It's About Time: Unravelling Standing and Equitable Ripeness

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It's About Time:
Unravelling Standing and Equitable Ripeness

LAURA E. LITTLE*

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Imagine a young woman, eight and one-half months pregnant with her first child, experiencing labor pains. The young woman, Sarah Mills, gets a ride to a local hospital, the only hospital within seventy-five miles of her home. After initial processing in the emergency room, she is sent to the labor and delivery unit, where the staff doctor confirms that Mills is indeed in labor. Concluding that Mills is poor and has no medical coverage, the doctor declines to admit Mills and directs her to a university hospital in a city nearly three hours away. When asked how Mills can get herself to the university hospital, the doctor shrugs his shoulders. Mills has no means of transportation to the city hospital and delivers her baby at home. The child suffocates during delivery because its umbilical cord is wrapped around its neck.¹

Mills is angry. She wants to sue for money damages for her loss, and an injunction to ensure that the hospital and its staff do not treat her and others like her similarly in the future. A federal statute provides a theory of liability supporting this relief,² and she will likely have no difficulty convincing a federal court to entertain her claim for damages.³

She will, however, meet substantial obstacles in getting the injunction. In fact, she will probably stumble at the first step: under the banner of “standing,” the federal court is apt to dismiss her re-

². The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1988), prohibits a hospital from refusing medical care to patients who are not in a stable medical condition.
³. See Owens, 741 F. Supp. at 1280 (awarding damages for failure of hospital to comply with federal statutory requirements governing patients in active labor).
quest for an injunction without reaching the merits or giving Mills an opportunity to develop her case. In the cant of standing doctrine, Mills may be out of court on her injunction claim because she lacks a "personal stake in the outcome" of the claim.4

Sarah Mills is not alone; alleged victims of voter intimidation,5 police brutality,6 unjustified body-cavity searches,7 employment discrimination,8 abortion clinic violence,9 religious discrimination,10 and many others11 have shared the difficulty of convincing federal courts to open their doors to requests for forward-looking relief. The problem—which is not confined to disputes involving public entities—derives in large part from the United States Supreme Court's precedent on standing, reinterpreted and expanded in the Court's decision in City of Los Angeles v. Lyons.12

In Lyons, Los Angeles police choked to unconsciousness an individual stopped for a minor traffic violation. The plaintiff, Adolph Lyons, alleged the existence of a police department policy of applying unnecessary, life-threatening chokeholds and sought damages as well as injunctive and declaratory relief.13 Ruling only on Lyons' request for an injunction, the United States Supreme Court held that Lyons lacked Article III standing14 to seek injunctive relief against

4. See, e.g., Baker v. Carr, 369 U.S. 186, 204 (1962) (holding that plaintiffs must demonstrate "a personal stake in the outcome" in order to assure "concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions).
5. See, e.g., Smith v. Meese, 821 F.2d 1484, 1494-96 (11th Cir. 1987) (reversing district court's determination that plaintiffs lacked standing to challenge voter intimidation practices by government officials).
6. Curtis v. City of New Haven, 726 F.2d 65 (2d Cir. 1984) (finding that the plaintiff had no standing to challenge police use of mace).
8. See, e.g., Feit v. Ward, 886 F.2d 848, 857 (7th Cir. 1989) (asserting that a fired employee had no standing to sue former employer for injunction against firing policies).
9. See, e.g., Roe v. Operation Rescue, 919 F.2d 857, 865 (3d Cir. 1990) (reversing district court's determination that abortion clinics had no standing to seek injunction against anti-abortion protesters).
10. Society of Separationists, Inc. v. Herman, 959 F.2d 1283, 1285-86 (5th Cir.) (holding that a prospective juror imprisoned for contempt because she refused on religious grounds to take oath does not have standing to seek forward-looking relief), cert. denied, 112 S. Ct. 191 (1992).
11. For a discussion of the various circumstances in which federal courts have raised substantial threshold barriers to injunctive relief, see infra notes 51-52, 70 and accompanying text.
13. Id. at 97-98. Lyons alleged that the policy threatened rights protected under the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution. Id. at 98.
14. Standing derives from Article III's restriction of the federal judicial power to cases and controversies. Standing doctrine, however, also includes "prudential" requirements, which derive from principles of prudent judicial administration. See ERWIN
the chokehold policy. Lyons lacked standing, said the Court, because he had failed to show that the threat of future injury to him was "real and immediate," rather than "conjectural" or "hypothetical."

For that reason, the Court concluded that the district court lacked jurisdiction over Lyons' injunction request.

The Lyons Court added that, even if Lyons had established standing, equitable principles required the dismissal of Lyons' injunction claim because he had not shown that he would personally suffer from another improper chokehold. According to the Court, Lyons' request for equitable relief failed to demonstrate a "likelihood of substantial and immediate irreparable injury." The immediate threat of injury requirement thus served as a double-barreled weapon, acting as both a jurisdictional and a remedial obstacle.

The doctrine emerging from Lyons is only one of many mechanisms used by federal courts to avoid difficult and sensitive questions on the merits of a case. The rule of Lyons, however, is particularly treacherous. It is not only a seemingly neutral procedural instrument for crafting a desired substantive outcome, but it also terminates litigation before the true nature of the dispute has come to full view. Unfettered by the consequences of publicity, the Lyons approach is capable of barring plaintiffs like Sarah Mills from even the opportunity to seek relief.

In addition to its harsh practical results, Lyons has also confounded lower courts. Inconsistent lower court holdings in the wake of Lyons have prompted at least two Supreme Court Justices to call for a reexamination of the issues presented in the case. In particu-


15. Lyons, 461 U.S. at 103, 105-06.

16. Id. at 111. The Court further ruled that comity and deference to law enforcement officers required dismissal of the injunction request. Id. at 112.

17. Id. at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

18. Commentators have overwhelmingly condemned the Lyons decision. See, e.g., MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 95 (1991); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 99-120 (1985); Richard H. Fallon, Jr., Of Justicia-


lar, the lower courts have disagreed on whether *Lyons* requires plaintiffs to establish standing for each type of relief requested.20 Most lower courts have concluded that *Lyons* requires separate standing for each type of requested relief, a conclusion most consistent with the language of *Lyons*.

In this Article, I begin by tracing the evolution of *Lyons* and examining the decision in detail. After evaluating how lower courts have interpreted *Lyons*, I next turn—in Part II—to the Article’s first major argument. In particular, I posit that the *Lyons* Court was ill-advised to suggest that federal courts must undertake a separate “standing” inquiry for each type of remedy sought in a case. Threshold questions about whether a controversy is sufficiently concrete to justify federal court jurisdiction should be analytically distinct from issues bearing on whether a particular remedy is appropriate in a case.

Part II of this Article demonstrates that the Court’s collapse of the standing and remedial inquiries is particularly inappropriate for permanent injunctive relief. As the structure and text of *Lyons* itself illustrates, equitable doctrine already in place is useful in analyzing whether the threat of harm is sufficiently ripe to justify issuing an injunction. Contrary to *Lyons*, however, a court should invoke this equitable doctrine—known as imminence or equitable ripeness21—after the parties have developed a factual record. Only after the facts have unfolded can a court intelligently weigh the potential threat of harm in light of other factors bearing on whether an injunction is the most effective and appropriate remedy.22

At the end of Part II, I reinforce this reasoning with a detailed study of the values that motivate and explain standing doctrine. I conclude that the *Lyons* methodology is neither necessary nor appropriate to satisfying these values.

20. See infra notes 60-62 and accompanying text for further discussion of the split among the courts of appeals on the meaning of *Lyons*.

21. Although “imminence” is the more common name for the doctrine, I use “equitable ripeness” throughout the remainder of this Article. As explained further in notes 209-10 and accompanying text, the doctrine actually includes both an imminence component and a probability component. For that reason, equitable ripeness is a more accurate moniker.

22. See City of Los Angeles v. *Lyons*, 461 U.S. 95, 131 (1983) (Marshall, J., dissenting) (“[I]t will be rarely easy to decide with any certainty at the outset of a lawsuit that no equitable relief would be appropriate under any conceivable set of facts . . . .”); Fallon, supra note 18, at 75 (noting that *Lyons*’ remedial standing “precludes a federal court from obtaining relevant information concerning the appropriateness and desirability of adjudication”); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1273 (1989) (arguing that the *Lyons* Court terminated the dispute before anyone was able to ascertain the scope of the police department policy or the terms of permanent injunctive relief the district court would impose).
Part III explores the role—if any—that remedial concerns should play in determining whether an injunction plaintiff has standing to sue. To study this issue, I examine two general categories of plaintiffs: those who fear future injury similar to that they have already suffered and those who have no past injury but nonetheless fear prospective harm. On final analysis, it appears that remedial concerns have little relevance to standing analysis for either category of litigants.

Finally, in Part IV, I shift my focus to the remedial phase of litigation and canvass equitable principles governing permanent injunctions. This Part advocates reconsidering traditional principles governing the equitable ripeness doctrine, which restricts injunctive relief to circumstances where threatened harm is both immediate and practically certain to occur. Drawing on social science and historical materials, I conclude that—while equity’s concern with the imminence and probability of harm is appropriate—courts are best advised to avoid giving the concern undue weight in deciding whether to issue an injunction.

I. THE THREADS OF THE LYONS DOCTRINE

Standing is, of course, only one of several doctrines designed to limit federal court jurisdiction to questions “presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”23 Other justiciability doctrines such as mootness and ripeness, deriving from Article III’s case and controversy limitation, seek to ensure that courts respond only to suits by individuals whose personal interests are at stake.24 Indeed, the justiciability doctrines share common purposes and each can be recast in terms of another.25

23. Flast v. Cohen, 392 U.S. 83, 95 (1968); see Alexander M. Bickel, The Least Dangerous Branch 115 (1962) (asserting that the standing and case and controversy requirements are designed to ensure that the “judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions”).


25. Erwin Chemerinsky, A Unified Approach to Justiciability, 22 Conn. L. Rev. 677, 678 (1990) (arguing that a “daunting” set of justiciability rules is unnecessary because “all of the doctrines are animated by a few basic policy questions”); see also Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227, 229 (1990) (asserting that “underlying the various justiciability and joinder doctrines is a common question of constitutional interpretation: the idea of a case”). But cf. Fallon, supra note 18, at 26 (maintaining that while mootness and standing “serve similar functions,” there are “important differences between the doctrines”).
Nothing mandates, therefore, that a court analyze the jurisdictional implications of an injunction request under the rubric of standing. In fact, courts have also invoked the doctrines of ripeness and mootness to analyze questions of immediate and concrete threats of injury. Nevertheless, in recent Supreme Court cases such as Lyons, standing—the issue of who is the proper party to bring the suit—has served as the primary jurisdictional vehicle for analyzing threats of injury. Although the meaning of Lyons and its antecedents has divided lower federal courts, these courts have nearly unanimously followed the Supreme Court’s choice of standing doctrine to analyze injunction requests.

A. Spinning the Yarn: Evolution of Lyons

The Lyons Court’s approach to requests for prospective relief owes its legacy to two earlier public law disputes, O'Shea v. Littleton and Rizzo v. Goode. Like Lyons, O'Shea and Rizzo challenged law enforcement practices. In both cases, the Supreme Court rejected plaintiffs’ requests for injunctive relief, finding that the plaintiffs lacked the Article III requirement of a “real and immediate” threatened injury.

Both cases also rested in part on equitable principles, including a deep concern for the intrusive effect of federal injunctive relief on state law enforcement efforts. It was O'Shea, however, that articulated the doctrinal twist that has proved so troublesome for plaintiffs in both private and public law disputes. Specifically, O'Shea clarified that the requirement of a real and immediate threat of injury serves as both a jurisdictional and remedial barrier. By its analysis, the O'Shea Court showed that the requirement was coex-


27. In O'Shea v. Littleton, an antecedent to Lyons, the Court did not speak in terms of any specific justiciability doctrine, but instead held only that the plaintiffs failed to establish a case or controversy. 414 U.S. 488, 493 (1974).

28. See infra notes 52-53 and 60-61 for a discussion of cases using standing to analyze injunction requests, but disagreeing over the meaning of Lyons.


tensive in both contexts.\textsuperscript{35}

Applying the real and immediate threat of injury requirement in \textit{Lyons}, the Court ensured that it could preclude federal court review of a wide array of cases. In fact, the \textit{Lyons} Court seemed to require that a plaintiff invoking a federal court’s power to issue an injunction demonstrate that the threat of injury was almost a certainty.\textsuperscript{36}

The facts in \textit{Lyons} bring home the severity of the threat of injury requirement. Adolph Lyons, a black male, was pulled over for driving with a burned out tail light. Officers with drawn revolvers instructed him to face his car and spread his legs. He was then ordered to place his clasped hands on top of his head. One officer did a patdown, revealing no weapons. Lyons then lowered his hands, but the officers slammed them back onto his head. When he complained of the pain,

[\textit{w}ithin five to ten seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him but continued to apply the chokehold until Lyons blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.\textsuperscript{37}]

Although Lyons was given little opportunity to develop a record in the case, he established that Los Angeles police officers had applied chokeholds on at least 975 occasions in the five-year period before his incident.\textsuperscript{38} In that period, at least 16 of the persons subjected to such chokeholds—twelve of them black males like Lyons—had died.\textsuperscript{39} The parties did not dispute that Los Angeles instructed its officers that chokeholds were less than deadly force. Nor did any of

\begin{itemize}
  \item \textsuperscript{35} Following its jurisdictional analysis, the \textit{O'Shea} Court analyzed the equitable constraints on injunctive relief. In discussing whether the injury was sufficiently real and immediate to satisfy equitable requirements, the \textit{O'Shea} Court asserted that it had already disposed of the requirement in its earlier jurisdictional discussion: “We have already canvassed the necessarily conjectural nature of the threatened injury.” \textit{Id.} at 502.
  \item \textsuperscript{36} See \textit{TRIBE}, supra note 18, at 101-02 (“\textit{The Court demanded that Lyons show, apparently to a certainty, that he would again be choked without provocation or that the city had ordered or authorized that he be.}’’); \textit{Fisher}, supra note 18, at 1097 (arguing that the \textit{Lyons} test “\textit{requires a virtual certainty of future injury}”). \textit{But see Fisher}, supra note 18, at 1100 (suggesting that the language in \textit{Lyons} “\textit{should be narrowly construed to require only a reasonable likelihood of recurrence [of injury], instead of a virtual certainty of recurrence}” in order to reconcile the decision with prior case law).
  \item \textsuperscript{37} In a dissenting opinion joined by Justices Brennan, Blackmun and Stevens, Justice Marshall described this version of the facts in \textit{Lyons} which he contended was based upon “uncontradicted evidence in the record.” \textit{City of Los Angeles v. Lyons}, 461 U.S. 95, 114-15 (1983) (Marshall, J., dissenting).
  \item \textsuperscript{38} \textit{Id.} at 116 (Marshall, J., dissenting).
  \item \textsuperscript{39} \textit{Id.} at 115-16 (Marshall, J., dissenting).
\end{itemize}
the parties doubt that chokeholds pose a high risk of serious injury or death.\textsuperscript{40} The dissent observed that the policy of the City of Los Angeles permitted the use of chokeholds in a variety of instances, including a situation where, although the suspect is resisting arrest, the officer is not threatened with serious bodily injury.\textsuperscript{41}

Notwithstanding Lyons' showings, the Supreme Court concluded that he fell "far short of the allegations" necessary for standing to seek an injunction.\textsuperscript{42} The Court explained that, in order to establish an actual controversy in the case, Lyons would have had "to allege that he would have another encounter with the police."\textsuperscript{43} In addition, Lyons would have had "to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such manner."\textsuperscript{44}

Turning to the equitable constraints on Lyons' request for an injunction,\textsuperscript{45} the Court reiterated the "speculative nature of Lyons' claim of future injury" and concluded that he had failed to establish "any real or immediate threat that [he] would be wronged again."\textsuperscript{46} Alluding to Lyons' damage claim, the Court added that the injury that Lyons allegedly suffered would not go uncompensated. Finally, the Court emphasized, "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers . . . in the absence of irreparable injury which is both great and immediate."\textsuperscript{47}

B. Applying the Final Product: Lyons in the Lower Courts

Since Lyons, the Supreme Court has handed down a number of decisions discussing a plaintiff's standing to pursue injunctive relief in federal court.\textsuperscript{48} Although early decisions suggested that the Court

\begin{itemize}
\item \textsuperscript{40} Id. (Marshall, J., dissenting).
\item \textsuperscript{41} Id. at 118 (Marshall, J., dissenting).
\item \textsuperscript{42} Id. at 105.
\item \textsuperscript{43} Id. at 105-06.
\item \textsuperscript{44} Id. at 106.
\item \textsuperscript{45} Kenneth M. Casebeer, Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law, 37 U. MIAMI L. REV. 379, 411 (1983) (arguing that under the Lyons Court's analysis, "the justiciability standard becomes conceptually interchangeable with the prerequisite for equitable relief").
\item \textsuperscript{46} Lyons, 461 U.S. at 111.
\item \textsuperscript{47} Id. at 112.
\item \textsuperscript{48} See, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2306 (1991) (finding standing to seek injunctive relief where plaintiffs alleged "personal injury" that was "fairly traceable" to defendant's conduct); County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1667 (1991) (finding standing in class action where injury to plaintiff was likely to be "fairly traceable to de-
may have planned to abate the severity of Lyons, the Court recently issued a resounding reaffirmation of Lyons, eliminating any doubt that the decision retains its original harshness. At present, Lyons unquestionably provides the yardstick for lower federal courts confronting injunction requests. In addition, lower courts appear unanimous in concluding that Lyons' analysis of standing to seek injunctive relief governs requests for declaratory judgments.

In Allen v. Wright, 468 U.S. 737 (1984), a major post-Lyons standing decision concerning a request for injunctive relief, the Court's disposition turned on the definition of a judicially cognizable injury and the tracing requirement of standing doctrine. While relevant, these components of standing doctrine are not central to this Article.

In Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), the Court found that the plaintiff failed to demonstrate injury sufficiently imminent to establish standing. The Court further observed that where, as in Lyons, "a plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's control...we have insisted that the injury proceed with a high degree of immediacy." Id. at 2139 n.2; see Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 MICH. L. REV. 163, 226 (1992) (asserting that Lujan placed "renewed emphasis on the notion that the harm must be the imminent and nonspeculative").

See, e.g., Foster v. Center Township of LaPorte County, 798 F.2d 237, 244 (7th Cir. 1986) (dismissing claim for declaratory relief for failure to demonstrate Lyons standing requirement of immediate danger of injury); Haislah v. Walton, 748 F.2d 359, 360-61 (6th Cir. 1984) (denying availability of declaratory relief where lawfulness of defendant's actions had been determined leaving no existing dispute for adjudication); Brown v. Edwards, 721 F.2d 1442, 1446-47 (5th Cir. 1984) (holding that plaintiff lacked standing to seek either injunctive or declaratory relief under Lyons because of his failure to establish any real and immediate threat of injury); Buie v. Jones, 717 F.2d 925, 927-29 (4th Cir. 1983) (holding that prisoner serving life sentence lacked standing to seek declaratory and injunctive relief related to pretrial detainment under Lyons because他 was unlikely to be detained in same facility again); Hudson City News Co. v. Metro Assocs.,
Lower courts draw from Lyons in analyzing a variety of issues,52 and on several of these issues the courts are not in accord.53 One particularly difficult issue dividing the lower courts is relevant here: whether a plaintiff can establish standing to seek an injunction simply by relying on an existing damages claim.54

141 F.R.D. 386, 390 (D. Mass. 1992) (citing Lyons); Stover v. Meese, 625 F. Supp. 1414, 1417-18 (S.D. W. Va. 1988) (finding that claim for declaratory judgment by plaintiff who had not yet received a presidential pardon was too speculative and therefore failed to satisfy the actual controversy requirement); Doe v. McPaul, 599 F. Supp. 1421, 1434 (E.D. Ohio 1984) (observing that standing rules articulated in Lyons "govern all forms of equitable relief, both declaratory and injunctive").

52. See, e.g., United Food & Commercial Workers Union v. Kroger Co., 778 F.2d 1171, 1174-76 (6th Cir. 1985) (citing the mootness discussion in Lyons and holding that, unlike Lyons, the Union's claim for injunction pending litigation may evade review), cert. denied, 479 U.S. 815 (1986); Nicacio v. INS, 768 F.2d 1133, 1136 (9th Cir. 1985) (holding that members of Hispanic class had standing because, unlike Lyons, several class members had experienced repeated incidents and possibility of recurrence was not speculative); Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) (observing that Lyons dictates court restraint in issuing relief that affects enforcement of the criminal laws); Lewis v. Tully, 99 F.R.D. 632 (N.D. Ill. 1983) (distinguishing Lyons as not involving class action).

53. In addition to the split among circuit courts, discussed infra notes 60-61, the lower courts have taken contrasting approaches to the question whether plaintiffs in class action suits have standing to seek prospective relief. Compare Nicacio, 768 F.2d at 1136-37 and Perez-Funez v. INS, 619 F. Supp. 656, 669 n.24 (C.D. Cal. 1985) (finding plaintiffs in class action to have standing) with Howard v. City of Greenwood, 783 F.2d 1311, 1313 n.2 (5th Cir. 1986) (noting that standing is prerequisite for injunctive relief in class action) and John Does 1-100 v. Boyd, 613 F. Supp. 1514, 1528-29 (D. Minn. 1985) (denying plaintiffs' motion for class action certification where plaintiffs lacked standing to pursue injunctive relief). Because the standing determination in each of these cases is so fact-specific, it is difficult to assess whether these cases represent a lasting "split in the circuits." See Chemerinsky, supra note 25, at 681 ("Lower federal courts are divided as to whether class action suits are an exception to the Lyons doctrine.").

The lower courts have also undertaken markedly different approaches to analyzing whether the threat of injury to a plaintiff is sufficiently real and immediate to justify standing to seek injunctive relief. Compare Owens v. Nacogdoches County Hosp. Dist., 741 F. Supp. 1269, 1280-81 (E.D. Tex. 1990) (finding that a real threat of future injury to formerly pregnant plaintiff existed where hospital had long-standing pattern of patient dumping); Birl v. Wallis, 619 F. Supp. 481, 488 (M.D. Ala. 1985) (holding that state mental institution's trial visiting policy posed real and immediate threat of injury to former patient where there was likelihood that patient would be recommitted in the future) and Lake v. Speziale, 580 F. Supp. 1315, 1327 (D. Conn. 1984) (finding that indigent plaintiff had standing to seek injunction requiring judges to appoint counsel to indigent individuals in civil contempt proceedings because plaintiff faced real threat of being charged with civil contempt in the future) with Alvarez v. City of Chicago, 649 F. Supp. 43, 45 (N.D. Ill. 1986) (holding that hearing-impaired plaintiffs who were beaten, falsely arrested, and imprisoned by police officers lacked standing to seek injunction because claim is speculative, and threat of future injury is not sufficiently real and immediate) and Smith v. Montgomery County, 573 F. Supp. 604, 608 (D. Md. 1983) (finding that plaintiff lacked standing to challenge detention center's strip search policy because he failed to allege credible threat of future injury from the policy).

54. See infra notes 60-61 for a discussion of cases on both sides of the issue.
This issue implicates plaintiffs like Sarah Mills, who have a palpable injury based on a past wrong (the death of her child) and who also seek injunctive relief against future harm (similar treatment by the hospital staff). In Lyons, the plaintiff's damages claim was severed from his injunction claim, and, as a result, the Court decided only whether the plaintiff had standing to pursue his injunction request alone. The Court did not explicitly consider whether a plaintiff simultaneously pursuing damages and injunction claims must make a separate showing that standing exists for each type of relief.

The most plausible reading of Lyons suggests that a plaintiff must, in fact, demonstrate standing for each type of relief sought—even where the plaintiff pursues several types of relief. Although Lyons' damages and injunction claims were procedurally separated, the existence of his damages claim and the injury underlying that claim arguably could provide the "personal stake" and the "concrete adverseness" necessary to confer standing to prosecute the injunction request. Lyons' injury transported his injunction claim from the realm of fiction by providing real facts and real injury to give substance and energy to the litigation. The Court decided, however, that Lyons lacked the necessary standing to pursue the injunction even though he had—in the Court's words—"a live controversy" with the City of Los Angeles through his damages claim.

The Court's analysis of the injunction request indicates that it was not the separation of the injunction claim from the damages claim that undermined Lyons' standing to seek the injunction. Rather, the Court suggested, it was Lyons' failure to make the independent showing necessary to establish "an actual controversy" over the injunction request itself. Such an independent showing would presumably be required even if the damages claim remained joined with the injunction request.

In confronting this issue, most federal courts have agreed with this reading of Lyons. The consensus among these courts is that, under Lyons, a plaintiff must establish standing separately for each type of relief requested. The Ninth Circuit, however, has reached a

56. "Equitable relief no longer serves as alternative relief. It must be pled as its own cause of action." Casebeer, supra note 45, at 410.
58. Id. at 109.
59. Id. at 105-06.
60. Doucette v. Ives, 947 F.2d 21, 29 (1st Cir. 1991) (recognizing that standing to seek damages for past deprivations does not establish standing to seek injunctive relief); Facio v. Jones, 929 F.2d 541, 544 (10th Cir. 1991) (finding that a plaintiff who has been injured can bring an action to recover damages, but that same plaintiff cannot maintain a
markedly different conclusion. According to the Ninth Circuit, once a plaintiff's standing to seek damages is established, a court need not undertake a separate standing inquiry for equitable relief so long as the damages and equitable claims are predicated on "the same operative facts and legal theory."^{61}

Although not the most plausible reading of Lyons, the Ninth Circuit's position is nevertheless entirely consistent with the components of standing doctrine applied in Lyons. Lyons focused on the "concrete adverseness" and "personal stake" requirements of standing law.^{62} As explained in detail below, not only is the Ninth Cir-

declaratory or injunctive action without demonstrating "a good chance of being likewise injured in the future"); Robinson v. City of Chicago, 868 F.2d 959, 967 (7th Cir. 1989) (finding Lyons to require separate showing of standing for each type of relief requested), cert. denied, 493 U.S. 1035 (1990); National Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228, 1234 (D.C. Cir. 1987) (interpreting Lyons to establish that damages standing may be available while injunctive standing is not); Tucker v. Phyfer, 819 F.2d 1030, 1034 (11th Cir. 1987) ("Lyons stands for the proposition that a plaintiff who has standing to bring a damages claim does not automatically have standing to litigate a claim for injunctive relief arising out of the same set of operative facts."); O'Donnell Construction Co. v. District of Columbia, 762 F. Supp. 354, 361 (D.D.C. 1991) (holding that plaintiff may possess standing as to damages but not as to injunctive relief under Lyons), rev'd on other grounds, 963 F.2d 420 (1992); see also Beattie v. United States, 949 F.2d 1092, 1093 (10th Cir. 1991) (reading Lyons to provide that plaintiff with standing for damages claim must still show a good chance of being injured in the future to establish standing for injunction claim); Stewart v. County of Lubbock, 767 F.2d 153, 155 n.3 (5th Cir. 1985) (suggesting in dictum that standing to seek equitable relief should be considered separately from standing to seek damages), cert. denied, 475 U.S. 1053 (1986); Olzinski v. Maciona, 714 F. Supp. 401, 411 (E.D. Wis. 1989) (reading Lyons to stand for the proposition that past exposure to allegedly unconstitutional action provides standing for damages but not for injunctive relief). But see Brower v. Village of Bolingbrook, 735 F. Supp. 768, 772 (N.D. Ill. 1990) (suggesting that a plaintiff need not establish separate standing for damages and injunction claims combined in same case, although decided after Seventh Circuit decision to the contrary).

61. Smith v. City of Fontana, 818 F.2d 1411, 1423 (9th Cir.), cert. denied, 484 U.S. 935 (1987). Smith's requirement of overlap between the damages and injunction claim modified the Ninth Circuit's earlier, less restrictive reading of Lyons in Giles v. Acker-

man, 746 F.2d 614, 619 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985). See Smith, 818 F.2d at 1423 ("Interpreting Giles in light of Lyons, we believe that we must limit . . . Giles . . . ."); see also Soules v. Kauaians for Nukolii Campaign Committee, 849 F.2d 1176, 1179-80 n.6 (9th Cir. 1988) (following Giles as restricted by Smith); Blair v. Shanahan, 775 F. Supp. 1315, 1319 (N.D. Cal. 1991) (determining that the case falls "within the Giles exception . . . as . . . limited by Smith").

Although the Court of Appeals for the Seventh Circuit had previously interpreted Lyons differently, the United States District Court for the Northern District of Illinois recently rendered a decision in accord with the Ninth Circuit view. See Brower v. Village of Bolingbrook, 735 F. Supp. 768 (N.D. Ill. 1990). The Brower court stated that Lyons does not "apply to a suit seeking both damages and an injunction." Id. at 772. The district court opined that Lyons "appeared to concede that Article III would be satisfied if the bid for an injunction were combined with a suit for damages." Id.

62. One common formulation of standing doctrine provides for three minimum requirements: (1) the party invoking the federal court's power "personally has suffered
cuit's position consistent with these standard measures, but it is also normatively more appealing than the approach taken by other courts of appeals.

II. UNRAVELLING REMEDIAL QUESTIONS FROM STANDING

Proposals for reform of standing doctrine are plentiful. Among the proposals are persuasive entreaties to eliminate or substantially modify the requirement—so troublesome to plaintiffs such as Sarah Mills—that the plaintiff demonstrate an actual or threatened injury likely to be redressed by a favorable decision. In Part III below, I too argue that this "redress requirement" is unnecessary and unsuitable in Lyons-type cases. Clearing the way for this argument, this Part reviews the reasons for extricating the standing inquiry from the decision whether a particular remedy will be appropriate in a given case.

Of all the uncertainty surrounding the meaning of Lyons, one point is clear: the Court endorsed a standing analysis that makes no clear distinction between threshold questions about a federal court's constitutional power to entertain a lawsuit and the decision whether to award a particular remedy. Specifically, the Lyons Court included in its standing formula an analysis of whether the injunction

some actual or threatened injury as a result of the putatively illegal conduct of the defendant,” (2) the injury “fairly can be traced to the challenged action,” and (3) the injury “is likely to be redressed by a favorable decision.” Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 478 (1982) (internal quotation marks and citations omitted). The focus of the Lyons problem in injunction cases is the first requirement, concerning the plaintiff’s “threatened injury.” Factors such as a plaintiff’s “personal stake” in the controversy and “concrete adverseness” serve as aids in assessing whether the threatened injury is sufficiently “real and immediate.” Lyons, 461 U.S. at 101-02.


64. See, e.g., Fletcher, supra note 63, at 229-34 (arguing for elimination of injury in fact requirement); Nichol, supra note 63, at 1939-50 (proposing the reformulation of the injury requirement); Nichol, supra note 18, at 70 (arguing that the Supreme Court should reconsider “particularized injury standard”); Tushnet, supra note 63, at 700 (proposing that courts reduce standing inquiry to a “candid assessment of the plaintiff’s ability to present the case adequately and a pragmatic evaluation of the factual concreteness” (citation omitted)).

65. Fallon, supra note 18, at 7.
Lyons sought would eliminate the threat of a particular injury. In this standing analysis, the Court emphasized what I refer to throughout this Article as "remedial efficacy": the effectiveness and appropriateness of the remedy a plaintiff seeks. For injunctive relief, a plaintiff must demonstrate a threat of injury that an injunction could properly eliminate. Otherwise, Lyons prevents the plaintiff from even trying to convince the court that its power to issue prospective relief is needed.

In essence, the Lyons Court collapsed analysis of jurisdictional and remedial concerns into a single threshold enterprise. Not only is this approach unnecessarily severe, but it also unwisely obscures the concerns at the heart of the decision whether to issue an injunction. Moreover, neither the values traditionally associated with justiciability doctrines nor federalism considerations demand the approach espoused in Lyons.

Analysis of the Lyons problem differs significantly depending on whether the plaintiff seeking injunctive relief has already received injury. Indeed, as explored in Part III, a plaintiff with a potential damages claim is far better situated to overcome the Article III and prudential hurdles composing standing doctrine than one with no such claim. For all plaintiffs, however, forceful arguments counsel against Lyons' remedial efficacy approach. These arguments are canvassed immediately below.

A. Remedial Concerns

1. Equitable Principles. In his Lyons dissent, Justice Marshall identified a number of severe consequences of the majority's approach to the case. His arguments were later expanded by commentators. In particular, Justice Marshall cited the broad discretion a federal court normally enjoys in deciding whether to grant equitable relief to protect a party injured by unlawful conduct. With full development of the facts motivating a dispute, a federal court may readily grant relief that the court was actually inclined to deny at the inception of the suit. Yet under the Lyons formulation, the court must make the crucial remedial decision at the threshold of litigation—without the benefit of discovery or a full-scale hearing on the merits of the plaintiff's allegations. At this early stage, the court

66. Id.
67. Professor Richard Fallon's article on Lyons presents a particularly helpful examination of the practical consequences of the decision. Fallon, supra note 18; see also Tribe, supra note 18, at 114-20; Gerwatowski, supra note 18, at 794-802.
68. Lyons, 461 U.S. at 131 (Marshall, J., dissenting).
69. Id. (asserting that "it will rarely be easy to decide with any certainty at the outset of a lawsuit that no equitable relief would be appropriate under any conceivable set of
may well dismiss a case for which further study would have uncovered a sound basis for injunctive relief.\textsuperscript{70}

The distinctive potential of injunctions is their ability to anticipate and prevent threatened injury before harm (or at least further harm) actually happens.\textsuperscript{71} Injunctions not only prevent suffering, but also avoid the difficult task of reconstructing with money damages the position the plaintiff would have been in but for the defendant's wrongful conduct.\textsuperscript{72} Injunctions usually enable courts to avoid vexing questions, such as valuation, avoidable consequences, and proximate cause.\textsuperscript{73} The Lyons formula, however, blunts this potential.

\textsuperscript{70} Cf. Shanks v. City of Dallas, 752 F.2d 1092, 1095-96 (5th Cir. 1985) (deciding that district court order based on lack of standing had effect of improperly denying injunction on the merits).

The Supreme Court has noted that, in making rulings on standing at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" because the Court will "presume[s] that general allegations embrace those specific facts that are necessary to support the claim..." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992) (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990)). Nevertheless, Lyons and the many decisions applying it in the context of a motion to dismiss raise substantial doubt about the willingness of federal courts to adhere faithfully and literally to this language. See, e.g., Feit v. Ward, 886 F.2d 848, 856-57 (7th Cir. 1989) (dismissing employee's suit against former employer because the termination of employment destroyed plaintiff's standing); Hamill v. Wright, 870 F.2d 1032, 1035-36 (5th Cir. 1989) (dismissing civil rights claim seeking injunction against future contempt proceedings because it was improbable that future contempt proceedings would also be unlawful); Graham v. Jones, 709 F. Supp. 969, 974 (D. Or. 1989) (dismissing civil rights claim for failure to show that police activities threatened immediate and irreparable injury); Runkle v. Cohen, 666 F. Supp. 700, 702 (M.D. Pa. 1986) (dismissing taxpayer's complaint because changes in tax refund intercept program made assertions of future injury purely speculative); Alvarez v. City of Chicago, 649 F. Supp. 43, 45-46 (N.D. Ill. 1986) (dismissing complaint of hearing-impaired plaintiffs who were beaten and falsely imprisoned on two occasions because plaintiffs failed to prove that they would be beaten in the future); Minne v. Indiana, 627 F. Supp. 1189, 1194 (N.D. Ind. 1986) (dismissing civil rights claim by characterizing plaintiff's claim of future injury as conjectural, remote, and speculative); see also Jones v. Bowman, 664 F. Supp. 433, 433-34 (N.D. Ind. 1987) (denying motion to enjoin police from strip searching arrestees because plaintiff could not show significant likelihood that she would be strip searched in the future).

\textsuperscript{71} See, e.g., Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 82 (1902) (holding that "one of the most valuable features of equity jurisdiction [is] to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable"); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 862 (13th ed. 1886) (indicating that injunctions primarily serve the unique role of preventing and protecting). But see OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 8 (1978) (characterizing an injunction as a special "instrument designed to prevent a wrong from occurring in the future" is flawed in two respects: "it overstates the claim of uniqueness and takes insufficient account of reparative and structural injunctions").


\textsuperscript{73} Id. at 59; see also Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. FLA. L. REV. 346, 351-52 (1981) (arguing that in addition to
tial by severely limiting the availability of injunctive relief.

The rule of Lyons also makes cautious reflection on the propriety of prospective relief impossible. Yet, the inquiry whether to grant an injunctive remedy needs to be rich in its consideration of the specific facts and circumstances of a particular case. Indeed, the hallmark of equity jurisdiction is the power of the chancellor to mold each decree to the necessities of the case before the court. 74

To require an up-front decision on whether a plaintiff may seek a prospective remedy robs the court and the parties of the opportunity to explore the possible ramifications of the requested injunction and to tailor an appropriate decree. 75 In fact, the Lyons approach ignores the various factors that courts traditionally weigh in evaluating whether to issue an injunction.

Under equitable doctrine, a court deciding whether to issue an injunction should carefully weigh a number of factors, such as the magnitude of the threatened harm, the probability and proximity of

avoiding imprecise measurement, injunctions serve the economic policy of actually forcing parties to bargain privately).

74. See Fiss, supra note 71, at 12 (arguing that injunctions can be "individuated" by addressing a clearly identified individual, describing acts prohibited with specificity, and delineating particular beneficiaries); Fallon, supra note 18, at 46 (indicating that "[s]tandards of remedial propriety probably never should be cast as determinate rules; trial court discretion seems unavoidable within the law of remedies"); Kent Roach, The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies, 33 Ariz. L. Rev. 859, 882 (1991) (asserting that the central elements of equity are breadth and flexibility of equitable remedial powers); Gene R. Shreve, Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law, 1991 B.Y.U. L. Rev. 767, 803 (1991) (noting that "[e]quity evolved to a large extent as a natural law reaction against legal formalism").

75. See Fallon, supra note 18, at 73-74 (suggesting that Lyons' approach does not respect the aspiration of equity jurisprudence "to achieve a particularized balancing of interests that would be affected by granting or denying a particular remedy"); Pierce, supra note 22, at 1273 ("How could the [Lyons] Court conclude that injunctive relief of some type was an inappropriate way of limiting the [police department's] policy choices with respect to chokeholds [when the Court did not even know] what the [department's] policy was?" (citation omitted)); cf. Meltzer, supra note 63, at 318 (noting that discovery and proof help uncover instances where there is a pattern of conduct to justify offensive deterrent remedies).

Casebeer, supra note 45, at 410-11, argues that the Lyons Court's collapse of the standing and remedial inquiries into one threshold undertaking is a return to "code pleading," long rejected by the Federal Rules of Civil Procedure. Because the Lyons Court did not permit actual proof at trial to determine the nature of the remedy allowed, Casebeer argues that the Court treated the pleading stage of the litigation as a screen for remedial options and thereby rejected the notice pleading approach of the Federal Rules. Id. at 411; see also City of Los Angeles v. Lyons, 461 U.S. 95, 121 (1983) (Marshall, J., dissenting) ("I am aware of no case decided since the abolition of the old common-law forms of action ... that in any way supports [the Court's] crabbed construction of [Lyons'] complaint.").
its occurrence, and the difficulty of supervising the remedy.\textsuperscript{76} Especially for disputes such as Lyons' and Mills'—where the impact of the requested injunction on the defendant can be significant—the court also must carefully heed the hardship on the defendant imposed by the requested relief. In many cases, these factors—along with the concern that jury trials are generally not available in equitable proceedings\textsuperscript{77}—can stand as important obstacles to injunctive relief.

Doctrine restricting injunctions derives from the unique considerations implicated by prospective relief—for example, the tendency of injunction actions to drain court resources. Injunctions can consume significant court time and money throughout the process of formulation, implementation, administration, and enforcement.\textsuperscript{78} Restrictions may also reflect court concern that, because injunctions are personal commands of the court, they require the court to risk its power, prestige, and credibility more than other remedies. This concern is exacerbated where the requested injunction may be impractical to implement, burdensome to supervise,\textsuperscript{79} or—in a case such as Lyons' and Mills'—where the injunction potentially interferes with institutional management or the authority of another governmental entity.\textsuperscript{80}

Injunctions also operate as direct governmental restraints on conduct. Therefore, a court may hesitate to issue an injunction if there is any chance that it may ultimately prove unnecessary. Under such circumstances, the injunctive decree would needlessly restrain the defendant and potentially taint her reputation.\textsuperscript{81} Moreover, 


\textsuperscript{77} See, e.g., Rendleman, supra note 73, at 354 (noting that judges rather than juries decide factual issues in equitable proceedings and arguing that the contemporary policy favoring jury trials can persuade courts to prefer damages to injunctions).

\textsuperscript{78} Id.

\textsuperscript{79} LAYCOCK, supra note 76, at 269 (stating that courts should deny permanent relief if impracticality problems outweigh disadvantage to plaintiff of receiving damages or other "substitutionary" relief).

\textsuperscript{80} For review of concerns regarding the use of injunctions in institutional reform litigation, see, for example, William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Interference, 91 YALE L.J. 635, 635-49 (1982); Meltzer, supra note 63, at 320-21; Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 GEO. L.J. 1355, 1378-1409 (1991).

\textsuperscript{81} See, e.g., SEC v. Harwyn Indus. Corp., 326 F. Supp. 943, 957 (S.D.N.Y. 1971) (noting that "issuance of an injunction can sometimes have a harmful impact on the per-
either as a result of overbreadth or unintended consequences, the injunction may also prohibit or discourage perfectly lawful, socially useful activity of the defendant or innocent third-parties. If established principles of equity thus support the Lyons Court's trepidation about granting injunctive relief. Lyons' "remedial standing" analysis, however, is not the proper technique for handling the Court's concern. In fact, the analysis submerges time-tested equitable doctrine, which stands ready to accommodate possible doubts about the propriety of injunctions in specific cases. As personal reputation and legitimate business activities of the defendants" (citing SEC v. Broadwell Securities, Inc., 240 F. Supp. 962, 967 (S.D.N.Y. 1965)).

82. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 223 (1985) (asking if key motivation behind restricting injunctive relief is concerned with prohibiting "socially useful enterprises that might be run lawfully and harmlessly"). Injunctions can inappropriately intimidate those entities to which they are directed as well as innocent third parties not involved in the litigation. See LAYCOCK, supra note 76, at 160-64, 268-69. Felix Frankfurter and Nathan Greene, in describing the "most vulnerable charges against the injunction," note "that the injunction includes more than the lawless; that it leaves the lawless undefined and thus terrorizes innocent conduct; that it employs the most powerful resources of the law on one side of a bitter social struggle." FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 81 (1930).


A related economic concern, less relevant to a Lyons-type case, focuses on the capacity of injunctions to impose on a defendant a greater financial obligation than a damages judgment. Although an insolvent defendant may successfully evade paying a damages judgment, injunctive orders can be much harder to avoid since they are backed by the threat of contempt. The injunction may therefore force an insolvent defendant to perform activities requiring expenditure of resources. Accordingly, courts in equity have expressed concern that injunctions can undercut the law's concern with equality among creditors, preferring the plaintiff over the defendant's other creditors who possess only an uncollectible damages judgment or no judgment at all. See LAYCOCK, supra note 76, at 271 (restating general rule that "[a] court should refuse specific relief if the relief would prefer plaintiff over other creditors of an insolvent defendant").

83. Coined by Professor Fallon, the term "remedial standing" refers to the "requirement that any requested remedy must be effective in redressing the injury on which standing is predicated, or some other injury sufficient to support standing." See Fallon, supra note 18, at 11.

84. For example, see Rendleman, supra note 73, for discussion of how modern courts use the inadequate remedy at law requirement to evaluate economic, moral, and administrative factors bearing on the decision to grant an injunction.

I do not mean to suggest, of course, that there is no room for improving the traditional doctrine restricting injunctions. See generally LAYCOCK, supra note 76, and Fiss, supra note 71 (proposing reforms of equitable restrictions on injunctive relief). See also infra notes 226-55 (discussing proposed changes to the doctrine of equitable ripeness).
a threshold doctrine, the Lyons formula effectively renders useless consideration of the equitable principles deliberately designed to use facts developed in the course of litigation to restrict and customize injunctive relief to specific cases.85

2. Civil Rights Remedies. The effect of Lyons remedial standing is pervasive, extending beyond the civil rights context in which it was developed. Nevertheless, the decision's impact in civil rights cases is particularly devastating.

For a number of reasons, injunctions have served as "the primary remedy in civil rights litigation."86 Injunctions are well suited for accommodating the collective nature of many civil rights claims, which often seek to change the status of an entire group.87 Professor Fiss theorizes that civil rights litigants have increasingly used injunctions because they allocate power to the "citizen-grievant (the power of initiation) and to the judiciary (the power of decision)."88 This allocation of power, Professor Fiss posits, is crucial to the litigant's attempt to overcome the tyranny of majoritarian forces.89

Thus, Lyons significantly circumscribes a civil rights plaintiff's ability to pursue an important, if not essential, tool for success. Moreover, this effect of Lyons is not likely to be mitigated through the class action mechanism. Indeed, for many types of civil rights violations, it is impossible to identify a potential class because the violations are short in duration and difficult to identify in advance.90 In addition, the Supreme Court is likely to view a class of plaintiffs as no more than a conglomerate of persons who each suffer from the same infirmity as an individual plaintiff such as Adolph Lyons and Sarah Mills: the inability to demonstrate a probable threat of repeated injury.91

The fallout from Lyons is even more stark in the many civil rights cases where damages are not even available. An array of obstacles—such as the Eleventh Amendment and absolute immunity rules—prohibit money damages in suits challenging official miscon-
duct, yet leave open the possibility of prospective relief. In such cases, Lyons obliterates not only the most effective remedy, but the sole remedy.

Another problem arises where government official conduct is protected by qualified immunity. In qualified immunity cases, case law allows for liability only where the conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Where the law does not clearly prohibit an official's activity, qualified immunity insulates the official from individual liability for damages. Thus, the victim of the activity will not receive damages if the law is unsettled. Moreover, if the victim cannot meet the rigorous Lyons showing of threatened repeated injury, injunctive relief will also be unavailable. Because neither a damages nor an injunction claim can proceed, the law may never become clearly settled, and the conduct can continue indefinitely despite the claims of many victims. The intersection of Lyons and qualified immunity rules therefore creates an impasse not only for many victims of official misconduct, but also for the development of the law itself.

3. General Remedial Principles. Lyons also conflicts with broad principles of federal court remedies jurisprudence. In fact, in a decision predating Lyons, the United States Supreme Court mapped out an approach separating justiciability questions concerning the timing of a suit from questions about the propriety of injunctive relief. Any doubt about the continuing vitality of this approach is belied by the notion, repeatedly reflected in the cases, that courts enjoy wide latitude to fashion remedies for violations of federal law.

The Supreme Court’s decision in Franklin v. Gwinnett County...


94. This line of reasoning was suggested to me by Douglas Laycock. The argument has greatest force if one interprets Lyons to govern requests for declaratory relief. See supra note 51 for a list of cases in which courts have applied Lyons in declaratory judgment actions. See also Samuels v. Mackell, 401 U.S. 66, 72 (1971) (equating declaratory and injunctive relief).

95. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (asserting that "the court's power to grant injunctive relief survives discontinuance of the illegal conduct" (citations omitted)).

96. See, e.g., Bell v. Hood, 327 U.S. 678, 684 (1946) ("Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (citations omitted)).
Public Schools strongly reaffirms "the traditional presumption" that federal courts have at their disposal "all appropriate relief" available to remedy transgressions of federal standards of conduct. In other words, as long as a federal court has power to extend some right of recovery, the court is vested with the authority to make that right effective by using any of the procedures or remedies suitable under the exigencies of a particular case. Implicit in this formulation is the view that the threshold inquiry into whether a court should take control of a particular dispute is wholly independent of any decision about the appropriate remedial solution to the dispute. The court's competence to award particular relief is presumed to be within the court's expertise.

Finally, Lyons is in tension with the ethic of caution and patience permeating remedies law. Courts traditionally wait until after ruling on the merits of a case before allowing a remedial obstacle to bar the specific relief requested. For example, in the context of damages, a court will not use problems of mitigation, certainty,
or foreseeability to avoid adjudicating liability. Similarly, for injunctions, courts treat liability as a first step to be resolved before weighing the propriety of permanent injunctive relief. Courts generally reckon with restrictions on injunctive relief only after concluding that the plaintiff has succeeded on the merits of her claim.

B. Justiciability Values

Lyons is also not mandated by the values traditionally associated with standing dogma. These values, identified by courts and

103. See, e.g., Pinnacle Port Community Ass'n v. Orenstein, 952 F.2d 375, 379 (11th Cir. 1992) (reversing district court's determination of damages as being unrelated to and not arising naturally from the breach); Potti v. Duramed Pharmaceuticals, Inc., 938 F.2d 641, 649-50 (6th Cir. 1991) (remanding on the issue of damages to determine whether the damages were within contemplation of the parties and whether the breach actually caused the consequential damages); Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 894 (1st Cir. 1988) (holding that once breach of contract is established, "a plaintiff may receive consequential damages if the plaintiff proves with sufficient evidence that ... [the breach] proximately caused the loss of identifiable professional opportunities"), cert. denied, 486 U.S. 1043 (1989); National Controls v. National Semiconductor, 833 F.2d 491, 496-500 (3d Cir. 1987) (holding that to sustain a damages award, plaintiff must have provided sufficient evidence that the lost profits were proximately caused by defendant's breach); Murphy v. Cincinnati Ins. Co., 772 F.2d 273, 277 (6th Cir. 1985) (affirming award of attorney's fees as proper measure of damages arising naturally from a breach of an insurer's implied contractual duty to act reasonably in refusing to pay a claim).

104. See, e.g., K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (holding that for permanent injunctive relief, "the movant must show 'actual success' on the merits of the claim, rather than the mere likelihood of such success" (citing Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987))); Shanks v. City of Dallas, 752 F.2d 1092, 1097 (5th Cir. 1985) ("A permanent injunction... is usually granted only after a full trial on the merits of a particular suit."); CIBA-GEIGY Corp. v. Bolar Pharmaceutical Co., 747 F.2d 844, 850 (3d Cir. 1984) ("In deciding whether a permanent injunction should be issued, the court must determine if the plaintiff has actually succeeded on the merits.... If so, the court must then consider the appropriate remedy." (citation omitted)), cert. denied, 471 U.S. 1137 (1985); American Home Prods. Corp. v. Barr Lab. Inc., 656 F. Supp. 1058, 1062 (D.N.J.) (holding that "[s]hould plaintiff succeed on the merits of at least one of its claims, the court may fashion an appropriate, permanent injunctive remedy so long as the balance of equities favors such a remedy"), aff'd on other grounds, 834 F.2d 368 (3rd Cir. 1987).

105. See, e.g., CIBA-GEIGY, 747 F.2d at 853 (addressing the proper scope of injunction after confirming that defendant violated the law); Logan v. Shealy, 660 F.2d 1007, 1012 (4th Cir. 1981) (summarizing how the district court, after conducting jury trial to dispose of related claims, requested that parties present additional authority in connection with plaintiff's claim for injunctive relief), cert. denied, 455 U.S. 942 (1982); Winston Research Corp. v. Minnesota Mining & Mfg. Co., 350 F.2d 134, 141 (9th Cir. 1965) (affirming trade secret liability before addressing challenge to length of permanent injunction); City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159 (1982) (holding that actions of theatre constituted a public nuisance before questioning whether injunction would be improper prior restraint on expressive conduct).

106. Cf. LAYCOOK, supra note 82, at 223-25 (asserting that "constitutional and re-
commentators as principles inspiring standing doctrine, include: (1) ensuring that litigants are truly adverse;107 (2) requiring that the individuals in control of the litigation are directly concerned with its outcome;108 (3) guaranteeing that a concrete case illustrates the consequences of the court’s decision;109 (4) preventing the federal judiciary from expropriating the prerogatives of the elected branches of government;110 and (5) shielding the federal judiciary from the distracting and weakening effect of a deluge of cases.111 Upon close ex-

medial ripeness” serve “different primary purposes”). But see Shreve, supra note 76, at 401 (arguing that “[i]t seems appropriate to draw a parallel between the imminence requirement of equitable jurisdiction and the ‘case and controversy’ requirement of Article III” because the doctrines serve similar goals).

107. See, e.g., Flast v. Cohen, 392 U.S. 83, 106 (1968) (holding that standing requirements ensure that “issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor”); Chemerinsky, supra note 25, at 697 (arguing that several justiciability requirements seek to ensure that “the federal court decision is likely to have an effect” on the parties); Fletcher, supra note 63, at 222 (asserting that standing seeks to ensure that “litigants are truly adverse”).

108. See, e.g., Brilmayer, supra note 24, at 306-11 (arguing that personal stake requirement serves values of representation and self-determination); Fletcher, supra note 63, at 222 (recognizing that standing “ensur[es] that the people most directly concerned are able to litigate the questions at issue”; Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 HARV. L. REV. 605, 651-52 (1992) (arguing that standing requires the plaintiff have a personal stake in the outcome in order to protect “the interests of nonlitigants who will be bound by the stare decisis effect of the judgment”).

109. See, e.g., Cohen, 392 U.S. at 106 (holding that standing requirements ensure that “questions will be framed with the necessary specificity”); Baker v. Carr, 369 U.S. 186, 204 (1962) (asserting that a concrete context “sharpen[s] the presentation of issues [needed] for illumination of difficult Constitutional questions”); Fallon, supra note 18, at 13 (holding that “one set of concerns” animating standing doctrine “involves the functional requisites of informed adjudication”); Fletcher, supra note 63, at 222 (asserting that standing seeks to ensure that a “case informs the court of the consequences of its decision”).

110. See, e.g., Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136, 2145 (1992) (holding that standing doctrine ensures that federal courts are confined to their “separate and distinct constitutional role” and is one of the essential elements identifying those “Cases” and “Controversies” that are the business of courts rather than of the political branches); Brilmayer, supra note 24, at 303 (noting that standing seeks to ensure that the “countermajoritarian institution of courts is held to a minimum “in a fundamentally democratic society”); Chemerinsky, supra note 25, at 697 (asserting that justiciability doctrines are concerned with whether judicial review should be refused in certain instances); Monaghan, supra note 63, at 1376-77 (arguing that federal courts would violate separation of powers principles if they opened their doors to “ideological” plaintiffs without congressional authorization).

111. See, e.g., United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (asserting that relaxation of standing requirements would divert limited resources and impair the effectiveness of federal courts); Fallon, supra note 18, at 15 (arguing that underlying standing doctrine is the notion that “scarce judicial resources should not be diverted from their most important historical functions”); Meltzer, supra note 63, at 308 (noting the contention that standing doctrine “guards against a vast and
amination, the *Lyons* approach to standing is far broader than is necessary to preserve these values.

1. **True Adversity.** According to standing jurisprudence, true adversity between the parties is an important component of a litigant's standing to sue. A plaintiff whose interests are at odds with the defendant's is required for the robust advocacy that assists courts in making reliable decisions.\(^1\) Courts can count on adverse parties—the argument goes—to sharpen the issues with vigorous contest.\(^3\)

Commentators have long attacked the logic of this reasoning.\(^4\) But one need not indict traditional standing principles to conclude that *Lyons'* emphasis on remedial efficacy does not necessarily further the value of robust advocacy.

To be sure, evaluation of parties' adversity can rationally serve as a surrogate for scrutiny of their ability to illuminate the issues central to a dispute. But it is neither necessary nor logical to measure adversity through such an indirect means as remedial efficacy. Remedial efficacy focuses on whether the plaintiff has asked for a remedy that will eliminate real or threatened injury and is proper under all of the circumstances of the case. This inquiry is far removed from the question whether the parties are at each other's throats or—although amicable—nonetheless have truly conflicting interests. Moreover, much more direct means of testing adversity exist, such as studying whether the relationship between the parties suggests collusion or investigating whether the parties lack resources, ability, or inclination to litigate vigorously.\(^1\)

2. **Personal Stake.** Closely related to adversity is the standing requirement that the plaintiff have a personal stake in the outcome of suit. The personal stake requirement guarantees that interested parties are in control of litigation. Like the adversity standard, the

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1. Undesirable increase in litigation challenging government action); Monaghan, *supra* note 63, at 1376 (recognizing that increasing the number of 'ideological' plaintiffs may "critically impair the ability of a Supreme Court, already hard pressed, to give coherent direction to our corpus of constitutional law"); cf. Nichol, *supra* note 24, at 176 (arguing that ripeness doctrine serves to ensure efficient allocation of governmental powers).

112. But see Meltzer, *supra* note 63, at 307 (arguing that this notion is "dubious in general").


114. For critical examples of this reasoning, see Louis L. Jaffee, *The Citizen as Liti

115. Tushnet, *supra* note 63, at 679, 700 (asserting that collusion and lack of diligence are relevant to issue of adverseness).
personal stake requirement is designed to promote vigorous advocacy.

But "personal stake" focuses on another matter as well: adequate representation of nonlitigants whose interests are implicated by the litigation. Because the precedential impact of a case can touch nonlitigants' interests directly, notions of fairness suggest that nonlitigants are entitled to some assurance of adequate representation in litigation. According to this reasoning, problems with adequate representation may arise because a plaintiff without a personal stake may not forcefully and vividly demonstrate the full scope of a legal claim and may be less likely to anticipate the practical and tactical consequences of various litigation strategies.

Supplementing the literature on representation, one scholar has proffered yet another value animating the personal stake requirement—self-determination. According to this view, requiring the plaintiff to have a personal stake in the suit implements our legal system's preference for allowing individuals to make their own decisions about asserting their legal rights. The value of self-determination emphasizes individual personal choice and suggests that "persons should not be able to assert the rights of others even assuming they are good representatives." Intimately tied to the self-determination value are notions such as preference for individualism, distaste for governmental paternalism, and tolerance for the choices of others.

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117. Brilmayer, supra note 24, at 306-10; Meltzer, supra note 63, at 307.
118. Brilmayer, supra note 24, at 310-11.
119. Id. at 310-15. For a critique of this view, see Mark V. Tushnet, Comment, The Sociology of Article III: A Response to Professor Brilmayer, 93 HARV. L. REV. 1698, 1723-25 (1980). He argues that "no good reason exists to accept [the] assumption that the ideology of contemporary law is consistent only with self-determination, and inconsistent with the altruism of the public interest litigant." Id. at 1724.
120. Brilmayer, supra note 24, at 310.
121. Id. at 310-11. Professor Brilmayer's self-determination theory has some caselaw support. In Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992), the Court explained that where a plaintiff asserts the rights of third-party nonlitigants, a rigorous standard is applied. In such a circumstance, the Court held:

The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict... and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.... Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, it is ordinarily substantially more difficult to establish.

Id. at 2137 (internal quotation marks and citations omitted).
As with the adversity requirement, commentators have advanced persuasive arguments that the personal stake rule is inadequately tailored to satisfy its stated purposes. In particular, several scholars question whether plaintiffs motivated by idealism alone are presumptively any less able or motivated than plaintiffs with a more "personal" or economic interest in the outcome of litigation. More over, questions about whether a remedy is appropriate and effective in a particular case are tangential to the issues of representation and advocacy.

Yet the pertinence of the personal stake rule to a case such as Lyons' or Mills' is not so easily dismissed. The concerns underlying the rule are relevant not only to purely ideological plaintiffs, but also plaintiffs like Adolph Lyons and Sarah Mills who seek injunctive relief that extends beyond their own personal protection. To the extent that Lyons and Mills ask for prospective relief shielding more than themselves, they are acting in the interests of third parties. The self-determination and representation values are therefore directly implicated.

For Lyons and Mills, the concern with adequate representation should not be an obstacle. To begin with, they are similarly situated to others who may be affected by the litigation. Thus, if one were to accept the view that those litigating for personal and proprietary reasons are the "best" representatives of individuals not involved in the suit, Lyons and Mills would be expected to conduct the litigation in a manner consistent with the interests of those they "represent." For those who believe that plaintiffs motivated by...
idealism make good representatives, Lyons and Mills should also have no standing problem because they are clearly working in the public interest for rewards to be shared by others not entangled in the lawsuit.\textsuperscript{126} A court with doubts about such a plaintiff's representational capacity can inquire into the plaintiff's abilities, resources, and dedication to the suit.\textsuperscript{127}

As reflected in the typicality requirement for class actions, a court can properly dispose of concerns with the adequacy of representation without raising the problem to the level of subject matter jurisdiction.\textsuperscript{128} There may be instances in which a court is particularly concerned with the plaintiff's capacity to "represent" those who stand to benefit from the relief, but are not before the court. The court can dispose of those concerns by informally inquiring into the plaintiff's representational abilities or by requiring class certification before issuing broad-based relief.\textsuperscript{129}

The value of self-determination is, however, more problematic because the injunctions sought by Lyons and Mills are far broader than necessary to protect only themselves. Nevertheless, this observation should not preclude them from seeking such relief. In fact, Mills and Lyons are not acting solely as intermeddlers, but instead, stand to benefit from part of the relief they seek.

Fundamentally, it is unclear how much weight the value of self-

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shared by those who stand to benefit from the prospective relief, but have no claim to a potential damage award. Thus, such individuals could be harmed by Lyons' and Mills' "representation."

This line of reasoning leads to the ironic suggestion that those who have been personally injured by challenged conduct may not be the best representatives. Before disqualifying Lyons and Mills on this basis, however, one must carefully consider how their personal experiences actually improve their representational qualities and help ensure that other justiciability values are satisfied.

\textsuperscript{126} See Tushnet, supra note 119, at 1711-12 (arguing that ideological or "non-Hohfeldian" plaintiffs are actually better representatives than plaintiffs motivated by personal or propriety reasons).

\textsuperscript{127} Cf id. at 1706 (asserting that a basic approach to standing asks, \textit{inter alia}, whether the "plaintiff [is] capable of generating a reasonably good, 'concrete' record for decision"). Tushnet further argues that a court concerned with the representative abilities of a plaintiff can use "auxiliary devices," such as guardians ad litem, experts, and amici, to supplement the representative role of the plaintiff. \textit{Id.} at 1716 (quoting Abram Chayes, \textit{The Role of the Judge in Public Law Litigation, 89} HARV. L. REV. 1281, 1311-12 (1976)).

\textsuperscript{128} For a class to proceed, a court must determine that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." \textbf{FED. R. CIV. P. 23(a)(3)}

\textsuperscript{129} Under current case law, it is not settled whether a plaintiff proceeding without benefit of class action certification can obtain an injunction protecting individuals beyond the plaintiff herself. \textit{Compare} Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973) (not requiring class certification) \textit{with} Zepeda v. INS, 763 F.2d 719 (9th Cir. 1985) (requiring class certification) \textit{and} Hurley v. Ward, 584 F.2d 609 (2d Cir. 1978) (requiring class certification).
determination should bear in making decisions on standing. Compare, on one hand, a plaintiff who pursues relief only affecting others with, on the other hand, a plaintiff who asks for relief that affects herself and inadvertently also remedies the problems of others. Under the premise that our society values the right of an individual to make her own life decisions, standing doctrine is presumably more disapproving of the first plaintiff than the second. Yet both plaintiffs are equally at odds with the value of self-determination. Indeed, the degree to which a third-party nonlitigant's life is invaded is not at all related to the degree to which the plaintiff's own life is affected by the relief sought. The rules of standing, however, fail to incorporate this important subtlety. Consequently, the role of self-determination in resolving specific standing problems should arguably be minimized.

One can also argue that, in certain circumstances, the law should simply refuse to incorporate the value of self-determination. Even assuming that Lyons' standing doctrine adequately serves the value of self-determination, a court may conclude that the value should not control where plaintiffs such as Lyons and Mills perform the invaluable service of litigating important issues that otherwise would not have come to the courts.

For financial, logistical, or other reasons, the government may have no avenue available for enforcing legal standards and litigating significant issues. If private individuals whose lives are touched by the issues are unable to bring suit, valuable suits may well never be brought. Moreover, under some circumstances, flexible standing rules may be needed because individuals directly affected by objectionable conduct find it logistically impossible to bring suit. A court should investigate these possibilities and weigh the impor-

130. Two additional points undercut the role of self-determination in standing analysis. First, it is not entirely clear why a plaintiff motivated by the desire to use her time and money to correct social wrong is any less deserving of the protection of legal doctrine than a plaintiff who uses her time and money to correct injustice to herself. Second, on account of the doctrine stare decisis, it is rare that a plaintiff's lawsuit will affect only herself. Perhaps, in accepting the phenomena that a lawsuit will almost always infringe upon the rights and privileges of others, we must concentrate on ensuring that the plaintiff provides adequate representation.

131. Professor Tushnet suggests that it is unwise to place controlling weight on the value of self-determination. He argues that no good reason supports the "assumption that the ideology of contemporary law is consistent only with self-determination, and inconsistent with the altruism of the public interest litigant." Tushnet, supra note 119, at 1724.


133. See, e.g., id. at 117-18 (finding that patients who were denied Medicaid benefits for abortions were not able to assert their own rights).
tance of defining and enforcing legal standards before blindly denying standing on the basis of the value of self-determination. 134

3. Concrete Context. Also underlying standing doctrine is the related notion that a concrete case should apprise the court of the consequences of its decision. Hypothetical situations are thought inadequate to clarify the true-life ramifications of a court decision and therefore cannot assist the court in exploring the appropriate scope and terms of its adjudication. 135 Proper decisionmaking demands specific facts to illuminate the import of a ruling.

Lyons posited that, where threatened harm was not imminent, a case does not present the requisite concreteness. 136 In reaching this conclusion, the Lyons majority seemed to assume that, where harm is not knocking at the door, a court will never have a sufficient factual backdrop for making an informed decision. Although perhaps useful, this assumption is too expansive and does not accurately separate hypothetical disputes from real controversies with a definite context. In many cases, injury may be remote but, should it actually occur, a court can predict with confidence the specific, tangible details surrounding the injury. 137

The value of concreteness is best served when the court expressly and unequivocally evaluates whether the case presents facts illustrating challenged conduct. To undertake this evaluation, a court need not distract itself with inquiries into whether injury is imminent or whether a particular remedy can eliminate or mitigate the effects of challenged conduct.

4. Judicial Restraint. An often cited policy of standing doctrine is to prevent judicial interference with the prerogatives of other

134. Professor Brilmayer would ease standing requirements where it appears that a plaintiff is pressing an issue that would not otherwise be litigated. Brilmayer, supra note 24, at 315. Her reasoning, however, is apparently unrelated to the concern that, without such an exception to rigid standing requirements, important issues would never be litigated. Id. Nevertheless, she maintains that an exception should be available where the individuals possessing a right simply cannot assert it themselves—for example, when an individual suffers because of a law that restrains another individual, such as a doctor, from dispensing birth control. See id. at 317. Under these circumstances, Professor Brilmayer appears to be concerned that an avenue should be available for litigation of important issues. See id.


137. Particularly in cases of widespread illegality, a plaintiff may be unable to show impending harm, but may be able to point to numerous instances of past specific conduct that can predict how future conduct will unfold. Meltzer, supra note 63, at 306.
branches of government.\textsuperscript{138} In particular, standing seeks to prevent the “anti-majoritarian federal judiciary from usurping the policymaking functions of the elected branches.”\textsuperscript{139}

Federal courts have traditionally been cast in the role of protecting the rights of individuals and minorities.\textsuperscript{140} By requiring a plaintiff to demonstrate a particularized injury or threat of injury that sets her “apart from the citizenry at large,”\textsuperscript{141} standing attempts to confine federal courts to their traditional role. More generalized grievances shared by the collective population are, presumed grievances of the majority, which are best redressed in executive, administrative, or legislative forums.\textsuperscript{142} Focusing a court’s attention only on a plaintiff’s individual injuries, standing doctrine thus excludes courts “from the even more undemocratic role of prescribing how the other branches would function in order to serve the interest of the majority itself.”\textsuperscript{143}

\textsuperscript{138}See, e.g., Valley Forge, 454 U.S. at 472 (noting that the standing requirement confines federal courts to “a role consistent with a system of separated powers,” giving power over those disputes “traditionally thought to be capable of resolution through the judicial process”); Warth v. Seldin, 422 U.S. 490, 500 (1975) (noting that rules of standing serve to limit the role of courts in resolving public disputes); Fallon, supra note 18, at 14 (noting that where plaintiffs assert generalized grievances about government, Court has fashioned judicial doctrines to limit role for courts in “democratic society” (citations omitted)); see also sources cited supra in notes 50, 110. See generally Marla E. Mansfield, Standing and Ripeness Revisited: The Supreme Court's “Hypothetical” Barriers, 68 N.D. L. REV. 1, 37-46 (1992) (discussing the doctrinal roots of separation of powers as a important component of the standing decision's "philosophical pedigree"); David A. Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 WIS. L. REV. 37 (discussing the interrelationship between standing and separation of powers).

\textsuperscript{139}Fletcher, supra note 63, at 222 (citations omitted); see, e.g., Allen v. Wright, 468 U.S. 737, 760 (1984) (permitting the use of standing to bring generalized challenge that government is not acting in accord with the law “would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action” (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972))); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 133 (3d ed. 1988) (noting that Allen v. Wright is “distinctive in suggesting . . . that the application of standing doctrine in a particular case should be guided by separation of powers concerns”).

In contrast to most recent justices, Chief Justice Warren doubted whether standing implicates separation of powers concerns in the same way as other justiciability doctrines: [Separation of powers] problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.


\textsuperscript{141}Scalia, supra note 140, at 881.

\textsuperscript{142}Mansfield, supra note 138, at 43.

\textsuperscript{143}Scalia, supra note 140, at 894.
Regardless of the merits of this argument, it does not support an approach to justiciability that resolves remedial issues at the outset of litigation. To begin with, remedial issues have little relevance to the central concern fueling the separation of powers component of justiciability doctrines—to avoid enmeshing the judiciary in substantive issues of liability with significant "political" elements.

Moreover, although the ultimate choice of remedy may implicate separation of powers principles, the institutional prerogative of a court to make remedial choices is insulated from separation of powers attack. As previously mentioned, a conservative majority of the United States Supreme Court has recently reaffirmed the historical role of federal courts to select the relief appropriate for particular cases. Not only did the Court emphasize the broad latitude of courts in this area, it also suggested that federal judicial authority to select among remedies is actually essential to the Constitution's separation of powers: "It is well to recall that [judicial authority to award appropriate relief] historically has been thought necessary to provide an important safeguard against abuses of legislative and executive powers... as well as to insure an independent judiciary."

Professor Brilmayer casts doubt on the role of separation of powers analysis as an underpinning of justiciability doctrines. Professor Brilmayer's critique focuses on the argument that courts must be restricted because they are countermajoritarian bodies in fundamentally democratic societies. According to Professor Brilmayer, this emphasis ignores the observation that even legislatures themselves "risk behaving in a countermajoritarian fashion," if they are fulfilling "their responsibilities to consider whether their activities are constitutional." Brilmayer, supra note 24, at 304.

Professor Brilmayer's reasoning appears confined to a critique of the role of justiciability doctrines where a court is deciding constitutional questions, such as reviewing agency or legislative action for compliance with the constitution. See id.

See, e.g., Baker v. Carr, 369 U.S. 186, 227 (1962) (holding that an issue may be considered nonjusticiable if it involves elements of political questions); Paul Hubschman Aloe, Note on Presidential Foreign Policy Power (Part I): Justiciability and the Limits of Presidential Policy Power, 11 HOFSTRA L. REV. 517, 538 (1982) (arguing that standing and ripeness requirements help courts avoid becoming enmeshed in political disputes where they do not belong); Gene R. Nichol, Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. PA. L. REV. 635, 648 (1985) (noting that federal constitutional cases do not in most instances raise separation of powers concerns because they "cannot in good faith be deemed political"); see also Flast v. Cohen, 392 U.S. 83, 100-01 (1968) (finding that separation of powers problems arise from the substantive issues the individual seeks to have adjudicated).


Several commentators have articulated another separation of powers argument un-
5. Increased Caseload. Docket control, the final value supporting standing doctrine, provides no more help to Lyons than the other principles. The role of standing in restricting federal court litigation is simple: standing doctrine is a significant barrier to federal court access because the doctrine protects federal courts from a burgeoning docket.149 Loss of efficiency and prestige are thereby avoided, and federal courts may effectively decide and administer those cases that do come to judgment.

This argument is flawed in at least two respects. On a general level, docket control alone is rarely a reasoned basis for segregating the plaintiffs allowed access to federal court from those who are excluded.150 The rationale ignores the possibility that, for policy reasons, a particular plaintiff should be allowed to bring her case in federal court.151 Moreover, in the specific context of injunction suits, Lyons' rigid standing rules may not be necessary to control federal dockets. The remedial obstacles to injunctive relief may be so rigorous that plaintiffs will hesitate before commencing such actions—thereby limiting the federal court caseload through self restraint.152
C. Federalism Restraints

It is no secret that the Supreme Court uses justiciability doctrines to restrain federal court intervention into state and local affairs. In fact, in Lyons itself, the Supreme Court used federalism restraints as an explicit basis for declining to find jurisdiction in the case. Thus, although the traditional rationales underlying justiciability doctrines do not adequately justify Lyons, support for the decision's approach to standing may lie in the sensitive area of state and federal relations. Upon further scrutiny, however, federalism fails as a justification for Lyons' remedial standing test.

First, federalism is either irrelevant or peripheral to several classes of cases in which courts have held Lyons to govern. Courts have adhered to Lyons in suits challenging the actions of federal officials as well as disputes between private parties.

153. Cf. Tushnet, supra note 63, at 663-64 (noting that "standing has . . . become a surrogate for decisions on the merits, providing an especially useful approach for the Court when a decision on the merits might overturn settled precedent").


155. See Nichol, supra note 63, at 1948 (arguing that the Lyons Court speaks extensively of "federalism sensitivity," but "fails to explain . . . why the dangers posed by an injunction limiting police use of deadly force are more debilitating than a bevy of other acceptable federal restraints"); see also Meltzer, supra note 63, at 320 (finding no difference in terms of federalism concerns between interference endorsed in Mapp v. Ohio, 367 U.S. 643 (1961), and interference rejected in Lyons; rather the difference in cases is nature of the remedy sought).

156. See, e.g., Bryant v. Cheney, 924 F.2d 525, 528-29 (4th Cir. 1991) (federal civilian employee seeking to enjoin retaliatory job performance appraisals by armed services personnel); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 557-59 (9th Cir. 1990) (Salvadoran nationals seeking to enjoin United States immigration officials from interfering with right to seek political asylum); Hernandez v. Cremer, 913 F.2d 230, 233-35 (5th Cir. 1990) (American of Puerto Rican descent seeking to enjoin immigration officials from applying discriminatory policies at border checkpoints); Feit v. Ward, 886 F.2d 848, 856-58 (7th Cir. 1989) (former Forest Service employee seeking to enjoin United States Department of Agriculture from discharging employees for exercising their constitutional free speech rights); Haase v. Sessions, 835 F.2d 902, 910-11 (D.C. Cir. 1987) (freelance journalist seeking equitable relief against a policy of illegal FBI searches); LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985) (residents of migrant farm dwellings challenging INS policy of conducting searches without a warrant or probable cause).

Separation of powers issues are certainly implicated in federal officer cases. Nevertheless, as explained supra in the text accompanying notes 138-48, separation of powers is not an adequate justification for the rigors of Lyons standing requirements.

Even in those cases where federalism is directly implicated, numerous devices unrelated to justiciability are available to protect the prerogatives of state and local governments. Because injunctions are distinct and specific commands, they can be particularly intrusive into the affairs of state and local officials. One may argue, therefore, that damage actions more appropriately vindicate federal rights while preserving the autonomy of state and local governments.

Yet specific tools—such as the Anti-Injunction Act and *Younger* abstention—are designed to handle unique problems of injunctive relief. In addition, more general innovations, such as the "custom or policy" requirement for actions under 42 U.S.C. § 1983, are significant limitations on federal court power over state and local governmental action. If the myriad controls developed for injunctions or for § 1983 actions are unavailable, a court is free to follow the course outlined in *Lyons*: to conclude that generic concerns of comity require denying relief.

A court's decision to recognize standing is not necessarily a direct affront to state prerogatives. Generally, the most significant irritant to federal/state relations is not a federal court's decision to adjudicate a challenge to state action, but rather the court's final


160. See generally *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) (recognizing that "there are [a few narrowly defined] classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is the normal thing to do" (internal quotation marks omitted)).


162. *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); see *Roach, supra* note 74, at 859 (noting that equity "grants a court discretion not to award intrusive remedies").
decision to condemn and nullify the state action.\textsuperscript{163}

The Younger doctrine, of course, recognizes that where certain state proceedings are pending, a court's decision to entertain an injunction action can disrupt the state proceedings so significantly as to call for federal court abstention. But Lyons and its antecedents do not suggest a similar concern. Nothing in Lyons or related decisions mandate that, where a federal district court confronts a request for injunctive relief, federalism precludes the court from considering the request past the initiation of suit.\textsuperscript{164}

Moreover, the practicalities of litigation counsel delaying decision on federalism issues until later in the case. It is not until the facts and theory of a dispute have developed that a court can best appreciate the federalism implications of its ruling.\textsuperscript{165} Accordingly, a threshold doctrine like standing is neither needed nor appropriate to police federal court forays into state and local domains.\textsuperscript{166}

III. WEAVING AN APPROPRIATE STANDING MODEL: THE TWO FACES OF LYONS

Compelling arguments suggest that the ultimate decision whether to grant a particular remedy should be removed from threshold investigation of whether a plaintiff has standing to bring suit. The question still remains, however, whether analysis of remedial efficacy has any role in evaluating standing in an injunction case. As it turns out, the answer is "no." Nonetheless, the process of reaching this conclusion is complicated, requiring analysis of the two general categories of injunction plaintiffs: those who have been in-

\textsuperscript{163} See REDISH, supra note 18, at 96 (arguing that violation of judicial restraint principles comes, if anywhere, "in the ultimate judicial invalidation of . . . challenged governmental action, not in the mere fact of the court's willingness to adjudicate the constitutional challenge").

\textsuperscript{164} Official immunity doctrines present another instance where courts have concluded that the mere allowance of suit is a significant source of irritation. See, e.g., Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (noting that, because official immunity includes "immunity from suit rather than a mere defense to liability . . . , it is effectively lost if a case is erroneously permitted to go to trial"). Nevertheless, unlike instances where immunity doctrines are relevant, the injunction suits governed by Lyons do not necessarily implicate personal liability of government officials. Accordingly, the immunity doctrines' special concern for protecting individuals from the burdens of litigation do not govern with the same force in many Lyons-type lawsuits.

\textsuperscript{165} Cf. Fallon, supra note 18, at 44 ("[T]he impulse to erect threshold barriers ignores the reality that not every lawsuit affecting a public institution stretches judicial competence or intrudes too deeply into institutional management.").

\textsuperscript{166} Cf. Shreve, supra note 76, at 419. Professor Shreve argues that the doctrine of Younger v. Harris, 401 U.S. 37 (1971), inappropriately requires a federal court to decline jurisdiction in certain cases automatically. Professor Shreve advocates that instead courts should undertake a fact-sensitive approach to equitable jurisdiction questions now governed by Younger.
jured and fear future injury as well as those who have no past injury but only fear of prospective harm.

A. The Lyons Plaintiff with a Damages Claim

Plaintiffs like Sarah Mills and Adolph Lyons have suffered past injury and therefore come to court with a potential damage action as well as a claim for prospective relief. Although the Lyons majority suggests otherwise, these plaintiffs should encounter little difficulty establishing standing. Generally, the potential for damage recovery assures that each of the values underlying standing is adequately served. An additional inquiry into the efficacy of the injunctive remedy thus performs no useful function in evaluating the plaintiff's standing. Importantly, avoiding rigorous restraints on plaintiffs seeking both damages and injunctive relief is also fully consistent with standard jurisdictional principles governing federal courts.

1. Justiciability Values. As mentioned in Part I, the lower federal courts diverge over whether a plaintiff with a potential damage claim need establish separate standing to seek injunctive relief. Most courts agree that a plaintiff must establish standing separately for each type of relief requested;\textsuperscript{167} courts within the Ninth Circuit, however, hold that a plaintiff can establish standing to seek injunctive relief simply by relying on an existing damages claim and demonstrating that the damages and injunction claims derive from "the same operative facts and legal theory."\textsuperscript{168} In most cases, the Ninth Circuit's approach fully serves the values inspiring standing and other justiciability doctrines.

Where a plaintiff has both damages and injunction claims, she can readily meet justiciability's adversity, personal interest, and concrete context components through her damages claim alone. Since the plaintiff has suffered injury at the hands of the defendant, she has a personal interest—adverse to the defendant—in litigating a real set of facts and ultimately collecting a judgment from the defendant.\textsuperscript{169}

Separation of powers poses little difficulty under the Ninth Circuit view of Lyons. A plaintiff with a damages action asks the federal court to act in its most traditional, least controversial capacity: to

\textsuperscript{167} See supra note 60 for examples of cases reflecting this view.

\textsuperscript{168} Smith v. City of Fontana, 818 F.2d 1411, 1423 (9th Cir. 1987), cert. denied, 484 U.S. 935 (1987). See supra note 61 and accompanying text for further discussion of case law from the Ninth Circuit.

\textsuperscript{169} City of Los Angeles v. Lyons, 461 U.S. 95, 126 (1983) (Marshall, J., dissenting) (noting that Lyons' claim for damages ensured that he had a personal stake in the outcome of litigation).
adjudicate a specific dispute between specific parties and to issue relief directly related to the injury suffered. Arguably, a court granting broad-based injunctive relief treads more closely to the discretionary and policy-making functions of coordinate branches of the government than a court ordering damages alone. Yet merely entertaining the possibility of injunctive relief does not jettison the court into territory held by the other governmental branches. To the extent that injunctions implicate separation of powers concerns, those concerns can be examined toward the end of the litigation when the court is considering whether and to what extent to issue such relief.

The final justiciability value, docket control, also presents no problem under the Ninth Circuit approach. Allowing a plaintiff to pursue an injunction without a separate standing showing preserves the efficiency of the system. In fact, federal court dockets should not swell, since the plaintiff is already using court resources to litigate a damages action.

Hence, the justiciability values are apparently satisfied by the Ninth Circuit approach. To test this conclusion, consider the following change in the Sarah Mills story: assume that Mills, a plaintiff with a significant damages action, became sterile as a result of the birth of her child at home. Certainly, this increases her potential

170. See, e.g., Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (noting that federal courts are restricted to remedies that are narrowly tailored to the nature and extent of constitutional violation); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282-83 (1976) (describing the traditional model of adjudication as operating on the assumptions that litigation is bipolar, retrospective, self-contained, party-initiated, party-controlled, and that right and remedy are interdependent); see also Sturm, supra note 80, at 1360-65 (discussing the perspectives on remedies and traditional forms of adjudication).

171. See Nagel, supra note 146, at 724 (arguing that separation of powers principles should circumscribe and define judicial power to issue equitable remedies).

172. Even where the plaintiff does not actually litigate the damages claim together with the injunction claim, the mere potential for a damages claim will in most instances be sufficient to satisfy the justiciability values. The potential damage claim can inspire the plaintiff to litigate vigorously and with personal animation. See Lyons, 461 U.S. at 126 n.18 (Marshall, J., dissenting) (arguing that the severance of Lyons' damages and injunction claims does not diminish his incentive to establish that defendants breached a substantive standard of conduct).

Additionally, the bare existence of a potential damage claim indicates to the court that the case arises from a specific factual setting that can inform the adjudication. Docket control should not be a significant problem because a very limited class of plaintiffs are apt to pursue their injunction claim without the benefit of their damages claim. Finally, while separation of powers may be a concern, the court is still only contemplating injunctive relief and is not committed to issuing and implementing broad commands that may intrude on the prerogatives of other branches. Cf. Redish, supra note 18, at 96 (asserting that judicial restraint principles are violated by judgment itself rather than act of entertaining constitutional challenge).
damage award. But her sterility renders her incapable of personally benefitting from her requested injunction. Should she be able to seek an injunction on behalf of others who may be subject to similar wrongs in the future?

The answer—it seems—should be "yes." The case still has adversity, personal interest, and concrete context inspired by Mills' damages claim. Representation may pose a slight problem, but Mills' prior membership in the class of individuals directly affected by the injunctive relief should assist her in effectively and intelligently pursuing the injunction claim. Self-determination should not be an obstacle because Mills still has a significant interest in the case. In addition, the impact on a court's docket is very small.

The next inquiry is whether Mills' injunction request is so intrusive from a separation of powers perspective that the court should deny her the opportunity to litigate. On reflection, separation of powers is also not an insurmountable obstacle. According to Supreme Court case law, standing serves separation of powers principles by preventing "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies established to carry out their legal obligations." In order to fall within this proscription, the challenged conduct must first be classified as "governmental." Assuming one could make such a characterization in Mills' case, her prior experience with the defendants (the hospital and its employees) enable her to identify future specific "violations of law" to remedy.

Enforcing separation of powers principles, the Supreme Court also condemns plaintiffs with simply generalized grievances of broad social application. Mills, however, hardly has a mere abstract dispute with the hospital and its employees; she (as well as other plaintiffs) can point to prior instances of improper conduct that animate and inform specific requests for forward-looking relief.

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173. Cf., e.g., Sosna v. Iowa, 419 U.S. 393, 401 (1975) (holding that Article III is satisfied even where class representatives' claim becomes moot after class certification); see also Brilmayer, supra note 24, at 318 ("[R]epresentation arguments against allowing ideological challenges apply less forcefully when the would-be plaintiff was once but is no longer a class member." (citing Babbitt v. United Farm Workers, 442 U.S. 289 (1979))).

174. To the extent that self-determination is nevertheless implicated because Mills is seeking relief that does not affect her at all, it should still not raise too much difficulty for the reasons discussed in the text accompanying supra notes 130-34.


2. The Redress Requirement and Remedial Efficacy. One common formulation of standing doctrine provides that a plaintiff must demonstrate an actual or threatened injury that "is likely to be redressed by a favorable decision" in the litigation.\textsuperscript{177} This "redress requirement" resembles Lyons' remedial efficacy standard, which—as we know—operated to deprive Adolph Lyons of the right to seek injunctive relief even though his damages claim gave him a "live controversy"\textsuperscript{178} with the City of Los Angeles. It is, therefore, a significant question whether the redress requirement serves an important, meaningful role for cases in which a plaintiff seeks both damages and injunctive relief.

The redress requirement is easily traced to several of the justiciability values: adversity, personal interest, and separation of powers. Where the requested remedy is likely to relieve the plaintiff's injury or threatened injury, the court may assume that the plaintiff will advocate vigorously and take a personal interest in the litigation. In addition, a close nexus between the court's decision and an identifiable injury to the plaintiff will assure that the court is acting in a conventional judicial capacity.\textsuperscript{179}

Given the connection between the redress requirement and justiciability values, one could argue that the requirement serves as a useful shorthand to ensure that the values are satisfied. As with any legal rule, however, the redress requirement is not always necessary or appropriate to serve the values it was designed to promote.\textsuperscript{180} Indeed, in the context of a plaintiff with both damages and injunction claims, a separate standing inquiry for each type of relief sought is rarely necessary to effect the policies influencing standing and other justiciability doctrines. Thus, it seems nonsensical to adhere to a categorical rule precluding such a plaintiff from seeking injunctive relief on the basis of an uncritical application of the redress requirement—or, its close cousin, Lyons' remedial efficacy standard.

\textsuperscript{177} Id. at 472 (quoting Simon v. East Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976)).

\textsuperscript{178} City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

\textsuperscript{179} See sources cited supra note 170 for discussion of the conventional view of the proper judicial role. But see Nichol, supra note 145, at 646-47 (arguing that the redressability requirement is unrelated to separation of powers concerns). Professor Nichol contends that "redressability' takes no account of the relative efficacy of possible action taken by [another] branch of government. Redressability asks only whether the judiciary can construct a useful remedy, not how favorably that remedy compares with hypothetical cures that could be fashioned by another branch." Id. at 647 n.63.

\textsuperscript{180} See Tushnet, supra note 119, at 1705 (stating that once the purposes of standing are expressed in legal doctrine, "the rules become easily manipulable and may produce unintended results"); cf. Jane B. Baron, Intention, Interpretation, and Stories, 42 DUKE L. J. 630, 642-43 (1992) (asserting that language initially bearing plain meaning can take on a life of its own, separated from meaning initially intended).
3. Jurisdictional Principles. Established principles of federal court jurisdiction strongly support the view that a plaintiff who has established standing to seek damages can press a related injunction claim without making a separate showing of standing. The United States Constitution extends the federal judicial power only to "Cases" or "Controversies," and standing rules purport to implement this jurisdictional limitation. Case law interpreting the "case or controversy" requirement suggests that—in disputes such as Lyons' and Mills'—a plaintiff can aggregate injunction and damages claims into one federal lawsuit without showing an independent jurisdictional basis for each claim.182

The United States Supreme Court has long recognized that two claims can compose the same constitutional "case" whenever they derive from a "common nucleus of operative fact."183 In United Mine Workers v. Gibbs,184 the Court applied this concept, holding that a federal court could exercise federal question jurisdiction over federal and state law claims under certain circumstances. Under Gibbs, a plaintiff may append her state law claim to her federal law claim if she can demonstrate that the federal claim is sufficiently substantial to confer federal question jurisdiction on the district court and the state law claim shares a common factual nucleus with the federal claim. In a recent statutory enactment,185 Congress ratified and incorporated this constitutional analysis, clarifying that federal district courts shall exercise "supplemental jurisdiction" to the full extent that the Constitution permits.186

Applying principles of supplemental jurisdiction to a case such as Lyons' or Mills', suggests that the plaintiff should be relieved of demonstrating separate standing for the injunction and damages

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182. This line of reasoning seems to have strong intuitive appeal. As a teacher of federal court jurisdiction and civil procedure, I encounter a student "discovering" the argument at least once a semester. In addition, the reasoning is outlined in Fallon, supra note 18, at 22 n.115. Professor Fallon points out that Lyons was not the first time the Court "failed to accede to the logic of Gibbs in a case presenting nontraditional attributes of public litigation." Id.
claims. Under Gibbs' analysis, once standing to seek damages is established or conceded, a court should conclude that both claims compose one case properly subject to federal court jurisdiction. Lyons and the cases construing it, however, do not recognize this synthesis.

Whether by design or accident, the Ninth Circuit's approach to the Lyons problem roughly tracks the analysis in Gibbs and its progeny. Under the Ninth Circuit approach, a plaintiff is relieved from establishing separate standing for damages and injunction claims only if the two claims involve "the same operative facts and legal theory."188

Measured against principles of supplemental jurisdiction, the Ninth Circuit test actually restricts more than is necessary: the notion of a constitutional "case" does not require identity of legal theory underlying two claims joined together. Nevertheless, the similarity between Gibbs and the Ninth Circuit formula lends credence to the Ninth Circuit test and casts doubt on the jurisdictional underpinnings of the other Circuits' more niggardly approach to plaintiffs seeking distinct remedies in two related claims.

B. The Lyons Plaintiff without a Damages Claim

Turning now to a new character: Sarah Mills' neighbor who is presently pregnant, without health care coverage, and living in poverty. Mills' neighbor wishes to bring an action for injunctive relief, asking the court to ensure that Mills' tragedy does not recur either for the neighbor or others like her. From the perspective of standing, this plaintiff is analytically more challenging than Mills.189 The neighbor is not yet hurt and thus may run into difficulty with the justiciability values.

To ensure that competent plaintiffs can overcome justiciability hurdles and perform a vital enforcement function for issues of significant public import, many commentators have suggested that courts allow citizen suits by plaintiffs motivated primarily by idealism.190 For plaintiffs like Mills' neighbor, however, it is not necessary

187. Fallon, supra note 18, at 22 & n.115. Of course, Gibbs and the parallel statutory provision, 28 U.S.C § 1367 (1988), contain a discretionary element, allowing the district court to decline jurisdiction over a pendent claim under certain circumstances. Gibbs, 383 U.S. at 726; 28 U.S.C.A. § 1367(c) (1988). The existence of this discretion, however, does not undercut the conclusion that both damages and injunction claims are within a federal court's power to decide.


189. See supra note 125 for an outline of an argument to the contrary.

190. See, e.g., Jaffee, supra note 114, at 1043-47; Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1738, 1744-47 (1975); Tushnet, supra note 119, at 1706-09. To the extent justiciability concerns are jeopardized,
to sweep so broadly. Nor is it necessary to reach so far in the other
direction as to impose on the neighbor an impossible showing such
as that required under Lyons.\textsuperscript{191} The justiciability values can be sat-
sified by a more moderate standard.

1. Justiciability Values. Because the neighbor has no injury,
her only claim to judicial intervention derives from the possibility of
future injury. To the extent that her fear of future injury is un-
founded, she experiences difficulty with standing's disdain for hypo-
thetical disputes and abstract controversies. The neighbor's case
may therefore lack the requisite concreteness and may implicate the
separation of powers concern that generalized grievances are more
appropriately addressed to other branches of government. Moreover,
the neighbor is more apt to lack the requisite personal stake in the
suit than a plaintiff who has already been injured and has a poten-
tial damages claim to litigate.\textsuperscript{192}

Although not entirely clear, these concerns may have given rise
to the rigorous remedial efficacy standard in Lyons. I propose, how-
ever, that a more reasonable standard would insure that the justi-
ciability values are satisfied in a case such as the neighbor's. Spe-
cifically, I would require that the neighbor make two showings: (1)
some reason exists for suspecting that the defendants may engage in
future illegal conduct and (2) the neighbor may be among those

\textsuperscript{191}As previously discussed, the Lyons decision held that, in order to establish an
actual controversy, Adolph Lyons would have to allege that he would have another en-
counter with police and either all police officers in Los Angeles always choke citizens they
encounter or the City of Los Angeles actually authorized the officers to use deadly choke-
holds on citizens they happen to encounter. City of Los Angeles v. Lyons, 461 U.S. 95, 106
(1983). Applied to Mills' neighbor, this standard would presumably require her to show
first that she would enter the hospital as a maternity patient. In addition, the Lyons for-
mula would presumably force her to demonstrate that all maternity patients are always
treated in the same way as Sarah Mills or that the hospital actually orders or authorizes
its employees to act in such a manner.

\textsuperscript{192}Interestingly, an argument could be made that Mills' neighbor may actually
serve as a better plaintiff than Mills who has already suffered an injury. Indeed, Mills
may well have learned by experience and will take her own steps to ensure that the de-
fendants' actions do not so dramatically touch her life again. Under this reasoning, Mills
has less of a personal stake in the outcome of the suit than one who does not have the
same life experiences to mold her actions and incentives.

This argument, of course, ignores the vigor and resolve that Mills' injury may bring
to her case. The argument also ignores the very real understanding that Mills can share
with the court concerning the defendants' actions and their effect on the lives of others.
Both this understanding and the motivating force of Mills' prior injury are characteristics
that—according to traditional standing doctrine—make Mills a better plaintiff than one
who has not already received injury.
threatened by this conduct. While making these showings, the neighbor will illustrate for the court a specific factual context for the suit—removing the case from the realm of the hypothetical. Separation of powers problems would be avoided because she will demonstrate that the court’s decision will provide distinct, individual relief based on an identifiable threat.

Since the plaintiff will demonstrate that she is within the class of individuals at risk, she should also satisfy concerns of adequate advocacy and representation of others affected by the suit. The value of self-determination, however, may provide more of an obstacle. Indeed, like Adolph Lyons and Sarah Mills, the neighbor is seeking relief beyond that necessary to remove the threat to herself. A partial response, of course, is that the neighbor is not merely intruding into the lives of others because she too stands to benefit from the relief requested. The earlier discussion of Lyons and Mills provides another response: it is not evident that the value of self-determination should control decisions on standing questions.

Finally, docket control should not be a critical issue if plaintiffs like Mills' neighbor are allowed standing to pursue injunctions. The significant remedial obstacles to injunctions may cause such plaintiffs to hesitate before bringing actions. This restraint on federal court suits would be fortified by my proposed requirement that the plaintiff demonstrate some reason to suspect the defendant of future illegality and to believe that the plaintiff may be among those threatened by the illegality.

It should be noted, however, that the proposed requirement should not be so strictly applied as to require plaintiffs to prove a significant probability of injury. Such a rigorous showing is unnecessary since the plaintiff is seeking only to convince the federal court to hear the case, not to issue the actual relief requested. After discovery and the development of the facts in the case, the plaintiff can then be required to justify for the court the necessity for a prospective remedy.

193. Meltzer, supra note 63, at 296 (advocating similar requirements for challenges to governmental illegality). Apparently, Professor Meltzer would also include in justiciability analysis a showing of “the appropriateness of the particular form of deterrent relief sought, giving due concern to a broad range of remedial considerations.” Id. For the reasons outlined earlier in this Article, I would defer consideration of such remedial matters until after the threshold justiciability inquiry. See supra notes 67-105 and accompanying text.

194. See supra notes 130-34 and 174 for further discussion of the value of self-determination as it relates to Lyons and Mills.

195. See supra notes 150-52 and accompanying text for a discussion of this argument.

196. See Meltzer, supra note 63, at 308 (arguing that concern with opening floodgates of federal litigation “is particularly doubtful as applied to suits seeking deterrent remedies, since the elements of the claim for relief...are likely to be sufficiently difficult to establish that plaintiffs will not likely commence such actions”).

197. There remains the question whether to allow standing for individuals who have
2. The Redress Requirement and Remedial Efficacy. The two-part showing I advance need not be supplemented with notions of remedial efficacy or with standing doctrine's redress requirement. As for a plaintiff with both damages and injunction claims, a plaintiff like Mills' neighbor need not demonstrate that she is seeking a remedy that is likely to redress the threatened injury. 198

Of course, it is not irrelevant to the justiciability values that the injunctive relief the neighbor seeks is capable of protecting her from the threat of the defendant's illegal conduct. Nevertheless, she will have established the requisite personal stake in the suit by demonstrating that she is within a sphere of danger created by the defendant's threat. Any suggestion that the precise relief she requests is unjustified, unwise, or unnecessary can be addressed later in the litigation.

IV. PATTERNING THE EQUITY INQUIRY:
THE ROLE OF EQUITABLE RIPENESS

For Sarah Mills and her neighbor, the foregoing has established their entitlement—under traditional justiciability values—to have a federal court decide their injunction requests. I now turn to the later stage of the litigation—when the court must decide whether the facts of their cases actually support their requested injunctions.

As a matter of traditional equity theory, a major impediment to injunctive relief is the irreparable injury rule, which requires the plaintiff to demonstrate that, absent an injunction, she will be irreparably injured and will have no adequate remedy at law. 199

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198. See supra notes 177-80 and accompanying text for discussion of this issue in the context of plaintiffs with both damages and injunction claims.

199. See, e.g., DAN B. DOBBS, REMEDIES § 2.5, at 57 (1973) (indicating that the first task of a plaintiff seeking equitable relief is to explain why equitable relief is better than a legal remedy).

Professor Douglas Laycock explains that the irreparable injury rule and the requirement that a plaintiff demonstrate no adequate remedy at law are different formulations of the same principle:

Today, the typical application of the irreparable injury is a comparison between some equitable remedy that will prevent a threatened injury, and money damages that will compensate for the injury after it has occurred. If money damages
cause the threatened "injury" Mills and her neighbor seek to avoid includes death or serious bodily harm to a laboring woman or her child, this rule should not pose a serious barrier for them.\textsuperscript{200} Instead, their more troublesome problem is the equitable requirement that the threat of injury be "ripe."

Traditionally, courts have applied the equitable ripeness rule quite strictly and, in fact, have tied the ripeness requirement intimately to the general presumption against injunctions enforced through the irreparable injury rule. In this Part, I argue that this union of ripeness and irreparable injury should be dissolved and that courts should consider equitable ripeness together with other concerns favoring and disfavoring injunctive relief. Finally, I identify substantial reasons in favor of courts relaxing their rigid enforcement of equitable ripeness. My aim is not to articulate a scientific formula for ripeness problems, but instead to expose some of the difficulties with the current approach.\textsuperscript{201}

A. Equitable Ripeness: Content of Traditional Fabric

In \textit{Lyons}, the Court invoked the doctrine of equitable ripeness, explaining that it could not authorize an injunction because Lyons made no showing of any "likelihood of substantial and immediate irreparable injury."\textsuperscript{202} The Court further reasoned that "[t]he speculative nature of Lyons' claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled."\textsuperscript{203}

This ruling was, of course, dictum since the Court had already held that Lyons lacked standing even to attempt to convince a fed-
eral court to issue his requested injunction. Nevertheless, the equitable formulation cited by the Court is common to many injunction cases, including requests for both individual and class-based relief. Moreover, the formulation is not confined to cases in which the plaintiff's standing is an issue.

The Lyons Court's rhetoric actually combined the irreparable injury rule and equitable ripeness doctrine. Surely, however, the Court did not mean to suggest that the nature of the injury Lyons cited—being choked to death—was somehow not irreparable. Rather, the Court was concentrating on Lyons' failure to provide sufficient evidence that he would be choked again—a concern focusing on the prematurity or ripeness of his suit. Perhaps the Court was also reacting to Lyons' failure to support his request for broad reaching relief with class certification or other formal showing that he was qualified to represent those who stood to benefit from his requested injunction. Nonetheless, Lyons' blurring of the irreparable injury rule and equitable ripeness doctrine is typical of the approach followed by other courts.

When courts do focus on equitable ripeness, they generally apply the doctrine strictly. In fact, courts often require that the threatened harm must be "practically certain" to occur. Even in decisions where a Lyons standing problem consumes much of the court's attention, courts still apply equitable ripeness with a vengeance, requiring much more than prior instances of the challenged conduct.

204. See Laycock, supra note 76, at 221 (asserting that despite the irreparable injury language, the Lyons Court actually was concerned with ripeness).

205. The case law is divided on whether a plaintiff proceeding without benefit of a class action certification can obtain an injunction protecting individuals beyond the plaintiff herself. Compare Zepeda v. INS, 753 F.2d 719 (9th Cir. 1985) (requiring class certification) with Hurley v. Ward, 584 F.2d 609 (2d Cir. 1978) (permitting injunctive relief without class certification) and Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973) (allowing injunctive relief without class certification).

206. See Laycock, supra note 76, at 220-21 (indicating that the most typical opinions combine ripeness and irreparable injury).

207. See Hellerich, supra note 76, at 1031 n.22, 1032 n.25 (surveying a number of cases and concluding that "as a general rule courts will require a 'practical certainty' that the anticipated nuisance will result"); see also Reserve Mining Co. v. EPA, 514 F.2d 492, 537 (8th Cir. 1975) (modifying injunctive relief in an environmental case where "the risk of harm to the public is [only] potential, not imminent or certain, and [defendant] says it earnestly seeks a practical way to abate the pollution").

208. See, e.g., Lopez v. Garriga, 917 F.2d 63, 67-69 (1st Cir. 1990) (asserting that plaintiff not only failed to establish standing, but also failed to show threat of future unlawful conduct sufficient to justify injunctive relief); Committee of Central American Refugees v. INS, 682 F. Supp. 1055, 1064 (N.D. Cal. 1988) (stating that to justify injunctive relief under Lyons, plaintiff must not only show a pattern of unlawful conduct but also must show that the pattern is due to a policy of defendant and that immediate irreparable injury is likely); Grant v. Cohen, 630 F. Supp. 513, 520 (E.D. Pa. 1985) (holding that even if the plaintiff had standing to seek injunctive relief, she failed to demonstrate a
The rigidity of the ripeness doctrine is also fortified by its dual requirements: likelihood and immediacy of harm. Courts usually require that a plaintiff not only show that harm is nearly certain to occur, but also demonstrate that the harm will occur in the immediate future. Therefore, as applied, the doctrine has both timing and probability elements.

B. Reweaving Portions of Traditional Doctrine

As it presently exists, the traditional doctrine of equitable ripeness has potentially useful features. One commentator, for example, explains that the doctrine serves primarily to ensure that the plaintiff petitions the court between the time she can assure the court of impending harm and the time at which the court can no longer actually avert the harm. Accordingly, the doctrine thereby avoids needless injunctions—which are "wasteful, unfair, and potentially chaotic." This reasoning is most appropriate in circumstances that, by design, require preliminary steps before the defendant can engage in harmful conduct. Under such circumstances, the doctrine effectively cues the plaintiff that it is time to invoke the protection of equity.

Other cases, such as Lyons', concern wrongful conduct for which the defendant provides little warning. In such cases, the plaintiff cannot pinpoint when impending harm is relatively certain. Strictly applied to these cases, the doctrine is potentially overbroad. Applied with proper perspective, however, the doctrine may be serviceable in identifying those disputes for which injunctive relief should be considered. Under a light-handed approach, a court can

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real and immediate threat of irreparable injury); see also Stefaniak v. Michigan, 564 F. Supp. 1194 (W.D. Mich. 1983) (finding that the plaintiff failed to show sufficiently real and immediate threat of injury to justify injunctive relief under Lyons).

209. Hellerich, supra note 76, at 1031-32. Occasionally, a court finds that the presence of one element alone is sufficient. See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 142-43 (1974) (allowing suit to enjoin conveyance where conveyance was quite certain, although it would take place at an unspecified future date).

210. The classic case of Fletcher v. Bealey, 28 Ch. D. 688 (1885), illustrates this observation. The plaintiff in Fletcher feared that the river water it used to produce paper would become polluted by defendant's negligence in maintaining a chemical waste dump upstream. The court rejected plaintiff's injunctive request because it would be "some years" before defendant's pollutants would injure plaintiff. Id. at 700. Unpersuaded that there was a significant likelihood that these events would occur, the court also dismissed plaintiff's suggestions that a landslide or collapsed wall would cause more precipitous damage. See also Shreve, supra note 76, at 391-92 (arguing that Fletcher also illustrates the integration of the imminence concept with a requirement that the threatened wrong be substantial).

211. Shreve, supra note 76, at 391-92.

212. Id. at 401.
determine if harm is sufficiently certain to ensure that the plaintiff's claims have some grounding in fact and in law. The doctrine can thereby assist the court in analyzing whether the benefits of an injunction outweigh its costs.

The dual character of equitable ripeness doctrine is especially well-suited to ensure that injunctions are not needlessly issued. The probability or likelihood component of the doctrine specifically focuses on the necessity for prospective judicial intervention. Similarly, the timing or imminence component of equitable ripeness limits the period in which defendants and affected third parties are constrained by a decree, thereby minimizing government regulation of potentially useful conduct.

The timing component also assists with the difficulty of predicting whether an injunction is actually necessary. Logic suggests that the further in time one is from a harm-causing event, the more likely that intervening, unanticipated factors will prevent that event from happening. Not surprisingly, established forecasting theory propounds the thesis that the more distant a forecast target date, the less accurate the forecast will be.\(^1\)

Because of these salutary characteristics of equitable ripeness doctrine, the entire doctrine should not be abandoned in favor of new material. Nevertheless, several innovations suggest themselves.

1. *Loosening the Knot: Extricating Irreparable Injury from Equitable Ripeness.* Unlike the doctrine of equitable ripeness, the irreparable injury rule has recently received abundant scholarly attention. Much of the analysis has been negative, concluding that the rule is a jurisdictional artifact that is either dead in practice or ill-advised in theory.\(^2\) For the purposes of this Article, one idea

\(^{213}\) See WILLIAM ASCHER, FORECASTING 199 (1978).

\(^{214}\) See, e.g., FISS, supra note 71, at 38-85 (asserting that the irreparable injury rule is unwise, unjustifiable, and not taken seriously by courts); LAYCOCK, supra note 76, at 5 ("I conclude that the irreparable injury rule is dead. It does not describe what cases do, and it cannot account for the results."); Rendleman, supra note 73, at 358 (commenting that although irreparable injury rule can serve important purposes, it "masks the intellectual process of identifying and evaluating interests..., grants excessive discretion and is too imprecise to ensure predictability"); Doug Rendleman, Irreparability Irreparably Damaged, 90 Mich. L. Rev. 1642, 1649 (1992) (reviewing DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991)) (arguing that "because of new principles, the rule no longer meant what its words conveyed; it survived nominally and with reduced force"); see also Gene R. Shreve, The Premature Burial of the Irreparable Injury Rule, 70 Tex. L. Rev. 1063, 1072 (1992) (reviewing DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991)) (noting that "[p]erhaps [Laycock] is right in suggesting that some commentators have been too cordial to the rule"). But cf. Shreve, supra note 76, at 392-95 (opining that the rule serves to assist in principled decisions to grant or deny injunctions and accommodates many important public policy concerns).
emerging from this scholarship is particularly important: whatever the proper role (if any) for the irreparable injury rule, it should not be confused with equitable ripeness.

Upon initial inquiry, courts' tendency to treat equitable ripeness and irreparable injury as one concept is understandable: both help in measuring the degree to which the threatened injury should be feared. Ripeness focuses on whether the injury is probable and impending; the irreparable injury rule asks whether money damages are an adequate remedy if the injury actually occurs.

Despite this connection, the distinction between the two concepts can be quite significant. Once a court concludes that a threatened injury is not irreparable, the plaintiff's only choice is to seek damages if the injury eventually occurs. On the other hand, a finding of lack of ripeness should only delay further injunction proceedings until the plaintiff can demonstrate that the threat has matured. Thus, a court finding that a plaintiff has failed to show a ripe threat of injury is not necessarily relegating the plaintiff only to a damages remedy.

Confusion can be avoided by severing the two concepts. A court dismissing a suit under the rubric of irreparable injury may effectively relegate the case to a damages action, even though the plaintiff need only make another request—later in time—for equity to intervene. The analytical clarity resulting from isolating the two doctrines may also allow courts to understand better their own decisions, fulfill their obligation to explain their decisions to litigants, and provide unambiguous guidance to future courts struggling with similar issues. Finally, segregating the doctrines also avoids interjecting into ripeness analysis the many serious, but largely irrelevant, issues from the debate over the continued validity of the irreparable injury rule.

215. Cf. LAYCOCK, supra note 76, at 220 (suggesting that although analytically distinct, two ideas "can be verbally combined into a single sentence: that there be a ripe threat of irreparable injury").

216. This line of reasoning is derived from id. at 221. See also Rendleman, supra note 214, at 1656 (arguing that "[r]ipeness and mootness are not ways to choose between a legal and an equitable remedy—they are reasons to decline all relief").

217. See, e.g., Laura E. Little, An Excursion into the Uncharted Waters of the Seventeenth Amendment, 64 TEMP. L. Q. 629, 657-58 (1991) (reviewing salutary effects of fully developed, clear, and candid judicial opinions).

218. Cf. LAYCOCK, supra note 76, at 266-67, 272 (treating the irreparable injury rule as dead, yet endorsing the equitable ripeness principle). But cf. FISS, supra note 71, at 80-85 (suggesting that some may try to use difficulty in prophesying as justification for irreparable injury rule).

I do not mean to suggest that a court should divorce analysis of the extent of threatened harm from analysis of the likelihood and imminence of its occurrence. A court may fruitfully undertake the two inquiries in tandem. Instead, I advocate separating consid-
2. Creating the Final Cloth: Integrating Equitable Ripeness with Other Concerns. Courts evaluating equitable ripeness often have articulated the ripeness issue only as a predictive problem, severed from other factors bearing on whether to issue an injunction.\(^{219}\) Equitable ripeness, however, is intimately tied to several interrelated considerations relevant to selecting an injunction as the most appropriate and effective remedy in a case.

Indeed, cut loose from the process of weighing benefits and costs of injunctive relief, equitable ripeness has no meaning other than as an abstract measurement of threatened harm. Under such circumstances, the doctrine serves as little more than an empty slogan invoked to deny or grant relief. The better approach, then, is to use equitable ripeness to evaluate the factors pertinent to choice of remedy. Earlier in this Article, I explained the standard reasons courts are thought to hesitate before issuing injunctions: conserving court resources and prestige, avoiding undue restrictions on defendants and innocent third-parties, protecting the civil jury trial right, and avoiding inappropriate interference with institutional management and other governmental entities.\(^{220}\) In each case, these costs of injunctive relief must be weighed against the benefits of an injunction.\(^{221}\) Benefits to be analyzed include the advantages of preventing actual harm to the plaintiff and avoiding cumbersome valuation tasks and other difficulties of replicating with damages the position the plaintiff would have been in but for the defendant's wrong.\(^{222}\)

The importance of these various costs and benefits differs, of course, according to the facts of each particular case. In Sarah Mills' suit—for example—a court need not tarry with such issues as preferring one creditor over another and imposing its power on another governmental unit. Focusing on the specific facts of the case, how-

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220. See supra notes 76-82 and accompanying text for further discussion of these concerns.

221. See LAYCOCK, supra note 76, at 268-72 (noting that, in practice, courts should balance advantages of injunctive relief against concerns such as burdening the defendant and third parties, promoting impracticality, and jeopardizing civil jury trial rights); Fallon, supra note 18, at 72 (arguing that in deciding whether to issue injunctive relief, courts should employ a balancing "calculus more complex than employed by Lyons").

222. See supra notes 68-74 and accompanying text for further discussion of the benefits of injunctive relief.
ever, the court will need to assess the impact of an injunction on the ability of hospital management to run the institution effectively. Similarly, the court should weigh the financial burdens of the injunction on the hospital itself and on innocent third parties who use hospital services. The court must also appraise whether the management can practically implement the injunctive order and whether the court's own resources will be needed to monitor and enforce the decree. Is the defendant apt to resist compliance? Will the court frequently be forced to reformulate its original order, to hold compliance hearings, to appoint masters or other adjuncts, or to empanel juries to hear contempt charges?

Conversely, the court in Mills' case must consider that the relief requested may actually save infant and maternal lives and may considerably diminish certain birth defects or injuries that may later tax the health care system. The court must also take account of the reality of handling numerous actions for wrongful death and personal injury, which would burden courts in the absence of an injunction. In determining the weight of this factor, the court must reckon with the particular complexities of arriving at a meaningful damage figure in such cases.

The ultimate result of this balance should reflect carefully the specific circumstances of the case, including the characteristics identifying the defendant, the plaintiff, and other beneficiaries of the injunction. Moreover, the court can find significant guidance in the doctrine of equitable ripeness: inquiry into the timing and possibility of future injury helps to give significance to the various costs and benefits of a particular injunction.

223. See, e.g., Scott v. United States, 884 F.2d 1280, 1282 (9th Cir. 1989) (calculating damages based on loss of infant and injury to the parent-child relationship); Morrissey v. Welsh Co., 821 F.2d 1294, 1300 (8th Cir. 1987) (asserting that computation of parents' consortium damages for the loss of a child "must include the physical, emotional and psychological relationship between the parents and the child"); El-Meswari v. Washington Gas Light Co., 785 F.2d 483, 486 (4th Cir. 1986) (holding that damages for wrongful death of infant include recovery for sorrow, mental anguish, and loss of consortium as well as medical and burial expenses); Miller v. National Fire and Marine Ins. Co., 578 F.2d 125, 127-28 (5th Cir. 1978) (stating that dying infant's outward manifestations of suffering warrant a jury award of damages to the parents for child's pain and suffering); Silverman v. Travelers Ins. Co., 277 F.2d 257, 261 (5th Cir. 1960) (explaining that although courts recognize loss of child's companionship and grief of beneficiaries, no concrete estimate of damages to parent for the death of a minor child is available); Barnes v. Robison, 712 F. Supp. 873, 875 (D. Kan. 1989) (opining that "pecuniary losses to a parent from the loss of a minor child... are difficult to measure"); Hord v. National Homeopathic Hosp., 102 F. Supp. 792, 794 (D.D.C. 1952) (posing that hospital's liability for wrongful death of newborn infant should be substantial, despite the fact that such damages are hard to measure), aff'd, 204 F.2d 397 (D.C. Cir. 1953).

224. Inquiry into the extent of injury threatened—as opposed to whether the injury is irreparable—can also be useful in weighing the costs and benefits of injunctive relief.
Assume, for example, that the court finds the defendant hospital has no policy of discriminating against indigent obstetric patients and that Mills' injury was aberrational. The court may therefore conclude that the harm alleged in Mills' complaint is neither probable nor imminent. Using this reasoning, the court may decide that the possible savings in human life, future health care costs, and damage suits (although significant if they actually happen) do not outweigh the requested injunction's more certain costs to the court system, the hospital, and the individual defendants.  

3. Easing the Tension: Making Less of Prediction Problems. Having separated equitable ripeness from irreparable injury and integrated ripeness with the costs and benefits of injunctive relief, a court does not avoid the difficult task of measuring the probability and imminence of threatened harm. In fact, following the suggestions outlined above, a court actually magnifies the importance of realistically predicting the threat of injury.

Obviously, there is no scientific answer to the problem of prediction in issuing injunctions. The practice among courts of insisting on something close to certainty of harm suggests that prediction problems act as a strong incentive for withholding injunctive relief. Stymied by the lack of reliable formulae for dealing with uncertainty of harm, courts apparently often prefer inaction to intervention—particularly in cases such as Sarah Mills where the institutional effects of intervention can be significant.  

Courts are advised, however, not to overemphasize the difficulties of prediction in deciding whether to issue an injunction. Observations from legal tradition, modern remedial law, newly developed equitable doctrine, and human nature all suggest that a court need

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226. Moreover, in the final injunction setting, prediction problems plague two planes of the decisionmaking process: (1) determining the timing and nature of harm that may occur if no injunction issues and (2) determining the costs and benefits that will follow if an injunction does issue. Cf. id. at 541-42 (arguing that, in the preliminary injunction context, the court should compare the possibility and degree of harm to the defendant flowing from an improperly issued preliminary injunction with the possibility and degree of harm to the plaintiff if the preliminary injunction is erroneously denied).

227. Professor Fiss attributes courts' trepidations about prediction with the subordination of injunctive relief to other remedies:

Insofar as the injunction seeks to prevent a future wrong, it requires the court to make predictions about the future, and these judgments are widely assumed to be treacherous, fraught with error. The question raised is whether the burden of prophesy justifies subordination of the injunction.

Fiss, supra note 71, at 80. Fiss ultimately concludes, however, that prediction difficulties cannot justify subordinating injunctive relief. Id. at 80-81.
not withhold relief on the basis of prediction difficulties.

a. Legal Tradition. Our legal traditions have long reflected satisfaction with probability: probable outcomes, probable results, probable indicators, something far less than certainty. As early as 1680, English case reports exhibit a marked tolerance for uncertainty of proof. The report of one assassination case maintains that "the proof ought to be very great, to convict a man of such an offence; but you must not expect it should be so clear, as in a matter of right between man and man."229

Similarly in a 1680 libel dispute, the judge counsels the jury that, for particular types of crimes, "we are fain to retreat to such probable and conjectural Evidence as the matter will bear."230 "[E]ven for men's lives," the judge continues, "you have very often not a direct proof of the fact, of the act, or of the actual killing; but yet you have such evidence by presumption, as seems reasonable to conscience."231 Accordingly, the judge admonishes:

You must take evidence in this case, as you do all the year long; that is, in other cases, where you know there is an absolute certainty that the thing is so: for human frailty must be allowed; that is, you may be mistaken. For you do not swear, nor are you bound to swear here, that he was publisher of this book; but if you find him guilty, you only swear you believe it is so.232

Later, in 1756, Sir Geoffrey Gilbert, in his treatise on evidence, attempted to fashion a system for accommodating the uncertainty in proof:

[T]here are several degrees from perfect Certainty and Demonstration quite down to improbability and Unlikeness, even to the Confines of Impossibility; and there are several Acts of the Mind proportioned to these Degrees of Evidence, which may be called Degrees of Assent, from full Assurance and Confidence, quite down to Conjecture, Doubt, Distrust and Disbelief.


Even earlier, in 1665, Leibniz documented the role of probability in legal theory. See IAN HACKING, THE EMERGENCE OF PROBABILITY 87 (1975). In fact, Leibniz used law as his model for developing probability theory. See id. at 91.


231. Id.

232. Id. at 1128; see also SHAPIRO, supra note 228, at 188-89 (describing an attitude among legal thinkers at the time embracing conscience and moral assurances as appropriate touchstones for decisionmaking).
Now what is to be done in all Trials of Right, is to range all Matters in the Scale of Probability, so as to lay most Weight where the Cause ought to preponderate, and thereby to make the most exact discernment that can be, in Relation to the Right. Implicit in Sir Gilbert’s formulation is not only tolerance for degrees of probability, but also recognition that certain benefits may emanate from uncertainty. His analysis suggests that, by locating various offers of proof along a probability scale, a fact-finder may develop a more profound understanding of evidence than would emerge if perfect certainty were sought.

A similarly positive attitude toward uncertainty is reflected in modern law. Dean Pound, for example, argued that decisions made without perfect information about the future are necessary fuel to the development of the common law. Similarly, rules allowing civil judgments to rest on a “preponderance of the evidence” and rules upholding prior administrative decisions absent an “arbitrary and capricious” finding all testify to our belief that absolute certainty is neither possible nor necessary in contemporary adjudications.

b. Uncertainties in Modern Remedial Law. One also encounters tolerance of uncertainty in many areas of modern remedial law. Take for example the task of calculating a plaintiff’s lost income resulting from injury. In such a case, one must grapple with such problems as divining whether the plaintiff will remain in the occupation she held at the time of the accident, whether intervening events in her personal life or in the industry where she works will cause her to earn more or less than ordinarily expected, and whether her working life expectancy will be greater or less than average. When confronted with such complex damages issues, courts do not evade the responsibility of fixing a damages figure and cope with the prediction problems by allowing themselves considerable latitude. No reason exists for foregoing this approach in handling

236. See, e.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946) (concluding that where damages are hard to measure, fact-finders may make a just and reasonable estimate based on relevant data); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63 (1931) (asserting that fact-finders may determine the amount of uncertain damages through a reasonable and probable estimate, as long as it is established that defendant actually caused the damage); Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 372 (5th Cir. 1990) (stating that the jury enjoys substantial dis-
injunction requests with similarly difficult forecasting dilemmas.

A related point emerges from this discussion: since uncertainty issues permeate remedial law, a court's decision to decline injunctive relief will not remove it from the realm of prophesy. Ironically, the difficulty of translating the impact of a civil violation into money damages is often cited as a ground for injunctive relief. Indeed, as alluded to earlier, the uncertainty problems of approximating plaintiff's rightful position are often avoided by injunctive relief.

c. Equitable Doctrine. Fear of erroneously issued injunctions perhaps explains the strictness of equitable ripeness doctrine. Injunctions are not only future-looking but are also a static response to what is usually a dynamic problem. Courts may, therefore, perceive a significant risk of error in predicting the need for an injunction and may prefer not to intervene unless the plaintiff makes a vigorous showing of probability and imminence of harm. Strong arguments, however, counsel against allowing this concern to overpower the decision whether to issue an injunction.

The consequences of an erroneously issued injunction may be overstated. A court can err in issuing an injunction by incorrectly evaluating the substantive legal standard applicable to the case, incorrectly interpreting the facts and circumstances surrounding the

237. Criminal statutes as well as injunctions and damages in civil actions, contain substantial predictive elements. Fiss, supra note 71, at 60-81. See also Leubsdorf, supra note 82, at 132 ("Daily, [judges and juries] grant remedies premised on informed guesses about what will happen in the future, or about what would have happened but for the defendant's illegal acts.").

238. See, e.g., Laycock, supra note 82, at 345 (arguing that difficulty in measuring damages is "common ground" for holding legal remedy inadequate); Developments, Injunctions, 78 HARV. L. REV. 994, 1002-04 (1965) (asserting that courts frequently grant injunctions on the ground that damages would be "uncertainable").

239. See supra notes 72-73 and accompanying text for discussion of the uncertainties of approximating with damages the position a plaintiff would have been in but for the defendant's wrong. See also Fiss, supra note 71, at 81 (stating that the risk of error is "notorious" in damage actions and criminal prosecutions, since such actions "call for the reconstruction of a historical event, where the decisional agency did not 'experience' that event"); Leubsdorf, supra note 82, at 142 (asserting that injunctions avoid prediction problems).

240. Fiss, supra note 71, at 80-85 (suggesting that the difficulty of prophesying the future explains in part the subordination of injunctions to other types of relief).

241. See Timothy S. Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 TEX. L. REV. 1101, 1103 (1986). Professor Jost explains that injunctions can be problematic because they "attempt to bring all of the future into the present and deal with it as though it were present." Id. at 1103 n.20.
case, or incorrectly assessing the need to enjoin the defendant. In the third situation, the court’s error has limited significance. The court may have rendered a substantively correct ruling about the parties’ rights, but simply miscalculated whether the defendant was likely to engage in wrongful conduct. Under such circumstances, the court did not incorrectly assert its power, but merely asserted its power unnecessarily.\textsuperscript{242} Possible attacks to such a decision are limited: one can criticize the decision only as a possible waste of judicial resources\textsuperscript{243} or, perhaps, as a slur on the defendant’s reputation for lawfulness.

Where errors of fact and law are concerned, the situation is more unsettling. Although legal and factual errors are not unique to injunctive orders, the consequences of such errors are often exaggerated in the case of injunctions. Unlike damages, injunctions act as direct restraints on conduct, fortified by the court’s contempt power. Because the collateral bar rule prohibits challenges to the substance of an injunction in criminal contempt proceedings,\textsuperscript{244} an error in fact or law can bind a defendant’s future conduct for quite some time before being corrected by the issuing judge or on appeal.\textsuperscript{245}

A recent development may help mitigate this problem. The United States Supreme Court has recently liberalized doctrine governing modifications of injunctive decrees, at least for injunctions restructuring institutions such as school districts and prisons.\textsuperscript{246} At one time, a court could modify the terms of an injunction only upon “a clear showing of grievous wrong evoked by new and unforeseen conditions.”\textsuperscript{247} Recently, however, in the context of a consent decree governing Boston’s prison system, the Supreme Court announced that a party is entitled to have the decree modified upon showing merely “a significant change in circumstances.”\textsuperscript{248}

Although the reach of this innovation beyond institutional reform litigation is uncertain, the new standard unquestionably pro-

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\textsuperscript{242} Fiss, \textit{supra} note 71, at 81.

\textsuperscript{243} Id. at 81-82. The court’s decision may not needlessly expend judicial resources if it provides a necessary clarification of the law.

\textsuperscript{244} Walker v. City of Birmingham, 388 U.S. 307, 320 (1967).

\textsuperscript{245} See Fiss, \textit{supra} note 71, at 82.


\textsuperscript{248} Rufo, 112 S.Ct. at 760. The Court further ruled that once the party meets this standard, a court should consider whether the proposed modification is suitably tailored to the changed circumstance. \textit{Id.}
vides more opportunity for defendants to persuade lower courts to revise ill-considered decrees. Indeed, the new standard reflects an attitude of allowing courts to alter decrees where the defendant can show unintended or deleterious consequences of the injunction.\textsuperscript{249} This allows courts to avoid long-term effects of prediction errors in framing injunctive orders\textsuperscript{250} and should therefore diminish courts’ reluctance to issue injunctions.

d. Human Nature. Left to its own devices, the human mind is generally risk averse, preferring the certainty of the status quo to the uncertainty of change. Indeed, Hamlet tells us that the unknown “puzzles the will,” [a]nd makes us rather bear those ills we have [t]hen fly to others that we know not of . . . .”\textsuperscript{251} Cognitive psychologists and game theorists have also long documented individuals’ preference for a certain outcome over a probable one, even where—mathematically speaking—the individual is more likely to benefit from the probable outcome.\textsuperscript{252} Moreover, the mind attributes far greater weight to prospective harm than prospective gain, so that individuals readily choose to forego probable gain in order to avoid harm that is statistically far less probable.\textsuperscript{253}

Social science literature is replete with normative critiques of

\textsuperscript{249} The Rufo Court explained that a court ordinarily should not modify a consent decree “where a party relies upon events that actually were anticipated at the time it entered into [the] decree.” \textit{Id.} (citations omitted). Where a party anticipated the events upon which it relies in arguing for modification, the Court reasoned, “that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of its undertaking” under Federal Rule of Civil Procedure 60(b). \textit{Id.} at 761.

\textsuperscript{250} Short-term effects that cannot be undone by modification may be dealt with in the preliminary injunction stage through bonding procedures.

\textsuperscript{251} \textit{WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK} act 3, sc. 1, lines 80-82 (Phillip Edwards ed., 1985).


\textsuperscript{253} See, e.g., Abelson & Levi, supra note 252, at 276 (positing that the individual may well reject a choice with a higher value over a choice with a lower value if latter is “less uncertain”); Kahneman & Tversky, \textit{Prospect Theory}, supra note 252, at 263 (arguing that individuals underweight outcomes that are probable in comparison to outcomes that are certain).
this human predilection. For the purposes of evaluating equitable 
ripeness doctrine, however, the observations of Hamlet and the so-
cial scientists hold a different lesson.

At first blush, one might argue that respect for human risk 
preferences provides equivocal guidance in formulating a ripeness 
standard. On one hand, risk aversion suggests a rigid ripeness rule 
because of the uncertainties surrounding the effects of injunctive re-
lief. From this perspective, courts should tightly control injunctions 
and withhold them often because we can never be certain of their ef-
fects. Alternatively, a flexible standard may be in order so that the 
threat of probable harm to plaintiffs can be removed easily.

Upon further analysis, deference to risk preferences seems to 
favor a more flexible ripeness approach. The concern of courts with 
unintended or unforeseen effects of their rulings can be handled 
with flexible modification principles such as those now evolving in 
federal court case law. Without standards allowing latitude in is-
suing injunctions, however, the law will provide plaintiffs with no 
preventative protection from the threat of harm that has inspired 
them to file suit. In terms of comparative risk, the latter seems 
weightier for the human consciousness. This is particularly true for 
plaintiffs like Lyons and Mills for whom prior experience may exac-
terbate the psychological burden posed by fear of future injury.

Empirical research, perhaps, is necessary to develop definite 
principles for analyzing the risk choices inherent in the decision 
whether to issue an injunction. Absent such guidance, however, re-
spect for documented cognitive patterns suggests that the law 
should embody deference to a plaintiff living under the threat of in-
jury. The result—in close cases—will be for courts to resolve doubt 
about threat of harm in favor of an injunction designed to protect 
the plaintiff from that harm.

CONCLUSION

Difficulty in predicting the occurrence and effects of harm pre-
sents daunting problems for courts confronting injunction requests. 
Similarly, federal courts are burdened with a formidable task in 
balancing their responsibility to vindicate federal rights with limi-
tations on their authority reflected in the structure of our constitu-
tional scheme. Standing doctrine, such as that reflected in Lyons, is 
a product of this troublesome balance. As it has played out in the 
case law, however, the compromise at the core of this doctrine is in 
fact no compromise at all: as a result of Lyons standing principles,
whole categories of federal law violations are insulated from federal court review. Reacting to this bald fact, this Article develops two proposals for federal courts to incorporate into an evolving model for deciding requests for permanent injunctions. First, inquiry into the effectiveness and appropriateness of a requested remedy has no place at the doorstep of litigation. Accordingly, federal courts should analyze threshold justiciability issues without reference to the type of relief requested.

Second, after the parties have crystallized the facts and issues in the case, the court is ready to confront whether the case actually merits prospective relief. At this point, the court should not consider equitable ripeness problems in a vacuum. Instead, the court should weigh ripeness in tandem with other factors bearing on the propriety of an injunction, avoiding undue emphasis on the uncertainty that threatened harm will occur.

Implementing these recommendations, federal courts will—I believe—provide more effective, deterrent remedial solutions for plaintiffs such as Sarah Mills and the many others like her.