

NOTES

STANDING AND INJUNCTIONS: THE DEMISE OF PUBLIC LAW LITIGATION AND OTHER EFFECTS OF LYONS

Prior to the Warren Court era, use of injunctions by federal courts was considered a last resort or an "extraordinary remedy."¹ Beginning with the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*,² however, the injunction was given "special prominence" and became one of the Court's most important tools in effecting societal changes in the area of desegregation.³ Following *Brown*, federal court injunctive power became more widely used.⁴ This development led to a proliferation of civil rights cases filed under section 1983,⁵ in which federal courts became increasingly sympathetic to plaintiffs who filed suit in order to enjoin government policy.⁶ These cases in which federal courts have used their injunctive power against state government have been called "public law litigation" or "institutional litigation" by many commentators because of the unique nature of the remedies ordered in such cases.⁷ These decisions are unique because they tend to involve affirmative administrative changes in, and continuing judicial supervision of, government institutions.⁸ The proliferation of public law litigation and the intrusive nature of the injunctions that have been issued in such cases have raised questions concerning the appropriateness and legitimacy of such federal court activity.⁹

¹ O. FISS, *THE CIVIL RIGHTS INJUNCTION*, 1-4 (1978) [hereinafter cited as O. Fiss].

² 347 U.S. 483 (1954). See also *Brown v. Board of Education*, 349 U.S. 294 (1955) (where the Supreme Court later affirmed lower court injunctive orders in the same case).

³ O. FISS, *supra* note 1, at 4.

⁴ *Id.*

⁵ 42 U.S.C. § 1983 (1976 & Supp. V 1981). See Howard, *The States and the Supreme Court*, 31 CATH. U. L. REV. 375, 380 (1982) [hereinafter cited as Howard]; Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Court Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & ORD. 557, 561 (1973).

⁶ See Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L. J. 635, 665 (1982) [hereinafter cited as Fletcher].

⁷ See, e.g., Chayes, *The Supreme Court 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4 (1982) [hereinafter cited as Chayes, 1982]; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) [hereinafter cited as Chayes, 1976]; Fletcher, *supra* note 6, at 635; Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 949 (1978) [hereinafter cited as Mishkin]. The term public law litigation, as it will be used in this note, will refer to federal court litigation in which the plaintiff has brought suit seeking to change the policies and administration of a branch of local government. Such suits result in the federal court attempting to remedy the violation of statutory or constitutional law by ordering affirmative changes in the administration of the particular branch of government or institution. For the purposes of this note, the focus of inquiry will be on public law litigation that primarily involves a branch of state or local government.

⁸ See, e.g., Howard, *supra* note 5, at 426; Mishkin, *supra* note 7, at 649.

⁹ See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY*, 4 (1977) [hereinafter cited as D. HOROWITZ]; Fletcher, *supra* note 6, at 635; Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 716 (1978) [hereinafter cited as Frug]; Glazer, *Towards an Imperial Judiciary*, 41 PUB. INTEREST 104, 106-08 (Fall 1975) [hereinafter cited as Glazer]; Howard, *supra* note 5, at 426; Mishkin, *supra* note 7, at 949; Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661 (1978) [hereinafter cited as Nagel].

Indeed, the proliferation of such litigation has led to a heated debate among commentators.¹⁰ Some critics have suggested that the decrees issued in these cases constitute an illegitimate use of federal power that usurps the democratic process,¹¹ while others have characterized the federal court activity as a necessary means of enforcing newly recognized substantive rights.¹²

Since 1971,¹³ the Supreme Court has responded to the flood of public law litigation the Court invited in its earlier decisions by curtailing the availability of such suits.¹⁴ One way the Court has limited public law litigation has been by applying the entry requirements of standing in a manner that limits the circumstances in which a plaintiff may gain access to the courts for the purposes of airing a grievance with government policy.¹⁵ Another way that the Court has limited public law litigation is by requiring that federal courts give deference, in the name of federalism, to executive and legislative branches of state government before issuing an injunction that intrudes into local decision-making processes.¹⁶ The Court's restrictive trend has brought forth a considerable amount of criticism from both commentators and members of the Court.¹⁷ This criticism indicates

For comments on the use of federal equitable power in specific areas, see, e.g., W. ELLIOT, *THE RISE OF GUARDIAN DEMOCRACY* (1974) (critical look at use of federal equitable power in reapportionment cases); L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS*, 13 (1976) (critical look at court ordered busing as a remedy); LaRue, *Justiciability and Mental Health*, 32 WASH. & LEE L. REV. 347 (1975) (critical look at court supervision of mental institutions).

¹⁰ Compare authorities cited, *supra* note 9 with Chayes, 1982, *supra* note 7, at 4; Chayes, 1976, *supra* note 7, at 1281; Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) [hereinafter cited as Eisenberg & Yeazell]; Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978) [hereinafter cited as Goldstein]; Johnson, *The Role of Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981) [hereinafter cited as Johnson]; Rudenstine, *Institutional Injunctions*, 4 CARDOZO L. REV. 611 (1983); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1191 (1977) [hereinafter cited as Weinberg]. See also *Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267 (1981) (a symposium consisting of a series of articles on public law litigation).

¹¹ See, e.g., Fletcher, *supra* note 6, at 635; Frug, *supra* note 9, at 735; Glazer, *supra* note 9, at 118; Howard, *supra* note 5, at 426.

¹² See, e.g., Eisenberg & Yeazell, *supra* note 10, at 516.

¹³ In 1971, the Supreme Court decided *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, the Court invoked the doctrine of "Our Federalism" to restrain a federal court from enjoining a state court criminal proceedings. *Id.* at 44. The doctrine of federalism enunciated in that decision planted the seeds of federalism that would later be utilized to restrain federal court injunctive power in other public law litigation cases. See *infra* notes 149-69 and accompanying text.

¹⁴ For consideration of various ways in which the Court has limited federal court litigation under section 1983, see generally Howard, *supra* note 5; *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Developments — Section 1983*]. As the above commentaries demonstrate, the Supreme Court has limited section 1983 actions in various ways (i.e. abstention, scope of liability, exhaustion of remedies). This note, however, is principally concerned with the limitations on public law litigation arising from the *O'Shea-Rizzo-Lyons* line of cases, regarding standing and the prerequisites of injunctive relief.

¹⁵ See, e.g., Warth v. Seldin, 422 U.S. 490, 517-18 (1975); United States v. Richardson, 418 U.S. 166, 179-80 (1974); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220-21 (1974). See also *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1667 (1983).

¹⁶ See, e.g., Rizzo v. Goode, 423 U.S. 362, 380 (1976).

¹⁷ See, e.g., *supra* note 10 and articles cited therein. See also *Juidice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting).

For two rather cynical characterizations of the Supreme Court's trend, see Fiss, *Dombrowski*, 86 YALE L. J. 1103, 1159-60 (1977) [hereinafter cited as Fiss, *Dombrowski*] (suggesting that the application of federalism to limit federal equity power is founded in "a desire to insulate the status quo"); Weinberg, *supra* note 10, at 1235 (suggesting that the Court's use of federalism "may be perceived as

that the Court's restrictive trend has serious implications for the federal judicial system.

One of the most recent public law litigation cases to come before the Supreme Court was *City of Los Angeles v. Lyons*.¹⁸ In *Lyons*, a plaintiff sought damages and injunctive relief in a federal district court against the city police department for injuries he allegedly sustained from a "chokehold" applied to him by Los Angeles police officers after he had been stopped for a minor vehicle code violation.¹⁹ In the process of the lower court proceedings, the plaintiff's damages claim was "severed" from his claim for injunctive relief.²⁰ Ruling only on the injunctive claim, the lower court issued a preliminary injunction that prohibited the use of chokeholds by city police officers.²¹ After the court of appeals affirmed the district court injunctive order, the Supreme Court reversed, holding that the plaintiff lacked standing to seek injunctive relief.²² The Supreme Court reasoned that for purposes of establishing standing to seek injunctive relief, a plaintiff's allegation of past injury would not be enough to meet the case or controversy requirement of Article III.²³ The Court stated that although the plaintiff had a pending damages claim that appeared to meet the standing requirements, the plaintiff lacked standing to seek an injunction because he had failed to show a likelihood of future injury.²⁴ In addition, the Court recognized the need for a proper balance between state and federal authority, stating that granting injunctions which regulate the conduct of local law enforcement authorities was not the role of a federal court.²⁵

The Supreme Court's decision in *Lyons* is significant because of the restrictive analysis used by the Court. Shortly after *Lyons* was decided, lower federal courts began denying injunctions against state government on the basis of the reasoning in the *Lyons* opinion.²⁶ In those cases, plaintiffs have made a clear showing of past injury and sought damages

a way to accomplish procedurally a counterrevolution in race relations impossible to launch substantively").

¹⁸ 103 S. Ct. 1660 (1983). For a thorough critique of the *Lyons* decision, see Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) [hereinafter cited as Fallon]. See also *Standing to Seek Equitable Relief*, 97 HARV. L. REV. 215 (1983) [hereinafter cited as *Standing to Seek Equitable Relief*].

¹⁹ *Id.* at 1663.

²⁰ *Id.* at 1667 n.6.

²¹ *Id.* at 1664.

²² *Id.* at 1667.

²³ See *id.* at 1665.

²⁴ *Id.* at 1667.

²⁵ *Id.* at 1670-71.

²⁶ See, e.g., *Curtis v. City of New Haven*, 726 F.2d 65, 65 (2d Cir. 1984) (plaintiffs denied injunction against police use of mace); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (illegal and resident aliens denied injunction against city police department for allegedly unconstitutional arrests under federal immigration laws); *Brown v. Edwards*, 721 F.2d 1442, 1447 (5th Cir. 1984) (plaintiff denied injunction against a constables' fee system that allegedly deprived plaintiff of an objective probable cause determination); *Buie v. Jones*, 717 F.2d 925, 927 (4th Cir. 1983) (plaintiff, a prisoner, lacked standing to seek an injunction against County Sheriff for various alleged violations of constitutional rights); *Smith v. Montgomery County, Maryland*, 573 F. Supp. 604 (D. Md. 1983) (woman denied injunctive relief against County Police for allegedly unconstitutional strip searches); *McQuarter v. City of Atlanta*, 572 F. Supp. 1401, 1423 (N.D. Ga. 1983) (plaintiff denied injunction against police department's use of chokehold, the use of which had previously caused the death of plaintiff's husband); *Trotter v. Klinecar*, 566 F. Supp. 1059, 1062 (N.D. Ill. 1983) (plaintiff denied injunction against prisoner parole board for alleged deprivation of civil rights); *Stefaniak v. State of Michigan*, 564 F. Supp. 1194, 1199 (W.D. Mich. 1983) (plaintiffs denied injunctive relief against state police department for alleged police misconduct).

and injunctive relief against a branch of local government.²⁷ Despite allegations of past injury which afforded the plaintiffs standing to seek damages, the lower courts have denied standing to seek injunctive relief on the grounds that *Lyons* requires a plaintiff to show a likelihood of future injury in order to have standing to bring an injunctive claim.²⁸

The standing inquiry established by *Lyons* requires a plaintiff to meet case or controversy requirements for each claim of relief sought. Such an inquiry is, indeed, a new approach to the question of standing. In previous standing cases, the Supreme Court has traditionally required that a court consider only whether a plaintiff is entitled to some form of relief that will give the plaintiff a "personal stake in the outcome" of his suit.²⁹ In other words, if the plaintiff could show that he was entitled to a damages remedy or an equitable remedy, he was deemed to have met the standing requirements for the purposes of having his entire complaint heard by the federal court.³⁰ Once the plaintiff had demonstrated that either remedy was available, a sufficient case or controversy existed for the federal court to take jurisdiction over the case.³¹ In contrast to this traditional inquiry, the new inquiry requires that the plaintiff show a sufficient case or controversy for each claim of relief.³² Traditionally, the issue whether a plaintiff is entitled to an injunction has been reserved to the end of a law suit after all of the evidence has been presented and the trial court has had an opportunity to determine the need for such relief in light of all the facts proven during the trial.³³ The decision whether a plaintiff was entitled to an injunction rested within the sole discretion of the trial judge.³⁴ The new standing inquiry,

²⁷ See cases cited *supra* note 26.

²⁸ See, e.g., *Curtis v. City of New Haven*, 726 F.2d 65, 66-67 (2d Cir. 1984); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983); *McQuarter v. City of Atlanta*, 572 F. Supp. 1401, 1421-23 (N.D. Ga. 1983).

²⁹ See, e.g., *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

³⁰ The Court has stated that a plaintiff must allege "a distinct and palpable injury to himself . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (citation omitted) (emphasis added). Once a plaintiff has alleged such an injury, the Article III requirements are deemed to have met. *Id.* at 115. The Court has never before inquired whether the plaintiff has a "personal stake" in each claim of relief the plaintiff seeks.

³¹ See 103 S. Ct. at 1681 (Marshall, J., dissenting).

³² See, e.g., *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984); *Twyman v. Rockville Housing Authority*, 99 F.R.D. 314, 319 (D. Md. 1983); *Trotter v. Klincar*, 566 F. Supp. 1059, 1063 (N.D. Ill. 1983).

³³ See generally WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2942 (1973) [hereinafter cited as WRIGHT & MILLER] (indicating that the decision to grant injunctive relief is generally a discretionary decision made by the trial court). As Wright and Miller have stated:

Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion. . . . [I]n most cases the determination whether to issue an injunction involves a balancing of the interests of the parties who might be affected by the court's decision. . . . [B]ecause of its discretionary character, an injunction decree typically is drafted in flexible terms, can be molded to meet the needs of each case, and may be modified if circumstances change. . . .

Id. at 365-68.

³⁴ See *id.* Before a party is entitled to injunctive relief, the court must find "that the plaintiff is being threatened by some injury for which he has no adequate remedy at law." *Id.* at 368-69. Although this requirement is similar to the allegation of future injury that is necessary to afford a person standing under *Lyons*, it has been pointed out that there is a danger involved in foreclosing injunctive relief before the court can gather information about the defendant's misconduct. See *City of Los Angeles v. Lyons*, 103 S. Ct. at 1680 (Marshall, J., dissenting). See also Fallon, *supra* note 18, at 7.

however, effectively constitutionalizes this issue of appropriate remedy by requiring, as a mandate of Article III, that the plaintiff allege a likelihood of future injury during the pleadings stage of the case.³⁵

The *Lyons* standing inquiry has been an effective obstacle to plaintiffs who have sought injunctive relief against governmental defendants.³⁶ As formulated by the Court, however, the inquiry is constitutionally mandated as a requirement of Article III.³⁷ The analysis of *Lyons* is, therefore, theoretically applicable to cases in which a non-governmental defendant is involved. If a plaintiff seeks damages and injunctive relief against a private defendant such as an individual or a corporation, the implication is that the plaintiff will have to meet standing requirements for each claim of relief because Article III is applicable to all federal court cases, not merely public law litigation.³⁸

This note submits that the Supreme Court's restrictive approach to standing and injunctive relief in *Lyons* is representative of the Court's general disapproval of public law litigation and reflects the Court's desire to limit the role of the federal courts. In its haste to further a sound policy of judicial restraint, however, the Supreme Court has transformed the law of standing by constitutionalizing the prerequisites for injunctive relief. Such constitutionalization of the law of remedies does not only limit public law litigation, but also has serious implications for cases that arise in the non-public law litigation context where a private party seeks an injunction against a non-governmental defendant.

This note will summarize how the law of standing has been altered by the *Lyons* decision, describe how the new standing inquiry has limited public law litigation, and discuss how the new approach could affect private litigation as well. First, this note will describe the Supreme Court's restrictive trend that limits public law litigation by describing the developments in the law of standing and the rules governing the availability of injunctive relief. Next, the note will consider the reactions of some of the commentators to the Court's restrictive trend, focusing primarily on the debate that has developed over the legitimacy of public law litigation. The note will then review the lower court and Supreme Court opinions in the *Lyons* case. A discussion of the impact of *Lyons* will follow, focusing on how the *Lyons* decision has already limited public law litigation in the lower courts and examining how dicta in the *Lyons* opinion may serve to limit such litigation even further. Finally, the note will consider the applicability of *Lyons* in the non-public law litigation context.

I. THE COURT'S DIRECTION: A RESTRICTIVE TREND THAT LIMITS PUBLIC LAW LITIGATION

Since 1971, the Court has embarked on a restrictive trend that severely limits public law litigation.³⁹ One area that reflects this trend is the law of standing, where the Court

³⁵ See *supra* note 28 and cases cited therein.

³⁶ See *supra* note 26 and cases cited therein.

³⁷ See 103 S. Ct. at 1665.

³⁸ See C. WRIGHT, *LAW OF FEDERAL COURTS*, 60 (4th ed. 1983) (stating that although the standing question does not often create analytical difficulty in private litigation, the same requirements are nonetheless applicable).

A federal court's subject-matter jurisdiction extends only to those cases that meet the case or controversy requirements. If the requirements are not met, the federal court is without power to hear the complaint. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 52 (1978); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297-98 (1979).

See, e.g., *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 754-55 (1976); *Senter v. General Motors Corp.*, 532 F.2d 511, 516-17 (6th Cir. 1976) (both cases applying Art. III case or controversy requirement in private litigation suits).

³⁹ See *supra* note 14.

has limited the circumstances in which a litigant may enter a federal court to change government policy.⁴⁰ Another area has been the restrictions on the availability of equitable relief, in which the Court has applied principles of federalism to restrain the power of federal courts to issue injunctions against state government.⁴¹ Questions regarding standing and the availability of injunctive relief have overlapped to some extent in recent Supreme Court decisions.⁴² In those decisions, the Court has limited the ability of public law litigation plaintiffs to obtain injunctive relief under both doctrines.⁴³ Although there has been an overlap, however, the issues have still been considered separately by the Court.⁴⁴ Both doctrines, therefore, will be considered separately in the succeeding subsections of this note. Accordingly, this part of the note will summarize the restrictive trend of the Court, focusing separately on the law of standing and the requirements of injunctive relief as these rules have been applied by the current court.

A. Standing

Standing has been referred to by commentators as one of the most amorphous concepts of public law.⁴⁵ The inconsistency of the Supreme Court's standing cases has been noted by members of the Court⁴⁶ and commentators alike.⁴⁷ As recently as 1982, the Court recognized the difficulty of reconciling the case law, stating: "We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided. . . ."⁴⁸ Nevertheless, a general summary of the law of standing over the last decade is necessary to understand the Court's trend to limit public law litigation.⁴⁹

According to the Court in recent cases, the question of standing has two dimensions.⁵⁰ The first dimension consists of the constitutional case or controversy requirements of Article III and the second dimension consists of prudential rules of judicial self-governance that the Court has imposed in the name of judicial restraint.⁵¹ The Article III

⁴⁰ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220-21 (1974).

⁴¹ See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

⁴² See, e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1666 (1983); *Rizzo v. Goode*, 423 U.S. 362, 372, 380 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

⁴³ See *supra* note 42 and cases cited therein.

⁴⁴ See *supra* note 42 and cases cited therein.

⁴⁵ See e.g., *Hearings on S.2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2 at 498 (1966) (statement of Prof. Paul Freund).

⁴⁶ See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982). See also *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such").

⁴⁷ See K. DAVIS, *ADMINISTRATIVE LAW*, 428-29 (3d ed. 1972) (cited in *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.4 (1973)).

⁴⁸ *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

⁴⁹ For a concise summary of the development of the law of standing, see C. WRIGHT, *LAW OF FEDERAL COURTS*, 59 (4th ed. 1983) [hereinafter cited as C. WRIGHT]. For the Court's most recent formulation of the law of standing, see *Allen v. Wright*, 104 S. Ct. 3315, 3324-25 (1984) (reviewing the Court's recent line of standing cases).

⁵⁰ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

⁵¹ *Id.*

case or controversy requirement generally has been articulated as a question of whether the plaintiff has alleged a "personal stake in the outcome of the controversy."⁵² In order to assure that a plaintiff has such a personal stake in the outcome, the Court has required that a plaintiff allege that he has sustained or is in danger of sustaining a concrete, particularized injury.⁵³ These requirements of "personal stake" and "concrete injury" have been reiterated by the current Court in nearly every case where the standing issue has arisen.⁵⁴ The Court, however, has also indicated that even where a plaintiff has alleged a sufficient injury to satisfy the case or controversy requirements, he still must overcome prudential standing bars that have been erected by the Court.⁵⁵

The prudential standing rules represent judicial policy decisions through which the Court seeks to limit the role of the judiciary.⁵⁶ Two prudential rules are cited frequently by the Court. First, the Court will refuse to hear any claims that amount to "generalized grievances" shared in equal measure with all or a large class of citizens.⁵⁷ Second, the Court will not permit a plaintiff to assert the legal rights or interests of third parties as a basis of standing, rather, a plaintiff must assert his or her own legal rights to warrant invocation of federal court jurisdiction.⁵⁸ The prudential limitations of standing have not always been clearly distinguished from the constitutional limitations.⁵⁹ Only recently has the Court articulated the difference in a more clearly delineated fashion.⁶⁰ As the Court has defined these limitations, it has formulated an increasingly restrictive law of standing.⁶¹

Prior to the restrictive trend, it was well-settled that a party could not invoke federal judicial power unless he could allege "a personal stake in the outcome of the controversy. . . ."⁶² As the Court stated in the case of *Flast v. Cohen*,⁶³ "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a

⁵² *Baker v. Carr*, 369 U.S. 186, 204 (1962). See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

⁵³ See, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-17 (1973).

⁵⁴ See C. WRIGHT, *supra* note 49, at 70.

⁵⁵ See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

⁵⁶ See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975).

⁵⁷ *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

For an extensive examination of the "generalized grievance restriction," see Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?*, 70 GEO. L. J. 1157 (1982) [hereinafter cited as *Generalized Grievance Restriction*]. The author of this Note observes that the "generalized grievance" restriction has two dimensions. The first is the constitutional dimension where a party only asserts a "general interest" in a problem. The second is the prudential dimension where the plaintiff has asserted an injury sufficient under Article III, but does not have standing because his "harm" is a "generalized grievance" shared with other citizens. *Id.* at 1173-74.

⁵⁸ *Warth v. Seldin*, 422 U.S. 490, 499 (1975). See C. WRIGHT, *supra* note 49, at 70-71.

⁵⁹ See *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (stating that the policy considerations have not always been clearly distinguished from the constitutional considerations).

⁶⁰ See, e.g., *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 471-72 (1982); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

⁶¹ See C. WRIGHT, *supra* note 49, at 67.

⁶² See, e.g., *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁶³ 392 U.S. 83 (1968).

federal court and not on the issues he wishes to have adjudicated."⁶⁴ The focus of the standing inquiry, therefore, was whether the particular plaintiff whose standing was challenged was a "proper party to request an adjudication of a particular issue and not whether the issue itself [was] justiciable."⁶⁵ In cases subsequent to *Flast*, the personal stake requirement has been repeated as a threshold consideration of the case or controversy requirement of Article III.⁶⁶ In recent cases, however, the personal stake requirement has become synonymous with the requirement of actual injury to the plaintiff.⁶⁷ As the Court indicated in a 1973 case: "Although the law of standing has greatly changed in the last 10 years, we have steadfastly adhered to the requirement that . . . federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."⁶⁸ Since 1973, the Court has further refined the "personal stake" element of the case or controversy requirement, embarking on a restrictive trend that has made it more difficult for plaintiffs to seek injunctive relief.

One of the first cases in which the Court took steps to restrict the law of standing was *O'Shea v. Littleton*.⁶⁹ In *O'Shea*, a civil rights class action suit was filed under section 1983⁷⁰ against various law enforcement and court officials, including a judge and a county magistrate.⁷¹ According to the plaintiff's complaint, the officials had engaged in continuing activities of illegal bond-setting, sentencing, and jury-fee practices which deprived the plaintiffs of their rights under the constitution.⁷² The plaintiffs sought injunctive relief against the state and local officials to prevent them from continuing the alleged unconstitutional practices against others.⁷³ When the case reached the Supreme Court, the Court denied the plaintiffs injunctive relief on two grounds. First, the Court held that the plaintiffs failed to meet the case or controversy requirements.⁷⁴ Second, the Court held that even if the plaintiffs had alleged a case or controversy, they had failed to meet the requirements for injunctive relief.⁷⁵

In deciding whether the plaintiffs had met the Article III requirements, the Court relied on the principle articulated in *Flast* that plaintiffs must be able to show "a personal

⁶⁴ *Id.* at 99.

⁶⁵ *Id.* at 100.

⁶⁶ See, e.g., *Roe v. Wade*, 410 U.S. 113, 123 (1973); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586 (1972); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

⁶⁷ See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (The Court stated: "As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require . . . a 'distinct and palpable injury' . . ." *Id.*). See also *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-17 (1973).

The "personal stake" requirement also includes the requirement that there be a "fairly traceable" causal connection between the claimed injury and the challenged conduct." See *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 73 (1978).

⁶⁸ *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (footnotes omitted).

⁶⁹ 414 U.S. 488 (1974).

⁷⁰ 42 U.S.C. § 1983 (1976 & Supp. V 1981).

⁷¹ 414 U.S. at 490.

⁷² *Id.* at 491-92.

⁷³ *Id.* at 493. The Court indicated that the injunctive relief sought included "a requirement of 'periodic reports of various types of aggregate data on actions on bail and sentencing.'" *Id.* at 493 n.1 (quoting *Littleton v. Berbling*, 468 F.2d 389, 415 (7th Cir. 1972)).

⁷⁴ 414 U.S. at 493.

⁷⁵ *Id.* at 499. See *infra* notes 150-56 and accompanying text.

stake in the outcome."⁷⁶ According to the Court, abstract injury would not be enough, a plaintiff must be able to allege that he "has sustained or is immediately in danger of sustaining some direct injury."⁷⁷ After reciting this Article III principle, the *O'Shea* Court applied the case or controversy requirement in a more restrictive fashion. During oral argument, plaintiffs' counsel had alleged that the plaintiffs had, in fact, suffered from unconstitutional practices.⁷⁸ In response to this claim of injury, the Court held: "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."⁷⁹ The *O'Shea* Court concluded that while past wrongs serve as evidence of a threat of future injury, the threat of future injury in this case was "simply too remote" to satisfy the case or controversy requirement.⁸⁰

Two years later, the Court used the principle of *O'Shea* in the 1976 case of *Rizzo v. Goode*.⁸¹ *Rizzo* involved two class action suits filed under section 1983⁸² against the Mayor of Philadelphia, the Police Commissioner and other officials, alleging a pattern of unconstitutional mistreatment of citizens by Philadelphia police officers.⁸³ The plaintiffs, citizens of Philadelphia, sought various forms of injunctive relief against the police department in order to prevent future abuses.⁸⁴ The district court found widespread violations of constitutional rights by the police⁸⁵ and ordered a comprehensive program for dealing with citizen complaints.⁸⁶ After the Third Circuit affirmed the district court's order,⁸⁷ the Supreme Court granted certiorari to consider whether the district court's order was an unwarranted federal court intrusion into the discretionary functions of the local officials.⁸⁸ The Court, citing three separate grounds for its decision, concluded that the order did constitute such an intrusion and reversed the lower courts.⁸⁹ First, according to the Court, the plaintiffs failed to meet the case or controversy requirements.⁹⁰ Second, the Court held that the plaintiffs could not make out a case that created statutory liability under section 1983.⁹¹ Finally, the Court held that the doctrine of federalism would preclude an injunction under principles governing the availability of equitable relief.⁹²

In considering whether the plaintiffs as individuals had alleged a case or controversy, the Court relied on the principle of *O'Shea* that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy. . . ."⁹³ The Court stated that the plaintiffs'

⁷⁶ *Id.* at 494 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁷⁷ *Id.*

⁷⁸ *Id.* at 495.

⁷⁹ *Id.* at 495-96.

⁸⁰ *Id.* at 498. One commentator has viewed the *O'Shea* holding as "blend[ing] standing with both ripeness and mootness concerns." WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3531 at 231 (1978) [hereinafter referred to as WRIGHT, MILLER & COOPER].

⁸¹ 423 U.S. 362 (1976).

⁸² 42 U.S.C. § 1983 (1976 & Supp. V 1981).

⁸³ 423 U.S. at 366.

⁸⁴ *Council of Organizations on Phila. Police A. & R. v. Rizzo*, 357 F. Supp. 1289, 1290 (E.D. Pa. 1973).

⁸⁵ *Id.* at 1318.

⁸⁶ *Id.* at 1320.

⁸⁷ 423 U.S. at 366.

⁸⁸ *Id.*

⁸⁹ *Id.* at 366.

⁹⁰ *Id.* at 372-73.

⁹¹ *Id.* at 377.

⁹² *Id.* at 380. See *infra* notes 157-68 and accompanying text.

⁹³ *Id.* at 372 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

past exposure to police misconduct, and the "attenuated" allegations of future injury were insufficient to meet the requirements of Article III.⁹⁴ Accordingly, the Court found that the individual plaintiffs had failed to show the required "personal stake in the outcome" necessary to warrant invocation of federal court jurisdiction.⁹⁵ By applying the holding of *O'Shea*, the *Rizzo* Court reaffirmed the principle that even if a plaintiff can show past exposure to illegal conduct, it may not be enough for an actual case or controversy when that plaintiff seeks only injunctive relief.

In 1974, the Court further elaborated on the restrictions of the case or controversy requirement in the companion cases⁹⁶ of *U.S. v. Richardson*⁹⁷ and *Schlesinger v. Reservists Committee to Stop the War*.⁹⁸ *Richardson* involved a suit brought by federal taxpayers to obtain an order declaring the Central Intelligence Act of 1949 unconstitutional.⁹⁹ Because the Act permitted an accounting of agency expenditures solely to the CIA Director, the plaintiffs alleged that the Act violated Article I, Section 9, Clause 7 of the constitution that mandates a public accounting of government expenditures.¹⁰⁰ The Supreme Court held that the plaintiffs failed to meet the case or controversy requirement.¹⁰¹ According to the Court, the plaintiffs were asserting nothing more than an interest in the use of public funds.¹⁰² Such an assertion, the Court stated, was an impermissible attempt "to employ a federal court as a forum in which to air [their] generalized grievances about the conduct of government."¹⁰³ Since the plaintiffs could allege no danger of suffering any direct injuries, they had failed to meet the threshold requirement of Article III.¹⁰⁴ In reaching its decision, the Court rejected the argument that if these plaintiffs did not have standing to litigate, then no one would be able to litigate the issue.¹⁰⁵ Such an assertion could not be used as a basis for standing. In fact, the Court reasoned, the absence of a party who was able to sue supported the argument that the issue was better left to the democratic process.¹⁰⁶

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The cases were decided on the same day.

⁹⁷ 418 U.S. 166 (1974).

⁹⁸ 418 U.S. 208 (1974).

⁹⁹ 418 U.S. at 169.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 170.

¹⁰² *Id.* at 177.

¹⁰³ *Id.* at 175 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

¹⁰⁴ *Id.* at 180.

¹⁰⁵ *Id.* at 179.

¹⁰⁶ *Id.* The Court stated:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III

In the companion case of *Reservists*, the plaintiffs brought suit as both citizens and taxpayers against the Secretary of Defense, alleging that Reserve membership of members of Congress violated the Incompatibility Clause of the constitution.¹⁰⁷ Echoing its decision in *Richardson*, the Court found that the plaintiffs were asserting nothing more than "generalized grievances,"¹⁰⁸ and held that the plaintiffs lacked standing because of their failure to allege a concrete injury.¹⁰⁹ In sum, the *Reservists* Court reaffirmed the principle in *Richardson* that a plaintiff who asserts nothing more than a general interest in common with members of the public, lacks standing in the constitutional sense because such a "generalized grievance" fails to meet the concrete injury requirement of Article III.¹¹⁰

In subsequent standing cases, the Court indicated that even if a plaintiff can allege an injury that meets the minimum constitutional requirement, he still lacks standing on prudential grounds if his injury is one that is shared by all or a large group of other citizens.¹¹¹ The case that first clearly delineated the difference between these constitutional and prudential limitations of standing was *Warth v. Seldin*.¹¹² In *Warth*, the Court denied standing to several plaintiffs who attempted to use a federal district court as a vehicle to challenge certain local zoning laws.¹¹³ The suit was brought by various organizations and individuals of the Rochester, N.Y., metropolitan area to challenge the zoning laws of the suburban town of Penfield.¹¹⁴ The plaintiffs alleged that the zoning laws excluded persons of low income from living in Penfield, in violation of the constitution and 42 U.S.C. §§ 1981, 1982, and 1983.¹¹⁵

Before considering the merits of the case, Justice Powell, writing for the Court, reviewed the principles of the law of standing.¹¹⁶ According to the Court, the standing inquiry involves both constitutional and prudential limitations.¹¹⁷ Both limitations, the Court stated, are founded in a "concern about the proper — and properly limited — role of the courts in a democratic society."¹¹⁸ Turning first to the constitutional case or controversy requirement, the Court framed the inquiry as a question "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction. . . ."¹¹⁹ According to the Court, the

jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

418 U.S. at 179 (emphasis in original).

¹⁰⁷ 481 U.S. at 210.

¹⁰⁸ *Id.* at 217.

¹⁰⁹ *See id.* at 220.

¹¹⁰ *See* C. WRIGHT, *supra* note 49, at 67.

¹¹¹ *See, e.g.,* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 61, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

¹¹² 422 U.S. 490 (1975). For a critical commentary on *Warth v. Seldin*, *see* Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978) [hereinafter cited as Sager].

¹¹³ 422 U.S. at 517-18.

¹¹⁴ *Id.* at 493.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 498-502.

¹¹⁷ *Id.* at 498.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 498-99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (emphasis in original).

judiciary is available only to remedy past injuries or protect against future injuries.¹²⁰ The Court reasoned that the threshold inquiry required by Article III in every case, therefore, is whether the plaintiff has suffered an actual or threatened injury.¹²¹ The Court indicated, however, that even if the minimum constitutional requirement is met, a plaintiff must still overcome the prudential limitations of standing.¹²²

The Court defined two prudential limitations.¹²³ First, the Court stated, where a plaintiff's injury "is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," exercise of the court's jurisdiction is not warranted.¹²⁴ Second, the Court continued, a plaintiff cannot assert "the legal rights or interests of third parties," he must assert his own rights and interests in order to be granted standing.¹²⁵ The Court explained that the prudential limitations restrain a court from considering "abstract questions of wide public significance" where the issues are better left to other institutions of government that are more competent to address public concerns.¹²⁶ After reviewing the law of standing, the Court moved directly to a consideration of whether the parties in the matter before it had standing,¹²⁷ ultimately concluding that none of the plaintiffs had met the necessary requirements.¹²⁸ The individuals of low and moderate income, according to the Court, lacked standing because they failed to allege the demonstrable, particularized injury necessary under Article III to warrant federal court intervention.¹²⁹ In reaching this conclusion, the Court reminded the parties of "the availability of the normal democratic process" as a way of changing local ordinances.¹³⁰ The Court also found that the other individuals and organizations involved in the case lacked standing because they were either asserting the rights of others,¹³¹ or failed to assert injury sufficient under Article III.¹³² *Warth*, like the other standing cases previously discussed, had the effect of making it very difficult for a plaintiff who is dissatisfied with government policies to have his complaint heard in a federal court.

Emerging from this line of cases is a restrictive law of standing. The current Court has consistently held that in order to meet the case or controversy requirement, a plaintiff

¹²⁰ *Id.* at 499.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *Id.* For an examination of the generalized grievance restriction, see *Generalized Grievance Restriction*, *supra* note 57.

¹²⁵ 422 U.S. at 499.

¹²⁶ *Id.* at 500.

¹²⁷ *Id.* at 502.

¹²⁸ *Id.* at 518.

¹²⁹ *Id.* at 508.

¹³⁰ *Id.* at 508 n.18. The Court stated:

We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

Id. See Sager, *supra* note 112, at 1389, for a critical discussion of this footnote.

¹³¹ *Id.* at 509.

¹³² *Id.* at 516.

¹³³ See *supra* note 67 and cases cited therein. In addition encompassing allegation of injury, the "personal stake" requirement also requires that the injury "fairly can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). See *Allen v. Wright*, 104 S. Ct. 3315, 3328-30 (1984) (applying the "fairly traceable" requirement).

must demonstrate a "personal stake in the outcome" by alleging a concrete injury.¹³³ Where the plaintiff seeks an injunction, however, a past injury will not be enough unless there is a "real and immediate threat" that injury will recur.¹³⁴ In addition, where a plaintiff merely asserts a general interest in having government conducted constitutionally, he will also fail to meet the direct injury requirement of Article III.¹³⁵ Finally, even if a plaintiff alleges injury sufficient under Article III, he still must overcome prudential limitations of standing that the Court has established as rules of judicial self-restraint to limit the role of the judiciary.¹³⁶

B. *The Requirements for Injunctive Relief*

Apart from the threshold restriction of standing, the Court has restricted public law litigation by tightening the requirements for injunctive relief.¹³⁷ According to the current Court, principles of federalism that govern the relationship between the federal and state governments limit the circumstances in which a federal court may issue an injunction against a branch of state government.¹³⁸ This restriction on the equitable power of federal courts is rooted in the 1971 landmark case of *Younger v. Harris*,¹³⁹ where the Court's reasoning planted the seeds of federalism upon which later Supreme Court cases would rely.¹⁴⁰

In *Younger*, the plaintiff had been indicted in a California state court under a State Penal Code statute known as the Criminal Syndicalism Act.¹⁴¹ Subsequently, the plaintiff filed a suit in federal court seeking an injunction to prevent the District Attorney from prosecuting him under the Act.¹⁴² The plaintiff alleged that both the prosecution and the Act as written inhibited him from exercising his rights of free speech under the First and Fourteenth Amendments.¹⁴³ The Supreme Court held that except under extraordinary circumstances, a federal court may not enjoin pending state court criminal proceedings.¹⁴⁴ In reaching its decision, the *Younger* Court blended two principles. First, the Court stated the basic doctrine of equity that a court will not enjoin a criminal proceeding where an adequate remedy at law exists and the plaintiff will not suffer irreparable harm if denied the relief requested.¹⁴⁵ Second, the Court invoked the notion of comity and "Our Federalism," stating that a proper respect for state institutions and a belief that the federal government should not interfere with legitimate state activities compelled a

¹³³ See *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

¹³⁵ See *United States v. Richardson*, 418 U.S. 166, 177 (1974).

¹³⁶ See *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

¹³⁷ See *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976).

¹³⁸ *Id.* at 380.

¹³⁹ 401 U.S. 37 (1971). The literature on *Younger* is voluminous. For a selective list of articles on *Younger*, see C. WRIGHT, *supra* note 49, § 52A at 320 n.1. For further lists of sources, see WRIGHT, MILLER & COOPER, *supra* note 80, § 4251 at 537 n.14, 453 n.37, and § 4252 at 544 n.1. See also Theis, *Younger v. Harris: Federalism in Context*, 33 HASTINGS L. J. 103, 103 n.1 (1981).

¹⁴⁰ See, e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1670 (1983); *Real Estate Association v. McNary*, 454 U.S. 100, 112 (1981); *Rizzo v. Goode*, 422 U.S. 362, 380 (1976); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). For a concise description of the evolution of *Younger* federalism see C. WRIGHT, *supra* note 49, § 52A at 320.

¹⁴¹ 401 U.S. at 38.

¹⁴² *Id.* at 39.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 40-41.

¹⁴⁵ *Id.* at 43-44.

decision to restrain the federal court from issuing the injunction.¹⁴⁶ Although the *Younger* Court left unclear whether the primary basis for the decision was the doctrine of equity or the principles of federalism, it was the second basis that had the broadest impact on the scope of federal equitable power. Subsequent Supreme Court decisions relied on the principles of federalism to limit federal injunctive power in cases not involving a criminal prosecution.¹⁴⁷

The case of *O'Shea v. Littleton*¹⁴⁸ was one of those cases that cited *Younger* as grounds for such a limitation.¹⁴⁹ As discussed previously, *O'Shea* involved a civil rights class action suit filed against law enforcement and court officials for alleged unconstitutional bond-setting, sentencing and jury-fee practices.¹⁵⁰ In the first portion of the opinion, the Court held that the plaintiffs had failed to allege an actual case or controversy.¹⁵¹ In addition to holding that the complaint did not present a case or controversy, however, the Court offered an alternative holding in part two of the opinion to reinforce its decision to deny injunctive relief.¹⁵²

The Court began the second part of the opinion by stating that the Article III considerations it had just discussed shaded into those considerations necessary for determining whether the complaint stated a sound basis for granting equitable relief.¹⁵³ Without specifically referring to how the case or controversy considerations shade into the determinations for equitable relief, the Court held that even if the plaintiffs had met the

¹⁴⁶ *Id.* at 44-45. The Court stated:

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Id.

¹⁴⁷ See *supra* note 140 and cases cited therein.

¹⁴⁸ 414 U.S. 488 (1974). See *supra* notes 69-80 and accompanying text.

¹⁴⁹ *Id.* at 499.

¹⁵⁰ See *id.* at 490. See *supra* notes 69-80 and accompanying text.

¹⁵¹ *Id.* at 492-93. See *supra* notes 69-80 and accompanying text.

¹⁵² *Id.* at 499.

¹⁵³ *Id.* at 499. In a concurring opinion, Justice Blackmun asserted that the Court was writing "an advisory opinion that we are powerless to render" when the Court considered the question of equitable relief in part II. *Id.* at 504 (Blackmun, J., concurring). Justice Douglas made the same observation. *Id.* at 512 (Douglas, J., dissenting). See also *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1682 (1983) (where Justice Marshall makes a similar criticism).

Article III requirements, they had failed to state an adequate basis for equitable relief.¹⁵⁴ In reaching this determination, the Court cited *Younger*, and stated that principles of federalism precluded injunctive relief in the case before it.¹⁵⁵ According to the Court, the injunction sought by the plaintiffs would indirectly cause the same type of interference with criminal proceedings that the *Younger* Court had sought to prohibit.¹⁵⁶

Although the invocation of the principles of equity and federalism was only dictum in the *O'Shea* opinion, the reasoning of that dictum was later used by the Court in the case of *Rizzo v. Goode*.¹⁵⁷ As discussed earlier, *Rizzo* involved a section 1983 class action suit brought against officials of the City of Philadelphia for allegedly pervasive unconstitutional police misconduct.¹⁵⁸ The Court initially ruled that the plaintiffs as individuals failed to meet the case or controversy requirements.¹⁵⁹ In addition to its holding on Article III grounds, however, the Court also denied injunctive relief on grounds of equitable principles.¹⁶⁰ In that portion of the Court's opinion, the Court rejected the claim made by the plaintiffs that citizens have a right to federal equitable relief where government officials do not take steps to minimize unconstitutional police misconduct.¹⁶¹ In rejecting this claim made by the plaintiffs, the Court held that principles of federalism must be given appropriate consideration in determining the scope of federal equitable relief.¹⁶²

Although *Younger v. Harris* was not cited in the *Rizzo* Court's opinion,¹⁶³ the Court did cite *O'Shea v. Littleton* for the proposition that, even outside of the context of state criminal proceedings, principles of equity and federalism weigh against the issuance of an injunction.¹⁶⁴ The Court stated that principles of federalism are not limited to cases involving

¹⁵⁴ 414 U.S. at 499. The Court never explained how case-or-controversy considerations shade into the determination for equitable relief, but the Court may have been referring to the injury requirement of each consideration. Article III requires a showing "that the plaintiff is being threatened by some injury for which he has no adequate legal remedy." WRIGHT & MILLER, *supra* note 33, § 2942, at 368-69.

¹⁵⁵ 414 U.S. at 499.

¹⁵⁶ *Id.* at 500.

¹⁵⁷ 423 U.S. 362, 379-80 (1976) (see *supra* notes 81-95 and accompanying text). For commentaries both critical and favorable of the *Rizzo* decision, see e.g. Chayes, 1976, *supra* note 7, at 1305 (critical); Cox, *Federalism and Constitutional Rights Under the Burger Court*, 73 NW. U. L. REV. 1, 15 (1978) (critical); Fiss, *Dombrowski*, *supra* note 17, at 1159 (critical); Howard, *supra* note 5, at 427 (favorable); Mishkin, *supra* note 7, at 973 (favorable); Nagel, *supra* note 9, at 715 (favorable); Redish, *The Doctrine of Younger v. Harris: Deference In Search of a Rational*, 63 CORNELL L. REV. 463, 470 (1978) (critical); Note, *Rizzo v. Goode: Federal Remedies For Police Misconduct*, 62 VA. L. REV. 1259 (1976) (critical); Casenote, *Availability of Federal Equitable Relief Against Police Supervisory Personnel*, 90 HARV. L. REV. 238 (1976) (critical). For a very harsh attack on the Supreme Court decision in *Rizzo*, see generally Weinberg, *supra* note 10.

¹⁵⁸ *Id.* at 366.

¹⁵⁹ *Id.* at 372-73. See *supra* notes 81-95 and accompanying text.

¹⁶⁰ *Id.* at 377-80.

¹⁶¹ *Id.* at 378.

¹⁶² *Id.* at 379.

¹⁶³ It is unclear why Justice Rehnquist did not cite *Younger*, since he cited *O'Shea* for the reference to federalism. 423 U.S. at 379-80 (The *O'Shea* Court relied on *Younger* in its consideration of federalism. See 414 U.S. at 499-500). Perhaps, Justice Rehnquist, in his effort to demonstrate the broad application of the principles of federalism, omitted the citation of *Younger* in order to avoid any suggestion that federalism applies only to limited situations. Implicit in the omission of the *Younger* citation may be the notion that federalism acts as a limitation on the federal government in a broad sense, of which the *Younger* doctrine is only one example. See *infra* note 432.

¹⁶⁴ 423 U.S. at 379.

injunctions sought against criminal proceedings.¹⁶⁵ According to the Court, those principles are also applicable to cases where injunctive relief is sought against an executive branch of state or local government.¹⁶⁶ The Court indicated that it was inappropriate for the federal court to have injected itself into the internal affairs of the local police department,¹⁶⁷ and reversed the order for equitable relief.¹⁶⁸

By holding that the principles of federalism restrain a federal court from issuing an injunction, the *Rizzo* Court formulated a potentially broad restriction on federal court injunctive power. The holding of *Rizzo*, taken together with the language of *Younger* and *O'Shea*, established the principle that except in extraordinary circumstances where the danger of irreparable injury is "both great and immediate," a federal court may not issue an injunction that intrudes into the internal affairs of an executive branch of state government.¹⁶⁹ After *Rizzo*, the implications of federalism for public law litigation plaintiffs could not be overstated.

The Court's restrictive trend has not gone unchallenged by dissenting members of the Court. The decisions limiting public law litigation have been far from unanimous.¹⁷⁰ While a majority of the Court has taken steps to limit the availability of such suits, dissenting members of the Court have been highly critical of the Court's decisions.¹⁷¹

¹⁶⁵ *Id.* at 380.

¹⁶⁶ *Id.* The Court stated:

Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against an executive branch of an agency of state or local governments such as petitioners here.

Id.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 381.

¹⁶⁹ See *id.* at 379; *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 44, 46 (1971).

¹⁷⁰ See *Rizzo v. Goode*, 423 U.S. 362 (1976) (5-3 decision); *Warth v. Seldin*, 422 U.S. 490, 492 (1975) (5-4 decision); *United States v. Richardson*, 418 U.S. 166, 167 (1974) (5-4 decision); *O'Shea v. Littleton*, 414 U.S. 488, 489 (1974) (6-3 decision).

¹⁷¹ See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 387 (1976) (Blackmun, J., dissenting) ("The facts, the deprivation of constitutional rights, and the pattern, are all proved in sufficient degree. And the remedy is carefully delineated. . . . It is a matter of regret that the Court sees fit to nullify what so meticulously and thoughtfully has been evolved to satisfy an existing need relating to constitutional rights that we cherish and hold dear." *Id.*); *Warth v. Seldin*, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting) ("While the Court gives lip service to the principle, oft repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal,' . . . in fact the opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits." *Id.* (citation and footnote omitted)); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 239-40 (1974) (Marshall, J., dissenting) ("It is a sad commentary on our priorities that a litigant who contends that a violation of a federal statute has interfered with his aesthetic appreciation of natural resources can have that claim heard by a federal court, . . . while one who contends that a violation of a specific provision of the United States Constitution has interfered with the effectiveness of expression protected by the First Amendment is turned away without a hearing on the merits of his claim." *Id.*).

Some of these dissenters have criticized the majority for reshaping the doctrines of jurisdiction, justiciability and remedy in order to bar litigants with substantial claims from entering federal court.¹⁷² In addition, they have criticized the Court for distorting the doctrine of federalism and condoning violations of civil liberties.¹⁷³ In the dissenters' view, the Supreme Court in these cases "has gone on to limit the protective role of the federal judiciary."¹⁷⁴

II. THE DEBATE OVER PUBLIC LAW LITIGATION

The restrictive trend developed by the Supreme Court in recent public law litigation cases has aroused both favorable and critical responses from the commentators.¹⁷⁵ Those commentators favoring the Court's trend assert that a limited policymaking role of the judiciary in a democratic form of government makes public law litigation in the federal courts inappropriate.¹⁷⁶ On the other hand, those critical of the Court's trend maintain that public law litigation is desirable because, in their view, the role of the courts in our constitutional system is to oversee the other branches of government and prevent constitutional violations.¹⁷⁷ Each of these views on the validity of public law litigation in the federal courts will be considered separately in the following section.

Many commentators who view public law litigation as inappropriate are concerned with preserving the democratic political process.¹⁷⁸ According to these commentators, the judicial orders issued in public law litigation intrude into the democratic decision-making process in a way that the normal invalidation of a law on constitutional grounds does not.¹⁷⁹ In the course of normal constitutional adjudication, a federal court generally invalidates a law and prohibits the government from acting unconstitutionally.¹⁸⁰ In public law litigation, however, a federal court issues an affirmative order that mandates the government to administer one of its institutions in a prescribed fashion.¹⁸¹ These commentators assert that such affirmative judicial orders eliminate the discretion given to the legislative and executive branches of government and displace the normal democratic

¹⁷² *Judice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* The dissenters have been particularly critical of the majority's trend to limit the availability of suits filed under section 1983. 42 U.S.C. § 1983 (1976 & Supp. V 1981). *Id.* at 342. The dissenters have claimed that Congress intended to make the federal courts the primary vindicators of constitutional rights when Congress enacted section 1983. *Id.* See also *Mitchum v. Foster*, 407 U.S. 225, 240 (1972). As Justice Brennan has asserted: "The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights. . . ." 430 U.S. at 342 (quoting *Mitchum v. Foster*, 407 U.S. at 242). The debate over the role of the federal judiciary in the context of section 1983 is a subject that is not within the scope of this article. For more extensive discussions, see *Developments — Section 1983*, *supra* note 14 (An extensive examination of section 1983 and how it has developed since the Civil War. The authors are critical of the Court's restrictive trend and call for Congressional action. *Id.* at 1360-61); Howard, *supra* note 5 (a more favorable examination of the Court's trend to restrict section 1983. See *id.* at 434-38).

¹⁷⁵ See *supra* notes 9-10 and articles cited therein.

¹⁷⁶ See, e.g., Frug, *supra* note 9, at 734-35; Mishkin, *supra* note 7, at 975-76.

¹⁷⁷ See, e.g., Chayes, 1982, *supra* note 7, at 60.

¹⁷⁸ See, e.g., Frug, *supra* note 9, at 734-35; Howard, *supra* note 5, at 426; Mishkin, *supra* note 7, at 975-76.

¹⁷⁹ Howard, *supra* note 5, at 426.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

and political processes.¹⁸² To support their argument, these commentators have emphasized how the remedies ordered in public law litigation cases impact the financial resources of government.¹⁸³ They have argued that judges are normally concerned with the conditions to be remedied in the cases before them and rarely consider the impact of their decisions on the limited financial resources of government.¹⁸⁴ As a result, these commentators maintain, public funds are allocated to resolve the problems of the case before the court at the expense of other problems not before it.¹⁸⁵ This criticism manifests the belief that courts are not as competent as the legislative or executive branches of government to make social policy.¹⁸⁶ This view is most clearly articulated by Professor Horowitz, a frequently cited critic of public law litigation.¹⁸⁷

Professor Horowitz has identified five characteristics inherent in the "adjudicative process" that severely limit a court's ability to formulate social policy.¹⁸⁸ First, Horowitz has asserted that the initial inquiry undertaken by courts, concerning the rights and duties of the parties, defers the consideration of alternatives to a later stage in the inquiry.¹⁸⁹ This limited approach, according to Professor Horowitz, prevents courts from analyzing cost factors in the formulation of a solution.¹⁹⁰ As a result, he argues, the court's attitude reflects the view that "if a person possesses a right, he possesses it whatever the cost."¹⁹¹ Second, Professor Horowitz recognizes the "piecemeal" quality of litigation¹⁹² which permits a judge to decide only the particular issues before the court. Because courts must decide issues on a case by case basis, Horowitz argues, they lack a comprehensive view.¹⁹³ In addition, the courts are not capable of altering course as a legislature can when unanticipated problems arise.¹⁹⁴

The third factor that Horowitz has labeled as a limitation on the court's ability to determine social policy is the "passivity of the judicial process."¹⁹⁵ "Passivity" refers to the characteristic of the judiciary that requires a court to decide only the case before it.¹⁹⁶ Effective social policymaking, according to Professor Horowitz, requires an ability to initiate action and formulate a solution that will resolve the problems faced by the majority of people in the particular situation.¹⁹⁷ In Horowitz's view, a court is not capable of such action because it is forced to act on the case before it even if that case is not

¹⁸² See, e.g., Fletcher, *supra* note 6, at 637; Frug, *supra* note 9, at 735; Howard, *supra* note 5, at 426.

¹⁸³ See, e.g., Frug, *supra* note 9, at 733; Glazer, *supra* note 9, at 118; Howard, *supra* note 5, at 426.

¹⁸⁴ See, e.g., Glazer, *supra* note 9, at 118; Howard, *supra* note 5 at 426.

¹⁸⁵ See, e.g., Glazer, *supra* note 9, at 118; Howard, *supra* note 5, at 426.

¹⁸⁶ See, e.g., Glazer, *supra* note 9, at 118.

¹⁸⁷ D. HOROWITZ, *supra* note 9, at 17-19. But see Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 31-35 (1979); Goldstein, *supra* note 10, at 45-48 (both commentators are critical of Horowitz's arguments).

¹⁸⁸ D. HOROWITZ, *supra* note 9, at 33-56. But see A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM, 233-34 (1982) (calling for the courts to become more activist in "making public policy").

¹⁸⁹ D. HOROWITZ, *supra* note 9, at 34.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 35.

¹⁹³ See *id.* at 37.

¹⁹⁴ See *id.* at 36-37.

¹⁹⁵ *Id.* at 38.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 39, 41.

representative of the broader problems in need of solution.¹⁹⁸ Fourth, Professor Horowitz recognizes that a court is ill-adapted to the task of ascertaining social facts beyond the history of the case before it.¹⁹⁹ Horowitz maintains that the formulation of general policy requires the ascertainment of social facts that are "the recurrent patterns of behavior on which policy must be based."²⁰⁰ The adjudicative process, in Horowitz's view, places its emphasis on the specific, historical facts of the individual case rather than the social facts.²⁰¹ He asserts that the practical result of this approach is that a court may be formulating policy without the empirical data necessary for an effective policy decision.²⁰²

The final factor identified by Professor Horowitz is that litigation is directed towards remedying past injustices rather than planning for the future.²⁰³ As a consequence, Horowitz asserts, the courts lack the necessary ability to review, monitor and control the plans that they set in motion.²⁰⁴ Professor Horowitz maintains that courts lack the resources to minimize unintended consequences, and more important, they lack the resources to correct those consequences once they occur.²⁰⁵

The view that democratic decision-making is preferable to judicial decision-making is not the only argument, however, that is cited by the critics of public law litigation. According to these critics, federalism, a doctrine related to the preference for democratic decision-making, also imposes limits on public law litigation.²⁰⁶ The doctrine of federalism represents a concern for local control over local institutions.²⁰⁷ According to some commentators, federalism requires that federal courts refrain from interrupting or intruding upon local decision-making.²⁰⁸ These commentators maintain that federalism is implicated in public law litigation when a federal court orders systematic relief that mandates state expenditure of funds.²⁰⁹ At least one of these commentators has argued that such federal supervision is an improper invasion of state responsibilities.²¹⁰ According to this view, the limitation of federalism should be applied as a restriction in public law litigation cases in order to ensure that such federal court intrusions are minimized.²¹¹ According to

¹⁹⁸ *Id.* at 41.

¹⁹⁹ *Id.* at 45.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See id.* at 50-51.

²⁰³ *Id.* at 51.

²⁰⁴ *Id.* at 56.

²⁰⁵ *Id.* at 52.

²⁰⁶ *See, e.g.,* Frug, *supra* note 9, at 743.

²⁰⁷ *See, e.g.,* Howard, *supra* note 5, at 428.

²⁰⁸ *See, e.g.,* Frug, *supra* note 9, at 747-48; Howard, *supra* note 5, at 426.

²⁰⁹ *See, e.g.,* Frug, *supra* note 9, at 743; Howard, *supra* note 5, at 426.

For a critical examination of the re-emergence of federalism, see Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L. J. 1317 (1982) [hereinafter cited as Powell].

²¹⁰ Frug, *supra* note 9, at 748.

²¹¹ *Id.* Frug takes a very strict view of federalism as "an absolute bar to a federal remedy" in institution cases. *Id.* at 748. He asserts, however, that in cases of "justiciable fourteenth amendment violations," federalism does not preclude such relief. *Id.* He states:

The fourteenth amendment itself, however, increases federal power over state activities; therefore, cases like *Usery*, which limit federal power under the commerce clause, and *O'Shea and Rizzo*, which involve no justiciable fourteenth amendment violations, should not preclude a federal judicial remedy in cases, such as the institution cases, in which fourteenth amendment violations are established.

The mere existence of a fourteenth amendment violation does not mean, however, that all restraints on the federal government in its relations with the states are elimi-

some commentators, the notion of forum allocation, a belief that state courts should be adjudicating the public law litigation cases rather than the federal courts, is also inherent in the doctrine of federalism.²¹² According to this view, decisions affecting local institutions should be made by state courts because such tribunals are closer to the people affected by their decisions and, therefore, are better equipped than a federal court to appreciate and account for local conditions.²¹³

The principles of federalism reinforce the view that the role of the federal judiciary in our system of government is a limited one. As one commentator has stated, it is not the role of the federal courts to solve all of society's problems, it is their role to set the perimeters within which the democratic process can work.²¹⁴ In marked contrast to this view of a limited judiciary, however, is the view of the advocates of public law litigation.

Despite the numerous criticisms of public law litigation, there is substantial support for such federal court activity.²¹⁵ Two of the commentators who have supported federal court involvement in public law litigation, Professors Eisenberg and Yeazell, disagree with those critics who suggest that federal courts lack the capacity to efficiently supervise local institutions.²¹⁶ According to Eisenberg and Yeazell, there is nothing extraordinary about public law litigation because courts have demonstrated their capacity to supervise complex institutions through the well-established activity of monitoring executors and trustees of very large estates and businesses.²¹⁷ Given the courts' historical involvement in such complicated supervisory functions, Eisenberg and Yeazell maintain that it is not an abuse of judicial power for courts to ensure the protection of constitutional rights by supervising state and local authorities when necessary.²¹⁸ According to Eisenberg and Yeazell, public law litigation, as a practical matter, presents very little that is new to court activity.²¹⁹ Eisenberg and Yeazell state that although the nature of modern enterprises may, by itself,

nated. . . . The principles of federalism are still applicable in cases of fourteenth amendment violations to ensure that the federal courts minimize their incursions into the area of state sovereignty. In that sense, the principles of federalism must be considered in formulating the remedy in the institution cases.

Id. at 748-49.

The strict view that federalism acts as an absolute bar has been disputed. *See* Mishkin, *supra* note 9, at 975. Mishkin, in response to Professor Frug's view, states:

I believe that such an extreme reading is unwarranted. Justice Rehnquist's analysis [in *Rizzo*] of the relevant statutory and case material does tend to emphasize restrictions on federal court authority, but careful examination of his language and handling of authority should make clear that no absolute barrier was erected.

Id. at 975.

²¹² *See* H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW*, 90 (1973) [hereinafter cited as H. FRIENDLY]; Howard, *supra* note 5, at 391; Sager, *supra* note 112, at 1389; Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59, 65 (1981). *See also* *State Courts and Federalism in the 1980's*, 22 WM. & MARY L. REV. 599 (1981) (a symposium on the choice between state and federal courts for constitutional adjudication). *But see* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (rejects notion that state courts should be preferred over federal courts).

²¹³ *See* Sager, *supra* note 112, at 1391; Sherin, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 799 (1981).

²¹⁴ Mishkin, *supra* note 7, at 976.

²¹⁵ *See supra* note 10 and articles cited therein.

²¹⁶ Eisenberg & Yeazell, *supra* note 10, at 496.

²¹⁷ *See id.* at 494.

²¹⁸ *Id.*

²¹⁹ *Id.* at 474.

be more complex than that of the past, judicial involvement in the oversight of such enterprises is not at all distinct from the historical role played by courts.²²⁰

In addition to their argument that there is nothing extraordinary about public law litigation, Eisenberg and Yeazell have also maintained that the doctrine of federalism should not be a bar to public law litigation.²²¹ They assert that sufficient deference to state officials can be given by the courts by seeking guidance from those officials in the formulation of equitable remedies.²²² Eisenberg and Yeazell have also rejected the argument that public law litigation should be curtailed because such litigation intrudes on the legislative prerogative to allocate funds as the legislature sees fit.²²³ According to these professors, the legitimacy of federal judicial orders affecting the public fisc is already well-established.²²⁴ They maintain that any criticism of the judicial orders in public law litigation should focus on the substantive rights created and the merits of allocating funds in each individual case, rather than the legitimacy of such court orders in general.²²⁵

Another noted supporter of public law litigation is Professor Chayes. Professor Chayes describes public law litigation as a relatively recent judicial development.²²⁶ In Chayes' view, the emergence of public law litigation was necessary in order to meet the demands for justice in our complex society.²²⁷ Chayes maintains that this need for the courts to oversee bureaucratic actions should not be viewed as being in conflict with the roles of the legislative or executive branches.²²⁸ As Professor Chayes has observed, bureaucratic actions are not necessarily the result of democratic decision-making.²²⁹ According to Chayes, the courts should be able to work as partners with the legislative and executive branches to ensure that bureaucracies carry out their programs properly, while at the same time protecting the individuals affected by the bureaucratic actions.²³⁰

Judge Frank M. Johnson of the Fifth Circuit is another outspoken advocate of judicial activism and public law litigation.²³¹ According to Judge Johnson, the increase in public law litigation is due to the "increasingly prominent role government has come to play in our society."²³² He justifies court involvement in the institutional cases on the grounds that one of the courts' most important duties is "to secure the integrity of the relationship of private citizens to government."²³³ According to Judge Johnson, as long as public officials disregard their responsibility to govern constitutionally, the judiciary must intervene to the extent necessary in order to protect the rights of the deprived.²³⁴ In Judge Johnson's view, it is the role of the courts in our system of government that permits and, indeed, requires judicial involvement in public law litigation.²³⁵

²²⁰ See *id.* at 481.

²²¹ *Id.* at 472-73.

²²² *Id.* at 506.

²²³ *Id.* at 509.

²²⁴ *Id.* at 507-08. According to Eisenberg and Yeazell, "judicial enforcement of individual rights often necessarily involves the reallocation of funds." *Id.* at 507.

²²⁵ *Id.* at 510, 516.

²²⁶ Chayes, 1976, *supra* note 7, at 1282.

²²⁷ See Chayes, 1982, *supra* note 7, at 60.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See *id.*

²³¹ Johnson, *supra* note 10, at 271.

²³² *Id.* at 272.

²³³ *Id.*

²³⁴ *Id.* at 279.

²³⁵ *Id.* at 271.

In summary, the debate over the validity of public law litigation involves two distinct and conflicting views on the role of the federal judiciary. Those in opposition to this litigation view the judicial role to be a limited one in a democratic form of government.²³⁶ The advocates of public law litigation, however, maintain that the role of the judiciary is an active one of overseeing the other branches of government.²³⁷ In the Supreme Court's recent decision in *City of Los Angeles v. Lyons*,²³⁸ the Court stated its view on the proper role of the judiciary.²³⁹ As that decision makes clear, a majority of the Court agrees with the critics of public law litigation and has moved towards limiting the availability of injunctive relief in such suits.²⁴⁰ In the following parts of this note, the *Lyons* decision and its impact will be considered at length.

III. CITY OF LOS ANGELES V. LYONS

This part of the note examines the Supreme Court's opinion in *Lyons* and will be divided into two sections. One section describes the lower court opinions and the framework in which the case arose.²⁴¹ The second section then considers the Supreme Court's majority and dissenting opinions.

A. The Lower Courts

On February 7, 1977, Adolf Lyons filed a claim under the Civil Rights Act against the City of Los Angeles in the United States District Court for the Central District of California, alleging police misconduct that violated Lyons' constitutional rights.²⁴² Lyons alleged that on October 6, 1976, four Los Angeles police officers stopped his car for a vehicle code violation because one of the vehicle's taillights was not operating.²⁴³ According to Lyons, the police officers, without any provocation or reason to fear their safety, seized him and applied a "chokehold" that rendered him unconscious and injured his larynx.²⁴⁴ Lyons further asserted that the routine use of such chokeholds was authorized

²³⁶ See, e.g., Frug, *supra* note 9, at 735; Mishkin, *supra* note 7, at 975-76.

²³⁷ See, e.g., Johnson, *supra* note 10, at 271; Chayes, 1982, *supra* note 7, at 60.

²³⁸ 103 S. Ct. 1660 (1983).

²³⁹ *Id.* at 1670-71.

²⁴⁰ See *infra* notes 366-95 and accompanying text.

²⁴¹ Two court of appeals opinions were written in the *Lyons* case. *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1244 (9th Cir. 1980) and *Lyons v. City of Los Angeles*, 656 F.2d 417 (9th Cir. 1981). No district court opinions were written. See 615 F.2d at 1246.

²⁴² 103 S. Ct. at 1663.

²⁴³ *Lyons v. City of Los Angeles*, 616 F.2d 1243, 1244 (9th Cir. 1980).

²⁴⁴ 103 S. Ct. at 1663. The Supreme Court later described the allegedly unconstitutional "chokehold" in a footnote. *Id.* at 1663 n.1. The Court stated:

The police control procedures at issue in this case are referred to as "control holds," "chokeholds," "strangleholds," and "neck restraints." All these terms refer to two basic control procedures: the "carotid" hold and the "bar arm" hold. In the "carotid" hold, an officer positioned behind a subject places one arm around the subject's neck and holds the wrist of that arm with his other hand. The officer, by using his lower forearm and bicep muscle, applies pressure concentrating on the carotid arteries located on the sides of the subject's neck. The "carotid" hold is capable of rendering the subject unconscious by diminishing the flow of oxygenated blood to the brain. The "bar arm" hold, which is administered similarly, applies pressure at the front of the subject's neck. "Bar arm" pressure causes pain, reduces the flow of oxygen to the lungs, and may render the subject unconscious.

Id.

under a city police department policy "even in non-life-threatening situations,"²⁴⁵ and that numerous other citizens of Los Angeles had also been injured by this activity.²⁴⁶ Finally, Lyons claimed that he feared any future contact with the police would result in his being choked again.²⁴⁷ Lyons' complaint sought monetary damages under section 1983²⁴⁸ and an injunction restraining the city from authorizing the use of chokeholds in non-life-threatening situations.²⁴⁹ After the district court granted the city's motion for partial summary judgment on the claim for injunctive relief, Lyons appealed the ruling to the United States Court of Appeals for the Ninth Circuit.²⁵⁰

The court of appeals began its analysis by considering whether the plaintiff had standing to seek an injunction.²⁵¹ Because the district court did not issue any findings of fact or conclusions of law with its judgment, the court of appeals assumed that the district court's ruling was based on the arguments made by the city in its motion for partial summary judgment.²⁵² According to the court, the city relied on the holdings of *O'Shea* and *Rizzo* that past exposure to illegal activity does not by itself present a case or controversy in regard to injunctive relief.²⁵³

The court of appeals, however, distinguished *O'Shea* and *Rizzo*, and reversed the district court.²⁵⁴ First, the court reasoned that the threat of future injury to Lyons and to other citizens of the Los Angeles area was much more immediate than the threat of future injury which was faced by the plaintiffs in *O'Shea* and *Rizzo*.²⁵⁵ *O'Shea* had involved a claim of racial discrimination brought against local court officials.²⁵⁶ The court of appeals explained that the threat of injury in *O'Shea* was too speculative because the only way the plaintiffs in that case could have been affected by the alleged illegal practice was to violate the law, become arrested, and subsequently be tried and held by the court officials.²⁵⁷ In *Rizzo*, a suit was brought against city officials for alleged police abuses.²⁵⁸ According to the

²⁴⁵ Lyons v. City of Los Angeles, 615 F.2d 1243, 1244 (9th Cir. 1980).

²⁴⁶ *Id.*

²⁴⁷ 103 S. Ct. at 1663.

²⁴⁸ 42 U.S.C. § 1983 (1976 & Supp. V 1981). The plaintiff alleged "the strangleholds violated the first amendment (prior restraint on speech), the fourth amendment (unreasonable seizure of the person), the eighth amendment (cruel and unusual punishment), and the fourteenth amendment (due process)." Lyons v. City of Los Angeles, 615 F.2d 1243, 1244 (9th Cir. 1980). The plaintiff also invoked 42 U.S.C. §§ 1985 and 1986. *Id.*

²⁴⁹ *Id.* at 1244. The complaint contained seven counts. Counts one through four sought money damages; count five sought an injunction; count six sought declaratory relief; and count seven concerned a declaratory judgement concerning a local ordinance and an alleged conflict of interest within the city attorney's office. *Id.* at 1244-45 (Count seven was dismissed by the Circuit Court on grounds of mootness, and was never raised again in subsequent proceedings. *Id.* at 1245).

²⁵⁰ *Id.* The district court issued no opinion with its ruling. *Id.* at 1246.

²⁵¹ *Id.* It is unclear from the opinion why the Court of Appeals considered whether the plaintiff had standing on counts five and six in light of the fact that the plaintiff apparently had standing due to his damages claim. There is no indication that the damages claim had yet been "severed" from the claim for equitable relief, as apparently had occurred in the proceedings on remand to the District Court. See 103 S. Ct. 1667 n.6.

²⁵² Lyons v. City of Los Angeles, 615 F.2d 1243, 1246 (1980).

²⁵³ *Id.* See *supra* notes 69-95 and accompanying text for discussion of the *O'Shea* and *Rizzo* opinions.

²⁵⁴ *Id.* at 1250.

²⁵⁵ *Id.* at 1246. See *supra* notes 69-95 and accompanying text.

²⁵⁶ *O'Shea* v. Littleton, 414 U.S. 488, 490 (1974). See *supra* notes 81-95 and accompanying text.

²⁵⁷ Lyons v. City of Los Angeles, 615 F.2d 1243, 1246 (1980).

²⁵⁸ *Rizzo* v. Goode, 423 U.S. 362, 366 (1976). See *supra* notes 81-95 and accompanying text.

court of appeals, the threat of future injury in *Rizzo* was "even more speculative" since it depended upon what a minority of unnamed police officers might do to the plaintiffs because of the officers' misunderstanding of police disciplinary procedures.²⁵⁹ The court of appeals asserted that the odds of having additional chokeholds applied by the Los Angeles police were much greater than the odds of having the encounter in *O'Shea* or the encounter in *Rizzo*.²⁶⁰ and held, therefore, that Lyons' complaint met the case or controversy requirements.²⁶¹ The court of appeals also distinguished *Lyons* from *O'Shea* and *Rizzo* on "broader and more significant grounds."²⁶² First, the court reasoned that the Supreme Court had denied standing in *O'Shea* and *Rizzo* because those cases involved requests for "massive structural relief" against state institutions.²⁶³ According to the court of appeals, those requests constituted intrusions into state matters that violated the doctrine of federalism, and gave rise to stricter standing requirements.²⁶⁴ Second, the court of appeals reasoned that because the plaintiff in the case before it did not seek such structural relief,²⁶⁵ the stricter standing requirements of *O'Shea* and *Rizzo* were inapplicable.²⁶⁶ According to the court, the plaintiff in *Lyons* did not seek "to supervise the functioning of the police department," but instead, sought to enjoin an established, sanctioned police practice that allegedly violated constitutional rights.²⁶⁷

The city's initial petition to the Supreme Court for a writ of certiorari was denied.²⁶⁸ Accordingly, the case was remanded to the district court where the district court considered Lyons' application for a preliminary injunction.²⁶⁹ On remand, the district court severed Lyons' claim for damages from his claim for injunctive relief.²⁷⁰ From this point in the proceedings, Lyons pressed only his injunctive claim.²⁷¹ After considering the merits

²⁵⁹ *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1246 (1980).

²⁶⁰ *Id.* at 1246-47.

²⁶¹ *Id.*

²⁶² *Id.* at 1247.

²⁶³ *Id.*

²⁶⁴ *See id.*

²⁶⁵ *Id.*

²⁶⁶ *See id.*

²⁶⁷ *Id.*

²⁶⁸ *City of Los Angeles v. Lyons*, 449 U.S. 934 (1980) (Justice White dissented, joined by Justices Powell and Rehnquist).

The dissent, written by Justice White, stated: "*O'Shea* and *Rizzo* made clear that the federal courts are not the forum in which dissatisfied citizens may air their disagreements with government policy. The jurisdiction of the federal courts is limited by the case-or-controversy requirement of Art. III." *Id.* at 936.

Justice White later concluded: "We could not conclude that respondent has standing to press his claims for equitable relief without re-examining our holdings in *O'Shea* and *Rizzo* on the limits of the case-or-controversy requirement of Art. III." *Id.* at 937.

In this opinion, Justice White did not indicate why the respondent's standing to seek an injunction was considered without reference to the damages claim. He did state, however, that "[t]he only issue before this Court is whether in seeking injunctive and declaratory relief respondent has stated a case or controversy within the jurisdiction of the federal courts." *Id.* at 935. No reference was made to whether or not the damages claim had yet been "severed." *See* 103 S. Ct. at 1667 n.6.

The Court of Appeals opinion failed to give an adequate explanation why *only* standing to seek an injunction was considered. No explanation for this procedural point is offered until Justice White's footnote in the final *Lyons* decision, 103 S. Ct. at 1667 n.6. *See infra* notes 290-92 and accompanying text.

²⁶⁹ 103 S. Ct. at 1664.

²⁷⁰ *See id.* at 1667 n.6.

²⁷¹ 103 S. Ct. at 1664.

of the plaintiff's claim, the district court entered a preliminary injunction enjoining the use of chokeholds in situations where police officers were not threatened by death or serious bodily injury.²⁷² The preliminary injunction also included an order that required the development of an improved training program, the filing of regular reports and the keeping of records of all incidents where chokeholds were applied.²⁷³ Subsequently, the case was appealed for the second time to the Ninth Circuit, this time by the City of Los Angeles.²⁷⁴ In a very brief opinion, the court of appeals considered whether the district court had abused its discretion in issuing the injunction.²⁷⁵ Finding that the district court had not abused its discretion, the court of appeals affirmed the injunctive order.²⁷⁶ The City of Los Angeles then filed a second petition for certiorari with the Supreme Court, which the Court granted.²⁷⁷

B. *The Supreme Court's Opinion*

In a 5-4 decision, the Supreme Court held that the plaintiff in *Lyons* had failed to meet the case or controversy requirements.²⁷⁸ The majority opinion, written by Justice White, began by describing the facts and procedural history of *Lyons*.²⁷⁹ Justice White pointed out that the Court was "principally concerned" with Lyons' claim for an injunction,²⁸⁰ and stressed that on remand Lyons had pressed only his claim for injunctive relief.²⁸¹ Then Justice White commenced the Court's analysis by briefly considering the plaintiff's request to vacate the preliminary injunctive order on the grounds that the case was moot due to a temporary moratorium that had been placed on the use of chokeholds by the city.²⁸² After rejecting the plaintiff's request on the ground that the temporary moratorium could be lifted at any time,²⁸³ the Court turned to a consideration of whether the plaintiff had standing to bring an injunctive claim under the Article III case or controversy requirements.²⁸⁴

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Lyons v. City of Los Angeles*, 656 F.2d 417 (9th Cir. 1981).

²⁷⁵ *Id.* at 418.

²⁷⁶ *Id.*

²⁷⁷ 455 U.S. 937 (1982). Prior to the grant of certiorari, Justice Rehnquist wrote a short opinion granting the City's application to stay the district court's injunction. 453 U.S. 1308 (1981). In one portion of that opinion, Justice Rehnquist stated in part: "On this [standing] issue, I think there is enough difference in the approach of the Court of Appeals in this case and the approach of this Court in *O'Shea v. Littleton* . . . and *Rizzo v. Goode* . . . to offer applicants a reasonable chance of success on the merits should the Court grant certiorari." *Id.* at 1311 (citations omitted).

Justice Rehnquist also stated: "I conclude that there is sufficient doubt about the correctness of the basic holding of the Court of Appeals with respect to standing on the part of the respondent, together with sufficient equities in favor of the city, to warrant a stay. . . ." *Id.* at 1312.

²⁷⁸ 103 S. Ct. at 1667.

²⁷⁹ 103 S. Ct. at 1663 (Justice White was joined by Chief Justice Burger and Justices O'Connor, Powell and Rehnquist). Justice White was also the author of the opinion in *O'Shea v. Littleton*, 414 U.S. 488 (1974), upon which the *Lyons* decision relied. . .

²⁸⁰ 103 S. Ct. at 1663.

²⁸¹ *Id.* at 1664.

²⁸² *Id.* Lyons had asserted that an injunction was no longer necessary in light of the moratorium. *Id.* Apparently, Lyons desired to have the preliminary injunction vacated in order to preserve the right to an injunction by avoiding a possible unfavorable Supreme Court decision. See 449 U.S. 934 (1980) (opinion written by Justice White dissenting from denial of certiorari).

²⁸³ 103 S. Ct. at 1664.

²⁸⁴ *Id.* at 1665.

The Court began its Article III analysis by reciting the well-settled principle that in order to meet the case or controversy requirements, a plaintiff "must demonstrate a 'personal stake in the outcome.'" ²⁸⁵ According to the Court, a showing of abstract injury would not be enough. ²⁸⁶ As Justice White reasoned, a plaintiff must be able to show that he "has sustained or is immediately in danger of sustaining some direct injury" resulting from the challenged conduct. ²⁸⁷ The Court then reiterated the principle articulated in *O'Shea* and *Rizzo* that past exposure to illegal activity does not establish a case or controversy entitling the plaintiff to injunctive relief unless accompanied by continuing, adverse effects. ²⁸⁸ According to the Court, no extension of *O'Shea* and *Rizzo* was necessary to hold that the plaintiff in the matter before it had failed to allege a case or controversy that would justify injunctive relief. ²⁸⁹ To support this conclusion, the Court indicated in an accompanying footnote that the damages claim in *Lyons* had been severed from the claim for injunctive relief. ²⁹⁰ As a result of the severance, the Court maintained, the *Lyons* case came to the Court "on all fours with *O'Shea* and should be judged as such." ²⁹¹ The Court then indicated in its opinion that although Lyons "presumably" would be afforded standing to bring a claim for damages because he had been choked, such an occurrence did not establish a threat of future injury. ²⁹² According to the Court, the allegations were therefore insufficient under *O'Shea* and *Rizzo* to provide a federal court with jurisdiction to entertain the injunctive claim. ²⁹³ The Court then proceeded to reject the court of appeals reasons for distinguishing *O'Shea* and *Rizzo*. ²⁹⁴

The Court first characterized as "untenable" the court of appeals' assertion that Lyons was more immediately threatened with future injury than the plaintiffs in *O'Shea* and *Rizzo* had been. ²⁹⁵ According to the Supreme Court, it was "no more than conjecture" that the police would apply a chokehold in every traffic stop or encounter with citizens, and "no more than speculation" that Lyons would become involved in another incident where he would "provoke the use of a chokehold." ²⁹⁶ In the Supreme Court's view, the

²⁸⁵ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

²⁸⁶ *Id.*

²⁸⁷ *Id.* The Court stated:

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

Id. (citations omitted).

²⁸⁸ *Id.* The Court also quoted from *O'Shea*'s observation that "'case or controversy considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief.'" *Id.* at 1666 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)).

²⁸⁹ *Id.* at 1667.

²⁹⁰ *Id.* at 1667 n.6.

²⁹¹ *Id.* Footnote 6, in full, stated:

The City states in its brief that on remand from the Court of Appeals' first judgement "the parties agreed and advised the district court that the respondent's damages claim could be severed from his effort to obtain equitable relief." Brief for Petitioner 8 n.7. Respondent does not suggest otherwise. This case, therefore, as it came to us, is on all fours with *O'Shea* and should be judged as such.

Id.

²⁹² *Id.* at 1667.

²⁹³ *Id.* at 1668.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

claim of possible future injury in *Lyons* was no less speculative than the claims at issue in *O'Shea* and *Rizzo*.²⁹⁷ The majority opinion then criticized the court of appeals' reasoning that *Lyons*, unlike *O'Shea* and *Rizzo*, did not involve a request for "massive structural relief."²⁹⁸ The Court explained that for purposes of Article III, it did not matter that the relief requested was not structural, the decisive factor was a lack of realistic threat of future injury.²⁹⁹ According to the Supreme Court, the court of appeals failed to give sufficient weight to *O'Shea* and *Rizzo* when it erroneously reversed the district court.³⁰⁰

After concluding that the plaintiff had failed to meet the case or controversy requirement, the Supreme Court asserted that even if it could be assumed that *Lyons*' "pending damages suit" afforded him standing to seek an injunction, the plaintiff still could not obtain an injunction because he failed to meet the prerequisites for injunctive relief.³⁰¹ The Court maintained that one of the prerequisites for obtaining equitable relief is that the party make a showing that he will suffer irreparable injury if such relief is denied.³⁰² In the Court's view, this requirement could not be met where the plaintiff could not show a real and immediate threat of future injury.³⁰³ Because the Court had already determined that the plaintiff's claim was too speculative, it ruled that *Lyons* failed to meet the threshold requirement of equitable relief — "a 'likelihood of substantial and immediate irreparable injury.'"³⁰⁴ In addition, the Court stated that *Lyons* failed to satisfy the second requirement for obtaining equitable relief, namely, demonstrating that no adequate remedy at law was available.³⁰⁵ *Lyons* had such an adequate remedy, according to the Court, because he could still challenge the legality of the city's actions in his suit for damages.³⁰⁶

After determining that *Lyons* had failed to meet the basic prerequisites of equitable relief, the Court, citing three significant standing cases,³⁰⁷ further asserted that *Lyons* was no more entitled to injunctive relief than any other Los Angeles citizen.³⁰⁸ According to the majority, a federal court may not hear claims brought by citizens who merely assert that law enforcement officers are acting unconstitutionally.³⁰⁹ Such "undifferentiated claims," the Court stated, should be brought to the attention of local authorities through the democratic process.³¹⁰ A federal court, the majority explained, is not the proper

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1669. The Court also rejected the lower court's application of the "capable of repetition, yet evading review" rule, stating: "The rule that a claim does not become moot where it is capable of repetition, yet evades review, is likewise inapposite. *Lyons*' claim that he was illegally strangled remains to be litigated in his suit for damages; in no sense does that claim 'evade' review." *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1670. Justice Marshall, in dissent, asserted that the Court was writing an advisory opinion in this portion of the opinion. *Id.* at 1682 (Marshall, J., dissenting).

³⁰² *Id.* at 1670.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* The cases cited were: *Warth v. Seldin*, 422 U.S. 490 (1975) (see *supra* notes 112-32 and accompanying text); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974) (see *supra* notes 96-110 and accompanying text); and *United States v. Richardson*, 418 U.S. 166 (1974) (see *supra* notes 96-110) (all three cases denied standing to the plaintiffs).

³⁰⁸ *Id.* at 1670.

³⁰⁹ *Id.* at 1671.

³¹⁰ *Id.* at 1670. The Court observed in a footnote that civic complaints and debate in the city had already resulted in a self-imposed moratorium on the use of chokeholds. *Id.* at 1670 n.10.

forum in which to press such claims unless the standing and remedial requirements have been met.³¹¹ Invoking the federalism considerations that persuaded the Court to restrain federal equitable power in *Younger*,³¹² the Court asserted that "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws. . . ."³¹³ According to the Supreme Court, the court of appeals failed to apply these principles when it erroneously affirmed the district court order.³¹⁴ Finally, the Court observed that state courts are not constrained by the same requirements for standing and equitable relief as federal courts.³¹⁵ State courts, the Supreme Court concluded, may oversee the conduct of law enforcement officials on a continuous basis if the individual states so permit; however, such judicial supervision is not the proper role of a federal court.³¹⁶

Justice Marshall wrote a dissenting opinion in *Lyons*, joined by three other members of the Court, that maintained that Lyons' damages claim plainly gave him standing.³¹⁷ The dissent asserted that the majority used an "unprecedented and unwarranted approach" that fragmented the standing inquiry into a requirement that the plaintiff show standing for each form of relief sought.³¹⁸ According to the dissent, the decision departed significantly from the Court's traditional standing analysis, and misapplied the principles of *O'Shea* and *Rizzo*.³¹⁹ The cases on which the majority relied, the dissent observed, did not involve damages claims.³²⁰ According to the dissent, the plaintiffs in *O'Shea* and *Rizzo* relied solely upon their allegations of future injury because they had sought only equitable relief.³²¹ Deeming the severability of the damages claim to be "irrelevant,"³²² the dissent argued that the plaintiff's claim for damages in *Lyons* enabled him to meet the standing requirements on the basis of his past injury.³²³ The majority's decision, according to the dissent, "turn[ed] . . . well accepted [standing] principles on their heads. . . ."³²⁴ The dissent observed that the only relevancy that remedy has had to the standing inquiry in the past has been the limited question of whether some form of relief is possible.³²⁵ The dissent argued that the majority in *Lyons* had drastically altered that inquiry³²⁶ by requiring a separate standing inquiry for each form of relief requested.³²⁷

The dissent then observed that considerations of remedy have traditionally occurred

³¹¹ *Id.* at 1670.

³¹² See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (see *supra* notes 139-47 and accompanying text).

³¹³ 103 S. Ct. at 1670.

³¹⁴ *Id.* at 1670-71.

³¹⁵ *Id.* at 1671.

³¹⁶ *Id.*

³¹⁷ *Id.* (Marshall, J., dissenting) (Justice Marshall was joined by Justices Brennan, Stevens and Blackmun).

³¹⁸ *Id.* at 1676.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ See *id.*

³²² *Id.* at 1678 n.18. Footnote 18 appears to be the only place in the dissent where Justice Marshall addressed the significance of the severability of the damages claim.

³²³ *Id.* at 1677-78.

³²⁴ *Id.* at 1680.

³²⁵ *Id.*

³²⁶ See *id.*

³²⁷ *Id.*

at the end of the trial on the merits.³²⁸ According to the dissent, the new fragmented standing inquiry employed by the majority moved these considerations to a threshold determination on the pleadings.³²⁹ There are dangers involved in a doctrine that permits foreclosure of a remedy by ruling on the pleadings, the dissent asserted, because it is very difficult for courts to determine with any degree of certainty at that stage of the lawsuit that equitable relief is appropriate.³³⁰ The *Lyons* decision, the dissent concluded, was "wholly inconsistent" with both well established principles of standing and well accepted conceptions of the remedial powers of federal courts.³³¹

The dissent next criticized the majority's application of the *Younger* principles of federalism.³³² According to the dissent, the application in this case of comity and federalism to restrain a federal court from enjoining a police department was not proper.³³³ The dissent maintained that the federalism restraints on federal equitable power should only be applied in cases involving federal court interference with state court criminal proceedings.³³⁴ In the dissent's view, the preliminary injunction should have been analyzed under traditional equitable principles rather than the stricter standard of *Younger*.³³⁵ If the majority had analyzed the district court grant of an injunction under

³²⁸ *Id.* The dissent stated:

The Court's fragmentation of the standing inquiry is also inconsistent with the way the federal courts have treated remedial issues since the merger of law and equity. The federal practice has been to reserve consideration of the appropriate relief until after a determination of the merits, not to foreclose certain forms of relief by a ruling on the pleadings. The prayer for relief is not part of the plaintiff's cause of action. . . .

Id. The dissent also indicated that Rule 54(c) of the Federal Rules of Civil Procedure states that a party does not have to demand a specific form of relief in order to be entitled to it. The dissent stated: "The question whether a plaintiff has stated a claim turns not on 'whether [he] has asked for the proper remedy, but whether he is entitled to *any* remedy.'" *Id.* (quoting WRIGHT & MILLER, *supra* note 33, § 1664) (emphasis in original).

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 1682.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* The distinction between "general equitable principles" and "the more stringent standards of *Younger*" turns on whether or not federalism concerns are present. See WRIGHT & MILLER, *supra* note 33, § 2942 at 378.

When a plaintiff's request for an injunction is not against a branch of local or state government, federalism concerns are not present. In that case, a district court is given broad discretion to determine whether a preliminary injunction should be issued by weighing four factors. According to one authority those four factors are:

- (1) the significance of the threat of irreparable harm to the plaintiff if the injunction is not granted;
- (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
- (3) the probability that plaintiff will succeed on the merits; and
- (4) the public interest.

Id. at § 2948, 430-31. Once the district court grants the injunction in the typical case, "[t]he scope of review is limited to determining whether the lower court violated some principle of equity or abused its discretion under Rule 65." *Id.* at § 2962, 633.

The standard in *Younger* is a higher one, in which "considerations favoring restraint become . . . important." *Id.* at § 2942, 378. In applying the *Younger* standard "even irreparable injury is in-

those general principles, according to the dissent, the preliminary injunction could not have been set aside.³³⁶

IV. THE IMPACT OF *LYONS*

A. *The New Standing Inquiry*

The most significant doctrinal aspect of the *Lyons* decision is the manner in which the Court has apparently altered the traditional standing inquiry. Justice Marshall in dissent asserted that the majority changed the law of standing by applying a fragmented standing inquiry which required the plaintiff to meet standing requirements for each claim of relief sought.³³⁷ Assuming that Justice Marshall is correct,³³⁸ then a major doctrinal shift has taken place in the law of standing. First, the new inquiry has the effect of constitutionalizing the law of injunctions.³³⁹ This result means that the federal courts are now required to consider the question of whether the plaintiff is entitled to injunctive relief at the threshold of the suit, as a mandate of Article III.³⁴⁰ Prior to *Lyons*, it was within the discretion of the trial court to issue a preliminary or permanent injunction.³⁴¹ The trial court could balance the interests of both parties to an action, consider the interest of the public at large, and issue an injunction if the court deemed such a measure to be appropriate.³⁴² In fact, the decision to issue a preliminary injunction could be overturned by an appeals court only if it was found that the trial court abused its discretion.³⁴³ After *Lyons*, however, the discretionary decision is taken out of the hands of the trial court and turned into a question of constitutional law to be determined at the beginning of the suit.³⁴⁴

sufficient unless it is 'both great and immediate'." *Younger v. Harris*, 401 U.S. 37, 46 (1971). In other words, an injunction will not be issued under the *Younger* standard "except under extraordinary circumstances where the danger of irreparable loss is both great and immediate." *Id.* at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926)).

According to the dissent in *Lyons*, the appropriate standard for determining whether to uphold the preliminary injunction was to inquire whether the lower court abused its discretion. 103 S. Ct. at 1682-83 (Marshall, J., dissenting). The dissent asserted that it was not an abuse of discretion for the lower court to have concluded on the basis of general equitable principles and the preliminary facts before it, that *Lyons* may have been at risk of future injury. In addition, the dissent indicated that under the traditional standard, the lower court should have been at liberty to consider the risk to the public in its determination that preliminary injunctive relief was appropriate. *Id.* (Marshall, J., dissenting).

³³⁶ *Id.* See *supra* note 335.

³³⁷ 103 S. Ct. at 1676 (Marshall, J., dissenting).

³³⁸ A remote possibility exists that the Supreme Court did not fragment the standing inquiry in *Lyons*. The Court made reference to the fact that the damages claim had been severed from the claim for injunctive relief and, therefore, was not before the Court. 103 S. Ct. at 1667 n.6. See *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (stating that in *Lyons* the "injunctive claim, standing alone, did not present a case or controversy"). But see *infra* notes 357-65 and accompanying text.

³³⁹ See Fallon, *supra* note 18, at 10-11; Glekel, *Constitutionalizing Law of Injunctions*, 189 N.Y.L.J. 1, 32 (May 25, 1983) [hereinafter cited as Glekel]; *Standing to Seek Equitable Relief*, *supra* note 18, at 219.

³⁴⁰ See 103 S. Ct. at 1665. See also *supra* note 28 and cases cited therein.

³⁴¹ See *supra* notes 33-34.

³⁴² See WRIGHT & MILLER, *supra* note 33, § 2942.

³⁴³ See 103 S. Ct. at 1682-83 (Marshall, J., dissenting).

³⁴⁴ See *id.* at 1665. See also Fallon, *supra* note 18, at 43.

In addition to constitutionalizing the law of injunctions, the new standing inquiry changes the traditional standing analysis by focusing on the claims of relief the plaintiff alleges.³⁴⁵ This change is a significant shift because in past Supreme Court cases, the focus of the standing inquiry has been on the *party* seeking to have his complaint heard before a federal court.³⁴⁶ In other words, once a plaintiff met the personal stake and injury requirement of Article III, the plaintiff was deemed to have alleged a case or controversy for the purposes of having his claims considered by a federal court.³⁴⁷ The fragmented standing inquiry, however, forces a plaintiff to allege a case or controversy for each claim of relief sought.³⁴⁸ In other words, if a plaintiff has brought both a claim for damages and a claim for equitable relief, he would have to allege two cases or controversies: one case or controversy for the damages claim and a second case or controversy for the equitable claim.³⁴⁹ Such an analysis is, indeed, "wholly inconsistent" with precedent.³⁵⁰ Justice Marshall's dissent is correct in asserting that "[t]he Court's decision turns . . . well accepted [standing] principles on their heads. . . ."³⁵¹ Never before has the Court required a plaintiff to make such a dual showing of a case or controversy.

Although the Court has stated in previous cases that the question of standing "often turns on the nature and source of the claim asserted,"³⁵² Justice Marshall was correct in observing in his *Lyons* dissent that the focus on the claim has had only limited relevance to the standing inquiry.³⁵³ In regard to the case or controversy requirement, focus on the substantive claims has been made only to determine whether the plaintiff is an "appropriate party to invoke federal judicial power,"³⁵⁴ in other words, whether some form of relief

³⁴⁵ Compare *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (stating: "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated") with *Allen v. Wright*, 104 S. Ct. 3315, 3325 (1984) (stating: "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims").

³⁴⁶ See *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Flast v. Cohen*, 392 U.S. 83, 99 (1968). But see *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

The Court in *Warth v. Seldin* may have established a precedent for fragmenting the standing inquiry. In determining that one of the plaintiff-associations did not have standing, the Court first considered whether the damages claim provided a basis for standing. *Id.* at 515. After concluding that the association's allegation of past injury was insufficient to confer standing, *id.* at 515-16, the Court considered whether the claim for equitable relief provided a basis for standing. *Id.* at 516. The Court then concluded that the complaint did not show a "sufficient immediacy and reality" of injury to meet the case or controversy requirements. *Id.* It is true that the Court considered each claim separately to determine if there was a basis for standing, but the Court did not actually establish the principle that a plaintiff must meet the standing requirements for both claims. The Court merely concluded that neither of the claims could serve as a basis for the particular plaintiff's standing. See also Fallon, *supra* note 18, at 35-39.

³⁴⁷ The traditional inquiry has been whether the plaintiff has a sufficient "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962). See *supra* note 30. See also 103 S. Ct. at 1679 (Marshall, J. dissenting).

³⁴⁸ See *supra* note 28 and cases cited therein.

³⁴⁹ See, e.g., *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984); *Twyman v. Rockville Housing Authority*, 99 F.R.D. 314, 319 (D.Md. 1983); *Trotter v. Klinecar*, 566 F. Supp. 1059, 1063 (N.D.Ill. 1983).

³⁵⁰ 103 S. Ct. at 1680 (Marshall, J., dissenting).

³⁵¹ *Id.*

³⁵² *Warth v. Seldin*, 422 U.S. 490, 500 (1975). See *supra* note 346.

³⁵³ 103 S. Ct. at 1680 (Marshall, J., dissenting).

³⁵⁴ *United States v. Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

is available to the plaintiff that would provide him with a personal stake in the outcome.³⁵⁵ In regard to the prudential limitations of standing, the focus on the claim has been related to inquiring whether the relevant constitutional or statutory provision grants the plaintiff a right to seek judicial relief.³⁵⁶ If the *Lyons* Court altered the standing inquiry as the dissent has asserted, the Court has failed to provide a rationale that is soundly based on precedent, and has extended the principles of *O'Shea* and *Rizzo* far beyond their holdings.

The *Lyons* decision, on the other hand, can be viewed consistently with precedent. Justice White expressly stated in the *Lyons* opinion that the Court was not extending *Rizzo* and *O'Shea* by its holding.³⁵⁷ In making this assertion, Justice White explained that as a result of the severance of the damages claim, the case came to the Court "on all fours with *O'Shea*."³⁵⁸ The case of *O'Shea*, the reader may recall, involved *only* a claim for injunctive relief.³⁵⁹ It therefore follows that if *Lyons* was "on all fours with *O'Shea*" after the damages claim had been severed, the Court, therefore, may have considered the *Lyons* case to be an independent suit seeking only injunctive relief.³⁶⁰ The damages claim may have constituted a separate suit which was considered completely apart from the suit for injunctive relief. Under this assumption, the Court would not have been establishing a fragmented standing inquiry,³⁶¹ but merely reaffirming the rule of law from *O'Shea* that a person who seeks only injunctive relief does not meet the case or controversy requirement unless he can show a likelihood of future injury.³⁶² This interpretation loses its force, however, when one considers the oddity of having the case turn on the mere fact that the damages claim had been voluntarily severed during the lower court proceedings.³⁶³ In addition, if the Court intended such an approach, the majority opinion would most likely have refuted Justice Marshall's criticism that the Court was fragmenting the standing inquiry.³⁶⁴ One can safely assume, therefore, that the Court has created a new standing

³⁵⁵ See *supra* note 30.

³⁵⁶ See *Warth v. Seldin*, 422 U.S. 488, 500 (1975).

³⁵⁷ 103 S. Ct. at 1680 (Marshall, J., dissenting).

³⁵⁸ *Id.* at 1667 n.6. See *supra* note 338.

³⁵⁹ See *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). See *supra* notes 69-80 and accompanying text.

³⁶⁰ The language used by the Court in the opinion may be interpreted to suggest that the majority viewed the damages claim as an independent suit. At three places in the opinion the Court referred to the damages claim as a separate suit.

The Court stated: "*Lyons* fails no better if it be assumed that his *pending damages suit* affords him Article III standing. . . ." *Id.* at 1670 (emphasis added).

The Court also stated: "The legality of the violence to which *Lyons* claims he was once subjected is at issue in *his suit for damages* and can be determined there." *Id.* (emphasis added).

In addition, the Court stated: "*Lyons*' claim that he was illegally strangled remains to be litigated in *his suit for damages*. . . ." *Id.* at 1669 (emphasis added).

It is also worth noting that the Court stated, in reference to the case as a whole, that *Lyons* had failed "to establish an *actual controversy in this case*. . . ." *Id.* at 1667 (emphasis added). If the Court had required the plaintiff to meet the standing requirements for each claim, it is unclear why the Court did not say "actual controversy as to *this claim*" rather than "in this case." *Id.*

See also *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (stating that the injunctive claim in *Lyons*, "standing alone," did not meet the case or controversy requirement) (the Ninth Circuit, however, applied a fragmented standing inquiry to the claims in the case before it).

³⁶¹ But see 103 S. Ct. at 1678 (Marshall, J., dissenting).

³⁶² *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

³⁶³ See 103 S. Ct. at 1667 n.6.

³⁶⁴ *Id.* at 1676 (Marshall, J., dissenting).

inquiry. In fact, lower federal courts have already applied the principles of *Lyons* as a fragmented standing inquiry.³⁶⁵

B. *The Demise of Public Law Litigation*

The *Lyons* decision has a two-fold effect on public law litigation. First, the constitutionalization of the prerequisites to injunctive relief makes it virtually impossible for a plaintiff to enjoin government policy or practices unless the plaintiff can show a likelihood of future injury at the pleadings stage of the law suit.³⁶⁶ This requirement must be met even if the plaintiff has already been injured by such government policy or practices.³⁶⁷ Second, dicta in the *Lyons* decision regarding the constraints of *Younger* federalism suggests a further obstacle for plaintiffs who seek to enjoin government.³⁶⁸ Even if a plaintiff can make an adequate showing of future injury and consequently meets the strict standing requirements, the *Lyons* decision indicates that the doctrine of federalism "counsels restraint" in the issuance of an injunction against a branch of state government.³⁶⁹ This section of the note discusses two post-*Lyons* decisions that have dismissed claims for injunctive relief in public law litigation cases on the basis of these principles and explains why *Lyons* may halt the proliferation of such litigation.

1. Standing to Seek Injunctive Relief

Since *Lyons* was decided, there have been numerous federal court decisions relying on the restrictive standing principles of *Lyons* to deny injunctive relief against local governments.³⁷⁰ Some of these decisions have denied such relief despite gross violations of plaintiffs' constitutional rights by government.³⁷¹ One of these cases, *Smith v. Montgomery County, Maryland*,³⁷² is particularly illustrative of the serious effect that *Lyons* has had on public law litigation.

In *Smith*, a district court denied injunctive and declaratory relief to a woman who had been subjected to an unconstitutional strip search.³⁷³ *Smith* involved a plaintiff by the name of Vivian Smith who had been arrested for contempt of court for failure to appear in court in connection with a child support action.³⁷⁴ Upon arriving at the detention center, Ms. Smith was subjected to a complete strip search and was forced to squat as a correctional officer inspected her oral, vaginal and anal cavities.³⁷⁵ The search was conducted pursuant to a strip search policy that required the search of all detainees regardless of whether probable cause existed to conduct such a search.³⁷⁶ The indiscriminate strip search policy was unconstitutional,³⁷⁷ according to the court, but the plaintiff did not

³⁶⁵ See *supra* note 28 and cases cited therein.

³⁶⁶ See *supra* note 26 and cases cited therein.

³⁶⁷ See 103 S. Ct. at 1667.

³⁶⁸ *Id.* at 1670-71.

³⁶⁹ *Id.* at 1670.

³⁷⁰ See *supra* note 28 and cases cited therein.

³⁷¹ See *supra* note 26 and cases cited therein.

³⁷² 573 F. Supp. 604 (D.Md. 1983).

³⁷³ *Id.* at 608-09.

³⁷⁴ *Id.* at 606.

³⁷⁵ *Id.* at 606-07.

³⁷⁶ *Id.* at 607.

³⁷⁷ *Id.* at 611.

have standing to request injunctive or declaratory relief because she could not allege a likelihood that she would again be subjected to the strip search.³⁷⁸ As a result, the plaintiff was left only with her damages claim, and the court was left powerless to enjoin the County from continuing its unconstitutional search policy.

The *Smith* case illustrates the effect that the *Lyons* decision has on public law litigation. A plaintiff will not be able to obtain an injunction against a government policy, even where such policy is blatantly unconstitutional and could be repeated on other individuals, unless the plaintiff can allege that she is likely to be personally injured in the future as a result of that policy.³⁷⁹ Without such an allegation, a trial court is powerless to issue an injunction.

2. The Constraints of Federalism

Even if a plaintiff is able to meet the stringent standing requirements for obtaining an injunction, the *Lyons* decision indicates that there is a further hurdle for the public law litigation plaintiff.³⁸⁰ In *Lyons*, the Supreme Court stated that even "if it be assumed that [the plaintiff's] pending damages suit afford[ed] him standing to seek an injunction as a remedy," the plaintiff still could not obtain the injunction on basic equitable grounds.³⁸¹ Citing *Younger v. Harris*, the Court indicated that a "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions. . . ."³⁸² According to the Court, principles of comity and federalism restrain a federal court from issuing injunctions against state law enforcement officials.³⁸³ The *Lyons* Court, in effect, reaffirmed the broad principle of *Rizzo v. Goode* that a federal court may not interfere with the internal affairs of a state agency except in extraordinary circumstances.³⁸⁴

By reaffirming the broad principles of federalism arising out of *Rizzo*, the *Lyons* decision not only establishes a strict standing analysis, but also stands as precedent for federal court refusal to issue injunctive relief on grounds of federalism.³⁸⁵ At least one

³⁷⁸ *Id.* at 608-09. The court was apparently uncomfortable with its decision not to enjoin the unconstitutional strip search policy, because the court issued a warning to the defendant, stating: "[A]lthough defendants are technically free to resume the strip search policy that was in effect prior to the issuance of the preliminary injunction, to do so may subject them to both compensatory and punitive damages." *Id.* at 609.

³⁷⁹ *Id.* at 608. In his *Lyons* dissent, Justice Marshall foresaw the effects of the majority opinion, stating:

The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future.

103 S. Ct. at 1683 (Marshall, J., dissenting).

³⁸⁰ See 103-S. Ct. at 1670.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ See, e.g., *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984); *Trotter v. Klinciar*, 566 F. Supp. 1059, 1063 (N.D. Ill. 1983).

³⁸⁵ The Supreme Court has indicated that federalism acts as a constraint in any situation where a federal court considers issuing an injunction against a branch of state government. See *Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

Prior to *Lyons* it was possible to argue that *Rizzo* was an aberration, but the *Lyons* Court made

circuit court has already used this principle of federalism to deny injunctive relief.³⁸⁶ In *Gonzales v. City of Peoria*,³⁸⁷ the Ninth Circuit denied injunctive relief on grounds of federalism, despite a finding that the plaintiffs had alleged a sufficient likelihood of future injury to meet the standing requirements.³⁸⁸ *Gonzales* involved a suit brought by eleven persons of Mexican descent who filed claims for injunctive and damages relief against the City of Peoria, Arizona for an allegedly unconstitutional police department policy that permitted the stopping of persons of Mexican descent for the purposes of enforcing federal immigration laws.³⁸⁹ The Ninth Circuit found that some of the plaintiffs were able to show a sufficient threat of future injury because they had alleged that the policy was consistently applied to all citizens stopped for traffic violations.³⁹⁰ Accordingly, the court held that the plaintiffs had standing to seek injunctive relief.³⁹¹ The court relied on *Lyons*, however, and denied injunctive relief on the grounds that "federal courts may not intervene in state enforcement activities absent extraordinary circumstances. . . ."³⁹²

Gonzales demonstrates that *Lyons* affects public law litigation not only through its restrictive standing requirements, but also in its reassertion of the federalism principles arising out of *Younger v. Harris*,³⁹³ and *Rizzo v. Goode*.³⁹⁴ If this impact does not spell the demise of public law litigation, it at least makes it so difficult for a public law litigation plaintiff to obtain an injunction, that only in the most extreme cases will such litigation successfully lead to an injunction against government.³⁹⁵

C. The Applicability of *Lyons* In the Non-Public Law Litigation Context

As previously discussed, *Lyons* effectively limits public law litigation by requiring, as a constitutional mandate of Article III, that a plaintiff show a likelihood of future injury in

clear that the federalism concerns that constrained the Court in *Rizzo* was a consideration in *Lyons* as well. See 103 S. Ct. at 1670.

One might also argue that the *Younger* federalism that was applied in *Rizzo* and *Lyons* is a narrow constraint because it has been applied only to restrain a federal court from issuing injunctions against law enforcement authorities. See e.g. Weinberg, *supra* note 10, at 1220. But such a narrow view of the constraints of federalism is not consistent with the broad concept as described in *Younger* and *Rizzo*. If federalism is a consideration at all, it must be a consideration in all cases where a conflict arises between federal and state authority.

The Supreme Court recently suggested that the federalism constraints of *Rizzo* would be applicable in a situation that did not involve law enforcement authorities. See *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 910 n.13 (1984). Dicta in footnote 13 stated: "We do not decide whether the District Court would have jurisdiction under this reasoning to grant prospective relief on the basis of federal law, but we note that the scope of any relief would be constrained by principles of comity and federalism. . . ." *Id.* (citing *Rizzo v. Goode*, 423 U.S. 362, 378 (1976)).

³⁸⁶ See *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983).

³⁸⁷ 722 F.2d 468 (9th Cir. 1983).

³⁸⁸ *Id.* at 481.

³⁸⁹ *Id.* at 472.

³⁹⁰ *Id.* at 481.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ 401 U.S. 37 (1971). See *supra* notes 139-47 and accompanying text.

³⁹⁴ 423 U.S. 362 (1976). See *supra* notes 157-69 and accompanying text.

³⁹⁵ Under the *Lyons* analysis, law enforcement authorities are, indeed, virtually immunized from injunctive relief, see 103 S. Ct. at 1683 (Marshall, J., dissenting), because it will be only in rare circumstances that a citizen will be able to allege that a law enforcement policy is likely to personally injure him. And even if the citizen can make such a showing, a federal court may still be bound to deny injunctive relief on grounds of federalism.

order to seek injunctive relief.³⁹⁶ The basis of this principle is the Supreme Court's concern for the proper role of the federal courts in our democratic system of government.³⁹⁷ As the Court stated in *Lyons*, it is not the role of a federal court "to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis."³⁹⁸ The Court has reiterated this principle in a recent standing decision, indicating that at the core of the holding in *Lyons* "was the principle that '[a] federal court . . . is not the proper forum to press' general complaints about the way in which government goes about its business."³⁹⁹ According to the Court, this notion of the proper role of the federal courts is grounded in the idea of separation of powers and the principle that the government is granted wide latitude in the administration of its internal affairs.⁴⁰⁰ Federalism restrains the federal courts from interfering with state government in the same way the doctrine of separation of powers constrains court action in the context of judicial interference with an agency of the federal government.⁴⁰¹ The Court has stated that this notion of the proper role of the federal judiciary is at the core of Article III and gives rise to the strict injury requirement of the *Lyons* standing analysis.⁴⁰²

If the strict Article III injury requirements formulated in *Lyons* are founded in the doctrine of separation of powers and the notion of the properly limited role of the federal courts, the question arises as to the applicability of such requirements in cases where separation of powers or federalism concerns are not present.⁴⁰³ In cases where an injured plaintiff seeks an injunction against government, the Supreme Court's decision to require

³⁹⁶ 103 S. Ct. at 1665. See *supra* notes 285-300 and accompanying text.

³⁹⁷ See 103 S. Ct. at 1670-71; *City of Los Angeles v. Lyons*, 449 U.S. 934, 936 (1980) (White, J., dissenting from denial of certiorari); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

³⁹⁸ 103 S. Ct. at 1665.

³⁹⁹ *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984). While discussing the relevance of separation of powers concerns to the Article III standing analysis, the Court stated:

The same concern for the proper role of the federal courts is reflected in cases like *O'Shea v. Littleton* . . . , *Rizzo v. Goode* . . . , and *City of Los Angeles v. Lyons*. . . . Animating this Court's holdings was the principle that "[a] federal court . . . is not the proper forum to press" general complaints about the way in which government goes about its business.

Id. (quoting *Lyons*, 103 S. Ct. at 1670) (citations omitted).

⁴⁰⁰ *Id.*

⁴⁰¹ See *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974). See also *Allen v. Wright*, 104 S. Ct. 3315, 3329-30 (1984) (discussing separation of powers, *Lyons* and *Rizzo*, 423 U.S. 362 (1976) and citing *Rizzo* to illustrate a basic principle of separation of powers doctrine).

At least one commentator has discussed at length the overlap of federalism and separation of powers concerns. See Nagel, *supra* note 9.

⁴⁰² See *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984) (see *supra* note 399).

⁴⁰³ Justice Stevens has criticized the Court for basing its "redressability" requirement of Article III on separation of powers grounds. See *Allen v. Wright*, 104 S. Ct. at 3346 & n.10 (Stevens, J., dissenting).

Justice Stevens stated:

The danger of the Court's approach is illustrated by its failure to provide any standards to guide courts in determining when it is appropriate to require a more rigorous redressability showing because of separation of powers concerns, or how redressability can be demonstrated in a case raising separation of powers concerns. The only guidance the Court offers is that separation of powers counsels against recognizing standing. . . .

Id. at 3346 n.10 (Stevens, J., dissenting).

Justice Stevens' remarks may implicitly suggest that when separation of powers concerns are not present, the standing requirement may not be as strict.

a showing of future injury is arguably justifiable as a mandate of Article III and the separation of powers concerns at its core.⁴⁰⁴ Where an injured plaintiff seeks an injunction against a private, non-governmental defendant, however, separation of powers or related federalism concerns are not implicated.⁴⁰⁵ In such a case, therefore, requiring an injured plaintiff to meet standing requirements for each claim of relief sought is not justified on separation of powers or federalism grounds. The question, then, is whether in private litigation a plaintiff will be subjected to the strict fragmented standing inquiry of *Lyons*, or whether such plaintiff will only be required to allege past injury to invoke the federal court's jurisdiction over the injunctive claim.

The question whether *Lyons* is applicable in the private litigation context is an important one. If the plaintiff in such cases does not have standing to bring an injunctive claim at the threshold of the suit, the plaintiff will lose all opportunity to obtain equitable relief under traditional principles of equity at the end of the trial.⁴⁰⁶ Traditional principles of equity require a likelihood of irreparable injury⁴⁰⁷ which is similar to the likelihood of future injury that is required by *Lyons*;⁴⁰⁸ but, historically, a federal court does not determine if irreparable harm is threatened until the end of the trial on the merits.⁴⁰⁹ A plaintiff who cannot allege a likelihood of future injury at the pleadings stage of the trial may be able to make that showing by the end of the trial after all the evidence has been presented. The fragmented standing inquiry of *Lyons*, however, would eliminate at the threshold of the suit any equitable relief sought in the complaint, and presumably leave the federal court powerless to consider any injunctive relief at a later stage.⁴¹⁰

There has never been any doubt that the Article III case or controversy requirements are applicable to all federal cases, private litigation as well as public law litigation.⁴¹¹ Hence, it is possible that the Court intended the fragmented standing inquiry to apply to all federal cases without regard to the nature of the particular suit. The Court has indicated, however, that the principles underlying the *Lyons* decision are grounded in separation of powers concerns.⁴¹² If so, it may be unclear what the standing inquiry should be when such concerns are not present.⁴¹³ As critical as some of the commentators may be of the Supreme Court's approach to standing in the *Lyons* decision,⁴¹⁴ the Court

⁴⁰⁴ See *United States v. Richardson*, 418 U.S. 166, 176-79 (1974) (indicating that a plaintiff ought to use the democratic process to voice his grievances with government policy); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 222 (1974) (holding that a court may not allow a plaintiff to adjudicate a dispute with government policy without meeting the injury requirements because such a case would "open the Judiciary to an arguable charge of providing 'government by injunction'").

⁴⁰⁵ That is, the federal court will not be violating either the doctrine of separation of powers or the doctrine of federalism by recognizing standing. Separation of powers or federalism concerns may still be present in another aspect of the case.

⁴⁰⁶ It can be presumed that if a court rules at the pleadings stage of the suit that the plaintiff does not have standing to bring an injunctive claim, that such plaintiff has lost his right to obtain such relief. Otherwise, the standing issue would be rendered meaningless.

⁴⁰⁷ See *supra* note 34.

⁴⁰⁸ See 103 S. Ct. at 1666 (stating "that case or controversy considerations shade into those determining whether the complaint states a sound basis for equitable relief." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. at 499)). See also *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984).

⁴⁰⁹ 103 S. Ct. at 1680 (Marshall, J., dissenting).

⁴¹⁰ See *supra* note 26 and cases cited therein. See also *supra* note 406.

⁴¹¹ See *supra* note 38.

⁴¹² See *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984) (see *supra* note 399).

⁴¹³ See *supra* note 403.

⁴¹⁴ See Fallon, *supra* note 18; Glekel, *supra* note 339; *Standing to Seek Equitable Relief*, *supra* note

was on arguably sound constitutional grounds.⁴¹⁵ When a plaintiff seeks an injunction against government, he is attempting to use the federal court as a means of changing government policy.⁴¹⁶ As the Court has indicated, making policy is not the proper role of a federal court in a democratic system of government.⁴¹⁷ In the private litigation context, however, the *Lyons* approach loses its constitutional foundation because there is no democratic alternative to the courts. It is, therefore, not justifiable on constitutional grounds, nor reasonable as a matter of prudential concern to require a private litigation plaintiff to meet a heightened standing requirement which supplants traditional principles of equitable relief. A governmental defendant may require deference in the name of federalism or separation of powers before standing to seek an injunction can be conferred on the plaintiff;⁴¹⁸ however, a private defendant who has engaged in unlawful conduct which has injured a plaintiff deserves no such deference. In such private cases, the federal courts should allow traditional principles of equity to determine the appropriateness of injunctive relief.⁴¹⁹ The courts should not supplant the traditional principles of equity by making a premature decision regarding equitable relief at the threshold of the suit. The decision regarding injunctive relief in the private litigation context should remain as a discretionary trial court decision made at the end of the trial.

Where a plaintiff seeks damages and an injunction in a private litigation case, he or she must be required to meet the personal stake requirement of Article III by alleging *either* a past injury, *or* the likelihood of future injury.⁴²⁰ It would be inappropriate, however, to require the private litigation plaintiff to meet the heightened requirements of *Lyons*.⁴²¹ The *Lyons* approach may be justifiable in the context of public law litigation due to the separation of powers or federalism concerns present in such cases, but such an approach is entirely inappropriate and unjustifiable in a private suit brought against a non-governmental defendant.

CONCLUSION

Over the last decade, the Supreme Court has embarked on a restrictive trend that limits public law litigation in the federal courts. First, the Court has tightened the requirements of standing in a way that limits the circumstances in which a plaintiff may gain access to a federal court to air his grievances with government policy. Second, the Court has tightened the requirements for injunctive relief by requiring federal courts to refrain from issuing injunctions against state government except in extraordinary cir-

⁴¹⁵ See *supra* note 404.

⁴¹⁶ See *supra* notes 178-86 and accompanying text.

⁴¹⁷ See *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984); *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1671 (1983); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

⁴¹⁸ See, e.g., *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984).

⁴¹⁹ See *WRIGHT & MILLER, supra* note 33, § 2942.

⁴²⁰ The Court has stated that "federal plaintiffs must allege some threatened *OR* actual injury . . . before a federal court may assume jurisdiction." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (emphasis added). See also 103 S. Ct. at 1676 (Marshall, J., dissenting).

⁴²¹ Although this note argues that a private litigation plaintiff should not be required to split his claims for purposes of standing, it is not unlikely that this result, in fact, is required by *Lyons*. As indicated earlier, *supra* note 38, Article III is applicable to all federal cases. Until the Court addresses the issue, private litigation plaintiffs will need to be cognizant of the doctrinal effect of the *Lyons* decision on the availability of injunctive relief.

cumstances. Continuing with its restrictive trend, the Supreme Court in *City of Los Angeles v. Lyons* denied a plaintiff standing to seek an injunction against a local police department. The *Lyons* Court held that even though the plaintiff had a pending damages claim that appeared to meet the standing requirements, the plaintiff lacked standing to seek equitable relief because of his failure to allege a sufficient threat of future injury. In addition, the Court reaffirmed the principle that federalism concerns counsel restraint in the issuance of injunctions against state government. As a result, the holdings of *Lyons* spell the demise of public law litigation by making it extremely difficult to obtain an injunction against the government.

The *Lyons* decision, however, has implications for cases outside of the context of public law litigation. Since the *Lyons* decision was grounded in principles of Article III, and Article III is applicable to all federal cases, the principles of *Lyons* are presumably applicable in private litigation, as well as public law litigation. The Article III principles of *Lyons*, however, are based on the notion of the proper role of the federal courts in our democratic system of government, a notion founded in the doctrine of separation of powers and related federalism principles. The restrictive standing inquiry, therefore, which forces a plaintiff to meet standing requirements for each claim of relief sought, should not be applicable in the context of private litigation where such separation of powers and federalism concerns are not present.

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