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ARTICLE

THE CLAIM AND THE RELIEF: REVEALING MISCONCEPTIONS AND MISSTEPS IN THE U.S. SUPREME COURT'S JURISPRUDENCE FOR §1983 ACTIONS AND BLACK LIVES MATTER

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This article explores the persistent challenges in addressing police brutality through civil rights litigation, focusing on the limitations imposed by federal jurisdiction and justiciability doctrines post-Lyons. It argues that the Supreme Court's approach, which conflates jurisdictional inquiries with procedural or remedial ones, has significantly hindered access to justice for plaintiffs seeking to vindicate their constitutional rights under §1983. By examining the foundational jurisdictional and procedural principles at stake, the article reveals the Court's missteps and suggests ways to disentangle these concepts, aiming to restore §1983's essential role in defending constitutional rights and ensuring that victims of police misconduct can obtain full redress in federal courts.

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I. INTRODUCTION

Nearly four decades after *City of Los Angeles v. Lyons* was decided,[1] we are still unable to challenge police brutality effectively via injunctive relief, and are instead confined to seeking damages for "past conduct"—for the brutalities and the use of deadly force that may have resulted in deaths—over and over again, all because the plaintiff before, and the one before that, could only bring to court, if they were lucky enough to make it that far, their "past exposure to illegal conduct."

Our post-*Lyons*[2] history is perhaps the strongest possible signal that the Court's approach to the problem has not proven successful, for the problem persists and dramatic violations of fundamental constitutional rights continue to occur, leading to the creation of movements like Black Lives Matter (BLM), a decentralized political and social movement advocating against the racism, discrimination, and inequality experienced by Black people. Their advocacy has provided a tremendous contribution to social justice and equality, but more needs to be done. Namely, federal jurisdiction and justiciability doctrines should be tools that the social justice and equality movements can draw upon, rather than obstacles that they must continually struggle to overcome.

Presently, the relevant doctrines and their interpretations do not allow federal courts to act within their province and perform their duty to say what the law is, thereby defending the Constitution. This article offers some ideas to help courts facilitate that mission and restore to §1983 its essential role in defending our constitutional system.

The core problem in current §1983 litigation derives from both a mistaken blurring of the jurisdictional and the remedial or procedural, and from a surgical fragmentation of the claim, in the erroneous belief that the plaintiff has a separate claim for each injury and each form of relief sought. But a "claim" in federal court is not the same as a "cause of action" in state court, and the difference between the two is not merely stylistic.

A federal court "claim" is a set of operative facts that give rise to one or more rights of action. Thus, it may comprise one or more injuries that are related to the same underlying set of facts. By contrast, a "cause of action," in state courts like California that have adopted the primary rights approach, is a set of operative facts giving rise to one right of action, with the result that there is a separate cause of action for each right sought to be vindicated. The more rights violated, the more causes of action, even if they all arose from the same transaction or occurrence. The federal "case or controversy" analysis doesn't apply in state courts since they are not subject to the jurisdictional limitations of Article III, §2. Nor, conversely, should state "cause of action" analysis apply in federal courts. However, the result of these two parallel but very different approaches to defining "cause of action" and "claim" is that federal courts have unwittingly blended the two concepts, thereby creating severe obstacles to plaintiffs obtaining complete relief on §1983 claims in federal court.

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[1] 461 U.S. 95 (1983).

[2] Id.

By examining some of the foundational jurisdictional and procedural principles at stake, this article reveals some of the Supreme Court's missteps in its constitutional rights jurisprudence and the source of these misunderstandings. In doing so, I hope to provide the federal courts with a means of applying these principles in a way that will allow those whose constitutional rights have been violated to obtain full redress in a forum uniquely qualified to dispense justice in such cases.

Starting with *Linda R.S. v. Richard D.*,[3] and *City of Los Angeles v. Lyons*,[4] the Supreme Court has slowly but steadily imported categories taken from the "injunctive relief" realm into the analysis of standing, conflating the claim and the relief, and thus frontloading the analysis of the merits of the claim, making access to justice increasingly difficult, especially in constitutional rights actions brought under §1983.[5] The recurring language in the Supreme Court's and lower courts' decisions – that "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",[6] or that "plaintiff who alleges past harm lacks standing to seek injunctive relief",[7] or even more troubling, that "plaintiff must demonstrate standing separately for each form of relief sought"[8] – reveals the source of the problem.

Because standing calls for a jurisdictional inquiry, while relief calls for a procedural or remedial one, the standard for satisfying the former cannot be the same as the one applicable to deciding whether relief can be granted, and the consequences of failing to show entitlement to the relief

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[3] 410 U.S. 614 (1973).

[4] 461 U.S. 95 (1983).

[5] 42 U.S.C. §1983.

[6] Lyons, 461 U.S. at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974); *see also* Thompson v. Lengerich, 798 Fed. Appx. 204, 210-211 (10th Cir. 2019); Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019)) ("As the district court explained, a plaintiff seeking prospective injunctive relief 'may not rely on prior harm' to establish Article III standing. '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.' Because the plaintiffs are pursuing prospective injunctive relief in connection with their facial challenge to STAF 6.24, they may not rest on the University's past conduct, but they must instead 'establish an ongoing or future injury in fact.'") (internal citations omitted); Rezaq v. Nalley, 677 F.3d 1001, 1008 (10th Cir. 2012) ("When prospective equitable relief is requested, the requesting party must show an ongoing, personal stake in the controversy, a likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.' 'Similarly, in the context of an action for declaratory relief, a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant.'") (internal citations omitted).

[7] *See* Black Lives Matter D.C. v. Trump, 544 F.Supp.3d 15 (D.D.C. 2021).

[8] *See*, *e.g.*, Perez v. San Diego County, 2021 WL 3533322, *2 (S.D. Cal. 2021); Ward v. City of Barstow, 749 Fed. *Appx.* 529, 530 (9th Cir. 2018); Center for Bio-Ethical Reform, Inc. v. Black, 234 F.Supp.3d 423, 431 (W.D.N.Y. 2017); Wisconsin Carry, Inc. v. City of Milwaukee, 35 F.Supp.3d 1031, 1036 (E.D. Wis. 2014); Cooke v. Wood, 2011 WL 1542825, *6 (D. Del. 2011); MacIssac v. Town of Poughkeepsie, 770 F.Supp.2d 587, 593-549 (S.D.N.Y. 2011) ("'[A] plaintiff must demonstrate standing separately for each form of relief sought'… Past injury alone does not establish a present case or controversy for injunctive relief. Rather, 'the injury alleged must be capable of being redressed through injunctive relief at the moment.'") (internal citations omitted); Schirmer v. Nagode, 621 F.3d 581, 585 (7th 2010); Discovery House, Inc. v. Consolidated City of Indianapolis, 319 F.3d 277, 280 (7th Cir.), *cert. denied*, 540 U.S. 879 (2003).

sought cannot be dismissal of the action on the theory that there is then "no case or controversy." For, among other things, a federal judge may in fact grant the plaintiff a form of relief more limited than the one sought, or even a relief different from the one requested,[9] if the facts and the rights to which those facts give rise have been properly pleaded and proven. Thus, this article addresses the improper conflation of the requirements for establishing standing (a jurisdictional question) with the criteria for granting the specific relief sought (a procedural or remedial question), demonstrating the need for clearly distinguishing between these two different types of analysis to ensure proper judicial handling of claims and remedies within the context of jurisdiction, access to justice, and enforcement of individual claims of right.

By mistakenly conflating the claim and the relief—the jurisdictional and the remedial or procedural—the Court has created high barriers to access to justice and has made it much harder to use tools like §1983[10] for the vindication of constitutional rights.

II. THE CLAIM AND THE RELIEF

The proponents of the primary-rights model viewed the law as a collection of relatively stable, enforceable right-duty relationships, each of which could be discerned as a matter of natural law and distilled into a manageable primary right.[11] Early twentieth-century reformers, such as Roscoe Pound, rejected the natural law premise of the primary-rights theorists and viewed law as a morphing, sociological phenomenon that, at its optimum, should reflect a balancing of interests dependent on time and circumstance.[12] For Pound and others of his generation,[13] the law was in a constant state of becoming. Such a morphing legal landscape was not reducible to identifiable primary rights; nor could it operate under a rigid procedural framework. Indeed, Clark, who was heavily influenced by Pound's work, questioned the coherence of the primary-rights approach. To

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[9] *See* FED. R. CIV. P. 54(c). ("A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.")

[10] 42 U.S.C. §1983.

[11] *See, e.g.*, JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA 45-48 (1885) (extolling the virtues of permanent and stable law). On the other hand, Pomeroy did recognize the value in the "elasticity" of the common law. *Id.* at 52-53.

[12] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-606 (1908):

> Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processor the strictness with which its rules proceed from the dogmas it takes for its foundation. …Law has the practical function of adjusting every-day relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to regard it as wholly arbitrary.

Id.

[13] Wesley Newcomb Hohfeld, who also influenced Clark's work, believed that there was no universally ideal system of legal rights and that legal rights were the result of socially contingent policy choices. For Hohfeld's idea of right and legal relations, *see* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

Clark and other legal reformers of his era, a system of pleading premised on facts seemed most conducive to the promotion of their preferred sociological jurisprudence.[14]

Consistent with that goal, asC a claim in federal court was understood not as a specified right of action, but rather, as the confluence of the operative facts and the rights of action arising out of them,[15] i.e., "a group of operative facts giving rise to one or more rights of action."[16] According to Clark, a right of action pertained to a "'remedial right,' that is the particular *right-duty* legal relation which is being enforced in the particular legal action under consideration."[17] A claim, on the other hand, was intended as a nontechnical, fact-driven narrative suggestive of a legal theory that would entitle the pleader to relief. Clark thought that this approach to the claim would be most conducive to "the convenient, economic, and efficient conduct of court business, the enforcing of rules of substantive law with as little obtrusion of procedural rules as possible."[18]

The claim controls the scope of discovery, provides the focal point for summary judgment, and determines the relevance of evidence to be presented at trial, should there be one. It is the heartbeat of the case. Beyond that, a claim presents a demand for justice under the law. As such, the judicial recognition and enforcement of claims are essential components of the rule of law. As famously stated in *Marbury v. Madison*,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection…
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will

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[14] Robert Bone suggests the following distinction between the advocates of primary rights and the reform movement that led to the adoption of the Federal Rules:

> Late nineteenth century jurists believed in a fundamental dichotomy between right and remedy and in the right-remedy-procedure hierarchy that held that procedure was instrumental to granting the ideal remedy, which, in turn, was instrumental to protecting legal rights rooted in natural law beliefs. Early twentieth century reformers, on the other hand, rejected the right-remedy dichotomy and the natural law assumptions that supported it. For these reformers, there was no fixed social ideal that gave content to legal rights. Instead, legal rights, duties, privileges and a host of other legal institutions were all shaped by the changing facts of social life.

Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 97 (1989).

[15] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING *supra* note 12, at 477 (2d ed. 1947).

[16] *Id*. at 477; *see also id*. at 137 ("The cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action…."). While the quoted materials specifically refer to the code-pleading phrase "cause of action," Clark made it clear that his pragmatic definition of cause of action was embraced by the term "claim" under the federal rules. *Id*. at 146-148.

[17] *Id*. at 824 (emphasis in original).

[18] Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J 817, 820 (1924).

> certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[19]

The relief is not part of the claim or a part of standing. It is rather the type of remedy that can partially or fully compensate the plaintiff for the injury and the violation of the right suffered, as shown by the relevant set of operative facts. Douglas Laycock defines the remedy as "anything a court can do for a litigant who has been wronged or is about to be wronged."[20] The two most common remedies are monetary damages and injunctions, i.e., orders requiring defendants to refrain from their wrongful conduct or to undo its consequences.[21] "The court decides whether the litigant has been wronged under the substantive law that governs primary rights and duties; it conducts its inquiry in accordance with the procedural law. The law of remedies falls somewhere in between procedure and primary substantive rights. Remedies are substantive, but they are distinct from the rest of the substantive law, and sometimes their details blur into procedure."[22] Laycock also notes that "[f]or long periods in our past, remedies were casually equated with procedure."[23] And while substantive rules define the standards of conduct applicable to everyday life, procedural rules specify the manner or means through which claims arising under the substantive law may be adjudicated.[24] An injunction is an order of the court commanding or preventing an action. More specifically,

> an injunction is a judicial process or mandate operating *in personam* by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience; as a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction; and as a writ issuing by the order and under the seal of a court of equity.[25]

An injunction can be preliminary (or temporary) or permanent. A preliminary injunction is "issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case" and it is "issued only after the defendant receives notice and an opportunity to be heard."[26] A permanent injunction, on the other hand, is

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[19] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[20] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1 (4th ed. 2010).

[21] Id.

[22] Id.

[23] Id.

[24] ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CIVIL PROCEDURE: CASES AND PROBLEMS 466 (5th ed. 2016).

[25] HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS §1, at 2-3 (1909).

[26] BLACK'S LAW DICTIONARY, "injunction" (11th ed. 2019).

granted after a final hearing on the merits.[27] In order to get a permanent injunction, a movant is required to show that it has suffered irreparable injury; that the remedies available at law are inadequate to compensate for that injury; that, considering the balance of hardships between the parties, a remedy in equity is warranted; and that the public interest would not be disserved by a permanent injunction.[28] To obtain a preliminary injunction, a plaintiff must show that without such relief it will suffer irreparable harm before final resolution of its claims; that traditional legal remedies would be inadequate; and that it has some likelihood of success on the merits.[29] Thus, it is evident how the law of injunctions would fall, as Laycock observed, somewhere in between procedure and substantive rights.[30]

But the standing doctrine, intended to ensure satisfaction of the "case or controversy" requirement under Article III, §2 of the Constitution, is neither substantive law nor remedial or procedural law. Rather, it is jurisdictional and constitutional law.

III. STANDING [31]

Standing is an aspect of justiciability. The term *justiciability* refers to a body of judicially created doctrines that define and limit the circumstances under which an Article III federal court may exercise its constitutional authority, including its authority to engage in judicial review. These doctrines are derived in part from an interpretation of Article III's "case or controversy" requirement, and in part from prudential policy considerations involving perceptions of the proper role of the federal judiciary within the constitutional structure of government.

Stated very broadly, a matter is deemed justiciable if it's capable of judicial resolution.[32] To that end, the doctrines of standing, ripeness, mootness, and political questions are designed to ensure that Article III courts do not become embroiled in matters of a nonjusticiable nature that would take a federal court beyond the sphere of activity commonly associated with judging.

Article III, § 2 provides that the "judicial Power shall extend to" certain enumerated categories of "cases" and "controversies." These words have been interpreted as being not merely descriptive of the business of Article III federal courts, but as imposing a specific constitutional limitation on the circumstances under which an Article III court may exercise its judicial authority. This limitation "helps to ensure that the legal questions presented to the federal courts will not take the form of abstract intellectual problems resolved in the 'rarified atmosphere of a

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[27] Id.

[28] *See, e.g.,* eBay Inc. v. MercExchange, LLC, 547 U.S. 388, at 391 (2006).

[29] *See*, *e.g.*, Courthouse News Service v. Brown, 908 F.3d 1063, 1068 (7th 2018), *cert. denied*, 140 S. Ct. 384 (2019).

[30] LAYCOCK, *supra* note 1.

[31] For a more extensive analysis of justiciability and the doctrine of standing *see* ALLAN IDES, CHRISTOPHER N. MAY, AND SIMONA GROSSI, CONSTITUTIONAL LAW: NATIONAL POWERS AND FEDERALISM (9th ed. 2022); *see also* SIMONA GROSSI, ALLAN IDES, FEDERAL COURTS: PRINCIPLES, CASES & PRACTICES, WEST ACADEMIC PUBLISHING, forthcoming.

[32] *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

debating society' but instead … will be presented 'in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'"[33]

Because of the fact-intensive nature of the inquiry, "the precise boundaries of the 'case or controversy' requirement are matters of 'degree…not discernible by any precise test.' At the same time, the Court has developed a subsidiary set of legal rules that help to determine when the Constitution's requirement is met."[34] The essence of this limitation is that an Article III court may only exercise jurisdiction over those matters in which there is an actual dispute involving the legal relations of adverse parties, and for which the judiciary can provide some type of effective relief.[35] In other words, "[a] justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."[36]

An important corollary to the case or controversy requirement is that an Article III court may not issue an advisory opinion—i.e., an opinion issued outside the context of a justiciable case or controversy.[37] The proscription against advisory opinions, however, does not preclude an Article III court from providing declaratory relief when requested to do so in the context of an actual case or controversy.[38]

While the case or controversy requirement establishes the constitutional minimum for the exercise of Article III authority, the mere satisfaction of that minimum is not always sufficient to establish justiciability. Prudential considerations may also sometimes operate to divest an otherwise constitutional case of its justiciable character. These prudential considerations are premised on a combination of concerns derived from principles of separation of powers, federalism, and sound judicial administration. At the heart of "prudence" is the Court's perception of the federal judiciary's proper function within the structure of government, and the Court's desire to avoid unnecessary clashes with other government institutions. These are essentially the same principles that inform the Court's interpretation of the case or controversy requirement. The prudential overlay, however, allows the Court to expand the application of those principles beyond the established minimum requirements of constitutional justiciability. Since prudential limitations are not constitutionally required, the Supreme Court can (and does) develop exceptions to its prudential rules. For example, an exception to the rule against third-party claims, allows plaintiffs standing to raise such claims if there are substantial obstacles that prevent the absent third party from doing so itself. Similarly, Congress can mandate exceptions to the Court's prudential rules.

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[33] Clapper v. Amnesty International USA, 568 U.S. 398, 423 (2013) (Breyer, J., et al., dissenting).

[34] Id.

[35] Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-241 (1937).

[36] Id. at 240.

[37] Hayburn's Case, 2 U.S. 409 (1792).

[38] Aetna Life Ins., 300 U.S. 227.

Standing is one of the justiciability doctrines and requires the presence of an injury-in-fact, causation, and redressability. These elements of a case or controversy are intended to ensure the presence of an actual dispute between adverse parties that is capable of judicial resolution. Taken together, these elements—injury-in-fact, causation, and redressability—form what the Court has described as Article III's "irreducible constitutional minimum" for standing."[39] The standing doctrine examines that constitutional minimum from the perspective of the individual seeking to invoke the court's authority, typically a plaintiff in a civil suit, and it asks whether the plaintiff has established, through injury, causation, and redressability, a personal stake in the outcome of a justiciable controversy.[40] With respect to each of these elements, the party invoking federal court jurisdiction bears the burden of pleading and proof.[41] And when a plaintiff asserts a number of different claims, plaintiff must separately establish standing as to each of those claims.[42] If the suit is brought as a class action, plaintiffs must show that each class member individually satisfies the requirements of standing for each form of relief that they seek.[43]

Since the injury, causation, and redressability requirements of standing define what constitutes an Article III "case or controversy," an objection to standing may be raised at any time, in the trial court or on appeal, by a party or by a judge. "As a jurisdictional requirement, standing to litigate cannot be waived or forfeited. And when standing is questioned by a court or an opposing party, the litigant invoking the court's jurisdiction must do more than simply allege a nonobvious harm.… [T]he litigant must explain how the elements essential to standing are met."[44]

To satisfy the injury-in-fact requirement, a plaintiff must show that he or she has suffered a "concrete and particularized" invasion of a legally protected right.[45] An injury is concrete if it is actual—i.e., if it exists in fact.[46] It is particularized if it affects the plaintiff in a personal way.[47] And

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[39] McConnell v. Federal Election Comm'n, 540 U.S. 93, 225 (2003).

[40] *See* Horne v. Flores, 557 U.S. 433, 445-447 (2009) (party subject to an injunction has "personal stake" in outcome of proceeding seeking relief from the underlying judgment), *see also* Department of Commerce v. United States House of Representatives, 525 U.S. 316, 329-330 (1999); Bennett v. Spear, 520 U.S. 154, 162 (1997).

[41] TransUnion LLC v. Ramirez, 141 S. Ct.. 2190, 2207-2208 (2021); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); *and see* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 & n.3 (2006) (when a case is removed from state to federal court, defendant has the initial burden of showing that the case meets federal justiciability requirements).

[42] DaimlerChrysler Corp., 547 U.S. at 349-353 (rejecting theory of "ancillary standing" and holding that plaintiff must separately satisfy standing as to each claim asserted).

[43] TransUnion LLC,141 S. Ct. at 2208.

[44] Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950-1951 (2019) (party who intervened as a defendant in the federal district had suffered no cognizable injury that would have given it standing below or allowed it to appeal to the Supreme Court).

[45] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

[46] Id.

[47] Id.

it is legally protected if it is recognized as such by law. The typical individual rights case easily satisfies this standard.[48]

The injury-in-fact requirement will usually be met if there has been a violation of any of the plaintiff's rights that are recognized by the Constitution, federal or state statute, or by the common law, although this is not invariably true in the case of statutorily conferred rights. The requirement will also be satisfied by any other type of harm to the individual, so long as a federal court does not believe the interest invaded is too abstract or too novel to satisfy Article III's case or controversy requirement. The injury may be either a present injury or a threatened injury, so long as the threatened future injury is not too speculative or remote.

There is no test to determine whether an asserted interest or harm is adequate to satisfy the injury-in-fact requirement. But as harms become more creative, courts become increasingly reluctant to find the Article III injury-in-fact requirement satisfied. For example, in *Lujan v. Defenders of Wildlife*,[49] the Court rejected three creative theories of harm (ecosystem nexus, animal nexus, and vocational nexus), explaining that "[s]tanding is not 'an ingenious academic exercise in the conceivable,' but as we have said requires…a factual showing of perceptible harm."[50]

Thus, the *Lujan* Court was unwilling to credit as constitutionally sufficient the supposed harm a person interested in an endangered species would experience whenever government action threatened that species' chances for survival, a so-called animal nexus. The Court did concede that it was "plausible…to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing [constitutionally sufficient] harm, since some animals that might have been the subject of his interest will no longer exist."[51] But regardless of that more concrete possibility, the claims of a generalized "animal nexus" were inadequate to satisfy Article III, ingenious though the theory may have been. However, the threatened injury might have sufficed in *Lujan* had plaintiff already purchased her ticket or had made specific arrangements to visit the area where the endangered species lived, at a definite point in the future.

In a case where plaintiff seeks damages, the injury or harm in question has already occurred. In other cases, however, where plaintiff seeks prospective injunctive relief, the injury that plaintiff relies upon for standing purposes is some threat of future harm. Such allegations require the court to predict the likelihood of that harm occurring. To satisfy the injury-in-fact standard, the prediction must be based on concrete,

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[48] For example, suppose a public school fires a teacher because of her religious beliefs. The teacher's First Amendment claim against the school would satisfy the injury-in-fact requirement since her dismissal constitutes an actual abridgment of her personal right to religious freedom as protected by the First Amendment. Cf. Gill v. Whitford, 138 S. Ct. 1916 (2018) (to establish standing in a vote-dilution challenge to legislative redistricting, a voter must show that his or her voting strength was in fact diluted).

[49] 504 U.S. 555, 565-567 (1992).

[50] Id. at 566.

[51] Id. at 566-567.

nonspeculative facts that establish a sufficient "imminence" of that injury occurring to the plaintiff.[52] "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."[53] If a court deems the chances of such injury ever occurring are too speculative or remote, the injury-in-fact requirement for prospective relief will not be satisfied.

In threatened future harm cases, it is harder to satisfy the injury-in-fact test. In *Clapper v. Amnesty International USA*,[54] plaintiffs sought a declaratory judgment that the Foreign Intelligence Surveillance Act (FISA) was unconstitutional. FISA allowed the federal government to obtain secret court approval for the surveillance of electronic communications between persons within the United States and certain persons thought to be in foreign territories. Plaintiffs in the case included lawyers who represented persons imprisoned in Guantanamo Bay, Cuba, or who had been subject to C.I.A. rendition, and whose communications with their lawyers might be intercepted under FISA. The suit was filed on the day FISA became law. The district court dismissed it for lack of standing because plaintiffs had not yet suffered any injury. The Court of Appeals reversed, concluding that plaintiffs had alleged a sufficient threatened injury, i.e., an "objectively reasonable likelihood" their communications with foreign contacts would be intercepted at some point in the future. The Supreme Court reversed in a 5 to 4 decision, holding that for a "threatened injury" to qualify for standing, it is not enough that there be an "objectively reasonable likelihood" of a harm occurring. Instead, plaintiffs must "demonstrate that the threatened injury is *certainly impending*…."[55] Here, there was no such certainty that the harms alleged by these particular plaintiffs would ever come to pass. While this "certainly impending" phrase had appeared in earlier opinions, the phrase is not necessarily synonymous with "impending with certainty." Instead, the word "certainly" may simply mean "definitely" or "at least." Or, as the dissent suggested, "certainly" may equate to "reasonable probability,"[56] a standard that plaintiffs clearly met in this case.

Standing also requires that the injured plaintiff establish a causal link between the claimed injury and the conduct of the defendant. As the Court has often phrased it, the injury must be "fairly traceable" to defendant's conduct.[57] The causation requirement is essentially identical to the concept of proximate cause in torts. The more direct the link between the plaintiff's injury and the defendant's conduct, the more likely it is that a court will find this element satisfied. And as was the case with injury-in-fact, one can expect the Court to be somewhat reluctant to accept what may be characterized as speculative or elongated chains of causation,

[52] Id. at 562-567.

[53] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (internal citations omitted).

[54] 568 U.S. 398 (2013).

[55] Id. at 401 (emphasis added).

[56] Id. at 431-433 (Breyer, J., et al., dissenting).

[57] California v. Texas, 141 S. Ct. 2104, 2113 (2021); Department of Commerce v. United States House of Representatives, 525 U.S. at 329-330; Bennett v. Spear, 520 U.S. 154, 162 (1997); Allen v. Wright, 468 U.S. 737, 750-751 (1984).

particularly so when the actions of absent third parties are a factor in that causal chain.[58]

The third standing requirement, redressability, focuses on the relationship between the injury and the relief sought. The relief requested must be designed to alleviate the injury caused by defendant's conduct. In fact, the redressability requirement is quite similar to the causation requirement, and in many cases—particularly those involving injunctions—merely serves as another perspective from which to examine the causal chain. Here the question, however, is not whether the defendant caused the plaintiff's injury, but whether the relief sought from the court will alleviate or otherwise redress that injury. The mere possibility of redress is not enough. Rather, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[59]

For the redressability requirement to be met, the relief sought need not correct or compensate for all the injury plaintiffs may have suffered. Instead, it is enough that the relief sought will alleviate or lessen that injury, even if only to a minimal extent.[60] And, as was the case with causation, redressability becomes somewhat more difficult to establish when alleviation of plaintiff's injury depends upon the action of an absent third party.[61]

When describing several exceptions to the ordinary tripartite standing inquiry, the Court in *Lujan* noted that Article III standing would exist in "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious

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[58] For example, in *Warth v. Seldin*, several low-income individuals filed suit challenging the constitutionality of a town's zoning ordinance that, according to their allegations, had the purpose and effect of excluding persons of low income from residing within the town. Even though the Court accepted plaintiffs' allegation that the zoning ordinance had such an exclusionary effect, the Court concluded that plaintiffs had not established causation with respect to their personal injuries. For there were no facts establishing that any builder had specific plans to develop low-cost housing within the town that plaintiffs could afford. According to the Court, in the absence of such a showing, the "cause" of plaintiffs' injuries—the inability to purchase low-cost housing within the town—was not the zoning ordinance, but "the economics of the area housing market…." 422 U.S. 490, 506 (1975). Of course, one could certainly argue that "the economics of the area housing market" were, in part, a product of the exclusionary zoning ordinance. But regardless of the merits of this argument, the Court's attitude was clear: causation, like injury-in-fact, cannot be established through conjecture, but must be premised on specific and plausible allegations of fact establishing a tangible causal link between plaintiff's injury and the defendant's conduct.

[59] Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125, 134 (2011) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). *And see* Collins v. Yellen, 141 S. Ct. 1761, 1779 (2020) (it must be shown that "a decision in the [plaintiffs'] favor could easily lead to the award of at least some of the relief that the [plaintiffs] seek").

[60] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021) ("nominal damages" of but "a single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement.").

[61] *See* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *But see* Utah v. Evans, 536 U.S. 452 (2002) (finding redressable a state's claim that it was deprived of a congressional seat by a census miscount when a correction of the count could add a seat to the state's congressional delegation, but only if the President and House of Representatives chose to honor the recount); *see also id.* at 510-515 (Scalia, J., dissenting).

plaintiff."[62] The Court explicitly reaffirmed this reasoning in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*,[63] holding that an individual who brings suit under a structured "bounty" statute like the False Claim Act's *qui tam* provision has Article III standing.[64] The *Stevens* Court reasoned that the government suffers a cognizable injury when it is defrauded, and that the False Claims Act's *qui tam* provision may be construed as a partial assignment of the government's claim to damages.[65] Thus, the Court, through a "representational standing," found the plaintiffs' injury sufficient to support standing.

But while the presence of a cash bounty may signal the existence of an interest, does it also prove the existence of an injury? In *Stevens*, the Court noted:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit."[66] But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.[67]

Also, in *Steele Co. v. Citizens for a Better Environment,*[68] the Court held that "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[69] Thus, it seems logical to conclude that Congress (or a state legislature) may not satisfy Article III standing by merely imposing a duty and conferring a cause of action with statutory damages, as it's only a particularized injury, personal to the

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[62] 504 U.S. at 572-73.

[63] 529 U.S. 765, 773-774 (2000).

[64] *Id*.

[65] "We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The [False Claims Act] can reasonably be regarded as effecting a partial assignment of the Government's damages claim.... We conclude, therefore, that the United States' injury in fact suffices to confer standing on [the qui tam relator]." 529 U.S. at 773-774.. *See also* Bauer v. Marmara, 942 F.Supp.2d 31, 35-37. (2013).

[66] *Lujan*, *supra* note 59, at 573.

[67] 529 U.S. at 772-773 (internal citations omitted).

[68] 523 U.S. 83 (1998).

[69] *Id*. at 107.

individual, one that distinguishes that individual from the citizens at large, that can confer standing.

In *Vermont Agency for Natural Resources v. U.S. ex rel Stevens,*[70] the Court held that Congress can "define new legal rights, which in turn will confer standing,"[71] but "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."[72] Thus, the prospect of a cash bounty cannot be a substitute for the injury. It's therefore quite interesting that the Court may approve of the cash bounty situation as an exception to the traditional tripartite standing test,[73] while nevertheless insisting upon a strict "certainly impending" injury standard to find standing in non-cash-bounty cases. Isn't the prospect of the cash-bounty at least as speculative as an "objectively reasonably possible" injury? And isn't the cash-bounty just remedial or procedural rather than jurisdictional? This inconsistency reveals a disingenuous aspect of the Court's stance, suggesting that while the Court's classic standing analysis endorses a stringent standard for "injury in fact," the Court completely ignores this criterion when it allows for cash bounties, where the injury is merely fictional.

IV. LINDA R.S. V. RICHARD D. AND CITY OF LOS ANGELES V. LYONS

The relationship between the claim, the remedy, and jurisdiction is a complex and nuanced one. As explained above, the claim is the operative set of facts and the rights to which those facts give rise, while a remedy pertains to the specific relief a court may grant in response. Jurisdiction, on the other hand, determines a court's authority to hear a case and adjudicate the matters presented. Each of these elements operates under its own set of rules designed to meticulously address their respective nuances. Blurring the lines among these foundational legal concepts can significantly impede an individual's capacity to vindicate their rights, potentially obstructing access to justice and infringing upon constitutional guarantees. The cases of *Linda R.S. v. Richard D.*[74] and *City of Los Angeles v. Lyons*[75] serve as poignant illustrations of the complications that can arise when these critical legal elements are conflated.

In *Linda R.S. v. Richard D.*[76] the plaintiff, alleging that she was the mother of an illegitimate child, brought a class action on behalf of herself, her minor daughter, and all other women and minor children who had sought relief, were seeking, or will in the future seek child support from their father. Plaintiffs sought to establish the unconstitutionality of a Texas child-support law that had been interpreted as not being enforceable against the fathers of children born out of wedlock. Plaintiff sought a declaratory judgment and a court order barring the state from denying

[70] 529 U.S. 765 (2000).

[71] *Id.* at 773.

[72] *Id.*

[73] *Lujan*, *supra* note 59, 504 U.S. at 572-573.

[74] 410 U.S. 614 (1973).

[75] 461 U.S. 95 (1983)

[76] 410 U.S. 614 (1973).

enforcement of the child support law solely on the basis of the father's unmarried status. And because her goal was to obtain child support from the father,[77] she also sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."[78] The three-judge federal district court dismissed Linda R.S.'s action for want of standing.

On appeal, the Supreme Court, focusing on the probability of success on this ultimate "remedy"—the collection of child support—concluded that Linda's claim was not redressable because it was not clear that the father would pay that support, even if the law were enforced against him.[79] But had the Court attended to the plaintiff's equal protection claim, it would have realized that the plaintiff had asserted a well-recognized right of action—the equal enforcement of the laws—that, if meritorious, would entitle her to relief, namely, a wedlock-neutral application of prosecutorial discretion.

The Court noted,

> Before we can consider the merits of appellant's claim or the propriety of the relief requested, however, appellant must first demonstrate that she is entitled to invoke the judicial process. She must, in other words, show that the facts alleged present the court with a "case or controversy" in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated. The threshold question which must be answered is whether the appellant has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[80]

The Court also observed that while it had "greatly expanded the types of 'personal stakes' which are capable of conferring standing… 'broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'"[81] The Court went on to note that "[a]lthough the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."[82]

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[77] Id. at 620 (White, J., dissenting).

[78] Id.

[79] *Linda R.S.*, supra note 3, 410 U.S. at 618 ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.") *Id.*

[80] 410 U.S. 614, 616 (1973) (internal citations omitted).

[81] Id. at 616-617.

[82] Id. at 617.

Applying the stated law of standing to the facts of the case, the Court found that the plaintiff had "failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention."[83] In fact, even if she had suffered an injury (the failure of her child's father to contribute support payments), she had not shown that her failure to secure the payment resulted from the non-enforcement of the discriminatory law. After all, the father could still not pay and there was high likelihood of such occurring.[84]

"The party who invokes (judicial) power" added the Court, "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of (a statute's) enforcement'… and must show 'a logical nexus between the status asserted and the claim sought to be adjudicated . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power.'"[85] If the plaintiff were granted the requested relief, i.e. the non-discriminatory enforcement of the criminal statute, that "would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."[86] In other words, "the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case."[87]

Noting that the Court had confused the right with the relief, Justices White and Douglas, dissenting, observed that: "Obviously, there are serious difficulties with appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others, or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what *relief* the court may ultimately grant appellant. They do not affect her *right* to bring this class action."[88] Justice White also noted that, while the father, if prosecuted under the state provision, would have had standing to seek to enjoin enforcement of the statute against him for under-inclusiveness, it was hard to see why the plaintiff and her class would not have standing to assert the same claim. "They are not, after all, in the position of members of the public at large who wish merely to force an enlargement of state criminal laws."[89] He pointed out how the plaintiff, her daughter, and the children born out of wedlock whom the plaintiff was attempting to represent had all allegedly been excluded intentionally from the class of persons protected by a particular criminal law, that is, how they did not get the protection of the laws that other women and children get.[90]

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[83] Id. at 617-618.
[84] Id. at 618.
[85] Id.
[86] Id.
[87] Id.
[88] Id., at 620 (White, J., and Douglas, J., dissenting) (emphasis added).
[89] Id.
[90] Id., at 620-621.

Justice White then added:

> The Court states that the actual coercive effect of those sanctions on Richard D. or others 'can, at best, be termed only speculative.' This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly, Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.[91]

It's truly hard to understand how the Court could find lack of standing under the circumstances of the case, and why it conflated, as Justice White noted, the *right* and the *relief*. The only possible explanation one might give for such a reading and outcome is, as the Court noted, the case arose "in the unique context of a challenge to a criminal statute…."[92]

Ironically, ten years later, Justice White authored another problematic opinion, *City of Los Angeles v. Lyons*,[93] in which he would take a very different and less welcoming view of standing. In *Lyons*, an African American male was stopped for a traffic violation by the Los Angeles police. He offered no resistance to the officers, and without provocation or justification, they seized him and applied a "chokehold." Lyons filed a §1983 action seeking damages and injunctive relief barring the Los Angeles police from using chokeholds except in situations where the detained individual reasonably appeared to be threatening the immediate use of deadly force. The trial court granted defendant's motion to dismiss on standing grounds, the Court of Appeals reversed, but the Supreme Court, in agreement with the trial court, found that the plaintiff indeed had no standing. The Court reached this result by conflating the claim and the relief. The Court began by stating that "[t]he issue here is whether respondent Lyons satisfied the prerequisites for seeking injunctive relief in the federal district court."[94] To answer the question, it said:

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate 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. Abstract injury is not enough. The plaintiff must show that he "has sustained or is

[91] Id. at 621.
[92] Id., at 617.
[93] 461 U.S. 95 (1983).
[94] Id. at 97.

> 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."[95]

Then, after describing *O'Shea v. Littleton*[96] and *Rizzo v. Goode*,[97] two equitable injunctive relief cases, the Court found that "[n]o extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers."[98]

After fragmenting Lyons' claim in two[99]—a claim for damages and a claim for injunctive relief—the Court explained:

> That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.[100]

But if a claim is a set of operative facts giving rise to one or more rights of action, why were there two, rather than only one claim? In *Lyons* it's clear that the nucleus of facts that gave rise to the claim was the traffic stop and the attendant use of a chokehold. This set of facts gave rise to one right of action, the right not to be injured. And there are two injuries at stake here, one (past) to Lyons' larynx, and another (future) that he's trying to prevent via the injunctive relief request. It is, after all, these very types of cases for which the declaratory and injunctive relief were designed, i.e., to avoid an injury from happening again. Sometimes, seeking relief only after the injury would be of no remedy to the petitioner, as we sadly know from all the cases where police brutalities culminated in the death of the victims.

As we said earlier, there was only one claim here, for there was but one set of operative facts and all the rights and the injuries related to the same. Fragmenting the claim in two, treating the past injury and the

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[95] Id., at 101-102 (internal citations omitted).

[96] 414 U.S. 488 (1974).

[97] 423 U.S. 362 (1976).

[98] *Lyons*, *supra* note 6, 461 U.S. at 105.

[99] This view was shared by Justice Marshall, dissenting in *Lyons*. He objected to the majority's decision to "fragment[ ] a single claim into multiple claims for particular types of relief." *Lyons*, *supra* note 6, 461 U.S. at 122 (Marshall, J., dissenting).

[100] *Lyons*, *supra* note 6, 461 U.S. at 105.

future injury as injuries giving rise to different rights of action would perhaps be appropriate in a system taking a primary right approach. But this is not appropriate in the federal system which has endorsed the transactional approach to the claim. However, by taking the approach that it did, the Court was able to dismiss the case on standing grounds, thereby avoiding any need to confront the merits of plaintiff's constitutional claim.

The *Lyons* Court also conflated standing with entitlement to the relief sought, speaking of these two interchangeably. Thus, in referring to two equitable relief cases, the Court noted that "[u]nder *O'Shea* and *Rizzo,* these allegations were an insufficient basis to provide a federal court with *jurisdiction* to entertain Count V of the complaint" seeking injunctive relief.[101] In note 8, the Court again imported words from the injunctive relief realm into the realm of jurisdiction:

> Lyons alleged that he feared he would be choked in any future encounter with the police. The reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant. Of course, emotional upset is a relevant consideration in a damages action.[102]

And to the risk that this could happen again to Lyons (or someone else), the Court's response was:

> Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.[103]

According to the Court, what should Lyons have alleged to have had standing to obtain the desired injunctive relief? The Court proclaimed,

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have

[101] Id. (emphasis added).
[102] Id. at n. 8 (emphasis in original).
[103] Id. at 108.

> another encounter with the police but also to make the incredible assertion 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.[104]

The *Lyons* Court made it incredibly difficult to challenge a pattern or practice of police brutality, one that has been responsible for tens of deaths over the past four decades in Los Angeles. And, no, Justice White did not predict this correctly, for the price of the Court's doctrinal choice has translated into more than just "certain instances" [105] and the grievances inflicted afterwards on our community were more than mere "speculation."[106] Justice Marshall, in dissent, warned that the majority's approach was going to lead to dangerous results: "[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. 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. I dissent from this unprecedented and unwarranted approach to standing."[107]

Justice Marshall, also pointed out that "by *fragmenting* a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this Court's traditional conception of standing and of the *remedial* powers of the federal courts."[108] And, Marshall continued,

> [b]ecause Lyons has a claim for damages against the City, and because he cannot prevail on that claim unless he demonstrates that the City's chokehold policy violates the Constitution, his personal stake in the outcome of the controversy adequately assures an adversary presentation of his challenge to the constitutionality of the policy. Moreover, the resolution of this challenge will be largely dispositive of his requests for declaratory and injunctive relief. No doubt the requests for injunctive relief may raise additional questions. But these questions involve familiar issues relating to the appropriateness of particular forms of relief, and have never been thought to implicate a litigant's standing to sue. The denial of standing separately to seek injunctive relief therefore cannot be justified by the basic concern underlying the Article III standing requirement.[109]

According to Justice Marshall,

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[104] Id. at 105-106 (emphasis in original).
[105] Id. at 108.
[106] Id.
[107] Id. at 113 (Marshall, J., dissenting).
[108] Id. at 122-123 (emphasis added).
[109] Id. at 126.

> [b]y fragmenting the standing inquiry and imposing a separate standing hurdle with respect to each form of relief sought, the decision today departs significantly from this Court's traditional conception of the standing requirement and of the remedial powers of the federal courts. We have never required more than that a plaintiff have standing to litigate a claim. Whether he will be entitled to obtain particular forms of relief should he prevail has never been understood to be an issue of standing. In determining whether a plaintiff has standing, we have always focused on his personal stake in the outcome of the controversy, not on the issues sought to be litigated, or the "precise nature of the relief sought."[110]

Thus, Justice Marshall had understood that the Court had reached the result it had reached by distorting the traditional, foundational ideas of jurisdiction, claim, and remedy, perhaps because conflating the three seemed to be the only way to respectfully deal with "the unique context of a challenge to a criminal statute."[111] But was it? Would it have been better to achieve the same result by just finding that the plaintiff had failed to meet the "irreparable injury" standard required to get an injunctive relief? The effects on §1983 litigation and the enforcement of fundamental constitutional rights would have not been as harsh as they ended up being, and perhaps today, forty years later, we would not need to have a "Black Lives Matter" movement, as police brutalities would have been stopped already.

If the judiciary was willing to uphold the cash-bounty stratagem—that, by artificially creating an injury overcame any Article III hurdle—to make the system work, it's hard to understand why the Court would, in the name of protecting the strictures injury-in-fact requirement, fragment the claim and conflate the remedial and jurisdictional analysis, thus denying §1983 plaintiffs a meaningful and effective chance of litigating their claims and enforcing their fundamental constitutional rights.

V. STATING A CLAIM, SEEKING RELIEF, AND ESTABLISHING STANDING IN §1983 ACTIONS[112]

In the realm of §1983 actions, plaintiffs are confronted with the intricate task of delineating their claims, seeking appropriate relief, and establishing the requisite standing to proceed. Title 42, United States Code §1983, serves as a pivotal tool for individuals to challenge deprivations of their constitutional or federal statutory rights under the color of state law. Nevertheless, the effectiveness of this statute is frequently undermined by contemporary judicial interpretations that blur the distinctions between claims, remedies, and standing. This approach complicates the analysis,

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[110] Id. at 127.

[111] Id., at 618.

[112] For a more extensive analysis of §1983 actions, standing, and the Eleventh Amendment jurisprudence *see* ALLAN IDES, CHRISTOPHER N. MAY, AND SIMONA GROSSI, CONSTITUTIONAL LAW: NATIONAL POWERS AND FEDERALISM (9th ed. 2022); *see also* SIMONA GROSSI, ALLAN IDES, FEDERAL COURTS: PRINCIPLES, CASES & PRACTICES, WEST ACADEMIC PUBLISHING, forthcoming.

often hindering the statute's foundational aim to provide a robust avenue for redress against state-level infringements of federal rights. This conflation within the judicial process not only obfuscates legal principles, but also places significant impediments in the path of plaintiffs seeking justice under §1983.

Title 42 of the United States Code §1983,[113] provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[114]

The statute, first enacted in 1871, provides a cause of action for legal or equitable relief against any "person" who, while acting "under color of" state law, violates someone's federal constitutional or statutory rights. Those who may be sued as "persons" under this statute include cities, counties, and other political subdivisions of a state, as well as individual state and local governmental officials. However, the Eleventh Amendment to the Constitution bars suits against a state itself or against a state-level agency. The state is therefore not a "person" who may be sued under § 1983.

Yet if that Amendment were construed as barring all private suits instituted against nonconsenting states, *including state officials*, it would be virtually impossible to bring a federal or state court action to force a state to honor the Constitution and laws of the United States. The Court has therefore recognized an exception to the Eleventh Amendment which allows suit to be brought to enjoin a state official from violating the Constitution or laws of the United States. In *Ex parte Young*,[115] the Court explained this exception through the fiction that when a state official acts contrary to federal law, the official is thereby "stripped" of any state garb and transformed into an ordinary private individual. The stripping doctrine rests on the Supremacy Clause,[116] which prohibits a state from violating the Constitution or laws of the United States. Since the state itself has no authority to violate federal law, it cannot confer such authority on its officials. A state official who acts contrary to federal law is therefore illegally attempting to use the name of the state to engage in conduct that the state is powerless to perform. A suit to enjoin that state official from violating federal law is therefore not a suit against the state for purposes

[113] 42 U.S.C. §1983.
[114] Id.
[115] 209 U.S. 123 (1908).
[116] U.S. CONST., Art. VI, cl. 2.

of the Eleventh Amendment, and thus falls within §1983 and is not barred by the Constitution.

The stripping doctrine is a fiction since in nearly every instance where a state official violates a person's federal rights, the official has acted within the scope of his or her official duties and pursuant to a custom, policy, or law of the state. Whether or not the state *in theory* could authorize such conduct, the state *in fact* authorized or permitted the violation to occur, with the result that someone was injured. It is a fiction to pretend that the injury was caused by an ordinary private individual rather than by an official representative of the state. Yet if, as the fiction suggests, state officials cease to be representatives of the state the moment they violate federal law, a state could never violate the Constitution. The state itself is a legal abstraction that can act only through its officers, agents, and employees. Unless the conduct of these individuals is deemed to be that of the state, it would frankly be impossible for a state ever to violate the Fourteenth Amendment[117] or any other constitutional provision that restrains the state's behavior. The Court has therefore held that the stripping doctrine applies only to the Eleventh Amendment and not to other constitutional provisions. As the Court has noted, there is "the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment."[118]

While the *Ex parte Young* stripping doctrine is an exception to the Eleventh Amendment's ban on suits against a state, the doctrine is consistent with *Hans v. Louisiana,*[119] *and it*s view that the Eleventh Amendment incorporated the doctrine of sovereign immunity. The ancient doctrine of sovereign immunity rested on the precept that "the king can do no wrong." The king's officers, however, were not shielded by sovereign immunity and could be sued when they violated the law. The stripping doctrine recognizes a similar distinction. Thus, while the Eleventh Amendment shields the state from suit in federal or state court, the state's officers, agents, and employees, as well as the state's political subdivisions

[117] The Fourteenth Amendment plays a critical role in the analysis of the stripping doctrine by underpinning the principle that state action can infringe upon individual rights, thereby necessitating redress under federal law. This amendment establishes a substantive legal framework that defines and prohibits certain state behaviors, specifically those that violate the rights and liberties guaranteed to individuals. When state officials, acting within their official capacities, contravene federally protected rights, they engage in "state action" as construed under the Fourteenth Amendment. This concept is pivotal because it enables individuals to seek remedies against state actors who, while ostensibly operating within their lawful prerogatives, infringe upon constitutionally enshrined protections. Thus, while the stripping doctrine facilitates actions against state officials by conceptually disassociating their unlawful conduct from state authority under the Eleventh Amendment, the Fourteenth Amendment ensures that such conduct remains attributable to the state for the purpose of enforcing constitutional rights. This dichotomy underscores the nuanced interplay between individual rights and state responsibilities, reinforcing the essential checks on state power envisioned by the framers of the Fourteenth Amendment to safeguard individual liberties against state encroachments.

[118] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

[119] 134 U.S. 1 (1890).

such as cities and counties, enjoy no similar immunity and may be sued if they violate the federal Constitution or laws.

The stripping doctrine sometimes allows a federal court to enforce obligations on state officials that go beyond those specifically imposed by federal law. This may occur in situations where a suit brought against state officials to enforce some provision of federal law results in a settlement that is reduced to a so-called *consent decree*. Under the terms of the decree, state officials may have agreed to provisions that go beyond what the federal statute specifically requires. It might be argued that the stripping doctrine should not allow judicial enforcement of such provisions, on the theory that as to them, the state was not acting contrary to federal law. However, the Supreme Court has rejected this contention, noting that a consent decree "is a federal court order that springs from a federal dispute and furthers the objectives of federal law."[120] As such, it "reflects a choice among various ways that a State could implement" federal law; therefore, "enforcing the decree vindicates an agreement that the state officials reached to comply with federal law."[121]

To invoke the stripping doctrine, plaintiff must sue a *named state official* rather than the *state* itself, a *state agency*, or a *state office.* This is necessary to preserve the fiction on which the stripping doctrine rests, namely, that the suit is against an individual and not against the state. At the same time, a plaintiff alleging a constitutional violation must also clarify to the court that the conduct complained of was action of the state and not that of a purely private individual, for otherwise the Constitution would not apply to the challenged action. To satisfy these seemingly contradictory requirements, plaintiffs must sue the defendant state officials *by name*, and must indicate that the officials are being sued both in their "individual capacity" *and* in their "official capacity." The "individual capacity" designation preserves the fiction on which the Eleventh Amendment stripping doctrine rests; the "official capacity" designation reveals that the action complained of was that of the state for purposes of establishing a constitutional violation.

Yet the fact that a plaintiff is careful to sue a state official rather than the state, a state agency, or a state office will not always guarantee that the suit will survive an Eleventh Amendment challenge. The Court has warned that "even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment.… '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"[122]

The prohibition against suits to recover money from the state is also the basis for the Court's having limited the stripping doctrine to claims for *prospective* relief—i.e., relief directed toward the future behaviour of the

[120] Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 438 (2004).
[121] Id. at 439.

[122] Edelman v. Jordan, 415 U.S. 651, 663 (1974).

defendant, such as an injunction to prevent a continuing violation of federal law. The stripping doctrine thus excludes claims for *retroactive* relief—i.e., relief designed as a remedy for past behaviour, such as damages, compensation, or an injunction directed at undoing a completed transaction. The Eleventh Amendment bars claims for retroactive relief. Even if a suit is nominally against a state official, it is still barred by the Eleventh Amendment if the retroactive relief will require payment of funds from the state treasury. On the other hand, a federal court may order state officials to pay money that will come from the state's treasury in connection with the award of prospective relief; this is permitted, for example, when a court awards plaintiff's attorney's fees or costs in a suit for injunctive relief, or where a state official is fined for contempt in violating a federal injunction.

The relief sought in *Ex parte Young* was consistent with these limitations on use of the stripping doctrine. Plaintiffs there sued the Minnesota attorney general to enjoin continued enforcement of a railroad rate statute that violated the Fourteenth Amendment. Such prospective injunctive relief to bar a state official from violating the Constitution in the future did not run afoul of the Eleventh Amendment. While the defendant official's compliance with the injunction would cost the state money in the form of fines it could no longer collect from railroads that ignored the rate law, this incidental impact on the state treasury was an inevitable consequence of requiring that state officials comply prospectively with federal law. On the other hand, the plaintiffs in *Young* would have been barred by the Eleventh Amendment from attempting to recoup any fines they may have paid to the state under the challenged rate statute.

Even though prospective relief is usually injunctive in nature, ordering governmental officials to take or refrain from taking certain specified action, relief sometimes takes monetary form. For example, if, under the stripping doctrine, a federal court issues an injunction and the state official to whom it is directed then fails in good faith to comply with the order, a federal court may award attorney's fees to the plaintiff's lawyers, to be paid from the state treasury. Though such an order may have the appearance of a damages award, it is distinguishable in that instead of being based on past behaviour, it is ancillary to and an inseparable part of a federal court's authority to enforce a prospective injunction.[123]

Despite the Eleventh Amendment, a plaintiff may be able to obtain retroactive relief against state officials for past violations of federal law if it is clear that the recovery is being sought solely from the official's own pocket and not from the state treasury. Under these circumstances, the fiction on which the stripping doctrine rests—i.e., that the suit is against the individual official personally and not against the state—is preserved and the suit is not barred by the Eleventh Amendment. This is true even if

[123] As the Supreme Court explained, "In exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan*, federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced.…If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. *See* Hutto v. Finney, 437 U.S. 678, 690-691 (1978)

the state has agreed to indemnify the official for any damages the official is ordered to pay. While a damages judgment against the official may ultimately result in money being paid from the state treasury, this is a consequence of the state's voluntary decision to indemnify its officials. If the mere existence of an indemnity agreement were sufficient to block a damages claim against a state official under the Eleventh Amendment, every state would make such an agreement since it would cost them nothing. The very fact of such an agreement would prevent the official from ever being found liable and the obligation to indemnify would therefore never arise.

Although the Eleventh Amendment will pose no bar to recovering retroactive damages from a state official personally, the official may be shielded by common law immunity. Because the Supreme Court has read this immunity into 42 U.S.C. § 1983, the immunity applies whether the § 1983 action is brought in federal or state court. The purpose of common law immunity is to ensure that government officials will not be unduly inhibited in discharging their duties, out of fear that they could be subject to personal monetary liability.[124]

The extent of an official's common law immunity from civil liability will depend on the type of function the official was performing when he or she violated the plaintiff's rights. If the function was legislative in nature, the official is absolutely immune from civil suit—including both damages claims and claims for declaratory or injunctive relief. If the function was prosecutorial or judicial in nature, the immunity is likewise absolute, but only as to damages claims; as to the latter, however, the immunity attaches no matter how blatant or wilful the violation may have been. The same absolute immunity extends to government officials who appear as witnesses before a grand jury or at trial.[125] For other types of governmental functions, such as executive and ministerial actions, the official possesses a qualified immunity but solely with respect to claims for damages.

Under qualified immunity, a defendant official will not be held liable for damages if a reasonable person in the defendant's shoes would not have realized that his or her conduct was in violation of federal law. This shields an official from damages liability if, in light of pre-existing law, the legal rule or right in question was not "clearly established" at the time the violation occurred. The test is one of "objective legal reasonableness."[126] In order to be "clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[127] The question must have been "'beyond debate' at the time [the official] acted…."[128] Because the test is an objective rather than a subjective one, the Court has suggested that if qualified immunity would otherwise exist, it cannot be defeated by alleging that a government official

[124] It is also designed to free them from the burden of having to defend against lawsuits based on insubstantial claims, a burden that could seriously impair government's ability to function. These common law immunities protect both state and local governmental officials.

[125] Rehberg v. Paulk, 566 U.S. 366 (2012).

[126] Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[127] Taylor v. Barkes, 575 U.S. 822, 825 (2015).

[128] Lane v. Franks, 573 U.S. 228, 246 (2014).

acted with an improper motive, for this would defeat the goal of allowing such suits to be dismissed at an early stage.[129] Private individuals who are temporally retained by the government to help carry out its work likewise enjoy a qualified immunity in suits brought against them under § 1983.[130]

The Supreme Court has not resolved the question of what sources of law are sufficient to "clearly establish" a right for purposes of the qualified immunity doctrine. In the case of a federal statutory right, the statute itself may be sufficiently clear to satisfy the requirement. With respect to constitutional rights, or statutory rights that are facially unclear, the rights must be clarified and refined by case law. For this purpose, some federal courts have insisted on a definitive ruling from the U.S. Supreme Court, while others have suggested it is enough that there is some consensus among the courts of appeals, while some have looked simply at whether the matter had been settled by the court of appeals for that particular circuit. However, the Supreme Court has recently cast doubt on these latter approaches. Thus, it has questioned whether "a 'robust consensus of cases of persuasive authority' could itself clearly establish the right" in question.[131] The Court has also expressed uncertainty about the idea "that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals…."[132] These decisions suggest that the qualified immunity hurdle may be an increasingly difficult one for plaintiffs to clear when seeking to recover damages for violation of their constitutional rights.

In deciding, for qualified immunity purposes, whether a legal right or rule was clearly established at the time defendant acted, the Supreme Court has "repeatedly told courts…not to define clearly established law at a high level of generality."[133] The test is one of reasonable notice. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances…. Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."[134] In other words, the question is whether "at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing

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[129] *See* Wood v. Moss, 572 U.S. 744, 761-763 (2014) (upholding Secret Service agents' qualified immunity despite allegation that they engaged in viewpoint discrimination prohibited by the First Amendment).

[130] Filarsky v. Delia, 566 U.S. 377 (2012).

[131] City and County of San Francisco v. Sheehan, 575 U.S. 600, 617 (2015).

[132] Taylor v. Barkes, *supra* note 127, 575 U.S. at 826. See also City of Escondido v. Emmons, 139 S. Ct. 500, 503-504 (2019) (questioning whether "a court of appeals decision may constitute clearly established law for purposes of qualified immunity," noting that "a body of relevant case law is usually necessary to clearly establish the answer…" (internal quotation marks omitted); Carroll v. Carman, 574 U.S. 13, 17 (2014) (questioning whether "a controlling circuit precedent could constitute clearly established federal law").

[133] Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011). "[T]he crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced." Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) (emphasis supplied); accord Kisela v. Hughes, 138 S. Ct. 1138, 1152-1153 (2018) (per curiam); White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) (particularized to the facts of the case); Mullenix v. Lewis, 577 U.S. 7 (2015) (per curiam) (in light of the specific context of the case).

[134] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

violates that right."[135] Similarly, where there is a substantial and credible difference of opinion among lower courts as to the proper interpretation of a controlling Supreme Court precedent, the standard emanating from that precedent will not be treated as "clearly established" in cases falling within the bounds of that interpretive disagreement.[136] The Supreme Court has made it clear that in applying the qualified immunity doctrine, all doubts are to be resolved in favour of the defendant. This is a strict standard, one that is designed to give federal and state "officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'"[137]

However, there may be rare occasions when a constitutional violation is so blatant and egregious that the right in question will be deemed clearly established, despite the absence of any fact-specific prior precedent.[138]

The doctrine of sovereign immunity incorporated into the Eleventh Amendment is broader than the common law doctrine of sovereign immunity. At common law, the king's officers enjoyed no immunity from suit if they violated people's rights under the law. By contrast, the Eleventh Amendment shields state officials from suit for any violations of state law.

As noted earlier, the stripping doctrine is a judge-made exception to the Eleventh Amendment. When it applies, the doctrine has the consequence of allowing claims that arise under federal law to be brought against state officials. Congress has the power to narrow the lower federal courts' subject matter jurisdiction by excluding certain cases, even those that may arise under federal law. Consistent with these principles, Congress may direct that the stripping doctrine not be employed in selected federal question cases, with the result that these claims against state officials would be barred from federal court. Thus, Congress can in effect expand the states' Eleventh Amendment immunity beyond that established by the Supreme Court.

Congress's intent to limit use of the stripping doctrine may be either express or implied. In *Seminole Tribe of Florida v. Florida*,[139] the Court found an implied intent to bar use of the stripping doctrine in a case where plaintiffs sought a federal injunction requiring the governor of Florida to negotiate with local Indian tribes, as required by the federal Indian Gaming Regulatory Act. In the Court's view, for a federal judge to issue an injunction that could be enforced through the court's contempt powers would impose a more drastic mode of enforcement than the "modest set of sanctions" provided for under the "carefully crafted and intricate remedial scheme" created by Congress.[140] Since the stripping doctrine could not be

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[135] Ashcroft v. al-Kidd, *supra* note 133, 563 U.S. at 741.

[136] *See* Safford Unified School District #1 v. Redding, 557 U.S. 364, 377-379 (2009) (so holding).

[137] Ashcroft v. al-Kidd, *supra* note 133, 563 U.S. at 743 (federal official); and see Messerschmidt v. Millender, 565 U.S. 535, 546-548 (2012) (state officials).

[138] *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52 (2020).

[139] 517 U.S. 44 (1996).

[140] Id. at 73-76.

used in this particular setting, plaintiffs' case against the governor was barred by the Eleventh Amendment as a suit against the state.

In cases involving federal *constitutional* rights, the Court may be less willing to infer a congressional intent to bar use of the stripping doctrine than it was in *Seminole Tribe*, where only a *statutory* right was at stake. Before finding that the stripping doctrine cannot be employed in a case involving constitutional rights, the Court might insist that Congress's intent be stated expressly and that the alternative remedies available to plaintiff be adequate. Where these conditions were met, Congress could bar use of the stripping doctrine even in a constitutional case. Although the Court has not addressed this question in terms of the Eleventh Amendment, it has allowed Congress to selectively deny lower federal courts the power to grant injunctive relief in constitutional cases. In such instances plaintiffs must litigate their constitutional claims in state court, with possible review in the Supreme Court.

The Eleventh Amendment's prohibition against bringing a suit against a non-consenting state does not protect "political subdivisions such as counties and municipalities even though such entities exercise a 'slice of state power.'"[141] The reason for this is that the states' immunity from suit derives from the sovereignty they possessed prior to ratification of the Constitution, a sovereignty that was not enjoyed by cities, counties, or other political subdivisions of a state. As a result, under the Eleventh Amendment, "only States and arms of the State possess immunity from suits authorized by federal law."[142] The Eleventh Amendment's narrow definition of "state" stands in sharp contrast to many other constitutional provisions such as the Fourteenth Amendment, in which the word "state" is deemed to embrace all of a state's political subdivisions.

Governmental entities other than cities, counties, and political subdivisions of the state may qualify for Eleventh Amendment immunity if it is determined that they are in effect acting as arms of the state. However, it may at times be difficult to decide whether a particular governmental entity should be treated as part of the state and therefore shielded by the Eleventh Amendment, or whether it is instead a political subdivision of the state and hence enjoys no Eleventh Amendment protection. Some cases are easy. The various departments, offices, and bureaus of the state government are part of the state. These could include such entities as the state Office of Education, the state Department of Highways, and the attorney general's office. At the opposite extreme, cities, counties, mosquito abatement districts, community college districts, and metropolitan water districts are political subdivisions of the state.

The Court has identified several factors that may be helpful in determining an entity's status for purposes of the Eleventh Amendment. The most important of these is the source of the entity's funding. If the entity is funded largely or entirely by the state, so that a judgment against the entity will operate against the state treasury, it is very likely the entity

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[141] Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

[142] Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006).

will be protected by the Eleventh Amendment. On the other hand, if the entity receives funding from sources other than the state, or if it has been given the power to generate its own funds, such as through taxation or the issuance of bonds, it is more likely to be treated as an independent non-state entity. Other relevant factors, besides funding, include the extent of state control over the entity; the type of functions the entity performs; and how the state has designated the entity. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court applied these factors in concluding that a bi-state agency created by a compact between California and Nevada enjoyed no Eleventh Amendment immunity. The agency was funded by the counties in which it operated, not by the states; the agency's governing board was controlled by counties and cities rather than by the states; the agency performed land use functions of a type traditionally undertaken by local governments; and the states had identified the agency as being a "separate legal entity" and "a political subdivision."[143]

An entity that is normally not protected by the Eleventh Amendment because it is deemed to be a political subdivision of a state may sometimes be immunized from suit in federal court. If a judgment against the entity would in effect be a judgment against the state treasury, the court will ignore the fact that the suit is nominally against a political subdivision and treat the action as being one against the state or a state officer. Whether or not the suit is barred will then depend on whether any of the exceptions to the Eleventh Amendment apply. The fact that cities, counties, and other political subdivisions of the state are usually not shielded by the Eleventh Amendment means that federal and state courts can potentially issue money judgments against these entities. Thus, it is beneficial for a plaintiff to sue, if possible, a political subdivision of the state rather than the state, a state agency, or a state-level official.

However, to sue a political subdivision of the state, the plaintiff must have a cause of action – i.e., the law must afford plaintiff the right to recover for the injury complained of. As we noted earlier, a federal statute, 42 U.S.C. § 1983, gives a cause of action against any "*person*" who, while acting "*under color of state law*," deprives a plaintiff of a federal constitutional or statutory right. Section 1983 is the primary vehicle used for asserting claims against state and local officials have violated a plaintiff's federal rights. The Supreme Court has held that neither states nor state-level agencies are "persons" within the meaning of § 1983. A plaintiff may therefore only sue the individual state officials or employees who impaired her federal rights; she may not sue the state itself or the state agency or state entity for whom the individual defendant was working.

Cities, counties, and other political subdivisions of the state, on the other hand, are "persons" within the meaning of § 1983. Suits for legal or equitable relief may be brought directly against these entities, but only if plaintiff can prove that the conduct causing her injury was taken pursuant to an official policy or custom of the entity.[144] Liability may not be imposed

[143] 440 U.S. at 401.

[144] Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).

on a political subdivision simply on a theory of *respondeat superior* or vicarious liability.[145] Absent a proven custom or policy, the entity cannot be held liable for damages or made subject to prospective injunctive relief.[146]

A subdivision's policy or custom need not be written in order to trigger § 1983 liability. Instead, it may consist of "deliberate indifference" on the entity's part to a pattern or practice of constitutional violations by its employees, where the entity has taken no steps to prevent such violations through the provision of adequate training.[147] If a custom or policy is shown to exist, plaintiff may then seek both damages and prospective relief from the entity and from the individuals who acted on its behalf. Moreover, while the entity's officers or employees may be shielded from damages liability by absolute or qualified common law immunity, the entity itself enjoys no common law immunity. This rule encourages cities and counties to respect the people's federal rights, even in areas where the precise scope of these rights may be unclear. Thus, while a lack of clarity will shield an individual defendant from liability through the doctrine of common law immunity, the entity, because it can be held liable even in cases of doubt, is likely to err on the side of over rather than under-protecting an individual's federal rights.

The "under color of state law" requirement of § 1983 is satisfied in cases brought against political subdivisions of the state as long as the action complained of was within the scope of the officer's or employee's official duties or responsibilities, as opposed, for example, to action that was taken after hours or while the employee was on vacation. And if the action was within the scope of the employee's duties, there is no requirement that a state law also have sanctioned the conduct.

The final exception to the Eleventh Amendment comes into play where Congress has passed a law abrogating the states' immunity from suit. We saw earlier that Congress may quite easily *expand* the states' Eleventh Amendment immunity by prohibiting the federal courts from using the stripping doctrine. It is more difficult, however, for Congress to *narrow* the states' Eleventh Amendment immunity through abrogation. An attempt by Congress to abolish the states' sovereign immunity from suit will be upheld by the Court only if two requirements are met. First, Congress must have made its intention to abrogate the immunity "unmistakably clear in the language of the statute."[148] Since the intent "must be both unequivocal and textual," any "recourse to legislative history will be unnecessary…."[149] Second, the law abrogating the states' immunity must not have been enacted under one of Congress's Article I powers, such as the Commerce Clause (Art. I, § 8, cl. 3) or the Patent Clause (Art. I, § 8,

[145] Id. at 691.

[146] *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1951 (2018); Los Angeles County v. Humphries, 562 U.S. 29, 36 (2010).

[147] Connick v. Thompson, 563 U.S. 51, 60-62 (2011).

[148] Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

[149] Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

cl. 8), but must have been adopted pursuant to the Fourteenth Amendment.[150]

The first requirement constitutes a "clear statement" rule. It is designed to protect the states by ensuring that they have notice and an opportunity to defend themselves when legislation to abolish their Eleventh Amendment immunity is being debated in Congress. Unless it is clear at the time of enactment that the law will subject the states to suit, the states' members in the U.S. House and the Senate have no chance to oppose the measure on this ground. The Court relied on the clear statement principle in *Raygor v. Regents of the University of Minnesota*,[151] where it held that the tolling provision of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), could not be construed to toll the statute of limitations on a federal claim against a state that was first filed in federal court but dismissed on Eleventh Amendment grounds, and then refiled in a state court after the statute of limitations had run out. As the Court noted, the text of § 1367 did not specifically refer to claims filed against a state or to dismissals premised on the Eleventh Amendment. As such Congress had not made its intent to abrogate a state's sovereign immunity on such claims unmistakably clear.[152]

The second requirement bars Congress from abrogating the states' Eleventh Amendment immunity under any of its Article I powers. This requirement logically follows from the fact that the Eleventh Amendment is, in part, a constitutional limitation on the subject matter jurisdiction of the federal courts—i.e., it removes certain cases from the federal judicial power as originally defined by Article III, § 2. The Court has long held that Congress cannot expand the federal courts' subject matter jurisdiction beyond the limits defined by the Constitution. Just as Congress may not use its commerce power (Art. I, § 8, cl. 3) to give federal courts jurisdiction over tort claims between motorists from the same state, it may not use its Article I powers to give the courts jurisdiction over cases that are excluded from the federal judicial power by the Eleventh Amendment.

In *Seminole Tribe of Florida v. Florida*,[153] the Court, on this basis, struck down a law enacted by Congress under the Indian Commerce Clause,[154] which had allowed Indian tribes to file suit against a state in federal court to enforce the Indian Gaming Regulatory Act. *Seminole Tribe* overruled *Pennsylvania v. Union Gas Co.*,[155] a short-lived decision in which a bare majority of the Court ruled that the states' Eleventh Amendment immunity may be abrogated by Congress under any of its law-making

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[150] Allen v. Cooper, 140 S. Ct. 994, 1001-1003 (2020) (Copyright Clause); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 57-73 (1996) (Indian Commerce Clause); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 635 (1999) (Interstate Commerce Clause and Patent Clause); Alden v. Maine, 527 U.S. 706, 755 (1999) (Interstate Commerce Clause).

[151] 534 U.S. 533 (2002).

[152] *Id.* at 544-545. Cf. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 724-726 (2003) (statutory provision that allows party to seek money damages against a "State or political subdivision thereof" or "any agency of State" constitutes a clear statement).

[153] 517 U.S. 44 (1996).

[154] U.S. CONST., Art. I, § 8, cl. 3.

[155] 491 U.S. 1 (1989).

powers, including those contained in Article I. In *Alden v. Maine*,[156] the Court subsequently held that "the States' immunity from private suits in their own courts" is likewise "an immunity beyond the congressional power to abrogate by Article I legislation." Were the rule otherwise, said the Court, "the National Government would wield greater power in the state courts than in its own judicial instrumentalities."[157]

Even though Congress may not use its Article I powers to lift the states' Eleventh Amendment immunity, Congress may do so through a law enacted pursuant to the Fourteenth Amendment. The Fourteenth Amendment was ratified in 1868, 70 years after the Eleventh Amendment. Section 5 of the Fourteenth Amendment expressly authorizes Congress to enforce the Amendment "by appropriate legislation"; this may include legislation that allows suit to be brought against a state.

In *Fitzpatrick v. Bitzer*,[158] the Court thus upheld provisions of Title VII of the 1964 Civil Rights Act to the extent that they authorized state workers to sue the state for gender discrimination in employment. The Court reasoned that the Fourteenth Amendment, which prohibits the states from denying equal protection of the laws, in effect modified the Eleventh Amendment by authorizing Congress to subject the states to suit in federal or state court, if Congress believed this was necessary to enforce the Equal Protection Clause. As the Court later explained:

> *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.[159]

If Congress intends to abrogate a state's sovereign immunity pursuant to § 5 of the Fourteenth Amendment, the abrogation must be both "congruent" and "proportional" to the actual violation of judicially recognized Fourteenth Amendment § 1 rights.[160] This means that Congress must identify a pattern of state violations of a judicially recognized constitutional right, create a statute that is plainly designed to ameliorate the violation of those constitutional rights, and devise a remedy that is tailored to the demonstrated pattern of state-induced constitutional violations. In recent years, the Court has applied the congruence and proportionality requirements rather strictly, severely limiting Congress's ability to use its § 5 power to abrogate a state's sovereign immunity.

For example, in *Board of Trustees of the University of Alabama v. Garrett*,[161] the Court held that the attempted abrogation of state sovereign

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[156] 527 U.S. at 753-754.
[157] Id. at 752.

[158] 427 U.S. 445 (1976).
[159] Seminole Tribe of Florida, supra note 153, 517 U.S. 44 at 65-66.

[160] *See* ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS § 1.5.2 (9th ed. 2022).
[161] 531 U.S. 356 (2000).

immunity in Title I of the Americans with Disabilities Act (ADA) was ineffective since the substantive provisions of Title I, prohibiting disability discrimination in public employment, were neither congruent with nor proportional to any established pattern of state violation of constitutional rights of the disabled in the public employment setting. Because Title I in essence sought to create and protect rights that went beyond those guaranteed by § 1 of the Fourteenth Amendment, it exceeded Congress's § 5 power.

Four years later, in a case involving access to courthouses and court proceedings, the Court upheld Title II of the ADA, which prohibits discrimination against the disabled in the provision of public services.[162] In contrast to Title I, Congress in enacting Title II had amassed a large "volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," including specifically their access to the courts.[163] In addition to there being far more evidence of past discrimination in this Title II setting, the Fourteenth Amendment § 1 rights at issue in *Lane* were also more fundamental than the Title I right involved in *Garrett*, making it far easier to show that the rights had been violated in the past. As the Court noted in *Lane*, the Title I equal employment right at stake in *Garrett* triggers mere rational basis review under the Equal Protection Clause; by contrast, Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review"—including the right of access to the courts.[164]

Once the *Lane* Court concluded that Title II sought to protect a group whose § 1 Fourteenth Amendment rights had in fact been violated, it went on to hold that Congress, in invoking its § 5 power, may enact remedial, as well as preventative or prophylactic measures, the latter not being limited to state conduct that would itself violate § 1. With adequate findings, Congress may thus invoke its § 5 power to prohibit state conduct that might not itself be found unconstitutional, as long as the legislation is congruent and proportional to the past § 1 violations.[165]

More recently, in *Allen v. Cooper*,[166] the Court rejected Congress's use of § 5 to adopt the Copyright Remedy Clarification Act of 1990 (CRCA).

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[162] Tennessee v. Lane, 541 U.S. 509 (2004).

[163] Id. at 526-528.

[164] Id. at 522-523.

[165] *Compare* Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) (Family and Medical Leave Act (FMLA) provision authorizing state employees to sue their employer for failure to grant spousal or parental leaves, as required by Act, was proper exercise of § 5 enforcement powers given history of gender discrimination in public and private employee benefit plans, even though this statutorily prohibited conduct might not itself be unconstitutional), *with* Coleman v. Court of Appeals of Maryland, 566 U.S. 30 (2012) (plurality opinion) (FMLA provision authorizing state employees to sue their employer for failure to grant sick leave, as required by the FMLA, was invalid exercise of § 5 enforcement power where there was no evidence that states had discriminatory sick-leave policies and where nothing in the Congressional Record suggested that Congress had reason to believe women were being discriminated against in this respect).

[166] 140 S. Ct. 994 (2020).

That act amended federal copyright law to expressly allow infringement actions to be brought against the states, thereby remedying the problem of states' uncompensated takings of private property through copyright infringement. CRCA met the clear statement rule. Moreover, before enacting it, Congress received a 158-page report from the Register of Copyrights which, based on a year-long study, concluded that "copyright owners … will suffer immediate harm if they are unable to sue infringing states in federal court."[167] Yet despite this "headline-grabbing conclusion," said the Court, neither the report nor the legislative history suggested that this was a serious problem. The report identified a dozen cases of possible state infringement, only two of which appeared to involve intentional or reckless state conduct that would violate the Takings Clause. "This is not, to put the matter charitably, the stuff from which Section 5 legislation ordinarily arises."[168]

Moreover, Congress's CRCA solution—allowing states to be sued in all instances of copyright infringement—failed the congruence and proportionality tests. For it reached all state copyright infringements, including those lacking the requisite intent element, and allowed those suits even if state law afforded other means of redress sufficient to satisfy due process, such as through contract or unjust enrichment lawsuits.

Even though the Court struck down CRCA, it went out of its way to encourage Congress to give it another shot. The Justices noted that CRCA was enacted before *Seminole Tribe* made clear that Article I would not suffice, and before the Court came up with the congruence and proportionality requirements. "But going forward," said the Court, "Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice."[169] It remains to be seen what if anything Congress now does.

The Court's rationale in *Seminole Tribe* would seemingly allow Congress to abrogate the states' Eleventh Amendment immunity through legislation enacted under other, later-adopted amendments that expressly restrict conduct on the part of the states—such as the Thirteenth and Fifteenth Amendments. To date, however, the Court has limited Congress's power to abrogate to legislation passed pursuant to the Fourteenth Amendment.

The effect of the Eleventh Amendment may be to make it extremely difficult to hold a state accountable for having violated the Constitution or laws of the United States. Through the stripping doctrine, state officials can usually be enjoined by a federal or state court from engaging in future illegal conduct. Redress for *past* violations, however, is generally impossible other than through whatever remedies a state may itself have consented to provide. And since Congress's ability to abrogate the states' Eleventh Amendment immunity is essentially limited to enforcing the

[167] Id. at 1006.
[168] Id.
[169] Id. at 1007.

Fourteenth Amendment, courts can award damages for a state's violation of federal environmental, welfare, and other federal laws only if the state has waived its sovereign immunity, or if those damages will come from the pocket of an individual state official—a pocket that will often be either empty or protected by common law immunity.

Thus, as the Supreme Court noted in a case where a state withheld welfare benefits in violation of federal law, "whether or not the [plaintiffs] will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court."[170] To the extent that the Eleventh Amendment deprives plaintiffs of federal redress for harms they suffer at the state's hands, the Amendment may thus encourage a state to ignore federal law. If a state violates an individual's federal constitutional or statutory rights, the worst that will ordinarily happen *to the state* is that one of its officials will be enjoined by a federal court from continuing to violate the law. While such relief may cost the state money in the future, the state will normally not have to compensate for any of the injuries it has already caused.

Yet in *Alden v. Maine*,[171] the Supreme Court rejected the proposition that its broad reading of the Eleventh Amendment

> confer[s] upon the State a…right to disregard the Constitution or valid federal law.…We are unwilling to assume that States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States…shall be the supreme Law of the Land."[172]

The Court also noted that states are not necessarily shielded from damages liability, even in situations like *Alden* where Congress lacks the power to abrogate the state's sovereign immunity because the federal law in question (e.g., the Fair Labor Standards Act (FLSA)) was enacted under Article I. In these situations, said the Court, Congress may authorize a suit to be brought against the state in the name of the United States, thereby invoking one of the recognized exceptions to the Eleventh Amendment. The FLSA, under which the private employees unsuccessfully sued the State of Maine in *Alden*, in fact *authorizes* the United States to sue the states in federal court to recover damages on behalf of aggrieved state workers. Yet as Justice Souter noted in his dissent:

> [U]nless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy. Facing reality, Congress specifically found…"that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even

[170] Quern v. Jordan, 440 U.S. 332, 348 (1979).

[171] 527 U.S. 706 (1999).

[172] Id. at 755.

> a substantial portion of the situations where compliance is not forthcoming voluntarily."…One hopes that such voluntary compliance will prove more popular than it has in Maine, for there is no reason today to suspect that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with this federal law in the multifarious circumstances of some 4.7 million employees of the 50 States of the Union.[173]

While Congress might try to deal with this problem by authorizing private parties to bring a so-called *qui tam* action on behalf of the United States, thereby relieving the U.S. Justice Department of the litigation burden, the Supreme Court has cast doubt on whether a *qui tam* action against a state would qualify as a suit by the United States so as to trigger one of the exceptions to the Eleventh Amendment.[174]

The Court in *Alden* asserted that "[t]he principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States."[175] Yet the notion that a state is effectively immune from damages—no matter how wilful or flagrant its violation of the Constitution or laws of the United States—seems fundamentally at odds with the principle of federal supremacy. This anomaly is a result of the Court's reinterpretation of the Eleventh Amendment in *Hans v. Louisiana*[176] and its progeny. Had the Court instead adhered to the text of the Eleventh Amendment—which merely bars suits against a state by citizens of another state, or by citizens or subjects of foreign countries—rather than expanding its scope to enshrine a broad doctrine of sovereign immunity, federal and state courts would have been able to entertain damages actions against a state on the basis of the state's violation of federal law. Such actions would not have been affected by the Eleventh Amendment's repeal of the Citizen-State and Alien-State Clauses in Article III, for they could have entered federal court as cases "arising under" federal law. In recent years some Justices have called for overturning *Hans*'s interpretation of the Eleventh Amendment,[177] but a majority of the Court has so far at least declined the invitation.

Besides the above doctrinal barriers to §1983 actions, framing the proper injury and seeking the right relief seem to have become a particularly challenging task in §1983 actions. More recently, in *Gill v. Whitford*,[178] democratic voters filed § 1983 action against members of Wisconsin Elections Commission, claiming that the state legislative redistricting plan drafted and enacted by a Republican-controlled Wisconsin legislature was unconstitutional partisan gerrymander that

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[173] Id. at 810.

[174] Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 786-787 (2000).

[175] 527 U.S. at 757.

[176] 134 U.S. 1 (1890).

[177] *See, e.g.*, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247-302 (1985) (Brennan, J., Marshall, J., Blackmun, J., and Stevens, J., dissenting).

[178] 138 S.Ct. 1916 (2018).

systematically diluted voting strength of Democratic voters statewide based on their political beliefs. Thus, the state legislative redistricting plan violated the Equal Protection Clause and First Amendment rights of association and free speech, by two gerrymandering techniques known as "cracking," or dividing party's supporters among multiple districts so they fell short of majority in each one, and "packing," or concentrating one party's backers in a few districts that they won by overwhelming margins. A three-judge panel of the issued an injunction for the plaintiffs, but the Supreme Court reversed, finding that the plaintiffs had no standing:

> The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a *failure to distinguish injury from remedy*. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." Here, the plaintiffs' claims turn on allegations that their votes have been diluted. Because that harm arises from the particular composition of the voter's own district, remedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[179]

However, it is hard to see how the plaintiffs' injury was limited to the injury that they had suffered as individual voters and did not instead extend to the statewide harm to their interest in their collective representation in the legislature and in influencing the legislature's overall composition and policymaking, as in fact the plaintiffs described in their brief.[180] And it is difficult to understand how the Court would downplay this injury and downgrade it to "generalized grievance,"[181] to then conclude that the case was not justiciable.

The examination of § 1983 actions within this context brings to the forefront the substantial hurdles imposed by the Eleventh Amendment and the doctrine of sovereign immunity, which collectively form a formidable barrier against claims directed at the state. These constitutional and legal constructs emphasize the deeply rooted principle of state sovereignty, effectively shielding states from being unwilling defendants in federal courts. The nuanced interplay between the Eleventh Amendment and sovereign immunity not only complicates the pursuit of redress under § 1983 but also delineates the boundaries of legal recourse available against state entities and officials. Particularly, the Eleventh Amendment presents a nuanced barrier that requires plaintiffs to navigate a legal landscape where states are generally immune from suit in federal court, except under specific circumstances where such immunity is abrogated or waived. The

[179] Id., at
[180] Id., at 1931.
[181] Id.

doctrine of sovereign immunity further complicates this terrain, reinforcing the state's protection against legal actions that seek redress from the state treasury or challenge state sovereignty directly. These doctrines underscore the meticulous care with which plaintiffs must frame their § 1983 claims, ensuring they target individual state officials in their personal capacity or invoke established exceptions like the *Ex parte Young* doctrine for prospective relief. In essence, the Eleventh Amendment and the doctrine of sovereign immunity serve as critical filters through which § 1983 actions must be processed, underscoring the delicate balance between upholding state sovereignty and ensuring accountability for violations of federal rights. For practitioners and scholars, understanding these hurdles is paramount, as it shapes the strategies employed in litigating § 1983 actions and influences the evolving jurisprudence surrounding state accountability under federal law. The emphasis on these doctrines in this analysis highlights their central role in defining the contours of legal action against state actors, a fundamental aspect for those seeking justice through the federal legal system.

VI. THE EFFECTS OF THE PRECEDENT AND HOW TO REVERSE THE TREND

The § 1983 actions that have been filed since *Lyons* have often encountered insurmountable standing barriers. Those seeking injunctive relief based on specific wrongful conduct have typically seen their claims dismissed on standing grounds because, as the Court said in *Atascadero*, "[p]ast 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.'"[182]

Black Lives Matter D.C. v. Trump[183] is one of the many [most recent] *Lyons* repeats. There, among other things, the plaintiffs brought a class action against former President Trump, former Attorney General William Barr, the District of Columbia police, and various other federal and local officials. Plaintiffs asserted *Bivens* constitutional as well as federal statutory claims arising from law enforcement's response to plaintiffs' protests near the White House on June 1, 2020. Plaintiffs alleged that peaceful protesters had assembled in Lafayette Park across from the White House to protest racial injustice after the death of George Floyd and other Black people at the hands of law enforcement and that, in response to the peaceful protest, officials, wielding batons, sprayed the crowd with tear gas, flash-bang grenades, smoke bombs, and rubber bullets. Although the law enforcement officers provided warnings before dispersing the crowd, plaintiffs alleged that those warnings were inadequate because they were given via a megaphone 50 yards away from the closest protestors, and thus were "barely audible. The plaintiffs Black Lives Matter ("BLM") alleged that the purpose of the law enforcement response was to clear the area to permit the President to walk to a photo opportunity at a nearby church. What resulted was unprovoked violence. The crowd fled Lafayette

[182] Abbott v. Pastides, 900 F3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019); *see also* Thompson v. Lengerich, 798 Fed. Appx. 204, 210-211 (10th Cir. 2019); Rezaq v. Nalley, 677 F.3d 1001, 1009 (10th Cir. 2012).

[183] 2021 WL 2530722 (D.D.C. June 21, 2021).

Square only to be met by additional District of Columbia police officers who fired tear gas at the fleeing crowd.[184] The plaintiffs alleged that they suffered injuries, both physical and psychological, as a result of the law enforcement response to the protest, and that they "fear[ed] further retaliation in the future…if they continue to observe, record, or participate in constitutionally protected activity."[185]

Plaintiffs sought injunctive relief against the defendants under the First, Fourth, and Fifth Amendments, alleging that the practices of "deploying physical force against demonstrators to remove them from places in which they have gathered with others to express their political opinions," and "deploying physical force without provocation, warning, or legal grounds to do so, against demonstrators to force them to halt or move,"[186] violated their constitutional rights.

The Court, after relying on *Lujan* for the elements of standing, noted that:

> When plaintiffs seek injunctive relief, as they do here, "past injuries alone are insufficient to establish standing." Instead, "[a]n allegation of future injury may suffice if the threatened injury is *certainly impending*, or there is a substantial risk that the harm will occur." Of note, "allegations of *possible* future injury are not sufficient." Future injuries—even those with an "objectively reasonable likelihood" of occurring—are not adequate to establish standing.[187]

Even an "objectively reasonable likelihood" is not enough to give access to justice. Instead, the future harm must be "certainly impending," a standard that few future harms will ever be able to meet.

The Court held that the defendants' clearing of Lafayette Square on the day of the protest did not itself establish "either an ongoing injury or an immediate threat of future injury," for the June 1 assembly was over. Plaintiffs therefore lacked standing to seek an injunction requiring defendants to change their practice of using physical force against protestors.[188] In an effort to show that their injury was in fact "ongoing," plaintiffs alleged "ongoing chilling effects resulting from the events of June 1, 1920."[189] But, said the court, "such allegations of a *subjective* chilling effect resulting from the defendants' past actions are insufficient to confer standing.[190] And the plaintiffs likewise failed to establish standing based on an immediate threat of future harm,[191] for even if they alleged that they planned to continue demonstrating in or near Lafayette Square, and that they feared law enforcement officers might again disperse or attack them again, those fears still rested on the isolated event of the day of the protest,

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[184] Id., at *1-2.
[185] Id., at *2.
[186] Id., at *8.
[187] Id., at *8 (some emphasis added) (internal citations omitted).
[188] Id. at *8.
[189] Id. at *9.
[190] Id. (emphasis added).
[191] Id.

and not on a law or policy as the basis for this claimed risk of future harm.[192] "[P]laintiffs do not challenge a large-scale policy—or any policy at all. Rather, Plaintiffs challenge...the implied threat to take similar actions in the future at the President's whim."[193] Because the plaintiffs "do not claim that a law or policy has 'ordered or authorized police officer[s] to act in such manner' as allegedly occurred on June 1, the plaintiffs' claims of impending future harm are too speculative to confer standing to seek an injunction."[194]

Thus, as in *Lyons*, in order to prevail against an objection to standing, the plaintiffs would be required to prove that they would again demonstrate in Lafayette Square; that agencies headed by the official-capacity defendants would again respond to the demonstration; that federal officers would again use that same law enforcement response as a cover to deliberately target non-violent peaceful demonstrators; and that one or more of the plaintiffs would again be targeted.[195] Only then would their threatened harm be "certainly impending." By contrast, their "hypothetical chain of events [was] simply too speculative to confer standing for injunctive relief."[196]

Similar problems encountered the plaintiff in *MacIssac v. Town of Poughkeepsie*.[197] In his complaint, MacIssac alleged that, when operating his vehicle on a public highway in the Poughkeepsie, he was stopped by police officers, who arrested him on suspicion of driving while intoxicated, and that after he was handcuffed, the officers used a Taser stun gun on him three times; bent his back, arms, and legs in a manner that caused significant pain; and used excessive force beyond that needed to control him. He did not resist arrest.[198] MacIssac filed a §1983 action against the Town and the police officers, seeking compensatory and punitive damages against the officers, compensatory damages and injunctive relief against the Town, and attorneys' fees and costs under §§ 1983 and 1988.

Under the Supreme Court's decision in *Lyons*, the plaintiff here clearly had standing to seeking damages. However, the Town moved to dismiss plaintiff's claim for injunctive relief on standing grounds. In granting the motion, the court focused on the redressability requirement:

> The third prong of this test—redressability—has been interpreted to mean that a plaintiff's standing depends on the form of relief requested. *See Friends of the Earth*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.") In seeking prospective relief like an injunction, a plaintiff must show that he can reasonably expect to encounter the same injury again in the future—otherwise there is no remedial benefit that he can derive from such judicial decree. Past injury

[192] Id.
[193] Id.
[194] Id.
[195] Id.
[196] Id.
[197] 770 F.Supp.2d 587 (S.D.N.Y. 2011).
[198] Id., at 592.

> alone does not establish a present case or controversy for injunctive relief. Rather, "the injury alleged must be capable of being redressed through injunctive relief 'at that moment.'"[199]

After describing *Lyons* as the case that seemed most on point, the court noted that *Lyons* had long been criticized because "the restriction that [it] places on the availability of injunctive relief in Section 1983 cases is significant."[200] The court suggested that little attention had been paid to the fact that *Lyons* requires a more stringent showing by plaintiff for standing to *seek* equitable relief than *Monell v. Department of Social Service*[201] "requires for the same plaintiff to *receive* that relief."[202] In other words, the factual allegations that, if proven, may entitle a plaintiff to an injunction under *Monell* seems not enough for the same plaintiff to have standing to seek injunctive relief under *Lyons*.[203] To put it differently, the Court's decisions seem to allow a plaintiff to *receive* injunctive relief on a basis that would not afford standing to *seek* it. The court suggested that this anomaly may have come about for two reasons:

> First, under *Lyons* and its progeny, "a plaintiff seeking injunctive relief must demonstrate *both* a likelihood of future harm *and* the existence of an official policy or its equivalent." An official policy sanctioning the illegality is required for a plaintiff to have *equitable standing*, but this by itself is not enough if there exists no reasonable likelihood that the plaintiff, in going about his everyday activities, will be affected by the implementation of that policy in the future. In contrast, an official policy theoretically is sufficient to enjoin the unconstitutional acts of a municipality and its officers under *Monell*.[204]

"Logically then," said the court, "equitable relief ought to be available in a Section 1983 case, if the court deems it appropriate, on the same record on which damages are available.[205]

Moreover, said the court,

> Because a plaintiff must prove an official policy to hold a municipality liable for any and all forms of relief, and because the relief requested has no bearing on what constitutes an official policy, then proof of an official policy ought to entitle the plaintiff to whatever relief the court considers appropriate. So long as the plaintiff has proved municipal liability under *Monell*, it is within the power and discretion of the court to remedy the constitutional deprivation by awarding monetary damages or equitable

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[199] Id. at 593-594 (some internal citations omitted).
[200] Id., at 594-595.
[201] 436 U.S. 658 (1978).
[202] Id., at 595 (emphasis in original).
[203] Id.
[204] Id. (internal citations omitted) (emphasis added).
[205] Id., at 596 (internal citations omitted).

> relief or both, depending on its assessment of what the particularities of the case require."[206]

The court went on to suggest that the Supreme Court appears to have endorsed this view in *Los Angeles County v. Humphries*,[207] where it held that "*Monell*'s 'policy or custom' requirement applies in §1983 cases irrespective of whether the relief sought is monetary or prospective."[208] It follows then, "[l]ogically," said the *MacIssac* court, that "equitable relief ought to be available in a Section 1983 case, if the court deems it appropriate, on the same record on which damages are available."[209]

> Ironically, this view—now seemingly endorsed by the Supreme Court in *Humphries*—was first expressed by the four dissenting justices in *Lyons*. The *Lyons* dissenters flatly rejected the notion that a court could have jurisdiction to adjudicate a request for damages but not for injunctive relief, where both depended on a demonstration that an official policy was unconstitutional. They clamored against the majority's decision to "fragment a single claim into multiple claims for particular types of relief." Now, twenty-seven years later, an [sic] unanimous Supreme Court similarly has rejected a "relief-based bifurcation" of the logic of *Monell*. While nothing in *Humphries* suggests an intention to retreat from the holding of *Lyons*, which does bifurcate standing to bring a *Monell* claim on the basis of the relief sought, how the two are to be squared remains to be seen.[210]

The second possible reason for this anomaly—i.e., that it's easier to obtain relief under *Monell* than it is to have standing under *Lyons*—is that *Lyons* defines its "official policy" requirement in a significantly more limited way than the courts have interpreted this same requirement under *Monell*.[211] "Both standing under *Lyons* and municipal liability under *Monell* require an official policy sanctioning the unconstitutional conduct at issue. But a policy sufficient to hold a municipality liable may be too 'unofficial' to give the plaintiff standing to sue for equitable relief in the first place."[212] This is not so under *Lyons*.[213]

"In sum," continues the court, "'*Lyons* ha[s] effectively rendered injunctive relief against police misconduct virtually unobtainable, even

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[206] Id.

[207] 131 S. Ct. 447 (2010).

[208] Id. at 453-454.

[209] *MacIssac, supra* note 8, 770 F.Supp.2d at 596.

[210] Id.

[211] Id.

[212] *MacIssac*, at 596-597. As the court points out, under *Monell*, a municipality's failure to train its officers may constitute a "policy" actionable under §1983 where (1) "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact," and (2) there is a causal link between the "identified deficiency in a city's training program" and the constitutional injury suffered.

[213] Id. *See also* Part IV.

where the misconduct involves patterns of abuse or unconstitutional official policies' that would entitle a plaintiff to relief under *Monell*."[214]

And thus, when trying to resolve "the incongruous result of *Lyons* that an equitable claim on which *Monell* liability properly could be found will fail virtually every time for lack of standing suggests to this Court that the issue of justiciability ought remain separate from the appropriateness of a particular remedy."[215] This is because *Lyons*, "by requiring that a complaint demonstrate not that some form of judicial relief is capable of redressing the plaintiff's alleged injury but rather that injunctive relief is the appropriate and necessary redress, effectively denies litigants the opportunity to be heard on the merits and denies federal courts their power to remedy constitutional harms as they see fit."[216]

And of course the court notes that injunctive relief should be granted with caution, especially when plaintiffs in §1983 actions are seeking a judicial decree to get a structural reform of a local law enforcement agency.[217] "But whether a plaintiff has met the 'likelihood of irreparable harm standard for injunctive relief should be decided by the court *after* the parties have developed a factual record,"[218] as "[o]nly after the facts have unfolded can a court intelligently weigh the potential threat of harm in light of other factors bearing on whether an injunction is the most effective and appropriate remedy…[o]n a developed record/ the failure to demonstrate a likelihood of irreparable harm, or a "real and immediate threat of injury' as *Lyons* termed it, should be a remedial barrier, but not a jurisdictional one."[219]

Applying the law to the facts of the case, though, the court granted the defendant's motion to dismiss because the case was distinguishable from *Lyons*, as he had failed to allege facts demonstrating with any credibility that he himself would suffer the same injury again. Among the reasons for such failure was the fact that he had not been stopped for a minor traffic violation but on suspicion of DWI, an offense to which he later pled guilty.[220] And this distinguishes this case from those in which the plaintiffs had standing to sue for injunctive relief in part because their likelihood of suffering the same harm again did not depend on them

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[214] Id., at 596. In *Cadiz v. Kruger*, 2007 WL 4293976, at *10 n. 9 (N.D.Ill. Nov. 29, 2007), the court noted that "[w]e are mindful ... that some plaintiffs may seek not only monetary damages on a *Monell* claim, but also may seek injunctive relief against specific police practices.... However, in the typical excessive force case that would give rise to an accompanying *Monell* claim, a plaintiff would lack standing to seek prospective injunctive relief for a past event that (as to that plaintiff) has no foreseeable likelihood of recurring." *Id.*

[215] Id., at 598.

[216] Id. *See also 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, 7 (1984) ("*Lyons* forecloses a federal court from obtaining pertinent information about the lawfulness of the defendant's conduct and from balancing the various interests, before deciding whether relief ought to be provided").

[217] Id., at 598.

[218] Id.

[219] Id.

[220] Id., at 601.

willfully breaking the law.[221] And even if MacIssac faced a realistic threat of being stopped on suspicion of DWI again, nothing in the complaint suggested a reasonable likelihood that, during such a stop and possible arrest, the Town's officers again would use a Taser stun gun.[222] The court then notes that "[w]hether these allegations, if proven, would give rise to municipal liability under *Monell* is irrelevant because they do not confer standing to sue for injunctive relief under *Lyons*."[223]

Although the *MacIssac* opinion endorses much of our theory of standing and jurisdiction and relief, it falls short of fully embracing such theory, applying it to the facts of the case accordingly and truly giving meaning to §1983 actions and injunctive relief there sought. The judge, in fact, concluded that the plaintiff had no standing because, like in *Lyons*, "[the] *likelihood of suffering* the same harm again did not depend on them willfully breaking the law."[224] This conclusion again conflates right, injury, jurisdiction, and remedy. Whether this *likelihood* existed or not should be a merits inquiry, not a jurisdictional injury. In other words, an "objectively reasonable likelihood" should be enough to show a "case or controversy" within Article III, § 2 of the Constitution, a case capable of judicial resolution.

In any event, *MacIssac* remains a powerful opinion that could be used to reverse the problematic trend that originated with *Lyons* and that is increasingly making a mockery of injunctive reliefs in §1983 actions. What will be required is a clear identification of the claim and relief, insisting on the idea that the relief is not part of the claim, and that the injunctive relief is remedial or procedural not jurisdictional, and that, as the court in *MacIssac* says, "[o]nly after the facts have unfolded can a court intelligently weigh the potential threat of harm in light of other factors bearing on whether an injunction is the most effective and appropriate remedy…[o]n a developed record/ the failure to demonstrate a likelihood of irreparable harm, or a "real and immediate threat of injury' as *Lyons* termed it, should be a remedial barrier, but not a jurisdictional one."[225]

VII. CONCLUSION

Over forty years after *Lyons*, police brutalities, deaths, and the consequences of those brutalities continue. We have tools to revert the trend, and the above considerations and analysis should help return to §1983 its meaning and force, for the preservation of our constitutional system and through the enforcement and protection of constitutional rights. As Martin Luther King put it, "[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[226]

To effectively reverse the restrictive trend established by the Lyons decision regarding access to injunctive relief, it's important to emphasize a

[221] Id.
[222] Id.
[223] Id.
[224] *Id.* (emphasis added).
[225] Id.
[226] Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963.

nuanced judicial approach. This approach should recognize the distinction between the claim of a constitutional violation and the type of relief being sought. The emphasis here is on ensuring that individuals who allege a breach of their constitutional rights have a clear pathway to the courts, whether they are seeking damages or an injunction. A more flexible understanding of standing is also essential. Rather than narrowly focusing on whether the same individual is likely to suffer the same harm again, the judiciary should consider the broader implications of systemic or policy-driven misconduct. This understanding would allow for the acknowledgment of potential impacts on the community or individuals who might encounter similar policies or their effects in the future. Additionally, courts should allow for the thorough development of the factual record before making determinations about the appropriateness or feasibility of injunctive relief. This approach would enable more informed decisions that accurately consider potential ongoing harms and the realities of implementing specific remedies. Furthermore, acknowledging the systemic implications of certain misconduct is vital. When actions stem from broader policies or widespread practices, understanding these broader contexts can help in preventing future violations and ensuring community-wide protections. Lastly, by facilitating access to injunctive relief in cases of constitutional violations, courts can affirm their critical role in safeguarding civil rights and liberties. This not only helps in addressing individual grievances effectively but also plays a crucial part in deterring and rectifying systemic issues, reinforcing the judiciary's role in upholding justice and equity.

In my manuscript, I have delved into the complex interplay between the precedent and the ongoing struggle for racial justice, particularly through the lens of §1983 actions. This exploration is deeply relevant to the field of racial justice work for several reasons. First, my analysis addresses the significant challenges related to standing and the obstacles individuals and groups face when pursuing justice for constitutional violations, especially in scenarios involving law enforcement misconduct. By evaluating how decisions like *Lyons* have erected formidable barriers for those seeking injunctive relief, my work underscores the pressing need to dismantle these legal hurdles to better combat systemic racial discrimination and police brutality.

Furthermore, my focus on reversing the restrictive trends set by precedents like *Lyons* resonates with a broader imperative in racial justice advocacy: the need to challenge and reform institutional practices that uphold racial inequities. In advocating for a more accessible and responsive legal framework, my manuscript is inherently linked to efforts aimed at ensuring that victims of racial injustice have viable pathways to demand accountability and systemic change.

Moreover, by examining cases such as *Black Lives Matter D.C. v. Trump*, my work situates itself within the vital national discourse on race, protest, and state power. It highlights the role of legal strategies within the larger racial justice movement, illustrating how litigation can serve as a powerful mechanism to redress wrongs, mobilize public awareness, and catalyze institutional reform.

My contribution to the field of racial justice work is, therefore, multifaceted. Through my analysis, I aim to provide a detailed critique of current legal barriers and propose pathways for reform, thereby offering insights that could inform both legal strategies and broader advocacy initiatives. By situating my work within the context of ongoing racial justice efforts, I am engaging with and contributing to a critical dialogue aimed at reshaping the legal landscape to better reflect the principles of equity and justice.

In doing so, my work builds upon and contributes to a rich tradition of racial justice scholarship and activism. It echoes and amplifies the calls for justice articulated by organizations like the NAACP Legal Defense and Educational Fund, the American Civil Liberties Union, and the Movement for Black Lives and Black Lives Matter, all of which have employed legal advocacy as a tool to confront and dismantle systemic racism. By critically analyzing legal precedents and advocating for change, my manuscript aims to be part of this vital continuum of efforts to secure racial justice and equality.