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**STANDING AND THE ROLE OF FEDERAL COURTS:  
TRIPLE ERROR DECISIONS IN *CLAPPER V. AMNESTY  
INTERNATIONAL USA* AND *CITY OF  
LOS ANGELES V. LYONS***

Vicki C. Jackson\*

The question of standing is a subcategory of justiciability doctrine, which fundamentally concerns a set of questions about the role of the judiciary in U.S. constitutional democracy. What makes these questions fraught, and complex, is that among the rights deserving of protection in any constitutional democracy is the structural right to democratic self-governance, a right that is arguably at risk whenever courts are asked to invalidate government action authorized by democratically elected bodies in enacted laws in order to protect other rights constitutionally secured to individuals.<sup>1</sup> The U.S. Supreme Court has long been accused of unprincipled manipulation of standing and other justiciability doctrines.<sup>2</sup> But some degree of inconsistency in justiciability

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\* Thurgood Marshall Professor of Constitutional Law, Harvard Law School. With thanks to Tara Grove, both for organizing the panel and for providing very helpful comments on prior drafts, and to Judith Resnik, Richard Fallon, Federico Fabbrini, John Goldberg, Jamal Greene, Victor Quintanilla, Mark Tushnet, and Martin Lederman for their very helpful comments and suggestions. Thanks as well to Andres Salinas, Harvard J.D. expected 2016, for valuable research assistance. Any errors that remain despite all this help are only my own responsibility. Please see *infra* note 43 concerning my own involvement in one of the cases discussed.

<sup>1</sup> Although the Court has from time to time stated that the Constitution provides no right to vote, see, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000), such a view places too much weight on the absence of one kind of explicit text (“right to vote”) and misses the significance of the Constitution’s clear textual, and structural, commitments to elections. The “Republican form of government” clause, U.S. CONST. art. IV, § 4, can be understood to backstop the Constitution’s implicit requirement that state legislatures—and hence the Congress, see U.S. CONST. art. I, § 2, and the Seventeenth Amendment—be popularly elected. The structural requirement of elected legislatures, expressed in these constitutional texts requiring that representatives be “elected by the people,” reflects a theory of political legitimacy that rests, ultimately, on the right of self-government, of government by consent of the people. Invalidation of laws and acts by elected officials claimed to violate individual rights can be viewed as disrupting rights of self-governance. That is, there are often important constitutional values on both sides of major constitutional controversies whose weight might vary depending on the degree of connection and accountability for the challenged act (e.g., between challenges to recently enacted legislation and challenges to the constitutionality of discrete acts of executive branch personnel). See *infra* note 176.

<sup>2</sup> See, e.g., GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 116, 121 (7th ed. 2013) (suggesting standing law is inconsistent when it treats loss of an opportunity for something, rather than the thing itself, as an Article III injury and that “[s]tanding doctrine went wrong in *Data Processing*” in 1970); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J.

doctrines' application may be inevitable across the wide range of substantive issues that arise as the federal courts, headed by the Supreme Court, seek to find a proper balance between their role in redressing or preventing violations of constitutional rights and limits on the one hand, and an understandable hesitation about interfering in the process (and rights) of self-governance on the other.

Determinations of justiciability were at the heart of Alexander Bickel's argument for the "passive virtues," involving what Bickel called a power to "decline the exercise of jurisdiction" in some cases.<sup>3</sup> This power, he argued, was necessary to allow the Court, "exist[ing] in the Lincolnian tension between principle and expediency," to play its importantly countermajoritarian role in other cases.<sup>4</sup> In his Harvard Foreword, Bickel implied that the Court, even if it is not as "principled" in deciding not to decide as it must be in deciding the merits, must remain a forum of "decency and reason"; it must not engage in undisciplined or merely "expedient" decisionmaking, but must be governed by standards of "prudence."<sup>5</sup> For Gerald Gunther, however, Bickel's arguments for prudential avoidance of full merits decision were too great a threat to the Court's role as principled adjudicator.<sup>6</sup>

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221 (1988) (noting critique of standing law as "incoherent" and arguing that modern standing doctrine misses the right question, which is whether the plaintiff has a "legal right to judicial enforcement of an enforceable legal duty" and calling for revised understandings of virtually all of standing law); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1715 n.72 (1980) (expressing highly skeptical view of standing law as inconsistent and subject to manipulation); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (noting the "traditional criticisms of standing law . . . that it is confusing and seemingly incoherent"); see also Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41 (1981); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

<sup>3</sup> Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 43, 47 (1961) (arguing that the "passive virtues" of deciding when not to decide are necessary to sustain the Court's legitimacy to adjudicate on the merits).

<sup>4</sup> *Id.* at 50.

<sup>5</sup> *Id.* at 51; cf. David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) ("[D]iscretion need not mean incoherence, indeterminacy, or caprice; nor is discretion at odds with the recognition of responsibility for the adjudication of disputes.").

<sup>6</sup> Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (opposing Bickel's approach as unprincipled and inconsistent with the Court's adjudicatory obligations). Gunther was especially critical of Bickel's praise for the Court's dismissing for want of a substantial federal question the appeal in *Naim v. Naim*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956), in which the lower court had rejected a constitutional challenge to "anti-miscegenation" laws. Gunther, *supra*, at 11–12. Bickel and Gunther agreed that the Court could not uphold such laws in light of the principle of *Brown. Id.*; ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 174 (1962). But Bickel treated the Court's action as essentially equivalent to denying certiorari; Gunther concluded that such dismissals do speak to the

Considerations of “prudence” are reflected across standing doctrine. As Bickel argued, “standing” originally meant that the courts “may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results,” and that further development of standing reflects the Court’s development of doctrine that essentially “declined” to exercise a jurisdiction it lawfully had.<sup>7</sup> Thus, as Bickel’s work suggests, much of the Court’s doctrine, though denoted as “constitutional” as opposed to “prudential” by the Court,<sup>8</sup> can be regarded as reflecting considerations of prudence rather than ineluctable understandings of the constitutional terms “case” or “controversy.”<sup>9</sup> In the philosophy of Aquinas, prudence was a form of wisdom, distinct from but allied to justice as a cardinal virtue.<sup>10</sup> The well-known disputes between Bickel and Gunther might be taken to raise questions of whether prudence can be married to sufficiently principled reason. Or is the idea of a reasoned or principled prudence an oxymoron?<sup>11</sup>

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merits of the lower court decision, denying the Court’s mandatory jurisdiction because the federal challenge was so without merit, and as such the *Naim* decision was inconsistent with the Court’s role as principled adjudicator. *Id.* at 12.

<sup>7</sup> See Bickel, *supra* note 3, at 42–43; see also BICKEL, *supra* note 6, at 119–27.

<sup>8</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (distinguishing the three so-called “constitutional” components of standing—*injury, causation, and redressability*—from three other so-called “prudential” aspects of standing).

<sup>9</sup> See, e.g., Winter, *supra* note 2, at 1372–73 (noting the *Burger* Court’s expansion of the “irreducible minimum” [*Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)] to include the requirements that the plaintiff also show that the injury was caused by the defendant’s allegedly illegal conduct and that the injury is one that can be redressed by the court’s decision.” (footnote omitted)). The entire structure of standing law is (relatively) a newly created doctrine of the mid-20th century, one that many scholars have concluded is not constitutionally compelled. Not only was “standing” a mid-20th century invention, largely of Justices Brandeis and Frankfurter, designed at first to protect progressive or New Deal programs from judicial interference, but, as well-rehearsed in scholarly literature in the 1970s and 1980s, “standing” doctrine only came to focus on “injury in fact” as an element beginning in 1970, with requirements of “traceability” and “redressability” added later. See, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 n.9 (1988) (stating that “the writ tradition, especially at the origin of the republic, makes it extremely awkward to suggest that modern notions of injury in fact . . . have constitutional status”); Winter, *supra* note 2, at 1374, 1440–57; see also Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Fletcher, *supra* note 2, at 224–25; Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

<sup>10</sup> See John Finnis, *Aquinas’ Moral, Political, and Legal Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2014 Edition) (Edward N. Zalta ed.), <http://plato.stanford.edu/archives/sum2014/entries/aquinas-moral-political> (noting that, according to Aquinas, prudence “enters into every other virtue,” including justice).

<sup>11</sup> For an elegant and eloquent defense of the concept of principled discretion, see Shapiro, *supra* note 5, at 578–79.

Standing doctrine presents an interesting test case.<sup>12</sup> Some applications of standing doctrine, reflecting genuine concerns about whether the particular party invoking jurisdiction has the appropriate connection to the subject matter, rely on reasoning that has only limited effects in excluding Article III courts from adjudicating an issue.<sup>13</sup> In such cases, whether the decision is fully principled or not, the prudential arguments to withhold jurisdiction are supported by the likelihood that another party will soon be able to challenge similar conduct. But standing is sometimes used by the Court to shelter large swathes of governmental conduct from the most effective forms of judicial review, as in these two cases separated by three decades: *Clapper v. Amnesty International USA*<sup>14</sup> and *City of Los Angeles v. Lyons*.<sup>15</sup> In these cases, I will argue, the Court's decisions have the virtues of neither consistency with well-established principle, nor of wisdom.

A fundamental idea behind justiciability doctrines is that the mere fact of an asserted, or actual, illegality is not sufficient for courts to act. This idea is a distinctive one, not followed by all constitutional democracies, in some of which courts stand as more general monitors of the legality of the actions of other branches.<sup>16</sup> Justiciability doctrines can be understood, in part, to reflect the United States' commitments to democratic decisionmaking, commitments that in some respects far exceed those of

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<sup>12</sup> For a thoughtful effort to identify a "meaningful legal order" to the Court's standing doctrine, see Richard Fallon's contribution to this symposium. Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105 (2014) [hereinafter Fallon, *Realism*]. See also Richard H. Fallon, Jr., *The Fragmentation of Standing and What To Do About It*, 93 TEX. L. REV. (forthcoming 2015) [hereinafter Fallon, *Fragmentation*] (arguing that standing doctrine reflects real differences based on substantive issues and arguing that the Court should acknowledge "that what counts as an 'injury' will depend on the provision under which a plaintiff brings suit").

<sup>13</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). Whether else may be said, the prudential denial of standing in *Newdow* would not prevent custodial parents from raising religiously based First Amendment challenges to recitation of words about God in the Pledge of Allegiance in public schools and is thus unlikely to have any long-term effects on the adjudication of such challenges. A similar argument could be made about the denial of standing in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), though with less clarity. In *Perry*, the issue of the constitutionality of the state's ban on same-sex marriage had been adjudicated in the lower Article III courts; the dispute was only about appellate standing, when state officials declined to appeal and proponents of the referendum that resulted in the ban invoked the Court's jurisdiction. While the reasoning in *Perry* may have systematic effects in excluding proponents of successful referenda from seeking review when state officials fail to do so, such issues were adjudicated in the trial level Article III court and in any event are unlikely to escape Supreme Court review because officials in other states may have standing to seek review of successful challenges to their own similar laws.

<sup>14</sup> 133 S. Ct. 1138 (2013).

<sup>15</sup> 461 U.S. 95 (1983).

<sup>16</sup> See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 525–35, 899–922 (2d ed. 2006) (describing "abstract review" in Germany's Constitutional Court and exploring the claimed absence of a political question doctrine in Germany).

otherwise comparable polities. One need think no further than the fact that a majority of states elect, or subject to reelection, a significant number of their judges, to have a sense of this difference. Justiciability doctrines also reflect instincts for institutional self-protection for the courts, of a kind with which Bickel's arguments for avoidance of decision were concerned.

The core idea of standing is that the person invoking an Article III court's jurisdiction must have suffered (or be likely to suffer) injury requiring judicial redress. Although several rationales for "standing" doctrine have been offered,<sup>17</sup> an important set of justifications are related to those for other justiciability doctrines: By limiting standing to those suffering concrete injury, standing doctrines may help insulate the courts from, or delay their involvement in, ideological battles between the branches,<sup>18</sup> thereby protecting judicial independence, an independence in part grounded in the idea that the Court's jurisdiction is demarcated from the policy-making sphere of elected officials.

But the idea that justiciability doctrines help conserve the courts' interventions for when they are most needed is also grounded in a vision of the *affirmative* role the courts are to play in securing the actual protection of constitutional rights, so that they are not mere "parchment" rights.<sup>19</sup> The courts' role in so doing is especially important in settings where ordinary political processes cannot be expected to provide adequate protection to those rights.<sup>20</sup> That their role is to assure the protection of rights

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<sup>17</sup> These include the idea that without a concrete stake, a party may not aggressively advocate and thereby deprive the courts of the procedural basis for the exercise of adjudicatory powers (a concern that, in cases involving deeply committed legal public interest groups, has little connection to the reality of hard fought litigation), and the idea that standing helps prevent "bystanders," or those lacking so direct a connection to a matter, from litigating in place of those more directly affected, an important concern articulated, for example, in Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979). In this paper I primarily focus on the justifications for standing that sound in preventing usurpation of the political branches' power.

<sup>18</sup> Cf. *Clapper*, 133 S. Ct. at 1146 (stating that standing doctrine "serves to prevent the judicial process from being used to usurp the powers of the political branches").

<sup>19</sup> Cf. THE FEDERALIST NO. 48 (James Madison) (arguing against the sufficiency of "trust [in] parchment barriers against the encroaching spirit of power" to establish "practical security" to each branch from the exercise of powers by the others). The proposition that an important function of Article III courts is the protection of rights that majoritarian processes may not account for is not particularly controversial (in contrast to the debate over the courts' role, *vel non*, in enforcing structural limits on branches and levels of government). This paper is concerned primarily with the protection of individual rights, as distinct from structures, but has taken note, above, of the complexity of issues that can arise if one recognizes as a formidable "right"—at once individually and collectively exercised—the right of democratic self-government.

<sup>20</sup> For the most prominent scholarly exposition of this "representation-reinforcing" theory of judicial review, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

does not necessarily mean that the courts must give an individually satisfying remedy to each litigant,<sup>21</sup> the protection of rights can be promoted as well by judicial doctrine that facilitates the attention of other branches to constitutionally salient values.<sup>22</sup>

A critical consideration of standing decisions thus entails at least the following constitutional concerns: first, the basic purposes of courts in a constitutional democracy, including the protection of rights, either directly or through doctrine that encourages other branches to do so; second, self-limitations on the exercise of jurisdiction to preserve the courts' institutional capacities; and third, self-limitations on the exercise of jurisdiction to allow room for democratic self-governance. As I will suggest, self-limitation on the exercise of jurisdiction will not necessarily preserve courts' institutional capacities if refusals to adjudicate or allow adjudication contribute to

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<sup>21</sup> See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

<sup>22</sup> For discussion of the capacity and role of legislatures and other constitutional actors in interpreting the Constitution, see, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); see also, e.g., Robin West, *Toward the Study of the Legislated Constitution*, 72 OHIO ST. L.J. 1343 (2011). My suggestion that *nonjusticiability* determinations can sometimes contribute to *weakening* the accountability and democratic legitimacy of other branches may be viewed as inconsistent with scholarly arguments that judicial review itself weakens democratic accountability. See, e.g., Waldron, *supra*, at 1353 (arguing that judicial review is "politically illegitimate, so far as democratic values are concerned," because "it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights"); James B. Thayer, *The Origin and Scope of the American Doctrine of Judicial Review*, 7 HARV. L. REV. 129, 155–56 (1893) ("No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. . . . The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent."); see also Mark Tushnet, *Thayer's View: Judicial Review or Democracy*, 88 NW. U. L. REV. 9 (1993) (arguing that Thayer's argument to constrain judicial review, to invalidate laws only when it was beyond doubt that the statute was unconstitutional, was most concerned with protecting democracy from the debilitating effects of more aggressive judicial review); Mark Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993) (arguing that legislators sometimes "pass the buck" to the courts on difficult issues). Cf. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 295 (2007) (arguing that judicial supremacy in interpreting the Constitution has developed in important part from decisions of political actors who "defer to the Court precisely because they do not wish to accept the responsibility of deciding these issues themselves"; also suggesting that judicial supremacy has been produced by decisions of democratically elected representatives and that U.S. democratic politics might not be "better absent the temptation of judicial supremacy").

disrespect for the courts' fairness and reasoning,<sup>23</sup> and self-limitation may not advance democratic self-government if it reinforces or fails to remove obstacles to the workings of well-functioning constitutional democracy.

In this Essay I discuss two cases, one from 2013, the other from 1983, that display somewhat similar misunderstandings of the federal courts' role in the U.S. constitutional system. The Court's understanding of its self-developed "standing" limits in such decisions as *Clapper v. Amnesty International USA*,<sup>24</sup> and *City of Los Angeles v. Lyons*,<sup>25</sup> is incompatible with some of the most important justifications for the degree of independence allowed to Article III courts. The Court's vision in these two cases confuses non-adjudication with appropriate deference to the political branches, and overlooks the role of adjudication in prompting democratic deliberation about rights protection. Nor are these decisions justifiable by resort to ideas of a disciplined prudence, or principled discretion, in the timing and posture of adjudication.<sup>26</sup>

Both cases arguably involved minority interests particularly in need of judicial scrutiny. In *Lyons*, the plaintiff was a member of a discriminated-against minority group, an African American male, chokeheld by Los Angeles police in 1976 when racism was rampant in that department.<sup>27</sup> In *Clapper*, although the constitutional rights claims affected the shared interests of large groups, the plaintiffs grounded their standing in important part in their role protecting the legal rights of potential terrorism suspects, in the years following the attacks of 9/11.<sup>28</sup> In this sense, neither set of plaintiffs could expect a majoritarian political process to fully attend to the asserted invasion of their rights. In both cases plaintiffs raising non-frivolous claims of constitutional rights violations were denied access to important judicial remedies. These decisions, I will argue, were both errors in the treatment of the plaintiffs, failing to advance the important purpose of judicial review of providing an impartial forum to evaluate claims of rights denials by minority groups or persons taking unpopular positions (and those acting on their behalf).<sup>29</sup>

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<sup>23</sup> See, e.g., Gunther, *supra* note 6.

<sup>24</sup> 133 S. Ct. 1138 (2013).

<sup>25</sup> 461 U.S. 95 (1983).

<sup>26</sup> Bickel's concerns about the passive virtues seemed mostly centered on adjudication in the Supreme Court itself. See BICKEL, *supra* note 6, at 131–33, 173. But as others have noted, because justiciability doctrines are generally described by the Court as applying to all Article III courts, they lack the flexibility needed to achieve many of Bickel's prudential goals. See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 108–12 (2007) (discussing the "passive virtues"). For a further critique of the "passive virtues," see Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 416–17 (1997) (arguing that prudential "passive virtues" are inconsistent with concept of litigation as party-driven and responsive to parties' arguments and evidence).

<sup>27</sup> See *Lyons*, 461 U.S. at 97–98; *id.* at 114–16 (Marshall, J., dissenting); *infra* text at notes 169–71.

<sup>28</sup> *Clapper*, 133 S. Ct. at 1145.

<sup>29</sup> The plaintiffs in *Clapper* were attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes

In both cases, moreover, the body politic may have suffered constitutional and other harms that might have been avoidable were it not for the Court's self-restraint. This is particularly evident in *Lyons*: In the years following the Court's 1983 decision in that case, the L.A. Police Department continued to visit unjustified physical violence on its citizens; the physical violence of the "Rodney King" riots occurred following acquittal of the LAPD officers involved, notwithstanding the visual images of their brutality.<sup>30</sup> Some of this unjustified police behavior, and thus some of the physical violence of the rioting the Rodney King episode provoked, might have been forestalled by earlier injunctive relief and related judicial monitoring, had *Lyons* not essentially ruled it out through its new standing requirements. Of course, whether or not allowing standing would have led to further relief against the LAPD, and if so, whether it would have been effective in disrupting the culture of racism and violence, are uncertain; but the failure to allow the possibility of such relief raises haunting questions of what might have been. The Court's decision also stands as a failure to develop doctrine designed to prompt other branches and levels of government proactively to protect rights as they govern.<sup>31</sup>

In *Clapper*, the connection between denying access to the courts and any harm resulting to the people's sense of trust and privacy from the surveillance itself, or harm from unauthorized disclosures of classified material concerning surveillance by leakers, is less direct and more contestable. Nonetheless, a potential for harm from foreclosing adjudication exists. Denying justiciability left the constitutionality of a statute potentially affecting millions of Americans' privacy rights unresolved. Denying justiciability in *Clapper* may also have added to the felt pressures for unlawful disclosures of information, on the view that litigation in court over the constitutionality of the surveillance would be unavailing.<sup>32</sup> Denying justiciability also passed up opportunities for courts to develop legal standards concerning covert surveillance in this setting, or to spread on-the-record reliable information about how, in general terms, the statutory authority was understood by those who implemented it, information that could be helpful to democratic deliberation.

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privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad [and who] believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under § 1881a.

*Id.*

<sup>30</sup> See James H. Johnson, Jr. & Walter C. Farrell, Jr., *The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992*, 71 N.C. L. REV. 1403, 1403-07 (1993).

<sup>31</sup> Compare *Gov't of S. Africa v. Grootboom*, 2000 (1) SA 46 (CC) (S. Afr.) (holding that the justiciable right to access to housing in South Africa's Constitution imposed an obligation on the government to develop a reasonable plan for meeting housing needs but did not entitle the homeless plaintiffs to specific individual relief), with *Rizzo v. Goode*, 423 U.S. 362 (1976) (dismissing on justiciability, equitable and federalism grounds action to have police department placed under judicial supervision focused on its disciplinary mechanisms in order to prevent future incidents of police abuse).

<sup>32</sup> See *infra* note 132 (describing leaker Snowden's question to his attorney about standing).

To continue as a constitutional democracy, there must be sufficient checks, through law, on the exercises of power, especially where those exercises of power are not fully transparent. In both *Lyons* and *Clapper* the Court missed opportunities, through constructions of standing doctrine that were unnecessary (in David Shapiro's memorable phrase, "unforced error[s]"<sup>33</sup>) to improve the quality of our democracy by considering substantial claims that important constitutional rights were being violated. These errors, unforced by precedent, may flow from a vision that mistakenly equates judicial self-restraint with democratic self-governance,<sup>34</sup> or that values democratic governance over particular constitutional rights, in circumstances where constitutional democratic self-governance would have benefitted from allowing adjudications to go forward. Harm to society from the Court's failure to allow merits adjudication reflects the second shared error in these cases.

Finally, the Court does not necessarily protect itself institutionally by not deciding; there are cases it ought to decide—or allow to be decided in the lower courts—in order to legitimate the substantial power and independence federal courts enjoy under the Constitution. The courts do not sit simply to duplicate what legislatures and executives do;<sup>35</sup> their special provenance is the protection of rights, and especially the kinds of constitutional rights asserted by minorities not likely to prevail through purely political processes—not likely, perhaps, even to get on the agendas of elected bodies—but which the courts, generally, "have" to decide. Refusals to decide claims of constitutional right brought by minorities on justiciability grounds are in tension with one of the most powerful arguments for having independent courts review government action. The third error shared by these cases, then, is the self-inflicted harm to the Court's own role in the U.S. Constitutional System.

The legitimacy of the federal courts rests on many factors: the constitutional provisions securing their independence; their long history as national symbols; the courts' procedures, and their sense of self-discipline and restraint; the restraint of other branches and levels of government in dealing with the courts; the justness and correctness of their judicial decisions; and the regard for the courts from the legal

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<sup>33</sup> David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 70 (1984) (describing a recent decision by the Court as an "unforced error").

<sup>34</sup> See, e.g., *Clapper*, 133 S. Ct. at 1146 (noting that Article III standing law "serves to prevent the judicial process from being used to usurp the powers of the political branches"); see also *Allen v. Wright*, 468 U.S. 737, 750 (1984) (describing Article III's concern with "unelected, unrepresentative judiciary" in determining standing) (citation and internal quote marks omitted).

<sup>35</sup> See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 58–59 (2001) (emphasizing how judges' constitutionally secured independence, in contrast to elected representatives' constant need to worry about reelection, enables judges to take a longer and more impartial view of constitutional questions); cf. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1700 (2008) (arguing that courts bring a "distinctive perspective that makes them more likely than legislatures to apprehend serious risks of rights violations in some kinds of cases").

community, political elites, and from the people.<sup>36</sup> Especially for the people at large, the Supreme Court is a symbol, as well as the head, of the federal courts. Yet unlike European-style constitutional courts, the membership of the Supreme Court is not renewed on a regular basis; U.S. justices serve unlimited tenures, unlike European constitutional court judges who are typically replaced after serving single terms of considerably less than a generation's span.<sup>37</sup> Support for the Court turns, in part, on its being perceived as an open-minded forum, somehow at once vindicating democratic governance and protecting individuals and minorities, while resolving disputes and providing justice under law. Judicial legitimacy also draws strength from the Court's use of legal processes, and legal reasoning, consistent with the norms of the broader legal community in which it is situated. The errors reflected in *Lyons* and *Clapper* may work together with other developments—including “door-closing” doctrines in civil rights cases and in tort and consumer actions against businesses—to raise concerns about what the Court is for, and with it, questions about its legitimacy and continued independence.

The standing decisions in *Lyons* and *Clapper* were, then, a triple error. First, the individuals and organizations involved, members of political or racial minorities, were remitted to the very majoritarian processes of whose results they complained. In this sense the cases represent a fundamental failure of the individual rights protecting role that is so important an aspect of the federal courts' responsibilities. Second, for the body politic, the predictable failures of the political processes to remedy the complained-of conduct in *Lyons* may have contributed to very adverse developments for bona fide social interests in peace, order, and security.<sup>38</sup> *Clapper* was a missed opportunity to contribute to the development of legal standards for regulating the vitally important yet potentially harmful surveillance practices of the government in an age of metadata collection. And third, for the Court itself, continuing to close the doors to litigants pressing the kinds of constitutional claims on which the courts have a particularly significant role to play in a democratic constitutional society is inconsistent with the long term institutional interests of the judiciary in being seen as a forum for protecting the rights of all of the people.

Part I discusses *Clapper*, demonstrating how it expanded the standing barrier beyond prior cases, to the detriment of plaintiffs' ability to practice their professions free from reasonable fear of (assertedly) unlawful surveillance, and of the country's understanding of how the Constitution limits (if at all) government surveillance of innocent persons. Part II discusses *Lyons*, and its expansion of the law of standing,

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<sup>36</sup> These factors are not necessarily independent; elite evaluation may depend on the perceived correctness of decisions or candor and persuasiveness of reasoning; popular opinion may interact with that of elected representatives.

<sup>37</sup> In Germany, constitutional court judges serve for twelve-year nonrenewable terms; in France, members of the Conseil Constitutionnel serve for nine-year nonrenewable terms. JACKSON & TUSHNET, *supra* note 16, at 498.

<sup>38</sup> See *infra* Part II.

as Richard Fallon argued long ago, by replacing the mootness doctrine's emphasis on a showing that past unlawful behavior *will not* recur with a standing doctrine requirement to show that past unlawful behavior *will recur* to affect the particular plaintiff.<sup>39</sup> This change works to the detriment of individuals injured by police misconduct and to the detriment of the broader society that was afflicted by the harms caused by racist police brutality and ensuing mob violence. Part III addresses potential harm to the Court's legitimacy from its reliance on threshold barriers to public adjudication in the federal courts, including but not limited to standing doctrine, having in mind from a comparative perspective the particular institutional structure of the Supreme Court.

#### I. *CLAPPER*: STANDING TO CHALLENGE MASSIVE SECRET SURVEILLANCE

*Clapper* was an "unforced error" in the direction of tightening standards for standing in order to avoid deciding on the constitutionality of a new program of mass surveillance claimed to pose a particular threat to the privacy of plaintiffs' communications. In the extremity of its insistence on the certainty of future injury,<sup>40</sup> *Clapper* goes beyond the requirements for standing applied in other arguably analogous cases. Its approach may be contrasted with *United States v. Windsor*,<sup>41</sup> decided the same Term, in which the Court arguably relaxed Article III case-or-controversy requirements in light of the interests in resolving the unconstitutionality of the federal Defense of Marriage Act (DOMA). The Court's choice to deny justiciability in *Clapper* did not advance self-governance and cannot be squared with the fundamental rights-protecting role of the Article III judiciary.

##### A. *A Prefatory Note: Windsor and Clapper Compared*

In *United States v. Windsor*, the Court upheld the Article III standing of the United States to seek review of a judgment, with which the United States agreed, upholding an individual's constitutional challenge to DOMA.<sup>42</sup> (I served as Court-appointed amica curiae in *Windsor*, arguing, at the request of the Court, that the government's agreement with the court below deprived the Supreme Court of jurisdiction and that the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives lacked Article III standing.)<sup>43</sup> In *Windsor*, there was no need for appellate review to protect

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<sup>39</sup> See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 6, 24–30 (1984).

<sup>40</sup> See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (stating that future harm must be "certainly impending").

<sup>41</sup> 133 S. Ct. 2675 (2013); see *infra* notes 42–55 and accompanying text.

<sup>42</sup> *Windsor*, 133 S. Ct. at 2686–89.

<sup>43</sup> I was appointed by the Court and served pro bono as amica curiae for the purpose of arguing the above two points. In this unusual role, I sought to make the best, most responsible arguments for each position the Court asked me to argue. I do not here evaluate the correctness of these two arguments (on which I may write in the future), but focus rather on

the rights of the *individual* litigant, who could recover the taxes owed her under the district court judgment.<sup>44</sup> The “injury” to the Government—the need to pay a tax refund—was not one the Government sought to remedy on appeal; rather, it sought an affirmance.<sup>45</sup> But interests in the settlement of an important question of federal constitutional law affecting many people were plainly at stake; respondent Windsor supported the Court’s jurisdiction, and in doing so noted the interests of many other same-sex married couples who were disadvantaged by the federal law.<sup>46</sup>

In upholding the government’s standing under Article III to pursue appellate review in *Windsor*, the Court could have articulated a distinct framework for government appeals. Given the peculiar nature of sovereign interests, one could readily imagine such an argument being made.<sup>47</sup> Instead, the Court purported to apply ordinary Article III standards for determining standing.

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the Court’s different attitude toward relaxing or tightening standing requirements found in *Windsor* and *Clapper*.

<sup>44</sup> Had appellate review been denied, the district court judgment, once final, would have been payable through standing appropriations for the Tax Judgment Funds and plaintiff could have collected on her judgment. See Reply Brief for Court-Appointed *Amica Curiae* on Jurisdiction at 9 n.9, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); see also 31 U.S.C. § 1304 (establishing the judgment fund, a permanent indefinite appropriation to pay judgments entered against the United States that are not payable from other sources); 31 U.S.C. § 1324 (establishing indefinite appropriation to be used to pay tax refunds).

<sup>45</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>46</sup> See Brief on the Jurisdictional Questions for Respondent Edith Schlain Windsor at 11, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (noting “harmful uncertainty” for Ms. Windsor and “hundreds of thousands of others”).

<sup>47</sup> The “injuries” that a government pursues in a criminal prosecution, for example, are not “personal” to the government but go to the government’s interests in vindicating the law; an interest in vindicating the law is not sufficient for standing for a private person. It was an interest in vindicating the law—of the Constitution, and, if it were constitutional, of the DOMA statute—that presumably contributed to the government’s decision to seek review in *Windsor*. On the application (vel non) of Article III doctrine on standing to suits by the federal government, see, e.g., Edward A. 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, 2245 (1999) (“[N]o federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is ‘personal,’ ‘concrete and particularized,’ and ‘actual or imminent, not conjectural or hypothetical’ before litigation on its behalf can be brought in federal court. And no federal judge would contend that injury to the United States be more than an ‘abstract . . . injury to the interest in seeing that the law is obeyed . . .’”); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) (“Federal courts regularly adjudicate government enforcement actions that would lack ‘injury in fact’ if brought by private plaintiffs.”); cf. *Massachusetts v. EPA*, 549 U.S. 497, 518–21 (2007) (stating that “States are not normal litigants for the purposes of invoking federal jurisdiction” and suggesting that the fact that party plaintiff and petitioner was a sovereign state allowed some relaxation of the standard to meet Article III standing requirements). For an argument defending different standing requirements for executive branch and private parties, see Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 782–84 (2009).

As the Court summarized Article III's "familiar" standing requirements:

"First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be '*redressed by a favorable decision.*'"<sup>48</sup>

Having embraced this established three-part test, however, the Court acted as though the true test was whether the government had a "stake" in the decision, and concluded that it did:

[The government] retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is "a real and immediate economic injury," indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA . . . .<sup>49</sup>

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<sup>48</sup> *Windsor*, 133 S. Ct. at 2685–86 (emphasis added) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (footnote and citations omitted)).

<sup>49</sup> *Windsor*, 133 S. Ct. at 2686 (citation omitted). In this passage, which seemingly distinguishes the "Government of the United States" from the "Executive," there is implicit recognition that the government, as a party litigant, has more complex, "multi-hatted" interests than ordinary litigants. One might reason that the interest of the government in terms of the correct application of constitutional law led it to seek affirmance; its interest in protecting the Treasury—its financial interests—as the Court saw it, gave it standing to appeal from the judgment with which the Government agreed. The Court remarks on two other interests that supported exercising jurisdiction (that also might have motivated the government's position)—an interest in vindicating "the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff" and in avoiding the threats to separation

The Court did not fully explain how a decision reversing the order below—which would “redress” this “economic injury”—could be regarded as a “favorable decision,” when the government had argued the decision below should be affirmed. But the Court did note the prudential problems posed by the government’s position and its absence of adversity to the plaintiff, which problems, it held, were redressed by the vigorous advocacy provided by BLAG, whose independent standing to sue the majority did not address.<sup>50</sup> In treating the requirement of adversity, a fundamental aspect of justiciability,<sup>51</sup> as one satisfied by an amicus, in a case where the parties agree with the judgment below, the Court arguably expanded the scope of “case or controversy.”<sup>52</sup>

What may have been driving the decision to exercise jurisdiction was the Court’s perception of the interests—beyond those of the immediate parties—in resolving the issue, which it treated as prudential factors bearing on justiciability:

Were this Court to hold that prudential rules require it to dismiss the case . . . ,<sup>[53]</sup> extensive litigation would ensue. The district

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of powers from a precedent for unilateral executive “nullif[ication]” of a federal statute. *Id.* at 2688.

<sup>50</sup> *Id.* at 2688 (“[T]he prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court’s ruling and its affirmance in the Court of Appeals on BLAG’s own authority.”).

<sup>51</sup> *Cf.* Siegel, *A Theory of Justiciability*, *supra* note 26, at 134–35 (arguing that of the justifications for standing doctrine only the interest in adversity was of true functional significance, and it did not require the kind of injury requirement on which the Court had insisted).

<sup>52</sup> In only two prior cases of which I am aware did the Court exercise jurisdiction over an appeal by the United States from a lower court finding a statute unconstitutional, where the United States agreed that the statute was unconstitutional and sought affirmance. *See* *INS v. Chadha*, 462 U.S. 919 (1983); *United States v. Lovett*, 328 U.S. 303 (1946). In *Chadha*, the Houses of Congress were considered intervening parties and they defended the legislative veto in the challenged statute; the Court did not decide whether the issues would have been justiciable absent participation of the intervenors. 426 U.S. at 931 n.6, 939. In *Lovett*, no party or amicus objected to the justiciability of the claim on grounds of lack of adversity. (Not infrequently, the Court has appointed amicus to argue in defense of an otherwise undefended judgment below, see Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions*, 63 *STAN. L. REV.* 907 (2011), but in such cases the parties are generally adverse to the judgment below.) *Windsor* thus appears to be the first clear decision by the Court that an appeal by a party, who agreed with both the judgment below and with the only other party, met adversity requirements through participation by an amicus.

<sup>53</sup> The Court assumed that if it reversed for lack of standing, “in consequence, [it would follow] that the Court of Appeals erred in failing to dismiss it as well.” *Windsor*, 133 S. Ct. at 2688. *But cf.* Brief of Court-Appointed *Amica Curiae* Addressing Jurisdiction at 33–37, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (suggesting that even if the Court found for prudential reasons that the government lacked standing before it, the Court of Appeals judgment could survive because of the greater importance of the exercise of jurisdiction over cases under 28 U.S.C. § 1291 (which makes jurisdiction mandatory) than of the Supreme Court’s exercising its discretionary certiorari jurisdiction under 28 U.S.C. § 1254).

courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations. . . . Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term "prudential" counsels that it is a proper exercise of the Court's responsibility to take jurisdiction.<sup>54</sup>

Thus, apart from viewing *Windsor* as reflecting the special role of government in litigation, the Court's arguable relaxation of the standard Article III requirements for standing can be understood also in the context of the Court's appreciation of how many people ("hundreds of thousands") and cases were affected by the issue, and (perhaps) its perception of how unfair it would be to force people to continue to suffer the stigma and adverse effects of a law that a majority believed unconstitutionally discriminated against same-sex couples. But the *Windsor* Court's concern for the adverse effects of "years" of "costs, uncertainties, and alleged harms" was not extended to the plaintiffs, or those they stood for, in *Clapper*.<sup>55</sup>

#### *B. Clapper and Tightened Standards for Standing in Challenges to Secret Surveillance*

If in *Windsor* the Court relaxed Article III standing requirements, in *Clapper v. Amnesty International USA* the Court added stringency to its more usual articulation

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<sup>54</sup> *Windsor*, 133 S. Ct. at 2688.

<sup>55</sup> Of course, many Supreme Court cases will affect large numbers of nonparties. *Clapper's* negation of standing means fewer cases in the future, in contrast to the many pending individual cases the Court contemplated in *Windsor*. But the number of persons affected by the challenged government practices in *Clapper* may be as great, or even greater, than in *Windsor*. Yet there may be other differences, not explicitly referred to in *Windsor*, nor embraced within the stated tests for standing, that further account for the difference in treatment of such prudential factors—including the nature of the harm caused by the claimed constitutional violation (including, in *Windsor*, DOMA's effects across many areas of federal law), the victims' awareness vel non of the harm, and/or the degree of certainty that there was a constitutional violation.

of the requirements for Article III standing—and especially for the “injury” component at its core. In so doing, it failed to appreciate the increased importance of judicial review when secret government surveillance is at issue.

### 1. Special Importance of Judicial Review to Determine Legality of Secret Surveillance Programs

When a government in a democracy seeks to act in secret, the need for judicial review of the legality of statutes authorizing the secrecy should be deemed especially pressing. The United States government needs to conduct surveillance and gather intelligence, some of which must be covert, in order to fulfill a basic government function of protecting its people from attack. But these legitimate, even compelling needs for secrecy do not preclude judicial review of the infrastructure through which such covert activity occurs, to assure respect for constitutional rights. Indeed, the secrecy of the operations makes more pressing the need for judicial review of the constitutionality of the framework.

In 2008, Congress enacted an amendment to the Foreign Intelligence Surveillance Act (FISA), creating

new procedures for the authorization of foreign intelligence surveillance targeting non–United States persons located outside the United States. . . . [I]n contrast to the preexisting FISA scheme, [Section 702] does not require the government to submit an individualized application to the FISC identifying the particular targets or facilities to be monitored. Instead, the Attorney General (“AG”) and Director of National Intelligence (“DNI”) apply for a mass surveillance authorization by submitting to the FISC a written certification and supporting affidavits attesting generally that “a significant purpose of the acquisition is to obtain foreign intelligence information” and that that information will be obtained “from or with the assistance of an electronic communication service provider.”<sup>56</sup>

The statute also requires a certification that the procedures are designed to “minimize the acquisition and retention” of data, “consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.”<sup>57</sup>

Plaintiffs in *Clapper* brought a facial challenge to the 2008 amendment, alleging that it violated their First and Fourth Amendment rights, as well as guarantees under Article III and separation of powers principles. In three respects the amended statute

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<sup>56</sup> *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 124 (2d Cir. 2011) (emphasis added). This Second Circuit decision on standing was reversed in *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

<sup>57</sup> *See Clapper*, 683 F.3d at 123 n.5; *see also* 50 U.S.C. §§ 1881a, 1802(d), 1821(4).

differed importantly from prior law: in the breadth of surveillance authorized (for example, a large geographic area could be targeted); in no longer requiring a showing that a foreign power was the object of the surveillance; and in removing the FISA court from its role in monitoring ongoing compliance with minimization requirements.<sup>58</sup> Plaintiffs alleged that their jobs required them to engage in “sensitive international communications” which they feared would be surveilled under this new Act, to protect against which they were taking costly and burdensome measures to protect the confidentiality of communications.<sup>59</sup>

The government argued that only persons who showed that they had been surveilled under these procedures had standing to sue. The Second Circuit disagreed, concluding that plaintiffs had shown a “sufficient likelihood” that they would be surveilled in the future to meet the injury requirement, and also concluding that the expenditures and burdensome procedures plaintiffs were following to avoid surveillance constituted a “present” injury for Article III purposes.<sup>60</sup>

The Supreme Court disagreed, finding, 5–4, that the plaintiffs lacked standing.<sup>61</sup> The Court’s refusal to allow their claims to be adjudicated removed an important check for securing constitutional rights. That there may be aspects of the program’s implementation that would need to remain confidential to be effective should not have led the Court to be more willing to find challenges nonjusticiable, given the importance of oversight of constitutionality and the *ex parte* and nonadversarial character of the proceedings in the FISA court.

It is because of the necessary secrecy of government operations to obtain foreign intelligence that the plaintiffs could not say, with absolute certainty, that they were being surveilled; only in unsuccessful covert surveillances could such a plaintiff emerge. Yet the growth of covert surveillance systems by governments can have pernicious effects on democracy, the rule of law, and constitutionalism. Executive branch officials have incentives to over-collect, and over-retain, data;<sup>62</sup> files can be misused by those who lawfully hold them; data can be inadvertently leaked. In light of the importance of assuring that the rule of law is complied with, and especially when rights of individuals are at stake, the secrecy of these programs should be understood to provide special reason for judicial review.<sup>63</sup>

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<sup>58</sup> See *Clapper*, 133 S. Ct. at 1156; Brief for Respondents at 11, 30, in *Clapper v. Amnesty Int’l USA*, No. 11-1025, 133 S. Ct. 1138 (2013).

<sup>59</sup> *Clapper*, 133 S. Ct. at 1142–43.

<sup>60</sup> *Clapper*, 638 F.3d at 134, 136, 138.

<sup>61</sup> *Clapper*, 133 S. Ct. at 1143.

<sup>62</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (“For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.”).

<sup>63</sup> Cf., e.g., *Kennedy v. United Kingdom*, App. No. 26839/05, 2010 Eur. Ct. H.R., ¶ 119 (18 May 2010) (“[I]n recognition of the particular features of secret surveillance measures

The reasoning of the European Court of Human Rights (ECtHR) on this point is worthy of consideration.<sup>64</sup> Ordinarily, applicants before the ECtHR, like plaintiffs invoking the jurisdiction of an Article III court, must show that they are harmed by (the “victim” of) the government action they seek to challenge and cannot bring “abstract” challenges. Over a series of cases involving challenges to governments’ covert surveillance and data collection programs, however, the ECtHR has held that individuals need show only a “reasonable likelihood”—not a certainty—of having been subject to covert surveillance to challenge its legality, or need show only that they are in a group “at risk” of being subjected to surveillance under a statute in order to challenge the statute’s validity.<sup>65</sup> The modified standard reflected facts about covert operations:

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and the importance of ensuring effective control and supervision of them, the Court has permitted general challenges to the relevant legislative regime.”). This was a unanimous decision by a seven-judge panel.

<sup>64</sup> See *supra* note 63. The ECtHR has jurisdiction to adjudicate claims, under the European Convention on Human Rights, against forty-seven member states—including all members of the European Union. It is widely regarded as the most successful human rights tribunal in the world. Article 8 of the European Convention on Human Rights, at issue in the line of cases discussed in text, provides:

1. Everyone has the right to respect for his private and family life, home and correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222. Article 8’s core right, set forth in section 1, encompasses rights of privacy and protection from intrusion on the home, private life and correspondence embodied in the U.S. Due Process clauses (under the *Griswold/Roe/Lawrence* line of cases) and the Fourth Amendment. Although there are many differences between the statutory schemes at issue in *Kennedy* and in *Clapper*, there is nothing in the ECtHR’s reasoning in *Kennedy v. U.K.* that turns on the specific language of Article 8 as compared to the U.S. Constitution. Indeed, other ECtHR decisions under Article 8 have been noted and relied on by the U.S. Supreme Court in resolving substantive due process questions. See *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003) (referring to ECtHR’s decision in *Dudgeon v. United Kingdom*).

<sup>65</sup> *Kennedy*, 2010 Eur. Ct. H.R., at ¶¶ 122, 128; *Iordachi v. Moldova*, App. No. 25198/02 (Eur. Ct. H.R.) (Sept. 14, 2009), ¶¶ 33–34 (concerning lawyers who claimed they were at risk of surveillance in speaking to clients who could be targeted for surveillance under national law); see also *Klass v. Germany*, App. No. 5029/76 (6 September 1978), Series A no. 28 (Eur. Ct. Hum. Rts.), ¶¶ 34–38, 41. The “reasonable likelihood” standard concerning claimed incidents of surveillance is similar to that applied by the Court of Appeals in *Clapper* with respect to the likelihood of surveillance under the new statute. See *Clapper*, 638 F.3d at 134. At least one amicus brief in *Clapper* brought ECtHR case law to the Supreme Court’s attention. See Brief of the Canadian Civil Liberties Association, et al., In Support of Respondents, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025) (discussing *Iordachi*, *Klass*, and *Lambert v. France*).

In applying the “reasonable likelihood” standard, for example, the ECtHR “make[s] its assessment in light of all the circumstances of the case and will not limit its review to the existence of direct proof that surveillance has taken place given that such proof is generally difficult or impossible to obtain.”<sup>66</sup> The distinctiveness of covert action, then, leads to a realignment of the standards for determining a challenger’s status as “victim” entitled to invoke the ECtHR’s jurisdiction.

In one recent decision invoking the “reasonable likelihood” and member of a group “at particular risk” standards, the ECtHR, in an opinion by President (Fourth Section) Lech Garlicki,<sup>67</sup> explained its reasons for more relaxed standards for allowing challenges to covert surveillance:

Sight should not be lost of the special reasons justifying the Court’s departure, in cases concerning secret measures, from its general approach which denies individuals the right to challenge a law *in abstracto*. The principal reason was to ensure that the secrecy of such measures did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court . . . . In order to assess, in a particular case, whether an individual can claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court must have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him. Where there is no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such cases, even where the actual risk of surveillance is low, there is a greater need for scrutiny by this Court.<sup>68</sup>

The interest in assuring that the “secrecy of such measures did not result in [their being] effectively unchallengeable” is relevant to U.S. standing law, notwithstanding

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<sup>66</sup> *Kennedy*, 2010 Eur. Ct. H.R., ¶ 123.

<sup>67</sup> Garlicki served as a constitutional law professor in Poland and as a Justice on the Polish Constitutional Court before his appointment to the ECtHR. His term on the ECtHR expired in 2012. He has more recently been a visiting professor of law at NYU Law School, see <https://www.facebook.com/ConstitutionalTransitions> (“Meet Lech Garlicki, Visiting CT Fellow for Fall 2013 and Global Professor at NYU Law.”) and at Yale Law School, see <http://www.law.yale.edu/faculty/16984.htm>.

<sup>68</sup> *Kennedy*, 2010 Eur. Ct. H.R., at ¶ 124 (citation omitted); *see id.* at ¶¶ 125 (“reasonable likelihood”), 128 (“particular risk”).

that law's interest in allowing political processes to address "generalized grievances," because concrete harm to individual rights may go unremedied, as the covert nature of the activity means that it may not be recognized as a "grievance" at all even if specific individuals' private communications are unlawfully intercepted. Judge Garlicki's second argument—that where there is no possibility of challenge, suspicion of abuse "cannot be said to be unjustified"—is also of salience in the United States, where the judicial review provisions of FISA fail to provide for challenges by those who believe themselves subject to surveillance (or others acting on their behalf).<sup>69</sup>

Thus, the fact that a program of covert surveillance, not previously reviewed by public proceedings in Article III courts, was involved should not have been an occasion for *Clapper* to ratchet up the "standing" inquiry in ways likely to preclude judicial review. If anything, more relaxed standards should have been applied. As the experience in European democracies suggests, judicial review of the constitutionality of covert surveillance programs is not inconsistent with maintaining high levels of secrecy. In many cases before the ECtHR the national measures are upheld.<sup>70</sup> But the ECtHR has emphasized the importance of "clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated."<sup>71</sup>

Indeed, the greater protections afforded against abusive data collection and retention in Europe may improve both appropriate data sharing and data security by

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<sup>69</sup> The FISA court exists primarily to review and approve government applications for warrants and does not permit those subject to surveillance to challenge the surveillance. "[E]lectronic service providers and business order recipients," who receive FISA orders to collect and turn over information, may challenge those orders, and the government may appeal denials of authorization requests. See *Overview of the FISC*, EPIC.ORG, <http://epic.org/privacy/terrorism/fisa/fisc.html#Overview> (last visited Oct. 23, 2014). However, service providers have little incentive to challenge because they are immunized from liability by 50 U.S.C. § 1805(h). Media reports identify only a single (and unsuccessful) challenge by a service provider, brought in 2007, by Yahoo. See Harley Geiger, *Yahoo Court Documents Reveal Pitched Battle Over Surveillance Power*, CENTER FOR DEMOCRACY & TECHNOLOGY (Sept. 12, 2014), <https://cdt.org/blog/yahoo-court-documents-reveal-pitched-battle-over-surveillance-power> (also noting heavy fines that Yahoo was threatened with).

<sup>70</sup> Including in *Kennedy v. United Kingdom*, the case quoted above, and in *Klass v. Germany* (1978), one of the earliest of the ECtHR's decision in this area. Of course, one cannot exclude the possibility that adjudicating these cases simply gives a patina of lawfulness to covert activities not in fact subject to effective review. And it is true that there is much we cannot know. But we can observe that for decades European countries that are party to the ECtHR have allowed challenges on the merits to data collection to be brought by parties who can show a likelihood, but not a certainty, that they themselves are surveilled.

<sup>71</sup> *Kruslin v. France*, App. No. 11801/85, 176-A Eur. Ct. H.R. (ser. A) at ¶ 33 (1990); see also *Kopp v. Switzerland*, App. No. 13/1997/797/1000, 1998-11 Eur. Ct. H.R. at ¶ 72 (1998) (indicating that "interception of telephone conversations constitute[s] a serious interference with private life" that must be precisely regulated by law).

creating a greater sense of control by law.<sup>72</sup> While it is for the most part only speculation to consider the motivations of leakers of U.S. data, the absence of judicial review of the legality of these massive programs may have contributed to such unlawful actions—as the denial of justice in the state courts in the Rodney King matter may have contributed to the unlawful mob violence that followed.<sup>73</sup> That such behavior is unlawful does not mean one should ignore the possible connections between denial of judicial recourse and the felt pressures to resort to unlawful means.

In opposition to the argument that there is enhanced need for judicial review of the constitutionality of statutes authorizing covert surveillances, it might be suggested that U.S. standing law has traditionally disfavored judicial review of activities justified by claims of national security. In *Laird v. Tatum*,<sup>74</sup> the Court rejected a claim for standing based on the possibility that First Amendment rights would be chilled. Professor Fallon has suggested that the opinion in *Clapper* can best be understood in the special context of intelligence and national security surveillance, as in *Tatum*, where “the Court has demanded elevated showings of likely injury by parties seeking injunctive relief from policies that relate closely to national security.”<sup>75</sup> Professor Fallon’s

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<sup>72</sup> Cf., e.g., Mark Scott, *Irked by N.S.A., Germany Cancels Deal With Verizon*, N.Y. TIMES, June 27, 2014, at B2 (reporting that Germany was cancelling its contract with the U.S. firm, “Verizon Communications, part of the fallout from continuing revelations by Edward J. Snowden, a former National Security Agency contractor,” and noting that as public upset over Snowden’s revelations mounted, Europe’s “own cellphone carriers, like Deutsche Telekom, have been promoting their European roots—and the fact that they comply with Europe’s stringent data protection rules—to win business from American competitors”).

<sup>73</sup> See *infra* note 132 (concerning statement attributed to Snowden). In October 2011, the FISA court itself had found illegal activity by the NSA in its procedures for retention of wholly domestic communications. This ruling, however, was not made public until August 2013, after the Snowden revelations and in part as a result of a FOIA lawsuit. See Ellen Nakashima, *NSA Gathered Thousands of Americans’ E-mails Before Court Ordered It To Revise its Tactics*, WASH. POST (Aug. 21, 2013), [http://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd_story.html).

<sup>74</sup> 408 U.S. 1 (1972).

<sup>75</sup> Fallon, *Fragmentation*, *supra* note 12 (mss. of Sept. 8, 2014, at 25). Of the cases Professor Fallon cites in this category, only two—*Tatum* and *Clapper*—relate to government surveillance of private persons. The other two cases cited by Professor Fallon in this category, see *id.* at n.157, are *United States v. Richardson*, 418 U.S. 166 (1974) and *Schlesinger v. Reservist Committee To Stop the War*, 418 U.S. 208 (1974). See also Fallon, *Realism*, *supra* note 12, at 110 n.31. In *Schlesinger*, the Court held that a citizen and taxpayer lacked standing to challenge the reserve membership of members of Congress in the military in asserted violation of Article I Section 6. The issue was connected to national security only remotely, if at all. Likewise, the issue in *Richardson* was again raised by a taxpayer/citizen, arguing that a statute limiting the details of public reporting about the CIA budget was inconsistent with the Statement of Accounts Clause of Article I Section 9 clause 7. See 418 U.S. at 168–69. In both cases, the challenger was someone who claimed no special injury by virtue of the challenged program, unlike the plaintiffs in *Clapper*.

observation may well be correct as a positive matter. But *Clapper* is distinguishable from prior case law involving government surveillance, principally *Tatum* (whatever its merits),<sup>76</sup> and thus *Clapper* is subject to critique as an unnecessary extension.

In *Tatum*, plaintiffs alleged that an Army program of gathering information, “by lawful means,” about participation in political events would have a chilling effect on the exercise of First Amendment freedoms.<sup>77</sup> As the D.C. Circuit described, the *Tatum* plaintiffs “freely admit that they complain of no specific action of the Army against them,” a point emphasized also by the Second Circuit in *Clapper*.<sup>78</sup> Plaintiffs in *Clapper*, by contrast, asserted that the allegedly unlawful program was already having an adverse and costly effect on their present conduct of their professions.<sup>79</sup>

The Court in *Tatum* was at pains to emphasize the absence of any claim that the information gathering was itself unlawful, noting the military’s reliance largely on publicly available resources.<sup>80</sup> And in its closing paragraph the Court implied that injunctive relief might be available in future cases involving “unlawful” activities: “there is nothing in our Nation’s history or in this Court’s decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.”<sup>81</sup> In rejecting standing for plaintiffs who had concrete and objective reasons to believe that their communications with identified persons abroad would be subject to surveillance that was itself unlawful, and who thus alleged “actual or

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<sup>76</sup> *Tatum* was itself subject to vigorous dissents. See *Tatum*, 408 U.S. at 16 (Douglas, J., dissenting with Marshall, J.); *id.* at 38 (Brennan, J., dissenting, joined by Stewart, J. and Marshall, J.).

<sup>77</sup> *Tatum*, 408 U.S. at 3. Judge MacKinnon of the U.S. Court of Appeals for the D.C. Circuit noted that “[plaintiffs] are not people, obviously, who are cowed and chilled . . .” *Tatum v. Laird*, 444 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J., concurring in part and dissenting in part), *rev’d*, *Laird v. Tatum*, 408 U.S. 1 (1972).

<sup>78</sup> *Tatum*, 444 F.2d at 953; accord *Tatum*, 408 U.S. at 3; see *Amnesty Int’l USA v. Clapper*, 638 F.3d at 146 (“They did not claim that they, or anyone with whom they regularly interacted, would be subject to any illegal or unconstitutional intrusion if the program they challenged was allowed to continue. Rather, they claimed only that they *might* be injured if the information lawfully collected by the military were misused in some unspecified way at some unspecified point in the future, and they alleged that the surveillance scheme had a chilling effect, while essentially admitting that they themselves had not been chilled, and that the program had not altered their behavior in any way.”).

<sup>79</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1145–46 (2013).

<sup>80</sup> *Tatum*, 408 U.S. at 9 (noting the D.C. Circuit’s conclusions that “[t]here is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.” (internal quotation marks omitted)). *But see id.* at 27 (Douglas, J., dissenting) (arguing the dangers of allowing the military to engage in any surveillance of civilian activities and referring to surveillance measures as including “infiltrating undercover agents” and impersonating journalists).

<sup>81</sup> *Id.* at 16.

threatened injury by reason of unlawful activities” of the executive branch, *Clapper* went beyond the holding in *Tatum*, or other “national security” standing cases, thereby expanding the area of nonjusticiability.<sup>82</sup> At the least, one could conclude, *Clapper* could have responsibly distinguished *Tatum*.

## 2. *Clapper* Involved an Extension of Standing Precedents Precluding Review

As articulated in *Windsor*, and many other cases, the key Article III requirement is for an injury that is “actual or imminent, not conjectural or hypothetical.” In *Clapper*, however, the Court held that for Article III purposes an injury must be “certainly impending,” following the argument in the Government’s Brief that equated those two formulations of the injury requirement.<sup>83</sup> Under so absolute a standard, injunctive relief against feared future harm would rarely be available.

“*Certainly Impending*” as *Inapposite Standard*: The Court drew this language of “certainly impending” harm from *Whitmore v. Arkansas*,<sup>84</sup> a case involving the

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<sup>82</sup> Cf. *Gilligan v. Morgan*, 413 U.S. 1, 3, 5 (1973) (holding nonjusticiable a request, in the aftermath of the Kent State shootings, for “injunctive and supervisory relief” to assure adequacy of National Guard training, weaponry and orders and “to restrain leaders of the National Guard from future violation of students’ constitutional rights”). Five members of the Court joined an opinion stating that it was not reaching the question of mootness but found the requested relief nonjusticiable in the circumstances of the case, which included its possible mootness and the significant changes in procedures already undertaken by the Ohio National Guard since the shootings. *Id.* at 6–12. Four justices who dissented would have found the case moot. *Id.* at 12 (dissenting opinion). The majority relied importantly on the detailed, specific provisions of the Constitution’s Militia Clauses, providing that Congress would provide for “organizing, arming, and disciplining, the Militia,” while the states had authority to train “according to the discipline prescribed by Congress.” U.S. CONST. art. I, § 8, cl. 16. The majority relied not only on the specificity of the delegation to Congress and the states (an important factor under the “political question” doctrine), and the possible mootness of the claim, but the possible lack of standing of the plaintiffs. *See id.* at 10 (referring to “the infirmity of the posture of respondents as to standing”). The majority also emphasized the advisory nature of the declaration sought and stated “that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, *whether by way of damages or injunctive relief.*” *Id.* at 11–12 (footnote omitted) (emphasis added).

<sup>83</sup> *See Clapper*, 133 S. Ct. at 1143; Brief for Petitioners at 18–19, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025).

<sup>84</sup> 495 U.S. 149, 158 (1990). *Whitmore* in turn cited *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)), as its source for the “certainly impending” standard. *Babbitt*, however, did not use the phrase “certainly impending” as a minimal requirement for standing. Rather, *Babbitt*’s standard was that a party must face a “*realistic danger* of sustaining a direct injury as a result of the statute’s operation or enforcement.” *Babbitt*, 442 U.S. at 298 (emphasis added). It was in the next sentence that the *Babbitt* Court quoted a passage from *Pennsylvania v. West Virginia*, which concerned the availability of anticipatory relief (not justiciability, which had been addressed in a prior section of the opinion, see *Pennsylvania v. West Virginia*, 262 U.S. at

asserted standing of one death row inmate to challenge the execution of another. The petitioner there had argued that he had an interest in not allowing the other inmate's execution to go forward because it would weaken his own eventual claim that the death penalty was cruel and unusual. The facts in *Whitmore* seem remote from those in *Clapper*, in which the plaintiffs alleged facts about their own activities and contacts to support their claim that they themselves were likely to be subjected to surveillance under the program. But the *Clapper* Court held that because the plaintiffs could not say with certainty that they were, or were about to be, subject to surveillance, they failed the injury requirement.<sup>85</sup>

The “certainly impending” standard applied in *Clapper* seems more rigorous than the standard applied in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>86</sup> where the claim of injury accepted by the Court included the “‘objectively reasonable’ present fear and apprehension regarding the ‘effect of the increased radioactivity in air, land and water upon [appellees] and their property, and the genetic effects upon their descendants.’”<sup>87</sup> In *Lujan v. Defenders of Wildlife*,<sup>88</sup> a majority of the members of the Court would apparently have upheld plaintiffs’ standing to challenge the process by which agency decisions were made to fund projects abroad that might threaten endangered species, had the plaintiffs purchased tickets for trips to those areas<sup>89</sup>—although

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591): “But ‘[o]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough.’” *Babbitt*, 442 U.S. at 298 (alteration in original) (quoting *Pennsylvania v. West Virginia*, 262 U.S. at 593). In context, this quotation was used to illustrate what “is enough” for preventative relief, and not wholly to define a standard for future injuries for Article III standing purposes. Indeed, *Babbitt* followed this reference by explaining that what is needed to establish standing to challenge a criminal statute proscribing conduct the plaintiff intends to engage in is a “credible threat of prosecution thereunder,” which cannot be established “[w]hen plaintiffs ‘do not claim that they have ever been threatened with prosecution, that prosecution is likely, or even that prosecution is remotely possible’ . . .” *Id.* at 298–99 (emphasis added) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). The *Babbitt* Court was no more suggesting that the injury must be “certainly impending” than it was suggesting that it would be sufficient if a prosecution were only “remotely possible.”

<sup>85</sup> *Clapper*, 133 S. Ct. at 1148–50. The Court also observed that the challenged statute merely authorizes but does not require, surveillance, so the statute’s mere existence does not afford a basis for standing. *Id.* at 1149. *But see infra* note 124 and accompanying text.

<sup>86</sup> 438 U.S. 59 (1978).

<sup>87</sup> *Id.* at 73 (alteration in original) (emphasis added).

<sup>88</sup> 504 U.S. 555 (1992). *Lujan* is one of the unusual cases in which the Court refers to the “certainly impending” language of *Whitmore*, see *Lujan*, at 564 n.2, but even *Lujan* more often uses the “actual or imminent” language that is the more common formulation. *See id.*; *id.* at 560, 564. The words “actual or imminent” to describe the injury required by Article III standing doctrine are far more commonly used than the words “certainly impending”: a Westlaw Search, of Supreme Court Cases, on September 13, 2014, for “actual w/2 imminent” and “date after 1/1/1990” (the year of *Whitmore*), yielded 33 cases; in the same time period, a search for “certainly w/2 impending” yielded 9 cases.

<sup>89</sup> Three members of the Court in *Lujan* believed that plaintiffs already had standing to challenge agency failures to consult with the Interior Department concerning U.S.-funded

uncertainties would have remained concerning the effect of better procedures on the funding decision, the effect of funding decisions on the projects, the effect of the projects on the environment, and whether the plaintiffs' ability actually to view the animals was likely even in the absence of the project or how it would be affected if the projects went forward. *Clapper's* "certainly impending" standard is also far more demanding than the "actual or imminent" injury standard applied, for example, in *Massachusetts v. EPA*, where, the Court found, the "risk" of climate change, together with a present rise in sea levels of between five and ten centimeters, met the Article III injury requirements.<sup>90</sup> It is hard to understand why the plaintiffs' allegations in *Clapper*—including the likelihood that, given their overseas contacts and clients, their communications would be subject to data collection and their having presently incurred expenditures to avoid surveillance of confidential conversations<sup>91</sup>—do not manifest a sufficiently strong likelihood that they would be subject to the surveillance of which they were complaining. And given the nature of covert surveillance—its necessity in, but risks to, constitutional democracies—such a strong likelihood should have been regarded as a sufficiently concrete and present injury, as were the likelihoods of harm in the environmental cases.

*The Role of Plaintiffs' Own Actions or Situation:* In affirmative action cases, the Court has allowed relaxed requirements for standing by conceptualizing the injury as the failure to be treated equally.<sup>92</sup> In *Gratz v. Bollinger*,<sup>93</sup> moreover, the Court dispensed with the need for one of the challengers to take concrete steps manifesting a present interest in applying in order to have standing to seek injunctive relief. Standing to

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projects abroad, given their pleadings concerning their past travels to and their future interest in travelling again to view the habitats of specific endangered animals in remote parts of the world. *See id.* at 582 (Stevens, J., concurring in the judgment); *id.* at 589 (Blackmun, J., with O'Connor, J., dissenting). Another two members of the Court apparently would have upheld the two individual plaintiffs' standing had plane tickets been purchased for their trips, manifesting a stronger likelihood that plaintiffs would in the future be in the vicinity of the animals whose protection they sought. *See id.* at 579–80 (Kennedy, J., with Souter, J., concurring in part and concurring in the judgment) ("While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis . . ." (citations omitted)).

<sup>90</sup> 549 U.S. 497, 522 (2007). The relationship between the "present" loss of land and the risk of future harm in the opinion is unclear, as is the precise impact of Massachusetts's being a sovereign state.

<sup>91</sup> *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1145–46 (2013).

<sup>92</sup> Thus, for example, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978), the Court accepted as an Article III "injury" the lost opportunity to be considered without regard to race, a formulation that avoided problems of causation and redressability that would have been presented by characterizing the injury as denial of a place in the medical school. *Cf. Pierre v. Louisiana*, 306 U.S. 354 (1939) (holding that discrimination in selection of grand jury denied equal protection and required reversal of conviction in case where petit jury that convicted did not exclude jurors based on race).

<sup>93</sup> 539 U.S. 244 (2003).

seek future relief for plaintiff Hamacher was upheld, even though, after being denied admission, he began attending another school and had not at the time of filing his complaint made an application to transfer. For the Court, it was sufficient that he was “able and ready” to apply if the race-based admissions policy, which he alleged would deny him equal treatment, were changed.<sup>94</sup>

If standing doctrine is supposed—in part—to preclude suit by bystanders,<sup>95</sup> and if plaintiffs must have standing for each remedy they seek, some effort towards applying, demonstrating actual continued interest in attending the school, might have been required. In the absence of such an effort, it is hard to see how his injury (as a basis for future relief) was either “actual or imminent” injury, much less “certainly impending.”<sup>96</sup> *Gratz* upheld standing for one not even willing to pay the small price of applying (and whose claimed injury might have been mooted by acceptance). By contrast, plaintiffs in *Clapper* were concerned enough about being subject to covert surveillance that they had incurred expenses to try to mitigate the likelihood of injury to the confidentiality of their communications with foreign clients or contacts.<sup>97</sup> These steps the Court dismissed as arising from subjective fears that were not sufficient for standing purposes and could not be “bootstrapped” into injury.<sup>98</sup> Of course, inconsistency in the case law does not indicate one way or the other how a particular issue should be resolved. But inconsistencies do suggest that the denial of standing in *Clapper* was very much a choice, at least open under the precedents.

*Chains of Connection, Imminence and Traceability:* In important ways, the Court’s conclusion that no injury was sufficiently certain or imminent overlapped

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<sup>94</sup> *Id.* at 260–62.

<sup>95</sup> See generally Brilmayer, *supra* note 17, at 310–15 (arguing that an important function of standing is to protect self-determination by requiring that only those persons most affected by a controversial practice can litigate it).

<sup>96</sup> Given the relatively low numbers of minority students admitted even under the challenged program, it seems unlikely that any individual white student would realistically be deterred from trying to apply by an increased risk that he would not be admitted.

<sup>97</sup> In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), the lower court found that some members of the plaintiffs had moved away or made plans to move away from the area. *Carolina Envtl. Study Group, Inc. v. U.S. Atomic Energy Comm’n*, 431 F. Supp. 203, 205, 209 (W.D.N.C. 1977). Without explicitly so stating, the lower court may have treated these actions as evidence of the “objectively reasonable” apprehensions it also found to constitute one of several “immediate effects” of the challenged action. The Supreme Court in upholding standing focused on “[s]everal of the ‘immediate’ adverse effects . . . found to harm appellees,” but noted it was not determining the sufficiency of other effects, including “the possibility of a nuclear accident and the present apprehension generated by this future uncertainty.” *Duke Power Co.*, 438 U.S. at 73–74.

<sup>98</sup> Given the nature of the plaintiffs’ work, there seems little reason to doubt the genuineness and reasonableness of their fears of surveillance. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (upholding Article III standing of plaintiff “tester” who, in order to test whether a company was discriminating based on race, sought information about rental apartments although the plaintiff had no intent to rent or buy one).

with its analysis of why plaintiffs failed to meet the second requirement for Article III standing analysis—that the injury complained of be traceable to the challenged government action. First, the Court said, the plaintiffs could not show that the government would decide to target the particular contacts plaintiffs’ identified.<sup>99</sup> Second, they could not show that if the government so decides, it would use the authority provided by the 2008 amendments, which plaintiffs challenged.<sup>100</sup> Third, the Court said, even if they could show the government would seek to surveil their contacts under this statute, that did not mean the FISA court would permit it.<sup>101</sup> Thus, the Court said, “We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.”<sup>102</sup> Fourth, the Court said, even if the FISA Court authorized surveillance, it might not pick up information from any of the plaintiffs’ foreign contacts.<sup>103</sup> Fifth, even if it did, it might not pick up any communications from the plaintiffs.<sup>104</sup>

Applying such reasoning to challenges to covert surveillance would mean that no one subject to covert surveillance could bring a challenge unless there was an unauthorized leak or unless a government proceeding against the person was brought. For if covert surveillance is proceeding covertly, the subjects of the surveillance would never be certain that they were being monitored. Even though the chain of events described by the Court does reveal some uncertainty about both the existence of injury and its traceability to the challenged statute, the importance of the constitutional issue and the suitability of these plaintiffs to raise it, suggest that the Court erred in cutting off, at a very preliminary stage, lower court proceedings on the constitutional questions.<sup>105</sup>

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<sup>99</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148–49 (2013).

<sup>100</sup> *Id.* at 1148–49.

<sup>101</sup> *Id.* at 1148–50.

<sup>102</sup> *Id.* at 1150.

<sup>103</sup> *Id.* at 1148, 1150.

<sup>104</sup> *Id.*

<sup>105</sup> Less than four months after the Supreme Court decided *Clapper*, newspapers began reporting unauthorized revelations by Edward Snowden concerning the scope of NSA surveillance under FISA. See Glenn Greenwald & Ewen MacAskill, *NSA PRISM Program Taps in to User Data of Apple, Google and Others*, THE GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data?guni=Article:in%20body%20link>. According to an unsuccessful petition for certiorari of a Ninth Circuit decision, [t]he immense breadth of the actual surveillance being conducted under the auspices of the FAA statute shows that the *Amnesty* plaintiffs had better reason to believe their international communications would be intercepted than even they understood at the time, and casts doubt on this Court’s judgment that their fears of interception were based on speculative assumptions (and were, implicitly, statistically unlikely to come to pass).

Petition for a Writ of Certiorari at 32, *Ctr. for Constitutional Rights v. Obama*, 134 S. Ct. 1497 (2014) (No. 13-802); see also *id.* at 33–35 (arguing that revelations concerning minimization procedures are inconsistent with the *Clapper* Court’s reliance on the minimization procedures,

Moreover, some elements of the Court's traceability analysis seem disingenuous, designed to evade decision on the merits. For example, questioning whether the government would use this authority, which it actively sought from Congress and which is broader and easier to use than pre-existing authorities,<sup>106</sup> seems tendentious. Likewise, given the pleadings of the plaintiffs concerning the identity of their foreign contacts, it is hard to see why some of those foreign contacts, like Khalid Sheikh Mohammed's family and friends,<sup>107</sup> would not be targeted for metadata collection through the broadest and most easy to use authority. Treating the FISA court as one whose judgments cannot be predicted also seems disingenuous: This court was and is set up to approve the government's applications; historically it has approved over 99% of those applications; and the appellate process, though rarely used, permits the government to seek review of a denial of its application.<sup>108</sup> The FISA court is thus designed to and has in fact generally approved government applications. Thus, the Court's analysis in *Clapper* seems at points lacking in prudential wisdom—especially in light of the unauthorized revelations that came soon after.<sup>109</sup>

The conclusion of the Court of Appeals in *Clapper*, applying a “reasonable likelihood” standard, seems more realistic and less far-fetched:

On these facts, it is reasonably likely that the plaintiffs' communications will be monitored under the FAA [the 2008 FISA

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and revelations concerning the DOJ actual practice were acknowledged, four months after the Supreme Court decision, to be inaccurate in describing the government practice relating to providing notifications of use of FAA-derived material). (Certiorari was denied on March 3, 2014.)

<sup>106</sup> *Clapper*, 133 S. Ct. at 1149. As noted above, *supra* note 105, subsequent disclosures by unauthorized leakers confirm the existence of apparently massive data collection programs. See also, e.g., Ellen Nakashima & Barton Gellman, *Court Gave NSA Broad Leeway in Surveillance, Documents Show*, WASH. POST (June 30, 2014), [http://www.washingtonpost.com/world/national-security/court-gave-nsa-broad-leeway-in-surveillance-documents-show-2014/06/30/32b872ec-fae4-11e3-8176-f2c941cf35f1\\_story.html](http://www.washingtonpost.com/world/national-security/court-gave-nsa-broad-leeway-in-surveillance-documents-show-2014/06/30/32b872ec-fae4-11e3-8176-f2c941cf35f1_story.html) (reporting that a 2010 classified legal certification by the FISA court, leaked by Snowden, authorized surveillance under Section 702 from a list of 193 countries in the world).

<sup>107</sup> See *Clapper*, 133 S. Ct. at 1157 (noting that one of the plaintiffs alleged that he represented Khalid Sheik Mohammed).

<sup>108</sup> See, e.g., *Foreign Intelligence Surveillance Act Court Orders 1979–2014*, EPIC.ORG, [http://www.epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://www.epic.org/privacy/wiretap/stats/fisa_stats.html) (last visited Oct. 23, 2014); see also *History of the Federal Judiciary: Foreign Intelligence Surveillance Court*, FEDERAL JUDICIAL CENTER, [http://www.fjc.gov/history/home.nsf/page/courts\\_special\\_fisc.html](http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html) (last visited Oct. 23, 2014) (noting that FISA court and a review court, to hear government appeals from denial of its warrant applications, were established in 1978 but that “[b]ecause of the almost perfect record of the Department of Justice in obtaining the surveillance warrants and other powers it requested from the Foreign Intelligence Surveillance Court, the review court had no occasion to meet until 2002”); *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 140 (2d Cir. 2011) (noting that in 2008, 2,082 surveillance orders were sought and 2,081 were granted by the FISA court).

<sup>109</sup> See *supra* note 105; *infra* note 132.

Amendments Act]. The instant plaintiffs' fears of surveillance are by no means based on "mere conjecture," delusional fantasy, or unfounded speculation. Their fears are fairly traceable to the FAA because they are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world. Confering standing on these plaintiffs is not tantamount to confering standing on "any or all citizens who no more than assert that certain practices of law enforcement offices are unconstitutional." *Lyons*, 461 U.S. at 111. Most law-abiding citizens have no occasion to communicate with suspected terrorists; relatively few Americans have occasion to engage in international communications relevant to "foreign intelligence." These plaintiffs however, have successfully demonstrated that their legitimate professions make it quite likely that their communications will be intercepted if the government—as seems inevitable—exercises the authority granted by the FAA.<sup>110</sup>

The Court of Appeals also found that the plaintiffs were acting objectively reasonably in taking measures to protect the confidentiality of their communications, in light of the realistic risks of future injury from surveillance under the statute; they thus suffered present injury based on a realistic threat of future harm.<sup>111</sup> But the Supreme Court treated the expenditures and measures being taken by the plaintiffs to avoid surveillance as based on their merely "subjective" reactions, insufficient to establish standing,<sup>112</sup> given the lack of certainty about the fact or likelihood that they were actually being surveilled.

As Justice Breyer's dissent argued,<sup>113</sup> the Court treats these measures differently than it treated the preventive testing measures that conventional alfalfa growers claimed they would need to use to find out if their crops were affected by genetically modified

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<sup>110</sup> *Clapper*, 638 F.3d at 139 (some citations omitted).

<sup>111</sup> *Id.* at 134, 141, 143–44. That surveillance is "reasonably likely" might still be viewed by some members of the Court as insufficient for standing, but accepting the reasonable likelihood of surveillance would have made for a less disingenuous analysis. *Cf. Clapper*, 133 S. Ct. at 1150 n.5 (stating that, if there were a difference between "certainly impending" and "substantial risk," "respondents fall short of even that [latter] standard.>").

The Court of Appeals also indicated that the Fourth Amendment standard of when it would be reasonable to do so did not vary as between attorneys protecting confidential communications and others, e.g., journalists. *Clapper*, 638 F.3d at 144 n.27. A difference may be that when it becomes objectively reasonable to take such measures, attorneys—unlike those who do not have privileged and confidentiality obligations to clients—may have an obligation to do so. *Cf. Declaration of Professor Stephen Gillers, Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 08 Civ. 6259), 2008 WL 5267726 (explaining the duty of confidentiality imposed by lawyers).

<sup>112</sup> *Clapper*, 133 S. Ct. at 1151 (quoting dissenting opinion in lower court).

<sup>113</sup> *Id.* at 1163–64 (Breyer, J., dissenting).

alfalfa seeds in *Monsanto Co. v. Geertson Seed Farms*.<sup>114</sup> In both cases, Breyer argued, the challengers should be seen as incurring present expenses that were a reasonable response to the objective likelihood of future harm. Moreover, in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*,<sup>115</sup> the Court treated as reasonable precautions taken by the plaintiffs to avoid using outdoor facilities which had a risk of contamination by unlawful polluting discharges.<sup>116</sup> It is difficult, within the framework only of standing doctrine, to account for the Court's acceptance of the reasonableness of precautionary measures taken in *Monsanto*, and in *Laidlaw*, but not in *Clapper*.

As the Court itself recognized, *Clapper*'s "certainly impending" standard was arguably in tension with a line of cases upholding "standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm."<sup>117</sup> However, the Court said, the plaintiffs did not meet the substantial risk standard by pleading concrete facts, and the Court seemed to suggest that to the extent the risk of harm depends on third party decisions, plaintiffs "cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'"<sup>118</sup> Yet in a number of the cited cases, the risks deemed sufficient to give rise to Article III standing included risks posed by third party actions—in *Monsanto*,<sup>119</sup> of genetically modified seed growers, in *Pennell v. City of San Jose*,<sup>120</sup> of tenants seeking and receiving hardship relief to the detriment

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<sup>114</sup> 561 U.S. 139 (2010).

<sup>115</sup> 528 U.S. 167 (2000).

<sup>116</sup> *Id.* at 182–83.

<sup>117</sup> *Clapper*, 133 S. Ct. at 1150 n.5 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152–55 (2010) and citing as "see also" *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1000–01 (1982); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). *Monsanto* and *Pennell* are discussed in the text above. In *Blum*, the Court applied the "substantial risk" standard to uphold nursing home residents' standing to challenge procedures for transfer to lower levels of care, but not to challenge procedures for transfers for higher levels of care, where there was no evidence that the complainants had been transferred or been threatened with transfer to higher levels of care. *See also Babbitt*, 442 U.S. at 298 (stating that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" (emphasis added)). *See supra* note 84, further discussing *Babbitt*.

<sup>118</sup> *Clapper*, 133 S. Ct. at 1150 n.5 (internal quotation marks omitted) (citation omitted).

<sup>119</sup> 561 U.S. 139 (2010) (upholding standing for conventional growers of alfalfa to sue the EPA to enjoin its decision deregulating the growing of genetically modified alfalfa seeds). Even though it was uncertain whether use of those seeds by the other farmers would affect the challengers' crops, the Court said, the threat that they might do so and consequent need for the traditional growers to do testing of their own crops to find out were sufficient for standing. *Id.* at 153–55. In *Clapper*, the Court might have followed this reasoning to find that even if plaintiffs were not subject to surveillance the threat that they might be made it reasonable for them to take precautions (especially if they were in a lawyer-client relationship) and thus afforded standing to test the legality of the program.

<sup>120</sup> 485 U.S. 1 (1988) (holding that the risk that a rent control statute permitting "hardship exceptions" for particular tenants would be enforced against members of an association was sufficient to uphold standing, even though there was no specific pleading that any association

of landlords. Moreover, arguably comparable relationships of present fears to future injury in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>121</sup> and *Laidlaw*,<sup>122</sup> were found sufficient to uphold standing.

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members had such tenants and the representation at oral argument that association members had such tenants did not say anything about whether those tenants would seek an exception or whether the exception would be granted). Thus, the risk of actual injury to members of the building association, by virtue of the statute, depended on the anticipated action of independent third parties, as Justice Breyer's *Clapper* dissent points out. See *Clapper*, 133 S. Ct. at 1161 (Breyer, J., dissenting) (noting *Pennell*'s standard—that the landlords demonstrate a “‘realistic danger of sustaining a direct injury as a result of the statute’s operation,’” and *Pennell*'s conclusion “that the landlords had done so by showing a likelihood of enforcement and a ‘probability,’ that the ordinance would make the landlords charge lower rents—even though the landlords had not shown (1) that they intended to raise the relevant rents to the point of causing unreasonably severe hardship; (2) that the tenants would challenge those increases; or (3) that the city’s hearing examiners and arbitrators would find against the landlords. Here, even more so than in *Pennell*, there is a ‘realistic danger’ that the relevant harm will occur.” (citations omitted)). In *Clapper*, that injury to the plaintiffs depended on the third party decisions of the government and the FISA court likewise need not have negated the plaintiffs’ standing, where the unique history and nature of the statutory scheme was such that it could reasonably be expected that the government would seek and be permitted to conduct surveillance of the plaintiffs’ contacts and where the legitimately covert nature of the government’s acts would ordinarily preclude more definitive claims of injury.

<sup>121</sup> 438 U.S. 59, 74 (1978) (indicating that exposure to radiation in the environment was a “direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health . . . consequences of even small emissions”). Cf. *id.* at 77 (deeming it sufficient for satisfying the redressability component of standing that there was a “substantial likelihood” that the plants would not go forward as planned if the Price-Anderson Act were invalidated).

<sup>122</sup> 528 U.S. 167 (2000) (upholding individuals’ standing to challenge the environmental practices of the defendant, even though the lower courts had found (and the Supreme Court did not disagree) that the company’s activities caused no harm to the environment). Justice Ginsburg, writing for the Court, explained that “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.” *Id.* at 181. And such “injury” to the plaintiffs was adequately pleaded by allegations that plaintiffs had engaged in recreational and aesthetic activities in the area but “no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutant”; another plaintiff, “Moore[,] testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges.” *Id.* at 182. The Court distinguished *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): in *Laidlaw*, the challenged activities “directly affected” the plaintiffs’ interests, and “the affiants’ conditional statements—that they would use the nearby North Tyger River for recreation if *Laidlaw* were not discharging pollutants into it—[could not] be equated with the speculative “‘some day’ intentions’ to visit endangered species halfway around the world that we held insufficient to show injury in fact in” *Lujan*. 528 U.S. at 184. The plaintiffs’ fears of harm were found reasonable, and sufficient to meet the Article III injury requirement. In *Clapper*, as well, plaintiffs’ fears of privacy invasion seemed reasonable at the time, in light of the scope and purpose of the government surveillance program, even before the unauthorized disclosures that came later.

The *Clapper* Court noted that the challenged statute did not target the plaintiffs as U.S. based persons, and indeed, took affirmative steps to prohibit targeting them, and suggested that prior cases, such as *Pennell*, were in this respect different.<sup>123</sup> This arguable distinction, however, does not seem sufficient to justify, and surely does not compel, the difference in result, given the obviously strong likelihood that surveillance of foreign persons with contacts in the United States would lead to surveillance of U.S. persons. This is so especially because the statute challenged in *Clapper* on its face contemplates that communications of U.S. persons will be intercepted, and requires reporting on such intercepts to, inter alia, congressional committees.<sup>124</sup> By these provisions the legislation itself recognizes both the likelihood that U.S. persons' communications would be captured and the seriousness of such acts.<sup>125</sup>

*Injury to Plaintiffs and to Society:* In deciding not to allow adjudication of the merits of a substantial challenge to the constitutionality of the 2008 amendment, the Court not only dealt incorrectly with the plaintiffs but also may have contributed to, or passed up an opportunity to help avert, harm to society. An important function of the courts is to provide a site for the vindication of constitutional rights. Another important function of the Court is to provide, through public adjudication, a degree of accountability under law for other government actors. In *Clapper*, the Court failed to provide guidance on novel legal questions affecting the rights of many, in reasoning suggesting that the courts would generally not be available to do so. In so doing, it is possible that the decision contributed to incentives for unlawful leaks and to declining confidence, in both the American public and needed allies, in U.S. capacity for managing necessary covert activities, data collection, and retention, in ways that conform with the rule of law.<sup>126</sup>

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In *Laidlaw* it was evident that the defendant's activities were unlawful, even though they were found not to harm the environment. *Clapper* thus differs from both *Laidlaw* and *Lyons* in that neither the fact of surveillance nor its illegality were conceded or established. In both *Lyons* and *Laidlaw* there was clear evidence of past wrongful conduct. But the legitimate need for secrecy in covert surveillance should not be a reason to apply heightened standards of showing injury, causation, and redressability; if anything, the necessary secrecy of covert operations should allow plaintiffs with reason to believe they are subject to surveillance to establish standing on lesser threshold showings. See *supra* notes 62–72 and accompanying text.

<sup>123</sup> *Clapper*, 133 S. Ct. at 1147–50.

<sup>124</sup> See 50 U.S.C. § 1881a(k)(1)(3)(A) (2006 & Supp. II 2009).

<sup>125</sup> Cf. *R. v. Tse*, [2012] 1 S.C.R. 531, ¶¶ 82–84, 98–99 (Can.) (holding unconstitutional, as a breach of the Canadian Charter's protection against "unreasonable searches," a statutory authorization for covert surveillance of specified individuals that did not require after-the-fact disclosure to the individuals of the surveillance or comparably adequate accountability). The Canadian Supreme Court also commented that a reporting requirement to the Parliament "that does not provide for active oversight of wiretapping generally, far less any particular use of the wiretap provisions, cannot be a constitutional requirement of a reasonable wiretap power within the meaning" of the Charter's protections against unreasonable searches. *Id.* at ¶ 90. Query whether the Court thereby implies that such a reporting requirement would not by itself mitigate the need to inform the individuals directly affected by the surveillance?

<sup>126</sup> See, e.g., *supra* note 72.

There is, to be sure, substantial and continued disagreement about the constitutionality of the various forms of mass surveillance now authorized.<sup>127</sup> If the Court had allowed the merits in *Clapper* to be litigated, it is possible that the challenged surveillance program would have been upheld as constitutional. It is also possible that such a decision, legitimating the statute, would make it more difficult to secure statutory protection against unnecessarily broad forms of surveillance or data retention.<sup>128</sup> Moreover, even if the courts had found constitutional violations, the scope of the remedy and its effects on privacy interests would be uncertain; effects on would-be leakers are even more uncertain, as motivations there are no doubt complex.

On the other hand, the claim that decisions upholding government practices necessarily result in uncritical legitimation effects foreclosing further political attention is open to doubt. Congress has at times responded to judicial decisions upholding government practices against constitutional challenge with legislation designed to provide protection to individual rights.<sup>129</sup> And, even when the Court upholds government

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<sup>127</sup> For example, it might have been argued at the time of *Clapper*, based on *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that a bank customer has no expectation of privacy, and thus no Fourth Amendment rights protecting against government seizure of data, in information voluntarily disclosed to the customer's bank), that metadata collection programs from third party carriers violate no Fourth Amendment rights. See also PRIVACY & CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 11 (Jan 23, 2014) (condemning the NSA's metadata program as unauthorized by statute but stating that "existing doctrine does not fully answer whether the [program] is constitutionally sound"). *But cf.* *Riley v. California*, 134 S. Ct. 2473 (2014) (treating information on a cell phone as sufficiently private as to generally require a search warrant before a cell phone seized incident to a lawful arrest can itself be searched). Moreover, the program challenged in *Clapper* authorized surveillance targeted at persons outside the United States, though it contemplated that conversations with U.S. persons would be overheard; the Fourth Amendment may allow more latitude to the government in connection with foreign intelligence surveillance than domestic, see *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 308–09 (1972), though how those categories should be applied in the present technological circumstances is uncertain. For disagreement in the lower courts on the constitutionality of a different program—the collection of telephonic metadata for virtually all phone calls in the United States—compare *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013), with *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013).

<sup>128</sup> See, e.g., Mark Tushnet, *Living with a Bill of Rights*, in UNDERSTANDING HUMAN RIGHTS 3–19 (Conor Gearty & Adam Tomkins eds., 1996) (describing legitimation effects of judicial decisions rejecting constitutional challenges to legislation or government action). *But see* Mark Tushnet, *Policy Distortion and Democratic Debilitation*, 94 MICH. L. REV. 245, 269 n.99 (1995) (questioning how often a decision upholding a statute has prevented development of better laws).

<sup>129</sup> See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the First Amendment did not require states to make accommodation for religiously motivated behavior in violation of generally applicable laws), *responded to by statute* in Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that discrimination based on pregnancy was not discrimination based

action, it may provide guidance and foundations for future limitations on the government power being exercised;<sup>130</sup> it may explicitly construe statutes to avoid constitutional doubts.<sup>131</sup> Thus one can at least wonder whether, had the Court allowed the litigation to proceed in the lower courts, data collection and retention programs might have been improved sooner, with trust in government enhanced, and incentives to leak information diminished.<sup>132</sup> Both national security and rule-of-law protection of privacy rights might have benefitted.

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In *Windsor* we see a Court eager itself to resolve an important issue of constitutional equality, notwithstanding the absence of any real disagreement between the

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on sex), *responded to by statute in* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076. Cf. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 532–36 (2007) (noting that while courts were rejecting constitutional or common law claims of journalist or reporter privileges, state legislatures “led the way with adoption of statutory shield laws”).

<sup>130</sup> Thus, for example, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court rejected a claim by a journalist that he had a constitutional privilege grounded in the First Amendment not to provide grand jury testimony. But the Court did not simply reject any claim of privilege or special First Amendment concerns; it suggested that the relevant standard is “that the government ‘convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.’” *Id.* at 700–01 (citation omitted). Justice Lewis Powell’s concurrence emphasized that no “harassment” of journalists would be tolerated, and that journalists subpoenaed to testify had constitutional rights “with respect to the gathering of news.” *Id.* at 709–10 (Powell, J., concurring). Opinions in *Branzburg* have been cited in lower courts in support of journalists’ claims for special protection under the First Amendment. See *Zerilli v. Smith*, 656 F.2d 705, 711 & nn.39, 41 (D.C. Cir. 1981); *Bruno & Stillman Inc. v. Globe Newspapers*, 633 F.2d 583, 594–96 (1st Cir. 1980).

<sup>131</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 689–99 (2001); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 368–73 (1971).

<sup>132</sup> Edward Snowden’s disclosures of NSA metadata and mass data collection activities were first reported June 5, 2013, less than four months after *Clapper* came down. See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>. The possible impact of the *Clapper* decision on Snowden’s disclosures is suggested by the report that one of Snowden’s first questions to his attorney, Ben Wizner, in July of 2013, was, “Do you have standing now?” Colleen Walsh, *Defending Snowden*, HARVARD GAZETTE (Mar. 26, 2014), <http://news.harvard.edu/gazette/story/2014/03/defending-snowden>. In both *Klayman v. Obama* and *ACLU v. Clapper*, the district courts noted the role of Snowden’s unauthorized disclosures of information in providing a factual basis for plaintiffs’ assertion of standing in those cases. On the distinct point of possible harm to the United States from unauthorized disclosures, see, e.g., David Ignatius, *Underestimating the Enemy’s Will to Fight*, WASH. POST, Sept. 19, 2014, at A19 (describing NSA head Clapper as suggesting that due to leaks, NSA “had to ‘throttle back’ on some intelligence collection ‘because we need to recover foreign intelligence partnerships and commercial partnership.’ ‘We are accepting more risk in this country because of that,’ Clapper warned.”).

government and the party plaintiff and the availability of individual judicial remedies for other affected parties, numbering in the hundreds of thousands. In *Clapper*, we see a Court refusing to resolve an important issue of constitutional privacy that may affect even more U.S. persons but whose scope is unknown, knowledge being held (at the time of the judgment) largely within the secret confines of the Executive Branch. Perhaps the Court evaluates differently the harms from discriminatory treatment of same-sex couples and the harms to privacy interests that could be posed by surveillance programs (most of whose U.S. “victims” were unaware of the monitoring). The malleability of supposed Article III requirements for standing, in light of the Court’s evaluation of the substantive claims, is old news; scholars have frequently described, and decried, inconsistencies in the Court’s standing case law. Viewing that case law as a method for exercising sound judicial discretion about the balance between judicial review to vindicate individual rights and allowing room for democratic decisionmaking about important matters, some degree of inconsistency should not be surprising. But the harms, not only to the plaintiffs but also to the larger society from the Court’s refusal to exercise jurisdiction in *Clapper*, may turn out to be considerable.<sup>133</sup>

## II. *CITY OF LOS ANGELES V. LYONS*: A PREDECESSOR CASE

*City of Los Angeles v. Lyons*,<sup>134</sup> though not discussed by the Supreme Court in *Clapper*, figured prominently in the Second Circuit’s decision in *Clapper*. For the Court of Appeals, *Lyons* was the seminal case concerning standing to seek relief as against future injury. In *Lyons*, the Court for the first time held that a plaintiff, clearly injured by past assertedly unlawful conduct for which he had standing to seek damages, lacked standing to seek an injunction because of uncertainty over whether the plaintiff himself would in the future be subject to the unlawful conduct again.

In the Court of Appeals decision (later reversed in *Clapper*), Judge Lynch distinguished *Lyons*, which found that a motorist who had been subjected to an injurious “chokehold” by the L.A. County Police Department lacked standing to sue for injunctive relief since he could not show a likelihood that he would again be subject to such action in the future.<sup>135</sup> For Judge Lynch, the difference between the two cases lay in part on the fact that the conduct complained of in *Clapper* was explicitly authorized by a new statute, which the government had eagerly sought:

It is significant that the injury that the plaintiffs fear results from conduct that is authorized by statute. This case is not like *Lyons*,

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<sup>133</sup> FISA court review provides at least some check on government action. But such review is nonadversarial, and nonpublic. Even the decisions of the FISA court were, for the most part, not published until after recent leaked disclosures. One of the most important functions of a court is to provide accountability through transparency of public reasoning. The in camera, nonadversarial proceedings of the FISA court does not serve that purpose. Proposals to improve FISA procedures are under consideration in Congress at this writing.

<sup>134</sup> 461 U.S. 95 (1983).

<sup>135</sup> *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2011).

where the plaintiff feared injury from officers who would have been acting outside the law, making the injury less likely to occur. Here, the fact that the government has authorized the potentially harmful conduct means that the plaintiffs can reasonably assume that government officials will actually engage in that conduct by carrying out the authorized surveillance. It is fanciful, moreover, to question whether the government will ever undertake broad-based surveillance of the type authorized by the statute. The FAA was passed specifically to permit surveillance that was not permitted by FISA but that was believed necessary to protect the national security.<sup>136</sup>

The Supreme Court's failure to discuss *Lyons*, or the Second Circuit's distinction of *Lyons*, might itself be subject to critique as manifesting a lack of regard for the work of lower federal courts or its own past decisions. But *Lyons* was, I would argue, another "triple error" case, and in ways connected to *Clapper*.

In *Lyons*, there was no question that the African American motorist, injured in application of a chokehold by the police during a routine traffic stop, had standing to sue the officers for damages, given his injuries. Under established standards *Lyons* had standing to sue the City and its police officers for what he claimed were acts that violated the Constitution and injured his rights and his body; his "case" was thus within Article III. The Court, however, for the first time disaggregated the various claims for relief from the Article III "case," insisting that "standing" had to be separately established for each form of relief sought in the case.

*Lyons*'s complaint had already been found to have merit in the lower courts. As the Supreme Court explained, the complaint had alleged that

"pursuant to the authorization, instruction and encouragement of Defendant City of Los Angeles, [police officers] regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever," that numerous persons have been injured as the result of the application of the chokeholds, that *Lyons* and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that *Lyons* "justifiably fears that any contact he has with Los Angeles Police officers may result in his being

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<sup>136</sup> *Id.* While it is true that there was no statutory authority specifically authorizing use of the chokeholds in *Lyons*, and that plaintiff's claim was that the chokeholds were unlawful under the Constitution, the District Court had found that the use of the chokehold was at the time authorized by Department policy, see *Lyons*, 461 U.S. at 99, although there was disagreement within the Court on the scope and nature of that policy, compare *id.* at 106 & n.7 with *id.* at 117–22 (Marshall, J., dissenting). In the other respects identified by the Court of Appeals the cases appear plainly to be distinguishable.

choked and strangled to death without provocation, justification or other legal excuse.”<sup>137</sup>

The District Court in the case had “found that Lyons had been stopped for a traffic infringement and that without provocation or legal justification the officers involved had applied a ‘Department-authorized chokehold which resulted in injuries to the plaintiff.’”<sup>138</sup> Moreover, the District Court had found that such chokeholds were authorized by the department “in situations where no one is threatened by death or grievous bodily harm,” and further that “officers are insufficiently trained, that the use of the holds involves a high risk of injury or death as then employed, and that their continued use in situations where neither death nor serious bodily injury is threatened ‘is unconscionable in a civilized society.’”<sup>139</sup>

Not surprisingly, in light of these findings, the District Court concluded “that such use violated Lyons’ substantive due process rights under the Fourteenth Amendment.”<sup>140</sup> The District Court entered a preliminary injunction, “enjoining ‘the use of both the carotid-artery and bar arm holds under circumstances which do not threaten death or serious bodily injury.’”<sup>141</sup> Additionally, the District Court ordered “[a]n improved training program and regular reporting and record keeping.”<sup>142</sup> The District Court’s findings and orders were affirmed on appeal to the Ninth Circuit, in a unanimous per curiam opinion.<sup>143</sup> The Supreme Court, however, by a five to four vote, concluded that the complaint’s allegations were too speculative to give rise to a reasonable present belief that Lyons was at risk of being stopped and assaulted again by the police (and noted that one could not assume that “every” police stop would result in unconstitutional infliction of injury),<sup>144</sup> and thus there was no standing to seek injunctive relief.

As the Court noted, during the pendency of Lyons’s case, first filed in 1977, the number of deaths attributable to the LAPD’s use of the chokehold had mounted.<sup>145</sup>

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<sup>137</sup> *Lyons*, 461 U.S. at 98.

<sup>138</sup> *Id.* at 99 (quoting the district court).

<sup>139</sup> *Id.* (quoting the district court).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 100 (quoting the district court).

<sup>142</sup> *Id.* at 99–100.

<sup>143</sup> 656 F.2d 417 (9th Cir. 1981) (per curiam).

<sup>144</sup> *Lyons*, 461 U.S. at 107 n.8 (“Lyons alleged that he feared he would be choked in any future encounter with the police. The reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant. Of course, emotional upset is a relevant consideration in a damages action.”); *id.* at 108 (“[I]t is no more than conjecture to suggest that in every . . . encounter” between citizens and police, unconstitutional violence will be used). The Court does not further explain why “emotional upset” is “relevant” to standing in a damages action but not in one for injunctive relief. *See infra* note 162.

<sup>145</sup> *Lyons*, 461 U.S. at 100 (noting that the first complaint alleged two deaths, the amended complaint alleged ten and by May 1982 there had been five more).

After certiorari was granted, the LAPD imposed a six month moratorium on the use of chokeholds except when deadly force is authorized; the City informed the Court of a question of possible mootness but argued that the case was not moot, and the plaintiff moved to dismiss the writ as improvidently granted.<sup>146</sup> At briefing and oral argument, Lyons argued that the case was now moot and urged that the preliminary injunction be vacated; the City opposed because the moratorium was not permanent and could be lifted at any time.<sup>147</sup> The Court agreed “with the City that the case is not moot, since the moratorium by its terms is not permanent” and subsequent events had not “irrevocably eradicated the effects of the alleged violation.”<sup>148</sup>

Notwithstanding this recognition that the “effects” of the chokehold practice were not eradicated, the Court found that Lyons lacked standing because, in its view, Lyons had made an insufficient showing that he would be subject to an unlawful chokehold in the future, suggesting that he was no more at risk in the future of being subjected to an unlawful chokehold than any other person in Los Angeles.<sup>149</sup> He therefore lacked

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<sup>146</sup> *Id.* at 100–01. One way of understanding *Lyons* is that the Court, by disaggregating the standing inquiry to particular forms of relief, also shifted analysis of the risk of future harm from mootness doctrine to standing doctrine. *See generally* Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, *supra* note 39. Mootness doctrine would not necessarily have required abandonment or vacatur of injunctive relief, were any granted. *Id.* at 26–27 (arguing that “mootness” is a much more flexible tool than “standing”). Lyons’s standing was measured as of the time he filed his complaint, well before the LAPD sought itself to restrain use of the chokehold. Typically, defendants who are subject to prospective judicial relief raise mootness claims; and typically, the burden is on the party claiming mootness to establish that there was no need for relief. *See* *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3533.5 (3d ed. 2008) (“Mootness can be found only if the defendant can bear the ‘heavy’ burden of showing that ‘there is no reasonable expectation that the wrong will be repeated.’”). Even the repeal of a challenged ordinance is not necessarily sufficient to moot the claim for injunctive relief, where there is a prospect that the law would be reenacted if the injunction were withdrawn. *See, e.g.*, *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 288–89 (1982); WRIGHT ET AL., *supra*, at § 3533.5. By treating the likelihood of future injury arising from repetition of past events as a question of the plaintiff’s standing ab initio to seek injunctive relief, rather than as a question of mootness, *Lyons* also switched the burdens that typically fall on defendants and plaintiffs. *Cf.* Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, *supra* note 39, at 26–27 (noting that under the Court’s prior case law, “the personal interest needed to defeat mootness may be different from, and less than, that required initially to establish . . . standing”).

<sup>147</sup> Lyons’s argument was presumably motivated by a desire to avoid an adverse decision by the Supreme Court on the merits—a reasonable concern given that the four lower court judges had agreed on the violation and the remedy, the Court of Appeals decision was per curiam without dissent, but certiorari had nonetheless been granted. Notwithstanding Lyons’s argument for mootness, the decision against mootness seems correct under prevailing standards. Moreover, whatever position Lyons as a litigant took on mootness, had the Court not reached the conclusion on “standing” that it did, other plaintiffs might have been able to seek injunctive relief in the lower courts.

<sup>148</sup> *Lyons*, 461 U.S. at 101 (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625 (1979)).

<sup>149</sup> *Lyons*, 461 U.S. at 111 (“Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles;

standing to pursue that form of relief, as the Court saw it, even though he had plainly suffered an Article III injury for which he could seek damages. In bifurcating the injury from the remedy as the Court did, it acted in an unprecedented manner, going beyond the holdings of the principal cases on which it relied.<sup>150</sup>

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and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.”). Although this passage appears in a part of the opinion devoted to equitable arguments against injunctive relief, the Court cites three Article III standing cases immediately after these sentences, *id.*, emphasizing the analytical overlap in its arguments.

<sup>150</sup> The Court’s claim that *Lyons* was no extension of prior cases was, as the dissent stated, somewhat “disingenuous.” *Id.* at 123–24 (Marshall, J., dissenting). *Rizzo v. Goode*, 423 U.S. 362 (1976) and *O’Shea v. Littleton*, 414 U.S. 488 (1974) were the principal past decisions on which the Court relied. In neither case was a party complaining of and seeking both damages and injunctive relief to protect himself or herself from a specific, injurious, and unlawful action that had previously been directed against him or her, as in *Lyons*. In *O’Shea*, the Court noted that the nineteen named plaintiffs had identified *no* specific instance of past discriminatory conduct towards them by the judges who were the petitioners. *Id.* at 492. The Court did note that counsel asserted, at oral argument, that some of the plaintiffs had in fact suffered from the alleged unconstitutional practices, and commented that “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects”; but the Court also noted other significant barriers to relief had cases involving the respondents been pending before the petitioner judges. *Id.* at 495–96. In the Supreme Court, the only petitioners were judges against whom no damages were sought (though the complaint had also alleged police misconduct). *Id.* at 490, 492. For standing purposes, the fact that the only petitioners were judges made the possibility of future harm far more remote than in *Lyons*, since the challengers would have had to be arrested and charged for future misconduct before appearing before the judges of whose conduct they complained.

In *Rizzo*, the plaintiffs asserted that they and others were the victims of various forms of constitutional rights violations by the police; the injunctive relief they sought, however, was directed at the improvement of police disciplinary mechanisms. *Rizzo*, 423 U.S. at 364–66; *COPPAR v. Rizzo*, 357 F. Supp. 1289 (E.D. Pa. 1973). The Court noted the failure to sue the individual police officers and argued that the causal nexus between the named defendants’ failure to develop better police disciplinary practices and the harms suffered was too remote and tenuous. *See Rizzo*, 423 U.S. at 371 (“Individual police officers *not named as parties* to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct. Instead, the *sole* causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, *not* with respect to them, but as to the members of the classes they represented. In sum, the genesis of this lawsuit—a heated dispute between individual citizens and certain policemen—has evolved into an attempt by the federal judiciary to resolve a ‘controversy’ between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeals’

The Court's novel decision on standing in *Lyons* was vigorously condemned by much of the scholarly literature. Indeed, a *Harvard Law Review* Note emphasizing that Lyons had already suffered a concrete injury giving rise to a serious claim for damages, stated that the assertion that the decision

fell squarely within *O'Shea* [*v. Littleton*] and *Rizzo* [*v. Goode*] was . . . “simply disingenuous.” . . . [Unlike] the plaintiffs in *Rizzo* and *O'Shea*, who had sought only equitable relief, Lyons had a live claim for damages, which under prior decisions would have created the “personal stake in the outcome of the controversy” required by Article III.<sup>151</sup>

Likewise, Justice Thurgood Marshall's dissent noted that “[b]ecause the plaintiffs in *O'Shea*, *Rizzo*, *Mattis*, and *Zwickler* did not seek to redress past injury, their standing to sue depended entirely on the risk of future injury they faced. Apart from the

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words, “[appear] to have the potential for prevention of future police misconduct.”). The Court expressed doubt about whether there was an Article III case or controversy, because the individual respondents' claim to “real and immediate” injury rests not upon what the named petitioners might do to them in the future—such as set a bond on the basis of race—but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures.

*Id.* at 372. Unlike in *Lyons*, there was no departmental policy authorizing the conduct complained of. *Rizzo*, 423 U.S. at 368. The Supreme Court rested judgment on its analysis of both equitable considerations and federalism, finding that the order revising citizen complaint and disciplinary procedures could not be supported by the finding of sixteen violations of constitutional rights by a large metropolitan police force over the course of one year, a pattern the Court found fairly normal for large city police forces. *Id.* at 374–75.

No one has suggested that use of the chokehold as a routine measure, or the death rate following such use in Los Angeles at the time of *Lyons*, was normal. Even the dissent in *Rizzo* noted that the incidents of unconstitutional conduct that had occurred were not pursuant to any “policy,” *id.* at 383 (Blackmun, J., dissenting), in contrast to the facts found in *Lyons*, see *supra* note 137, that the Department authorized use of the chokehold. *Rizzo* may have turned much more on the majority's disinclination to impose any form of liability on public officials for failures to train or impose discipline. See *Rizzo*, 423 U.S. at 384–85 (Blackmun, J., dissenting); see also *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (concluding that failure to train can be basis for liability only where it manifests a deliberate indifference to rights); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–95 (1978) (rejecting respondeat superior theories of liability under Section 1983 actions); cf. *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009) (rejecting supervisory liability for unconstitutional discrimination in *Bivens* actions).

<sup>151</sup> *The Supreme Court, 1982 Term—Federal Jurisdiction and Procedure—Standing to Seek Equitable Relief*, 97 HARV. L. REV. 215, 219 (1983) [hereinafter *Standing to Seek Equitable Relief*]; *Lyons*, 461 U.S. at 121–26 (Marshall, J., dissenting). For additional critique, see Winter, *supra* note 2, at 374–75; Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, *supra* note 39.

desire to eliminate the possibility of future injury, the plaintiffs in those cases had no other personal stake in the outcome of the controversies.<sup>152</sup> Moreover, and also unlike the challenges in *O'Shea* and *Rizzo*, which embraced a very wide range of police and judicial practices, the gist of Lyons's complaint was focused on a very specific police practice.<sup>153</sup>

In *Lyons*, then, as in *Clapper*, the Court had discretion, under prior decisions, in how to resolve the case and chose to narrow the arena of justiciability—both cases were “unforced errors.” Motivated by an apparent concern to prevent undue interference in the operations of police work, the Court in *Lyons* erred in denying standing, in several respects.

First, the fact that the plaintiff had once been injured by the very government policy of which he complained gave him precisely the kind of special stake, differentiated from the general public, with which Article III standing is concerned. The decision left Lyons, and those situated like him, without an effective remedy to provide for their future security, reducing the right not to be unlawfully assaulted by the police essentially to a right to seek damages for being assaulted—rather than the right to be “secure in their persons” protected by the Fourth Amendment (or the right to equal treatment owed to citizens of the United States and all persons therein).<sup>154</sup>

Who better than a person who himself has been subject to such unlawful conduct to seek to enjoin its future use? The introduction of a requirement that such a plaintiff allege that he himself is likely *again* to be subjected to the force he was already subjected to was a significant heightening of the requirements for pleading standing, as the dissent bitterly protested.<sup>155</sup> The Court's articulated requirement that, to establish

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<sup>152</sup> *Lyons*, 461 U.S. at 124 (Marshall, J., dissenting).

<sup>153</sup> *Standing to Seek Equitable Relief*, *supra* note 151, at 219; Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, *supra* note 39, at 44.

<sup>154</sup> Damages claims, unlike claims for injunctive relief, may be defeated in actions against individual officers by qualified immunity, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and against local governments by the need to prove a “policy.” See *Monell v. Dep't Soc. Servs.*, 436 U.S. 658 (1978). Moreover, damages claims may be subject to settlements, which, if kept private, do little to clarify the law controlling government action and whose deterrent impact may be undermined by particular budgetary arrangements for financial liabilities. For a further explanation of why damage awards have not been effective in controlling police misconduct, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

<sup>155</sup> See, e.g., *Lyons*, 461 U.S. at 121 (Marshall, J., dissenting). Justice Marshall detailed the facts behind the high death rates from use of the chokehold:

Although the City instructs its officers that use of a chokehold does not constitute deadly force, since 1975 no less than 16 persons have died following the use of a chokehold by an LAPD police officer. Twelve have been Negro males. The evidence submitted to the District Court established that for many years it has been the official policy of the city to permit police officers to employ chokeholds in a variety of situations where they face no threat of violence. In reported “altercations” between

a justiciable claim for injunctive relief, such a plaintiff would need to allege that *all* police officers always choke citizens they encounter or that they were authorized to do so (without provocation),<sup>156</sup> seems more designed to undermine Fourth Amendment

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LAPD officers and citizens the chokeholds are used more frequently 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 115–16 (Marshall, J., dissenting) (footnotes omitted). These figures, he explained “undoubtedly understated” the dimensions of the problem. *Id.* at 116 n.6 (Marshall, J., dissenting). The barbarity of the procedure was also detailed:

It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death. Chokeholds are intended to bring a subject under control by causing pain and rendering him unconscious. Depending on the position of the officer’s arm and the force applied, the victim’s voluntary or involuntary reaction, and his state of health, an officer may inadvertently crush the victim’s larynx, trachea, or hyoid. The result may be death caused by either cardiac arrest or asphyxiation. An LAPD officer described the reaction of a person to being choked as “do[ing] the chicken,” in reference apparently to the reactions of a chicken when its neck is wrung. The victim experiences extreme pain. His face turns blue as he is deprived of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly.

*Id.* at 116–18 (Marshall, J., dissenting) (footnote and citation omitted). And under the conditions that prevailed before the preliminary injunction, Marshall noted, more deaths could be expected:

[T]he officers are taught to maintain the chokehold until the suspect goes limp, despite substantial evidence that the application of a chokehold invariably induces a “flight or flee” syndrome, producing an *involuntary* struggle by the victim which can easily be misinterpreted by the officer as willful resistance that must be overcome by prolonging the chokehold and increasing the force applied. In addition, officers are instructed that the chokeholds can be safely deployed for up to three or four minutes. Robert Jarvis, the city’s expert who has taught at the Los Angeles Police Academy for the past twelve years, admitted that officers are never told that the bar-arm control can cause death if applied for just two seconds. Of the nine deaths for which evidence was submitted to the District Court, the average duration of the choke where specified was approximately 40 seconds.

*Id.* at 119 (Marshall, J., dissenting) (citations omitted).

<sup>156</sup> *Id.* at 105–06. *But see id.* at 121 (Marshall, J., dissenting) (“There is no basis for the Court’s assertion that Lyons has failed to allege ‘that the City either orders or authorizes application of the chokeholds where there is no resistance or other provocations.’ I am completely at a loss to understand how paragraphs 8 and 13 can be deemed insufficient to allege that the City’s policy authorizes the use of chokeholds without provocation. The Court apparently finds Lyons’ complaint wanting because, although it alleges that he was choked without provocation and that the officers acted pursuant to an official policy, it fails to allege in haec verba that the City’s policy authorizes the choking of suspects without provocation. I am aware of

rights to security of the person than to limit the federal courts to traditional cases or controversies. The Court in effect evaded the implications of the District Court's finding that the use of chokeholds was *authorized* by the department, and of evidence that chokeholds had been used by the LAPD at least 975 times over a five year period,<sup>157</sup> in concluding that Lyons did not face a reasonable likelihood of again being subject to the harm.

Moreover, the Court's assertion that Lyons had no more reason to fear such police assaults in the future than any other person seems willfully blind to the facts of American life. That Lyons had once been the recipient of such abusive conduct in all probability did make it more likely that he would be subject to similar behavior in the future than was the case for a random motorist in Los Angeles. A random motorist, for one thing, was likely to be white and, as Justice Marshall's dissent showed, a disproportionate number of those subjected to chokeholds with resulting injuries were black or Hispanic: "[I]n a City where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds."<sup>158</sup> Black citizens in Los Angeles were twenty times more likely to be strangled in chokeholds than were whites.<sup>159</sup> The casual racism that may have contributed to these astonishing figures is suggested by a widely quoted remark of then-LAPD Chief Darryl Gates "who, when asked why blacks were dying in such disproportionate numbers at the hands of the police, suggested that the disparity was attributable to physiological differences between blacks and 'normal people.'"<sup>160</sup> To say that Lyons had no greater chance than the general citizenry of again being subjected to this harm ignored "his status as a black male who thereby faces a markedly heightened chance of being illegally mistreated by the police."<sup>161</sup>

A "random" motorist might also have been better off than Mr. Lyons was and thus less likely to be driving a car with defective tail lights—the purported occasion for the traffic stop. These factors are "objective" in the sense of being externally observable. The Court's refusal to resolve the case on the merits, because Lyons was in no different a position than other L.A. citizens, would have created a perception that the law was profoundly removed from the lived realities of African American drivers in Los Angeles at the time.

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no case decided since the abolition of the old common law forms of action, and the Court cites none, that in any way supports this crabbed construction of the complaint. A federal court is capable of concluding for itself that two plus two equals four.").

<sup>157</sup> *Id.* at 116 (Marshall, J., dissenting).

<sup>158</sup> *Id.* at 116 n.3 (Marshall J., dissenting).

<sup>159</sup> *Standing to Seek Equitable Relief*, *supra* note 151, at 216 n.8 (citing Respondents Brief in Opposition to the Petition for Writ of Certiorari at i, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (No. 81-1064)).

<sup>160</sup> *Id.* (citing *NEWSWEEK*, May 24, 1982, at 32).

<sup>161</sup> *Id.* at 220; *see also* Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 346–47; Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1225 (1999).

Moreover, it is at least arguable that it is objectively “reasonable” for one already subjected to an unlawful procedure producing substantial injuries to fear imminent repetition. That persons *not* previously subject to enforcement are not allowed to invoke their fear of such enforcement as a basis of standing does not bear on whether those who *have already been* subjected can be understood to have a reasonable fear of repetition.<sup>162</sup> Even granting that the likelihood of Lyons again being subject to

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<sup>162</sup> The idea of an objectively reasonable fear might mean one of two things. First, it might refer to the mathematical odds of a particular event happening in the future. As already noted, the Court’s claim that Lyons was at no higher risk than average is quite contestable and quite probably wrong as a matter of externally observable facts. Second, the idea of an objectively reasonable fear might instead refer to what an average reasonable person would believe; on this view, even if an average person’s feelings are the result of cognitive biases, that would not necessarily make them unreasonable. An average reasonable person who has already once been assaulted would be quite likely to have a greater fear of future assault than someone who had not been (especially if the reasons for the assault were not random but related to a visible personal characteristic); and, from the internal perspective, this fear could also be deemed reasonable. Syndromes involving fear of future injury based on a prior exposure to a disease agent, while controversial and subject to different requirements, are sometimes treated as creating compensable injury in tort law. *See, e.g.,* *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 322–23 (La. 2012) (“Here, each plaintiff testified to a fear of contracting cancer in the future as a result of his exposure to the toxic chemicals contained in the slop oil for a period of weeks. . . . ‘While to a scientist in his ivory tower the possibility of cancerous growth may be so minimal as to be untroubling, we are not prepared to hold that the trier of fact erred in finding compensable this real possibility to th[ese] worrying workmen.’ We find that the lower courts did not err in awarding plaintiffs damages for fear of future injury.” (quoting *Anderson v. Welding Testing Lab., Inc.*, 304 So. 2d 351, 353 (La. 1974))). For discussions of varying approaches to whether and when to allow compensation for fears of future disease in tort law, see 1 *LAW OF TOXIC TORTS* § 7:9 (2014) (Michael Dore, compiler); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1660–71 (2002); Glen Donath, *Curing Cancerphobia Phobia: Reasonableness Redefined*, 62 U. CHI. L. REV. 1113 (1995); Debbie E. Lanin, *The Fear of Disease As a Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 ST. JOHN’S L. REV. 77 (1993); *cf.* Eric J. Knapp, Note, *Tort Law—Turning Blood Into Whine: “Fear of AIDS” as a Cognizable Cause of Action in New Mexico—Madrid v. Lincoln Co. Medical Center*, 28 N.M.L. REV. 165 (1998). To be sure, in tort law the fear of future injuries is typically linked to a biological process triggered by plaintiff’s prior exposure to a potential disease-causing agent, whereas in police misconduct cases, it might be thought, actual injury will depend on the intervening acts of other police officers acting in the future. In both cases, however, there may be only a small statistical likelihood of the feared future harm occurring and the initial exposure—to a harmful agent or to an incident of police brutality—may contribute to future harm only through a combination of other intervening factors; but as to the *injury*, tort law suggests that fear of future harm from past events may sometimes be compensable even if the future harm is remote and unlikely. (Social psychology suggests that unwarranted violence by one member of a community might contribute to similar acts by others, as people tend to “view a behavior as correct in a given situation to the degree that we see others performing it.” ROBERT CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 100 (4th ed. 2001).) On the general problem in standing law of probabilistic future injuries, see Fallon, *Fragmentation*, *supra* note 12, text at notes 148–63. From

chokeholds himself was uncertain—as it plainly was—the idea that his fear of such treatment, and the continuing pall that would cast over his life as a supposedly free citizen of California living in LA, was not relevant to standing, was incorrect, and would in other contexts have been recognized as more than sufficient for standing. Recall, in *Laidlaw*, the Court’s insistence that what standing focuses on is injury to the plaintiff, not to the environment, and its conclusion that the plaintiffs’ fears of contamination (and their acting on such fears by refraining from activity in certain areas) were reasonable even though no contamination was shown to have existed. Notwithstanding Lyons’s pleading in his complaint that he now “‘justifiably fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse,’” his fears were deemed merely “‘subjective apprehensions.’”<sup>163</sup> In its treatment of these fears as unworthy of recognition as an injury by the one who has already suffered such a chokehold, *Lyons* may bring to mind the *Plessy* majority’s view that enforced separation of the races on public transport could not be regarded as a publicly enacted “‘badge of inferiority,’” but would be so “‘solely because the colored race chooses to put that construction upon it.’”<sup>164</sup>

The failure to allow federal actions for injunctive relief by contracting standing was a missed opportunity for the Court to intervene to protect politically powerless members of a racial minority group from police abuse. At the time Lyons first filed his action in early 1977, at least two motorists had died at the hands of the LAPD using this technique; by the time the case was decided that number had grown to sixteen.<sup>165</sup> (The

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an internal perspective of reasonableness, Lyons’s fear of future assault by the police might be considered an objectively reasonable one, whereas a white person living in Beverly Hills (or for that matter in New York) who had never been chokeholded but had a “‘subjective apprehension’” of this occurring would have a fear that could be considered “‘unreasonable’” and not sufficient for either compensation or proof of an Article III injury the law would recognize. “‘Bystander’” fears of future injuries might thus be distinguished from those of actual victims of the feared behavior.

<sup>163</sup> See *Lyons*, 461 U.S. at 98; *id.* at 107 n.8 (“The reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant.”). *But see supra* note 162. For additional critique of *Lyons* for not treating the plaintiff’s “‘present injury’” from continuation of the police practice as sufficient for Article III standing purposes, see, e.g., Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 171–72 (1987); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 100–01 (1984).

<sup>164</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“[T]he underlying fallacy of the plaintiff’s argument [consists] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

<sup>165</sup> Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1385 (2000) (noting these

LAPD may have been willing to pay damages to settle claims for excessive use of force, but such awards—for reasons chronicled by scholars, and especially if they were made pursuant to confidentiality agreements—may have had little effect on police training, discipline or practices.)<sup>166</sup> U.S. legal culture enables courts and judges to protect unpopular rights in ways that political representatives may pay so high a price for doing as to render their efforts self-defeating. And contemporary observers of the *Lyons* decision correctly intuited its “disturbing and potentially dangerous” implications.<sup>167</sup>

In March 1991, eight years after the Supreme Court cut off the possibility for relief on Lyons’s injunctive claim, Rodney King—another African American motorist in Los Angeles stopped, not for a broken taillight, but for excessive speed—was viciously beaten by members of the LAPD while a larger group of police officers watched. Following the acquittal in state court of the officers involved in April 1992, riots broke out which claimed 54 lives, with over 2,000 others injured; a federal trial resulted in two of the officers being convicted in April 1993.<sup>168</sup> Could earlier intervention by the federal courts have prevented the accumulation of poor management and supervision of excessive force and racism in the LAPD that led to the King episode—and that may have been behind the Lyons episode?

In the summer of 1991—three months after the video of the Rodney King beating stirred the public—an independent Commission headed by Warren Christopher reported on its findings: there were “a significant number of officers in the LAPD who repetitively use excessive force . . . and persistently ignore the written guidelines of the Department”; the Department itself exercised “inadequate supervisory and management

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numbers and stating that “[t]he seventeen years since *Lyons* have seen a proliferation of brutal instances of police abuse.”)

<sup>166</sup> See Armacost, *supra* note 154, at 472 (noting that Los Angeles paid almost \$80 million in civil settlements and judgments between 1991 and 1995 for police misconduct); Marc L. Miller & Ronald Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 *BUFF. L. REV.* 757, 775 (2004) (“[M]any civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases, and perhaps even less strong cases, but they are requiring (and probably paying for) sealed agreements.”); accord Mark Iris, *Your Tax Dollars at Work! Chicago Police Lawsuit Payments: How Much, and for What?*, 2 *V.A. J. CRIM. L.* 25, 28–29 (2014) (and noting that problem may be becoming worse); cf. Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984) (noting public values at stake in some cases, including cases of “police brutality,” and expressing concerns generally about rising interest in mediation and settlement over adjudicated dispositions in civil litigation). (*Lyons* was not brought as a class action, but the availability of class relief has been considerably restricted. See Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 *NOTRE DAME L. REV.* 593, 608–11, 614–17, 619–23 (2012).) The effects of *Lyons* (and *Rizzo* and *O’Shea*, discussed *supra* note 150), make it quite difficult to use injunctive relief to prevent police misconduct, in individual or class actions.

<sup>167</sup> *Standing to Seek Equitable Relief*, *supra* note 151, at 224.

<sup>168</sup> ALLYSON COLLINS, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 199–201* (1998).

attention,” promoting officers who had repeatedly been accused of using excessive force.<sup>169</sup> The Christopher Commission also found that bias and racism were rampant and not discouraged by management; “officers typing [overtly racist messages] apparently had little concern that they would be disciplined for making such remarks.”<sup>170</sup> The report also found that there was completely inadequate intake for and investigation of complaints against officers, and that severely biased criteria were used in deciding whether to investigate and who to believe.<sup>171</sup> This was the state of affairs eight years after *Lyons*, in what another source, writing in 1998, described as “[d]ecades of brutal behavior by officers, poor management by the chief and his deputies, and racist attitudes expressed at all levels of the department in word and deed.”<sup>172</sup>

When political branches default in their obligation to secure constitutional rights at risk from actions of government actors, the justifications for courts doing so are heightened.<sup>173</sup> The problem of violent and abusive behavior by members of the LAPD was of long standing at the time *Lyons* was decided in 1983. Once a culture of lawlessness and violence becomes instantiated in a police department, it may be necessary for an independent outside institution to intervene. By denying standing, the Court allowed police departments to continue abusive practices (provided they resolved damage claims when necessary), creating what many regard as too little incentive for meaningful change in practice.<sup>174</sup>

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<sup>169</sup> WARREN CHRISTOPHER ET AL., REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT iii, ix, 141 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT].

<sup>170</sup> *Id.* at xii.

<sup>171</sup> *See id.* at xix–xx, 153, 158–64 (finding that “the complaint system is skewed against the complainant[ ]” in the initiation, investigation, and classification of complaints; also finding that the Department treated excessive force complaints “more leniently than . . . other types of officer misconduct”).

<sup>172</sup> COLLINS, *supra* note 168, at 199. A full generation had come to pass between the assault on Adolph Lyons in early 1976, and this 1998 report. Collins also concludes that after the 1991 Christopher Commission Report the LA Police Department did begin to make some reforms and was “slowly, on the mend.” *Id.*; *see id.* at 204–06.

<sup>173</sup> *See generally* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) (arguing that ordinarily it is presumptively illegitimate for trial courts to exercise remedial discretion in institutional reform cases, because such discretion is “inevitably political in nature” but that “the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default . . . [in which] event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion”). *Cf., e.g.*, David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319 (2010) (defending the activism of some South American constitutional courts because of the endemic weaknesses of the political branches to govern).

<sup>174</sup> *See* Gilles, *supra* note 165, at 1399; Armacost, *supra* note 154, at 454–55, 464–82; sources cited *supra* note 166. Armacost specifically notes the view of some police departments, including of the LAPD, that damages and settlements are simply a “cost of doing business.”

In so doing, the Court defaulted on its proper role in a constitutional democracy, a role of special importance for those who are relatively powerless in majoritarian political settings, when they are injured by official violations of constitutional norms.<sup>175</sup> The courts are supposed to secure to all the rule of law that is at the heart of constitutionalism. In *Lyons*, the Court refused to allow Article III courts to do what they might have to prevent further police violence on the citizens of Los Angeles.<sup>176</sup> Had the lower courts been allowed to proceed, might their monitoring of reforms have

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Armocost, *supra* note 154, at 474–75 & nn. 117–18 (quoting JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 205 (1993)). Although the City had, in the course of the litigation, imposed a moratorium on chokeholds, it might not have been prompted to do so without the litigation; the standing doctrine of *Lyons* removed one set of incentives for Los Angeles, and for other city police departments, proactively to seek to prevent violations of constitutional rights.

<sup>175</sup> The argument here is not as broad as that in Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281–82 (1990), which argued for viewing the case or controversy requirement in inclusive terms in light of the primary role of the Court to enforce and interpret the Constitution (regardless of the beneficiaries of its provisions). Indeed, Professor Bandes argued that rather than treating the widespread nature of injury as a reason not to adjudicate, widespread injuries should be treated as a signal of an issue’s importance and of the need for adjudication. But because some widespread injuries are likely to be capable of being redressed politically, the case for judicial scrutiny may be correspondingly weaker.

<sup>176</sup> Judicial review of executive action poses somewhat different challenges in a constitutional democracy than does judicial review of legislative action. Enacted legislation is the product of a democratically elected representative body; executive level action often has a more attenuated connection to the legitimating force of action by an elected representative body. A court’s relative majoritarian deficit is thus, as a formal matter, usually larger in reviewing legislation than executive action. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 77–93 (1969) (distinguishing between invalidating a statute and invalidating executive decisions made under some general governmental authority, e.g., by local police officers). In reviewing executive action, moreover, there is often the possibility of finding the action to be *ultra vires*—unauthorized by the proper authority, and even of applying a clear statement canon that conduct that is constitutionally troublesome should not be deemed authorized unless clearly so stated. *Cf.*, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 542–45 (2004) (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that in light of prior legislation, the Authorization for Use of Military Force enacted after the 9-11 attack should not have been deemed sufficient authority for the detention of the petitioner). At the same time, executive action—especially in policing decisions—is sometimes viewed as calling for greater judicial deference. See, e.g., *Allen v. Wright*, 468 U.S. 737, 761 (1984) (stating that the idea of separation of powers underlying Article II requirements “counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties”); *cf.* *Rizzo v. Goode*, 423 U.S. 362, 378–80 (1976) (noting importance of giving governments wide latitude in managing their “internal affairs,” including police discipline or training). But judicial review, of both legislation and executive action, is of special importance when the challenged government acts fall with special severity on minority groups that face unusual challenges in protecting their interests through majoritarian processes. See generally ELY, *supra* note 20.

helped head off the causes of the King incident and the mass riot that followed the state court acquittal of the officers charged with beating him?

In addition to these errors—in what was due to Lyons as an injured victim of excessive force and what was due the larger society of which Lyons was a part in terms of correcting patterns of unconstitutional conduct by its undisciplined police force—the Court’s refusal of jurisdiction in *Lyons* implicates its own institutional self-interests, as does the denial of standing in *Clapper*, as discussed in Part III below.

### III. THE COURT’S ROLE AND INSTITUTIONAL LEGITIMACY

Door-closing decisions may have a third cost, beyond unfairness to individual litigants and the losses to society of judicial contributions to democratic accountability mechanisms through which constitutional values can be vindicated. That third cost is to the legitimacy and strength of independent courts themselves. In some tension with the idea that judicial restraint in adjudicating sensitive issues generally supports judicial legitimacy, I want to suggest that it may at times impair that legitimacy.

The Court’s role cannot accurately be described as either countermajoritarian or majoritarian. It is in some respects both; the vast literature on judicial review is divided, both on how much of a majoritarian institution the Court is (that is, how much it departs from or follows popular views),<sup>177</sup> and on what the normative aspirations for the Court’s role should be.<sup>178</sup> But to the extent that one role of the Court is to act at times

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<sup>177</sup> Compare, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14 (2009), and JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH* 4 (2006) (both suggesting that the Court is not very countermajoritarian and is responsive to shifts in public opinion), with, e.g., Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103 (2010) (describing “warring perspectives” and disciplinary approaches of Robert Dahl, who saw the Court as being largely in tune with majorities, and Alexander Bickel, who saw the Court as a deviant, “countermajoritarian” institution; criticizing the “majoritarianism” thesis of recent legal scholarship; and arguing that decisions like *Citizens United* suggest that the Court is at least “semi-autonomous”); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 794 (2011) (criticizing what Driver calls the “consensus” view of the Court’s interpretive history for its “anemic notion of the judiciary’s capacity to protect minority rights against the majority’s will”).

<sup>178</sup> In this Essay I will not engage at length the normative debates over the Court’s role. But there is widespread support for the idea that one of the Court’s most important roles is to secure the protection of constitutional rights, especially when those rights may be under majoritarian pressures. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (arguing that standing doctrine should function to support separation of powers by limiting courts to role of protecting individuals and minorities whose rights are threatened by majoritarian action and keeping courts out of prescribing how the other branches should function in the interest of majorities). Another widely accepted role is the law-articulating and uniformity-producing role of interpretation of norms of federal law—constitutional, statutory, treaty, federal common law. (A more controversial idea of the Supreme Court’s role is to act as a superior court in correcting errors of lower “inferior” courts—errors of law, errors of fact and errors of justice. Although modern sensibilities either outright reject the error correction role, or place it in a

as a countermajoritarian institution to protect the constitutional rights of relatively powerless minorities—or to put it differently, to act in ways that the political branches cannot be expected to on such issues—the Court can fulfill this role only if it has legitimacy among the people, other organs of government and legal communities. Justiciability decisions like *Lyons* and *Clapper*, along with a pattern of some other door-closing decisions since the 1970s, raise questions about its capacity to sustain the needed degree of legitimacy over time.

The judicial legitimacy of which I speak has multiple aspects. Professor Richard Fallon has thoughtfully described constitutional legitimacy as having three aspects: legal legitimacy (which depends on legal norms), sociological legitimacy (which may vary among different groups in a society), and moral legitimacy (which embraces concerns about the moral legitimacy of both the Constitution and of actions of public officials); he has argued that sociological legitimacy may be the foundation for much of the Constitution's legal legitimacy.<sup>179</sup> His observations emphasize the importance of sociological acceptance of the Court's role, by various communities of influence, including the general public, elected branches of government, and legal and political experts. In addition to legal, sociological, and moral legitimacy, there may be an institutional or "role" legitimacy for the Court, relating to the justifications in political theory for the special role, and special independence, that the Court has.

Drawing on Professor Fallon's insights,<sup>180</sup> and on the idea of the special institutional role of the federal courts, I want to note ways in which "not deciding"—and, importantly, not allowing the lower federal courts to decide—may impair judicial legitimacy.

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highly subordinate position, this role may well be undervalued. Being seen as an error-correcting court, at least for egregious errors of law, fact, or justice in the courts below, may well reinforce that broader legitimacy on which its power to protect individual constitutional rights may depend. *Cf.* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993); Vicki C. Jackson, *Lee v. Kemna: Federal Habeas Corpus and State Procedure*, 127 HARV. L. REV. 445, 447–48 (2013) ("The Supreme Court is both 'supreme' and a 'court.' As a 'supreme' court, it necessarily cannot sit as a court of errors to correct all mistakes of federal law in the lower courts, state and federal; but as a 'court,' hearing claims of serious injustice, even in an otherwise 'small' case, it can appropriately affirm the link between justice and judging.")

<sup>179</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1803–05, 1824 (2005) [hereinafter Fallon, *Legitimacy*].

<sup>180</sup> In this Part III, I focus more on sociological and institutional role perspectives on legitimacy, informed by Fallon's insights on the relationship of legal to sociological legitimacy. But what Professor Fallon calls questions of moral legitimacy might well bear on the legitimacy of judicial decisions, including on justiciability. It could be argued, for example, that the moral dimensions of DOMA's discrimination against same sex marriages justified stretching standing rules, in ways that the uncertain morality of covert surveillance in a time of newly inventive terrorism would not. *Cf. supra* note 55. As I have argued, however, upholding standing in *Clapper* would have served important constitutional purposes. For Professor Fallon's recent suggestions that there is some consistency in the Court's imposing more rigorous requirements for standing in cases arising in the national security area, see *supra* note 75.

First, as Gerald Gunther argued, engaging in unprincipled decisionmaking about when to avoid decision is arguably inconsistent with the Court's being seen as a place of principled decisionmaking. If decisionmaking by principle is a central legal task of courts, as both Gunther and Bickel agreed it is, Gunther suggests that encouraging unprincipled decisionmaking part of the time undermines at least the perception of principle when the Court does decide; this may be especially so when the Court writes broadly on nonjusticiability so as to cut off access to federal adjudication on important constitutional claims. Moreover, the habits of principled decisionmaking may be more generally undermined by departures sanctioned under prudential doctrines, especially if courts lose the habit of honest explanation of their decisions. If justiciability doctrines, including "standing," are applied in an insufficiently reasoned way, both legal and sociological legitimacy may be undermined.

Second, as Gunther also argued, decisions not to decide may be perceived as decisions upholding the challenged action. That is, contrary to Bickel's expectation, nonjusticiability decisions may be seen as legitimizing the challenged acts. (Political science studies of the relative lack of effect of particular decisions on diffuse legitimacy may cast doubt on both of these claims, so far as public/sociological legitimacy is concerned.)<sup>181</sup> Nonjusticiability decisions may also remove pressures on the political branches to take hard looks at challenged practices. To the extent that a challenged practice poses problems for democratic self-government, nonjusticiability rulings undermine the courts' ability to promote democratic self-government, by depriving the polity of information about whether and why a practice is (or is not) constitutional.

Apart from the Court's role in facilitating democratic decisionmaking through information provision, there are at least two other political theory, or "role"-based reasons, why justiciability decisions may pose threats to judicial legitimacy. The first is that courts are generally understood to be distinct from legislatures not only in their procedures, and their obligations to give reasons, but also in their *having to decide* claims brought to them within their mandatory jurisdiction.<sup>182</sup> In this sense, courts provide a site within government that invites forms of participation foreclosed to many in legislative spheres. Second, courts are made independent in part so that they can respond, fairly, to minoritarian claims of right, in a way that majoritarian processes may not.

To the extent that justiciability decisions sweep broadly to close courthouse doors, and do not rest soundly on core principles, they can undermine both of these roles, and thus part of the political theory for their separation and independence from legislative and executive branches. Notwithstanding Bickel's view of most justiciability

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<sup>181</sup> See, e.g., Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1551–53 (2010).

<sup>182</sup> Unprincipled denials of certiorari are distinct from unprincipled decisions of nonjusticiability, insofar as the latter may apply to preclude any Article III court from addressing an issue. For competing views on the role of discretion in the exercise of jurisdiction, compare Shapiro, *Jurisdiction and Discretion*, *supra* note 5, with Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

doctrines as a subset of discretionary avoidance devices, there are significant differences between the Supreme Court's denying certiorari—which does not bar other courts from hearing an issue—and the Supreme Court's concluding that a plaintiff has no standing to seek prospective relief on a theory that will bar many other cases from the lower federal courts.

Finally, when questionable nonjusticiability decisions are seen as part of a broader landscape of door-closing decisions, they may threaten long term support for independence of courts, complicating the maintenance of socio-legal legitimacy and “diffuse” support for the Court among the public, and legitimacy in the sense of legitimately doing law, among legally trained experts.<sup>183</sup>

#### *A. A Pattern of Closing Courthouse Doors?*

Since the 1980s, it can be asked whether the Court has displayed a more general hostility to adjudication as a tool to redress violations of law, and especially of public law,<sup>184</sup> apart from the justiciability decisions in cases like *Lyons* and *Clapper*. Such decisions include a line of sovereign immunity decisions barring access to federal or state courts to vindicate claims under federal law against states based on an atextual interpretation of the Eleventh Amendment.<sup>185</sup> In another important doctrinal shift

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<sup>183</sup> On the “diffuse” nature of sociological legitimacy in the general public, see Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992). On the complexity of the relationships among the different types or sources of legitimacy, see Fallon, *Legitimacy*, *supra* note 179, at 1805 (arguing that sociological legitimacy is necessary and at times sufficient for legal legitimacy); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239 (2011) (describing the “sociological-legitimacy difficulty” as “originat[ing] from a clash between the promise of an expert legal authority and the indeterminacy of legal materials”; arguing that as the perception of indeterminacy rose and the perception that legality only drove Court decisionmaking correspondingly fell, the Court's worries about sociological legitimacy and public confidence in it affected the Court's decisionmaking and compounded concerns about countermajoritarianism and consent).

<sup>184</sup> On some of these changes in federal constitutional and statutory litigation in the 1990s and the 2000s, see, for example, Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L. REV. 691 (2000); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress and the Federal Power*, 78 IND. L.J. 223 (2003); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006). For a quantitative analysis demonstrating the Supreme Court's increased hostility to enforcement of federal law by private litigation in a study based on the Court's decisions on four issues—standing, private rights of action, attorneys fees, and arbitration—in the years between 1970 and 2013, see Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1570–80 (2014).

<sup>185</sup> See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (treating the Eleventh Amendment as standing for an atextual principle barring federal courts from hearing cases arising under federal law brought by citizens against their state); *Alden v. Maine*, 527 U.S. 706

relating to the quasi-threshold defense of qualified immunity in civil rights damages actions, the Court, in *Harlow v. Fitzgerald*,<sup>186</sup> moved from a doctrine designed to protect government officials acting in good faith to one designed to provide a wide swathe of protection from civil claims for public officials unless plaintiffs can surmount the burden of showing that the behavior in which the official engaged had been clearly established to violate the law. In so doing the Court drew important force away from a central mechanism by which common law remedies enforced the rule of law against governments.<sup>187</sup>

In procedural rulings in private civil litigation, the Court, as Professor Resnik has shown in her recent Harvard Comment, has made it more difficult to use aggregate forms of litigation, such as class actions that make it easier for injured consumers or employees to seek justice.<sup>188</sup> Not only are single one-off arbitrations more difficult for average consumers or wage earners to undertake, but they lack—as Professor Resnik has argued—the possibility for public observation that can operate as what she calls a “disciplinary mechanism for government,” the publicity and openness that Jeremy Bentham valued.<sup>189</sup> The Court’s recent decision in *Genesis Healthcare Corp.*

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(1999) (treating the Eleventh Amendment limit on the “judicial power” of the United States as a bar to Congress’s creating causes of action to enforce federal statutes in the state courts).

<sup>186</sup> 457 U.S. 800 (1982).

<sup>187</sup> Compare *Harlow v. Fitzgerald*, 457 U.S. 800, with, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (recognizing a “good faith” immunity); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (rejecting any immunity from liability for ship captain following President’s orders under what he believed in good faith, but mistakenly, to be statutory authority).

Substantive law also has been adjusted to limit the courts’ role in checking abusive police conduct, as in the Court’s refusal to engage in or allow analysis of the actual motivation of police conduct where probable cause exists, which arguably has exacerbated problems of unchecked police discretion. See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The Court’s substantive decisions have also weakened the ability of the judiciary to consider whether widespread structural discrimination requires remediation. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (refusing judicial inquiry into systemic racism in the criminal justice system by deeming statistical evidence that race of victim mattered to whether the death penalty was sought or imposed to be irrelevant, unless a showing could be made of a specific intent in the defendant’s case to rely on race).

<sup>188</sup> See Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) [hereinafter Resnik, *Fairness in Numbers*]. Hostility to consumers as claimants for some Justices goes back to the 1980s. See Sunstein, *supra* note 9, at 1455–57 (discussing views of then-Judge Scalia and Judge Silberman of the D.C. Circuit on standing for consumers to challenge government failure to require greater fuel efficiency for trucks and cars).

<sup>189</sup> Resnik, *Fairness in Numbers*, *supra* note 188, at 87; Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 3, 7 (2011) [hereinafter Resnik, *Bring Back Bentham*] (arguing that public adjudication has democratic benefits insofar as it may “engender normative contestation predicated on popular input,” while noting that public democratic engagements do “not necessarily insure progressive practices”).

*v. Symczyk*,<sup>190</sup> seemingly approved a tactic by which class action defendants can prevent adjudication of the claims against them and prevent relief to the many members of classes who may be injured but lack means or knowledge to assert their injuries.<sup>191</sup>

The expansion of threshold defenses has been accompanied by a dramatic decline in the numbers of cases resolved through trial and public adjudication of the facts.<sup>192</sup> In *Lyons*, we know from the district court's decision after a hearing on the preliminary injunction that the chokeholds were authorized by the department; we know something about the number of persons hurt by this. As Professor Fallon argued soon after *Lyons*, one of the harms of applying concerns over the level of future risk through standing rather than mootness is that mootness is applied, often, after facts have been developed in earlier stages of litigation.<sup>193</sup> Although fact and law are not the same, understanding what the facts are can usefully inform development of the law. There is a harm to society from not knowing, in the eyes of an impartial adjudicator, what happened in the past when claims of unjust action by the government is at issue. Yet increasingly since the early 1980s, threshold barriers have been erected in the adjudication of civil claims against government officials for violation of constitutional rights, which have the effect of cutting off litigation early, before facts are fully developed.<sup>194</sup> Professor Fallon's regret over the shift from standing to mootness, as cutting off opportunity for public development of the facts in adjudication, is related to Professor Resnik's concerns for the valuable role of transparency promotion that public adjudication can perform.<sup>195</sup>

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<sup>190</sup> 133 S. Ct. 1523 (2013) (holding that a Rule 68 offer to the single plaintiff in a class action could moot the entire case).

<sup>191</sup> See *id.* at 1532–37 (Kagan, J., dissenting).

<sup>192</sup> See, e.g., Judith Resnik, *Trial As Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

<sup>193</sup> Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, *supra* note 39, at 51–52.

<sup>194</sup> In addition to developments noted elsewhere in this Essay, as long ago as the 1970s the Court began to restrict the availability of habeas corpus jurisdiction to review the validity of state criminal convictions, in important respects modifying its own doctrine in the absence of legislative changes so as to make it much more difficult for state-court convicted prisoners to challenge their convictions. See *Stone v. Powell*, 428 U.S. 465 (1976); see also *Teague v. Lane*, 489 U.S. 288 (1989). Congress followed the Court's lead, further restricting federal courts' habeas corpus jurisdiction. See *Anti-Terrorism and Effective Death Penalty Act*, 28 U.S.C. § 2254(d); see also *Terry Williams v. Taylor*, 529 U.S. 362 (2000). The costs to finality of allowing habeas review after the initial fact-finding of final conviction raise a different set of issues from those arising from threshold barriers to first time litigation of civil claims, however. Moreover, the Court in this regard was moving in harmony with the Congress, in retrenching jurisdiction, raising few questions of legitimacy from the point of view of democratic self-governance. In these two respects they differ from the cases discussed in the text above. The *Prison Litigation Reform Act (PLRA)* of 1996 also restricted access to federal courts, in ways in harmony with the Court's evolving views. Judicial acquiescence in such legislative restrictions raises different kinds of questions about federal courts' roles.

<sup>195</sup> See *supra* notes 189, 193. Even if there is no final adjudication, the spreading of factual claims on a public record, subject to scrutiny by the press and the public, may have independent

*B. Door Closing, Separation of Powers and Absence of Deference to Congress*

Justiciability doctrines are often justified by virtue of the separation of powers and in particular, the idea that processes of democratic self-governance should be left to resolve problems. Similarly, courts now frequently decline to infer causes of action under statutes, on the theory that legislatures should be charged with the decision whether to create a judicial remedy.<sup>196</sup> Yet deference to self-governing processes seems an insufficient account of the door-closing trend, in light of the Court's persistent lack of deference to congressional findings in cases like *Garrett*,<sup>197</sup> *Kimel*,<sup>198</sup> *Morrison*,<sup>199</sup> and *Shelby County v. Holder*<sup>200</sup>—where what is being protected are the rights of states to immunity from suit or federal regulation, rather than the rights of injured individuals. At times the Court seems to show a particular lack of respect for Congress as compared with state legislatures.<sup>201</sup> In cases dealing with challenges to

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value in helping democracies function well. See Resnik, *Bring Back Bentham*, *supra* note 189, at 31–32 (discussing, for example, Bentham's suggestions for independent note takers in judicial and legislative proceedings).

<sup>196</sup> See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001); cf. *Medellin v. Texas*, 552 U.S. 491 (2008) (concluding that treaties were not “self-executing” international obligations enforceable by courts where the text of the treaty instrument failed to make clear the intent of the President and Senate for the treaty to be self-executing).

<sup>197</sup> *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

<sup>198</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>199</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>200</sup> 133 S. Ct. 2612 (2013); see also Pamela S. Karlan, *The Supreme Court, 2011 Term, Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

<sup>201</sup> See, e.g., *Alden v. Maine*, where the Court wrote:

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

527 U.S. 706, 750–51 (1999). This is an astonishing passage, apparently privileging “representative” decisions at the state level over those at the national level, in a decision holding unconstitutional Congress's efforts to enforce a concededly *valid* liability it imposed on state governments as employers thorough actions at law by employees to recover past due wages. See also *Gregory v. Ashcroft*, 501 U.S. 452, 463–64 (1991) (referring to “Congress' powers” under the Commerce Clause as against the “authority of the people of the states” to determine

federal statutes, such deference has played much less of a role, as the Court has engaged in appellate-like review of findings on which important federal legislation has been based. The decision invalidating a key provision in the Voting Rights Act in *Shelby County*,<sup>202</sup> is only one of the more recent of a line of cases in which the Court has given virtually no heed to congressional fact-finding and judgment on constitutional issues.<sup>203</sup>

Of course, it is possible that the Court more highly values deference to political branches in some areas affecting constitutional rights than others, for reasons that could be articulated. My only point here is that the nonjusticiability determinations in *Lyons* and *Clapper* cannot be accounted for by an overarching commitment to deference to representative branch decisionmaking. Whether this degree of consistency matters for the Court's sociological, or even institutional, role legitimacy is unclear. It is possible that what matters is more the overall mix of actions—door closings, door openings, refusals to decide (e.g., denials of certiorari, findings of no appellate standing), and other determinations of nonjusticiability (that may preclude Article III courts more broadly from deciding), merits decisions, and the Court's reasoning.

It is also possible that the Court's institutional structure and role, when viewed comparatively, raises a particular set of opportunities and challenges in sustaining its legitimacy. To this I now turn, far more briefly than the subject warrants.

### *C. Door Closing, Door Opening, and the Legitimacy of a Supreme Court in Comparative Constitutional Perspective*

The Court has not been uniformly hostile to litigation against governments; the landscape is complex, especially if substantive law is considered as well as the law of threshold barriers. In recent decades the Court has in its substantive decisions opened

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qualifications for public officers, thereby implicitly contrasting the democratic legitimacy of state governments with the more remote actions of the Congress). For an argument that after *Baker v. Carr*, the Court came to see democracy as residing more in the state legislatures than in Congress, see Vicki C. Jackson, *The Early Hours of the Post-World War II Model of Constitutional Federalism: The Warren Court and the World*, in EARL WARREN AND THE WARREN COURT: THEIR LEGACY IN AMERICAN AND FOREIGN LAW (Harry Scheiber ed. 2007).

<sup>202</sup> *Shelby Cnty.*, 133 S. Ct. 2612.

<sup>203</sup> See, e.g., *Coleman v. Court of Appeals*, 132 S. Ct. 1327, 1334–37 (2012); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Morrison*, 529 U.S. at 614; *Bd. of Trustees v. Garrett*, 531 U.S. 356, 370–72 (2001); *Kimel*, 528 U.S. at 90–91; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting). On occasion, however, the Court has apparently deferred to Congress's fact-finding where it seems especially unwarranted. See *Gonzales v. Carhart*, 550 U.S. 124, 141, 166–67 (2007) (noting that Congress made a now erroneous statutory “finding” that no medical schools taught the “partial birth” abortion procedure, but nonetheless upholding challenged statute in part because of Congress's findings that procedure was never medically necessary and the ensuing “uncertainty over whether the barred procedure is ever necessary to preserve a woman's health”).

the courthouse doors to claims by women,<sup>204</sup> and sexual minorities,<sup>205</sup> and the Court has resisted congressional efforts to foreclose judicial review in habeas corpus for executive detainees at Guantanamo and elsewhere.<sup>206</sup> During this same period, the substantive and procedural constitutional law of property rights and analogous claims has expanded in welcoming challenges relating to punitive damages,<sup>207</sup> commercial speech,<sup>208</sup> regulatory takings,<sup>209</sup> and regulation of money in politics.<sup>210</sup> Likewise, the courts have been quite open to claims against affirmative action for minorities brought by members of majority groups.<sup>211</sup>

Recent *Harvard Law Review* Forewords portray a Court that is mistrustful of politics, of representative government, and perhaps also of legislation that disrupts prior distributions of wealth and power, and that shows more empathy for members of the white majority than for racial minorities.<sup>212</sup> If these portrayals were to come to be seen as true, over a long period and wide range of cases, it is hard to imagine it would not undermine the Court's legitimacy with significant parts of the public—a public that, as a demographic matter, grows increasingly diverse. It is hard to predict how such a development would affect support for the continued independence of the courts. One mechanism by which courts deciding constitutional challenges may gain the support and legitimacy needed to have their judgments be respected is by being seen as open to a wide range of claims, including those of powerful stakeholders (such as different branches or levels of government), and those of ordinary citizens.<sup>213</sup> If

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<sup>204</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003). *But see* *Nguyen v. INS*, 533 U.S. 53 (2001); *Coleman*, 132 S. Ct. 1327.

<sup>205</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>206</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008); *INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>207</sup> See, e.g., *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007).

<sup>208</sup> See, e.g., *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011) (upholding First Amendment challenge against California statute regulating juveniles access to violent videos).

<sup>209</sup> See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>210</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>211</sup> See Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013); see also *supra* notes 92–97 and accompanying text (discussing the Court's relaxed standing decisions in affirmative action cases like *Gratz*). As is familiar from representation reinforcement theory, if an affirmative action program disadvantages the majority significantly, the ballot box can be expected to provide a real remedy—as arguably occurred in California and Michigan, when public referenda precluded consideration of race in admissions to higher education.

<sup>212</sup> See Karlan, *supra* note 200, at 29 (referring to the Court as “Protecting Spenders and Suspecting Voters” in campaign finance regulation context); Siegel, *supra* note 211, at 3–4 (describing differences in the Court's empathy for minorities and majorities bringing equal protection claims).

<sup>213</sup> For emphasis on the benefits to judicial legitimacy of decisionmaking about disputes involving major stakeholders, see Martin Shapiro, *The Success of Judicial Review*, in

courts cease to be seen as places of even-handed justice, then public trust in the legitimacy of the institution or public support for protecting the courts' independence may decline.

The balance of sources of legitimacy of high courts that are “generalist” courts, like the U.S. Supreme Court (and the high courts of Australia and Canada, as well) may differ from those of high courts that are established as specialized “constitutional courts,” as in Germany, Austria, or France. The U.S. Supreme Court is not constituted as a “constitutional court”: such courts, understood to sit between politics and law, and charged with handling primarily constitutional questions, typically are staffed with term-limited appointees.<sup>214</sup> Perhaps the most prominent constitutional court in Europe is the German Constitutional Court, whose members serve twelve-year nonrenewable terms. They are appointed, often in what amount to staggered groups, by the two houses of the German parliament. The more “generalist” supreme courts, like those in Canada, Australia, and the United States, typically provide longer tenure for judges and view the constitutional authority of those courts as part and parcel of a more general judicial task.

Without the political accountability of regular replacement of their members, it may be more important for supreme courts (than for constitutional courts appointed as such) to be seen as doing law across the range of their work and to develop doctrines that allow deferral of some issues, allowing passage of time between government action and the “sober second look” of judicial review.<sup>215</sup> Adherence to the norms of

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CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193 (Sally J. Kenny et al. eds. 1999). For emphasis on the possible benefits to judicial legitimacy of deciding complaints by individual citizens relating to constitutional rights, as opposed to disputes involving struggles between branches of government, see JACKSON & TUSHNET, *supra* note 16, at 762. See also Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117 (2001) (suggesting, within a model of courts operating through strategic interactions with other government institutions designed to assure compliance with judicial decisions, that structural issues offer less in the way of “overlapping tolerances” than do individual rights decisions).

<sup>214</sup> See generally JACKSON & TUSHNET, *supra* note 16, at 465–85; Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence* (February 2011), Sydney Law School Research Paper No. 11/15, available at <http://ssrn.com/abstract=1754209>.

<sup>215</sup> Professor Greene's creative and well-argued suggestion that the Article III courts entertain legislative standing to resolve certain disputes between the President and the Congress over separation of powers issues, rather than waiting for the issue to arise in a context that causes injury to ordinary plaintiffs, see Jamal Greene, *The Supreme Court 2013 Term—Comment: The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. \_\_\_\_ (forthcoming 2014), might be thought to raise concerns, especially insofar as it would increase and accelerate the Court's confrontation with interbranch disputes (subject to prudential decisions of the courts whether to exercise jurisdiction), without any change in the nature of the appointment process or in the term served by members of the Court. See also *supra* note 213 (describing Lee Epstein's work comparing the maneuvering room of courts dealing with separation of powers issues as compared with individual rights issues).

legal reasoning—including candid account of past decisions and some degree of consistency in the application of justiciability standards, especially when they cut off all recourse to Article III courts—may be all the more important. “Generalist” high courts may also benefit from deciding significant numbers of cases not involving highly divisive constitutional issues, but which allow the court to play a valuable dispute settlement function, particularly in cases where—from a societal point of view—it is more important that matters be settled than which way they are settled. But this makes it important to see how “open” a court is, and what else it decides.<sup>216</sup>

Yet whether the Court’s particular decisions, or numbers of decisions, or reasoning in particular cases, affect general public regard for the Court is unclear at best. Many political scientists conclude that disagreement with specific decisions does not affect the Court’s high diffuse public legitimacy, while noting that other factors may affect the Court’s legitimacy.<sup>217</sup> Recent public opinion polls show public trust and confidence in the Supreme Court declining, as it has around most (though not all) institutions of government.<sup>218</sup> A Gallup poll in early June 2013 found more public

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<sup>216</sup> The U.S. Supreme Court has in recent years substantially cut down its docket of cases decided. In the 1970s the Court was deciding roughly around 150 cases a Term with full opinions, and receiving under or around 4000 petitions yearly. Since 2006, the Court typically decides somewhere between 70 and 85 cases with full opinions most years, and receives roughly around 8,000 petitions most years. (Data is based on *Harvard Law Review*’s annual compilation of Supreme Court statistics.) This reduction by roughly one half in the number of cases decided with full opinions heightens the importance attached to what it does issue full decisions on. (The reduction may also diminish the breadth and depth of the Court’s knowledge of and thinking about other cases in the legal landscape.) The Court’s selection of cases may be sagacious enough to offer adjudicatory benefits to enough significant groups, that, to the extent its legitimacy depends on having supportive constituencies or stakeholders who value the Court as a forum for decision, it is protected. But 70–85 cases a year may allow less room for error in case selection and decision than did prior practice.

<sup>217</sup> See, e.g., Baum & Devins, *supra* note 181, at 1550–53 (summarizing data). For other concerns about possible threats to public trust in courts in general, see Kathleen Hall Jamieson & Bruce W. Hardy, *Will Ignorance & Partisan Election of Judges Undermine Public Trust in the Judiciary*, DAEDALUS, Fall 2008, at 11 (raising concerns about public ignorance and the effects of living in states that elect judges in partisan elections, while noting high levels of existing confidence especially in Supreme Court). For an interesting argument that the public at once has high regard for the courts and suspicion of them and that these “opposing accounts are a source of institutional durability and power,” see Susan S. Silbey, *The Courts in American Public Culture*, DAEDALUS, Summer 2014, at 140.

<sup>218</sup> The New York Times reported that in a Gallup poll in September, 2011, the Court’s approval rating was down to 46% from 61% in 2009. Editorial, *Trust and the Supreme Court*, N.Y. TIMES, Feb. 19, 2012, available at <http://www.nytimes.com/2012/02/20/opinion/trust-and-the-supreme-court.html>. A CBS/NY Times poll in early June, 2012, found a 44% approval rating for the Court. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012, available at <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all>.

confidence in the military, small businesses, the police, religious or church bodies, the presidency, and the medical system than in the Supreme Court (which was, however, rated well ahead of the Congress).<sup>219</sup> It is possible that these are just insignificant variations in which part of the government scores best in a particular moment.<sup>220</sup> It is also possible, as noted, that declining levels of confidence in the Court are simply an aspect of a general decline of confidence in government institutions.<sup>221</sup> But it would appear that the Court—an institution that, unlike Congress or the Presidency, cannot use elections and new members to develop public support—may not have quite as large a reservoir of public confidence as it has had in the past.<sup>222</sup>

Exercising its own jurisdiction so as to allow the lower federal courts to adjudicate important claims of constitutional violations of individual rights may, under some circumstances, better promote confidence in the courts and in the Supreme Court as accessible forums of constitutional principle than doubtful denials of justiciability. The denials of standing in *City of Los Angeles v. Lyons* and *Clapper v. Amnesty International USA* were based on assumptions that available information and later events suggested were incorrect—about the situation of minority group motorists stopped by the LAPD in the later decades of the twentieth century, and about the

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<sup>219</sup> *Gallup Poll June 1–4, 2013: Confidence in Institutions*, GALLUP, <http://www.gallup.com/poll/163055/confidence-institutions-2013-pdf.aspx> (showing—looking at top two of five categories of confidence—that public confidence rankings were highest in the military (43% (great deal); 33% (quite a lot)), then Small Business; Police; Religion or Church; then, the Presidency (19%/17%); then the Medical System; then the Supreme Court (13%/21%); then Public schools; the Criminal justice system; Banks; TV news; Newspapers; Big business; Organized labor; HMOs; and then Congress (5%/5%)). Quick analysis of the results of the same poll in 2014 shows that the top four institutions remain ranked in the same order; confidence in both the Supreme Court (12%/18%) and the Presidency (14%/15%) has dropped, while these institutions have switched places in the poll. See Rebecca Riffkin, *Gallup: Public Faith in Congress Falls Again, Hits Historic Low*, GALLUP (June 19, 2014), <http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx> (data available for download at bottom of page).

<sup>220</sup> In Gallup's Confidence in Institutions Polls over time, since 2002, in six years more confidence (based on the top two levels of confidence in the instrument) in the Presidency than the Supreme Court was expressed; in two years about the same amount was expressed; and in five years more confidence in the Court than the President was expressed. *Gallup Confidence In Institutions, Gallup Historical Trends*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx#1> (last visited Sept. 29, 2014).

<sup>221</sup> When Gallup began measuring confidence in institutions, in 1973, the percentage having a “great deal” or “quite a lot” of confidence in the Court was at 45%, in the Presidency at 52% and in Congress at 42%. In 2013, in these categories, the Court was at 34%, the Presidency at 36%, and the Congress at 10%. See *id.*; Gallup poll, June 1–4, 2013, *supra* note 219.

<sup>222</sup> In the first 18 years of Gallup's polls, from 1973 to February 1991, the Court had confidence ratings (in the highest two categories, see *supra* note 219) in the 40s and 50s%. In October 1991 it dipped briefly below 40 (39%) and was then in the 40–50s% again until 2007. Since 2007, its confidence ratings using these two categories have been: 34, 32, 39, 36, 37, 37, 34, and 30 % respectively. See sources cited *supra* notes 219, 221.

scope of covert surveillance being conducted by the NSA. Such decisions have at least the potential to detract from respect for the Court itself.

#### CONCLUSION

Closing the door to the adjudication of non-frivolous claims involving plausible allegations of serious government misconduct harming discrete persons who seek judicial relief has real costs: to the alleged victims; to the society in which they live; and, potentially, to the Court itself as an institution. Justiciability doctrines must be used and deployed in ways that plausibly enhance rather than detract from the Court's legitimacy both with the public and with the legal community. The written decisions must be sufficiently plausibly principled to appear as acts of a court. And they must allow the Court to fulfill those basic functions on which its place in the constitutional system, and through which its own institutional legitimacy, is secured. Both *Lyons* and *Clapper* were "triple error" cases, in which, I suggest, the Court fell down in performing aspects of its essential roles.