which Lyons’s own (allegedly) illegal conduct would play a necessary role, his future injury lacked reality and immediacy. White then buttressed his argument with *Rizzo v. Goode*,⁸⁶ where the Court had found that causation was “even more attenuated” than in *O’Shea* because the claim relied on “what one or a small, unnamed minority of policemen might do . . . in the future because of that unknown policeman’s perception of departmental procedures.”⁸⁷ The alleged police violence was the work of bad apples, not departmental policy. To present a sufficient claim, White concluded, Lyons would have to make two demonstrations.⁸⁸ First, Lyons would have to show that he “would have another encounter with the police.”⁸⁹ Second, even if he could make that (all but impossible) showing, Lyons would also have to show “either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.”⁹⁰ In spite of the district court’s finding that the City of Los Angeles did, in fact, authorize the use of chokeholds in non-life-threatening situations,⁹¹ Justice White held that Lyons’s claim was too speculative to establish an Article III case or controversy.⁹²

b. An Adequate Basis for Equitable Relief

Having found the threat of future injury insufficient, Justice White could have stopped there. Instead, White further analogized to *O’Shea* and *Rizzo* to suggest that, even if Lyons’s alleged future injury had been sufficiently real and immediate, “an adequate basis for equitable relief” might still be lacking.⁹³ Lyons’s claim was implicitly similar to the claim in *Rizzo*: a “few instances of [constitutional] violations by individual police officers, without any showing of a deliberate policy . . . [do] not provide a basis for equitable relief.”⁹⁴ Unless Lyons was “*realistically threatened* by a repetition of his experience[,]” he could not seek an injunction.⁹⁵ Given the already established “speculative nature of Lyons’[s] claim of future injury,” equitable relief was unavailable.⁹⁶ But even if Lyons could allege the necessary “likelihood of substantial and immediate irreparable injury,” he would still fail to satisfy the requirements for equitable relief because he had “an adequate remedy at law” by way of his claim for damages.⁹⁷ Failing to meet both

⁸⁵ *Id.* at 103 (quoting *O’Shea*, 414 U.S. at 497 (1974)) (internal quotation marks omitted).

⁸⁶ In *Rizzo*, “plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and against City residents in general.” *Lyons*, 461 U.S. at 103.

⁸⁷ *Id.* at 103–04 (quoting *Rizzo v. Goode*, 423 U.S. 362, 372 (1976)) (internal quotation marks omitted).

⁸⁸ *Id.* at 105–06.

⁸⁹ *Id.*

⁹⁰ *Id.* (emphasis in original).

⁹¹ *Id.* at 113 (Marshall, J., dissenting).

⁹² *Id.* at 108.

⁹³ *Id.* at 103 (citing *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

⁹⁴ *Id.* at 104 (quoting *Rizzo v. Goode*, 423 U.S. 362, 372 (1976)).

⁹⁵ *Id.* at 109 (emphasis added).

⁹⁶ *Id.* at 111 (cleaned up).

⁹⁷ *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)) (cleaned up).

requirements for equitable relief meant that Lyons “was no more entitled to an injunction than any other citizen of Los Angeles.”⁹⁸

c. Factors Counseling Restraint

Having denied Lyons’s claim on both equitable restraint and standing grounds, Justice White could have, again, called it a day, but he had more work to do. In characterizing Lyons’s claim for injunctive relief as an “invitation to slight the preconditions for equitable relief,” White invoked several principles that “counsel[ed] restraint.”⁹⁹ First, the “need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states’ criminal laws in the absence of irreparable injury which is both great and immediate.”¹⁰⁰ Second, “the normal principles of equity, comity and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities.”¹⁰¹ Finally, the “federal courts,” White reiterated, “must recognize the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.”¹⁰² With these factors in mind, White suggested that allowing federal courts to provide injunctive relief to “oversee the conduct of law enforcement authorities on a continuing basis” would be inappropriate “absent far more justification than Lyons [had] proffered.”¹⁰³ But—with so much weighing against Lyons—White offered this consolation: “withholding injunctive relief does not mean that the federal law will exercise no deterrent effect”; damages remedies and criminal prosecutions of “those who deliberately deprive a citizen of his constitutional rights” remained available to vindicate the threatened rights.¹⁰⁴

II. HOW WE GOT HERE: THE *LYONS* LINEAGE

To the extent that the [justiciability] doctrines prevent certain suits from being brought at all, the excluded suits do not correspond to any proposed purpose of the exclusion. *We are left only with the principles’ historical pedigree, which cannot sustain them.*¹⁰⁵

How did we get here? To answer that question, we will now consider the legal lineages from which *Lyons* drew support. This is not an inquiry into each legal principle’s doctrinal evolution. Rather, as with establishing a chain of title, we track each principle back to its source through the cases *actually* cited by each generation of jurists to support their opinions and then move forward in time back to *Lyons*. So, instead of tracing each principle’s evolution at the level of the species, we follow each principle’s evolution at the level of a single family line. Each principle has its own lineage. Some of these lineages

⁹⁸ *Id.* (cleaned up).

⁹⁹ *Id.* at 112.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)) (cleaned up).

¹⁰³ *Id.* at 113.

¹⁰⁴ *Id.* at 112–13 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 503 (1974)).

¹⁰⁵ Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 121 (2007) (emphasis added).

involve only a single line of cases. Others involve multiple lines meeting and intertwining at specific points in time. This Section tracks each lineage, one principle at a time. We begin with standing and the subordinate principles that shape it.

A. *The Standing Lineage*

i. An Actual Case or Controversy

Justice White’s initial proposition that a plaintiff must “alleg[e] an actual case or controversy”¹⁰⁶ is not itself controversial. Article III’s jurisdictional grant enumerates “cases” and “controversies” over which the judicial power extends.¹⁰⁷ What is controversial, however, is what is meant by these terms.¹⁰⁸ From an originalist perspective, scholarship has well established that cases and controversies carried distinct meanings to the Framers of the Constitution.¹⁰⁹ As legal scholar Robert Pushaw has argued,

The word “controversy” supplies a textual basis for application of current justiciability doctrines, which concern judicial resolution of bilateral disputes, to Article III “Controversies.” However, the term “case” provides no constitutional support for application of standing, ripeness, or mootness to Article III “Cases,” because those doctrines ignore the key judicial function of exposition.¹¹⁰

While neither the *Lyons* majority nor the dissent raised this distinction, it has important implications for how *Lyons*’s claims were received by the Court. This is so because, in late eighteenth century public law cases, “[a] citizen who had suffered no individualized injury could challenge unlawful government action in a variety of ways, most commonly through prerogative writ procedure.”¹¹¹ In 1789, *Lyons*’s claim for damages based on past injury

¹⁰⁶ *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983) (citing *Flast v. Cohen*, 392 U.S. 83, 94–101 (1968); *Jenkins v. McKeithen*, 395 U.S. 411, 421–25 (1969)).

¹⁰⁷ U.S. CONST. art. III, § 2, cl. 1.

¹⁰⁸ See, e.g., James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1356–57 (2015) (“Whereas the . . . term [controversies] connotes a dispute between opposed parties (and does much of the textual work in arguments for an adverse-party requirement), the . . . term [cases] has proved more elusive. Some scholars have argued, despite the tendency of the Supreme Court to conflate the two terms, that the term ‘case’ confers a broader power than simply that of dispute resolution.”). See also Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 14 (1984). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695, 721–23 (2004).

¹⁰⁹ See, e.g., Robert J. Pushaw Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 449–50 (1994) (“In the eighteenth century, ‘case’ referred to a cause of action requesting a remedy for the claimed violation of a legal right, in which a judge’s primary role was to answer the legal question presented through ‘exposition’—the process of ascertaining, applying, and interpreting the law in light of precedent and the facts presented. A dispute between parties was a usual—but not necessary—ingredient of a ‘case,’ and resolving any such disagreement was less important than legal exposition By contrast, ‘controversy’ meant a bilateral dispute wherein a judge served principally as a neutral umpire whose decision bound only the immediate parties.”).

¹¹⁰ *Id.* at 450.

¹¹¹ *Id.* at 480–81.

would have been construed as a controversy, as it was by the *Lyons* Court,¹¹² but his claim for injunctive relief might have been construed as a case. The claims may, indeed, have been fragmented in 1789, but not in the same fashion as they were in 1983. Assuming, then, that the case/controversy distinction was clear at the Founding, how was that distinction not passed down through the centuries to the *Lyons* Court?

The case/controversy lineage begins with the Constitution, and over the first century of decisions, there is no indication that the terms had become indistinguishable.¹¹³ It is not until 1887 that we find the first signs of legal mutation. In that year, Justice Stephen Field, riding circuit in California, penned an opinion in *In re Pacific Railway Commission*.¹¹⁴ There, a district attorney sought a peremptory order to compel Leland Stanford, president of the Central Pacific Railroad, to answer interrogatories by the Pacific Railway Commission.¹¹⁵ Those interrogatories regarded whether Stanford or his company had used federal financial aid to influence legislation or to achieve other “illegitimate or corrupt purposes.”¹¹⁶ Because the court viewed the statute under which the Commission operated as asking the Article III judiciary to exercise jurisdiction over non-judicial proceedings, the relevant provision of the act was invalidated.¹¹⁷ Drawing on *Chisolm v. Georgia* and *Osborn v. Bank of the United States*, Justice Field made the unsupported assertion that “[t]he term ‘controversies,’ if distinguishable at all from ‘cases,’ is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.”¹¹⁸ Neither *Chisholm* nor *Osborn* provides support. In *Osborn*, Chief Justice Marshall asserted that:

[The judicial] power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.¹¹⁹

The Chief Justice thus described the nature of a case, but Justice Field added, without support, that the “term [case] implies the existence of present or possible adverse parties”¹²⁰ In so doing, Field began the process of conflating cases and controversies.¹²¹

¹¹² *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (acknowledging “that Lyons had a live controversy with the City” that satisfied Article III).

¹¹³ The proposition passes unaltered through *Hayburn’s Case*, 2 U.S. 409, 409–11 (1792), *Chisholm v. Georgia*, 2 U.S. 419, 431–32 (1793), *Marbury v. Madison*, 5 U.S. 137, 173–74 (1803), *Osborn v. Bank of U.S.*, 22 U.S. 738, 819 (1824), *Cherokee Nation v. Georgia*, 30 U.S. 1, 15–16 (1831), and *Georgia v. Stanton*, 73 U.S. 50, 77 (1867).

¹¹⁴ *In re Pac. Ry. Comm’n*, 32 F. 241 (C.C.N.D. Cal. 1887).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 258.

¹¹⁸ *Id.* at 255.

¹¹⁹ *Osborn v. Bank of U.S.*, 22 U.S. 738, 819 (1824).

¹²⁰ *In re Pac. Ry. Comm’n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887).

¹²¹ See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1422 (2015) (discussing “Justice Field’s reformulation of the Marshall-Story definition of a ‘case,’ from one that contemplates ex parte applications to one that requires adverse parties” and tracking how that reformulation catalyzed the “conflation of cases with controversies”).

Because the Commission’s proceedings did not fall within Field’s description, and because the Commission was not a judicial body, Article III courts lacked jurisdiction.

Although the Supreme Court would later hold that federal courts could act to assist an agency’s investigation,¹²² Justice Field’s conflation of cases and controversies survived¹²³ and was given Supreme Court approval in the next generation of the lineage—*Muskrat v. United States*.¹²⁴ *Muskrat* had its origins in a 1902 federal statute that allocated land to Native American tribes.¹²⁵ After passing that statute, Congress approved restrictions on those land grants and expanded the class of persons who could share in the allotted lands.¹²⁶ Then, in 1907, Congress passed another law authorizing individual Cherokee to bring suit in the Court of Claims “to determine the validity of any acts of Congress” that followed the original 1902 allocation.¹²⁷ David Muskrat and J. Henry Dick challenged the validity of a statute that had expanded the “number of persons entitled to share in the final distribution of lands and funds of the Cherokees” while William Brown and Levi B. Gritts challenged the validity of a statute that had “empowered the Secretary of the Interior to grant rights of way for pipe lines over” lands previously granted to the Cherokee.¹²⁸ Some plaintiffs, therefore, sought to keep their allotments undiminished while others sought to keep their property unencumbered.

But the Court never reached the merits. Because Congress had authorized the actions in order to test the statutes’ constitutionality, the Court viewed the suits as beyond its jurisdiction.¹²⁹ In support, Justice William Day relied on Justice Field’s contention that cases and controversies were virtually indistinguishable and that both required adversity.¹³⁰ Once this jurisprudential step had been taken, it was easy to argue that the parties were not truly adverse—since Congress had specifically authorized the suits—and hold that the judicial power could not be exercised.¹³¹ Conflation was, therefore, an essential move in denying the Cherokee their day in court. Without it, there would be no impediment to hearing a friendly case designed to test a statute’s constitutionality. And this jurisprudential move toward conflation remained undisturbed as it was passed down to the Burger Court, where it implicitly denied Lyons his day in court.¹³² Were it not for *Muskrat*’s dramatic

¹²² *Id.* at 1380 (citing *Interstate Com. Comm’n v. Brimson*, 154 U.S. 447, 489 (1894)).

¹²³ *Id.* at 1422.

¹²⁴ *Muskrat v. United States*, 219 U.S. 346 (1911).

¹²⁵ *Id.* at 347–48; Act of July 1, 1902, ch. 1375, 32 Stat. 716–720, 721.

¹²⁶ *Id.* at 347.

¹²⁷ *Id.* at 350; Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1028.

¹²⁸ *Id.* at 348–49.

¹²⁹ *Id.* at 361–62.

¹³⁰ *Id.* at 356–57. Notably, not only did the Court accept the conflation of the terms, but it also conflated the purpose of the 1907 statute—to test the validity of other congressional statutes—with the purposes of the individual litigants. *Id.* at 360 (noting that “the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress”). See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346, 1422 (2015) (noting that the *Muskrat* Court “recited the ‘present or possible adverse parties’ idea from *Pacific Railway* in the course of rejecting what it perceived as an improper attempt to secure an advisory opinion . . . [a]nd [that] by the middle of the twentieth century, the conflation of cases with controversies was complete”).

¹³¹ 219 U.S. at 361.

¹³² The *Muskrat* formulation was passed on to *Lyons* through *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 259 (1933), *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam), and *Flast v. Cohen*, 392 U.S. 83, 95 n.13 (1968).

departure from the original meaning of cases and controversies, Lyons would have been able to argue, at the very least, that his claim for injunctive relief presented a *case* through which the federal courts would be “duty” bound to determine the constitutionality of chokeholds in order “to say what the law is.”¹³³

ii. Real and Immediate

In denying Lyons standing, Justice White relied on the proposition that “abstract injury is not enough”; rather, “the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.”¹³⁴ White cited four cases in support. Three of them—*Golden v. Zwickler*, *United Public Workers v. Mitchell*, and *Maryland Casualty Co. v. Pacific Coal & Oil Co.*—are rooted in the same legal lineage. The fourth—*Massachusetts v. Mellon*—is the culmination of a second lineage. Within the first lineage, support breaks into two distinct lines of cases, which intertwine in *Aetna Life Insurance Co. v. Haworth*.¹³⁵ These distinct lineages and the lines within the first lineage are considered in turn.

a. The First Lineage: Linguistic Origins

The first line of cases begins and ends in 1850 with *Lord v. Veazie*.¹³⁶ Indeed, when one traces this principle through its hundreds of ancestral iterations, it is not far off the mark to say that all roads lead to *Veazie*. There, faced with the problem of a potentially “friendly” suit, Justice Roger Taney noted that “any attempt, by a mere colorable dispute, to obtain the opinion of the Court upon a question of law . . . when there is no *real and substantial controversy* between those who appear as adverse parties . . . is an abuse . . . punishable [as] contempt.”¹³⁷ Within the lineage, this “real and substantial controversy” language originates here.

The second line of cases begins with *Tutun v. United States*.¹³⁸ In *Tutun*, the Court considered whether circuit courts had jurisdiction to hear appeals to denials of naturalization petitions.¹³⁹ Critical to resolving the jurisdictional question was whether a naturalization petition constituted “a case” within Congress’s jurisdictional grant, the Circuit Court of Appeals Act.¹⁴⁰ But Justice Louis Brandeis broadened the scope of the inquiry beyond the statutory question and instead addressed whether the naturalization proceeding satisfied constitutional jurisdiction.¹⁴¹ Viewing *potential adversity* as helping a

¹³³ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹³⁴ *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (quoting *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89-91 (1947); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)) (cleaned up).

¹³⁵ 300 U.S. 227 (1937).

¹³⁶ 49 U.S. 251 (1850).

¹³⁷ *Id.* at 255 (emphasis added).

¹³⁸ 270 U.S. 568 (1926).

¹³⁹ *Id.* at 574.

¹⁴⁰ *Id.* at 576.

¹⁴¹ *Id.* at 577. See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1393-1400 (2015).

non-contentious case find its way within the Constitution’s jurisdictional limits, Brandeis noted that, whenever litigants pursue judicially enforceable remedies, “there arises a case within the meaning of the Constitution . . . [In this case] [*t*]he *United States is always a possible adverse party*.”¹⁴² Thus, while acknowledging that a constitutional case did not *require* adversity, Brandeis insinuated that a fictional adversity could further explicate how non-contentious proceedings fit into Article III’s jurisdictional grants.

Essential to locating *Tutun* within the Court’s jurisdictional jurisprudence is understanding that Brandeis did not rely on potential adversity in crafting his opinion; rather, Brandeis recognized that non-contentious proceedings like those involved in an *ex parte* naturalization petition stand on their own constitutional legs.¹⁴³ Although *Tutun* does not ultimately provide any support for Justice White’s requirement in *Lyons* of “real and immediate” injury, it demonstrates two important truths. First, *Tutun* shows that, as late as 1926, in spite of *Muskrat*, the Court understood that cases and controversies could present distinct questions of justiciability.¹⁴⁴ Second, Brandeis’s opinion reveals the growing gravitational pull of the perceived necessity of adversity to Article III cases. *Muskrat*’s conflation was not yet complete, but controversies were well on their conceptual way to absorbing cases.¹⁴⁵ Simultaneously, the Court’s justiciability doctrines were beginning to transcend the case/controversy distinction.

Standing alongside *Tutun* in its importance to this line of cases is *Nashville, Chattanooga & St. Louis Ry. v. Wallace*.¹⁴⁶ In *Nashville*, the Court heard an appeal from the Supreme Court of Tennessee regarding whether a state excise tax constituted an as-applied violation of the Commerce Clause and the Fourteenth Amendment.¹⁴⁷ Because the state action had been brought under Tennessee’s Uniform Declaratory Judgments Act, concerns that declaratory judgments could not be reconciled with Article III’s limits on the judicial power informed the Court’s jurisdictional analysis.¹⁴⁸ Focusing on the nature of the underlying dispute rather than the declaratory judgment label, the Court found jurisdiction proper because “the case[] retain[ed] the essentials of an adversary proceeding, involving *a real, not a hypothetical, controversy . . .*”¹⁴⁹ Here originates the juxtaposition of “real” with “hypothetical” that later evolves into *Lyons*’s injury language.

These two lines of cases eventually intertwine in a single generation. Developed in decisions spanning just over a century of Supreme Court jurisprudence—from 1831 to 1933—these lines converge in *Aetna Life Ins. Co. v. Haworth*, the Court’s 1937 decision upholding the constitutionality of the Declaratory Judgment Act.¹⁵⁰ There, the lines comingle to support three justiciability principles. First, the controversy “must be definite and concrete, touching the legal relations of parties having *adverse* legal interests.”¹⁵¹

¹⁴² *Id.* (emphasis added).

¹⁴³ See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346, 1400–1402 (2015).

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 1422.

¹⁴⁶ 288 U.S. 249 (1933).

¹⁴⁷ *Id.* at 258.

¹⁴⁸ *Id.* at 258–59.

¹⁴⁹ *Id.* at 264 (emphasis added).

¹⁵⁰ 300 U.S. 227, 240–41 (1937).

¹⁵¹ *Id.* (citing *S. Spring Gold Co. v. Amador Gold Co.*, 145 U.S. 300, 301 (1892); *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922); *Massachusetts v. Mellon*, 262 U.S. 447, 487–88 (1923)) (emphasis added).

Second, “[i]t must be a *real and substantial controversy* admitting of specific relief through a decree of conclusive character, as distinguished from an opinion *advising* what the law would be upon a *hypothetical* state of facts.”¹⁵² Third, “[w]here there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an *adversary* proceeding . . . the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.”¹⁵³

Aetna thus fuses the demands of its ancestors. *Aetna* draws on *Veazie* for adversity and the requirement of a “real and substantial controversy.”¹⁵⁴ *Tutun*’s implied need for, at the very least, a fictional adversity further colors the *Aetna* requirements.¹⁵⁵ And *Nashville*’s added qualification that a controversy be “real” and not “hypothetical” supports *Aetna*’s aversion to advisory opinions based on “a hypothetical state of facts.”¹⁵⁶ Much of the language deployed in *Lyons* originates in these cases, but all of these ancestors speak of *controversies* rather than of *injuries*. Thus, even as these lines of cases converged, their expression in *Aetna* would in no way have obstructed Lyons’s access to the courts. That is to say, in 1937, Adolph Lyons would not have faced the Burger Court’s injury requirements. Rather, Lyons would have only needed to present a real and substantial controversy based on real, not hypothetical, facts.

b. The Second Lineage: Controversies Become Injuries

The second lineage—which culminates in *Massachusetts v. Mellon*—begins in *Cherokee Nation v. Georgia*.¹⁵⁷ In that case, the Cherokee sought to enjoin the enforcement of recently enacted state laws that would allow the seizure of Cherokee lands in Georgia and abrogate all Cherokee law.¹⁵⁸ The Cherokee argued that these state laws violated the sovereignty of the Cherokee Nation under the Constitution, numerous treaties between the Cherokee and the United States, and federal statutes.¹⁵⁹ Before reaching the merits, the Court addressed whether it had jurisdiction to hear the case.¹⁶⁰ As a starting point, Chief Justice Marshall considered whether the Cherokee Nation should be considered a foreign state within the meaning of the Constitution,¹⁶¹ which he viewed as necessary to

¹⁵² *Id.* at 241 (citing *Muskraat v. United States*, 219 U.S. 346 (1911); *Texas v. ICC*, 258 U.S. 158, 162 (1922); *New Jersey v. Sargent*, 269 U.S. 328, 339–40 (1926); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927); *New York v. Illinois*, 274 U.S. 488, 490 (1927); *Willing v. Chicago Auditorium Ass’n*, 277 U.S. 274, 289–90 (1928); *Arizona v. California*, 283 U.S. 423, 463–64 (1931); *Alabama v. Arizona*, 291 U.S. 286, 291 (1934); *United States v. West Virginia*, 295 U.S. 463, 474–75 (1935); *Ashwander v. TVA*, 297 U.S. 288, 324 (1936)) (emphasis added).

¹⁵³ *Id.* (citing *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 263 (1933); *Tutun v. United States*, 270 U.S. 568, 576–77 (1926); *Fid. Nat’l Bank & Tr. Co. v. Swope*, 274 U.S. 123, 132 (1927); *Old Colony Tr. Co. v. Comm’r*, 279 U.S. 716, 725 (1929)) (emphasis added).

¹⁵⁴ 49 U.S. 251 at 255.

¹⁵⁵ 270 U.S. 568 at 577.

¹⁵⁶ *Nashville*, 288 U.S. at 264. For an in-depth discussion of how *Nashville* came to influence the earlier Eighth Circuit decision in *Aetna*, see Edwin Borchard, *Justiciability*, 4 U. CHI. L. REV. 1 (1936).

¹⁵⁷ 30 U.S. 1 (1831).

¹⁵⁸ *Id.* at 7–8, 13–15.

¹⁵⁹ *Id.* at 4–8, 15.

¹⁶⁰ *Id.* at 15.

¹⁶¹ *Id.* at 16.

establishing jurisdiction.¹⁶² Marshall determined that the Cherokee could not be so regarded; rather, the Cherokee’s “relation to the United States resemble[d] that of a ward to his guardian.”¹⁶³ There is—to state the obvious—no small measure of paternalism in that statement. In concluding remarks, Marshall commented:

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. *If it be true* that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.¹⁶⁴

The *Lyons* language does not, however, originate in the Chief Justice’s majority opinion, but in Justice Smith Thompson’s dissent. Justice Thompson, joined by Justice Story, argued that the Cherokee Nation was indeed a foreign state within the meaning of the Constitution, and although some facets of the complaint presented political questions, he viewed the threats to Cherokee property as proper for judicial resolution: “This court can have no right to pronounce an *abstract* opinion upon the constitutionality of a state law. Such law must be brought into *actual or threatened* operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.”¹⁶⁵ Here, in 1831, we find the earliest ancestor of *Lyons*’s requirement of a “real and immediate”—rather than an “abstract”—injury. Because the state law had indeed been brought into actual operation against the Cherokee’s land, Justice Thompson would have reached the merits and issued the injunction the Cherokee had requested.¹⁶⁶ Ironically, then, while *Lyons*’s denial of standing is a proper descendant of *Cherokee Nation*’s majority opinion denying jurisdiction, *Lyons*’s language properly descends from a dissent that would have allowed the Cherokee to be heard on the merits.

¹⁶² *Id.* at 20.

¹⁶³ *Id.* at 17. Of course, in addition to avoiding the implications of the many agreements signed between the United States and the Cherokee, the Court did not consider the Cherokee Nation’s self-identification as a sovereign state. Rather, the Court set the rules by which “foreign state” would be defined. Cheryl Harris discusses this facet of racial domination and subordination through *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978): “Beyond the immediate outcome of the case lies the deeper problem posed by the hierarchy of the rules themselves and the continued retention by white-controlled institutions of exclusive control over definitions as they pertain to the identity and history of dominated peoples.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1765–66 (1993). “When group identity is a predicate for exclusion or disadvantage, the law has acknowledged it; when it is a predicate for resistance or a claim of right to be free from subordination, the law determines it to be illusory.” *Id.* at 1766.

¹⁶⁴ *Cherokee Nation*, 30 U.S. at 20 (emphasis added). The consequences for the Cherokee were tragic. Although the Court reversed course a year later in *Worcester v. Georgia*—finding the Cherokee Nation to be a distinct political community over which “the laws of Georgia [could] have no force”—that decision came either too late or with too little muscle. 31 U.S. 515, 561 (1832). President Andrew Jackson, who in 1830 had signed the Indian Removal Act, responded to the Court’s decision as thoroughly indifferent to his oath of office: “The decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate.” Baynard Woods, *Jackson, Trump, Hitler and the Seeds of Global Fascism*, THE BALTIMORE SUN (May 31, 2017, 12:15PM), <https://www.baltimoresun.com/citypaper/bcpnews-jackson-trump-hitler-and-the-seeds-of-global-fascism-20170531-story.html>. The Cherokee were forced to walk the Trail of Tears, *Trail of Tears*, HISTORY.COM, <https://www.history.com/topics/native-american-history/trail-of-tears> (last visited Jul. 7, 2020).

¹⁶⁵ *Id.* at 75 (Thompson, J., dissenting) (emphasis added).

¹⁶⁶ *Id.* at 80.

Ninety-two years later, the Court transformed *Cherokee Nation*'s language in its influential opinion in *Massachusetts v. Mellon*.¹⁶⁷ In *Mellon*, both the State of Massachusetts and an individual litigant, Harriet Frothingham, challenged the constitutionality of the Maternity Act, which aimed to “reduce maternal and infant mortality and protect the health of mothers and infants” in part by awarding appropriations to states choosing to comply with the statute.¹⁶⁸ Although Massachusetts had chosen not to comply, the State argued that the statute violated the Tenth Amendment by attempting to exercise power over local government via its appropriations-inducement mechanisms.¹⁶⁹ As an individual litigant, Frothingham argued that the Maternity Act effected an unconstitutional taking of “property, under the guise of taxation[.]”¹⁷⁰

The Court disposed of Massachusetts' complaint as presenting a political question not subject to Article III judicial power.¹⁷¹ In support, Justice George Sutherland drew on Justice Thompson's *Cherokee Nation* dissent: “This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or remedy is not to be had here.”¹⁷² To Sutherland, this language from *Cherokee Nation* sealed the fate of the State suit. Yet, it also directly informed the Court's disposal of the individual suit. After distinguishing cases in which municipal taxpayers had obtained relief—finding that a federal taxpayer's interest in the federal treasury was “comparatively minute and indeterminable”—Sutherland metamorphosed *Cherokee Nation*'s “actual or threatened operation” language into the requirement that a “party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct *injury*[.]”¹⁷³ With one swift stroke of the pen, “operation” became “injury.” Without this not-so-subtle transposition, Adolph Lyons would have faced, at the very least, a less exclusive immediacy barrier sixty years later. The *threat* of unconstitutional police violence alone, without consideration of temporal imminence, might have sustained Lyons's claim for injunctive relief.

c. The Lineages Converge

When the *Aetna* and *Mellon* lineages intertwined in *Lyons*, Justice White contended that “[a]bstract injury is not enough”; rather, “the plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”¹⁷⁴ *Cherokee Nation*'s language eschewing “abstract opinion[s]” was reborn rejecting “abstract injur[ies].” *Mellon*'s transformation of *Cherokee Nation*'s “actual or threatened operation” language was adopted wholesale. And *Aetna*'s requirement of “real and substantial controvers[ies]” based on non-hypothetical facts was

¹⁶⁷ 262 U.S. 447 (1923).

¹⁶⁸ *Id.* at 478–79.

¹⁶⁹ *Id.* at 479–80.

¹⁷⁰ *Id.* at 480.

¹⁷¹ *Id.* at 483.

¹⁷² *Id.* at 484 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 75 (1831)).

¹⁷³ *Id.* at 487–88 (emphasis added).

¹⁷⁴ *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

adapted to further clarify the nature of justiciable injuries. By 1983—through these critical *Lyons* ancestors—cases had become controversies and controversies had become injuries. And this triple conflation did not just close the courthouse doors on Adolph Lyons. It effectively blocked citizens from challenging the use of chokeholds, and other forms of police violence, in the federal courts.¹⁷⁵

iii. Generalized Grievances

There remains one final principle through which Justice White justified his denial of standing—the Court’s aversion to entertaining “generalized grievances.”¹⁷⁶ As Justice White argued, absent “sufficient likelihood” of future injury, federal courts “may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement are unconstitutional.”¹⁷⁷ Although he cited three cases in support—*Warth v. Seldin*, *Schlesinger v. Reservists to Stop the War*, and *United States v. Richardson*—White could have simply cited one, for all three cases drew support from a single source—*Ex parte Levitt*.¹⁷⁸ There, three lines of caselaw intertwine.

The first generalized-grievances line begins and ends with *Tyler v. Judges of the Court of Registration*.¹⁷⁹ William Tyler had petitioned the Supreme Judicial Court of Massachusetts for a writ of prohibition to stop the court of registration from delineating the boundaries of lots that adjoined his own.¹⁸⁰ Tyler argued that the Massachusetts statute granting the court of registration its authority was unconstitutional because the court was allowed to issue conclusive decrees without notice to those whose land might be encroached upon by the registration of adjoining lands.¹⁸¹ In other words, Tyler viewed the statute as empowering the court of registration to deprive him of property without due process.¹⁸² After the Supreme Judicial Court ruled the statute constitutional and dismissed Tyler’s petition, Tyler appealed to the Supreme Court. Writing for a 5-4 majority, Justice Henry Brown concluded that Tyler lacked the necessary interest in the case to question the statute’s constitutionality.¹⁸³ As legal scholar Steven Winter has written, the “dissenters were astonished,” for not only had the Massachusetts Supreme Judicial Court “not questioned Mr. Tyler’s capacity to bring the action[,]” but such writs of prohibition had been available to strangers in Massachusetts since 1787.¹⁸⁴ As astonishing as was that jurisprudential step, it is Justice Brown’s rationale that is most relevant to *Lyons*:

¹⁷⁵ See *supra* note 48, and accompanying text.

¹⁷⁶ The “generalized grievances” language itself originated in *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

¹⁷⁷ *Lyons*, 461 U.S. at 111 (citing *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974)).

¹⁷⁸ 302 U.S. 633 (1937).

¹⁷⁹ 179 U.S. 405 (1900). For a thorough discussion of *Tyler*’s place within the evolution of generalized grievances in standing doctrine, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1431–33 (1988).

¹⁸⁰ *Tyler*, 179 U.S. at 406.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 410.

¹⁸⁴ Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1431–32 (1988).

Save in a few instances where, by statute or settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit *personal* to himself, and even in a proceeding which he prosecutes for the benefit of the public . . . he must generally aver an *injury peculiar to himself, as distinguished from the great body of his fellow citizens*.¹⁸⁵

Given that Tyler had, in fact, alleged a personal injury, Justice Brown seems to have gone out of his way to articulate this broad principle. The majority could just as easily have reached the same result by affirming the judgment below, but they chose, instead, to deny the prerogative writ on innovative grounds.¹⁸⁶ It is hard to ascertain whether Brown's novel rationale represents judicial activism or just indiscriminate jurisprudence, but the effect on Adolph Lyons would be the same regardless. That is, by the time *Tyler's* innovation reached the Burger Court, Lyons could not claim that his request for injunctive relief sought to protect the public at large—or even just the Black citizens of Los Angeles—from unconstitutional police violence. Rather, Lyons was required to allege that he would *personally* suffer an injury “peculiar to himself.”

The second generalized-grievances line begins, familiarly, with *Cherokee Nation*.¹⁸⁷ There, in addition to denying that the Cherokee Nation was a foreign state, Chief Justice Marshall suggested that at least some of the Cherokee's claims might also be viewed as non-justiciable political questions.¹⁸⁸ Responding to that suggestion, Justice Thompson's dissent carefully distinguished those Cherokee claims that could be viewed as presenting political questions from those that could not: “It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.”¹⁸⁹ Justice Thompson's line of demarcation thus implicitly distinguished political rights from rights of “persons or property[.]”

Thirty-six years later, in *Georgia v. Stanton*, relying heavily on *Cherokee Nation*, the Court fully articulated Justice Thompson's implication by explicitly juxtaposing civil and political rights:

[T]his judicial power may condemn acts of men exercising political power which work a prejudice to the rights of any juridical or natural person suing for justice. If the rights imperilled be of a *civil* nature, entitled to protection under the principles of the Constitution . . . [s]uch cases do not present *political* questions . . . which the Constitution, or some valid law, intrust[] exclusively to the one or both of the departments, commonly styled political.¹⁹⁰

¹⁸⁵ *Tyler*, 179 U.S. at 406 (emphasis added).

¹⁸⁶ See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1431–33 (1988).

¹⁸⁷ 30 U.S. 1 (1831); *supra* b. The Second Lineage: Controversies Become Injuries.

¹⁸⁸ *Cherokee Nation*, 30 U.S. at 20. See also Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 715 (2004).

¹⁸⁹ *Cherokee Nation*, 30 U.S. at 75 (Thompson, J., dissenting).

¹⁹⁰ 73 U.S. 50, 68 (1867) (emphasis added) (“The case, bearing most directly on the one before us, is *The Cherokee Nation v. The State of Georgia*.”) *Id.* at 73.

The Court thus clarified that distinction drawn in *Cherokee Nation* between political rights and rights of persons or property by juxtaposing political rights with civil rights. The nature of the right invaded—not whether the right was widely shared or whether the challenged actor was political—was determinative when considering a potentially political question.

This distinction between political and civil rights was on display early in the twentieth century in a 1903 voting rights case, *Giles v. Harris*.¹⁹¹ In *Giles*, the Court considered granting equitable relief to Jackson Giles and “more than five thousand negroes” who claimed that those sections of the Alabama Constitution that authorized the State’s discriminatory voter registration scheme violated the Fourteenth and Fifteenth Amendments.¹⁹² Simultaneously, because declaratory relief was unavailable, the complainants asked to be registered to vote under that unconstitutional registration scheme.¹⁹³ In the majority opinion, Justice Oliver Wendell Holmes dismissed the suit on the grounds that the claims were, essentially, mutually exclusive.¹⁹⁴ If the Court granted the requested relief, it would become “a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists[.]”¹⁹⁵ In the alternative, Holmes suggested that Section 1979—ancestor of today’s Section 1983—did not necessarily encompass state constitutions when it authorized equitable relief for constitutional violations executed “under color of a state ‘statute, ordinance, regulation, custom, or usage.’”¹⁹⁶ And in any event, as a suit against the State of Alabama—in contravention of *Hans v. Louisiana*’s broad assertion of state sovereign immunity—equity’s power to counter the conspiracy perpetrated by “the great mass of the white population” was limited: “[a]part from damages to the individual, relief from a great political wrong, if done . . . by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.”¹⁹⁷ While *Giles* did not further contribute to the evolution of political question doctrine into a ban on generalized grievances, *Giles* remains a critical *Lyons* ancestor to the extent that both decisions denied injunctive relief to racial and political minorities while suggesting that damages were the only available remedy.

The third line of cases in the generalized-grievances lineage returns the discussion again to *Massachusetts v. Mellon*.¹⁹⁸ As noted earlier, Justice Sutherland’s opinion transformed *Cherokee Nation*’s “actual or threatened operation” language into the requirement that a “party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury[.]”¹⁹⁹

¹⁹¹ 189 U.S. 475 (1903).

¹⁹² *Id.* at 482, 486 (internal quotation marks omitted).

¹⁹³ *Id.* at 486.

¹⁹⁴ *Id.* at 486–87.

¹⁹⁵ *Id.* at 486.

¹⁹⁶ *Id.* at 484–85, 487.

¹⁹⁷ *Id.* at 487–88 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890), in support of state sovereign immunity).

Though not directly implicated in the *Lyons* lineage, Justice Harlan’s dissent is noteworthy, for Harlan would have dismissed the suit simply because it failed to meet the amount-in-controversy requirement then in place, and he would have otherwise found no impediment to reaching the merits. *Giles*, 189 U.S. at 503–04 (Harlan, J., dissenting).

¹⁹⁸ 262 U.S. 447 (1923); *supra* b. The Second Lineage: Controversies Become Injuries.

¹⁹⁹ *Mellon*, 262 U.S. at 488. *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 715, 718 (2004) (suggesting that *Mellon* was continuous with *Cherokee Nation* and *Stanton* and characterizing those earlier cases as standing, rather than political question, cases).

Sutherland did not, however, stop there; rather, he further clarified that the “direct injury” must be—in modern parlance—particularized. That is, a party could not invoke the judicial power by showing “merely that he suffers in some indefinite way in common with people generally.”²⁰⁰ *Mellon*’s import is not, therefore, limited to how it reconstituted “operation” as “injury.” By drawing on political-question cases to support a ban on generalized grievances, *Mellon* blurred the distinction between civil and political rights. No longer were political wrongs alone beyond the judicial power. Civil wrongs, if felt commonly among the people, were now also beyond that power. *Mellon* thus borrowed from a doctrine that had applied only to political rights—and, more critically, had explicitly *not* applied to civil rights—to innovate a new principle of justiciability that would apply to both political and civil rights. In short, what *Mellon* added to the language of *Cherokee Nation* and *Stanton* swallowed up the political question doctrine.²⁰¹ And within the generalized-grievances lineage, *Mellon* allowed its progeny, including *Lyons*, to avoid the merits not only of suits alleging political wrongs, but of those alleging civil wrongs as well.

Manifesting in *Lyons*, these ancestral lines allowed Justice White to state that *Lyons* was “no more entitled to an injunction than any other citizen of Los Angeles.”²⁰² Gone was the distinction between political and civil rights. But what remained finds its closest ancestor in *Giles*, where Justice Holmes had suggested that damages were all a federal court could afford a plaintiff who seeks to enjoin unconstitutional (and racist) state action.²⁰³ As White noted, *Lyons* “ha[d] a remedy for damages under § 1983.”²⁰⁴ In a sense, so much had changed and so much had not changed in the eighty years separating Jackson Giles and Adolph Lyons’s appeals to the Supreme Court.

B. The Equitable Relief Lineage

As noted earlier, once Justice White had rejected *Lyons*’s claim for injunctive relief on standing grounds, the case was over. Yet, White proceeded to justify the Court’s decision on alternative grounds. He began by stating that the “case or controversy considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief.”²⁰⁵ So, even where a case or controversy exists, there must still be an “adequate basis for equitable relief[,]” which requires “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”²⁰⁶ And, adding weight to these equitable principles, there were prudential factors that “counsel[ed] restraint.”²⁰⁷

²⁰⁰ 262 U.S. at 488.

²⁰¹ Indeed, Justice William Douglas expressed the common effect of—though perhaps not the relationship between—standing and political question doctrine in his dissent to *Warth v. Seldin*: “Standing has become a barrier to access to the federal courts, much as ‘the political question’ was in earlier decades But cases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need.” 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

²⁰² *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

²⁰³ *Giles v. Harris*, 189 U.S. 475, 488 (1903).

²⁰⁴ *Lyons*, 461 U.S. at 113.

²⁰⁵ *Id.* at 103 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974)) (cleaned up).

²⁰⁶ *Id.* (quoting *O’Shea*, 414 U.S. 488, 499) (internal quotation marks omitted).

²⁰⁷ *Id.* at 112.

i. An Adequate Basis for Equitable Relief

The story of how these principles arrived in *Lyons* begins in 1824 with *Osborn v. Bank of the United States*.²⁰⁸ There, the Court considered whether a state officer could be restrained “from performing any official act enjoined by statute.”²⁰⁹ It was argued that the requested injunction could issue only “upon one of two principles: either that it was necessary to secure . . . the enjoyment of a franchise or exclusive privilege, or to protect it from irreparable mischief.”²¹⁰ Whenever an injunction had been issued “to protect parties in the enjoyment of a franchise,” it had been “difficult, if not impossible, to estimate the damages.”²¹¹ With those principles in mind, Chief Justice Marshall discussed the importance of equity operating alongside law: “The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in Chancery, which prevents repetition, and protects the privilege.”²¹² Thus, damages could issue to remedy a past violation, and equity could intervene to protect a privilege whose violation would result in inestimable damages.

Sixty-seven years later, the Court reformulated *Osborn*’s view of equitable principles in *Pennoyer v. McConnaughy*, where a California citizen sought to enjoin Oregon state officers from selling property to which he claimed title.²¹³ En route to finding that the statute under which the state officers operated unconstitutionally impaired the obligation of contracts, Justice Joseph Lamar wrote that:

The general doctrine of *Osborn v. Bank*, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would violate rights and privileges . . . guaranteed by the Constitution, and would work irreparable damage and injury . . . has never been departed from.²¹⁴

Pennoyer’s reformulation of *Osborn* is marked by two important linguistic changes. First, what had been “franchise or exclusive privilege” was broadened to “rights and privileges” generally.²¹⁵ Second, while *Osborn* presented two disjunctive principles as bases for equitable relief—securing a privilege when damages are inestimable *or* protecting the enjoyment of a privilege from irreparable harm—*Pennoyer* joined the two principles with the conjunctive, presenting a singular basis for equitable relief. *Pennoyer* thus worked both an expansion and contraction of equitable power. That is, Justice Lamar expanded *what* was protected but narrowed *how* relief could issue.

²⁰⁸ 22 U.S. 738 (1824).

²⁰⁹ *Id.* at 838.

²¹⁰ *Id.* at 748–49.

²¹¹ *Id.*

²¹² *Id.* at 842.

²¹³ 140 U.S. 1 (1891).

²¹⁴ *Id.* at 12, 25.

²¹⁵ Of course, this change of phrase may only be indicative of the distinct facts before the Courts.

Almost ineluctably, *Pennoyer*'s reformulation of *Osborn*'s principles was quoted in full in 1908's watershed *Ex parte Young* decision²¹⁶ before being narrowed in *Fenner v. Boykin*.²¹⁷ In *Fenner*, while declining to enjoin the enforcement of a state statute that criminalized participation in certain commodities agreements, Justice James McReynolds relied on the "established . . . doctrine that, when absolutely necessary for protection of constitutional rights," federal courts "have power to enjoin state officers from instituting criminal actions."²¹⁸ Such injunctions could issue, McReynolds continued, only "*under extraordinary circumstances, where the danger of irreparable loss is both great and immediate.*"²¹⁹ While the principles themselves had indeed been "established" in *Young* and other cases, McReynolds' linguistic additions would inform the Court's analysis in 1971's landmark federalism case, *Younger v. Harris*,²²⁰ where Justice Hugo Black relied on *Fenner* to drive home that injunctions should issue "only under *very special circumstances*" where "irreparable injury is . . . 'both great and immediate.'"²²¹

The final evolutionary link between *Osborn* and *Lyons* came just three years after *Younger* in *O'Shea v. Littleton*.²²² There, nineteen residents of Cairo, Illinois—seventeen of whom were Black—had filed a class action against a magistrate and circuit court judge for a pattern and practice of racially and financially discriminatory "administration of the criminal justice system[.]"²²³ In a majority opinion by Justice White, the Court rejected the suit because none of the nineteen plaintiffs had alleged sufficient personal injury.²²⁴ Here, White first fashioned the language he would later quote in *Lyons*: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."²²⁵ Because class members would have to engage in and be prosecuted for illegal conduct to again be subjected to the judges' allegedly discriminatory conduct, the threat of future injury was "too remote[.]"²²⁶ The petitioners lacked standing, and Article III standing "considerations . . . shade[d] into those determining whether [there was] a sound basis for equitable relief[.]"²²⁷ If the requisite Article III injury was lacking, petitioners could not allege injury sufficient to satisfy the more demanding equitable-relief standard.

Citing *Younger* as reaffirming equity's demands of great and immediate irreparable injury and inadequate remedy at law, Justice White then expanded *Younger*'s aversion to

²¹⁶ 209 U.S. 123, 152 (1908). For a thorough exploration of how equity jurisprudence evolved into *Ex parte Young*, see James E. Pfander & Jacob Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269 (2020).

²¹⁷ 271 U.S. 240 (1926).

²¹⁸ *Id.* at 243.

²¹⁹ *Id.* (emphasis added).

²²⁰ 401 U.S. 37 (1971).

²²¹ *Id.* at 45–46 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)) (emphasis added). For a discussion of how *Younger* and its progeny disregarded Reconstruction-era legislative intent, see Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987 (1983).

²²² 414 U.S. 488 (1974).

²²³ *Id.* at 490–91.

²²⁴ *Id.* at 495.

²²⁵ *Id.* at 495–96. Here, the Court seems poised to fragment the standing inquiry along remedial lines, but there was no need since the plaintiffs were not seeking damages. *Id.* at 492.

²²⁶ *Id.* at 496–98.

²²⁷ *Id.* at 499.

enjoining ongoing criminal *prosecutions* to include enjoining “state officers engaged in the *administration* of the State’s criminal laws.”²²⁸ Even if the requirements of standing and equitable relief had been satisfied, the Court saw the proposed injunction as “nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent.”²²⁹ Yet, as invasive as the lower court’s proposed injunction may have been, it would only have come into play *during* criminal proceedings. Without any expansion, therefore, *Younger* alone could have justified withholding injunctive relief. White’s expansion of *Younger* to encompass state administrative action was, therefore, simply unnecessary to the resolution of *O’Shea*.²³⁰ Attentive to some purpose external to resolving the case or controversy before the Court, and relying on the tools produced by *Pennoyer* and *Fenner*, White actively expanded the scope of equitable restraint.

The equitable-relief lineage thus supports those charges of judicial activism levied against the Burger Court by the likes of legal scholars Suzanna Sherry and Paul Butler.²³¹ But, in light of the *O’Shea* and *Lyons* expansions, it is possible to more acutely focus those charges on Justice White. In portions of his opinions unnecessary to the resolution of either case, White alone (with the majority’s consent) reframed *Younger* to encompass injunctions directed at local law enforcement.²³²

ii. Factors Counseling Restraint

As we have seen, after denying *Lyons* standing to seek injunctive relief, Justice White unnecessarily discussed and expanded the application of equitable restraint. Likewise, after alternatively rejecting *Lyons*’s claim on equitable principles, White unnecessarily raised prudential factors counseling restraint.²³³ White’s invocation and expansion of *Younger* provided an opportunity to expound on that federalism—“Our Federalism”—for which *Younger* is widely known.²³⁴ White did so by asserting three broad principles. First, a “recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states’ criminal laws in the absence of irreparable injury which is both great and immediate.”²³⁵ Second, “the normal principles of equity, comity and federalism . . . should inform the judgment of federal courts when asked to oversee state

²²⁸ *Id.* (citing *Younger v. Harris*, 401 U.S. 37, 43–44 (1971); *Fenner v. Boykin*, 271 U.S. 240 (1926); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943)) (emphasis added).

²²⁹ *Id.* at 500.

²³⁰ Indeed, Justices Blackmun, Douglas, Brennan, and Marshall all dissented to this expansion, calling it nothing more than “advisory.” *Id.* at 504 (Blackmun, J., concurring in part), 511–12 (Douglas, J., dissenting). Of course, Justice White would again deploy this expansion of *Younger*, and *Pennoyer*’s conjunctive reformulation of *Osborn*, in *Lyons*. 461 U.S. 95, 103 (1983). And again, Justice Marshall—joined by Justices Blackmun and Brennan and newcomer John Paul Stevens—would call the expansion “advisory.” *Id.* at 134 (Marshall, J., dissenting).

²³¹ See *supra* note 22, and accompanying text.

²³² See 461 U.S. at 103, and accompanying text; *O’Shea*, 414 U.S. at 499; *supra* c. Factors Counseling Restraint; *infra* a. A Proper Balance.

²³³ *Lyons*, 461 U.S. at 111–13.

²³⁴ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425 (1987).

²³⁵ *Lyons*, 461 U.S. at 112 (citing *O’Shea*, 414 U.S. at 499; *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

law enforcement authorities.”²³⁶ And third, “in exercising their equitable powers federal courts must recognize the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.”²³⁷ The evolution of each of these principles is addressed in turn. Taken together, however, the lineages reveal that these principles were actively developed by a handful of Justices in cases where the rights of political and racial minorities were usually at stake. Given that these principles evolved in such factual contexts, it is sadly unsurprising to see them deployed against a Black man trying to curtail unconstitutional police violence.

a. A Proper Balance

[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states’ criminal laws in the absence of irreparable injury which is both great and immediate.²³⁸

This principle’s story begins in 1888 with *In re Sawyer*.²³⁹ *Sawyer* concerned a petition for a writ of habeas corpus submitted by the mayor of Lincoln, Nebraska and eleven members of the city council who had been jailed by U.S. marshals for contempt of the U.S. circuit court.²⁴⁰ The jurisdictional question before the Court was whether the circuit court, sitting in equity, had the authority to order the U.S. marshals to hold the petitioners.²⁴¹ Of course, *Sawyer* arose well before the merger of law and equity was complete.²⁴² So it is in that context that Justice Horace Gray wrote that courts of equity had “no jurisdiction over the prosecution, the punishment, or the pardon of crimes” and “[t]o assume such a jurisdiction, or to sustain a bill in equity to restrain” such criminal proceedings, would be “to invade the domain of the courts of common law, or of the executive and administrative department of the government.”²⁴³

Thirty-six years later, Justice Sutherland cited these portions of *Sawyer* in *Packard v. Banton* to support this assertion: “The general rule undoubtedly is that a court of equity is without jurisdiction to *restrain criminal proceedings*, unless they are instituted by a party to a suit already pending before [that same court] to try the same right that is in issue there.”²⁴⁴ One year later, in *Hygrade Provision Co. v. Sherman*, Sutherland adjusted this

²³⁶ *Id.*

²³⁷ *Id.* (cleaned up).

²³⁸ *Id.* at 112 (citing *O’Shea*, 414 U.S. at 499; *Younger*, 401 U.S. at 46).

²³⁹ 124 U.S. 200 (1888).

²⁴⁰ *Id.* at 201.

²⁴¹ *Id.* at 209.

²⁴² “[F]or about a century and a half after the Founding, each federal court had law and equity ‘sides,’ with the same judge presiding over both. It is now often said that law and equity have merged in the United States, and the decisive event in that merger is usually regarded as the adoption of the Federal Rules of Civil Procedure in 1938.” Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 537–38 (2016).

²⁴³ *Id.* at 210. For a discussion of how *Sawyer*’s rationale fits into the merger of law and equity, see James E. Pfander & Jacob Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1340–41 (2020).

²⁴⁴ 264 U.S. 140, 143 (1924) (citing *Sawyer*, 124 U.S. at 209–11 (1888) and *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207, 217 (1903)) (emphasis added). For a brief account of the merger of law and equity, see Pfander & Wentzel, *supra* note 243, at 1276.

language a bit: “The general rule is that equity will not interfere to *prevent the enforcement of a criminal statute* even though unconstitutional.”²⁴⁵ In *Hygrade*, the Court was considering a request for an injunction to enjoin criminal prosecutions which had neither been brought nor threatened,²⁴⁶ so the linguistic transformation of “restrain criminal proceedings” to “prevent the enforcement of a criminal statute” worked the expansion necessary to encompass the requested relief. Yet, after expanding the applicability of equitable restraint, the Court proceeded to reach the merits,²⁴⁷ so within *Hygrade* itself, the expansion was dicta.

Half a century later, Justice White continued this expansion via linguistic transformation in *O’Shea v. Littleton*, writing that the “recognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State’s criminal laws.”²⁴⁸ The “proper balance” language is the child of *Stefanelli v. Minard*, cited later in *O’Shea*, but not used in support here, and *Williams v. Austrian*, not mentioned in the opinion. The *Stefanelli* Court had asserted that the Civil Rights Act “should be construed so as to respect the proper balance between the States and the federal government in law enforcement.”²⁴⁹ Justice Frankfurter, dissenting in *Williams*, had argued that Congress’s “prevailing policy” was to “limit[] federal jurisdiction and preserv[e] a proper balance between federal and State courts.”²⁵⁰ In *O’Shea*, White comingled these propositions to create a new one—one where *the Court*, rather than Congress, seeks to preserve a proper balance between both the state and federal courts *and* state and federal law enforcement. While espousing federalism concerns, White blurred both federalism boundaries and separation-of-powers demarcations, accruing power to the federal judiciary.

These newly comingled structural principles then counseled restraint not when asked to enjoin criminal proceedings or the enforcement of criminal statutes, but when called upon to enjoin “state officers in the administration” of state criminal laws. Justice White thus continued the expansion of *Sawyer* that Justice Sutherland had begun in *Packard* and *Hygrade*. Taken together, these expansions wrought by Sutherland and White evince at least a species of judicial activism on both their parts, for these expansions allowed both Justices to reach outcomes that could not have been sustained by precedent alone.

²⁴⁵ 266 U.S. 497, 500 (1925) (citing *Packard v. Banton*, 264 U.S. 140, 143 (1924); *In re Sawyer*, 124 U.S. 200, 209–11 (1888); and *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207, 217 (1903)) (emphasis added).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ 414 U.S. 488, 499 (1974) (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971); *Fenner v. Boykin*, 271 U.S. 240 (1926); and *Douglas v. City of Jeannette*, 319 U.S. 157 (1943)).

²⁴⁹ *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951) (quoting *Screws v. United States*, 325 U.S. 91, 108 (1945)) (internal quotation marks omitted).

²⁵⁰ *Williams v. Austrian*, 331 U.S. 642, 663 (1947) (Frankfurter, J., dissenting).

b. Equity, Comity, and Federalism

[T]he normal principles of equity, comity and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities.²⁵¹

This principle reaches *Lyons* via *Mitchum v. Foster*, where two lines of caselaw intertwine.²⁵² The first line originates in Justice Harlan Stone’s 1932 opinion in *Matthews v. Rodgers*.²⁵³ There, the Court considered an appeal from a district court decision enjoining the collection of a Mississippi tax on buyers and sellers of cotton “as an unconstitutional burden on interstate commerce.”²⁵⁴ After discussing the Anti-Injunction Act’s prohibition against federal courts entertaining suits in equity “where a plain, adequate, and complete remedy may be had at law[,]”²⁵⁵ Justice Stone wrote that “[t]he reason for this guiding principle is of peculiar force” when the suit seeks “to enjoin the collection of a state tax” in federal courts, which are “courts of a different, though paramount, sovereignty.”²⁵⁶ Inferring general support from three decisions issued between 1870 and 1909, Stone then laid the foundation for Justice White’s “equity, comity and federalism” principle:

The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.²⁵⁷

Three years later, in *Di Giovanni v. Camden Fire Insurance Association*, Justice Stone further developed the connection between federalism and equitable restraint that he had articulated in *Matthews*.²⁵⁸ In *Di Giovanni*, the district court had exercised equity jurisdiction over a suit brought by a New Jersey fire insurance company alleging that a Missouri couple had fraudulently procured insurance policies and then conspired to defraud the insurance company by setting fire to their own property.²⁵⁹ The question before the Court was whether the circumstances of the case could sustain federal equity

²⁵¹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951); *O’Shea v. Littleton*, 414 U.S. 488, 500 (1974)) (citing *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Cleary v. Bolger*, 371 U.S. 392 (1963); *Wilson v. Schnettler*, 365 U.S. 381 (1961); *Pugach v. Dollinger*, 365 U.S. 458 (1961)) (cleaned up).

²⁵² 407 U.S. 225 (1972).

²⁵³ 284 U.S. 521 (1932). For a discussion of *Matthews* and Justice Stone’s role in connecting federalism concerns to principles of equitable restraint, see Gary L. McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 HARV. J. L. & PUB. POL’Y 507 (1984).

²⁵⁴ *Matthews*, 284 U.S. at 522.

²⁵⁵ *Id.* at 525 (quoting The Judiciary Act of 1789, § 16, 1 Stat. 82) (internal quotation marks omitted).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ 296 U.S. 64 (1935).

²⁵⁹ *Id.* at 66–67.

jurisdiction.²⁶⁰ Citing to his earlier opinion in *Matthews*, Stone observed that federal courts, sitting in equity, should give “scrupulous regard for the rightful independence of the state governments and a remedy infringing that independence . . . should be withheld if sought on *slight or inconsequential grounds*.”²⁶¹ Finding the threatened injury to the insurance company to be “of too slight moment,” the Court rejected the assertion of federal equity jurisdiction.²⁶² By adding the “slight or inconsequential grounds” language to his own *Matthews* formulation, Stone thus perfectly queued up his resolution of *Di Giovanni* and further interwove those concepts of federalism and equitable restraint that would eventually reach the Burger Court’s decision in *Lyons*. Indeed, as some have argued, Stone was a devout proponent of deploying federalism to justify equitable restraint,²⁶³ and that is precisely the role Stone plays in the prudential-factors lineage.

The second line of cases originates—unsurprisingly—in *Younger v. Harris*.²⁶⁴ Justice Hugo Black’s discussion of equity, comity and federalism in *Younger* casts long shadows over *Mitchum* and, by extension, *Lyons*. There, Black suggested that equitable restraint’s “fundamental purpose . . . [is] to prevent erosion of the role of the jury and avoid” unnecessarily duplicative legal proceedings.²⁶⁵ Yet, “an even more vital consideration [is] the notion of ‘comity,’ that is, a proper respect for state functions, a recognition” that the United States is comprised “of separate state governments,” and “the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”²⁶⁶ This notion of comity is “Our Federalism,” which represents:

[A] system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.²⁶⁷

These conceptions of equity, comity, and federalism, though long present in federal jurisprudence, favored abstention in *Younger* because good-faith criminal proceedings were pending in state court and enjoining such proceedings would constitute an inappropriate “veto over the [state’s] legislative process.”²⁶⁸ Regardless, then, of how broadly Justice Black may have articulated “Our Federalism,” federalism’s influence in *Younger* only reached so far as to counsel restraint in enjoining *already initiated* criminal proceedings in state court and in construing state statutes outside the confines of an Article III case or controversy.

²⁶⁰ *Id.* at 68.

²⁶¹ *Id.* at 73 (citing *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935) and *Matthews v. Rodgers*, 284 U.S. 521 (1932)) (emphasis added).

²⁶² *Id.* at 74.

²⁶³ See Gary L. McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 HARV. J. L. & PUB. POL’Y 507, 509 (1984).

²⁶⁴ 401 U.S. 37 (1971).

²⁶⁵ *Id.* at 44.

²⁶⁶ *Id.* (cleaned up).

²⁶⁷ *Id.* (internal quotation marks omitted).

²⁶⁸ *Id.* at 49, 53.

The following year, the Court relied on both *Matthews* and *Younger* in *Mitchum v. Foster*.²⁶⁹ In the majority opinion—which held that Section 1983 came within exceptions to the Anti-Injunction Act—Justice Potter Stewart took care to acknowledge the importance of *Younger*'s principles: “we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.”²⁷⁰ Thus summarizing *Younger*, Stewart fashioned the “equity, comity, and federalism” language. Yet, drawing on both *Younger* and eight other cases that demonstrated how the Court had “emphasized . . . [these principles] many times in the past[,]” Justice Stewart implied that *Younger* had not effected any grand expansion of federalism's influence on equitable restraint.²⁷¹ By interweaving the earlier decisions in the *Matthews* line of cases with *Younger*, Stewart obscured the relevance of those pre-*Younger* decisions. *Matthews* certainly acknowledged the importance of the “rightful independence of state governments” generally, but it—and the earlier decisions from which it drew support—were focused on “a proper reluctance to interfere . . . with [state] fiscal operations.”²⁷² Thus, in a case where the Court reinforced the power of the Civil Rights Act to authorize coercive relief, *Younger*'s broad aversion to federal intervention in state court proceedings eclipsed the more narrow conceptions of equitable restraint that had informed the Court's pre-*Younger* decisions.

In *Lyons*, Justice White did not cite to *Younger* to support his proposition that “the normal principles of equity, comity and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities.”²⁷³ Instead, drawing on the more obfuscatory opinion, White cited to *Mitchum*.²⁷⁴ But *Younger* is the only case in the lineage from which White could find support. Though *Younger* was focused on injunctions directed at state court proceedings, Justice Black's discussion of federalism deployed language that was broad enough to encompass injunctions aimed at “state law enforcement authorities.” Regardless then of what *Younger* expressed about federalism, *Lyons* could not help but work an expansion of federalism's influence on federal courts because the principles of equity, comity and federalism had never before been invoked in a context like that of *Lyons*. As Justice Thurgood Marshall pointed out in dissent, “[w]hatever the precise scope of the *Younger* doctrine, the concerns of comity and federalism that counsel restraint when a federal court is asked to enjoin a state criminal proceeding simply do not apply to an injunction directed solely at a police department.”²⁷⁵ Marshall drew support for this assertion not only from *Younger*, but also from *Steffel v. Thompson*.²⁷⁶ There, Justice Brennan had distinguished *Younger* on the grounds that the

²⁶⁹ 407 U.S. 225 (1972).

²⁷⁰ *Id.* at 226, 236–37, 243 (1972) (citing *Younger v. Harris*, 401 U.S. 37 (1971); *Fenner v. Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Beal v. Mo. Pac. R.R.*, 312 U.S. 45 (1941); *Watson v. Buck*, 313 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Stefanelli v. Minard*, 342 U.S. 117 (1951); and *Cameron v. Johnson*, 390 U.S. 611 (1968)).

²⁷¹ *Id.* at 243.

²⁷² *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (emphasis added).

²⁷³ *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (citing *Mitchum v. Foster*, 407 U.S. 225 (1972)) (emphasis added).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 135 (Marshall, J., dissenting).

²⁷⁶ 415 U.S. 452 (1974).

“principles of equity, comity, and federalism ‘have little force in the absence of a pending state proceeding.’”²⁷⁷

Ignoring *Steffel*, Justice White chose not to acknowledge this distinction or the expansion he was working in *Lyons*. Rather, like Justice Stewart in *Mitchum*, White seems to have been intent on presenting *Younger*’s principles as time-tested and invariable. Yet, the lineage reveals that they had not been nearly so broadly entrenched in Supreme Court jurisprudence as White suggested. More than any other facet of the opinion, White’s subtle addition of the word “normal” to the *Mitchum* formulation speaks to this effort to *normalize* the *Younger* doctrine even as *Lyons* significantly expanded the Court’s deference to those principles. The lineage thus reveals a joint—though several—project on the part of Justices Stone and White to significantly expand federalism’s influence over equitable restraint.

c. A Special Delicacy

In exercising their equitable powers federal courts must recognize the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.²⁷⁸

Justice White’s third principle represents the intertwining of two distinct lines of caselaw. The first line is fully embodied in *Stefanelli v. Minard*,²⁷⁹ where the specific language was fashioned. The second line begins with broad federalism concerns in *Mayor v. Educational Equality League*²⁸⁰ and evolves in *Rizzo v. Goode*.²⁸¹

In *Stefanelli*, the Court considered whether a federal court could enjoin a state criminal proceeding from admitting evidence obtained in violation of the Fourth Amendment.²⁸² Without much ado, Justice Frankfurter held that “the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured” illegally.²⁸³ In support, Frankfurter expressed how federalism concerns influenced equitable restraint: “The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment.”²⁸⁴ Although this language does not express any concept distinct from those embodied in the cited caselaw, Frankfurter drew linguistic inspiration from Justice Holmes’ opinion in *Sacco v. Massachusetts*:

Mr. Justice Holmes dealt with this problem in a situation especially appealing: ‘The relation of the United States and the Courts of the United

²⁷⁷ *Id.* at 462 (quoting *Lake Carriers’ Ass’n v. MacMullan*, 406 U.S. 498, 509 (1972)).

²⁷⁸ *Id.* at 112 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951); *O’Shea v. Littleton*, 414 U.S. 488, 500 (1974)) (citing *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Cleary v. Bolger*, 371 U.S. 392 (1963); *Wilson v. Schnettler*, 365 U.S. 381 (1961); *Pugach v. Dollinger*, 365 U.S. 458 (1961)) (cleaned up).

²⁷⁹ 342 U.S. 117 (1951).

²⁸⁰ 415 U.S. 605 (1974).

²⁸¹ 423 U.S. 362 (1976).

²⁸² 342 U.S. at 117–18.

²⁸³ *Id.* at 120.

²⁸⁴ *Id.* at 120–21 (citing *Watson v. Buck*, 313 U.S. 387, 401 (1941), *Beal v. Mo. Pac. R.R.*, 312 U.S. 45, 50 (1941), *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935), *Fenner v. Boykin*, 271 U.S. 240 (1926), *Maryland v. Soper* (No. 1), 270 U.S. 9 (1926), *Maryland v. Soper* (No. 2), 270 U.S. 36 (1926), and *Maryland v. Soper* (No. 3), 270 U.S. 44 (1926)) (cleaned up).

States to the States and the Courts of the States is a very *delicate* matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene.’²⁸⁵

In *Sacco*, Justice Holmes considered—and rejected—a request to stay Sacco’s imminent execution until the full Supreme Court could consider his application for relief.²⁸⁶ Holmes defended his denial by noting that “[f]ar stronger cases than this have arisen with regard to *the blacks* when the Supreme Court has denied its power.”²⁸⁷ Specifically, Sacco argued that Judge Thayer, who had presided over the Sacco and Vanzetti trial, was prejudiced against them.²⁸⁸ Thayer had, indeed, made public statements that supported this assertion.²⁸⁹ After Holmes denied the stay, the men were put to death in what would become “the most famous wrongful execution case” in United States history, but when Frankfurter penned his *Stefanelli* opinion, the execution of Sacco and Vanzetti had not yet become so widely regarded as wrongful.²⁹⁰ It is thus unsurprising that Frankfurter may have found the Sacco case “especially appealing[.]”²⁹¹ and therefore chose to echo Holmes’ “delicate” language.²⁹² Yet, by the time Justice White relied on *Stefanelli* in *Lyons*, the *Sacco* decision should not have seemed quite so “appealing.”²⁹³ Had *Stefanelli* adequately contextualized the “special delicacy” principle, or had White reinvestigated the contextual strength of that principle, he might not have so cavalierly relied on it. Then again, perhaps White would have found contextualization through *Sacco* contrary to the racial-subordination project in which Paul Butler suggests he was engaged.²⁹⁴ Either way, for want of interrogating the principle and transparently presenting its origins, the most famous wrongful execution in U.S. history—and an opinion laced with racism—had left another loaded weapon lying around in Supreme Court jurisprudence, and White deployed it to fortify his arguments against Lyons.

The second line of cases begins less than a decade before *Lyons* in *Mayor of City of Philadelphia v. Educational Equality League*.²⁹⁵ The *Mayor* case came before the Court after the Third Circuit granted the Educational Equality League injunctive and declaratory relief against the Mayor of Philadelphia for “violat[ing] the Equal Protection Clause of the Fourteenth Amendment by discriminating against Negroes in appointments to” the Philadelphia Board of Education.²⁹⁶ After first finding that the Mayor’s appointments

²⁸⁵ *Id.* at 124–25 (quoting *Sacco v. Massachusetts*, 1927 WL 27838, at *1 (1927)) (emphasis added).

²⁸⁶ 1927 WL 27838 at *1. See Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 411 (2006).

²⁸⁷ 1927 WL 27838 at *1 (emphasis added).

²⁸⁸ *Id.* at *1–2.

²⁸⁹ Kirchmeier, *supra* note 286, at 411.

²⁹⁰ *Id.* (noting that “many who have evaluated the evidence in recent years conclude that Sacco and Vanzetti were innocent” and that “[f]ifty years after their execution, the governor of Massachusetts . . . declared ‘that [all] stigma and disgrace should be . . . removed . . . from the names of their families’”).

²⁹¹ *Stefanelli v. Minard*, 342 U.S. 117, 124 (1951).

²⁹² *Id.* at 120.

²⁹³ See Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 411 (2006).

²⁹⁴ See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246 (2010).

²⁹⁵ 415 U.S. 605 (1974).

²⁹⁶ *Id.* at 606–11.

constituted an exercise of executive discretion for which the Mayor could be held accountable “only at the polls[,]” Justice Lewis Powell, stated, in dicta, that there were “also *delicate* issues of federal-state relationships underlying [the] case.”²⁹⁷ Whatever those issues were, they did not come into play in *Mayor*, for the Court decided the case “on an absence of proof.”²⁹⁸

Two years later, however, Justice Rehnquist relied on the *Mayor* dicta in *Rizzo v. Goode* to expand the application of federalism principles beyond requests to enjoin state court action and into requests to enjoin local law enforcement.²⁹⁹ In denying injunctive relief to rectify a “pervasive pattern of illegal and unconstitutional mistreatment by police officers . . . against minority citizens[,]” Rehnquist asserted that the Civil Rights Act remained subject to federalism principles:

[T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself.³⁰⁰

The *Mayor* dicta thus helped to work *Rizzo*’s expansion of federalism to encompass injunctions directed at police officers. And while White would contend in *Lyons* that “no extension” of *Rizzo* was necessary to deny injunctive relief, that claim was—as Justice Marshall argued in dissent—“simply disingenuous.”³⁰¹ Neither equitable restraint nor federalism concerns had yet applied to a case in which a plaintiff who had already suffered unconstitutional injury subsequently sought to enjoin the local law enforcement practices that had caused that injury.³⁰²

What is most disconcerting about this “special delicacy” lineage are the factual contexts through which both the language and the underlying principle were developed. The *Sacco* opinion—laced with racism and abdicating power to stay what would ultimately be revealed as a wrongful execution—spawned the language. And all three cases that worked the expansion of federalism concerns—*Mayor*, *Rizzo*, and *Lyons*—rejected the requests of minority citizens to enjoin unconstitutional conduct by local executive actors. This facet of the “special delicacy” lineage distinguishes it, dubiously, from the “proper balance” and “equity, comity, and federalism” lineages. While those lineages are marked by the judicial activism of Justices Stone, Sutherland, and White, the “special delicacy” lineage suffers from both White’s judicial activism and an ancestry of arguably racist import. And all three lineages reveal how quickly the factual contexts and origins of legal principles can be obfuscated. Indeed, when no effort is made to contextualize and transparently present the legal foundation on which a decision is rationalized, it is logically conceivable that the only possible outcome will be obfuscation. Like the *Lyons* majority

²⁹⁷ *Id.* at 614–15 (emphasis added).

²⁹⁸ *Id.* at 616.

²⁹⁹ 423 U.S. 362, 380 (1976) (citing *Educ. Equal. League*, 415 U.S. at 605).

³⁰⁰ *Rizzo*, 423 U.S. at 366, 378–80. Although Justice White cited directly to *Stefanelli*’s “special delicacy” language in *Lyons*, his string cite to *Rizzo* was directed at this passage.

³⁰¹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 123 (1983) (Marshall, J., dissenting).

³⁰² *Id.* at 123 (Marshall, J., dissenting).

opinion, judicial opinions which do this are, in Justice Marshall's words, "simply disingenuous." And such disingenuousness erodes the legitimacy of the federal judiciary.

iii. Other Remedies

After rejecting Lyons's claim on standing, equitable-restraint, and federalism grounds, Justice White offered this consolation:

[W]ithholding injunctive relief does not mean that the federal law will exercise no deterrent effect in these circumstances. If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983. Furthermore, those who deliberately deprive a citizen of his constitutional rights risk conviction under federal criminal laws.³⁰³

This deterrence concept—which, incidentally, has been largely gutted through the doctrine of qualified immunity³⁰⁴—originates in the Court's 1961 decision in *Monroe v. Pape*.³⁰⁵ There, thirteen Chicago police officers had broken into the home of a Black family "in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room," after which Mr. Monroe was detained at a police station for ten hours and interrogated without access to an attorney or his family.³⁰⁶ After canvassing the history of the Civil Rights Act from its origins in the Ku Klux Klan Act, Justice William Douglas concluded that federal courts had jurisdiction to hear such a complaint under Section 1983.³⁰⁷ In so holding, Justice Douglas's concern for the availability of alternative remedies focused on whether the existence of state common law remedies should preclude redress under Section 1983.³⁰⁸ But The Civil Rights Act, Douglas determined, had been designed to provide a federal remedy "where state law was inadequate."³⁰⁹ More pointedly, the Act sought "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."³¹⁰ On these findings, Justice Douglas determined that "[t]he federal remedy is supplementary to the state remedy[.]"³¹¹ In other words, with regard to violations of The Civil Rights Act, other remedies were very conceivably inadequate. Thus, had a citizen like Adolph Lyons brought suit against local law enforcement in 1961, the Court would not have suggested that other remedies would

³⁰³ *Id.* at 112–13 (majority opinion) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974)) (cleaned up).

³⁰⁴ Particularly in cases where "the Eleventh Amendment and absolute immunity rules . . . prohibit money damages[.]" *Lyons* has "obliterate[d] not only the most effective remedy"—injunctive relief—"but the sole remedy." Little, *supra* note 7, at 952–53. "The intersection of *Lyons* and qualified immunity rules . . . creates an impasse not only for many victims of official misconduct, but also for the development of the law itself." *Id.* at 953.

³⁰⁵ 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978) (*overruled insofar as municipalities could be deemed "persons" under Section 1983*).

³⁰⁶ *Id.* at 169.

³⁰⁷ *Id.* at 169–87.

³⁰⁸ *Id.* at 172.

³⁰⁹ *Id.* at 173.

³¹⁰ *Id.* at 174.

³¹¹ *Id.* at 183. *See generally* Michael J. Schmidtberger, *No Holds Barred in City of Los Angeles v. Lyons: Standing to Seek Injunctions in Federal Court against Municipalities*, 15 COLUM. HUM. RTS. L. REV. 183, 187–88 (1984).

adequately replace federal injunctive relief as a deterrent to unconstitutional police violence. Rather, providing such injunctive relief would have been viewed as essential to protecting civil rights.

Five years later, however, in *City of Greenwood v. Peacock*, the Court relied on *Monroe* when it rejected an attempt to remove state criminal prosecutions to federal court.³¹² State criminal charges had been brought against twenty-nine people who had been involved in civil rights activities in Mississippi.³¹³ Those charged claimed that the courts of Mississippi “were prejudiced against them because of their race or their association with Negroes” and were engaged in a “declared policy of racial segregation.”³¹⁴ Consequently, they sought to remove to federal court, and the Court was faced with questions “concerning the scope of the civil rights removal statute.”³¹⁵ After construing two statutory provisions as incapable of sustaining removal,³¹⁶ Justice Stewart defended that resolution: if those charged had been subjected to “an outrageous denial of their federal rights,” other remedies would enable the federal courts to redress those wrongs.³¹⁷ Supreme Court review and “many other remedies” would be available should the state courts fail to vindicate any federal rights.³¹⁸ In dissent, Justice Douglas cautioned that, rather than “tak[ing] considerable comfort from the availability . . . of numerous other federal remedies,” the majority should not forget “when these alternative remedies were conferred.”³¹⁹ All of these remedies were made available between 1866 and 1871, when Congress was particularly concerned that state courts would fail to vindicate federal civil rights.³²⁰ Had the majority so desired, the statutory removal provisions could have been read in concert with these other congressional enactments; that is, they could have been read in the context in which they were enacted. As Douglas saw it, the many remedies Congress had created were designed to work together to protect civil rights. But Justice Douglas spoke only in dissent, and for plaintiffs like Lyons, such a comprehensive remedial scheme was beginning to fracture.

Less than a decade later, Justice White would rely on *Peacock* in *O’Shea v. Littleton*, where he would further the idea that those remedial schemes enacted by the Reconstruction Congresses would retain their potency when segregated.³²¹ In denying injunctive relief to the “17 black and two white residents of Cairo” for want of standing, White echoed the defensive language of *Peacock* and penned the broader language he would later quote in

³¹² 384 U.S. 808 (1966).

³¹³ *Id.* at 810.

³¹⁴ *Id.* at 813 n.6.

³¹⁵ *Id.* at 814.

³¹⁶ 28 U.S.C. § 1443(1)–(2).

³¹⁷ *Peacock*, 384 U.S. at 828.

³¹⁸ *Id.* at 828–29. First, a federal injunction might enjoin the state prosecutions. *Id.* at 829 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)). The convictions might be set aside for violating Due Process. *Id.* (citing *Thompson v. City of Louisville*, 362 U.S. 199 (1960), *abrogated by Jackson v. Virginia*, 443 U.S. 307 (1979)). Or the writ of habeas corpus could issue. *Id.* (citing *Fay v. Noia*, 372 U.S. 391 (1963), *overruled by Wainwright v. Sykes*, 433 U.S. 72 (1977)). Finally, federal civil and criminal sanctions would be available against state officers who violated federal rights. *Id.* at 829–30 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)).

³¹⁹ *Id.* at 852 (Douglas, J., dissenting) (emphasis added).

³²⁰ *Id.* at 852–53 (Douglas, J., dissenting). See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 69 (1984).

³²¹ 414 U.S. 488 (1974).

Lyons: “Nor is it true that unless the injunction sought is available federal law will exercise no deterrent effect in these circumstances. Judges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights must take account of” potential criminal fines and imprisonment, as well as civil liability from which official immunity would not shield them.³²² While this may have still carried some truth in 1974, since *Pierson v. Ray* had innovated only a modest form of qualified immunity just seven years prior, by the time White restated the principle in *Lyons*, law enforcement had indeed been “shielded”—just one year earlier—under *Harlow v. Fitzgerald*.³²³ That is, once qualified immunity acquired its post-*Harlow* potency, the availability of civil liability would no longer counter-balance the unavailability of equitable relief.³²⁴

There are two striking features to the “other remedies” lineage. First, we may notice how *Monroe*’s juxtaposition of state and federal remedies—deployed to *sustain* the federal remedy—was repackaged to justify *withholding* federal remedies. Second, we must recognize that the entire “other remedies” jurisprudence developed in suits alleging racial discrimination. Yet, White acknowledged none of this in his *Lyons* opinion, and that failure to acknowledge the factual crucibles in which these principles developed presents one of the more pervasive and dangerous problems with our jurisprudence, to be discussed further in the following two Sections.

III. IMPLICATIONS

The *Lyons* ancestry shows us how past Supreme Courts enabled the Burger Court to close the courthouse doors on Adolph Lyons and allow the continued use of chokeholds. Principles developed in specious, obfuscatory, and activist Supreme Court opinions lay ready—preserved both innocuously and insidiously—for White to deploy against Lyons.

Considering the plaintiffs and outcomes in cases like *Muskraat*, *Cherokee Nation*, *Giles*, *O’Shea*, *Sacco*, *Mayor*, *Rizzo*, and *Peacock*, those charges of racism leveled against the Burger Court by the likes of Paul Butler can be seen *systemically* at work in the *Lyons* lineages.³²⁵ Likewise, when one considers the plaintiffs and outcomes not only in those cases, but also in cases like *In re Pacific Railway Commission* and *Nashville*, those lineages reveal an elitist protection of privilege and power noted by the likes of Gene Nichol and Steven Calabresi.³²⁶ And they reveal that the supermajoritarian paternalism of which Suzanna Sherry writes is not limited to the Burger Court, but—as evidenced by cases as old as 1831’s *Cherokee Nation*—is deeply ingrained in Supreme Court jurisprudence.³²⁷

³²² *Id.* at 491, 503–04.

³²³ *Pierson v. Ray*, 386 U.S. 547 (1967); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

³²⁴ *See supra* note 304.

³²⁵ *See supra* note 16, and accompanying text. “[T]he function that the Supreme Court has historically served in American government” is to “announce legal prohibitions on discrimination and enforce them against the other branches of government in a way that *suggests* a societal commitment to racial equality,” while “allocat[ing] resources in a way that overrides the very equality that its opinions pronounce.” Spann, *supra* note 18, at 1454 (emphasis in original). “[T]hroughout the history of the United States, the Supreme Court has presided over the sacrifice of minority interests for majority gain.” *Id.* at 1488.

³²⁶ *See supra* note 19 and accompanying text.

³²⁷ *See supra* note 18 and accompanying text.

And throughout the *Lyons* ancestry, the normative biases of Justices past are preserved in the rationales of Justices present.³²⁸

While this may not necessarily be true for every Supreme Court decision, its manifestation in the jurisprudence that bore *Lyons* should give us “pause” and encourage us “to review our principles.”³²⁹ This Note does not suggest that any of our jurisprudence should be discarded out of hand as irremediably tainted. Nor does it suggest that all Supreme Court decisions are, like *Lyons*, built on sand. Rather, this Note suggests that decisions like *Lyons*—arguably “wrong” in their own right—cannot be made “right” if the seemingly sound legal principles upon which they rest are left unexamined, and certainly not if they are obscured. Tear down *Lyons*, but pay no heed to its foundational sand, and whatever else is built on those principles will founder. Those doubtfully forged weapons remain and will again find willing hands. For whether we might join to overturn cases like *Lyons* on what are essentially normative grounds (i.e. because the decision encourages police violence and the Court refused to listen to a Black man), for constitutional reasons, or for the majority opinion’s own jurisprudential missteps, the distorted principles underlying *Lyons* would remain. Not all “loaded weapons” look like weapons. Not all dangerous legal principles cry out in normative terms to be overruled or abandoned. We must pay just as close, if not closer, attention to the seemingly settled and “neutral” principles that, when put together, construct a loaded weapon. To address these, this Note’s suggestion is modest: greater transparency in jurisprudence.

Critical to promoting the kind of transparency that might encourage systemic reform, we must “review our principles” relating to the discussion and citation of supporting caselaw. Not only does the lineage present another vantage point from which we may discern why the *Lyons* decision was wrong, but it should also encourage us to question how we interrogate legal principles and weigh different facets of precedent. Many scholars have argued that *Lyons* was wrongly decided and should be overruled, and to their chorus, this Note adds yet another voice. Yet, this Note seeks not only to help reopen the courthouse doors to people harmed by police violence, but also to demonstrate the value of embracing jurisprudential methodologies that refuse to consider legal principles stripped of their factual and political contexts. This Note does not suggest a radical departure from our existing methodologies; rather, it suggests that subtle shifts in how we present and argue legal principles will promote a radical improvement in judicial transparency. But before discussing that more thoroughly, let us review what the research itself reveals vis-a-vis Adolph Lyons and the Supreme Court.

A. *The Standing Lineage*

The *Lyons* decision, while relevant to other areas of law, remains critical to whether a plaintiff has standing to seek injunctive relief.³³⁰ What the lineage reveals is that Lyons himself may have had standing were it not for a handful of jurisprudential ancestors. Were it not for *Muskraat*, Lyons’s request for injunctive relief might have survived as an Article III case, rather than failing as an Article III controversy.³³¹ Were it not for *Cherokee Nation*,

³²⁸ See *supra* notes 19–21, 30 and accompanying text.

³²⁹ See President Andrew Jackson, *Veto Message (July 10, 1832)*, THE AVALON PROJECT, https://avalon.law.yale.edu/19th_century/ajveto01.asp.

³³⁰ See *supra* notes 7, 47–48 and accompanying text.

³³¹ See *supra* i. An Actual Case or Controversy.

Lyons's claim of future injury might have been seen as sufficiently real and immediate.³³² And were it not for *Cherokee Nation*, *Tyler*, and *Mellon*, Lyons's claim might not have been discounted as a generalized grievance.³³³ Without the pivotal changes these decisions worked, Justice White would have had to break far more new ground than he did when he fragmented the standing inquiry. Without the tools left lying about in those earlier opinions, White might not have been able to weaponize standing doctrine against Adolph Lyons. Just as *Lyons*—with all it has to teach us about systemic racism, police protectionism, elitism, over-glorified individualism, and supermajoritarian paternalism—is alive and well in 2021, so too these critical cases live and breathe in *Lyons*. *Lyons* is their progeny, and they are, largely, not ancestors of which any should be proud.

*Muskra*t well exemplifies how jurisprudential principles cannot be divorced from the context in which they were developed. The conflation of cases and controversies that helped the *Muskra*t Court avoid reaching the merits of the Cherokee's claims was used to deny a historically oppressed racial and political minority the right to be heard to the advantage of the economically, politically, and racially privileged. And the *Muskra*t decision smells of the same supermajoritarianism Suzanna Sherry identified in *Lyons*, for the *Muskra*t Court actively rejected Congress's attempts to rectify those wrongs already inflicted on the Cherokee. Nor was *In re Pacific Railway Commission*—where Justice Field fashioned the *Muskra*t conflation—free from elitist bias. Speaking to such elitism, Gene Nichol has observed that the federalism concerns that counseled restraint in *Lyons* “melted away” in *Bush v. Gore* because “George W. Bush is not Adolph Lyons.”³³⁴ It may just as truly be said that Adolph Lyons is not Leland Stanford. And while the Court overturned *In re Pacific Railway Commission*, it did not discard that decision's conflation of cases and controversies. Rather, the Court embraced that conflation, deployed it against the Cherokee, and passed it on to *Lyons*.

Cherokee Nation likewise demonstrates how legal principles, by surviving the ugliness of their conceptions, can still carry that ugliness with them in the jurisprudence of future Courts. *Cherokee Nation*'s “actual or threatened” language, rephrased in *Mellon*, is the direct ancestor of the *Lyons* injury formulation. Authored by Justice Thompson in dissent, that language was fashioned to argue *against* silencing a racial and political minority, against Chief Justice Marshall's paternalistic framing of the Cherokee-United States relationship as that of a “ward to his guardian,”³³⁵ and against the unconstitutional taking of property. And although Thompson's arguments should have been vindicated by the Court's about-face in *Worcester v. Georgia*, they were undone when the language survived *Cherokee Nation* and was repackaged to silence another racial and political minority—Adolph Lyons. The ugliness, though long forgotten (at least largely by privileged majorities), inheres to the “loaded weapon,” always ready to reveal itself.³³⁶

The generalized-grievances lineage is no less disturbing. Categorically, it supports the idea that the Court has actively sought to restrict court access by demanding personalized injury.³³⁷ First, the majority opinion in *Tyler* embarked on an astonishing

³³² See *supra* b. The Second Lineage: Controversies Become Injuries.

³³³ See *supra* iii. Generalized Grievances.

³³⁴ See Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 328 (2002).

³³⁵ 30 U.S. 1, 17 (1831).

³³⁶ See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

³³⁷ See *supra* note 21 and accompanying text.

departure from the settled and original practice of affording strangers writs of prohibition.³³⁸ While that departure was an innovation unnecessary to *Tyler*'s resolution, *Tyler* went on to form much of the bedrock upon which myriad decisions would build when refusing to reach the merits of constitutional claims.³³⁹ *Mellon*'s absorption of political question doctrine forms the rest of that bedrock.³⁴⁰ While *Mellon* depended on *Cherokee Nation*'s suggestion that some violations of Cherokee rights might present political questions,³⁴¹ that suggestion did not decide the case. The racism, elitism, and paternalism that inhered to *Cherokee Nation* did, however, survive to fight another day in *Giles*'s refusal to enjoin racially discriminatory voting laws.³⁴² And although *Mellon*'s subsequent expansion of the principle to encompass civil as well as political rights occurred in the arguably innocuous context of preventing a challenge to a Progressive federal statute aimed at protecting the health of mothers and infants, that expansion lay ready, like one of Justice Jackson's "loaded weapon[s],"³⁴³ for the *Lyons* Court to pick up. When *Tyler*'s contraction of third-party standing combines with *Mellon*'s expansion of political question doctrine into a ban on generalized grievances pertaining to civil rights, the result is the closing of the courthouse doors to those like *Lyons* who just might be motivated by altruism, rather than particularized self-interest.³⁴⁴ *Cherokee Nation*'s dicta and *Tyler*'s rejection of stranger suits—both *unnecessary* to the resolution of those cases—became *necessary* tools in silencing *Lyons*.

B. The Equitable Relief Lineage

Although unnecessary to the *Lyons* decision, Justice White's equitable-restraint dicta—including federalism concerns and the notion that "other remedies" will deter violations of constitutional rights—builds on Court decisions that deserve greater scrutiny. The better part of those cases in which these principles were developed is marked by what can only be recognized as an obfuscatory species of judicial activism. Justices Stone, Sutherland, White, and, to a lesser extent, Rehnquist reveal themselves as the primary architects of a federalism-fueled version of equitable restraint. What Paul Butler has described as "a project by the Burger, Rehnquist, and Roberts Courts to expand the power of the police against people of color[]" may be more broadly framed as the *reality* of Supreme Courts past and present.³⁴⁵ Certainly, Justice White's activist involvement cannot be overstated. In *O'Shea*, White began an unnecessary—an activist—expansion of both equitable restraint and federalism's influence, and he continued that expansion in *Lyons*.³⁴⁶

³³⁸ See *supra* iii. Generalized Grievances.

³³⁹ See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1431–33 (1988). Indeed, *Tyler* continues to have relevance today. In the 2020 abortion rights case, *June Medical Services L.L.C. v. Russo*, Justice Clarence Thomas cited *Tyler* to support his argument that the aversion to third-party standing should be viewed as constitutionally compelled rather than prudential. 140 S. Ct. 2103, 2143–44 (2020) (Thomas, J., dissenting).

³⁴⁰ See *supra* iii. Generalized Grievances.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1503, 1511 (1988).

³⁴⁵ See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246 (2010).

³⁴⁶ See *supra* i. An Adequate Basis for Equitable Relief.

Taken alongside Justice Rehnquist's expansion of federalism's influence in *Rizzo*, White's efforts fortify the view that the Burger Court played a major role in this "project."³⁴⁷ Yet, the Burger Court's contributions were built on those expansions worked by at least two other "Courts"—those led by Chief Justices Taft and Hughes. The expansion of federalism concerns worked by Justice Sutherland in the mid-1920s generated the caselaw on which Justice White would later rely.³⁴⁸ Likewise, Justice Stone's efforts to promote federalism in the early 1930s offered White the tools with which to *normalize* the principles of "equity, comity and federalism."³⁴⁹ When Adolph Lyons requested injunctive relief, his appeal was heard not only by the Burger Court, but by these crucial earlier Courts as well. It was not only Justices White, Burger, Powell, Rehnquist, and O'Connor who denied Lyons's claim. Justices Sutherland and Stone were still very much sitting in judgment on the bench. To be clear, this point should in no sense be perceived as an assault on the ideal of federalism itself—which is a vital component of our structural Constitution—but only as a rejection of judicial activism cloaked in the language of federalism, particularly when deployed against minorities of *any* kind.

Yet, the equitable-relief lineage is not only marked by judicial activism (or a lack of judicial restraint). It is also seeded with racism. The "special delicacy" language finds its origins in *Sacco*, where Justice Holmes blithely refers to "the blacks" while denying a stay of execution.³⁵⁰ And *Mayor, Rizzo*, and *Lyons* expanded the influence of that articulation of federalism while rejecting claims of racial discrimination in city appointments, racial discrimination by local law enforcement, and unconstitutional police violence that disproportionately impacted minorities.³⁵¹ Such suspect decisions denying relief to those alleging race-related constitutional violations define the Court's rejection of *Monroe* in *Peacock*, *O'Shea*, and *Lyons*.³⁵² Those opinions worked hard to defeat the connection between federal remedies and the Civil Rights Act that Justice Douglas had carefully (and correctly) established in *Monroe*.³⁵³ And they succeeded against his dissent in *Peacock* and against his further admonitions in cases outside the *Lyons* lineage like *Terry v. Ohio*, where Douglas wrote that "[t]here have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."³⁵⁴ As the *Lyons* ancestry reveals, those pressures have indeed been at play in Supreme Court decisions "throughout our history." And those pressures do not evaporate when the Justices change or public sentiment evolves; rather, they continue to exert their influence on the Court through seemingly neutral legal principles that were forged when past Courts capitulated to those very pressures.

³⁴⁷ See *supra* c. A Special Delicacy. See also *supra* note 16, and accompanying text.

³⁴⁸ See *supra* a. A Proper Balance.

³⁴⁹ See *supra* b. Equity, Comity, and Federalism.

³⁵⁰ See *supra* c. A Special Delicacy.

³⁵¹ *Id.*

³⁵² See, *supra* Section II.B.iii.

³⁵³ *Id.* Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 988 (1983) ("[T]he federal courts' refusal to use their equitable powers to reform state justice systems directly contravenes the intent of the Reconstruction Congresses that adopted the fourteenth amendment and enacted section 1983.").

³⁵⁴ *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). And, as Paul Butler notes, Justice Douglas considered police practices to be "anti-Negro." Paul Butler, "*A Long Step Down the Totalitarian Path*": Justice Douglas's Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 31 (2009). (quoting WILLIAM O. DOUGLAS, POINTS OF REBELLION 45 (Random House 1970)).

This is, again, not to diminish the role of the Court that actually hears a particular case. Despite the pressures of Courts past, those Justices writing in the present have choices to make. To pick up or let lie the loaded weapon—that is the question. And, regardless of the answer, to do so transparently. But there are also normative choices to make between competing precedential lineages. For example, both *Monroe*—where Justice Douglas sought to return the federal courts to their congressionally intended role in defending civil rights—and *Giles*—where Justice Holmes allowed “the great mass of the white population” to run roughshod over the Constitution—were ancestors of *Lyons*.³⁵⁵ And Justice White decidedly chose to honor *Giles* rather than *Monroe*. Just as Holmes suggested that federal courts could only provide a damages remedy to rectify a “great political wrong,” so White made clear that damages were all the relief the federal courts would provide to redress a great and pervasive civil wrong.³⁵⁶ We can, and we must, make better normative and jurisprudential choices. And we can, and we must, recognize that even the most seemingly inoffensive legal principles can be weaponized. And truly, as a matter of first principles, regardless of the doctrinal choices, we must transparently explain and justify our decisions. We must not allow judicial opinions to hide the law.

IV. RECOMMENDATIONS

As John Hart Ely contended just three years before *Lyons*, representative democracy malfunctions “when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change”³⁵⁷ With regard only to the *Lyons* decision, the lineage reveals that the *process* whereby the Supreme Court’s jurisprudence was forged is very much “undeserving of trust,” for that process built on principles developed by arguably racist, elitist, paternalist, and speciously activist Courts. The *Lyons* decision cannot be separated from those decisions underlying its rationale. And the result in *Lyons* can very aptly be called one whereby “the ins” choked off one channel of political change—the federal courts. The very nature of the jurisprudence that led to *Lyons* should elicit distrust. And the *Lyons* majority opinion, by “disingenuously” framing what the law had been in order to change what the law is, should elicit similar distrust.

Both because the jurisprudence on which *Lyons* was built cannot be trusted and because the real-world ramifications of the *Lyons* decision translate into an enhanced protection of unconstitutional police violence—particularly that which is directed at Black and Brown individuals and communities—*Lyons* should be overturned and the import of its progeny abandoned. Advocating for a rejection of *Lyons* is, however, but one purpose of this Note.

The other is to encourage increased transparency in the judiciary and legal profession. Only through devotion to transparently stating the law can we avoid outcomes like that in *Lyons*. Achieving transparency begins with recognizing that some of our current methodologies are flawed. For example, judicial opinions will often cite to a recent controlling case that supports a legal principle. Such cases, like those cited by the *Lyons* majority, are often far removed from the original source of the principle—the case that first fashioned and announced it—and often far removed as well from later cases that

³⁵⁵ See *supra* iii. Generalized Grievances.

³⁵⁶ *Id.*

³⁵⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (Harvard University Press 1980).

fundamentally altered the principle. By citing to more recent caselaw that simply parrots, and sometimes distorts, the original principle and fails to attend to its historical evolution, we obfuscate the factual and political contexts through which the principle was born and developed. In so doing, we unconsciously reinforce systemic problems. Surely there is a great deal of our Supreme Court law that is not built on principles developed in such doubtful contexts as those found in *Lyons*'s ancestry, but we cannot know unless we look. And, more broadly, *the people* cannot know unless jurists are thorough and rigorous in their opinions.

Contextualizing legal principles by understanding how and when they were born or evolved is critical to assessing the merits of both Court decisions and generally accepted legal principles. Once the inquiry has been made and a principle's context laid bare—once transparency has been achieved—we can make an informed decision to either repudiate the principle or reaffirm it. Conversely, when we continue to affirm principles without regard for the factual and political crucibles in which they were forged, we ignorantly reaffirm any systemic problems that might inhere to those principles. Some jurists already embrace such contextualization and the transparency it engenders, but we need jurists to broadly embrace this jurisprudential power. The legitimacy—or perceived legitimacy—of our judiciary is at stake.

A recent district court opinion, *Jamison v. McClendon*,³⁵⁸ should inspire us to embrace this form of transparency and the species of judicial activism that it represents. In *Jamison*, Judge Carlton Reeves granted qualified immunity on a motion for summary judgment relating to an unconstitutional search of a Black man's vehicle during a traffic stop.³⁵⁹ The ruling was an inevitable consequence of the current law of qualified immunity. Before so holding, however, Reeves took the time, “[i]n accordance with Supreme Court precedent, . . . [to] look at the ‘origins’ of the relevant law.”³⁶⁰ In a section of his opinion titled “Historical Context,” Reeves devoted twenty-seven pages of a seventy-two-page opinion to a discussion of the origins and evolution of both 42 U.S.C. § 1983 and the doctrine of qualified immunity.³⁶¹ What's more, Reeves declined to exercise his discretion under *Pearson v. Callahan*³⁶² to grant qualified immunity without reaching the merits of the underlying constitutional violation and, instead, took the time to determine whether *Jamison*'s Fourth Amendment rights had been violated.³⁶³ Both of these jurisprudential steps speak precisely to the kind of transparency for which this Note advocates. In particular, Reeves's devotion to acknowledging and discussing the historical origins of the “relevant law” should be taken as the best form of judicial activism—where jurists do not shy away from rendering fully transparent judicial opinions. Certainly, every jurist need not discuss the origins of every legal principle to such a fulsome degree as did Judge Reeves in *Jamison*. But to present legal principles without any acknowledgment of their origins—as Justice White so often did in *Lyons* and as so many jurists before him did throughout the *Lyons* ancestry—is a jurisprudential choice fundamentally at odds with the value of

³⁵⁸ *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

³⁵⁹ *Id.* at 409, 411, 424.

³⁶⁰ *Id.* at 396 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)).

³⁶¹ *Id.* at 396–409.

³⁶² 555 U.S. 223 (2009).

³⁶³ *Jamison*, 476 F. Supp. 3d at 409–16.

transparency. With time, the cumulative effect of such obfuscating choices is to render ours a government of words, and not of laws.

Of course, the choice to contextualize the origins of a legal principle generates further normative choices. Judge Reeves’s decision to thoroughly contextualize the relevant law is one choice, and his decision to highlight certain facets of the legal history is another choice. But even where the present case does not lend itself to a full discourse on legal origins, normative choices must be made, and these choices significantly impact the relative transparency achieved.

Consider, for example, the choices made in writing a simple parenthetical citation to *Lyons* itself. One recent *Lyons* parenthetical reads, “holding that appellant’s claim for injunctive relief is moot because ‘there was no finding that [he] faced a real and immediate threat of [repeated illegal conduct].’”³⁶⁴ Setting aside what should be an obvious error (*Lyons* actually held that the claim was *not* moot), notice the bracketed “repeated illegal conduct” in place of *Lyons*’s “again being illegally choked.”³⁶⁵ The choice to generalize from the specific may be natural to the legal profession and may have practical value, but that choice nevertheless carries normative implications because it launders the law when it articulates the principle. But both the specific and the general can co-exist without sacrificing legal clarity. Indeed, as this Note has argued, such generalization can obfuscate the factual truth that inheres to the legal principle. Likewise, notice that the parenthetical strips *Lyons* of his identity; he is “appellant” now. While generalizing *may* be adequate, generalizing does not promote transparency, nor does it center the human beings impacted by the decision. This illustrative parenthetical could convey the same legal principle without obscuring the important factual context through which that principle was forged.

Consider, as but one variation, this parenthetical instead: “holding that *Lyons, a Black man, lacked standing* for injunctive relief because ‘there was no finding that [he] faced a real and immediate threat of *again being illegally choked.*’” These are not “major” changes, but they enhance transparency without diminishing legal clarity. While “appellant” adds nothing to one’s understanding of the holding, “Lyons, a Black man” reminds us of the litigant’s name, race, gender, and humanity. A human named Adolph Lyons was denied relief. He was a man. And he was Black. These facts are far from irrelevant, and including them adds only a few words and takes nothing from the expression of the principle. Even “Black appellant” would be preferable when we consider the judiciary’s proclivity for willful colorblindness.³⁶⁶ Likewise, “again being illegally choked”—the language from *Lyons* itself—preserves some of *Lyons*’s factual context without sacrificing clarity. Here, the court replaced “again” with “repeated,” changed “illegally” to “illegal,” and generalized “choked” into “conduct.” These choices do not enhance the clarity of the legal principle, but they do play a role in subverting transparency. Again, this is just an example, and affording thorough consideration to such normative choices is beyond the scope of this Note. These illustrative revisions serve simply to highlight this truth: when discussing legal principles or citing caselaw, jurists make

³⁶⁴ *Malhan v. Att’y Gen. New Jersey*, 848 F. App’x 517, 520 (3d Cir. 2021) (alterations in original). No offense is meant in singling out this parenthetical; it merely serves as an example.

³⁶⁵ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 110 (1983).

³⁶⁶ See BUTLER, *supra* note 17 and accompanying text; Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 330 (2014).

choices, and these must be active, conscious, and conscientious choices if we are to advance the cause of transparency in the judiciary.

Such a focus on contextualization could also have applications in the Court's *stare decisis* analysis, which currently does not interrogate the factual contexts in which decisions were rendered other than to ask if the facts have changed.³⁶⁷ And while the Court does consider a decision's relative age, it gives greater weight to older decisions in part because of reliance interests.³⁶⁸ But what the *Lyons* lineage should reveal is that our distrust of decisions might increase, not decrease, with age. Indeed, there may be certain temporal lines of demarcation that can help determine the degree of skepticism with which long-established principles should be reviewed. For example, principles that originated prior to the adoption of the Reconstruction Amendments, or the Nineteenth Amendment, or perhaps the Voting Rights Act, might be accorded less weight than those fashioned later because the Justices who shaped them were appointed and confirmed by politicians who were elected by only a fraction of the people. To weigh such principles equally with those principles more recently developed is to allow Justices long passed to continue to sit in judgment over the likes of Adolph Lyons—Justices like John Marshall who, though possessed of powerful legal minds, also enslaved human beings.

To make such a searching inquiry into jurisprudential principles may seem a daunting and unmanageable task, but the work is no less essential just because it is difficult. And the work snowballs, getting easier as more jurists embrace contextualizing the origins of relevant law. As a case in point, Judge Reeves's discussion of the evolution of the Reconstruction statutes and qualified immunity in *Jamison* need not be cabined to that case. It is an easy thing for other jurists to quote—and even reframe, if they choose—that discussion when rendering similar decisions. In short, transparency does not demand that we continually reinvent the wheel; rather, transparency is a project in which jurists can engage as necessity and practicality dictate.

Nor is such a project limited to jurists and their clerks. Legal practitioners can participate in promoting transparency by making arguments regarding the contextual origins of the legal principles at issue. Very likely such arguments will often be unavailing, but that should not deter those committed to transparency from making the arguments and thereby challenging the courts to respond to them. Just as Justice White's rejection of Adolph Lyons was the culmination of 150 years of evolving jurisprudence—just as it took far more Justices than the nine sitting on the bench in 1983 to close the courthouse doors on Lyons—so, too, a project to reform the judiciary, beginning with transparency, will take the combined efforts of many jurists and attorneys, and it too will take time.

CONCLUSION

George Floyd was murdered, in part, because the Court—not the Burger Court, or today's Court, or the Court at the Founding, but the Court as the head of a branch of government unbounded by time—suffers from its own, peculiar multi-generational biases, a penchant for an obfuscatory species of judicial activism, and, most critically, a jurisprudential process that slowly but surely affords such systemic biases time and space to take root. In short, the federal judiciary suffers from systemic problems that judicial

³⁶⁷ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

³⁶⁸ *Id.* at 1415.

processes themselves reinforce. But this Note proposes that the cure does not require a radical upheaval. Rather, valuable, apolitical reform is possible through modest jurisprudential adjustments.

Chief Justice Marshall famously asserted that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”³⁶⁹ At first blush, perhaps Marshall’s language suggests that it is the judiciary’s jurisdictional duty to announce law, to “discover” law, or to have the final word among the branches, but Marshall’s words can also serve as an admonition and, even, an aspiration. That is, it is the duty of the third branch to state the law, fully and thoroughly, without diminishing the factual and historical contexts through which the law has been shaped. The Article III judiciary should be held to the Chief Justice’s emphatic command. If factually barren generalizations that obscure—intentionally or unintentionally—the contextual origins of legal principles sufficiently state the law, then our judicial processes are healthy. But if “concrete adverseness” does indeed “sharpen[] the presentation of issues necessary for the proper resolution of constitutional questions,”³⁷⁰ then such concreteness inheres to the law. The law is not truly the law when it is stripped of those facts which the Court itself considers essential to saying “what the law is.” For, again, the law is not doctrine *derived from* cases and controversies; the law *is* cases and controversies.

Nearly a year following George Floyd’s death, his brother, Philonise Floyd, said of George, “I know that he’s with us, and he’s standing up . . . America, we need to heal. This nation needs healing. Our family needs healing.”³⁷¹ Part of that healing must focus on our judiciary. The Court is not, alone, responsible for George Floyd’s murder, but it played a role—substantially the one in which Justice Thurgood Marshall cast the majority when he wrote in dissent that:

The Court today holds that a federal court is without power to enjoin the enforcement of the City’s policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result . . . Under the view expressed by the majority today, if the police adopt a policy of “shoot to kill,” or a policy of shooting one out of ten suspects, the federal courts will be powerless to enjoin its continuation. The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.³⁷²

³⁶⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803). “Province” in this context most likely means “jurisdiction.” See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 360 (2002).

³⁷⁰ *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (internal quotation marks omitted).

³⁷¹ Brad Parks, Carma Hassan & Deanna Hackney, *Minneapolis Will Pay George Floyd’s Estate \$27 Million After City Council Votes to Settle Lawsuit with Family*, CNN (Mar. 12, 2021, 7:03 PM), <https://www.cnn.com/2021/03/12/us/george-floyd-minneapolis-settlement/index.html>.

³⁷² *City of Los Angeles v. Lyons*, 461 U.S. 95, 113, 137 (1983) (Marshall, J., dissenting) (citations omitted).

Just as Justices long passed joined the Burger Court in silencing Lyons, so too, today, the Burger Court continues its effort to keep the courthouse doors closed. The suit filed by Floyd’s family against the City of Minneapolis proves that Justice Marshall was right. The Floyd family alleged a pervasive, city-sanctioned practice of allowing unconstitutional police violence.³⁷³ And while not adopting a policy of “shoot to kill,” the Minneapolis Police Department allowed, among other things, “Killology” training, where police officers are taught “to consider every person and every situation as a potential deadly threat and to kill ‘less hesitantly.’”³⁷⁴ Yet, despite this policy, the Floyd family could only seek monetary damages; they did not even ask for an injunction.³⁷⁵ How could they? *Lyons* is insurmountable. The federal district court was, indeed, “limited to levying a toll” for a systemic constitutional violation, so the City settled for \$27 million.³⁷⁶ As the City announced the settlement, the City Council President acknowledged that “‘no amount of money’ could bring Floyd back.”³⁷⁷ Truly, with at least \$3 billion paid out in police misconduct settlements between 2011 and 2021 alone,³⁷⁸ it is clear that no amount of money can remedy problems that the Constitution is structured to solve or cure violations the Constitution explicitly prohibits. Police violence goes on undeterred. And, regardless, no amount of money can change the *fact* that George Floyd—and uncounted others—are gone.

We cannot fix these problems with existing methodologies. If we are to reform, if we are to heal, the Court as an institution, we must recognize that “[t]he dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise—with the occasion . . . we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.”³⁷⁹ What was true for President Abraham Lincoln in 1862 is true for us in 2021. But today, disenthralling ourselves begins with transparency. Only by embracing that principle in jurisprudence can we rise to the occasion of contemporary problems like unchecked, unconstitutional, and racist police violence and actively choose from among those “dogmas of the quiet past” which we will reaffirm and which we will abandon. Only through a reimagined commitment to transparency can we begin the (impossible) process of finding justice for George Floyd. Only through transparency can we begin to make his family, our people, and our Constitution whole.

³⁷³ Pl.’s Compl. ¶¶ 221–41, *Schaffer v. Chauvin*, No. 20-cv-1577 (SRN/TNL), 2020 WL 3988441 (D. Minn. July 15, 2020).

³⁷⁴ *Id.* ¶ 145.

³⁷⁵ *Id.* ¶ 2.

³⁷⁶ Steve Karnowski & Amy Forliti, *Floyd Family Agrees to \$27M Settlement Amidst Ex-Cop’s Trial*, AP (Mar. 12, 2021), <https://apnews.com/article/minneapolis-pay-27-million-settle-floyd-family-lawsuit-52a395f7716f52cf8d1fbeb411c831c7>.

³⁷⁷ *Id.*

³⁷⁸ Amelia Thomson-DeVeaux, Laura Bronner, & Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here’s Why It’s So Difficult to Hold Departments Accountable*, FIVETHIRTYEIGHT (Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/#:~:text=Our%20analysis%20shows%20the%20cities,over%20the%20past%2010%20years.>

³⁷⁹ Abraham Lincoln, *Annual Message to Congress – Concluding Remarks*, COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler, ed. 1953) (emphasis added). (Note: page number missing.)