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Judicial Restraints on Illegal State Violence: Israel and the United States

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ABSTRACT

This Article examines the role of courts in controlling state violence in the United States and Israel. The Author considers how U.S. federal courts should respond to illegal state violence by comparing a U.S. Supreme Court case, City of Los Angeles v. Lyons, *with a case decided by the Supreme Court of Israel,* Public Committee Against Torture in Israel v. Israel. *Part II highlights the legal issues that were central to each court in reaching a decision, including standing, the scope of equitable discretion to craft remedies, and baseline attitudes towards illegal government action. Part III examines the doctrines discussed in Part II, and considers whether expanding or altering these doctrines would strengthen the ability of U.S. courts to respond to illegal state violence. In Part IV, the Author examines the differences in the roles and powers of the U.S. and Israeli courts in an effort to address the relationship of U.S. and Israeli courts to state violence. The Author argues that despite the greater formal power enjoyed by the U.S. Supreme Court compared to the Israeli Supreme Court, the U.S. Supreme Court may have less flexibility to enforce civil rights.*

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I. INTRODUCTION

Governments are often violent, and one of law's many functions is to regulate the state's use of violence to maintain social order.[1] Sometimes, however, state actors wield unauthorized or illegal violence, with the frequent result that people die or suffer serious injuries.[2]

The primary responsibility for controlling illegal state violence in this country lies with the legislative and executive branches. When, for example, state and local authorities helped foster violent resistance to desegregation and other advances in civil rights, they were effectively resisted only through the forceful interventions of the Eisenhower and Kennedy administrations.[3] More generally, the

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1. *See generally* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Austin Sarat & Thomas R. Kearns, *Introduction*, *in* LAW'S VIOLENCE 1-4 (Austin Sarat & Thomas R. Kearns eds., 1992); Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, *in* LAW'S VIOLENCE at 175-78. This seems an appropriate place to note that this Article is concerned with state violence—and in particular illegal or questionably legal state violence, see *infra* note 2—in the form of physical actions that cause pain and other physical, mental, or emotional harms, and not with violence as a metaphor for or description of law, legal practice, or judging in general.

2. Illegal state violence is violence that is contrary to a statute or the Constitution, and this Article argues that unauthorized state violence should be illegal as well. Caselaw, however, appears to hold that the Constitution neither requires legislative authorization as a precondition to the use of state violence nor allows a remedy that would adequately restrain illegal state violence. *See, e.g.*, text at *infra* notes 43-58, 223-35. As a result, and at the risk of appearing tendentious, I have substituted the term "illegal state violence" for "excessive force" in most of this article because of the former's greater scope and the latter's link to current constitutional doctrine.

3. Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 968, 968 n.69 (1978). For a narrative account, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 (1988).

willingness of executive officials to restrain themselves and their peers is a crucial component of the effort to manage state violence.[4]

For its part, Congress enacted 42 U.S.C. § 1983 to provide legal and equitable relief for violations of civil rights under color of state law. More recently, Congress enacted 42 U.S.C. § 14141, which authorizes the Department of Justice (DOJ) to seek injunctive relief against patterns or practices of law enforcement conduct that violate civil rights.[5] Section 14141 is an important tool, but it leaves individuals dependent upon the energy, resources, and timeliness of the federal executive branch for equitable relief, and perhaps for this reason has been applied in only a few instances since its enactment.[6] While improvements in the statute or its enforcement are possible,[7]

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4. Put differently, courts are not the only government actors who interpret the law, and rule of law ideals mean little if they are not embraced by executive officials. Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 485-92 (1987).

5. Section 14141 responds to cases such as *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), which held that "the United States may not sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *Id.* at 201-02. *City of Philadelphia* grew out of the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), which rejected individual and class standing to sue the Philadelphia police for equitable relief. The Justice Department conducted its own investigation, substantiated the gist of the claims made in *Rizzo*, and brought suit. *See City of Philadelphia*, 644 F.2d at 207-08 (Gibbons, J., dissenting from denial of rehearing en banc).

6. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1404-12 (2000) (discussing use of § 14141 against the Columbus, Pittsburgh, and Steubenville police and investigations of other police departments, and assessing the statute's efficacy) [hereinafter Gilles, *Reinventing*]; Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1362-64 (2001) (doubting the federal government's ability adequately to enforce individual private rights); Todd S. Purdum, *Los Angeles Agrees to Changes For Police*, N.Y. TIMES, Sept. 21, 2000, at A18 (describing agreement between Los Angeles and DOJ to address "what the Justice Department has called a systemic pattern of abusive conduct by officers here"); Kevin Flynn, *Wild Card in Police Oversight Talks*, N.Y. TIMES, July 8, 2000, at B3 (noting New York City has been negotiating with DOJ over a consent decree to end a § 14141 investigation); U.S. Dep't of Justice, Civil Rights Division, Special Litigation Section, *Documents and Publications*, *at* http://www.usdoj.gov/crt/split/findsettle.htm (collecting § 14141 consent decrees).

7. *See, e.g.*, Gilles, *Reinventing*, *supra* note 6, at 1417-18 (proposing deputizing aggrieved individuals to bring suit on behalf of the federal government). Analogizing to qui tam suits, Professor Gilles suggests courts might find standing in such circumstances. *Id.* at 1421-24, 1445-49; Myriam E. Gilles, *Representational Standing: U.S. ex rel.* Stevens *and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 364-67 (2001) [hereinafter Gilles, *Representational*]. Her proposal suggests important new ways for Congress to ensure adequate civil rights enforcement. If the Court, however, views such an amendment as an effort to undermine its constitutional decision in *Lyons*, the statute could be in peril under *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78 (1992) (suggesting Congress cannot use citizen suits to overcome constitutional standing requirements); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on*

§ 1983 continues to provide the primary vehicle for individual challenges to government action.

The role of federal courts in controlling state violence consists largely of deciding cases brought under statutes passed by Congress—again, § 1983 is the primary example. On occasion, however, federal courts have looked beyond statutes to create remedies for illegal conduct by government officials. For example, the *Bivens* doctrine creates a cause of action directly under the Constitution for violations by federal officials of constitutional rights.[8] The doctrine of *Ex parte Young* allows claims for prospective injunctive relief against government officials charged with carrying out allegedly unconstitutional laws or policies.[9]

In the course of applying § 1983, federal courts have had to interpret the words of the statute[10] and in particular have had to determine how it interacts with traditional doctrines of remedies and official immunity, as well as how principles of federalism impact its scope. The Supreme Court has adopted doctrines of absolute and qualified immunity for state officers—and federal officers sued under *Bivens*—that prevent many injured plaintiffs from obtaining relief.[11] The Court also has limited the scope of equitable remedies because of federalism concerns. One of the central cases in this latter effort is *City of Los Angeles v. Lyons*,[12] which declared that § 1983 plaintiffs must establish standing to seek injunctive relief over and above their standing to seek damages and established that the irreparable injury rule, supported by principles of federalism, bars injunctive relief in

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the Jurisprudence of Lyons, 59 N.Y.U. L. REV. 1, 30-35, 48-56 (1984) [hereinafter Fallon, *Public Law*] (arguing pre-*Lujan* and *Boerne* that Congress could legislate around *Lyons*). For a discussion of the complexity and potential intrusiveness of § 14141 consent decrees, see *infra* notes 218-19 and accompanying text.

8. Bivens v. Six Unknown Named Agents Of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* has been limited in cases such as *Chappell v. Wallace*, 462 U.S. 296 (1983), which refused to allow a *Bivens* action in the military context where statutory remedies were available.

9. *Ex parte* Young, 209 U.S. 123 (1908). *See also* Edelman v. Jordan, 415 U.S. 651 (1974) (holding the *Ex parte Young* doctrine is limited to suits for prospective injunctive relief); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73-76 (1996) (holding remedies created by Congress can displace the *Ex parte Young* doctrine).

10. For example, the Supreme Court repeatedly has grappled with the meaning of the word "person" in § 1983. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (holding cities are not "persons"); Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978) (holding cities are "persons"); Quern v. Jordan, 440 U.S. 332 (1979) (suggesting states are not "persons"); Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (holding states are not "persons").

11. *See* Forrester v. White, 484 U.S. 219, 223-29 (1988) (describing absolute immunity); Butz v. Economou, 438 U.S. 478 (1978) (holding immunity doctrines apply to *Bivens* actions as well as § 1983 actions); Scheuer v. Rhodes, 416 U.S. 232 (1974) (adopting qualified immunity from suit for most officials); *see also* Richardson v. McKnight, 521 U.S. 399 (1997) (holding private parties who act as agents of states cannot claim qualified immunity); *infra* notes 176-77 and accompanying text.

12. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

most § 1983 cases. As a result of *Lyons*, § 1983 plaintiffs cannot obtain injunctions unless they can prove that they or members of a class of similarly situated people are suffering a continuing injury or face a definite, imminent, and personal threat of future injury.[13] The same standing requirements apply to claims against federal officials.

Even as federal courts have crafted doctrines that restrict civil rights claims, our federal and state governments have continued to employ illegal violence, all too often against minorities or those who in some way are on the margins of our society.[14] The vast majority of law enforcement officials perform their duties without using unnecessary or illegal violence, and it is a simple fact that the police must use violence to do their jobs properly and effectively. The terrorist attacks of September 11, 2001 on New York City and Washington, D.C. underscore in extreme fashion the risks faced by law enforcement officials and the need to ensure that they have adequate tools to counter violent crime.

Nonetheless, persistent reports of illegal or questionably legal police violence suggest that it continues at an unacceptably high level. Among the most prominent incidents are:

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13. *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 552 (2001) ("*Lyons* . . . makes it virtually impossible for the victim of police abuse to secure injunctive relief against a local government entity for practices of its police or sheriff's department."); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review*, 5 WM. & MARY BILL RTS. J. 427, 501 n.172 (1997) (arguing *Lyons* "has proved an almost insurmountable barrier to prospective relief in most police cases"). *See also* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, 5-27-5-40 (4th ed. 1997 & Supp. 2001) (collecting cases applying *Lyons*, the vast majority of which denied standing to seek injunctions); Gilles, *Reinventing*, *supra* note 6, at 1399 n.57 (similarly collecting cases applying *Lyons*); Laura E. Little, *It's About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 941-46 (1993) (arranging another collection of cases applying *Lyons*). *But see* Brandon Garrett, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1820-26 (2000) (arguing *Lyons* requires only a "credible threat" of future harm and collecting cases in which courts found such a threat).

14. *See* SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 85-108 (1996) (exploring the disproportionate impact of police violence on minority groups, particularly African American males); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1281 n.35 (2000) (noting the poor and minorities are most likely to suffer from police violence); Amnesty International, *United States of America: A Briefing for the UN Committee Against Torture* 7 (May 2000) [hereinafter Amnesty International, *Torture*], http://www.web.amnesty.org/ai.nsf/index/AMR510562000.htm ("There is evidence that racial minorities are disproportionately the victims of police ill-treatment . . . . Mentally ill and homeless people are also frequently the victims of police abuse. Gays and lesbians have been subjected to harassment or brutality in some areas."); Coalition Against Torture and Racial Discrimination, *Torture in the United States* 5 (Oct. 1998), http://www.udayton.edu/~race/06internat/torture01.htm (noting "special problems related to abusive treatment of detainees and experienced by those seeking asylum status" in the United States).

- the shooting of an unarmed, fleeing African American man by Cincinnati police;[15]
- corruption in the Los Angeles Police Department that included the intentional shooting of a man in handcuffs;[16]
- the Louisville police department's decision to reward two officers who shot an unarmed African American man twenty-two times;[17]
- corruption in the Miami police department that included the intentional shooting of three unarmed men;[18] and
- a spate of killings of unarmed or mentally ill individuals by New York City police.[19]

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15. *Cincinnati Officer Acquitted in Killing that Ignited Riots*, N.Y. TIMES, Sept. 27, 2001, at A18 (describing shooting by police of fleeing 19-year-old whose record consisted of outstanding traffic and flight warrants).

16. *Los Angeles Settles Lawsuit Against Police*, N.Y. TIMES, Nov. 22, 2000, at A20 (describing $15 million settlement "to a man who said police officers shot him in the head and chest and then framed him in the attack."); James Sterngold, *Los Angeles Police Officials Admit Widespread Lapses*, N.Y. TIMES, Feb. 17, 2000, at A16 (noting "more than 40 criminal cases have been or will shortly be overturned" because of police corruption including unlawful violence); James Sterngold, *Police Corruption Inquiry Expands in Los Angeles*, N.Y. TIMES, Feb. 11, 2000, at A16 (reporting Los Angeles police "shot an unarmed man in handcuffs, planted guns, drugs and other evidence on suspects, lied in court testimony to frame innocent people and stole drugs and money"). *See also New Oversight of Police Urged in Los Angeles*, N.Y. TIMES, Sept. 12, 2000, at A21 (reporting conclusions of Professor Erwin Chemerinsky in a study requested by the Los Angeles Police Protective League that "[a]n environment in which excessive force and a code of silence was tolerated has allowed corruption to fester"); Don Terry, *Rackets Law Can Be Used Against Police in Los Angeles*, N.Y. TIMES, Aug. 30, 2000, at A14 (reporting a federal judge has allowed a civil RICO suit to go forward against the LAPD). The scope of the most recent LAPD corruption scandal may not be as broad as some have claimed, but the LAPD's overall record of illegal violence remains poor. Peter J. Boyer, *Bad Cops*, NEW YORKER, May 21, 2001, at 60. For an additional recent incident, see *Los Angeles Board Rules Police Shooting Was Wrong*, N.Y. TIMES, Feb. 20, 2000, § 1, at 22 (describing fatal shooting by police of a fifty-four year-old mentally ill homeless woman who brandished a foot long screwdriver when two officers approached her and asked whether she had stolen the shopping cart that she was using).

17. Francis X. Clines, *Protesting by Angry Police Leaves Louisville Unsettled*, N.Y. TIMES, Mar. 10, 2000, at A12. When the mayor fired the police chief for giving the awards, officers "deserted their beats" to protest at city hall. *Id.* "[S]houting officers cut off downtown traffic and left the lights on their cruisers flashing ominously outside the seat of government as they called for the mayor's ouster." *Id.*

18. Dana Canedy, *11 Miami Officers Facing U.S. Charges in 3 Shooting Deaths*, N.Y. TIMES, Sept. 8, 2001, at A1 (describing shooting by police of three unarmed men in separate incidents, followed by planting of weapons and claims that the men were armed).

19. Amnesty International, *Torture*, *supra* note 14, at 8 (describing shooting by NYPD of Amadou Diallo and officers' subsequent acquittal on criminal charges); John Kifner, *No Charges Against Officers in Fatal Brooklyn Shooting*, N.Y. TIMES, Nov. 2, 1999, at B1 (describing shooting by NYPD of hammer-wielding mentally ill man after a brief altercation); Eric Lipton, *Guiliani Cites Criminal Past of Slain Man: Pressed on Shooting, Mayor Criticizes Victim*, N.Y. TIMES, Mar. 20, 2000, at B1 (describing

for the task of combating illegal state violence in the United States. The Supreme Court of Israel operates within a social and legal context that is different enough from that of the United States to prevent an easy transfer of doctrines—although I argue that U.S. courts should think seriously about some of these doctrines. Moreover, *Public Committee* is a complex decision, and aspects of it may turn out to be unworkable for U.S. courts. Finally, the realities of state violence—legal or illegal—in Israel are far different from those in the United States, even after September 11. Frequent terrorism, the renewed intifada, and the government's responses to these events make clear that the role of Israeli courts in managing state violence of any kind is limited and precarious—although the same is also true to some degree in the United States. Yet even with these caveats, *Public Committee* suggests methods and doctrines for putting into practice at the most basic level the ideal of law as a constraint on arbitrary government power.[23]

Part II of this Article describes the decisions in *Lyons* and *Public Committee* and highlights the legal issues that were central to each court: standing, the scope of equitable discretion to craft remedies, and the proper baseline attitude toward illegal government action. Part III examines these three doctrines in depth and considers whether expanded standing, greater equitable discretion and reconsideration of the preference for damages, and, most significantly, a rule of no restraints on liberty without explicit legislative authorization would strengthen the ability of U.S. courts to respond to illegal state violence.

I argue that the federalism and separation of powers concerns that animate much of standing doctrine—and in particular the *Lyons* doctrine of limited injunction-standing—can be addressed by courts at the remedies stage of litigation. In addition, a fair evaluation of the inadequacies of damages in civil rights cases supports a greater role for injunctions. Injunctions, however, are no panacea, and many of the federalism and separation of powers concerns about overly intrusive federal court injunctions have considerable force. To accommodate these views, I propose adoption of the Israeli doctrine prohibiting unauthorized force. In addition to damages awards in private-plaintiff civil rights cases, courts should issue injunctions

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23. Although this Article compares decisions of the U.S. and Israeli supreme courts, it is not "comparative" in the strong sense. *See* Vivian Grosswald Curran, *Cultural Immersion, Difference, and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998) [hereinafter Curran, *Cultural Immersion*] (arguing comparative analysis requires immersion in the legal culture to be studied but with the awareness that immersion may lead to findings of difference rather than commonality). I will offer an interpretation of *Public Committee*, but I am no expert on Israeli law, politics, or society. My primary goal is to use the case to gain critical perspective on U.S. law and practice, not to provide a definitive explanation of *Public Committee* and its place in Israeli law.

These examples, while not exhaustive, provide sufficient evidence of the ongoing problem of illegal state violence in the United States.[20] In addition, the September 11 attacks increase the chances that federal officials will engage in illegal or unauthorized violence. For example, federal officials have considered the use of physical force in the interrogation of those suspected of participating in the September 11 attacks.[21] More generally, recent events could lead to vastly increased claims of executive branch discretion and inherent law enforcement authority.

This Article considers how federal courts could better respond to claims challenging state violence, particularly claims that are linked to the problem of excessive executive discretion. I approach this issue by comparing the decision in *Lyons* with the Supreme Court of Israel's recent decision—sitting as the High Court of Justice—in *Public Committee Against Torture in Israel v. Israel*,[22] which prohibited the illegal torture of suspected terrorists. I have chosen this comparison because the two cases exhibit different approaches to the problem of controlling illegal state violence. *Lyons* strongly suggests that individuals have no enforceable right to be free of illegal state violence, while *Public Committee* takes such a right as a premise and enforces it.

My focus, therefore, is whether and to what extent *Public Committee* should serve as a model for doctrinal change in the United States. I do not, however, claim that Israel presents an ideal model

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shooting by undercover officers of unarmed man after scuffle that began when the victim rebuffed the officers' efforts to involve him in a drug sting). *See also* Dan Barry, *Officer's Silence Still Thwarting Torture Inquiry*, N.Y. TIMES, Sept. 5, 1997, at A1 (describing torture of Abner Louima by NYPD officers); Kevin Flynn, *How to Sue the Police (and Win): Lawyers Share Trade Secrets of a Growth Industry*, N.Y. TIMES, Oct. 2, 1999, at B11 (describing conference on litigating police misconduct cases in New York City, where "2,600 citizens accuse the police of misbehavior every year").

20. For other examples of recent police violence in these and other cites, see Bandes, *supra* note 14, at 1306-07; Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1112-17, 1146-48 (2000); David Kocieniewski, *Charges Dismissed in Shooting Case Against Trooper*, N.Y. TIMES, Nov. 1, 2000, at A1 (describing dismissal of charges against officers who killed three unarmed men during traffic stop); *Amtrak Police Kill Man at Philadelphia Station*, N.Y. TIMES, July 19, 2000, at A21 (describing fatal shooting by police of homeless man who threw a chair at them); Tamar Lewin, *Images of Police Beatings are Subject to Blurring*, N.Y. TIMES, July 15, 2000, at A1.

21. *See* Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6. *See also* Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, pt. 2 at 19 (proposing judges should be able to issue "torture warrants"); Jim Rutenberg, *Torture Seeps Into Discussion by News Media*, N.Y. TIMES, Nov. 5, 2001, at C1; Steven Lee Myers & Neil A. Lewis, *Rumsfeld Offers Assurances About Use of Military Courts*, N.Y. TIMES, Nov. 16, 2001, at B10 (noting a former deputy attorney general argued "it might also be permissible to transfer terriorist suspects to other nations with different standards of interrogation").

22. H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, *reprinted in* 38 I.L.M. 1471 (1999).

against restraints on liberty that were not approved in advance by a legislature or, in narrow circumstances, a regulatory entity. These injunctions would essentially throw the underlying dispute back into the democratic process for resolution—with, of course, the potential for substantive judicial review of the constitutionality of any resulting rules.

Although doctrine is important, *Lyons* and *Public Committee* also reflect larger differences in the roles and powers of U.S. and Israeli courts. I argue in Part IV that we should acknowledge the possible unfortunate consequences for civil rights plaintiffs of the U.S. Supreme Court's formal power, as well as the greater flexibility to enforce civil rights enjoyed by the formally less powerful Supreme Court of Israel. Despite its power, the U.S. Supreme Court is unlikely—and may perhaps be afraid—to adopt something like the Israeli no-restraint rule in wholesale fashion. An incremental, common-law-style approach offers the best opportunity for meaningful doctrinal change.

The organization of this Article reflects its two-fold purpose. Parts II and III are relatively straightforward analyses of *Lyons* and *Public Committee*, of the doctrinal differences between them, and of whether it is desirable as a matter of doctrine to move from *Lyons* toward *Public Committee*. While I believe this analysis is important, my strong sense is that it is insufficient on its own. My discussion of judicial review and doctrinal change in Part IV is a more frankly speculative effort to address the relationship of courts to state violence. This final section thus exists not as a last word but as a half step, a set of ruminations about how better to energize U.S. courts to restrain illegal state violence.

II. *LYONS* AND *PUBLIC COMMITTEE*

Officers of the Los Angeles Police Department (LAPD) pulled Adolph Lyons over for the traffic offense of having a burned-out tail light.[24] Although Lyons, an African American, cooperated with the officers, they drew their guns when they confronted him, slammed his hands against his head, and applied a chokehold after he complained. Lyons lost consciousness, urinated and defecated on himself, and was left gasping for breath and spitting up blood.[25] The police issued a traffic citation and released him.[26]

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24. City of Los Angeles v. Lyons, 461 U.S. 95, 97 (1983).

25. *Id.* at 115 (Marshall, J., dissenting).

26. *Id.* The majority's presentation of the facts is consistent but shorter. *Id.* at 97-98 (majority opinion). For a detailed description of chokeholds and the injuries they cause, see *id.* at 115-19 (Marshall, J., dissenting).

No elected body had specifically authorized the LAPD to use chokeholds.[27] Moreover, the precise nature of the LAPD's policy was unclear and disputed.[28] An LAPD training officer characterized department policy as authorizing a police officer "to deploy a chokehold whenever he 'feels that there's about to be a bodily attack made on him.'"[29] The City claimed that LAPD policy required "officers to use only that force which is 'reasonable and necessary' and the minimal force required to overcome resistance," but also said that chokeholds could be used "upon resisting, attacking (typically weaponless), or fleeing suspects."[30] Lyons relied on depositions and LAPD documents to argue that the LAPD

> authorized strangleholds in a wide variety of situations where neither life nor serious bodily injury was threatened. Officers were permitted to use strangleholds whenever a police officer 'felt' there was about to be a bodily attack on him; to subdue any resistance by suspects, to overcome or subdue combative suspects, and 'when necessary to stop a suspect's resistance.[31]

From February 1975 to July 1980, "LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations" between police and suspects.[32] Sixteen people—twelve of them African American males—died from LAPD chokeholds between February 1975 and May 1982.[33] Many others probably suffered injuries similar to or worse

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27. *Id.* at 99 (majority opinion).

28. *Id.* at 110 ("there has been no occasion to determine the precise contours of the city's chokehold policy"); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1273 (1989) ("because the case was in the preliminary injunction phase, the Court did not know the agency's policy").

29. *Lyons*, 461 U.S. at 118 (Marshall, J., dissenting); *see also id.* at 110 n.9 (majority opinion).

30. Brief for the City of Los Angeles at 5, 6, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (No. 81-1064).

31. Brief for Respondent at 17-18, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (No. 81-1064).

32. *Lyons*, 461 U.S. at 116 (Marshall, J., dissenting) (citing testimony of the "officer-in-charge of the Physical Training and Self-Defense Unit of the LAPD").

33. *Id.* at 99, 100 (majority opinion); *id.* at 116-17 (Marshall, J., dissenting). African American males were nine percent of Los Angeles's population at the time. *Id.* at 116 n.3. According to information the Author obtained from the California Department of Justice's Criminal Statistics Center, of the 198,373 people arrested for felonies and misdemeanors (including misdemeanor traffic offenses) by the LAPD in 1980, 72,143 (36.37%) were African American. Of the 61,964 felony arrestees, 29,892 (48.24%) were African American. For all of Los Angeles County, African Americans were 138,760 (27.68%) of the 501,320 felony and misdemeanor arrestees, and 60,369 (39.64%) of the 152,370 felony arrestees. Due to racial bias, these rates of arrest probably overstate the rates of criminality of African Americans and other groups relative to whites. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 792 (1994) (citing *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV.

than those suffered by Lyons.[34] During this period, the Board of Police Commissioners, whose members were appointed by the mayor and confirmed by the city council, studied the LAPD's use of chokeholds and concluded there were "no suitable alternatives" to their use.[35] After the Supreme Court granted certiorari, however, the Los Angeles Chief of Police prohibited one of the two types of chokehold and the Board of Police Commissioners imposed a moratorium on the other.[36]

Lyons brought suit under 42 U.S.C. § 1983 for damages, declaratory relief, and an injunction barring the use of chokeholds by the LAPD.[37] In his complaint, Lyons alleged that LAPD officers "regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever," in violation of the First, Fourth, Eighth, and Fourteenth Amendments to the Constitution.[38] The district court found that "without provocation or legal justification the officers involved had applied a 'Department-authorized chokehold which resulted in injuries to the plaintiff.'"[39] Concluding that the LAPD authorized chokeholds "in situations where no one is threatened by death or grievous bodily harm,"[40] the court entered a preliminary injunction enjoining the use of chokeholds absent such a threat and requiring improved training and record-keeping.[41] The Ninth Circuit affirmed.[42]

1473, 1508 (1988)). In any event, the disparity between the percentage of African American arrestees and the percentage of African Americans among those killed by chokeholds is suggestive.

34. *Lyons*, 461 U.S. at 115-19 (Marshall, J., dissenting) (describing the predictable consequences of chokeholds).

35. Brief for the City of Los Angeles at 8, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (No. 81-1064). The city council also conducted an investigation. *Id.*

36. *Lyons*, 461 U.S. at 100 (majority opinion). Because the LAPD could resume using chokeholds, the Court rejected Lyons's claim that these changes mooted the case. Thus, the moratorium on chokeholds should have had no impact on the Court's conclusion that Lyons's fear of future injury was too speculative to support standing.

37. *Id.* at 97, 112-13.

38. *Id.* at 98.

39. *Id.* at 99.

40. *Id.*

41. *Id.* at 100.

42. Lyons v. City of Los Angeles, 656 F.2d 417 (9th Cir. 1981) (per curiam). The court found no abuse of discretion and described the preliminary injunction as a

> relatively innocuous interference by the judiciary with police practice . . . when the record reveals that nine suspects who have been stopped by the police and who have been subdued by the use of carotid and bar arm control holds have subsequently died, allegedly of the injuries sustained in the application of these holds. *Cf.* Rizzo v. Goode, 423 U.S. 362, 379 (1976) (federal court may not order sweeping structural relief requiring federal court supervision of state police procedures absent "extraordinary circumstances").

Id. at 417-18.

The Supreme Court reversed. The Court ruled that while Lyons presumably had standing to seek damages, "a plaintiff must demonstrate standing for each form of relief sought."[43] Lyons's standing to seek an injunction, according to the Court, "depended upon whether he was likely to suffer future injury from the use of chokeholds by police."[44] The Court determined that Lyons could not make a "realistic" claim to that effect unless he could show that all members of the LAPD always apply chokeholds when arresting, questioning or issuing a citation, or that "the City ordered or authorized police to act in such manner."[45] The Court concluded that allegations of this nature by Lyons would be mere "conjecture" and "speculation."[46]

Put another way, the Court rejected Lyons's claim because he was unlikely to suffer another chokehold under any reasonably conceivable department policy. The Court appears to have accepted Lyons's allegation "that the City authorized the use of the control holds in situations where deadly force was not threatened"[47]—in other words, that the LAPD had a policy of allowing chokeholds in such situations—and the district court so found.[48] The Supreme Court observed, however, that this allegation "is not equivalent to the unbelievable assertion that the City either orders or authorizes application of chokeholds where there is no resistance or other provocation" and that such an allegation "is belied by the record made on the application for preliminary injunction."[49] The Court later characterized the LAPD's policy as prohibiting chokeholds "absent some resistance or other provocation by the arrestee or other suspect,"[50] but then equated that policy with allowing chokeholds "when the officer 'feels' or believes there is about to be a bodily attack."[51] The Court's language suggests that a policy of using deadly force against citizens based on an officer's feelings or beliefs is immune from equity. Yet such a policy would be in some tension with the constitutional ban on the use of deadly force against fleeing suspects absent probable cause to believe the suspect "poses a threat of serious physical harm."[52] Whether actions under such a policy

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43. *Lyons*, 461 U.S. at 109.

44. *Id.* at 105.

45. *Id.* at 106.

46. *Id.* at 108. The Court also ruled that Lyons's "assertion that he may again be subject to an illegal chokehold does not create the actual controversy that must exist for a declaratory judgment to be entered." *Id.* at 104.

47. *Id.* at 106.

48. *See id.* at 99.

49. *Id.* at 106 n.7.

50. *Id.* at 110.

51. *Id.* at 110 n.9.

52. Tennessee v. Garner, 471 U.S. 1, 11 (1985). The *Garner* Court stated that the use of deadly force to prevent an escape was permissible "if the suspect threatens

satisfy the objective reasonableness standard for claims of excessive force during an arrest is unclear.[53]

Because Lyons had no standing, the Court did not consider the merits of his claim.[54] The Court, however, took pains to explain that even if Lyons had standing, he could not have shown the irreparable injury or lack of an adequate remedy at law that are prerequisites to injunctive relief.[55] The Court said that "Lyons is no more entitled to an injunction than any other citizen of Los Angeles"[56] and declared that "the need for a proper balance between state and federal authority" requires "restraint" in the use of injunctions "to oversee state law enforcement authorities."[57] The Court also asserted that the availability of after-the-fact damages and criminal sanctions is a sufficient deterrent against violent deprivations of constitutional rights.[58]

While the facts of *Lyons* are appalling, its holdings stand comfortably on the foundation of *Rizzo v. Goode*,[59] *O'Shea v. Littleton*,[60] and *Younger v. Harris*,[61] all of which limited the scope of equitable relief under § 1983. True, *Lyons* can be distinguished on its facts and legal posture,[62] and the case certainly extended standing doctrine by "fragmenting" cases into separate claims, each of which

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the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . and if, where feasible, some warning has been given." *Id.* at 11-12. *Cf.* Pierce, *supra* note 28, at 1273 n.206 ("Apparently, the *[Lyons]* majority would hold that the agency's stated policy falls within constitutional boundaries").

53. Graham v. Connor, 490 U.S. 386, 394-95 (1989) (holding objective reasonableness is the proper standard for excessive force claims); *see also* Saucier v. Katz, 121 S. Ct. 2151, 2158 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed.").

54. Two years later, the Court accepted part of the basic theory of liability that Lyons had urged. *See supra* note 52 and accompanying text; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375 (1988).

55. *Lyons*, 461 U.S. at 111.

56. *Id.*

57. *Id.* at 112.

58. *Id.* at 113.

59. Rizzo v. Goode, 423 U.S. 362 (1976) (finding no case or controversy in civil rights action seeking injunction against widespread police misconduct and specifically criticizing the district court's decision to order the police department to draft internal policies as a remedy for civil rights violations); *see supra* note 5.

60. O'Shea v. Littleon, 414 U.S. 488 (1974) (finding no case or controversy in civil rights action seeking injunction against discriminatory police practices).

61. Younger v. Harris, 401 U.S. 37 (1971) (limiting federal court ability to enjoin state criminal proceedings). For additional cases limiting standing or requiring abstention prior to *Lyons*, see Fallon, *Public Law*, *supra* note 7, at 35-36, 69.

62. *See, e.g.*, *Lyons*, 461 U.S. 123-24 (Marshall, J., dissenting); Fallon, *Public Law*, *supra* note 7, at 36-39 (distinguishing earlier cases as resting on inadequate allegations of causation); *id.* at 44 (distinguishing earlier cases as seeking more sweeping relief).

requires an independent standing inquiry.[63] *Lyons*, however, is consistent with the attitudes that animate *Younger*, *O'Shea*, and *Rizzo*, chief among them the reluctance to "circumscribe the authority of the wielders of state violence."[64]

Still, the path to *Lyons* was not inevitable. In *Allee v. Medrano*, the Court rejected Article III and federalism-based objections to the entry of an injunction against a "persistent" but discontinued "pattern of police misconduct" that destroyed the efforts of farmworkers to unionize.[65] *Allee* suggested an approach to justiciability that had historical support[66] and would have made more

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63. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought") (citing *Lyons*, 461 U.S. at 109); *Lyons*, 461 U.S. at 122 (Marshall, J., dissenting); Fallon, *Public Law*, *supra* note 7, at 22 n.115 (describing precedents on the meaning of "case" that undermine the analysis in *Lyons*); *id.* at 24-25 (suggesting prior cases, including *Rizzo* and *O'Shea*, may have rested as much on mootness as on standing); Linda E. Fisher, *Caging* Lyons: *The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1085 (1987) (arguing *Lyons* extended previous doctrine).

64. Robert Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 56 (1983) [hereinafter Cover, Nomos]. *See also* Fallon, *Public Law*, *supra* note 7, at 43 (arguing *Lyons* imposes "heavy costs" as "a solution to the problems of public law litigation"); *id.* at 71 ("*Lyons*'s principal significance for the doctrine of equitable restraint may lie in its failure to interrupt the self-enforcing momentum of 'Our Federalism'"); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 319-20 (1988) (noting "[t]he slogan of federalism . . . leads to the total denial of judicial redress (state or federal) for the violation of federal rights"); Winter, *supra* note 54, at 1381 ("All too often, the inevitable consequence of a decision denying standing is 'that the most injurious and widespread government actions c[an] be questioned by nobody.'").

65. Allee v. Medrano, 416 U.S. 802, 815 (1974). *See also* Hague v. CIO, 307 U.S. 496 (1939) (upholding an injunction preventing police from illegally disrupting labor activities).

66. Standing doctrine as such did not exist until after the drafting of Article III, and some version of public law litigation was well-established in the founding era. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300-01 (1979) ("The practice at the time the Constitution was written was . . . both more restrictive and more lenient than at present."); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) (describing the history of British and American public actions and arguing they were well-established in the United States by an early date); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 637-41 (1992) (summarizing evidence about the meaning of "cases" and "controversies" and finding little proof that the framers understood these words to include modern-day notions of justiciability); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 402, 426, 436-37, 483 (1996) (reaching similar conclusions); Peter M. Shane, *Returning Separation of Powers to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 ENVTL. L. REP. 11081, 11082-89 (2000) (surveying the history of standing doctrine to reach similar conclusions and suggesting how the court went off track) [hereinafter Shane, *Returning*]; Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 178 (1992) ("There is absolutely no affirmative evidence that Article

room for the use of equity to control official discretion to employ violence. Moreover, we could link *Allee* to the underlying goals of public law litigation to argue for a more relaxed standing test.[67] The declining era of public law litigation, however, provides little traction against the Court's current, overriding concern for safeguarding federalism and executive discretion.[68] The theme that emerges from *Lyons* and its predecessors—with *Allee* reminding us of the path not taken—is that government officials sometimes abuse their power, but so long as they pay for the damage, we must accept it and move on. *Lyons* thus suggests a world in which illegal state violence is a fact of life over which judges have little control—perhaps because the political process is said to be the appropriate forum for further remedies[69]—except for their limited power to hear damages claims or preside over criminal prosecutions.

What then are we to make of the Supreme Court of Israel's decision in *Public Committee*? Six Palestinians suspected of involvement in terrorist activities were tortured by Israel's General Security Service—GSS, also known as Shin Bet.[70] The methods of torture included:

III was intended to limit congressional power to create standing. There is no affirmative evidence of a requirement of a 'personal stake' or an 'injury in fact'—beyond the genuine requirement that some source of law confer a cause of action.") [hereinafter Sunstein, *What's Standing*]; Winter, *supra* note 54, at 1394-1457 (arguing standing limits on public rights litigation are a recent phenomenon and suggesting alternatives to contemporary doctrine). *But see* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, BROOK. L. REV. 1001 (1997) (arguing earlier writers, including Jaffe, seriously misunderstood British practice and contending there is little evidence of public actions in England). For additional discussion of this history, see *infra* note 142.

67. *See* Fallon, *Public Law*, *supra* note 7, at 39-47; Winter, *supra* note 54.

68. For a brief history of public law litigation, see Gilles, *Reinventing*, *supra* note 6, at 1389-99. *See also* Fallon, *Public Law*, *supra* note 7 (assessing the Court's then-emerging hostility to public law litigation).

69. *See* Meltzer, *supra* note 64, at 287-89, 299-300 (suggesting flaws in the claim that the political process will provide adequate remedies for official misconduct).

70. Throughout this Article, I describe the interrogation practices at issue in *Public Committee* as "torture"—a description I believe is amply warranted. *See* ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 47-48 (1985) (describing how even ordinary movements or postures qualify as torture when prolonged); *see also* Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216, 250 (1989) ("A cold shower may be commonplace. . ., but it can be degrading treatment when forced upon a person as a means of breaking down his resistance."); *see infra* note 76 and accompanying text (discussing fatalities from Israeli interrogations). The court, however, never used "torture" to describe these practices. *See, e.g.*, H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, at 3-4, *reprinted in* 38 I.L.M. 1471 (1999) (using the terms "physical means," "pressure methods," and "physical force"). The court only used "torture" when describing the claims and arguments of the parties; *see id.* at 5, 8, 9, or when making general observations, such as "a reasonable investigation is necessarily one free of

- "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly";[71]
- the "Shabach position," which involves a suspect seated in a chair that is tilted forward, with one arm between his back and the chair, and the other arm against the outside of the chair, his hands then tied together, his head covered by a sack, and subjected to loud music for a prolonged period;[72]
- the "frog crouch," which involves forcing suspects to crouch on their toes for five minute intervals;[73]
- intentional tightening of handcuffs to cause pain and swelling;[74] and
- sleep deprivation associated with the Shabach position and with prolonged interrogation.[75]

During the 1987-1994 period, between sixteen and twenty-five Palestinians died after being subjected to similar treatment.[76]

As in *Lyons*, no elected body had specifically authorized these practices. In 1987, however, a commission chaired by Moshe Landau, former president of the Supreme Court of Israel, examined the GSS's

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torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever." *Id.* at 16.

71. *Id.* at 6.

72. *Id.* at 7.

73. *Id.*

74. *Id.* at 7-8.

75. *Id.* at 8. Amnesty International claims Israel has also "forced [suspects] to stand hand-cuffed to a wall . . . or tied up in some other painful position (like the 'banana', in which the body is bent backwards by tying up hands to feet) for prolonged periods," with "beatings all over the body, sometimes concentrated on sensitive areas such as the genitals, and prolonged confinement in closet-sized dark cells" that may be "particularly cold or hot." Amnesty International, *Israel and the Occupied Territories: Torture and Ill-treatment of Political Detainees* § II.B, *at* http://www.amnesty.org/ailib/aipub/1994/MDE/150394.MDE.txt (1994) [hereinafter Amnesty, *Ill-treatment*]. *See also* Emmanuel Gross, *Legal Aspects of Tackling Terrorism*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 120-23 (2001) (providing further detail about Israeli interrogation practices and GSS explanations for them); Catherine M. Grosso, Note, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 313-18 (2000) (describing Israeli interrogation practices prior to *Public Committee*); *Israel, Palestinians Reject Amnesty Criticism*, DEUTSHE PRESSE-AGENTUR, June 16, 1999 (describing Israeli government response to Amnesty International's allegations); *Israel Rejects Amnesty Charges of Systematic Torture*, AGENCE FRANCE PRESSE, July 7, 1994 (describing the same).

76. *See* Amnesty, *Ill-treatment*, *supra* note 75, § IV.B. *See also* Amnesty International, *Israel and the Occupied Territories: Oral Statement to the United Nations, Commission on Human Rights on the Israeli Occupied Territories*, 2 (1997), *at* http://msanews.mynet.net/MSANEWS/199704/19970402.7.html ("In April 1995 'Abd al-Samed Harizat, a Palestinian, violently shaken 12 times over a 12-hour period, fell into a coma and died without regaining consciousness.").

interrogation practices.[77] The Landau Commission report described the interrogation of a suspected terrorist as "a difficult confrontation between the vital need to discover all he knows, based on a well-founded assumption, usually from classified sources, and the will of the person interrogated to keep silent and conceal what he knows or to mislead the interrogators by providing false information."[78] The Commission concluded that Israel's codified version of the necessity defense authorizes in advance the use of force in interrogation, so long as the interrogator reasonably believes the lesser evil of force is necessary to get information that would prevent the greater evil of loss of innocent lives:

> To put it bluntly, the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.[79]

The Landau Commission report generated controversy, but its recommendations continued to provide the bureaucratic framework for torture in Israel at the time *Public Committee* was decided.[80] According to the *Public Committee* court,

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77. Amnesty, *Ill-treatment*, *supra* note 75, § III.B.

78. *Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity* (1987), *excerpted in* 23 ISR. L. REV. 146, 157-58 (1989).

79. *Id.* at 174. The Commission distinguished between the use of force and the use of torture and insisted that "disproportionate exertion of pressure on the suspect is inadmissible; the pressure must never reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity." *Id.* at 175. For assessments of the necessity argument, see Paul H. Robinson, *Letter to the Editor*, 23 ISR. L. REV. 189, 190 (1989) ("If there are instances in which such use of force is justified, the number is relatively small."); Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—and to Lie About It?*, 23 ISR. L. REV. 192, 199-200 (1989) (admitting physical methods of interrogation may be justified in "some circumstances" but insisting such cases are far rarer than investigators would claim); S. Z. Feller, *Not Actual "Necessity" but Possible "Justification": Not "Moderate" Pressure, but Either "Unlimited" or "None at All,"* 23 ISR. L. REV. 201 (1989) (arguing the balance of evils rationale for necessity would allow more force than the Landau Commission admits and physical force in interrogations should be barred); Kremnitzer, *supra* note 70 (making similar arguments); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 315-34 (1989) (concluding torture is morally justified in a narrow range of circumstances); Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 346 (1989) (arguing torture is almost always prohibited but there may be extreme cases in which it is permitted). *See also* George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Point of View*, 48 DUKE L.J. 975, 1031-32 (1999) (considering the application of necessity to torture). For general discussions of necessity, see *id.*; Moore, *supra*; John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397 (1999) [hereinafter Parry, *Virtue*].

80. Tamar Gaulan, *Israel's Interrogation Policies and Practices*, 1996, *available at* http://web.idirect.com/~cic/IsraelDemocracy/tamarGaulanArticle.html.

> The decision to utilize physical means in a particular instance is based on internal regulations, which requires obtaining permission from various ranks of the GSS hierarchy. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations. Among other guidelines, the Committee set forth directives pertaining to the rank authorized to allow these interrogation practices. . . . Different interrogation methods are employed depending on the suspect, both in relation to what is required in that situation and to the likelihood of obtaining authorization. The GSS does not resort to every interrogation method at its disposal in each case.[81]

In practice, however, GSS investigators often disregarded the limits that the Landau Commission attempted to put in place.[82] Moreover, evidence before the court in *Public Committee* indicated that the bureaucratization of torture did not restrain its frequency: GSS interrogators tortured as many as eighty-five percent of detained Palestinians.[83]

The interrogations and torture of the individual applicants were over by the time the court began hearings in *Public Committee*. Each applicant had been released or convicted of a crime, was awaiting trial, or simply was no longer subject to the methods being challenged.[84] None sought damages. Instead, they petitioned the High Court of Justice "to hold that the methods used against them by the GSS are illegal."[85]

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81. H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, at 6, *reprinted in* 38 I.L.M. 1471 (1999).

82. *See* Joel Greenberg, *Israel Reports Abuses in Past Interrogations of Palestinians*, N.Y. TIMES, Feb. 10, 2000, at A3 (describing an Israeli government report that concluded GSS investigators "regularly . . . violat[ed] the commission's guidelines and the Shin Bet's own interrogation rules" during the first intifada).

83. Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259, 306 (1999). There is, however, some evidence that GSS interrogation methods have thwarted some terrorist attacks. *See* Jason S. Greenberg, *Torture of Terrorists in Israel*, 7 ILSA J. INT'L & COMP. L. 539, 546 (2001).

84. *See Public Committee*, at 4-5.

85. *Id.* at 4. *Public Committee* was not the first torture case to reach the High Court of Justice. The court admitted that "[a] number of applications dealing with the application of physical force by the GSS for interrogation purposes have made their way to this Court throughout the years" but claimed it had never "actually decide[d] the issue of whether the GSS is permitted to employ physical means for interrogation purposes in circumstances outlined by the defense of 'necessity.'" *Id.* at 10-11. In 1996, for example, the court issued an order to prevent the use of physical force in a particular interrogation, but lifted the order the next day after the GSS claimed it sought information from the suspect that could prevent future terrorist attacks. Serge Schmemann, *Israel Allows Use of Physical Force in Arab's Interrogation*, N.Y. TIMES, Nov. 16, 1996, § 1, at 8. According to the suspect's attorney, the court's decision reflected its usual practice of "grant[ing] injunctions only when the state made no objection, and allow[ing] the use of physical pressures when the state sought it." *Id.* *See* Christie, *supra* note 79, at 1031 n.306 (discussing the 1996 decision and assuming it allowed the Israeli government to use torture at least where it could result in a net saving of lives); Grosso, *supra* note 75, at 321-23 (discussing the cases). The 1996 decision led to a United Nations investigation of Israel's use of force in interrogations.

The applicants who had been released or were no longer subject to torture were in the same position as Lyons; to seek declaratory and injunctive relief in a federal court against government-sponsored torture, they would have to make a credible allegation that they were likely to be tortured again. The convicted applicants may have had less standing than Lyons, because they would have fewer opportunities to commit acts that could lead to torture during interrogation. The applicants awaiting trial may have been slightly closer to having standing under federal law than Lyons, because the GSS might reopen their interrogations, but this argument seems nearly as speculative as those rejected in *Lyons*.

None of this mattered to the High Court of Justice. As to those who had been released, the court said only, "we have elected to continue hearing their case, in light of the importance of the issues they raise in principle."[86] Later in its opinion, the court stated that, regardless of the varying nature of the individual applications, "we have decided to deal with them, since above all we seek to clarify (uncover) the state of the law in this most complicated question."[87] With these comments, which indicate an utter lack of concern for standing as we know it, the court moved to the merits.

Chief Justice Barak began by establishing a baseline:

> An interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect's dignity and his individual privacy. In a state adhering to the Rule of Law, interrogations are therefore not permitted in absence of clear statutory authorization.[88]

The court rejected the claim that there was "an administrative vacuum" such that the government's "residual (prerogative) powers authorize it to act."[89] No vacuum exists, the court concluded, because

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See Israel Defends Use of Force in Interrogation, N.Y. TIMES, May 8, 1997, at A14 (describing criticisms of Israel's interrogation practices during U.N. committee proceedings). Chief Justice Barak, author of the 1996 opinion, circulated at least one foreign newspaper criticism of the decision to his colleagues. David Makovsky, *A Constitutional Battle: After 50 Years, Israel Tackles Fundamental Questions*, U.S. NEWS & WORLD REP., May 4, 1998, at 39. Soon thereafter, the court began the hearings that culminated in *Public Committee*. *See, e.g.*, Joel Greenberg, *Israel Court Weighs Legality of What Many Call Torture*, N.Y. TIMES, Jan. 25, 1999, at A10 (reporting on the court's hearings in *Public Committee*).

86. *Public Committee*, at 4.

87. *Id.* at 11. The remaining two claims were brought by the Public Committee Against Torture in Israel and the Association for Citizen's Rights in Israel. The Committee also represented three of the five individual applicants, but there is no indication that the Association represented specific individuals or classes of individuals who were subject to or in fear of torture. *Id.* at 4-5. At least as to the Association, the court saw no need to determine whether it or its members were "among the injured." *See* Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

88. *Public Committee*, at 11-12.

89. *Id.* at 12.

in the absence of legislation, "the relevant field is entirely occupied by the principle of individual freedom."[90] Whether or not a basic law applies, "[t]here are to be no infringements on this liberty absent statutory provisions which successfully pass constitutional muster."[91]

Although the court found legislative authorization for interrogations in general, it found none for any of the coercive practices at issue.[92] Drawing on international law, the court held that the "law of interrogation" requires an investigation to be "free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever."[93] Applying this principle, the court held that shaking, the Shabach position and its various components, the frog crouch, cuffing for the purpose of causing pain, and sleep deprivation as an end in itself are all prohibited.[94] The court also rejected the government's claim that torture is authorized in advance by the necessity defense because it leads to information that saves lives.[95] The court, however, declared its willingness "to accept that in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity' defence, if criminally indicted."[96]

As a remedy, the court ruled that the "order *nisi*" it had entered in three of the individual petitions comprising the case would "be made absolute" against the GSS.[97] At the very least, this ruling is the equivalent of declaratory relief in the United States. The court, however, conceded that this remedy requires Israel to fight terrorism "with one hand tied behind its back."[98] These comments and Justice Kedmi's concurring warning that the government was "helpless from a legal perspective" in emergency situations[99] indicate that the court saw its opinion as providing more than a declaration. Together with

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90. *Id.*

91. *Id.* at 13. The basic laws are legislation that when complete will form the constitution of Israel, although their status compared to other legislation is uncertain and depends in part on the language of each basic law. *See* Basic Laws—Introduction, http://knesset.gov.il/main/eng/engframe.htm; MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 6-30 (1994); Hon. Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325 (1999); Marcia Gelpe, *Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space*, 13 EMORY INT'L L. REV. 493, 500-05 (1999); Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73, 92-97 (2000) [hereinafter Hirschl, *Struggle*]; Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 588-89 (1996); *infra* text at notes 294-308.

92. *See Public Committee*, at 12-17, 21.

93. *Id.* at 16.

94. *See id.* at 17-21.

95. *See id.* at 21-25; *cf. supra* notes 78-79 and accompanying text.

96. *Public Committee*, at 23. *See also id.* at 26; *infra* note 291.

97. *Public Committee*, at 27.

98. *Id.* at 26.

99. *Id.* at 29 (Kedmi, J., concurring).

the reaction of the Israeli government, which took the position that specific legislation is necessary for coercive interrogations to continue,[100] these statements suggest that the relief entered by the court is the functional equivalent of a general injunction against torture.[101]

In the final pages of its opinion, the court stressed the limits of its holding. "Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities," the court declared, is a question that "must be determined by the Legislative branch."[102] Insisting that the legislature authorize these methods before they can be used, the court continued, "is required by the principle of Separation of Powers and the Rule of Law, under our very understanding of democracy."[103]

In contrast to a world in which illegal state violence is inevitable, *Public Committee* insists on freedom from illegal state violence. Although the doctrines of *Public Committee* may be rooted in aspects of Israeli legal culture that are irreconcilably different from the legal culture of the United States,[104] such differences by themselves should

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100. Several members of the Knesset have proposed legislation—so far without success—to allow "physical coercion" in emergency situations. *See* Deborah Sontag, *Israel Court Bans Most Use of Force in Interrogations*, N.Y. TIMES, Sept. 7, 1999, at A1; Dan Izenberg, *Beilin Warns Peres not to Join Sharon Government*, JERUSALEM POST, Feb. 21, 2001, at 4. *See also* Mandel, *supra* note 83, at 313 n.168 (discussing reactions to *Public Committee*).

101. For a brief explanation of orders *nisi* in Israel, see Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the* Intifada, 33 LAW & SOC'Y REV. 319, 323, 323 n.8 (1999) (stating "[a]n order *nisi* is one that takes effect at a specified time unless previously modified or avoided by cause shown or a condition fulfilled," and noting such an order "requir[es] the respondent to appear in court and show why a particular action should or should not be performed"). I read these comments to indicate that in Israel an order *nisi* is similar to a show cause order and that when made absolute it is similar to an injunction. My interpretation is supported by the remarks of an Israeli lawyer, who referred to the court's orders in prior torture cases as "injunctions." *See* Schmemann, *supra* note 85, at 8. *See also* Matthew G. St. Amand, Public Committee Against Torture in Israel v. The State of Israel et al.: *Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained?*, 25 N.C. J. INT'L L. & COM. REG. 655, 661 (2000) (asserting an order *nisi* is similar to both a show cause order and a preliminary injunction that can be made permament).

102. *Public Committee*, at 25. *See also id.* at 26 (observing that whether "it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations . . . is an issue that must be decided by the legislative branch which represents the people.").

103. *Id.* at 25.

104. Curran, *Cultual Immersion*, *supra* note 23, at 86. For example, the United States has a common-law legal tradition, while Israel's may best be described as a hybrid of civil and common law. This difference could lead to fundamentally different doctrinal assumptions, *id.* at 78-83 (discussing differences between common law and civil law perspectives on contract law), although it may not be irreconcilable. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity*

not bar consideration of how to achieve a similar goal. In short, courts and commentators in the United States should take seriously the possibility of using *Public Committee* as a model for confronting and restraining illegal state violence.

III. ILLEGAL STATE VIOLENCE AND LEGAL DOCTRINE

Despite the apparent contrasts between the two cases, is it possible to harmonize *Lyons* and *Public Committee*? Israel had a clear and undisputed policy of torturing suspected terrorists, while the scope of the policy at issue in *Lyons* was unclear but almost certainly did not include regular chokeholds of traffic offenders. I hope a federal court would apply this reasoning to distinguish *Lyons* and grant injunctions in cases involving clear policies of authorized brutality. But *Lyons* did involve a policy that probably authorized some unconstitutional police conduct—in addition to a custom of such conduct[105]—and the Court insulated that policy from injunctive relief. Moreover, *Public Committee* did not state whether the torture of each petitioner actually fell within the GSS's policy. GSS investigators frequently used torture in situations outside the scope of the written policy, which was not a simple, blanket authorization of torture in all cases.[106] In addition, the Supreme Court of Israel did not expressly base standing on the existence of a policy; the fact that people were being tortured appears to have been sufficient. Finally, while the doctrinal nuances of *Lyons* and *Public Committee* are important, my focus includes the attitudes towards illegal state violence that underlie those doctrinal statements. On that level, the two opinions are far apart.

These differences provide a basis for considering whether the doctrines of *Public Committee* would put U.S. courts in a better position to confront illegal state violence. But making U.S. law look more like Israeli law may not be easy. The Supreme Court of Israel's willingness to enjoin torture may be inseparable from its approach to standing. And the court's approach to standing may rest, in turn, on a conception of the judicial role that is far different from that of the United States. U.S. courts are unlikely to remake the judicial role in order to confront illegal state violence, but it may be difficult to craft

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and the Homogenization of the European Union, 7 COLUM. J. EUR. L. 63 (2001). Differences in Israeli and U.S. models of judicial review and judicial power are also important and potentially irreconcilable. *See infra* text at notes 294-332.

105. *See supra* text accompanying notes 45-53; *see also* 42 U.S.C. § 1983 (1997) (creating cause of action for acts "under color of any statute, ordinance, regulation, custom, or usage"); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000) (arguing for broader municipal liability for § 1983 "custom" claims) [hereinafter Gilles, *Breaking*].

106. *See supra* notes 81-83 and accompanying text.

strong doctrines without going that far. Yet without their accustomed role, U.S. courts may not be in a position to craft or enforce strong doctrines.

This Part considers three interwoven areas in which U.S. courts could make doctrinal changes to become more like the *Public Committee* court: standing, the scope of equitable discretion to restrain illegal state violence and the related preference for damages over injunctions, and baseline attitudes toward government discretion and violence. In Part IV, I consider an additional critical difference between the approaches of *Lyons* and *Public Committee*: the constraints and freedoms arising from very different conceptions of the role of courts in a constitutional order.

A. *Standing*

Subsequent cases in the United States have done little to mitigate the impact of *Lyons*. To the contrary, in *Lujan v. Defenders of Wildlife*, the Supreme Court stated that separation of powers requires federal courts "'solely, to decide on the rights of individuals'" and not to "vindicat[e] the *public* interest."[107] According to the Court, it follows that

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[108]

In *Steel Co. v. Citizens for a Better Environment*, the Court made clear that the phrase "generally available grievance" includes Lyons's effort to enjoin all chokeholds.[109]

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107. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)). *See* Pushaw, *supra* note 66, at 479-80 (criticizing Justice Scalia's reliance on this passage from *Marbury*); Winter, *supra* note 54, at 1416 (arguing *Marbury* is a public rights case).

108. *Lujan*, 504 U.S. at 573-74. *Lujan* also suggests that Congress lacks power to expand standing in federal court beyond the limits of Article III, thus creating uncertainty over the scope of numerous citizen suit provisions in federal statutes. For an extended and persuasive critique of *Lujan*, see Sunstein, *What's Standing*, *supra* note 66. For specific discussion of the private rights model of standing, see *id.* at 187-88.

109. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 108-09 (1998) ("Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III" (citing City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983)); Fallon, *Public Law*, *supra* note 7, at 47 ("If the city's chokehold policy was in fact unconstitutional, the class of all persons potentially subject to that policy—a class at least as large as the city's driving population—would be threatened. Yet the individual threats themselves, conceived as injuries, would be classed by standing doctrine as widespread and undifferentiated.").

To be sure, the majority opinions in *Lyons*, *Lujan*, and *Steel Co.* do not provide a complete picture of developments in the law of standing, especially given the concurrences in *Lujan* and *Steel Co.*[110] And *Lyons* does not bar all injunctions.[111] Moreover, a pair of recent cases—*FEC v. Akins*[112] and *Friends of the Earth v. Laidlaw Environmental Services*[113]—suggests that the tide of restricting standing may have crested with the retirement of Justice White. Whether *Akins* and *Laidlaw* mark a significant rollback of standing restrictions or whether the doctrine has simply stabilized short of Justice Scalia's ambitions for it is unclear.[114]

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110. *Steel Co.*, 523 U.S. at 110 (O'Connor, J., concurring) (stating on behalf of herself and Justice Kennedy in 5-4 case that "had respondent alleged a continuing or imminent violation . . . the requested injunctive relief may well have redressed the asserted injury"); *Lujan*, 504 U.S. at 579-80 (Kennedy, J., concurring) (stating on behalf of himself and Justice Souter in 6-3 case that there was no showing of injury on the specific facts of the case but suggesting standing would exist if it were "reasonable to assume that the affiants will be using the sites on a regular basis" or if they had "claim[ed] to have visited the sites since the projects commenced").

111. The Court has found standing in a few cases notwithstanding *Lyons*, but those cases are exceptions to a robust rule of sharply limited standing for equitable relief. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 210-12 (1995) (finding standing to seek injunction against an allegedly unconstitutional statute for company which had and would bid on every relevant contract under the statute); County of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) (finding standing in class action filed by people arrested without warrants and who alleged delays in their probable cause determinations, because the injury was continuing to at least some named plaintiffs when the complaint was filed and thus was "at that moment capable of being redressed through injunctive relief"); City of Houston v. Hill, 482 U.S. 451, 459 n.7 (1987) (finding standing to seek injunctive relief against allegedly overbroad statute based on plaintiff's allegations of systematic harassment and his four prior arrests under the statute); Kolender v. Lawson, 461 U.S. 352, 357 n.3 (1983) (holding a man who was arrested fifteen times in less than two years under a California loitering statute had standing to bring a facial challenge to the statute because there was "a 'credible threat' that Lawson might be detained again"). For discussions of lower court applications of *Lyons* to prohibit injunctive relief, see *supra* note 13.

112. FEC v. Akins, 524 U.S. 11 (1998) (finding "voter standing" to challenge an FEC decision not to require disclosures by an interest group).

113. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000) (approving standing to seek civil penalties and injunctive relief under the Clean Water Act of individuals who lived near and had expressed interest in using a river into which the defendant had made discharges in violation of a permit but without harming the environment).

114. *See* Gilles, *Representational*, *supra* note 7, at 331 n.97 (arguing *Akins* and *Laidlaw* turn on factual distinctions from prior cases); Shane, *Returning*, *supra* note 66, at 11090-92 (suggesting *Akins* and *Laidlaw* cut back on prior cases); Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613 (1999) (arguing *Akins* is a significant step toward recognizing the ability of Congress to create new causes of action); Symposium, *Citizen Suits and the Future of Standing in the 21st Century: From* Lujan *to* Laidlaw *and Beyond*, 11 DUKE ENVTL. L. & POL'Y F. 193 (2001) (providing a variety of assessments). For *Laidlaw*, compare 528 U.S. at 198-210 (Scalia, J., dissenting) (claiming *Laidlaw* undermines *Lyons*, *Lujan*, and *Steel Company*), with *id.* at 182-88 (majority opinion) (asserting the decision is consistent with all three cases). For *Akins*, compare 524 U.S.

The specific impact of *Akins* and *Laidlaw* on the doctrine of *Lyons* also remains to be seen. *Laidlaw* reaffirmed *Lyon*'s holding that a plaintiff must establish standing for each form of relief sought.[115] The Court, however, also declared that the question of standing in *Lyons* turned simply on "[t]he reasonableness of [the] fear" that the challenged conduct would resume.[116] This description of the *Lyons* test could lead to some loosening of doctrine.[117] As for *Akins*, neither opinion cited or discussed *Lyons*. The impact on *Lyons* of *Akins*'s reformulation of generalized grievance standing is thus unclear.[118]

In short, even after *Akins* and *Laidlaw*, federal standing law reflects a chilling idea of insulated state authority.[119] To make this point more vivid, imagine a federal case in which an individual

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at 32-37 (Scalia, J., dissenting) (claiming *Akins* undermines the rule that people with generalized grievances do not have standing), with *id.* at 23-25 (majority opinion) (asserting the decision is consistent with prior cases). *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (arguing separation of powers principles require significant limits on federal court standing).

115. *Laidlaw*, 528 U.S. at 184.

116. *Id.*

117. Under *Laidlaw*'s version of the *Lyons* test, the existence or non-existence of a policy might simply be evidence of reasonable fear. Moreover, a reasonable fear arguably would be enough to sustain standing even in the absence of a showing that all members of the LAPD routinely apply chokeholds when arresting, questioning, or issuing a citation. City of Los Angeles v. Lyons, 461 U.S. 95, 106 (1983). *See also* Fisher, *supra* note 63, at 1100 (arguing a reasonableness test could mitigate the impact of *Lyons*); Harold J. Krent, *Redressing the Law of Redressability*, 12 DUKE ENVTL. L. & POL'Y F. 85, 87, 99-100 (2001) (suggesting *Laidlaw* undercuts *Lyons* by allowing suits when harm is speculative but that the distinction between the two cases is the *Laidlaw* Court's deference to Congress).

118. Writing for the Court, Justice Breyer conceded that "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." 524 U.S. at 23. But he refused to say whether this statement was a constitutional or prudential standard and then distinguished between abstract generalized grievances—as to which individuals do not have standing—and concrete generalized grievances—which can constitute sufficient injury to confer standing. Justice Breyer explained that an abstract generalized grievance includes "harm to the 'common concern for obedience to law,'" *id.* (citation omitted), while a concrete generalized grievance exists where "large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law." *Id.* at 24. The examples of concrete grievances are a past injury that supports damages and a continuing injury to the same group of people that supports statutorily-created equitable relief. By contrast, Lyons's claim for equitable relief relied on the assumption that he or others would be subjected to unlawful chokeholds in the future. Whether this assumption is reasonable or, as the Court held, speculative, see *Lyons*, 461 U.S. at 105-06, it is distinct from Justice Breyer's examples. In addition, the *Lyons* Court described the claim as "no more than [an] assert[ion] that certain practices of law enforcement officers are unconstitutional," which seems indistinguishable from Justice Breyer's "common concern for obedience to law." *Id.* at 111.

119. *See* Little, *supra* note 13, at 952-53 (describing *Lyons*'s impact on civil rights cases).

claims to have been tortured by government agents.[120] Under *Lyons*, the torture victim would be allowed to seek damages for harms already inflicted but would lack standing to seek an injunction absent a reasonable likelihood of being tortured again. If agents of a state government committed the torture, the underlying explanation for lack of standing would be a federalism concern about interfering in the activities of state governments.[121] If the torture claim were linked to a pending state criminal proceeding, *Younger v. Harris*[122] would provide additional federalism reasons to deny standing.

The answer would be the same if federal agents were the torturers. The underlying explanation for lack of standing to seek equitable relief would simply switch from federalism to separation of powers.[123] If the torture claim arose in a federal criminal case,

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120. *See supra* note 21 (noting discussions by Federal officials of using torture on suspected terrorists). For cases raising claims of torture by state or federal agents, see Blyden v. Mancusi, 186 F.3d 252, 257 (2d Cir. 1999) (describing torture of inmates after 1971 Attica prison riot); Wiggins v. Martin, 150 F.3d 671, 673 (7th Cir. 1998) (describing claim that Chicago police used electric shocks to torture on forty occasions); Wilson v. City of Chicago, 120 F.3d 681 (7th Cir. 1997) (describing use of torture to extract confessions from multiple suspects); Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1996) (allowing plaintiff to proceed on damages claims that individuals affiliated with the Drug Enforcement Agency tortured and mistreated him); United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) (refusing to dismiss indictment of defendant who claimed he was kidnapped and tortured by federal agents); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (requiring dismissal of indictment if defendant proved he was abducted and tortured by agents of the United States). *See also* Amnesty International, *Torture*, *supra* note 14, at 6-11, 13-23 (describing recent reports of torture and abuse by police and prison officials); U.S. Department of State, *Initial Report of the United States of America to the UN Committee Against Torture* (Oct. 15, 1999) pt. I General Information at 10-12 [hereinafter U.S. Department of State] (describing situations involving state and federal officials that are "relevant to the prohibition of torture and other cruel, inhuman or degrading treatment"), *at* http://www.state.gov/www/global/human_rights/torture_geninfo.html.

121. *See Lyons*, 461 U.S. at 112 ("recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws"). This statement applies to the standards for injunctions, but "case-or-controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.'" *Id.* at 103 (quoting O'Shea v. Littleton, 414 U.S. 488, 499 (1974)).

122. Younger v. Harris, 401 U.S. 37 (1971) (limiting federal court ability to enjoin state criminal proceedings). *See also O'Shea*, 414 U.S. at 499-502 (rejecting equitable relief that would have allowed ongoing federal court supervision of state criminal proceedings).

123. *See* Lewis v. Casey, 518 U.S. 343, 349 (1996) (stating in case involving state officials that standing requires federal courts to avoid intruding too much on state and federal political branches); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737, 750 (1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J.) (affirming dismissal of damages claims on the basis of sovereign immunity and dismissal of injunction claims on the basis of equitable discretion "without necessarily disapproving the District Court's conclusion that all aspects of the present case present a nonjusticiable

the *Ker-Frisbie* doctrine would bar the court presiding in that case from inquiring too closely into treatment of the defendant prior to trial.[124] Even if the plaintiff sought an injunction to protect a class of similarly situated individuals, the chances remain strong that a federal court would dismiss the case for lack of standing unless the class could make more concrete allegations about the likelihood of future harm.[125] The same would be true if the plaintiff sought only declaratory relief.[126]

Finally, if Congress or a state legislature passed a statute explicitly authorizing some form of torture,[127] standing issues would still exist if the statute, similar to the policy in *Public Committee*, simply provided that torture was one available method of

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political question"); David Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985); Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261 (1996).

124. The doctrine provides that "the court need not inquire as to how respondent came before it." United States v. Alvarez-Machain, 504 U.S. 655, 662 (1992). *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 444 (1886). *See also* Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) (holding government torture will not support dismissal of an indictment); *Matta-Ballesteros*, 71 F.3d at 763-65 (holding defendant's allegations of mistreatment were insufficient to support dismissal of indictment). *Compare Toscanino*, 500 F.2d 267 (requiring dismissal of indictment on proof of torture), *with* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 786, 786 n.358 (1995) (citing *Toscanino* as an example of a decision "repeatedly distinguished, even in the circuit of origin").

125. *See Lewis*, 518 U.S. at 357; Rizzo v. Goode, 423 U.S. 362, 370-77 (1976); *O'Shea*, 414 U.S. at 494 (1974). *But see* County of Riverside v. McLaughlin, 500 U.S. 44, 51-52 (1991) (finding class standing where at least some named plaintiffs had claims that could have been redressed by injunctive relief at the moment the complaint was filed). *See also* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 681, 681 n.15 (1990) (noting division among the circuits on this issue); Fisher, *supra* note 63, at 1115-17 (discussing class actions after *Lyons*); Kreimer, *supra* note 13, at 501 n.172 (discussing the problem of class actions after *Lyons* in light of a survey of 1994 federal district court cases); Little, *supra* note 13, at 943, 943 n.53 (noting lower court efforts to apply *Lyons* in class actions); Meltzer, *supra* note 64, at 309-11 (suggesting class actions cannot resolve Article III problems). For a useful discussion of how *Lyons* can be distinguished in cases involving group-based harms resulting from government policies, especially racial profiling policies, see Garrett, *supra* note 13. Whether standing in such cases would extend to injunctive relief against forms of violence that could result from the application of such policies is far from clear, however.

126. *Lyons*, 461 U.S. at 104; Little, *supra* note 13, at 942, 942 n.51. *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106 (1998) (finding no standing to seek declaratory relief when there was "no controversy over whether petitioner [violated the law]," with the result that "the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world"); Samuels v. Mackell, 401 U.S. 66 (1971) (holding declaratory relief is unavailable if a state criminal prosecution is pending under the challenged statute).

127. Early drafts of this Article described such a statute as "unlikely." Although I still believe that is an accurate description, the events of September 11, 2001 have altered the possibilities. *See supra* note 21 (noting discussions about using torture on suspected terrorists).

interrogation.[128] The existence of an official policy does not alone establish standing to seek an injunction because the victim still must satisfy the *Lyons* standard with respect to the application of that policy.[129] In the more likely case of government agents acting with less than clear and formal statutory authority—pursuant to a practice or unwritten or ambiguous policy—the likelihood of standing diminishes. Thus, in the cases of illegal state violence that are the focus of this Article and are most likely to occur, individual standing to seek equitable relief is least likely to exist.

Public Committee shares one quality with *Lyons* on the issue of standing: it too is unexceptional. Israel's expansive standing doctrine allows citizens to petition the court in its capacity as High Court of Justice in the absence of a personal, material stake in the outcome.[130]

> Unlike the United States, where the rules of standing grew out of a constitutional provision, [Israel's] rules of standing developed without any statutory anchor. On the contrary: the statutory language appears broad and authorizes the High Court of Justice to deal, among other things, with any violation of law by a governmental authority, regardless of the status of the petitioner.[131]

In addition, the court has not drawn a strong connection between justiciability and the power to hear a claim. That is, even if

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128. *See Lyons*, 461 U.S. at 106 (stating that to have standing Lyons would have to make the "unrealistic" claim that the LAPD always applies chokeholds or that the city "ordered or authorized police officers to act in such manner"); *see also* Adarand Constructors v. Pena, 515 U.S. 200, 210-12 (1995) (requiring more for standing than existence of statute, regulations, and contract terms).

129. *See* Pierce, *supra* note 28, at 1273 n.206 ("If . . . Lyons proved at trial that the agency's de facto policy is to apply chokeholds indiscriminately, I hope that the majority would find such a policy unconstitutional . . . Because of the unprecedented manner in which the majority blended the doctrines of standing and remedies, however, no federal court has the power to enjoin an agency from implementing even a stated, formal policy of administering chokeholds to anyone who is stopped for a traffic violation.").

130. *See* Allen Zysblat, *Protecting Fundamental Rights Without a Constitution*, *in* PUBLIC LAW IN ISRAEL 47, 52-53 (Itzhak Zamir & Allen Zysblat eds., 1996); Shimon Shetreet, *Standing and Justiciability*, *in* PUBLIC LAW IN ISRAEL, *supra* at 265; Ariel L. Bendor, *Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience*, 7 IND. INT'L & COMP. L. REV. 311, 313 (1997); Gal Dor, *Governmental Avoidance versus Judicial Review: A Comparative Perspective on Israeli Decision-Making Strategies in Response to Constitutional Adjudication*, 13 TEMPLE INT'L & COMP. L.J. 231, 232 (1999); Gelpe, *supra* note 91, at 528-30; Hofnung, *supra* note 91, at 590. This relaxed doctrine is not without controversy, however. *See* Dor, *supra*, at 231 n.5 (quoting Knesset member who criticized the court for creating a legal regime in which "[e]verything is open; everything is breached; everything is justiciable"); Mandel, *supra* note 83, at 292-94 (linking the same statement to a larger set of criticisms of the court's activism).

131. H.C. 910/86, Ressler v. Minister of Defence, 42(2) PD 441 (Barak, J.), *reprinted and translated in* PUBLIC LAW IN ISRAEL, *supra* note 130, at 275, 279. The court linked this doctrine to a "judicial philosophy [that] is rooted in the consciousness that the judge's function is to create rights and maintain the rule of law" rather than simply "to resolve disputes between holders of existing rights." *Id.* at 280.

justiciability is in doubt, the court has no duty to raise the issue on its own or to decide it at all and may proceed instead to the merits.[132] The U.S. Supreme Court has developed a different approach: proof of justiciability, including standing, is an essential prerequisite to theexercise of federal judicial power.[133]

The contrast between U.S. and Israeli standing law and the importance of standing to the outcomes in *Lyons* and *Public Committee* suggest that a more flexible federal standing doctrine would be a crucial step toward greater protection for individuals from illegal state violence. Such a doctrine might take several forms. For example, Mark Tushnet has proposed a "barebones approach" that "would insist only on real adversity between plaintiff and defendant, and a plaintiff capable of generating a reasonably good, 'concrete' record for decision."[134] Cass Sunstein has proposed a rule that is potentially more restrictive than Tushnet's but still more expansive than current law: "people have standing if the law has granted them

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132. In *Bergman v. Minister of Finance*, for example, the court said:

> The Attorney-General relieved us of the need to deliberate on [justiciability] by stating on behalf of Respondents that they "do not take a position on the question whether the legal validity of a legislative enactment is a justiciable matter before this court, since they are of the opinion that the petition must fail on the merits." . . . It is therefore up to the court to decide whether it wishes to examine the question of justiciability. We have decided not to do so because, for obvious reasons, the substantive problems raised here require urgent resolution, whereas clarification of the preliminary constitutional questions would entail separate, lengthy deliberation. We therefore leave the question of justiciability open for further consideration and, clearly, nothing in this judgment should be taken as an expression of opinion on that matter.

H.C. 98/69, Bergman v. Minister of Finance, 23(1) P.D. 693, *reprinted and translated in* 8 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 13, 15-16 (Arnold N. Enker ed., 1992). The court then ruled against the government. *Id.* at 19. *See also* Dor, *supra* note 130, at 239-40 (discussing the court's willingness to overlook standing issues in order to reach the merits); *id.* at 243-44 (discussing the reasons why the court does not raise justiciability issues sua sponte); Gelpe, *supra* note 91, at 540-41 ("In Israel, all of these doctrines [of justiciability] are seen as discretionary and relate to the Supreme Court's choice whether to hear a case. . . . [T]he Supreme Court has the authority to ignore questions of standing at will, and to reach out and decide cases that would be beyond the authority of the U.S. Supreme Court").

133. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). Thus, the Court will raise questions of standing sua sponte. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 63-73 (1997); Juidice v. Vail, 430 U.S. 327, 331 (1977).

134. Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980) [hereinafter Tushnet, *Sociology*]. *See also* Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."); Shane, *Returning*, *supra* note 66, at 11082 ("To conclude that a party has standing with regard to a particular claim is, at root, to decide that, given the nature of a particular claim and a litigant's relationship to the particular claim presented, the suing party is not advancing a case that is collusive or merely abstract.").

a right to bring suit."[135]

Either approach would resolve the *Lyons* problem and allow federal courts to play a greater role in restraining illegal state violence because both approaches implicitly reject *Lyon*'s core holding that a plaintiff must show standing for each form of relief sought, which in turn led the Court to reject Lyons's claim for injunctive relief. Indeed, because this core holding is the primary barrier to individual standing to seek restraints on illegal state violence, a doctrine that simply did not require proof of standing for each form of relief—or made it a prudential requirement that Congress could overturn—would probably be sufficient.[136]

None of these proposals goes as far as current Israeli doctrine. Yet, Israel's expansive doctrine is part of a functioning legal system—albeit one that is different from the U.S. system in important ways. Proposals to expand standing in the United States are not new, but the Israeli experience demonstrates the viability of alternative approaches and suggests that these proposals are presumptively reasonable and workable.

A potential objection is that expanded standing would encourage ideological plaintiffs—or at least partially ideological plaintiffs, as Lyons may have been—to bring risky claims. The failure of these claims would create bad precedents that would block the more concrete claims of better-situated plaintiffs.[137] Several reasons make this objection unconvincing. First, the number of ideological cases might not increase significantly if the doctrinal change were simply to drop the requirement of proving standing separately for each form of relief while maintaining an overall standing requirement. Second, the benefits of expanded civil rights protection might outweigh the

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135. Sunstein, *What's Standing*, *supra* note 66, at 177. *See also id.* at 191 ("Whether an injury is cognizable should depend on what the legislature has said, explicitly or implicitly, or on the definition of injury provided in the various relevant sources of positive law."); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1466 (1988) [hereinafter Sunstein, *Privatization*] ("The question whether there is a 'case or controversy' within the meaning of article III depends largely or entirely on positive law, not on the nature of the injury."); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 88-94 (1984) (arguing interests created by statutes and the Constitution should create standing).

136. Richard Fallon made exactly this proposal in his classic analysis of *Lyons*. *See* Fallon, *Public Law*, *supra* note 7, at 35-47. *But see* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 184 (2000) (reaffirming this aspect of *Lyons*).

137. *See* Brilmayer, *supra* note 66, at 306-10. Ideological plaintiffs are often referred to as "non-Hohfeldian." "A Hohfeldian plaintiff is one who has the 'personal and proprietary interests of the traditional plaintiff, and [not] the representative and public interests of the plaintiff in a public action.'" Tushnet, *Sociology*, *supra* note 134, at 1708 (quoting Flast v. Cohen, 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting)). *See also* Fallon, *Public Law*, *supra* note 7, at 3-4 & nn.12-13; Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

costs of such an increase in any event. Third, the possibility that ideological plaintiffs will create bad results must be balanced against the possibility that the self-interest of nonideological plaintiffs will lead them to settle winnable cases. Ideological plaintiffs may be more likely to secure favorable precedents because they have less incentive to settle.[138] Finally, the distinction between traditional and ideological plaintiffs is simply not an issue in state violence cases controlled by *Lyons*; no one is better situated because no one can bring equitable claims of the kind Lyons sought to bring. Remember that the Court ruled that Lyons, who suffered a concrete, physical injury at the hands of the LAPD, was no different from any other member of the general public when it came to equitable relief.[139]

A stronger set of objections maintains that an expanded standing doctrine would open the door to judicial second-guessing of legislative decisions to vest discretion in executive officials and to judicial control of executive action. The result would be—or already is—too much power in the hands of an unelected judiciary and a corresponding decrease in majoritarian democracy.[140] This vision of the proper allocation of judicial, legislative, and executive authority in a system of separated powers is vulnerable to attack, however. First, even if Israel's standing doctrine goes too far, not all changes in U.S. standing doctrine would be fatal to the balance of power. So long as courts could address separation of powers concerns at the

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138. *See* Lee, *supra* note 66, at 653-54; Scalia, *supra* note 114, at 891-92; Sunstein, *Privatization*, *supra* note 135, at 1448; Tushnet, *Sociology*, *supra* note 134, at 1711-13. *See also* Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 486 (1982) (noting standing turns on injury, not "the intensity of the litigant's interest or the fervor of his advocacy").

139. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); *see also* Meltzer, *supra* note 64, at 307 (arguing the ideological plaintiff objection has less force in *Lyons* because it would mean no one could sue). A possible response is that we should not be concerned if no one is better situated, because the case is then entirely public and a matter for the government to address. This position assumes the existence and desirability of a strong public rights or private rights distinction; it is also unrealistic because the government is unlikely to take action as frequently as it ought. *See supra* notes 5-7 and accompanying text (discussing 28 U.S.C. § 14141); *see also* Meltzer, *supra* note 64, at 278-89, 299-300 (discussing problems with relying on the political process).

140. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737 (1984); *Valley Forge Christian Coll.*, 454 U.S. 464; Scalia, *supra* note 114; *see also* Little, *supra* note 13, at 962-64 (criticizing this view); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37 (arguing the Court should use prudential rather than constitutional standing doctrines to address separation of powers concerns); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985) [hereinafter Nichol, *Abusing*] (arguing concerns about the role and power of the federal judiciary have warped standing doctrine).

remedies stage, a more incremental approach could move the doctrine without undue harm to majoritarian values.[141]

Second, broad assertions of this theory may conflict with the original understanding of Article III, which appears to allow a more flexible approach.[142] Third, these broad objections may not be entirely desirable despite their association with majoritarian themes. A system in which unelected judges check the actions of a representative executive and legislature is not obviously worse than one in which a majority of representatives presumptively prevails.[143] Deference to majorities and enforcement of minority rights in the face of majoritarian claims are both fundamental aspects of U.S. constitutionalism.[144] How we set the balance between them, and thus how we feel about the proper role and powers of federal judges, is likely to turn in large part on our assessment of which position will lead to substantive outcomes with which we agree.

Moreover, the objection from legislative power is too vague. All too often, as in *Lyons* and *Public Committee*, there is no directly relevant legislative action to review, unless one concludes that the decision to create a police force with discretion to choose its methods

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141. *See infra* notes 170-73 and accompanying text. For additional discussion of the link between standing, judicial power, and democracy, see *infra* notes 294-332 and accompanying text.

142. *See supra* note 66. The authorities cited therein also undermine the idea that there is historical support for stretching Article III's "case or controversy" language to require a restrictive standing doctrine. *See also* Sunstein, *Privatization*, *supra* note 135, at 1474 ("article III requires a case or controversy, but whether there is a case or controversy is something on which, with respect to standing, article III is silent"); *id.* at 1478-80 (criticizing other views of article III). The relevant history suggests that the narrow, private law model of standing is of very recent vintage and that the traditional model of standing made room, on balance, for a greater number of plaintiffs. Qui tam actions for money damages and mandamus actions to compel a clear legal duty were well-established, although the Supreme Court limited mandamus actions early in the nineteenth century. These actions often took the place of adequate local oversight of government action and interests and correspondingly declined as local administration became more prevalent and effective. *See* Jaffe, *supra* note 66; Sunstein, *What's Standing*, *supra* note 66; and Winter, *supra* note 54, at 1375-78. These surveys suggest that *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (finding qui tam standing consistent with Article III), accords with historical practice, that *Lujan* is probably inconsistent with it, but also that *Lyons* could be a close call. Interestingly, if historical practice is the guide, the government's power to seek injunctions against public nuisances, as in *In re Debs*, 158 U.S. 564 (1895), or *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), must also be good law. *See* United Steelworkers of America v. United States, 361 U.S. 39, 60-61 (1959) (Frankfurter, J., concurring); *infra* notes 271-72.

143. *See* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 272 (1992) (arguing the realities of the political process make "the clear contrast between 'representative' legislatures and 'unrepresentative' judges begin[] to look rather murky"); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (arguing liberty, not majoritarianism, is the primary constitutional value and provides a firm foundation for judicial review).

144. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

is sufficiently particular. Even when relevant legislation exists, contemporary doctrines of judicial review, the doctrine of avoiding constitutional questions, the *Chevron* doctrine,[145] and common-law doctrines of statutory interpretation already give courts wide latitude to interpret, marginalize, or strike down legislation. Judicial interference with a vague or sweeping grant of authority to the executive in cases of government violence is not inherently more controversial. Thus, the majority rule objection becomes serious only when the legislature has staked out a relatively clear position in support of state violence.[146]

Separation of powers concerns also provide the claim that expanded federal standing, especially for injunctions, interferes with the President's authority to "take Care that the Laws be faithfully executed."[147] Justice Scalia has been the strongest proponent of this view. In a 1983 article, he argued that, "so long as no minority interests are affected," it is "a good thing" when "important legislative purposes [are] lost or misdirected in the vast hallways of the federal bureaucracy"[148]—a position that reads the power to execute the laws for all it is worth. On the Court, Justice Scalia has continued to raise the alarm against allowing Congress to transfer to the courts and individual citizens the power to execute the laws.[149]

The "take Care" objection falls short as well. The President obviously has discretion to allocate resources for and choose the manner of executing the laws, but nothing in the Constitution purports to give the President the authority "to violate the law through insufficient action any more than . . . to do so through

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145. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984); *see also* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1408-15 (2000) (describing the Court's use of *Chevron* to manipulate administrative authority).

146. *See* Mathew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 806-74 (1997) (arguing democracy-based theories of judicial restraint do not apply to judicial review of administrative rules and actions); Kreimer, *supra* note 13, at 459 ("Much of the constitutional business at the Supreme Court, however, involves the actions of officials whose claims to represent the will of the people are at least as diffuse as the mandate of the judiciary.").

147. U.S. CONST. art. II, § 3, cl. 4.

148. Scalia, *supra* note 114, at 897.

149. *See* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 208-09 (2000) (Scalia, J., dissenting); FEC v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting); Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992) (Scalia, J.). *See also* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (Scalia, J.) (suggesting possible Article II argument against qui tam standing). Justice Scalia's Article II claims are closely linked to his advocacy of a unitary executive. *See* Sunstein, *What's Standing*, *supra* note 66, at 211-12; Shane, *Returning*, *supra* note 66, at 11094-102.

overzealous enforcement."[150] To the contrary, although the "take Care" clause grants powers to the President, it can also plausibly be construed as imposing a duty—perhaps even one that is judicially enforceable.[151] But one need not go so far to conclude that the "take Care" clause does not grant unreviewable discretion to the President sufficient to overcome the argument for expanded standing in cases such as *Lyons*.

As *Lyons* illustrates, concerns about judicial intrusion resonate at least as strongly in the context of federalism.[152] The force of these objections derives from the sensible proposition that a system in which states maintain some amount of sovereignty must also require the federal government and federal courts to respect that sovereignty. Moreover, sovereign states have greater power to pursue state interests, and those interests include—but are not limited to—the concerns of individual citizens and groups of citizens.[153] The idea of federalism, however, cannot support sweeping restrictions on standing to seek the exercise of federal judicial power such as those imposed in *Lyons*, unless it is always better ex ante to permit violations of the Constitution by state actors rather than place them under the supervision of a federal court injunction.[154] Federal

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150. Sunstein, *Privatization*, *supra* note 135, at 1471. For a thoughtful overview of this issue, see Peter L. Strauss, *The President and Choices not to Enforce*, 63 LAW & CONTEMP. PROBS. 107 (Winter/Spring 2000). My discussion sidesteps the issue of presidential power not to enforce statutes that are or might be unconstitutional. *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (Winter/Spring 2000); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (Winter/Spring 2000).

151. *See* Sunstein, *Privatization*, *supra* note 135, at 1471-72; *see also* Pushaw, *supra* note 66, at 416-17 & nn.110-11; Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees,"* 30 WM. & MARY L. REV. 375, 380 (1989)

> I am unaware of evidence that the faithful execution clause was intended at all as a power-conferring clause. Its origination in the English Bill of Rights and the lack of debate surrounding its adoption in this country suggest strongly that it was understood chiefly as an uncontroversial prohibition on the executive suspension of statutes, not an aggrandizement of the President's role in policy making.

Id.; Sunstein, *What's Standing*, *supra* note 66, at 211-14.

152. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111-12 (1983) (noting federalism-based objections to federal judicial intrusion on the states).

153. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 99-104 (1995).

154. Put another way, even if we know that a state government has violated the Constitution and is likely to do so again, the federalism objection to injunction-standing insists that federal courts must be strictly limited in their ability even to consider trying to prevent these violations. While I believe such a position is untenable, I am not arguing that the only acceptable level of constitutional violations is zero or that every violation requires a complete remedy. *Cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778-87 (1991) (stating the ideal of a remedy for every violation of a right cannot

courts must respect state sovereignty, but they must also recognize valid federal rights.[155]

The text of 42 U.S.C. § 1983, which gives federal courts the power to place state actors under injunction, balances these interests. Section 1983 derives from Congress's power to enforce the terms of the Fourteenth Amendment "by appropriate legislation."[156] The enforcement power includes the ability to abrogate state sovereign immunity and provide remedies directly against the states for violations of the Constitution.[157] Rather than exercise its full power, Congress limited liability to individual state actors and municipalities.[158] As the Court noted in *Pulliam v. Allen*, however, Congress plainly intended that defendants would be subject to injunctions when it drafted the original version of § 1983.[159] The federalism-based restriction on standing to seek injunctions imposed by *Lyons* thus labors against the Constitution's express grant of power to Congress and Congress's decision to craft rights of action and authorize remedies that are well within the scope of its power.

Stripped of clear constitutional or statutory support, the federalism objection to a modestly expanded standing doctrine appears to reflect a conclusion either that the substantive rights at issue are less important than other important social objectives or that earlier courts have erred in their interpretation of the law—perhaps because they have substituted their own views of good policy for those

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be attained in practice and describing history of incomplete remedies). At the merits and remedy stages, courts might conclude that the government or its agents should prevail despite a violation of individual rights. Immunity doctrines and, sometimes, equitable discretion work in just this way.

155. *See generally* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) [hereinafter Fallon, *Ideologies*] (comparing federalist and nationalist models of the role and powers of federal courts and concluding both models should be abandoned in favor of a richer "between the poles" analysis).

156. U.S. CONST. amend. XIV, § 5.

157. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The scope of the § 5 power has been hotly debated of late. *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997). But *Fitzpatrick* remains good law. *See Kimel*, 528 U.S. at 80; Alden v. Maine, 527 U.S. 706, 756 (1999); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001) (discussing the relationship between *Fitzpatrick* and recent federalism decisions).

158. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) (holding states are not "persons" under § 1983); Quern v. Jordan, 440 U.S. 332 (1979) (holding language of § 1983 indicates Congress did not intend to abrogate Eleventh Amendment immunity to suits against states in federal court); Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978) (holding cities are "persons" subject to suit).

159. Pulliam v. Allen, 466 U.S. 522, 540-41 (1984). *See* Fallon, *Public Law*, *supra* note 7, at 60-61; Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959 (1987) (discussing this issue in the context of considering the extent to which § 1983 authorizes federal court intervention in state judicial processes).

of the states. As with separation of powers, this objection reduces to an argument about the proper role of federal judges, particularly their use of the power to compel state and federal officials to adhere to judicial declarations of what the law is.

Notably, the Supreme Court of Israel did not recognize these kinds of objections as impediments to its decision. The court invoked "the principle of Separation of Powers and the Rule of Law" as a reason to hear the case and grant relief rather than as a reason to stay its hand.[160] As I shall discuss in greater detail below, the court's reliance on separation of powers as a reason to act draws from its place in the constitutional structure of Israel, just as the use of separation of powers and federalism in the United States as reasons not to act draws from the constitutional role of the U.S. Supreme Court. For now, however, it is enough to recognize that an incremental change in standing doctrine would help courts confront illegal state violence without infringing too far on federalism and separation of powers concerns.

B. *Equitable Discretion and the Preference for Damages*

The differences between the *Lyons* and *Public Committee* courts over remedies mirrors their differences over standing. The *Lyons* Court stressed the traditional requirements of irreparable future injury and no adequate remedy at law as prerequisites to an injunction and expressed concern about interference with state governments.[161] The *Public Committee* court never mentioned irreparable injury or adequate remedy at law requirements and declared that individual rights take precedence over interference concerns.[162]

Each court could easily have adopted the opposite view. Equity is flexible almost by definition, and the irreparable injury and adequate remedy at law rules are not as hard and fast as tradition would suggest.[163] As Douglas Laycock has demonstrated, courts

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160. H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, at 25, *reprinted in* 38 I.L.M. 1471 (1999).

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

162. *See Public Committee*, at 23, 27. The court was considering whether to make its order *nisi* absolute and was not specifically discussing the requirements of injunctive relief. *See supra* notes 97-101 and accompanying text. Nonetheless, when assessing restraints on the executive, I suspect most courts would consider requirements of this kind out of concern about conflict with executive officials. Throughout this discussion, therefore, I shall assume that the Supreme Court of Israel has discretion in selecting remedies and could have made different choices.

163. Justice Scalia nicely described the traditional view in *Bowen v. Massachusetts*:

regularly grant specific relief when successful plaintiffs request it.[164] Whether the rule is dead or merely weak,[165] lower courts apply it with greater flexibility than the Supreme Court did in *Lyons*.[166] Under the version of the rule actually applied by common-law courts, the existence of serious physical injury, the widespread past use of chokeholds, and the risks of future encounters between the LAPD and citizens could have led the *Lyons* Court to find irreparable injury. The same factors could also have overridden concerns about interfering with state governments.

Similarly, the Supreme Court of Israel could have applied the irreparable injury rule to preclude relief. Moreover, separation of powers and political question concerns could easily weigh against court intrusion on a government that is trying to defend the nation against the violence of terrorism.[167] The court could have found that a more limited form of relief or even no relief at all was appropriate in light of the need to fight terrorism; indeed, the court's earlier

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> Like the term "damages," the phrase "adequate remedy" is not of recent coinage. It has an established, centuries-old, common-law meaning in the context of specific relief—to wit, that specific relief will be denied when damages are available and are sufficient to make the plaintiff whole. Thus, even though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an "adequate remedy" in all but the most extraordinary cases.

Bowen v. Mass., 487 U.S. 879, 925 (1988) (Scalia, J., dissenting) (citations omitted).

164. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991). I accept Professor Laycock's conclusion that there is little difference between the irreparable injury and adequate remedy at law requirements: "what makes an injury irreparable is that no other remedy can repair it." *Id.* at 8.

165. For debate about the status of the rule, see DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 92 (2d ed. 1993); DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 175-76 (6th ed. 1999) (quoting comments of Professor Ken York); Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642 (1992) (book review); Gene R. Shreve, *The Premature Burial of the Irreparable Injury Rule*, 70 TEX. L. REV. 1063 (1992) (book review); Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 156 n.54 (1995).

166. Professor Laycock argues the *Lyons* Court confused the irreparable injury rule with the ripeness doctrine, which would provide an independent basis for provisional denial of an injunction. LAYCOCK, *supra* note 164, at 220-22. Laycock also believes the irreparable injury rule retains its force for preliminary injunctions, which complements his discussion of ripeness. *Id.* at 110-23. The injunction in *Lyons* was preliminary, which provides some basis for the Court's invocation of a strict irreparable injury rule. The Court, however, did more than deny preliminary relief; it held that Lyons could not seek an injunction at all due to his failure to satisfy the irreparable injury rule. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). Thus, the distinction between preliminary and permanent injunctions cannot explain the Court's reasoning and the resulting status of equitable remedies for violations of § 1983.

167. The court made clear that it understood that terrorism and the threat to the survival of Israel are important motivations—perhaps even justifications—for torture. *See Public Committee*, *supra* note 22, at 26-27.

torture cases and the Landau Commission appear to have taken this more restricted approach.[168]

The difference in the courts' approaches thus appears to be less an issue of strict doctrine and more a matter of when and why to employ discretion in selecting equitable remedies against governments. Discretion led the *Lyons* court to erect high obstacles to relief for fear of interfering with state governments—and similar concerns would likely lead to a similar result if the federal government were the party.[169] Discretion, however, also led the *Public Committee* court to grant relief in the face of concerns that restraints on torture would deprive the government of flexibility.

As with standing, federal courts could modify the doctrine of equitable discretion to favor the injured individual rather than the violent state. The easiest way to make such discretion possible is to return the question of remedy to its proper place at the end of a case rather than link it with justiciability as a barrier to suit.[170] Again, as with standing, the strongest objection to a change of this kind is the federalism and separation of powers concern about unelected judges interfering in legislative and executive tasks and in the affairs of sovereign states.[171] The Supreme Court of Israel was less sensitive to this charge than was the Supreme Court of the United States. The reason, again, derives from a different substantive position on the importance of these concerns, but also from the very different formal conceptions of the judicial role in the United States and Israel.

Perhaps a change in the nature of federal court power would obviate these federalism and separation of powers concerns—an issue I consider in Part IV. Absent such a change, federalism and

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168. *See supra* text at notes 78-79, 85.

169. *See supra* note 123.

170. *See* Fallon, *Public Law*, *supra* note 7, at 35-47.

171. City of Los Angeles v. Lyons, 461 U.S. 95, 112-13 (1983); O'Shea v. Littleton, 414 U.S. 488, 499-502 (1974); Mishkin, *supra* note 3 (providing overview of concerns about institutional injunctions); Colin S. Diver, *The Judge as Political Power Broker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979) (providing a variety of reasons, including federalism and separation of power concerns, to doubt the ability of federal judges to manage institutional reform); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (suggesting the use of equitable discretion in institutional reform litigation is illegitimate unless the relevant political entities have defaulted); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (arguing separation of powers doctrine limits federal court remedial power); *see also* Fallon, *Public Law*, *supra* note 7, at 63-71 (discussing the relationship of federalism and equity); Meltzer, *supra* note 64, at 319-20 (discussing the use of federalism as a basis for denying injunctions); David Rudenstine, *Judicially Ordered Social Reform*, 59 S. CAL. L. REV. 449 (1986) (exploring the tensions between neofederalist and neonationalist conceptions of the role and powers of federal courts); Symposium, *State Courts and Federalism in the 1980's*, 22 WM & MARY L. REV. 599 (1981) (providing a variety of perspectives on the roles and relative competence of state and federal courts in constitutional litigation).

separation of powers present real issues that courts must consider when deciding whether to enjoin federal, state, or local governments. My claim is simply that these concerns do not justify a near-blanket rule against injunctions for all but repeat players.[172] A better doctrine would link the mix of available remedies to the facts and circumstances of each case. Under a doctrine of real equitable discretion, the decision whether to grant an injunction would continue to take into account the potential intrusion of an injunction on government action, but the possibility of such intrusion would not bar an injunction in advance. For example, courts could consider a range of factors before entering an injunction: whether an injunction would be too difficult to enforce; the link between the actions complained of and an existing government custom, policy, or practice; assurances by the government that the conduct will end; and institutional competence issues—rather than issues of sovereignty—about interfering in the workings of law enforcement and other agencies.[173]

In short, I am arguing that federal courts could use equitable discretion to impose injunctions against governments to prevent illegal violence while remaining sensitive to legitimate concerns about court intrusion into the activities of other branches and sovereigns. But what if damages are a sufficient remedy? Would a pre-existing injunction have prevented harm to Lyons? In the rest of this subsection, I shall discuss problems with the traditional preference for damages and suggest reasons for making some kind of injunction an equally important remedy for constitutional torts.

Damages are obviously a critical remedy because they provide compensation for injury and may also deter future violence.[174] Yet damages do not provide complete compensation in civil rights cases.

> In practice, damages are available only for tort-like harms, such as property damage, medical expenses, pain and suffering, and emotional distress. Recovery is not permitted for the inherent value of constitutional rights, their value as public goods, the "expressive harms" inflicted by constitutional violations, the moral costs of breaching deontological prohibitions, third party harms . . . , or any of the other conceivable harms to society that may occur when government violates constitutional rights.[175]

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172. *See supra* notes 13, 111 (describing applications of *Lyons*).

173. For discussion of these factors in relation to federal judicial power, see *infra* notes 323-24 and accompanying text. For a general discussion of equitable discretion, see DOBBS, *supra* note 165, at 66-67, 78-85.

174. Carey v. Piphus, 435 U.S. 247, 254 (1978) ("the basic purpose of a § 1983 damages award should be to compensate"); *Lyons*, 461 U.S. at 112-13 (suggesting damages and the possibility of criminal prosecution will have a deterrent effect).

175. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000) [hereinafter Levinson, Making Government Pay]. *See also* John C. Jeffries, Jr., *The Right-Remedy*

Although current damages doctrine does not allow compensation for the full cost of a constitutional tort, people who are injured can at least seek damages for their identifiable personal injuries. Yet the qualified immunity doctrine ensures that some plaintiffs injured by unconstitutional conduct will not receive compensation because reasonable government actors would not have known that their conduct was unconstitutional.[176] Qualified immunity does not shield local government entities, but proof of municipal liability on the merits raises its own set of difficulties.[177]

Even if plaintiffs can satisfy the qualified immunity standard—as they probably could in cases similar to *Lyons* but not in all excessive force cases[178]—they may not be able to collect damages. Individual officers may be judgment proof, while indemnification may be uncertain and incomplete.[179] Finally, juries might not award significant—or any—damages against a law enforcement official who they believe made a bad decision in difficult circumstances.[180] As a result, success rates in constitutional tort cases are lower than in other categories of cases.[181] Moreover, limits on damages and the

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Gap in Constitutional Law, 109 YALE L.J. 87, 89 (1999) [hereinafter Jeffries, Right-Remedy] ("many victims of constitutional violations get nothing, and many others get redress that is less than complete").

176. Saucier v. Katz, 121 S. Ct. 2151, 2155-57 (2001) (explaining application of the qualified immunity standard); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating the standard for qualified immunity); Gilles, *Breaking*, *supra* note 105, at 25-27 (explaining how qualified immunity allows officers to avoid liability for violations of the constitution); Jeffries, *Right-Remedy*, *supra* note 175, at 93-94 (explaining the same).

177. Owen v. City of Independence, 445 U.S. 622 (1980); Gilles, *Breaking*, *supra* note 105, at 35-48; Symposium, *Section 1983 Municipal Liability Civil Rights Litigation*, 46 DEPAUL L. REV. 619 (1999).

178. The Court's recent decision in *Saucier v. Katz* notes that in excessive force cases, qualified immunity requires considering the possibility that the officer-defendant "did not know the full extent of the threat [plaintiff] posed or how many other persons there might be who, in concert with [plaintiff] posed a threat." *Katz*, 121 S. Ct. at 2160. The claim in *Katz* involved a protest during a speech by the Vice President at a military base. But officers on regular patrols could probably make credible arguments in many excessive force cases that they did not know the full extent of the threat and were unsure whether the plaintiff was acting in concert with others.

179. City of Newport v. Fact Concerts Inc., 453 U.S. 247, 269 n.30 (1981); Gilles, *Breaking*, *supra* note 105, at 30-31. *See also* Kentucky v. Graham, 473 U.S. 159, 161-62 (1985) (noting state refused to defend police officers who used excessive force after "a 'complete breakdown' in police discipline had created an 'uncontrolled' situation"); John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998) [hereinafter Jeffries, *Praise*] (suggesting "the state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on government defense and indemnification").

180. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 548-49 (1993); Gilles, *Breaking*, *supra* note 105, at 30 n.50; Jeffries, *Praise*, *supra* note 179, at 50.

181. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*,

impact of these limits on attorney fees reduce the incentives to take cases that do not promise a substantial recovery.[182]

Although damages provide incomplete compensation for real harms under current doctrine, they also have a deterrent function. If, as Justice White hypothesized in *Lyons*, damages are a sufficient deterrent, then injunctions are superfluous. An award of damages to Lyons will compensate him to some degree, deter the officers involved and other officers from similar conduct, and pressure the LAPD to change its ways.

Damages may not perform their deterrent function very well, either. First, the Court and commentators have argued that damages risk creating too much deterrence, with the result that law enforcement officials will refrain from conduct that is constitutional and socially desirable.[183] To prevent overdeterrence, damages must be reduced or liability must be prevented through mechanisms such as qualified immunity. Yet reduced damages and increased immunity create their own problems by weakening the compensation function of damages.

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73 CORNELL L. REV. 719, 726-35 (1988) (describing results of study showing that non-prisoner civil rights cases in three federal judicial districts in 1980-81 had a fifty percent success rate including favorable settlements, that civil rights cases against police had a sixty percent success rate, that other civil cases had an eighty-four percent success rate, and that the amounts of money recovered in civil rights cases are relatively low); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989) (finding low success rates relative to other cases for plaintiffs in federal trials of civil rights actions). *See also* Kreimer, *supra* note 13, at 492-96 (reporting similar results for civil rights cases against police from all of the reported federal district court cases in 1994).

182. Limits on damages, the possibility that an award of nominal damages will lead to no award of fees, Farrar v. Hobby, 506 U.S. 103 (1992), and the possibility of fee waivers, Evans v. Jeff D., 475 U.S. 717 (1986), make lump sum settlements and resulting reduced fees more likely, which in turn reduces the incentives of attorneys to take cases. *See* Julie Davies, *Federal Civil Rights Practices in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997). The recent decision in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001), rejecting the catalyst theory for fee awards, is likely further to reduce the incentive to take cases.

183. Richardson v. McKnight, 521 U.S. 399, 408 (1997); Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 68-77 (1983); Jeffries, *Praise*, *supra* note 179, at 73-78; Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 26-28 (Spring 1978); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982); Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2015-16 (1998). *See also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 585-88 (1998) (describing arguments for and against the overdeterrence argument); Mark R. Brown, *The Failure of Fault under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1522-25 (1999) (arguing overdeterrence can be a social good).

Indemnification and insurance may mitigate overdeterrence to some extent.[184] Another alternative is to increase the scope of municipal liability while reducing individual liability, on the theory that officers will have the leeway to exercise discretion while local government will be on the hook for compensation and thus have incentives to regulate law enforcement conduct.[185] Both steps risk shifting the problem of overdeterrence to the general governmental level. Moreover, increased municipal liability might force governments to raise taxes or shift resources away from other tasks, with potential undesirable consequences for the state's ability to protect citizens and perform other functions.[186]

Second, underdeterrence may be just as likely a consequence of constitutional tort damages as overdeterrence. Most claims of overdeterrence are based on speculation rather than evidence.[187] In fact, some evidence suggests that the success rate of constitutional tort claims and the amount of resulting damages are quite small relative to non-civil rights cases.[188] If this evidence is representative, damages are unlikely to provide sufficient deterrence.

Moreover, even if damages are readily available in significant amounts, they may not generate sufficient deterrence at the governmental level. According to Daryl Levinson, the claim that damages deter undesirable government behavior mistakenly assumes that governments "respond to costs and benefits in the same way as a private firm."[189] If, as Levinson argues, "government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."[190] In fact, Levinson concludes that underdeterrence is the most likely result of a preference for damages:

> So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will *never* deter a majoritarian government

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184. *See* John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 486-87 (1990).

185. *See* SCHUCK, *supra* note 183, at 100-13; Posner, *supra* note 183, at 641; Note, *supra* note 183, at 2018.

186. *See* Levinson, *Making Government Pay*, *supra* note 175, at 412; William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1225-26 (1998).

187. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997); Meltzer, supra note 64, at 291.

188. *See supra* note 181.

189. Levinson, *Making Government Pay*, *supra* note 175, at 347.

190. *Id.* at 347. *See also* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS AND UNEQUAL PAY FOR WOMEN IN AMERICA 108-09 (1999) (explaining why public sector employers are less sensitive to market forces than private sector employers); James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1569 n.172 (2000) (collecting citations).

> from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims. Adding compliance costs just makes the benefits to the majority of violating constitutional rights that much greater.[191]

Levinson's analysis does not discuss punitive damages and attorney fees, both of which are available in § 1983 excessive force cases and should increase deterrence.[192] The amount of additional deterrence may depend, however, on whether a local government defends its officers and indemnifies them against punitive damages. Yet even a local government that indemnifies its officers may not be optimally deterred if it fails to internalize costs sufficiently. In any event, although Levinson's claims may be a bit dramatic,[193] some evidence supports his theory that governments are not good at internalizing costs and changing behavior.[194]

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191. Levinson, *Making Government Pay*, *supra* note 175, at 370. Levinson also considers whether deterrence fares any better under interest group and bureaucratic models of government decisionmaking; he concludes it does not. *Id.* at 379-80, 386. To the contrary, he concludes that "the more moving parts and debatable assumptions added to the overall model of government outcomes, the less confident we can be in making even highly contextual predictions about the effects of requiring compensation." Levinson, *Making Government Pay*, *supra* note 175, at 386. *See also* NELSON, *supra* note 190, at 93-100 (explaining theory of organizational inequality, which relies on "normative, cultural, and institutional forces operating in work organizations" rather than market forces to describe unequal pay).

192. *See* 42 U.S.C. § 1988 (2001) (allowing fee awards to prevailing parties); *see also supra* note 182 (discussing limits on fees). Punitive damages are available against individual § 1983 defendants who act with evil motive or intent or with reckless or callous indifference to the rights of others. *See* Smith v. Wade, 461 U.S. 30 (1983). Punitive damages, however, are not available against local government entities. *See* City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1981); *see also* 1 NAHMOD, *supra* note 13, at 4-128-4-132 (stating punitive damages are relatively easy to obtain in excessive force cases); Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 856-64 (1996) (providing overview of punitive damages issues and arguing that they are ineffective for constitutional torts in general because they are not sufficiently available).

193. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing Levinson's claims are overstated).

194. For discussion of local government responses to § 1983 suits, see Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits do not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000) (arguing deterrence has failed in New York City chiefly because of indemnification). *See also* Lant B. Davis et al., Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 812-14 (1979) (finding "few changes in police department practices" resulting from pre-*Monell* § 1983 suits in Connecticut and noting that "[n]o injunctions ordering changes in police procedures were issued in any case in the sample"); Kreimer, *supra* note 13, at 499-501 (collecting damages figures for civil rights cases against police and concluding that "the real effect of such litigation, if an effect exists at all, will usually be heuristic rather than deterrent"); Meltzer, *supra* note 64, at 284-86 (discussing problems with relying on damages to deter constitutional violations). In Los Angeles, attorneys have been litigating excessive force claims since at least 1965, and the "police-brutality bar" has been described as "flourishing." Boyer,

Finally, if Levinson is wrong and the full measure of damages and attorney fees in fact risk overdeterring, then we ought to expect governments to prefer injunctions, which hold out the possibility of clear rules and far less financial liability. And if governments actually do prefer injunctions to damages, then courts should be less skittish about imposing them. If, on the other hand, governments prefer to pay damages rather than submit to an injunction, then perhaps we must add to the deterrence calculus the benefit to the government of paying damages. That is, to avoid underdeterrence, we must discount the supposed deterrent value of damages to account for the benefit received from not having to submit to the intrusion and disruption of an injunction.[195]

If damages risk producing inadequate deterrence, then we should consider increased use of injunctions. Remember that the issue is not the choice between damages or an injunction, but rather whether we should prefer a pool of available remedies that includes damages and injunctions in cases similar to *Lyons*. If injunctions add something that damages fail to provide and the added benefit outweighs the accompanying costs, then injunctions should be available in illegal state violence cases.

Absent the standing requirements imposed by *Lyons*, a claim for injunctive relief has at least one advantage over a claim for damages from the plaintiffs' perspective: the qualified immunity doctrine does not apply to claims for injunctions.[196] On the other hand, because

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supra note 16, at 64. The damages won by a flourishing police-brutality bar—$67.5 million in the 1991-95 period, *see* Kreimer, *supra* note 13, at 449 n.166—should have provided sufficient incentive for the LAPD to reform itself, unless the qualified immunity doctrine and the City's failure to internalize social costs have in fact led to underdeterrence. Whatever changes the LAPD has made, valid excessive force claims continue to accumulate, see *supra* note 16, and the department will now have the chance to reform itself under the auspices of a federal consent decree. *See supra* note 6. New York City announced several changes in police policies in the wake of the Justice Department's investigation and the $8.75 million settlement of Abner Louima's claims—the largest settlement the City has paid in a police brutality case. While the settlement was obviously important, the threat of a federal injunction also played a crucial role. *See* Kevin Flynn, *Louima Case One Factor in Changes for the Police*, N.Y. TIMES, July 14, 2001, at B1; Alan Feuer & Jim Dwyer, *City Settles Suit in Louima Torture*, N.Y. TIMES, July 13, 2001, at A1.

195. *Compare* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1329 (2001) (suggesting injunctions are more intrusive than damages), *with* Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42 (1980) (arguing injunctions are less disruptive than damages).

196. *See* Behrens v. Pelletier, 516 U.S. 299, 312 (1996) (noting "no 'clearly established' right need be alleged" in actions for injunctive relief); Ryder v. United States, 515 U.S. 177, 185 (1995) (stressing qualified immunity applies only to damages actions); Pulliam v. Allen. 466 U.S. 522 (1984) (holding state judges are not immune from injunctive relief under § 1983), superseded in part by Pub. L. No. 104-317 § 309(c) (amending § 1983 to bar injunctions against judicial officers in most circumstances); Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 732, 736 (1980) (noting

injunction claims are functionally against a government rather than its officials—despite the *Ex parte Young* fiction[197]—plaintiffs may have to prove a policy of unconstitutional conduct, which is more difficult than proof of individual liability.[198]

Whether or not injunctions are easier to obtain, they hold out the possibility of a more complete remedy, and, in particular, a remedy that prevents harm rather than simply puts a price on it.[199] First, injunctions create rules, which in turn foster reliance.[200] As a result, an injunction against state violence is likely to have some restraining impact because it creates standards for future conduct. State actors will adjust their behavior and fewer people will be harmed.

Second, injunctions have expressive power.[201] Although they cannot guarantee freedom from state violence, injunctions express our right to be free of it in advance and up the ante for state actors

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prosecutors "are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law" and holding state courts and judges can be sued for injunctive relief under § 1983 when they act in an "enforcement capacity" but state legislators cannot be sued for injunctions for actions taken in their legislative capacity); Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (1975) (stating in § 1983 case that "immunity from damages does not ordinarily bar equitable relief as well"). *See also* Harlow v. Fitzgerald, 457 U.S. 800, 819 n.34 (1982) ("express[ing] no view" on whether qualified immunity applies to injunction claims). Lower courts and commentators have reached the same conclusion. *See* Armacost, *supra* note 183, at 669 n.410; Fallon & Meltzer, *supra* note 154, at 1749 n.88, 1804-05; Jeffries, *Right-Remedy*, *supra* note 175, at 110; Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 600-01 n.13 (1989) (collecting cases); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 858, 858 n.776 (1998); Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1500 n.110 (1996); 2 NAHMOD, *supra* note 13, at 8-4 n.2.

197. *Ex parte* Young, 209 U.S. 123 (1908).

198. *See* Gilles, *Breaking*, *supra* note 105, at 35-48.

199. *See* Standen, *supra* note 165, at 150-51.

200. *See* Whitman, *supra* note 195, at 50; *see also* Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 533 (1999) (providing hypothetical in which a factory owner loses a lawsuit over dumping hazardous chemicals and observing that to decide "whether he may continue dumping, he need only consult the terms of the authoritative settlement, which will tell him that he may not").

201. Since § 1983 itself has a symbolic function, this aspect of injunctive relief is hardly trivial. *See* Whitman, *supra* note 195, at 21-25, 52-53. Of course, damages also have expressive power, *see* Armacost, *supra* note 183, at 669-70, but the message is not necessarily the same. *See* Parry, *Virtue*, *supra* note 79, at 427-28 (noting the complexities of determining the social meaning of government conduct). For discussions of the expressive functions of law, see Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 302-03, 351-52, 353-57 (1996), and sources cited therein. *See also* Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (criticizing some versions of expressive theories); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (defending a version of expressive theory similar to that invoked here).

who might consider using violence.[202] Moreover, an injunction attempts to remake relationships between people, and in cases of state violence, between people and governments. Injunctions thus "present a view of the world which others are asked to share"[203] —a world in which state violence is limited rather than commonplace. By contrast, the world presented to us by *Lyons*—"the kind of society that [the decision] appeals to and seeks to engender"[204]—is one in which illegal state violence is neither constrained in advance nor effectively punished after the fact.[205] Put plainly, damages compensate for harms that may result from systemic problems but are inefficient at creating systemic change, while injunctions can address those systemic problems directly and perhaps even more efficiently.[206]

Third, courts have the power to compel compliance with an injunction through the contempt power. Fines for contempt can rapidly outstrip the amount of any likely damages award, which creates a much greater likelihood of compliance and deterrence.[207] If, however, an injunction is sufficiently complex—as they threaten to be in disputes over police conduct—contempt sanctions run the risk of being categorized as criminal and thus will require more extensive proceedings to protect the alleged contemner's constitutional rights.[208]

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202. Winter, *supra* note 54, at 1391-93, 1489.

203. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 872 (1988).

204. *Id.* at 874.

205. *See* Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1467 (1992) (describing a court's refusal to enter an injunction against illegal conduct by attorneys and concluding that, "[b]y denying relief, the court showed a weak commitment to the little law it did create . . . . It refused to back its interpretation with force . . . .").

206. Whitman, *supra* note 195, at 49-50. As should be clear by now, this discussion implicitly adopts a preference for a public law model for constitutional tort litigation rather than a private law model, which in turn colors my consideration of federalism and separation of powers issues. *See* City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality opinion) (declaring that a civil rights claim is "more than a private tort suit" because it "vindicate[s] important civil and constitutional rights that cannot be valued solely in monetary terms"); *see also* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989) (discussing implications of using tort language in § 1983 cases); Wells, *supra* note 192, at 856-64 (arguing for increased punitive damages as part of a public law model for constitutional torts).

207. *See* Spallone v. United States, 493 U.S. 265 (1990) (holding contempt fines against city that began at one hundred dollars per day and doubled to a cap of one million dollars per day were not an abuse of discretion but striking down sanctions against nonparty city council members); Levinson, *Making Government Pay*, *supra* note 175, at 416-17. For a general discussion of contempt sanctions, see DOBBS, *supra* note 165, at 130, 135-38.

208. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 833-34 (1994). Criminal contempt proceedings require the full panoply of criminal procedure rights, while civil contempt proceedings resemble an ordinary civil hearing. For

The possibility that a complex injunction must be enforced through criminal contempt highlights a potential problem with injunctive relief in these circumstances. Any injunction, but particularly one that addresses the conduct of multiple government actors in multiple circumstances, must be drafted with reasonably precise language, which requires substantial time on the part of the judge.[209] As Jeff Standen has explained, to craft an injunction judges must "assess the likelihood that harm would result, the steps needed to preclude it, and the value of the interests at stake."[210] Failure to be precise makes the injunction—particularly an institutional reform injunction, which by its nature is intrusive—"clumsy" and difficult to administer.[211] Not only does a clumsy injunction run the risk of failing to protect the plaintiff's rights, it may also fail to give adequate notice to the defendant, which in turn will lessen the possibility of using contempt as a sanction.[212]

A clumsy injunction thus is harder to enforce and risks both over and under deterrence.[213] To some degree, then, injunctions are

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discussion of the differences between civil and criminal contempt proceedings and related issues of due process, see Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345 (2000).

209. Standen, *supra* note 165, at 161.

210. *Id.* at 187.

211. *Id.* at 185-88. *See also* Fallon, *Public Law*, *supra* note 7, at 39-40 (discussing complexity problems of institutional injunctions); Meltzer, *supra* note 64, at 320-26 (discussing the same). The consent decrees obtained by the Department of Justice in § 14141 litigation reflect an increasing complexity. The April 1997 Pittsburgh decree is fourteen pages and covers a wide array of practices. *See* http://www.usdoj.gov/crt/split/documents/pittssa.htm. The December 2000 Los Angeles decree is forty-five pages and covers an even wider array of practices in greater detail. *See* http://www.usdoj.gov/split/documents/laconsent.htm.

212. *See* DOBBS, *supra* note 165, at 159 (noting defendants often raise ambiguity as a defense to contempt). For other reasons why an injunction is no panacea in cases of police violence, see Bandes, *supra* note 14, at 1279-80 (listing a variety of doctrines and police practices that impede the ability of plaintiffs to hold police accountable for illegal acts).

213. *Cf.* Francis X. Clines, *Police in Cincinnati Pull Back in Wake of Riots*, N.Y. TIMES, July 19, 2001, at A1 (reporting Cincinnati police are engaged in less vigorous law enforcement in the wake of protests over their behavior). The Cincinnati experience could be read to suggest that public opinion and by extension the political process are alternatives to injunctive relief. An aroused populace can generate changes in police behavior, which might be ratified by legislators seeking to satisfy the demands of constituents. At least in Cincinnati, however, public opinion has been far clumsier than any likely injunction would have been. Some claim the police have simply stopped policing in certain neighborhoods, which has led to a large increase in violence, injuries, and fatalities. *Id.* While in theory an injunction could generate similar results, injunctions are far more likely to be tailored and less tinged with hostility than public opinion. Thus, while public opinion is crucial to democratic change, it is not a substitute for an injunction. As for the political process, representative bodies should take the lead in addressing illegal state violence. But we can still provide remedies to protect citizens when the political process fails them. *See also* Meltzer, *supra* note 64, at 287-89, 299-300 (discussing the limits of political process remedies). The next

similar to other remedies for personal injuries; they are inexact and may not be as effective in practice as they are in theory. Indeed, if injunctions directed at governments run a sufficiently high risk of failing,[214] then federalism and separation of powers concerns about intrusion loom even larger. But because no remedy is precise, the risks of over and under deterrence associated with injunctions should not lead to rules against injunctions, any more than the imprecision of damages should lead to rules against damages. Remedial imprecision suggests the need for flexibility, so that courts can choose from an array of remedies that best address the circumstances of the individual case.

Consider the preliminary injunction entered by the district court in *Lyons*, which was less intrusive than most institutional reform injunctions.[215] Part of the order simply required improved training and record-keeping, which would have been fairly easy to draft, comply with, and supervise.[216] The heart of the injunction, however, prohibited the use of chokeholds "under circumstances which do not threaten death or serious injury."[217] Officers considering whether to use a chokehold would first have to evaluate the circumstances, which might be difficult to do in the heat of a confrontation. Officers might refrain from acting and then find themselves at greater risk in some cases. Or they might mistakenly perceive a threat and respond with a chokehold. Unless it disregarded fault altogether, the court in a subsequent contempt proceeding would have to assess the reasonableness of the officer's actions and the credibility of the story—exactly what a jury would be asked to do in an excessive force case. Thus, compliance with and supervision of the injunction might have been difficult and could have led to overdeterrence. Still, given the record of the LAPD, the district court was correct even if it erred on the side of too much deterrence. Faced with the violation of constitutional rights, the court had to decide whether to risk protecting too much in order to safeguard the right, or risk leaving the right vulnerable by protecting too little. The need to prevent harm to citizens of Los Angeles and the expressive power of an injunction limiting the use of chokeholds provide a reasonable basis for the court's decision.

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section is, in part, an effort to blend injunctive relief with the political process, so that courts would protect citizens without displacing politics.

214. *Cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991) (providing pessimistic account of ability of courts to change social conditions).

215. Fallon, *Public Law*, *supra* note 7, at 44; Meltzer, *supra* note 64, at 322.

216. City of Los Angeles v. Lyons, 461 U.S. 95, 99-100.

217. *Id.* at 100.

The same or greater compliance and enforcement issues almost certainly exist for § 14141 consent decrees.[218] These issues suggest the possible utility of less intrusive remedies at an earlier stage. The *Lyons* injunction, or the no-restraint injunction discussed in the next section, might have mitigated or even resolved some of the problems that made the forty-five page Los Angeles consent decree necessary.[219] In other words, federal courts should not have to choose between no equitable relief or a detailed § 14141-style injunction in private-plaintiff civil rights cases. An intermediate position would allow private plaintiff's to seek injunctions against unauthorized or unregulated law enforcement activities. More detailed—and thus more intrusive—injunctions could remain available in extraordinary cases or when less intrusive efforts fail. In addition, complex injunctions would remain a staple of § 14141 cases brought by DOJ, most of which end in consent decrees negotiated by experts on both sides.

Injunctions thus provide an important additional remedy in cases challenging illegal state violence. But, like other remedies, they are not problem-free.[220] Injunctions must be sufficiently precise that plaintiffs' rights will be protected, defendants will know how to modify their behavior to an appropriate degree, and courts can supervise and enforce them. Injunctions that attempt to codify a right to be free of excessive force are vulnerable to ambiguity and possibly excessive intrusiveness. If, however, we could restate the right in more concrete terms, federal courts would be better able to enforce it in private-plaintiff cases through equitable relief. The next section considers the possibility of a different baseline position toward government violence which, if enforced by federal courts, could generate injunctions that help to prevent illegal state violence with greater precision and less intrusion.

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218. *See supra* note 211 (describing representative § 14141 consent decrees).

219. *See infra* note 256 and accompanying text.

220. As part of its effort to show that other remedies made injunctions unnecessary, *Lyons* noted that criminal prosecutions of violent state actors are available. *Lyons*, 461 U.S. at 113. Prosecutions are probably inadequate, however, because they fail to prevent harm, grand juries are reluctant to indict, and judges and juries are reluctant to convict in all but the most egregious cases—which weakens whatever deterrence is created by the threat of prosecution and may even cause the ultimate message to be one of tolerance for state violence. *See supra* notes 15, 19, 20; Colbert, *supra* note 180, at 500-01, 548; Gilles, *Breaking*, *supra* note 105, at 19.

C. *Baseline Attitudes toward Government Violence: The No-Restraint Rule*

On the merits, *Public Committee* adopted a baseline position that government actions restricting individual rights are barred unless specifically authorized by the legislature:

> An interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect's dignity and his individual privacy. *In a state adhering to the Rule of Law, interrogations are therefore not permitted in absence of clear statutory authorization*, be it through primary legislation or secondary legislation, the latter being explicitly rooted in the former. . . . Thus, an administrative body, seeking to interrogate an individual—an interrogation being defined as an exercise seeking to elicit truthful answers, as opposed to the mere asking of questions as in the context of an ordinary conversation—*must point to the explicit statutory provision which legally empowers it.* This is required by the Rule of Law (both formally and substantively).[221]

This holding reflects settled doctrine that individual freedom from government restraints is a fundamental assumption of the Israeli constitutional order, whether or not the particular freedom at issue is specified in a basic law.[222]

Freedom from government restraints is a basic tenet of the U.S. constitutional system as well,[223] but not to the extent articulated by the *Public Committee* court. *Lyons* suggests that as a matter of federal constitutional law, law enforcement officials have

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221. H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, at 11-12, *reprinted in* 38 I.L.M. 1471 (1999) (emphasis added). *See also id.* at 12 ("the relevant field is entirely occupied by the principle of individual freedom").

222. *Id.* at 11-13; Dorner, *supra* note 91, at 1326, 1327, 1331; Gelpe, *supra* note 91, at 509, 523-28. In addition, Article 1(a) of Israel's Criminal Procedure Statute states that "[d]etentions and arrests shall be conducted only by law or by virtue of express statutory authorization for this purpose." *Public Committee*, at 12. *See also* Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327, 1342-43 (2000) (describing *Kol Ha'am v. Minister of the Interior*, 7(2) P.D. 871 (1953), as the source of the doctrine that the government must act within the boundaries of statutory authority and of the presumption in favor of individual liberty) [hereinafter Tushnet, *Universal*]. For critical discussions of the court's application of this principle, see Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998) [hereinafter Hirschl, *Revolution*]; Mandel, *supra* note 83, at 296-307, 316-21.

223. Excessive force, torture, and other forms of degrading treatment are barred by the Fourth Amendment, the Eighth Amendment, the due process clauses, and various federal and state laws. *See* Hudson v. McMillian, 503 U.S. 1 (1992); Graham v. Connor, 490 U.S. 386 (1989); Chambers v. Florida, 309 U.S. 227 (1940); U.S. Dep't of State, *supra* note 120, at http://www.state.gov/www/global/human_rights/torture_geninfo.html, 8-9, http://www.state.gov/www/global/human_rights/torture_articles.html 2-5, 16-17, 31-35, 38-45.

considerable discretion to use force against nonresisting citizens. The Court, of course, did not explicitly reach the merits, but the idea that rulings on standing overlap with the substantive merits of a case is by now familiar.[224] Similarly, the Court's ruling that Lyons could not show irreparable injury also carries with it a hint of the merits. My discussion thus draws an impression of the Court's position on one aspect of the merits—the baseline position toward illegal state violence—out of its discussions of standing and irreparable injury.[225]

Lyons appears to reflect a basic assumption about the powers of law enforcement in the United States. For example, the scope of authority to investigate and interrogate an individual at the federal level is not detailed in any statute or regulation. Federal law provides that the Attorney General may appoint officials "to detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters . . . as may be directed by the Attorney General."[226] In addition, FBI agents

> may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.[227]

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224. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State Inc., 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) ("there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels 'standing'"); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) ("The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked.").

225. I am not addressing the Court's position on all aspects of the substantive merits of Lyons's claim, although I should mention again that in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court accepted part of his claim when it ruled that the use of deadly force against nondangerous, fleeing suspects violates the Constitution.

226. 28 U.S.C. § 533 (2001). Other sections provide authority "to investigate" specific categories of crimes. *See* 28 U.S.C. § 535 (2001) (crimes involving government officers and employees), § 538 (aircraft piracy), § 540 (felonious killings of state or local law enforcement officers), § 540A (violent crimes against travelers), § 540B (serial killings). Department of Justice regulations delegate the authority "to investigate" to the FBI. *See* 28 C.F.R. § 0.85 (2001).

227. 18 U.S.C. § 3052 (2001). *See also* 18 U.S.C. §§ 3105, 3107 (2001) (providing authority to serve warrants and make seizures pursuant to them); FED. R. CRIM. P. 41(a) & (h) (providing search warrants may be issued upon the request of federal law enforcement officers so authorized by the Attorney General); 28 C.F.R. pt. 60 (2001) (providing the necessary authorizations). Various statutes authorize the seizure of property, and DOJ regulations delegate the power to conduct these seizures to the FBI. *See* 28 C.F.R. §§ 8.1, 8.2. DOJ has promulgated a policy on subpoenas, interrogation, indictment, and arrest of members of the news media, *see* 28 C.F.R. § 50.10, and guidelines on obtaining documents from third parties, *see* 28 C.F.R. pt. 59, but neither

Apart from these provisions, the powers of federal law enforcement officials derive from the nature of executive authority, constitutional restrictions on investigative techniques, general statutory authorizations for federal law enforcement, common law, and the enactment of specific criminal statutes.[228] The Department of Justice has drafted policies to govern some investigative and law enforcement activities, but the policies create no legal rights and provide no sanctions for violations.[229] In the wake of the September 11 attacks, moreover, DOJ has floated a proposal to relax some of those restrictions.[230]

At the state level the picture is more complicated. The Constitution permits a wide amount of state police discretion.[231] Most states, however, have codified at least some procedures for arrests and the use of force, and many individual police departments

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set of provisions creates any enforceable individual rights, see 28 C.F.R. §§ 50.12(n), 59.6(b).

228. *See* Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1543-53 (2001) (relying on common-law powers of arrest in case involving state police to deny claim that Fourth Amendment forbids warrantless misdemeanor arrests); United States v. Coplon, 185 F.2d 629, 634 (2d Cir. 1950) (L. Hand, J.) (discussing common law powers of arrest); John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 786 (1984); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416-17 (1819) (implying congressional authority to set sentencing ranges from power to create federal crimes). Twenty-five years ago, a Senate committee urged the adoption of "[a] basic law—a charter of powers, duties, and limitations—[for the] FBI's domestic intelligence," but Congress never acted on the recommendation. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, bk. II, at x (1976); *see also* Elliff, *supra, at* 785-86, 813-14.

229. *See* 28 C.F.R. § 0.17 (authorizing the Office of Investigative Agency Policies to draft policies on law enforcement activities); *Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, at* http://www.usdoj.gov/ag/readingroom/generalcrimea.htm; *Policy Statement: Use of Deadly Force, at* http://www/usdoj.gov/ag/readingroom/resolution14b.htm; *see also* Elliff, *supra* note 228 (discussing the evolution and non-enforceability of guidelines for FBI investigations).

230. David Johnston & Don Van Natta, Jr., *Ashcroft Weighs Easing F.B.I. Limits for Surveillance*, N.Y. TIMES, Dec. 1, 2001, at A1.

231. The Warren Court's criminal procedure decisions can be read as a sustained effort to reduce the discretion created by vague statutory authorizations, particularly at the state level. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998). Suspicion of police discretion recurs from time to time. *See* City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (holding Chicago gang loitering statute gave too much discretion to the police and refusing to consider police department internal rules that limited discretion); *id.* at 71 (Breyer, J., concurring) (asserting the statute is unconstitutional on its face "because the policeman enjoys too much discretion in every case" even if that discretion is used "wisely"). Just as important as the use of constitutional provisions to restrain police discretion, however, is what seems to be the corollary that the police otherwise have discretion to act.

have drafted policies on a wide range of police practices.[232] These statutes and policies perform a valuable function, but they are neither universal nor complete; gaps in coverage persist.[233] Moreover, continued unacceptable levels of illegal police violence[234] suggest that policies on the use of force are not sufficiently widespread, are not consistently effective, or both. Behind all of this is the common law, including doctrines of immunity from damages for certain official activities.[235]

In the face of so much discretion, *Public Committee* suggests that one way for U.S. courts to restrain state violence is simply to say that unauthorized government restraints on liberty are unconstitutional. Absent specific authorization through statutes or binding regulations,[236] law enforcement authorities could not restrain a person's liberty. Such a rule would presumably apply against nonbinding policies, practices, customs, and individual incidents.

Federal and state courts would enforce the rule through prohibitory and mandatory injunctions: courts would prohibit the

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232. *See Atwater*, 121 S. Ct. at 1552, 1558-60 (listing statutes allowing warrantless arrests for misdemeanors committed in officer's presence); Tennessee v. Garner, 471 U.S. 1, 16-19 & nn.14-20 (listing statutes and policies on use of deadly force against fleeing suspects); Ker v. California, 374 U.S. 23, 50, 50 n.4 (1963) (opinion of Brennan, J.) (listing statutes requiring police to announce themselves before entering dwelling); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 446, 483-92 (1990) (noting an increase since 1975 in the promulgation by police departments of written guidelines for investigative practices and particularly on the use of deadly force). The American Law Institute's *Model Code of Pre-Arraignment Procedure* (1975) proposes a fairly comprehensive codification of police authority.

233. *See* Bandes, *supra* note 14, at 1278-79 (stating many police departments lack policies to control police practices, with the result that norms of behavior circulate unimpeded and encourage illegal violence).

234. *See supra* notes 14-20 and accompanying text. *Compare with* Kreimer, *supra* note 13, at 521 n.232 (suggesting deadly force policies have reduced police violence).

235. Fallon & Meltzer, *supra* note 154, at 1781-84; *see supra* note 228.

236. I include regulations because so much contemporary lawmaking takes place as part of the administrative process, and because other writers have noted the possibility of using administrative law to curb police discretion. *See* Ronald J. Allen, *The Police and Substantive Rulemaking*, 125 U. PA. L. REV. 62, 64-67 (1976) (providing an overview of this issue); LaFave, *supra* note 232, at 470-83; Luna, *supra* note 20, at 1167; *see also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 10.3 (1975) (requiring the promulgation of state and local regulations in addition to statutes); James J. Fyfe, Terry*: A[n Ex-]Cop's View*, 72 ST. JOHN'S L. REV. 1231, 1247 (1998) (advocating clear policies that define reasonable suspicion and reasonable fear). The distinction between nonbinding or less than fully binding departmental policies and binding regulations drafted under an express grant from the legislature is important. The Supreme Court has used the existence of routine procedures to uphold brief detentions of individuals and vehicles, as well as inventory searches, although evidence of these "procedures" often consists of nothing more than an officer's testimony, not actual written and binding regulations. *See* LaFave, *supra* note 232, at 451-63, 470-83.

unauthorized practice and mandate the adoption of statutes or regulations as a precondition to resuming the activity at issue.[237] The remedy thus would differ from a standard institutional reform injunction, which often takes the form of detailed standards drawn up by the court and imposed on the government. Not only would a no-restraint injunction be less intrusive, it would also be less onerous because it would require governments to do what many already have begun to do: draft clear policies on the use of violence against citizens. Finally, some evidence indicates that enforcement of a no-restraint rule, and a corresponding increase in policies on the use of force and related topics, would reduce illegal state violence.[238]

In the course of adapting the Israeli doctrine, I have phrased it as a negative liberty—freedom from unauthorized restraints—to reflect the general language of constitutional rights in the United States. The due process clauses of the Fifth and Fourteenth Amendments would be the best sources for a constitutional no-restraint doctrine, because lack of legislative or administrative authorization means that restraints on liberty are by definition without procedural due process.[239] Importantly, locating the doctrine in the due process clauses highlights the limited nature of the no-restraint principle. Once the process happens—that is, once there is a law or regulation—the restraint on liberty is permitted unless it violates some other constitutional doctrine.

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237. The Supreme Court also has limited federal court power to require police departments to draft policies as a remedy for civil rights violations. *See* Rizzo v. Goode, 423 U.S. 362, 379-80 (1976) (relying on federalism concerns to reject federal court power to require changes in police department "internal procedures"); LaFave, *supra* note 232, at 499-501. The no-restraint rule and a loosening of equitable discretion would thus lead to the demise of this aspect of *Rizzo* as well as *Lyons*.

238. *See* Kriemer, *supra* note 13, at 521 n.232.

239. *See* Kent v. Dulles, 357 U.S. 116, 129 (1958) ("the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."). As the source for most excessive force claims, the Fourth Amendment is also a strong candidate, *see* Graham v. Connor, 490 U.S. 386 (1989), but it fails to capture the procedural nature of the no-restraint rule. Another source for a no-restraint doctrine is federal court supervisory power. *See* United States v. Matta-Ballesteros, 71 F.3d 754, 774 (9th Cir. 1995) (Noonan, J., concurring). The supervisory power, however, would have to be stretched to accommodate the no-restraint rule. *See* United States v. Williams, 504 U.S. 36, 45-47 (1992) (stating the supervisory power does not allow the creation of rules for institutions separate from the courts); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (suggesting use of supervisory power to regulate conduct that occurs prior to litigation may go beyond federal courts' Article III power); Office of Legal Policy, *Report to the Attorney General on the Judiciary's Use of Supervisory Power to Control Law Enforcement Activity* (Dec. 15, 1986), *reprinted in* 22 MICH. J. LEGAL REFORM 773 (1989) (suggesting the same). Classifying the doctrine as supervisory would also bar its application to state officials. Smith v. Phillips, 455 U.S. 209, 221 (1982).

The no-restraint doctrine thus resembles clear statement rules of statutory interpretation.[240] The doctrine also has a strong affinity to the requirement of First Amendment vagueness doctrine that "'the legislature establish minimal guidelines to govern law enforcement.'"[241] A full discussion of the possibilities, drawbacks, and complexities of a no-restraint rule is beyond the scope of this Article. The following pages, however, consider some examples of the doctrine's possible scope and limits, beginning with *Lyons* and working out to other police conduct and then to potential broader applications.

If the executive branches of the state and federal governments have constitutional authority to use against citizens only the violence that the legislature or regulatory process has specifically authorized them to use, then the result in a case such as *Lyons* would be easy. No legislative body had authorized the widespread use of chokeholds, and injunctive relief against their use would be appropriate. The LAPD's materials on chokeholds—which arguably could be construed as guidelines for its officers—do not satisfy the no-restraint rule because they were ambiguous and not legally binding on individual officers or the department.[242] An exception to the rule exists, however. If an officer were attacked and responded with a chokehold, that conduct might be excused or justified as a necessity in subsequent proceedings against the officer, but the burden of proving necessity should be on the officer and would not be a defense to

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240. *See* Adler, *supra* note 146, at 863-74; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598-603 (1992).

241. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)); *see* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 415-17, 419-21 (1982). Professor Neuborne's important article also describes the place of the no-restraint rule in French constitutional jurisprudence. *Id.* at 384-86, 392, 395. *See also* Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 15-16 (2001) (suggesting the importance of no-restraint principles to British constitutionalism). Mark Tushnet recently proposed a nonconstitutional version of the no-restraint doctrine. MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 163-65 (2000) (describing the rule as an administrative law ultra vires doctrine). Professor Tushnet's proposal mirrors the language of the *Public Committee* court. If the Supreme Court were to scale back its formal supremacy in constitutional interpretation—as Tushnet also proposes—the constitutional version of the no-restraint rule might become problematic and his version might be the best available form for such a rule. Tushnet is unclear, however, on how this doctrine could be applied by federal courts to state officials. To the extent his proposal would apply only to federal officials, it is similar to Judge Noonan's suggested expansion of the supervisory power. *See supra* note 239. The no-restraint rule also has links to ideas expressed in Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 235-51 (1976), and Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

242. *See supra* notes 27-31, 47-51 and accompanying text (describing debate on the scope of the LAPD's chokehold policy).

injunctive relief. This exception accords with the *Public Committee* court's decision to leave open the possibility that coercive interrogation might be defensible on necessity grounds in after-the-fact criminal proceedings.[243] The use of an unauthorized chokehold, however, would have to be explained and justified on its merits; it would no longer be the norm.

Compare the situation in *Lyons* with *Tennessee v. Garner* and *Atwater v. City of Lago Vista*. The no-restraint rule would not apply in either case because statutes existed that authorized the use of deadly force in *Garner* and the warrantless arrest in *Atwater*.[244] Even when the no-restraint rule is satisfied, however, courts would still consider whether the authorizing statute or regulation is substantively constitutional. In *Garner*, the statute failed as applied because it contravened the substantive requirements of the Fourth Amendment,[245] while in *Atwater* the Court found the statute consistent with the Fourth Amendment.[246]

The fact that many states have adopted statutes and large numbers of police departments have drafted policies on the use of force suggests that compliance with the rule in this context would be neither onerous nor unprecedented—despite the Court's concerns in *Rizzo v. Goode* about ordering such policies.[247] In some contexts, however, the results would be more sweeping. Consider *Terry v. Ohio*,[248] in which the Supreme Court ruled that the Fourth Amendment does not prevent police who wish to question an individual from detaining and then frisking that person for weapons if they have reasonable suspicion that he or she is armed.

Terry represents the standard constitutional approach to police power. The majority opinion by Chief Justice Warren never asked whether a state or local statute authorized the stop-and-frisk conduct at issue, although Justice Harlan's concurrence observed that "[o]n the record before us Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion."[249] The Court's analysis, moreover, took place against the assumption that police officers

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243. *See supra* note 96 and accompanying text; *see infra* note 291. Whether necessity should be a defense to damages as well as criminal charges is an important question. Allowing such a defense to damage actions would weaken the claim, but not allowing it could be too harsh in some cases. One option is to to have the government undertake the necessity calculus when deciding whether to defend and indemnify the officer.

244. Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1541 (2001); Tennessee v. Garner, 471 U.S. 1, 4-5 (1985).

245. *Garner*, 471 U.S. at 9-12.

246. *Atwater*, 121 S. Ct. at 1557.

247. Rizzo v. Goode, 423 U.S. 362, 377-80 (1976).

248. Terry v. Ohio, 392 U.S. 1 (1968).

249. *Id.* at 32 (Harlan, J., concurring). New York adopted a stop and frisk law in 1964—four years before *Terry*, see N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992)—but such guidelines were and are rare, see Fyfe, *supra* note 236, at 1235-36.

simply possess the authority to frisk potentially dangerous people, except to the extent that the Constitution places limits on such activity. For example, the Court began with the assertion that "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[250] Immediately, however, the Court reformulated the idea of "clear and unquestionable authority of law" into a right under the Fourth Amendment "to be free from *unreasonable* governmental intrusion."[251] The move from a requirement of clear legal authority for all restraints on freedom to a willingness to accept reasonable restraints even if not specifically authorized occurs so quickly that it seems natural. But what has occurred is a move from a requirement of positive law to a concession that police authority exists except when specifically restrained by the Constitution.[252]

I am not arguing that police officers should be powerless to protect themselves from concealed weapons. Under the no-restraint rule, the *Terry* frisk is permissible if authorized by law. Moreover, as Chief Justice Warren said, "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."[253] Justice Harlan put the matter more plainly, arguing that "the only satisfactory basis" for affirming Terry's conviction arose "from the necessity of the situation and not from any broader right to disarm."[254] In other words, the principle of necessity provides the reason for police discretion in the absence of express statutory authority. We cannot reasonably expect the police to act otherwise; of

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250. *Terry*, 392 U.S. at 9 (quoting Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

251. *Id.* (emphasis added).

252. The Court understood what was at stake when it accepted a baseline of unauthorized police discretion. "On the one hand," the Court observed, "it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Id.* at 10. "On the other side," the Court recognized, "the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment." *Id.* at 11. Rather then resolve this debate, the Court conceded its powerlessness to "control[] the myriad daily situations in which policemen and citizens confront each other on the street." *Id.* at 12. The Court also admitted that allowing the admission of evidence obtained from a stop-and-frisk "has the necessary effect of legitimatizing the conduct which produced the evidence." *Id.* at 13. And, in fact, *Terry* holds that a pat-down for weapons before questioning a suspicious individual is legitimate police conduct so long as the police officer can "point to specific and articulable facts which . . . reasonably warrant that intrusion." *Id.* at 21.

253. *Id.* at 23.

254. *Id.* at 32 (Harlan, J., concurring). *See also* Christopher Slobogin, *Let's Not Bury* Terry, 72 ST. JOHN'S L. REV. 1053, 1062 (1998) (noting "most commentators seem to endorse" the police safety rationale for frisks based on less than probable cause).

course they will frisk people whom they wish to question but who might be armed—but under the no-restraint rule, they would bear the burden of showing the necessity to engage in illegal activity.

The problem with *Terry* is that the necessity principle—that police obviously will act to protect themselves—does not require a regime in which police discretion is the baseline rule. A baseline rule that unauthorized police action is illegal and actionable has room for the necessity principle. These competing approaches each have strengths and weaknesses. The *Public Committee* rule enhances democracy by ensuring that legislatures, or those to whom they delegate their power, determine the scope of police power to interact with citizens. The rule also endorses individual liberty as a fundamental baseline value that overcomes government claims of discretion. Yet the *Public Committee* rule is less flexible and could prove unworkable in practice, or at least not be as workable in a large urban U.S. city as it might be for the GSS in Israel.[255]

The *Terry* approach is more flexible and thus might support efficient crime detection and control. Moreover, the decision as to what procedures are most appropriate would be left in the first instance to those who presumably are most expert in assessing law enforcement needs—although the same would be true under the no-restraint rule if the legislature chose to delegate to police officials the power to craft binding regulations. Flexibility and efficiency, however, often come at the expense of individual liberty, and requiring police officers to articulate their needs to some legislative or regulatory body would not automatically deprive them of the necessary tools to carry out their law enforcement duties. Moreover, leaving the balance between order and liberty in the hands of those charged with keeping order could well skew the balance. Increasing discretionary powers and decreasing liberty could lead, not just to frisks of dangerous suspects, but to pretextual stops and even violence against those who resist, talk back, or somehow get in the way. Leaving the scope of discretion in the hands of the police could lead, in other words, to *Lyons*.[256]

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255. *See* City of Chicago v. Morales, 527 U.S. 41, 87 (1999) (Scalia, J., dissenting); *Terry*, 392 U.S. at 15 ("a rigid and unthinking application of the exclusionary rule . . . may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter").

256. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 43 (1997) ("One can only wonder how much of the racial tragedy visited upon Los Angeles in recent years might have been avoided had the Supreme Court done the right thing in *Lyons* and sent a different signal to the LAPD."); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1320 (1998) (arguing law enforcement discretion reinforces the "biases and prejudices of individual officers").

A rule of no restraints on individual liberty without statutory authorization could have implications beyond traditional crime control activities, but again those implications are not entirely without precedent. For example, *Youngstown Sheet & Tube Co. v. Sawyer*[257] and *Kent v. Dulles*[258] indicate that the Court has flirted with constitutional doctrines that could overlap with the no-restraint rule and limit executive discretion.[259] In *Youngstown*, the Court ruled that President Truman's seizure of steel mills was an unconstitutional exercise of legislative power.[260] That is to say, in the absence of constitutional authority to act, the President can restrain the liberty and property rights of mill owners only if Congress provides the necessary legislative authorization. In *Kent*, the Court relied on *Youngstown* to hold that the Secretary of State could not deny passports to U.S. citizens who were also communists because Congress had not specifically authorized the Secretary to deny passports on that basis. The Court declared that the right to exit the country was part of the right to travel "included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."[261] Almost immediately, however, the Court backed away from *Kent*, and the possibility of a meaningful no-restraint rule melted away.[262]

Other cases demonstrate the consequences of rejecting the no-restraint rule. In *In re Debs*,[263] the Supreme Court ruled that the executive branch had the power to seek and the federal courts to grant an injunction against a boycott linked to the 1894 Pullman strike, even though no federal statute had been violated and no federal statute provided authority to seek or grant injunctions for

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257. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

258. Kent v. Dulles, 357 U.S. 116 (1958).

259. *See also infra* note 286 (discussing *Ex parte Endo*, 323 U.S. 283 (1944)); *cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (striking down a regulation not explicitly authorized by Congress that barred aliens from federal civil service employment, in part because such a decision should be made by a different level of the government).

260. *Youngstown*, 343 U.S. at 585-89.

261. *Kent*, 357 U.S. at 129 (citing *Youngstown*).

262. The Court held in *Zemel v. Rusk*, 381 U.S. 1 (1965), that the statutory language which in *Kent* did not authorize the Secretary of State to deny passports to communists could nonetheless be read to authorize a blanket ban on travel to Cuba. The Court distinguished *Kent* by stressing its First Amendment overtones. *Id.* at 13; *see also* Regan v. Wald, 468 U.S. 222, 240-42 (1984). Note, however, that *Zemel* and *Wald* are consistent with the no-restraint rule to the extent (1) they hold that Congress in fact provided the necessary authorization to the Secretary of State and (2) they relied on the necessity exception in light of the tensions between the U.S. and Cuba. Yet the statutory language is far from clear, and the U.S. was not engaged in hostilities with Cuba. Such low thresholds for satisfying the no-restraint rule and activating the necessity exception would render the doctrine meaningless.

263. *In re* Debs, 158 U.S. 564 (1895).

such conduct. The Court reasoned that the Constitution gives Congress control over interstate commerce and the transportation of mail, and Congress had exercised its power.[264] "It follows," according to the Court, "that the national government may prevent any unlawful and forcible interference" with interstate commerce and the transportation of mail.[265]

Ordinarily, the Court admitted, Congress would "prescribe by legislation that any interference with these matters shall be offences against the United States, and prosecuted and punished by indictment in the proper courts."[266] Yet even in the absence of a statute, the Court insisted that other remedies were available. Making an analogy to insurrection, the Court declared that the primary remedy was violence:

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the arms of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.[267]

Having established a baseline executive power to use violence to enforce order even where Congress has not actually created a remedy or even an offense, the Court asserted that Debs was lucky only to be enjoined and held in contempt rather than, presumably, maimed or killed:

> [I]t is more to the price than to the blame of the government, that instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals . . . .[268]

So taken was the Court with the violent majesty of the executive branch that it never considered the possibility that the executive could—indeed, should—have simply done nothing in the absence of relevant federal law.[269]

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264. *Id.* at 579-81.
265. *Id.* at 581.
266. *Id.*
267. *Id.* at 582.
268. *Id.* at 583.
269. The Court went on to state its holding in more palatable terms: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . ." *Id.* at 584. But this language cannot mask the Court's acceptance of discretionary state violence to suppress any threat to order.

A court that took the no-restraint rule seriously could not write such an opinion, objectionable both in its sanctioning of violence against citizens and in its approval of inherent executive power to seek equitable relief to restrain citizens who are not breaking any federal law. Lest we dismiss *Debs* as a relic of the first era of "government by injunction,"[270] remember that its approval of discretionary executive power to seek injunctions appears to remain good law.[271] Moreover, while executive power to seek injunctions can be described as neutral—it can serve or undermine civil rights—*Debs* has been limited or questioned by the courts precisely when the government sought to use it as authority for suing to enforce individual civil rights and restrain state violence.[272] Put simply, *Debs* and its progeny suggest—as, indeed, does *Lyons*—that we are lucky when the government submits its claims against troublemakers to the courts instead of using violent methods that it has every right to employ.

Here, too, we see the necessity principle at work. Who would doubt that the federal executive should use violence—or forego violence and instead seek an injunction—to keep order when circumstances warrant its use? In response to terrorism, for example, the executive branch obviously may use necessary violence to protect the nation and apprehend the perpetrators. The issue is how to treat such violence. U.S. courts could apply the no-restraint rule and refuse to validate the use of violence in advance while holding out the possibility that it might be justified as necessary after the fact. U.S. courts could insist that the use of such violence and, indeed, any expansion of executive discretion be temporary—only what is necessary and only for as long as required for Congress to act

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270. Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487 (1898).

271. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 473-75 & n.13 (1976); Sluys v. Hands, 831 F. Supp. 321, 323 n.1 (1993). *See also* United Steelworkers of America v. United States, 361 U.S. 39, 61 (1959) (Frankfurter, J., concurring) ("The crux of the *Debs* decision, that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest, has remained intact."). *But see* New York Times Co. v. United States, 403 U.S. 713, 740-48 (1971) (Marshall, J., concurring) (asserting the Attorney General lacks statutory authority to seek prior restraints on publication); *id.* at 752-54 (Harlan, J., dissenting) (questioning the authority of the Attorney General to seek prior restraints); *infra* note 272 and accompanying text. Federal courts may no longer punish contempt summarily. *See* Bloom v. Illinois, 391 U.S. 194 (1968). Inherent power to punish contempt, however, remains. *See* Young v. United States *ex rel.* Vuitton et fils S.A., 481 U.S. 787, 795-96 & n.8 (1987). Congress partially overruled *Debs* when it limited federal court power to grant labor injunctions. *See* 29 U.S.C. §§ 101-15 (2001).

272. United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) (holding the United States does not have inherent authority to sue to enjoin violations of individuals' civil rights); *id.* at 209, 213-18 (Gibbons, J., dissenting from denial of rehearing) (arguing *Debs* supports such suits); *see supra* notes 5-7 and accompanying text (discussing 28 U.S.C. § 14141 and *City of Philadelphia*).

on the question of whether to provide or withhold authority to the executive. But the *Debs* Court, perhaps seeing the Pullman strike and associated boycotts as the beginning of the end, endorsed discretionary government violence with all its might.[273]

The perception of necessity and the limits of the no-restraint rule are also central to the Court's rulings in *Hirabayashi v. United States*[274] and *Korematsu v. United States*,[275] although a version of the no-restraint rule played a role in *Ex parte Endo*.[276] Korematsu, for example, was convicted of the crime of knowingly remaining in a

> military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander.[277]

Tracing Korematsu's crime leads to Executive Order 9066, which declared that for "protection against espionage and against sabotage," military commanders could "prescribe military areas . . . from which any or all persons may be excluded."[278] Specificity is achieved only with the military proclamations themselves, which imposed curfews specifically on Japanese Americans, barred them from certain areas, and ultimately ordered them "resettled" into camps.[279]

Thus, Congress did not specifically authorize the relocation of Japanese Americans to camps, nor did it specifically authorize curfews to limit their movement.[280] Instead, it delegated power to the Executive branch and in particular to the armed forces.[281] If the

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273. My discussion of *Debs* suggests an affinity between the no-restraint rule and the liberal model of emergency power. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989). Under the liberal model, the boundary between authorized conduct and the requirements of necessity is the line between constitutional and unconstitutional conduct. *Id.* at 1388. In other words, the exercise of emergency power is illegal, unconstitutional, and subject to censure, and the executive is subject to impeachment and personal liability for any damages—subject to indemnification by Congress. *Id.* at 1389-91. Professor Lobel describes how the liberal model has been undermined by realist approaches to separation of powers and theories of inherent, constitutional executive power. *Id.* at 1398-1412. Lobel's analysis also demonstrates the limits of the no-restraint rule. So long as Congress authorizes the executive to use emergency powers, the rule is satisfied. *Id.* at 1408, 1418-21. Moreover, Congress has a weak commitment to enforcing emergency legislation to limit executive discretion. *Id.* at 1412-16. *See also infra* note 332 (discussing the problem of commitment).

274. Hirabayashi v. United States, 320 U.S. 81 (1943).

275. Korematsu v. United States, 323 U.S. 214 (1944).

276. *Ex parte* Endo, 323 U.S. 283 (1944); *see infra* note 286.

277. Act of March 21, 1942, 56 Stat. 173. *See Korematsu*, 323 U.S. at 216-17.

278. 7 Fed. Reg. 1407 (Feb. 19, 1942).

279. *Korematsu*, 323 U.S. at 227-30 (Roberts, J., dissenting).

280. Hirabayashi v. United States, 320 U.S. 81, 89-91 (1943).

281. *Id.* at 91 ("The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. And so far as it lawfully

no-restraint rule applies here—because the delegation was insufficiently specific and amounted to an abdication of power or obfuscation of the massive civil rights and liberties violations already underway—then it is in tension with the ability of Congress to delegate authority to the executive branch.[282] This tension may be a good thing; the idea of restrictions on legislative ability to delegate the authority to define when and how physical restraints on individual liberty can be made is hardly far-fetched.[283] While it is probably unrealistic to forbid all delegations of this nature, the no-restraint rule plausibly could require, first, an express delegation that sets clear parameters for administrative rulemaking, second, that the law enforcement agency which receives this authority promulgate binding regulations pursuant to standard administrative procedures, and third, that the regulations themselves be clear and precise.[284]

Even with these requirements, the no-restraint rule would have been small comfort to Hirabayashi and Korematsu. Congress did

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could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President."). The Court attempted to reframe the question, not as one of delegation, but rather of whether, "acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction. . . ," *id.* at 91-92—a chilling prelude to Justice Jackson's later and more famous claim that there are few limits on the power of the President and Congress acting together. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

282. For the Court's most recent approval of a broad delegation of power by Congress to an administrative agency, see *Whitman v. American Trucking Associations*, 121 S. Ct. 903, 912-14 (2001); *see also id.* at 920 (Stevens, J., concurring) (chastising the majority for its refusal to recognize that the delegated power is "legislative" power); Bressman, *supra* note 145, at 1403-08 (providing overview of the development of and debate over delegation); Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999) (providing a variety of perspectives on the doctrine). For an insightful argument that nondelegation ideals are alive and well in the form of statutory construction canons, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) [hereinafter Sunstein, *Canons*].

283. *See* Nadine Strossen, *Delegation as a Danger to Liberty*, 20 CARDOZO L. REV. 861 (1999) (arguing application of *Kent v. Dulles*, 357 U.S. 116 (1958), would require heightened scrutiny of delegations that restrain individual liberty). Professor Sunstein draws an explicit connection between this kind of nondelegation doctrine and the decision in *Public Committee*. *See* Sunstein, *Canons*, *supra* note 282, at 343 n.123.

284. *See* LaFave, *supra* note 232 (arguing regulations would impose desirable limits on police discretion, particularly in the Fourth Amendment context); Luna, *supra* note 20, at 1167 (arguing for such a result as one way to achieve greater accountability for and trust in police decisions). On some level, every government action is a restraint on liberty, with the result that the no-restraint rule could become a strict nondelegation rule. A sliding scale or the creation of different categories of restraints would solve the problem, however, by distinguishing physical force used against natural persons from other trespasses on liberty interests. *See* Neuborne, *supra* note 241, at 376 (suggesting that separation of powers judicial review could be limited to protection of fundamental values).

delegate authority, and military officials did craft reasonably clear rules that restrained the liberty of thousands of Japanese Americans.[285] Except as modified by *Ex parte Endo*'s application of the no-restraint rule to hold that detention was unauthorized once a citizen's loyalty was established, Hirabayashi and Korematsu had no claim.[286] Once more we run up against the limit of the no-restraint rule. Procedurally valid laws or regulations that restrain liberty satisfy the rule. Substantive limits on the ability to restrain citizens must come from some other source.[287]

Examples of the potential impact of a vigorous no-restraint rule could multiply with each volume of the U.S. reports, but the point is clear.[288] The United States could follow Israel and adopt some

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285. *But see* Korematsu v. United States, 323 U.S. 214, 230-33 (1944) (Roberts, J., dissenting) (arguing the web of military regulations made compliance with the law impossible).

286. Endo challenged the power of military authorities to detain her in a "relocation center" once she established that she was a loyal citizen. Observing that "[n]either the Act nor the orders use the language of detention," *Endo*, 323 U.S. at 300-01, the Court determined that detention authority could exist only by implication. "If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program." *Id.* at 301-02. Denying that Congress had ratified the detention of loyal citizens, *id.* at 303 n.24, Justice Douglas declared,

> The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else.

Id. at 302. The Court ordered Endo's release from detention, *id.* at 303, although her liberty to return home remained in question. *Id.* at 308 (Murphy, J., concurring). Justice Murphy would have applied a stronger version of the no-restraint rule and a substantive equal protection right: "I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program." *Id.* at 307.

287. *See, e.g.*, *id.* (arguing equal protection principles invalidated detention); LaFave, *supra* note 232 (noting regulations on police procedures must be consistent with the Constitution).

288. For example, in response to the claim that the bombing of Cambodia by U.S. forces during the Vietnam War was illegal because unauthorized by Congress, a district court "permanently enjoined . . . the Secretary of Defense, the Acting Secretary of the Air Force, and the Deputy Secretary of Defense, from 'participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia.'" Holtzman v. Schlesinger, 414 U.S. 1304 (1973) (Marshall, J., in chambers) (quoting the district court's order). The Court of Appeals stayed the injunction, and Justice Marshall refused to vacate it. *Id.* The plaintiffs then applied to Justice Douglas, who entered an order vacating the stay. Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (Douglas, J., in chambers). The Solicitor General then applied to Justice Marshall for a stay of the injunction, which Justice Marshall granted after consulting with the rest of the Court, all of whom agreed except for Justice Douglas, who dissented. Schlesinger v. Holtzman, 414 U.S. 1321 (1973) (Marshall, J., in chambers); *id.* at 1322-26 (Douglas, J., dissenting). The Court of Appeals subsequently dismissed the case under the political question doctrine and expressed doubts about standing.

version of a rule that government officials cannot restrain the liberty of individuals without specific legislative or administrative authorization.

The limits of the doctrine should also be clear. First, authorized conduct, even if odious, satisfies the no-restraint rule—although other doctrines may bar it. Yet the formal and procedural nature of the rule also takes a significant step toward addressing separation of powers and federalism concerns about court intrusion on the executive and sovereign states.[289] Second, the necessity principle could apply as an after-the-fact justification of or excuse for conduct that violates the no-restraint rule.[290] While difficult to deny in some form, the necessity principle destabilizes the no-restraint doctrine and risks undermining it entirely.[291]

The limits of the doctrine are troubling, but in the meantime the Supreme Court of Israel is using the no-restraint rule to prohibit at

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Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973). The no-restraint rule might not override the political question doctrine, but the existence of a clear rule preventing government violence unless authorized by law would alleviate some of the concerns which animate that doctrine. *See* Baker v. Carr, 369 U.S. 186, 217, 226 (1962); *see also supra* note 123.

289. Indeed, this limitation probably explains why the *Public Committee* court described its ruling as consistent with and even required by "the principle of Separation of Powers and the Rule of Law." H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, at 25, *reprinted in* 38 I.L.M. 1471 (1999).

290. For discussion of classifying necessity as justification or excuse, see Parry, *Virtue*, *supra* note 79, at 442-45, and sources cited therein.

291. Slobogin, *supra* note 254, at 1053, 1065 (noting the police safety rationale for *Terry* has the "potential for swallowing up the probable cause requirement entirely"). *Public Committee* declared that the necessity defense would be appropriate in the "ticking time bomb" situation, in which a suspect "holds information respecting the location of a bomb that was set and will imminently explode." *Public Committee*, at 22. How the GSS will know whether a suspect has such information when any suspected terrorist could possess it is unclear. In addition, while the court noted the requirement of imminence, it suggested that harm would be imminent "even if the bomb is set to explode in a few days, or perhaps even after a few weeks." *Id.* The magnitude of the hypothetical potential harm thus controlled the imminence requirement. *See* Parry, *Virtue*, *supra* note 79, at 401 (arguing "the balance of harms" is "the centerpiece of the defense—the inquiry around which all else is organized"). Moreover, this relaxation seems almost to serve as guidance for the GSS in future investigations, and an aggressive reading could produce the rule that any interrogation of a person suspected of terrorist ties could disclose an imminent harm, which in turn would justify torture. *See* Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 141-43 (1978) (assessing the balance of harms argument); *see supra* note 79 (citing articles from an *Israel Law Review* symposium that address the necessity issue); *see also* Mandel, *supra* note 83, at 313 n.168 ("since the decision did not order anything but a formal change, it is difficult to avoid the conclusion that the court's main goal . . . was not to stop torture but rather to legitimate it"); John T. Parry, *Resisting Complicity: Judicial Responses to State Violence in the United States and Israel*, *in* THEIR DEEDS WERE EVIL: UNDERSTANDING ATROCITY, FEROCITY AND EXTREME CRIMES (Diana Medlicott ed., forthcoming 2002) (discussing this problem) [hereinafter Parry, *Resisting Complicity*].

least some forms of unauthorized state violence and protect individuals from harm.[292] Moreover, the breadth of these limits will itself depend upon whether courts can use binding judicial review to impose other substantive restraints on government action.[293]

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292. Amnesty International has stated that "the GSS ceased systematic use of these interrogation techniques." Amnesty International, *Torture in Israel: Amnesty International Oral Statement to the UN Commission on Human Rights Concerning Israel and the Occupied Territories* (March 2000), *at* http://www.angelfire.com/ia/palestinefoever/amnestytorture.html. Amnesty and other groups, however, claim that torture still occurs. *See* Elizabeth Olson, *Israel Denies Groups' Charge that It Is Torturing Detainees*, N.Y. TIMES, Nov. 21, 2001, at A10. *See also Israel's Shin Bet Still Tortures Despite Court Ban, Report Says*, DEUTSCHE PRESSE-AGENTUR, Sept. 6, 2000 (describing report by the Public Committee Against Torture which admits a dramatic drop in claims of torture but contends the GSS has worked to bypass the court's decision). Reports of torture and ill treatment since *Public Committee* are usually unsubstantiated. *See* U.S. Dep't of State, *Occupied Territories: Country Reports on Human Rights Practices* 6 (2000), *at* http://www.state.gov/g/drl/rls/hrrpt/2000/nea/index.cfm?docid=882; U.S. Department of State, *Israel: Country Reports on Human Rights Practices* 3 (2000), *at* http.www.state.gov/g/drl/rls/hrrpt/2000/nea/index.cfm?docid=794. *See also* Elizabeth Olson, *Citing Some Progress, U.N. Panel on Torture Urges Israel to Take More Steps*, N.Y. TIMES, Nov. 24, 2001, at A8. In at least one substantiated incident, seven Israeli policemen are facing charges, which might not have happened before *Public Committee*. Joel Greenberg, *Charges in Beating of Palestinian*, N.Y. TIMES, May 17, 2001, at A6. The aggressive response of the Israeli government to the current intifada raises the possibility that any continuing risk of torture arises as much from regular army forces as from the GSS. *See* Olson, *U.N. Panel, supra* (noting an increase in allegations of mistreatment "as fighting intensified over the past year").

293. International law norms are also relevant to controlling illegal state violence, but several difficulties limit their usefulness in the United States. The Senate frequently ratifies treaties with reservations that limit their scope and bar private rights of action in U.S. courts—as it has done with the treaties that litigants would be most likely to invoke in this context. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346-48 (1995). Even without such reservations, courts are reluctant to find a private right of action. *See* Erik G. Luna & Douglas J. Sylvester, *Beyond* Breard, 17 BERKELEY J. INT'L L. 147, 155 (1999). Nor are courts likely to use customary international law to restrain or compensate for domestic executive action. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 837, 837 n.150 (1997), Luna & Sylvester, *supra*, at 165-71. Finally, the utility of international law for restraining illegal state violence in the United States may be limited. International law has little to say about the availability of or the conditions for providing equitable relief as a remedy, see Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1275-76, 1283 (1991), and torture and other forms of degrading treatment are already illegal here, see *supra* note 223. In sum, international law might best play a role in developing a stronger baseline position against government discretion to engage in illegal violence and could serve as an important source for criticism of government actions and court decisions.

IV. JUDICIAL REVIEW AND DOCTRINAL CHANGE IN ISRAEL AND THE UNITED STATES

This Article's focus so far has been on the specific doctrinal differences between the United States and Israel with respect to standing, equitable discretion, and the validity of unauthorized restraints on liberty. At the same time, I have also suggested that the differences between *Lyons* and *Public Committee* could derive from a deeper source: the different roles of courts in Israel and the United States. More specifically, the Supreme Court of Israel's willingness to take a relaxed view of standing, to decide the merits based on a general principle of individual liberty, and to restrain the government is linked to the court's relative lack of formal power as compared to the U.S. Supreme Court. Similarly, the U.S. Supreme Court's restricted view of standing and remedies and its relatively permissive view of police discretion are linked to its formal supremacy. The question then is whether the United States could move closer to Israeli doctrines without also moving closer to the Israeli model of judicial review.

Instead of a comprehensive constitution, Israel has a series of basic laws adopted by the Knesset.[294] If no basic law applies to a particular case, background principles of individual liberty may forbid government action that has no statutory authorization.[295] The Knesset, however, retains power to fill the void and authorize state action that contradicts these background rights.[296] "[I]n the absence of express provisions granting them preference status," moreover, "basic laws are not inherently superior to ordinary legislation," and "the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority."[297] Some basic laws contain "entrenchment" provisions that make it harder—but not impossible—for the Knesset to enact changes.[298] The Knesset thus can modify the documents that are intended to be Israel's constitution.[299]

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294. *See supra* note 91.

295. H.C. 5100/94, Public Comm. Against Torture in Israel v. The State of Israel (Sept. 6, 1999), *available at* http://207.232.15.136/mishpat/html/en/system/index.html, at 11-12, *reprinted in* 38 I.L.M. 1471 (1999); David Kretzmer, *The New Basic Laws on Human Rights*, *in* PUBLIC LAW IN ISRAEL, *supra* note 130, at 141, 143; *see supra* notes 221-22 and accompanying text.

296. Kretzmer, *supra* note 295, at 141, 143.

297. *Id.* at 144; *see* Dorner, *supra* note 91, at 1328.

298. Dorner, *supra* note 91, at 1329-30; Kretzmer, *supra* note 295, at 145-46.

299. EDELMAN, *supra* note 91, at 43. This power is not just theoretical. In 1993, the court held that the government's refusal to allow importation of non-Kosher meat violated the entrenched Basic Law: Freedom of Occupation. In response, the Knesset

As a result, the Supreme Court of Israel's rulings are not final statements of what the law is. *Public Committee*'s references to separation of powers and the Knesset's ability to authorize torture were simple descriptions of Israel's political structure.[300] Yet the court's lack of formal power need not lead to real weakness, as *Public Committee* shows. To the contrary, many believe that lack of finality has freed the court to articulate an expansive conception of rights.[301] As Gary Jacobsohn explains:

> [A]n activist judiciary functioning in a political context that is structurally and philosophically opposed to the doctrine of judicial finality is not as vulnerable to the sort of criticism [*i.e.*, countermajoritarian concerns] that regularly surfaces in polities, such as the American, where the doctrine has been more readily assimilated into the nation's constitutional culture.[302]

One might say the court has taken advantage of its freedom to propose anything but to conclude nothing.[303]

The court's formal power of judicial review has expanded since the adoption in 1992 of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty, although it is still not as extensive as U.S.-style judicial review.[304] While some herald these basic laws as Israel's bill of rights,[305] others claim the court has

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amended the Basic Law to allow its modification by ordinary legislation passed by a majority of the Knesset. A majority then passed a statute barring the importation of non-Kosher meat, and the court upheld it. Hirschl, *Revolution*, *supra* note 222, at 442-43; Hofnung, *supra* note 91, at 596-97.

300. *Public Committee*, at 25-26.

301. Aharon Barak, *Freedom of Speech in Israel: The Impact of the American Constitution*, 8 TEL AVIV U. STUD. L. 241, 247 (1985); Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 CARDOZO L. REV. 2013, 2022-23 (1989).

302. GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 150 (1993). *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (2d ed. 1986) (discussing the countermajoritarian difficulty in the United States).

303. *Cf.* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 253 (Max Farrand ed., rev. ed. 1937) (Madison) (reporting the comments of James Wilson on the freedom of delegates to the constitutional convention); *id.* at 266 (King) (reporting the same).

304. The Supreme Court of Israel has begun to consider whether legislation enacted after the passage of these basic laws conforms to their requirements of consistency with the values of the state, a proper purpose, and only minimal infringement. Gelpe, *supra* note 91, at 510-11. The court has also asserted its power to review statutes for conformity with any provision of the basic laws, whether entrenched or not. *Id.* at 513-21. For a general discussion of these issues from the perspective of administrative law—and thus to some extent of the no-restraint rule—see Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581 (2001).

305. Aharon Barak, *Chamishim Shamot Mishpat B'Yisrael [Fifty Years of Law in Israel]*, 16 ALPAYIM 36, 39 (1998) (stating the new basic laws turned Israel "from a parliamentary into a constitutional democracy"), *translated and quoted in* Orna Ben-Naftali & Sean S. Gleichgevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 41 HARV. INT'L L.J. 185, 207 (2000); Hirschl, *Struggle*, *supra* note 91, at 96-97.

become more timid as its power has grown.[306] Moreover, the court's growing power has generated criticism of its role in Israeli society.[307] These criticisms could lead to self-imposed restraints on the court's power, including restrictions on standing.[308] Because the Knesset has the last word, they could also lead to legislative revision of the judiciary's functions.

In contrast, the U.S. Supreme Court has declared that its rulings are final and binding and that it alone has the ultimate power to interpret the Constitution.[309] When Congress has attempted to substitute its own interpretation of the Constitution for that of the Court, the Court has responded with indignation.[310] In other words, although there are limits to its interpretive and practical power,[311] the U.S. Supreme Court takes its name seriously.

Just as the Supreme Court of Israel's lack of supremacy may play a role in decisions such as *Public Committee*, so too the U.S. Supreme Court's formal supremacy may have played a large role in its development of doctrines such as standing. The assertion of

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306. Mandel, *supra* note 83, at 302-07.

307. Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216 (1999); Gelpe, *supra* note 91, at 494 n.2; *see supra* note 130.

308. Gavison, *supra* note 307, at 233-34; Gelpe, *supra* note 91.

309. *City of Boerne* v. *Flores*, 521 U.S. 507, 516-21 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219, 227 (1995); *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

310. *Boerne*, 521 U.S. 507. *See also* Dickerson v. United States, 120 S. Ct. 2326 (2000) (responding with less indignation but equal effect). Of course, Congress can dissolve a federal court's continuing decree by changing the underlying law. *See* Miller v. French, 120 S. Ct. 2246, 2257-59 (2000); *Plaut*, 514 U.S. at 232. But if the underlying law is the Constitution, Congress has no power to modify it. *Boerne*, 521 U.S. 507. The picture becomes a bit murkier when we remember that Congress may alter the available remedies for constitutional claims. *Compare* Bivens v. Six Unknown Named Federal Agents, 403 U.S. 388 (1971) (allowing damages action based directly on the Constitution), *with* Chappell v. Wallace, 462 U.S. 296 (1983) (refusing to allow *Bivens* action in military context where statutory remedies were available). *See also* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73-76 (1996) (holding remedies created by Congress can displace the doctrine of *Ex parte* Young, 209 U.S. 123 (1908)). Altering remedies can easily be understood as altering the right itself. Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) [hereinafter Levinson, *Rights Essentialism*].

311. The political question doctrine gives Congress the last word in some areas, see *Nixon v. United States*, 506 U.S. 224 (1993), and Congress can overrule the Court's dormant commerce clause decisions, see *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572 (1997). Moreover, Congress's power to define remedies for constitutional violations inevitably influences the meaning of the underlying rights. Friedman, *supra* note 310; Levinson, *Rights Essentialism*, *supra* note 310. *See also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 674-80 (1983) (arguing resistance to remedies can result in narrower definitions of rights and that it is impossible to bifurcate rights and remedies). Interpretive power, finally, does not always translate into the power to get things done. *See* BICKEL, *supra* note 302, at 254-70 (2d ed. 1986) (describing resistance to *Brown*); Burt, *supra* note 301, at 2093-94 (noting Congress and the states have significant ability to resist the Court).

supremacy may have made the Court acutely conscious of its power, and this consciousness may in turn have nourished the fear that using this power too much could undermine the Court's legitimacy. In *Richardson v. United States*, for example, Justice Powell declared in an influential concurring opinion that "[r]elaxation of standing requirements is directly related to the expansion of judicial power" and argued that "public confidence [in the judiciary]. . . may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches."[312] Three pages later, he again stressed restraint and limited standing as necessary by-products of judicial supremacy:

> The power recognized in *Marbury v. Madison*, 1 Cranch 137 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing. Were we to utilize this power as indiscriminately as is now being urged, we may witness efforts by the representative branches drastically to curb its use.[313]

Justice Rehnquist echoed these concerns in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*:

> While the exercise of that 'ultimate and supreme function' [of judicial review] is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role [and] has been recognized as a tool of last resort on the part of the federal judiciary throughout its 200 years of existence.[314]

Turning to the question of standing, Justice Rehnquist asserted that "[t]he importance of this precondition should not be underestimated as a means of 'defining the role assigned to the judiciary in a tripartite allocation of power.'"[315] To at least some Justices, in short,

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312. Richardson v. United States, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

313. *Id.* at 191.

314. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473-74 (1982).

315. *Id.* at 474. *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-77 (1992) (claiming standing is so fundamental to separation of powers and the proper role of courts that Congress cannot expand it to encompass a general interest in proper enforcement of the law); Allen v. Wright, 468 U.S. 737, 750-52 (1984) (stating standing "is perhaps the most important" of "[t]he case-or-controversy doctrines [that] state fundamental limits on federal judicial power in our system of government," and asserting standing questions "must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers'"); BICKEL, *supra* note 302, at 114-15, 117 (contending justiciability doctrines make judicial review an "acceptable process" and thus are "necessary supports" for it); JACOBSOHN, *supra* note 302, at 168 (stressing the link between justiciability and judicial supremacy); Bendor, *supra* note 130, at 348-49 (suggesting courts are afraid too broad an intrusion into the workings of other branches will cause the other branches to limit court jurisdiction or erode public trust); Meltzer, *supra* note 64, at 281-82; Pushaw, *supra* note 66 (linking a

the familiar separation of powers rationale for standing is not just about respecting majoritarian decisionmaking or the need for flexibility in executing the laws. Separation of powers also restrains the use of judicial power in order to protect the judiciary from the other branches.

The Supreme Court's efforts to insulate itself from reprisals have consequences for litigants. The doctrines of restraint created by the Court in cases such as *Lyons* limit remedies for reasons that trace back at least as much to the problem of judicial supremacy as to the equities of the case or more general concerns about judicial competence.[316] The consequences may go even deeper. The countermajoritarian difficulty did not apply directly in *Lyons* because chokeholds had been neither authorized nor validated by any elected, representative body.[317] The lack of a democratic warrant for the official violence makes the Court's acquiescence in *Lyons* more significant and more troubling. Faced with actions that had little connection to the democratic process, the Court still allowed concerns about using federal judicial power to paralyze it in the face of state violence. Seen in this way, the justiciability- and federalism-based restraints articulated by the Court in *Lyons* do not rest on respect for the states as democratic sovereigns exercising a majority will, but rather on respect for state power, even if that power is undemocratic and in tension with individual federal rights.

In short, doctrines of federalism and standing—as well as rules about the separation of powers and the availability of equitable relief—may have dual functions. On the one hand, these doctrines serve straightforward substantive goals, such as the proper allocation of judicial, legislative, and executive power. At the same time, these doctrines also function as self-imposed and overlapping limits on the Court's ability to exercise the power it claims to possess.[318]

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limited conception of judicial review to more relaxed ideas of justiciability in the early republic); Winter, *supra* note 54, at 388-93.

316. BICKEL, *supra* note 302, at 114-15, 117.

317. *See supra* text accompanying notes 27-36; *see also* Adler, *supra* note 146, at 806-74 (arguing decisions by administrative bodies present less of a countermajoritarian difficulty); Cover, Nomos, *supra* note 64, at 57 n.158 (arguing the same); Kramer, *supra* note 143, at 372 (questioning the assumption that legislatures are more representative than courts and noting that administrative bodies craft many of the specific rules that govern our conduct). Countermajoritarian concerns might be more appropriate during the crafting of relief, to ensure that courts do not coerce legislators directly and instead allow flexibility in complying with an injunction. *See* Spallone v. United States, 493 U.S. 265 (1990); *supra* note 173 and accompanying text (discussing factors courts should consider in the exercise of equitable discretion).

318. *See* Fallon & Meltzer, *supra* note 154, at 1787-91 (arguing the availability of constitutional remedies should be measured against two principles: individual redress and ensuring government faithfulness to the law in ways consistent with the separation of powers); Nichol, *Abusing*, *supra* note 140 (arguing standing doctrine reflects concerns about the role and power of the federal judiciary).

Moreover, the Court's concerns about exercising its power plainly affect the substantive scope of these doctrines. Indeed, the impact of these concerns on substantive doctrine—their ability to limit the right of citizens to be free from illegal state violence—is my concern here.

I do not mean to suggest that the existence of these dual functions is automatically bad. To the contrary, if the Court seeks to preserve its ability to wield the vast power of final and supreme constitutional interpretation, then some version of these dual-functioning doctrines is probably necessary.[319] As Justice Powell suggested, if the Court were too free with its power, it would quickly forfeit its capital of legitimacy and become locked in a power struggle with the other branches and with the states—a struggle it would almost certainly lose.[320] Absent the cooperation of the executive and legislature—the institutions on whom courts depend for enforcement and resources—courts run the risk of becoming powerless.[321]

If activism and supremacy are in tension with each other, U.S. courts may have difficulty adopting the doctrines of *Public Committee* to their full extent without sacrificing judicial supremacy. One alternative is to accept current doctrine as the best equilibrium position and give up on more expansive approaches. The nation's persistent problems with police violence and general government discretion to restrict individual liberty make this option difficult to accept, however.

A second alternative draws on the possibility that one way out of the countermajoritarian difficulty is not to be restrained, but simply not to be supreme. Mark Tushnet, for example, has recently urged that the Court give up its final interpretive power over the Constitution.[322] If, following Tushnet, the Court were less worried

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319. BICKEL, *supra* note 302, at 114-15, 117; Gelpe, *supra* note 91 (arguing the Supreme Court of Israel may have to develop such doctrines to maintain legitimacy as its power grows).

320. Richardson v. United States, 418 U.S. 166, 191 (1974) (Powell, J., concurring).

321. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 200 (1985) (claiming judges play "a deference game" to allay fears of attacks on their legitimacy and position); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1011-15 (2000) (discussing the vulnerability of a bureaucratized federal judiciary to congressional micromanagement and noting judicial anxiety about complaints that they are too independent and should be called to account for unpopular decisions).

322. TUSHNET, *supra* note 241. In addition, Robert Burt has argued that the Court should not see its task as the provision of final and definitive resolutions of social conflicts. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992). Abandoning a court-centered perspective, Michael Paulsen has argued that the executive branch already possesses the authority to decide for itself what the Constitution and federal statutes require. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). To my mind, however, he succeeds only in proving the existence but not the legitimacy of this power. For other

about formal supremacy, the power-limiting function of the various doctrines I have mentioned would be less necessary and limits on individual remedies in constitutional cases might be relaxed. Concerns about court intrusion on the executive branch or on the states would diminish to the extent Congress could restrike the balance when it disagreed with a decision.[323] Aggrieved individuals could seek relief for constitutional violations, including injunctions against state and federal governments, and the reasons for denying such relief would come from the facts of the case and traditional doctrines of equity rather than from a collateral interest in maintaining supremacy.[324] Under this approach, an individual in Lyons's situation would have standing to seek prohibitory and mandatory injunctions against similar unconstitutional future violence.

Yet with this option, the cure might be worse than the disease.[325] There is no assurance that scrapping or even relaxing the Supreme Court's formal supremacy would lead to better substantive results for citizens seeking protection from illegal state violence. Absent their formal power, U.S. courts might not turn in a more activist direction. Many judges would feel more exposed to political reprisal and so would not act. Other judges would have no interest in activism on behalf of individual rights, whether or not the Court is supreme.

Moreover, U.S. society and legal culture are different from Israel's, and those differences might be crucial ingredients in Israel's ability to have a rights-enhancing judiciary without judicial supremacy.[326] Nor is it entirely clear as a matter of law or social fact that Israel's system is as rights-enhancing as *Public Committee*

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recent proposals to limit the Court's power of judicial review, see Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 375 (2000) (collecting citations).

323. My assumption here is some greater degree of congressional power to participate in the definition of constitutional rights, but not an erosion in federal supremacy. *Cf.* OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 295-96 (1920) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.").

324. *See supra* text accompanying note 173 (listing factors important to equitable discretion). These factors are not free of concern about the power of supreme federal courts, and it is difficult to distinguish standard equitable concerns from judicial supremacy concerns in the Court's statements about equitable relief. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000). Absent this second concern, however, the decision whether to grant equitable relief could more easily develop in an expansive, relief-promoting direction. *See* Fallon, *Public Law*, *supra* note 7, at 43-47 (discussing how equity could function if freed from justiciability).

325. Not to mention that the proposal is unrealistic. *See* Richard Posner, *Appeal and Consent*, NEW REPUBLIC, Aug. 16, 1999, at 36.

326. *Cf.* Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

makes it appear.[327] Indeed, the Knesset presumably has the power, not just to authorize restraints on liberty, but to abolish the Israeli version of the no-restraint rule. Perhaps that is why many commentators keep searching for Israel's own *Marbury v. Madison*.[328] Too many factors are in play for us to focus only on formal judicial power, despite its importance to the results in *Lyons* and *Public Committee*.[329]

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327. In earlier torture cases, the Supreme Court of Israel was far more deferential to the GSS, despite the same lack of authorization for torture. *See infra* note 85. Other landmark decisions by the Supreme Court of Israel have upheld the rights of Palestinians, see Hirschl, *Revolution*, *supra* note 222, at 446-47; Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 LAW & SOC'Y REV. 781, 786-94 (1990), but the court has not applied these decisions consistently in subsequent cases, which creates the possibility that their influence on actual legal rights or declared public policies has been limited. *Compare* Hirschl, *Revolution*, *supra* note 222, at 446-47 (arguing the court has failed to protect human rights sufficiently and its decisions merely legitimate an unacceptable system), Mandel, *supra* note 83, at 309-15 (arguing the same), *and* Shamir, *supra*, at 786-94 (arguing the same), *with* George E. Bisharat, *Courting Justice? Legitimation in Lawyering Under Israeli Occupation*, 20 LAW & SOC. INQUIRY 349, 373-79 (1995) (concluding the rare Palestinian victories have an impact on the government's conduct), Burt, *supra* note 301, at 2085 (arguing "the prospect of judicial review has apparently induced caution and meticulous observance of procedural regularity by the military authorities"), *and* Dotan, *supra* note 101, at 357-58 (suggesting the court has achieved desirable outcomes by setting in motion "a complicated legal apparatus of constant negotiations, bureaucratic maneuvering, and legal decisionmaking over which the Court presided"). In addition, the court's treatment of the necessity defense raises troubling questions. *See supra* note 291. Finally, the ongoing violence between Israel and Palestinians—including the current intifada and the government's reactions to it—undermine the possibility of developing doctrines that would provide equal protection to all who live under Israeli power. Put more bluntly, an African American living in Los Angeles is probably safer under current U.S. doctrine than is a Palestinian living in Israel under current Israeli doctrine.

328. At least three cases have been given that designation so far. *See, e.g.*, JACOBSOHN, *supra* note 302, at 113, 124 (discussing *Bergman v. Minister of Finance*, 23(1) P.D. 693 (1969), and *Kol Ha'am v. Minister of the Interior*, 7(2) P.D. 871 (1953)); Burt, *supra* note 301, at 2045-47, 2066-76 (comparing *Bergman* to *Marbury* and comparing *Dweikat v. Government of Israel*, 34(1) P.D. 1 (1979), to *Dred Scott*); Hirschl, *Revolution*, *supra* note 222, at 447 (noting *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 195 (1995), "was described by scholars as the Israeli *Marbury v. Madison*"); Tushnet, *Universal*, *supra* note 222, at 1334 (describing *Kol Ha'am* as "Israel's equivalent of *Marbury v. Madison*").

329. Ending the Court's power of final judicial review could also destroy the equilibrium between self-government and the rule of law that can be said to characterize our judicial system. Michelman, *supra* note 144; *see also* NOMOS XXXVI: THE RULE OF LAW (Ian Shapiro ed., 1994) (providing broad discussion of the tensions and commonalities between ideals of democracy and ideals of the rule of law); THE RULE OF LAW: IDEAL OR IDEOLOGY (Allan C. Hutchinson & Patrick Monahan eds., 1987) (same). To some extent, of course, this objection simply restates the proposal, which obviously would entail fundamental change in U.S. constitutional structure, but it nonetheless reminds us not to rush to resolve a countermajoritarian difficulty that may be no difficulty at all. Still another objection is that announced supremacy may serve as a deterrent to legislators contemplating action that comes close to constitutional boundaries. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J.

The third alternative is to seek improvements in doctrine without fundamental restructuring. Even if judicial supremacy stands in the way of the most desirable option—simply adopting something close to the doctrines of *Public Committee* as quickly as possible—the United States is not forced to choose between revolution and the status quo. To a large extent, law itself is a process of continued incremental change, which suggests that the most realistic way to achieve the doctrines of *Public Committee* is through an incremental approach.[330] Rather than announce a sweeping no-restraint rule, the Court could begin to apply a no-restraint principle in the circumstances of individual cases. Over time, the decisions would create a broadly applicable doctrine. As change occurred, moreover, courts could keep an eye out for resistance from the states and political branches and adjust the pace of doctrinal movement.

The incremental approach meshes nicely with the no-restraint rule, which is itself an incremental doctrine. The no-restraint rule does not command a specific content for government policies that authorize the use of violence; it merely requires that such authorization exist. Incremental application of the no-restraint rule might also forestall the possibility that expansive standing could lead to curtailment of substantive rights—a possibility that in turn supports the claim that expanded standing is bad because a more restricted class of plaintiffs might gain more complete relief.[331] The possibility of a complex interaction among doctrines provides a reason to prefer, or at least accept, an incremental approach lest every step forward in one area lead to a step back in another.[332]

853, 888, 888 n.221 (1991). Of course, judicial review may discourage legislators from giving full consideration to constitutional issues. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1366-68 (1997); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155-56 (1893). *See also* Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 362-66 (2000) (describing the debate over whether judicial review encourages legislators to defer constitutional questions or take them more seriously). For comments on and additional objections to Tushnet's proposal, see the *Richmond Law Review*'s symposium on *Taking the Constitution Away from the Courts*, 34 U. RICH. L. REV. 359 (2000).

330. I have drawn this paragraph from the following discussions of legal and constitutional change: Burt, *supra* note 301; EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Friedman, *supra* note 309; Meyer, *supra* note 196; Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1193-94 (1999); Sunstein, *Canons*, *supra* note 282.

331. Jeffries, *Praise*, *supra* note 179, at 78-81; Karlan, *supra* note 195, at 1338; Levinson, *Rights Essentialism*, *supra* note 310, at 914-15.

332. To ensure that incremental change continues on the path toward the doctrines of *Public Committee* and to make those doctrines stick in the face of settled approaches and traditions of restraint and deference to law enforcement discretion,

V. CONCLUSION

Lyons and *Public Committee* present different doctrinal approaches to illegal state violence. Both cases also reflect the very different assumptions about judicial review that underlie the U.S. and Israeli constitutional orders. Indeed, I have explored the possibility that the Supreme Court of Israel is better able to restrain state violence precisely because it does not have the last word on Israeli constitutional norms. But the court's formal power is not the whole story. The court's actions ultimately are part of a dialogue between the court and the Knesset over the proper scope of executive authority, and the Knesset has been willing to spell out the authority that it wants the GSS to have in response to the requirements of Israeli administrative law doctrines.

By contrast, although the U.S. Supreme Court's claims of supremacy contribute to an undesirable level of restraint in the face of state violence, we should not simply assume that these claims are the root of the problem. The fault also lies with Congress and state legislatures, which have failed to draft comprehensive legislative charters for law enforcement agencies. As a consequence, there is less structure within which to have a meaningful dialogue over the proper scope of authority for law enforcement officials. Federal courts instead have sought to create outer limits for the exercise of police power from the prohibitions of the Fourth, Fifth, and Sixth Amendments. The resulting doctrines include important protections for individual rights but also leave too much room for police

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courts and individual judges must be committed to change. Cover, Nomos, *supra* note 64, at 49; Koniak, *supra* note 205, at 1461. Commitment springs from many sources. Some judges are committed to particular doctrines or to changes in doctrine because of pre-existing political loyalties. *See* Fallon, *Ideologies*, *supra* note 155, at 1146-47 (exploring the possibility that judges invoke federalist or nationalist models of federal courts law based on political predilections). Judges with strong views may be able to convince wavering colleagues through the force of persuasion and personality. Judges may also derive commitment from their particular jurisprudential outlook. Mark J. Osiel, *Dialogue with Dictators: Judicial Resistance in Argentina and Brazil*, 20 LAW & SOC. INQUIRY 481 (1995). Another way to instill commitment is to convince judges that they are complicit in the state violence they fail to confront. For example, recognition of its past complicity in GSS torture may explain the Supreme Court of Israel's decision to switch course in *Public Committee* and ban torture. *See* Mandel, *supra* note 83, at 313 n.168 (noting one commentator has described *Public Committee* as "an act of repentance"); *infra* note 85 (noting the court's awareness of criticism); *see also* United States v. Matta-Ballesteros, 71 F.3d 754, 774 (9th Cir. 1995) (Noonan, J., concurring) (arguing federal courts are complicit in the efforts of law enforcement officials to apprehend suspects and must therefore oversee those practices); Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787 (2001) (arguing judges have a share of responsibility for the LAPD's recent scandals because their actions increased the chances that police perjury would succeed). For a more extended treatment of these issues, see Parry, *Resisting Complicity*, *supra* note 291.

discretion even as they often fail to provide clear guidance to law enforcement officials and raise countermajoritarian concerns.

The United States does not have to change its fundamental system of separation of powers in order to create a structure that would enhance judicial control of state violence and that might also maintain and even encourage democratic accountability. All U.S. courts have to do is take the ideas of no-restraint and nondelegation more seriously in the context of police activities while adopting more flexible doctrines of standing and equitable discretion. Using the Due Process Clauses, courts should demand that law enforcement entities act only pursuant to the terms of an explicit legislative charter. Once such a charter exists, courts can confront issues of state violence as a matter of statutory interpretation—has the legislature authorized or delegated the power to authorize the conduct?—rather than exclusively as a matter of constitutional doctrine. Legislatures could respond to court decisions by modifying the statutory framework for law enforcement activities—always subject, of course, to the more amorphous substantive restraints of the Constitution. As a result, courts and legislatures might develop a dialogue on issues of state violence, and the tension between individual rights and majority rule could lessen as judges and legislators seek practical solutions to the problem of police authority.

In the end, *Public Committee* is something more than a mere doctrinal template. Recognizing its responsibility for past failures to stop torture, the Supreme Court of Israel used administrative law to stop the GSS's pervasive violations of human rights. From this decision, U.S. courts can draw a lesson in doctrine but also, and more importantly, a recognition of their inevitable responsibility for protecting individuals from illegal state violence.

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