10-2000

Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights

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ARTICLES

REINVENTING STRUCTURAL REFORM LITIGATION: DEPUTIZING PRIVATE CITIZENS IN THE ENFORCEMENT OF CIVIL RIGHTS

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The aim of this Article is to explore the possibility of constructing a model that harnesses the power of private citizens to reform unconstitutional practices, particularly in the critical area of police-related rights violations. I seek here to reintegrate private citizens into the enforcement of public laws; to tap the private experiential and financial resources that were a necessary condition of the great structural reform efforts of the civil rights movement of the 1950s and 1960s.

The vehicle by which I propose to accomplish these ends is a simple, yet novel, amendment to 42 U.S.C. § 14141, the statute which authorizes the Justice Department to seek broad injunctive remedies against municipal police departments engaged in unconstitutional "patterns and practices." While Supreme Court standing jurisprudence would preclude private litigants from engaging in the sort of reformist enterprise envisioned in § 14141, I advance a theory of deputation which would give citizens a powerful voice in the social discourse on police-related policies. Drawing upon the notion of "public-private" partnerships, I argue here for the creation of an agency relationship between the executive charged with enforcing prohibitions against unconstitutional police practices, and the individuals and community groups that are directly affected by, and have the information, means and incentives required to challenge those practices.

[We] have with special soul . . .
Lent him our terror, dress'd him with our love,
And given his deputation all the organs
Of our own pow'r.[1]

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1. William Shakespeare, Measure for Measure act 1, sc. 1, l. 17–20 (G. Blakemore Evans ed., Houghton Mifflin Co. 1974) (1604). Deputation figures prominently in this play: The Duke announces his sabbatical, ostensibly departing the dissolute city but actually lingering incognito to see how his subjects are behaving. He entrusts all his power to a deputy, Angelo, who, it is hoped, will carry out the program of penal reform the Duke is unwilling to enforce himself. So I must also thank William Shakespeare, because it was while sitting through a very long and boring production of his play that I conceived the theory presented in this piece.

INTRODUCTION

In 1983, the Supreme Court ruled that a twenty-four-year-old black man who had been severely injured by an illegal chokehold at the hands of Los Angeles Police Department (LAPD) officers could not sue to enjoin the LAPD from employing its notorious chokehold in the future.[2] Developing its doctrine of "equitable standing," the Court ruled that the plaintiff, Adolph Lyons, lacked standing under Article III of the Constitution to seek injunctive relief because he could not show to a "substantial certainty" that he would again fall victim to the LAPD's nefarious practice.[3]

At the time Lyons brought his initial suit, two African-American males had been killed by LAPD chokeholds.[4] By the time the Supreme Court finally ruled that Lyons lacked standing to challenge this practice, there had been sixteen reported deaths attributable to the LAPD chokehold.[5]

The seventeen years since *Lyons* have seen a proliferation of brutal instances of police abuse. As victims of high-profile police brutality cases have become household names—Rodney King, Abner Louima, Amadou Diallo and others[6]—these victims, their families, and the community groups and civil rights organizations that support them are powerless to

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2. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983). LAPD officers were authorized to use two types of chokeholds: the "carotid" hold and the "bar arm" hold. In the "carotid" hold, an officer puts one arm around the victim's neck and applies pressure on the carotid arteries located on the sides of the victim's neck. The "carotid" diminishes the flow of oxygenated blood to the brain, and the victim may quickly lose consciousness and die. The "bar arm" hold applies pressure at the front of the victim's neck, which causes pain, reduces the flow of oxygen to the lungs, and may also render the victim unconscious or result in death. Id. at 97 n.1. In Adolph Lyons's case, the officer used the bar arm hold: "As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated." Id. at 115 (Marshall, J., dissenting).

3. Lyons brought suit under 42 U.S.C. § 1983 (1994) alleging that the LAPD "regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever." *Lyons*, 461 U.S. at 98 (citation omitted).

4. See 461 U.S. at 100 ("[O]riginally, Lyons' complaint alleged that at least 2 deaths had occurred as a result of the application of chokeholds by police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May 1982, there had been 5 more such deaths.").

5. See id. at 115–16 (Marshall, J., dissenting). Seventy-five percent of those killed by the LAPD chokehold during this time period were African-Americans. See id.

6. Most recently, Patrick Dorismond, a 26-year-old Haitian-American, was shot and killed by an undercover New York City police officer on March 16, 2000. Dorismond was the fourth unarmed black man to be shot and killed by NYPD officers in 13 months, and his death sparked a new round of acrimony less than a month after four white police officers were acquitted of all charges in the fatal shooting of Guinean immigrant Amadou Diallo. See, e.g., Lynne Duke, Giuliani Hit By Barrage Of Criticism: Reaction to Latest Shooting Draws Fire From All Sides, Wash. Post, Mar. 25, 2000, at A6.

use the legal system to effect meaningful change in police policies. Left on the legal sidelines in the wake of *Lyons*, these victims' representatives and community leaders have been relegated to approaching the United States Department of Justice, hat in hand, and requesting that federal officials bring actions against police departments engaged in unconstitutional "patterns or practices."

We have lost, in the post-*Lyons* world, the powerful force of the citizenry as a direct agent in effecting meaningful social change through America's courts. *Brown v. Board of Education*,[7] *Hutto v. Finney*,[8] *Roe v. Wade*,[9] *Regents of the University of California v. Bakke*,[10] and scores of other landmark constitutional cases were driven by private plaintiffs who sought not only redress for themselves, but protection for society at large against the harms that they had personally suffered. All of the plaintiffs in these cases sought to reform the institutions, laws, or customs that had injured them. None of the plaintiffs in these cases would have been able to scale the equitable standing bar erected in *Lyons*.[11]

Most of these seminal cases were actions brought to enforce civil rights statutes or constitutional provisions. In the aftermath of *Lyons*, meaningful enforcement of rights guaranteed by the Fourteenth Amendment and federal civil rights statutes—at least so far as injunctive relief is concerned—is now left solely to the government. Indeed, responding to *Lyons* and other incidents of systemic police misconduct, Congress in 1994 enacted a statute, 42 U.S.C. § 14141, which specifically empowers the Attorney General to uncover and sue to enjoin unconstitutional police practices.[12] Six years later, it is fair to say this legislation has proven ineffective, as the government has failed to muster the political will or

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7. 347 U.S. 483 (1954) (classes of black school-aged children brought actions to enjoin enforcement of state statutes and constitutional provisions which required racial segregation in public schools; ordering an end to segregation in public schools).

8. 437 U.S. 678 (1978) (thirty-four individual and class actions brought by inmates of Arkansas prisons to enjoin inhumane and cruel practices by prison officials; ordering a maximum limit of 30 days of confinement in isolation cells).

9. 410 U.S. 113 (1973) (pregnant single woman brought a class action to enjoin enforcement of Texas criminal abortion laws; striking down as unconstitutionally broad a state statute that restricted elective abortions).

10. 438 U.S. 265 (1978) (white male sought injunctive and declaratory relief compelling his admission to medical school based on allegation that special admissions program was unconstitutional; finding special admissions program illegal, but also holding that race may be one of a number of admission factors considered by schools).

11. For example, Professor Tribe argues that, under a literal interpretation of *Lyons*, the *Bakke* case would not have been justiciable because the plaintiff, a white male who had been denied admission to medical school because of a policy requiring that a set number of minority applicants be admitted, would not have been able to demonstrate with certainty that he would be admitted to a future class but for the admission policy. See Laurence H. Tribe, Constitutional Choices 115–17 (1985). Similarly, the plaintiff seeking an abortion in *Roe v. Wade* could not have demonstrated that she would again be pregnant and seek an abortion. See id. at 125, 147–51.

12. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (1994 & Supp. 1997)). See also infra

requisite resources to address systemic police misconduct in a meaningful way.[13]

What is truly lost in such a centralized regime are the eyes, experiences, motivation, and resources of millions of Americans who bear witness to institutionalized wrongdoing and are willing to endure the expense of rooting it out.[14] It was not the federal government, but private plaintiffs and community-based organizations that successfully identified and challenged unconstitutional practices in schools, prisons, mental hospitals, and other institutions. And yet, the Court's jurisprudence of the past twenty years has effectively neutered the popular force that powered all of these reforms.

The question, then, becomes: Can we tap the private resources, personal experiences, and community-based motivation that have engineered the great structural reform efforts of our time, given the constitutional barriers the Supreme Court has erected over the past two decades? The question takes on particular poignancy in the area of police misconduct litigation, where highly publicized instances of police misconduct have proliferated in recent years, and where the federal government lacks the sort of regulatory presence that it has in such other areas as education, voting, housing, and employment.[15] And yet, the most critical and incendiary civil rights issues of today are not being played out in the schools, voting booths, housing markets, or workplaces; they are being played out in the relations between local law enforcement agencies and the communities they police.

The aim of this Article is to explore the possibility of constructing a constitutionally sound model that harnesses the power of private citizens to reform unconstitutional practices, particularly in the critical area of police-related rights violations. The importance of this issue can hardly be overstated: As with segregated schools in the 1950s and inhuman prison conditions in the 1960s, the problem of police brutality and its disproportionate impact on minority groups and the poor threatens the stability of our society and the legitimacy of our justice system.

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text accompanying notes 77–100 (discussing the legislative history, enforcement, and efficacy of the legislation).

13. See infra text accompanying notes 82–94 (reviewing the three "patterns or practices" cases brought by the Department of Justice since 1994 and discussing the political and resource-related impediments to effective governmental enforcement of § 14141).

14. See infra note 57 (reviewing post-*Lyons* cases in which private citizens have alleged and sought to enjoin unconstitutional police "patterns or practices," with varying results).

15. See, e.g., Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1994); Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (1994 & Supp. 111 1997); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(3) (1994); Civil Rights Act of 1964, 42 U.S.C. § 2000e-6 (1994).

The mechanism I propose for re-enfranchising private litigants draws upon the notion of "public-private" partnership[16] and is loosely modeled upon structures developed in the areas of qui tam actions under the False Claims Act and citizen suit provisions in federal environmental statutes. Moving beyond those structures, the model developed here centers on the concept of deputation—the creation of an agency relationship between the executive charged with enforcing prohibitions against unconstitutional police practices, and the individuals and community groups that are directly affected by, and have the information, means, and incentives required to challenge those practices.

Specifically, the implementation of this model in the area of police misconduct litigation would take the form of an amendment to 42 U.S.C. § 14141, the statute which authorizes the Attorney General to uncover and sue to enjoin unconstitutional police "patterns or practices." The amendment proposed here would include a deputation provision, allowing the Justice Department, in appropriate circumstances, to authorize private citizens to bring suits for injunctive relief against unconstitutional "patterns or practices." Beyond its practical application, the model proposed here has the potential to reinvent structural reform litigation—to reintegrate into public law litigation the popular energy and private resources that drove the remedial revolution of the 1950s and 60s, and that have lain untapped since at least the time of *Lyons*.

Part I considers the role of private litigants in structural reform efforts from the mid-1950s to the present. Chronicling the rise and fall of the "public law litigation" model and the plaintiff-driven structural reform efforts it spawned, this section reviews the Supreme Court's decisions restricting private plaintiffs' access to federal reformative remedies and concludes that the Court has effectively extinguished the power of private individuals to seek structural reform remedies.

Part II reviews the Congressional response to the Court's restrictive view of private enforcement in the area of police misconduct litigation. Specifically, in enacting 42 U.S.C. § 14141, Congress sought to fill the gap left by the Court's ruling in *Lyons* by authorizing the federal executive to seek injunctive relief against unconstitutional police practices. In the final analysis, however, this legislation has largely failed. This should come as no surprise: The political considerations and allocation of resources that are endemic to modern government effectively doom any effort to

16. This now-trendy phrase concerns the quite important issue of combining innovative uses of public and private funds and entities working together to accomplish broad social goals. For example, General Colin Powell, a staunch advocate of the public-private partnership model, has launched a group called America's Promise, a public-private partnership of businesses, governors, mayors, community groups, national coalitions, professional athletes, entertainers, and many others who are dedicated to improving the lives of America's youth. See Rick Pierce, Gen. Powell Urges Group to Support Programs That Help Youths Become Productive Adults, St. Louis Post-Dispatch, Aug. 10, 1999, at A1.

place primary regulatory enforcement of local police practices in the federal executive.

Part III begins by considering alternatives to the exclusively executive-run § 14141 regime, and finally proposes an amendment founded on the concept of deputation and borrowing from the qui tam provisions of the False Claims Act and citizen suit provisions of federal environmental statutes. Part IV, then, examines the conceptual and historical roots of deputation in American law.

Part V discusses the significant constitutional challenges that would likely confront this model's scheme for private enforcement, focusing primarily on the Article II and Article III objections that have been raised in the context of qui tam and citizen suit provisions. Finally, Part VI contemplates the practical and political implications of this model, including the inevitable impact of partisan politics, the balancing of political accountability and prosecutorial discretion, the question of frivolous claims, and the adaptability of the model to other areas of the law.

I. THE RISE AND FALL OF PLAINTIFF-DRIVEN STRUCTURAL REFORM EFFORTS

The issues that inspired the civil rights movement of the 1950s and 60s—segregation in the schools, inequalities in the areas of work, housing, and voting—are not the primary civil rights issues of today. As we are reminded daily, the contemporary agenda of civil rights groups and concerned citizens is focused, more than anything else, upon the interactions between the police and minority communities.[17] In virtually every major

17. See Myriam E. Gilles, Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability, 80 B.U. L. Rev. 17, 37 (2000) ("[T]he paradigmatic § 1983 complaints of *this* era—especially amongst minority groups in urban centers—concern issues of police brutality, false arrests and other forms of official misconduct . . . ."); Human Rights Watch, Shielded From Justice: Police Brutality and Accountability in the United States 39 (1998) (finding that "minorities have alleged human rights violations by police more frequently than white residents and far out of proportion to their representation in those cities"); Report of the Independent Commission on the Los Angeles Police Department 70 (1991).

> Within the minority communities of Los Angeles, there is a widely-held view that police misconduct is commonplace. The King beating refocused public attention to long-standing complaints by African-Americans, Latinos and Asians that LAPD officers frequently treat minorities differently from whites, more often using disrespectful and abusive language, employing unnecessarily intrusive practices . . . and engaging in the use of excessive force when dealing with minorities.

Id. Of course, the often incendiary relationship between police and minorities has been an issue of some national concern for decades. See, e.g., United States Commission on Civil Rights, 1961 Commission on Civil Rights Report, Book V: Justice 26 (1961) (declaring that "police brutality in the United States . . . is a serious and continuing problem"); Report of the National Advisory Commission on Civil Disorders 93 (1968).

> [T]o many Negroes, police have come to symbolize white power, white racism, and white repression. . . . The atmosphere of hostility and cynicism is reinforced by a widespread perception among Negroes of the existence of police brutality

city in this country, repeated incidents of police misconduct and brutality have raised popular calls for meaningful reform.[18]

As spontaneous protests and rallies evolve into focused efforts to effect change, it is natural to look back to the extraordinary achievements of the last civil rights movement for a blueprint. And yet, the remedial tools that were available to civil rights advocates in the middle of the last century are no longer at our disposal. While a young Thurgood Marshall led bands of trial lawyers into courthouses throughout the South in the 1950s,[19] today's civil rights reformers are relegated to imploring Justice Department officials to initiate federal lawsuits against offending institutions—lawsuits these leaders and their constituents are no longer empowered to bring themselves.

What happened, then, to the most potent weapon in the arsenal of civil rights advocates of the 1950s and 60s—plaintiff-driven structural reform litigation? Only by examining this question does it become possible to understand whether there exists, in one form or another, a way of reintegrating private interests into public law litigation.

A. *An Autopsy of the Remedial Revolution*

The modern structural reform revolution began in the 1950s,[20] when federal courts began to hear cases asserting the deprivation of

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and corruption and of a "double standard" of justice and protection—one for Negroes and one for whites.

Id.

18. See, e.g., Peter Noel, Is Sharpton Protecting Hillary?, The Village Voice, May 30, 2000, at 57 (reporting on rallies organized by the Reverend Al Sharpton and members of his National Action Network to protest racial profiling and police brutality, and noting that "[s]ome of the demonstrations culminated in acts of civil disobedience, such as blocking entrances to buildings and police headquarters, that recalled the civil rights movement in the South").

19. See Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 348 (1996).

> More than a means to equal rights, the [civil rights] movement itself was a moment of empowerment, an instance of the civic strand of freedom. The laws that desegregated public facilities and secured voting rights for blacks served freedom in the voluntarist sense—the freedom to choose and pursue one's purposes and ends. But the struggle to win these rights displayed a higher, republican freedom—the freedom that consists in acting collectively to shape the public world.

Id. (citation omitted). See also Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 85–91 (1994); Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961 ch. 11 (1994).

20. Some scholars, including Professors Cass Sunstein and Bruce Ackerman, have posited that structural reform litigation actually began during the New Deal, when courts confronted cases in which regulatory beneficiaries were injured by the failure of agencies to regulate or by inadequate or ineffective regulation. Requiring agencies to promulgate meaningful and non-barmful regulations, scholars have argued, marked the rise of grants of injunctive relief aimed at ensuring future compliance. See Bruce Ackerman, We the People, Vol. II, Transformations 345–82 (1998); Cass R. Sunstein, What's Standing After

rights to large groups of people by state and local institutions, such as schools and prisons.[21] In response to findings of constitutional deprivations, courts were asked to restructure these public institutions in accordance with the commands of the Constitution.[22] Plaintiffs claimed that the violations of their rights could not be cured by traditional remedies, such as damage awards or simple injunctive orders.[23] Rather, they argued that the only remedy was massive change in the operations of complex social institutions.[24] "Public law litigation,"[25] as these suits soon

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Lujan? Of Citizen Suits, "Injuries," and Article III?, 91 Mich. L. Rev. 163, 165 (1992). Others credit the NAACP's campaign against segregated professional schools, which began in the 1920s, with the rise of the structural reform movement. See, e.g., Richard Kluger, Simple Justice 543–81 (1976) (describing the NAACP's early desegregation strategies and goals); Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950, at 158–63 (1987) (describing the social and economic contexts of the NAACP's early desegregation efforts).

21. The birth of the modern structural reform injunction can be traced to Brown v. Board of Educ. ("Brown II"), 349 U.S. 294 (1955), which directed the district courts to implement the right to a non-segregated education. See also Hutto v. Finney, 437 U.S. 678 (1978) (upholding district court order limiting inmates' time spent in punitive isolation to 30 days); Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971) (approving a court-ordered affirmative desegregation plan); Baker v. Carr, 369 U.S. 186 (1962) (declaring "one man, one vote" standard for legislative malapportionment cases).

22. See William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 227–28 (1988) (describing federal litigation in the 1960s and 70s as increasingly involving attempts by private citizens to enforce constitutional and public values).

23. See Owen M. Fiss, The Civil Rights Injunction 87 (1978) ("The inadequacy [of cash payments as compensation] stemmed from considerations much deeper than difficulties of measurement . . . [It] stemmed from the group nature of the underlying claim and a belief that only in-kind benefits would effect a change in the *status* of the group."); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1295–96 (1976) (noting that prohibitory injunctive orders proved an inadequate remedy to eliminate wrongful conduct or conditions, making it necessary for courts to formulate comprehensive, forward-looking patterns of reforming the defendant institution).

24. So, for example, in the reapportionment cases, an individual voter's right to cast a ballot free from the pernicious effects of malapportionment could only be vindicated by overall reapportionment. And, given that malapportionment itself distorts the composition of the legislature, thus tending to prevent correction by legislative means, judicial restructuring of the overall representative scheme became a necessity. See, e.g., *Baker*, 369 U.S. at 237 (requiring reapportionment consistent with the "one person/one vote" principle to correct severe malapportionment in the state legislature). Similarly, in the school desegregation cases, which met with tremendous local opposition, judicial supervision was deemed essential for effecting the constitutional right to a non-segregated education. See Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 550 n.288 (1997). Klarman notes that Brown II

> required the Court to take on an entire region of the country, which was intensely hostile toward the Court's edict. The only way to make this work was to revolutionize several facets of federal courts doctrine and constitutional law, as well as for the courts to take over administration of local school systems.

Id.

25. This term has been used to refer to a class of cases involving public institutions, such as school desegregation, environmental hazards, housing discrimination, prison and mental hospital conditions, and legislative reapportionment. See generally Chayes, supra

came to be called, therefore resulted in "structural reform injunctions,"[26] which, rather than enjoining the defendant institution from acting in a particular unconstitutional fashion, ordered forward-looking, affirmative steps be taken to prevent future deprivations.[27] In this way, the federal courts were "cast in an affirmative, political—activist, if you must—role."[28] During this activist period, courts adopted liberalized views of Article III justiciability, as well as liberal interpretations of statutes, to expand the concept of standing and the class of plaintiffs who could bring suit to challenge government action or force government accountability.[29]

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note 23, at 1284 (noting the distinction between public law litigation and the traditional model of a lawsuit concerning disputes "between private parties about private rights"); Fiss, supra note 23 at 86–95 (noting the role that injunctive relief played in civil rights litigation to enforce public rights). These actions share a number of common characteristics. First, they often begin when a group brings a class action suit against state and local governments or institutions alleging broad constitutional violations. Typically, there are hundreds, if not thousands, of affected plaintiffs, as well as numerous other parties, amici, and intervenors. In the typical structural reform case, a finding of a constitutional violation is only the first step in a sprawling, seemingly endless process of using injunctive decrees to reform the defendant institution. Often, the judge will decide upon a remedial plan only after consulting with the plaintiffs, the state and institutional defendants, expert witnesses, community leaders, and sometimes its own appointed masters or special committees. See John Cboon Yoo, Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts, 84 Cal. L. Rev. 1121, 1138 (1996). Finally, the remedial plan may remain in effect for quite some time, as adjustments are made and compromises hammered out in efforts to achieve the corrective ideal. Id. at 1128 (noting that courts may retain "jurisdiction over a structural reform case for years, if not decades . . . until the constitutional violation has been cured").

26. Professor Owen Fiss introduced the term "structural injunction" as the category of injunction "which seeks to effectuate the reorganization of an ongoing social institution." Fiss, supra note 23, at 7. According to Fiss, the structural injunction is

> the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution. . . . [It] received its most authoritative formulation in civil rights cases, specifically those involving school desegregation, and has been legitimated in terms of those cases. Required to defend structural relief, reference will always be made to *Brown v. Board of Education* and the duty it imposed on the courts of the nation to transform dual school systems into constitutionally acceptable forms.

Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965, 965 (1993) (citation omitted).

27. See, e.g., Donald L. Horowitz, The Courts and Social Policy (1977). A contemporaneous and critical observer of structural reform litigation, Professor Horowitz noted in the late 1970s that "[i]t is no longer even approximately accurate to say that courts exercise only a veto. What is asked and what is awarded is often the doing of something, not just the stopping of something." Id. at 6.

28. Abram Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 4 (1982).

29. See, e.g., Flast v. Cohen, 392 U.S. 83, 102 (1968) (finding that a taxpayer may challenge the constitutionality of a federal taxing or spending program if there is a logical connection between the taxpayer's status and the claim); see also Hardin v. Kentucky Utils. Co., 390 U.S. 1, 6 (1968) (finding that "when the particular statutory provision invoked

The mid-twentieth-century remedial revolution was applauded by many commentators, most notably professors Owen Fiss and Abram Chayes.[30] Professor Chayes's now-classic article, "The Role of the Judge in Public Law Litigation," delighted in the "sprawling and amorphous" structure of structural reform litigation, wherein the trial judge became the central figure of the entire litigation process by fashioning a decree that would achieve the constitutional or regulatory purpose.[31] Professor Fiss echoed this faith and boldly proclaimed that the structural reform injunction "in the years ahead promises to become a central—maybe *the* central—mode of constitutional adjudication."[32]

By the mid-1970s and early 1980s,[33] however, a number of events signaled the demise of the structural reform revolution,[34] including the

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does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision"); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 932 (2d Cir. 1968) (finding that alleged victims of housing discrimination had standing to sue under the Housing Act of 1954); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000 (D.C. Cir. 1966) (granting standing to television viewers under the Federal Communications Act to contest the renewal of a broadcast license); Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965) (granting standing under the Federal Power Act to plaintiffs with "special interests" in the environment).

30. See Fiss, supra note 23; Chayes, supra note 23; see also John Denvir, Towards a Political Theory of Public Interest Litigation, 54 N.C. L. Rev. 1133, 1133–60 (1976) (highlighting the positive and democratic effects of judicial involvement in systemic social reform movements).

31. Chayes, supra note 23, at 1284. Professor Chayes was seemingly unconcerned by the increased role played by judges in administering structural reform remedies, asserting that the liability stages of public law litigation gave judges little insight into the remedy that should be used to undo the wrong, so that the judges' new role would necessarily be prospective and supervisory in order to determine what steps would correct the violation. See id. at 1284–91.

32. Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979) (emphasis added).

33. Indeed, one commentator has noted that court-ordered structural reform was on the wane even as Professors Chayes and Fiss were lauding this remedial regime. See Richard L. Marcus, "Public Law Litigation" and Legal Scholarship, 21 U. Mich. J.L. Reform 647, 648 (noting that "Chayes's focus on public law litigation seems ill-conceived because the incidence of the kind of lawsuits he had in mind—school desegregation and prison conditions cases—was waning even as be wrote."). Professor Cbayes himself acknowledged, six years after the publication of "The Role of tbe Judge in Public Law Litigation," that "[t]he long summer of social reform that occupied the middle third of the century was drawing to a close" by the mid-1970s. Chayes, supra note 28, at 7.

34. For example, the legal scholarship during this period was almost universally critical of structural reform remedies. See, e.g., Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 273, 408 (1977) (characterizing the Court's activist decisionmaking as a "continuing constitutional convention," wherein "courts substitute their own views of policy for those of legislative bodies"); Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Scbools 282–83 (1976) (arguing that school desegregation decrees were a massive failure revealing the inherent inability of courts to reform racial problems); Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 90–105 (1979) (critiquing the capacity of judges to manage structural reform cases); Paul

appointment of a number of conservative Justices to the Supreme Court.[35] The conservative Court soon began to set aside desegregation

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J. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 965–66, 970–71 (1978) (arguing that courts are not competent to make broad bureaucratic reforms); Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 664 (1978) (arguing that separation of powers limits the ability of the judiciary to undertake executive or legislative functions when ordering relief against state officials); Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1183 (1982) (examining problems for the attorney-client relationship in the context of "class actions seeking structural reforms in public and private institutions"). These scholars argued that structural reform remedies were problematic because they often required unelected and unaccountable federal judges to undertake management of large, bureaucratic institutions, and order the massive expenditure of state funds to achieve far-reaching social goals. See Mishkin, supra, at 971 (noting that institutional decrees "involve the taking over of institutions of state or local government by federally-appointed lawyers neither chosen by nor responsive to an electorate, neither charged with nor even assuming responsibility for the ultimate directional thrust or effectiveness of the institutions of state or local government").

In addition, public sentiment began to turn against structural reformist remedies, particularly where the implementation of such remedies required increases in taxes. For example, *Missouri v. Jenkins*, a school desegregation case that began in 1977 and continues to the present day, involved a district court's order that property taxes be increased to finance high schools

> in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature-controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

495 U.S. 33, 77 (1990) ("Jenkins II") (Kennedy, J., concurring in part and concurring in judgment). Quite likely, residents of the state of Missouri were none too happy with this solution to the problem of segregated schools and the resulting increase in their local taxes. See Florida CRC Meeting Proceedings, Jan. 15, 1988, at 284–85 <http://www.law.fsu.edu/crc/minutes/crcminutes011598.html> (on file with the *Columbia Law Review*) (statement of commissioner Marshall) (discussing the "horror scenario" of a federal judge taking control of the Kansas City school system and compelling massive taxation and spending); see also Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 336–43 (1991) (chronicling the demise of structural reform litigation and questioning the efficacy of top-down judicial reform); Mark Walsh, Achievement Standards at Issue in Kansas City Case, Educ. Week, Jan. 11, 1995, at 18 (discussing the $1.3 billion in forced spending and capital improvements to produce only "modest improvements in student achievement").

35. Professor David Rudenstine has suggested that, on an impressionistic level, the limitations on access to federal court adjudication for constitutional violations can be viewed as a product of the appointment of a new block of conservative Justices to the Court. See David Rudenstine, Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure, 59 S. Cal. L. Rev. 449, 452 (1986); see also Transcript, The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates, 28 Ariz. St. L.J. 17, 109 (1996) (noting that the three Republican administrations in the 1980s appointed a "very large number of conservative thinkers to the federal judiciary," including Justices O'Connor in 1981, Scalia in 1986, Kennedy in 1987, Souter in 1990, and Thomas in 1991). However, Professor Rudenstine acknowledges

decrees,[36] and uphold challenged conditions in prison cases.[37] More forebodingly, the Court began issuing decisions that threatened to restrict the availability of private equitable remedies for constitutional violations through a variety of techniques, including the employment of an increasingly narrow reading of constitutional[38] and statutory rights,[39] as well as the use of procedural mechanisms to limit access to federal court adjudication.[40] In doing so, the Court warned federal courts hearing institutional cases to "bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate'" a government institution.[41]

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that this impressionistic assertion is susceptible to contradicting proof. For example, he notes that in the first few years of Justice Burger's ascension to Chief Justice, the Court remained relatively supportive of court-ordered structural reform injunctions in the school desegregation context. See Rudenstine, supra, at 453; see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (affirming that the district court retained broad authority to fashion a remedy insuring an integrated school system when school authorities had failed to proffer an acceptable remedy).

36. See, e.g., Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (finding that the court could not require continuing modifications in the remedial plan to maintain racial balance); Milliken v. Bradley, 418 U.S. 717 (1974) (finding that the court could not impose a multi-district remedy for single-district de jure segregation in the absence of findings that the other districts had failed to operate unitary school systems or had committed acts that effected segregation). Most recently, the Court struck down a desegregation decree on the ground that the district court had exceeded its remedial authority. See Missouri v. Jenkins, 515 U.S. 70 (1995) (finding that the district court had exceeded its authority in ordering the state to pay for across-the-board salary increases and to continue funding quality education programs).

37. See, e.g., Rhodes v. Chapman, 452 U.S. 337 (1981) (concluding that the challenged prison policy—double-bunking in 63-square-foot cells—did not violate the Eighth Amendment and vacating a lower court injunctive decree aimed at changing the policy); Bell v. Wolfish, 441 U.S. 520 (1979) (sustaining the challenged prison policies and vacating the lower court injunction).

38. See, e.g., Olim v. Wakinekona, 461 U.S. 238 (1983) (transfer of state prisoners to facility in another state did not deprive inmate of constitutionally protected liberty interest under the Fourteenth Amendment); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (discriminatory distribution of state revenues to local school districts did not violate equal protection under the Fourteenth Amendment).

39. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 830–31 (1982) (private school discharge of teachers did not constitute state action under § 1983, even though public funds made up 90% of school's budget).

40. See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 89 (1984) (holding that state law claims for injunctive relief against state officials were barred in federal courts by sovereign immunity and Eleventh Amendment); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 465 (1982) (holding that plaintiffs challenging government conveyance of property to religious college lacked standing because unable to show "injury in fact").

41. *Rhodes*, 452 U.S. at 351 (citations omitted). Justice Powell also warned that federal courts should not assume that "state legislatures and prison officials are insensitive to the requirements . . . of how best to achieve the goals of the penal function in the criminal justice system." Id. at 352.

Of particular importance, in a number of cases decided during this retrenchment era, the Court denied standing to plaintiffs who, it claimed, failed to meet the requirements of causation, redressability, and injury-in-fact.[42] Continuing into the 1980s and 90s, the Court has relied heavily on Article III standing doctrine to limit plaintiffs' ability to adjudicate broad constitutional and statutory claims.[43] Among the restrictive devices developed by the Court during this era was the "equitable standing doctrine."

1. The Equitable Standing Doctrine. — Under the Court's "equitable standing" doctrine, developed in the area of police misconduct litigation, a private plaintiff has standing to seek injunctive relief against unconstitutional police practices only if he can show to a "substantial certainty" that he will suffer similar injury in the future.[44] In *City of Los Angeles v. Lyons*,

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42. See, e.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 27 (1976) (denying standing to indigent persons to challenge IRS regulations because claimants could not possibly prove that IRS rules caused hospitals to reduce the amount of care to the poor, nor could they prove that the requested remedy—a court order to enjoin application of the rules—would cause hospitals to restore the amount of care to previous levels); Warth v. Seldin, 422 U.S. 490, 504 (1975) (denying standing to plaintiffs challenging zoning ordinance that excluded low and moderate income housing because of failure to show a "substantial probability" that, absent the zoning, plaintiffs could afford housing in the area); United States v. Richardson, 418 U.S. 166, 166–67 (1974) (denying standing to taxpayer in constitutional challenge to Central Intelligence Agency Act on grounds that the plaintiff could not demonstrate injury-in-fact); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974) (denying standing to group claiming standing based on its members' status as taxpayers and citizens on grounds that "standing to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public"); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (denying standing to mother of an illegitimate child in challenge to state practice of refusing to enforce criminal sanctions for parents' failure to pay child support on grounds that plaintiff had failed to demonstrate either that the absence of support payments resulted from non-enforcement or that enforcement, if ordered, would cause support payments to begin).

43. See, e.g., Allen v. Wright, 468 U.S. 737, 757, 760 (1984) (denying standing to parents of African-American public school students who alleged that tax-exempt status granted to private schools resulted in race discrimination; held that the "federal court . . . is not the proper forum to press general complaints about the way in which government goes about its business") (citation omitted); *Valley Forge*, 454 U.S. at 472 (denying standing to nonprofit taxpayer organization for failure to allege injury-in-fact). See also Gene R. Nichol, Jr., Abusing Standing: A Comment on *Allen v. Wright*, 133 U. Pa. L. Rev. 635, 656–57 (1985) (arguing that the standing doctrine "serves as a poor surrogate . . . for defining the role of the federal judiciary").

44. The Court first began to articulate a nascent equitable standing requirement in the mid-1970s. See Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974). *O'Shea* was a class action alleging that a County Magistrate and an Associate Judge had deprived minorities of constitutional rights through a continuing pattern of illegal bond setting, discriminatory sentencing and jury fee practices. See *O'Shea*, 414 U.S. at 490–92. The *O'Shea* plaintiffs sought no damages, but requested the unconstitutional practices be enjoined. See id. at 492. The Court, in a 6-3 opinion, found that plaintiffs lacked standing to seek federal equitable relief because they had failed to allege injury—either past or threatened—sufficient to warrant judicial intrusion into the state criminal justice system. The Court further noted that even if plaintiffs had suffered past injury due to these alleged practices, "[p]ast exposure to illegal conduct does not in itself show a

discussed briefly above, police officers unreasonably applied a chokehold to a black motorist on a routine traffic stop.[45] Lyons suffered permanent damage to his larynx[46] and brought suit against the city and the officers involved, alleging that LAPD officers "routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever."[47] Lyons further alleged that numerous individuals had been injured or killed as a result of this practice.[48] In addition to monetary damages, Lyons sought equitable relief to enjoin the LAPD from employing chokeholds where there is no immediate threat of deadly force.[49] The district court decided in favor of the city but was

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present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Id. at 495–96.

Similarly, the plaintiffs in *Rizzo*, who had at trial proven systemic, widespread constitutional violations by the Philadelphia Police Department, obtained a district court injunctive order requiring the Department to create "'a comprehensive program for improving the handling of citizen complaints alleging police misconduct' . . . ." *Rizzo*, 423 U.S. at 365. Relying on its decision in *O'Shea*, the Court found that plaintiffs had not proven that the injuries they suffered in the past were likely to recur because their claim to "real and immediate" injury did not lie "upon what the named petitioners might do to them in the future." Id. at 372. The Court therefore reversed the grant of injunctive relief for lack of standing to seek such relief. Id. at 372–73.

45. 461 U.S. 95, 97–98 (1983); see text accompanying notes 2–5. When the plaintiff, Adolph Lyons, exited his car after being pulled over for a burned-out taillight, be encountered two LAPD officers with drawn revolvers who directed him to face the vehicle, place his hands behind his head, and spread his legs. Their pat-down search revealed no weapons, but when Lyons began to lower his arms an officer slammed his bands onto his bead, and when Lyons complained of pain, the officer applied a chokehold which rendered Lyons unconscious. See id. at 114–15 (Marshall, J., dissenting).

46. See id. at 97–98. When Lyons regained consciousness, he was on the ground spitting up blood and had urinated and defecated. He could not speak, due to the damage to his larynx. The officers then gave him a ticket for the burned-out taillight, and let him go. See id. at 115 (Marshall, J., dissenting).

47. Id. at 98. At the time of this incident, the LAPD, by its own admission, authorized the use of chokeholds "to gain control of a subject who is violently resisting the officer or trying to escape," and to "subdue any resistance by suspects." Id. at 110, 118. Moreover, Department policy provided that an officer, when "resisted, but not necessarily threatened with serious bodily harm or death," could "subdue a suspect who forcibly resists" by use of the chokehold. Id. at 118.

48. When Lyons filed his original complaint, be alleged that there bad been at least 2 deaths resulting from the application of chokeholds by the police. When he filed his first amended complaint a few months later, he alleged that at least 10 chokehold-related deaths had occurred. By May 1982, there had been five more such deaths. See id. at 100. According to Justice Marshall's dissenting opinion, between 1975 and 1983 at least 16 people died following the use of a chokehold by the LAPD. Twelve of these people—75%—were black men, although only 9% of the city's population consisted of black males. See id. at 115–16 & n.3 (Marshall, J., dissenting). Furthermore, in reported "altercations" between LAPD officers and citizens over a period of five years, the LAPD applied the chokehold more often than any other means of physical restraint: "Between February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations." Id. at 116.

49. See id. at 98.

subsequently overruled by the Ninth Circuit.[50] On remand, the district court found for the plaintiff and enjoined the use of chokeholds by the LAPD "under circumstances which do not threaten death or serious bodily injury."[51] The Ninth Circuit affirmed.[52]

Leaving intact Lyons's claim for monetary damages, the Supreme Court reversed the grant of injunctive relief, finding plaintiff had "failed to demonstrate a case or controversy with the City that would justify the equitable relief sought."[53] Lyons's standing to seek such relief, the Court held, depended on whether *he himself* was "realistically threatened by a repetition of his experience" with the LAPD.[54] And in order to show actual threat of future injury, Lyons "would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion . . . that *all* police officers in Los Angeles *always* choke *any* citizen with whom they happen to have an encounter."[55] This test requires a "substantial certainty" of future personal injury to ensure remedial effectiveness. Since Lyons could not show that an injunction barring future use of the chokehold would provide relief to him personally, he had no standing to seek that remedy.[56]

The Court's application of this "equitable standing" bar has ensured that victims of police brutality will rarely be allowed to enjoin injurious

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50. See Lyons v. City of Los Angeles, 615 F.2d 1243 (9th Cir. 1980). The Ninth Circuit found that there was a sufficient likelihood that Lyons would again be stopped and subjected to the unlawful use of force to confer standing and to warrant the issuance of an injunction. See id. at 1246–47.

51. *Lyons*, 471 U.S. at 100. The district court also required an improved police training program on the proper use of the chokehold, as well as regular reporting and record keeping of incidents involving the application of chokeholds by the police. See id.

52. The per curiam opinion found that there was a sufficient likelihood that Lyons would again be stopped and subjected to the unlawful use of force to confer standing and to warrant the issuance of an injunction. See Lyons v. City of Los Angeles, 656 F.2d 417, 418 (9th Cir. 1981) (per curiam).

53. *Lyons*, 461 U.S. at 105.

54. *Lyons*, 461 U.S. at 109. The *Lyons* Court relied, in part, on its earlier decisions in O'Shea v. Littleton, 414 U.S. 488 (1974) and Rizzo v. Goode, 423 U.S. 362 (1976). See supra note 44 (discussing the early development of the equitable standing doctrine in *O'Shea* and *Rizzo*).

55. *Lyons*, 461 U.S. at 105–06 (emphasis added).

56. See id. at 105–09. The "substantial certainty" requirement of *Lyons* has drawn tremendous scholarly criticism. See, e.g., Laurence H. Trihe, Constitutional Choices 110, 114 (1985) (casting *Lyons* as "anomalous," "extreme and unprecedented"); Richard H. Fallon Jr., Of Justiciability, Remedies and Public Law Litigation: Notes on The Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1, 24–30 (1984) (arguing that the fundamental flaw in the *Lyons* majority's reasoning lies in its failure to analyze the case under ordinary mootness principles); Linda E. Fisher, Caging *Lyons*: The Availability of Injunctive Relief in § 1983 Actions, 18 Loy. U. Chi. L.J. 1085, 1118 (1987) (concluding that "*Lyons* unnecessarily limits the remedies available to those subjected to unconstitutional conduct"); The Supreme Court—1982 Term, 97 Harv. L. Rev. 70, 219 (1983) (noting that *Lyons* was a "marked extension of the restrictive principles of standing and equitable relief announced in *O'Shea v. Littleton* and *Rizzo v. Goode*").

police practices.[57] The ability of plaintiffs to seek forward-looking, reformative injunctive relief had been the singular hallmark of structural reform revolution; the equitable standing doctrine, in theory and substance, is too higb a hurdle for any individual or class of plaintiffs to overcome in order to obtain forward-looking relief against unconstitutional police practices.

II. A CONGRESSIONAL RESPONSE TO THE EQUITABLE STANDING DOCTRINE

The equitable standing doctrine articulated in *Lyons* effectively relegates private individuals aggrieved by police misconduct to damages suits under 42 U.S.C. § 1983. Damage suits against police departments and individual officers, however, have proven largely ineffectual in remedying the problem of police brutality and misconduct.[58] Moreover, by the time

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57. Some lower federal courts have gone to Herculean lengths to distinguish *Lyons* in ways that allow them to grant victims of police misconduct standing to seek injunctive relief. Fairly read, these cases seem to reveal that many district judges haven't accepted that injunctive relief may simply be unavailable to private plaintiffs seeking to enjoin unconstitutional police practices. See, e.g., Mack v. Suffolk County, 191 F.R.D. 16, 20 (D. Mass. 2000) (upholding plaintiff's standing to enjoin county-wide policy and noting that *Lyons* "did not hinge entirely" on the likelihood of future injury, because to so hold would mean that "the only people who could seek injunctive relief would be those that the police were truly 'out to get'"); National Congress for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 159 (S.D.N.Y. 1999) (in finding plaintiff class had standing to enjoin the New York City Police Department's "pervasive pattern of unconstitutional stops and frisks," and distinguishing *Lyons* on the grounds that in that case, the plaintiff only alleged "that 10 chokehold-related deaths had occurred as a result of defendant's official policies," whereas in this case the defendant's actions "allegedly affected tens of thousands of New York City residents, most of whom have been black and Latino men"); Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560, 564 (D. Md. 1999) (finding plaintiff class had standing to enjoin alleged pattern of racially discriminatory detentions and searches and distinguishing *Lyons* on the grounds that the plaintiff class "clearly [had] made a reasonable showing that there was a pattern and practice of stops by the Maryland State Police based upon race") (citations omitted).

However, many more courts simply follow the rule announced in *Lyons* to deny standing. See, e.g., Knox v. McGinnis, 998 F.2d 1405, 1413 (7th Cir. 1993); Ward v. City of Portland, 857 F.2d 1373, 1376 (9th Cir. 1988); Stewart v. Lubbock County, 767 F.2d 153, 155 (5th Cir. 1985); Curtis v. City of New Haven, 726 F.2d 65 (2d Cir. 1984). See also Laura L. Little, It's About Time: Unravelling Standing and Equitable Ripeness, 41 Buff. L. Rev. 933, 942 (1993) (discussing cases denying plaintiffs injunctive relief against unconstitutional police practices under *Lyons*).

It may be nearly impossible to accurately gauge the impact of the *Lyons* rule on cases seeking to enjoin unconstitutional police conduct, as some defendants may fail to raise the equitable standing argument and some courts may fail to cite the case or doctrine in a written decision. However, as an imperfect measure, shepardizing *Lyons* in the Westlaw database results in 42 cases in which courts distinguished *Lyons* and granted plaintiffs standing to seek injunctive relief, and 1158 cases in which courts have applied the equitable standing bar to deny plaintiffs the right to enjoin injurious practices.

58. Many scholars have made the point that damages remedies have proven ineffective in deterring systemic police misconduct. See Gilles, supra note 17, at 29–31 (arguing that damage awards under 42 U.S.C. § 1983 fail to deter systemic constitutional misconduct because individual officers are insulated from payment by qualified immunity

Lyons was decided, it was clear that the federal government also lacked authority to enjoin ongoing, unconstitutional police practices absent a clear congressional mandate.[59] Thus, the government was left with only federal criminal prosecutions as a means of deterring police misconduct; again, such prosecutions have also proven ineffective in remedying systemic police abuse.[60] Accordingly, neither private victims nor the Attor-

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jurisprudence, state indemnification provisions, and other procedural barriers to judgment); see also Alison L. Patton, The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality, 44 Hastings L.J. 753, 754 (1993) (stating that § 1983 is ineffective because actions under that section are prohibitively expensive to poor minorities, the Supreme Court has severely limited the ability of plaintiffs to enjoin a particular police technique, and juries tend to find police officers more credible than plaintiffs).

59. In 1979, three years after the Supreme Court denied equitable standing to plaintiffs in *Rizzo v. Goode*, the Justice Department filed an "unprecedented" lawsuit against the Philadelphia Police Department, 18 high-ranking municipal officials, and the city of Philadelphia, alleging a pattern of unconstitutional conduct of the sort alleged by the *Rizzo* plaintiffs. See United States v. City of Philadelphia, 644 F.2d 187, 190 (E.D.Pa. 1980) (summarizing government's allegations in complaint); see also Charles R. Babcock, Justice Accuses Philadelphia of Police Abuses, Wash. Post, Aug. 14, 1979, at A1 (same). Hoping to "fill the gap left by *Rizzo*'s denial of standing to individuals," the government sought both declaratory and injunctive relief against the rights violations and the police department's failure to correct policies which resulted in the violations. Marshall Miller, Police Brutality, 17 Yale L. & Pol'y Rev. 149, 160 (1998). The district court dismissed the complaint, finding that the Attorney General lacked standing to bring suit to enforce the civil rights of third persons, absent an express grant by Congress. See United States v. City of Philadelphia, 482 F. Supp. 1248 (E.D.Pa. 1979).

The government appealed. Again, the primary issue before the Third Circuit was whether the government had the authority to sue a city and its officials for injunctive relief against violations of the Fourteenth Amendment rights of third parties. The Third Circuit held that there was no federal right to sue for an injunction against the Philadelphia police department, and tbat the Attorney General lacked standing to bring such a suit. The court noted that Congress had provided numerous civil rights statutes under which plaintiffs could seek injunctive relief, but failed to mention that the Supreme Court's equitable standing doctrine bad severely limited this option. See *City of Philadelphia*, 644 F.2d at 192. The Third Circuit's ruling closed yet another door to the reform of unconstitutional police practices: "[a]s a result, by 1983, the triumvirate of *Rizzo*, *Lyons*, and *City of Philadelphia* had effectively removed injunctive relief from the tools available to deter police misconduct." Miller, supra, at 161.

60. See Gilles, supra note 17, at 19 (noting that "criminal prosecutions and administrative disciplinary proceedings against offending officers have proven largely ineffective in curbing pervasive police misconduct over the years"). See also Paul Chevigny, Edge of the Knife 99–101 (1995) (noting that criminal prosecutions of police are unlikely to have any effect on police practices when police managers do not agree with the decision to prosecute, and moreover that criminal law standards define "the outer limits of what is permissible in society" rather than practices that police reformers aspire to institute in a wayward department); Debra Livingston, Police Reform and the Department of Justice: An Essay on Accountability, 2 Buff. Crim. L. Rev. 815, 842 (1999) (noting that "criminal prosecution plays some role in holding officers accountable for acts of clear illegality but it is, at best, a cumbersome tool to effectuate departmental reform"); David Rudovsky, Police Abuse: Can the Violence Be Contained?, 27 Harv. C.R.-C.L. L. Rev. 465, 499 (1992) (explaining that criminal prosecutions of police officers are rare because "prosecutors do not like prosecuting fellow law enforcement officers (with whom they

ney General possessed the right to seek federal injunctive relief against continuing police abuses; essentially, no matter the unconstitutional practices a police department might engage in, there was no federal remedy available to stop it.

In 1991, however, the brutal beating of Los Angeles resident Rodney King by six LAPD officers, caught on tape and broadcast repeatedly in the days following the incident,[61] focused national attention on the problem of police abuse and spurred Congress to action. But coming up with a viable legislative response to the problem of police abuse was not an easy task. The Court had denied standing in *Lyons* on constitutional grounds rather than prudential grounds.[62] The equitable standing doctrine, therefore, could not be overturned by legislative fiat.[63] Furthermore, in the early 1990s, it was unclear whether legislation authorizing private citizens to bring injunctive suits against unconstitutional police practices was politically salable. The war on drugs, fear of violence, and the increased strength of police unions and lobbyists provided powerful disincentives to legislative action.[64] Given the constitutional and political obstacles, it is not surprising that Congress was slow to enact legislation authorizing some form of injunctive relief to remedy police abuse.[65]

In the fall of 1991, after hearing numerous experts on police use of excessive force,[66] House Democrats introduced the Police Accountability Act, which prohibited police officers from engaging in a "pattern or practice" of conduct violative of civil rights, and authorized the Attorney Gen-

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work on a day to day basis) . . . ; victims are more readily subject to impeachment . . . ; and juries are inclined to give the benefit of the doubt to the police").

61. See, e.g., Martin Berg, Chronology of the Case, L.A. Daily J., Feb. 3, 1992, at 8 (reporting on the uproar caused by the rebroadcast of the tape). After the four officers were acquitted of state law charges arising from the incident, week-long riots ensued in which 58 persons were killed and 2,283 injured. See Louis Sahagun & Carla Rivera, Jittery L.A. Sees Rays of Hope, L.A. Times, May 3, 1992, at A1; Toll from the Riot, USA Today, Aug. 6, 1992, at 9A.

62. The federal courts' standing jurisprudence includes not only the constitutional dimension but also a prudential dimension of "judicially self-imposed limits on the exercise of federal jurisdiction." Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). These prudential limits "can be modified or abrogated by Congress." Id. (citation omitted).

63. While Congress can completely abolish prudential standing requirements, it cannot legislate around constitutional standing requirements. See Warth v. Seldin, 422 U.S. 490, 501 (1975).

64. See Miller, supra note 59, at 162 (discussing rising national concerns over crime and violence during this period).

65. See id. (noting that the largely-Democratic Congresses of the 1980s and 90s "mounted no serious attempt to pass legislation" authorizing injunctive relief to remedy police abuse).

66. See Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 170–75 (1992) [hereinafter 1991 Police Brutality Hearings] (testimony of Yale Law School Professor Drew S. Days III). Others tesitifying included Paul Hoffman, Legal Director of the ACLU Foundation of Southern California, John R. Dunne, Assistant Attoruey General of the Civil Rights Division, Representatives Washington and Edwards, and Professor James J. Fyfe.

eral and victims of such conduct to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."[67] The Act was incorporated into the Omnibus Crime Control Act of 1991 as Title XII.[68]

The provision granting the Attorney General standing to seek injunctive relief substantially enhances the Justice Department's authority with regard to local police affairs by affording the Civil Rights Division a statutory basis for intervening in police "patterns or practices" in ways analogous to statutes that have authorized federal government intervention in other spheres. For example, the Department of Justice has brought many school desegregation,[69] employment discrimination,[70] public housing,[71] and prison condition cases under specific congressional authorization.[72]

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67. See H.R. 2972, 102d Cong. 2 (1991). The Police Accountability Act of 1991 was only one of many bills put forth by members of Congress to address the problem of police misconduct. See, e.g., 1991 Police Brutality Hearings, supra note 66, at 26 (statement of Rep. Washington) (suggesting the addition of a specific reference to tbe protection of civil liberties of citizens in the police officer oath of duty); id. at 131 (statement of Rep. Edwards) (suggesting the amendment of 18 U.S.C. §§ 241, 242 to increase effectiveness of criminal prosecutions against police officers).

68. See H.R. 3371, 102d Cong. §§ 1201–1204 (1991); see also H.R. Rep. No. 102-1085, at 65 (1993) (describing the incorporation of H.R. 2972 into H.R. 3371).

69. Many school desegregation cases were brought under authorization of the Civil Rights Act of 1964, § 407, 42 U.S.C. § 2000c-6 (1994). This section of the statute authorizes the Attorney General to sue on hehalf of public school or college students for the purpose of assuring their Fourteenth Amendment rights and "the orderly achievement of desegregation in public education." Id. However, the Act requires that parents of the affected class file a written complaint to the Attorney General alleging Fourteenth Amendment violations and that the Attorney General further certify that the signers of the complaint are themselves unable, either because of expense or danger, to maintain the action on their own. See id. Therefore, § 2000c-6, unlike § 14141, allows some role for private plaintiffs in the enforcement of federal laws.

70. 42 U.S.C. § 2000e-6 authorizes the Attorney General to bring employment discrimination actions when a "pattern or practice" of discrimination is found to exist. In 1974, authority to bring such suits was transferred from the Justice Department to the Equal Employment Opportunity Commission ("EEOC"). See 42 U.S.C. § 2000e-6(c) (1994); see also International Bhd. of Teamsters v. United States, 431 U.S. 324, 329 n.1. (1977).

71. The fair housing provisions of the Civil Rights Act of 1968 grant the Attorney General authority to seek injunctive relief against any "pattern or practice" of discrimination in housing or any denial to a group of persons of any right granted by the Act if such denial "raises an issue of general public importance." 42 U.S.C. § 3614(a) (1994).

72. While courts have generally assumed that Congress has authority to grant standing to the Attorney General in a range of circumstances, it has also been held that the Attorney General is entitled to sue for injunctive relief where no statutory authority exists. See, e.g., United States v. Brand Jewelers, Inc., 318 F. Supp. 1293, 1295–97 (S.D.N.Y. 1970) (reviewing various grounds upon which the United States may sue for injunctive relief in the absence of statutory authority); but see United States v. City of Philadelphia, 644 F.2d 187, 190–92 (1980) (dismissing complaint brought by Attorney General against Philadelphia Police Department, police officials, and City of Philadelphia for alleged civil rights violations, on the grounds that the Attorney General lacked standing to bring suit to enforce the civil rights of third persons, absent an express grant by Congress).

However, granting victims of police abuse the same power was immediately controversial. But in response to the Rodney King incident and the perceived failure of traditional legal sanctions to curtail police abuses, the drafters of the Police Accountability Act felt it necessary to experiment with new legal theories to reform the way police departments conducted themselves.[73] In this way, the drafters hoped that extending the authority to initiate pattern or practice suits to individuals as well as to the federal government would increase both the reach and significance of the legislation. And, in context, this decision makes great sense: After twelve years of Republican control of the executive branch, Democratic members of Congress were reluctant to entrust enforcement solely to the Justice Department.

The private standing provision of Title XII was immediately attacked by opponents as a recipe for frivolous and harassing lawsuits. In particular, police advocates and conservative lawmakers feared the citizen suit provision would be abused: "While the Attorney General migbt be expected to exercise restraint . . . [a]ny individual who feels aggrieved by conduct that [he/she] perceives to be part of a pattern or practice can file a suit that will be expensive and time-consuming to defend against."[74] These and other political pressures[75] threatened the saleability of the provision and the Conference Committee eventually compromised by eliminating the citizen suit provision.

This and other compromises failed to win over opponents, and Title XII eventually died.[76] In 1994 however, the provision was quietly resurrected when Congress enacted the Violent Crime Control and Law Enforcement Act.[77] This legislation, more popularly remembered for putting one hundred thousand additional police officers on the streets, also included a provision authorizing the Attorney General to bring civil actions for equitable and declaratory relief against any police department

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73. For example, in addition to "pattern or practice" legislation, members of Congress suggested a host of other bills. See, e.g., 1991 Police Brutality Hearings, supra note 66, at 26 (suggesting various bills aimed at protecting civil rights of citizens vis-a-vis police).

74. Terence Moran & Daniel Klaidman, Police Brutality Poses Quandary for Justice Dept., Legal Times, May 4, 1992, at 1 (quoting a letter from Assistant Attorney General W. Lee Rawls to Representative Henry Hyde). As Marshall Miller notes, however, nay-sayers were concerned not only with frivolous "pattern or practice" litigation, but also meritorious suits: "[I]ndividual standing to bring 'pattern or practice' suits presented a much greater danger of shifting control over police practices from legislators, mayors, and police chiefs to federal judges than granting the Attorney General such standing." Miller, supra note 59, at 175.

75. See Moran & Klaidman, supra note 74, at 1 (discussing political opposition from the Bush Justice Department and police advocacy groups that led to the demise of Title XII).

76. See Joan Biskupic, Crime Measure Is a Casualty of Partisan Skirmishing, 49 Cong. Q. Wkly. Rep. 3528, 3528–30 (1991).

77. See S. Res. 1488, 103d Cong. (1993) (enacted). The bill was introduced by Senator Joseph Biden.

engaged in an unconstitutional "pattern or practice."[78] This marked, in the words of one commentator, "the first time Congress [had] invested the Justice Department with explicit statutory authority to work proactively to change policies and practices in police departments with records of misconduct."[79]

Markedly absent from § 14141 was the provision authorizing private victims of police violence and misconduct to seek injunctive relief.[80] Therefore, victims of unconstitutional police patterns or practices were left without a right to sue or intervene in litigation directed at eradicating the problem of unconstitutional police conduct.

Section 14141(a) declares that "[I]t shall be unlawful for any governmental authority, or agent thereof . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Subsection (b) provides the sole method for enforcing the prohibition: "Whenever the Attorney General has reasonable cause to believe that a violation of paragraph [(a)] has occurred, the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."

A. *Enforcement Under § 14141*

This legislation gives the Justice Department a new role in holding police departments accountable to constitutional norms, though it may be a role the Department is neither comfortable nor willing to play.[81] At the time of this writing, the Justice Department has brought only three "pattern or practice" suits under this legislation, two of which resulted in complex decrees requiring the defendant police departments to take certain affirmative steps to deter future constitutional violations and fix existing structural problems.[82] While the Department is also reportedly in-

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78. See Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 2071 (1994) (codified at 42 U.S.C. § 14141 (1994 & Supp. 1998)).

79. Miller, supra note 59, at 150.

80. In reference to the original Police Accountability Act, the House Judiciary Committee had termed private standing "necessary, especially in situations where the Department of Justice does not act." H.R. Rep. No. 242-77, at 138 (1991). Yet, in enacting the 1994 bill, Congress adopted the 1991 Conference Committee's compromise version, which dropped the private cause of action.

81. Prior to the enactment of § 14141, police abuse experts had frequently charged that the Justice Department "plays virtually no active role in holding local police accountable for abiding by the Constitution." Jerome H. Skolnick & James J. Fyfe, Above the Law 211 (1993).

82. The suits were brought against the Pittsburgh, Pennsylvania; Steubenville, Ohio; and Columbus, Ohio police departments. See United States v. City of Steubenville, C2-97-966 (S.D. Ohio Sept. 3, 1997) (consent decree entered); United States v. City of Pittsburgh, No. 97-0354 (W.D. Penn. Apr. 16, 1997) (consent decree entered); Mark Ferenchik and Doug Caruso, Coleman Listens to Protesters' Concerns, Columbus Dispatch, Mar. 22, 2000, at 8E (reporting that the Justice Department has sued the Columbus Police Department over alleged civil rights abuses). The Justice Department is also reportedly

vestigating other police departments,[83] no additional suits have been brought.

The first "pattern or practice" investigation was brought against the Pittsburgh police force in 1996, after the high-profile death of an African-American businessman at the hands of police officers and a subsequent class-action lawsuit, brought by community leaders and the ACLU, focused national attention on the city's police problems.[84] After a lengthy and public investigation of police practices and a threat of a lawsuit, the

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negotiating a settlement with the New Jersey state troopers over allegations of racial profiling arising out of the April 1998 incident in which two white New Jersey state troopers opened fire on a car carrying four black and Latino men on their way to a college basketball game, wounding three of them. See Jerry Gray, New Jersey Plans to Forestall Suit on Race Profiling, N.Y. Times, Apr. 30, 1999, at A1; Ron Howell, Sharpton: 10 Days in Jail For Protest Over Profiling, Newsday, Mar. 9, 2000, at A32.

83. The Justice Department is also currently investigating police departments in New Orleans; Washington, D.C.; New York; Orange County, Florida; Riverside, California; and Eastpointe, Michigan. See Larry Bivins, Justice Dept. Implemented Measures to Fight Police Abuse, Gannett News Service, May 5, 1999, available in 1999 WL 6967749; see also Deborah Orin et al., Feds Probe NYPD in Wake of Amadou, N.Y. Post, Mar. 19, 1999, at 4–5 (reporting Justice Department "blockbuster" announcement of "pattern and practice" investigation of Police Department's Street Crimes Unit following police shooting death of African immigrant); Oralandar Brand-Williams, Black Drivers Say They're Targets of Suburban Cops, Detroit News, April 15, 1999 (reporting that Eastpointe, Michigan is under investigation by Justice Department on allegations of racial profiling); Justice Department Seeks Deal Over New Orleans Police Oversight, Saturday St. Times, Apr. 3, 1999, at B1 [hereinafter New Orleans Police Oversight] (reporting on the Justice Department's five-year investigation of the New Orleans police force and its efforts to convince the city to enter into a consent decree); David Rosenzweig, U.S. Launches Probe of Police in Riverside, L.A. Times, July 9, 1999, at A1 (citing police shooting death of Tyisha Miller as cause of federal investigation to determine whether there are unconstitutional "patterns or practices" within the Riverside police department).

84. See Dep't of Justice, Press Release, Justice Department Reaches Agreement with Pittsburgh Police Department (Feb. 26, 1997) <http://www.usdoj.gov.opa/pr/1997/February97/083cr.htm> (on file with the *Columbia Law Review*). The Justice Department began investigating the Pittsburgh police department in April 1996 after the death of Jonny Gammage, a cousin of a football player for the Pittsburgh Steelers. Gammage died of suffocation after police officers stopped him for erratic driving and pinned him face-down on the ground. See Jim McKinnon, Cops Charged in Death of Black Motorist in Pennsylvania, Newsday, Nov. 28, 1995, at A18 (reporting that five white policemen were charged with the death of Gammage, who was stopped hy police while driving a Jaguar belonging to his cousin, a professional football player). Following Gammage's death, the Pittsburgh branch of the ACLU filed a federal civil rights class action lawsuit against the city and its police department alleging a pervasive patteru of police misconduct by Pittsburgh officers. The ACLU then provided substantial assistance to the Justice Department in its investigation, giving the Department access to more than four dozen complaints about police misconduct that became, in large part, the basis for the Department's case. See Press Release, ACLU Adds Ten Plainuffs to Pittshurgh Police Misconduct Class Action Law Suit (Feb. 24, 1997) <http://www.aclu.org/news/n022497b.html> (on file with the *Columbia Law Review*) (noting ACLU's cooperation with Justice Department investigation). The Justice Department was also alerted to the fact that Pittsburgh police officers had been sued more than 100 times for civil rights violations during the 1990s. See Sari Horwitz, Officers Go Too Far, Wash. Post, Nov. 19, 1998, at A23.

city chose to enter into a consent decree with the Justice Department rather than face a federal trial.[85] The forty-page, detailed decree requires the city, among other things, to institute a computerized "early-warning system" to flag problem officers;[86] mandates that officers generate detailed reports each time they use force, perform searches or stop drivers;[87] requires that every complaint against a police officer is investigated and that reports detailing investigations are filed in the system;[88] and establishes procedures for reviewing officers' performance, complaints, arrests, and other aspects of job performance, as well as external audits of police supervisors' responsibilities to maintain order in the system.[89] Pittsburgh is required to have "at least 95 percent of the changes ordered by the decree in effect for two consecutive years before the decree can be lifted."[90]

The Steubenville, Ohio consent decree, entered into a year later, is patterned closely on the Pittsburgh decree,[91] and also calls for more training, more detailed reporting, and stronger investigations of citizens' complaints.[92] Most recently, the Department filed a § 14141 pattern or practice suit against the Columbus, Ohio police department.[93] The Columbus case is currently in litigation, as the local police union and the

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85. See United States v. City of Pittsburgh, No. 97-0354 (W.D. Penn. Apr. 16, 1997) (consent decree entered).

86. The system is designed to track 16 different data points for each individual officer, including complaints, arrests, traffic stops, training, and sick time. Under the decree, officers with three or more misconduct complaints in two years—whether sustained or not—are subject to counseling, transfer, or reassignment. See id.

87. See id.

88. See id.

89. See id.

90. Michael A. Fuoco, A Long Wait for Justice, Pittsburgh Post-Gazette, Apr. 4, 1999, at A1 (reporting on the requirements imposed by the consent decree and delays in achieving these goals).

91. According to former Deputy Assistant Attorney General James Turner, "[i]nstitutional memory" may have contrihuted to the Justice Department's decision to file suit against the Steubenville Department:

> In the 1970s, the [Department] indicted several Steubenville officers for systematically abusing prisoners, usually blacks, in the lockup. The evidence was compelling, and, at the trial, most of the police force showed up each day, in dress uniforms, to demonstrate their solidarity with the defendants. All were acquitted and the reputation of the force in the minority community plunged even further when the lead defendant was named chief of police. He is still the chief and is a signatory to the current consent decree.

James Turner, Police Accountability in the Federal System, 30 McGeorge L. Rev. 991, 1014 n. 133 (1999).

92. See United States v. City of Steubenville, C2-97-966 (S.D. Ohio Sept. 3, 1997) (consent decree entered).

93. See Paul Souhrada, Officers' Group Accuses Prison System of Discrimination, The Plain Dealer, June 5, 1999, at 5B; Jodi Nirode, A Force at the Table, Columbus Dispatch, Dec. 21, 1999 (reporting that the Justice Department investigation into the Columbus police department uncovered evidence of a pattern or practice of violating civil rights by conducting illegal searches, making false arrests, and using excessive force).

city have filed a motion to dismiss the government's complaint on the grounds that § 14141 is unconstitutional.[94]

B. *Efficacy of § 14141*

Although it may be too early to evaluate the effectiveness of these decrees upon the respective police departments' practices,[95] it is incontrovertible that federal intervention in Pittsburgh, Steubenville, and Columbus has forced those departments and municipalities to take a hard look at police practices.[96] A better question, perhaps, is whether the Justice Department is doing enough, or put differently, whether three cases in five years against relatively small police departments is what Congress intended in enacting this legislation.[97]

Many community leaders view the Justice Department's efforts thus far as insufficient.[98] Given the number of recent, high-profile allegations of police brutality and misconduct, the fact that only three suits have been brought seems to reflect the lax enforcement of the statute. This view is bolstered by the fact that the Justice Department has been "investigating" pattern or practice violations in at least twenty other police de-

94. See Feds Make Case For Lawsuit Against Police in Columbus; FOP, City Want Court to Dismiss Abuse Claim, Cincinnati Enquirer, Mar. 14, 2000, at B02 (reporting that the Fraternal Order of Police and the city of Columbus have argued that § 14141 is unconstitutional, "the lawsuit is too vague, and that it seeks solutions that are outside the government's authority").

95. See Livingston, supra note 60, at 817 (noting that "[t]he law is too recent for [any] assessment, and its future impact will very much depend on how it is enforced").

96. For example, civil rights attorney James McNamara, who has handled police brutality cases in Steubenville, says that after the city entered into the consent decree with the Justice Department in 1996, he stopped getting calls to represent victims of alleged police brutality. "I think the consent decree in Steubenville—the one I'm most familiar with—has forced the department there to take a closer look at how it does things," he said. Doug Caruso and Jodi Nirode, Police Union Wary of Consent Decree, Columbus Dispatch, Aug. 22, 1999, at 1C; see also Rep. Bobby L. Rush, Should Washington Step In to Curb Police Brutality?, Insight Magazine, May 17, 1999, at 24 (quoting Vic Walczak, director of the ACLU's Pittsburgh chapter: "As the first and only major city that operates under a consent decree, Pittsburgh has done quite well."); David Voreacos, Peek at N.J. Troopers' Future? Federal Cuffs Chafe Pittsburgh Police, The Record, March 8, 1999, at A1 (quoting a black councilman that the Pittsburgh decree "has improved" relations between police and the public and that "police behavior is beginning to change," while also noting that police advocates feel that "the federal government is trying to micromanage the city").

97. For example, Steubenville City Manager Gary Dufour has said: "We're an awfully small community. You see all these problems that have come up at the police departments in Los Angeles and New York and New Orleans, and you've got to wonder, why us?" Eric Lichtblau, U.S. Low Profile in Big-City Police Probes Is Under Fire: Critics Say Justice Dept. Boldly Pursues Misconduct Cases in Smaller Towns But Goes Slow on Larger Inquiries, L.A. Times, Mar. 17, 2000, at A1.

98. See, e.g., Rush, supra note 96, at 24 (noting that civil rights leaders met with Attorney General Janet Reno to request that the Justice Department take a more "proactive stance in reviewing police brutality," including withholding federal law enforcement monies from police departments with unusually high numbers of brutality complaints and development of uniform standards for police-civilian review boards).

partments—mainly in large, urban cities—since 1995, yet no reports, much less lawsuits, have resulted.[99] The Attorney General herself seems aware that her Department may not be enforcing the statute rigorously enough—in May 1999, she "announced that the department would become more aggressive in using its power [under § 14141] to sue to extract agreements with other police agencies."[100]

C. *Possible Explanations for the Paucity of § 14141 Suits*

There may be a number of explanations for the paucity of "pattern or practice" cases brought by the Justice Department in the past five years. First, it is at least theoretically possible that these three police departments are the only departments whose practices are sufficiently unconstitutional to require federal intervention. However, with incidents involving such high-profile and potentially unconstitutional "patterns or practices" by, for example, the Street Crimes Unit of the New York City Police Department in the Amadou Diallo case[101] and the Rampart Division of the Los Angeles Police Department in the recent scandal involving widespread police corruption,[102] this explanation seems unduly optimistic. More likely, Pittsburgh, Steubenville, and Columbus were the "low-hanging fruit" that the Justice Department could quickly and easily reform, while major, urban police departments presented a much greater challenge.

Further, many of the reforms required in the Pittsburgh and Steubenville decrees—including the implementation of an early-warning system to identify "problem" officers and better reporting of civilian complaints—are not in place in other police departments currently under

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99. "Indeed, while federal officials have recently stepped up their four-year inquiry into broad patterns of misconduct at the Los Angeles Police Department, critics are left to wonder how the Justice Department missed warning signals leading up to [the Rampart Division scandal], the worst corruption scandal in LAPD history. And they question whether federal authorities have the resources—or the will—to move aggressively now in cleaning up the embattled force." Lichtblau, supra note 97, at A1.

100. Bivins, supra note 83.

101. Diallo, an unarmed 22-year old immigrant from Guinea, was shot dead on February 4, 1999 outside his Bronx apartment building by four NYPD officers, who fired 41 shots and hit Diallo 19 times. See, e.g., Rocco Parascandola et al., Rudy Tells Rookies: Don't Forget Respect, N.Y. Post, Feb. 19, 1999, at 18. The four officers indicted for this crime were acquitted by an Albany jury on February 25, 2000.

102. In September 1999, the Los Angeles Police Department's criminal investigation into the Rampart Division—a cadre of officers charged with law enforcement in one of the toughest neighborhoods in the city—uncovered evidence of unjustified shootings, beatings, drug dealing, planting of evidence, false arrests, witness intimidation, and perjury by police officers. Eleven criminal convictions already have been overturned as a consequence of the investigation and, as of January 25, 2000, 20 officers have resigned, been relieved of duty, suspended without pay, or fired in connection with the scandal. See Matt Lait & Scott Glover, D.A. Seeks to Void 10 More Rampart Cases, L.A. Times, Jan. 25, 2000, at A1; Lichtblau, supra note 97, at A1.

investigation by the Justice Department.[103] Thus, if the reforms outlined in the Pittsburgh and Steubenville consent decrees reflect the Department's vision of the minimum policies and procedures required to deter systemic police misconduct,[104] it seems strange, to say the least, that other police departments with similar or worse histories of police misconduct have not been required to meet this minimum standard.

It is also theoretically possible that the small number of § 14141 cases reflect an executive determination "to make sure the first cases are sure, solid cases that help establish good law."[105] One problem with this explanation is that the Justice Department has not evinced any concern with "making law"; rather, it has entered into consent decrees with two police departments sued thus far.[106]

More compelling explanations for the ineffectiveness of the current § 14141 regime lie, predictably, in money and politics. The limitation on available resources to detect, investigate, and litigate "pattern or practice" cases is severe by any measure,[107] and reveals perhaps that the Department of Justice does not view itself as the "front line" in "combating instances of police abuses."[108] As of this writing, the Department of Justice

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103. See Livingston, supra note 60, at 852.

104. See id. at 859 (noting that the Pittsburgh and Steubenville consent decrees may reflect an effort by the Justice Department to implement national standards of police conduct).

105. Mark Curriden, When Good Cops Go Bad, 82 A.B.A. J. 62, 63 (May 1996) (quoting Deval Patrick, deputy U.S. Attorney General in charge of the Civil Rights Division).

106. Indeed, both the Pittsburgh and Steubenville consent decrees came about after intense negotiations between the Justice Department and city officials—negotiations which took place *before* the government actually filed the threatened "pattern or practice" lawsuits. And, in both cases, the consent decrees were filed in conjunction with the filing of the Justice Department's complaint. See Livingston, supra note 60, at 825. It therefore seems apparent that the Justice Department is not particularly interested in litigating issues such as what constitutes an unconstitutional "pattern or practice," or under what circumstances a police department may be found to have engaged in or condoned such practices. Thus, the argument that the Justice Department is seeking to establish strong precedent for "hard" cases that may arise in the future seems unsupportable.

107. See Lichtblau, supra note 97, at A1 (noting that the Justice Department may not "have the resources to get [its] hands around the problem" of widespread police misconduct by local law enforcement).

108. See 1991 Police Brutality Hearings, supra note 66, at 3 (statement of John R. Dunne, Assistant Attorney General, Civil Rights Division). The Department's vision of itself as "more of a backstop" on the issue of preventing police brutality was also reflected in the number of lawyers assigned to civil rights prosecutions and the number of cases brought. Id. at 3, 321. Of the 80,747 positions at the Department of Justice in 1991, only 44 were slated for civil rights prosecution. See id. at 321. And though the Department received more than 8000 and investigated more than 3000 complaints of police misconduct per year in the late 1980s and early 1990s, federal prosecutors annually pursued indictments in only about 50 to 60 cases. See id. at 247, 254–80 (listing cases in which indictments were filed between October 1984 and September 1990). Furthermore, between 1985 and 1992, while the staffing levels at the Department grew by 40%, the number of civil rights prosecution positions declined by 2%. See id. at 321.

assigns only twenty-six attorneys working full or part-time to the Special Litigation Unit, which is responsible for "pattern or practice" cases, among other things.[109] The capacity to detect and investigate these cases is even more hamstrung by resource limitations; the Department currently assigns only 15 F.B.I. agents to investigate local police departments' patterns and practices.[110] In the absence of a massive (and politically improbable) infusion of capital resources into the detection and investigation of unconstitutional police patterns and practices,[111] the current § 14141 regime appears doomed from the outset.

Attacking local police departments is also politically perilous.[112] Most obviously, the political interests of a President and his party are generally ill-served by alienating local law enforcement agencies.[113] Likewise,

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109. Steven H. Rosenbaum currently heads the Special Litigation Unit. See Bruce Alpert, U.S. Keeps Up Probe of NOPD, New Orleans Times-Picayune, Apr. 2, 1999, at A1; see also New Orleans Police Oversight, supra note 83, at B5 (reporting that President Clinton has asked Congress for funding to hire an additional 16 people to deal with the backlog of police brutality cases referred to the Justice Department).

110. See Alpert, supra note 109, at A1.

111. Similarly, during debates on the 1986 Amendments to the False Claims Act, which gave greater financial incentives to qui tam relators to bring suits against violators, the issue of limited government resources played an important role. As one representative noted:

> The public will be well served by having more legal resources brought to bear . . . . Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain. I do not say this to impugn the ability or character of Government attorneys, but only to reflect the harsh reality of today's funding limitations of Government activities in all areas which include the budgets of the government's prosecuting agencies. If the government can pass a law that will increase the resources available . . . without paying for it with taxpayers' money, we are all better off. [We must] deputize ready and able people . . . to play an active and constructive role through their counsel.

132 Cong. Rec. H9388 (daily ed. Oct. 7, 1986) (statement of Rep. Berman).

112. In terms of politics, the Justice Department is often caught between the proverbial rock and hard place: If it determines not to bring a § 14141 suit against a police department alleged to have engaged in unconstitutional patterns and practices, civil rights and community leaders may charge that the government is pandering to police unions; if it does choose to bring a "pattern or practice" suit, local elected officials may charge that the Department is engaged in partisan politics. For example, as the Justice Department currently considers whether to file an action against the New York City Police Department, New York City Mayor and former Senate-hopeful Rudy Giuliani has argued to the press that a Justice Department "pattern or practice" suit against the NYPD would be motivated by Hillary Clinton's run for the New York Senate seat. At a press conference, Giuliani observed, "I don't think that any administration has politicized the Justice Department more than the Clinton administration." Dividing the City, Wall St. J., Mar. 22, 2000, at A22. He added, "[I]f they proceed against the NYPD, it would be clear to everyone in the country that this was a political move." Id.

113. The support of the National Fraternal Order of Police, the union that represents law enforcement officers, was important to President Clinton's bid for reelection in 1996. See Michael K. Frisby & James M. Perry, Four More Years—Clinton Beats Dole But He Doesn't Gain A Democratic Congress, Wall St. J., Nov. 6, 1996, at A1 (reporting that "[t]he

an Attorney General has much to lose and little to gain by attacking local law enforcement in an era where federal-state cooperation, as exemplified by narcotics and other task forces, has become a standard tool of law enforcement.[114] In addition, lurking just beneath the surface is the notorious reluctance of federal law enforcement officials to prosecute their municipal brethren[115]—a phenomenon that has been well-examined in the area of criminal prosecutions[116] but is likely to be at work in the arena of civil enforcement as well.[117]

Relatedly, the current § 14141 regime subjects "pattern or practice" enforcement to the shifting sands of political will. Recall that the liberal drafters of the Police Accountability Act—§ 14141's predecessor—were loathe to entrust enforcement solely in the Republican-controlled Department of Justice and therefore authorized aggrieved individuals to bring suit as well.[118] These legislators understood that political tides would have significant impact on enforcement of the statute where the sole authority to bring suit is vested in the Attorney General.

One pointed example of the distortive influence of politics in federal executive enforcement of civil rights was the failure of the Reagan Administration to vigorously enforce the Civil Rights of Institutionalized Persons Act ("CRIPA")[119]—a law authorizing the Attorney General to pursue injunctive relief to remedy unconstitutional patterns and practices in prisons. As more than one commentator has noted, "[t]he failure of the Civil Rights Division to enforce [CRIPA] during the Reagan/Bush

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skill and determination with which the Clinton team pursued the [support of the police] was evident in the campaign to win the endorsement of the Fraternal Order of Police, which had backed George Bush in 1992," and noting that the President's "wooing of police groups began shortly after Mr. Clinton took office in 1993").

114. See infra text accompanying note 195 (discussing the rise of joint federal-state cooperative efforts in law enforcement).

115. See generally Gilles, supra note 17, at 63–71 (discussing the impact of the police "code of silence" on officers' reluctance to publicize or bring attention to fellow officers' misconduct).

116. See Rudovsky, supra note 60, at 499. Rudovsky notes:

> [P]rosecutors do not like prosecuting fellow law enforcement officers (with whom they work on a day to day basis); evidence of such misconduct is often shielded by the code of silence; victims are more readily subject to impeachment . . .; and juries are inclined to give the benefit of the doubt to the police.

Id.

117. See Recent Cases, Constitutional Law—Searches and Seizures—Warranted Search of Party Not Suspected of Criminal Behavior is Unreasonable when Subpoena Not Shown to Be Impractical, 86 Harv. L. Rev. 1317, 1327 (1973) (noting that available remedies for police misconduct, including "federal 'tort' actions . . . are generally thought to be ineffective" because federal civil enforcement is uncommon or lax).

118. See supra text accompanying notes 80–91 (reviewing the doomed legislative/political history of the Police Accountability Act).

119. See 42 U.S.C. § 1997 (1980).

years underscores the fact that giving the Justice Department such authority will not ensure meaningful federal enforcement."[120]

Whatever the explanation for the inadequate number of "pattern or practice" cases brought by the government, there is a pervasive belief in the most affected communities that § 14141 in its current form is simply not effective.[121]

D. *Remedying the Defects in the Current § 14141 Regime*

It follows from the foregoing discussion that any proposal for reforming § 14141 must address the financial and political obstacles to effective enforcement of unconstitutional police practices. Of course, money and politics have been familiar obstacles to virtually all institutional reform projects, from school and housing desegregation to prison and mental hospital reform.[122] But the structural reformation of these institutions did not depend on the centralized allocation of capital resources or on the shifting winds of political sentiment.[123] Instead, the structural reform of all of these institutions was achieved, in large measure, through enforcement actions initiated and financed by private litigants.

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120. Paul Hoffman, The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. Cal. L. Rev. 1455, 1524 n.279 (1993); see also Miller, supra note 59, at 176 (noting that the lax enforcement of CRIPA "demonstrates that providing the executive branch with statutory authority to enjoin abuses does not necessarily translate into enforcement").

121. See, e.g., Rush, supra note 96, at 24 (noting that civil rights leaders met with Attorney General Janet Reno "to request that the Justice Department take a proactive stance in reviewing police brutality," including "withholding federal law-enforcement monies from police departments that have an unusually high number of brutality complaints" and developing uniform standards for police-civilian review boards).

122. See, e.g., Block v. Rutherford, 468 U.S. 576, 584–85, 588 n.9 (1984) (holding that conducting periodic "shakedowns" of prisoner's cells and denying prisoners contact visits did not violate the Fourth or Fourteenth Amendments); Rhodes v. Chapman, 452 U.S. 337, 347–49 (1981) (concluding that the challenged prison policy—double-bunking in 63-square-foot cells—did not violate the Eighth Amendment and vacating lower court's injunction); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981) (noting the potentially intrusive federal oversight involved in enforcing reformist remedies against state institutions); Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976) (holding that political obstacles to improving conditions in state prisons were not a defense to claims of cruel and unusual punishment), aff'd as modified sub nom., Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd in part and remanded sub nom., Alabama v. Pugh, 438 U.S. 781 (1978); see also Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 17–25, 171–203 (1998) (reviewing various political reasons for opposing judicial reform of prisons).

123. However, some commentators have noted that structural reform litigation in, for example, the school-desegregation cases was driven very much by significant changes in political and social sentiment in the 1950s and 1960s. See James S. Liebman, Desegregating Politics: "All-Out" School Desegregation Explained, 90 Colum. L. Rev. 1463, 1472 (1990) (discussing the "legal, intellectual, and moral bases for desegregation" of public schools).

As with schools, prisons, hospitals, and other institutions that have been the subject of reformative constitutional litigation, the effective reformation of unconstitutional police practices will necessarily be driven by the engine of private enforcement. First, with respect to resources, a regime of plaintiff-driven reform transcends governmental budgetary limitations by tapping the immense resources of the public at large[124]—or, more to the point, those members of the public most affected by unconstitutional patterns and practices. Relatedly, the massive governmental expenditures required to detect and investigate misconduct are no match for the millions of "eyes on the ground" that bear witness to constitutional violations. And of course, private litigants are generally impervious to the political constraints that have impeded the meaningful enforcement of § 14141.

In a related vein, Professor Debra Livingston has argued that § 14141 will prove effective only "when the police organization itself is involved in the process and, ultimately, when reform involves not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere."[125] In other words, "police reform works best when the police department itself can be brought along."[126] In suggesting a greater role for local police officers and supervisors in determining the breadth and scope of § 14141 remedies, Professor Livingston worries that, "[i]n the adversarial context of Section 14141 litigation . . . line officers may already be resentful and defensive about the charges leveled at their departments," and that these perceptions on the part of police officers may undermine the efficacy of § 14141 as a remedial tool.[127]

Just as Professor Livingston notes the necessity for police cooperation and involvement in achieving the goals of § 14141, there is also a need for citizen participation in the process of reforming problematic

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124. Similar arguments have been made in support of class actions, which enable plaintiffs to concentrate their resources to obtain higher-quality representation, reduce the burden on witnesses and courts, and level the playing field between plaintiffs and defendants. In this way, class actions also encourage private enforcement of the law. See, e.g., Paula Batt Wilson, Attorney Investment in Class Action Litigation: The *Agent Orange* Example, 45 Case W. Res. L. Rev. 291, 299–300 (1994) (positing that the costs of individual suits are too burdensome for average citizens to raise, so that class action suits tend to provide members with access both to courts and better counsel); see also Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv. L. Rev. 1143, 1144 n.3 (1983) (stating that while individual claims may be small, there may be a significant loss to society which should be redressed in class action litigation).

125. Livingston, supra note 60, at 848; see also David Dixon, Law in Policing: Legal Regulation and Police Practices 157 (1997) (noting that "external controls and accountability mechanisms (desirable as they are) cannot be expected to be effective unless police organizations are themselves involved in the process of control"); Skolnick & Fyfe, supra note 81, at 187 (arguing that lasting reform requires officers to adopt different systems and values).

126. Livingston, supra note 60, at 851.

127. Id. at 849.

police policies. In any effort to improve the interaction between the police and the policed, it is vital that both sets of voices are heard. If, as one scholar has noted, "reform can enhance accountability through the message[ ] it sends to the police . . . that greater accountability is desired by the community,"[128] then the community must have some role in determining the content of that reformative message.

The question, then, becomes: How do we tap the private resources, personal experiences, and community-based motivation that have engineered the great structural reform efforts of our time, given the constitutional barriers the Supreme Court has erected over the past two decades? Drawing on the statutory machinery developed in other areas of public/private litigation, the next section, Part III, will outline a model for amending § 14141 which effectively taps private resources to combat unconstitutional police practices. The following section, Part IV, will explore the historical roots of deputization in American law. Part V will then address the inevitable constitutional issues raised by this model.

III. THE DEPUTATION MODEL FOR PRIVATE ENFORCEMENT OF REMEDIES AGAINST UNCONSTITUTIONAL POLICE "PATTERNS OR PRACTICES"

The question of how to reintegrate private litigants in the enforcement of remedies against unconstitutional police "patterns or practices" can be answered in a variety of ways. The first, which proponents of the original Police Accountability Act unsuccessfully put forth in 1991, is a straightforward amendment to 42 U.S.C. § 14141 authorizing, in addition to the Attorney General, "all aggrieved persons" to sue to enjoin unconstitutional "patterns or practices."[129] In essence, such an amendment would pattern citizen suit provisions in many federal environmental statues[130] by directly expanding private standing to enforce federal law. While this is clearly the most direct method of giving private litigants a role in § 14141 litigation, it would raise insurmountable constitutional problems under the equitable standing rule of *Lyons*[131] since litigants could not prove a "substantial certainty" of future injury.[132]

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128. David H. Bayley, Accountability and Control of Police: Lessons for Britain, *in* Policing II 439, 444 (Robert Reiner ed., 1996).

129. See supra text accompanying notes 66–68 (discussing proposed "citizen suit" provisions of the Police Accountability Act).

130. Environmental citizen suit provisions generally authorize any "citizen," defined as "a person or persons having an interest which is or may be adversely affected," to commence suit to enforce statutory requirements against violators, or to require the government to perform a mandatory duty under the statute. See Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1994). Citizen suit provisions were first included in the Clean Air Act § 304, codified at 42 U.S.C. § 7604 (1994). For a comprehensive listing of environmental citizen suit provisions, see Sunstein, supra note 20, at 165 n.11.

131. See supra text accompanying notes 45–57 (discussing the equitable standing bar of *Lyons*).

132. Any such expansion of private citizen standing to sue police departments would be viewed as suspect by the current Court, which has generally treated cases involving

Alternatively, Congress might grant victims of unconstitutional police practices a *right* to be free of further injury, and vest these victims with the authority to seek injunctive relief against such practices. At first blush, this does not seem to violate *Lyons*: Whether or not there is a "substantial certainty" that the plaintiff will suffer future injury, this hypothetical statute allows her to protect her congressionally-declared "right" to be free of future harm by seeking injunctive relief against the unconstitutional practice.

Here again, however, recent Supreme Court standing jurisprudence poses an obstacle. In *Lujan v. Defenders of Wildlife*, the Court rejected the view that injury-in-fact is satisfied "by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right.'"[133] Under the Court's decision in *Lujan*, the mere legislative declaration of a

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police and minorities with little patience. For example, Professor Tribe contrasts *Lyons* with Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). He argues that in *Duke*, the Supreme Court brushed aside a more serious problem of standing to sue in order to reach the merits and affirm the constitutionality of the limitations in the Price-Anderson Act on tort damages for nuclear reactor accidents, while in *Lyons* the Court used the doctrine of standing opportunistically to deny a black man a needed remedy. See Tribe, supra note 11, at 106–07; see also Glen O. Robinson et al., The Administrative Process 229 (2d ed. 1980) (contrasting the upholding of standing in *Duke* with the denial of standing in two cases where low-income persons or their representatives were the plaintiffs).

133. 504 U.S. 555, 573 (1992). *Lujan* involved a challenge by an environmental group to a 1986 Department of Interior revision of regulations in the Endangered Species Act concerning consultation processes where federally-funded projects threaten endangered species. Specifically, two group members identified federally-funded foreign projects that threatened endangered species of particular interest. One member alleged that she had traveled to Sri Lanka to observe the habitat of the Asian elephant and leopard, which was jeopardized by a project funded by the Agency for International Development. Another member alleged to have "observed the traditional habitat" of the Nile crocodile and "intend[s] to do so again," but for American funding of a dam in Egypt which threatened the species. Id. at 563. The Eighth Circuit had granted the plaintiffs standing based on the provisions of the statute, which made clear that "'any person' may commence a suit to enjoin . . . violation of the [Act]." Defenders of Wildlife v. Lujan, 911 F.2d 117, 121 (8th Cir. 1990), rev'd, 504 U.S. 555 (quoting Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988)). The Court, however, found the plaintiffs' allegations fell short of the "imminent injury" standard for Article III standing. According to Justice Scalia, without "concrete plans," the affiants' profession of an intent to return to the places they had visited was "simply not enough": "'Some day' intentions . . . do not support a finding of 'actual or imminent' injury that our cases require." Id. at 564. Professor Sunstein poses a similar hypothetical based on the facts of *Lujan*: He asks us to

> suppose that Congress has given to all Americans a kind of beneficial legal interest in the survival of the Nile crocodile, at least in the sense that it has granted each of us a jointly held property right, operating against acts of the U.S. government that threaten to destroy the species.

Sunstein, supra note 20, at 205. Further, "suppose . . . that Congress has granted every American the right to sue to vindicate that property right." Id. As Sunstein concludes, notwithstanding the Court's analysis in *Lujan*, the Constitution does not bar such a congressional grant. See id.

right to be free of a particular "injury" is insufficient;[134] rather, the "injury" at issue must, within the standards developed by the Court, be "concrete," "particularized," and "not hypothetical."[135] Essentially, *Lujan* suggests that a widely generalized injury—even where authorized by statute—would be an insufficient basis for standing. Therefore, it is now far from obvious that Congress may establish rights the violation of which necessarily give rise to Article III standing.[136]

Commentators have—with great justification—sharply criticized the subjectivity of the Court's invalidation of statutory grants of standing, noting that the definition of a cognizable right or injury is now nothing more than whatever the current inhabitants of the Supreme Court believe that it is.[137] However, while the rule of *Lujan* may be woefully indeterminate and may often lead to conflicting results,[138] one thing seems fairly clear:

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134. *Lujan*, 504 U.S. at 564; see also Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

135. *Lujan*, 504 U.S. at 560–61 (noting that to have standing, the plaintiff must have suffered a "particularized" injury, meaning that "the injury must affect the plaintiff in a personal and individual way"); see also *Raines*, 521 U.S. at 830 (finding that members of Congress did not have standing to sue because they had not "alleged a sufficiently concrete injury"); Allen v. Wright, 468 U.S. 737, 752 (1984) (asking: "[i]s the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?"); O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (noting that "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'") (citations omitted).

136. See, e.g., Fletcher, supra note 22, at 233 (arguing that the Article III limitations on Congressional grants of standing "limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against"); Sunstein, supra note 20, at 166 (stating that after *Lujan*, Article III appears to forbid Congress from granting standing to "citizens" qua citizens); but see Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 Mich. L. Rev. 1793, 1806–08 (1993) (arguing that just as Congress cannot "delegate authority to individuals to regulate workplace safety," it cannot confer upon private citizens standing to enforce statutes through citizen suit provisions).

137. See, e.g., Christopher T. Burt, Procedural Injury Standing after *Lujan v. Defenders of Wildlife*, 62 U. Chi. L. Rev. 275, 285 (1995) (stating that the Court's procedural injury standard is "vague and provides little guidance for prospective plaintiffs and the lower courts"); Karl S. Coplan, Refracting the Spectrum of Clean Water Act Standing in Light of *Lujan v. Defenders of Wildlife*, 22 Colum. J. Envtl. L. 169, 225 (1997) (criticizing the majority opinion for retreating from "two decades of environmental standing doctrine"); Brian J. Gatchel, Informational and Procedural Standing After *Lujan v. Defenders of Wildlife*, 11 J. Land Use & Envtl. L. 75, 109 (1995); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power, 42 Duke L.J. 1170, 1188 (1993) (criticizing the scope of the decision and noting that "it is impossible to predict with confidence the scope and effect of the holding").

138. See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs., 120 S.Ct. 693, 704–05 (2000) (finding that an environmental group had standing to bring a citizen suit seeking both civil penalties and injunctive relief against a violator of the Clean Water Act); FEC v. Akins, 524 U.S. 11, 20–21 (1998) (finding that a group of voters had standing to bring suit under the Federal Election Campaign Act of 1971 to challenge the Federal Election

Any purported legislative grant of standing to enforce a "right" to be free of unconstitutional police practices—practices that could, in theory, befall any citizen—would likely be invalidated by the Court, as currently constituted.[139]

A. *A Proposal for Amending 42 U.S.C. § 14141*

The amendment proposed here would allow the Justice Department, in circumstances it deems appropriate, to authorize or deputize private individuals to bring "pattern or practice" suits where the government has declined, for whatever reason, to do so itself. And, as with any classic deputation scheme, this amendment would give the government the power to quash any private § 14141 suit at any stage. As such, the proposed deputation model gives private citizens an incentive to seek government authorization to bring "pattern or practice" suits, while also sustaining the government's interests in controlling public law litigation.

At the outset, alleged victims of an unconstitutional police practice would file a petition with the Justice Department setting out the basis for their claims, alleging facts indicating the existence of an unconstitutional "pattern or practice,"[140] and delineating other damages claims under, for example, 42 U.S.C. § 1983.[141]

The Justice Department may then investigate the allegations to determine their factual and legal sufficiency and, at that point, would have three options in any individual case. First, the Justice Department could itself bring a "pattern or practice" suit under § 14141 based on the initial information provided in the citizen's petition. In this scenario, the case

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Commission's refusal to compel a lobbying organization to disclose information); see also Cass R. Sunstein, Informational Regulation and Informational Standing: *Akins* and Beyond, 147 U. Pa. L. Rev. 613, 616 (1999). Sunstein argues that the *Akins* Court

> appears to have held [in contradiction to recent precedent] that any citizen has standing to sue under FECA; that Congress is permitted to grant standing to all or many citizens, even if they are seeking to redress a 'generalized grievance'; that the key question, in cases involving information or anything else, is what the relevant source of law actually says; and that Article II is no barrier to suits brought by citizens whose interests are not substantially different from those of the citizenry as a whole.

Id.

139. But see Sunstein, supra note 138.

140. I call this instigating document a "petition," in part because of the almost-forgotten clause at the end of the First Amendment which gives to the citizenry the right to "petition the Government for a redress of grievances." U.S. Const. amend. I. While the model proposed in this Article does not rely squarely on this phrase for support, this First Amendment right to petition is a powerful and underused source of authority that deserves greater scholarly attention.

141. This model envisions that only actual victims of an unconstitutional police pattern or practice could petition the government. In other words, third parties and other concerned but uninjured citizens would not have a right to seek relief under this proposal. This parallels the requirement in qui tam provisions of the FCA which authorize only those individuals with "direct and independent knowledge" of the alleged fraud to bring suit. 31 U.S.C. § 3730(e)(4)(B) (1994 & Supp. 1998).

would proceed in a fashion similar to cases brought in Pittsburgh, Steubenville, and Columbus, with federal officials negotiating with or litigating against particular police departments and municipalities to identify and remedy unconstitutional "patterns or practices."

Second, the Justice Department could quash the petition. After investigating the underlying allegations, the Department could relay to the petitioner that it has elected not to proceed with the case or to allow the petitioner to proceed, and state its reasons for so deciding. In this scenario, the victim of the allegedly unconstitutional police practice could go forward with any private civil suit for damages, but would have no right to seek injunctive relief.[142]

Finally, the Justice Department could decide not to pursue the § 14141 suit, but to instead authorize the private petitioner-deputy to litigate the matter. In other words, the Justice Department could *deputize* private plaintiffs, authorizing them to bring viable "pattern or practice" cases against local police departments in appropriate situations. These deputized private individuals would bring suit for injunctive relief on behalf of the government, although they may derive ancillary benefits.[143] And, as with any deputation regime, the Attorney General would continue to have the authority to quash, dismiss, or settle the case over any objections by the petitioner-deputy at any point in the litigation.

B. *Doctrinal Antecedents of the Deputation Model*

The essential architecture of the regime proposed here is familiar in American law. The deputation model proposes that private plaintiffs first petition the Justice Department for relief from unconstitutional police practices. This is a role that the Justice Department has played in the context of school desegregation and prison reform cases.[144] And indeed, both governmental and private entities have traditionally played some role in hearing and evaluating private claims for relief. One example in the public law context is the role played by the Equal Employment Opportunity Commission ("EEOC"), which reviews complaints of employment discrimination and either prosecutes those claims or allows private

142. Neither would the private petitioner have a right to seek judicial review of the Justice Department's election to quash the petition. While this would result in a completely insulated and unaccountable decisionmaking process, it is likely that in at least some high-profile cases, significant media and public attention would attend Justice Department decisions to quash. Public attention in these cases would likely "open up" the decisionmaking processes. See infra text accompanying notes 270–273 (discussing the legal and political implications of granting the executive an ultimate right to quash petitions).

143. See infra text accompanying notes 273–280 (discussing the benefits inurred to private petitioner-deputies under the model proposed).

144. See supra text accompanying note 15 (reviewing statutes which authorize the Attorney General to file suit to remedy and deter civil rights violations in education, housing, and voting).

individuals to do so.[145] Indeed, even in cases where EEOC complainants allege systemic harms, or illegal "patterns or practices" by their employer, the role of the EEOC is to investigate such claims and either prosecute the action or allow the private plaintiff to pursue the claim.[146] Analogously, in the private law context, corporate boards of directors review complaints of wrongdoing and either prosecute those claims on behalf of the corporation or, under derivative suit statutes, allow individual shareholders to do so.[147]

Probably the closest living relatives to the deputation model proposed here dwell in the citizen suit provisions of the federal environmen-

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145. In order to bring suit under Title VII or the Americans with Disabilities Act, a plaintiff must file a timely charge of discrimination with the EEOC and receive a right-to-sue notice from that agency. See 42 U.S.C. § 200e-5(b),(e),(f) (1994); 29 C.F.R. § 1601.28 (1999). The EEOC may investigate the allegations made in the complaint, attempt to conciliate the charges, or prosecute violators. See 42 U.S.C. § 200-5(b),(f). If the EEOC fails to act or grants the complainant a right-to-sue notice, the individual may bring a court action. See 42 U.S.C. § 200e-5(f). The intended functions of the EEOC are to "screen[ ] a large number of nonmeritorious claims" and to bring claims "the private bar would be less likely . . . to bring . . . because these cases may not be sufficiently lucrative to attract profit-motivated attorneys." Michael Selmi, The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law, 57 Ohio St. L.J. 1, 3 (1996). However, private litigants have become the primary enforcement power in employment discrimination litigation. See id. at 22 (noting that private attorneys typically file a majority of the employment discrimination cases that end up in federal court). Interestingly, the Attorney General, and not the EEOC, originally had authority to bring actions alleging an employer's "pattern or practice" of violating Title VII. See Civil Rights Act of 1964, Pub. L. No. 88-352 § 707, 78 Stat. at 261–62 (current version at 42 U.S.C. § 2000e-6 (1988)).

146. See, e.g., EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950, 953 (8th Cir. 1999) (alleging a "pattern or practice" of violations of the ADEA based in part on EEOC contention that managers' "cultural focus on youths" evidenced by their strong regard for younger employees "created an environment of pervasive age bias that tainted" employment decisions); EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 300 (2d Cir. 1998) (ADEA suit brought by EEOC on behalf of 17 former investment bankers, alleging "pattern and practice" of termination on the basis of age); EEOC v. American Airlines, Inc., 48 F.3d 164, 165 (5th Cir. 1995) (rejecting EEOC's allegations of a "pattern and practice" of intentional age discrimination by corporation against applicants who were over 40 years old). See generally Maurice E. R. Munroe, The EEOC: Pattern and Practice Imperfect, 13 Yale L. & Pol'y Rev. 219, 247–52 (1995) (discussing the EEOC's mission and investigative role).

147. See, e.g., Model Bus. Corp. Act § 7.40 (1998); Del. Code Ann. Tit. 8, § 327; Fed. R. Civ. P. 23.1. The general rule is that, before bringing a derivative suit, a shareholder must make a demand on the corporation's board of directors that it take corrective action (unless certain "demand futility" criteria are satisfied). Typically, if the directors decline to take action, the shareholder may be able to proceed with his derivative suit. See, e.g., Issner v. Aldrich, 254 F. Supp. 696, 699 (D. Del. 1966) (holding that a shareholder can maintain a derivative suit where directors have refused to take corrective action if he can allege and prove that the directors are "personally involved or interested in the alleged wrongdoing in a way calculated to impair their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way" (quoting Ash v. IBM, Inc., 353 F.2d 491, 493 (3d Cir. 1965)). Essentially, shareholder derivative laws allow any individual shareholder to appoint himself as a policeman for all the others.

tal statutes and the qui tam provisions of the False Claims Act. Federal environmental statutes frequently include citizen suit provisions,[148] which allow private individuals to bring suit against violators of environmental laws in order to secure relief in the form of civil fines, injunctions, and declaratory judgments.[149] Citizen suit provisions generally authorize "any person" to bring an action against "any person" who is in violation of the relevant statute.[150]

Driven by Congress's intent to supplement governmental enforcement,[151] citizen suits represent a democratic, participatory mechanism that affords concerned citizens a means to redress environmental pollution and "open[s] wide the opportunities for the public to participate in a meaningful way in the decisions of government."[152] Citizen suits have given national environmental groups, statewide citizen-rights groups, and other local organizations the power to protect resources.[153] Where gov-

148. See Sunstein, supra note 20, at 165 n.11 (listing environmental citizen-suit provisions).

149. Citizen-suit provisions generally authorize any "citizen," defined as "a person or persons having an interest which is or may be adversely affected," to commence suit to enforce statutory requirements against violators, or to require the government to perform a mandatory duty under the statute. Federal Water Pollution Control Act, 86 Stat. 816, 888–89 (1972) as amended (codified at 33 U.S.C. at § 1365) (1994). These provisions confer jurisdiction on the district courts to entertain citizen suits without regard to diversity of citizenship or the amount in controversy. No citizen suit may be commenced unless 60 days notice has been given to the violator, the EPA, and other appropriate authorities, or where the EPA has commenced and is diligently prosecuting its own enforcement action.

150. "Person" is defined quite broadly in most citizen-suit provisions. For example, the Clean Water Act definition of person includes "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).

151. See, e.g., Laveta Casdorph, Comment, The Constitution and Reconstitution of the Standing Doctrine, 30 St. Mary's L.J. 471, 510–14 (1999) (claiming that Congress incorporated citizen-suit provisions into environmental statutes to cure problems, including the lack of effective agency oversight by any of the three branches of government and the fear of "agency capture," wherein agency employees become less motivated over time to make decisions adversely affecting the regulated community's interests); Robert B. June, Note, The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power, 24 Envtl. L. Rep. 761, 764 (1994) (stating that "Congress first established the citizen suit in the 1970 amendments to the Clean Air Act, in response to a perceived governmental failure to enforce the statute").

152. Envtl. Pol'y Div. of the Cong. Res. Serv. of the Libr. of Cong., 93d Cong., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 819 (Comm. Print 1973).

153. "Citizens suits provisions have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and in locating and taking actions against violators of these Acts." H.R. Rep. No. 99-253, pt. 5, at 83 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 3206. See also Drew Caputo, A Job Half Finished: The Clean Water Act After 25 Years, 27 Envtl. L. Rep. 10574, 10580–81 (1997) (discussing the vital role played by citizen suits in the enforcement of the Clean Water Act).

ernment enforcement of environmental violations has declined, environmental organizations have been able to pick up the slack.[154]

Congress established a slightly different scheme of private enforcement in the False Claims Act (FCA).[155] The FCA, which authorizes the government to bring civil actions against those who defraud it, contains a qui tam enforcement provision, whereby private citizens with independent knowledge of fraud perpetrated against the government may sue to recover a portion of the claim.[156]

The historical evolution of the qui tam provisions of the FCA reveals the importance of private enforcement in this area. While the original

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154. A House Report on environmental litigation stated:

> The argument that citizens' suits would interfere with an energetic and well organized cleanup program simply is not supported by the facts. A recent comprehensive study of citizens' suits brought under the major federal environmental laws which was conducted by the Environmental Law Institute at the request of EPA conclusively refutes the argument that such suits interfere with the agency's effective implementation of its statutory mandate. The study found that the number of citizens' suits filed under major national environmental laws increased in direct response to a decline in EPA's enforcement activities following massive cuts in the agency's budget during the early eighties. The study further found that such suits fulfilled Congressional intent in enacting such provisions by serving as both a goad and an alternative to the agency's own inadequate enforcement efforts. The study dismissed all allegations that such suits interfere with government enforcement programs or are brought against insignificant violators of the law. Finally, the study indicated that the possibility of citizens' suits gives industry an added incentive to comply with the law.

H.R. Rep. No. 99-253, pt. 1, at 289–90 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2964–65.

155. See 31 U.S.C. § 3730 (1994). The Act provides that anyone who presents a false money claim to the federal government shall be liable for double or treble damages and civil penalties of up to $10,000 per false claim. See id. § 3729.

156. See id. § 3730(b)(1). Under the qui tam provisions of the FCA, any person may bring a civil action "for the person and for the United States Government" to recover damages and penalties. Id. Qui tam is short for the Latin phrase, "qui tam pro domino rege, quam pro se ipso in hac parte sequitur," which literally means "who prosecutes this suit as well for the king as for himself." William Blackstone, Commentaries on the Law of England 161 (1768). Qui tam actions began with the Water Pollution Act of 1388 in England, which authorized a private person to sue on "behalf of the government and receive a reward of a portion of the damages collected." Elizabeth Rae Potts, Comment, A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources, 36 San Diego L. Rev. 547, 561 (1999). The English government also used qui tam actions to enforce certain penal codes, relying on private individuals to prosecute suits instead of government police forces. See id. This practice spread to the United States where many of the First Continental Congress's penal codes contained qui tam provisions. See id. Thus, qui tam statutes "have been in existence for hundreds of years in England, and in this country since the foundation of our Government." Marvin v. Trout, 199 U.S. 212, 225 (1905). Indeed, "[i]t appears that not a day has passed since [the first] Congress convened in Philadelphia in 1789 . . . without at least one qui tam law in the statute books." Vermont Agency of Natural Resources v. United States ex rel. Stevens, Amicus Brief of the National Employment Lawyers Association in Support of Respondent (available at 1999 WL 1076138).

FCA was enacted in 1863,[157] Congress amended the statute in 1943 to limit the circumstances under which a private individual could bring suit.[158] Underlying the 1943 amendment was the government's belief that it could discover and prosecute fraud on its own, without the information or vantage point of private individuals.[159]

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157. See False Claims Act, ch. 67, 12 Stat. 696–99 (1863) (current version at 31 U.S.C. § 3730 (1994)); see also S. Rep. No. 99-345, at 4 (1986) (stating that the original FCA was enacted in 1863 in response to the contractor fraud perpetrated on the Union Army). Congress enacted the original FCA "to assist in ferreting out unscrupulous defense contractors who committed fraud against the Union army by delivering bullets loaded with sawdust." Joan R. Bullock, The Pebble in the Shoe: Making the Case for the Government Employee, 60 Tenn. L. Rev. 365, 368–69 (1993); Ara Lovitt, Fight for Your Right to Litigate: Qui Tam, Article II, and the President, 49 Stan. L. Rev. 853, 856 (1997). The provision was intended to "supplement the nascent prosecutorial capabilities of the Attorney General." Id. at 856 n.20 (noting that when Congress enacted the FCA in 1863, the Attorney General's office was still in its infancy and the Department of Justice did not yet exist); John T. Boese, When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the Qui Tam Law, 43 St. Louis U. L.J. 53, 60 (1999) (noting that the qui tam provision of the original FCA was a response to "the absence of effective government resources to investigate and prosecute fraud against the government"). The original Act was referred to as Lincoln's Law or the Informer's Act. See 89 Cong. Rec. 510, 741 (daily ed. Dec. 16, 1943) (statement of Sen. Langer).

158. See 31 U.S.C. § 3730(e)(4)(A). The Amendments also permitted the Justice Department to take over a case and reduced the relator's share of the recovery from 50% to a maximum of 25% if the government did not intervene, and to 10% if it did. See 31 U.S.C. § 3730(c); 89 Cong. Rec. S7608 (daily ed. Sept. 17, 1943). The 1943 Amendments barred qui tam actions based on public information, thereby allowing private individuals to bring suit under the FCA only where these individuals were original sources of the information. See 89 Cong. Rec. S7596 (daily ed. Sept. 17, 1943); Robert Salcido, Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to *Qui Tam* Actions Under the False Claims Act, 24 Pub. Cont. L.J. 237, 241 (1995) (noting that, in the 1930s, relators began bringing lawsuits copied from preexisting indictments or ongoing congressional investigations into fraudulent practices). An important background note: In *United States ex rel. Marcus v. Hess*, the Supreme Court held that the FCA permitted private persons to bring suit even if they copied their complaint from an indictment and had no original information regarding the defendant's fraudulent conduct. See 317 U.S. 537, 545–48 (1943). In a subsequent letter to Congress, the Attorney General expressed concern that the *Marcus* decision would create a "scramble among would-be informers" to see who could be the first to file suit based on charges in an existing indictment. The 1943 Amendments to the FCA were a direct response to the *Marcus* opinion. 89 Cong. Rec. 7571 (1943); see also James T. Blanch et al., Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy 58 (1996) (describing the 1943 Amendments as Congress's attempt to prohibit qui tam actions that were based on information already known to the government); Salcido, supra, at 242 ("Congress acted immediately and decisively after *Marcus* to amend the False Claims Act.").

159. See Francis E. Purcell, Jr., *Qui Tam* Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression, 42 Cath. U.L. Rev. 935, 942 (1993) (describing the 1943 Amendments as signaling Congress's belief that the federal government could handle fraudulent claim litigation without the assistance of private relators).

As it turns out, the government was wrong on this score. From 1943 to 1986, actions under the FCA became increasingly rare,[160] as the limitations on qui tam actions and a lack of interest on the part of the Justice Department drove the Act "into a period of desuetude."[161] Finally, in the midst of federal budget deficits and high-profile reports of fraud against the government, Congress amended the FCA in 1986 in order to generate a greater number of private suits under the qui tam provision.[162] Congress gave qui tam relators more power to initiate and prosecute suits, enhanced financial incentives, and provided protection against employer retaliation.[163] As a result of the 1986 amendments, more qui tam suits were filed under the FCA and major incidents of fraud against the government were uncovered and prosecuted.[164] In 1987, thirty-three qui tam suits were filed. By 1997, that number leapt to over 529, with more

160. See Pamela H. Bucy, Where to Turn in a Post-Punitive Damages World: The *Qui Tam* Provisions of the False Claims Act, 58 Ala. Law. 356, 356 (1997) (noting that "[f]or a variety of reasons, the FCA was not particularly effective until 1986"); Elletta Sangrey Callahan & Terry Morehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273, 318 (1992) (noting that, from 1943 to 1986, qui tam actions averaged about six per year).

161. Evan Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341, 343 (1989).

162. See S. Rep. No. 99-345, at 23 (describing the Committee's intent in amending the qui tam section to encourage more private enforcement of fraud); see also Michael Waldman, Time to Blow the Whistle? 'Qui Tam' Lawsuits Are a Double-Edged Sword: They Encourage Disclosure of Fraud but Can Poison Workplace Relations and be Used to Settle Employee Grudges, Nat'l L.J., Mar. 25, 1991, at 13, 13 (noting that "[f]aced with well-publicized reports of $400 hammers and $600 toilet seats, Congress in 1986 turned to the whistleblower lawsuit as its chief weapon for fighting fraud").

163. Congress in 1986 amended the FCA to remove the requirement of the specific intent to defraud, to provide that the government or relator prove its case by the "preponderance of the evidence" standard, and to increase the penalties for false claims submitted to the government. See 31 U.S.C. § 3731(c) (1994); see also § 3729(a)(7) (1994) (explaining the Act's intent requirement and ensuing liability for making false statements to the government); § 3730(d)(1)–(d)(2) (describing the award to the qui tam plaintiff). The 1986 Amendments also expanded the rights and role of the qui tam relator, increasing the relator's share of the recovery to 15% to 25% of the recovery if the government intervenes, and to 25% to 30% if it does not. See id. at § 3730; see also Steve France, The Private War on Pentagon Fraud, 76 A.B.A. J. 46, 47 (Mar. 1990) (explaining how relations now operate more as private attorneys as opposed to the traditional notion of "bounty-hunting informants"). The 1986 Amendments also increased the maximum damage award possible to three times the government damage (treble damages), and provided that attorneys' fees could be required from the losing defendant. See Marc S. Raspanti & David M. Laigaie, Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act, 71 Temp. L. Rev. 23, 27 (1998).

164. See Purcell, supra note 159, at 936 (noting that after the 1986 amendments, civil recoveries under the FCA more than doubled); Waldman, supra note 162, at 13 (reporting that in the five year period from October 1986 to March 1991, nearly 280 qui tam suits had been filed); see also Robert L. Vogel, Citizens' Lawsuits Based on the False Claims Act Have Multiplied, Nat'l L.J., Nov. 26, 1990 at 20, 20 (reporting that "[t]he number of qui tam lawsuits has been steadily increasing" since 1986).

than two billion dollars recovered.[165] The current qui tam provisions, which encourage the qui tam relator and the government to work in tandem through proper alignment of incentives,[166] have thus proven the most effective means of recapturing the estimated billions of dollars of public money lost to fraudulent practices each year.[167]

Both citizen suits and qui tam provisions attempt to mobilize private citizens to supplement law enforcement resources. These two mechanisms are, however, fundamentally different. In successful citizen suits, all penalties and damage awards go to the federal fisc, and the plaintiff recovers only attorneys fees and costs; in qui tam actions, the relator retains a specified portion of the damages—a "bounty"—recovered for the government. This difference reflects the understanding that citizen suit plaintiffs sue on behalf of the public as "private attorneys general" to redress an injury to the public at large, whereas qui tam relators sue on behalf of the United States to redress an injury suffered by the government in its capacity as keeper of the public fisc.[168] In effect, both citizen suit plaintiffs and qui tam relators are deputies of the government, representing public interests through litigation.

The next part will more closely discuss the concept of deputation, which has the potential to reinvent both structural reform litigation and the relationship between the government and its citizens by creating a true partnership between private and public interests.

IV. The Deputation of Private Citizens

Underlying the deputation model is the concept of creating a partnership between private and public interests for the purpose of solving systemic social problems, such as police brutality. No other regime effects these ends.

For example, a regime in which private litigants have standing on their own to seek forward-looking reformist remedies would also tap the experiential and financial resources of the citizenry, but in a manner that is highly inefficient. Such a regime necessarily fosters a patchwork of uncoordinated litigation efforts, contains no check against frivolous claims, and imposes upon the federal courts enforcement obligations that they may be ill-equipped to handle. Nor would a helter-skelter rash of private litigation do much to promote the evolution of national standards or pro-

165. See Department of Justice, FCA Statistics (last modified Jan. 31, 2000) <http://www.ffhsj.com/quitam/fcastats.htm> (on file with the *Columbia Law Review*).

166. See S. Rep. No. 99-345, at 2 ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.").

167. See id. at 3 (estimating public money lost to fraud ranging "from hundreds of millions of dollars to more than $50 billion per year").

168. See Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 1858 (2000). For a discussion of the basis for relator standing to bring suit on behalf of the government, see infra text accompanying notes 265–272.

cedures designed to ensure the constitutionality of police patterns and practices.

Alternatively, a regime in which the government alone is empowered to seek reform of unconstitutional police patterns and practices not only suffers from the political and economic deficiencies discussed above in Part II,[169] but also fosters an unhealthy reliance in affected communities on the benevolent paternalism of the federal government. A regime that forces community leaders—particularly in minority communities—to come hat in hand to federal officials seeking protection of their civil rights is at cross purposes with a *zeitgeist* that encourages community empowerment and everywhere looks to roll back reliance upon government.[170]

By contrast, the deputation model aligns public and private interests in a fashion that encourages coordinated litigation strategies aimed at developing national standards for police conduct; contains powerful checks against frivolous claims; places implementation and enforcement of reformist remedies in the hands of the executive, rather than federal judges; and empowers and enfranchises affected communities to seize the initiative in curbing ongoing unconstitutional police patterns and practices.

Througb the mechanism of deputation and the creation of a legal agency relationship between individuals and the government that represents them, the model proposed here promises to reinvent structural reform litigation. The key is the concept of deputation, which warrants brief exploration here.

A. *Deputation Throughout American Law*

While the word "deputize" may invoke images of the Wild West and a posse system of justice,[171] the concept has broad application throughout

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169. See supra text accompanying notes 58–80.

170. Norman Siegel, the head of the New York Civil Liberties Union, has urged the Justice Department to bring a § 14141 suit against the New York City Police Department. He recently stated:

> Just as 40 years ago we needed the federal government to come in and improve the situation [in the South], we need the federal government and the Department of Justice to come in to facilitate, to mediate, to negotiate, and, yes, to sue the city of New York and the NYPD for systemic violations of civil rights of people of the city of New York.

Patricia Hurtado, Policing the Cops: Rights Advocates Call For Permanent Federal Monitoring, Newsday, Mar. 3, 2000, at A05. Siegel, who has litigated a number of important civil rights cases, would surely prefer that the affected community have the authority to petition the Justice Department and, where appropriate, become deputies in pattern or practice litigation.

171. The concept of sheriffs deputizing civilians to aid in law enforcement finds its root in the justice system created to meet the unique needs of the West during the 1800s, where marshals of dusty towns rounded up posses, deputized them and rode off in search of a villain. It was impossible for a lone marshal effectively to enforce the law of the Wild West against everyone, so he enlisted the townspeople for help. See generally The Western

American law. As a logical outgrowth of representative government[172] and agency theory,[173] deputation is based on the principle of limited empowerment of an archetypal citizen as an intermediary for achieving public goals.[174] The power that is created by a deputation scheme is the right of the agent to step into the principal's shoes, and act in limited ways on the principal's behalf. Throughout history, governments have utilized their general populace to enforce public laws and protect public interests.[175]

Reader (Jim Kitses & Greg Rickman eds. 1998). Indeed, in chaotic periods throughout American history, sheriffs have deputized ordinary citizens to carry out politically perilous law enforcement tasks. See, e.g., Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 438 (1988) (noting that, in an effort to stem the escalating violence by the Ku Klux Klan in the aftermath of the Civil War, some state governments authorized ordinary citizens to arrest Klan members). Today, county sheriffs continue to have the traditional power to deputize private citizens and form a posse comitatus. See Brannon P. Denning, Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century, 21 Okla. City U. L. Rev. 191, 229–30 (1996).

172. "Government by deputation," when properly safeguarded, Zabdiel Adams maintained in 1782, could enable people to "be as free as the state of the world will commonly admit." Zabdiel Adams, An Election Sermon (1782), *in* 1 American Political Writing During the Founding Era 543–44 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

173. An agent is defined as:

> A person authorized by another (principal) to act for or in place of him; one intrusted with another's business. One who represents and acts for another under the contract or relation of agency. . . . A business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.

Black's Law Dictionary 63 (6th ed. 1990) (citation omitted). See also Restatement (Second) of Agency § 1 (1957):

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. (2) The one for whom action is to be taken is the principal. (3) The one who is to act is the agent.

174. While this subsection will focus primarily on government deputation of private citizens for aid in enforcing laws, deputation also occurs in the private sector. For example, proxies are typically deputized by shareholders of a corporation with the power to conduct certain types of corporate business. See Securities Exchange Act of 1934, 15 U.S.C. § 78(a) et seq. (1994). Another widespread, private law example of deputation is the "power of attorney," where a grantor appoints an attorney to handle her affairs in the event of incapacity. See generally Major Michael N. Schmitt & Captain Steven A. Hatfield, The Durable Power of Attorney: Applications and Limitations, 132 Mil. L. Rev. 203 (1991) (discussing powers of Attorney General).

175. See, e.g., Marvin v. Trout, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy

Courts have long used their inherent authority to deputize private individuals to help enforce judicial orders and directives. For example, in the mid-nineteenth century, when labor disputes raged throughout the country, federal courts began to issue injunctions to quell strikes.[176] Often, the courts would deputize private security personnel hired by the employers to enforce these federal injunctions, as local police and even federal law enforcement officials sided with the strikers.[177] Modern courts have also relied on their inherent authority to initiate criminal contempt proceedings for disobedience of court orders[178] by appointing private attorneys to prosecute such contempt charges.[179] Indeed, the Su-

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other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.").

176. First issued in labor disputes by the federal courts during the 1877 railroad strikes, by the 1890s, the injunction had become a popular device by which the federal judiciary could quell strikes, even in the face of local politicians' support for the strike. See Sherry v. Perkins, 17 N.E. 307, 310 (Mass. 1898) (finding that injury to plaintiff's business and property "was a nuisance such as a court of equity will grant relief against"); Worthington v. Waring, 32 N.E. 744, 746 (1892) ("Under pre-existing statutes, courts of equity have the right to issue 'all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations, and persons, when necessary to secure justice and equity.'"). Injunctions, then, became the means whereby the federal courts could circumvent local juries, police, and elected officials who often sided with labor. See Deborah A. Ballam, Commentary: The Law as a Constitutive Force for Change, 32 Am. Bus. L. J. 125, 143 (1994) ("Sympathy strikes and community-wide boycotts, both of which had flourished in the 1880s, quickly died away due to the onslaught from the judiciary."); William E. Forbath, The Shaping of the American Labor Movement, 102 Harv. L. Rev. 1109, 1117 (1989) (discussing how federal judges "repeatedly removed from local officials critical bits of authority over labor protest"); Edwin E. Witte, Early American Labor Cases, 35 Yale L.J. 825, 834 (1926) (discussing the notion that "the courts [had to] protect public carriers in the discharge of their duty" during the railroad strikes of the late 1800s).

177. The United States Supreme Court gave its imprimatur to the use of labor injunctions and the private-enforcement approach to labor disputes in its 1895 decision, In re Debs. 158 U.S. 564 (1895); see also Eileen Silverstein, Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction, 11 Hofstra Lab. L.J. 97, 107 (1993) (discussing the use of private security forces to enforce labor injunctions and quell strikes).

178. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 46–51 (1991) (holding that the courts' authority to impose sanctions is inherent and thus cannot be limited by statute); Ex parte Robinson, 86 U.S. 505, 510–11 (1873) (discussing the inherent authority of federal courts to impose sanctions in criminal-contempt proceedings).

179. For example, in a case involving the CBS network's refusal to produce a transcript of an upcoming "60 Minutes" broadcast for in camera review by the court in an on-going litigation, the court held the network in contempt. When the U.S. Attorney for the Eastern District of Louisiana declined to prosecute CBS for contempt, the court appointed private prosecutors to bring the contempt charge. In re CBS, Inc., 570 F. Supp. 578 (E.D. La. 1983), appeal dismissed sub nom. United States v. McKenzie, 735 F.2d 907 (5th Cir. 1984). See also Mistretta v. United States, 488 U.S. 361, 390 (1989) (federal courts possess inherent authority to initiate contempt proceedings and to appoint a private attorney to prosecute the contempt); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 802 (1987) (a district court may appoint a private attorney to prosecute the contempt on behalf of the United States as long as the attorney is not counsel for a party that is a beneficiary of the court order underlying the alleged contempt); Earl C. Dudley,

preme Court has approved of judicial deputation of private prosecutors where the executive branch—for whatever reason—declines to prosecute the contempt.[180]

Law enforcement agencies also deputize private attorneys to prosecute various charges.[181] One notorious example is the 1992 rape trial of boxer Mike Tyson, where the Indianapolis District Attorney's office hired private attorney Greg Garrison to head its high-profile prosecution.[182] Indeed, the use of private attorneys by local prosecutorial agencies is commonplace in many parts of the country.[183] And even in large cities, with resourceful and well-staffed District Attorney's offices, it is very common for members of the private bar to prosecute criminal appeals and other matters as part of pro bono programs.[184]

Jr., Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts, 79 Va. L. Rev. 1025, 1058-59 (1993) (describing private prosecution of contempt charges and listing cases in which private parties have litigated contempt proceedings).

180. Most recently, in *Young*, 481 U.S. at 801–02, the Court stated that courts should refer contempt prosecutions to the executive branch first, and only appoint a private prosecutor in cases in which the United States refuses to prosecute for any reason or is disqualified by reason of conflict of interest. In this respect, the pronouncement in *Young* substantially mirrors the deputation model proposed here: In both regimes, the executive has the "first crack" at the prosecution. Where it declines, the court (in *Young*) or the government (under the deputation model) may appoint or deputize a private party to litigate the case.

181. Under the common law, both in England (until well into the nineteenth century) and the United States (until the end of the eighteenth century) the private injured party, rather than the State, brought criminal prosecutions. Originally implemented through trial by "private battle," private prosecution evolved in the eigbteenth century into the formal institution and prosecution of criminal charges by private parties, at their own expense. See Frederick Pollock & Frederic William Maitland, 1 The History of English Law 44–47 (2d ed. 1899). In England today, while private prosecution has now been supplemented and replaced by public prosecutions in the name of the Crown, the English system retains the concept that the Crown brings criminal prosecutions on behalf of the injured individual, as much as or more than they are brought on behalf of the community at large. See Andrew Sidman, Note, The Outmoded Concept of Private Prosecution, 25 Am. U. L. Rev. 754, 760–62 (1976). See also John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 Ark. L. Rev. 511, 531–36 (1994) (describing cases in which private parties participated in prosecuting criminal actions); Allen Steinberg, From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History, 30 Crime & Delinq. 568 (1984) (detailing extensive role of private prosecutors in state law enforcement throughout colonial and early constitutional periods, and demonstrating that the fundamental transformation from a private-enforcement-dependent to a mostly public-dependent law enforcement regime took place in the mid-nineteenth century).

182. See Phil Berger, A Drama That Will Rival The Ring When Tyson Faces His Accuser, N.Y. Times, Jan. 22, 1992, at B9.

183. See, e.g., New Jersey v. Kinder, 701 F. Supp. 486, 491 (D.N.J. 1988) (noting "a widespread practice in the municipal courts of New Jersey [of allowing] citizens to enforce the laws of the state in instances where the municipal prosecutor routinely does not prosecute because of a lack of resources").

184. See Consortium on Legal Services and the Public, American Bar Ass'n, Legal Needs and Civil Justice: A Survey of Americans 7 (1994) (noting that private practitioners

The federal executive branch itself also deputizes or appoints private attorneys to prosecute various matters.[185] For example, under the Ethics In Government Act, the Attorney General may deputize a private citizen as independent counsel to investigate and prosecute charges against high-ranking government officials.[186] Less formally, the government relies upon private attorneys to litigate various matters on its behalf, such as the recent case of *United States v. Microsoft, Inc.*, where the Justice Department tapped private attorney David Boies to head up its massive antitrust suit.[187]

On a more general level, the federal government routinely looks to private citizens or entities to aid in the enforcement of laws, often on the theory that the most likely initial source of information about wrongdoing is the citizenry, whose millions of "eyes on the ground" see far more than federal investigators ever could. Examples include the imposition of monitoring and reporting requirements upon financial institutions under money laundering statutes,[188] as well as the provision of private

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engaged in civil and criminal pro bono matters are a crucial component of the legal services delivery system in every state).

185. Indeed, before the creation of the Department of Justice in 1870, private attorneys frequently handled the federal government's cases. See Lincoln Caplan, The Tenth Justice 4–5 (1987); see also Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 19–20 (1994).

> [F]ederal prosecutorial authority was also granted to private individuals wholly outside the executive's control. Both through citizen access to federal grand juries, and through civil qui tam actions (treated for at least some purposes as criminal actions), citizens retained the power to decide whether and in what manner to prosecute for violations of federal law.

Id. (citations omitted); Daniel N. Reisman, Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive, 53 Alb. L. Rev. 49, 58 (1988) ("In the period after the framing of the Constitution . . . federal law enforcement powers were dispersed among private individuals, state officials, and largely independent United States district attorneys."); Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? *Morrison v. Olson* and the Framers' Intent, 99 Yale L.J. 1069, 1083 (1990) (noting that in the nineteenth century, "[f]ederal departments and local officers routinely resorted to hiring private attorneys as 'special counsel' to prosecute government cases").

186. See infra text accompanying notes 200–220 (discussing the constitutional and political issues surrounding the independent counsel statute).

187. See 2000 U.S. Dist. LEXIS 8721 (D.D.C. 2000). Joel I. Klein, chief of the Justice Department's Antitrust Division, hired David Boies as special counsel for the United States in its case against Microsoft in December 1997. See Boies Wonder, Nat'l L.J., Dec. 27, 1999, at A9; see also Saundra Torry, Did the FDIC Get a Fair Fee from Cravath, Swaine & Moore?, Wash. Post, April 15, 1991, at F5 (reporting that the federal government paid private lawyers as much as $600 an hour to recoup money lost from savings and loans); John R. Wilke, U.S. Hires Axinn to Review MCI-Sprint Deal, Wall St. J., Dec. 14, 1999, at A3 ("In a signal that MCI Worldcom Inc.'s proposed $115 billion buyout of Sprint Corp. will face extraordinary federal scrutiny, the Justice Department hired a well-known Wall Street antitrust lawyer, Stephen Axinn, to review the merger.").

188. The federal government partially deputizes banks and other financial institutions in order to uncover evidence concerning money laundering or other financial crimes. Beginning in December, 1995, the Treasury Department required financial institutions to file a Suspicious Activity Report ("SAR") detailing criminal and suspected criminal

rights of action to enforce consumer fraud,[189] antitrust,[190] securities fraud statutes,[191] and environmental violations,[192] among many others. In all of these ways, the executive branch relies on private citizens and institutions to help in its law enforcement efforts.[193]

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conduct. A bank must report any transaction involving the bank which it "knows, suspects, or has reason to suspect" involves illegal proceeds or an attempt to hide or disguise illegal proceeds, an attempt to evade any money laundering statute including the reporting requirements, or a transaction with no legitimate business purpose or "reasonable explanation." 31 C.F.R. § 103.21; see also Robert R.J. Grispino, The Coordination and Administration of Complex Interstate Organized Criminal Enterprise Investigations, The Prosecutor, Jan.–Feb. 1996, at 28 (1996). While the government stops short of delegating law enforcement authority to a financial institution, it does grant a form of prosecutorial or investigatory discretion. A financial institution's judgment is necessary because it may have specific "knowledge of its customer [that] provide[s] a reasonable explanation for the transaction that removes it from the suspicious category." 61 Fed. Reg. 4326, 4329 (1996) (to be codified at 31 C.F.R. part 103); see also Matthew R. Hall, An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report, 84 Ky. L.J. 643, 659 (1995) (noting the prosecutorial nature of the discretion delegated to the reporting bank to "interpret the law, analyze conduct, describe the elements of conduct constituting a possible offense, and to suggest further investigation").

189. The Uniform Deceptive Trade Practices Act (UDTPA) has been enacted by a number of jurisdictions and allows both a public and a private right of action to remedy consumer fraud. See Annotation, Right to Private Action under State Consumer Protection Act, 62 A.L.R.3d 169 (1975) (listing consumer protection statutes permitting a private right of action); Marshall A. Leaffer & Michael H. Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521 (1980) (overview of state legislation prohibiting deceptive acts and unfair methods of competition in the conduct of trade or commerce); Fred H. Miller, Consumer Issues and the Revision of U.C.C. Article 2, 35 Wm. & Mary L. Rev. 1565, 1566–68 (1994) (discussing status of relevant uniform and model laws); Joseph Thomas Moldovan, New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook. L. Rev. 509, 509–19 (1982) (discussing background of the New York consumer protection statutes).

190. The nineteenth-century antitrust laws were the first to rely chiefly on the injured parties, encouraged by the prospect of bounty in the form of trebled damages, to enforce an important national economic policy. See Sherman Anti-trust Act of 1890, ch. 647, 26 Stat. 209, 210 (codified as amended at 15 U.S.C. §§ 1-37a (1994 & Supp. IV 1998)).

191. See 1995 Securities Litigation Reform Act, 15 U.S.C. § 77 (1994).

192. See, e.g., Natalie Bussan, All Bark and No Bite: Citizen Suits After *Steel Company v. CBE*, 6 Wisc. J. Envtl. L. 195 (1999).

> The townspeople have also been enlisted to enforce environmental laws. The environmental problems of the United States reached a crisis point in the early 1970's, and the Environmental Protection Agency . . . didn't have enough 'marshals' to effectively enforce new environmental statutes. As a result, Congress enacted citizen suit provisions that 'deputized' citizens to bring suits against alleged violators to give bite to these new laws. The 'possies' Congress created are known as private attorney generals.

Id. at 195–96.

193. In general, private enforcement has become critical to achieving various civil and criminal law enforcement goals. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) ("acknowledging that, in many statutes providing for the allowance of reasonable attorney's fees, Congress has opted to rely heavily on private enforcement to implement public policy"); S.Rep. No. 94-1011, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910 (The Civil Rights Attorney's Fees Awards Act of 1976, 42

The federal government also deputizes state and local officials to aid in the enforcement of laws on the theory that state and local police departments can contribute much-needed manpower and informational resources which are not available to federal agencies. A good example of federal deputation of state and local officials is the trend of initiating joint federal-state task forces in complex, organized crime and drug investigations[194] and in border patrol activities.[195] Conversely, federal agents are authorized, under the agents' "peace officer" status, to assist local officers in the execution of a state search warrant. "Peace officer" status generally refers to the full or partial legislative grant, or other deputation of general police officer powers and immunities, upon federal officers.[196] Indeed, even intra-federal government deputation has occurred.[197]

The concept of deputation has deep roots in American law and continues to enjoy widespread and diverse application because it is thought

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U.S.C. § 1988) (recognizing that "[a]ll of these civil rights laws depend heavily upon private enforcement").

194. The Associate Attorney General of the United States has authorized the United States Marshals Service to deputize state and local law enforcement officers to enable those officers to perform federal law enforcement functions under the supervision of the FBI. The individuals deputized as special federal officers can carry firearms outside their regional jurisdictions, execute federal warrants, serve federal subpoenas, make arrests and seizures and monitor court-ordered electronic surveillance in complex interstate organized crime and drug investigations. And, as one author has noted, "According to the provisions of the Anti-Drug Abuse Act of 1986, the deputation process can be initiated solely with the approval of appropriate FBI and Department of Justice officials, in federal drug investigations only, without the involvement of the [United States Marshals Service]." Grispino, supra note 188, at 26, 28.

195. As amended in 1996, Section 103 of the Immigration and Naturalization Act ("INA") authorizes "cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws." 8 U.S.C. § 1103(c) (Supp. III 1997). Section 287 of the INA authorizes state and local law enforcement officials to perform immigration law enforcement functions under agreements with the Department of Justice that provide for training and federal supervision of the local officers involved. Id. § 1357(g). And, if the Attorney General determines that "an actual or imminent mass influx" of aliens off the coast or near a land border presents "urgent circumstances requiring an immediate Federal response," Section 103(a) of the INA allows the Attorney General to deputize state or local law enforcement officers to perform the duties of INS officers or employees. Id. § 1103(a).

196. Peace officer status of federal officers varies from state to state. For example, most federal officers and agents in Illinois were granted limited peace officer status. See 745 Ill. Comp. Stat. Ann. 22/10 (West 1993 & Supp. 1999). The statute provides immunity for a federal agent while the agent assists a local officer in making an arrest or when the agent takes action upon seeing a felony being committed.

197. For example, in 1984, after lengthy review and consideration of the Environmental Protection Agency's request for special deputation for the Agency's criminal investigators, the Department of Justice acknowledged the need by granting first temporary deputation, and finally recommended permanent deputation to Congress, which was granted in 1988. 18 U.S.C. § 3063 (1994). See also Helen J. Brunner, Environmental Criminal Enforcement: A Retrospective View, 22 Envtl. L. 1315, 1324–25 (1992) (reviewing events leading up to the special deputation of EPA agents).

to be an effective way of tapping private resources—both financial and experiential—in furtherance of the public good.

B. *Defining The Petitioner-Deputy*

Many of the examples of deputation discussed above concern the retention of private attorneys. The deputation model proposed here, however, moves beyond that traditional paradigm. The instant model seeks, in part, to capitalize on the millions of "eyes on the ground," and looks to the citizenry to seize the initiative in bringing to light unconstitutional police patterns and practices. Merely authorizing the Justice Department to retain lawyers—an authority the Department arguably possesses already[198]—does nothing to further those ends. Nor does the mere retention of attorneys overcome the political and resource-related issues which stymie vigorous enforcement of § 14141 as it currently stands.

So the deputation model contemplates more than deputizing lawyers. That raises the question of just *who* the model does—or should—deputize. The model proposed here would deputize only those individuals who have been injured by an unconstitutional police pattern or practice. This limitation is consistent with the qui tam provisions of the FCA—which authorize only persons with "direct and independent knowledge" of fraud to act as relators[199]—as well as scores of other federal statutes limiting private rights of action to persons who have suffered direct injury. This eligibility limitation for petitioner-deputies serves salutary purposes. Limiting the pool of potential petitioner-deputies to those who have suffered injury promotes manageability and insulates the Justice Department from a potential onslaught of meritless or vexatious petitions. Further, this limitation heeds the general maxim that legislation should be narrowly tailored to accomplish its intended goals, which in this case are to access the stories and experiences of the victims of police misconduct and to channel the energies and resources of those who are most motivated to initiate actions.

While the proposed amendment would limit petitioner-deputy status to those who have suffered injury, there will no doubt be an important role for third-party institutions, such as the NAACP Legal Defense Fund and the Center for Constitutional Rights, in sponsoring and providing counsel for petitioner-deputies. In many cases, it will fall to these institutions to perform the first level of triage in vetting petitions from aggrieved citizens.

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198. See 28 C.F.R. § 50.15(a)(6) (1999) (authorizing the Justice Department to hire private counsel to represent federal employees in civil and congressional proceedings and in state criminal proceedings in which employees are sued or subpoenaed in their individual capacities).

199. 31 U.S.C. § 3730(e)(4)(B).

V. THE CONSTITUTIONALITY OF DEPUTATION: ARTICLE II AND III CONCERNS OF PRIVATE ENFORCEMENT

The deputation model potentially implicates a number of constitutional issues related to congressional assignments of federal authority. Similar issues have been raised by courts and commentators in addressing challenges to citizen suit and qui tam provisions. Those challenges take three principal forms. First, litigants and scholars point to the "Take Care" clause of Article II, which grants to the executive, rather than to unelected persons, the power to enforce federal laws on behalf of the public and the government. Second, critics contend that the Appointments Clause bars Congress and the executive from authorizing or assigning private citizens the right to bring suit on behalf of the citizenry or the government. Finally, it has been argned that private litigants cannot independently meet Article III standing requirements in these cases. These constitutional attacks on citizen suits and, in particular, qui tam actions in recent years have called into question the viability of private enforcement in the environmental and fraudulent claims areas. The arguments raised in these contexts provide an accessible laboratory for testing the constitutional soundness of the deputation model.

A. *Article II's "Take Care" Clause*

Article II, section 3, of the Constitution assigns the President the sole power and duty to "take Care that the laws be faithfully executed."[200] This clause embodies the concept of a strong executive free from encroachment by the other branches as necessary for effective, uniform, and consistent enforcement.[201] It has been argued that this constitu-

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200. U.S. Const. art. II, § 3; see also U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."). The President delegates authority in most of the civil and criminal suits brought on behalf of the federal government to the Attorney General, and "all such suits, so far as the interests of the United States are concerned, are subject to the direction, and are within the control of, the Attorney General." Buckley v. Valeo, 424 U.S. 1, 139 (1976); see also United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888) (The Attorney General is "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government."); Springer v. Government of Philippine lslands, 277 U.S. 189, 202 (1928) (stating that the "[l]egislative power . . . is the authority to make laws, but not to enforce them or appoint agents charged with the duty of such enforcement. The latter are executive functions.").

201. See, e.g., The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("[N]one of [the branches of government] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."); Printz v. United States, 521 U.S. 898, 936 (1997). In striking down the Brady Act provisions on other grounds, the Court in dicta noted that the Act

> effectively transfers [the enforcement] responsibility to thousands of [state law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control . . . . The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well-known . . . . That unity would be shattered, and the power of the President would

tional grant of power to the executive is exclusive and that such power cannot be exercised by a private citizen.[202] Thus, congressional enactments which authorize private citizens to exercise the prosecutorial power reserved to the Executive in Article II potentially undermine the authority of the coordinate branch, and raise serious separation of power concerns.[203] As traditional separation of powers doctrine dictates, where one branch usurps the power of another, undermining the independence and authority of a coordinate branch, the very foundation of the Constitution is breached and the ideal of liberty is endangered.[204]

It is important, in the first instance, to recognize the Article II concerns that are *not* implicated by the deputation model. For example, the deputation model does not involve congressional usurpation or aggrandizement of power at the expense of the executive.[205] In amending § 14141 to provide for deputation of private litigants, Congress would "retain[ ] for itself no powers of control or supervision" over deputies.[206] The anti-aggrandizement principle explicated in cases such as *Buckley v. Valeo*[207] only prohibits Congress from arrogating non-legislative powers

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be subject to reduction, if Congress could act as effectively without the President as with him.

Id.

202. See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 541–42 (1994).

203. Separation of powers, of course, is the fundamental concept of a tripartite system of shared power among the branches of government. See, e.g., Mistretta v. United States, 488 U.S. 361, 382 (1989) (finding separation of powers violated by legislation "that either accrete[s] to a single Branch powers more appropriately diffused among separate Branches or that undermine[s] the authority and independence of one or another coordinate Branch"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (noting that while separation of powers is not an explicit constitutional requirement, it is a function of the Constitution's basic structure, which "divides all power conferred upon the Federal Government into 'legislative Powers,' '[t]he executive Power,' and '[t]he judicial Power'") (internal citations omitted); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers.").

204. See, e.g., *Mistretta*, 488 U.S. at 380 (separation of powers principles flow from "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

205. See, e.g., Bowsher v. Synar, 478 U.S. 714, 726–27 (1986) (finding that statute that vested sole authority in Congress to remove an Executive official violated separation of powers because Congress may not aggrandize itself by exceeding the outer limits of its power); Myers v. United States, 272 U.S. 52, 161 (1926) (finding that the Constitution prevents Congress from "draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power [because] [t]o do this would be to go beyond the words and implication of [Article II] and to infringe the constitutional principle of the separation of governmental powers").

206. Morrison v. Olson, 487 U.S. 694, 694 (1988).

207. 424 U.S. 1, 122 (1976) (per curiam) (finding that the separation of powers doctrine contains a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

and functions to itself;[208] therefore, this principle has no application to congressional assignment outside the federal government, such as the deputation of private citizens.

Nor does the deputation model implicate the expansion of congressional authority at the expense of the courts.[209] While any legislative expansion of a potential class of litigants necessarily affects the functioning of the federal courts, this is not a separation of powers problem. Finally, deputation does not work any judicial usurpation of executive functions: The proposed amendment does not provide for judicial review of executive decisions to quash or deputize, nor is the judiciary involved in the appointment of petitioner-deputies.[210]

The deputation model proposed here does, however, raise separation of powers concerns inasmuch as the model conceives of a congressional grant of authority to private litigants. While this grant of authority would be limited to petitioning the Justice Department, the petition itself forces an executive action on whether to bring a "pattern or practice" suit or deputize the petitioner. It could therefore be argued that Congress, by amending § 14141 to include a deputation provision, undermines the independence and authority of the executive branch to determine whether or when to bring these injunctive suits.

Thus, the relatively narrow separation of powers questions raised by the deputation model are this:[211] May Congress authorize private citizens

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208. See Neil Kinkopf, Of Devolution, Privatization and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors, 50 Rutgers L. Rev. 331, 347 (1998) (noting that the anti-aggrandizement principle "applies only to how power is allocated among the three branches of the federal government").

209. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (finding the Religious Freedom Restoration Act unconstitutional on the grounds that Congress has no authority to declare the substance of the rights secured under the Fourteenth Amendment; rather, Congress only has authority to provide remedies for and protections against violations of whatever substantive rights the judiciary determines the Fourteenth Amendment contains); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1995) ("The Legislature [is] possessed of power to prescribe the rules by which the duties and rights of every citizen are to be regulated, but the power of the interpretation of the laws [is] the proper and peculiar province of the courts.") (citation omitted).

210. For example, one of the constitutional challenges lodged against the Ethics in Government Act contended that the appointment of an independent counsel by the Special Division, a panel of the D.C. Circuit, was an unconstitutional exercise of judicial power. The Supreme Court rejected this argument. See *Morrison*, 487 U.S. at 695.

211. Admittedly, there is a broader debate over the meaning of Article II which this argument does not engage. For example, many scholars have argued that Article II creates a "unitary executive," so that any individual exercising national executive power must be directly answerable to the President. See, e.g., Calabresi & Prakash, supra note 202 (arguing against a theory of a unitary executive); Calabresi & Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1215 (1992) (examining the relationship between Article II "unitary executive" debates and Article III "jurisdiction-stripping" debates and concluding that "all constructions of Article III offered in the jurisdiction-stripping debate lead to a unitary executive construction of Article II); Lessig & Sunstein, supra note 185, at 19–20 (noting that in the 18th century "Federal prosecution vested in at least some Federal officers not subject to direct Presidential

to force executive action? Further, where the executive elects to deputize private petitioners, does such a deputation violate the Take Care Clause? In order to examine these questions, it is important to understand the scope of congressional power to authorize private enforcement actions and the concomitant duties of the Executive in retaining oversight of private actions brought on behalf of the government.

1. *The Morrison Test of Executive Control.* — One of the clearest formulations of the balance between congressional and executive power appears in *Morrison v. Olson*,[212] where the Supreme Court considered the constitutionality of the Ethics in Government Act of 1978. One of the questions before the Court was whether the Act "'impermissibly undermine[s]' the powers of the Executive Branch, or 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions'."[213] In considering this question, the Court found that while it was "undeniable" that the Act "reduces the amount of control or supervision" exercised by the executive over the "investigation and prosecution of a certain class of alleged criminal activity,"[214] the executive nonetheless retained sufficient control over the independent counsel so as to discharge its duties under Article II.[215]

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control"). Others dispute the concept of a unitary executive and contend that Article II is perfectly consistent with creating officers and agencies who administer the law with considerable autonomy from presidential control. See, e.g., Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725 (1996) (reconstructing early historical approaches to separation of powers to counter "formalist assumptions" of unitary theory); Abner Greene, Checks & Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123 (1994) (arguing that principles of checks and balances requires acceptance of congressional regulation of presidential lawmaking). While this conceptual debate over the unitary executive certainly contributes to our understanding of Article II, my argument operates on the presumption that executive power is nonexclusive. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987) (upholding general authority of district courts to appoint disinterested private attorneys as special prosecutors); In re Certain Complaints Under Investigation, 783 F.2d 1488, 1505 (11th Cir. 1986) (upholding statute authorizing judicial council to investigate improper conduct by federal judges), cert. denied sub nom. Hastings v. Godbold, 477 U.S. 904 (1986). See also James A. Cohen, Self-Love and the Judicial Power to Appoint a Special Prosecutor, 16 Hofstra L. Rev. 23 (1987) (discussing *Young* and the decision's separation of powers implications).

212. 487 U.S. 654 (1988). *Morrison* dealt with the independent counsel provision of the Ethics in Government Act. See infra text accompanying notes 216–220.

213. Id. at 695 (alteration in original) (citations omitted) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) and Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 443 (1977)).

214. Id. For example, the Attorney General may not appoint the Independent Counsel of her choice, does not determine the counsel's jurisdiction, and has limited powers of removal. Id. at 695–96.

215. Id. at 696. The Court found that the "Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel." Id.

First, an independent counsel can only be appointed by specific request of the Attorney General.[216] Thus the Act "gives the Executive a degree of control over the power to initiate an investigation by the independent counsel."[217] Second, once an independent counsel is appointed, he must abide by Justice Department policy and his jurisdiction is defined by the Attorney General.[218] Finally, the Attorney General retains the power to remove the independent counsel for "good cause"—a power the Court found "provides the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel."[219]

The *Morrison* Court therefore examined the three stages of executive involvement in the independent counsel process—initiating the action, conducting the litigation, and terminating the action—to determine whether the executive retained sufficient control over the investigative and prosecutorial process for purposes of Article II.[220] Examining these three stages in other private prosecutorial regimes may prove helpful in determining whether the Executive retains sufficient control of private enforcement actions.

2. *Separation of Powers Challenges to Qui Tam Actions.* — While a number of lower federal courts have rejected separation of powers challenges to qui tam provisions,[221] the Fifth Circuit recently broke rank and declared the qui tam provisions of the FCA unconstitutional. In *Riley v. St. Luke's Episcopal Hospital*, the defendants argued that qui tam actions in which the government elects not to intervene violate the Take Care

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216. Id. The Attorney General's decision not to request appointment if she finds "no reasonable grounds to believe that further investigation is warranted" is unreviewable. Id.

217. Id.

218. Id.

219. Id.

220. See id. at 670–72, 691–96.

221. See, e.g., United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 751–55 (9th Cir. 1993). In *Kelly*, the Ninth Circuit analyzed the Article II issue by comparing the FCA to the Ethics in Government Act. The court found that while the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator, once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately end the litigation in a qui tam action than it does in an independent counsel's action. Id. See also United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1090–92 (C.D. Cal. 1989) ("The permissive intervention provision of the amended [FCA] is less intrusive in effect than a similar feature of the Ethics in Government Act approved in *Morrison v. Olson.*"); United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 621–22 (C.D. Cal. 1989) ("[The FCA] grants the executive branch greater litigative control than that provided for in the Ethics in Government Act of 1978, which the Supreme Court validated in *Morrison v. Olson*".). The Supreme Court refused to consider separation of powers challenges to qui tam actions by limiting the grant of certiorari in Hughes Aircraft Co. v. United States ex rel. Schumer, 519 U.S. 926 (1996) to statutory questions.

Clause and the separation of powers doctrine because these provisions "stripped" the executive branch of its prosecutorial power.[222]

The Fifth Circuit agreed with the defendants that the qui tam provisions reduced the executive branch's control over litigation brought in the government's name, and further found that qui tam actions in which the government does not intervene encroach upon "the prosecutorial discretion that is at the heart of the President's power to execute the laws."[223] The court then compared the level of encroachment to that found acceptable in *Morrison* and concluded that the qui tam provisions failed to provide the executive sufficient control over litigation brought on behalf of the United States. Specifically, it found that the qui tam provisions did not give the Attorney General the power to remove the relator, control the decision to bring suit, determine the scope of the suit once initiated, and that the relator was not bound to follow Department of Justice guidelines.[224] The Fifth Circuit was particularly concerned by qui tam actions in which the government elected not to intervene, explaining that where "the sole injury—the only ticket into court—belongs to the government, the Executive's prosecutorial discretion must include the power to decide whether to bring suit."[225] Thus, an individual's suit on behalf of the government that is permitted to proceed despite the government's decision not to intervene encroaches on the executive's discretion over whether to prosecute a claim.

3. *Preserving Executive "Control" Under the Deputation Model.* — The application of the *Morrison* test to the qui tam provisions in *Riley* reveals that private enforcement regimes are vulnerable to separation of powers chal-

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222. 196 F.3d 514, 523 (5th Cir. 1999). Specifically, the defendants argued that the executive lacks control at the very initial stages of litigation because a qui tam relator can file a false claims action without the consent of the Attorney General. See 31 U.S.C. § 3730(b)(1) (1994). Similarly, in the actual prosecution of the litigation, the government's "control"—for *Morrison* purposes—is undercut by the fact that a qui tam relator remains, by operation of law, a party in interest, irrespective of whether the Justice Department elects to take over the lawsuit during the 60-day sealing period. See id. § 3730(b)(4)(A). Finally, the Justice Department may not settle or otherwise terminate the litigation without the consent of the relator, unless it can prove to a court that the proposed settlement is "fair, adequate and reasonable under all the circumstances." Id. § 3730(c)(2)(B).

223. *Riley*, 196 F.3d at 526.

224. Id. at 528.

225. Id. at 526. The Fifth Circuit noted that the Attorney General may decide not to intervene in a qui tam suit "perhaps because he believes that institution of the action is inimical to the government's interests." Id. Other courts have perceived the Attorney General's refusal to enter the suit as "tantamount to the consent of the District Attorney to dismiss the suit." Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990) (quoting United States ex rel. Laughlin v. Eicher, 56 F.Supp. 972, 973 (D.D.C. 1994)). The Ninth Circuit, in contrast, has stated that "[t]o hold that the government's initial decision not to take over the qui tam action is the equivalent of its consent to a voluntary dismissal of a defendant with prejudice would require us to ignore the plain language of section 3730(b)(1)." United States ex rel. McGough v. Covington Technologies Co., 967 F.2d 1391, 1397 (9th Cir. 1992).

lenges where the executive does not retain sufficient control over the processes of initiating, conducting, and terminating litigation. The deputation model, however, provides for genuine executive "control" over the various stages of "pattern or practice" litigation and satisfies the dictates of *Morrison*. This control is accomplished through one simple mechanism, lacking in other models of private enforcement: the absolute executive power to quash a private § 14141 suit at any stage. Whatever else the *Morrison* test may mean, surely the unfettered right to quash a litigation at any stage is the very touchstone of "control."

This right to quash presents a vital distinction between the deputation model and other forms of private enforcement. While the *Morrison* test considers three stages of litigation, arguably the most important is the decision to commence litigation: Central to the entire concept of prosecutorial discretion is the ability to prevent the commencement of particular suits that may conflict with the policy interests of the federal government. Indeed, the Supreme Court has observed that separation of powers principles protect the executive's power not only to conduct litigation, but also to forego litigation: "The decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[226] The *Riley* court echoed this concern in striking down qui tam provisions where the government elects not to intervene because "the Executive's prosecutorial discretion must include the power to decide whether to bring suit."[227]

This executive right to quash is also necessary for the effective operation of the deputation model because of the government's role in overseeing and administering any decree or settlement under § 14141. Should the Justice Department determine, at any stage in a private § 14141 action, that the alleged unconstitutional "patterns or practices" of the defendant police department are nonexistent, or are being handled adequately by local officials, or simply are not a great priority for the expenditure of federal resources, it is vital that the Department be given the power to terminate the lawsuit.

The right to quash represents neither constitutional compromise nor political pandering to a conservative Congress. Rather, the vetting role assigned to the Justice Department in the deputation model serves a vital quality-control function. Where a petition presents allegations that the Justice Department recognizes as serious, the government will presumably initiate litigation itself or deputize the petitioner; where the petition is weak or insignificant, the government will presumably quash. The entire concept of deputation rests on this belief that private petitioners

226. Heckler v. Chaney, 470 U.S. 821, 832 (1985); see also United States v. Nixon, 418 U.S. 683, 693 (1974) (declaring that the Executive Branch must have "exclusive authority and absolute discretion to decide whether to prosecute a case").

227. *Riley*, 196 F.3d at 526.

and the executive share the common goal of reducing and deterring unconstitutional police practices.[228]

Again, the qui tam model provides an apt analogy. Rather than ask whether the qui tam provisions unconstitutionally encroach upon executive control of litigation brought on behalf of the government, one can instead ask why these provisions retain such an extensive role for the government.[229] At least in part, the answer is that members of the qui tam bar attribute the success of qui tam litigation to be the partnership between the private litigant and the government. For this reason, qui tam practitioners invest considerable effort persuading the government to intervene by convincing the Justice Department of the quality of the case. Ultimately, it appears that the Justice Department is an effective judge of quality.[230]

The deputation model envisions a similar executive role in which the Justice Department carefully reviews petitions and determines, on the basis of a much greater number of stories and incidents than are currently available, which police departments are in need of intervention and reform. Because the decision to initiate a "pattern or practice" suit, deputize a private petitioner, or quash a suit remains with the executive, serious separation of powers concerns are not implicated.

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228. Again, the government's practices in the qui tam context provide some forecast for the deputation model. The Justice Department has intervened in approximately 13% of private FCA actions filed by qui tam relators since 1986. See John C. Ruhnka et al., Qui Tam Claims: Threat to Voluntary Compliance Programs in Health Care Organizations, 25 J. Health Pol. Pol'y L. 283, 288 (2000). In addition, courts have dismissed more than 730 FCA cases where the government did not join the lawsuit. See id. at 298. The remaining cases—those in which the government did not intervene to take over the action or to dismiss—comprise approximately 87% of qui tam actions filed and have netted more than $1.8 billion in recoveries, of which private relators have been awarded only $324 million. See id. at 288. This reveals that where the government believes an action to be potentially meritorious, it will either intervene to prosecute the action itself or allow a private citizen to do so.

229. Despite arguments that the qui tam statute fails to preserve for the executive sufficient control over litigation brought on behalf of the United States, these provisions do include a number of executive checks on relators. See, e.g., 31 U.S.C. § 3730(b)(4)(A) (1994) (providing that the government has an absolute right to take over a qui tam action during the 60-day sealing period); id. § 3730(c)(2)(D) (providing that the Justice Department or the defendant can petition the court to limit the relator's participation in an FCA case).

230. Government statistics indicate that the Justice Department has intervened in approximately 22% of qui tam suits filed since the 1986 amendments; in those suits, the average recovery was more than $8 million. By contrast, cases in which the government declined to intervene resulted in an average recovery of only $30,000, and the vast majority of those cases were dismissed with no recovery. See Jill E. Fisch, Class Action Reform, *Qui Tam*, and the Role of the Plaintiff, Law & Contemp. Probs., Autumn 1997, at 167, 198.

B. *Article II's Appointments Clause*

Article II's Appointments Clause[231] requires that principal "Officers of the United States" be appointed by the President with the advice and consent of the Senate,[232] and that inferior officers may, by congressional authorization, be appointed by the President, heads of departments or the judiciary.[233] The Appointments Clause therefore establishes two classes of officers—principal and inferior[234]—and requires that anyone who is appointed to a federal office must be appointed by one of the processes expressly set forth in the clause.[235] As such, this clause serves as a constitutional safeguard against the concentration of power in one branch of government, granting both the executive and the legislature a role in appointing individuals who will act on behalf of the government as "Officers of the United States."[236]

The Appointments Clause raises threshold questions for the deputation model with regard to the actual identity of the litigant. As discussed above, if the model reduces to the mere retention of attorneys who regularly and systematically bring "pattern or practice" suits—the development of a § 14141 bar—the Appointments Clause is not implicated, as the Justice Department clearly has the authority to hire lawyers to represent the United States in various types of litigation.[237] But if, as I argue, the model cannot fairly be characterized as a government-sponsored employment program for lawyers, then the Appointments Clause asks whether the private petitioner-deputy is a "principal" or "inferior" officer of the United States.

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231. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

232. Id.

233. See Buckley v. Valeo, 424 U.S. 1, 132 (1976) (noting that "[p]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary").

234. See id.; see also United States v. Germaine, 99 U.S. 508, 509 (1879) (noting that "[t]he Constitution for purposes of appointment . . . divides all its officers into two classes").

235. See *Buckley*, 424 U.S. at 126.

236. See The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed. 1961) (arguing that the Constitution is founded on the idea that the government be "so constituted that the members of each should have as little agency as possible in the appointment of the members of the others"); see also *Buckley*, 424 U.S. at 120–29.

237. See supra text accompanying notes 198–199 (discussing the distinction between mere retention of attorneys to represent the government in litigation and the deputation of private citizens).

Here again, a set of determining criteria is supplied by *Morrison v. Olson*, where the Court concluded that the independent counsel was an inferior officer within the meaning of the Appointments Clause.[238] First, the *Morrison* Court noted that the independent counsel is subject to removal by a higher executive branch official, which indicates that she is "to some degree 'inferior' in rank and authority."[239] Second, the Court found that the independent counsel's job is limited to the investigation and possible prosecution of certain federal crimes.[240] And, indeed, in discharging these duties, the independent counsel is required to comply with Justice Department policies, which again reveals the "inferior" rank of the counsel. Finally, the Court noted that the independent counsel's job is a temporary one: "[A]n independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated."[241] Thus, by considering the limited nature of the tenure, duties and duration of the office of the independent counsel, the *Morrison* Court concluded that this individual "clearly falls on the 'inferior officer' side" of the admittedly hazy line between principal and inferior officers.[242]

Lower federal courts have relied on the *Morrison* inquiry to determine whether qui tam relators are principal or inferior officers. These courts have uniformly reasoned that qui tam relators are "inferior" or "subordinate" officers because they have a length of service that is gener-

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238. 487 U.S. 654, 670–77 (1988). The *Morrison* Court cited a numher of cases to support this conclusion. See, e.g., United States v. Nixon, 418 U.S. 683, 694 (1974) (finding that the Watergate Special Prosecutor was a "subordinate officer"); Go-Bart Importing Co. v. United States, 282 U.S. 344, 352–53 (1931) (finding that United States commissioners are inferior officers); United States v. Eaton, 169 U.S. 331, 343 (1898) (finding that Department of State regulations that allowed executive officials to appoint a vice-consul during the temporary absence of the counsel did not violate the Appointments Clause; "[b]ecause the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official"); Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (establishing that a person whose "position is without tenure, duration, continuing emolument, or continuous duties, and [who] acts only . . . temporarily . . . is not an 'officer'" for purposes of the Appointments Clause); Ex Parte Siebold, 100 U.S. 371, 397–98 (1880) (finding that federal election supervisors were not principal "Officers of the United States" for purposes of the Clause); *Germaine*, 99 U.S. at 511 (considering factors relating to the "ideas of tenure, duration . . . and duties" to determine whether an individual was a principal or inferior officer).

239. *Morrison*, 487 U.S. at 671.

240. Id. at 671–72. While the Court acknowledged that the statute grants the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," it found that this grant of authority "does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office." Id.

241. Id. at 672. The Court further noted that, "[u]nlike other prosecutors," the independent counsel "has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for." Id.

242. Id. at 671.

ally limited to a single case, a relatively limited scope of authority, and are not vested with the "primary responsibility" for enforcing the laws of the United States.[243]

Much the same could be said for petitioner-deputies under the model proposed bere. As "one-shot" litigants without general authority beyond that granted in the amended statute, the petitioner-deputy's jurisdiction is limited to the particular "pattern or practice" alleged, and his tenure is subject to revocation by the Justice Department.[244] Just as the Attorney General may remove the independent counsel, the Justice Department would retain the right to quash a petition at any time.[245] Looked at this way, the *Morrison* criteria are likely met in the deputation scheme proposed here.

However, one could argue that the highly politicized *Morrison* case is fairly regarded as *sui generis*,[246] and that the real determinant of the principal vs. inferior officer inquiry is whether the officer "exercises siguificant authority"[247] by formulating government policy, as the Court's pre-*Morrison* jurisprudence suggests.[248] Looked at in this way, a deputy vested with authority to engage in forward-looking structural reform litigation against local police departments in the name of the United States may be said to "formulate policies" that require "continuing and permanent" supervision, and as such, "exercises siguificant authority." Indeed, this ar-

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243. See, e.g., United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1094 (C.D. Cal. 1989); United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989).

244. Of course, if a deputy were to discover additional unconstitutional "patterns or practices" in the course of a § 14141 litigation, the Justice Department could also decide to allow the deputy to pursue additional claims.

245. Indeed, the executive retains greater power under the deputation model than the Ethics in Government Act. While the Attorney General must make a showing of "good cause" to remove an independent counsel, the deputation model allows the Attorney General to quash the petition at any time and for any reasons.

246. As at least one scholar has noted, the political context of the *Morrison* decision made it particularly attractive for the Court to accept some limitation on executive power. See Earl C. Dudley, Jr., *Morrison v. Olson*: A Modest Assessment, 38 Am. U. L. Rev. 255, 265 (1989). See also Julie R. O'Sullivan, The Interaction Between Impeachment and the Independent Counsel Statute, 86 Geo. L. J. 2193, 2235 (1998) (noting that "Congress has more potential power to influence the initiation and conduct of [independent counsel] investigations than the Supreme Court acknowledged in *Morrison*, but Congress has not effectively exercised (and politically probably could not exercise) its powers clandestinely to dictate the type of political witch-hunt posited by critics").

247. While the Supreme Court has not conclusively defined the phrase "significant authority," it has supplied some content. For example, in *Buckley v. Valeo*, the Court identified several functions each of which "represents the performance of a significant governmental duty exercised pursuant to a public law:" rule making, issuance of advisory opinions, and "determinations of eligibility for funds." 424 U.S. 1, 140–41 (1976) (per curiam).

248. Morrison v. Olson, 487 U.S. 654, 671 (1988) (noting that the Act "does not include any authority to formulate policy for the Government or the Executive Branch").

gument was often lodged against plaintiff-driven structural reform litigation in the 1950s and 60s.[249]

Yet, the Appointments Clause ostensibly applies only to the creation of a federal office or a position of employment within the federal government.[250] Here again, there exists a relevant distinction between petitioner-deputies and independent counsels. While the Ethics in Govern-

249. For example, Professor Mamlet has argued that the increased power of plaintiffs was most worrisome at the remedial stage of structural reform litigation, when the parties would negotiate plans or decrees for court approval. When the defendant institution bargains with the plaintiffs, the "concessions it gives will correspond to their policy preferences rather than those of absentee class members or third parties." Alfred M. Mamlet, Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits, 33 Emory L.J. 685, 723 (1984). Mamlet further notes that, since a wide range of remedies exist to vindicate plaintiffs' constitutional rights, and each of these remedies entails different sets of resource allocations, costs to non-class members and citizens, and benefits to class members and third parties, "[t]he selection from these possible remedies is the type of public policy choice which should be made by majoritarian bodies," rather than as part of a negotiated settlement in an individual case. Id. Professor Diver has argued that plaintiffs engaged in structural reform litigation have used the legal system "less as a method for authoritative resolution of conflict than as a means of reallocating power." Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 45 (1979). In this way, the lawsuit "becomes a component of the continuous political bargaining process that determines the shape and content of public policy." Id.

Even sympathetic observers of the mid-century remedial revolution observed that, by its very nature, the structural reform injunction encourages ongoing involvement in, and supervision of, the defendant institution. Unlike a single injunctive order requiring the defendant institution to stop doing something which caused a constitutional deprivation, forward-looking remedial regimes seek change on an incremental basis, so that "no single order of relief can be regarded as definite and final; implementation of a remedy and evaluation of defendant's compliance continues long after the initial finding of a violation." Robert E. Buckholz, Jr. et al., Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 789 (1978). Particularly where courts issued very detailed decrees, revisions and compliance checks ensured ongoing engagement with the defendant institution. See, e.g., Miller v. Carson, 392 F. Supp. 515, 517 (M.D. Fla. 1975) (court-ordered per-cell population restriction revised to account for one cell that was larger than others); United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 230–33 (1969) (in response to non-compliance, court established a more specific desegregation plan and timetable).

250. Three Supreme Court cases reflect this requirement. See Auffmordt v. Heddens, 137 U.S. 310 (1890); United States v. Hartwell, 73 U.S. 385 (1867); United States v. Germaine, 99 U.S. 508 (1878). In *Hartwell*, the Court concluded that the position at issue violated the Appointments Clause because it was a "public station" within the federal government. See *Hartwell*, 73 U.S. at 393. In *Auffmordt* and *Germaine*, on the other hand, the Court held that the positions at issue were not offices subject to the Appointments Clause because the Court understood in each case that the applicable statute did not, and was not intended to, establish a position within the federal government. See *Auffmordt*, 137 U.S. at 326–27; *Germaine*, 99 U.S. at 511–12. Rather, the Court properly construed the statutes as calling upon the services of the pension examiner (in *Germaine*) and the merchant appraiser (in *Auffmordt*) as private, disinterested decisionmakers who would perform a public service. The consistent reference in these cases to such factors as "tenure" and "continuing emolument" reflect the Court's view that the position must be within the federal government for the Appointments Clause to apply.

ment Act creates a position or an office within the federal government, the deputation of petitioners merely calls upon the services of private, disinterested persons to perform a public service. For Appointments Clause purposes, this distinction between the creation of a federal office and the "outsourcing" of a particular service appears far more important than the question of whether the deputy exercises "significant authority" in bringing "pattern or practice" suits on behalf of the government.

C. *Article III Standing*

The third potential constitutional challenge to the deputation model charges that private plaintiffs lack Article III standing to seek injunctive relief against unconstitutional police "patterns or practices." The current test for constitutional standing requires that a plaintiff demonstrate an "injury in fact" that is "concrete and particularized"[251] and "actual or imminent, not conjectural or hypothetical."[252] Importantly, the plaintiff must also establish that her injury "is likely to be redressed by a favorable decision."[253] In addition to these constitutionalized requirements, the Supreme Court has outlined prudential requirements that a plaintiff must meet to establish standing.[254]

On its face, the deputation model is vulnerable to numerous Article III challenges,[255] most notably the equitable standing bar announced in *Lyons*.[256] As discussed in Part I, the Court in *Lyons* found that a private plaintiff has standing to seek injunctive relief against unconstitutional police practices only if he can show to a "substantial certainty" that he will

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251. Lujan v. Defenders of Wildlife, 509 U.S. 555, 560 (1992) (quoting Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983)).

252. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

253. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976). These elements comprise the "irreducible minimum" required by the Court's interpretation of the Constitution. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

254. One such requirement is that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975).

255. Article III issues are only triggered when the petitioner is deputized by the Justice Department to bring a § 14141 suit. In other words, there are no constitutional barriers to private litigants petitioning the Justice Department in the first instance. See, e.g., Marilyn Rauber, Feds to Watch Diallo Trial, N.Y. Post, Jan. 25, 2000, at 15 (reporting that Al Sharpton and Rep. Charles Rangel successfully petitioned the Justice Department to monitor the Albany trial of the four officers charged with murdering Amadou Diallo for purposes of its continuing § 14141 investigation into the New York City Police Department). Similarly, the questions that surrounded statutory grants of standing to private individuals in *Lujan* likely have no application to the deputation model. Unlike the environmental statutes at issue in those cases, the proposed amendment to § 14141 would not purport to define a protectable interest belonging to the citizenry. On this model, Congress is neither defining a private right, nor authorizing a private right of action.

256. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983); see also supra text accompanying notes 46–56 (discussing the equitable standing bar of *Lyons*).

suffer similar injury in the future.[257] One could argue that a petitioner-deputy has no greater chance of proving a "substantial certainty" of future injury than any other private litigant, and is thus barred by the equitable standing doctrine from seeking injunctive remedies to reform unconstitutional police "patterns or practices."

A related challenge would posit that petitioner-deputies lack standing because they have not suffered an injury that can be redressed by injunctive relief.[258] So, for example, if a victim of the police practice of racial profiling were to bring a § 14141 suit acting as a deputy of the Justice Department, his requested relief would likely include the implementation of various procedures to reduce the incidence of racial profiling in the future. However, none of these future-looking forms of relief would redress the deputy's past injury, and thus, he has no standing under current doctrine.[259]

Further, the Court's prohibition on generalized grievances may also serve to deny standing to petitioner-deputies.[260] To the extent that peti-

257. See *Lyons*, 461 U.S. at 105.

258. See Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1018 (1998) (finding that citizen-suit plaintiffs lacked standing to bring a citizen suit based on past violations of an environmental statute because, in the absence of ongoing violations, "[n]one of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent").

259. See id. at 119 (concluding that citizen suit plaintiffs lacked standing to seek injunctive relief because they would gain nothing but the "psychic satisfaction" of knowing that the defendant had finally complied with the law).

260. The Court has long held that plaintiffs alleging a "generalized grievance shared in substantially equal measure by all or a large class of citizens" lack Article III standing. Warth v. Seldin, 422 U.S. 490, 499–500 (1975). For a time, the bar on "generalized grievance[s] was viewed as merely a prudential rule, not required by Article III and therefore subject to displacement by Congress." Edward Hartnett, The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places, 97 Mich. L. Rev. 2239, 2240 (1999). The Court's decision in *Lujan*, however, treated the prohibition against generalized grievances as a function of the case or controversy requirement. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992). The Court insisted, as an Article III matter, that the injury must be to something more than "every citizen's interest in the proper application of the Constitution and laws," and the litigant must not be "seeking relief that no more directly and tangibly benefits him than it does the public at large." Id. In *Akins*, the Court acknowledged that the bar on generalized grievances has been treated sometimes as a constitutional limit and sometimes as a prudential limit on standing. Significantly, it did not choose between characterizations, but instead subdivided the bar on generalized grievances into a prudential rule and a constitutional rule. The prudential rule counsels hesitation before finding standing because "a political forum may be more readily available where an injury is widely shared." Federal Election Comm'n v. Akins, 118 S. Ct. 1777, 1785 (1998) (noting that the availability of a political forum to redress widely shared injuries "counsel[s] against . . . interpreting a statute as conferring standing"). The constitutional rule requires that the injury not be of "an abstract and indefinite nature—for example, harm to the common concern for obedience to law." Id. at 1786 (quotation marks and citation omitted); see also Cass R. Sunstein, Informational Regulation and Informational Standing:

tioner-deputies bring § 14141 cases based on allegedly unconstitutional "patterns or practices" which affect and injure a wide swath of the citizenry, such claims are insufficiently "distinct" to satisfy Article III.[261]

These Article III cballenges are only available, however, if the petitioner-deputy is viewed as a traditional private litigant, representing his own interests in bringing a claim for injunctive relief against a local police department. On the other hand, if the petitioner-deputy is properly viewed as an agent of the government, representing the interests of the executive, these standing challenges lose their force. In other words, if the petitioner-deputy stands in the shoes of the government in bringing a § 14141 suit, the government may then confer its standing to sue upon the private litigant. As the executive is not constrained by the Court's decisions regarding redressability, equitable standing, or generalized grievances, these obstacles would then not stand in the way of the petitioner-deputy.

The question, therefore, is this: Whose interests does a private § 14141 petitioner really represent in bringing a "pattern or practice" suit where the Justice Department opts to deputize the petitioner rather than pursue the case itself?

The Supreme Court recently addressed this precise question in the context of qui tam actions under the FCA. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court, in an opinion authored by Justice Scalia, observed that claims under the FCA serve to redress injury to the United States, and not to the relator.[262] The Court nonethe-

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Akins and Beyond, 147 U. Pa. L. Rev. 613, 617 (1999) (noting that the Court in *Akins* "made clear, for the first time, that Congress can grant standing to someone who suffers a quite generalized injury"); id. at 636 (describing the Court's "key step" as distinguishing between injuries that are "widely shared" and injuries that are "abstract and indefinite," such as an injury "to the interest in seeing that the law is obeyed") (quoting *Akins*); The Supreme Court 1997 Term, Leading Cases, Federal Jurisdiction & Procedure, 112 Harv. L. Rev. 222, 260 (1998) (suggesting that *Akins* can be read "as embracing a definition of injury distinctly broader and more accommodating than that in *Lujan*—a definition that distinguishes between widely shared 'concrete' injuries . . . that are sufficient to confer standing and widely shared 'abstract' injuries that are not").

261. See, e.g., *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 223 n.13 (1974) (explaining that taxpayer-plaintiff did not satisfy Article lll because the claim was based on an "abstract injury in nonobservance of the Constitution"); Massacusetts v. Mellon, 262 U.S. 447, 488 (finding that taxpayer-plaintiff lacked standing where her only injury was that officials were executing a statute that she asserted to be unconstitutional because such injury is not sufficiently "distinct," but rather, one "suffered in some indefinite way in common with people generally").

262. 120 S. Ct. 1858, 1862 (2000) (noting that "[i]t is beyond doubt that the [relator's] complaint asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws . . . and the proprietary injury resulting frolm the alleged fraud"). In *Stevens*, the state agency argued that a qui tam suit against it violates the Eleventh Amendment because the private plaintiff is the real party in interest. Both the district court and circuit court rejected this argument, finding that the government is the real party of interest in qui tam litigation, and further, that states are "persons" for purposes of the FCA. See United States ex rel. Stevens v. Vermont Agency of Natural

less held that the qui tam relator enjoys standing to sue based on the government's partial assignment to him of its claim for damages.[263] In so holding, the Court endorsed a theory of "representational standing"—which the Court had never before "expressly recognized"[264]—whereby the government confers its own standing to an agent or assignee.

In his majority opinion, Justice Scalia considered whether "it would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States."[265] Under the particular statutory regime of the FCA, however, the Court found that the qui tam provisions do not create a true agency relationship insofar as they confer upon the relator rights over and above those of the government, including the right to maintain the suit in the face of government opposition.[266]

It is instructive to compare the basis for "representational standing" in *Stevens* with the basis for such standing under the model proposed here. In considering the qui tam provisions of the FCA, the *Stevens* Court in essence tried on the dress of agency and found it did not fit. The Court then turned to the concept of assignment, which was availing in the context of the FCA, where the government looks to vindicate its proprietary interests, and where the government—like any other litigant asserting a claim for money damages—is free to assign all or part of its claims to a third party.

The model proposed here, by contrast, *does* create a true agency relationship: The petitioner-deputy (as agent) acts on behalf of the United States (as principal) in bringing suit to vindicate the interests of the government, which is the real party in interest in any "pattern or practice" litigation under Section 14141.[267] Importantly, as in any true agency rela-

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Resources, 162 F.3d 195, 198 (2d Cir. 1998), cert. granted, 119 S. Ct. 2391 (1999). After briefing and argument on the Eleventh Amendment issue, the Court sua sponte directed the parties to file supplemental briefs addressing the closely related question of whether a private person has standing under Article III to litigate claims of fraud upon the government. See Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 523, 523 (1999).

263. See *Vermont Agency of Natural Resources*, 120 S. Ct. at 1863 (finding that "adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assiguor").

264. Id. While conceding that it has never expressly recognized "representational standing" on the part of assignees, the Court noted that it has "routinely entertained their suits." Id. (citing Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 465 (1962); Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 829 (1950)).

265. Id. at 1862.

266. See id. The Court found, for example, that the qui tam provisions of the FCA give the relator "the right to continue as a party to the action" even when the Government has intervened to prosecute the claim, "entitles the relator to a hearing before the Government's voluntary dismissal of the suit, and prohibits the Government from settling the suit over the relator's objection without a judicial determination of [the] fairness, adequacy, and reasonableness" of the proposed settlement. Id. (citations omitted).

267. It is beyond doubt that the government is the real party of interest in "pattern or practice" litigation, as the statute itself provides as much. Further, the proposed deputation model does not alter the government's status in this regard. First, the model

tionship, the petitioner-deputy on this model does not have any right to pursue claims except as authorized by the government; nor does the petitioner-deputy otherwise enjoy rights independent of the government whose interests she is representing. There is no need for recourse to the concept of assignment—which would not appear to make sense where the government is vindicating non-proprietary, representational interests; rather, the familiar doctrine of agency provides the basis for "representational standing" under the deputation model.

VI. Practical and Political Considerations Raised by the Deputation Model

In addition to the constitutional issues discussed above, the deputation model raises a number of practical and political considerations. For example, does granting the executive the ultimate right to quash private petitions undermine the efficacy of the model? What incentives exist for private citizens to file petitions seeking authority to bring pattern or practice cases? And by what process would frivolous or unsupportable petitions be limited? The answers to these practical questions are important for understanding the real-world operation of the model and for appreciating the unique mechanism of deputation in this context.

A. *Will The Government Be Responsive?*

Might not the Justice Department simply quash all of the petitions it receives from private citizens seeking authority to pursue § 14141 actions? Why should we believe the government would be more active in authorizing private petitioners to proceed than it has been in instigating its own actions under the statute? For if the government would be no more inclined to allow petitioners to pursue § 14141 actions than it is to pursue them on its own, the implementation of the deputation model would represent but a pyrrhic victory for the cause of structural reform litigation.

There are at least three reasons why the government will be more willing to allow private petitioners to proceed with § 14141 actions than it is to pursue those actions itself. First, there is the issue of money. To the extent resource-allocation issues animate the government's failure to act

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provides the government with the ultimate power to quash any § 14141 suit; those suits which the government does not choose to quash, therefore, must be the suits which it believes further its interests. Second, since the government is the ultimate administrator of any consent decree garnered by a private § 14141 litigant against unconstitutional police practices, the executive remains a real party of interest even where it elects not to intervene or quash the suit. Finally, the government has an interest in reducing and deterring unconstitutional police patterns and practices, and it has a responsibility to safeguard its citizens from injuries resulting from such practices. While this interest may be somewhat more inchoate than the monetary injury caused by fraudulent claims, it is in some senses a much stronger interest: Government in its representative or sovereign capacity is, I would argue, more fundamental to our system than government in its proprietary capacity. See Myriam Gilles, Representational Standing: *United States ex rel. Stevens* and the Future of Public Law Litigation, 89 Cal. L. Rev. (forthcoming Mar. 2001).

under the current regime,[268] we can surely expect greater responsiveness where investigation and litigation activity will be funded by private parties.[269]

Second, there is the issue of political appearances. As a matter of political reality, the executive is hamstrung, under the current § 14141 regime, by the potential ramifications of appearing unduly meddlesome in state and local affairs.[270] The deputation model provides a necessary element of political "cover." It is one thing for the Justice Department to announce an attack on the policies and practices of a municipal police agency; it is quite another for it to allow aggrieved victims of police misconduct to seek to ensure that others do not likewise suffer at the hands of those unconstitutional policies and practices.

Third, there is the matter of accountability.[271] At present, the executive is totally unaccountable when it decides whether to pursue an investigation or litigation under § 14141. There exists no formal mechanism for bringing to the government's attention patterns and practices that might form the basis of § 14141 investigations. And even where the government does consider possible § 14141 action, it does so in a shroud of unaccountable secrecy. Responsible Justice Department officials are largely insulated from any public outcry stemming from their failure to pursue any particular pattern or practice claim, if only because there is no public awareness that any decision is being made. The deputation model proposed here preserves the executive's absolute prosecutorial discretion, but injects accountability into the process.[272] Executive decisions

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268. See supra text accompanying notes 101–111 (discussing the possibility that the Justice Department has brought only three pattern or practice cases under § 14141 because of limited resources).

269. See supra text accompanying notes 165–167 (discussing the significantly greater number of cases brought by private relators under the False Claims Act compared to the number of actions filed by the government under the statute).

270. See supra text accompanying notes 112–117 (discussing the impact of politics on the apparent executive reluctance to seek injunctive relief against unconstitutional local police practices).

271. Accountability is the principle that decisionmakers be given a stake in the reasonableness and honesty of their actions; "that decision makers are responsible, either personally or institutionally, for the consequences of their decisions." International Monetary Fund, Study Group Report: Transparency and Evaluation 5 (1998) (reviewing the workings of the International Monetary Fund). Political accountability is particularly critical in regulating conduct which directly affects the citizenry. See generally David A. Herrman, To Delegate or Not to Delegate—That is Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power, 28 Pac. L.J. 1157, 1169–70 (1997) (discussing the importance of political accountability and elected decisionmakers in the federal system). So, for example, the Administrative Procedure Act established procedures that demanded openness in the administrative process in response to the emerging administrative state. See 5 U.S.C. § 553 (1994) (requiring legally binding rules to be promulgated through a notice and comment procedure).

272. To demand a degree of political accountability in governmental decisionmaking, particularly where those decisions have immediate impact on the constitutional and civil

to proceed or quash would be held up to public scrutiny, if only because the private petitioner herself has a voice, particularly in higher profile cases.[273]

B. *Who Will Step Up To The Plate?*

Implementation of the deputation regime would, of course, be fairly meaningless if we could not reasonably expect private citizens to seek government authorization to pursue pattern or practice actions. This raises several questions: Who would file these petitions? Why would anyone want to engage in potentially expensive, time-consuming litigation that is not directed at obtaining money judgments?

There are several reasons to expect the emergence of a pool of petitioners ready, willing, and able to pursue § 14141 actions. First, it is simply the case that many persons aggrieved by police misconduct seek—for whatever reasons—forward-looking redress against unconstitutional police practices. Even in the wake of *Lyons*, there has been no dearth of plaintiffs seeking (albeit futilely) to assert claims for injunctive relief against municipal police agencies.[274]

Second, it is reasonable to expect that venerable civil rights organizations and attorneys, such as the NAACP, the Center for Constitutional Rights, and others, will actively solicit and encourage victims of police misconduct to come forward. These organizations have the resources and legal expertise, as well as standing in the community, to bring legitimate petitions to the Justice Department and pursue "patterns or practices" cases where the Department elects to deputize a private citizen. It is not hard to imagine civil rights organizations becoming akin to the Sierra Club, National Defenders of Wildlife, or other groups commonly seen in the caption box and widely-known for their representation of citizens in environmental suits.

Third, at least indirectly, there exist meaningful financial incentives for petitioners to initiate § 14141 claims. Most often, private § 14141 petitioners will have parallel damages actions based upon the same facts

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rights of the citizenry, ensures the freedom and ability of the represented to "influence the political process that produces their representatives and governing legislation." Eric Bruggink, A Modest Proposal, 28 Pub. Cont. L.J. 529, 543 (1999). See also Cass R. Sunstein, Lessons From a Debacle: From Impeachment To Reform, 51 Fla. L. Rev. 599, 601 (1999) ("[The Founding Fathers] had a picture of democracy which had a revolutionary feature: [T]hey wanted to combine a high degree of political accountability with a commitment to deliberation and reason-giving. They sought to ensure that outcomes would be supported by reasons, not just power.").

273. The importance of forcing political accountability is mirrored in various Congressional statutes, such as the Freedom of Information Act, 5 U.S.C. § 552 (1994), Lobbying Disclosure Act, 2, U.S.C. § 1601 (1994), and Ethics in Government Act of 1978, 5 U.S.C. app. § 10 (1994).

274. See Little, supra note 57, at 941–46 (reviewing post-*Lyons* cases in which plaintiffs have sought standing to enjoin allegedly unconstitutional police practices).

under federal civil rights laws or state law.[275] A ruling on a § 14141 claim would be entitled to preclusive effect in those damages suits, providing a powerful incentive, in many cases, for the filing of a § 14141 petition.

C. *Should We Worry About Frivolous Claims And Other Abuses?*

Any proposal to open the courthouse door to new classes of petitioners inevitably meets with concerns of frivolous or vexatious litigation. In the context of the deputation model, however, these concerns are less justified than elsewhere in the law. For one thing, the absolute right vested in the Justice Department to quash a petition, for any reason or for no reason at all, acts as a potent check against ill-founded claims. Indeed, this check retains its vitality throughout the litigation process, as the Justice Department is empowered to dismiss the action at any point.

In addition, one would expect fewer frivolous claims in this area than elsewhere if only because there is no direct financial benefit to the § 14141 petitioner-deputy. Moreover, to the extent that established civil rights organizations and their attorneys represent § 14141 petitioner-deputies, the interests that these groups have in their public reputations arguably acts as yet another check against unfounded or frivolous litigation.

Another set of potential objections—albeit extralegal ones—will center around the potential for the deputation regime to furnish a platform for unelected community leaders to try to enlist the machinery of the federal government in their parochial causes. The concern is that community leaders, such as Al Sharpton, would demand federal intervention into local police practices under the threat of civil unrest or other public protest measures.[276]

But these objections, far from exposing any shortcoming in the deputation model, highlight the singular value of injecting a meaningful element of openness and accountability into an otherwise closed and unaccountable process. If the government believes there is no merit to a particular petition, it has a strong incentive to exercise its right to quash; and where the petition has been attended by media coverage due to threats of protest, it may well be in the government's interest to state publicly its reasons for electing to quash. If anything, concerns with civil unrest are ameliorated by the introduction of a mechanism for affected

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275. The deputation model would not interfere with any individual's right to pursue a suit for damages under common law or statute. Similar to the savings clauses provisions in environmental citizen suits, which ensure the retention by the citizen plaintiff of any rights that he may have under any statute or at common law, the model would allow a private petitioner to seek civil damages based on the same underlying facts alleged in the petition. See, e.g., 42 U.S.C. § 7604(e) (1988).

276. For example, after an undercover NYPD officer shot and killed Patrick Dorismond, an unarmed black man, Sharpton threatened "to close the subways, the airports, the bridges" with a "spring offensive" unless the police department and the city took a strong position against the illegality of the shooting. Exile on Main Street, Wall St. J., Mar. 22, 2000, at A22.

individuals to seek federal intervention. Moreover, it certainly cannot be said that, in a democratic government, decisions which affect the citizenry should remain under wraps to protect the citizenry from itself.

CONCLUSION

The deputation model presented in this Article seeks to tap the powerful force of the citizenry as a direct agent in effecting meaningful social change through America's courts. Just as plaintiff-driven structural reform efforts undergirded the most meaningful and lasting victories of the civil rights movement of the last century, so too can plaintiff-driven structural reform be used to attack the unconstitutional patterns and practices of contemporary institutions. And in urban America today, there is no more burning civil rights issue than systemic police misconduct.

Much has changed since the time of the civil rights movement, of course, including the constitutional standing and separation of powers jurisprudence of the Supreme Court. As a result, the re-enfranchisement of the citizenry into structural reform litigation will require genuine partnership between public and private interests. Serendipitously, the upshot of the Court's restrictive standing jurisprudence is this: In order to tap the millions of eyes on the ground—the experiences, energies and resources of the people directly affected by systemic misconduct—there needs to be a model that ensures close cooperation between community groups and responsible leaders in the Department of Justice. The legislation proposed in this Article establishes a pragmatic framework for that cooperation and breathes new life into an institution—plaintiff-driven structural reform litigation—that justly warrants a proud place in American jurisprudence.