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STATE ATTORNEYS GENERAL AS AGENTS OF POLICE REFORM

JASON MAZZONE & STEPHEN RUSHIN[†]

ABSTRACT

State attorneys general can and should play an important role in remedying police violations of constitutional rights. In 1994, Congress enacted 34 U.S.C. § 12601 to authorize the U.S. attorney general to seek equitable relief against state and local police departments engaged in patterns or practices of misconduct. The Department of Justice (“DOJ”) has used this statute to reform some of the nation’s most troubled police departments. However, the DOJ has lacked the resources to pursue more than a few cases each year, and in 2017 the Trump administration announced it would no longer enforce § 12601.

In response, some state attorneys general have sought to fill the regulatory gap. These attorneys general claim legal standing under the common law doctrine of parens patriae to seek equitable relief in federal court against police departments within their states for violations of constitutional rights—even without any statutory authority for their lawsuits. Allowing these cases to proceed would give state attorneys general expansive and untapped potential as agents of police reform, with significant implications for police practices and accountability.

This Article provides a cautionary tale about uses of parens patriae by state attorneys general and presents an alternative. It urges that the

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[†] Jason Mazzone is the Albert E. Jenner, Jr. Professor of Law and Director of the Program in Constitutional Theory, History, and Law, University of Illinois College of Law. Stephen Rushin is Associate Professor of Law, Loyola University Chicago School of Law. For helpful comments we thank participants in the Illinois Constitutional Law Colloquium, as well as workshops at DePaul University College of Law and Loyola University Chicago School of Law.

common law doctrine of parens patriae should not allow state attorneys general to seek equitable relief in federal district court against local police departments engaged in patterns of misconduct. The Article shows that such uses of parens patriae raise numerous doctrinal and policy concerns. Nevertheless, the Article concludes that state attorneys general are uniquely situated to provide a check on abuses by local law enforcement and that they should be given the tools to do so. As an alternative to using common law parens patriae, both Congress and state legislatures should grant state attorneys general explicit statutory authority to seek equitable relief against local police departments. Empowering state attorneys general in this manner has the potential to curb seemingly intractable problems of police violations of constitutional rights.

TABLE OF CONTENTS

Introduction	1001
I. The History of Police Reform and Avenues for Equitable Relief.....	1012
A. Avenues for Reforming Police Departments	1013
B. Standing and the Push for Equitable Relief.....	1020
C. Dramatic Pullback of DOJ Enforcement of § 12601	1028
D. Efforts by State Attorneys General to Reform Local Police Departments	1030
II. The Limits of <i>Parens Patriae</i> Standing	1033
A. History and Elements of <i>Parens Patriae</i> Standing	1034
B. Two Concerns About <i>Parens Patriae</i> Standing	1040
1. <i>Allocations of Power</i>	1040
2. <i>Extension of Federal Statutory Claims</i>	1041
C. <i>Parens Patriae</i> and Police Reform.....	1044
III. Empowering State Attorneys General.....	1050
A. Congressional Authorization.....	1051
1. <i>Clarity and Constraint</i>	1051
2. <i>Avoiding Conflicts</i>	1055
3. <i>Promoting Aggressive Oversight</i>	1061
B. State Law Authorization	1063
C. Challenges	1067
Conclusion.....	1072

INTRODUCTION

This Article considers the appropriate role of state attorneys general in reforming local police departments. Recent events in Chicago, Illinois, illustrate the importance and complexity of this topic. In October of 2014, Officer Jason Van Dyke of the Chicago Police Department (“CPD”) shot and killed seventeen-year-old African American Laquan McDonald.¹ In the hours after the shooting, Van Dyke and his fellow officers claimed that McDonald had charged at them while swinging a knife in an “aggressive, exaggerated manner,” forcing Van Dyke to open fire in self-defense.² The supervisor who reported to the scene of the shooting found the officers’ account credible and initially ruled the use of force justified.³ In the months that followed, this shooting received minimal press coverage, and Chicago officials resisted calls to release video recordings from that evening.⁴ Then, in November of 2015, a judge in Cook County, Illinois, ordered the City of Chicago to release dash-camera footage of the shooting.⁵ The video showed that, contrary to claims by Van Dyke and his fellow officers, McDonald had not charged at them.⁶ In fact, it appeared from the video footage that McDonald had been walking away from the officers when Van Dyke fired sixteen shots in fourteen seconds, killing him.⁷

1. Steve Mills et al., *Laquan McDonald Police Reports Differ Dramatically from Video*, CHI. TRIB. (Dec. 5, 2015, 1:25 AM), <http://www.chicagotribune.com/news/ct-laquan-mcdonald-chicago-police-reports-met-20151204-story.html> [https://perma.cc/86YQ-FHJF]; Stacy St. Clair, Jeff Coen & Todd Lighty, *Officers in Laquan McDonald Shooting Taken off Streets—14 Months Later*, CHI. TRIB. (Jan. 22, 2016, 7:01 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-chicago-police-laquan-mcdonald-officers-20160121-story.html> [https://perma.cc/M4EV-Q53P].

2. Mills et al., *supra* note 1.

3. St. Clair et al., *supra* note 1 (noting that Van Dyke was not taken off the streets until fourteen months after the shooting).

4. Carol Marin & Don Mosely, *Judge Orders Release of Video Showing Shooting Death of Chicago Teen*, NBC CHI. (Dec. 17, 2015, 1:43 PM), <http://www.nbcchicago.com/news/national-international/Judge-to-Decide-on-Release-of-Laquan-McDonald-Video-351741261.html> [https://perma.cc/9Y88-KN3D].

5. *Id.* (“Cook County Judge Franklin Valderrama told a packed courtroom Thursday the department must reveal the dashcam footage that capture[d] the death of 17-year-old Laquan McDonald in October 2014 at the hands of a white police officer.”).

6. Jason Meisner, Jeremy Gornier & Steve Schmadeke, *Chicago Releases Dash-Cam Video of Fatal Shooting After Cop Charged with Murder*, CHI. TRIB. (Nov. 24, 2015, 7:14 PM), <https://www.chicagotribune.com/news/breaking/ct-chicago-cop-shooting-video-laquan-mcdonald-charges-20151124-story.html> [https://perma.cc/6CAM-SXE5].

7. Josh Sanburn, *Chicago Releases Video of Laquan McDonald Shooting*, TIME (Nov. 24, 2015), <http://time.com/4126670/chicago-releases-video-of-laquan-mcdonald-shooting> [https://

Protests soon erupted across the city.⁸ Within weeks, the U.S. Department of Justice opened an investigation into the CPD.⁹ Under 34 U.S.C. § 12601, Congress had authorized the U.S. attorney general to conduct such investigations and to seek equitable relief in federal court against local police departments engaged in patterns of unconstitutional behavior.¹⁰ Congress passed § 12601 in 1994, partially in response to the U.S. Supreme Court's decision in *City of Los Angeles v. Lyons*.¹¹ The plaintiff in that case had been subjected to a chokehold during a traffic stop by officers of the Los Angeles Police Department ("LAPD").¹² Suing under 42 U.S.C. § 1983, the plaintiff contended that chokeholds violated the federal Constitution, and he sought monetary damages as well as an injunction against future uses of chokeholds by the LAPD.¹³ The Supreme Court held that although the plaintiff could pursue monetary damages for the injuries he suffered, Article III's case-or-controversy requirement¹⁴ barred his claim for an injunction.¹⁵

To understand the Court's holding—and by way of background to this Article's discussion of *parens patriae* lawsuits—a brief overview of

perma.cc/ZW9Q-WFAE].

8. Mills et al., *supra* note 1; see also Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/25/us/chicago-officer-charged-in-death-of-black-teenager-official-says.html> [<https://perma.cc/NZ7A-P9RK>] (“[P]rotesters led clusters of police officers on a march through the streets of Chicago’s Loop, blocking intersections, chanting outside a police station and, along a major road to the city’s largest highways, unfurling a banner that cited deaths at the hands of the police.”).

9. Monica Davey & Mitch Smith, *Justice Officials To Investigate Chicago Police Department After Laquan McDonald Case*, N.Y. TIMES (Dec. 6, 2015), <https://www.nytimes.com/2015/12/07/us/justice-dept-expected-to-investigate-chicago-police-after-laquan-mcdonald-case.html> [<https://perma.cc/RB5S-M4BH>].

10. 34 U.S.C. § 12601 (2018). This section was previously codified at 42 U.S.C. § 14141. Congress originally enacted this measure as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071.

11. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); see *Federal Responses to Police Misconduct: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 76 (1992) [hereinafter *Federal Responses to Police Misconduct Hearing*] (statement of attorney Johnnie Cochran explaining why, after *Lyons*, federal governmental action was needed to remedy police misconduct).

12. *Lyons*, 461 U.S. at 97.

13. *Id.* at 98.

14. Article III provides that the judicial power of the United States “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2; see also 28 U.S.C. § 1331 (2018) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

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

standing doctrine is useful. The Supreme Court has explained that to meet Article III's case-or-controversy requirement, a plaintiff must demonstrate that he or she "has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable [judicial] decision."¹⁶ Congress can, by statute, create a cause of action. The Court has explained: "Congress may create a statutory right or entitlement the alleged deprivation of which can confer [Article III] standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."¹⁷ However, Congress's power in this regard is not unlimited because the Court still insists upon a sufficient injury to satisfy Article III.¹⁸ It is therefore not guaranteed that a statutory basis to sue will satisfy the constitutional requirements.¹⁹

16. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). In addition to the constitutional standing requirements, the Court has also identified certain "prudential" concerns that limit standing in federal court. *Id.* at 161. These include a ban on a litigant raising claims of third parties; the requirement that a party raise a claim within the "zone of interests" protected by the statutory provision that is the basis for the lawsuit; and the prohibition on "generalized grievances" such as an interest, shared by all citizens, in making sure the government abides by a law. *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Although Article III requirements cannot be altered, "Congress legislates against the background of [the Court's] prudential standing doctrine, which applies unless it is expressly negated." *Bennett*, 520 U.S. at 163. Nonetheless, Congress's ability to override prudential standing rules is not unlimited, such that the line between Article III and the doctrine of prudential standing is far from sharp. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 885 (1983) (discussing the lack of precision in this area and concluding that "[p]ersonally, I find this bifurcation unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate").

17. *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

18. The Court made this point in *Massachusetts v. Environmental Protection Agency*:

Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

549 U.S. 497, 516 (2007) (citation omitted) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)); *see also* *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (explaining that "Article III standing requires a concrete injury even in the context of a statutory violation" and rejecting the claim that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right").

19. *Compare* *FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding that Article III requirements were satisfied where Congress created a broad right to obtain information about the financial activities of political committees and the Federal Election Commission denied the plaintiff access to the information sought), *with* *Lujan*, 504 U.S. at 578 (holding that the provision of the

In rejecting the plaintiff's claim for an injunction, the *Lyons* Court explained that private litigants lack Article III standing to pursue equitable relief against a police department unless they can demonstrate a substantial likelihood of future harm to themselves.²⁰ Because the plaintiff could not show he was likely to be subjected to a chokehold in the future, Article III itself barred injunctive relief.²¹ "Absent a sufficient likelihood that he will again be wronged in a similar way," the Court explained, the plaintiff was "no more entitled to an injunction than any other citizen of Los Angeles; 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."²² Because past victims of police misconduct will rarely be able to demonstrate that they personally are likely to be victimized by factually similar misconduct again in the future, *Lyons* effectively barred the vast majority of private litigants from seeking equitable relief against police departments. Congress enacted § 12601 to ensure that at least one litigant—the U.S. attorney general acting through the DOJ, operating under the obligation of the executive branch to "take Care that the Laws be faithfully executed"²³—would have both statutory and constitutional standing²⁴ to pursue court-ordered reform against the nation's most problematic police departments.²⁵

Endangered Species Act permitting "any person" to sue to enforce the statute was an insufficient basis for conservation organizations to satisfy Article III standing).

20. *Lyons*, 461 U.S. at 95 (holding that in order to meet the case-or-controversy requirement of Article III, private litigants seeking injunctive relief against police departments must demonstrate an immediate "danger of sustaining some direct injury" from similar misconduct by the police department again in the future (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923))).

21. *Id.* at 111.

22. *Id.*

23. U.S. CONST. art. II, § 3.

24. In contrast to private litigants, the U.S. attorney general, as part of the federal executive branch, readily meets Article III standing requirements when suing to enforce a validly enacted federal statute:

It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights. But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.

United States v. Raines, 362 U.S. 17, 27 (1960) (rejecting a challenge to a federal lawsuit under the Civil Rights Act of 1957 against local officials for interfering with voter-registration efforts).

25. Section 12601 also responded to the U.S. Court of Appeals for the Third Circuit's decision that the U.S. attorney general lacked statutory authority, under federal civil rights and

In the wake of the Laquan McDonald shooting, it was hardly surprising that the DOJ's investigation proceeded similarly to other investigations pursuant to § 12601. The investigation involved interviewing over three hundred CPD employees, analyzing around five hundred officer use-of-force cases, participating in more than sixty ride-alongs, and extensively reviewing internal departmental documents.²⁶ A little over a year later, the DOJ issued its findings. According to the DOJ, the shooting of Laquan McDonald was not an isolated incident; the Chicago police were engaged in “widespread [c]onstitutional abuses,” including patterns of excessive use of force in violation of the Fourth Amendment.²⁷ To remedy this problem, the DOJ announced that it would seek a court order mandating significant reforms to CPD policies and procedures.²⁸ It appeared that Chicago would soon become the largest municipal police department ever to undergo court-ordered reform via § 12601.²⁹

However, before the DOJ could finish negotiating a consent decree with the CPD, President Donald J. Trump took office and appointed then-Alabama Senator Jeff Sessions as U.S. attorney

other statutes, to pursue broad remedies in federal court against police departments for asserted violations of Fourteenth Amendment rights. *See* United States v. City of Philadelphia, 644 F.2d 187, 189–90 (3d Cir. 1980) (holding that the attorney general, acting through the DOJ, lacked standing to seek injunctive relief against a police department engaged in a pattern of misconduct unless explicitly authorized by statute).

26. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 2 (2017) [hereinafter DOJ INVESTIGATION OF CHICAGO POLICE DEPARTMENT], <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/3NMD-4PBJ>].

27. Jon Seidel, Andy Grimm, Lynn Sweet & Mick Dumke, *Justice Dept. Finds Widespread Constitutional Abuses by Police*, CHI. SUN TIMES (Jan. 13, 2017, 7:17 PM), <https://chicago.suntimes.com/2017/1/13/18322939/justice-dept-finds-widespread-constitutional-abuses-by-police> [<https://perma.cc/JS34-H74Y>]; *see also* DOJ INVESTIGATION OF CHICAGO POLICE DEPARTMENT, *supra* note 26, at 1–4 (providing an initial synopsis of the DOJ's major findings).

28. DOJ INVESTIGATION OF CHICAGO POLICE DEPARTMENT, *supra* note 26, at 16 (stating the DOJ will seek a court order); Fran Spielman, *Emanuel Agrees To Negotiate Consent Decree That May Never Happen*, CHI. SUN TIMES (Jan. 13, 2017, 8:57 PM), <https://chicago.suntimes.com/2017/1/13/18391695/emanuel-agrees-to-negotiate-consent-decree-that-may-never-happen> [<https://perma.cc/8QE9-TB6A>] (discussing how Mayor Rahm Emanuel reached an agreement with the DOJ to negotiate a consent decree).

29. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 14 (2011) [hereinafter REAVES, LAW ENFORCEMENT CENSUS], <https://www.bjs.gov/content/pub/pdf/cslllea08.pdf> [<https://perma.cc/T7HX-Y6XH>] (showing that in 2008, Chicago had the second-most sworn officers of any department in the country, behind only New York); Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 777–79 (2017) (showing all other police departments to have undergone federal intervention via § 12601).

general.³⁰ Sessions quickly announced that the DOJ would no longer use its authority under § 12601 to reform local police departments, including the CPD.³¹ For a brief time, it seemed that the CPD had narrowly avoided a court-ordered reform process. Following Sessions's announcement, however, then-Illinois Attorney General Lisa Madigan filed a lawsuit in federal district court against the CPD under § 1983, along with several state law causes of action.³² The lawsuit asserted that the CPD had engaged in "a repeated pattern of using excessive force, including deadly force, and other misconduct that disproportionately harms Chicago's African American and Latino residents" and it sought broad injunctive relief.³³ The parties resolved the case a year later by entering a 236-page consent decree requiring the CPD to implement dozens of reforms.³⁴

When the DOJ brought its lawsuit against the CPD in federal court, it could safely rely upon § 12601 as the basis for statutory and Article III standing. However, § 12601, which only authorizes the "Attorney General [of the United States]" to seek equitable relief against local police departments, does not authorize any comparable action by state attorneys general.³⁵ Section 1983, which makes state actors who violate the federally protected rights of "any citizen of the

30. Eric Lichtblau, *Jeff Sessions, as Attorney General, Could Overhaul Department He's Skewed*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/politics/jeff-sessions-donald-trump-attorney-general.html> [https://perma.cc/38Z4-EKT5] (describing President Trump's appointment of Senator Jeff Sessions as attorney general shortly after the 2016 presidential election).

31. Memorandum from Att'y Gen. Jefferson B. Sessions to Heads of Dep't Components & U.S. Attorneys 1–2 (Mar. 31, 2017) [hereinafter Sessions Memorandum], <http://www.documentcloud.org/documents/3535155-Memorandum-from-Attorney-General-Jeff-Sessions.html> [https://perma.cc/7749-LLAU] ("It is not the responsibility of the federal government to manage non-federal law enforcement agencies. . . . The misdeeds of individual bad actors should not impugn or undermine the legitimate and honorable work that law enforcement officers and agencies perform in keeping American communities safe."); see also Stephen Rushin, *Police Reform During the Trump Administration*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/police-reform-during-the-trump-administration> [https://perma.cc/JLU3-BLTA] ("In issuing this short memorandum, Attorney General Sessions has signaled a drastic reorientation of federal priorities on police reform.").

32. Complaint at 1–4, *Illinois v. City of Chicago*, 2018 WL 3920816 (N.D. Ill. Aug. 16, 2018) (No. 17-cv-06260) [hereinafter *City of Chicago* Complaint].

33. *Id.* at 1; see also Bill Ruthhart, Annie Sweeney & John Byrne, *AG Madigan Sues To Enforce Chicago Police Reform; Emanuel Pledges Cooperation*, CHI. TRIB. (Aug. 30, 2017, 6:01 AM), <http://www.chicagotribune.com/news/local/politics/ct-emanuel-madigan-consent-decree-met-0830-20170829-story.html> [https://perma.cc/BQ2P-PMM9].

34. Consent Decree, *City of Chicago*, 2018 WL 3920816 (No. 17-cv-6260) [hereinafter *City of Chicago* Consent Decree].

35. 34 U.S.C. § 12601 (2018).

United States or other person within the jurisdiction thereof” liable to their victims, similarly lacks a provision for lawsuits by state governments.³⁶ And no other federal statute permits state attorneys general to sue in federal court under § 1983. In bringing her lawsuit, Madigan thus asserted a different source of standing: the *parens patriae* doctrine.³⁷ Under this common law doctrine, courts have permitted state attorneys general to file suits in federal court under federal law even absent clear statutory authorization so as to protect the state’s quasi-sovereign interests—generally defined as preventing or remedying a harm that affects a substantial portion of the state’s population without an adequate means of redress through private lawsuits.³⁸ Madigan contended that police misconduct in Chicago satisfied all of the elements for the state to assert *parens patriae* as a basis for standing, arguing that the misconduct by Chicago police implicated the “health and well-being of Illinois residents—both physical and economic.”³⁹ This harm, Madigan contended, affected a “substantial segment of the residents of the State of Illinois.”⁴⁰ And absent action by her office, Madigan argued, “Chicago residents will continue to be subjected to unconstitutional policing practices and, as a result, will incur medical expenses that the state will pay.”⁴¹ Thus, even though no federal statute explicitly gave the Illinois attorney general standing to pursue equitable relief against the CPD in federal court, Madigan asserted that the doctrine of *parens patriae* impliedly gave her office a right to sue, both under federal and state law, when police officers violate federal constitutional rights—and therefore statutory and constitutional standing requirements were met.

Madigan was not the first state official to assert *parens patriae* standing to seek a remedy for police misconduct in federal court. For example, in a small number of previous cases, state attorneys general

36. 42 U.S.C. § 1983 (2018).

37. *City of Chicago* Complaint, *supra* note 32, at 4–6 (laying out a standing claim via the *parens patriae* doctrine).

38. Romualdo P. Eclavea, Annotation, *State’s Standing To Sue on Behalf of its Citizens*, 42 A.L.R. Fed. 23, § 29(a) (1979); *see also infra* Part II.A (describing the origins and prior uses of the *parens patriae* doctrine).

39. *City of Chicago* Complaint, *supra* note 32, at 5.

40. *Id.*

41. *Id.* at 6.

in Pennsylvania⁴² and New York⁴³ have invoked *parens patriae* to seek consent decrees against local police departments in federal court. Many scholars have argued that this sort of court-ordered reform is an effective and important method to overhaul America's most troubled police departments.⁴⁴ After all, the DOJ itself has made effective use of court-ordered equitable relief under § 12601 to transform many of the nation's largest police departments, including those in Los Angeles, Seattle, Washington, D.C., Cincinnati, Cleveland, Baltimore, Pittsburgh, and New Orleans, as well as smaller agencies like that in Ferguson, Missouri.⁴⁵ Further, research shows that political considerations influence the DOJ's own willingness to utilize its authority under § 12601;⁴⁶ the DOJ uses § 12601 more aggressively during Democratic presidential administrations than during Republican administrations.⁴⁷ State attorneys general seem well positioned to pursue broad-scale relief against police departments when the DOJ is unwilling to act. On this theory, invocation of *parens patriae* should satisfy the requirements of Article III standing, and absence of a federal statute specifically authorizing states to sue should not stand in the way of needed police reform.

If Madigan's understanding of the *parens patriae* doctrine proves correct and widely applicable, it could radically reshape the world of

42. See *Pennsylvania v. Porter*, 659 F.2d 306, 314–17 (3d Cir. 1981) (en banc) (per curiam) (concluding that Pennsylvania had standing to seek injunctive relief against the police department in the Borough of Millvale).

43. *New York v. Town of Wallkill*, No. 01-Civ-0364 (CM), 2001 U.S. Dist. LEXIS 13364, at *22 (S.D.N.Y. Mar. 16, 2001) (determining that the New York attorney general had standing to seek equitable relief against the Wallkill Police Department).

44. STEPHEN RUSHIN, *FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS* 94–97 (2017) [hereinafter RUSHIN, *FEDERAL INTERVENTION*] (arguing that the introduction of federal intervention via § 12601 (then § 14141) represents one of the most important developments in the history of police regulation); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457 (2004) (calling § 12601 (then § 14141) one of the most “promising legal mechanism[s]” for reducing officer misconduct); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 789–99 (2006) (praising the importance of § 12601 (then § 14141)).

45. Rushin & Edwards, *supra* note 29, at 777–79 (listing these as cities targeted for federal intervention via § 12601).

46. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1408 (2015) [hereinafter Rushin, *Structural Reform Litigation*] (“[T]he federal government only has the resources to pursue SRL in a small fraction of the municipalities where there appears to be a pattern or practice of misconduct.”).

47. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3228–35 (2014) [hereinafter Rushin, *Federal Enforcement of Police Reform*] (describing shifts in enforcement of § 12601 as presidential administrations and corresponding DOJ policy have changed).

police oversight—particularly during periods when the federal government takes a hands-off approach, as it has during the Trump administration. If successful, Madigan’s approach would allow state attorneys general far-reaching authority to utilize the federal courts to combat patterns of police wrongdoing without the need for Congress or even the states to enact legislation authorizing these kinds of lawsuits. In essence, state attorneys general across the country could take up a role traditionally played by the DOJ.

The prospect of state attorneys general suing their own state’s police departments and governing municipalities in federal court to remedy violations of federal constitutional rights raises a number of pressing questions: What role can state attorneys general serve in promoting effective police reform within their own state? Should state attorneys general, though lacking federal statutory standing, have authority under the *parens patriae* doctrine sufficient to satisfy the requirements of Article III so as to seek equitable relief in federal court against police departments engaged in unlawful behavior? If so, why have more attorneys general not followed Madigan’s lead—and are they likely to do so in the future? Despite the importance of these issues, they have generated very little commentary and analysis.⁴⁸

This Article offers a comprehensive assessment of efforts by state attorneys general to reform their own local police departments through lawsuits in federal court. It concludes that although there is an urgent need to continue efforts to reform police departments engaged in misconduct, application of the *parens patriae* doctrine to the context of police reform raises a multitude of doctrinal and public policy concerns. Therefore, absent statutory authority, the *parens patriae* doctrine should *not* grant state attorneys general blanket authority to

48. Two prior works have addressed somewhat similar questions but in different ways. Amelia C. Waller authored an insightful student note in 1982 arguing for an expansion of the *parens patriae* doctrine to the context of police reform. See generally Amelia C. Waller, Note, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865 (1982). This Article, of course, reaches a different conclusion about how best to empower state attorneys general. More recently, Samuel Walker and Morgan Macdonald have made a strong argument in favor of states passing their own statutes that mirror § 12601. Walker and Macdonald do not consider the *parens patriae* doctrine or the significance of federal legislation to give state attorneys general standing in federal district court. See generally Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R. L.J. 479 (2009). This Article takes up the problems that an expansive approach to *parens patriae* standing presents in the context of police reform while offering an alternative mechanism to empower state attorneys general—issues that take on new significance given the pullback by the Trump administration and renewed interest at the state level in reform efforts.

seek equitable relief in federal district court against their local police departments for violations of constitutional rights. Instead, this Article argues, *both* Congress *and* state legislatures should provide state attorneys general explicit statutory authority to pursue equitable relief in federal court against local police departments engaged in patterns of unlawful misconduct. An unambiguous grant of standing through federal and state statutes, consistent with the requirements of Article III, is far more preferable than reliance upon the vagaries of common law *parens patriae*.

Statutory authorization would bring at least two significant benefits. First, it would result in state attorneys general more aggressively and systematically overseeing their local police departments, thereby filling an important gap in the existing regulatory framework. Some lower federal courts have approved efforts by state attorneys general to pursue equitable relief against local police departments under the *parens patriae* doctrine, but there remains very limited appellate precedent on the issue. The one federal circuit court decision approving such *parens patriae* standing is an en banc Third Circuit case from 1981 that generated a sharp dissent.⁴⁹ The dissenting judges took issue with the very idea that victims of police misconduct in virtually any city constitute a sufficiently large cross section of the state population to justify *parens patriae* standing.⁵⁰ They also concluded that existing federal laws like 42 U.S.C. § 1983 already empower private litigants to receive relief, thereby reducing the need for action by the state attorney general under the doctrine.⁵¹ Given the uncertainty surrounding the application of *parens patriae* to police-reform cases, it is understandable that few state attorneys general have expended the limited resources they have to litigating these sorts of cases. By explicitly empowering state attorneys general to pursue these cases under state and federal law, lawmakers could eliminate this uncertainty and likely increase the willingness of state attorneys general to pursue police reform. Many of the existing regulatory responses to police misconduct have proven ineffective at constraining police wrongdoing.⁵² With appropriate statutory powers, state attorneys general could play a critical role in improving police

49. *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981) (en banc) (per curiam). For a detailed discussion of this case, see *infra* Part II.C.

50. See *infra* notes 257–70 and accompanying text.

51. See *id.*

52. For a description of the existing regulatory mechanisms and their limitations, see *infra* Part I.A.

departments across the country through the use of court-ordered reform in a manner that comports with the requirements of Article III.

Second, insisting that Congress and state legislatures statutorily authorize federal lawsuits by state attorneys general prevents *parens patriae* from becoming a runaway vehicle for unconstrained structural-reform litigation.⁵³ Existing laws provide startlingly few details on the kinds of evidence state attorneys general must put forth to secure equitable relief against a local police department under the *parens patriae* doctrine.⁵⁴ There is also no mechanism in place to prevent state attorneys general from asserting authority under *parens patriae* in cases that may actually conflict with federal efforts to reform police departments under § 12601.⁵⁵ Requiring a statutory basis for a state attorney general to sue gives lawmakers at both the state and federal level much-needed opportunities to determine in advance things such as evidentiary requirements, standards of proof, available remedies, and oversight mechanisms. Legislative action promotes an effective role for state attorneys general within the existing regulatory framework.⁵⁶ More generally, the approach this Article urges represents a healthy interaction between federal and state governments in securing federal constitutional rights. Congress would specify when state attorneys general are able to sue in federal court to correct police violations of constitutional rights. Within these parameters, each state legislature would decide on the scope of power its own state attorney general would hold and exercise—with the understanding that the alternative could be intrusive investigations and lawsuits by the DOJ or other federal actors. A federal governmental role can promote base-level uniformity in safeguards against abusive police practices while a role for state government permits tailoring in light of local experiences and conditions. Viewed from a different direction, the approach this Article recommends also serves the separation-of-powers values that underlie Article III’s standing requirements.⁵⁷ The Article’s approach requires that the federal political branches signal a green light before the federal courts are

53. For a discussion of the basis for this concern, see *infra* Part III.A.2.

54. See *infra* Part III.A.1.

55. See *infra* Part III.A.2.

56. See *infra* Part III.A.3.

57. See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”).

available for state governments seeking themselves to enforce federal law.

The approach offered in this Article requires lawmakers to take additional steps before state attorneys general may seek equitable relief in federal court against local police departments. Legislative action is never certain, but the Article's proposal has a reasonable chance of success. It responds to the strong, current calls for remedying police misconduct in a way that empowers state governmental actors—rather than only federal executive officials. Accordingly, the proposal could well result in state attorneys general taking on a significant role in overseeing local police practices, forever reshaping the field of police accountability.

This Article proceeds in three parts. Part I explores the historical approach to regulating local police behavior and the emergence of equitable relief as a tool to reform the nation's most troubled police departments. Part II evaluates the history and purpose of the *parens patriae* doctrine in order to assess its usefulness for police reform. Then Part III explains why granting state attorneys general standing under *parens patriae* to remedy police misconduct raises some serious policy concerns and offers some alternative normative recommendations for empowering state attorneys general to reform local police departments.

I. THE HISTORY OF POLICE REFORM AND AVENUES FOR EQUITABLE RELIEF

This Part explores the historical responses to police misconduct and the emerging interest in the use of equitable relief by state attorneys general against local police departments within their own jurisdiction. Section A describes the traditional mechanisms used to regulate police misconduct and their shortcomings, which result principally from the decentralized nature of law enforcement in the United States and the difficulties of incentivizing police departments to implement reforms. As detailed in Section B, the failure of traditional mechanisms to curb misconduct led Congress in 1994 to pass 34 U.S.C. § 12601, which grants the U.S. attorney general statutory authority to seek equitable relief against state and local police departments engaged in patterns of unlawful misconduct. However, as explained in Section C, the Trump administration's refusal to enforce § 12601 has left police-reform advocates searching for new ways to respond to patterns of misconduct in America's most troubled police

departments. Section D describes how some state attorneys general have responded to these sorts of regulatory gaps by asserting the common law *parens patriae* doctrine as a basis for standing to pursue equitable relief in federal court in a manner that parallels the DOJ's specific authority under § 12601.

A. *Avenues for Reforming Police Departments*

There are around eighteen thousand state and local police departments in the United States, each operating with considerable autonomy.⁵⁸ We are not a nation with a single police force but one with thousands of decentralized law enforcement agencies each tasked with establishing its own goals, policies, and procedures.⁵⁹ For much of American history, state and federal policymakers did little to regulate these dispersed agencies.⁶⁰ In fact, policymakers did not even consider police misconduct a serious, widespread problem until the early twentieth century.⁶¹ Experts point to the release of the *Report on Lawlessness in Law Enforcement* by the National Commission on Law Observance and Enforcement (“NCLOE”) in 1931 as one of the first major recognitions of police misconduct as a “pervasive national epidemic.”⁶² Central to that conclusion was the vivid evidence the report provided of police departments throughout the United States engaged in abusive interrogation tactics known as the “third degree.”⁶³ In the years since the NCLOE report, “no fewer than six national commissions” have also documented misconduct in police departments across the country.⁶⁴

These reports have also revealed other key facts about police misconduct. For one thing, misconduct is not spread evenly across all police departments. Rather, some agencies engage in significantly more misconduct than others.⁶⁵ Numerous studies have also shown differences in victim profiles. Members of racial minority groups are

58. REAVES, LAW ENFORCEMENT CENSUS, *supra* note 29, at 2.

59. RUSHIN, FEDERAL INTERVENTION, *supra* note 44, at 5.

60. *Id.* at 8–9 (describing this as the “Hands-Off Era”).

61. *Id.* at 9 (“The responsibility of regulating police misconduct during this Hands-Off Era fell almost entirely on the states and localities.”).

62. *Id.*

63. *Id.* at 32.

64. Michael S. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 LAW & SOC. INQUIRY 171, 172 (2009).

65. RUSHIN, FEDERAL INTERVENTION, *supra* note 44, at 32–33 (identifying Los Angeles and New Orleans as two cities with particularly high rates of misconduct).

significantly more likely to be impacted by abusive police activities.⁶⁶ Additionally, police misconduct disproportionately affects individuals with prior criminal records, including those convicted of felonies; these victims may also have lost the right to vote and so lack power to seek protection through normal democratic channels.⁶⁷ Studies further demonstrate that even when police misconduct generates widespread attention and calls for change, reform can be elusive because it often requires municipalities to reallocate scarce resources from other local needs like schools, parks, and infrastructure.⁶⁸ Thus, the fight against police misconduct frequently boils down to a single challenge: How do we get police departments engaged in systematic misconduct “to adopt costly and sometimes politically unpopular reforms aimed at preventing misconduct that primarily affects a politically marginalized minority of the population?”⁶⁹

Three traditional mechanisms to address police violations of constitutional or other rights have involved civil lawsuits by victims using § 1983, exclusion of evidence in criminal trials, and prosecution of individual officers. These mechanisms operate as “cost-raising misconduct regulations,” in that they increase the costs borne by police departments when officers engage in misconduct, but they do not actually force departments to make costly procedural changes aimed at curbing future wrongdoing.⁷⁰ Additionally, these mechanisms primarily respond to individual acts of wrongdoing by police officers, but they do not address the organizational roots of misconduct.⁷¹ As a

66. Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<https://perma.cc/9WX5-5NX2>] (describing high numbers of Black and Latino individuals unlawfully stopped and frisked by NYPD); Oliver Laughland, Jon Swaine & Jamiles Lartey, *US Police Killings Headed for 1,100 This Year, with Black Americans Twice as Likely To Die*, GUARDIAN (July 1, 2015, 7:48 AM), <http://www.theguardian.com/us-news/2015/jul/01/us-police-killings-this-year-black-americans> [<https://perma.cc/Q7G6-74DV>] (describing high numbers of Black individuals killed by police officers).

67. See *Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/UF34-225Q>] (describing the limitations placed on voting rights for those convicted of criminal offenses).

68. Rushin, *Structural Reform Litigation*, *supra* note 46, at 1408–09 (describing the high costs of police reform and how some communities have had to make tough budgetary choices to meet these financial demands).

69. RUSHIN, FEDERAL INTERVENTION, *supra* note 44, at 8.

70. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3196.

71. See generally Armacost, *supra* note 44 (discussing at length the linkage between organizational culture and police misconduct).

result, these traditional responses to police misconduct have proven inadequate.

First, Congress has authorized private litigants under 42 U.S.C. § 1983 to seek civil damages, and in some cases equitable relief, against state governmental agents—including police officers—who violate their constitutional or other federally protected rights. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress⁷²

Congress originally enacted this statutory measure as part of the Civil Rights Act of 1871,⁷³ but until fairly recently, courts took a limited view of its applicability. In 1961, the U.S. Supreme Court in *Monroe v. Pape*⁷⁴ ruled for the first time that the “under color of” law language of § 1983 gave private individuals the right to bring a lawsuit against a government actor in his or her official capacity even if the challenged conduct was not actually authorized by state or local law.⁷⁵ The *Monroe* Court also held that plaintiffs did not need to avail themselves of state law and state court remedies prior to suing under § 1983.⁷⁶

Subsequently, in *Monell v. Department of Social Services*⁷⁷ and its progeny, the Court further held that private litigants may use § 1983 to hold municipalities responsible for the actions of their employees,⁷⁸ provided that the municipality was deliberately indifferent in its failure to train or oversee its employees.⁷⁹ In theory, civil litigation under

72. 42 U.S.C. § 1983 (2018).

73. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

74. *Monroe v. Pape*, 365 U.S. 167 (1961).

75. *Id.* at 184 (rejecting the argument that “‘under color of’ state law included only action taken by officials pursuant to state law”).

76. *Id.* at 183.

77. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

78. *Id.* at 700–01 (holding that municipalities and municipal corporations can be held liable as “persons” under § 1983).

79. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (holding that a municipality may be liable under § 1983 for inadequate training of employees if the “failure to train reflects deliberate indifference to the constitutional rights of its inhabitants”).

§ 1983, or on other grounds, should incentivize police departments to implement police reform so as to avoid costly civil judgments. In practice, however, civil litigation has proven ineffective at stimulating widespread reform in American police departments. For one thing, despite *Monroe* and *Monell*, the Court has limited the ability of private litigants to obtain punitive damages against municipal entities,⁸⁰ and many types of police misconduct may not create an opportunity for recovery of significant compensatory damages. The Court has also prohibited judgments against individual officers unless plaintiffs can overcome qualified immunity by showing that the officer violated clearly established law.⁸¹ Some scholars have shown how indemnification policies have had unexpected negative effects on the ability of § 1983 litigation to serve as a deterrent to individual officers or municipal entities.⁸² Others have noted that the use of private insurance by municipalities to protect themselves from § 1983 exposure can undermine the measure's deterrent effect.⁸³ And still others have shown that municipalities do not fully internalize the costs of civil litigation, resulting in few policy or procedural changes, even after courts order cities to pay out substantial damages because of officer misconduct.⁸⁴ All of this suggests that civil litigation is an imprecise

80. See *Smith v. Wade*, 461 U.S. 30, 56 (1983) (establishing the standard for punitive damages against an individual defendant under § 1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (establishing that punitive damages are not recoverable against a municipal entity under § 1983).

81. This doctrine has developed over time. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing qualified immunity for many government officials so that plaintiffs must demonstrate that a government agent violated clearly established law in order to recover under § 1983); *Wilson v. Layne*, 526 U.S. 603, 614–15 (1999) (defining clearly established law); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (further defining clearly established law for purposes of qualified immunity).

82. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (showing that virtually all police departments indemnify their officers, including for punitive damages, thereby reducing the likelihood that any officer will individually bear the burden of a civil judgment).

83. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543 (2017) (“Liability insurance dilutes, or even neutralizes, deterrence by transferring the risk of liability from the municipality to the insurer.”); cf. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 93, 95 (2009) (explaining that at the time that § 1983 became available for actions against police officers, “[t]he primary police liability insurance company, pointing to concerns about rising legal liability, had pulled out of the market” and describing how the resultant reforms made by police departments contributed to “legalized accountability”).

84. Walker & Macdonald, *supra* note 48, at 495 (explaining that in some cases where a municipality is found liable for significant § 1983 damages, the municipality may not internalize the costs of the lawsuit because “one agency of government, the police department, commits

mechanism for generating reform in police departments. And since it is a mere cost-raising mechanism, civil litigation “can only raise the cost of some types of misconduct, with the hope that a rational police department will respond with proactive policy changes.”⁸⁵ Compensatory damages alone cannot actually force local police departments to make policy or procedural reforms to curb future wrongdoing. Although the plain language of § 1983 gives litigants an opportunity to pursue equitable and injunctive relief—in addition to compensatory damages—as discussed in more detail in Part I.B, courts have significantly limited the availability of these remedies.

Second, courts have barred the admission of some evidence obtained in violation of the Constitution. The Supreme Court adopted the exclusionary rule “to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”⁸⁶ The Court first recognized the rule in *Weeks v. United States*⁸⁷ and expanded it to cover action by state and local law enforcement in *Mapp v. Ohio*.⁸⁸ Empirical evidence is mixed as to whether the exclusionary rule actually inspires police departments to substantially change internal policies to reduce misconduct.⁸⁹ After all, the exclusionary rule only applies if the police obtain incriminating evidence through a violation of the Constitution and the government seeks to introduce that evidence at trial. The Court itself has also carved out numerous exceptions to the exclusionary rule, thereby

abuses of rights, another agency, the city attorney’s office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlement results from the litigation”). For a detailed analysis of how jurisdictions pay for civil rights judgments and the influence of these different arrangements on the deterrent effect of civil litigation, see generally Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016).

85. Rushin, *Structural Reform Litigation*, *supra* note 46, at 1355.

86. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

87. *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule, but only applying the rule to federal law enforcement action).

88. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to state and local governments).

89. See, e.g., William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, U. MICH. J.L. REFORM 311, 355 (1991) (arguing that the exclusionary rule influences the likelihood of police departments implementing reforms to curb future wrongdoing); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) (finding that at least some officers in the CPD responded to the exclusionary rule by implementing policy reforms); cf. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 322 (2d ed. 2008) (arguing that the exclusionary rule failed to bring about substantial change in police departments).

lessening its usefulness as a deterrent.⁹⁰ More generally, critics contend that the exclusionary rule contributes to increases in crime by allowing dangerous and guilty suspects to go free and have called for additional limits on its application.⁹¹ Members of the Supreme Court have also questioned whether the exclusionary rule remains useful.⁹²

Third, state and federal prosecutors have the ability to bring charges against police officers who engage in criminal behavior. Police officers are subject to criminal prosecution for violating state criminal statutes,⁹³ and under 18 U.S.C. § 242, federal prosecutors can seek criminal charges against state and local officials who “willfully” deprive a person of civil rights.⁹⁴ The threat of prosecution is a useful deterrent in some cases, but criminal conduct represents only a small subsection of all police misconduct.⁹⁵ A significant portion of police misconduct may violate internal departmental policies or even the federal Constitution but still not rise to the level of a criminal offense. Even when officers have committed crimes, prosecution may not occur. Federal prosecutors have limited resources to investigate and prosecute misconduct by state and local law enforcement officers all across the country.⁹⁶ At the local level, prosecutors are often reluctant to bring criminal charges against police officers because they depend

90. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504–27 (1996) (documenting the numerous exceptions to the exclusionary rule recognized by the U.S. Supreme Court over time).

91. See, e.g., Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 159 (2003) (concluding that the adoption of the exclusionary rule contributed to a statistically significant uptick in crime rates nationally); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1127–36 (1998) (concluding that the Court’s holding in *Miranda*, enforced via the exclusionary rule, contributed to a statistically significant downtick in national clearance rates, the rate at which police close cases).

92. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (suggesting a reduced need for the exclusionary rule in an era of increasingly professionalized law enforcement officers).

93. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3202 (discussing the possibility of criminal prosecution of police officers).

94. 18 U.S.C. § 242 (2018) (making it a federal criminal offense for state officials, including police officers, to willfully violate an individual’s constitutional rights and providing for significant criminal penalties, particularly if the violation results in bodily harm).

95. Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999) (“[C]riminal law standards define ‘the outer limits of what is permissible in society’—not the good police practices that police reformers aspire to institute in a wayward department.” (quoting PAUL CHEVIGNY, *EDGE OF THE KNIFE* 101 (1995))).

96. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3203 fig. 1 (showing the small number of cases that the DOJ had the resources to address under § 242).

heavily on a maintaining a cooperative relationship with local departments.⁹⁷ For many years, scholars have recognized that local prosecutors cannot serve as “an effective instrument for controlling police violence” because of their “hopeless conflict of interest.”⁹⁸ In cases involving police officer defendants, it is also not uncommon for prosecutors to “present exculpatory evidence to a grand jury,” thereby reducing the likelihood of a criminal indictment.⁹⁹ Even if a case gets to trial, juries have proven hesitant to convict police officers, even in instances of egregious wrongdoing.¹⁰⁰ As a result, criminal prosecution is not a useful tool for reforming police practices across the country.

In sum, the expansion of civil liability against officers and police departments, the exclusionary rule, and the occasional use of criminal prosecution may address some individual instances of police misconduct. However, these sorts of “cost-raising misconduct regulations will always be of limited use”¹⁰¹ because, in the language of law and economics, they allow police departments to engage in a form of efficient breach.¹⁰² So long as police departments are willing to accept the costs associated with constitutional violations—say, increased civil liability or the possibility of evidentiary exclusion—they remain free to permit and even encourage such violations. These mechanisms do not directly force police departments to make procedural or policy changes that would stop misconduct by frontline officers. Put differently, the mechanisms generally treat police misconduct as a “bad-apple” problem, rather than as a “rotten-barrel”

97. Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 (1996) (“Local prosecutors who ordinarily work closely with the police face an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality.”).

98. Louis B. Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney’s Office*, 118 U. PA. L. REV. 1023, 1023–24 (1970).

99. Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 756 (2016).

100. See Armacost, *supra* note 44, at 466 (“The fact that the victim is viewed as unsympathetic and unreliable contributes to jurors’ natural reluctance to brand a police officer a criminal and to send him to prison for doing his job.”); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009) (“[V]ictims of police misconduct often make problematic witnesses[] and . . . juries frequently believe and sympathize with defendant officers.”).

101. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3196.

102. *Id.*

problem reflective of organizational failures in training, oversight, and discipline.¹⁰³

With traditional regulatory mechanisms ineffective in curbing police misconduct, Congress and state attorneys general have turned to equitable remedies, enforced by federal courts, to impose reforms upon police departments and to overhaul their policies and practices. That process began in the spring of 1991 following a fateful traffic stop in Southern California.

B. Standing and the Push for Equitable Relief

In March of 1991, George Holliday recorded a video of Los Angeles police officers brutally beating Rodney King without any apparent provocation.¹⁰⁴ The images shocked the nation and generated widespread and bipartisan condemnation.¹⁰⁵ In the weeks and months after this incident, the U.S. House Subcommittee on Civil and Constitutional Rights convened a hearing on how Congress could better prevent and respond to police brutality and other forms of misconduct.¹⁰⁶ Many members of Congress concluded from the hearing that existing mechanisms—namely the exclusionary rule, civil litigation, and criminal prosecution—were inadequate.¹⁰⁷ Multiple subcommittee members argued that it was therefore time for Congress to “experiment with new legal theories to reform the way police departments conducted themselves.”¹⁰⁸ Following recommendations from experts,¹⁰⁹ subcommittee members urged Congress to provide new statutory avenues for private litigants and the U.S. attorney

103. See Armacost, *supra* note 44, at 455 (“[R]eform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct.”).

104. REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3–4 (1991).

105. See Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1 (describing widespread condemnation of the officers, including from President George H.W. Bush).

106. See *Police Brutality: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *Police Brutality Hearing*].

107. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3213 (describing the subcommittee’s conversation); *id.* at 3197–3204 (describing prior attempts to address police misconduct).

108. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1403 (2000).

109. See *Police Brutality Hearing*, *supra* note 106, at 54–131 (statement of ACLU Legal Director Paul Hoffman); see also *Federal Responses to Police Misconduct Hearing*, *supra* note 11, at 74–88 (statement of attorney Johnnie Cochran).

general to obtain equitable relief in federal district courts against problematic police departments.¹¹⁰

New federal laws were needed because of a series of court rulings that private litigants and the U.S. attorney general lacked standing under existing federal civil rights statutes to pursue equitable relief against local police departments. First, in *United States v. City of Philadelphia*,¹¹¹ the U.S. Court of Appeals for the Third Circuit held that the DOJ lacked statutory authority to pursue equitable relief against the Philadelphia Police Department (“PPD”) to correct a pattern of unconstitutional behavior.¹¹² The DOJ’s investigation had demonstrated startling problems within the PPD:

[PPD] discourage[d] victims of abuse from complaining, suppress[ed] evidence that inculpate[d] police officers, accept[ed] implausible explanations of abusive conduct, harass[ed] complainants and witnesses, prematurely terminate[d] investigations, compile[d] reports that justify police officers’ conduct regardless of actual circumstances, refuse[d] to discipline police officers for known violations, and protect[ed] officers from outside investigations.¹¹³

By way of response, the DOJ sued the PPD in federal district court. Seeking broad equitable remedies, the DOJ argued that federal statutory law criminalizing conspiracies to violate civil rights and the Fourteenth Amendment itself implicitly authorized the DOJ to bring the lawsuit.¹¹⁴ The district court dismissed the complaint on the ground that absent an express grant by Congress, the U.S. attorney general lacked standing to sue a police department for injunctive relief to enforce the civil rights of third parties—the victims of the officers’ conduct.¹¹⁵ The Court of Appeals for the Third Circuit affirmed the dismissal,¹¹⁶ refusing to infer standing absent express authorization comparable to that found in other federal statutes.¹¹⁷ “[J]udicial

110. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3213–14; cf. Terence Moran & Daniel Klaidman, *Police Brutality Poses Quandary for Justice Dept.*, *LEGAL TIMES*, May 4, 1992, at 9 (describing conservative opposition to these proposals).

111. *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980).

112. *Id.* at 190, 199.

113. *Id.* at 190.

114. See *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1251–52 (E.D. Pa. 1979) (describing the DOJ’s complaint).

115. *Id.* at 1252.

116. *City of Philadelphia*, 644 F.2d at 206.

117. *Id.* at 192. The court also rejected the government’s argument that standing could be inferred from the Fourteenth Amendment. *Id.* at 201 (“We hold, therefore, that the fourteenth

assertion of the power to compel drastic and far-reaching changes in local governments,” the court wrote, “would be inconsistent with a proper division of power in a federal system.”¹¹⁸ After the *City of Philadelphia* case, it appeared that unless Congress specifically gave it standing, the DOJ could not pursue injunctive or other equitable relief against police departments in federal court.

Second, in *City of Los Angeles v. Lyons*, the U.S. Supreme Court significantly limited the circumstances under which a private litigant could seek equitable relief against a police department.¹¹⁹ There, LAPD officers stopped Adolph Lyons for a traffic violation and, without any apparent provocation, seized Lyons in a chokehold that caused him to lose consciousness and damaged his larynx.¹²⁰ Alleging violations of several federal constitutional rights, Lyons sued under § 1983 and sought compensatory damages for the harm he suffered and an injunction to permanently bar the LAPD officers from indiscriminately using these kinds of chokeholds.¹²¹

The Supreme Court held that Lyons lacked standing under Article III of the Constitution to pursue equitable relief in the case.¹²² In reaching its decision, the Court acknowledged the heavy toll inflicted by the LAPD’s use of chokeholds.¹²³ When Lyons filed his first amended complaint, he identified ten deaths caused by the LAPD’s use of a chokehold.¹²⁴ Five more such deaths occurred in the following months.¹²⁵ Even so, the Court found that Lyons had not satisfied the threshold requirements of Article III by alleging an actual case or controversy sufficient to secure injunctive or equitable relief.¹²⁶ Prior cases had established that a plaintiff seeking equitable or injunctive relief must show that he “‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct” and required that “the injury or threat of injury . . . be both

amendment does not implicitly authorize the United States to sue to enjoin violations of its substantive prohibitions.”).

118. *Id.*

119. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that Lyons did not have standing because he had not established a “real and immediate threat” of future violations of his constitutional rights).

120. *Id.* at 97–98.

121. *Id.* at 98.

122. *Id.* at 105.

123. *Id.* at 99–100.

124. *Id.* at 100.

125. *Id.*

126. *Id.* at 101, 105.

‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”¹²⁷ The *Lyons* Court quoted *Rizzo v. Goode*¹²⁸ and *O’Shea v. Littleton*¹²⁹ for the proposition that “past wrongs do not in themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy.”¹³⁰ Thus, to be eligible for injunctive or other equitable relief, Lyons needed to do more than show that a handful of police officers engaged in a series of unconstitutional acts: he had to demonstrate that *he* faced a “real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”¹³¹

The Court concluded that it was extremely unlikely that Lyons would “not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever,” and thus Article III barred the equitable claim.¹³² Although this result limited the ability of future litigants to seek equitable relief against a police department, the *Lyons* court took the view that federal law would still deter police misconduct because civil damages were available under § 1983 and criminal prosecution of officers was possible under § 242.¹³³ The Court also noted that states were free to impose more generous standing requirements to allow private litigants to seek injunctive relief under a broader array of circumstances in state court.¹³⁴

Combined, *Lyons* and *City of Philadelphia* made it extraordinarily difficult for any litigant—whether the U.S. attorney general or an individual victim—to claim standing to seek equitable relief against a police department engaged in a pattern of misconduct. Accordingly, members of Congress concerned about police misconduct argued that

127. *Id.* at 101–02 (quoting *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–91 (1947); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

128. *Rizzo v. Goode*, 423 U.S. 362 (1976).

129. *O’Shea v. Littleton*, 414 U.S. 488 (1974).

130. *Lyons*, 461 U.S. at 103.

131. *Id.* at 105.

132. *Id.* at 108.

133. *See id.* at 112–13 (“If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983. Furthermore, those who deliberately deprive a citizen of his constitutional rights risk conviction under the federal criminal laws.”).

134. *See id.* at 113 (“The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court, absent far more justification than Lyons has proffered in this case.”).

new federal legislative measures were essential. The first proposed response came in the form of the Police Accountability Act of 1991.¹³⁵ That measure, which would have given both the U.S. attorney general *and* private litigants the power to seek equitable relief against police departments engaged in a pattern or practice of unconstitutional misconduct, ultimately failed to garner sufficient congressional support.¹³⁶ Three years later, Congress enacted a pared-down version of the same bill as part of the Violent Crime Control Act of 1994.¹³⁷

Codified today as 34 U.S.C. § 12601, this measure has become one of the most important tools for reforming the country's most troubled police departments. Since its passage in 1994, the DOJ has used the statute to investigate and reform dozens of police departments across the country.¹³⁸ In many of these agencies, the DOJ used § 12601 to force police departments to adopt new policies and procedures on a wide range of issues, including officer use of force,¹³⁹ early-intervention and

135. Police Accountability Act of 1991, H.R. 2972, 102d Cong.

136. The measure was incorporated into the Omnibus Crime Control Act of 1991, which failed because of a Republican filibuster. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3208. Conservative lawmakers and policing advocates argued that any measure empowering private litigants would lead to “frivolous and expensive litigation.” *Id.* at 3214.

137. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as amended at 34 U.S.C. § 12601 (2018)); *see also* Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3214 (discussing the legislative history of 34 U.S.C. § 12601).

138. *See* Rushin & Edwards, *supra* note 29, apps. A & B, at 777–79 (listing all DOJ investigations and settlements between 1994 and 2016).

139. *See, e.g.*, Consent Decree Regarding the New Orleans Police Department at 14–34, *United States v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (E.D. La. July 24, 2012) [hereinafter *City of New Orleans* Consent Decree] (regulating use of force, canines, firearm use, electronic control weapons, and oleoresin capsicum spray); Consent Decree at 6, *United States v. Territory of the Virgin Islands*, No. 3:08-cv-00158-CVG-RM (D.V.I. Mar. 24, 2009) [hereinafter *Territory of the Virgin Islands* Consent Decree] (requiring documentation of use of force incidents); Memorandum of Agreement Between the U.S. Dep’t of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Dep’t 8 (Apr. 12, 2002) [hereinafter *Cincinnati MOA*], <https://www.justice.gov/crt/memorandum-agreement-between-united-states-department-justice-and-city-cincinnati-ohio-and> [<https://perma.cc/K7A7-PYHU>] (“The use of force report form will indicate each and every type of force that was used, and require the evaluation of each use of force.”); Memorandum of Agreement Between the U.S. Dep’t of Justice and Prince George’s Cty., Md., and the Prince George’s Cty. Police Dep’t 6–8 (Jan. 22, 2004) [hereinafter *Prince George’s County MOA*], https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/pg_memo_agree.pdf [<https://perma.cc/9KQL-D7GY>] (regulating use of force involving oleoresin capsicum spray).

risk-management systems,¹⁴⁰ the handling of civilian complaints,¹⁴¹ officer training,¹⁴² bias-free policing,¹⁴³ community policing,¹⁴⁴ crisis intervention,¹⁴⁵ interrogations,¹⁴⁶ promotion and evaluation,¹⁴⁷ lineup procedure,¹⁴⁸ gang-unit management,¹⁴⁹ and canine deployment.¹⁵⁰ Various empirical studies have found that equitable relief obtained via § 12601 can effectively reform police departments,¹⁵¹ reduce a police

140. See, e.g., Joint Application for Entry of Consent Decree at 15–18, *United States v. New Jersey*, No. 99-5970(MLC) (D.N.J. Dec. 30, 1999) [hereinafter *New Jersey* Consent Decree] (describing the development of the management-awareness program); Consent Decree at 7, 28–29, *United States v. City of Steubenville*, No. 2:97-cv-966 (S.D. Ohio Sept. 3, 1997) [hereinafter *City of Steubenville* Consent Decree] (detailing an information system to oversee officer behavior); Cincinnati MOA, *supra* note 139, at 12–14.

141. See, e.g., *City of Steubenville* Consent Decree, *supra* note 140, at 15–22 (setting out an investigation process for civilian complaints); Consent Decree at 23–32, *United States v. City of Pittsburgh*, No. 2:97-cv-00354-RJC (W.D. Pa. Feb. 26, 1997) [hereinafter *City of Pittsburgh* Consent Decree] (establishing standards for a civilian complaint process).

142. See, e.g., *Territory of the Virgin Islands* Consent Decree, *supra* note 139, at 21 (“The VIPD shall continue to maintain training records regarding every VIPD officer that reliably indicate the training each officer has received. The training records shall, at a minimum, include the course description and duration, curriculum, and instructor for each officer.”); *New Jersey* Consent Decree, *supra* note 140, at 24 (explaining training protocol); Prince George’s County MOA, *supra* note 139, at 14–18 (setting out steps to overhaul officer training).

143. See, e.g., *City of Steubenville* Consent Decree, *supra* note 140, at 31 (“The City shall conduct regular audits and reviews of potential racial bias”); *City of Pittsburgh* Consent Decree, *supra* note 141, at 13 (“The City shall conduct regular audits and reviews of potential racial bias, including use of racial epithets, by all officers.”).

144. See, e.g., *City of New Orleans* Consent Decree, *supra* note 139, at 60–63 (“NOPD agrees to reassess its staffing allocation and personnel deployment, including its use of specialized units and deployments by geographic area, to ensure that core operations support community policing and problem-solving initiatives”).

145. See, e.g., Settlement Agreement and Stipulated [Proposed] Order of Resolution at 37–39, *United States v. City of Seattle*, No. 2:12-cv-01282-JLR (W.D. Wash. July 27, 2012) [hereinafter *City of Seattle* Agreement] (establishing regulations on crisis interventions and the creation of a crisis-intervention committee).

146. See, e.g., *City of New Orleans* Consent Decree, *supra* note 139, at 46–47 (laying out interrogation standards).

147. See, e.g., *id.* at 75–77 (creating standards for the promotion and evaluation of officers).

148. See, e.g., *id.* at 47–48 (establishing procedures for photographic lineups).

149. Consent Decree at 47–50, *United States v. City of Los Angeles*, No. 2:00-cv-11769-GAF-RC (C.D. Cal. June 15, 2001) [hereinafter *City of Los Angeles* Consent Decree] (creating gang-management regulations).

150. Consent Decree at 15–17, *United States v. Prince George’s Cty.*, No. 8:04-cv-00185-PWT (D. Md. Jan. 22, 2004) [hereinafter *Prince George’s Cty.* Consent Decree] (regulating canine deployment and establishing reporting requirements).

151. See, e.g., ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE 1–6 (2005), http://archive.vera.org/sites/default/files/resources/downloads/277_530.pdf [<https://perma.cc/Z3U9-KM6W>] (surveying officers, conducting focus groups, and reviewing monitor reports in order to assess the Pittsburgh consent

department's civil exposure under § 1983,¹⁵² decrease officer uses of force,¹⁵³ and increase civilian satisfaction with law enforcement.¹⁵⁴

Nevertheless, the statute has suffered from two important drawbacks. First, the DOJ has limited resources. One study found that in the roughly twenty-five years since § 12601 was enacted, the DOJ has investigated an average of three or four agencies per year.¹⁵⁵ Given that there are some eighteen thousand state and local police departments in the United States, the DOJ has therefore annually used its statutory investigative power to assess just 0.02 percent of all police departments.¹⁵⁶ Further, the DOJ has only sought equitable relief against an average of one or two police departments per year.¹⁵⁷ These figures represent a very limited use of § 12601. As one former DOJ official remarked during an interview, “there’s no way that the [DOJ] can litigate all of the patterns and practices of police misconduct in this

decree); Joshua M. Chanin, *Examining Sustainability of Pattern or Practice Police Misconduct Reform*, 18 POLICE Q. 163, 163 (2015) (acknowledging success in reforming some police departments via § 12601 litigation, but recognizing the ongoing problem of sustainability); Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform* ii–iv, 333–35 (July 6, 2011) (unpublished Ph.D. dissertation, American University), <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf> [<https://perma.cc/5T7G-H7HG>] (describing the reform process across a handful of police departments targeted for federal intervention). *See generally* CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M. COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> [<https://perma.cc/J4QE-LMGS>] (documenting the largely successful reform process in Los Angeles).

152. Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOLOGY & PUB. POL’Y 575, 575–77 (2017) (finding a modest reduction in civil rights exposure after § 12601 interventions).

153. *See, e.g.*, Sarah Childress, *How the DOJ Reforms a Police Department Like Ferguson*, PBS FRONTLINE (Mar. 4, 2015), <https://www.pbs.org/wgbh/frontline/article/how-the-doj-reforms-a-police-department-like-ferguson> [<https://perma.cc/56Z2LTK2>] (“The resulting agreement led to major reforms, significantly reducing the number of police shootings . . .”).

154. *See, e.g.*, STONE ET AL., *supra* note 151, at 44–53 (showing the results of a survey of Los Angeles residents during the consent decree period).

155. *See* Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3230 (“This means that the DOJ has only formally investigated around three departments per year.”).

156. *See id.* at 3194, 3230 (quoting from in-depth interviews with subjects who worked at DOJ and who attributed limited DOJ interventions in part to resource constraints); *see also* Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (stating that “the DOJ lacks resources” to address some serious policing problems via § 12601 actions); Harmon, *supra* note 100, at 21 (explaining that both “insufficient resources devoted to structural reform of police departments and the related absence of political commitment . . . , especially on the part of the Bush Administration” help explain the limited number of (what are now) § 12601 cases).

157. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3232 fig. 3 (providing details on the number of cases that advanced to full-scale reform over the previous two decades).

country. There are too many policing jurisdictions for them to do that.”¹⁵⁸ Additional resources could, of course, expand investigative possibilities. However, the sheer number of police departments means that even if it is able to ramp up uses of § 12601, the DOJ will likely never be able to respond to each and every problem.

Second, politics influence the DOJ’s willingness to utilize § 12601. After President Obama took office, then-Assistant Attorney General Thomas Perez “told a conference of police chiefs . . . that the Justice Department would be pursuing [§ 12601 actions] much more aggressively than the Bush administration.”¹⁵⁹ President George W. Bush had said on the campaign trail that he did “not believe that the federal government should instruct state and local authorities on how police department operations should be conducted, [thereby] becoming a separate internal affairs division,”¹⁶⁰ and his administration acted accordingly. His DOJ favored a soft approach of voluntary technical-assistance letters.¹⁶¹ During the Obama administration, by contrast, the DOJ resumed the Clinton administration’s practice of using § 12601 to force police departments to agree to binding consent decrees overseen by external monitors.¹⁶²

When President Donald Trump took office in January of 2017, policing experts predicted that the newly appointed attorney general, Jeff Sessions, would again soften DOJ’s use of § 12601 while continuing to play a role in police reform as President Bush’s administration did in investigating and using voluntary technical-assistance letters.¹⁶³

158. *Id.* at 3230 (alteration in original).

159. Heather Mac Donald, *Targeting the Police*, WKLY. STANDARD (Jan. 31, 2011, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/targeting-the-police> [<https://perma.cc/342P-U58Z>].

160. Eric Lichtblau, *Bush Sees U.S. as Meddling in Local Police Affairs*, L.A. TIMES (June 1, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-jun-01-mn-36333-story.html> [<https://perma.cc/EEM5-3QW8>].

161. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3234 (“The prevailing belief was that technical assistance letters could provide departments with the necessary guidance to reform departments locally, without expending additional federal resources monitoring eventual reform efforts.”).

162. *Id.* at 3232–34 (showing in Figure 3 the changes in enforcement action over time).

163. See, e.g., Jon Schuppe, *What Would Jeff Sessions Mean for the Future of Police Reform as Attorney General?* NBC NEWS (Jan. 10, 2017, 4:51 AM), <https://www.nbcnews.com/news/us-news/what-would-jeff-sessions-mean-future-police-reform-attorney-general-n703886> [<https://perma.cc/5XS8-YKUI>] (speculating that although the appointment of Jeff Sessions would result in an overall deprioritization of police reform, DOJ support for voluntary reform programs would continue).

Instead, as discussed in the next Section, Sessions's DOJ dramatically reduced its oversight of local police departments in every respect.

C. Dramatic Pullback of DOJ Enforcement of § 12601

After Attorney General Jeff Sessions assumed control of the DOJ in February of 2017,¹⁶⁴ he engaged in an unprecedented pullback of DOJ enforcement of § 12601—even as compared to the practices of the Bush administration. One of Sessions's first acts as attorney general was to issue a two-page memorandum that announced, “It is not the responsibility of the federal government to manage non-federal law enforcement agencies”¹⁶⁵ and that “[t]he misdeeds of individual bad actors should not impugn or undermine the legitimate and honorable work that law enforcement officers and agencies perform in keeping American communities safe.”¹⁶⁶ Sessions further stated that the DOJ would immediately begin reviewing all existing and contemplated agreements that it had reached with local police departments during the Obama administration.¹⁶⁷

In the weeks that followed, the DOJ sharply curbed federal involvement in local police departments including those proven to have violated constitutional rights. The DOJ sought—unsuccessfully—to block implementation of a consent decree the Obama administration had already entered into with the Baltimore Police Department.¹⁶⁸ It also announced a reversal on its signed agreement with Chicago to negotiate a consent decree: the DOJ would no longer attempt to reform the nation's second-largest municipal police department despite having found, under the Obama administration, a pattern of unlawful and unconstitutional misconduct afflicting the agency.¹⁶⁹

164. Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html> [<https://perma.cc/JTM6-G79B>].

165. Sessions Memorandum, *supra* note 31, at 1.

166. *Id.* at 2.

167. *Id.*

168. See Kevin Rector, *Federal Judge Approves Baltimore Policing Consent Decree, Denying Justice Department Request for Delay*, BALT. SUN (Apr. 7, 2017), <https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-consent-decree-approved-20170407-story.html> [<https://perma.cc/CYV9-8XFZ>] (reporting on the district court's denial of the DOJ's motion to delay implementation of the consent decree).

169. See David Schaper, *Illinois Officials Ask Courts To Order Changes in Chicago Police Policies*, NPR (Aug. 30, 2017, 11:51 PM), <https://www.npr.org/sections/thetwo-way/2017/08/30/547377201/illinois-officials-ask-courts-to-order-changes-in-chicago-police-policies> [<https://perma.cc/YT5M-PQVU>] (“[S]ince coming into office shortly after the Chicago

Three years after Sessions announced the new policy, the DOJ had not opened a single public investigation against an American police department pursuant to § 12601. This hands-off approach differs significantly from that of the Bush administration, which eschewed binding consent decrees but nonetheless continued to investigate and offer voluntary assistance to police departments across country.¹⁷⁰

Session's approach also differed from the Bush administration in two other important respects. In August of 2017, Sessions announced that the DOJ would reverse the Obama administration's efforts to regulate the transfer of surplus military gear to local police departments.¹⁷¹ The next month, Sessions announced that the DOJ would also end its years-long program, through the department's Officer of Community Oriented Policing Services ("COPS"), of providing voluntary, collaborative assistance to local law enforcement agencies seeking advice on best practices in policing.¹⁷²

The changes in DOJ policy left a large gap in the regulatory approach to American policing. For years, the DOJ's use of § 12601, coupled with the COPS voluntary-assistance program, secured reform of some of the nation's most troubled police departments—albeit subject to the limitations described above. The DOJ's recent abandonment of its oversight efforts created an acute need for a different actor to take the lead. As discussed in the next Part, some state attorneys general have stepped up to fill the regulatory gap, arguing that they themselves have standing to pursue equitable relief against local police departments in federal court.

report was released, the Trump administration has taken a more hands-off approach. Attorney General Jeff Sessions has expressed skepticism of such legally binding efforts to reform departments and improve police-community relations.”)

170. Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3228–32 fig.3 (discussing the Bush administration's continued reliance on the statute and uses of technical-assistance letters).

171. Tom Jackman, *Trump To Restore Program Sending Surplus Military Weapons, Equipment to Police*, WASH. POST (Aug. 27, 2017, 7:47 PM), <https://www.washingtonpost.com/news/true-crime/wp/2017/08/27/trump-restores-program-sending-surplus-military-weapons-equipment-to-police> [https://perma.cc/K6P8-KJNS] (describing Sessions' speech at the Fraternal Order of Police convention in Nashville).

172. Devlin Barrett, *Justice Department Ends Program Scrutinizing Local Police Forces*, WASH. POST (Sept. 15, 2017), https://www.washingtonpost.com/world/national-security/justice-department-ends-program-scrutinizing-local-police-forces/2017/09/15/ee88d02e-9a3d-11e7-82e4-f1076f6d6152_story.html [https://perma.cc/27NT-NBJT] (describing how the DOJ rolled back the voluntary-assistance program through COPS).

D. *Efforts by State Attorneys General to Reform Local Police Departments*

During the past two decades, some state attorneys general have sought to overhaul local police departments through binding consent decrees or memoranda of understanding.¹⁷³ The role state attorneys general might play in police reform has gained new significance in light of the Trump administration's decision not to deploy § 12601. In bringing claims in federal court against their own states' police departments and governing municipalities, state attorneys general confront a basic problem: On what basis do they have standing to ask federal judges to order broad equitable remedies for police violations of federal rights? Every plaintiff in federal court must satisfy the standing requirements of Article III: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury asserted and the defendant's alleged misconduct; and (3) it must be likely that a favorable judicial ruling will address the injury complained about.¹⁷⁴ In *Lyons*, recall, a chokehold victim *himself* seeking an injunction against the LAPD under § 1983 did not meet these Article III requirements.¹⁷⁵ State attorneys general would seem to be in an even weaker position because neither § 1983—which gives “citizen[s] . . . or other person[s]” a cause of action—nor any other federal statute specifically authorizes a state attorney general to bring claims against a police department in federal court.¹⁷⁶ Recognizing this

173. Although most of these efforts have involved invocation of the *parens patriae* doctrine in federal court, some have relied exclusively on state court remedies. One example is the recent action by California Attorney General Xavier Becerra, who reached an out-of-court collaborative agreement with the San Francisco Police Department to overhaul the department's policies and procedures related to officer uses of force, community policing, recruitment, hiring, and officer accountability. See Press Release, Cal. Office of the Att'y Gen., Attorney General Becerra Takes On Independent Review of San Francisco Police Reforms (Feb. 5, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-takes-independent-review-san-francisco-police-reforms> [<https://perma.cc/S8NV-HS6X>]. California has a unique state statute, Cal. Civ. Code § 52.3, that, much like its federal counterpart, permits the California Attorney General to obtain equitable and declaratory relief in California state court in cases of police misconduct. For more than twenty years, the California Attorney General has relied on this statute to secure through state court processes reforms of local police departments. See Anita Chabria & Kate Irby, *California Steps In To Oversee Police Reform After Trump Administration Pulls Out*, SACRAMENTO BEE (Feb. 6, 2018, 6:16 PM), <https://www.sacbee.com/news/local/article198562044.html> [<https://perma.cc/T7DJ-2LA3>] (“In 1999, California investigated and later sued the Riverside Police Department, settling with a consent decree to reform the agency.”).

174. *Bennett v. Spear*, 520 U.S. 154, 167 (1997); see also *supra* note 16 and accompanying text.

175. See *supra* notes 20–22 and accompanying text.

176. Here, the best analysis comes from the decision of the U.S. Court of Appeals for the Fourth Circuit in *Virginia Office for Protection & Advocacy v. Reinhard*, 405 F.3d 185 (4th Cir.

hurdle, some state attorneys general have asserted standing based on the common law doctrine of *parens patriae*—which permits states to sue to protect their quasi-sovereign interests, including in the well-being of the state’s population—and have argued that it is adequate to meet the requirements of Article III.

The most prominent recent example is from Chicago. After Attorney General Sessions announced the DOJ would no longer use its authority under § 12601 to reform the CPD, then-Illinois Attorney General Lisa Madigan sued the City of Chicago, asserting claims against its police force under § 1983, the Illinois Civil Rights Act of 2003, and the Illinois Human Rights Act. In the lawsuit, Madigan sought broad injunctive relief to address CPD misconduct that, she contended, disproportionately affected Black and Latino residents.¹⁷⁷ Because § 1983 does not specifically give state attorneys general authority to seek relief in federal district court, Madigan argued that the *parens patriae* doctrine authorized her to act to protect the interests of its residents.¹⁷⁸ Madigan claimed that the interests that provided a basis for standing included the “health and well-being . . . both physical

2005). That court held that a state agency is not a “person” entitled to bring a lawsuit under § 1983. *Id.* at 190. The court’s analysis combined plain meaning analysis, statutory construction, and legislative history. The court wrote:

The word “person” in a federal statute generally includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” At the same time, the Supreme Court has held that “person” should generally not be construed to include the sovereign. . . . [T]he presumption that “person” does not include the sovereign may be overcome only by an “affirmative showing of statutory intent to the contrary.”

Id. at 189 (citations omitted) (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000)). As to the possibility of statutory intent, the court explained that the state “has not presented us with, and we are not aware of, any affirmative evidence of statutory intent to allow suits by sovereigns under § 1983 that would overcome the general presumption that ‘person’ in a statute does not include the sovereign.” *Id.* at 190. Indeed, the statutory history cuts the other way, because § 1983 “was enacted most specifically to help enforce the Fourteenth Amendment rights of the persecuted to equal protection under the laws” and there exists “no affirmative indication that Congress sought to protect the rights of sovereign entities as well.” *Id.* The court viewed the Supreme Court’s *Will* decision as providing additional support for its analysis:

Will established that Congress did not intend for “person” in § 1983 to include the sovereign for purposes of determining who may be sued. And, a term is presumed to have the same meaning throughout a statute. Indeed, that presumption is “at its most vigorous” when the term in question is repeated in the same sentence, as it is here.

Id. (citations omitted) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)); *see also* *Illinois v. City of Chicago*, 137 F.3d 474, 477 (7th Cir. 1998) (citing *Will* to conclude that a state “can be neither plaintiff nor defendant in a § 1983 case”).

177. *City of Chicago* Complaint, *supra* note 32, at 1–4 (articulating the statutory basis for the claim, as well as the reliance on *parens patriae*).

178. *See id.* at 4–6 (elaborating on the *parens patriae* basis for Madigan’s claim).

and economic” of Chicago residents who are victims of police misconduct¹⁷⁹ along with the state’s “quasi-sovereign interest in the prevention of present and future harm to its residents, including individuals who are, have been, or would be victims of the City’s unconstitutional law enforcement practices.”¹⁸⁰ Further, Madigan asserted, there were “proprietary interests” at stake given that taxpayers pay “billions of dollars annually on health care benefits and services for Illinois residents enrolled in Medicaid,” including for nearly “1 million Chicago residents.”¹⁸¹ In sum, Madigan claimed, “a substantial segment of the residents of the State of Illinois” is affected in some way by the CPD’s pattern of misconduct—and that she, as attorney general, had *parens patriae* standing to remedy the problem in federal court.¹⁸²

These arguments were not entirely novel. On occasion, federal courts have granted state attorneys general *parens patriae* standing in cases of police misconduct. For instance, in 2001 then-New York Attorney General Eliot Spitzer successfully invoked *parens patriae* standing in federal district court in an action against the Wallkill Police Department.¹⁸³ Spitzer alleged that officers of the Wallkill Police Department “routinely and openly used their powers to target women, critics, and perceived enemies of the Department, by making traffic stops without having reasonable suspicion to do so and by committing various acts of harassment, all in violation of the federal and state law.”¹⁸⁴ The court agreed that the state had standing in the case. It concluded that New York, represented by Spitzer, had a “strong quasi-sovereign interest in protecting law-abiding New Yorkers (including especially women) from systemic, unlawful, discriminatory and retaliatory police tactics carried out with official knowledge and sanction.”¹⁸⁵ The court also reasoned that the alleged pattern of misconduct affected a sufficiently large segment of the population—potentially all motorists and women in the community—to justify legal

179. *Id.* at 5.

180. *Id.*

181. *Id.* at 6.

182. *Id.* at 5.

183. *New York v. Town of Wallkill*, No. 01-Civ-0364 (CM), 2001 U.S. Dist. LEXIS 13364, at *2 (S.D.N.Y. Mar. 16, 2001).

184. *Id.*

185. *Id.* at *3.

action by the state.¹⁸⁶ Further, the court emphasized, standing was proper because the *Lyons* decision had made it “exceedingly difficult” for any private litigant to bring a similar claim in federal court.¹⁸⁷

There is some obvious appeal in allowing a state attorney general to reform, through federal litigation, police departments that violate federal constitutional rights—particularly if the DOJ is not willing to act. Nonetheless, there remains a question whether, in the absence of statutory authority to sue, state attorneys general should be able to proceed under the doctrine of *parens patriae*. The next Part explores that question by examining the history and limits of the *parens patriae* doctrine in order to assess its benefits and risks in cases involving police misconduct.

II. THE LIMITS OF *PARENS PATRIAE* STANDING

To understand whether courts should interpret the *parens patriae* doctrine to allow state attorneys general standing to seek equitable relief against police departments in their jurisdictions, it is useful to consider the history and purpose of the doctrine. Historically, *parens patriae* standing has been a powerful basis on which state governments have brought lawsuits to remedy problems that could not otherwise be addressed by private litigants. In recent decades, courts have facilitated these kinds of lawsuits by expanding the contours of *parens patriae* standing. States, in turn, have made frequent use of the doctrine in state and federal court to protect their environments,¹⁸⁸ safeguard consumers,¹⁸⁹ remedy discriminatory employment practices,¹⁹⁰ sue

186. *Id.* at *7, *13–17 (discussing why the suit served to prevent “injury to a . . . substantial segment of the population” (omission in original) (quoting *New York v. 11 Cornwell Co.*, 695 F.2d 34, 39 (2d Cir. 1982))).

187. *Id.* at *18–21 (discussing why *Lyons* and other cases have substantially limited the ability of private litigants to bring suits seeking similar relief).

188. *See, e.g., California v. Auto. Mfg. Assoc. (In re Multidistrict Vehicle Air Pollution M.D.L. No. 31)*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (involving states using *parens patriae* standing in an antitrust action stemming from an agreement to refrain from developing pollution-control devices for automobiles); *State v. Exxon Mobil Corp.*, 126 A.3d 266, 275, 289 (N.H. 2015) (involving the state seeking damages for environmental contamination on behalf of state citizens through *parens patriae* standing).

189. *See, e.g., Edmond v. Consumer Prot. Div. (In re Edmond)*, 934 F.2d 1304, 1309–13 (4th Cir. 1991) (considering a *parens patriae* action involving the Maryland Consumer Protection Act).

190. *See, e.g., New York v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 811–16 (N.D.N.Y. 1996) (involving a state asserting *parens patriae* standing to challenge racial discrimination in hiring).

tobacco companies,¹⁹¹ and, in some cases, curb abusive police practices.¹⁹²

State attorneys general marching to court to vindicate the rule of law might seem like a good thing—and a contrast to a long history of states themselves being sued for violating individual liberties. However, *parens patriae* standing comes with considerable concerns. This Part discusses those concerns with a particular focus on state attorneys general asserting *parens patriae* standing in lawsuits against their own cities in federal court to remedy police misconduct. It begins, in Section A, with a brief summary of the origins and contemporary features of *parens patriae* standing. Section B then considers the problems with granting *parens patriae* standing in the absence of a statutory grant. Section C provides a detailed synopsis of how the U.S. Court of Appeals for the Third Circuit, the only federal appellate court thus far to consider the issue, applied the *parens patriae* doctrine to permit a state attorney general to seek equitable relief against a local police department—and the cautionary tale that decision provides.

A. *History and Elements of Parens Patriae Standing*

In a *parens patriae* action, the state sues in its sovereign capacity and is the named plaintiff in the lawsuit. The concept of *parens patriae* originates in the royal prerogative: the powers of the King, as “father of the country,” to act on behalf of individuals lacking the legal capacity to protect themselves.¹⁹³ In the U.S. system, courts have long recognized *parens patriae* as a common law power of state legislatures. As the Supreme Court has explained:

This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . to be exercised in

191. See, e.g., *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 971 (E.D. Tex. 1997). The court in this case defended the use of *parens patriae*:

In the Court’s opinion, [*parens patriae* as] a basis for suit has long been available to the State. . . . In this case, the State has simply dusted off a long recognized legal theory and seeks to use it to further the purposes of the statutes in question and right the alleged wrongs involved in this matter.

Id.

192. See *supra* Part I.D.

193. See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (“Traditionally, the term was used to refer to the King’s power as guardian of persons under legal disabilities to act for themselves.”).

the interests of humanity, and for the prevention of injury to those who cannot protect themselves.¹⁹⁴

Separate from that legislative power, modern courts have created a common law doctrine of *parens patriae* standing.¹⁹⁵ Such standing allows the state to sue to redress an injury to its “quasi-sovereign” interests.¹⁹⁶ The Supreme Court has described that interest as “a judicial construct that does not lend itself to a simple or exact definition.”¹⁹⁷ According to the Court, “quasi-sovereign” interests that give rise to state standing in court “consist of a set of interests that the State has in the well-being of its populace” and “are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.”¹⁹⁸ That is to say, in a *parens patriae* action, the state is not simply representing private citizens. Instead, the Court has explained:

In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.¹⁹⁹

194. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (alteration in original) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

195. *See, e.g.*, *New York v. New Jersey*, 256 U.S. 296, 302 (1921) (holding that New York had *parens patriae* standing to sue to enjoin the discharge of sewage into the New York harbor); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 239 (1907) (holding that Georgia had standing to sue to enjoin the discharge of fumes from a Tennessee copper plant); *Missouri v. Illinois*, 180 U.S. 208, 248 (1901) (finding that Missouri had *parens patriae* standing to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River).

196. *Alfred L. Snapp & Son*, 458 U.S. at 601.

197. *Id.*

198. *Id.* at 602. On the standing of states to sue in a proprietary or sovereign capacity, including to enforce state laws, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 446–78 (1995).

199. *Alfred L. Snapp & Son*, 458 U.S. at 607.

As to the first of these two categories, the Supreme Court “has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior.”²⁰⁰ But it has said that “more must be alleged than injury to an identifiable group of individual residents” and that “the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.”²⁰¹ In making this assessment, the Court has observed, “[o]ne helpful indication . . . is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”²⁰² In other words, the harm should be general enough that it would attract the attention of lawmakers. As to the second interest, the Court has said that the state is entitled to act as *parens patriae* to “ensur[e] that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system,” including unimpeded access to interstate commerce and to the benefits of federal statutory regimes.²⁰³

In early years, state *parens patriae* lawsuits typically involved claims for injunctive relief.²⁰⁴ However, states now regularly also seek monetary damages through such suits.²⁰⁵ Depending on the nature of the claim and underlying state laws, the state may distribute the proceeds of these lawsuits to individuals or retain them in the state treasury.²⁰⁶ Not surprisingly, many *parens patriae* lawsuits are brought against private parties. Those brought against other government entities have typically involved lawsuits that cross state lines to address the activities of a sister state.²⁰⁷ *Parens patriae* lawsuits in which one

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 608.

204. *See, e.g.,* Missouri v. Illinois, 180 U.S. 208, 216 (1901) (involving a *parens patriae* claim by Missouri seeking an injunction against the discharge of sewage into the Mississippi River by the sanitary district of Chicago); People v. Tool, 86 P. 224, 225–26 (Colo. 1905) (involving a *parens patriae* claim for an injunction to prevent election fraud).

205. *See, e.g.,* State v. LG Elecs., Inc., 340 P.3d 915, 916–17 (Wash. Ct. App. 2014) (involving a *parens patriae* claim for damages under a state consumer-protection law); State v. Hess Corp., 20 A.3d 212, 214 (N.H. 2011) (involving a *parens patriae* claim for damages for groundwater contamination).

206. *See* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 391–405 (1999) (discussing the disposition of proceeds from *parens patriae* antitrust cases).

207. *See, e.g.,* Pennsylvania v. West Virginia, 262 U.S. 553, 581 (1923); Kansas v. Colorado, 206 U.S. 46, 47 (1907); Missouri v. Illinois, 180 U.S. at 208–09.

part of a state sues another part of that same state—such as the state suing one of its cities—appear to be comparatively rare.²⁰⁸ Finally, it bears mentioning that some courts have insisted that *parens patriae* standing “requires a finding that individuals could not obtain complete relief through a private suit,”²⁰⁹ but, as discussed in further detail below, the precise meaning of that requirement is not always clear.²¹⁰

The Supreme Court’s 1982 decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*²¹¹ illustrates many of the aspects of a *parens patriae* lawsuit and the broad contours of the modern doctrine. In *Snapp*, the Commonwealth of Puerto Rico sued Virginian apple growers in federal court.²¹² Asserting standing as *parens patriae* for Puerto Rican migrant farmworkers, the Commonwealth of Puerto Rico alleged violations of the federal Wagner-Peyser Act, the Immigration and Nationality Act of 1952, and associated implementing regulations.²¹³ These laws operated to give U.S. workers, including citizens of Puerto Rico, an employment preference over temporary foreign workers so as to ensure that the working conditions of domestic employees were not adversely affected by employment of foreign workers and to prohibit discrimination against U.S. employees.²¹⁴ Puerto Rico alleged that the defendants had 787 job openings for temporary farm labor to pick the 1978 apple crop in Virginia, and they had violated federal law by hiring foreigners over Puerto Rican migrant farmworkers and by subjecting the Puerto Rican workers they did employ to more burdensome employment conditions than those applied to the temporary foreign workers.²¹⁵

208. Nearly a century ago, the Supreme Court held that states lack power to sue the federal government in *parens patriae*. See *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (“It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.”); cf. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (holding that Massachusetts had constitutional standing to challenge the EPA’s failure to promulgate regulations under the federal Clean Air Act, stating that because of procedural protections Congress itself had created and “Massachusetts’ stake in protecting its quasi-sovereign interests,” the state was “entitled to special solicitude in our standing analysis”).

209. *New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part*, 718 F.2d 22 (2d Cir. 1983) (en banc).

210. See *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 101 (D. Mass. 1998) (“This ‘requirement’ is no more than another formulation of the general *parens patriae* standing consideration that the state be more than a nominal party in a private dispute.”).

211. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982).

212. *Id.* at 597.

213. *Id.* at 594–95.

214. *Id.* at 595–96.

215. *Id.* at 597–98.

Puerto Rico sought declaratory and injunctive relief.²¹⁶ The district court held that while Puerto Rico, like states, may assert *parens patriae* interests, it lacked standing in the case against the Virginia apple growers because of the small number of individuals involved—787 workers out of a total population of nearly three million—and the minimal impact upon Puerto Rico’s economy from loss of these temporary jobs.²¹⁷ The circuit court reversed and the Supreme Court affirmed that ruling.²¹⁸

The Supreme Court reasoned that focusing on the 787 job opportunities was “too narrow a view of the interests at stake.”²¹⁹ Puerto Rico also had “a substantial interest in assuring its residents that it will act to protect them from [unlawful discrimination],” and that interest swept beyond the 787 workers involved in the particular case.²²⁰ The Court further found that Puerto Rico had an independent interest in acting to ensure its residents were able to take full advantage of the employment opportunities established and protected by federal statutory law.²²¹ Thus, Puerto Rico was not simply standing in for the injured farm workers—it had broader interests in ensuring compliance with federal law.

The *Snapp* Court might have followed the reasoning of the district court and trimmed the reach of *parens patriae* standing, but instead, it endorsed a broad conception of the doctrine that gave states a green light to litigate on this basis. At the same time, *Snapp* left unclear some key aspects of the doctrine. On the facts before it, the Supreme Court upheld Puerto Rico’s right to sue, but the Court—unsurprisingly—did not provide a precise yardstick for determining when a state has a sufficient interest to invoke *parens patriae*. In particular, *Snapp* did not resolve some long-standing questions about how to calculate the number of affected citizens for purposes of determining whether a state has standing. In *Snapp*, the Supreme Court said the state had “alleged injury to a sufficiently substantial segment of its population,”²²² but it did not supply a definitive test for determining when the requirement is met. Other cases have used different terms, referring to the interests

216. *Id.* at 598–99.

217. *Id.* at 599.

218. *Id.* at 599, 610.

219. *Id.* at 609.

220. *Id.*

221. *Id.* at 609–10.

222. *Id.* at 607.

of “the inhabitants of a state”²²³ or to the state protecting “all or a considerable portion of its citizens.”²²⁴ It is not at all clear what fraction of a population must be affected in order for the state to act. *Snapp* also left open questions as to how the relevant community is to be defined for purposes of determining the baseline. For example, is it geography that counts? If so, is the baseline a specific locality or the entire state? Likewise, should everyone in a defined community be counted? Or does the relevant population only include those likely to be affected by the activities complained about? Neither in *Snapp* nor in later cases has the Supreme Court provided clarity.

From the perspective of states, the absence of well-defined limits to *parens patriae* has created opportunity. Since *Snapp*, states have asserted *parens patriae* standing in a wide array of cases in state and federal court and under state and federal law.²²⁵ Although not all invocations of *parens patriae* have succeeded, and thus the doctrine is not unlimited,²²⁶ *parens patriae* has emerged as a powerful tool for states to sue.

Given this trend, and with increased national attention on misconduct by police officers, it is not surprising that a few state attorneys general have turned to *parens patriae* as a basis for intervening in local police departments. Indeed, invocation of *parens patriae* is an almost natural development when police departments are unwilling or unable to reform themselves and other possible forms of external pressure—such as individual civil rights lawsuits, DOJ interventions, or state or federal legislative measures—are either inadequate or do not emerge. Whether attorneys general are predisposed to take a role in police reform because they are the chief law enforcement officers of the state or they are simply inclined to

223. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

224. *Kansas v. Colorado*, 185 U.S. 125, 142 (1902).

225. *See, e.g., AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 391 (4th Cir. 2012) (concluding that *parens patriae* allows states to sue on behalf of citizens when the interests of a group of citizens are at stake, so long as they are pursuing the quasi-sovereign interest of the state); *West Virginia ex rel. Morrissey v. Pfizer, Inc.*, 969 F. Supp. 2d 476, 492 (S.D. W. Va. 2013) (holding that the power to sue as *parens patriae* is inherent to each state); *see also infra* notes 235–39 (providing further examples).

226. *See, e.g., Illinois v. Life of Mid-Am. Ins.*, 805 F.2d 763, 766 (7th Cir. 1986) (holding, in a case in which the Illinois attorney general sued for damages asserting a violation of the federal RICO Act and state consumer-fraud laws, that where the complaint was limited to injury suffered by eight consumers, the state had failed to assert a quasi-sovereign interest and was merely a nominal party lacking *parens patriae* standing); *Sec’y of Labor v. Turnage*, 657 F. Supp. 1033, 1035–36 (D.P.R. 1987) (holding that *parens patriae* standing was inappropriate because the state was seeking merely to “litigat[e] a personal claim” of one of its citizens).

intervene to pick up the slack, state attorneys general have asserted *parens patriae* standing as a basis for actions against cities. The remainder of this Part discusses concerns that arise when state attorneys general make use of *parens patriae* in this manner.

B. Two Concerns About Parens Patriae Standing

The *parens patriae* doctrine can be a powerful tool for state attorneys general to access federal courts and secure relief for their residents. But the application of this doctrine also generates significant concerns. One concern implicates the allocation and exercise of governmental power within a state and as between the state and federal governments. A second concern relates to the use of *parens patriae* to expand the scope of federal statutory causes of action. These concerns are discussed in turn.

1. *Allocations of Power.* When the state attorney general asserts *parens patriae* standing and a federal court accepts that claim, there are other governmental actors whose interests may well be implicated. At the federal level, Congress has an interest in how litigants use, and how courts interpret, its statutory law and in the scope of federal jurisdiction. So too, the federal executive branch has an interest in how federal statutory laws are used, particularly if, as in the context of police misconduct, Congress has empowered the DOJ or another federal entity to determine when and how such laws are enforced.

At the state level, the state legislature has an interest in litigation pursued on the state's behalf—especially when it comes to federal lawsuits against the state's own cities. In the context of police misconduct, the state legislature might well prefer to address the problem itself, through state laws, rather than have federal courts impose remedies under federal law. Likewise, a police department or governing municipality sued by the state attorney general in federal court loses the opportunity to have other branches of state government—which might be more attentive to local interests—address police misconduct. In many states, the attorney general is elected. He or she might thus be of a different political party than the governor, with different policy preferences and goals and perhaps might even be eyeing the governor's job. *Parens patriae* lawsuits to address police misconduct thus raise the possibility that one state executive official—the attorney general—pursues a particular remedy

that the governor and other state executive officials oppose.²²⁷ State attorneys general who sue in federal court under federal law also bypass state courts, which may have interests in the development of legal rules governing police conduct within their jurisdiction as well.

None of this is to say that, as a general matter, any of these other governmental actors' interests are so pressing that they should necessarily prevent state attorneys general from litigating in federal court on the basis of *parens patriae*. For instance, a lawsuit by a state attorney general does not prevent the state legislature or other entities from also acting on a given issue; the attorney general's intervention might come only after other actors have failed to do anything and there is widespread belief that somebody should step up; and other actors might not oppose the attorney general's lawsuit and might even have taken affirmative steps to give it their blessing. Context obviously matters. Still, it remains important to consider the ways in which aggressive uses of *parens patriae* might alter allocations and exercises of governmental power.

2. *Extension of Federal Statutory Claims.* In the context of *parens patriae* suits involving police departments, state attorneys general have asserted causes of action under 42 U.S.C. § 1983.²²⁸ Originally enacted as part of the Civil Rights Act of 1871,²²⁹ § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

227. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 YALE L.J. 2100, 2143–54 (2015) (arguing that, as evidenced by their decisions whether or not to defend challenged state statutes, elected state attorneys general are increasingly motivated by partisan concerns).

228. Section 1983 does not itself confer federal jurisdiction. Instead, in a § 1983 suit the sources of federal jurisdiction are 28 U.S.C. § 1331 (the general federal question statute) and 28 U.S.C. § 1343(3) (providing for federal court jurisdiction “[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution . . . or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States”). State courts have concurrent jurisdiction over § 1983 actions. *Haywood v. Drown*, 556 U.S. 729, 734–35 (2009).

229. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress²³⁰

One familiar question that arises under § 1983 asks who counts as a person acting under color of state law and is thus subject to liability. On that issue, the Supreme Court has held that neither a state²³¹ nor state officials sued in their official capacities for monetary damages are persons subject to suit under § 1983.²³² However, a state officer sued in his or her official capacity for prospective injunctive relief is a person subject to suit.²³³ Cities and local governments whose customs, policies, or practices caused a deprivation of a federal right are also persons subject to lawsuits for damages and other remedies under § 1983.²³⁴ A separate question is who can act as a plaintiff in a § 1983 suit. In particular, may a state, though not a person for purposes of liability, bring a § 1983 action? State attorneys general have persuaded some courts that the state indeed has standing as a plaintiff even though the state is *not* a person subject to § 1983 liability as a defendant.

Before turning to consider *parens patriae* standing in § 1983 cases, it bears mentioning that courts have also allowed states to proceed as *parens patriae* in cases involving other federal statutes similarly lacking a provision authorizing states to sue. These cases have included Title III of the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973,²³⁵ the anticonspiracy provisions of the Civil

230. 42 U.S.C. § 1983 (2018).

231. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (explaining that “in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law,” including “[t]he doctrine of sovereign immunity”).

232. *Id.* at 71 (explaining that an official-capacity suit against a state officer “is not a suit against the official but rather is a suit against the official’s office. . . [and] is no different from a suit against the State itself” (citation omitted)). State government officials sued in their individual capacities are persons against whom monetary damages can be sought. *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

233. *Will*, 491 U.S. at 71 n.10; *see also Ex parte Young*, 209 U.S. 123, 159–60 (1908) (explaining that a state officer seeking to enforce an unconstitutional statute is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct”).

234. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700–01 (1978).

235. *See New York v. Mid Hudson Med. Grp.*, 877 F. Supp. 143, 146 (S.D.N.Y. 1995) (holding, in a case involving allegations of discrimination against individuals with hearing impairments, that the state could bring a *parens patriae* suit to enforce the Americans with Disabilities Act and the Rehabilitation Act of 1973). The *Mid Hudson* court explained that although it had not found any “case[s] holding that a state has *parens patriae* standing to sue under the ADA or under Section 504 . . . states have frequently been allowed to sue in *parens patriae* to other [wise] enforce federal statutes that . . . do not specifically provide standing for state attorneys general.” *Id.*

Rights Act of 1872;²³⁶ the Fair Housing Act;²³⁷ Title II of the Civil Rights Act of 1964;²³⁸ and the Older Workers Benefit Protection Act and the Age Discrimination in Employment Act.²³⁹ In these contexts, as under § 1983, courts have assumed that states may invoke *parens patriae* standing as a general matter and have turned quickly to the question of whether, on the facts of the case, the doctrinal requirements for such standing had been satisfied. Rather than examine, as an initial matter, whether *parens patriae* standing is permitted by or even consistent with the underlying statute, courts have understood such standing as always potentially available.²⁴⁰ By granting state attorneys general the opportunity to move forward as litigants under a *parens patriae* theory, courts appear perfectly willing to expand the enforcement of federal statutes—without regard for what Congress has actually provided for in the statute or the risks associated in stepping beyond the overall regulatory regime.

236. See *New York v. 11 Cornwell Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (holding, in a case involving allegations that a partnership preemptively purchased a home to thwart a state agency plan to buy and turn the property into a housing for mentally challenged citizens, that the state had *parens patriae* standing to sue under § 1985(3)), *vacated in part*, 718 F.2d 22 (2d Cir. 1983) (en banc); *New York v. Operation Rescue Nat'l*, No. 92 Civ. 4884 (RJW), 1993 WL 405433, at *2 (S.D.N.Y. 1993) (holding that the New York attorney general had *parens patriae* standing to seek an injunction under § 1985(3) prohibiting pro-life protesters from presenting Bill Clinton with fetal remains during the 1992 Democratic National Convention because “[d]efendants’ actions affect the general population by fomenting civil disobedience and by requiring extra police, thereby imposing substantial costs in order to enforce the law against defendants”). The anticonspiracy statute is at 42 U.S.C. § 1985(3) (2018).

237. See *Support Ministries for Persons With AIDS v. Vill. of Waterford*, 799 F. Supp. 272, 277 (N.D.N.Y. 1992) (holding, in a case involving allegations of discriminatory zoning practices by village officials against individuals with AIDS, that the state had standing to sue in *parens patriae* under the Fair Housing Act and § 1983 because “the State has alleged an injury to its quasi-sovereign interest in the health and well-being of its citizens”).

238. See *New York v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 813 (N.D.N.Y. 1996) (holding, in a case involving allegations of a commercial club’s discriminatory treatment of African American customers, that the state had *parens patriae* standing under Title II of the Civil Rights Act of 1964, in part because the state was seeking broad equitable relief).

239. See *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 98 (D. Mass. 1998) (holding, in an age discrimination case in which the defendant had laid off workers and sought waivers of claims to receive severance payments, that the state had *parens patriae* standing under the Older Workers Benefits Protection Act and the Age Discrimination in Employment Act because “[t]he subject matter of this litigation implicates the general well-being of the Commonwealth’s residents” in that “[d]iscrimination of any kind, whether based on age, race or handicap, corrodes the social fabric and fosters intolerance and inequality”).

240. See, e.g., *New York v. Utica City Sch. Dist.*, 177 F. Supp. 3d 739, 747–49 (N.D.N.Y. 2016) (holding that the New York attorney general had standing under *parens patriae* to pursue equitable relief against a school district that allegedly denied immigrant students with limited English-language skills the opportunity to enroll in high school).

Although courts have generally understood *parens patriae* standing broadly, it remains unclear just how far this doctrine ought to extend and whether it should apply in police-reform cases. Only one federal appellate court has considered whether the *parens patriae* doctrine grants state attorneys general authority under § 1983 to seek equitable relief against a local police department for violations of federal constitutional rights. The next Section examines that decision and the lessons it provides for assessing future efforts by state attorneys general to address police misconduct.

C. *Parens Patriae and Police Reform*

The only federal appellate court that has considered the application of *parens patriae* to a police-reform case is the Court of Appeals for the Third Circuit in *Pennsylvania v. Porter*.²⁴¹ *Porter* involved a § 1983 suit by the Community Action Unit of the Office of the Pennsylvania Attorney General against the Borough of Millvale and the borough's police department, mayor, council, police chief, and a police officer in connection with alleged violations of Fourteenth Amendment rights by the officer-defendant.²⁴² The state asserted *parens patriae* standing and sought broad injunctive relief barring the defendants from subjecting Millvale residents to unlawful searches and seizures, unconstitutional uses of force, threats, harassment, or other violations of their rights.²⁴³ The district court permitted the Commonwealth to proceed as a plaintiff on the basis of *parens patriae*, and it issued the requested injunction.²⁴⁴ On appeal, the circuit panel ruled that the state lacked such standing.²⁴⁵ The court subsequently

241. *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981) (en banc).

242. *Id.* at 310.

243. *Id.* at 310–11. It is worth noting that the state initially also claimed it could act as an “other person” under § 1983. *Id.* at 327.

244. *Id.* at 312 & n.7 (setting out the provisions of the permanent injunction the district court entered after trial). Several Pennsylvania district court decisions had held that a state can act as *parens patriae* under § 1983. *See, e.g.*, *Pennsylvania v. Flaherty*, 404 F. Supp. 1022, 1024 (W.D. Pa. 1975) (holding that Pennsylvania was permitted to act as a § 1983 plaintiff in a case involving a city's alleged racially discriminatory employment practices for police officers), *vacated on other grounds*, 760 F. Supp. 472 (W.D. Pa. 1991); *Pennsylvania v. Glickman*, 370 F. Supp. 724, 727–28 (W.D. Pa. 1974) (similar holding in case involving firefighters). *But c.f.* *Pennsylvania ex rel. Rafferty v. Phila. Psychiatric Ctr.*, 356 F. Supp. 500, 506 (E.D. Pa. 1973) (rejecting *parens patriae* standing in a § 1983 case involving a discharged nurse's due process and First Amendment suit against a state and federally funded psychiatric center on the ground that “[t]he public interest claimed here is . . . too remote to be encompassed by the doctrine of *parens patriae*”).

245. *Porter*, 659 F.2d at 327 (Garth, J., concurring in part and dissenting in part).

granted rehearing en banc.²⁴⁶ The en banc court affirmed the trial court's decision that *parens patriae* standing applied and mostly upheld the injunction.²⁴⁷

In his majority opinion, Judge Gibbons conceded that Pennsylvania was not a "person" under the language of § 1983; instead, he focused on the "Commonwealth's sovereign interests," beginning with what he called the "occasionally neglected fundamental" principle that the Fourteenth Amendment is "the supreme law of the land in all of Pennsylvania" and "[a]ll executive officers of Pennsylvania, including the Attorney General, have taken the [constitutional] oath . . . to uphold that amendment."²⁴⁸ Further, Gibbons wrote, Pennsylvania is "vitally interested in safeguarding the health and safety of individuals in its territory."²⁴⁹ Gibbons explained that under state law, "the attorney general is the officer responsible for vindicating [all of] the[se] sovereign interests" and, in so doing, is not required to "rely upon the happenstance of suits by individual victims of constitutional violations."²⁵⁰ In its lawsuit, then, Pennsylvania was "advancing significant sovereign interests of its own in the prevention of future violations of constitutional rights of its citizens, in circumstances in which it cannot reasonably anticipate that private enforcement will achieve the protection of those sovereign interests."²⁵¹

Judge Gibbons next offered four additional points to shore up his conclusion that the state had standing. First, he observed, a *parens patriae* lawsuit is not unusual. He wrote that that the "[a]ctions by a government for the prevention of harm to interests shared by all members of the community are no strangers to the federal law of remedies," as evidenced by the fact that the U.S. government has "been a frequent *parens patriae* plaintiff" and that "[p]arens patriae actions by the states are also familiar federal court remedies of long standing."²⁵² Second, Gibbons observed that lower courts in the Third Circuit in particular "have long recognized that the Commonwealth may bring a *parens patriae* action . . . to enforce the fourteenth amendment."²⁵³ Third, Gibbons invoked state law as basis for standing

246. *Id.*

247. *Id.* at 325 (majority opinion).

248. *Id.* at 314–15.

249. *Id.* at 315.

250. *Id.*

251. *Id.* at 316.

252. *Id.*

253. *Id.* at 317.

in the case. He explained that even if the “traditional federal law remedy of a *parens patriae* action” was not available to enforce the Fourteenth Amendment, Pennsylvania law empowers the attorney general to bring actions to “enforce the laws of the Commonwealth,”²⁵⁴ and federal jurisdiction is appropriate where the proceeding is “in vindication of civil rights.”²⁵⁵ Fourth, Gibbons explained, it was no objection that Pennsylvania could have brought a case in state court to address the police misconduct at issue. Gibbons said that Pennsylvania was not required to proceed in state court, and to insist that it do so when it “seeks the aid of a federal court in assisting it in the discharge of its freely acknowledged duty to enforce the provisions of the federal constitution” would be a “perversion of principles of federalism.”²⁵⁶

Writing in dissent in *Porter*, Judge Garth, joined by two other members of the en banc court, set out a series of objections. Garth began by observing that—as the state itself had conceded—Pennsylvania was not a person under § 1983.²⁵⁷ He added that “[i]n so conceding, the Commonwealth apparently recognized that a state itself cannot seek the protection of § 1983 with respect to its own sovereign interests.”²⁵⁸ Garth thus thought the majority decision in favor of standing had itself created a federalism problem: because § 1983 “offers redress to those who are injured under the color of state authority,” to allow a state to “bring suit, against its own instrumentalities and against its own officers” because of “alleged violations, under color of state law, of federal rights belonging to the very state which is suing” would “turn[] the statute on its head.”²⁵⁹ Garth further observed that barring a state from suing under § 1983 would not mean that states lack power to ensure governmental actors comply with constitutional requirements. Instead, Garth explained, Pennsylvania has “the power to *regulate* conduct by its municipalities when that conduct infringes upon the constitutional rights of the Commonwealth’s citizens” even though “Congress has not gone so far as to provide in § 1983 a . . . statutory remedy of which the state can avail itself.”²⁶⁰ According to Garth, § 1983 simply did not permit the state to sue governmental officials who violate federal rights.

254. *Id.* at 318 (quoting 71 PA. CONS. STAT. § 294(b) (repealed 1980)).

255. *Id.*

256. *Id.* at 319.

257. *Id.* at 327 (Garth, J., concurring in part and dissenting in part).

258. *Id.*

259. *Id.* at 327 n.3.

260. *Id.* (emphasis added).

Judge Garth then took up “the alternate ground of *parens patriae* standing also asserted by the Commonwealth”²⁶¹—protecting the interests of Pennsylvania citizens. He concluded that “in this respect as well, *parens patriae* standing is not available to the Commonwealth in this case because the Commonwealth failed to allege and prove injury to a ‘quasi-sovereign’ interest affecting all its citizenry” and instead “has sought to litigate, as a volunteer, personal claims of its individual citizens.”²⁶² According to Judge Garth, even though courts have expanded the doctrine of *parens patriae*, the state must still show two things: (1) “a widespread injury or threat which affects, or could potentially affect, the well being of virtually all of its citizens”;²⁶³ and (2) because *parens patriae* standing may not be used to “vindicate individual or personal rights . . . even when constitutional violations are alleged,”²⁶⁴ that the injury is such that “no individual or group of individuals could seek the same relief”²⁶⁵ as could the state.

Here, Garth concluded, Pennsylvania failed on both points. As to the first point, the harm the state had alleged was “limited to an exceedingly small number of the Millvale community—no more than fifty individuals.”²⁶⁶ Doing the math, Garth found that those fifty individuals represented just “.00004% of the Commonwealth’s entire population.”²⁶⁷ This figure was insufficient for *parens patriae* standing. As to the second point, Garth concluded that ample private remedies were available: the individual victims of the police conduct at issue had already sued and obtained relief.²⁶⁸ In his majority opinion, Judge Gibbons took the position that the injuries suffered by individual citizens gave rise to some broader interests on the part of the state, including in ensuring local officials comply with constitutional requirements and that the state not bear the costs of their failure to do so.²⁶⁹ On that point, Garth complained that the majority had engaged in “attenuated logic and questionable reasoning” and that these separate interests, though set out by Judge Gibbons, had not been

261. *Id.* at 327.

262. *Id.* at 327–28.

263. *Id.* at 329.

264. *Id.*

265. *Id.* at 328.

266. *Id.* at 330.

267. *Id.* at 331.

268. *Id.* at 333.

269. *Id.* at 315–16 (majority opinion).

asserted by the state itself and lacked a basis in the evidentiary record.²⁷⁰

These debates between the majority and dissent in *Porter* demonstrate the difficulties of *parens patriae* standing as a basis for states to reform police practices. Grafting *parens patriae* onto § 1983 asks courts to transform a statute that provides tailored remedies to *individuals* whose constitutional rights were violated by state officials into a mechanism for states themselves to overhaul its own governmental entities. Section 1983, recall, makes state officials who violate the rights of “any citizen of the United States . . . or other person . . . liable to the party injured.” By its very terms, therefore, the statute creates a cause of action and a basis for recovery for individuals, not for state governments. On the remedial side, allowing states to assert *parens patriae* as a basis for obtaining injunctions under § 1983 against police departments is inconsistent with the limitation that the Supreme Court recognized in *Lyons*. There, an individual victim of police misconduct could recover monetary damages under § 1983 but could not obtain injunctive relief because of the low likelihood the police would violate his rights again. *Parens patriae* lawsuits seek to circumvent this limitation on the theory that because the state is invoking the interests of the entire community or some large portion of it, future police misconduct will affect some individuals within that community even if it is impossible to identify those individuals in advance. Section 1983 does allow for injunctive relief, but again, it makes the remedy available only to those individuals whose rights have been violated: under the statute, it is the “party injured” who may bring a “suit in equity.” As *Lyons* makes clear, the statute does not contemplate injunctions on behalf of individuals unable to show that they are likely in the future to suffer a violation of their rights. There might be sensible reasons for allowing states greater latitude when they sue to protect constitutional rights. But rather than courts inferring that states have special leeway, Congress can—and should—specify when

270. *Id.* at 333 (Garth, J., concurring in part and dissenting in part). Even Judge Garth did not seem to entirely foreclose *parens patriae* standing in a § 1983 case. He acknowledged that under different circumstances Pennsylvania might succeed in demonstrating interests sufficient to show *parens patriae*. *Id.* Here, “[e]ven if the Commonwealth had alleged all of the elements leading to a quasi-sovereign interest which appear in the separate opinion of Judge Gibbons, it has failed to offer evidence to prove them.” *Id.* at 334.

and how it wants to authorize states to serve as plaintiffs to enforce federal statutes that safeguard the rights of individuals.²⁷¹

None of this is to conclude that § 1983 can never be used to redress harm to groups of individuals or to secure injunctive relief adequate to prevent police departments from violating constitutional rights in the future. As demonstrated by the recent successful challenge to the stop-and-frisk practices of the New York Police Department,²⁷² § 1983 class actions can protect the rights of large numbers of citizens from abusive police conduct.²⁷³ In contrast to *parens patriae* lawsuits, however, federal class actions are governed by procedural rules designed to protect the interests of class members and ensure the adequacy of representation.²⁷⁴ Those interests do not disappear just because the state attorney general is bringing the case.²⁷⁵ But when state attorneys general are permitted to claim *parens patriae* standing under § 1983,

271. See Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 40 (2014) (“Just as courts limit implied rights of action when private parties sue in a third party capacity, they should limit substitute rights of action for public litigants in the absence of statutory authorization.”).

272. See Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 1:08-cv-01034-SAS) (challenging NYPD’s stop-and-frisk practices and seeking individual damages and injunctive relief).

273. Following a bench trial, the district court found that the NYPD’s stop-and-frisk practices violated the Fourth and Fourteenth Amendments. *Floyd*, 959 F. Supp. 2d at 667. In a separate opinion, the court issued an injunction requiring, among other things, new forms of officer training, new reporting and auditing requirements, a pilot program of officer body cameras, and oversight by an appointed monitor. See generally *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013). After the election of Mayor Bill de Blasio, the city dropped its appeal and the case settled with the parties agreeing to most of the reforms the district court had ordered. Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html> [<https://perma.cc/EY8L-FHFR>].

274. See, e.g., FED. R. CIV. P. 23(a) (setting out requirements for class certification, including a finding that “the representative parties will fairly and adequately protect the interests of the class”); FED. R. CIV. P. 23(b)(3) (requiring that “questions of law or fact common to class members predominate over any questions affecting only individual members” of a proposed class and that a class action be “superior to other available methods for fairly and efficiently adjudicating the controversy”); FED. R. CIV. P. 23(c)(2) (requiring notice to class members); FED. R. CIV. P. 23(e) (requiring court approval of a proposed settlement); FED. R. CIV. P. 23(g)(4) (requiring class counsel to “fairly and adequately represent the interests of the class”).

275. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 530 (2012) (concluding, after describing conflicts of interest, weak opportunities for client monitoring, distortions in the conduct of litigation that result from resource constraints, and risks of inadequate settlement in the *parens patriae* context, that “even when it can be lauded on public policy grounds, *parens patriae* litigation may fail to serve the interests of the citizens most affected”).

they bypass the procedural safeguards that federal law imposes in the class-action context.

Accordingly, whether Judge Gibbons or Judge Garth had the better argument as to whether the conduct by Millvale police officers was sufficiently pervasive and serious to give rise to a state interest to litigate as *parens patriae* is not the point. The whole enterprise of adjudicating state standing on this basis involves a departure from the scope and contours of § 1983. State attorneys general can play a useful role in addressing constitutional violations by police departments within their jurisdictions, including by litigating in federal court. Before that happens, however, more is needed than a creative reading of a statute designed for different purposes. The next Part sets out how best to empower state attorneys general as agents of police reform.

III. EMPOWERING STATE ATTORNEYS GENERAL

Existing laws are largely inadequate to control misconduct in local police departments. Given this reality, it is hardly surprising that state attorneys general have adopted creative doctrinal arguments to support their claims of standing against local police departments in federal court. Although state attorneys general can serve as important agents of police reform, the common law *parens patriae* doctrine is not a reliable avenue forward. Instead, Congress and state legislatures should enact legislation specifically conferring standing upon state attorneys general to sue to obtain equitable relief in federal court against police departments in their jurisdiction to remedy and prevent violations of constitutional rights.²⁷⁶

This approach would keep courts from having to speculate about which kinds of police abuse affect a “sufficiently substantial segment of the population”²⁷⁷ so as to implicate an attorney’s general “quasi-sovereign interests.”²⁷⁸ It would also eliminate the difficulty of determining whether, as a result of *Lyons* and the sheer practicalities of litigation, private individuals “could not obtain complete relief through a private suit.”²⁷⁹ More generally, instead of ad hoc

276. Such legislation might be styled as conferring *parens patriae* standing. The terminology is not important. What matters is that authority would stem from a statute—which would, accordingly specify its scope—rather than be based in a common law doctrine.

277. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

278. *City of Chicago* Complaint, *supra* note 32, at 5.

279. *New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part*, 718 F.2d 22 (2d Cir. 1983) (en banc).

determinations by courts, this approach would allow legislatures to consider and determine the appropriate scope of—and limits to—lawsuits by state attorneys general as part of an overall approach to regulating police departments and protecting constitutional rights. In the end, this approach is likely to generate better and smarter reform. Rather than relying on an ambiguous doctrine to ground litigation efforts, state attorneys general would have a clear blueprint—and potentially a mandate—to pursue corrective measures. Empowering state attorneys general in the manner this Article proposes holds the promise of a new and successful remedy for police misconduct.

A. *Congressional Authorization*

Given the uncertainties of the common law *parens patriae* standing doctrine, it makes considerable sense to insist that Congress, as a statutory matter, confer standing upon state attorneys general before courts permit them to act as plaintiffs to enforce federal laws protecting the interests of their citizens. The case for congressional authorization is particularly strong with respect to states suing cities under § 1983, or comparable statutes, alleging police violations of constitutional rights and pursuing broad injunctive relief to overhaul local police departments.

1. *Clarity and Constraint.* First, congressional authorization would provide much needed clarity and constraint on efforts by state attorneys general to reform local police departments. The current approach to deciding by inference whether *parens patriae* standing is available is a clumsy enterprise. As noted, the Supreme Court insists that to assert *parens patriae* standing, states must be pursuing something more than the interests of individual state citizens, and lower courts dutifully repeat this requirement. In practice, though, courts have been willing to recognize an interest on the part of the state not to have their citizens subject to violations of federal law. If that suffices for finding a distinct state interest then there is very little meaning to the requirement; in virtually every case where there are citizens who have been injured, the state will be able to argue that it would prefer that those injuries—or others like them—did not arise. Yet with so much case law now built up around the notion of a quasi-sovereign interest, courts cannot be counted upon to abandon it in favor of a more precise yardstick for determining whether a state has standing. So too, courts are not likely to dispense with the oft-recited rule that *parens patriae* standing is not available to a state if individuals

who have been injured could themselves obtain complete relief. That rule, too, is an unlikely source of constraint. Litigation is inevitably expensive and otherwise burdensome. There are few cases in which one would confidently conclude that the costs do not deter somebody from seeking a remedy, and thus it is almost always possible to posit that a lawsuit by a state attorney general would add value. And if for some unlikely reason that conclusion is not persuasive, there are always other potential victims—who, of course, cannot act because nothing has happened to them yet—whose interests the state can anticipatorily protect. In its modern form, *parens patriae* standing tends to look like the state stepping up to litigate on behalf of injured individuals.

Rather than depend upon courts to determine and apply the requirements of *parens patriae* standing, it would be far better for legislatures to set out when state governmental standing is available and how the requirements for it can be met. Statutory specification of standing would avoid the need for courts to speculate about “quasi-sovereign interests” and other concepts that have proven elusive. It would also allow for tailoring—for recognition of the power of states to sue under some statutes but perhaps not others, to sue under specific statutes only in given circumstances, or to seek certain kinds of relief (like an injunction) but not others (like damages). On this approach, when state attorneys general sue under a federal statute in order to protect the rights of their citizens, the court would ask whether the statute itself confers standing upon the state either in its sovereign capacity or to litigate on behalf of its citizens. A plain reading of § 1983 is that it does not,²⁸⁰ and thus, absent congressional authorization, state attorneys general lack standing under § 1983.

In the context of lawsuits against police departments, there are some additional considerations that also countenance against courts inferring *parens patriae* standing on their own. Here, the concern is not that the state attorney general is really just invoking *parens patriae* to act as the lawyer for injured individuals. Instead, it is that the interests of specific individuals who have suffered abuses by the police are of little significance to the litigation because the lawsuit is just a vehicle for the state attorney general to overhaul a bad local police department. In other words, *parens patriae* standing turns § 1983 into a tool for structural reform of police departments led by the state attorney general.

280. See *supra* note 176.

There might well be sound reasons for reforming a particular police department, but a lawsuit under § 1983 by a state attorney general asking a federal court to infer *parens patriae* standing is a poor means to do it. As explained above, § 1983 is designed to provide remedies to individuals who suffer violations of their own rights. It is not and has not served well as a broad mechanism to overhaul the structure and operations of police departments.²⁸¹ Allowing state attorneys general to invoke § 1983 as the basis for transforming police departments within their own jurisdictions represents a novel and unwise use of the statute.²⁸² Because § 1983 is not designed as a tool for state attorneys general to restructure local police departments, allowing it to be used as such means proceeding without legislative specification of the triggers for intervention, the requirements of proof, available defenses, the changes that can be obtained, the nature of future oversight, the means to demonstrate compliance, or other relevant considerations.

When an individual sues under § 1983, the court's task is to assess whether he or she has proven injury and, if so, to impose a remedy tailored to the injury the individual has suffered. When state attorneys general assert *parens patriae* standing to sue the state's own police departments under § 1983 and ask, by way of remedies, for broad reforms, courts operate with far less precision. Indeed, in cases where a state is suing its own city, there might not even be a real defendant to push back vigorously on the state's allegations, to question the scope of remedies that are sought, or to appeal the outcome of the case. Instead, the city—a subordinate component of state government—might simply go along with the state's assertions and demands. By most accounts, Chicago, which entered into a consent decree with the Illinois attorney general, offered very little resistance to the lawsuit.²⁸³ A city might also offer little resistance to a lawsuit brought by the federal government, but in such instances the state itself offers a potentially separate source of resistance.

Federal structural-reform litigation, though successful in addressing a wide range of constitutional violations, has long presented

281. See Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 277 (2017).

282. See *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (explaining, in a § 1983 case against the Philadelphia Police Department, that “principles of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances”).

283. Ruthhart et al., *supra* note 33 (detailing the Chicago mayor's hesitant but eventual acceptance of the consent decree).

concerns about the size and scope of judicial intervention, the resulting impact upon the powers and operations of state and local governments, and accountability for reform measures.²⁸⁴ In recent cases, the Supreme Court has disapproved broad injunctive relief in structural-reform cases.²⁸⁵ These concerns are magnified when, rather than litigation brought by individual victims or the DOJ, state attorneys general and city mayors collaborate in federal court to reform police departments. In addition, *parens patriae* lawsuits typically preclude private actions raising the same claims.²⁸⁶ In this regard, *parens patriae* lawsuits by a state against its own city present a unique risk that the lawsuit will serve to shield the city from other forms of litigation and, perhaps, violate the due process interests of individual litigants.²⁸⁷

The consent decree in Attorney General Madigan's excessive-force lawsuit against Chicago requires the CPD to implement reforms that cover virtually every aspect of policing. Among the obligations are the integration of "a community policing philosophy into CPD operations" with "systematic use of community partnerships and problem-solving techniques" and with "[a]ll CPD members . . . responsible for furthering this philosophy";²⁸⁸ a specification that "CPD will provide police services to all members of the public without bias and will treat all persons with the courtesy and dignity which is inherently due every person as a human being";²⁸⁹ a requirement that "CPD members address individuals, using the names, pronouns, and titles of respect appropriate to the individual's gender

284. See, e.g., Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294–95 ("Nominal defendants [in structural reform cases] are sometimes happy to be sued and happier still to lose."); Michael W. McConnell, *Why Hold Elections? Using Consent Decrees To Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 317 (1987) (arguing that government officials may rely upon consent decrees to "block ordinary avenues of political change").

285. See, e.g., *Horne v. Flores*, 557 U.S. 433, 448 (2009) ("[I]nstitutional reform injunctions often raise sensitive federalism concerns."); *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (overturning, as "inordinately—indeed, wildly—intrusive" a district court's system-wide injunction in a class action lawsuit brought by prisoners involving claims of denial of access to courts and counsel because of limitations on available legal resources in the prison setting).

286. See *Lemos*, *supra* note 275, at 500 ("Although the case law on the preclusive effect of public aggregate litigation is surprisingly sparse, the prevailing view is that the judgment in a state case is binding on every person whom the state represents as *parens patriae*." (quotations omitted)).

287. See *id.* at 531 ("The current state of affairs is not just incoherent; it is also unconstitutional to the extent that *parens patriae* suits preclude private litigation . . .").

288. *City of Chicago Consent Decree*, *supra* note 34, at 3.

289. *Id.* at 15.

identity as expressed or clarified by the individual”;²⁹⁰ a duty to “incorporate the concept of impartial policing into its annual in-service training for all officers”;²⁹¹ a requirement that the CPD annually conduct “an assessment of the relative frequency of all misdemeanor arrests and administrative notices of violation . . . of persons in specific demographic categories, including race and gender”;²⁹² detailed requirements about use of force;²⁹³ measures to recruit, hire and promote “qualified candidates at all ranks that reflect a broad cross section of the Chicago community the Department serves”;²⁹⁴ the provision to CPD officers of “a range of support services that comport with mental health professional standards and that seek to minimize the risk of harm from stress, trauma, alcohol and substance abuse, and mental illness,” including “readily accessible confidential counseling services with both internal and external referrals; peer support; traumatic incident debriefings and crisis counseling; and stress management and officer wellness training”;²⁹⁵ new mechanisms for receiving and responding to citizen complaints and publishing data on those complaints;²⁹⁶ and the appointment of a monitor to ensure compliance with all of the obligations.²⁹⁷ There is no likelihood that private litigants, even in a well-planned class action, could obtain these same extensive remedial measures.²⁹⁸ As appealing as these reforms might seem, they do not reflect a proper use of § 1983.

2. *Avoiding Conflicts.* Second, statutory authorization would prevent *parens patriae* from becoming a vehicle for unconstrained structural-reform litigation that may conflict with other existing police-reform efforts. Congress has already provided a statutory mechanism for structural reform of police departments through litigation in federal court. 34 U.S.C. § 12601 empowers the DOJ—but not state attorneys

290. *Id.* at 18.

291. *Id.* at 22.

292. *Id.* at 24.

293. *Id.* at 46–72.

294. *Id.* at 72.

295. *Id.* at 106.

296. *Id.* at 118–70.

297. *Id.* at 186.

298. See *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (invalidating an injunction in a § 1983 police misconduct case that “significantly revis[ed] the internal procedures of the Philadelphia police department” as “a sharp limitation on the department’s ‘latitude in the dispatch of its own internal affairs’” (quotations omitted) (quoting *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 896 (1961))).

general—to seek broad equitable relief against police departments engaged in a pattern or practice of police misconduct. The DOJ has made use of this power to reform some of the nation’s most troubled police departments.²⁹⁹ There is a good argument that § 12601 is not a powerful enough medicine and that the DOJ has not made use of it as aggressively as the disease requires.³⁰⁰ But those assessments do not provide a basis for now inferring that state attorneys general can engage in their own structural reform litigation under § 1983.

Widening the lens, issues of federal versus state power loom large. In *Porter*, the U.S. Court of Appeals for the Third Circuit held that the Supremacy Clause provided a basis for inferring state standing: state government officials are required to abide by federal constitutional protections for constitutional rights and have an interest in responding to violations of those rights within their states.³⁰¹ The federal Constitution certainly binds the states, but that does not easily lead to the conclusion that the state attorney general may sue a city in federal court under federal law. What Judge Gibbons ignored in *Porter* is that the federal courts are courts of limited jurisdiction, and Congress specifies which cases the lower federal courts may hear. More fundamentally, under Section 5 of the Fourteenth Amendment, Congress has “power to enforce, by appropriate legislation” the amendment’s provisions.³⁰² Section 1983 was enacted pursuant to that authority.³⁰³ If Congress does not provide for enforcement by means of states suing cities in federal court, courts should be reluctant to permit this mechanism. Indeed, there is considerable irony to the Third Circuit’s approach. In *Porter*, the Third Circuit was willing to allow Pennsylvania to act as *parens patriae* in a lawsuit against a city under § 1983. But just seven months before the en banc decision in *Porter* and after the case was first argued, a panel of the same circuit court refused, in *United States v. City of Philadelphia*, to infer standing on the part of

299. See Rushin, *Structural Reform Litigation*, *supra* note 46, at 1347 (“[M]any of the nation’s largest police departments including Los Angeles, Detroit, Seattle, Albuquerque, Newark, Pittsburgh, Cincinnati, Washington, D.C., and New Orleans have undergone or are currently undergoing this sort of SRL.”).

300. See, e.g., Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3228–30 (describing patterns of enforcement of § 12601).

301. *Pennsylvania v. Porter*, 659 F.2d 306, 315 (1981).

302. U.S. CONST. amend. XIV.

303. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 665 (1978).

the DOJ to sue to remedy police misconduct in Philadelphia.³⁰⁴ In our judgment, a consistent approach would be to treat the DOJ and the state attorney general the same way. But if one and not the other is to have standing—and the decision is based on inferences about who should be empowered to enforce federal law—the DOJ would seem a more natural choice. In fact, that is the choice that Congress made when it enacted § 12601. In this sense, it is wise to recall that Article III’s standing requirements reinforce the Constitution’s structural divisions of power. Standing promotes federalism by limiting the cases that can be heard in federal court—a particular concern when an entity of state government is a party. Standing also guards against judicial encroachment upon the powers of Congress and the federal executive branch. Courts that infer standing from statutory silence can bypass congressional control of the reach of federal claims. Likewise, a relaxed approach to standing can negate Congress’s choice to limit enforcement power to the federal executive branch.

Congress might support empowering state attorneys general suing police departments under federal law in federal court and obtaining remedies that prevent future violations of constitutional rights. But Congress should authorize state attorneys general to do so as a statutory matter. There are different ways in which Congress could achieve this outcome. Congress could amend § 1983 so as specifically to empower state attorneys general to litigate under that law in designated circumstances. Alternatively, Congress could enact a new statute granting state attorneys authority to bring cases against local police departments—or even state governmental actors more generally—for violations of federal rights. Through either approach, Congress would be able to determine how litigation by state attorneys general can be made compatible with the grant of authority to the DOJ to engage in structural-reform efforts. For instance, Congress might well determine that the DOJ should have the first opportunity to initiate litigation and that the state is empowered to step in only when the DOJ declines to bring a case. Congress might determine that the DOJ is in a better position to secure robust protections for individual rights and so give the DOJ stronger tools than are available to state attorneys general. Alternatively, Congress might instead decide that state attorneys general have a better understanding of local conditions

304. *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980). *City of Philadelphia* was decided on Dec. 29, 1980; *Porter* was first argued on October 6, 1980, and decided en banc on July 30, 1981.

and the need for tailored reforms and so choose to allow them to play a larger role in litigation efforts. Some commentators have emphasized the role that state attorneys general can play in resisting muscular federal executive action, particularly during times of congressional gridlock.³⁰⁵ Pursuant to a properly crafted statutory framework, state attorneys general might also play a role in enforcing federal law when the federal executive decides to step back.

Insisting on congressional authorization is not out of the ordinary. Congress has proven perfectly capable of assigning state governments standing to enforce federal law. Congress has done this under various federal statutes.³⁰⁶ Some federal statutes authorize the state to litigate as *parens patriae* and specify the precise circumstances under which such standing is to be exercised, the available remedies, and the effects upon the claims of individuals who might prefer to litigate on their own.³⁰⁷ Notably, when Congress has allowed *parens patriae* standing by statute, it has not been constrained by judicial rules of “quasi-sovereign” interests and the like; in some instances, Congress has authorized states to litigate on behalf of injured citizens.³⁰⁸

305. See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 64 (2018) (describing how, through litigation, “states can challenge federal [executive] action that arguably goes too far”).

306. See *infra* note 307.

307. For example:

If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any appropriate United States District Court.

Freedom of Access to Clinic Entrances, 18 U.S.C. § 248(c)(3)(A)–(B) (2018) (allowing in such cases for “temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties”). The Commodity Exchange Act includes a similar provision:

Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, derivatives transaction execution facility, clearinghouse, floor broker, or floor trader) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order of the [U.S. Commodity Futures Trading] Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this chapter, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

Futures Trading Act of 1978 § 15, 7 U.S.C. § 13a-2(1) (2018).

308. See, e.g., *Pennsylvania v. Mid-Atl. Toyota Distribs.*, 704 F.2d 125, 129 n.8 (4th Cir. 1983) (explaining that under the Clayton Act “the statutory right of action is more expansive” than

For example, in *Hawaii v. Standard Oil Co. of California*,³⁰⁹ Hawaii sued four oil companies alleging antitrust violations.³¹⁰ Hawaii sued in three capacities: in its proprietary capacity for alleged overcharges on petroleum sold to the state; in its capacity as *parens patriae* for a general injury to the state's economy; and as a representative of the class of all petroleum buyers in the state.³¹¹ It sought injunctive relief and monetary damages on each basis.³¹² After the Court of Appeals for the Ninth Circuit dismissed the claims based on *parens patriae*, Hawaii sought review in the Supreme Court.³¹³ The Court held that *parens patriae* standing was unavailable under the applicable statutory provision, § 4 of the Clayton Act.³¹⁴ The Supreme Court had previously ruled that under § 16 of the Clayton Act, the state of Georgia could obtain an injunction against northern railroads that had conspired to restrict trade to the South.³¹⁵ In *Standard Oil*, however, the Court held that the rule in the Georgia case did not apply because—unlike § 4—§ 16, involving injunctive relief, contained no requirement that the asserted injury be in “business or property.”³¹⁶ Given this distinction, the *Standard Oil* Court refused to infer *parens patriae* standing under § 4, in part because doing so risked duplicative damages—the state could recover for harm to its economy at the same time individuals recovered for personal injuries.³¹⁷ In the absence of clear statutory language, the Court would not permit the state's claim to proceed.³¹⁸ After a separate ruling by the Court of Appeals for the

would be available under the common law of *parens patriae*, which does not permit states to sue “on behalf of injured natural residents”).

309. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1982).

310. *Id.* at 253.

311. *Id.* at 252–53.

312. *Id.*

313. *Id.* at 254.

314. *Id.* at 255.

315. *Georgia v. Penn. R.R.*, 324 U.S. 439, 460 (1945).

316. *Standard Oil Co. of Cal.*, 405 U.S. at 261.

317. *Id.* at 264.

318. *Id.* (“[I]f the . . . injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.”). Significantly, it was the nature of the claim that drove the conclusion:

The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing *parens patriae* actions.

Id. at 259.

Ninth Circuit also rejecting *parens patriae* standing,³¹⁹ Congress authorized state attorney generals to act as *parens patriae* to seek monetary damages. In 1976, as part of the Hart-Scott-Rodino Antitrust Improvements Act,³²⁰ Congress amended the Clayton Antitrust Act to allow such suits:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief . . . for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act].³²¹

This congressional response demonstrates the benefits of statutory authorization for state governmental standing. In creating standing for state attorneys general under § 4, Congress took account of the overall statutory scheme and structured standing rules with an eye to other potential claims against a defendant and also the relevant state interests. The amended statute requires the state attorney general, when acting as *parens patriae* in the manner the statute permits, to publish notice of the lawsuit.³²² It also gives individuals on whose behalf the suit has been filed an opportunity to have their own claims excluded³²³ from the state's action in order to prevent the state's final judgment from having *res judicata* effect as to their claims.³²⁴ The statute also requires that courts exclude from monetary rewards amounts duplicative of prior awards for the same injury and amounts allocable to excluded claims or to business entities.³²⁵ In addition, the statute sets out how recovered damages are to be dispensed.³²⁶ Further, it requires that the U.S. attorney general notify state attorneys general of actions brought by the United States involving violations of the

319. See generally *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.) (taking the view that *parens patriae* recovery would be inconsistent with class action laws), *cert. denied*, 412 U.S. 908 (1973).

320. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, tit. III, 90 Stat. 1383, 1394-97 (codified at scattered sections of 15 U.S.C.).

321. 15 U.S.C. § 15c(a)(1) (2018).

322. *Id.* § 15c(b)(1).

323. *Id.* § 15c(b)(2).

324. *Id.* § 15c(b)(3).

325. *Id.* § 15c(a)(1).

326. *Id.* § 15e.

antitrust laws for which the states themselves could sue.³²⁷ Finally, and significantly, these various provisions are deemed to apply in every state except where state law specifies otherwise.³²⁸

That Congress has at times created *parens patriae* standing under some statutes cautions against inferring such standing in other statutes that do not provide for it. If in some circumstances, Congress has taken the trouble to confer *parens patriae* standing and to specify its scope as part of provided-for enforcement mechanisms, in other circumstances such standing may not well serve statutory goals. After all, a statute's successful operation does not depend upon courts maximizing opportunities for lawsuits under it. Underenforcement of a statute can be problematic but so can overenforcement; Congress frequently limits the possibilities for lawsuits as a mechanism for enforcing a statute. Moreover, nothing prevents states—or even their attorneys general—from lobbying Congress to confer standing upon state attorneys general to sue under a federal statute.³²⁹

3. *Promoting Aggressive Oversight.* Third, statutory authorization may ultimately result in *more* aggressive oversight of local police departments, rather than less. Even though some courts have acquiesced to efforts by state attorneys general to pursue equitable relief against police departments under the *parens patriae* doctrine, there remains limited appellate precedent on the issue. As such, it makes sense that, so far, few state attorneys general have pursued cases against police departments on the basis of *parens patriae*. By specifically conferring standing on state attorneys general, Congress can eliminate uncertainties that may hinder litigation.

Empowered by Congress to make use of the federal courts, state attorneys general can play an important role in police reform. In the past, civil litigation has proven an unreliable means to curb police violations of constitutional rights. Among other impediments, rules of

327. *Id.* § 15f(a). Subsection (b) requires the U.S. attorney general to turn over investigative files if requested by the state attorney general. *Id.* § 15f(b).

328. *Id.* § 15h (“Sections 15c, 15d, 15e, 15f, and 15g of this title shall apply in any State, unless such State provides by law for its nonapplicability in such State.”).

329. See Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 54 (2011) (“Due to the power that inherently comes with enforcement authority, interested parties lobby for or against such legislative grants routinely.”).

qualified immunity,³³⁰ limitations on punitive damages,³³¹ and indemnification policies³³² have blunted the effectiveness of civil lawsuits. Criminal prosecutions of police officers have also failed to generate reform, in large part because of the sheer difficulty of prosecutors securing indictments and convictions against officers.³³³ And even when the U.S. attorney general has supported a strong federal role, the DOJ has lacked the resources to pursue more than a handful of § 12601 cases each year.³³⁴ Given the low risk of ever being held accountable, police departments and their governing municipalities have proven unwilling to invest in reform measures, particularly if doing so will anger police unions and other powerful interests³³⁵ and siphon resources from schools, parks, and community infrastructure.³³⁶ Empowering state attorneys general to act as agents of police reform could change the entire landscape. State attorneys general may be less indebted to police unions than other governmental actors.³³⁷ They are well positioned to recognize and investigate violations of constitutional rights. They have considerably more

330. See *supra* note 81 and accompanying text (describing qualified immunity barriers to suits against state officials under § 1983).

331. See *supra* note 80 and accompanying text (describing the case law on punitive damage awards in § 1983 suits).

332. See *supra* note 82 and accompanying text (discussing indemnification policies).

333. See PHILIP M. STINSON, THE HENRY A. WALLACE POLICE CRIME DATABASE, <https://policecrime.bgsu.edu> [<https://perma.cc/NHK9-8PVP>] (using media reports to estimate the number of police officers arrested and charged for various types of criminal offenses from 2005 to 2013 and finding that only fifty-four police officers faced criminal charges, despite the fact that roughly ten-to-eleven thousand individuals were killed by law enforcement officers during this same time period).

334. Rushin, *Structural Reform Litigation*, *supra* note 46, at 1408.

335. Commentators have noted the inherent conflict of interest here:

Elected district attorneys, who are subject to intense pressure from police unions, and their line attorneys who must rely on law enforcement for the success of every case they try, have a clear conflict of interest when the tables are turned and they must decide whether to bring charges and lead cases against police-defendants.

Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1483 (2016).

336. Rushin, *Structural Reform Litigation*, *supra* note 46, at 1408–09 (discussing municipal resources and the high costs of police reform).

337. To be clear, this is a hypothesis—based in part on anecdotal evidence that police unions give substantial contributions to state legislators and local officials. More research is necessary to determine whether state attorneys general receive similar political contributions or are subject to lobbying from police unions. See Stephen Rushin, *Unions and Police Reform*, in CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 535–37 (Tamara Rice Lave & Eric J. Miller eds., 2019) (discussing how police unions have exerted their political power to alter legislation in state legislative bodies).

resources than do private litigants.³³⁸ They bring technical expertise to police accountability efforts. And, located in every state in the union where they typically oversee a large cadre of attorneys and staffers, they have more manpower than the DOJ.³³⁹

B. State Law Authorization

There are also compelling reasons for insisting that state attorneys general be authorized by state statutory law before they proceed in federal court under federal law on claims of police misconduct. Accordingly, states would lack standing unless conferred both by federal and state statutes. To enforce this requirement, Congress itself can specify that the standing it gives to a state attorney general only exists when it is also authorized under state law.

The requirement for state statutory authority gives notice to police departments that, as a matter of state law, their own state attorney general has a powerful tool to respond to police misconduct and that redress is not dependent upon DOJ intervention or lawsuits by victims. This notice may result in proactive reform by local police departments. Authority in state law also normalizes and regularizes a state attorney general's lawsuit, thus tempering perceptions that the attorney general—who may be of a different political party than the legislative majority or even the governor—is engaged in creative litigation out of political ambition³⁴⁰ or in service of partisan interests.³⁴¹ So too, when the state legislature has authorized the lawsuit, the attorney general is implementing state law—not somehow acting as the agent of the federal government. A state legislature can also tailor authorization in ways that reflect circumstances and interests of the particular state. For

338. See Lemos & Young, *supra* note 305, at 65 (“In recent decades, state AGs have emerged as a uniquely powerful cadre of lawyers.”); *id.* at 120–21 (identifying subpoena powers and other advantages state attorney generals have compared to private parties).

339. Although the DOJ also has a large number of attorneys in U.S. Attorneys' offices all across the country, the DOJ has typically handled investigations of police departments pursuant to § 12601 through its Civil Rights Division in Washington, D.C. See Rushin, *Federal Enforcement of Police Reform*, *supra* note 47, at 3230 (describing how cases under § 12601 are handled through the Special Litigation Section of the Civil Rights Division and the resulting resource constraints). Assuming that practice holds, state attorneys general in the aggregate have more resources to address policing than does DOJ.

340. See Davis, *supra* note 271, at 46 (“Aggressively pursuing litigation as a means of policy-making is one way for a state attorney general to build political capital.”).

341. See Lemos & Young, *supra* note 305, at 114 (“[A]lthough one might hope that AGs consider the interests of *all* citizens, AGs' incentives to do so are, at the very least, questionable. . . . [T]o the extent that state public-law litigation has a partisan slant, state citizens not from the AG's party may strongly prefer that the litigation not be brought.”).

instance, a state legislature might require the state attorney general to issue it a report and recommendations prior to filing any lawsuit so that the legislative branch has an opportunity to take corrective action on its own.

There are different forms authorizing state statutes could take. For example, Congress itself might insist upon very specific language that invokes the particular federal law at issue. At a minimum, though, it is desirable for the state statute to provide that the attorney general is empowered to bring in any court of competent jurisdiction claims against police departments, governing municipal bodies, and government officials in cases of police misconduct that violates federally protected rights.³⁴² In many states there are generally worded statutes authorizing the state attorney general to bring lawsuits to protect the interests of the state and its residents.³⁴³ Although courts have been willing to accept such statutes as permitting *parens patriae* lawsuits in a variety of contexts,³⁴⁴ they should not be deemed adequate authority for state attorneys general to sue under federal law in federal court to remedy police misconduct. Instead, given the potential impact upon the organization and operations of a police department, the state legislature should provide more specific authorization to the attorney general to litigate.³⁴⁵ Similarly, although some courts have permitted state attorneys general to invoke the common law doctrine of *parens patriae* as a basis for standing to sue police departments,³⁴⁶ standing

342. See, e.g., CAL. CIV. CODE § 52.3 (West 2018) (permitting the California attorney general to obtain equitable and declaratory relief in California state court to eliminate patterns of unconstitutional misconduct).

343. Wisconsin provides an example of such a statute:

The governor, whenever in the governor's opinion the rights, interests or property of the state have been or are liable to be injuriously affected, may require the attorney general to institute and prosecute any proper action or proceeding for the redress or prevention thereof

WIS. STAT. § 14.11 (2019); see also N.Y. EXEC. LAW § 63(1) (McKinney 2019) (directing the attorney general to “[p]rosecute . . . all actions and proceedings in which the state is interested”).

344. See, e.g., *Pennsylvania v. Mid-Atl. Toyota Distribs., Inc.*, 704 F.2d 125, 130 (4th Cir. 1983) (holding that the state attorneys general of three states and the corporation counsel of the District of Columbia had power to bring *parens patriae* suits under the Hart-Scott-Rodino Act, given the general statutory authorization to “represent the jurisdiction and its interests in litigation”).

345. Some states, for instance, have statutes giving the state attorney general specific authority to litigate under federal antitrust law. See, e.g., TEX. BUS. & COM. CODE ANN. § 15.40 (West 2019) (“The attorney general may bring an action on behalf of the state . . . to recover the damages provided for by the federal antitrust laws”); see also *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1025–28 (5th Cir. 1983) (construing this statutory language to encompass *parens patriae* actions).

346. See *supra* notes 235–39 and accompanying text.

should be authorized by state statute. Thus, under this approach, in Attorney General Madigan's lawsuit against Chicago, invocation of common law standing as *parens patriae*³⁴⁷ would not suffice; a state statute authorizing the attorney general would be required to bring the lawsuit.³⁴⁸ The Illinois legislature should itself determine whether and when the state attorney general is permitted to sue in federal court under federal law in order to redress police misconduct in Chicago or elsewhere in Illinois.

State legislatures are perfectly capable of conferring specific authority upon their attorneys general. Various states already provide attorneys general with statutory *parens patriae* standing to enforce certain laws and, in so doing, specify such things as the circumstances in which the state attorney general can sue, where the lawsuit may be brought, the impact upon private claims, the kinds of relief available, conditions for settlement of a case, and the distribution of recovered damages.³⁴⁹ Some such laws specify that statutory authority is in addition to that provided for under the common law.³⁵⁰ States also have experience in conferring specific statutory authority upon their attorneys general to sue under designated federal laws.³⁵¹

Requiring state statutory authorization will generate some lumpiness in the enforcement of federal law. Some states will permit their attorneys general to sue to remedy police misconduct. Others will not. Some will provide authority only in certain circumstances. Some state legislatures might decide that if the state attorney general is to sue local police departments, the claims should be based on state constitutional protections and the cases should be brought in state

347. See *City of Chicago* Complaint, *supra* note 32, at 1, 4.

348. Similarly, we find lacking the claim by the New York City Bar Association's Committee on Civil Rights that § 63 of the New York Executive Law, which provides that "[t]he attorney-general shall . . . [p]rosecute . . . all actions and proceedings in which the state is interested," constitutes statutory authorization for *parens patriae* lawsuits to remedy police misconduct. N.Y.C. BAR ASSOC. COMM. ON CIVIL RIGHTS, THE AUTHORITY OF THE NEW YORK ATTORNEY GENERAL WHEN POLICE ABUSE THEIR AUTHORITY 1–2 (2002), <https://www.nybar.org/pdf/report/Report%20on%20the%20Auth%20of%20the%20AG.pdf> [<https://perma.cc/6VL5-GFNC>].

349. See, e.g., COLO. REV. STAT. § 6-4-111 (2019) (state antitrust law); CONN. GEN. STAT. § 35-32 (2019) (state antitrust law); R.I. GEN. LAWS § 46-12.3-5 (2019) (state environmental protection statute); WASH. REV. CODE § 19.350.030 (2019) (state consumer protection statute).

350. See, e.g., CAL. BUS. & PROF. CODE § 16760 (West 2019) (state antitrust law).

351. See, e.g., TEX. BUS. & COM. CODE ANN. § 15.40(a) (West 2019) ("The attorney general may bring an action on behalf of the state or any of its political subdivisions or tax supported institutions to recover the damages provided for by the federal antitrust laws.").

court.³⁵² Likewise, there will be differences in how, in practice, state attorneys general make use of statutory authorization. Some might never sue a police department. Some might do so only in response to especially egregious police practices or as a response to high-profile incidents that generate strong public calls for action. Some attorneys general might quickly settle cases with only modest reforms. Other attorneys general will stay with the case to pursue sweeping change.

Enforcement of federal law will also likely vary within a single state over time. One attorney general might be disinclined to go after police departments or fear voter retaliation for doing so. The next attorney general who takes office in the state might make police reform a mandate—or see it as the stepping stone to another office. A Republican attorney general might target only police departments in cities with Democratic mayors. The attorney general might litigate when the legislature and the governor—perhaps of a different political party—are themselves disinterested in addressing police misconduct. Broader political circumstances might also play a role. For example, state attorneys general might be content to leave lawsuits to the DOJ but become more active if it takes a hands-off approach. The converse is also imaginable: a state attorney general inspired by federal intervention to do something at home, even if only as a means to avoid the DOJ bringing suit. A flurry of lawsuits by state attorneys general around the nation might prompt the disinclined to join the party. For all of these reasons, there will likely be lawsuits in some states but not others and at some times but not at others. There will probably also be variation in the types of police conduct targeted and the remedies sought.

Lumpiness in the enforcement of federal law is not necessarily a problem, and it can be a virtue. For one thing, lumpiness indicates that federal law operates in sync with mechanisms of state government and in a way that is attentive to differences among states.³⁵³ Autonomy on

352. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (exploring ways in which state constitutions and state courts play a robust role in protecting individual rights).

353. In the antitrust area, states have tailored provisions of the Clayton Act. Illinois is one such example:

Before the filing of the first pleading in federal district court in any civil action brought by the Attorney General in the name of the State as *parens patriae* on behalf of the natural persons residing in this State, as authorized by Section 4c of the Clayton Act, 15 U.S.C.A. 15c, the Attorney General shall file with the Auditor General a statement disclosing the fee arrangements applicable to the attorneys' fees in relation to that civil action.

the part of state attorneys general confirms they are not puppets of a federal government that lacks respect for the states. Lumpiness also generates useful information about how federal law might best be implemented. Before suing under federal law, a state attorney general can watch how litigation plays out in another state. Members of the public can also point to successful reform through litigation in other states as a reason for their own attorney general to act.

Additionally, and perhaps even more importantly, variation may be the price for getting many state legislatures on board. Without some possibility of state-level control over litigation against police departments, state legislatures might be unwilling to permit the state attorney general to sue. Likewise, without an ability to control the litigation, the state attorney general might be reluctant to proceed at all. Of course, federal law should not be subject to so much state-level control that it no longer has a national character. Yet so long as Congress sets certain legislative floors and the DOJ remains an alternative source of enforcement, some variability from one state to the next does not necessarily present a difficulty.

Indeed, the approach this Article has set out could represent a healthy interaction between federal and state government in securing federal constitutional rights. Congress would specify when state attorneys general are able to sue in federal court to correct police violations of constitutional rights. Within these parameters, each state legislature would decide on the scope of power its own state attorney general would hold and exercise—with the understanding that the alternative could be intrusive investigations and lawsuits by the DOJ or other federal actors. The federal government would promote base-level uniformity in safeguards against abusive police practices while state governments would remain free to tailor responses and remedies to local experiences and conditions. States can help implement and shape federal requirements but within a framework in which there remains federal control. Congress would be able to determine at the outset the appropriate role of states, and the federal executive branch would be positioned to displace, if needed, state-level efforts.

C. Challenges

The obvious challenge for the proposal this Article offers is that it requires legislative action at both the federal and state levels. At the

federal level, even when there is strong support for laws to protect civil rights, getting Congress to act has proven difficult.³⁵⁴ Police reform is an especially complex political issue, and it is likely that most—if not all—members of Congress are sensitive to the hazards of federal legislation that affects local police departments. Perhaps, at least for now, federal police-reform legislation is unlikely. Nonetheless, the approach this Article offers, involving a partnership between federal and state government, almost certainly has a higher chance of success than more heavy-handed alternatives.

At the state level, some important dynamics bear longer exploration. A basic question is: Why would a state legislature ever authorize the state attorney general to sue police departments and governing municipalities within the state under federal law in federal court? One reason is that such authorization can be an easy mechanism for the legislature to address problems of police misconduct without actually having to deal with all of the details of the solution. Rather than grappling with how state-law reform should look or how to punish police departments or municipalities where problems are not cured, the state legislature can simply authorize its attorney general to act under federal law.

The legislature can kick the problem to the attorney general, who will bear the blame if the problem persists or pursuing a remedy goes badly. From the perspective of members of the legislature, the office of the attorney general might be a particularly good target for delegation of police reform. In most states, the attorney general is elected and thus answers directly to the public.³⁵⁵ Assignment of police reform to the attorney general can thus minimize the risk of voter backlash directed against the legislature. A legislator's incentive to empower the attorney general might be especially strong if the attorney general is of a different party: a hazardous assignment can be a way to keep a rival in check.

What if state legislatures do not provide their attorneys general with the requisite statutory authority to litigate in federal court under federal law in cases of police misconduct—or indeed affirmatively bar

354. For example, Congress has not adopted a new coverage formula for the Voting Rights Act in response to the Supreme Court's ruling in *Shelby County v. Holder*, 570 U.S. 529 (2013), that the existing formula, based as it was on outdated information, was unconstitutional. *Id.* at 556.

355. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 6 (1993) ("The state attorney general is popularly elected in forty-three states.").

such actions? The scenario is not unimaginable. Even if there is general concern with police misconduct and recognition of the need for reform, members of a state legislature might not approve of the specific remedy of lawsuits by a state attorney general in federal court. They might prefer a legislative response and consider states suing cities to be deeply problematic. They might also take the position that if the attorney general is to bring a lawsuit, it should be brought in state court under state law. If both federal and state statutory authorization is needed, the result may be that some state attorneys general will simply be unable to make use of a tool that Congress has offered.

There are ways to eliminate state impediments. As a sheer matter of federal power, Congress could conceivably do away with any need for state statutory authorization and override any state law that prohibits a state attorney general from exercising federally conferred standing. Under the Supremacy Clause, valid federal law trumps conflicting or inconsistent state law.³⁵⁶ A valid federal law that says the state attorney general has standing would thus be superior to a state law that says the state attorney general does not. However, the obvious cost to such a federal law is the loss of the considerable benefits, as described above, of dual congressional and state authorization. In addition, as a constitutional matter, a federal override may implicate issues of state governmental sovereignty that the Supreme Court has emphasized in recent years. Concerns with state sovereignty take different forms. One form, relevant here, is the ban on the federal government “commandeering” the operations of state government.³⁵⁷ A federal law that merely permits the state attorney general to sue does not involve unconstitutional commandeering of a state officer. By contrast, if Congress somehow *required* state attorneys general to sue

356. U.S. CONST. art. VI.

357. “While Congress has substantial powers to govern the Nation directly . . . the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *New York v. United States*, 505 U.S. 144, 162 (1992) (invalidating provisions of the federal Low-Level Radioactive Waste Policy Amendments Act requiring states to regulate low-level radioactive waste). A few years after *New York v. United States*, the Court reaffirmed the anticommandeering doctrine:

Congress cannot circumvent . . . [the prohibition established in *New York v. United States*] by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz v. United States, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act requiring local law enforcement officials to conduct background checks for firearms purchases).

to remedy police reform—say upon notification of reasonable cause or at the direction of the DOJ—then the absence of choice is likely to trigger plausible anticommandeering objections.³⁵⁸ Likewise, a state legislature is not commandeered merely because its own law is displaced by federal law. However, if federal law displaces a state ban on lawsuits by the state attorney general, the state legislature might more plausibly contend that the federal law involves commandeering on the ground that the state legislature must, as a result, make resources available for the state attorney general to bring the lawsuits.

Still, anticommandeering objections, while reflective of basic principles of federalism, will not necessarily prevail even against a federal law that actually required a state attorney general to sue to address police misconduct. Congress derives its power to respond to constitutional violations by the police from its powers to enforce the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which incorporates most of the provisions of the Bill of Rights against the states.³⁵⁹ Commandeering of the states has been held unconstitutional under the Commerce Clause,³⁶⁰ but it is far from clear whether the same rules apply when Congress legislates under the Reconstruction Amendments. The Supreme Court itself has not decided whether the anticommandeering principle applies to Congress's Reconstruction powers, but it has held that a properly "congruen[t] and proportional[]" federal statute enacted under Section 5 of the Fourteenth Amendment may force state-level change to "remedy or prevent unconstitutional actions."³⁶¹ Many scholars have suggested that the anticommandeering doctrine simply might not apply when Congress acts to enforce the Reconstruction Amendments, because those amendments give Congress special authority to regulate the states.³⁶²

358. See *Printz*, 521 U.S. at 933 (finding unconstitutional a "mandatory obligation" imposed by the federal government on state executive officers).

359. See *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010))).

360. See *supra* note 357 and accompanying text.

361. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

362. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REV. 71, 123 ("The Court's language in [*Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998)] implies that the anticommandeering doctrines limit only legislation adopted pursuant to the Commerce Clause, and are inapplicable to a federal statute appropriately grounded in the Fourteenth Amendment."); Matthew D. Adler,

On this view, the Reconstruction powers permit Congress to prevent states from engaging in certain activities and to demand that states take affirmative steps—as various federal civil rights laws already require.³⁶³ Thus, empowered by Section 5 of the Fourteenth Amendment to remedy and prevent police violations of constitutional rights, “the federal government could plausibly demand any enforcement service it wanted from the states,”³⁶⁴ including by permitting—and possibly even requiring—a state attorney general to sue under a federal statute. Congress might not be able to tell a local sheriff to carry out a firearms background check.³⁶⁵ But Congress could quite plausibly require a state governmental lawyer to litigate to remedy abusive police practices and require a state legislature to fund the lawsuit. Of course, as a practical matter, it would be difficult to enforce any such requirement. The reluctant state attorney general would have numerous ways to minimize compliance—for example, by slowing down investigations, filing few cases, writing weak briefs, seeking adjournments, or assigning low-performing staffers to the litigation. Likewise, a state legislature has numerous tools at its disposal to divert a state attorney general from following a federal requirement to litigate against police departments—for example, strategically decreasing or delaying funding to the attorney general’s office, enacting new state laws that require heavy enforcement

State Sovereignty and the Anti-Commandeering Cases, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 164–65 (2001) (treating the anticommandeering principle as limited to exercises of the Article I powers); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1006 n.13 (1995) (“Arguably, congressional commandeering as a means of exercising its Section Five power to enforce the Fourteenth Amendment’s limitations on state authority . . . does not raise the same federalism issues [as uses of Article I powers], since the Reconstruction Amendments were openly designed [*sic*] to curb state sovereignty.”); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1140–41 (2000) (“[E]ven the anti-commandeering principle may well bow to Congress’s enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments, as does the state’s sovereign immunity.”); Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 171 (2012) (“Congress may commandeer the states pursuant to its powers under the Reconstruction Era Amendments. . . . The basis for this exception is straightforward: the Reconstruction Amendments changed Congress’s relationship vis-à-vis the states” (footnote omitted)).

363. Adler & Kreimer, *supra* note 362, at 124–25; *id.* at 125–26 (“[M]uch . . . legislation—most prominently Title VII and the voting rights legislation sustained in *City of Rome*, as well as municipal responsibility for deliberate indifference to constitutional violations . . . requires the states to take affirmative measures to comply with federal civil rights mandates.” (footnotes omitted)).

364. Mikos, *supra* note 362, at 171.

365. See *Printz v. United States*, 521 U.S. 898, 935 (1997).

resources, or reducing the number of staffers available to work on police cases. Constitutional issues aside, it would thus make considerable practical sense for Congress to provide for standing in a manner that generates cooperation—not obstruction—on the part of state governments. The threat of a more coercive approach might itself encourage states to cooperate.³⁶⁶

CONCLUSION

When former Illinois Attorney General Madigan announced her lawsuit against the Chicago Police Department, she made a compelling argument for its necessity: “In the absence of a committed Justice Department,” she explained, the lawsuit was important to “implement safe and constitutional policing practices.”³⁶⁷ For decades, the City of Chicago had failed to provide police officers with the “resources and support they need to do their job safely and properly.”³⁶⁸ Meanwhile, “Black and brown residents of the city live[d] in fear of criminals *and* the police.”³⁶⁹ And in Chicago “more than half a billion taxpayer dollars have been used to pay for the consequences of unlawful policing over the past decade.”³⁷⁰ Chicago’s former mayor, Rahm Emanuel, praised Madigan’s decision, stating that he was “proud the attorney general [was] standing up for our city, for its residents and for our police officers where the Trump Administration fell flat.”³⁷¹

State attorneys general should act to protect state residents from abusive police practices, but the common law doctrine of *parens patriae* is not the right tool for them to do so. Instead, Congress and the state legislatures should specifically confer standing upon state attorneys general to bring cases against police departments in federal court. Statutory standing is essential to ensure that state attorneys general

366. Likewise, there are incentives to minimize the likelihood of state legislatures doing nothing—simply not adopting any law specifying whether a state attorney general has power to pursue police misconduct cases in federal court. Congress could specify that the attorney general of a state will be presumed to have the full powers provided for by the federal statute unless, after some date, the state itself has adopted a different measure. This would give state legislatures a window of opportunity to adopt some tailoring measures.

367. Charlie Wojciechowski & Shelby Bremer, *Attorney General Madigan Files Lawsuit Seeking Federal Court Oversight of Chicago Police Reforms*, NBC CHI. (Aug. 29, 2017, 5:24 PM), <https://www.nbcchicago.com/blogs/ward-room/lisa-madigan-lawsuit-justice-department-chicago-police-reforms-442143973.html> [<https://perma.cc/M6YX-UXS2>].

368. *Id.*

369. *Id.* (emphasis added).

370. *Id.*

371. Ruthhart et al., *supra* note 33.

have a reliable basis in law to act and that their efforts comport with other mechanisms for regulating police departments. With legislative authority in place, police reform would not need to wait for the sort of creative lawyering Madigan showed. Instead, empowered to act under statutory law, state attorneys general around the country would be able to respond to police violations of rights—and expected to do so. Police misconduct often seems intractable. With a statutory basis to act, state attorneys general may hold the key to successful reform.