NOTE

LYONS V. OKLAHOMA, THE NAACP, AND COERCED CONFESSIONS UNDER THE HUGHES, STONE, AND VINSON COURTS, 1936–1949

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INTRODUCTION

ON June 6, 1944, Americans awoke to the news that the Allied invasion of Normandy had begun. Readers of the nation's major newspapers learned of this historic event under the large, bold headlines that announced it.[1] Scanning down this same front page, these readers might also have seen the previous day's controversial United States Supreme Court decision, in which a divided Court held that insurance companies could be held liable for antitrust violations under the Sherman Act.[2] What they would not have seen, however, was the Court's decision that same day affirming the murder conviction of W.D. Lyons, a poor, young, black man from rural Oklahoma.[3] In contrast to the Sherman Act case, several major newspapers failed even to mention this case.[4]

Now almost seventy years old, *Lyons v. Oklahoma*[5] has received little attention among legal scholars and historians. Discussions of *Lyons* have generally been confined to the studies and biographies of Thurgood Marshall, who argued this case unsuccessfully before the Supreme Court on behalf of the NAACP.[6] The case's relative obscurity extends to its defendant, W.D. Lyons, who after twenty-

[1] Allied Armies Land in France in the Havre-Cherbourg Area; Great Invasion is Under Way, N.Y. Times, June 6, 1944, at 1; Allies Land in France, Eisenhower Announces, Wash. Post, June 6, 1944, at 1; Two Battered German Armies Reeling North from Rome Under Annihilating 2-Ply Blows, Atlanta Const., June 6, 1944, at 1.

[2] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[3] Lyons v. Oklahoma, 322 U.S. 596, 605 (1944).

[4] See Atlanta Const., June 6, 1944; Wash. Post, June 6, 1944. The *New York Times* noted the outcome of the case in a daily listing of all the Court's actions, but omitted any description of the facts or circumstances surrounding the defendant or the opinion. See United States Supreme Court, N.Y. Times, June 6, 1944, at 21.

[5] 322 U.S. 596 (1944).

[6] See, e.g., Howard Ball, A Defiant Life: Thurgood Marshall and the Persistence of Racism in America 81–82 (1998); Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 86–97 (1993); Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, at 61–64 (1994) [hereinafter Tushnet, Making Civil Rights Law]; Juan Williams, Thurgood Marshall: American Revolutionary 113–19 (1998); Randall Coyne, Taking the Death Penalty Personally: Justice Thurgood Marshall, 47 Okla. L. Rev. 35, 38–42 (1994); Mark Tushnet, Lawyer Thurgood Marshall, 44 Stan. L. Rev. 1277, 1278–81, 1284 (1992) [hereinafter Tushnet, Lawyer Thurgood Marshall].

five years in prison was finally pardoned by the Oklahoma governor in 1965, only to disappear into anonymity.[7]

The story of W.D. Lyons offers the modern reader a window into the world of criminal justice during the Jim Crow era. The story centers around the particularly grotesque treatment of a young black man at the hands of local Oklahoma law enforcement officials. According to Thurgood Marshall, who was then a young attorney with the NAACP, these officials beat and tortured Lyons, forcing him to feel the charred bones of recently murdered victims in order to obtain a confession.

Rather than being an obscure footnote in the history of constitutional criminal procedure, or just another example of racial discrimination in the pre-civil rights era, this Note will argue that *Lyons* is an important case that deserves to be revisited. *Lyons* presents an intriguing constitutional puzzle that provides insight into the confused evolution of coerced confessions and the Due Process Clause of the Fourteenth Amendment[8] under the Hughes, Stone, and Vinson Courts. Interestingly, this period marks the beginning of both the doctrine and the debates that ultimately culminated in *Miranda v. Arizona*,[9] a case that continues to be a source of controversy.

The gruesome facts surrounding both the crime and the defendant's treatment in *Lyons* attracted the attention of the NAACP and Thurgood Marshall, along with the ACLU. Though it would ultimately be the first case that he lost in the Supreme Court,[10] Marshall was very optimistic about his chances of obtaining a reversal of the state conviction. After initially learning the details of Lyons's story, Thurgood Marshall concluded, "We all believe that this is a most important case and a sure winner under the recent U.S. Supreme Court decisions. It is a case which we should be in on with all of our resources."[11]

[7] Rowan, supra note 6, at 97. Rowan writes, "I have not been able to find Lyons or anyone who knows what happened to him after he walked out of the McAlester prison." Id.

[8] U.S. Const. amend. XIV, § 1.

[9] 384 U.S. 436 (1966).

[10] Williams, supra note 6, at 119.

[11] Letter from Thurgood Marshall to Roscoe Dunjee, Editor, The Black Dispatch Publishing Co. (Jan. 18, 1941), *microformed on* Papers of the NAACP, pt. 8: Discrimination in the Criminal Justice System, 1910–1955, ser. B: Legal Department and

Marshall had good reasons for thinking the case would be a "sure winner." First, the facts of the case presented an opportunity to tell a story of gross mistreatment and injustice.[12] More importantly, recent Supreme Court decisions made *Lyons* look like an easy case. In 1936, the Court had taken an unprecedented step by invalidating a *state* criminal conviction for the first time under the Due Process Clause of the Fourteenth Amendment because of an unconstitutionally coerced confession.[13] Between 1936 and 1944 (the year *Lyons* was decided), the Court heard a total of nine coerced confession cases, and reversed the state conviction in eight of them.[14] Even more significant, seven of these nine cases involved poor black defendants from the South. In these cases, the Court reversed *all* seven convictions in unanimous or per curiam opinions without a single dissent.[15]

At first glance, the facts of *Lyons* seem indistinguishable from the facts of the earlier cases in which the Court had reversed the convictions unanimously: *Lyons* involved a poor black defendant who had been held incommunicado for long periods of time, had been questioned throughout the night by a large group of officials, and had suffered abuse and torture from white law officials seeking to obtain a confession.[16] Yet instead of reversing, the *Lyons* Court *affirmed* the state conviction, by a vote of six to three.[17]

The Court's puzzling decision provides a window into one of the broader themes surrounding the *Lyons* case: the evolution of the Court's coerced confession doctrine under the Fourteenth Amendment. Seemingly inexplicable in the face of then-recent

Central Office Records, 1940–1955, Reel 8, Frame 858 (John H. Bracey, Jr. & August Meier eds., Univ. Publ'n of Am. 1988) [hereinafter Papers of the NAACP].

[12] See infra Section I.A.

[13] Brown v. Mississippi, 297 U.S. 278, 287 (1936); see also Catherine Hancock, Due Process Before *Miranda*, 70 Tul. L. Rev. 2195, 2203 (1996) ("Due Process doctrine for police interrogations began its life with the Court's dramatic creation of a Fourteenth Amendment exclusionary rule in *Brown v. Mississippi*, where white police officers had procured murder confessions from African-American men by torturing them.") (footnote omitted); Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 Mich. L. Rev. 48, 67–68 (2000) ("In short, *Brown* created a new constitutional right . . . .").

[14] See infra Section I.C.

[15] Id.

[16] See infra Section I.A.

[17] *Lyons*, 322 U.S. at 605.

precedent, the Court's decision in *Lyons* can only be understood by stepping back and looking at the evolution of the coerced confession cases as a whole, including cases that came both before and after *Lyons*. To support this claim, this Note will argue that the coerced confession cases from 1936 (when the doctrine first emerged in *Brown v. Mississippi*[18]) to 1949[19] should be divided into two distinct stages.[20] Expanding upon arguments made by Professor Michael Klarman, this Note will argue that in the "first stage," reversals of state convictions were motivated primarily by racial concerns.[21] During this period the Court *unanimously* reversed state convictions in order to address egregious examples of police abuse, primarily in the South. In the "second stage," however, the Court became bitterly divided, failing to issue a single unanimous opinion in a coerced confession case.[22]

This Note will offer both a positive description of the differences between the two stages *and* an explanation for what might have been driving the changes. As for the description, the second stage cases were less clearly about race than the first stage cases. The convictions in the second stage cases became more difficult for the Justices to reverse because the abuse endured by the defendants was much less egregious than that of the first stage race cases, in which the abuse was obvious, brutal, and generally Southern.[23] Because of these factual differences, the first stage cases were usually decided unanimously with considerably less regard for the implications of this new federal judicial power over *state* judicial proceedings.

[18] 297 U.S. 278.

[19] See infra Part II. The analysis stops at 1949 because the deaths of Justices Murphy and Rutledge ushered in a new era of coerced confession decisions. With respect to coerced confessions, the Court (stocked with new Truman appointees) retreated significantly from its earlier decisions after their deaths. C. Herman Pritchett, Civil Liberties and the Vinson Court, 162–64 (1954).

[20] See Table 1, infra pp. 418–19.

[21] Klarman, supra note 13, at 48 ("Altogether, the Supreme Court decided six landmark state criminal procedure cases during the interwar period. Four of these cases involved black defendants from southern states. This Article contends that the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity.").

[22] To see the stages more clearly, see Table 1, infra pp. 418–19.

[23] See infra Section II.A. Notably, the reversals in the first stage all arose from convictions in former Confederate states.

This observation leads to the second important characteristic of the second stage cases: In its opinions, the Court engaged in a sometimes nasty internal debate—almost entirely absent from the first stage cases—about federalism and the proper scope of the Due Process Clause.[24] This absence seems curious in that one might expect profound federalism and states' rights concerns to surface when the doctrine—a doctrine capable of creating vast federal oversight of state criminal proceedings—first emerged in the late 1930s and early 1940s.[25] Yet, it was only in the *second* stage that these concerns were expressed, despite that fact that *both* stages of cases implicated federalism issues.

This Note will offer two explanations for this interesting phenomenon. First, given the factual circumstances surrounding the second stage cases, reversing the convictions arguably implicated federalism concerns more substantially because the cases were more difficult than the earlier, first stage cases. Whereas the first stage reversals could be viewed—even by the more conservative Justices—as limited to addressing individual examples of egregious racial abuse in the South, the second stage cases arguably required a greater degree of federal intervention, which in turn triggered the concerns of the more conservative Justices on the Court. In short, this Note will argue that problems emerged when the doctrine threatened to expand beyond its initial application.

Second, the Court had become embroiled in a dispute about incorporation of the Bill of Rights specifically, and about the scope of federal judicial oversight over states more generally, when *Lyons* and the other second stage cases were decided. This larger jurisprudential battle emerged at almost exactly the same time that the coerced confession cases passed into the "second stage." In other words, the federalism disputes failed to arise in the first stage in part because the larger battle over incorporation (and other issues regarding the scope of federal judicial power over states) did not

[24] See infra Section II.B.

[25] Throughout the discussion, this Note has used "federalism" and "states' rights" synonymously and interchangeably. While the two terms do not share exactly the same meaning, the purpose here is to examine the power and proper scope of federal judicial oversight of state criminal proceedings, as opposed to getting mired in a complex discussion of the meaning of federalism. Thus, either term should be adequate to convey the intended meaning.

begin in earnest until *after* many of the first stage cases had been decided. This Note will argue that this internal dispute, combined with the more egregious facts of the individual cases, was responsible for the different outcomes in the second stage of coerced confession cases.

Returning to the lingering question of why the conviction in *Lyons*—a case with substantial similarities to the first stage Southern cases in which the Court always voted unanimously to reverse—was affirmed, this Note will offer two explanations—one doctrinal and one jurisprudential. Doctrinally, *Lyons* arguably can be distinguished from the earlier Southern cases because it involved more disputed facts. In addition, this Note will show that Marshall and the NAACP wrote a poor brief that largely ignored important elements of the doctrine governing unconstitutionally coerced confessions.[26]

Jurisprudentially, this Note will argue that *Lyons* was a casualty of the larger federalism debate that began raging on the Court in the early 1940s. By the time *Lyons* was decided, the Court (in the context of coerced confessions) had become less concerned about issues of race and more concerned with federalism and the proper scope of federal judicial oversight of state courts.[27] From this perspective, the struggle over the scope and definition of a "coerced" confession proved to be one aspect of a larger ideological, jurisprudential, and even personal battle among the Justices on the Court at this time.

The point of this Note, then, will be not so much a comprehensive survey of the coerced confession cases, as it will be an examination of the early evolution of the doctrine surrounding coerced confessions and the Due Process Clause, using *Lyons* as a point of departure. *Lyons* provides an excellent case study in that it shares many characteristics with the early Southern cases that inspired the coerced confession doctrine, yet it also marks the boundary that divides one stage of cases from the other. Finally, *Lyons* also casts light upon the larger jurisprudential battles that divided the Supreme Court in the 1940s and beyond.

[26] See infra Section III.A.
[27] See infra Section III.B.

With this in mind, Part I of the Note will provide a detailed description of Lyons's story. This will include a description of his initial arrest, confession, and alleged abuse at the hands of Oklahoma state and local law enforcement. With the story laid out, the Note then will explain why this case represents a constitutional puzzle. With this puzzle established, Part II will divide the coerced confession cases into two distinct stages and will provide justification for this division. With the two-stage framework in mind, Part III will offer both a doctrinal and jurisprudential explanation for the result in *Lyons.*

I. *LYONS V. OKLAHOMA*—THE CONSTITUTIONAL PUZZLE

A. The "Facts"

The story begins rather gruesomely. On December 31, 1939, the family of Elmer Rogers was brutally murdered in rural Choctaw County, Oklahoma, near the town of Fort Towson.[28] Local newspapers described the grisly details of the crime, reporting that both Mr. and Mrs. Rogers "had been struck by some heavy instrument which resulted in the crushing of the heads and that Mrs. Rogers received a blow in the left side which crushed all [her] ribs."[29] The Oklahoma appellate court explained:

> Both Mr. and Mrs. Rogers were shot to death with a shot gun, and Mrs. Rogers was mutilated with an axe. Coal oil was then poured on the house and it was set on fire, burning the bodies of both, together with their young son who was asleep in the home.[30]

The appellate court continued, summing up the likely feelings of both the state and local residents: "The crime is one of the most revolting that has ever been perpetrated in this State."[31]

A few weeks after the murders, the police arrested W.D. Lyons and ultimately charged him with the crime.[32] Subsequently, a local

[28] *Lyons*, 322 U.S. at 598.

[29] Accused Slayers Held for District Court (1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 837.

[30] Lyons v. State, 138 P.2d 142, 146 (Okla. Crim. App. 1943), aff'd, 322 U.S. 596 (1944).

[31] Id.

[32] Brief on Behalf of Petitioner at 3, *Lyons*, 322 U.S. 596 (No. 433).

magistrate judge sent Lyons to jail without bond to await the action of the state district court.[33] Lyons had no attorney, and no testimony was offered in rebuttal at his initial hearing.[34] In response to Lyons's incarceration, Roscoe Dunjee, editor of *The Black Dispatch*, a black newspaper in Oklahoma City, wrote to Walter White at the national office of the NAACP, explaining the situation and recommending the organization represent Lyons.[35] Writing separately to Thurgood Marshall, Dunjee attempted to entice Marshall by claiming that this was "the best case to be found in the South on the question of forced confession" and that Dunjee believed "we could attract the attention of the entire nation."[36]

After Marshall inquired a little more, he agreed, replying that this case would be "a sure winner under the recent U.S. Supreme Court decisions."[37] Despite being short on funds,[38] Marshall traveled to Oklahoma to participate in the trial.[39] Convinced not only that Lyons was innocent, Marshall also believed that the lurid details of this story could translate into both membership and money for the NAACP. He wrote:

> This case has enough angles to raise a real defense fund over the country if handled properly. I think we should aim at $10,000 . . . . We could use another good defense fund and this case has more appeal tha[n] any up to this time. The beating plus the use of the bones of dead people will raise money . . . .

[33] Accused Slayers Held for District Court; Guardsmen Mobilized (1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 837.

[34] Accused Slayer Held for District Court (1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 837.

[35] Letter from Roscoe Dunjee, Editor, The Black Dispatch Publishing Co., to Walter White (Mar. 26, 1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 836. Referring to *Chambers v. Florida*, 309 U.S. 227 (1940), discussed infra text accompanying footnotes 133-44, Dunjee wrote that the *Lyons* case was "better than the Florida case in which Justice Black figured recently." Id.

[36] Letter from Roscoe Dunjee, Editor, The Black Dispatch Publishing Co., to Thurgood Marshall (Dec. 26, 1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frames 849–50.

[37] Letter from Thurgood Marshall to Roscoe Dunjee, Editor, The Black Dispatch Publishing Co. (Jan. 18, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 858.

[38] See id., *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 858.

[39] N.A.A.C.P. Acts in Torture Case (Jan. 24, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 872.

> . . . We have been needing a good criminal case and we have it. Lets [sic] raise some real money.[40]

Marshall had good reason for thinking that this case could generate national attention. The facts and allegations allowed him to construct a narrative that made the Oklahoma police look like nothing short of monsters. Those same facts and allegations, however, represent one of the problems with any analysis of *Lyons*. As Friedrich Nietzsche said of the French Revolution, the story is no text and all interpretation.[41] One can "know" it only through the competing, contradictory lenses of two opposing sides. In constructing the story, two competing narratives emerge—Thurgood Marshall's and the state of Oklahoma's.

1. The Night of the Arrest

On January 11, 1940, nearly two weeks after the murder, two officers arrested W.D. Lyons at his mother-in-law's house.[42] According to Marshall's brief and Lyons's testimony at trial, the abuse started immediately. Lyons claimed his hands were tied behind him with his belt. After that, he testified, "The officer that had me tied kicked me, threatened me, told me all about how he was going to burn me, and how he was going to kill me by degrees if I didn't confess to his crime."[43] Marshall asserted that, on the way to the jailhouse, the officers struck Lyons on the head with a one-inch board and bumped his head against a tree. As Lyons entered the jailhouse, the jailor "greeted [him] by striking him in the mouth

[40] Letter from Thurgood Marshall to Walter White (Feb. 2, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 888.

[41] Friedrich Nietzsche, Beyond Good and Evil 37, ¶ 38 (Rolf-Peter Horstmann & Judith Norman eds., Cambridge Univ. Press 2002) (1895) ("[The] noble and enthusiastic spectators across Europe have, from a distance, interpreted their own indignations and enthusiasm into [the French Revolution], and for so long and with such passion *that the text has finally disappeared under the interpretation*.").

[42] Trial Transcript at 105, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 661; Brief on Behalf of Petitioner at 3, *Lyons*, 322 U.S. 596 (No. 433).

[43] Trial Transcript at 106, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 662.

with the jail keys which weighed about five pounds."[44] Lyons was then taken downstairs where other officers were waiting for him. They proceeded to beat him some more, kicking "the skin off the shins of Lyons's legs" with cowboy boots.[45] To corroborate these allegations, Lyons's sister testified that she had seen him that night. She claimed he was bruised, had black eyes, and "couldn't hardly walk."[46]

The Oklahoma officials told a different story. First, their brief argued that Marshall's entire statement of facts should be called "Lyons' testimony" because it "blandly ignores the mass of testimony contradicting him."[47] For example, at trial the State pointed out that, on the night of his arrest, Lyons had fled when the police first approached him.[48] The State also denied any mistreatment and offered the testimony of several officers to rebut the accusations of abuse.[49]

2. The First Confession

Eleven days after the arrest, local officers took Lyons from his cell to the office of the county prosecutor. By around 4:30 a.m., Lyons had confessed to the murder.[50] What happened in between the arrest and the confession represents the heart of the controversy.

According to the NAACP, Lyons endured a night of sheer torture. On the way to the prosecutor's office, Lyons was hit with a blackjack on the back of the head and neck.[51] Once inside, Lyons was taken to a small room and handcuffed in a chair, surrounded

[44] Brief on Behalf of Petitioner at 4, *Lyons*, 322 U.S. 596 (No. 433).

[45] Id. at 5.

[46] Trial Transcript at 180–82, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 733–35.

[47] Brief on Behalf of Respondent at 4, *Lyons*, 322 U.S. 596 (No. 433).

[48] Trial Transcript at 246, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 801.

[49] For examples of these denials, see id. at 144, 157, 172–73, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frames 700, 713, 726–27; Brief on Behalf of Respondent at 5–6, *Lyons*, 322 U.S. 596 (No. 433).

[50] Brief on Behalf of Petitioner at 7, *Lyons,* 322 U.S. 596 (No. 433).

[51] Trial Transcript at 112, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 668.

by twelve men.[52] One of these men was Vernon Cheatwood, a special investigator sent from the Governor's office. Lyons testified, "Mr. Cheatwood called me a black son-of-a-bitch, and threatened to stick red hot irons to me to make me confess to a crime."[53] Over the course of the night, the NAACP's account continued, various officers struck Lyons with a blackjack and beat him with their fists. Lyons's testimony describes the night in graphic detail:

> Reasor Cain was behind me. He beat me with his fist behind my head, then he would pull my hair, then he would shake my head, and hit me with his fist every once in a while, and Mr. Cheatwood he was hitting me and beating me in front, on the knees and legs and arms and shoulders with the blackjacks.
>
> . . . .
>
> They beat me, beat me, beat me, kept yelling questions at me.[54]

At around 2:30 that morning, "officers brought in a pan of bones and placed them in Lyons's lap."[55] Lyons explained, "I had never seen any bones of a dead person before . . . . Mr. Cheatwood would lay the bones on my hands, such as teeth and body bones, and make me hold it and look at it . . . ."[56] Cheatwood admitted to this episode at trial, stating, "[t]hey were a part of the bones remaining of the four year old kid that was burned alive, arms and legs of Mr. and Mrs. Rogers in a pan. I asked for them to be brought up and placed them in his lap myself."[57]

By the early hours of the morning, Lyons confessed. In court, he claimed that he could no longer bear the abuse. When asked why

[52] Brief on Behalf of Petitioner at 5–6, *Lyons*, 322 U.S. 596 (No. 433). While all twelve were not in the room for the entire night, they were all there "from time to time." Id at 5.

[53] Trial Transcript at 114, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 670.

[54] Id. at 116, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 672.

[55] Brief on Behalf of Petitioner at 7, *Lyons*, 322 U.S. 596 (No. 433).

[56] Trial Transcript at 353, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 910.

[57] Id. at 312, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 866.

he confessed, he replied, "Because I didn't want to be tortured any more, and because I couldn't stand any more of the beating."[58]

While the State denied all allegations of physical abuse, Cheatwood's use of the pan of bones was not disputed. The Oklahoma appellate court's opinion stated, "All of the officers who were present denied the evidence of the defendant, and all testified that he was not struck, or injured in any manner."[59] According to the Oklahoma officials, the entire description is again "Lyons's testimony" rather than a statement of the facts.

3. The Scene of the Crime

After the confession, Cheatwood and other officials drove Lyons out to the remnants of the Rogers' house, although here again the State's and Marshall's version of events diverge. If true, the State's version casts some doubt on Lyons's testimony. In court, one officer testified that Lyons, after being taken to the remains of the house, showed them where the axe was located, digging it up from the ashes.[60] After this discovery, Lyons showed them where he had dropped shotgun shells in a pasture near the scene of the crime.[61] Though he claimed he had been hunting, the shotgun shells were "number 4 shot from a 12-gauge shot gun"—the kind of gun used in the murder.[62]

Marshall's version of these events differed dramatically. First, claimed Marshall, the officers again threatened Lyons in the car on the way to the scene of the crime. The trial transcript described the exchange between Lyons and his attorney in the courtroom:

> Q: What do you mean by threatening you?

[58] Id. at 364, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 921. Similar admissions can be found elsewhere in the *Papers of the NAACP*. See id. at 118–19, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 674–75.

[59] Lyons v. State, 138 P.2d 142, 148 (Okla. Crim. App. 1943).

[60] Trial Transcript at 168–69, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 724–25.

[61] Id. at 126–28, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 682–84; see also *Lyons*, 138 P.2d at 148 (recounting how Lyons led authorities to the axe and shotgun shells).

[62] Brief on Behalf of Petitioner at 11–12, *Lyons*, 322 U.S. 596 (No. 433).

> A: Threatened to burn me, threatened to beat me with a pick hammer, if I didn't do like they said.
>
> Q: Did he have a pick, pick hammer?
>
> A: Yes sir.
>
> Q: What did he tell you to do?
>
> A: Threatened to beat me, and burn me if I didn't do like he told me.[63]

Lyons alleged that later, after the officers had built a fire, he turned around and discovered that one of them had an axe in his hand. Lyons explained, "They accused me of putting it there, saying I knew something about it."[64] When he told the officer he knew nothing about the axe, the officer "threatened to torture [him] some more."[65] As for the bullets, Marshall conceded that Lyons had been hunting in the area on the day of, and the day after, the murders. Marshall also admitted that Lyons had used a twelve-gauge shotgun, but claimed it was defective.[66]

The defense called two local men who had helped search through the ashes immediately after the murder. Although both had raked meticulously through the ashes and found a number of small buttons and toys, neither found the axe.[67] One of these men, while not ruling out the possibility that the axe actually was buried there, testified that the police "said they found the axe where I had raked the ashes away."[68] The second was more explicit in questioning the police's version of events. When asked if there could have

[63] Trial Transcript at 122, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 678.

[64] Id. at 124, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 680.

[65] Id.

[66] Brief on Behalf of Petitioner at 12, *Lyons*, 322 U.S. 596 (No. 433). Marshall explained, "The gun Lyons borrowed was broken and the trigger would not stay cocked so that the hammer had to be released at the same time the trigger was pulled." Id.

[67] Trial Transcript at 332–33, 340–42, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 889–90, 897–99.

[68] Id. at 333, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 890.

been an axe lying on the site of the house, he responded, "I don't see how it could have been."[69]

4. The Second Confession

Although the trial court eventually threw out the first confession due to the questions surrounding it, it admitted the second confession.[70] Later in the afternoon on the same day he had made the first confession, Lyons was taken to the state penitentiary in McAlester, Oklahoma. During the trip, Lyons asserted that the Deputy Sheriff, Van Raulston, told his fellow officer, "We ought to hang and bury him right here."[71] After arriving at the prison, Warden Jesse Dunn had Lyons taken to his office for more questioning. After Lyons again denied any role in the murder, Van Raulston began beating him with the blackjack, saying, "You either answer our questions or get treated like you was [before]."[72] Eventually, Lyons cracked:

> He beat me awhile longer, until I couldn't stand it any more, I was already hurting from—already hurting from that last night beating, I hadn't had any sleep since that Sunday night . . . . Mr. Van Raulston asked me was I ready to answer his question, and I told him yes, and Mr. Dunn he sent and got a stenographer and Mr. Dunn and Mr. Van Raulston was telling me how the crime happened.[73]

Roughly fourteen hours after first admitting to the crime, Lyons signed a confession statement and was subsequently taken down to

[69] Id. at 342, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 899.

[70] Id. at 183, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 736. Because the second confession was the basis for Lyons's conviction, the facts and/or allegations relating to the second confession are very important.

[71] Id. at 362, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 919.

[72] Id. at 132, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 688.

[73] Id. at 133, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 689.

"death cell row."[74] Dunn left him in the cell with the electric chair, boasting "he had done sent down thirty nine men."[75]

The State completely denied this version of the story. Because the case turned on whether the second confession was voluntary, the State focused its efforts on contradicting Lyons's testimony relating to the second confession. First, "[h]is claim of mistreatment was positively contradicted by the testimony of Deputy Sheriff Van Raulston, Roy Marshall, a barber, and Warden Jess Dunn."[76] The State further claimed that Van Raulston had been in a car accident the day of the murders and was incapable of beating anyone.[77] The State also denied any conversation about the electric chair or execution.[78] Finally, the State pointed out that "[t]he most clear and convincing evidence with relation to the McAlester confession [i.e., the second confession] is found in the confession itself."[79] This confession, which the trial judge allowed to be introduced into evidence, is a long and detailed interrogatory. In the transcript, Lyons provided intimate details about how the crime took place.[80] He also affirmed that no force had been used on him.[81] This transcript was the document signed by Lyons at the McAlester penitentiary.

5. The Third Confession

A few days later, Lyons made a third confession while confined in the penitentiary. According to the State, Lyons admitted the murder while talking to both Cap Duncan, Sheriff of Choctaw County, and Bert Crawford, a prison guard who had known Lyons

[74] Lyons v. State, 140 P.2d 248, 249 (Okla. Crim. App. 1943) (Doyle, J., dissenting from denial of rehearing).

[75] Trial Transcript at 135, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 691.

[76] Brief on Behalf of Respondent at 5, *Lyons*, 322 U.S. 596 (No. 433).

[77] Id. at 6. Marshall responded that if this were true, "it is unbelievable that such an officer would be entrusted with the duty of transporting a man charged with a triple murder form one county into another county in an automobile." Brief on Behalf of Petitioner at 17, *Lyons*, 322 U.S. 596 (No. 433).

[78] Brief on Behalf of Respondent at 6, *Lyons*, 322 U.S. 596 (No. 433).

[79] Id. at 7.

[80] Lyons v. State, 138 P.2d 142, 153–56 (Okla. Crim. App. 1943).

[81] See id. at 153, 156; Brief on Behalf of Respondent at 8–13, *Lyons*, 322 U.S. 596 (No. 433).

in Fort Towson.[82] According to Duncan's testimony at trial, Lyons told him that he and another man had shot the Rogers family.[83]

Thurgood Marshall, while not challenging the veracity of this testimony, argued that Lyons was still afraid of receiving more physical abuse. He wrote that Lyons "was still under the influence of prior intimidation, coercion and beating."[84]

6. The Motive

To explain why the State of Oklahoma went to all this trouble to convict an innocent person, Marshall alleged political corruption. Specifically, Marshall portrayed Lyons as a fall guy for a mistake made by prison administrators that could have cost the Oklahoma Governor his office. According to Marshall, immediately after the murder, several "white prisoners from a nearby prison camp were arrested for the crime."[85] Apparently, the prison officials had been allowing the prisoners to get out at night.[86] According to Roscoe Dunjee in his letter to Thurgood Marshall, one of these prisoners had already confessed to the murder.[87] He wrote, "It was only when the Governor discovered that convicts from a prison camp were implicated, and felt his administration might be scarred, that a black man was beaten into a confession."[88] This potential embarrassment might explain why a special investigator from the Governor's office, Vernon Cheatwood, was sent to rural Oklahoma for a murder investigation.

Although the State denied any wrongdoing, several officials did admit that inmates had been arrested immediately following the murder. When asked how many had been arrested, Warden Dunn responded, "Something like four or five or six possibly. May be

[82] Brief on Behalf of Respondent at 10–11, *Lyons*, 322 U.S. 596 (No. 433).

[83] Trial Transcript at 229, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 782.

[84] Brief on Behalf of Petitioner at 18, *Lyons*, 322 U.S. 596 (No. 433).

[85] Id. at 3 (citation omitted).

[86] Letter from Thurgood Marshall to NAACP Office (Jan. 29, 1941) at 2, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 878.

[87] Letter from Roscoe Dunjee, Editor, The Black Dispatch Publishing Co., to Thurgood Marshall (Jan. 13, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 856.

[88] Id.

more, I don't know."[89] Upon further cross-examination, the point was made more explicitly:

> Q: Was there, or was there not, wide newspaper publicity to the effect that inmates of the camp were charged with this murder?
>
> A: There was newspaper publicity. There had been some arrests for it.
>
> Q: Wasn't the newspaper publicity condemning the management, the arrangement whereby the men got out from the camp?
>
> A: There was.
>
> Q: That was during the time that Lyons was brought to you.
>
> A: That is right.[90]

At the trial, and during an evidentiary hearing without the jury present, the judge excluded the first confession made in the jailhouse at Hugo. He found "that the defendant may have been frightened into making the confession . . . by long hours of questioning and by placing bones of the purported bodies of the deceased persons on his lap during the questioning."[91] The second confession, however, was *not* excluded. The judge ruled that the weight of the evidence "indicate[d] that no threats were made . . . [and] that the confession was made voluntarily by the defendant."[92] On the basis of this confession and other evidence, the jury found Lyons guilty and sentenced him to life imprisonment.[93] The Oklahoma appellate court affirmed,[94] as did the United States Supreme Court.

[89] Trial Transcript at 202, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 755.

[90] Id. at 212, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 765. Van Raulston also admitted the arrests had been made, but claimed that all of the suspects had been exonerated. Id. at 303, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 858.

[91] Id. at 183, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 736.

[92] Id.

[93] Lyons v. State, 138 P.2d 142, 146–47 (Okla. Crim. App. 1943).

[94] Id. at 168.

B. Evaluating the Merits of the Individual Case

Obviously, each side strongly disputed the other's claims and descriptions of the case. Evaluating the strength of the State's version first, there are some aspects of the case that weigh heavily against Lyons. First, the State introduced testimony that Lyons had been seen in town the day of the murder with a twelve-gauge shotgun, which he had concealed in a newspaper.[95] Moreover, he had also left shotgun shells near the scene of the crime.[96] Although Marshall and Lyons both explained that he had been hunting rabbits in the area both before and *after* the murder,[97] the admission put him near the scene of the crime with a gun. Finally, there was the testimony of several officers present that night, all of whom denied any mistreatment.[98]

While this evidence weakens Lyons's claim of innocence, other evidence seems to confirm both that he was innocent and that he was beaten mercilessly by the police. First, the trial took place more than a year after Lyons's arrest.[99] This seems unusual given the brutality of the crime and the passions that must have accompanied it. In *Brown v. Mississippi*,[100] for example, the trial that sentenced the defendants to death occurred less than a week after the murder.[101]

[95] Trial Transcript at 345, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 619. A man named Sammie Green let him borrow the gun before the murders. Id. at 41–43, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 597–99. According to Lyons, he concealed the gun because he had no hunting license. Id. at 345, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 902. The fact that he had been seen with a gun could explain why Lyons was arrested for the crime in the first place.

[96] See Brief on Behalf of Petitioner at 11–12, *Lyons*, 322 U.S. 596 (No. 433).

[97] Trial Transcript at 127, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 683.

[98] For examples of these denials, see id. at 144, 157, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frames 700, 713.

[99] Brief on Behalf of Petitioner at 2–3, *Lyons*, 322 U.S. 596 (No. 433); see also Tushnet, Making Civil Rights Law, supra note 6, at 61–62 ("Marshall's confidence in Lyons's innocence was bolstered because the state delayed bringing Lyons to trial, contrary to the usual practice of having extremely prompt trials in cases where African-Americans were accused of murdering whites.").

[100] 297 U.S. 278 (1936).

[101] Id. at 279. In *Brown*, the Court noted that:

Second, several witnesses contradicted the officers' denials. These witnesses included workers at a local hotel. Contradicting Cheatwood's denial that he beat Lyons or even possessed a blackjack, one hotel worker testified that after Lyons was taken to the McAlester prison, Cheatwood had instructed the hotel worker to "go up to my room and get me my nigger beater."[102] Another worker corroborated this testimony by adding that Cheatwood had a blackjack.[103] In addition, the *white* relatives of the victims testified on behalf of the defense. For example, Mrs. Rogers's sister-in-law and father testified that Cheatwood had a blackjack and had admitted beating Lyons the night before.[104] The father alleged that Cheatwood told him, "I beat that boy last night for, I think, six—either six or seven hours . . . I haven't even got to go to bed . . . ."[105]

Third, town sentiment seemed to favor Lyons. The local jury declined to give him the death penalty for this violent murder, opting instead for life imprisonment.[106] An article in *Crisis*, the magazine of the NAACP, explained, "When a white jury in Oklahoma finds a Negro guilty of shooting a white family to death, hacking the bodies to pieces with an axe, and then setting fire to the home and burning the bodies—*and still recommends mercy*—something is rotten in Denmark!"[107]

> Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Id. For an example outside the coerced confession context, see *Powell v. Alabama*, 287 U.S. 45, 49–50, 53 (1932) (reversing death sentences where black defendants were prosecuted without "effective and substantial" counsel six days after alleged rape and sentenced to death in one-day trials).

[102] Trial Transcript at 410, Oklahoma v. Lyons (Okla. Dist. Ct. 1940) (No. 2712), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 967.

[103] Id. at 411–13, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 968–70.

[104] Id. at 414–18, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 971–75.

[105] Id. at 418, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 975.

[106] *Lyons*, 322 U.S. at 597.

[107] Tortured With Charred Bones!, Crisis, Mar. 1941, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 928.

Dunjee and Marshall both confirmed these sympathies in their writings. Dunjee wrote that "[t]he Hugo community is for Lyons. It is only the Govwrnor's [sic] office and a few petty officials who oppose Lyons' freedom."[108] After the initial trial, Marshall wrote that "90% of the white people . . . were with Lyons" and that many had approached him, telling Marshall they didn't believe Lyons was guilty.[109] Further evidence of these sympathies can be seen in the actions of the murdered woman's father, who testified for the *defense*. In fact, after the trial, Mrs. Rogers's father (again, a white man) joined the NAACP.[110] He later became president of the nearby Towson branch of the NAACP.[111]

Fourth, the steady support from the NAACP indicates that they believed him innocent. As Professor Klarman has explained, given both the limited resources of the NAACP and the desire for a good public image, they were extremely hesitant to take criminal cases.[112] To avoid the negative publicity of helping to free criminal defendants, the accused needed a strong claim of innocence.[113] Despite these risks, the NAACP stayed with Lyons's case, arguing it at all the way to the Supreme Court.[114]

As for Marshall, there is little doubt that he believed Lyons to be innocent. Years later, he told a friend, "I *still* think Lyons was innocent."[115] The ACLU believed Lyons as well. The organization ul-

[108] Letter from Roscoe Dunjee, Editor, The Black Dispatch Publishing Co., to Thurgood Marshall (Jan. 19, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 863.

[109] Letter from Thurgood Marshall to Walter White, supra note 40, at 2, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 887.

[110] Press Release, NAACP, Father of Murder Victim Joins NAACP (June 6, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 8, Frame 956.

[111] Press Release, Decision Soon on W.D. Lyons Appeal (Mar. 6, 1942), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 25.

[112] Klarman, supra note 13, at 86.

[113] See Tushnet, Making Civil Rights Law, supra note 6, at 42; Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950, at 38 (1987) ("[T]he NAACP's policies regarding criminal defense . . . came close to requiring that the accused be innocent."); Klarman, supra note 13, at 86 ("The NAACP, to preserve its credibility, was unwilling to become involved in criminal cases unless convinced of a high probability of the defendant's innocence.").

[114] See Tushnet, Lawyer Thurgood Marshall, supra note 6, at 278.

[115] Rowan, supra note 6, at 97. For years following the Supreme Court case, Marshall periodically sent Lyons money "for cigarettes and a few other little things." Letter

timately joined the case, submitting amicus briefs to the both the Oklahoma appellate court and the Supreme Court.[116] Finally, the Oklahoma governor pardoned Lyons in 1965—nearly twenty-one years after his conviction.[117]

In sum, Lyons had a strong claim of innocence. When the Supreme Court heard arguments, it had access to much of this information. Based on the conflicting testimony (including that of the victim's family), the jury's imposition of a life sentence, Marshall's brief, and police violations of a number of Oklahoma statutes,[118] the Court had ample reason to believe either that Lyons was innocent or that the State of Oklahoma had acted illegally. But even if every single Justice believed Lyons was guilty—which seems hard to believe—Lyons still had a strong *constitutional* claim.[119]

C. Evaluating the Constitutional Claim

Even assuming Lyons was guilty, the Supreme Court's decision still flew in the face of recent precedent. To understand why, a review of the Court's recent history in this area explains why *Lyons* seemed like an easy case for the Court to reverse.

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from Thurgood Marshall to W.D. Lyons (Dec. 19, 1944), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 221.

[116] For the ACLU brief in the Oklahoma appellate court, see Brief of American Civil Liberties Union, Amicus Curiae, Lyons v. State (1940) (No. A-10108). For the ACLU's brief to the Supreme Court, see Brief of American Civil Liberties Union, Amicus Curiae, *Lyons*, 322 U.S. 596 (No. 433).

[117] Rowan, supra note 6, at 97.

[118] Marshall lists these in his brief. See Brief on Behalf of Petitioner at 25–27, *Lyons*, 322 U.S. 596 (No. 433) (citing Okla. Stat. ch. 17, art. 10, §§ 2760, 2765, 2766, 2768 (1931); Okla Stat. ch.17, art. 12, §§ 2793–96, 2799–2801 (1931).One of these statutes required the arresting officer to take the defendant before a magistrate "without unnecessary delay." Id. at 25 (citing Okla. Stat. ch. 17, art. 10, § 2765 (1931). The appellate court ruled that the failure to do so was not enough to find a violation of the due process clause. Lyons v. State, 138 P.2d 142, 166–67 (Okla. Crim. App. 1943).

[119] Because Lyons's innocence or guilt was irrelevant to the constitutional issues, one might question the discussion of it in this Note. There are at least two responses to this objection. First, the Note aims to be something more than a discussion of constitutional doctrine. A secondary goal is to provide a case study of Lyons's ordeal. Discussions of Lyons's innocence are thus highly relevant for this particular purpose, even if they may be irrelevant to the actual constitutional issue in question. Second, it is at least arguable that a discussion of Lyons's innocence is in fact relevant to understanding the Court's decision. If nothing else, it casts doubt on any speculation that the Court may have been less vigilant in protecting constitutional rights because Lyons was clearly guilty.

Historically, the Supreme Court did not intervene in state criminal proceedings.[120] Generally, its hesitancy stemmed from federalism and states' rights concerns.[121] More specifically, the Court lacked the doctrinal tools it needed for intervention. In the 1940s, the amendments dealing with criminal procedure—the Fourth, Fifth, Sixth, and Eighth—had not yet been incorporated through the Fourteenth Amendment, and thus did not apply to the states.[122] The Fourteenth Amendment's Due Process Clause, however, *did* apply to the states and provided the only real basis for reviewing state criminal procedures.[123] This clause is notoriously vague, though, and was not used by the Supreme Court to reverse convictions based on coerced confessions until 1936.[124]

In that year, the Court decided the landmark case of *Brown v. Mississippi*,[125] a dramatic departure from history and precedent.[126] There, the Court reversed a criminal conviction in Mississippi where the confession was found to be a product of coercion. The facts of that case were so heinous that two judges on the Mississippi Supreme Court dissented, stating that "the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."[127] In *Brown*, the police had taken one of the defendants out and hung him for a while from the limb of a tree, let him down, hung him again, and then tried to obtain a confession. He was also severely beaten. The record showed that at trial, he still had the marks of the rope impressed upon the skin of his neck.[128] The Court unanimously overturned the

[120] Tushnet, Making Civil Rights Laws, supra note 6, at 56 ("Before the 1940s, the Court placed few limits on state criminal procedures."); Klarman, supra note 13, at 48 ("Prior to 1920, the Supreme Court had upset the results of the state criminal justice system in just a handful of cases, all involving race discrimination in jury selection.").

[121] Klarman, supra note 13, at 48 ("For the Court to assume the function of superintending the state criminal process required a departure from a century and a half of tradition and legal precedent, both grounded in federalism concerns.").

[122] Pritchett, supra note 19, at 153–54.

[123] Id. at 153.

[124] See Klarman, supra note 13, at 67.

[125] 297 U.S. 278 (1936).

[126] Klarman, supra note 13, at 67 (asserting that *Brown* required the Justices to "manufacture new constitutional law").

[127] *Brown*, 297 U.S. at 282.

[128] Id. at 281–82.

conviction, stating that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners."[129]

After *Brown*, the Court heard eight more state court cases involving coerced confessions before the decision in *Lyons*. In seven of these, the Court followed and expanded *Brown* by reversing the state conviction.[130] Even more significant, seven of the nine coerced confession cases (including *Brown*) involved poor, black defendants from the South. The Court reversed *all seven* of these cases in unanimous or per curiam decisions without a single dissent.[131] In one case not involving a black defendant, the Court also seemed to expand its doctrine by ruling that, even in the absence of violence, confessions obtained under "inherently coercive" circumstances were also unconstitutional.[132]

In the first case in this series, *Chambers v. Florida*,[133] the Court reaffirmed and expanded *Brown.* In *Chambers,* the murder of an elderly white man outraged the public.[134] In response, the police stormed a black community, rounding up and arresting as many as forty black people in connection with the crime.[135] During the next week, the four defendants were continuously questioned without counsel. After five days of being held incommunicado, the defendants still had not confessed.[136] They also claimed they had been beaten and warned about the mob gathering outside, but the police denied the claims of physical abuse.[137] Finally, the defendants

[129] Id. at 286.

[130] The seven reversals were the following: *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Ward v. Texas*, 316 U.S. 547 (1942); *Vernon v. Alabama*, 313 U.S. 547 (1941); *Lomax v. Texas*, 313 U.S. 544 (1941); *White v. Texas*, 309 U.S. 631 (1940), reh'g denied, 310 U.S. 530 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); and *Chambers v. Florida*, 309 U.S. 227 (1940). The affirmance was *Lisenba v. California*, 314 U.S. 219 (1941).

[131] See cases cited supra note 130.

[132] *Ashcraft*, 322 U.S. at 153–54.

[133] 309 U.S. 227 (1940).

[134] Id. at 229.

[135] Id.

[136] Id. at 231, 238–40.

[137] Id. at 231 ("The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated.").

"broke" and confessed, which ultimately resulted in a death sentence.[138]

The Court unanimously overturned the conviction. Justice Black, writing for the Court, strongly criticized the State, explicitly comparing its actions to the practices of tyrannical regimes throughout history.[139] Several important points should be taken from his opinion in *Chambers*, which affirmed and expanded upon *Brown* in a number of ways. First, the Court asserted its authority to review the facts independently where a constitutional right was at issue.[140] Second, the Court claimed it was not reversing on the basis of torture because that evidence was disputed.[141] The Court instead reversed on the basis of the coercive *circumstances* surrounding the confession, which were established "without conflict."[142] Black wrote, "The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings."[143] Even if the Justices privately believed that the defendants had been abused in order to compel their confessions, the Court's holding that unconstitutional coercion was no longer limited to violence alone, but could include the kinds of *psychological* coercion present in *Chambers*, represented an important expansion of *Brown*'s holding. On the basis of *Chambers*, the Court, over the next two years, proceeded to overturn four more convictions in which confessions were unconstitutionally coerced.[144] The Court summarily reversed all four of these cases with terse per curiam opinions, although it did submit a lengthier (though still

[138] Id. at 227, 231–32.

[139] Id. at 236. Justice Black wrote, "Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny." Id. Very likely, the increasing strength of fascist regimes in 1940 influenced Justice Black's opinion.

[140] Id. at 228–29.

[141] Id. at 238.

[142] Id. at 238–39.

[143] Id. at 239.

[144] See Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 309 U.S. 631 (1940), reh'g denied, 310 U.S. 530 (1940); Canty v. Alabama 309 U.S. 629 (1940). Two of these decisions came within two months of *Chambers*. *White* was announced on March 25, 1940, while *Canty* was announced on March 12, 1940. See *White*, 309 U.S. at 631; *Canty*, 309 U.S. at 629.

unanimous) opinion in *White v. Texas* after a petition for rehearing.[145] As Bennett Boskey and John H. Pickering explain, these cases were "all from the South and involv[ed] Negro defendants from whom confessions were wrung under somewhat similar circumstances."[146] For example, in *Canty v. Alabama,*[147] a black defendant was confined for a week in a dark basement dungeon with whipping straps on the wall. He also claimed he was beaten, although this allegation was disputed.[148] In *Vernon v. Alabama*,[149] the defendant was detained for twelve days without the aid of counsel. The police regularly took him out to the woods in the middle of night for "questioning" and, according to Vernon, severe beatings.[150] In *Lomax v. Texas*,[151] the police stripped the defendant naked and continuously questioned him for hours, never allowing him to sit down.[152] Finally, in *White v. Texas,* an illiterate black man was kept in jail for a week with no formal charges and without the benefit of counsel.[153] The Texas authorities admitted to taking him out in the woods, in the middle of the night, for questioning several times. White also claimed he was whipped.[154]

The final case in this series ties together many important threads running through these seven decisions involving black defendants. In *Ward v. Texas*, the authorities arrested William Ward without a warrant and moved him from jail to jail over the course of three days.[155] Ward also claimed to have been beaten and burned with cigarettes. Although the State denied this allegation (stating they just "sweet talked" him into confessing), one sheriff testified that

[145] *White*, 310 U.S. 530.

[146] Bennett Boskey & John H. Pickering, Federal Restrictions on State Criminal Procedure, 13 U. Chi. L. Rev. 266, 285 (1946).

[147] 309 U.S. 629 (1940).

[148] Boskey & Pickering, supra note 146, at 285.

[149] 313 U.S. 547 (1941).

[150] Boskey & Pickering, supra note 146, at 285.

[151] 313 U.S. 544 (1941).

[152] Boskey & Pickering, supra note 146, at 285.

[153] 310 U.S. 530, 532 (1940).

[154] Boskey & Pickering, supra note 146, at 286. During one of White's rehearings, he was shot by a local man taking "justice" into his own hands. The gunman was acquitted after the prosecuting attorney explicitly requested that the jury return a verdict of not guilty. When they did, it "set off an impromptu celebration of cheering and whistling." Id. at 286 n.67.

[155] 316 U.S. 547, 549 (1942).

he had seen what appeared to be cigarette burns on Ward's skin.[156] Justice Byrnes concluded:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.[157]

The Court's ruling in *Ashcraft v. Tennessee*,[158] a few months before the *Lyons* decision in 1944, seemed to expand the definition of "coercion" considerably beyond the earlier precedents, which should have made *Lyons* an even easier case for the Court to decide. In *Ashcraft*, the police held a white man for thirty-six hours "incommunicado, without sleep or rest, [while] relays of officers, experienced investigators, and highly trained lawyers questioned him without respite."[159] Ashcraft alleged the police burned his eyes with a strong electric light, but he did not claim any other physical abuse.[160] Nevertheless, Justice Black found that the circumstances surrounding the confession were so "inherently coercive" that its use as the basis of the conviction violated the Due Process Clause.[161]

Although Justice Black explicitly grounded his holding on the undisputed facts, one should see *Ashcraft* as a potentially dramatic expansion of the Court's coerced confessions doctrine.[162] First, Ashcraft was white, which indicated that the doctrine would now be applied beyond egregious cases of racial abuse.[163] Second, unlike

[156] Id. at 552. The officer testified, "Yes sir, [the marks] were fresh. There were several of them on his body." Id.
[157] Id. at 555 (citations omitted).
[158] 322 U.S. 143 (1944).
[159] Id. at 153.
[160] Id. at 150.
[161] Id. at 154.
[162] Id. at 153 ("Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all.").
[163] Id. at 173.

the accused in some of the other cases, Ashcraft was not transferred from place to place, or taken out into the woods for "questioning." He remained in the jail during the questioning.[164] Most importantly, the Court held that twenty-eight (or possibly thirty-six, depending on which set of facts one believes) straight hours of questioning were "inherently coercive."[165] As the dissent pointed out, to reach this decision, the Court had to ignore a great deal of testimony indicating that Ashcraft was well-treated, well-fed, and alert despite the length of his interrogation.[166] To hold that a certain number of hours could be "inherently coercive," despite evidence to the contrary, jeopardized the legality of a large number of confessions obtained between the arrest and the arraignment. In response, the dissent warned of the expansive potential of "inherent coercion."[167]

Of the nine cases decided during this period, the Court affirmed the state conviction in only one, *Lisenba v. California*.[168] There are many significant distinctions, however, between *Lisenba* and the other state confession cases. First, *Lisenba* involved a white man in

[164] Id. at 149.

[165] Id. at 154 ("We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.").

[166] Id. at 163–70 (Jackson, J., dissenting). Justice Jackson stated:

> This evidence shows that despite the "inherent coerciveness" of the circumstances of his examination, the confession when made was deliberate, free, and voluntary in the sense in which that term is used in criminal law. This Court could not, in our opinion, hold this confession an involuntary one except by substituting its presumption in place of analysis of the evidence and refusing to weigh the evidence even in rebuttal of its presumption.

Id. at 163–64 (Jackson, J., dissenting).

[167] Id. at 162 (Jackson, J., dissenting). Justice Jackson explained:

> If the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by a general doctrine dependent on the clock, it should be capable of statement in definite terms. If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1? All are "inherently coercive." Of course questions of law like this often turn on matters of degree. But are not the states entitled to know, if this Court is able to state, what the considerations are which make any particular degree decisive? How else may state courts apply our tests?

Id. (Jackson, J., dissenting).

[168] 314 U.S. 219 (1941).

California who allegedly murdered his wife.[169] Second, the case addressed the more narrow issue of whether the police automatically violated the Constitution when, in violation of various California statutes, they failed to take the defendant before a magistrate, instead holding him incommunicado for several days.[170] Third, the claim of coercion was much weaker given that the defendant failed to raise the issue in his first hearing.[171] Finally, the prosecution had strong circumstantial evidence of the defendant's guilt, including an accomplice's testimony and the fact that the defendant had taken out a large insurance policy just before the murder.[172]

Considering all of these cases together, we can see why *Lyons* seemed to be a sure winner for the NAACP. First, Lyons was a poor, black, rural defendant subjected to harsh police tactics. In every similar situation over the past decade, the Court had reversed the conviction unanimously. Second, in *Ashcraft*, the Court

[169] Although the opinion never explicitly said that the defendant was white, the Court generally drew attention to the defendant's race when the defendant was black. See, e.g., *White*, 310 U.S. at 532; *Chambers*, 309 U.S. at 229. It should be noted, however, that *Ashcraft* also involved a white defendant. See supra text accompanying note 159.

[170] *Lisenba*, 314 U.S. at 234–35. In examining the officer's actions,

> The failure of the arresting officers promptly to produce the petitioner before an examining magistrate, their detention of him in their custody from Sunday morning to Tuesday morning, and any assault committed upon him, were violations of state statutes and criminal offenses.
>
> . . . .
>
> But illegal acts, as such, committed in the course of obtaining a confession, whatever their effect on its admissibility under local law, do not furnish an answer to the constitutional question we must decide. The effect of the officers' conduct must be appraised by other considerations in determining whether the use of the confessions was a denial of due process.

Id. at 234–35 (footnotes omitted).

[171] Id. at 221 ("No question arising under the Constitution of the United States had been raised or decided [in the initial hearings before the trial court and California Supreme Court]. In a second petition for rehearing, the petitioner, for the first time, asserted that his conviction violated the Fourteenth Amendment."). The failure to raise this issue arguably weakens the defendant's case. It seems more difficult to believe that the defendant would have failed to mention this in the initial hearings if he had in fact been abused. There was no indication that the claim had been waived because of this failure.

[172] Id. at 223–24. Interestingly, the defendant only came under suspicion when he tried to sue the insurance company to collect his money. Id. at 224 ("James attempted to collect double indemnity; the insurers refused to pay; suits were instituted and one of them settled. As a result of this activity, a fresh investigation of Mary James' death was instituted.").

seemed to be reining in police abuse by articulating a new and broader definition of unconstitutional "coercion."[173] Finally, with the combination of *Chambers* and *Ashcraft*, Lyons did not need to prove the use of physical violence. If being kept awake for thirty-six hours constituted a violation (as it did in *Ashcraft*), then surely the Court would find the state officials' conduct in *Lyons* unconstitutional. This conduct included keeping Lyons incommunicado for eleven days without counsel, forcing him to go to the crime scene at dawn after an all-night interrogation, moving him from prison to prison, and forcing him to touch a pan of charred bones from murder victims.

Yet, the Court voted six to three to *affirm* the state conviction in *Lyons*. While it is true that none of the previous cases involved the subsequent confessions found in *Lyons*,[174] this decision would apparently permit police to obtain any confession by abuse and violence, so long as they waited a while before obtaining a later confession. Both the ACLU and Marshall recognized this potential problem, arguing it would allow law enforcement officials to "circumvent the rulings of this Court on the admissibility of confessions . . . . Such procedure if upheld will nullify the long line of decisions of this Court."[175]

So what *was* going on in this decision? One possibility is that the Court genuinely thought Lyons was guilty. At oral argument, Justice Roberts asked Lyons's attorneys, "No. 4 is pretty big shot for

[173] See supra notes 158–67 and accompanying text.

[174] Both Marshall and the ACLU argued that *Canty*, 309 U.S. 629, involved the question of subsequent confession, though the record is hard to verify. Marshall wrote, "This Court in the case of *Canty v. Alabama* reversed the decision of the Supreme Court of Alabama in a case where effort was made to substantiate a subsequent confession made under changed circumstances without relying upon the first confession which was obviously extorted by force." Brief on Behalf of Petitioner at 22–23, *Lyons*, 322 U.S. 596 (No. 433) (citing *Canty*, 309 U.S. 629); see also Brief of American Civil Liberties Union, Amicus Curiae, at 9, *Lyons*, 322 U.S. 596 (No. 433) ("This Court . . . had no difficulty in reversing a conviction obtained on a second confession in a similar case.") (citing *Canty*, 309 U.S. 629). Because the Supreme Court did not issue an opinion, it impossible to know just what *Canty* stood for.

[175] Brief on Behalf of Petitioner at 22, *Lyons*, 322 U.S. 596 (No. 433); see also Brief of American Civil Liberties Union, Amicus Curiae, Lyons v. State (1940) (No. A-10108)("[A]ll 'second confessions' . . . ought to be scrutinized by the Court on its own motion, and with more than ordinary care, lest the great principle at stake—freedom of the accused from the rack and the torture chamber—be frittered away under hypocritical disguises.").

rabbit hunting, isn't it?"[176] Although Justice Roberts's question suggests that at least he, and possibly other Justices, did not believe Marshall's defense, this explanation seems unsatisfying. Too many factors suggest that Lyons was innocent, or at least was not clearly guilty.[177] Yet, even if the Justices believed him guilty, this belief should have been completely irrelevant to the constitutional issues at stake. By affirming the conviction in *Lyons*, the Court threatened to gut an entire decade of precedent and doctrine sculpted by unanimous opinions. After *Lyons*, police officers were arguably free to employ very questionable tactics, so long as they waited an acceptable amount of time before obtaining a second confession. In this way, affirming the conviction provided an easy way to evade the requirements of *Brown*.

Understanding the result in *Lyons* requires one to step back and take a broader view of the Court's coerced confession cases, both before and after *Lyons*. This broader perspective illuminates the context in which the case was decided and provides a better explanation for the Court's decision.

II. THE EVOLUTION OF COERCED CONFESSIONS UNDER THE STONE AND VINSON COURTS

This Section provides a descriptive framework for understanding the evolution of the coerced confession doctrine. The era from 1936 to 1949, which represents the first fourteen years of the doctrine's development, can be divided into two distinct stages. In the first stage, the Court, motivated primarily by race, acted to address individual examples of egregious abuse on a case-by-case basis, especially where the defendant had been sentenced to death. The Court unanimously decided against the State in *all* of the cases involving Southern black defendants in this first stage. In the second stage, however, the Court fractured, failing to issue a single unanimous opinion.

[176] Drew Pearson, Merry-Go-Round, Daily Mirror, May 7, 1944, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 175. The state appellate court also hinted that it thought Lyons was guilty. See Lyons v. State, 138 P.2d 142, 167 (Okla. Crim. App. 1943).

[177] See supra Section I.B.

The first distinguishing feature of the second stage (from a positive perspective) is the diminished significance of race. In addition, the dissenting (and sometimes bitter) opinions in this stage, which emphasized federalism and states' rights, appear increasingly skeptical of a new and expanding "unconstitutional coercion" doctrine.[178] More specifically, concerns emerged about the scope of the Due Process Clause, which represented one aspect of the more general concern regarding the proper scope of federal judicial oversight of state criminal proceedings.

A. Brown v. Mississippi *and its Progeny—Stage One, 1936–1942*

Rigid divisions between periods of time often obscure what are actually fluid progressions. In this sense, the "stages" that follow should be seen as helpful heuristic devices rather than clear boundary lines. That said, a strong case nevertheless exists for dividing the cases into two distinct periods, which are illustrated in Table 1 below.[179]

TABLE 1
STAGE ONE

CASE	*Conviction Reversed*	*Conviction Affirmed*
Brown v. Mississippi (1936)	9-0	
Chambers v. Florida (1940)	8-0	

[178] See supra note 13 and accompanying text.

[179] Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); *Lyons*, 322 U.S. 596; Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); Lisenba v. California, 314 U.S. 219 (1941); Vernon v. Alabama, 313 U.S. 547; Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 309 U.S. 631 (1940), reh'g denied, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940); *Brown*, 297 U.S. 278. This Note excludes *Lee v. Mississippi*, 332 U.S. 742 (1948), from its discussion. *Lee* involved a narrower issue than the other cases during this period; Mississippi had precluded the defendant's right to argue that the confession was coerced because of the defendant's earlier testimony that he had not actually confessed. Id. at 742–44. Thus, *Lee* implicated the right to raise a defense more than it did the scope of coercion.

Canty v. Alabama (1940)	Per curiam	
White v. Texas (1940)	Per curiam, 9-0 (reh'g)	
Vernon v. Alabama (1941)	Per curiam	
Lomax v. Texas (1941)	Per curiam	
Lisenba v. California (1941)		7-2
Ward v. Texas (1942)	9-0	

STAGE TWO

CASE	Conviction Reversed	Conviction Affirmed
Ashcraft v. Tennessee (1944)	6-3	
Lyons v. Oklahoma (1944)		6-3
Malinski v. New York (1945)	5-4	
Haley v. Ohio (1948)	5-4	
Watts v. Indiana (1949)	6-3	
Turner v. Pennsylvania (1949)	5-4	
Harris v. South Carolina (1949)	5-4	

The first aspect to note is the Court's relative unanimity during the first stage of cases. Only in *Lisenba*—the single case in this period not involving a Southern, black defendant—did the Court di-

vide.[180] Conversely, the Court *never* decided a case unanimously in the second stage of cases.

One factor helping to explain this division is race. As Professor Klarman has observed, race seemed to play a primary role in motivating the Court's decisions during this period.[181] As this Note has already discussed, the first seven state convictions ever reversed on the basis of unconstitutionally coerced confessions involved Southern, black defendants suffering at the hands of local law enforcement officials.[182]

Contemporary reaction to many of the Court's decisions also indicates that race was never far from both the Justices' and the public's minds. In *Chambers*, for example, the Court delayed releasing the decision for a week so that it could be announced on Abraham Lincoln's Birthday.[183] Adding to the gravity of the decision, Justice Black departed from custom by reading the opinion "in full."[184] Black citizens in Florida hailed the victory in *Chambers* as a "Second Emancipation."[185] An editorial in *The Nation* expressed similar sentiments:

> The court grappled here with a problem that was a severe test of the symbols on which its own power rests. It had to fight our worst form of race prejudice. It had to stand fast against the tide of the white man's unconscious fears in the Black Belt . . . . All

[180] See *Lisenba*, 314 U.S. at 241 (Black and Douglas, JJ., dissenting). As stated earlier, *Lisenba* differed significantly from the Southern cases in several important respects. See supra text accompanying notes 170–74.

[181] See supra note 21 and accompanying text.

[182] See discussion supra Section I.C.

[183] The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 505 (Del Dickson ed., 2001). Justices Reed and McReynolds voted in conference to affirm the conviction. In the end, however, the others persuaded them to be silent and the opinion was unanimous. Id.

[184] Court Rededicated as Haven for Victims, Wash. Daily News, Feb. 12, 1940, at 4, *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 811.

[185] Press Release, NAACP, Supreme Court Decision a "Second Emancipation," Say Florida Citizens (Feb. 16, 1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 2, Frame 833 ("The Negro citizens of Florida, who have given freely of their nickels and dimes through their local churches throughout this six-year fight, regard this supreme court victory as a 'Second Emancipation.'").

> we can say is that the Supreme Court saved the lives of four Negroes. And saved something precious for the rest of us, too.[186]

In *Canty*, decided only a month after *Chambers*, the Court reversed a conviction without even bothering to hear oral arguments.[187] Contemporary perceptions and reactions to *Canty* also suggest that the decision had strong racial implications and motivations. A local attorney representing Canty wrote, "This case is of extreme importance to the colored race."[188] After the decision came down, the *New York Times* headline read, "High Court Saves Another Negro."[189]

Contemporary law review commentary reflects these themes as well. One observer noted that all of the early confession cases "involve rather shocking examples of police abuses of accused persons, particularly Southern negroes charged with crimes against white victims."[190] Even one Southern law review observed that "[p]ragmatically speaking, the prejudices from which these practices arise necessitate a fair review by an appellate court not contaminated even subconsciously by these miasmas of the mind."[191] One gets the sense from these contemporary analyses that more was involved than simply correcting miscarriages of justice by the states. Responding to the rise of Nazism and other forces, national sentiment in the late 1930s and early 1940s had already become much more sensitive to racial discrimination.[192] The Court's deci-

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[186] Four Negroes, The Nation, Feb. 24, 1940, at 270.

[187] *Canty*, 309 U.S. at 629; see also Letter from Leon A. Ransom, Member, National Legal Committee, NAACP, to Thurgood Marshall, Assistant Special Counsel, NAACP (Mar. 12, 1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 610 ("So far as I know the action of the Court is unprecedented. It granted the motion for certiorari, leave to proceed in forma pauperis, and then, per curiam, reversed, without argument . . . .").

[188] Letter from Alex C. Birch, Esquire, to Thurgood Marshall (July 11, 1939), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 9, Frame 543.

[189] High Court Saves Another Negro, N.Y. Times, Mar. 12, 1940, at 22.

[190] Fred E. Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442, 443 (1948).

[191] Recent Decisions: Constitutional Law—Due Process—Use of an Involuntary Confession in the Trial, 29 Va. L. Rev. 115, 116 (1942). The author adds, "It is respectfully submitted that the instant case is entirely correct in its reasoning and its result." Id.

[192] Though this point warrants greater discussion, it is beyond the scope of this Note. For a good overview and sources, see David M. Bixby, The Roosevelt Court, Democ-

sions can thus be seen as giving expression to a burgeoning national impulse to end blatant racial discrimination.[193]

A second factor explaining the Court's unanimity in this period is that several Justices probably felt that the new doctrine would only be used to address individual, egregious cases of police abuse. As stated above, the Court traditionally shied away from supervising state criminal convictions. Prior to its 1936 decision in *Brown*, the Court had never ruled that a state's method of obtaining a confession could violate the Constitution.[194] It is likely that many of the Justices never intended the decision in *Brown* to grow into an expansive doctrine that granted the federal judiciary extensive oversight of the states' criminal systems.

Certain aspects of *Brown* and *Chambers* support this claim. For instance, both cases were unanimous even though there were Justices on the Court who were firmly against federal expansion into the domain of states.[195] Justice McReynolds from Tennessee, for example, will be remembered for many things, but passionate advocacy for the expansion of federal powers to protect minorities will not be one of them.[196] More likely, Justices like McReynolds believed they were reacting to an isolated situation, limited to the particular facts of the case. It seems hard to believe that the Court would have been unanimous in *Brown* and *Chambers* had the Jus-

ratic Ideology, and Minority Rights: Another Look at *United States v. Classic*, 90 Yale L.J. 741, 752–59 (1981).

[193] Bixby writes:

> During the Court fight, a number of opponents of the plan defended the Court as the protector of victimized minority groups. They expressed concern about the tendency toward racial, religious, and ethnic oppression in the United States, a theme that would become more insistent as the decade drew to a close.

Id. at 752.

[194] Hancock, supra note 13, at 2203; Klarman, supra note 13, at 67.

[195] *Chambers*, 309 U.S. at 227; *Brown*, 297 U.S. at 279. For example, the decision in *Brown* was unanimous, which meant that even the Four Horsemen went along with the decision. For a brief description of these Justices' infamous opposition to federal expansion, see Peter H. Irons, New Deal Lawyers 13 (1982) ("On the far right were the 'Four Horsemen of Reaction'—Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler. Occasionally liberal on issues of criminal law and race . . . this bloc rarely divided on issues of federalism and economic regulation.").

[196] For examples of McReynold's racism and anti-Semitism, see Michael E. Parrish, The Hughes Court: Justices, Rulings, and Legacy 67 (2002); Robert L. Carter, In Tribute: Charles Hamilton Houston, 111 Harv. L. Rev. 2149, 2153–54 (1998).

tices believed they were laying the groundwork for an expansive due process doctrine that would undermine state sovereignty.

Later cases also lend support to the idea that the Justices originally intended "coercion" to be applied narrowly, and only to flagrant cases of abuse. The opinions in this stage often emphasized the personal characteristics of the particular individuals, which suggests the Justices intended to apply a case-by-case, totality-of-the-circumstances type of review. In *Chambers*, Justice Black described the defendants as "ignorant young colored tenant farmers."[197] He repeated this theme in *White*, arguing that the police had coerced an "illiterate farmhand."[198] In *McNabb v. United States*,[199] a 1943 federal case reversing a conviction in federal court, Justice Frankfurter stressed that the young "Tennessee mountaineers" who were arrested had "lived in the Settlement all their lives; neither had gone beyond the fourth grade in school; neither had ever been farther from his home than Jasper, twenty-one miles away."[200] In *Lisenba*,[201] however, the Court affirmed the conviction—describing the defendant as "a man of intelligence and business experience."[202] Justice Roberts wrote:

> We have not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted in graver circumstances. These were secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning. This case is outside the scope of those decisions.[203]

[197] *Chambers*, 309 U.S. at 238. He writes, "And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless." Id.

[198] *White*, 310 U.S. at 532.

[199] 318 U.S. 332 (1943).

[200] Id. at 333–34.

[201] *Lisenba*, 314 U.S. 219 (1941).

[202] Id. at 229.

[203] Id. at 239–40.

A third factor explaining the Court's unanimity in this period involves the rationale behind excluding coerced confessions. Traditionally, two justifications have been offered for exclusion.[204] The first rationale focuses on the unreliability of coerced confessions and their implications for a fair trial. Because confessions obtained through force are "inherently untrustworthy," they must be excluded.[205] The second rationale focuses more on deterring questionable police practices.[206]

Determining which rationale to use has enormous implications for the *scope* of unconstitutional coercion. Adopting the first rationale allows significantly more convictions to stand, even if they included confessions that were obviously coerced. One scholar explained, "If the sole reason for the rule is that a conviction cannot stand when based on inherently untrustworthy evidence, the Court may allow a jury to consider any confession providing there was sufficient other evidence to establish guilt."[207] In other words, a co-

[204] Francis A. Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 DePaul L. Rev. 213, 233–34 (1958). The confession cases have been described as follows:

> The central difficulty in the latter-day confession cases centers about a pervasive ambiguity as to the purpose or rationale of the rule requiring the exclusion of coerced confessions from criminal trials. This confusion is not confined to the Fourteenth Amendment cases, but characterizes application of the confession rule throughout its modern history, both in and out of the federal supreme court.
>
> On the one hand, it is asserted that the exclusion of a confession can only be justified when such evidence is rendered unreliable and untrustworthy by virtue of the means employed to procure it, with the result that its admission would create the peril of convicting the innocent . . . .
>
> But it appears clear that this rationale is not adequate . . . . More is involved than the probable "untrustworthiness" of the confession. Thus, generally, the "coerced" confession is held inadmissible despite other evidence strongly corroborating the reliability of the confession. Rather, it has been maintained that the confession rule should be regarded as creating a privilege in behalf of the defendant for the purpose, not simply of excluding unreliable evidence from the trial, but of deterring police officials from employing physical torture and other practices deserving condemnation.

Id. (footnotes omitted); see also Monrad G. Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 414 (1953–54) (stating that trustworthiness was the original justification for the common law rule).

[205] Paulsen, supra note 204, at 414.

[206] Allen, supra note 204, at 234.

[207] Id. at 427.

erced confession will bring reversal *only* when no other evidence exists that could establish guilt.

The second rationale, however, allows for much greater judicial oversight of law enforcement officials. If the purpose of excluding these confessions is to deter "police officials from employing physical torture and other practices deserving condemnation," then establishing a coerced confession would reverse a conviction *regardless* of the other evidence against a defendant.[208] In the later second stage cases (plus *Ashcraft*), these potentially contradictory rationales played an important role in the growing conflicts within the Court.

In the first stage cases, however, "the ambiguity as to the rationale of the confession rule produced no serious problems."[209] This was because all of these early cases involved convictions (and death sentences) based *solely* on the coerced confessions.[210] And because these confessions resulted from flagrant abuse, either rationale easily could have been used to justify exclusion and thus reversal. In other words, both rationales worked equally well in this first stage.

In *Brown*, for instance, the Court looked to the dissenting opinion from the Mississippi Supreme Court, which relied on a combination of the two policies in arguing for reversal. As for reliability, the Court—quoting the dissenting opinion from the Mississippi Supreme Court opinion—wrote, "The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would

[208] Allen, supra note 204, at 234.

[209] Id.

[210] See, e.g., *White*, 310 U.S. 530 (reversing a death sentence where a coerced confession led to a conviction for rape). White argued in his brief that "[t]here was no other evidence in this case tending to show appellant's guilt except by the remotest of circumstantial evidence." Brief for Appellant at 6–7, *White*, 310 U.S. 530 (No. 87); see also Press Release, NAACP (June 11, 1941), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 15, Frame 596 ("[White's] reversal was based upon the fact that the only evidence upon which White had been convicted was a statement allegedly made by him after he was taken from jail on four successive nights and beaten unmercifully by police."); *Chambers*, 309 U.S. at 235 ("These are the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions."); *Brown*, 297 U.S. at 279 ("Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury.").

have been inescapable."[211] As for deterring police practices, the opinion is littered with condemnations of the "brutal treatment to which these helpless prisoners were subjected."[212]

Similarly, in *Ward*, the Court again quoted the lower court, which reasoned, "It may be stated bluntly that no conviction could be sustained in the present case without the confession of [the] appellant."[213] Here, too, the Court easily could have reversed on the basis of physical abuse that included cigarette burns to the defendant's flesh.[214]

Interestingly, in *Lisenba*[215]—the only case in which the Court divided during this period—the two rationales could not be equally applied to the facts at hand. There, the State had a strong evidentiary case against the defendant, including the testimony of an accomplice.[216] Thus, even if the confession had been coerced, there were good reasons to think that the defendant received a fair and trustworthy trial.

The dissent, however, strongly disagreed. In challenging the majority's decision, Justice Black (joined by Justice Douglas) focused on the *police practices*. In great detail, he listed the questionable actions by the police in this case.[217] *Lisenba* clearly showed the implications of adopting one rationale over the other. If the Court

[211] *Brown,* 297 U.S. at 284 (quoting Brown v. State, 161 So. 465, 471 (Miss. 1935) (Griffith, J., dissenting)).

[212] Id. at 282 (quoting *Brown*, 161 So. at 470 (Griffith, J., dissenting).

[213] 316 U.S. 547, 549 (1942).

[214] Although this should be considered a disputed fact, one police officer did corroborate the charges of violence. Id. at 552 ("Only the sheriff of Titus county corroborated petitioner's charges. He testified that . . . 'I saw some marks on his neck and shoulders and arms that appeared to be cigarette stub burns. Yes sir, they were fresh. There were several of them on his body.'").

[215] *Lisenba*, 314 U.S. 219.

[216] Id. at 224–39. Justice Roberts implied that other evidence existed when he wrote:

> Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? If we are so to hold, it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.

Id. at 239.

[217] Id. at 241–43 (stating that police officers held the defendant incommunicado for extended periods of times and slapped him).

embraced the deterrence rationale, many more convictions would have been reversed.

So although some seeds of conflict were present throughout this first stage, the Court remained almost completely united. The egregious and racially motivated violations, along with the ability to use either policy justification, allowed the Court to reverse state convictions without great concern. In the following years, however, the consensus began to unravel.

B. Ashcraft v. Tennessee *and its Aftermath—Stage Two, 1944–1949*

The second stage of coerced confession cases differs significantly from the first stage cases in a number of ways. Most obviously, the Court split on all seven of the cases that came before it.[218] In one case, *Malinski*, a bitterly fractured Court delivered no less than five separate opinions.[219]

One clear contrast with the earlier period is that cases in the second stage were no longer strictly about race. Both *Ashcraft*[220] and *Malinski*—the cases decided immediately before and after *Lyons*—involved white defendants, as did the 1949 case *Turner*.[221] In addition, the cases were no longer confined to the South.[222]

Several of the cases, however, continued to involve black defendants. For instance, the other four cases—*Lyons, Haley,*[223] *Watts*,[224] and *Harris*[225]—all involved black defendants. Yet even in these cases, race was no longer the Court's primary concern. In *Haley*, for example, police officers held a fifteen-year-old boy incommunicado for over three days.[226] Writing for the Court, Justice Douglas

[218] Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); *Lyons*, 322 U.S. 596; *Ashcraft*, 322 U.S. 143; see also supra Table 1, supra pp. 418–19.

[219] 324 U.S. 401.

[220] 322 U.S. 143.

[221] 338 U.S. 62. The Pennsylvania Supreme Court wrote, "The defendant is not a poor negro of a low degree of intelligence. From an observation of him and listening to his testimony, it is apparent that he is a smart, clever individual." Commonwealth v. Turner, 58 A.2d 61, 63 (1948).

[222] See Table 1, supra pp. 418–19, for a list of the states where the cases originated.

[223] 332 U.S. 596.

[224] 338 U.S. 49.

[225] 338 U.S. 68.

[226] *Haley*, 332 U.S. at 598. The Court described the defendant's treatment:

repeatedly emphasized the boy's youth. He wrote, "Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity."[227] Douglas repeated this theme several times in the opinion, suggesting that age rather than race drove this decision.[228]

The clearest and most important contrast with the first period, however, is that these cases all became battles over federalism and the scope of federal judicial oversight of the states. In this second stage, one gets the impression that debates about the proper bal-

> He was put in jail about 6 or 6:30 a.m. on Saturday, the 20th, shortly after the confession was signed. Between then and Tuesday, the 23d, he was held incommunicado. A lawyer retained by his mother tried to see him twice but was refused admission by the police. His mother was not allowed to see him until Thursday, the 25th.

Id.

[227] Id. at 599.

[228] Justice Douglas wrote, "Beginning shortly after midnight this 15-year-old lad was questioned by the police for about five hours. Five or six of the police questioned him in relays of one or two each. During this time no friend or counsel of the boy was present." Id. at 598. "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used." Id. at 599.

> A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.

Id. at 599–600. Later in the opinion, Douglas wrote:

> When the police are so unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year-old boy behind closed doors in the dead of night becomes darkly suspicious. The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

Id. at 600–01.

ance between the federal and state judiciaries played a role as important as the concern for the due process rights of the individual defendant. Again, this represents a sharp break from the earlier period, when the Justices seemed to focus on the *individual*, regardless of their own inclinations to favor or oppose state sovereignty.[229]

Several aspects of these cases support this claim. For one, opinions in this period went out of their way to invoke respect for states. Dissenting in *Ashcraft*, Justice Jackson opened by writing, "A sovereign State is now before us . . . . Heretofore the State has had the benefit of a presumption of regularity and legality."[230] He added, "[R]espect for the sovereign character of the several States always has constrained this Court to give great weight to findings of fact of state courts."[231] Justice Frankfurter opened his concurring opinion in *Malinski* with an extended exposition of the history of the power of states over criminal proceedings.[232] In the first stage of cases, by contrast, this invocation of state sovereignty was almost completely absent.[233]

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[229] See supra notes 194–203 and accompanying text.

[230] *Ashcraft*, 322 U.S. at 156 (Jackson, J., dissenting).

[231] Id. at 157 (Jackson, J., dissenting).

[232] See *Malinski*, 324 U.S. at 412–13 (Frankfurter, J., concurring). He wrote that:

> Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any "Bill of Attainder" or "ex post facto Law." This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws.

Id. (Frankfurter, J., concurring) (citation omitted).

[233] Compare *Chambers*, 309 U.S. 227 (lacking any discussion of state sovereignty), and *Ward*, 316 U.S. 547 (same), with the sovereignty language in *Ashcraft*, 322 U.S. at 156–57 (Jackson, J., dissenting) (emphasizing state sovereignty). In the former cases, the opinions never mentioned state sovereignty. Sovereignty was invoked once in *Lisenba*, but only in a cursory manner. *Lisenba*, 314 U.S. at 239 ("There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial . . . a federal right has been invaded.").

Throughout these opinions, the dissenters also regularly charged the majority with overturning a state's finding of fact. In *Ashcraft,* Justice Jackson wrote, "The Court either gives no weight to the findings of the Tennessee courts or it regards their inquiry as . . . immaterial."[234] The *Malinski* dissenters accused the Court of "re-weighing the conflicting testimony as to the alleged coercion."[235] They added that the Court should not be a "super-jury" that overturns "the verdict of a state court jury by weighing the conflicting evidence on which it was based."[236]

More strong evidence that federalism was the primary concern in this stage can be seen in the battle over the scope and structure of the doctrine at issue (that is, whether confessions are voluntary). As this Note explains below, some of the Justices in these later cases favored adopting clear (and more intrusive) rules. Accordingly, some argued that any coerced confession should result in a per se presumption of exclusion.[237] Other Justices wanted to judge subsequent confessions on a case-by-case, more individualized basis.[238]

The structure an appellate court favors reflects the amount of trust it has for the lower courts. For example, adopting a strict per se rule indicates that one has little—or at least less—trust in the lower state courts. Adopting a case-by-case approach, however, indicates that one has a greater degree of trust or respect for the discretion of the lower court. Thus, the battle over the structure of the doctrine can arguably be reduced to a battle over how much the Justices trusted state proceedings.

The opinions that favored an expansion of the doctrine in the form of per se rules illustrate this phenomenon. In *Malinski*, both Justices Murphy and Rutledge issued opinions that quite clearly argued for the expansion of the doctrine to include more general, per se exclusions of coerced confessions. In other words, they believed that the existence of certain facts created a presumption of illegality that must be rebutted by the State.

[234] *Ashcraft*, 322 U.S. at 170 (Jackson, J., dissenting).
[235] *Malinski*, 324 U.S. at 438 (Stone, C.J., dissenting).
[236] Id. (Stone, C.J., dissenting).
[237] See infra notes 241–45 and accompanying text.
[238] See infra notes 246–50 and accompanying text.

Like *Lyons*, *Malinski* involved a series of confessions that followed an initial confession that was either coerced or not admitted into evidence.[239] In *Malinski,* the Court reversed one defendant's conviction, though it upheld the conviction of another defendant. Both convictions had been based in part on this series of confessions.[240]

Looking first at Justice Rutledge's dissent (though he concurred in reversing one of the convictions), he argued that the initial, coerced confession "vitiated" the subsequent ones.[241] As such, he sought an automatic rule "that once a coerced confession has been obtained all later ones should be excluded from evidence, wherever there is evidence that the coerced one has been used to secure the later ones."[242] Justice Murphy agreed, writing in his dissent that "[o]nce an atmosphere of coercion or fear is created, subsequent confessions should automatically be invalidated unless there is proof beyond all reasonable doubt that such an atmosphere has been dispelled."[243]

In other cases, some Justices hinted that certain undisputed facts, such as the violation of state statutes, should automatically result in the exclusion of the confession. In *Watts*, for example, the defendant had been detained without the arraignment required by Indiana law.[244] Justice Douglas wrote, "We should unequivocally condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention."[245]

The dissenters, however, strongly disagreed with the suggestion that per se rules should replace case-by-case approaches. The first

[239] *Malinski*, 324 U.S. at 407–09.

[240] See id. at 409–12 (holding that Malinski's conviction was based in part on a coerced confession, but that Rudish's conviction was not dependent on the confession, despite Rudish's prejudice argument).

[241] Id. at 423 (Rutledge, J., dissenting in part) ("The 'leads' thus secured in violation of both the fundamental law and the law of the State led directly to the later confessions, including the written one, and vitiated them with every vice infecting the first." (citation omitted)).

[242] Id. at 429 (Rutledge, J., dissenting in part).

[243] Id. at 433 (Murphy, J., dissenting in part).

[244] *Watts*, 338 U.S. at 56 (Douglas, J., concurring) ("He was held without being arraigned, until . . . he gave a confession that satisfied the police. At no time was he advised of his right to remain silent, nor did he have the advice of family, friends or counsel . . . . He was not promptly arraigned as Indiana law requires.").

[245] Id. at 57 (Douglas, J., concurring).

signs of this disagreement appeared in the rather scathing dissent by Justice Jackson in *Ashcraft*, in which it is clear that he feared the doctrine was expanding into a general category, rather than a tool to be used cautiously and only in a few, individual cases.[246] Rejecting the idea of a "general doctrine," Jackson stressed that the individual facts had always guided the Court. He wrote, "[T]he Court always has considered the confessor's strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white."[247] As further proof that the earlier decisions had turned more on egregious abuses of the individual in question, Jackson stated, "This is not the case of an ignorant or unrepresented defendant who has been the victim of prejudice. Ashcraft was a white man of good reputation, good position, and substantial property."[248]

Similarly, after the Court reversed the conviction in *Haley*, Justice Burton, in dissent, immediately tried to limit the scope of the holding:

> The issue here is a narrow one of fact . . . . The judgment rendered today by this Court does not hold that the procedure authorized by the State of Ohio to determine the admissibility of the confession of a person accused of a capital offense violates *per se* the Due Process Clause of the Fourteenth Amendment. It holds merely that the application made of that procedure in this case amounted to a violation of due process . . . .[249]

Finally, in *Watts*, Justice Jackson condemned Justice Douglas's concurring opinion that went "to the very limit and seem[ed] to declare for outlawing any confession, however freely given, if ob-

[246] He voiced these fears in *Ashcraft*, writing,

> If the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by a general doctrine dependent on the clock, it should be capable of statement in definite terms. If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1? All are "inherently coercive."

Ashcraft, 322 U.S. at 162 (Jackson, J., dissenting).

[247] Id. (Jackson, J., dissenting).

[248] Id. at 173 (Jackson, J., dissenting).

[249] *Haley*, 332 U.S. at 607 (Burton, J., dissenting).

tained during a period of custody between arrest and arraignment—which, in practice, means all of them."[250]

Contemporary law review commentary confirms that these cases had major implications for state-federal relations. In contrast to the discussions of the earlier stage one cases, the new discussions were more skeptical of the Court's recent decisions. One writer suggested that the Court in *Malinski* was re-examining facts and resolving conflicting evidence.[251] He added that the "boundaries limiting the Supreme Court's power to review state court convictions for crime are apparently not yet in sight."[252] Another writer contended that in *Ashcraft*, the "Court went further than it had in any previous decisions" with respect to its oversight of law enforcement practices.[253] Finally, one writer suggested that the Court in *Ashcraft* circumvented constitutional restrictions of its authority in order to rein in police abuse at the state level.[254]

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[250] *Watts*, 338 U.S. at 58 (Jackson, J., concurring in part and dissenting in part).

[251] Recent Decisions, Constitutional Law—Jurisdiction of Supreme Court to Review State Court Conviction under Due Process Clause—Confession of Accused, 14 Fordham L. Rev. 234, 239 (1945). It was observed:

> Justice Douglas' analysis exhibits a tendency on the part of the court to sit as a second trier of the facts and to resolve conflicting evidence which the Supreme Court has previously acknowledged itself unauthorized to examine. Several of the more recent decisions show an inclination to disregard the verdict of the state juries and to ignore their findings in reexamining the facts.

Id.

[252] Id. at 234.

[253] Note, Supreme Court Interpretation of Admissibility of Criminal Confessions, 40 Ill. L. Rev. 273, 274 (1945); see also Recent Cases, Evidence—Confessions—Admission of Confession Obtained After Thirty-Six Hours of Continuous Questioning by State Officers Held Deprivation of Due Process, 57 Harv. L. Rev. 919, 921 (1944) ("[T]he Court here greatly extends the protection of the due process clause, imposing a more stringent rule on the states than on the inferior federal courts, since it not only rejects a finding of fact, but raises an irrebuttable presumption.").

[254] Inbau, supra note 190, at 447. Professor Inbau wrote:

> A careful examination of the *Ashcraft* case, especially when considered along with several other more recent Supreme Court decisions involving confessions, gives rise to the impression that what the Court was seeking to accomplish by its "inherent coercion" rule was to compel state law enforcement officers to employ what it considered to be a higher standard of interrogation practices. This it could not do directly, because of the absence of constitutional authority for any such inroads upon state government, but the same attempt was available, for all practical purposes, by extending the Court's interpretation of the Fourteenth Amendment due process clause in confession cases to prohibit "inherently coercive" police practices.

Id.

The Court's two rationales for excluding coerced confessions also help explain the Court's divisions during the second stage cases. Unlike the early cases, in which both rationales could be applied equally well, the second stage cases were more difficult. For instance, in *Ashcraft*, both the majority and dissent adopted different rationales for the exclusion of coerced confessions. The majority railed against abusive police practices.[255] The dissent, however, focused on the narrower "unreliability" and "fair trial" rationale, maintaining that coercion could be established only by relying "upon the utterly uncorroborated statements of defendant Ashcraft."[256] It then pointed to the number of witnesses contradicting Ashcraft, adding that he was neither ignorant nor unrepresented.[257] If police deterrence had been the primary rationale for excluding confessions, these considerations would have been irrelevant to the specific issue of whether the police had abused the defendant.

That federalism concerns would suddenly emerge in the *second* stage seems somewhat counterintuitive. One might logically expect these concerns to have arisen when the potentially expansive coerced confession doctrine first emerged in 1936 and 1940. Yet, the first stage opinions barely mentioned respect for states. In a way, however, this absence makes sense: If the Justices were creating and expanding a new doctrine at the expense of states' rights, the last thing to which they would want to draw attention would have been federalism. But why did some Justices wait until the doctrine had been affirmed repeatedly before voicing any federalism-based concerns?

First, the second stage cases were closer calls than the first stage Southern cases, in which abuse was clear. For example, the later cases could not be simultaneously justified according to both rationales underlying the unconstitutional coercion doctrine, as the first stage cases could. In addition, several of the second stage cases did not implicate broader racial discrimination concerns. To reverse these convictions, the Court arguably would have had to invade the state domain more intrusively. For example, *Ashcraft*

[255] *Ashcraft*, 322 U.S. at 153–54; Allen, supra note 204, at 235.
[256] *Ashcraft,* 322 U.S. at 172 (Jackson, J., dissenting).
[257] Id. at 173 (Jackson, J., dissenting).

(1944) and *Malinski* (1945) required the Court to overlook a significant amount of testimony and evidence against the defendant in cases where *race was not implicated*.[258]

Second, evidence suggests that several Justices never intended the doctrine to expand beyond individual acts of egregious police abuse, particularly white-on-black abuse in the South. When some Justices began moving toward a *Miranda*-like per se rule, other Justices balked. Put differently, there was no perceived need to defend states' rights in the first stage because no one feared that they were being seriously threatened. The respect for state criminal proceedings, along with the perception that the doctrine would be used only rarely, could have been unspoken assumptions. After all, even Justice McReynolds signed on to *Brown* and *Chambers*. It was only later, when the doctrine seemed to be expanding to new areas, that the *need* to assert respect for states became necessary.

This is only a partial explanation for the emergence of federalism concerns in the second stage. A complementary explanation involves the growing battles within the Court concerning incorporation and, more generally, the proper scope of federal judicial power.

III. EXPLAINING THE RESULT IN *LYONS*

Returning to *Lyons*, the case resembles, at first glance, the "stage one" cases. It involved a rural black defendant who had a strong claim of innocence. Although there were a number of disputed facts, the state admitted to using the bones, moving Lyons from place to place, and holding him incommunicado.[259] Finally, the conviction relied almost completely upon the confessions.[260] So why, especially given the state of precedent in 1944, did the Court affirm the conviction six to three?

This Part offers two primary explanations for the result in *Lyons*. Section A offers a doctrinal explanation. This Note argues that the legal doctrine, upon a closer reading, may not so clearly support reversing Lyons's conviction, largely because of the number of

[258] For *Ashcraft*, 322 U.S. 143, 173. For *Malinski*, see 324 U.S. at 435 (Stone, C.J., dissenting) (listing various examples of the defendant's guilt).

[259] *Lyons*, 322 U.S. at 599–600.

[260] Brief on Behalf of Petitioner at 11–12, *Lyons*, 322 U.S. 596 (No. 433).

disputed facts. It also shows how the NAACP wrote a bad brief that might have hurt Lyons's chances of securing a reversal. This Section complements Part II by showing how certain characteristics of *Lyons* distinguish it from the other stage one cases by focusing on those aspects of *Lyons* that triggered the federalism concerns so common in the stage two cases.

Section B offers a jurisprudential explanation. After showing why the doctrinal explanation only partly explains the result, this Note suggests that *Lyons* can be further explained by examining the larger jurisprudential battles that engulfed the Court at this time. Arguably, W.D. Lyons became a casualty of the Court's larger federalism debate that emerged in the early 1940s. The emergence of this debate drove the changes that occurred between the first and second stages of coerced confession cases. One implication of this argument is that Lyons might have been freed had his case reached the Court a few years earlier.

A. Doctrinal Explanations

The formal test for determining whether the admission of a confession constituted a violation of the Due Process Clause, as first established in *Brown v. Mississippi*, turned on whether the Court found the confession to be voluntary.[261] To determine whether a confession was voluntary, the Court made "an independent determination on the undisputed facts" surrounding the circumstances of the allegedly coerced confession.[262] Using the voluntariness test, *Ward v. Texas* described some of the instances in which the Court had found unconstitutional coercion:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been

[261] See Ashcraft v. Tennessee, 322 U.S. 143, 153–54 (1944) (reversing conviction because the confession was "not voluntary but compelled"); Ward v. Texas, 316 U.S. 547, 555 (1942) ("[W]e must conclude that [the defendant's] confession was not free and voluntary but was the product of coercion and duress . . . .").

[262] Malinski v. New York, 324 U.S. 401, 404 (1945).

> taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal.[263]

The *Ward* Court also noted that in determining voluntariness, it relied on "undisputed evidence."[264] The requirement that the Court limit its inquiry to the undisputed, rather than the disputed, facts had important implications. Contemporary case notes indicate that the undisputed facts requirement did a great deal of the work in the coerced confession cases—*Ashcraft v. Tennessee*, *Lyons*, and *Malinski v. New York* in particular. One journal stated that because of its reliance on uncontradicted testimony, the Court in *Ashcraft* should not be seen as usurping power. It explained that "[u]pon the uncontradicted evidence alone," the Court found inherent coercion.[265] Another commentator wrote, "In all these cases, the Court had weighed those facts in the record which were uncontested to determine whether the confession was actually involuntary."[266]

In *Lyons*, however, very few undisputed facts existed, though there were some important ones. First, the State conceded that a pan of bones from the murder victims had been placed in Lyons's lap.[267] The State also conceded that Lyons lacked representation at the time of the confessions.[268] Finally, the State admitted that the

[263] *Ward*, 316 U.S. at 555 (citation omitted).

[264] Id. at 550, 551.

[265] Recent Decisions, Constitutional Law—When Does Admission of Confession in State Court Violate Due Process, 28 Marq. L. Rev. 125, 125–26 (1944) (defending the *Ashcraft* majority because "[i]ts decision is not based upon disputed facts of which the trial judge and the jury are in better position to appraise the truth, but upon facts uncontradicted by either side").

[266] Recent Cases, Evidence—Confessions—Admission of Confession Obtained After Thirty-Six Hours of Continuous Questioning by State Officers Held Deprivation of Due Process, supra note 253, at 920; see also Edgar Bronson Tolman, Review of Recent Supreme Court Decisions, 30 A.B.A. J. 347, 348 (1944) (noting that Justice Black grounded the holding on "facts which are not in dispute at all" (quoting *Ashcraft*, 322 U.S. at 153)).

[267] *Lyons*, 322 U.S. at 599–600 ("It is not disputed that the inquiry continued until two-thirty in the morning before an oral confession was obtained and that a pan of the victims' bones was placed in Lyons' lap by his interrogators to bring about his confession.").

[268] Id. at 599 ("While petitioner was competently represented before and at the trial, counsel was not supplied him until after his preliminary examination, which was subsequent to the confessions.").

officers had taken Lyons to the scene of the crime in the early hours of the morning.[269]

Despite its concessions, however, the State flatly denied all allegations of force and violence. The problem for Lyons was that these allegations made up the bulk of the NAACP's argument. Justice Reed noted this problem in the majority opinion, writing that the evidence of violence surrounding both the arrest and the confessions was "conflicting."[270] He added that all of these allegations were "denied *in toto* by officers who were said to have participated."[271]

Considered in light of the prior and subsequent cases, the large number of disputed facts in *Lyons* gave the Court a solid doctrinal foundation upon which to sustain the conviction. The Court stated:

> When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions . . . but the legal duty is upon them to make the decision.[272]

The relative dearth of undisputed facts in *Lyons* seems to be the most logical way to distinguish its result from the reversals in *Ashcraft* and *Malinski*. In *Ashcraft*, the undisputed facts showed that the defendant had been held incommunicado while being kept awake for somewhere between twenty-eight and thirty-six hours.[273]

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[269] Id. at 600 ("After the oral confession in the early morning hours of January 23, Lyons was taken to the scene of the crime and subjected to further questioning . . . . He was returned to the jail about eight-thirty A.M. and left there until early afternoon.").

[270] Id. at 599 ("Again the evidence of assault is conflicting.").

[271] Id.

[272] Id. at 602.

[273] *Ashcraft*, 322 U.S. at 153–54 ("Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all."). Tennessee argued the actual length of time was closer to twenty-eight hours. Brief on Behalf of Respondent at 4, *Lyons*, 322 U.S. 596 (No. 433).

In *Malinski*, the undisputed facts showed that the defendant had been stripped naked and held incommunicado.[274] In addition, the prosecutor had made statements during the trial that were sufficient, according to the Court, to infer a coerced confession.[275] While the question necessarily is one of degree, the Court apparently found the particular kinds of undisputed facts in *Lyons* insufficient to support a reversal.

Another more speculative possibility, related to the undisputed facts doctrine, is that the NAACP presented its case poorly, offering the Court little grounds on which to sustain a reversal. The briefs in *Lyons*—including the ACLU amicus brief—emphasized the disputed facts, rather than explaining why the undisputed facts required a reversal. The failure to fully engage the undisputed facts requirement, which had been clearly articulated in earlier cases,[276] was an egregious doctrinal oversight. Specifically, Marshall failed to cabin those conceded, undisputed facts into a clear, coherent argument within the formal doctrine. To his credit, Marshall did write that the pan of bones was "freely admitted by officers of the State of Oklahoma."[277] Later in the brief, he twice mentioned that officials admitted that the pan of bones had been used.[278] Marshall also included some potentially damning statements made by the Oklahoma prosecutor at the trial, which could have been construed

[274] *Malinski*, 324 U.S. at 405.

[275] Id. at 407. After being stripped naked for several hours, Malinksi was then "held incommunicado; he was not allowed to see a lawyer, though he asked for one, and he was not allowed to see friends." Id. at 405. After criticizing the conduct and statements of the prosecutor as "indefensible," id. at 406, the Court concluded that "[i]f we take the prosecutor at his word, the confession of October 23rd was the product of *fear*—one on which we could not permit a person to stand convicted for a crime." Id. at 407 (emphasis added).

[276] See *Ward*, 316 U.S. at 551.

[277] Brief on Behalf of Petitioner at 7, *Lyons*, 322 U.S. 596 (No. 433).

[278] Id. at 15. ("[I]t is also admitted that officials of the State of Oklahoma brought in the bones of the deceased persons who had been dead for twenty-two days, and placed them in the lap of the petitioner while he was being questioned over a long period of time in the court house. This action . . . admitted by them to be true, will forever remain a disgrace to law enforcement in the United States."). One senses that even here Marshall attempted to shock the Court, rather than showing the Justices the doctrinal implications of this undisputed fact. For example, he next quoted *Brown*, not to make a doctrinal point, but to say that "[t]he rack and torture chamber may not be substituted for the witness stand." Id. at 15 (quoting *Brown*, 297 U.S. at 285–86).

as an admission that Lyons was beaten.[279] Justice Reed dismissed these statements as disputed, writing only that "the prosecutor in cross-examination used language which gave color to [the] defendant's charge."[280]

The problem, however, was that Marshall's brief read too much like a literary narrative, describing in lurid detail the actions of the Oklahoma officials and investigators.[281] Although both briefs (the NAACP's and the ACLU's) pointed out some undisputed facts, these few specific examples were interspersed among the much larger description of Lyons's abuse, which was disputed.[282] No real attempt was made to cabin off the undisputed facts, or to argue that they alone could form the basis of a reversal. Rather, both Marshall and the ACLU aimed to shock the Court with the brutality of the Oklahoma police instead of incorporating the undisputed facts into a formal doctrinal framework. The State's brief pointed out this flaw, contending that Marshall's statement of facts should actually be called "Lyons's testimony."[283]

To understand why this oversight seems egregious, one need only compare the *Lyons* briefs to those from earlier cases, including those the NAACP had argued. The NAACP's brief in *Chambers v. Florida*, for example, included a separate section entitled "Conceded Facts." It began, "While . . . the evidence as to the method of obtaining the confessions is in hopeless conflict, the fol-

[279] Brief on Behalf of Petitioner at 16, *Lyons*, 322 U.S. 596 (No. 433). Marshall wrote:

> During the examination of Lyons by the county prosecutor, the following admissions were made:
>
> "Q. I wasn't there in the office until six thirty was I, when they beat you? Isn't it true that Vernon Cheatwood had a strap of leather, and was tapping you like that, and because you refused to answer questions they put to you?
> "By Mr. Belden: We object to the attempt to intimidate the witness.
> "By the Court: Don't intimidate the witness, just the ordinary tone of voice.
> . . . .
> "Q. Isn't it true that you refused to answer, and they struck you on the knee with a piece of leather?
> "A. They struck me all night. I didn't rest any."

Id.

[280] *Lyons*, 322 U.S. at 599.

[281] Brief on Behalf of Petitioner at 2–12, *Lyons*, 322 U.S. 596 (No. 433).

[282] For illustrations, see id. at 7, 15; Brief of American Civil Liberties Union, Amicus Curiae, at 7–8, *Lyons*, 322 U.S. 596 (No. 433).

[283] Brief on Behalf of Respondent at 4–5, *Lyons*, 322 U.S. 596 (No. 433).

lowing facts are either conceded, admitted or not denied."[284] Later in the same brief, the NAACP *opened* its "Argument" section by stating it relied "solely upon the evidence adduced by the state's own witnesses to show that these confessions were illegally obtained."[285]

In *White v. Texas*, also argued by the NAACP, the defendant's brief again relied on evidence from the State's own witnesses.[286] In *Ashcraft*, the brief's "Argument" section began by focusing on what "the record shows without contradiction."[287] Finally, in *Malinski*, the first section of the legal argument read: "While there is a conflict in the testimony as to whether Malinski was beaten while in custody to procure a confession, there are certain conceded and undisputed facts which clearly and conclusively establish that the confession was extorted as the result of coercion . . . ."[288]

Later cases argued by Marshall showed a much stronger emphasis on the undisputed facts requirement, suggesting that he learned from his mistake in *Lyons*. Five years later, for example, in a draft petition for certiorari in *Watts v. Indiana*, Marshall opened with the undisputed facts, and did so explicitly. The petition read:

> Petitioner was arrested and held without process from November 12th until November 19th. During this period he was kept incommunicado without being permitted to see his family or friends, seek advice or secure the aid of counsel. During a sub-

[284] Petition for Writ of Certiorari to the Supreme Court of the State of Florida and Brief in Support Thereof at 22, *Chambers*, 309 U.S. 227 (No. 195). The conceded facts that were subsequently listed dealt primarily with the lack of counsel. Id. at 22–24.

[285] Id. at 25.

[286] Brief of the Petitioner on Petition for Rehearing by the State of Texas at 16, *White*, 310 U.S. 530 (No. 87) ("The State's evidence clearly shows through its own witnesses that the confession was illegally obtained and improperly introduced as evidence against the petitioner.").

[287] Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee at 10–11, *Ashcraft*, 322 U.S. 143 (No. 391). The brief summarized the undisputed facts:

> We have already stated that the record shows without contradiction that the defendant Ashcraft remained in this room on the 5th floor of the Shelby County Jail from 7 o'clock Saturday evening, June 14, 1941, until Monday morning, June 16, 1941, without the aid of counsel, without being permitted to communicate with friends . . . . It is admitted by all witnesses that he was never allowed to sleep or rest or get out of this room . . . .

Id.

[288] Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and Brief in Support Thereof at 19, *Malinski*, 324 U.S. 401 (No. 367).

> stantial part of this time petitioner was kept in solitary confinement, in a steel encased cell, without water or a bed. From the time of his arrest on November 12 until petitioner signed the confessions here in issue on November 18, he was subjected to continual and unrelenting questioning by police officers. *All of this is uncontroverted.*[289]

All of the elements emphasized in the draft petition were the kinds of facts upon which the Court based its reversals. Marshall pointed out that Watts was held incommunicado, denied counsel, and interrogated for long periods of time. He added that Watts was held "without process,"[290] which probably referred to the violation of the Indiana statute requiring the arrestee to be brought before a magistrate.[291] Clearly, Marshall was paying more attention to the undisputed facts.

Marshall and the NAACP repeated this pattern in subsequent briefs by listing the undisputed facts in detail. Only after these had been emphasized did the disputed evidence follow. In the argument that the confession had been coerced in *Watts*, the NAACP began by describing only the undisputed facts.[292] After the presentation, the brief read:

> By reference merely to this undisputed testimony, but one conclusion can be reached, namely, that petitioner's conviction herein must be reversed . . . . The facts and circumstances which were uncontradicted establish that the confession was not the result of the free choice of petitioner but rather flowed from the long gruelling [sic] questioning and physical exhaustion brought about by state officers while held incommunicado and without due process.[293]

[289] Draft of Petition for Writ of Certiorari and Brief in Support Thereof at 7, *Watts*, 338 U.S. 49 (No. 344), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 15, Frame 354 (emphasis added).

[290] Id.

[291] *Watts*, 338 U.S. at 53 ("Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate . . . the petitioner was not only given no hearing during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights.").

[292] Brief for Petitioner at 12–14, *Watts*, 338 U.S. 49 (No. 610).

[293] Id. at 14.

In this case, and unlike in *Lyons*, Marshall organized the undisputed facts so that they fit squarely within the existing legal doctrine.

One response to the general claim that Marshall erred in *Lyons* might be that the Court, in the early cases, did not take the undisputed facts requirement that seriously. If, at this time, the Court concerned itself mainly with correcting egregious abuse of Southern black defendants, then perhaps Marshall's shock strategy might have been wise.

On some level, this response seems intuitive. If the Court intervened primarily to protect Southern blacks (as it seemed to be doing in the first stage), it makes sense to think that the Justices cared more about the individual abuse than the undisputed facts requirement. Even if true, however, the historical record does not support this theory. At the very least, the undisputed facts requirement played a significant enough role in the earlier cases to deserve a more formal doctrinal treatment than Marshall provided in *Lyons*.

First, every opinion preceding *Lyons* based its holding on the existence of undisputed facts.[294] Even if the early cases only casually mentioned undisputed facts, the requirement should have been clear after the Court's unambiguous language in *Ward* in 1942. Justice Byrnes's opinion focused heavily on the "undisputed evidence," and referred to it several times.[295]

Second, Marshall's correspondence during the *Canty v. Alabama* litigation in 1941, which was the third case in the series after *Brown* and *Chambers*, indicated his awareness of the undisputed facts requirement. In a letter to Marshall in 1939, a local Alabama attorney wrote that, at the trial level, he "pretermitted the question of the infliction of physical violence, and contended that under the undisputed evidence in the record before that body, that the con-

[294] *Ashcraft*, 322 U.S. at 153 ("Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all."); *Ward*, 316 U.S. at 550–51 ("The undisputed evidence shows that the signing of the confession was preceded by the following events . . . . These facts are not disputed."); *White*, 310 U.S. at 532–33 (recounting the undisputed facts); *Chambers*, 309 U.S. at 238–39 (same).

[295] *Ward*, 316 U.S. at 550–52.

fession was involuntary as [sic] matter of law."[296] In a subsequent letter to Marshall, he wrote:

> It occurs to me that the Brown Case is conclusive of the main point of the case and that is that an involuntary confession unlawfully used is a [denial] of due process. Our case has to come within the influence of that case by meeting the only two possible suggestions: (1) that the confession was involuntary *under the uncontroverted evidence* (and this we show by undisputed proof that Canty was locked in a dungeon [sic] (2) that the confession was the basis of the conviction (and it is [apparent] that no jury would have convicted in the absence of the confession [sic].[297]

Someone at the NAACP was listening, because these arguments were incorporated into the petition for certiorari submitted to the Court. For example, one section read, "While there is conflict in the record as to whether actual physical violence was used to enforce a confession, there is no conflict in in [sic] the evidence that for the seven days and nights . . . the petitioner was held incommunicado in [the] 'dog-house' dungeon."[298] Given the NAACP's experience with earlier coerced confession cases, the failure to incorporate undisputed facts into a more clear doctrinal argument seems to be a major oversight.

One final possibility for distinguishing *Lyons* from the earlier stage one cases could be that, despite the law enforcement's seemingly reprehensible conduct, *Lyons* does represent a relative improvement in procedure as compared to the earlier Southern cases. In this sense, the Justices might have been rewarding Oklahoma for recognizing the basic procedural rights of a poor, rural, black defendant.

[296] Letter from Alex C. Birch, Esquire, to Thurgood Marshall, NAACP Central Office (July 11, 1939), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 2, Frame 542.

[297] Letter from Alex C. Birch, Esquire, to Thurgood Marshall, Special Counsel, NAACP (Jan. 4, 1940), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 2, Frame 544 (emphasis added).

[298] Draft of Petition for Writ of Certiorari to the Supreme [Court] of the State of Alabama at 6, 309 U.S. 629 (1940) (No. 634), *microformed on* Papers of the NAACP, supra note 11, pt. 8, ser. B, Reel 2, Frame 566.

To see this point more clearly, one need only recall some of the more brutal aspects of cases such as *Brown*.[299] For one, police officers candidly admitted beating the defendants and even hanging them from a tree repeatedly in order to secure a confession.[300] The trial also followed the murder by only a few days.[301] Similarly, in *Chambers*,[302] the trial court handed down the death sentence little more than a month after the murder.[303] The defendants' briefs in *Chambers* also relied heavily on the lack of competent counsel, asserting that one defense attorney discovered that he had been appointed only after happening to meet the judge on the street.[304] The

[299] *Brown*, 297 U.S. 278.

[300] Brown v. State, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting). The dissenting opinion summarized the pertinent facts:

> The crime with which these defendants, all ignorant negroes, are charged, was discovered about 1 o'clock p. m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

Id. (Griffith, J., dissenting).

[301] *Brown*, 297 U.S. at 279.

[302] *Chambers*, 309 U.S. 227.

[303] The trial took place less than one month after the murder. See Petition for Writ of Certiorari to the Supreme Court of the State of Florida and Brief in Support Thereof at 20, *Chambers*, 309 U.S. 227 (No. 195).

[304] Id. at 14. The defendants' brief emphasized that:

> The nearest approach to the appointment of counsel will be found in the transcript where Mr. Griffis says that he first knew that he was to represent certain of the defendants when Judge Tedder met him on the streets and told him that he had appointed him and Mr. Mather to represent certain of the defendants. Which two of the defendants he was to represent he did not know and Judge

defendants in both *Chambers* and *Brown* also received death sentences.

In *Lyons*, by contrast, the trial occurred over a year after the murder of the family.[305] Lyons also had a trial with competent counsel (no less than Thurgood Marshall) and was given only a life sentence.[306] While the treatment of W.D. Lyons prior to trial seems utterly incompatible with any idea of justice, the fact that he had a trial with competent counsel represented a substantial improvement over cases such as *Brown* and *Chambers*.

The idea that the Court might reward states for improvements in criminal procedure appears in other areas of race-related criminal procedure, such as jury discrimination. In 1935, the Court seemed to breathe new life into an old 1879 equal protection case, *Strauder v. West Virginia*,[307] by reversing a state death sentence in *Norris v. Alabama*.[308] One scholar argues that the Court in *Norris*, like the Court in *Brown* in 1936, created new law by revising "subconstitutional rules" in order to find unconstitutional jury discrimination.[309] Specifically, the Court began inferring jury discrimination from the "lengthy absence of blacks from jury service."[310] In a subsequent case, *Akins v. Texas*,[311] the Court examined whether county officials in Texas had satisfied the requirements of *Norris* by placing a single black on its grand jury. Given that the jury commissioners in

> Tedder did not tell him. Mr. Griffis says that he never talked with his clients or saw them before the day they were arraigned, May 24, 1933. He had notice only the day before of his appointment. He learned from the Clerk whom he was to represent; the judge never told him.

Id. (citations omitted).

[305] Brief on Behalf of Petitioner at 2–3, *Lyons*, 322 U.S. 596 (No. 433).

[306] See id.

[307] 100 U.S. 303 (1879) (striking down West Virginia statute forbidding blacks from serving on juries as an equal protection violation), abrogated by Taylor v. Louisiana, 419 U.S. 522 (1975).

[308] 294 U.S. 587 (1935).

[309] Klarman, supra note 13, at 65 (citing Norris v. Alabama, 294 U.S. 587 (1955); Neal v. Delaware, 103 U.S. 370 397 (1880)) ("However, *Norris* did require the Court to alter the critical subconstitutional rules, which for decades had doomed to failure virtually all jury discrimination claims. The Justices now reinvigorated the long dormant dicta of *Neal v. Delaware.*") (footnotes omitted). Professor Klarman adds that *Brown* "also required the Justices to manufacture new constitutional law." Id. at 67.

[310] Id. at 65.

[311] 325 U.S. 398 (1945).

Akins admitted "they had a quota of one black per grand jury,"[312] discrimination was very clear. Nevertheless, the Court affirmed the conviction. In justifying the decision, some of the Justices, in conference, explicitly stated that the Court should reward Texas for this relative progress.[313]

Although the doctrinal explanation partly explains the result in *Lyons*, doctrine alone cannot account for the decision. Despite the abundance of disputed facts, some important undisputed facts were established. The police admitted to frightening Lyons with the bones of murder.[314] He also had been interrogated by a large group of police officers and others while being held alone and incommunicado in a jailhouse.[315] And despite Justice Reed's dismissal, the statements of the prosecutor arguably showed that the officers abused Lyons.[316] Had the Court reversed the conviction, it easily could have pointed to a number of facts that supported its decision without undermining the undisputed facts requirement. After all, these were the *kinds* of undisputed facts that seemed to trigger reversals in past decisions.[317]

In addition, it seems hard to believe that the Court actually accepted the state of Oklahoma's argument. By this time, the Justices were very aware of the abuse black defendants endured at the hands of law enforcement officials. So although the legal doctrine was indeterminate and admittedly justified either outcome, one senses that the Court in *Lyons* turned a blind eye to what it knew to be abusive conduct.

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[312] Michael J. Klarman, Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s, 89 J. Am. Hist. 119, 125 (2002).

[313] Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 227 (2004).

[314] *Lyons*, 322 U.S. at 599–600.

[315] Id.

[316] See supra note 279 and accompanying text. It was not clear that this should be considered a disputed fact, but Justice Reed treated it like one nonetheless. See Lyons, 322 U.S. at 599.

[317] The undisputed facts in *Lyons* seemed quite similar to those in the *Ward* opinion:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal.

Ward, 316 U.S. at 555 (citations omitted).

Because of the weaknesses in using doctrine to explain the result in *Lyons*, the next Section offers a jurisprudential explanation.

B. The Jurisprudential Explanation

This Section is bit more speculative than the previous one. One can agree with the arguments in Section A without necessarily subscribing to the jurisprudential explanations below. To understand this explanation, this Section first examines some of the characteristics of the Stone and Vinson Courts that are relevant to the decisions in *Lyons* and the other coerced confession cases.

The idea that the Stone and Vinson Courts were transitional is not a new one.[318] Professor Melvin Urofsky described them as "transitional courts, located between the conservative, property-oriented courts of the Taft and early Hughes era and the individualistic activism of the Warren years."[319] Professor Urofsky argued that, while the Warren Court often (and to some extent, unfairly) overshadowed the expansion of individual liberties introduced in this earlier era, the Stone and Vinson Courts undeniably paved the road for the Warren Court's decisions.[320] This transition, however, was not easy. Professor Robert G. McCloskey wrote that this was an era of "groping readjustment, of ambivalence and uncertainty about the judicial role."[321] And, as these transitions and changes occurred, conflict among the Justices increased significantly.

This internal conflict leads to the first important characteristic that bears upon the result in *Lyons*: Divided opinions in the Stone Court era (1941–46) suddenly rose to unprecedented levels. Professor C. Herman Pritchett explains:

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[318] This era begins in 1941 with the death of Chief Justice Hughes and ends in 1953 with the appointment of Chief Justice Earl Warren. See Thomas E. Baker, Constitutional Law Symposium: A Symposium Precis, 50 Drake L. Rev. 359, 366 (2002) (listing tenures of Chief Justices).

[319] Melvin Urofsky, Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953, at 1 (1997) [hereinafter Urofsky, Division]. Other elements of this transition—namely the areas of disagreement—have been classified as the struggle to harmonize "judicial passivity with humanitarian impulses." G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges 321 (expanded ed. 1988).

[320] Urofsky, Division, supra note 319, at 7 (noting that this is when "incorporation" began to expand and be taken very seriously).

[321] Robert McCloskey, The Modern Supreme Court 9 (1972).

> For the term beginning in 1930, only 10 per cent of the decisions involved dissent, and for the 1935 term the figure was 16 per cent, while in 1940 there was a jump to 28 per cent, in 1941 to 36 per cent, and for the 1942 term the figure is 44 per cent.[322]

This trend continued into the October 1943 term "when, for the first time in history, a majority of the Court's decisions—58 percent—came down with divided opinions."[323] Thus, in the four-year span from 1940 to 1943, divided opinions jumped from twenty-eight percent to fifty-eight percent. Professor Pritchett noted that the Stone Court had "become by far the most badly divided body in the history of that institution."[324]

By early 1944, the national media had also picked up on these widening divisions.[325] One reporter wrote, "The present court term has been marked by sharp divisions in views. Only two of the nine decision days have passed without a dissent, and only nineteen of the forty opinions handed down since the session opened in October have had full approval of the court."[326] Another editorial added:

> The large crop of sharply worded dissents in opinions handed down by the Supreme Court on Jan. 3 drew the attention of many to the fact that the seven justices who had to pass the New Deal's legal philosophy test before they were appointed are not dwelling together in amity as mental brethren . . . . Lawyers [have begun] to wring their hands and write anonymous letters to the press, urging that, in the interests of democracy at war, dissenting brethren should disagree in silence, or at least eschew personalities. Perhaps this anxious advice was not wholly uninspired by the reflection that hot, frequent and personally worded dissents on the high court may further persuade citizens without the bar

[322] C. Herman Pritchett, The Coming of the New Dissent: The Supreme Court, 1942–43, 11 U. Chi. L. Rev. 49, 50 (1943).

[323] Urofsky, Division, supra note 319, at 42; see also C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947, at 41–42 (1963) (providing charts showing divisions on the Court).

[324] Pritchett, supra note 322, at 49.

[325] Dissents Marked in Supreme Court, N.Y. Times, Jan. 4, 1944, at 1, 11.

[326] Lewis Wood, Dissents Avoided in Supreme Court, N.Y. Times, Jan. 11, 1944, at 40. The title indicates that the given day's decisions were unanimous, in contrast with the then recent trend.

> that justice, like legal argument, is subject to the less admirable of human frailties.[327]

A second important characteristic bearing on *Lyons* is that the Court began splitting into distinct voting blocs. As every first-year student of constitutional law knows, President Roosevelt's Court backed completely away from reviewing economic regulation; on this, all of the Roosevelt Justices agreed.[328] With these cases off the docket, however, the focus shifted to cases involving individual liberties.[329] As these cases ascended through the federal judiciary, they drove the Court into different voting blocs—blocs noticed by both current and contemporary observers.

Professor Pritchett may have been the first to observe and empirically verify the existence of the distinct blocs on the Stone Court. His statistics established that at least two alignments existed among the nine Justices:

> Justices Black, Douglas, and Murphy constitute a bloc on one side of the Court, as evidenced by the fact that they so often dissented in company with one another and so seldom dissented in company with the other members of the Court. Justices Stone, Jackson, Reed, Frankfurter, and Roberts constitute a less definite bloc on the other side of the Court.[330]

Professor Peter Renstrom agrees with this view, writing:

> Readily identifiable voting blocs existed during the Stone and Vinson eras. Throughout their tenure on the Stone and Vinson

[327] Arthur Krock, Alignments and Disputes in the Supreme Court, N.Y. Times, Jan. 14, 1944, at 18.

[328] See generally Michael Comiskey, Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II, 57 Alb. L. Rev. 1043, 1045 (1994) ("Roosevelt specifically sought Justices who possessed . . . an unwavering belief in the constitutionality of economic regulatory and social welfare legislation.").

[329] McCloskey, supra note 321, at 49. In the 1935 Term, there were only two civil liberty decisions handed down. By 1940, this number increased to seventeen, and by 1945, the total was twenty-seven. Id.

[330] Pritchett, supra note 322, at 52; see also Krock, supra note 327, at 18 ("In these divisions Justices Black, Douglas, Murphy and Rutledge emerge as the 'liberals,' Justice Roberts the 'conservative'—though the terms have become inexact—Justices Reed, Frankfurter and Jackson somewhere in between, and the Chief Justice as a 'conservative' except when the issue concerns civil liberties.").

> Courts, Justices Black and Douglas formed a consistently liberal voting pair. In the 1941 term Black and Douglas were joined by Murphy and had an agreement rate of 82 percent. Two years later these three plus Rutledge faced a conservative bloc formed by the remainder of the Stone Court: Roberts (or Burton), Reed, Frankfurter, Stone [and Vinson], Byrnes, and Jackson.[331]

One should keep in mind that the labels "liberal" and "conservative" are relative terms. All of the Roosevelt Justices qualified as "liberals" in the economic sense in that they upheld Roosevelt's economic and social welfare legislation.[332]

One major source of disagreement among the blocs of justices—exhibited most famously in the battles between Justices Black and Frankfurter about incorporation and the Due Process Clause—was the issue of the federal judiciary's power to remedy deprivations of individual liberty by *states*. Professor James Simon wrote, "The Black-Frankfurter philosophical disagreement reached its contentious peak over the interpretation of the due process clause of the Fourteenth Amendment."[333]

This dispute was itself a function of the basic disagreement at the core of both Black's and Frankfurter's judicial philosophies. For Justice Frankfurter, there were no legal absolutes. Judges needed flexibility, but along with that flexibility came a solemn duty of restraint.[334] The definition of due process was not to be found clearly in the Constitution—it was to be articulated by enlightened, yet restrained judges. Frankfurter defined due process in terms of "fundamental fairness," or "those canons of decency and fairness which

[331] Peter G. Renstrom, The Stone Court: Justices, Rulings, and Legacy 199 (2001).

[332] See supra note 328 and accompanying text.

[333] James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America 171 (1989) (citation omitted).

[334] Id. at 172 ("Despite the vagaries of [the Fourteenth Amendment's Due Process Clause], Frankfurter was confident that the collective wisdom of the Court—and the Justices' commitment to judicial restraint—could produce a rational and just result."); Melvin Urofsky, Felix Frankfurter: Judicial Restraint and Individual Liberties 149 (1991) [hereinafter Urofsky, Frankfurter] ("[Frankfurter] also opposed absolute standards as a means of controlling subjectivity because he believed that judges need some flexibility in interpreting the law.").

express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[335]

Justice Black felt that this reeked of judicial subjectivity and old natural law concepts.[336] He sought to define due process *absolutely* with reference to other parts of the Constitution: "Due Process for me means the first nine amendments and nothing else."[337] For Black, restrictions on individual liberties (protected by these first nine amendments) were completely different from economic restrictions and thus deserved heightened judicial protection.[338]

As Professor Urofsky writes, "The [incorporation] debate almost came to a head in 1942 in *Betts v. Brady*, in which a majority of the Court held that the Sixth Amendment right to counsel did not apply to the states."[339] Justice Black argued in conference for incorporating the right to counsel, which in turn inspired a heated response from Justice Frankfurter.[340]

The incorporation debate continued famously throughout the next two decades, with Black and Frankfurter leading the discussion.[341] For purposes of this Note, it is necessary only to point out that this passionate debate really began in earnest as early as 1942, around the same time the number of divided opinions skyrocketed.

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[335] Urofsky, Frankfurter, supra note 334, at 150–51 (quoting Adamson v. California, 332 U.S. 46, 67–68 (1947) (Frankfurter, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Cardozo, J.))). Frankfurter, writing for the Court, applied this definition in some of the cases. In *Malinksi*, for example, he stated that:

> Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

Malinski, 324 U.S. at 416–17.

[336] Simon, supra note 333, at 172; Urofsky, Division, supra note 319, at 214.

[337] Memorandum regarding Petitions for Certiorari in Lempke case (Nos. 606-619, October Term 1962) at 5, *microformed on* The Felix Frankfurter Papers, pt. 1, Reel 7, Frame 263 (Univ. Publ'n of Am. 1986).

[338] Urofsky, Division, supra note 319, at 21. Somewhat ironically, Frankfurter's philosophy provided a fluid, flexible approach to due process that in practice was almost absolutely restrained. Black's philosophy, however, provided a strict, absolute definition of due process that in practice was highly activist.

[339] Id. at 87.

[340] Id.

[341] See generally id. at 213–40 (describing the Black-Frankfurter incorporation debate); Urofsky, Frankfurter, supra note 334, at 148–64 (describing the Black-Frankfurter meaning of due process debate).

This larger federalism debate may have given rise to the bitter personal animosities that also existed on the Court at this time. For example, when Justice Roberts (of the Frankfurter wing) retired in 1945, Chief Justice Stone drafted a letter praising his tenure on the Court, including the sentence "[y]ou have made fidelity to principle your guide to decision."[342] Roberts, however, had joined Justice Frankfurter in his dislike of Justices Black and Douglas and their tendency to "overthrow the law."[343] Thus, when Stone's letter came around for signatures, Black refused to sign it unless he removed that sentence. Frankfurter, rallying to his friend's side, insisted the sentence remain. No letter was sent.[344]

Personal spats like this were common throughout the period. Justice Jackson blamed Black for thwarting his chance to be Chief Justice.[345] Douglas and Frankfurter despised each other. Reacting to Frankfurter's tendency to lecture to and patronize his colleagues, Douglas said, "I agreed with the conclusion Felix has just announced. But he's just talked me out of it."[346] At other times, Douglas would stretch out on the couch and ignore Frankfurter as he spoke in conference.[347] Frankfurter in turn accused Black of bad faith and voting according to, in the words of Professor Simon, "naked political motives."[348] Finally, Frankfurter privately referred to Black, Douglas, and Justice Murphy as the "Axis" during World War II.[349]

The point of this brief account is to provide a context for the coerced confession cases. The decisions in *Lyons* and all of the second stage cases were made with an eye to the larger federalism disputes that disrupted the Court at this time. Reversing state convictions now had implications for much larger jurisprudential, and even personal, battles. In fact, the relatively sudden shift from stage one to stage two cases strongly correlates with the sudden

[342] Urofsky, Division, supra note 319, at 45 (quoting Letter from Justice Felix Frankfurter to Chief Justice Harlan Stone (Aug. 25, 1945), *microformed on* The Felix Frankfurter Papers, pt. 3, Reel 4, Frame 371 (Univ. Publ'n on Am. 1986)).
[343] Id.
[344] Simon, supra note 333, at 159.
[345] Renstrom, supra note 331, at 76.
[346] Urofsky, Division, supra note 319, at 35.
[347] Id. at 35–36.
[348] Simon, supra note 333, at 116.
[349] Id. at 115–16.

emergence of divided opinions. Thus, it seems plausible to think that the larger federalism debates (vis-à-vis individual liberty deprivations by states) *created* the second stage and its distinct characteristics.

As stated earlier, however, the stage one cases implicated federalism disputes just as much as the stage two cases.[350] In fact, one might suspect that the emergence of a new doctrine threatening state criminal proceedings might trigger more intense federalism disputes than the cases that followed the establishment of the doctrine. As explained at the end of Part II, there are at least two reasons explaining this phenomenon. First, the second stage cases simply involved closer calls than did the earlier, more egregious Southern cases. In other words, these later cases arguably required more activism by the judiciary in the form of more careful scrutiny of the trial court record. Second, disputes will not arise if no Justice perceives a need for dispute. Because many Justices never assumed that the doctrine would expand significantly beyond individual cases of egregious abuse (most common in the South), there was little need to argue passionately for states' rights. This perception of the doctrine's limited nature may very well have been an unspoken assumption. When the incorporation battle emerged in 1942 and divided opinions began to increase, suddenly there was a much greater need to defend state sovereignty. In the minds of the dissenting Justices, these cases—which required more federal intrusion—came along at the same time as the more general incorporation debate, which was itself a debate about the federal judiciary's power in individual liberty cases. Thus, reversing a conviction in a closer, second stage case suddenly had much broader implications by the mid-1940s.

Several aspects of *Lyons* and the second stage cases support the claim that the broader jurisprudential debates partially influenced the evolution of the coerced confession doctrine. For one, Justice Murphy's dissent in *Lyons* explicitly relied on incorporation of the Fifth Amendment. Interestingly, this was the *only* time in *any* of the cases (both stages one and two) that incorporation was relied on as a basis for reversal. Murphy wrote, "The Fifth Amendment prohibits the federal government from convicting a defendant on

[350] See supra text accompanying notes 152–53, 156.

evidence that he was compelled to give against himself. Decisions of this Court in effect have held that the Fourteenth Amendment makes this prohibition applicable to the states."[351] The problem was that the Court had *never* held this. Even worse, the very thought that the Constitution *could* do this represented the crux of the bitter debate between Justices Black and Frankfurter.

In addition, Justice Reed, in the majority opinion in *Lyons*, added that due process violations were to be found only where states disregard "that fundamental fairness essential to the very concept of justice."[352] That might as well have been Frankfurter talking. Reed's language drew directly upon Frankfurter's specific definition of due process, a definition that was used to counter Black's total incorporation theory.[353] Admittedly, this language hardly proves that Reed wrote with a conscious eye to incorporation arguments, but it should at least be noted.

The second major piece of evidence for the effects of jurisprudential debates on coerced confession cases comes from Frankfurter's concurrence in *Malinski* (he voted to reverse the conviction), which the Court decided a year after *Lyons*. First, Frankfurter began his opinion with an extended history of the Fourteenth Amendment. In doing so, he went out of his way to argue that the Fourteenth Amendment did not incorporate the Bill of Rights.[354] This seems strange given that *neither the briefs nor the various opinions made the slightest mention of incorporation*. Regardless, Frankfurter packed his opinion with many anti-incorporation statements and commentaries. For example, he wrote, "The suggestion that 'due process of law,' as guaranteed by the Fourteenth Amendment, is a compendious expression of the original federal Bill of Rights (Amendments I to VIII) has been rejected by this Court again and again."[355] Because, according to Frankfurter, due process implies "fundamental principles of liberty and justice," the Fourteenth Amendment due process requirements have a "potency different from and independent of the spe-

[351] *Lyons*, 322 U.S. at 605 (Murphy, J., dissenting) (citation omitted).
[352] Id. (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).
[353] Urofsky, Frankfurter, supra note 334, at 150–51.
[354] *Malinski*, 324 U.S. at 413–19 (Frankfurter, J., concurring).
[355] Id. at 414 (Frankfurter, J., concurring).

cific provisions contained in the Bill of Rights."[356] This rhetoric can be found throughout Frankfurter's opinion. Justice Black's Fourteenth Amendment, it was argued, led to a "warped construction" of the Bill of Rights, was "too frivolous to require elaborate rejection," and "[tore] up by the roots much of the fabric of law in the several States."[357]

It seems odd that Justice Frankfurter would spend so much effort on a theory that was not even mentioned in the majority opinion or the briefs. Frankfurter, however, was responding to the larger battles going on within the Court at this time, just as the coerced confession cases should be seen as one aspect of a much larger debate. Decisions in all these cases—including *Lyons*—were made with an eye to the implications they would have for this larger dispute.

To understand why incorporation mattered in these cases, one must understand what was at stake. As discussed in Section II.B, one of the underlying battles in the coerced confessions turned on whether the Court would adopt a bright-line rule or a more individualized case-by-case analysis. Adopting one rule over another reflected the amount of trust the Justices had in the lower courts (or state courts) in securing individual liberties. Bright-line rules (such as the ones eventually adopted in *Mapp v. Ohio*[358] and *Miranda v. Arizona*[359]) indicate a greater deal of distrust than a totality of the circumstances test.

Incorporation led to disputes because it would have required the Court to impose bright-line rules upon the states at the same time it increased its own oversight authority. For example, if the Fifth

[356] Id. at 414–15 (Frankfurter, J., concurring).

[357] Id. at 415–16 (Frankfurter, J., concurring). According to Professor Urofsky, Justice Frankfurter's concurrence inspired Justice Black's famous dissent in *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting), in which Justice Black articulated his full incorporation position. See Urofsky, Frankfurter, supra note 334, at 94, 153. For a discussion of *Adamson*, see Richard L. Aynes, Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment, 70 Chi-Kent L. Rev. 1197, 1215–24 (1995).

[358] 367 U.S. 643, 648 (1961) (stating that "[t]his Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required . . . deterrent safeguard").

[359] 384 U.S. 436, 467–68 (1966) (holding that "the following safeguards must be observed," and "we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given").

Amendment's protection against self-incrimination (which governs coerced confessions) were applied to the states, the federal judiciary could adopt prophylactic rules similar to the Fourth Amendment's exclusionary rule. Convictions might have been overturned whenever a coerced confession existed, regardless of independent evidence of guilt.

From a doctrinal perspective, however, nothing in the text of the incorporated amendments necessarily created bright-line, prophylactic rules. These rules could have just as easily been read into the Due Process Clause. The interesting question is why the Justices felt that incorporation—for good or bad—tended to lead to these types of bright-line rules. In other words, if Justices Black, Douglas, and Murphy wanted prophylactic rules, why did they prefer to use the incorporated amendments as their textual basis, given the controversy it caused?

Although these Justices wanted to expand federally enforced constitutional protections for the accused, they also lived in the shadow of *Lochner v. New York*[360] and the Four Horsemen.[361] Professor Simon wrote:

> Hugo Black . . . worried about an ambitious Court abusing its role in interpreting the Fourteenth Amendment. As a Senator, he had railed against the conservative majority that had twisted the meaning of the due process clause of the Fourteenth Amendment to affirm their conservative views. "No one has ever defined it," declared Senator Black. "No one has ever marked its boundaries. It is as elastic as rubber."[362]

If there was one doctrine that some of the New Deal Justices wanted to avoid, it was the old dreaded Due Process Clause, which was abused (in their minds) by the previous generation of Jus-

[360] 198 U.S. 45 (1905).

[361] The "Four Horsemen" refers to both a discredited jurisprudence and the four Justices themselves (Van Devanter, McReynolds, Sutherland, and Butler). For a general account of both the conventional view of the Four Horseman and challenges to the conventional view, see Barry Cushman, The Secret Lives of the Four Horsemen, 83 Va. L. Rev. 559, 559 (1997) ("For more than two generations scholars have seen the Four Horsemen as far right, reactionary, staunchly conservative apostles of laissez-faire and Social Darwinism.").

[362] Simon, supra note 333, at 172.

tices.[363] Given its history, one can understand why some of the Justices were hesitant to invoke this textual provision as a basis for new rights. The text of the Bill of Rights, however, provided an alternative textual basis—a basis free from the taint of Lochnerism.[364]

In one sense, then, incorporation itself played no major role in this dispute. What *did* play a major role was the larger jurisprudential battle over bright-line rules versus looser standards, which itself was a battle over the power of the federal judiciary to enforce individual liberties against the states. In this way, incorporation was merely a contingent manifestation of this broader battle. Thus, to the extent this Note argues that incorporation played a role in dividing the Court, it should be remembered that it was actually the underlying battle (which happened to take the form of incorporation) that drove the changes in the doctrine.

The final point to make in support of this jurisprudential argument is that the voting blocs mentioned earlier accurately describe how the Justices voted. In other words, the Justices tended to vote in familiar blocs in the coerced confession cases, with some notable exceptions. Table 2 lists how each Justice voted in the second stage cases.

TABLE 2

Case	Vote to Reverse Conviction	Vote to Affirm Conviction
Ashcraft v. Tennessee (1944)	Black, Douglas, Murphy, Reed, Rutledge, Stone	Frankfurter, Jackson, Roberts
Lyons v. Oklahoma (1944)	Black, Murphy, Rutledge	Douglas, Frankfurter, Jackson, Reed, Roberts, Stone
Malinski v. New York (1945)	Black, Douglas, Murphy, Rutledge, Frankfurter	Jackson, Reed, Roberts, Stone

[363] Maxwell L. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making 222 (2003).

[364] See id. at 229–30.

Haley v. Ohio (1948)	Black, Douglas, Frankfurter, Murphy, Rutledge	Burton, Jackson, Reed, Vinson
Watts v. Indiana (1949)	Black, Douglas, Frankfurter, Murphy, Rutledge, Jackson	Burton, Reed, Vinson
Turner v. Pennsylvania (1949)	Black, Douglas, Frankfurter, Murphy, Rutledge	Burton, Jackson, Reed, Vinson
Harris v. South Carolina (1949)	Black, Douglas, Frankfurter, Murphy, Rutledge	Burton, Jackson, Reed, Vinson

As the table illustrates, some Justices always voted for or against reversing the conviction. Black, Murphy, and Rutledge *always* voted to reverse. Roberts, Burton, and Vinson *always* voted to affirm. Douglas only voted to affirm in one case (*Lyons*—more on this below). Jackson, Reed, and Stone voted to reverse in only one of the cases. And most interestingly, Frankfurter voted to reverse in all but two of the cases.

Thus, the coerced confession votes roughly break down according to the voting blocs mentioned earlier. Justices Black, Douglas, Murphy, and Rutledge voted overwhelmingly for reversal. Justices Jackson, Reed, Roberts (and Burton), and Stone (and Vinson) voted overwhelmingly to affirm convictions. Justice Frankfurter, however, defied the correlation by voting mostly to reverse (more on this below).

The fact that the votes followed the "party line" tends to support the claim that the jurisprudential debate at least partially influenced the decisions. Had the confession cases turned strictly on a totality of the circumstances test, one might expect more variation. But given the relative uniformity of the decisions, especially remembering all of the federalism-based arguments that were a characteristic of the second stage cases, it seems plausible to think that these larger debates played an important role in the decisions.

Several objections, however, can be raised against this argument. First, in *Ashcraft*, both Justices Reed and Stone voted to reverse.[365] Because both Justices (especially Reed) voted consistently with the more conservative bloc, one wonders why they would have voted to reverse in *Ashcraft* if their decision would have had negative implications for the larger debate. In addition, *Ashcraft* preceded *Lyons* by just a little over a month.[366] Thus, if the jurisprudential debate played a role in the *Lyons* decision, it seems like it should have played an equally strong role in *Ashcraft*.

One possible answer is simply that the undisputed facts requirement did some real work in these cases. The Justices could plausibly believe that *Lyons* had too many disputed facts, or at least enough to justify a different result. Another possible answer is that Justices like Reed may not have immediately grasped the implications of *Ashcraft*. *Ashcraft*, one should remember, represented the first case in the second stage of cases.[367] Given that all of the other cases had been unanimous and were (arguably) intended only to remedy individual instances of abuse, it might be that some of the Justices still conceived of these cases independently of the broader debates. After Justice Jackson's scathing dissent,[368] however, the Justices might have suddenly realized that this doctrine could potentially get out of control. Thus, if some Justices harbored doubts about *Ashcraft*, and if the very next case they saw involved significant disputed facts, it makes sense that they might draw the line at *Lyons*.

Finally, there is always the possibility that no good reason exists. Perhaps Justices Reed and Stone realized they had made a mistake in *Ashcraft*. Neither one of them ever voted to reverse a conviction again, so maybe they wished they had voted differently. This explanation is, of course, pure speculation.

A second objection to the jurisprudential effects argument is that if the jurisprudential debates played such an important role, it

[365] *Ashcraft*, 322 U.S. at 156–74 (Jackson, J., dissenting, joined by Roberts & Frankfurter, JJ.).

[366] *Lyons*, 322 U.S. 596, was announced on June 5, 1944, while *Ashcraft*, 322 U.S. 143, was announced on May 1, 1944.

[367] See supra Table 1, pp. 418–19.

[368] *Ashcraft*, 322 U.S. at 156–74 (Jackson, J., dissenting, joined by Roberts & Frankfurter, JJ.).

seems that Justice Frankfurter would have deferred to the state and affirmed the conviction. Instead he voted to reverse in almost every case.[369] One response is that it is hard to deny that incorporation weighed on his mind, given his concurrence in *Malinski*. In addition, although Frankfurter did vote to reverse, he usually wrote solitary concurring opinions or opinions that were not joined by a majority.[370] This pattern suggests that he still wanted to maintain some distance from the Black and Douglas camps. But better reasons exist to explain his voting pattern.

First, although Frankfurter believed strongly in judicial restraint, he always had sympathies for criminal defendants suffering from police abuse.[371] Early in his career, he supported radical labor leader Tom Mooney after Mooney was sentenced to death in connection with a bombing at a parade in San Francisco supporting America's entry into World War I.[372] Throughout the 1920s, Frankfurter also strongly criticized the convictions and ultimately the executions of anarchists Sacco and Vanzetti.[373]

He also firmly believed that the judge had a role in maintaining the fairness of the criminal system. His flexible due process methodology (flexible in theory anyway) allowed judges to "ensure fundamental fairness."[374] Frankfurter at least believed himself to be one of these guardians of fairness, consistent with his idea of the proper judicial role. His views, he stated in *Haley*, came from "[a] lifetime's preoccupation with criminal justice, as prosecutor, defender of civil liberties, and scientific student."[375]

[369] Frankfurter voted to affirm only in *Lyons*, 322 U.S. 596, and *Ashcraft*, 322 U.S. 143. See Table 2, supra p. 458–59.

[370] For Frankfurter's solitary concurrences, see *Haley*, 332 U.S. at 601–07 (Frankfurter, J., concurring); *Malinski*, 324 U.S. at 412–20 (Frankfurter, J., concurring). In the last three cases of the second stage, all handed down on the same day, Frankfurter wrote for the Court, but was joined only by Murphy and Rutledge. Black and Douglas concurred in the judgment but did not join Frankfurter's opinion. See *Harris*, 338 U.S. at 68–71; *Turner*, 338 U.S. at 63–66 (1949); *Watts*, 338 U.S. at 49–55 (1949).

[371] McCloskey, supra note 321, at 98.

[372] Simon, supra note 333, at 46–47.

[373] Id. at 54–58.

[374] Urofsky, Frankfurter, supra note 334, at 156–57.

[375] *Haley,* 332 U.S. at 602. Justice Frankfurter's opinion was strikingly personal. Professor Urofsky speculates that Frankfurter possibly was making up for a prior decision in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), in which the state's electric chair malfunctioned during an execution. See Urofsky, Frankfurter, supra note 334, at 155. When the young man sued, arguing that a second attempt at execu-

Thus, two important observations should be made about how to understand Justice Frankfurter's concurrences throughout this period. First, Frankfurter argued for a particular conception of due process. More specifically, he aimed to establish his own definition of the Due Process Clause by equating it with fundamental fairness (lest anyone suspected his opinions gave support for the incorporation doctrine). Second, Frankfurter wanted to maintain federal oversight of state deprivations of liberty in *this particular field* (that is, coerced confessions in state courts), while avoiding recognition of the federal judicial power to enforce a bright-line rule against the states in other areas.

Justice Douglas's position is a bigger mystery. Of all the confession cases reviewed, *Lyons* was the *only* case where Douglas disagreed with the Black camp and voted to affirm the conviction. This decision simply does not mesh with his sympathies.[376] While it is possible that Douglas meant to save capital to argue for expansion in other individual liberty cases, this is hard to believe and even harder to prove.

Although this is speculative, it could be that Douglas's political aspirations affected his decisions. It was no secret that Douglas harbored political ambitions. His name had been thrown around in both 1944 and 1948 as a possible presidential candidate.[377] In 1944, there was serious talk that he might join Roosevelt on the Democratic ticket.[378] It is possible that Douglas did not want to upset his chances for the Democratic vice-presidential nomination by offending the important Southern wing of the party. Few decisions

tion would violate due process, Frankfurter affirmed the punishment in a 5-4 decision sending him back to the electric chair.

[376] For commentary on Justice Douglas generally, see James Simon, Independent Journey: The Life of William O. Douglas (1980) (providing an account of Douglas's life and achievements); White, supra note 319, at 369–420 (describing Douglas's self-image as a rugged individualist). On Justice Douglas's sympathies, see Neil Komesar, Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis, 51 U. Chi. L. Rev. 366, 389 (1984) (noting that Justice Douglas was "strongly associated with the protection of minority rights").

[377] White, supra note 319, at 399–400.

[378] Id. Professor White writes, "Moreover, Douglas had been taken seriously in many quarters as Roosevelt's logical successor: indeed he had been proposed by Roosevelt himself for the Vice Presidency in 1944. While publicly disclaiming any interest in that office, Douglas, according to some accounts, hoped and expected to get the nomination." Id. (citations omitted).

could have endeared him less to this constituency than those like *Lyons* that expanded federal rights at the expense of the states.

But again, this rationale is speculative. He might have just thought Lyons was guilty, or at least arguably guilty. Perhaps he felt the facts were simply too disputed. Regardless, Justice Douglas' decision in *Lyons* remains a mystery.

CONCLUSION

When *Brown* first held that state convictions based on coerced confessions could violate the Due Process Clause,[379] the logic of the Court's decision could not be easily confined to the grotesque circumstances of that case. Other cases soon reached the Court in which the police's questionable, and often race-inspired, conduct made the conviction look suspect. The struggle throughout this period for the Stone and Vinson Courts was to define a doctrine that could reach *Brown* and these other clear cases of abuse, and yet not transform the federal judiciary into a criminal appellate court with broad oversight over the states. In other words, finding the proper stopping point was the crux of the struggle.

In addition to documenting this struggle, this Note's examination of the early coerced confessions cases shows how outside considerations sometimes can affect legal doctrine. For example, in the first stage, the Court acted primarily to address egregious racial abuse in the South. Very likely, the Court originally intended the doctrine to be limited to these individual egregious examples of abuse. In the second stage, however, a formerly unanimous Court began splitting as federalism battles took center stage. Some Justices pushed for expanding the doctrine in a way that significantly increased federal oversight over state criminal proceedings, while another group of Justices retreated and voted against reversing any conviction.

Lyons offers an excellent insight into this history for several reasons. For one, *Lyons* provides a detailed, on-the-ground look into how these coerced confessions cases took shape and what the individuals endured at the hands of local law enforcement officials. Second, *Lyons* presents a window for understanding the similarities and differences between the two stages of coerced confessions

[379] *Brown*, 297 U.S. at 287.

cases from 1936 to 1949. Finally, *Lyons* shows how background struggles surrounding federalism (especially incorporation) came to bear on the coerced confession cases.

All in all, coerced confessions are but one part of the larger transition that in many ways defines the Hughes, Stone, and Vinson Courts. By following the progression of the confession doctrine, we can learn a great deal about the progressions and transitions of these colorful Courts.