govern procedure in the federal courts or allocate business between the state and federal courts.

But although *Verlinden* thus stops short of endorsing a theory of protective jurisdiction, its language hints that the Court may eventually be receptive to such a theory. Particularly noteworthy is the Court's insistence that the FSIA was passed pursuant to the exercise of Congress' "unquestioned" article I power to regulate foreign commerce[40] and that the Act represents an effort to deal with "sensitive issues concerning . . . foreign relations"[41] by "deliberately . . . channel[ing] cases against foreign sovereigns away from the state courts and into the federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states."[42] The Court's language echoes that of protective jurisdiction theorists who have argued that, even absent a federal rule of decision, a case may, for article III purposes, be deemed to arise under a purely jurisdictional statute that advances legitimate federal interests (that is, interests that can be inferred from article I's grant of legislative power).[43]

Verlinden's significance is therefore twofold. On one level, the case is the latest link in a long chain of precedent[44] implying that grants of protective jurisdiction are not foreclosed by article III. *Verlinden* leaves open the question, not presented by the case, whether there are any circumstances in which a case may be deemed to arise under a statute that merely governs the jurisdiction of federal courts. Of more immediate significance is *Verlinden*'s reaffirmation of the breadth of Congress' power to grant federal jurisdiction over cases requiring the application of any federal law that does more than govern access to federal courts. The Court has achieved this reaffirmation through an approach that avoids the extremes both of Justice Frankfurter's rejection of *Osborn* and of theories of "protective jurisdiction" that might render article III superfluous.

2. Standing to Seek Equitable Relief. — In the mid-1970's, the Supreme Court began using standing doctrine and a heightened standard for obtaining injunctive relief to limit the access of civil rights litigants to the federal courts.[1] Whether motivated by separation-of-powers concerns,[2] deference to the values of "comity and federalism,"[3]

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[40] 103 S. Ct. at 1973; *see id.* at 1971.

[41] *Id.* at 1971.

[42] *Id.* at 1973.

[43] *See supra* note 6.

[44] *See supra* note 15.

[1] *See* Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7–26 (1982).

[2] *See infra* pp. 220–21.

[3] *See infra* pp. 220–22.

or hostility to the underlying claims,[4] the Court has erected particularly substantial barriers to constitutional claims for injunctions against governmental misconduct. In *City of Los Angeles v. Lyons*,[5] the Court raised these barriers still higher by ruling that the victim of a police "chokehold" — a controversial type of physical restraint used by the Los Angeles police — could seek damages but not injunctive relief, because he could not establish a sufficient likelihood that he would again be choked.

Adolph Lyons, a twenty-four-year-old black male, brought an action in federal district court under 42 U.S.C. § 1983 for damages and declaratory and injunctive relief after nearly dying from a chokehold administered by a Los Angeles police officer. According to uncontroverted evidence in the record, Lyons was stopped by the police because one of his taillights was burned out. Two officers then "greeted him with drawn revolvers as he exited from his car."[6] Although Lyons offered no resistance, one officer

> began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.[7]

Lyons, who sustained injuries to his larynx, was one of the luckier victims: since 1975, sixteen Los Angeles residents — twelve of them black males — had died following police-administered chokeholds.[8] Finding the city's use of chokeholds "unconscionable in a civilized society,"[9] the district court issued a preliminary injunction. The Court

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[4] *See* Chayes, *supra* note 1, at 56–57.

[5] 103 S. Ct. 1660 (1983).

[6] *Id.* at 1672 (Marshall, J., dissenting).

[7] *Id.*

[8] *See id.* "Thus in a City where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds." *Id.* n.3. Blacks in Los Angeles were 20 times more likely to be strangled in chokeholds than were whites. *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari at i, *Lyons* (No. 81-1064). These figures are in keeping with nationwide studies of police brutality, which show that "[b]lack men have been killed by police at a rate some nine to ten times higher than white men." Takagi, *A Garrison State in "Democratic" Society*, CRIME & SOC. JUST., Spring–Summer 1974, at 27, 29.

Controversy over the chokehold became nationwide after the astonishing remark of Los Angeles Police Department 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." NEWSWEEK, May 24, 1982, at 32.

[9] Lyons v. City of Los Angeles, No. CV 77-0420-RMT, slip op. at 5 (C.D. Cal. Dec. 23, 1980), *quoted in Lyons*, 103 S. Ct. at 1664. The Court of Appeals for the Ninth Circuit had reversed an earlier dismissal of Lyons' claim for injunctive relief. *See* Lyons v. City of Los Angeles, 615 F.2d 1243, 1246–50 (9th Cir.), *cert. denied*, 449 U.S. 934 (1980).

of Appeals for the Ninth Circuit affirmed, describing the order as a "relatively innocuous interference by the judiciary with police practice."[10]

The Supreme Court voted 5–4 for reversal.[11] Writing for the majority, Justice White stated that Lyons' claim for injunctive relief[12] fulfilled neither the "case or controversy" requirement of article III[13] nor the traditional prerequisites for equitable relief.[14] The Court held that, under article III, Lyons' standing had to be determined with respect to each type of relief sought, and that Lyons' claim for injunctive relief required a showing of threatened harm that was all but certain.[15] In the Court's view, Lyons' contention that he might again be the victim of an unprovoked attack by the police was "no more than speculation" and was therefore insufficient to establish standing.[16] Thus, Lyons' past injury gave him standing only to seek dam-

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[10] Lyons v. City of Los Angeles, 656 F.2d 417, 418 (9th Cir. 1981). After the Supreme Court agreed to hear the case, the Los Angeles Police Commissioners issued a moratorium on the use of chokeholds. Lyons then argued that the case was moot and urged the Court to vacate his preliminary injunction rather than decide the case on the merits — an invitation that the Court declined. 103 S. Ct. at 1664–65.

[11] 103 S. Ct. 1660 (1983). Justice White wrote the majority opinion, in which Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined. Justice Marshall wrote a dissenting opinion in which Justices Brennan, Blackmun, and Stevens joined. *Id.* at 1671 (Marshall, J., dissenting).

[12] Lyons' claim for damages was severed from consideration of his claim for injunctive relief. *See* 103 S. Ct. at 1667 n.6.

[13] *See id.* at 1665–70.

[14] *See id.* at 1670–71.

[15] *See id.* at 1668 n.7 (asserting that Lyons would not have standing unless he could demonstrate "that he, himself, will not only again be stopped by the police but will be choked without any provocation or legal excuse"). The Court did not make clear whether Lyons would have to show an absolute certainty of future harm to him or only a very high likelihood. *Compare id.* at 1667 (holding that "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury" and whether he could "establish a real and immediate threat" of harm) *with id.* (holding that "[i]n order to establish an actual controversy in this case, Lyons would have had not only to allege that he *would* have another encounter with the police" (emphasis added), but also to allege that the police either choke or have orders or authorization to choke "any citizen with whom they happen to have an encounter").

[16] *Id.* at 1668. As the Court noted in Warth v. Seldin, 422 U.S. 490, 498–500 (1975), standing doctrine consists of constitutional requirements under article III and prudential doctrines that are "essentially matters of judicial self-governance." *Id.* at 500. The constitutional aspect of standing has become in effect a three-part test. The plaintiff must allege: (1) the requisite "threatened or actual injury," Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); (2) "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978) (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977)); and (3) the likelihood that the injury would "be redressed by a favorable decision," Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

The prudential aspect of standing includes limitations on third-party standing, on the adjudication of a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Warth*, 422 U.S. at 499, and on the assertion of claims that are not "arguably

ages; a separate showing of "a real and immediate threat" of future harm was necessary to establish his standing to seek an injunction.[17]

In an alternative holding,[18] the majority ruled that even if Lyons' suit for damages could serve to give him standing to seek an injunction, "normal principles of equity, comity and federalism" would require a denial of relief.[19] These principles command particular respect, said the Court, when federal courts are "asked to oversee state law enforcement authorities."[20] The Court cautioned against slighting the preconditions for equitable relief — "a 'likelihood of substantial and immediate irreparable injury'" — and found Lyons' fear of future harm too "speculative" to warrant the use of federal injunctive power.[21] Moreover, Lyons' claim for damages was, according to the majority, "an adequate remedy at law."[22]

In a vigorous dissent, Justice Marshall observed that, if Lyons lacked standing to sue for injunctive relief, no one would have standing to bring such a suit.[23] Justice Marshall argued that the "Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court."[24] Justice Marshall also attacked the majority for the unprecedented fragmentation of standing[25] that it accomplished by requiring that Lyons allege article III standing for each form of relief requested in his complaint.[26] This approach, in the dissent's view, departed from the well-established practice of allowing courts to fashion appropriate relief after a determination of the merits.[27] With respect to the merits of Lyons' claim for injunctive relief, the dissent saw no affront to the principles of federalism in the limited preliminary order entered by the district court,[28] and concluded that Lyons had established the "'usual basis for injunctive relief — "that there exists some cognizable danger of recurrent violation."'"[29]

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within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

[17] 103 S. Ct. at 1667.

[18] *See id.* at 1670–71. Justice Marshall argued that, if Lyons lacked standing under article III, the Court had no power to consider the merits of the claim for an injunction; in so doing, the Court had issued what could only be characterized as an advisory opinion. *See id.* at 1682 (Marshall, J., dissenting).

[19] 103 S. Ct. at 1670.

[20] *Id.*

[21] *Id.* (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

[22] *Id.*

[23] *See id.* at 1671 (Marshall, J., dissenting).

[24] *Id.* at 1683.

[25] *See id.* at 1671, 1676–78.

[26] *See id.* at 1677–80; *infra* p. 219.

[27] *See* 103 S. Ct. at 1680.

[28] *See id.* at 1681.

[29] *Id.* at 1683 (quoting Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 59 (1975) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953))).

Lyons represents a marked extension of the restrictive principles of standing and equitable relief announced in *O'Shea v. Littleton*[30] and *Rizzo v. Goode*[31] — cases in which the Court denied injunctive relief to plaintiffs challenging racially discriminatory law enforcement practices. The majority's assertion that its decision fell squarely within *O'Shea* and *Rizzo*[32] was, as the dissent recognized, "simply disingenuous."[33] For example, 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.[34] Moreover, Lyons sought only an injunction against a particular police practice, not the massive, structural reforms of entire law enforcement systems sought by the plaintiffs in *Rizzo* and *O'Shea*.

(a) Standing. — Although a substantial body of scholarly opinion has advocated a more relaxed threshold for standing,[35] *Lyons* demonstrates the Court's commitment to an increasingly restrictive doctrine. The Court's fragmented approach to standing in *Lyons* departs from the Court's previous practice of focusing the standing inquiry on the individual litigant's right to invoke the jurisdiction of the court.[36] The Court analyzed Lyons' standing with respect to each element of his cause of action: each type of relief sought must now be considered a separate "case" or "controversy" for purposes of determining whether the court has jurisdiction. The majority justified its approach by observing that, because the constitutionality of the police chokehold would be determined in Lyons' action for damages, his underlying claim would not evade review.[37] But the Court could have used this

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[30] 414 U.S. 488 (1974).

[31] 423 U.S. 362 (1976).

[32] 103 S. Ct. at 1667. The parties' agreement to sever consideration of Lyons' damage claim, *see supra* note 12, allowed the Court to assert that the case, "as it came to us, is on all fours with *O'Shea* and should be judged as such." 103 S. Ct. at 1667 n.6.

[33] *Id.* at 1676 (Marshall, J., dissenting).

[34] Baker v. Carr, 369 U.S. 186, 204 (1962); *see* 103 S. Ct. at 1675–80 (Marshall, J., dissenting).

[35] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-20, at 90–92 (1978); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1046–47 (1968); *cf.* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (noting the lack of historical basis for standing requirement).

[36] *See* Jenkins v. McKeithen, 395 U.S. 411, 423 (1969); L. TRIBE, *supra* note 35, § 3-17, at 79–80.

[37] *See* 103 S. Ct. at 1669. The Court's assumption that suits for damages vindicate constitutional rights effectively is questionable for several reasons. First, certain kinds of civil rights violations, such as illegal searches, are almost never litigated, and they are even less likely to be litigated if no possibility exists of obtaining an injunction. *Cf.* Note, *"Damages or Nothing" — The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 693 & n.145 (1979) (surveying 172 actions for damages against federal officials and finding that "[d]efendants won nearly every case that went to judgment"). Second, a judgment in an individual case that a

justification to reach precisely the opposite result: if the jurisdiction of an article III court has already been properly invoked for a ruling on the constitutionality of a local or state government's actions, neither principles of comity nor concerns of judicial economy warrant foreclosing — at the outset, without a record — consideration of the appropriate relief.

Even without the introduction of a fragmented standing requirement, however, the majority's unprecedentedly high case-or-controversy threshold may constitute a major obstacle for civil rights plaintiffs. The Court has confused what should be two separate inquiries by collapsing the article III requirement for standing into an unrealistically high standard for weighing the merits of a claim for injunctive relief.[38] *O'Shea* and *Rizzo* clearly require more than a speculative possibility of harm, but the Court has never before insisted on certainty as a prerequisite for standing or injunctive relief. Moreover, the Court's professed concern that Lyons was only one of a large, undifferentiated class of aggrieved citizens was inapposite, considering the harm Lyons had already incurred and his status as a black male who thereby faces a markedly heightened chance of being illegally mistreated by the police.[39]

Lyons illustrates how far the Court's decisions on standing have strayed from their original policy justifications. The Court has articulated two principal rationales for its standing rules. First, such rules are said to increase the likelihood that a controversy will be litigated with the full measure of "concrete adverseness," a condition assumed to be a sine qua non of informed decisionmaking by the courts.[40] Second, the rules supposedly serve a concern for federalism and separation of powers by ensuring that the federal judiciary does not

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particular practice is unconstitutional cannot be used by a similarly situated plaintiff unless she files her own suit for damages. By comparison, an injunction can be more quickly enforced through contempt proceedings. Third, even if there were adequate incentive to litigate all constitutional infringements through damage actions, and even if claims could be heard expeditiously, the typical judgment in such actions would have little deterrent effect on the challenged conduct. *See* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) (en banc) ("[T]he lesson of experience is that the remote possibility of money damages serves as no deterrent to future police invasions."); Note, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 867 & n.13 (1982) (citing survey showing average judgment of only $3024 for successful plaintiffs in police misconduct suits).

[38] *See supra* p. 217 & note 15.

[39] *See supra* note 8; *cf.* Terry v. Ohio, 392 U.S. 1, 14–15 & n.11 (1968) (discussing harassment of blacks by police). Lyons' motion for class certification was still pending when the Court considered his case. Although the Court did not explicitly rule out the possibility that its decision might have been different had the case reached the Court as a class action, language in the majority opinion suggests that the result would probably have been the same. *See* 103 S. Ct. at 1670 ("[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 . . . ." (emphasis added)).

[40] Baker v. Carr, 369 U.S. 186, 204 (1962); *see* Jaffe, *supra* note 35, at 1037.

encroach on prerogatives of the federal and state legislatures and state courts.[41] In Lyons' case, however, there is no reason to doubt the seriousness of the plaintiff's interest in litigating the constitutionality of police chokeholds: as the majority noted, his claim for damages depends on the outcome of that issue. Moreover, to rely on federalism and separation-of-powers concerns as a justification for barring Lyons' access to injunctive relief would defeat Congress' express purpose in creating a section 1983 cause of action that provides a federal forum for an "action at law" *or* "suit in equity" to vindicate civil rights.[42]

(b) Equitable Relief. — Like the Courts in *Rizzo* and *O'Shea*, the *Lyons* Court offered as an alternative ground for its decision the plaintiff's failure to make the showing of irreparable injury required for obtaining equitable relief in the federal courts — "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again."[43] The Court stiffened this standard with requirements going beyond even the limitations imposed in *Rizzo* and *O'Shea*. In *Rizzo*, for example, the Court denied relief because it viewed the challenged police misconduct as merely a series of unrelated incidents rather than the result of an official policy.[44] In *Lyons*, however, the district court found the police misconduct to be "department-authorized."[45] The Court in *O'Shea* refused to assume that any member of the plaintiff class would violate lawful criminal statutes, and thus considered too conjectural the possibility that local courts would treat the plaintiff class in a racially discriminatory manner.[46] In *Lyons*, no such anticipation of willful lawbreaking was necessary. Given that chokeholds were used by the Los Angeles police on at least 975 occasions over a five-year period during altercations between police and citizens,[47] the claim that such holds would be used again was in no sense dependent upon conjecture about the conduct of the plaintiff. Moreover, the *O'Shea* Court justified withholding equitable relief on the ground that the plaintiffs would have an adequate legal remedy because of the availability of appeal, habeas corpus, and change-of-venue proceedings.[48] But no adequate remedy exists for deaths caused by continued use of police chokeholds.

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[41] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

[42] 28 U.S.C. § 1343 (1976 & Supp. V 1981); 42 *id.* § 1983; *see* Allen v. McCurry, 449 U.S. 90, 98–101 (1980).

[43] 103 S. Ct. at 1670.

[44] *See* Rizzo v. Goode, 423 U.S. 362, 373–77 (1976).

[45] Lyons v. City of Los Angeles, No. CV 77-0420-RMT, slip op. at 2 (C.D. Cal. Dec. 23, 1980), *quoted in Lyons*, 103 S. Ct. at 1664.

[46] *See* O'Shea v. Littleton, 414 U.S. 488, 496–99 (1974). The *O'Shea* Court apparently assumed that only those who violated the law would find themselves in court and subject to the discriminatory procedures.

[47] *See* 103 S. Ct. at 1672 (Marshall, J., dissenting).

[48] *See O'Shea*, 414 U.S. at 502.

The explanation for the withholding of equitable relief in *Lyons* lies in the Court's increasing deference to the policies of comity and federalism. In determining whether injunctions against local officials are appropriate, the Court, though appealing to the "'special delicacy of the adjustment to be preserved'" between federal and state power,[49] appears to strike a balance in which autonomy of local law enforcement officials nearly always tips the scales. The Court's recently rediscovered adherence to the values of "Our Federalism"[50] has been rooted in the concept of deference to a coordinate *judicial* system.[51] This deference has slipped its analytical moorings, however, when it is applied to the practices of a local police force,[52] because it is precisely the problem of police lawlessness that Congress sought to control by creating a federal remedy under section 1983.[53]

(c) The Court's Political Agenda. — Lyons cannot be dismissed as simply a mistake or an aberration.[54] The Court's decision is best understood as part of the movement to withdraw federal courts from their role not only as protectors of minority rights, but also as regulators of the "subordinate power centers" in American society.[55] These centers — whether public, such as local governments and their agencies, or private, such as employers and other market actors — have operated since the middle third of this century under an increasingly wide blanket of regulatory supervision, which the Court,[56] along with Congress and the executive branch,[57] has recently begun to unravel. Viewed against this backdrop, *Lyons* represents more than a particularly narrow application of standing doctrine or of the requirements for equitable relief. The case exemplifies the Court's use of the "her-

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[49] 103 S. Ct. at 1670 (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).

[50] *See* Younger v. Harris, 401 U.S. 37, 43–45 (1971); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1174–75 (1977).

[51] *See* Allee v. Medrano, 416 U.S. 802, 814 (1974) (upholding federal injunction against misconduct by state police and noting that in absence of "interference with prosecutions pending in the state courts, . . . the special considerations [of federalism] relevant to cases like *Younger v. Harris* . . . do not apply here").

[52] This slippage became apparent in *Rizzo* when the Court held that federalism principles may bar injunctions against the executive branches of state and local governments as well as against their judiciaries. *See* Rizzo v. Goode, 423 U.S. 362, 380 (1976).

[53] *See* Monroe v. Pape, 365 U.S. 167, 180 (1961).

[54] The Court was apparently anxious to decide this case despite the clear opportunity not to do so. *See supra* note 10.

[55] *See* Comment, *Cases That Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 HARV. C.R.-C.L. L. REV. 713, 722–26 (1980).

[56] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976) (holding that plaintiff who was inaccurately accused in police flyer of shoplifting had no constitutionally protected interest in his reputation); Milliken v. Bradley, 418 U.S. 717 (1974) (refusing to order multidistrict school desegregation plan).

[57] *See, e.g.*, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (establishing federal block grant program).

meneutics of jurisdiction"[58] to limit the regulatory function of the federal courts. *Lyons* thus remits to subordinate power centers those who — like blacks and other minorities — have already found that their interests will go unprotected there.

The *Lyons* Court belittled — by ignoring — the seriousness of the police brutality faced by blacks in this country.[59] Experience has shown that the solutions the Court offered as alternative remedies are relatively futile. Participation in the political process,[60] for example, typically offers minorities little hope of reversing unconstitutional practices, especially police practices.[61] Similarly, actions for damages[62] are often ineffectual,[63] and criminal proceedings against police officers[64] are unlikely to succeed.[65] Finally, the Court's suggestion that state courts offer an adequate forum in which to enjoin lawless acts by the police[66] ignores well-settled precedent that in section 1983 actions the federal courts provide a supplementary forum.[67]

The Court's holding in *Lyons* suggests that the police may illegally threaten, and take, human life without interference from a federal court, as long as they are willing to respond in damages — a view that, as Justice Marshall noted, represents an "unprecedented . . . approach to standing."[68] By suggesting that Lyons and other blacks have adequate alternative remedies, the Court ignores a substantial body of opinion[69] — some of it from the Court's own decisions —

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[58] *See* Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 53–60 (1983).

[59] *See* Takagi, *supra* note 8, at 29–30; *supra* note 8.

[60] *See* 103 S. Ct. at 1670.

[61] *See* du Fresne & du Fresne, *"Non-Visible Scar" Police Misconduct as a § 1983 Deprivation of Civil Rights*, 10 WASHBURN L.J. 372, 374 n.14 (1971) ("The sound defeat at the polls of [civilian review boards] across the country seems to indicate a civilian acceptance of the concept of a non-accountable police force.").

[62] *See* 103 S. Ct. at 1671.

[63] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 421–22 (1971) (Burger, C.J., dissenting); *supra* note 37; *see also* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 799 (1979) (compiling empirical data showing that jurors favor police and disfavor plaintiffs who are nonwhite or non-middle class or who have had previous brushes with the law); *cf.* Mapp v. Ohio, 367 U.S. 643, 651–52 (1961) (terming "worthless and futile" the available remedies for illegal search and seizure by the police).

[64] *See* 103 S. Ct. at 1671.

[65] *See* Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499, 500 (1964) (noting evidentiary and other problems associated with criminal prosecutions of the police); Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 138 n.221 (1983) (noting that one study of 1500 killings of civilians by police during 1960–1970 found that only three killings resulted in criminal punishment).

[66] *See* 103 S. Ct. at 1671.

[67] *See* McNeese v. Board of Educ., 373 U.S. 668, 671–72 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961).

[68] 103 S. Ct. at 1671 (Marshall, J., dissenting).

[69] *See* sources cited *supra* note 63.

that has exposed the futility of such alternatives. By suggesting that these alternatives are the only ones that the Constitution permits, the Court has announced a disturbing and potentially dangerous principle.

3. Supreme Court Review of State Court Decisions. — In determining its jurisdiction to review decisions of a state court, the United States Supreme Court distinguishes state and federal grounds of decision to avoid interfering with judgments supported by an "adequate and independent state ground."[1] This task of demarcation has been complicated enormously in recent decades by the rapid expansion of federal law. Swelled by the growth of federal constitutional rights,[2] the increased volume of congressional enactments and regulatory programs,[3] and the evolving judicial use of preemption doctrine,[4] federal law has come to dominate in areas that were once the exclusive domain of state law.[5] The overarching presence of federal law has moved state judges to view federal law both as a growing constraint on the operation of state law and as a source of inspiration for the development of a state jurisprudence.[6] A consequence of this inter-

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[1] Although the Supreme Court is authorized to review federal questions that arise in the state courts, *see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342–52 (1816); U.S. CONST. art. III, § 2; 28 U.S.C. § 1257 (1976), it lacks jurisdiction to review state court interpretations of state law, *see* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632–33 (1875). In state court cases that involve both federal and state questions, the prohibition of review of state law questions merges with the judicial policy of avoiding needless decisions of federal law, *see* Minnesota v. National Tea Co., 309 U.S. 551, 555–57 (1940); *Murdock*, 87 U.S. (20 Wall.) at 635, to spawn the doctrine of adequate and independent state grounds, which limits Supreme Court review of a state court's decision to interpretations of federal law essential to that decision. *See* Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872).

[2] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481–84 (1972) (imposing federal due process requirements on state parole revocation determinations); Benton v. Maryland, 395 U.S. 784, 793–96 (1969) (holding double jeopardy clause applicable to states).

[3] *See* Commission on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 211–12 (1975).

[4] *See, e.g.*, Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (holding that federal labor policy preempts state authority to police certain labor tactics).

[5] *See Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1337–38 (1982) [hereinafter cited as *Developments*].

[6] *Compare* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977) (finding that state court felt compelled by federal constitutional considerations to limit state-created right of publicity), *with* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 279–80, 625 P.2d 779, 795–96, 172 Cal. Rptr. 866, 882–83 (1981) (employing federal constitutional principles to justify holding that California Constitution requires abortion funding). These cases represent, of course, only opposite extremes; the potential variations on each theme are myriad. For a discussion of the interplay between compulsion and inspiration within the formal category of state constitutional elaboration, see *Developments*, *supra* note 5, at 1368 n.3, 1391–92, 1434–43. *See generally* NATIONAL CENTER FOR STATE COURTS, COMPARISON OF FEDERAL LEGAL INFLUENCES ON STATE SUPREME COURT DECISIONS IN 1959 AND 1979 (1981) (noting greatly