2009

Constitutional Enforcement by Proxy

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CONSTITUTIONAL ENFORCEMENT BY PROXY

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AMERICANS love their Constitution. But love, as we all know, is blind. This may explain why we often look to constitutional law to vindicate our civil rights while ignoring the potential of sub-constitutional law. Federal courts have not ignored this possibility, however, and have increasingly forced civil rights plaintiffs to seek relief using sub-constitutional law where it is available. A victim of discrimination, for example, might be denied the chance to invoke the Equal Protection Clause and told instead to rely on a federal antidiscrimination statute. In this and other cases, courts seem to believe that constitutional rights can be enforced through the application of sub-constitutional law, a practice this Article refers to as "constitutional enforcement by proxy."

This Article is the first to analyze the emerging practice of proxy enforcement. This issue is important because it lies at the confluence of several important discourses in the federal courts field—such as the judicial duty to issue a remedy for every constitutional wrong, the role of non-Article III actors in setting constitutional norms, and the degree to which sub-constitutional law can, like the Constitution itself, be "constitutive" of the national order. This Article's central claim is that proxy enforcement, properly administered, is permissible and even advisable in a large number of cases. It is permissible because federal courts' duty to supervise the behavior of non-Article III actors does not require courts to invoke the Constitution directly (unless Congress has ordered otherwise). If courts can maintain constitutional norms using sub-constitutional law, they are entirely free to do so.

The practice is normatively attractive because it promises a partial truce in the everlasting debate over interpretive supremacy. By rely-

[*] Assistant Professor, University of Richmond School of Law. For their thoughts on this Article, I thank Chris Cotropia, Jessica Erickson, Barry Friedman, Jim Gibson, Corinna Lain, Jason Mazzone, Alan Morrison, Lou Mulligan, Jim Pfander, Ben Spencer, and Howard Wasserman, as well as participants in American University's 2008 Conference on Judges and Judging and the Fall 2008 Virginia Junior Faculty Forum.

ing on sub-constitutional law to enforce the Constitution, federal courts allow non-Article III actors a significant role in the articulation of constitutional norms, a role normally denied them when courts enforce the Constitution directly. Thus, sub-constitutional adjudication of civil rights claims does not spurn our love of the Constitution; it preserves individual rights while honoring a principle that lies at the Constitution's very heart: popular sovereignty.

INTRODUCTION

Americans love their Constitution. A typical visit to Washington, D.C., might involve a trip to the National Air and Space Museum, a tour of the monuments on an amphibious bus, and quite strangely, veneration of a *legal document*. That's right. Americans will stand in a long, snaking line outside the National Archives just to see, for a brief moment, *written law*. The Constitution is maintained at the Archives in a way that would make the Second Restatement of Agency positively jealous. Encased in a brass cabinet with a glass top, the document sits upon an altar that is framed by marble columns, high ceilings, and opulent draperies. The atmosphere is overtly religious, as though the Ark of the Covenant were on display.[1]

Given this solemn reverence of the Constitution, it should not be surprising that constitutional adjudication is also treasured.[2] The American civil rights action is widely regarded as the premier tool of social justice. It is how starving prisoners obtain food, women fight stereotypes, and black schoolchildren obtain a meaningful education.[3] Although these successes, like the opulent draperies, inspire our admiration, they also obscure a fundamental truth: the Constitution is, at its core, simply a set of laws. The laws tell government actors how they must behave and in this respect are no different from a great many other laws. Landmark civil rights statutes, for example, prohibit intentional discrimination just as the

[1] The Constitution has long been described in quasi-religious terms. See, e.g., Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 (1922) (referring to the Constitution as "the ark of our covenant"). For other commentary on this conception of the Constitution, see Sanford Levinson, Constitutional Faith (1988); Edward S. Corwin, The Worship of the Constitution, 4 Const. Rev. 3 (1920), *reprinted in* 1 Corwin on the Constitution 47–55 (Richard Loss ed., 1981); Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 3 (1984) (calling the Constitution "a sacred symbol, the most potent emblem (along with the flag) of the nation itself").

[2] See, e.g., Daniel B. Rodriguez, State Constitutionalism and the Domain of Normative Theory, 37 San Diego L. Rev. 523, 531 (2000) ("Constitutional adjudication is attached firmly in our minds to a conception of the constitution as grand law . . . .").

[3] Hutto v. Finney, 437 U.S. 678 (1978) (holding prison's failure to feed prisoners adequately a violation of the Eighth Amendment); United States v. Virginia, 518 U.S. 515 (1996) (holding public university's refusal to admit women a violation of the Fourteenth Amendment); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding school district's use of separate schools for African-Americans a violation of the Fourteenth Amendment).

Equal Protection Clause does.[4] Even the common law of battery—law that has no prayer of ever appearing on an altar in the National Archives—can often do the work of the Fourth Amendment in excessive-force cases.[5] Thus, one aggrieved by government actions need not always rely on the ultimate law of government.

But what if a plaintiff, fresh off a trip to the Archives, *preferred* to invoke the Constitution rather than some sub-constitutional law? With increasing regularity, plaintiffs have been denied this opportunity. Take, for example, *Correctional Services Corp. v. Malesko*.[6] The plaintiff there suffered a heart attack while in prison and brought a civil rights action against the prison, alleging a violation of his Eighth Amendment rights. The Court never reached the merits of the plaintiff's claim because he "enjoy[ed] a parallel tort remedy" for medical negligence.[7] Or take *Wilson v. Libby*, in which Valerie Plame sought relief from the Vice President and his top assistants for disclosing her status as a covert CIA operative.[8] The D.C. Circuit recently held that Plame's constitutional claims were barred because a federal statute, the Privacy Act, prohibited the disclosure of Plame's identity and provided her with at least some relief.[9] These and other cases[10] suggest that where sub-constitutional law is available for relief, the Constitution is unavailable. The Constitution, in other words, can be enforced by proxy.

The emerging practice of proxy enforcement in constitutional adjudication has yet to command much attention from the legal academy. This is surprising because the practice sits at the confluence of several important discourses in the federal courts field. Scholars and jurists have long debated the duty of federal courts to

[4] 42 U.S.C. § 2000e(f) (2000) (imposing liability on state agencies, counties, and municipalities for intentional discrimination in employment); Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that states will be liable under the Fourteenth Amendment for intentional racial discrimination in employment).

[5] Graham v. Connor, 490 U.S. 386, 397 (1989) (holding that the use of force during an arrest will violate the Fourth Amendment where such use is not "objectively reasonable"); Lewis v. Goodie, 798 F. Supp. 382, 390 (W.D. La. 1992) (holding police officer liable for common law battery for use of force during arrest).

[6] 534 U.S. 61 (2001).

[7] Id. at 72–73.

[8] 535 F.3d 697 (D.C. Cir. 2008).

[9] Id. at 709.

[10] See infra Section I.B.

issue a remedy for every constitutional wrong,[11] the role of non-Article III actors in setting constitutional norms,[12] and the degree to which sub-constitutional law, like the Constitution itself, is "constitutive" of the national order.[13] When the federal courts engage in proxy enforcement, they withhold constitutional remedies and rely on sub-constitutional law, thus giving non-Article III actors a more significant role in crafting constitutional norms. A comprehensive assessment of the modern practice—which is offered for the first time in this Article—will thus speak to many audiences and, of course, invite many responses as well.

This Article's central claim is that proxy enforcement, properly administered, is permissible and even advisable in a large number of cases. The permissibility of the practice turns chiefly on two conditions: whether Congress has forbidden the practice, and whether the sub-constitutional law can adequately enforce the constitutional interests at stake. If Congress has not instructed the federal courts otherwise, there is nothing to prevent courts from choosing sub-constitutional law to achieve constitutionally required ends. The Constitution does not mandate that the federal

[11] See Susan Bandes, Reinventing *Bivens*: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289 (1995) (arguing that judicial remedies for constitutional wrongs are compelled); Donald H. Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 38 Hastings L.J. 665 (1987) (arguing the same); Anthony J. Bellia Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 861–62 (2004) (arguing that federal courts do not have a duty to remedy every wrong); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1789 (1991) (arguing that judicial refusal of remedies for constitutional violations in some instances is "regrettable, but tolerable").

[12] For scholarship criticizing the exclusion of non-Article III actors from the process of constitutional interpretation, see Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943 (2003). For scholarship defending judicial supremacy in constitutional interpretation, see Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 457–58 (2000); Daniel A. Farber, The Importance of Being Final, 20 Const. Comment. 359 (2003); Larry Alexander & Lawrence B. Solum, Popular? Constitutionalism?, 118 Harv. L. Rev. 1594, 1629–35 (2005) (book review).

[13] William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216–17 (2001); Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 424–25 (2007).

courts issue a constitutional remedy for every constitutional wrong; it simply requires the courts to "keep government, overall and on average, tolerably within the bounds of law."[14] If sub-constitutional law can accomplish this end, then courts are free to use it.

Moreover—and more controversially—federal courts are free to rely on sub-constitutional laws *even if the laws provide rights that are narrower than constitutional rights, or remedies that are weaker than constitutional remedies*. Proxy enforcement is permissible in such instances because a large number of what we define as constitutional rights are not actually required by the Constitution, but rather judicially crafted rules designed to implement underlying constitutional norms. Such rules are born from the collision of constitutional ambiguity and necessity. The Constitution only vaguely suggests limits on justiciability, for example, but the Court *must* design rules to limit its jurisdiction, or else every policy question before Congress will be converted into a lawsuit—a result plainly at odds with the constitutional design.[15] Though the judiciary must design such rules, it necessarily has discretion in defining the rules' exact contours. Given this discretion, there is nothing to prevent the judiciary from choosing rules devised by Congress or the states that vary from judicially devised rules.

Even if courts are free to enforce the Constitution by proxy, why should they? The chief value of the practice lies in its promise of a partial truce in the everlasting debate over interpretive supremacy. Modern constitutional law and scholarship is infatuated with a single, seemingly insoluble question: who controls the meaning of the Constitution?[16] On one side are those who, remembering victory in *Brown*, claim that federal courts must retain interpretive supremacy so that core constitutional values can be protected from majoritarian passions. On the other side are those who, remembering defeat in *Lochner*, claim that federal courts must yield to the interpretive choices of political branches so that majority prefer-

[14] Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 311 (1993).

[15] Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1280–97 (2006) (discussing the political question doctrine in light of the need for enforcement of constitutional norms).

[16] Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153 (2002) (tracing the history of this debate).

ences will be realized. The practice of enforcement by proxy holds great promise as a mediating force in the inter-branch and inter-governmental struggle over interpretive supremacy. The practice allows the judiciary to retain its power to check abuses by non-Article III actors and, at the same time, allows these same entities a role in particularizing the norms of acceptable government behavior.

Some might find the practice of proxy enforcement undesirable because it will stymie the development of constitutional law, squelch public debate on constitutional issues, and be difficult to administer. These claims mostly fail because proxy enforcement will not significantly decrease the quantity or nature of constitutional litigation, thus leaving ample opportunities for constitutional development and debate. The practice will prove difficult, however, where state law is the putative stand-in for the Constitution. State laws emanate from legislative, executive, and judicial bodies at the municipal, county, and state-wide level throughout all fifty states. The sheer volume and heterogeneity of these laws will prevent the development of broadly applicable precedent to guide courts in future cases, thus requiring courts to analyze each case anew. This problem does not apply where a federal statute or regulation is the putative stand-in because those laws emanate from a far more limited number of sources and apply uniformly throughout the nation. Thus, from a normative perspective, proxy enforcement should be practiced using federal, but not state, law.

In the final analysis, Constitution worshipers—whether at the Archives, in court, or part of the legal academy—should be pleased with the prospect of constitutional enforcement by proxy. Instead of dishonoring the Bill of Rights by invoking sub-constitutional law, the practice honors a right that lies beneath and before every other right: the right of self-rule. Whatever else it may say, the Constitution makes clear that the ultimate sovereign is always "*the people themselves*."[17] Enforcing the Constitution by proxy affirms our popular sovereignty without dispensing with our individual rights—a difficult feat that should impress us all.

[17] Thomas Jefferson, Notes on the State of Virginia, *in* Writings 123, 274 (Merrill D. Peterson ed., 1984) ("Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories.").

I. THE SHIFT FROM DIRECT TOWARDS PROXY ENFORCEMENT

In the United States, law is everywhere. All three branches of the federal government create law, as do all branches of the fifty state governments and countless subordinate governments. The resulting multiplicity of laws makes it almost inevitable that some actions will violate multiple laws. When behavior violates the Constitution as well as sub-constitutional law, which law should apply? Section I.A below explains that sub-constitutional law has traditionally been irrelevant to the availability of a civil rights action and attributes this practice to historic presumptions about state courts, state law, and congressional preferences. Section I.B then describes changes in these presumptions and identifies areas of law where proxy enforcement has grown in use. This Section does not posit that proxy enforcement has taken hold in the federal courts, for it has not. Rather, it only posits that the ideological roadblocks that historically prevented proxy enforcement have largely disappeared and that the practice has begun to emerge as an alternative method of constitutional enforcement.

A. Direct Enforcement

In the United States, a person may enforce her constitutional rights by suing the officer responsible for the deprivation. The exact cause of action available to the plaintiff will depend on the identity of the officer. Where the officer acts under color of state law, the plaintiff must bring suit under 42 U.S.C. § 1983.[18] Where the officer acts under color of federal law, the plaintiff must bring a "*Bivens* action"—so-called because the action was first recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[19] *Bivens* actions are creatures of judicial creation and thus are more flexibly applied than Section 1983 actions.[20] In the modern civil rights era, the traditional rule in Section 1983 and *Bivens* cases has been that constitutional rights may be enforced

[18] 42 U.S.C. § 1983 (2000).

[19] 403 U.S. 388 (1971).

[20] Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (stating that, in determining whether to recognize a *Bivens* action, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal") (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).

without regard to whether sub-constitutional law might also provide relief.

Monroe v. Pape nicely illustrates this practice in the Section 1983 setting.[21] In *Monroe*, James Monroe alleged that thirteen Chicago police officers had, without a warrant or other authority, raided his house in the early morning, made his family stand naked in the living room, and later held him at the police station for ten hours without charges or access to an attorney. Monroe brought a civil rights action under Section 1983. At issue in the case was whether the officers acted under color of state law, even though they had no explicit authority or order to act as they did. Seeking to escape liability under Section 1983, the officers argued that Monroe's true remedy was under state tort law, not the Federal Constitution. Rejecting this argument, the Court explained:

> It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked*. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.[22]

Thus, plaintiffs intent on vindicating their constitutional rights against state officers did not have to resort to sub-constitutional law first, jointly, or even at all.[23] Put differently, a constitutional right was a freestanding right; it was susceptible to judicial enforcement without regard to which other rights may have been violated.

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[21] 365 U.S. 167 (1961).

[22] Id. at 183 (emphasis added).

[23] Though this principle is most often tied to *Monroe*, it actually predates *Monroe* and extends beyond the § 1983 context. For example, in the landmark case *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913), the Court held that "conduct of state officials that, prima facie, contravened the [U.S. Constitution] is open to challenge in the district courts without regard to whether that conduct also violates state law or whether the state provides adequate corrective process." Henry Paul Monaghan, Comment, State Law Wrongs, State Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979, 981 (1986); see also Michael Wells, "Available State Remedies" and the Fourteenth Amendment: Comments on *Florida Prepaid v. College Savings Bank*, 33 Loy. L.A. L. Rev. 1665, 1667 (2000) ("A central principle of constitutional law, established in *Home Telephone & Telegraph Co. v. City of Los Angeles*, is that the constitutional violation is complete when officials act, even if their conduct is not authorized by state law.") (footnote omitted).

Underlying the Court's decision in *Monroe* was the belief that state courts could not be trusted to enforce civil rights. Requiring civil rights plaintiffs to plead state law claims would typically force the plaintiffs into state court,[24] and state courts, in the opinion of the Court at least, were possessed of "prejudice, passion, neglect, [and] intolerance."[25] Thus, to allow plaintiffs to escape this prejudice and take advantage of federal courts' supposed solicitude for federal rights, plaintiffs must be permitted to plead federal claims even where state claims might be available.

A decade after *Monroe*, the Court applied the same rule to cases against federal officers. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, a plaintiff brought a Fourth Amendment claim against several federal officers for unlawfully searching and seizing him.[26] The availability of relief in the case turned on whether a cause of action should be "implied" from the Fourth Amendment. As in *Monroe*, the defendants argued that the plaintiff may enforce his "rights only by an action in tort, under state law."[27] Rejecting this argument, the Court explained:

> [O]ur cases make clear[] [that] the Fourth Amendment operates as a limitation upon the exercise of federal power *regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.* It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.[28]

Although the *Bivens* Court adopted the same rule as in *Monroe*, its reasoning was different. The Court did not advert to any "prejudice, passion, neglect, [or] intolerance" in state courts, presumably because common law actions against federal officers will

[24] Because civil rights violations usually occur at the local level, the plaintiff and defendant are typically citizens of the same state, thus precluding federal diversity jurisdiction. 28 U.S.C. § 1332 (2006). Although common law suits against government officers often involve federal questions, these questions typically arise as a defense, thus precluding federal question jurisdiction under the well-pleaded complaint rule. 28 U.S.C. § 1331 (2006); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

[25] *Monroe*, 365 U.S. at 180. The classical scholarly citation for this view is Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977).

[26] 403 U.S. 388 (1971).

[27] Id. at 390.

[28] Id. at 392 (emphasis added).

almost always occur in federal court.[29] Rather, the Court opined that state tort law might be "inconsistent or even hostile" to federal civil rights.[30] This "inconsistency" or "hostility" stemmed from the fact that tort law, though ostensibly similar to constitutional law in that it regulates the imposition of physical force, rarely mirrored constitutional law from a doctrinal perspective. This entails the risk that tort claims would not actually yield relief for civil rights plaintiffs. In *Bivens* itself, for example, the Court doubted that a trespass action by Bivens would be successful because the claim was susceptible to the defense of consent (based upon the fact that Bivens allowed the officers, upon their demand, to enter his apartment).[31]

Both *Monroe* and *Bivens* dealt with the role of *state* law in federal constitutional actions. As the corpus of federal statutory law slowly grew, however, courts were naturally presented with cases where *federal* statutory and constitutional rights overlapped. In these cases, the role of statutory rights has depended on congressional intent. Where the Court believes that Congress intended to *supplement* constitutional rights with statutory rights, the statutory rights will have no role in determining whether a constitutional cause of action exists. In contrast, where the Court believed that Congress intended to replace a constitutional cause of action with a statutory cause of action, the Court has yielded to congressional preferences. Of course, congressional intent is not easy to discern, and the Court's decision in any case is likely to reflect its presumptions about congressional behavior and the judicial role in protecting constitutional rights. For much of the twentieth century, the Court, generally speaking, viewed itself as indispensable in protecting rights and assumed that Congress would not lightly replace a

[29] Common law claims against federal officers can be filed in state court, but almost always are litigated in federal court because federal officers sued for acts taken within the scope of their employment have the right to remove the action to federal court. 28 U.S.C. § 1442 (2006); Tennessee v. Davis, 100 U.S. 257, 271 (1879) (holding that criminal cases for alleged offences against state laws may be removed from state courts to federal court if a federal question arises in them).

[30] *Bivens*, 403 U.S. at 394.

[31] Id. ("A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house.") (citing 1 Fowler V. Harper & Fleming James, Jr., The Law of Torts § 1.11 (1956)).

constitutional cause of action with a statutory one. This attitude led to decisions like *Carlson v. Green*, where the Court held that a federal prisoner may prosecute an Eighth Amendment claim in a *Bivens* action, even though the misbehavior alleged might also be actionable under the Federal Tort Claims Act.[32]

In sum, the traditional rule in federal civil rights actions has been to allow plaintiffs to bring constitutional claims even where analogous state law or federal statutory claims were also available. Depending on the nature of the case, this rule has been based on three separate beliefs: (1) that state courts cannot be trusted to enforce civil rights, (2) that state law will only imperfectly enforce federal rights, and (3) that Congress has explicitly or implicitly approved multiple avenues of enforcement. As the next Section explains, a change in these beliefs over the past several decades has coincided with a shift in the role of sub-constitutional law in civil rights actions.

B. Proxy Enforcement

Over the past several decades, the Court's beliefs that give rise to its direct enforcement decisions have undergone significant revisions. These revisions, in turn, appear to have precipitated a shift away from direct, and towards proxy, enforcement. In this Section, I briefly explain these revisions and then illustrate this shift through a discussion of recent cases.

Not long after it condemned state courts as bastions of "prejudice, passion, neglect, [or] intolerance," the Supreme Court changed its tune. In 1971, for example, the Burger Court expressed its "unwilling[ness] to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."[33] Later cases contain similar appellations and, whatever the truth of the assertion, the modern Court continues to believe that state courts are adequate protectors of civil rights.[34]

[32] 446 U.S. 14, 19–20 (1980) (preserving a *Bivens* action even where the plaintiff could bring an FTCA claim because "it [is] crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action").

[33] Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

[34] Allen v. McCurry, 449 U.S. 90, 104 (1980) (allowing state court decisions to have preclusive effect in federal court because, by giving the "parties a full and fair oppor-

Nor has the Court persisted in its wholesale skepticism of state law's capacity to enforce federal rights. In *Bivens* cases, therefore, the Court now evaluates each case *individually* to determine whether state law is likely to provide the plaintiff with an alternative remedy. Thus, in *Correctional Services Corp. v. Malesko*, the Court considered whether a *Bivens* claim against a halfway house should be permitted even though the plaintiff could have brought a claim under the Federal Tort Claims Act.[35] Responding to the argument in *Bivens* that state law was often "inconsistent or even hostile" to federal rights, the Court explained that "[s]uch logic does not apply" to the instant case.[36] Indeed, the Court noted that state law may be *more* beneficial to plaintiffs than federal constitutional law because tort law only requires proof of simple negligence, whereas the Eighth Amendment requires a showing of reckless disregard—"a state of mind more blameworthy than negligence."[37] Therefore, while future cases may arise where state law will be hostile to federal constitutional rights, it is now clear that such hostility is evaluated on a case-by-case basis, thus opening the door to proxy enforcement in individual cases.

Finally, the Court has also changed its views about congressional intent in creating federal statutory rights. This is most apparent with regard to *Bivens* actions, for which the Court no longer presumes that Congress intends statutory causes of action to be supplementary. The Court now sees *Bivens* actions as federal common law and thus presumptively susceptible to legislative override.[38] As a corollary, even the most basic of statutory remedies can now dis-

tunity to litigate federal claims," the state court "has shown itself willing and able to protect federal rights"); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do."); Younger v. Harris, 401 U.S. 37, 43–45 (1971) (refusing to intervene in state proceedings based in part on the implicit assumption that states can be trusted to adhere to federal constitutional mandates).

[35] 534 U.S. 61, 63 (2001).

[36] Id. at 73–74.

[37] Id. at 73 (quoting Farmer v. Brennan, 511 U.S. 825, 835 (1994)).

[38] See, e.g., id. at 75 (Scalia, J., concurring) (rejecting a *Bivens* action by referring to *Bivens* as "a relic of the heady days in which [the] Court assumed common-law powers to create causes of action").

place the *Bivens* action.[39] Such a shift is not apparent in the Section 1983 context, however, since Section 1983 is not a judicially created cause of action and is thus much less susceptible to legislative override.[40]

Thus, the beliefs that supported the practice of direct enforcement during the civil rights era no longer have the currency they once had. One might expect, therefore, to see a shift from direct towards proxy enforcement as well. Summarized below are recent decisions illustrating this shift, divided according to the type of sub-constitutional law involved: state law or federal statutory law.

1. State Law as Proxy

The most common type of state law used to protect federal constitutional rights is tort law. This makes sense, since many unconstitutional actions are also tortious. Eighth Amendment cases illustrate this most readily. In *Malesko*, for example, a prisoner in a federal halfway house brought a *Bivens* suit after he suffered a heart attack allegedly caused by the halfway house's refusal to accommodate his medical needs.[41] Writing for the majority, Chief Justice Rehnquist explained that *Bivens* actions were available only to plaintiffs who "lacked *any alternative remedy*."[42] Malesko was not without a remedy, however, because he "enjoy[ed] a parallel tort remedy"—presumably one for negligent care.[43] In a break with the traditional rule ignoring sub-constitutional law, the Court refused to recognize Malesko's action. Since *Malesko*, the lower courts have seized on Chief Justice Rehnquist's "any alternative remedy" language, repeatedly denying *Bivens* actions in Eighth Amendment cases.[44]

[39] Bush v. Lucas, 462 U.S. 367, 378 (1983) (holding that a statutory scheme offering less than complete relief for a First Amendment violation could displace a *Bivens* action).

[40] See, e.g., Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788 (2009) (holding that plaintiff could maintain an Equal Protection claim under § 1983 despite having a cause of action under Title IX).

[41] 534 U.S. 61, 64–65 (2001).

[42] Id. at 70 (emphasis in original).

[43] Id. at 72–73.

[44] See, e.g., Alba v. Montford, 517 F.3d 1249, 1254–56 (11th Cir. 2008) (holding that a prisoner could not pursue a *Bivens* action because an alternative state tort remedy was available); Holly v. Scott, 434 F.3d 287, 295–97 (4th Cir. 2006) (refusing to grant a

The preclusion of *Bivens* actions by tort law is not limited to the Eighth Amendment context. For instance, in *Wilkie v. Robbins*, the Supreme Court considered a series of Fourth and Fifth Amendment claims by a rancher against several federal officials.[45] The officials, the rancher alleged, had exacted retribution on him for failing to grant the federal government an easement over his land. The retribution took the form of, among other things, baseless prosecutions and illegal entry on his land.[46] For each of these alleged constitutional wrongs, the Court "assess[ed] the significance of any alternative remedies."[47] In the Court's view, the plaintiff could likely remedy the unfounded prosecutions through a malicious prosecution action and the illegal entry through a trespass action. These "alternative remedies" suggested that a *Bivens* action should not be implied.[48]

The Tenth Circuit recently reached a similar conclusion on a Sixth Amendment right to counsel claim. In *Peoples v. CCA Detention Centers*, a federal inmate alleged that prison officers had tapped his phone conversations with his attorney, thus effectively denying him the right to an attorney.[49] Relying chiefly on *Malesko*,

Bivens claim to a prisoner who possessed an alternative remedy under the state law of negligence); Irabor v. Perry County Corr. Ctr., No. 06-0483-BH-C, 2008 WL 1929965, at *2–*4 (S.D. Ala. Apr. 30, 2008) (holding that a prisoner could not maintain a *Bivens* action for denial of "basic necessities such as socks, toilet paper, and soap" because "adequate state tort remedies [were] available, . . . including, but not limited to, negligence and wantonness"); Kundra v. Johnson, No. H-06-710, 2006 WL 1061913, at *3 (S.D. Tex. Apr. 21, 2006) (holding that a *Bivens* action is not required against employees of a privately run prison "where state law provides [the plaintiff] with an effective remedy") (citing *Holly*, 434 F.3d at 296); Brown v. Pugh, No. CV 306-25, 2006 WL 2439859, at *2–*3 (S.D. Ga. Aug. 18, 2006) (holding that the plaintiff could not bring a *Bivens* suit against employees of a privately run prison where state court remedies were available); Pollard v. Wackenhut Corr. Corp., No. CV F 01 6078 OWW WMW P, 2006 WL 2661111, at *3–*4 (E.D. Cal. Sept. 14, 2006) (holding the same).

[45] 551 U.S. 537 (2007).

[46] Id. at 551.

[47] Id.

[48] Though the Court ultimately declined to dispose of the case on alternative remedy grounds (choosing instead to deny the *Bivens* action based on "special factors"), it is clear from the Court's opinion that state tort law suits do have the power to displace a *Bivens* remedy. Id. at 562. As precedent for its analysis of state tort remedies, the Court relied on *Malesko*'s "consider[ation of the] availability of state tort remedies in refusing to recognize a *Bivens* remedy." Id. at 551.

[49] 422 F.3d 1090, 1094 (10th Cir. 2005), vacated en banc, 449 F.3d 1097 (10th Cir. 2006). Though the *Peoples* opinion is emblematic of the role of tort law in constitutional tort actions, its precedential value is probably weak. After holding that the state

the court reasoned that "the *sole* purpose [of a *Bivens* action is] 'to provide an otherwise nonexistent cause of action against individual officers.'"[50] Thus, "a *Bivens* claim should not be implied unless the plaintiff has no other means of redress . . . arising under either state or federal law."[51] In this case, the plaintiff's *Bivens* claim was precluded because "Kansas law provides an alternative cause of action"—namely, a cause of action for "intrusion upon seclusion."[52]

As the above examples illustrate, tort law is well suited for use in proxy enforcement cases. Many constitutional violations involve the imposition of force on another, which is a central focus of tort law. The logic supporting these decisions, however, is not confined to tort law; rather, the logic suggests that *any* type of state law could be a sufficient proxy. Indeed, it would seem that state constitutional law will often lend itself to use in proxy enforcement cases. State constitutions contain many of the same provisions contained in the Federal Constitution and state courts routinely rely on federal constitutional precedent in interpreting analogous state provisions.[53] Similarly, state statutes and administrative regulations often guarantee citizens due process and equality, mimicking various constitutional rights.[54] Thus, although the role of state law in proxy enforcement has thus far only involved tort law, a large variety of state laws are likely available should courts wish to invoke them.

law cause of action displaced the *Bivens* action, the Tenth Circuit reheard the case en banc, splitting evenly on the issue. As a result, the original panel opinion was vacated. Despite the vacatur, however, the original *Peoples* opinion has played a significant role in this area. Courts relied on its reasoning prior to the vacatur, and inexplicably, have continued to rely on it as good law even after the vacatur. See, e.g., *Holly*, 434 F.3d at 301 n.3 (relying on *Peoples* prior to its vacatur); Bender v. Gen. Servs. Admin., 539 F. Supp. 2d 702, 708–09 (S.D.N.Y. 2008) (relying on *Peoples* after its vacatur). *Peoples* is thus an important case to note in this field, even if its authority is questionable.

[50] *Peoples*, 422 F.3d at 1102 (citation omitted) (emphasis in original).

[51] Id. at 1103.

[52] Id. at 1105, 1108 (citing Kan. Op. Atty. Gen. No. 93-93 (1993)).

[53] See James A. Gardner, Interpreting State Constitutions: A Jurisprudence of Function in a Federal System 42–52 (2005) (discussing state courts' "lockstep" method of interpreting state constitutional provisions that resemble federal constitutional provisions).

[54] See, e.g., California Fair Employment and Housing Act, Cal. Gov't Code § 12900 (West 2005); New York Human Rights Law, N.Y. Exec. Law §§ 290–301 (McKinney 2005 & Supp. 2009).

2. Federal Law as Proxy

Sometimes a civil rights action is displaced not by the promise of relief under state law, but by the promise of relief under a federal statute or regulation. *Smith v. Robinson* is a good example.[55] In *Smith*, parents of a child with cerebral palsy sued a school district for discriminating against their child. They alleged a violation of the Education of the Handicapped Act (EHA) as well as the Fourteenth Amendment's Equal Protection Clause. The EHA "establishe[d] an enforceable substantive right to a free appropriate public education."[56] This right was, in turn, enforced through an "elaborate procedural mechanism to protect the rights of handicapped children. The procedures . . . ensure[d] that hearings conducted by the State [were] fair and adequate."[57] The issue in *Smith* was whether the plaintiffs could pursue an Equal Protection claim under Section 1983 simultaneously with an EHA claim. The Court answered the question in the negative, chiefly because "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."[58]

Wilson v. Libby is a more recent example.[59] On July 14, 2003, the *Washington Post* printed a column by Robert Novak stating that Valerie Plame "is [a Central Intelligence] [A]gency operative on weapons of mass destruction."[60] Prior to this column, Plame's status

[55] 468 U.S. 992 (1984).

[56] Id. at 1010.

[57] Id. at 1010–11.

[58] Id. at 1009. This holding bears resemblance to the more popular doctrine established in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), in which the Court held that § 1983 was unavailable to vindicate a statutory right because Congress had, elsewhere in the statute, made clear that enforcement of the right was to occur under the terms of the statute. *Smith* and *Middlesex* cases differ in an important respect, however. In *Middlesex* cases, the court need not determine whether the right to be vindicated through § 1983 is "virtually identical" to the right vindicated through the statutory mechanism. Because the statute creates the right, they are exactly the same. See Maine v. Thiboutot, 448 U.S. 1 (1980) (holding that federal statutory rights are enforceable in § 1983 actions). In contrast, *Smith* cases require a court to determine the "virtual identical[ity]" of the constitutional right and the statutory right. In this sense, *Smith* implicitly holds that Congress may preempt a suit for a constitutional violation by creating a statutory right that is "virtually identical."

[59] 535 F.3d 697 (D.C. Cir. 2008).

[60] Robert D. Novak, Mission to Niger, Wash. Post, July 14, 2003, at A21.

as an undercover agent was secret. Novak's column thus "outed" Plame and ended her career as a secret agent. Plame believed that top officials in President Bush's administration—including Vice President Richard Cheney, I. Lewis "Scooter" Libby, Karl Rove, and Richard Armitage—deliberately leaked Plame's covert status to punish her husband's prior disloyalty to the Bush administration.[61] She and her husband, Joseph Wilson, thus sued these officials under *Bivens* for several constitutional deprivations.[62]

At issue in *Wilson* was whether a *Bivens* action was available to the Wilsons for their various claims. The defendants argued that such an action was not available because the Privacy Act—a federal statute that prohibits the disclosure of federal employee information in a variety of circumstances, including those present in the Wilsons' case—was a "comprehensive remedial scheme." Though allegedly "comprehensive," the Privacy Act has several gaps. For instance, the Act only provides a damages remedy to the "person whose records are actually disclosed."[63] Because Joseph Wilson's own records were not disclosed, he had no cause of action under the Act. Additionally, the Act specifically exempts the Offices of the President and Vice President from its coverage.[64] Thus Valerie Plame's claims against Cheney, Libby, and Rove would fail as a threshold matter.

Despite these gaps in the Privacy Act, the D.C. Circuit nonetheless held that the Privacy Act was a "comprehensive remedial scheme" that displaces any remedy available through *Bivens*. *Wil-*

[61] Such disloyalty was allegedly evidenced by an op-ed in the *New York Times* in which Joseph Wilson refuted President Bush's earlier claim in a State of the Union address that Saddam Hussein had "recently sought significant quantities of uranium from Africa." Joseph C. Wilson 4th, Op-Ed., What I Didn't Find in Africa, N.Y. Times, July 6, 2003, § 6, at 9.

[62] *Wilson*, 535 F.3d at 703. The Wilsons also brought claims under the Federal Tort Claims Act. These claims were dismissed for the Wilson's failure to timely exhaust their administrative remedies. Id.

[63] Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1123 (D.C. Cir. 2007); see also 5 U.S.C. § 552a(a)(4) (2006).

[64] 5 U.S.C § 552a(a)(1) (2006) (adopting definition of "agency" used in the Freedom of Information Act (FOIA)); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (holding that the Office of the President is not an "agency" under FOIA); Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) (relying on *Kissinger* to hold that the Office of the Vice President is not an "agency" under FOIA).

son is not a recent aberration, however. Courts have also found "comprehensive remedial schemes" to displace constitutional actions in a wide variety of circumstances, including access to information,[65] veterans' benefits,[66] federal employee rights,[67] tax refunds,[68] and numerous other situations.[69]

II. IS PROXY ENFORCEMENT PERMISSIBLE?

Federal courts possess an enormous amount of discretion, but it is not boundless.[70] There are thus some things that federal courts simply *must* do. This Part assesses whether enforcing the Constitution by proxy violates any judicial duty, thus making it an impermissible practice. Section II.A explains the judicial duties implicated by this question—the duties to implement constitutional norms and follow congressional preferences. Section II.B explains the role courts may give to Congress or the states in discharging their judicial duties. Section II.C explains that, in light of the judi-

[65] Johnson v. Executive Office for U.S. Att'ys, 310 F.3d 771, 777 (D.C. Cir. 2002) (holding that FOIA displaced a Fifth Amendment access-to-information claim).

[66] Thomas v. Principi, 394 F.3d 970, 975–76 (D.C. Cir. 2005) (holding that the Veterans Judicial Review Act precluded a *Bivens* claim challenging medical care provided by a Veterans Affairs hospital).

[67] Feit v. Ward, 886 F.2d 848, 858 (7th Cir. 1989) (declining to extend *Bivens* remedy for constitutional challenges to minor personnel actions governed by the Civil Service Reform Act); Spagnola v. Mathis, 859 F.2d 223, 229 (D.C. Cir. 1988) (refusing a *Bivens* action where relief under the Civil Service Reform Act was available); Daly-Murphy v. Winston, 820 F.2d 1470, 1478 (9th Cir. 1987) (holding that a Veterans Affairs employee's *Bivens* claim was precluded by the availability of other meaningful statutory and administrative remedies); Braun v. United States, 707 F.2d 922, 926 (6th Cir. 1983) (holding that an IRS employee had no *Bivens* claim in part because there were alternative remedies available).

[68] Shreiber v. Mastrogiovanni, 214 F.3d 148, 154–55 (3d Cir. 2000).

[69] For a catalogue of federal statutory programs that have been held to preclude a *Bivens* action, see Practicing Law Institute, New Developments in Civil Rights Litigation and Trends in Section 1983 Actions, 665 Litig. & Admin. Prac. 869, 1093–94 (2001).

[70] The classic article on judicial discretion in the federal courts is David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985). Throughout this Article, I focus on proxy enforcement from the perspective of the federal judiciary. I adopt the view of the federal judiciary mainly for ease of explanation and do not mean to suggest that proxy enforcement will not or should not occur in state courts. State courts will be obliged to adhere to whatever rule of enforcement is chosen by the Supreme Court. See Alfred Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1073–79 (1967) (explaining that federal common law binds state courts via the Supremacy Clause).

cial duties identified in Section II.A and the possibility for congressional or state input identified in Section II.B, federal courts are therefore free to apply sub-constitutional law in civil rights actions, provided that the sub-constitutional law would uphold constitutional norms. Finally, Section II.D, which offers several illustrations of this analysis in practice.

A. Federal Judicial Duty

Federal courts serve many roles in our constitutional system. Chief among them, however, is the maintenance of the constitutional order by requiring non-Article III actors (Congress, the Executive, and the states) to adhere to constitutional norms. At the same time, federal courts are *courts* and thus must do what any court does: follow the applicable law. In this Section, I explain that federal courts have a duty to craft judicial doctrine so that constitutional norms will remain effectual, as well as a duty to follow valid congressional directives. I reject, however, any claim that federal courts have a mandatory duty to right every constitutional wrong.

1. Implementing the Constitution

The founding generation, having suffered the pains of colonial rule, was dedicated to the preservation of individual liberty.[71] Although the Bill of Rights is now seen as the font of liberty, this was not always so. Indeed, during that hot summer of 1787, delegates to the Constitutional Convention explicitly rejected inclusion of a bill of rights in the new constitution.[72] For the Founders, liberty was to be secured through the *structuring* of government, not through a declaration of individual rights. Rights were not irrelevant, of course—a fact amply illustrated by the prompt adoption of the Bill of Rights in 1791. But enumerated rights could never protect liberty on their own; such rights would amount to little more than "parchment barriers" if government were not properly structured

[71] The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. *That to secure these rights, Governments are instituted among Men* . . . .") (emphasis added); The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (tying institutional design to the "preservation of liberty").

[72] 2 The Records of the Federal Convention of 1787, at 649 (Max Farrand ed., 1911).

to give them effect.[73] Thus, the "structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights."[74]

The animating features of the Constitution's structure have been rehearsed innumerable times and need not be repeated *en toto* here. For the present purposes, it is enough to note two essential structural choices. One is the separation of powers. Steeped in the political writings of John Locke and Baron de Montesquieu,[75] the Founders believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[76] The Founders therefore created a government where one branch would be charged with making law, one with executing law, and one with resolving individual disputes of law.

Separating raw power into its constituent parts, though necessary to protect liberty, was not sufficient to secure it. If an individual branch transgressed its enumerated powers and other branches had no ability to counteract the transgression, a balanced government could hardly be maintained. Thus, the Founders created mechanisms whereby each branch "may be a check on the other."[77]

[73] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 The Writings of James Madison 269, 272 (Gaillard Hunt ed., 1904) (referring to enumerated rights as "parchment barriers" and explaining that "the real power [to oppress] lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents"); see also Antonin Scalia, Foreword: The Importance of Structure in Constitutional Interpretation, 83 Notre Dame L. Rev. 1417, 1418 (2008) (stating that, when it comes to protecting liberty, "[s]tructure is everything").

[74] Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1514 (1991); see also David F. Epstein, The Political Theory of *The Federalist* 45 (1984) ("*The Federalist* insists that the real protection against abuse is to be found not in any limitation of the government's powers but in the government's *structure*, in how it is 'modeled.'").

[75] Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."); M.J.C. Vile, Constitutionalism and the Separation of Powers 72–74 (1998) (characterizing Locke as "the Father of the United States Constitution" with regard to dividing sovereign power into its executive and legislative components).

[76] The Federalist No. 47 (James Madison), supra note 71, at 301.

[77] The Federalist No. 51 (James Madison), supra note 71, at 322; see also Garry Wills, Explaining America: The Federalist 119 (1981) ("Checks and balances have to

The President was granted authority to veto bills and appoint judges; Congress was empowered to impeach judges and executive officials; et cetera. And with regard to the courts, "the Founders . . . positioned the judiciary to keep the political branches within the bounds of their lawful authority."[78] Yet, the judiciary was also positioned to keep the states—given as they were to "populist, parochial passions"[79]—within the bounds of law as well.[80]

Thus, for the Constitution to *work*—for it truly to protect liberty—the federal courts must fulfill their structural role of superintending Congress, the Executive, and the states. But how is the judiciary to discharge this duty? Perhaps the best place to begin is with Chief Justice Marshall's celebrated claim that it is the "duty of

do with corrective *invasion* of the separated powers . . . ."). For an explanation of these checks, see Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 Cornell L. Rev. 393, 427–34 (1996).

[78] Jonathan T. Molot, Reexamining *Marbury* in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation, 96 Nw. U. L. Rev. 1239, 1283 (2002); see also United States v. Nixon, 418 U.S. 683, 704 (1974) ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.") (internal quotation marks and citation omitted); Fallon & Meltzer, supra note 11, at 1788 ("The Constitution thus contemplates a judicial 'check' on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values—one of the hallmarks of the rule of law."). For originalist defenses of judicial review, see Randy E. Barnett, The Original Meaning of Judicial Power, 12 Sup. Ct. Econ. Rev. 115 (2004); Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003). For a recent structural defense of judicial review, see Richard H. Fallon, Jr., The Core of an Uneasy Case *For* Judicial Review, 121 Harv. L. Rev. 1693 (2008).

[79] James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 709 (1998); see also Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 18–23 (2d ed. 2005) (explaining that the "excesses of democracy" in the states underlay the design of the Constitution); Jack N. Rakove, James Madison and the Creation of the American Republic 44–52 (1990) (explaining the difficulty of controlling states under the Articles of Confederation).

[80] This was accomplished through use of the Supremacy Clause. U.S. Const. art. VI; Liebman & Ryan, supra note 79, at 729–31; Jack N. Rakove, The Original Justifications for Judicial Independence, 95 Geo L.J. 1061, 1068–69 (2007) ("The significance of the Supremacy Clause cannot be understated. It not only confirmed the status of the Constitution as fundamental law, but it also made the enforcement of its essential division of power between the Union and the States an inherently judicial function. Rather than give the national government the power to coerce States to do their duty, or abrogate the residual sovereignty of the States by subjecting their laws to prior congressional approval, the Constitution made the judiciary the first responders to disputes over the boundaries of federalism.").

the judicial department to say what the law is."[81] According to this description of judicial duty, federal courts "lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former."[82] If, for example, Congress enacts a statute setting the minimum age for U.S. Senators at thirty-five years old, and a thirty-two-year-old elected by her state is refused a seat in the Senate, the court's duty in an ensuing lawsuit is straightforward: the court must "say" that the Constitution requires only that Senators have "attained to the Age of thirty Years" and that the statute is therefore ineffectual.[83] By holding as such, the court preserves liberty in the general sense by keeping the legislature within its bounds. It resists those who would ignore the limits of their authority.

"Saying what the law is" is rarely as simple as the preceding example, of course. When presented with questions implicating the Equal Protection Clause, the Due Process Clause, or the speech and religion clauses, for example, "lawsaying" is a more difficult enterprise.[84] In these circumstances, simply reading the Constitution will never be enough to answer the question presented. Until recently, battles over judicial lawsaying were waged primarily in terms of interpretation. Constitutional decisions could be justified, or not, depending on whether one was an intentionalist or an originalist, among other types.[85] In recent years, however, the focus

[81] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[82] United States v. Butler, 297 U.S. 1, 62 (1936); see also *Marbury*, 5 U.S. (1 Cranch) at 178 ("[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

[83] U.S. Const. art. 1, § 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years . . . .").

[84] Kermit Roosevelt III, Judicial Supremacy, Judicial Activism: *Cooper v. Aaron* and *Parents Involved*, 52 St. Louis U. L.J. 1191, 1192 (2008) ("[L]aying an article of the Constitution beside a statute achieves nothing in any but the most trivial case."); id. at 1192 n.14 ("[L]aying down the Equal Protection Clause will not take a court very far, while laying down an 'ink blot' such as the Ninth Amendment or the Privileges and Immunities Clause may make things worse.").

[85] For a recent accounting of various methods of constitutional interpretation, see Symposium, Essays on Originalism, 31 Harv. J.L. & Pub. Pol'y 901 (2008).

has shifted from interpretation to implementation[86]—based in great part upon the observation that no theory of interpretation could, according to its own terms, accomplish what the Constitution *requires* the judiciary to accomplish: "keep[ing] the political branches within the bounds of their lawful authority."[87]

Take, for example, the question of custodial interrogations. The Fifth Amendment prohibits the state from "compel[ling] [a suspect] in any criminal case to be a witness against himself."[88] By any fair reading, the Amendment prohibits states from physically coercing suspects to confess. For many years, courts determined whether a confession was coerced based on the "totality of circumstances."[89] The defendant and the state would present evidence proving or disproving the use of force, threats, intimidation, etc. Quite predictably, these were difficult decisions for courts. There was rarely any physical evidence and all witnesses—the officers and the defendant—were highly biased. Moreover, in many cases, the state's witnesses were likely to be familiar to the presiding judge, thus raising the specter of judicial bias. Trial court decisions could be appealed, of course, but deferential standards of review precluded any meaningful scrutiny. In short, this doctrinal scheme carried with it a considerable risk that widespread police coercion would take hold.

Enter *Miranda v. Arizona*.[90] In that case, the Court held that an interrogation not preceded by certain warnings would be deemed *per se* coerced. Whatever its normative value, the decision can hardly be characterized as an "interpretation" of the Fifth Amendment. Yet, at the same time, the ruling was constitutionally *required*: the Constitution clearly prohibits coercive interrogations and the pre-*Miranda* doctrine was insufficient to check such mis-

[86] See, e.g., Richard H. Fallon, Jr., Implementing the Constitution 37 (2001) ("If we had to choose one word to characterize the proper role of the Supreme Court in constitutional adjudication, it should not be 'interpretation,' but 'implementation.'").

[87] Molot, supra note 78, at 1283; see also Lawrence Gene Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 45, 66–67 (1981) (interpreting congressional authority to regulate federal jurisdiction so as not to defeat the judiciary's "essential function" in the constitutional system).

[88] U.S. Const. amend. V.

[89] See Haynes v. Washington, 373 U.S. 503, 514 (1963).

[90] 384 U.S. 436 (1966).

behavior. To stand idle while Fifth Amendment guarantees were being violated would amount to an abdication of judicial duty. Thus, if we are to take seriously the judiciary's structural role in holding non-judicial actors accountable, we must accept that the judiciary will often craft rules that *implement* constitutional guarantees, even if those rules cannot be ordinarily described as the product of "interpretation." In other words, constitutional supervision may not operate according to the strict terms of the Constitution—an observation that opens the door to the use of sub-constitutional law in constitutional enforcement.

This is not to say that the judiciary has carte blanche to enforce the constitutional order in any manner it chooses. The Supreme Court could hardly dispatch a roving band of U.S. Marshals to sit in on police interrogations. But, the judiciary is free to act as a *judiciary*. Federal courts, the Supreme Court has recognized, are free to act in ways "traditionally done in order to accomplish their assigned tasks."[91] Thus, federal courts may decide cases through the application of law, precedent, and traditional forms of legal reasoning.[92] For hundreds of years, courts have created and relied on judicial tools such as bright-line rules, evidentiary presumptions, and standards of review.[93] These and other such rules are rarely dictated by any legal text, but are usually created to better achieve

[91] Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (Scalia, J., dissenting); see also Missouri v. Jenkins, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("As with any inherent judicial power . . . we should exercise [our remedial powers] in a manner consistent with our history and traditions."); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 741 (2001) (stating that the judicial power is limited to those practices "rooted in historical Anglo-American practice").

[92] 2 The Records of the Federal Convention of 1787, supra note 72, at 430 (Aug. 27, 1787) (statement of James Madison) (expressing conviction that only "cases of a Judiciary Nature" be allocated to the judicial department, lest the judiciary improperly interfere with political decisions); 1 The Works of James Wilson 296 (Robert G. McCloskey ed., 1967) ("The judicial power consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases. . . ."); David R. Stras & Ryan W. Scott, Retaining Life Tenure: The Case for a "Golden Parachute," 83 Wash. U. L.Q. 1397, 1414 (2005) ("By using the word 'judges,' however, the Constitution incorporates the essential powers and duties of a judge, as understood at the founding.").

[93] See Fallon, supra note 86, at 78–79 (cataloguing doctrinal tests that cannot be traced to constitutional text, including "forbidden content tests," "suspect-content tests," "balancing tests," "non-suspect-content tests," "effects tests," "purpose tests," and "appropriate deliberation tests").

some legal end. The creation of a *per se* rule in *Miranda* was an entirely ordinary judicial act. Indeed, those who have studied judicial behavior closely explain that such acts are "the norm, not the exception."[94]

Miranda is thus one example of the duty of constitutional implementation—the duty to craft judicial doctrine so that constitutional norms will, on the whole, be maintained. No doubt, there are many who will deny the legitimacy of implementation, decrying its atextual nature and ends-oriented methodology.[95] These criticisms are susceptible to an important retort, however: the Constitution does not mandate any particular method of interpretation, but *does* require the judiciary "to ensure that government generally respects constitutional values—one of the hallmarks of the rule of law."[96] Put differently, whatever method of interpretation the judiciary deems appropriate, that method *must* make the Constitution real—it must lead to rules that stand in the way of, rather than countenance, widespread police coercion. Courts may not hide behind sub-constitutional theories of interpretation while constitutional disorder slowly unfolds around them.[97]

[94] David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 195 (1988) ("Constitutional law is filled with rules that are justified in ways that are analytically indistinguishable from the justifications for the *Miranda* rules."); see also Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 61–78 (2004) (offering numerous illustrations for the proposition that such rules are a "ubiquitous component of constitutional doctrine").

[95] Even originalists, however, admit that original public meaning sometimes cannot always resolve a case on its own. See Kyllo v. United States, 533 U.S. 27, 33–34 (2001) (Scalia, J.) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 7 (1999) (admitting that, "[r]egardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered [through interpretation]" and that courts, at that point, must "construct" the text's meaning).

[96] Fallon & Meltzer, supra note 11, at 1788.

[97] See Fallon, supra note 86, at 18 ("Even if we accept that [the Constitution] is exclusively the written Constitution that the Court should interpret or implement, it does not necessarily follow that interpretive norms should be based solely on the Constitution's text, heedless of the way courts have interpreted the Constitution over time. To determine what needs to be interpreted is one thing; to identify applicable norms of interpretation may be something else."). I do not intend this point as a facial attack on originalist theories of constitutional interpretation. Rather, I simply challenge its use in situations that would lead to the inevitable breakdown of the constitu-

2. Implementing Congressional Preferences

The judiciary's obligation to superintend the constitutional order is not exclusive. Congress must also take care to enforce constitutional norms rather than contradict them.[98] Where Congress attempts to promote constitutional values through a statute, the judiciary will thus be presented with the choice between implementing the Constitution on terms chosen by the judiciary or on terms chosen by Congress. This situation implicates a second type of judicial duty: the duty to implement congressional preferences. Under this duty, the judiciary must give effect to all validly enacted federal statutes.

Thus, if Congress orders federal courts to enforce the Constitution directly, without regard to whether sub-constitutional law might also provide relief, the courts must obey this command. Conversely, if Congress orders federal courts to rely on sub-constitutional law when available, even in cases where constitutional law would also apply, the courts must obey this edict as well.[99]

Of course, these statutory commands are only binding if they are in fact constitutional. It should go without saying that statutory commands can be constitutionally infirm for a multitude of reasons. Generally speaking, statutes will be invalid if they impinge on an individual right (for example, the free exercise of religion) or address a subject outside Congress' power to regulate (for example, wholly intrastate commerce). Of particular import in proxy en-

tional order. Where such circumstances are not presented, the validity of originalism is completely unaffected by the arguments presented herein.

For further observations on the interaction between originalism and constitutional implementation, see infra notes 142–147 and accompanying text.

[98] Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585, 587 (1975) (relying in part on constitutional text to justify the "self-evident" proposition that "legislators are obligated to determine, as best they can, the constitutionality of proposed legislation" and refrain from enacting unconstitutional laws); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1227 (1978) ("At a minimum, the obligation of public officials in this context, as in any other, is one of 'best efforts' to avoid unconstitutional conduct.").

[99] One might challenge this claim by arguing that federal courts have a duty to issue a remedy for every constitutional violation. As I explain in the following Subsection, this challenge is not justified. See infra Subsection II.A.3.

forcement cases, congressional power is limited by the "judicial power" granted to the federal courts in Article III.[100]

A short example will illustrate this. Suppose Congress enacts a federal statute creating free speech rights and then amends Section 1983 by excluding free speech claims from its coverage. The federal statute, however, prohibits courts from issuing injunctive relief, limits damages to $100, and prohibits successful plaintiffs from recovering attorney's fees. The federal statute, in other words, severely curtails remedies for free speech violations and thus creates a significant risk of widespread speech deprivation. This statute—which essentially replaces direct enforcement via Section 1983 with proxy enforcement via a federal statute—would likely be constitutionally infirm. This statute would essentially force the federal courts to sit idly by while the First Amendment is rendered a nullity, a prospect that subverts the structural choices underlying the Constitution. While Congress has the authority to strip the courts of jurisdiction, it does not have the power to handicap the courts in such a way as to divest them of their essential structural functions.[101]

I do not argue here that *all* statutes limiting judicial remedies would be constitutionally suspect, though that argument may have significant force.[102] A statute that limits damages in free speech cases to $500,000 would not likely endanger the constitutional order, even though at least some plaintiffs would have their remedies

[100] U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Liebman & Ryan, supra note 79, at 708 (explaining that the grant of "judicial Power" to the federal judiciary in Article III limits congressional power to curtail core judicial practices).

[101] Although some believe that Congress enjoys complete control over judicial remedies, see generally John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 Geo. L.J. 2513 (1998), others argue that federal courts have core remedial powers ancillary to their Article III grant of "judicial Power." See, e.g., David E. Engdahl, Intrinsic Limits of Congress' Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, 170 (1999) (arguing that federal courts have autonomous remedial power because remedies are "the most fundamental and essential element of judicial power"); Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191, 226 (2001) (arguing that Congress may not curtail judicial remedies); Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537 (1998) (defending judicial power over remedies).

[102] Engdahl, supra note 101, at 170; Lawson, supra note 101, at 226.

curtailed. Similarly, a statute that shifts certain types of constitutional adjudications out of the federal courts and into administrative tribunals might not risk the constitutional order, provided appropriate safeguards were put in place.[103] What matters to my analysis here is not necessarily whether judicial power is limited in any particular way, but whether that limit is likely to place the constitutional order at risk. Where limits are imposed, but a risk of constitutional disorder is not created, the statute will be entirely constitutional under this analysis.[104]

In sum, federal courts have a duty to implement congressional preferences on constitutional enforcement (whether direct or proxy), provided those directives are validly enacted. A statute that deprives federal courts of their essential structural role is not a valid statute and must be ignored by the courts.

3. Correcting Wrongs

"One of the first duties of government," Chief Justice Marshall declared in *Marbury v. Madison*, is to "furnish [a] remedy for the violation of a vested legal right."[105] Since *Marbury*, many in the federal courts field have embraced this principle, known more familiarly by the refrain "a right without a remedy is no right at all."[106] Under this principle, federal courts have a duty to remedy *every* constitutional violation, even if a remedy is not required to preserve the constitutional order[107] or a statute does not order the courts to issue a remedy.[108] Adherents to this principle see judicial

[103] See, e.g., Yakus v. United States, 321 U.S. 414, 443–48 (1944) (holding that Congress could prohibit a criminal defendant from raising a constitutional defense because the defendant had the opportunity to raise the issue in a prior administrative proceeding); Crowell v. Benson, 285 U.S. 22, 49–65 (1932) (holding that an administrative tribunal could adjudicate an Article III case, provided that an Article III court retained ultimate authority on legal and jurisdictional questions).

[104] I stress that my focus here is only on the structural imperatives underlying judicial review. As noted above, some believe that Congress may not have the authority to limit judicial remedies, even if such limitations would not risk the constitutional order. See supra note 102.

[105] 5 U.S. (1 Cranch) 137, 163 (1803).

[106] Angel v. Bullington, 330 U.S. 183, 209 (1947) (Rutledge, J., dissenting); see also Bandes, supra note 11; Ziegler, supra note 11.

[107] See supra Subsection II.A.1.

[108] See supra Subsection II.A.2.

remedies as a form of "corrective justice"—a fundamental value inherent in adjudication.[109]

Though the right-remedy principle has significant normative appeal, it has considerably less basis in constitutional law. First, a broad principle of corrective justice can be found nowhere in the text, structure, or history of the Constitution. Of the entire document, only the Fifth Amendment (which orders "just compensation" for "private property . . . taken for public use") and the Suspension Clause (which safeguards the availability of the writ of habeas corpus) contemplate a remedy for a particular wrong.[110] Nowhere else are remedies mentioned, which is significant since so many state constitutions specifically guaranteed remedies for wrongs.[111] This makes perfect sense because, as described above, liberty was originally to be protected through *structural* arrangements, not a system of rights and remedies.[112] Moreover, judicial doctrine has long treated the right-remedy principle as precatory, often refusing to issue relief in cases of sovereign or official immunity.[113] In short, "[t]he dictum of *Marbury v. Madison* notwithstand-

[109] Some might argue that right-remedy principle is borne not of a penchant for corrective justice, but of deterrence. Only by providing a remedy for every wrong, the argument goes, can the federal courts adequately deter constitutional violations. Although deterrence, as noted above, is an appropriate goal for federal remedies, adequate deterrence does not require strict adherence to the right-remedy principle. Optimal levels of deterrence can rarely be reduced to the one-to-one formula that the principle implies. This is especially true in the field of constitutional torts, where agency relationships are often convoluted and official immunity questions feature prominently in nearly every suit. See Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345 (2000). Thus, even if the principle is understood as a tool of deterrence, there is nothing in the Constitution that requires the federal courts to deter unconstitutional conduct according to a specific ratio. This is not to say that issuing a remedy for every wrong is normatively undesirable. Empirical analyses may in fact confirm the wisdom of the principle and recommend its increased usage. Rather, it is simply to say that the right-remedy principle is not constitutionally compelled.

[110] See U.S. Const. art. I, § 9, cl. 2; U.S. Const. amend. V.

[111] Thomas R. Phillips, The Constitutional Right to a Remedy, 78 N.Y.U. L. Rev. 1309, 1310 (2003) (noting that the right to a remedy "expressly or implicitly appears in forty state constitutions"); id. at 1310 n.6 (providing citations to individual state constitutions).

[112] See supra Subsection II.A.1.

[113] See Bellia, supra note 11, at 784 (stating that the right-remedy principle in English law "was not a black letter legal doctrine; it was merely a platitude"); Fallon & Meltzer, supra note 11, at 1779–87 ("Notwithstanding *Marbury*'s contrary intimations, the structure of substantive, jurisdictional, and remedial doctrines that existed at the

ing, there is no right to an individually effective remedy for every constitutional violation. The ultimate commitment of the law of [constitutional] remedies . . . is to create schemes and incentives adequate to keep government, overall and on average, tolerably within the bounds of law."[114]

Second, the right-remedy principle incorrectly implies that every constitutional harm must be remedied in a *constitutional* case. Early judicial practices belie this claim, however—a point that, ironically enough, is well illustrated by *Marbury* itself. As is well known, William Marbury sought the Supreme Court's help in securing his position as justice of the peace for the District of Columbia. The Secretary of State in John Adams' administration (none other than John Marshall himself) had failed to deliver Marbury's commission to him before Thomas Jefferson became President. Jefferson ordered his Secretary of State, James Madison, to withhold the commission. This, Marbury alleged, violated his statutory right to the commission.[115] Marbury thus brought a mandamus action—a type of civil rights action demanding that a government official obey the law—to force Madison to deliver the commission.[116] A mandamus was an extraordinary remedy, however, and it was unavailable if more traditional remedies were sufficient. Thus, every mandamus action, including Marbury's, required the court to determine whether alternative means were available to remedy the harm alleged. Chief Justice Marshall did just this in *Marbury*. Madison had contended that Marbury's application for mandamus was displaced by a common law action for detinue, which allowed one to retrieve a lost "thing . . . *or* its value."[117] According to Mar-

time of the Constitution's framing and that evolved through the nineteenth century by no means guaranteed effective redress for all invasions of legally protected rights and interests.").

[114] Fallon, supra note 14, at 311.

[115] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154, 162 (1803) (stating that Marbury's right "originate[d] in an act of congress passed in February 1801" and that "the law creating the office [to which Marbury was commissioned], gave [Marbury] a right to hold for five years"). It is of no matter that Marbury was asserting a statutory as opposed to a constitutional right, for both are public rights.

[116] For background on the mandamus action and its role in enforcing the rule of law, see Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963); Harold Weintraub, English Origins of Judicial Review By Prerogative Writ: Certiorari and Mandamus, 9 N.Y. L. F. 478 (1963).

[117] *Marbury*, 5 U.S. (1 Cranch) at 173.

shall, a detinue action would not provide Marbury with relief since a public office was not a "thing" that could be retrieved and the "value of a public office . . . is incapable of being ascertained."[118] Thus, having found detinue law insufficient to provide relief, Marshall found that Marbury had stated "a plain case for a mandamus."[119] It is clear from the case, however, that if detinue law (or some similar common law action) had been available, Marbury's enforcement action against the Secretary of State would have lay not in public law, but simply in the private law of tort.[120]

Marbury thus illustrates that private law was an accepted tool for enforcing public law obligations. This aspect of *Marbury* is by no means aberrational. Scholars who have studied early constitutional enforcement agree that "[t]he predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass."[121] Thus, the Founders assumed that the common law, not the Constitution, would remedy government wrongs.[122] In light of this, it is fallacious to posit that

[118] Id.

[119] Id.

[120] See Bellia, supra note 11, at 787–88; Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 420–21 (1987).

[121] Woolhandler, supra note 120, at 399; see also Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 3–4 (1985) ("[I]n the first 70 years of the Republic, many of the Supreme Court's important constitutional decisions came in suits in which defendants sought, on constitutional grounds, to avoid liability, rather than in suits in which plaintiffs sought to obtain damages or injunctive relief for alleged constitutional violations."); Michael G. Collins, "Economic Rights," Implied Constitutional Acts, and the Scope of Section 1983, 77 Geo. L.J. 1493, 1510 (1989) ("Traditionally, governmental actors were liable at common law for injuries inflicted in the course of their employment."); Alfred Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1122–23 (1969) (noting that, in the nineteenth century, "the view developed that the governmental officer acting under a void statute, or outside the bounds of a valid statute, may be regarded as stripped of his official character, and answerable, like any private citizen, for conduct which, when attributable to a private citizen, would be an offense against person or property"); John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Cal. L. Rev. 1387, 1400 (2007) (stating that, in early America, "there was no distinctively federal cause of action to remedy constitutional violations," so "[a]ctions against officers typically alleged a common law harm").

[122] Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 20–21 (1997). This is consistent with English practice at the time of the founding, which was well-known to the Founders. See, e.g., Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763); Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763); Akhil Reed Amar, Fourth Amendment First Principles,

federal courts have a duty to imply a remedy directly from the Constitution for *every* constitutional wrong. Constitutional remedies need only be implied as necessary to maintain the constitutional order.

* * *

In sum, federal courts have a general duty to implement constitutional norms through doctrine, but also have a duty to prioritize congressional implementing preferences over judicial preferences. Federal courts have no duty, however, to issue a remedy in each and every case. I now turn to a deeper analysis of the judiciary's implementing rules, a discussion that reveals the surprising degree to which congressional preferences can replace judicial preferences.

B. The Status of Judicial Implementing Rules

In discharging their duty to implement constitutional norms,[123] federal courts produce judicial decisions. For a long time, decisions with a constitutional element, such as *Miranda*, were known simply as "constitutional law." In one sense, this was descriptively accurate, as such judicial decisions clearly involve the Constitution and have the force of law. Though accurate, the terminology inhibited a deeper understanding of judicial behavior in constitutional cases. In 1975, Henry Monaghan suggested that decisions like *Miranda* were perhaps not "constitutional" law at all. He explained that a "surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."[124] Monaghan called this "substructure" of law "constitutional common law."[125]

In the past decade, several scholars have developed a robust theory of constitutional decisionmaking based on Monaghan's original

107 Harv. L. Rev. 757, 772 n.54 (1994) ("The *Wilkes* case was a cause célèbre in the colonies, where 'Wilkes and Liberty' became a rallying cry for all those who hated government oppression.").

[123] See supra Subsection II.A.1.

[124] Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 2–3 (1975).

[125] Id.

description of constitutional common law. Professors Richard Fallon,[126] Mitchell Berman,[127] and Kermit Roosevelt[128] have explained that judges engage in two "conceptually distinctive" behaviors when adjudicating most constitutional cases.[129] One behavior is the assigning of meaning to the "constitutional operative proposition."[130] Constitutional operative propositions are the specific, textually self-defining directives found within the Constitution. To wit: Senators must be thirty years old,[131] trials must be by jury (except in cases of impeachment),[132] and statutes imposing taxes must originate in the House of Representatives.[133] Even ambiguous clauses, however, will still contain a core operative proposition. For example, although the Equal Protection Clause might mean many things, it at least means that "the government may not treat some people worse than others without adequate justification."[134] In adjudicating cases that implicate an operative proposition, courts will often simply apply the operative proposition just as it is written, such as in the case of eligibility requirements for U.S. Senators. Sometimes, however, the operative proposition, though relevant to the case, will be opaque with regard to the specific issue presented—such as in a case falling outside the core meaning of the Equal Protection Clause. In these instances, federal courts engage in a second type of behavior: the crafting of "constitutional decision rules."[135]

[126] Fallon, supra note 86; see also Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 61–75 (1997).

[127] Berman, supra note 94, at 32–39.

[128] Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649, 1652–58 (2005); see also Dan T. Coenen, A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue, 42 Wm. & Mary L. Rev. 1575, 1580–84 (2001).

[129] Fallon, supra note 86, at 38.

[130] Berman, supra note 94, at 15.

[131] U.S. Const. art. 1, § 3.

[132] U.S. Const. art. 3, § 2.

[133] U.S. Const. art. 1, § 7.

[134] Roosevelt, supra note 128, at 1657 (internal quotation marks and citations omitted). For other formulations of the Equal Protection Clause's core meaning, see Berman, supra note 94, at 9 ("[G]overnment may not classify individuals in ways not reasonably designed to promote a legitimate state interest."); Sager, supra note 98, at 1215 ("A state may treat persons differently only when it is fair to do so.").

[135] Berman, supra note 94, at 15.

A constitutional decision rule is a rule of decision designed to implement constitutional operative propositions. For example, upon reading that the Fifth Amendment prohibits the state from "compel[ling] [a defendant] in any criminal case to be a witness against himself," a court can reasonably conclude that the state may not physically coerce witnesses during interrogations.[136] Having assigned meaning to the operative proposition, the court must then consider whether the proposition can be applied on its own terms, or must be implemented with a decision rule. As explained in the preceding Section, the Supreme Court designed the *Miranda* decision rule to implement Fifth Amendment guarantees because a straightforward application of the Fifth Amendment could not, in practice, preserve Fifth Amendment rights.[137]

Other examples abound.[138] By way of further illustration, consider just two. In *Washington v. Davis*, the Supreme Court considered whether a police department may screen job applicants using an examination "designed to test verbal ability, vocabulary, reading and comprehension," even though the test disadvantaged African-American applicants.[139] The precise issue was whether a test adopted without a discriminatory motive, but nonetheless having a discriminatory impact, violated the Equal Protection Clause. The Court said no; it was the state's *motive*, not the effects of its behavior, that mattered. Compare this to *Lemon v. Kurtzman*.[140] There, the Court considered the constitutionality of a state statute that reimbursed parochial school teachers who taught public school students. The Court held the statute unconstitutional because the statute's "principal or primary effect" was the advancement of re-

[136] U.S. Const. amend. V.

[137] See supra Subsection II.A.1.

[138] See Kermit Roosevelt III, The Myth of Judicial Activism 19 (2006) (noting that "constitutional decisionmaking" involves numerous atextual rules, such as "tiers of scrutiny, five-factor tests, requirements of congruence and proportionality, . . . undue burden analysis, . . . bewildering distinctions, between content-based and content-neutral regulations of speech, between hard and soft money, between intentional discrimination and disparate impact"); Berman, supra note 94, at 61–78 (noting the use of decision rules in various constitutional doctrines); Fallon, supra note 86, at 78–79 (listing different types of doctrinal tests, including "forbidden-content tests," "suspect-content tests," "balancing tests," "non-suspect-content tests," "effects tests," "purpose tests," and "appropriate deliberation tests").

[139] 426 U.S. 229, 235 (1976).

[140] 403 U.S. 602 (1971).

ligion.[141] Unlike in *Washington*, "effects" mattered this time. *Washington* and *Lemon* might appear contradictory on their face, but only if one believes that the Court was interpreting the Constitution in both cases. This, however, is untenable. Both the First Amendment and Equal Protection Clause are utterly opaque with regard to the status of unintended effects. *Washington* and *Lemon*, like so much constitutional doctrine, can only be understood as examples of constitutional implementation through decision rules—the judiciary's effort to create doctrine so that constitutional norms may be realized.

It is appropriate to pause here and field a question that is certain to arise in the reader's mind: how does the judiciary know what our nation's "constitutional norms" are? Indeed, if posed rhetorically, this question amounts to an important criticism, for it conveys a suspicion that the judicial articulation of constitutional norms derives not from the Constitution, but from the judges' own personal norms. This criticism appeals to the charms of originalism, an issue I addressed briefly above.[142] There, I answered the originalist charge that constitutional implementation was illegitimate by pointing out that originalism, inasmuch as it fails to check lawlessness by non-Article III actors, is thus sometimes illegitimate itself. Here, I answer the slightly different charge that even if originalism might sometimes be illegitimate, it is still superior to open-ended implementation because it better tethers unelected decisionmakers to objectively ascertainable standards—that is, constitutional text. Such beneficent limitations will operate across the entire range of constitutional decisions, thus offsetting the relatively few circumstances where originalism may fail to check abuses by non-Article III actors. The argument, in short, is that it is better to check the judges all of the time than for the judges to check everybody else some of the time.

This argument is not without force, but it overestimates the constraining force of constitutional text. The Fourth Amendment, for example, says not one whit about whether police officers may use

[141] Id. at 612–14.

[142] See supra notes 95–97 and accompanying text.

thermal imaging devices to search homes without a warrant.[143] Nor does Article III provide any more than the barest guidance on whether the slow loss of shoreline due to rising sea levels is a harm sufficient to challenge a federal agency's response to global warming.[144] In deciding these questions, just like so many others in constitutional adjudication, courts necessarily run out of text. Thus, originalists, whether they admit it or not, are often unchecked by constitutional text.[145] They, like all judges, must resort to extratextual sources—history, tradition, structure, precedent, policy—to resolve cases. In consulting these sources, judges search not for "meaning" in the textual sense, but for meaning in a deeper sense. They seek to uncover the deep-seated norms that have guided our country, but are not exhausted in constitutional text. It is from this process that judges determine constitutional norms, and it is a process in which all judges engage. Thus, the project of implementing constitutional norms, while dangerously open-ended in the eyes of some, is *no more open-ended* than the project of originalist constitutional interpretation.[146] In both instances, judges run out of text and must discern constitutional norms from other sources.[147] Having addressed this, I return now to the principal discussion—that of decision rules and their constitutional basis.

[143] Kyllo v. United States, 533 U.S. 27 (2001) (holding that the use of thermal imaging technology on a private home is a search and thus is impermissible without a warrant).

[144] Massachusetts v. EPA, 549 U.S. 497, 520–21 (2007) (holding that Massachusetts had standing to challenge the EPA's regulation of carbon emissions).

[145] Lawrence B. Solum, Semantic Originalism 68–75 (Illinois Pub. Law & Legal Theory Research Paper Series, Paper No. 07-24), available at http://papers.ssrn.com/abstract=1120244 (explaining why "the meaning discovered by constitutional interpretation [of text] runs out" and arguing that constitutional practice therefore requires the "supplementation" of constitutional text).

[146] Dan T. Coenen, The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules, 77 Fordham L. Rev. 2835, 2860 n.158 (2009) (arguing that judicial creation of decision rules is no more threatening to democratic self-government than originalism because originalist judges must "inevitably extract from historical materials 'the principles the ratifiers understood themselves' and then 'apply those principles to unforeseen circumstances'") (quoting Robert H. Bork, Slouching Towards Miers, Wall St. J., Oct. 19, 2005, at A12).

[147] See, e.g., Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 857–60 (1989) (arguing that history and tradition should be studied to determine the proper application of constitutional text); Solum, supra note 145, at 75–79 (identifying several methods through which a judge might supplement textual meaning).

Although federal courts have an obligation to implement the Constitution through decision rules, it would be incorrect to say that each specific rule is the *only* permissible decision rule. In *Miranda*, for instance, it would have been perfectly acceptable for the Court to require suspects be informed that they have the "right to refuse to speak" rather than the "right to remain silent."[148] And for that matter, the Court could have decided not to create a *per se* rule, but rather to impose on the state the burden to disprove coercion by clear and convincing evidence. One can debate whether this decision rule would be preferable to the *Miranda* rule, but there can be little debate that the Court clearly had the *authority* to impose such a rule. The point here is that there may exist multiple decision rules, any one of which can sufficiently implement constitutional guarantees. Where multiple rules exist, the Court is free to choose among the competing rules.

Given that federal courts may choose among competing rules, there is no reason why a court cannot select a rule designed by a non-Article III actor.[149] Suppose that in 1968, two years after the Court issued *Miranda*, Congress amended the Federal Rules of Evidence to render inadmissible any confession not preceded by a series of warnings. Suppose further that the warnings promulgated by Congress were exactly the same as those ordered by the Court in *Miranda* itself, except that Congress adopted the phrase "right to refuse to speak" instead of "right to remain silent." In a subsequent case, the Court would be free to replace its *Miranda* rule with the evidentiary rule designed by Congress. If the Court could re-design the rule on its own, there is nothing to prevent it from borrowing that design from some other entity.[150] Of course, the

[148] Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent . . . ."). The Court explicitly recognized this point in *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989), stating that *Miranda* warnings need not "be given in the exact form described in that decision."

[149] Indeed, the *Miranda* Court acknowledged this possibility when it invited "Congress and the States to . . . search for . . . other procedures which are at least as effective [as *Miranda* warnings] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467.

[150] Professor Monaghan recognized this early on in his theory of constitutional common law. The "substructure of substantive, procedural, and remedial rules" he described, being sub-constitutional, was "subject to amendment, modification, or even reversal by Congress." Monaghan, supra note 124, at 2–3.

Court may only borrow that other design if it would be sufficient to enforce the constitutional order.

This hypothetical scenario is not completely fanciful, for Congress did attempt to modify the *Miranda* rule in 1968. Unlike the hypothetical modification explained above, however, Congress sought to largely re-instate the "totality of circumstances" test that *Miranda* had displaced.[151] Though the statute remained dormant for many years, it came before the Court in 2000 in *Dickerson v. United States*.[152] In an opinion by Chief Justice Rehnquist, the Court refused to implement the congressionally designed decision rule. Importantly, the problem was *not* that the totality of circumstances rule had originated with Congress,[153] but that the rule was not an "adequate substitute for the warnings required by *Miranda*."[154] That is, the rule did not "meet the constitutional minimum" imposed by the Fifth Amendment.[155]

Not only may Congress offer replacements for constitutional decision rules; states may as well. Consider, for example, *Smith v. Robbins*.[156] In *Smith*, the Court evaluated the procedures that a state-appointed defense attorney must follow in declining to file a frivolous appeal—procedures that the Court had previously outlined in *Anders v. California*.[157] In *Anders*, the Court explained that, where a public defender has reviewed the record and found no ground justifying a non-frivolous appeal, he should inform the court of this by letter and the court should evaluate the merits of any putative appeal independently.[158] In the Court's view, such procedures were necessary to ensure that the defendant's constitutional right to counsel was not accidentally forfeited. After *Anders*, however, California developed its own set of procedures for public defenders who refused to file frivolous appeals. At issue in *Smith*

[151] 18 U.S.C. § 3501(b) (2000) (listing several factors to consider when evaluating the coerciveness of an interrogation and stating that the "presence or absence" of any factor "need not be conclusive on the issue of voluntariness of the confession").

[152] 530 U.S. 428 (2000).

[153] Id. at 440–41 (stating that a "legislative alternative to *Miranda*" would be permissible if it were "equally as effective in preventing coerced confessions").

[154] Id. at 442.

[155] Id.

[156] 528 U.S. 259 (2000).

[157] 386 U.S. 738 (1967).

[158] Id. at 744.

was the constitutionality of the California procedures, which in turn required the Court to assess the constitutional significance of the *Anders* procedures. The Court explained that "the *Anders* procedure is *merely one method of satisfying the requirements of the Constitution* for indigent criminal appeals"—that is, the *Anders* procedure is a decision rule.[159] "The Constitution erects no barrier," the Court explained, to states designing their own decisions rules and to the Court's decision to give them effect.[160] Finding that the California procedures "affor[ded] adequate and effective appellate review to indigent defendants," the Court approved of the procedures in place of those promulgated in *Anders*.[161]

Thus, decision rules designed by Congress or the states can stand in the place of decision rules designed by the Court. This relationship between the Court and non-judicial actors is most comfortable when the rule proffered by Congress or the states is *more* protective of individual rights than the Court's decision rule. Thus, if Congress wishes to create a statutory right not to have one's car searched during a traffic stop, persons deprived of this statutory right could press this right in court and not be thwarted by judicially created decision rules holding that officers, consistent with the Fourth Amendment, may search cars in that setting.[162] There will rarely be an objection to congressional preferences that augment individual rights.

A more troublesome situation is presented, however, when Congress or the states promulgate decision rules that provide *less* protection than judicially created decision rules. For example, suppose Congress enacted a law allowing federal officers to use thermal imaging devices to search private homes, provided that the officers are on public property during the search and have a reasonable suspicion that unlawful activity is afoot. This law would provide less protection than is currently available under the Fourth Amendment, since officers currently need probable cause to justify

[159] *Smith*, 528 U.S. at 276 (emphasis added).

[160] Id.

[161] Id. (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956)).

[162] Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.").

such a search.[163] For those who believe that the Constitution's meaning is simply a sum of judicial holdings, this law is patently unconstitutional. In contrast, for those who accept that decision rules are judicial creations that implement constitutional norms in one of several acceptable ways, this law is not necessarily unconstitutional.[164] Its validity does not depend on whether it provides *less* protection than a judicially created rule, but only on whether it would endanger the constitutional order.

C. The Conditions Under Which Proxy Enforcement Will Be Acceptable

Thus far, I have explained that federal courts have a duty to "implement" the Constitution by crafting doctrine that will make constitutional guarantees real.[165] I have also explained that federal courts have a duty to obey the preferences of Congress with regard to direct or proxy enforcement, provided that Congress' edicts are themselves constitutional.[166] Finally, I have argued that implementing rules devised by the Court are not properly understood as "constitutional" law and thus may be displaced by rules devised by Congress or the states, provided that those rules would in fact protect constitutional norms from erosion. These arguments thus make proxy enforcement contingent on two matters: (1) whether Congress has sanctioned the practice, and (2) whether the alternative rule will, in fact, uphold the constitutional order. In this Section, I explain in detail how a court should determine whether these two conditions have been met.

[163] Kyllo v. United States, 533 U.S. 27 (2001) (holding that the use of thermal imaging technology on a private home is a search and is therefore impermissible without a warrant).

[164] See Berman, supra note 94, at 105 (explaining that "Congress might disagree with" a judicially created decision rule and "be moved to legislate" its own decision rule; in that case, the question "would then become whether to allow the judge-made decision rule to be replaced by the Congress-made one").

[165] See supra Subsection II.A.1.

[166] See supra Subsection II.A.2.

1. Discerning Congressional Intent

Congress enjoys plenary control over the federal courts and the enforcement of federal law.[167] If Congress wants federal courts to enforce the Constitution directly, it may order them to do so. In contrast, if Congress desires that federal courts enforce sub-constitutional law in place of constitutional law, it may also order courts to do so (provided that the sub-constitutional law maintains the constitutional order, a criterion I discuss in the following Section). Thus, in determining whether to enforce the Constitution by proxy, federal courts must first discern congressional preferences.

How should federal courts do this? Much in the same way that they discern any congressional preference—by reading the statute and applying standard rules of statutory interpretation. Thus, where Congress sanctions tort suits against federal officers and leaves unchanged the availability of *Bivens* actions, federal courts can reasonably infer that Congress remains comfortable with direct enforcement pursuant to *Bivens*.[168] At the same time, it is impossible to read such a statute as *commanding* direct enforcement through *Bivens*. Federal courts are thus left with significant discretion in these instances: Congress has not revealed a preference for proxy or direct enforcement, and federal courts are thus free to choose their own course.

Divining congressional preferences in Section 1983 cases will work slightly differently. Clearly, in enacting Section 1983, Con-

[167] Sheldon v. Sill, 49 U.S. 441, 449 (1850) (holding that Congress' Article I power to create the lower federal courts implicitly includes the power to define their jurisdiction).

[168] For instance, in amending the Federal Tort Claims Act (FTCA) in 1988, Congress exempted from FTCA coverage any claim "which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). As this provision was explained in a report by the House Judiciary Committee:

> Since the Supreme Court's decision in *Bivens*, . . . the courts have identified this type of tort [as compared to a common law tort] as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.

H.R. Rep. No. 100-700, at 6 (1988). For a recent article assessing the status of *Bivens* in light of various congressional enactments, see James E. Pfander & David Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 Geo. L.J. (forthcoming 2009).

gress evinced a preference for direct enforcement. Indeed, a major impetus for the statute was the impotence of sub-constitutional law (specifically, state law) in protecting citizens from governmental overreaching.[169] Despite its original preference for direct enforcement, Congress is, of course, free to modify Section 1983 in favor of proxy enforcement in specific instances. Thus, if Congress wishes to set up a comprehensive regulatory scheme to address discrimination in the school setting, it is free to modify Section 1983 so that educational inequality is dealt with pursuant to a separate statute. Federal courts already have a relatively well-developed tool for assessing congressional goals in this regard. Courts ask whether "the remedial devices provided in a particular Act are sufficiently comprehensive [so as to] demonstrate congressional intent to preclude" a Section 1983 action.[170] Although any measure of congressional intent is likely to breed some disagreement, this test is relatively stable and is thus a useful way to sort out vexing problems of congressional intent arising from congressional silence.[171] Further, this test appropriately ignores state law in interpreting congressional preferences for or against direct enforcement through Section 1983. While a federal statute can be read as an implied modification of another federal statute, state law cannot be read in this way because, quite obviously, state and federal laws issue from different sovereigns.[172]

2. Preserving Constitutional Order

If Congress opens the door to proxy enforcement—either by specifically ordering it or tacitly allowing it—federal courts must

[169] Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877, at 454–59 (1988).

[170] Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (refusing to enforce federal maritime statutes though a § 1983 suit); see also Bush v. Lucas, 462 U.S. 367, 368 (1983) (holding *Bivens* action unavailable because of congressional enactment of "comprehensive procedural and substantive provisions giving meaningful remedies"); Blessing v. Freestone, 520 U.S. 329, 346–48 (1997) (permitting § 1983 suits for relief under portions of the Social Security Act that do not provide comprehensive remedies).

[171] See, e.g., Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 796–97 (2009) (unanimous opinion applying this test).

[172] Montana v. Blackfeet Tribe, 471 U.S. 759, 765–66 (1985) (discussing the principles under which one federal statute will be read as impliedly modifying an earlier-enacted statute).

then determine whether the sub-constitutional law to be applied will indeed preserve the constitutional order. In making this determination, federal courts should focus on three factors: the *procedures* attending sub-constitutional enforcement, the *substance* of the sub-constitutional law, and the *remedies* available pursuant to it.

Procedures. It is hardly novel to note that procedures affect results. Indeed, over seventy years ago, the chief drafter of the Federal Rules of Civil Procedure referred to procedure as the "Handmaid of Justice."[173] Thus, in determining whether sub-constitutional law will produce sufficient results, federal courts should evaluate the entire procedural context in which enforcement will occur. This includes an inquiry into the formal procedures used, as well as a more holistic assessment as to whether enforcement, on the whole, is likely to be accomplished. This evaluation will be the most searching where sub-constitutional adjudication will occur outside an Article III court, since cases that occur in a federal court are adjudicated using the Federal Rules of Civil Procedure—rules that are presumptively adequate.[174] In these situations, the procedures and overall context need not be identical to those in federal court, but they must, on the whole, be sufficient to vindicate basic constitutional standards.

Federal courts are often called upon to make this determination, as the recent case of *Boumediene v. Bush* illustrates.[175] The issue in *Boumediene* was whether prisoners detained at Guantanamo Bay

[173] Charles E. Clark, The Handmaid of Justice, 23 Wash. U. L.Q. 297 (1938); see also Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 148 (1986) ("[P]rocedure is basically a handmaiden of substantive law.").

[174] The instances where proxy enforcement cases will occur in state court are rare. Suits against federal officers, even if filed in state court, will almost always end up in federal court because federal officers have a statutory right to remove the case to federal court. 28 U.S.C. § 1442. While a sub-constitutional law action against a state officer will likely end up in state court (save diversity of citizenship under 28 U.S.C. § 1332), proxy enforcement will rarely be permissible in these cases since § 1983 evinces a preference for direct enforcement without regard to state law. See supra note 172 and accompanying text. Thus, proxy suits most likely to be adjudicated outside an Article III court are those that must be originally filed in a federal administrative tribunal. See *Bush*, 462 U.S. at 367 (ordering federal employee to file First Amendment claim in administrative, rather than Article III, court).

[175] 128 S. Ct. 2229 (2008).

could seek relief through petitions for habeas corpus in light of Congress' attempt to foreclose such efforts in the Detainee Treatment Act (DTA). Although Congress is free to curtail habeas relief in various respects,[176] the resulting remedial apparatus must be "neither inadequate nor ineffective to test the legality of a person's detention."[177] The *Boumediene* Court was thus charged with determining whether Congress' replacement procedures were an "adequate substitute" for standard habeas procedures.[178] Five justices held that they were not. The DTA procedures, regardless of whether they "satisf[ied] due process standards," created a "considerable risk of error in the tribunal's findings of fact."[179] Detainees were assigned not a lawyer, but rather a "Personal Representative" who was not considered an "advocate"; the government's evidence was "accorded a presumption of validity"; the "circumstances [surrounding the detainee's] confinement" limited "his ability to rebut the Government's evidence against him"; and the appellate review process could not "cure all defects in the earlier proceedings."[180] For these reasons, the Court held that the DTA procedures were an inadequate substitute for a formal habeas corpus petition.

Boumediene is instructive on the issue of procedural adequacy in two respects. First, it highlights assorted criteria that will affect the adequacy of a procedural system in protecting the constitutional order. Second, it illustrates that a procedural system can be inadequate *even though the procedures comport with due process doctrine*.[181] *Boumediene* contemplates, and properly so, a broad-ranging inquiry into how the overall *context* of adjudication will affect results. This aspect of *Boumediene* is also nicely illustrated by the landmark case of *Ex parte Young*.[182] In *Young*, the Court allowed railroad employees to seek an injunction in federal courts

[176] See U.S. Const. art. I, § 9, cl. 2 ("Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[177] Swain v. Pressley, 430 U.S. 372, 381 (1977).

[178] 128 S.Ct. at 2662–63. This question necessarily followed the Court's prior conclusion that the right to habeas corpus relief "has full effect at Guantanamo Bay." Id.

[179] Id. at 2270.

[180] Id. at 2260.

[181] Id. at 2270 ("Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry.").

[182] 209 U.S. 123 (1908).

against the enforcement of an allegedly unconstitutional state statute. Although the employees could challenge the statute in state court by first violating the statute and then asserting its unconstitutionality as a defense, the federal courts found this prospect unrealistic. The statute ordered that violators "be punished by a fine not exceeding five thousand ($5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years, or both such fine and imprisonment."[183] Few employees would risk such harsh penalties to test the constitutionality of the law, with the effect that the penalties "close[d] up all approaches to the courts, and . . . prevent[ed] any hearing upon the question."[184] Thus, although the assertion of a defense might normally be procedurally adequate to enforce constitutional standards,[185] the special context surrounding *Ex parte Young* made this likelihood remote. A civil rights action in federal court was necessary.

Thus, in assessing the procedural sufficiency of a proxy enforcement system, the court should pay attention to standard indicia of procedural fairness as well as other contextual issues that may, as a practical matter, impede the vindication of the constitutional norm at issue.

Substance. The substance of sub-constitutional law will also affect whether the constitutional order will be preserved. To assess whether the sub-constitutional law will be substantively adequate to the task of preserving the constitutional order, courts should focus first on whether liability is triggered by the sub-constitutional law. For instance, tort law, inasmuch as it forbids police officers from beating suspects during an arrest, will be triggered, and is thus substantively sufficient to maintain the constitutional order. At the same time, government contract law would be wholly impotent to protect citizens from police brutality and thus would be an unacceptable proxy.

Where liability would be triggered under both the constitutional and sub-constitutional law, the sub-constitutional law will be (at

[183] Id. at 128.

[184] Id. at 148.

[185] Younger v. Harris, 401 U.S. 37, 49–54 (1971) (holding a § 1983 action to be unavailable while a state criminal action was pending because the state procedures—including the ability to raise a constitutional right as a defense—were adequate to protect the defendant's rights).

least from a substantive perspective) an adequate replacement for the constitutional decision rule. If liability is *not* triggered, however, the federal courts should not immediately dismiss the possibility of proxy enforcement. This point owes to the fact that constitutional decision rules are not "constitutional" law in a formal sense, but simply judicial creations used to implement constitutional norms. If federal courts have the authority to modify these decision rules (which, given the ambiguous and open-ended nature of the constitutional text, they quite often do), federal courts are free to replace their own rules with those devised by non-Article III actors.[186]

Thus, if liability is not triggered under the sub-constitutional law, the question becomes whether the alternative decision rule is substantively adequate to maintain the constitutional order. A sub-constitutional law that covers ninety-nine percent of the police brutality cases brought under the Fourth Amendment will quite likely continue to preserve Fourth Amendment norms. Suppose, for instance, that the tort law of a particular state recognizes a narrow defense to liability for battery where the defendant's imposition of force was based on the mistaken identity of the victim. This defense will likely defeat some tort claims based on police brutality, but it is difficult to believe that police officers, or the police departments that train them, will dispense with adherence to Fourth Amendment norms. Federal courts could thus apply a proxy enforcement rule in those situations, even if it meant that some victims of police brutality (that is, those abused based on a mistaken identity) will not receive relief. Importantly, however, courts would be free to revisit the advisability of proxy enforcement in this situation. If the invocation of the mistaken identity defense increased dramatically such that the boundaries between the state and its citizens were effectively shifted, proxy enforcement could, and should, be ended.

I recognize that courts may find it challenging to determine the extent of overlap between constitutional and sub-constitutional law, and further, whether something less than complete overlap will protect constitutional norms. This point, however, speaks to the normative desirability of a specific rule of proxy enforcement

[186] See supra Section II.B.

and not to the practice's overall permissibility. Moreover, as noted above, federal courts are constantly called on to consider whether a doctrinal rule will adequately implement constitutional norms.[187] Thus, while open-ended and susceptible to bald value judgments, this type of decisionmaking is hardly foreign to the federal judicial role in constitutional cases.

Finally, it should be noted that sub-constitutional law will sometimes sweep *more* broadly than constitutional doctrine. For instance, one of the chief barriers to relief in any civil rights action is the qualified immunity defense, which precludes recovery in cases where the officer "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[188] This defense is often unavailable in tort suits against governments, however, meaning that plaintiffs will recover when their rights were in fact violated, regardless of whether the rights were clearly established.[189] Thus, in a police brutality case, a plaintiff is likely to collect damages under tort much more often than under the Fourth Amendment, even though both laws, on their face, prohibit brutality. In these cases, proxy enforcement would be a net *gain* for plaintiffs.[190]

Remedies. Finally, a court presented with a proxy decision should also focus on the remedies provided by the alternative law.

[187] See supra Subsection II.A.1.

[188] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see generally Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 Iowa L. Rev. 261 (1995) (explaining official immunity analysis in constitutional tort cases); Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*, 88 Geo. L.J. 65, 65–66, 79–80 (1999) (explaining that *Bivens* suits rarely result in an assessment of damages and that "[q]ualified immunity is undoubtedly the most significant bar" to recovery).

[189] See, e.g., 28 U.S.C. § 1346(b)(1) (imposing liability on the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [negligent or wrongful] act or omission occurred"); United States v. Olson, 546 U.S. 43, 44 (2005) (stating that, because "the United States waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort," any official or municipal immunity created by state law is not applicable in FTCA suits against the federal government).

[190] To be sure, this gain will only be realized by plaintiffs alleging constitutional, but not common law, claims. For plaintiffs bringing both sub-constitutional and constitutional claims, no net gain will be realized. While many litigants bring common law claims with their constitutional claims, a large number of litigants do not—especially prisoners. See, e.g., Peoples v. CCA Detention Ctrs., 422 F.3d 1090 (10th Cir. 2005).

To be sure, the issue of remedies can sometimes be cast in procedural or substantive terms, since the ultimate relief a plaintiff may obtain is undoubtedly affected by both procedure and substance. Yet, there will be issues that fall solely into the remedial domain. Damages caps are the best example. Although punitive damages are a standard feature of state tort law, they are typically unavailable in tort claims against the federal and state governments.[191] Similarly, state common law employment discrimination claims are often governed by standard damages doctrine,[192] whereas damages for employment discrimination by public agencies are often capped.[193] Limitations on damages, however, need not be fatal to proxy enforcement. As with the procedural and substantive inquiries, the question is *not* whether the relief available under an alternative law is equal to, or greater than, that available in a civil rights action, but simply whether the alternative relief is sufficient to maintain the minimum constitutional order. As noted, courts have ample resources to make this determination and are free to revisit the issue should their initial determination prove incorrect.

D. Illustrations

Having justified the use of proxy enforcement under certain conditions, I now make these arguments concrete by applying them to several different cases.

Fitzgerald v. Barnstable School Committee.[194] In *Fitzgerald*, the parents of an elementary school student brought an Equal Protection claim against a school district under Section 1983. The complaint alleged that the district failed to prevent student-on-student sexual harassment, thus denying the student equal protection of the laws. The school district argued that the parents' Section 1983

[191] See 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, . . . but shall not be liable . . . for punitive damages."); Smith v. Wade, 461 U.S. 30, 31 (1983) (affirming the award of punitive damages in a § 1983 action); Carlson v. Green, 446 U.S. 14, 22 (1980) (stating that "punitive damages may be awarded in a *Bivens* suit").

[192] See, e.g., Niblo v. Parr Mfg., 445 N.W.2d 351, 355–56 (Iowa 1989) (holding that the remedy for wrongful discharge covers the "complete injury," including economic loss such as wages and out-of-pocket expenses, as well as emotional harm).

[193] 42 U.S.C. § 1981a(b)(3) (capping damages at either $50,000; $100,000; $200,000; or $300,000, depending on the size of the defendant-employer).

[194] 129 S. Ct. 788 (2009).

claim was precluded because Title IX was the exclusive avenue for addressing the wrongs alleged.

As set out above, proxy enforcement though Title IX will be permissible if Congress has ordered so (or at least, through its silence, left that possibility open) and Title IX will maintain a sufficient degree of equality so that equal protection norms will not become a nullity. In *Fitzgerald*, proxy enforcement is inappropriate because Title IX cannot be read, implicitly or explicitly, as withdrawing access to Section 1983. In enacting Title IX, Congress did not create a private right of action similar to that created in Section 1983; instead, Congress' chosen method of enforcing Title IX was the withdrawal of federal funding.[195] This suggests that Congress did not intend to displace the private right of action in Section 1983. Thus, regardless of whether Title IX would maintain sufficient equality, proxy enforcement is inappropriate because it contradicts Congress' choice on the matter.

Monroe v. Pape. *Monroe* presents a similar issue to that in *Fitzgerald*, except that *Monroe* involves the role of state law, rather than a federal statute. The facts of *Monroe*, discussed above,[196] should be familiar. Thirteen Chicago police officers, without a warrant or other justification, entered James Monroe's home and arrested him. Monroe, together with his wife, brought suit under Section 1983 for a violation of their constitutional rights. The defendants argued that the Monroes should have brought their claims under state tort law, not the Constitution. The Court rejected this invitation to enforce the Constitution by proxy.

The Court's decision was correct. In enacting Section 1983, Congress ordered federal courts to issue relief to any plaintiff who has suffered a "deprivation of any rights, privileges, or immunities secured by the Constitution."[197] There is no hint in Section 1983 that its availability depends on the nonexistence of relief under state

[195] Although a private cause of action does exist to enforce Title IX, the cause of action is judicially implied. See Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979). As such, the existence of the action says little about congressional preferences on enforcement. *Fitzgerald*, 129 S. Ct. at 796 ("Title IX contains no express private remedy . . . . This Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation.").

[196] See supra notes 21–22 and accompanying text.

[197] 42 U.S.C. § 1983 (2006).

law; as noted above, Section 1983 was specifically enacted to create an avenue of relief irrespective of state law.[198] Therefore, in *Monroe*, the Supreme Court was correct to follow Congress' choice and ignore the state law. *Monroe* thus illustrates that state law will rarely, if ever, be an adequate stand-in for a Section 1983 action. Unlike a federal statute that can be interpreted as an implied repeal of Section 1983,[199] state law can *never* be invoked to interpret congressional objectives regarding the availability of Section 1983.

Bush v. Lucas.[200] In *Bush*, an employee of the National Aeronautics and Space Administration (NASA) publicly criticized the agency on several occasions. As a result of these statements, the employee was demoted. Thereafter, the employee brought a *Bivens* action seeking damages for a violation of his First Amendment right to free expression. The federal government argued that the plaintiff's remedy lay not in a *Bivens* action, but under the Civil Service Reform Act (CSRA), a federal statute providing for the resolution of employment disputes (including First Amendment claims) between the federal government and its employees.

Under the framework explained above, proxy enforcement is likely inappropriate in this case. The problem lies not with congressional intent regarding proxy enforcement,[201] the substance of the alternative law,[202] or with its remedial force,[203] but rather with the

[198] See supra note 169 and accompanying text.

[199] See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19–21 (1981) (interpreting federal maritime statutes as impliedly foreclosing use of § 1983 as an enforcement mechanism).

[200] 462 U.S. 367 (1983).

[201] The statutory scheme evinces no clear preference for or against proxy enforcement. Id. at 373 ("Congress has not expressly authorized the damages remedy that petitioner asks us to provide. On the other hand, Congress has not expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress."). Thus, the recognition of a *Bivens* action is open to the discretion of the court. See supra Subsection III.C.1.

[202] In this instance, Bush's claims would be adjudicated under First Amendment law, not under a statute creating speech rights. See *Bush*, 462 U.S. at 386 (noting that the "First Amendment claims raised by petitioner . . . are fully cognizable within [the statutory] system"). Thus, as the substance of the legal standard will be the same in both circumstances, there can be no concern over a substantive variation.

[203] Under the statutory scheme, plaintiffs are eligible to receive remedies similar, but not identical, to those in *Bivens* actions. Id. at 388 (describing remedies that will "put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place") (internal quotation marks and citation omitted). Although punitive and emotional distress damages are not available, it is

procedural aspects of the alternative enforcement. A recent study of First Amendment claims by federal employees suggests that the "administrative scheme [utilized in such cases] is not vindicating the First Amendment . . . rights of federal employees."[204] The study makes a "startling" finding: in the entire history of the statutory review process, "not a single First Amendment . . . claim filed by a federal employee against the employee's agency has ever been successful on the merits."[205] The study traces this result to the "lack of neutrality and competency" in the administrative officers charged with hearing such cases, as well as the absence of "meaningful judicial review by an Article III court."[206] First Amendment claims fail under the CSRA, it seems, because CSRA procedures—not the laws applied or the remedies issued—are insufficient to deliver relief. As such, the federal courts may not rely on the CSRA process to vindicate First Amendment rights and instead must allow litigants to make use of *Bivens* actions.

Wilson v. Libby.[207] In *Wilson*, Valerie Plame and her husband, Joseph Wilson, brought a *Bivens* action against Vice President Cheney; his chief of staff, "Scooter" Libby; Richard Armitage of the State Department; and Karl Rove, top advisor to the President. The wrongful act for which the couple sued was the deliberate leaking of Plame's status as a covert agent for the CIA. This act, the couple alleged, infringed upon their rights of free speech, privacy, property, and equal protection. The defendants argued that, regardless of whether the leak constituted a constitutional violation, the couple's remedy lay under the federal Privacy Act, not the Constitution through a *Bivens* action.

The D.C. Court of Appeals recently sided with the defendants. This decision is likely wrong because the *substance* of the Privacy

unlikely that this substantially affects the deterrent force of the remedial system. As noted above, the qualified immunity defense does not apply in these cases, thus meaning that the statutory scheme will, on the whole, provide remedial force that meets or exceeds a *Bivens* action. See supra notes 188–190 and accompanying text.

[204] Paul M. Secunda, Whither the *Pickering* Rights of Federal Employees?, 79 U. Colo. L. Rev. 1101, 1103 (2008).

[205] Id. (emphasis omitted).

[206] Id. at 1139.

[207] 535 F.3d 697 (D.C. Cir. 2008).

Act (rather than it procedures[208] or remedies,[209] or any congressional intent underlying the Act[210]) is insufficient to protect the constitutional norms invoked by the plaintiffs. At first glance, the Privacy Act may seem substantively sufficient. It forbids the disclosure of information "about an individual"[211] under circumstances that, in this case at least, would be unconstitutional.[212] Yet there is a glaring hole in the substantive law in this case: the Privacy Act does not apply to the Offices of the President and Vice President.[213] Thus, the only defendant arguably liable under the Privacy Act would be Richard Armitage. It is difficult to believe that the President and the Vice President, together with their entire staffs, could be deterred from transgressing constitutional norms by holding their confederates from other agencies liable under the Privacy Act.[214]

[208] Privacy Act claims may be adjudicated in federal court under 28 U.S.C. § 1331. Thus, the procedures available in a Privacy Act claim will be the exact same procedures as those available in a federal court constitutional action. Further, there is no indication that the larger context of the adjudication will systematically prevent enforcement. 5 U.S.C. § 552 (2006).

[209] Victims of Privacy Act violations are entitled to "actual damages" as well as the "the costs of the action together with reasonable attorney fees." 5 U.S.C. § 552a(g)(4) (2006).

[210] There is no indication in the Privacy Act that Congress intended to displace the *Bivens* action. Thus, the decision to adopt proxy enforcement in this instance is entirely within the province of the courts.

[211] 5 U.S.C. § 552a(4)–(5) (2006).

[212] The D.C. Circuit correctly observed this as well. See *Wilson*, 535 F.3d at 707 ("Each claim in the Wilson complaint is based on . . . disclosure of Privacy Act protected information. . . . Thus, each Constitutional claim, whether pled in terms of privacy, property, due process, or the First Amendment, is a claim alleging damages from the improper disclosure of information covered by the Privacy Act.").

[213] The Privacy Act applies to agencies, see 5 U.S.C. § 552a(b) (2006), and under the Act an agency is defined by reference to the Freedom of Information Act (FOIA). 5 U.S.C. § 552a(a)(1) (2006). FOIA, in turn, does not apply to the offices of President or Vice President. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (holding that the Office of the President is not an "agency" pursuant to FOIA); Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) (holding that the Office of the Vice President is not an "agency" under FOIA).

[214] It might be argued that holding confederates liable will dissuade violations by those in the Executive Office of the President (EOP) and the Executive Office of the Vice President (EOVP) because confederates will thereafter be less likely to assist in the transgressions. But this claim is dubious for two reasons. First, it seems likely that the EOP and EOVP will always be able to find willing confederates to carry out their plans, and second, that they will often not need any confederates. The plan in this

Correctional Services Corp. v. Malesko.[215] In *Malesko*, the Court considered an Eighth Amendment claim by a prisoner against a federal halfway house. After suffering a heart attack, the plaintiff brought a *Bivens* action alleging that the prison corporation failed to take account of his fragile medical condition. That failure, alleged the plaintiff, amounted to "deliberate indifference" and thus was an Eighth Amendment violation.[216] The Supreme Court rejected this claim. In its view, a *Bivens* action was unnecessary because the plaintiff "enjoy[ed] a parallel tort remedy."[217] The Court suggested that this remedy lay in some type of "ordinary negligence" claim against the prison.[218]

A tort suit against a prison in this circumstance is likely a permissible avenue of constitutional enforcement. There is no indication that Congress has disapproved of enforcement by proxy here, and the procedures applicable to the tort action, whether the suit is brought in state or federal court, will be traditional adjudicatory procedures.[219] Moreover, the applicable law is, in fact, more protective of rights than the constitutional standard. A prison will be li-

case could have been fully executed without the participation of Richard Armitage. That is, Plame's covert status could have been leaked to Robert Novak directly by Scooter Libby or any other member of the EOP or EOVP. In this sense, it is difficult to conclude that Privacy Act claims for the misconduct alleged are an adequate tool for keeping government within bounds.

[215] 534 U.S. 61 (2001).

[216] See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (promulgating a deliberate indifference standard).

[217] *Malesko*, 534 U.S. at 72–73.

[218] Id.

[219] One could challenge the efficacy of state court adjudication by arguing that state courts are less willing to enforce the rights of marginalized individuals than federal courts. The force of this argument—first presented in Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1120–21 (1977)—has been undercut, however, by numerous empirical studies. See, e.g., Michael E. Solimine, The Future of Parity, 46 Wm. & Mary L. Rev. 1457, 1491–94 (2005) (reviewing empirical literature on the subject). For this reason, normative assessments of federal jurisdiction and practice increasingly ignore the issue of parity. See, e.g., Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 236 (1988) (seeking to "define a role for the federal courts without evaluating the comparative abilities of the federal and state courts in constitutional cases"); Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1214, 1221 (2004) (dismissing reliance on parity in allocating cases between federal and state courts because scholars "will never resolve the either-or problem," that is, "the common assumption . . . that cases must be litigated *either* in federal court *or* in state court").

able in tort for failing to protect a prisoner from harm if the failure was negligent.[220] In contrast, a prison will be liable under the Eighth Amendment for failing to protect a prisoner only if the failure was reckless—"a state of mind more blameworthy than negligence."[221] Thus, there can be no objection to enforcement by proxy based on the substantive content of the alternative law. Finally, as to the remedies available, a tort action against the prison will typically make available to the plaintiff the standard remedies (compensatory and punitive damages) that would be available in a constitutional tort action.[222] Thus, proxy enforcement was permissible in *Malesko*.

Carlson v. Green.[223] *Carlson* is similar to *Malesko* in several respects: it is an Eighth Amendment claim brought by a prisoner against a prison. The key difference between the two cases, however, is that the prison in *Malesko* was a privately operated prison, whereas the prison in *Carlson* was run by the federal government. Thus, a tort action against the prison in *Malesko* would have proceeded entirely under state tort law, while a tort action in *Carlson* would have proceeded under the Federal Tort Claims Act (FTCA).[224] This is important because the FTCA, unlike most state tort laws, does not allow punitive damages.[225] Thus, determining whether proxy enforcement is appropriate in *Carlson* requires one to determine the importance of punitive damages in maintaining Eighth Amendment norms. There can be no objection to proxy en-

[220] See Restatement (Third) Of Torts: Liability for Physical Harm § 41 cmt. f (Proposed Final Draft No. 1, 2005); Restatement (Second) Of Torts § 314A(2) (1965); Dan B. Dobbs, The Law of Torts, §§ 323–28 (2000); see also Brownelli v. McCaughtry, 514 N.W.2d 48, 50–51 (Wis. Ct. App. 1994) (holding that an inmate had a claim against a prison employee who negligently failed to provide medical assistance); Breaux v. State, 326 So. 2d 481, 483 (La. 1976) (holding that prison officials had a duty to protect a prisoner being attacked by another inmate); Taylor v. Slaughter, 42 P.2d 235, 236–37 (Okla. 1935) (holding that a jailor was obliged to protect a prisoner from harm at the hands of other prisoners).

[221] Farmer v. Brennan, 511 U.S. 825, 835 (1994).

[222] See, e.g., Adams v. Corrs. Corp. of Am., 187 P.3d 1190, 1198 (Colo. App. 2008).

[223] 446 U.S. 14 (1980).

[224] Although independent contractors may be government actors for the purposes of the Constitution, West v. Atkins, 487 U.S. 42, 54–57 (1988), they are not covered by the FTCA. 28 U.S.C. § 2671 (2006).

[225] See 28 U.S.C. § 2674 (2006) ("The United States shall be liable, respecting the provisions of this title relating to tort claims . . . but shall not be liable . . . for punitive damages.").

forcement on other grounds, such as the preference of Congress on the matter, the procedure attending the sub-constitutional litigation, and the substance of the sub-constitutional law.[226]

This is a difficult question because punitive damages are specifically designed to have a deterrent effect, and deterrence is the chief role of the constitutional tort action.[227] Because of this, one might expect the unavailability of punitive damages to weaken the deterrent effect of an FTCA action significantly. This may be true, but it depends on the *actual* availability of punitive damages in civil rights actions generally. As it turns out, punitive damages are available in theory more than in practice. They are not available against counties and municipalities,[228] nor available for conduct that is less than reckless or intentional.[229] In this way, the civil rights action, which is presumed to have deterrent effect, has proceeded in large measure without its chief deterrent tool—punitive damages. Assuming that the current structure of civil rights remedies adequately maintains Eighth Amendment standards,[230] it is quite possible to conclude that tort suits providing only compensatory damages will be a sufficient replacement for civil rights actions. This inference is bolstered by the fact that the defense of qualified immunity is not available in FTCA suits.[231] Thus, while the maximum damages award in an FTCA action is likely to be smaller than in a

[226] Congress has signified its comfort with the availability of *Bivens* actions for harms that could also be remedied under the FTCA. See supra note 170. Because FTCA claims must be litigated in federal court, the procedures applicable can be considered presumptively adequate. See 28 U.S.C. § 1346(b)(1) (2006). Carlson's Eighth Amendment claims were premised on inadequate medical care and would thus give rise to liability under the FTCA for medical malpractice. See, e.g., Hannah v. United States, 523 F.3d 597, 600 (5th Cir. 2008) (adjudicating an FTCA claim by a prisoner for substandard medical treatment received in prison).

[227] FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter *the officer*.").

[228] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

[229] Smith v. Wade, 461 U.S. 30, 56 (1983).

[230] I recognize that this is a questionable assumption. See, e.g., Michael Wells, Punitive Damages for Constitutional Torts, 56 La. L. Rev. 841, 841 (1996) (arguing that the Supreme Court's current punitive damage doctrine in constitutional tort cases is inadequate). Yet, the value of punitive damages generally is a question separate from what I address here: whether proxy enforcement is permissible in light of the current shape of civil rights doctrine.

[231] See supra notes 188–190 and accompanying text.

Bivens or Section 1983 action, the *average* FTCA award is likely to be larger, resulting in adequate deterrence.

Schweiker v. Chilicky.[232] *Chilicky* was an action by three individuals regarding the wrongful denial of Social Security disability payments. Using an administrative review process created by Congress, all three individuals were able to recoup their improperly denied payments. Despite this, the plaintiffs brought a *Bivens* action seeking damages for "emotional distress and for loss of food, shelter and other necessities proximately caused by [the government's] denial of benefits without due process."[233] The Court refused to recognize a *Bivens* action because "Congress . . . provided what it considers adequate remedial mechanisms for constitutional violations."[234]

The Court was correct to adopt a system of proxy enforcement in *Chilicky*. First, the statutory scheme suggests a congressional preference for proxy enforcement, since Congress created an elaborate system for determining the proper disability payments. Even if one sees this as less than clear, there is no indication that Congress preferred direct enforcement, thus leaving proxy enforcement open to judicial discretion. Second, there is no indication that the statutory scheme is procedurally inadequate to provide the appropriate remedies to claimants.[235] Third, the substance of the constitutional and sub-constitutional law is the same because liability under either law will hinge on the availability of disability benefits under the Social Security Act. And finally, the remedies available under the statutory scheme are likely sufficient to prevent improper denials. While it is true that relief for emotional distress is unavailable under the statutory scheme, it is unlikely that the lack of damages for emotional distress, applicable only to a narrow category of cases, will lower substantive due process rights below an acceptable threshold. While this assessment appears correct in the two decades since *Chilicky*, the Court is, of course, free to revisit it should subsequent events or research reveal the statutory scheme to be inadequate.

[232] 487 U.S. 412 (1988).

[233] Id. at 419 (internal quotation marks and citation omitted).

[234] Id. at 423.

[235] In fact, a specific goal of the statutory scheme was to improve prior procedures deemed to be flawed. Id. at 423–26.

Johnson v. City of Fort Lauderdale.[236] In *Johnson*, a black employee brought suit against the Fort Lauderdale Fire Department for discrimination on the basis of his race. He alleged that the Department violated his rights under Title VII and the Equal Protection Clause. At issue in the case was whether he could maintain an Equal Protection claim using Section 1983 given the availability of relief through Title VII. The Eleventh Circuit held that the plaintiff could pursue his constitutional claim because Title VII did not "preempt[] a constitutional cause of action under [Section] 1983."[237]

Contrary to the court's opinion, however, proxy enforcement in *Johnson* was likely permissible. As a preliminary matter, the congressional enactment of Title VII can be read as an implied prohibition on public employment Section 1983 cases, thus opening the door to proxy enforcement.[238] Next, there are no formal procedures or informal contextual matters that would render Title VII, as compared to Section 1983, ineffectual in preventing discrimination in public employment. The cases can be litigated in federal court, and plaintiffs thus have access to the full procedural tools and independence inherent in that tribunal.[239] With regard to substance,

[236] 148 F.3d 1228 (11th Cir. 1998).

[237] Id. at 1231.

[238] I recognize that many courts have taken the opposite view. See, e.g., Booth v. Maryland, 327 F.3d 377, 383 (4th Cir. 2003) (holding that a plaintiff may bring discrimination claims against municipal employers under both Title VII and the Equal Protection Clause via § 1983). This view, however, contradicts numerous other areas in which comprehensive statutory schemes have been deemed to be an implied repeal of § 1983 actions. See, e.g., City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 127 (2005) (holding that § 1983 cannot be used to enforce the Telecommunications Act of 1996 because the Act itself provides the sole remedy); Alsbrook v. City of Maumelle, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc) (denying a § 1983 action to enforce the Americans with Disabilities Act (ADA) because the ADA impliedly foreclosed access to § 1983); Zombro v. Baltimore City Police Dep't, 868 F.2d 1364, 1366–71 (4th Cir. 1989) (holding that the Age Discrimination in Employment Act (ADEA) provided an exclusive remedial scheme). As the Court has recently explained in the Title IX area, Congress can be presumed to "displace § 1983 suits enforcing constitutional rights" where it creates statutory "rights and protections" that are similar to the rights and protections available under § 1983. Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 794 (2009). The rights and remedies available under Title VII are similar to those available at the time Title VII was enacted. Thus, contrary to the majority view in these cases, congressional intent does not foreclose proxy enforcement in this area.

[239] While it is true that Title VII claimants must first exhaust available administrative remedies, see 42 U.S.C. § 2000e-5(b) (2006), there is little reason to think that this exhaustion requirement renders the law ineffectual at controlling discrimination. If one

there can be little objection to Title VII as a stand-in for Equal Protection law, since Title VII prohibits public employers from "discriminat[ing] against any individual . . . because of such individual's race, color, religion, sex, or national origin."[240] Finally, where remedies are concerned, Title VII is likely sufficient to deter unconstitutional discrimination. Successful Section 1983 claimants can obtain compensatory and punitive damages, both of which are available under Title VII.[241] Although Title VII caps compensatory and punitive damages between $50,000 and $300,000 (depending on the number of persons employed by the defendant-employer),[242] these caps do not apply to back-pay and attorney's fees,[243] which can be quite substantial. These amounts, it is fair to presume, procure substantial compliance with the law. To argue otherwise, one must argue that Title VII is ineffectual at controlling discrimination throughout the *entire private sector*, since Title VII applies there too.[244] Although courts considering proxy enforcement should be open to empirical studies suggesting otherwise, a court considering this issue today could reasonably conclude that Title VII is a fair proxy for an Equal Protection action in the public employment context.

III. IS PROXY ENFORCEMENT DESIRABLE?

In Part II, I identified the instances where federal courts may enforce the Constitution through sub-constitutional law. While this defines the practice as permissible in certain instances, it does not

deems Title VII cases effective in the private sphere (a reasonable assumption), there is no reason to think that they suddenly become insufficient in the public sphere.

[240] 42 U.S.C. § 2000e-2(a)(1) (2006).

[241] Although Title VII only allows punitive damages for intentional discrimination, see 42 U.S.C. § 1981a(a)(1) (2006), Equal Protection doctrine only recognizes a violation where the discrimination was intentional. See Washington v. Davis, 426 U.S. 229, 238–48 (1976). Thus, where an Equal Protection violation has been committed, punitive damages will be available in a Title VII suit.

[242] 42 U.S.C. § 1981a(b)(3) (2006).

[243] The cost of an adverse judgment to a defendant in a Title VII case is the sum of the damages awarded, the plaintiff's attorney's fees, and the defendant's own attorney's fees. See 42 U.S.C. § 2000e-5(k) (2006) (granting the court discretion to allow prevailing plaintiffs to collect reasonable attorney's fees from the defendants).

[244] 42 U.S.C. § 2000e(b) (2006) (imposing liability on any "employer," which "means a person engaged in an industry affecting commerce who has fifteen or more employees").

resolve another important issue: whether the practice is *desirable*. On the one hand, it is quite possible that enforcement by proxy, though a permissible practice from a constitutional perspective, is nonetheless undesirable from a normative perspective because it sacrifices important values, apart from keeping government within the bounds of constitutional norms. On the other hand, it is also possible that enforcement by proxy sacrifices no values and instead creates new value. In this Part, I consider the desirability of proxy enforcement aside from its constitutional permissibility.

I explain that proxy enforcement will be desirable *only* where the alternative law is federal in nature. I reach this conclusion by considering several normative values implicated by the practice, including shared constitutional interpretation, constitutional development, constitutional expression, and administrative efficiency. In short, proxy enforcement using a federal statute (or rarely, federal common law) allows for shared constitutional interpretation and does not frustrate other important interests. In contrast, proxy enforcement using state tort law, while allowing states a role in constitutional implementation, will impose significant practical costs on federal courts. I conclude this Part by briefly reviewing the cases where proxy enforcement is permissible and indentifying which of those cases are fit, normatively speaking, for proxy enforcement.

A. Sharing the Constitution with Congress

A central obsession of modern constitutional theory is the question of interpretive supremacy—who should control the meaning of the Constitution?[245] Though the views of scholars and judges on this issue can be mapped any number of ways, it is possible to chart most views somewhere along a continuum that stretches between "judicial supremacy" and "popular constitutionalism." These ideological endpoints, like poles on a magnet, are intensely repellant to each other. Commentators of all persuasions have expended great effort justifying one view to the exclusion of the other, or instead

[245] See Friedman, supra note 16, at 159 (stating that the "academic obsession with the countermajoritarian problem" is the "result of historical, professional, and intellectual forces that, as a cultural matter, simply were unavoidable for many academics (even though they seemed to matter little to those beyond the professorate)").

reconciling both views to each other, with little success. Constitutional enforcement by proxy, however, offers a partial solution. As explained below, it allows courts to uphold core constitutional values by holding government officials accountable for transgressing constitutional norms, while simultaneously giving effect to the views expressed by the electorate.

1. Judicial Supremacy

Modern judicial supremacy was born in *Cooper v. Aaron*.[246] There, the Court pronounced with great confidence that "the federal judiciary is supreme in the exposition of the law of the Constitution."[247] A half-century since *Cooper*, the Supreme Court has, if anything, only become more supreme. Thus, it is now a "cardinal rule of constitutional law" that the Court is the "ultimate expositor of the constitutional text."[248] Or as Chief Justice Rehnquist put it, "it falls to [the] Court, not Congress, to define the substance of constitutional guarantees."[249] Congress may not speak in constitutional terms, we are told, or else "[s]hifting legislative majorities could change the Constitution."[250] In short, proponents of judicial supremacy hold that the Constitution is defined by the Court—and *only* the Court.

The strongest case for judicial supremacy likely rests on the Court's greatest successes. For example, judicial supremacy produced *Brown v. Board of Education*.[251] When no one else would stand up for black schoolchildren, it was the Court—aided by its self-proclaimed interpretational supremacy—that came to the rescue. Or when a state attempted to outlaw pure political expression in the form of flag burning, it was the Court in *Texas v. Johnson* that stood on principle, striking down the statute despite enormous popular support for the law.[252] Thus, the case for judicial supremacy self-consciously acknowledges, and even flaunts, its "countermajoritarian" nature. Judicial supremacy, being practiced by judges

[246] 358 U.S. 1 (1958).
[247] Id. at 18.
[248] United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).
[249] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).
[250] City of Boerne v. Flores, 521 U.S. 507, 529 (1997).
[251] 347 U.S. 483 (1954).
[252] 491 U.S. 397 (1989).

insulated from "shifting legislative majorities," protects core constitutional values from passionate majorities.

Protecting constitutional values is not judicial supremacy's only justification. Another justification is more pragmatic: the judiciary must have the final word, it is argued, because final words are *useful*. Justice Brandeis' famous quip is particularly apt here: "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[253] Professors Alexander and Schauer find significant value in the capacity of judicial review to "say [with finality] what the law is."[254] For them, a "central moral function of law is to settle what ought to be done," and judicial supremacy accomplishes this goal more desirably than other alternatives.[255] Of course, it is fair to ask why the judiciary, rather than other constitutional actors, should be entitled to set the final word. That has been answered, however, by appeals to the judiciary's insulation from majoritarian pressures, its institutional practices, and its comparative expertise.[256]

2. Popular Constitutionalism

Popular constitutionalists believe essentially what President Abraham Lincoln believed on the day of his first inauguration in 1861: "if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[257] If there is any fundamental principle in American government, it is a dedication to popular sovereignty. The United States belongs to the people, and the officials of the federal government serve at the people's pleasure and for their welfare. Thus, for a popular constitutionalist, "the

[253] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[254] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[255] Alexander & Schauer, supra note 12, at 457; see also Farber, supra note 12.

[256] Alexander & Schauer, supra note 12, at 476–77; Roosevelt, supra note 128, at 1696–700 (arguing that courts are likely superior to non-judicial actors in interpreting text, though not necessarily superior in designing decision rules to implement the text).

[257] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* Abraham Lincoln: His Speeches and Writings 579, 585–86 (Roy P. Basler ed., 1976).

role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law."[258] Popular constitutionalists believe that the people should be involved in *every* act of constitution-making.

Popular constitutionalists reserve their fiercest criticism for the Rehnquist Court's "Section Five" decisions evaluating Congress' power to legislate under Section Five of the Fourteenth Amendment. *City of Boerne v. Flores* is a classic example.[259] Prior to 1990, the Supreme Court invalidated facially neutral laws burdening the free exercise of religion if those laws were not supported by a compelling government interest. Then, in 1990, the Court reversed course, holding that facially neutral laws raise no free exercise problems, regardless of the burden imposed on religious practices.[260] Congress disliked this turn of events. In 1993, therefore, it enacted the Religious Freedom Restoration Act (RFRA), the purpose of which was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[261]

In *City of Boerne*, decided four years later, the Supreme Court held the RFRA unconstitutional because Congress had attempted to "alter[] the meaning of the Free Exercise Clause."[262] The Court explained it thus:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to

[258] Larry D. Kramer, Popular Constitutionalism, circa 2004, 92 Cal. L. Rev. 959, 959 (2004).

[259] 521 U.S. 507 (1997). Other cases include *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the Violence Against Women Act), *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act), and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 67 (2000) (holding that Congress did not have the authority to abrogate state sovereign immunity in the Age Discrimination in Employment Act).

[260] Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[261] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (2006).

[262] *City of Boerne*, 521 U.S. at 519.

> alter it. Under this approach, it is difficult to conceive of a principle that would limit congressional power.[263]

On these grounds, *City of Boerne* is akin to *Lochner v. New York*, the now-mythic case in which the Supreme Court struck down social legislation supported by democratic majorities.[264]

Thus, the case in favor of popular constitutionalism stands chiefly on its consonance with America's deep commitment to democratic rule.[265] It is the people's Constitution after all, not the Court's, and the people therefore ought to have a say in how their Constitution is applied. Though the judicial apparatus will always be necessary to implement actual decisions, the judiciary should nonetheless defer to the people in close cases. Such deference affirms "the quintessentially democratic attitude in which citizens know themselves as authorities, as authors of their own law."[266]

Moreover, by listening to the populace in setting constitutional meaning, the Court encourages a sort of democratic self-actualization. Finding their voice relevant to constitutional questions, the public will explore and express their views, thus instigating further exploration and expression, all of which leads to a more informed populace and better self-government. As Dean Larry Kramer has explained, "Supreme Court decisions do not settle constitutional disputes so much as provide ammunition for their continuation."[267] This continuation, however, is valuable because it

[263] Id. at 529 (internal quotation marks and citation omitted).

[264] See, e.g., Erwin Chemerinsky, In Defense of Judicial Review: A Reply to Professor Kramer, 92 Cal. L. Rev. 1013, 1023 (2004) (drawing a parallel between *Lochner* and *City of Boerne*); Douglas Laycock, The Supreme Court and Religious Liberty, 40 Cath. Law. 25, 39–40 (2000) ("The most striking thing about the [*Boerne*] opinion is how the logic of *Boerne* parallels the logic of *Lochner v. New York*.").

[265] To be sure, there are many varied strains of thought often placed under the umbrella of "popular constitutionalism." In presenting this brief summary of the school's central views, I do not mean to suggest that numerous alternative views do not also exist. For a summary of several views, see James E. Fleming, Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts, 73 Fordham L. Rev. 1377, 1378–80 (2005), and Doni Gewirtzman, Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture, 93 Geo. L.J. 897, 906–11 (2005).

[266] Post & Siegel, supra note 12, at 1983.

[267] Kramer, supra note 258, at 972.

"provides the inspiration for reshaping the Constitution so as to keep it fresh and current with society."[268]

3. Mediating Supremacy and Populism

As described above, judicial supremacy and popular constitutionalism are fundamentally irreconcilable. Supremacists insist on judicial insulation from popular will because judging is the business of law, not politics. Populists insist that the people have a part in constitutional interpretation because law exists to serve the people. There is no way to both include and exclude the people at the same time—except perhaps through enforcement by proxy.

When a court enforces a constitutional norm through a sub-constitutional law, the court is able to stand up for the Constitution and yet allow the electorate to have significant—but not total—regulatory control over the issue in question. Core values that judicial supremacy is thought to protect—chiefly, minority rights in the face of intolerant majorities—will not be sacrificed through enforcement by proxy because, as explained above, the practice is *only* permissible if the alternative law will maintain the constitutional order.[269] At the same time that constitutional order is being maintained, however, democratic preferences are also given effect because the law applied is a product of the legislature, not the courts.

To be sure, federal courts might be able to mediate these tensions without the proxy enforcement tool through the long-standing "constitutional avoidance" doctrine, whereby courts decide constitutional cases on non-constitutional grounds when possible.[270] Although this doctrine does ameliorate tensions over inter-

[268] Id. at 975.

[269] See supra Subsection II.A.1; Section II.B.

[270] See Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J., dissenting) ("In recognition of our place in the constitutional scheme, we must act with 'great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.") (citation omitted); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (internal quotation marks and citation omitted); Michael L. Wells, The "Order-of-Battle" in Constitutional Litigation, 60 SMU L. Rev. 1539, 1548 (2007) (noting that the doctrine of constitutional avoidance is aimed at alleviating the "friction between democratic principles and judicial authority").

pretive supremacy, it is invoked haphazardly and less often today than before.[271] Even if the doctrine were invoked more often and more consistently, however, it could not, in the long run, stave off judicial supremacy as competently as proxy enforcement. As long as plaintiffs seek constitutional rulings from federal courts, courts will eventually be forced to rule on sensitive issues of constitutional law because complaints can be drafted in ways that avoid questions of sub-constitutional law.[272] Thus, only proxy enforcement provides courts a way to avoid, consistently and *autonomously*, plowing up new constitutional ground.

I do not contend that proxy enforcement will always be valuable in mediating tensions of interpretive supremacy. In fact, the mediating value will only arise where there is, in fact, a substantive difference between constitutional law and the putative alternative. If, for example, a federal statute creates a right to be free from intentional discrimination on the basis of race at the hands of government officials[273] and provides remedies equal to those available in a Section 1983 action, applying the statute instead of the Constitution will accomplish little because the democratic preferences (the statute) are perfectly aligned with judicial preferences (the case law). In this situation, there is no tension in need of mediation by the Court.

In other cases, however, tensions will be high and the corresponding value of proxy enforcement will be high as well in consequence. If Congress is dissatisfied with the Court's tiered scrutiny analysis in Equal Protection cases, it is free to create statutory rights of equal protection that would be more or less robust than the rights available under Court doctrine. Thus, Congress could grant homosexuals rights that the Court has denied them[274] and re-

[271] See generally Thomas Healy, The Rise of Unnecessary Constitutional Rulings, 83 N.C. L. Rev. 847 (2005).

[272] This is especially true in the most common types of constitutional tort cases, where the officer has not acted according to a specific statutory mandate, but instead has exceeded the scope of his authority. In those cases, state or federal statutory law will be irrelevant to the determination of whether the Constitution was violated. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976).

[273] See Washington v. Davis, 426 U.S. 229, 235 (1976).

[274] See Romer v. Evans, 517 U.S. 620, 631–33 (1996) (holding that legislation discriminating against homosexuals should be reviewed under a rational basis test).

tract from aliens some of the rights the Court has granted them.[275] Such statutes could likely stand in the place of the Equal Protection Clause without risking the constitutional order. Certainly, new rights for homosexuals do not put the constitutional order at risk, since they simply augment protections that (though minimal) are already in place. And a retraction of rights available to aliens need not risk the constitutional order as long as government is still compelled to recognize aliens' status as "persons" entitled to protections under the major provisions of the Bill of Rights.[276] While this may be undesirable from a policy perspective, it is not constitutionally objectionable unless one can say that strict scrutiny in alienage cases is *constitutionally required*—a position that is quite difficult to take considering the text of the Equal Protection Clause.

Inasmuch as enforcement by proxy gives effect to the choices of non-Article III actors, it encourages those actors to take an increasingly greater role in propounding their own solutions to various regulatory problems. That is, inasmuch as judicial supremacy breeds legislative apathy, enforcement by proxy should encourage legislative activism. The supremacy evidenced in *City of Boerne* illustrates this. With the RFRA, Congress did not, as the Court claimed, attempt to "alter[] the meaning of the Free Exercise Clause"; it simply sought to create statutory rights protecting the exercise of religion.[277] Had the Court been open to the possibility of proxy enforcement, it would have concluded quite readily that the RFRA could stand in the shoes of the Free Exercise Clause. As it

[275] See John E. Nowak & Ronald D. Rotunda, Constitutional Law 850 (7th ed. 2004) ("All of the Court's decisions since 1970 [regarding discrimination against aliens] would appear to be consistent if the Court were using an intermediate standard of review.").

[276] See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (holding that the Fourteenth Amendment applies to all "persons" regardless of citizenship).

[277] To be sure, this mistake was somewhat understandable, since Congress made clear that the RFRA was a response to a prior constitutional holding by the Court. See David Cole, The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights, 1997 Sup. Ct. Rev. 31, 41 ("Perhaps the Court overlooked this point because Congress's action, in establishing a statutory right, was expressly predicated on Congress's disagreement with the Court's interpretation of the Constitution—as the reference to 'Restoration' in the Act's title suggests.").

was, however, the Court chided Congress, and Congress was left to believe that it had no regulatory authority to protect free speech.

B. Sharing the Constitution with the States

Although judicial supremacy over Congress is highly contested, supremacy over the states is well established and widely accepted. Justice Holmes once compared the two types of judicial supremacy this way: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[278]

Thus, where state law is implicated in a proxy enforcement case, there is no tension over supremacy needing amelioration. Yet, there are still compelling reasons why the federal courts, though clearly possessed of supreme power, might decline to exercise it over the states. By applying state law to enforce the Constitution, federal courts provide states with the regulatory space to develop their own solutions to persistent constitutional problems. The nation benefits when sub-national sovereigns are able to experiment with innovative solutions while not simultaneously endangering the whole nation.[279]

Smith v. Robbins, discussed above, is a good example of this principle in action.[280] Years before *Smith*, the Supreme Court held in *Anders v. California* that the U.S. Constitution requires publicly appointed criminal defense attorneys to follow strict rules in declining to file an appeal on grounds of frivolity.[281] In *Smith*, the Court considered California procedures for attorney withdrawal that departed from these rules. The Court did not disapprove of

[278] Oliver Wendell Holmes, Law and the Court, *in* Collected Legal Papers 291, 295–96 (1920).

[279] See Barry Friedman, Valuing Federalism, 82 Minn. L. Rev. 317, 397 (1997) ("Intuition suggests that with fifty different parallel state governments, and countless substate governments as well, innovations in governing or problem solving will occur that will inure to the benefit of the entire populace in the long run."); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1498 (1987) (book review) ("Elementary statistical theory holds that a greater number of independent observations will produce more instances of deviation from the mean. If innovation is desirable, it follows that decentralization is desirable.").

[280] 528 U.S. 259 (2000).

[281] 386 U.S. 738, 744–45 (1967).

the procedure simply because it varied from the *Anders* procedure. Rather, it held that "the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals."[282] Although *Smith* was not a classic proxy enforcement case (it was a habeas petition), the illustration is apt. When a federal court applies a state constitutional or statutory provision in place of a federal constitutional rule, the same type of innovation that California attempted in *Smith* will be respected and encouraged. If state law is constantly ignored in civil rights actions, states will naturally become less interested in regulating the state-citizen relationship.

C. Developing the Constitution

The civil rights action, inasmuch as it invites courts to espouse constitutional meaning, can be a tool of constitutional development. Development, in this sense, is simply the process of constitutional elaboration.[283] The Constitution "deals in general language" and thus demands elaboration.[284] As Owen Fiss has put it,

> [t]he values that we find in our Constitution—liberty, equality, due process, freedom of speech, no establishment of religion, property, no impairments of the obligation of contract, security of the person, no cruel and unusual punishment—are ambiguous. They are capable of a great number of different meanings. They often conflict. There is a need—a constitutional need—to

[282] *Smith*, 528 U.S. at 276.

[283] Some see constitutional "development" as the expansion of individual rights. See John M.M. Greabe, *Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions, 74 Notre Dame L. Rev. 403, 405 (1999) (arguing that constitutional rights are expanded when courts hear larger numbers of constitutional cases). I do not offer it in this sense, however, there is little evidence that adjudicating civil rights damages actions will actually expand rights. See Healy, supra note 271, at 930 (raising "serious questions about the extent to which the Court's departure from the avoidance principle actually promotes the evolution of constitutional rights"); John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 89–90 (1999) (arguing that constitutional damages actions may impede the expansion of individual liberties); Nancy Leong, The *Saucier* Qualified Immunity Experiment: An Empirical Analysis, 36 Pepp. L. Rev. 667, 670 (2009) (presenting empirical evidence that the practice of constitutional avoidance "leads to the articulation of more constitutional law, but not the expansion of constitutional rights").

[284] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

> give them specific meaning, to give them operational content, and, where there is a conflict, to set priorities.[285]

The need for elaboration is, in many respects, simply a different gloss on the need for implementation discussed in Part II.[286] Whatever the nature of their kinship, the process of constitutional elaboration might seem to be threatened by constitutional enforcement by proxy. Proxy enforcement addresses the state-citizen relationship without particularizing constitutional meaning. This raises the fear that the Constitution will play a diminished role in our lives, atrophying from lack of use.[287]

For the most part, this fear is misplaced. It is no doubt true that constitutional enforcement through common law or statutory actions will decrease the number of constitutional expositions. It is incorrect, however, to assume that constitutional development will therefore suffer. As an initial matter, when a court engages in proxy enforcement, it must at least determine that the alternative law is sufficient to the task of preserving constitutional norms. Thus, when the Supreme Court, in *Smith v. Robbins*, held that a state rule of procedure could replace the *Anders* method of attorney withdrawal in criminal cases, the Court *by necessity* determined whether the state rule adequately protected the defendant's right to an attorney.[288] As the Court put it there:

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[285] Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 1 (1979); see also Robert J. Pushaw, Jr., Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 Notre Dame L. Rev. 447, 489–94 (1994) (arguing that the Founders intended that federal courts exercise an "expository function" in Article III "cases" but not "controversies").

[286] Richard Fallon's theory of constitutional implementation thus recognizes the role of constitutional elaboration. Fallon & Meltzer, supra note 11, at 1800 ("[T]here exists a substantial body of case law, rising almost to the level of a general tradition, in which adjudication, and constitutional adjudication in particular, functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes.").

[287] Greabe, supra note 283, at 405 ("[T]he corpus of constitutional law grows only when courts address and resolve novel constitutional claims, but courts often cannot order a remedy for such claims because of their novelty."); id. at 410 ("The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to 'freeze' constitutional law, then at least to retard its growth . . . .").

[288] 528 U.S. 259 (2000).

> Having determined that [the state withdrawal] procedure is not unconstitutional merely because it diverges from the [constitutionally required] Anders procedure, we turn to consider the . . . procedure on its own merits. We think it clear that [the state] system does not violate the Fourteenth Amendment, for it provides "a criminal appellant pursuing a first appeal as of right [the] minimum safeguards necessary to make that appeal 'adequate and effective.'"[289]

Thus, even in cases of proxy enforcement, the Constitution will not be left out of the discussion. It will continue to be discussed and its minimum requirements will continue to be elaborated.

Even if proxy enforcement does limit constitutional elaboration to some degree, it is unlikely that much harm will flow from that limitation. The appropriate inquiry here is not simply whether the instances of elaboration will decrease, but instead whether the remaining instances of elaboration are sufficient to accomplish the goal of constitutional development.[290] There can be little doubt that the federal courts will still retain numerous opportunities to address the great majority of constitutional rights in cases involving them. These opportunities include (1) defenses in criminal and civil actions, (2) motions to exclude evidence in criminal actions, (3) assertion of trial-based rights during trial, (4) petitions for a writ of habeas corpus, and (5) cases where proxy enforcement is impermissible.

Defenses. Where one is sued for committing a wrong, one way to escape liability is to claim that the law underlying the prosecution violates the Constitution. Thus, a person subject to criminal prosecution for burning his draft card can claim that his conduct was free expression protected by the First Amendment.[291] Or a defendant facing loitering charges can assert that the law used to prosecute

[289] Id. at 276 (citation omitted) (emphasis added).

[290] This much is evidenced by the widespread support for principles of constitutional avoidance, particularly the last resort rule, though it clearly decreases the instances of constitutional adjudication. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Healy, supra note 271 (criticizing the "rise of unnecessary constitutional rulings"). But see Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003, 1035–65 (1994) (supporting the last resort rule in cases of judicial review of congressional or executive action, but criticizing the rule's use in all other cases).

[291] United States v. O'Brien, 391 U.S. 367, 376 (1968).

him was unconstitutionally vague.[292] Or a homosexual can assert a substantive due process defense if prosecuted for homosexual acts.[293] Or a defendant charged with the use of marijuana can argue that the federal government has no authority to regulate home-grown marijuana.[294] Civil defendants can also make use of constitutional defenses, such as in defamation cases,[295] cases where personal jurisdiction is lacking,[296] or cases where the defendant is a government actor.[297]

Motions to Exclude. In state or federal criminal trials, the government may not prosecute a defendant using evidence obtained as the result of a constitutional violation.[298] Where a defendant believes that illegally obtained evidence may be offered against him, he will normally move the court to exclude such evidence. In these instances, courts must determine whether the defendant's constitutional rights were in fact violated. It should go without saying that such "exclusionary rule" issues arise incredibly frequently in criminal prosecutions, typically implicating Fourth, Fifth, or Sixth Amendment rights.[299] Admittedly, not all constitutional violations

[292] City of Chicago v. Morales, 527 U.S. 41 (1999).

[293] Lawrence v. Texas, 539 U.S. 558 (2003).

[294] Gonzales v. Raich, 545 U.S. 1 (2005).

[295] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[296] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

[297] When a law or practice of a government is challenged civilly, the government will often defend itself by arguing that it had the authority to behave as it did. Thus, the court must evaluate the contours of government authority, often a constitutional question. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress could not abrogate state sovereign immunity when acting pursuant to Commerce Clause); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that the federal government has power under the Commerce Clause to apply minimum wage requirements on state and local governments). Even in police abuse cases brought under tort law rather than the Fourth Amendment, the contours of the Fourth Amendment will often be discussed, since the Amendment defines the limits of police authority. See Lumen N. Mulligan, Why *Bivens* Won't Die: The Legacy of *Peoples v. CCA Detention Centers*, 83 Denv. U. L. Rev. 685, 709–15 (2006) (noting that state-law tort actions against government agents will often involve the same constitutional claims as those in civil rights actions, except the issues will arise as defenses rather than as part of the plaintiff's affirmative case).

[298] Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule to state criminal cases); Weeks v. United States, 232 U.S. 383 (1914) (applying the exclusionary rule to federal criminal cases).

[299] Pamela S. Karlan, The Paradoxical Structure of Constitutional Litigation, 75 Fordham L. Rev. 1913, 1915–16 (2007) (explaining that criminal defendants "often

merit exclusion, such as "knock-and-announce"[300] and certain *Miranda* violations.[301] And other rights, though generally covered by the rule, may not be vindicated by the rule if any of several exceptions apply.[302] Nonetheless, it is still likely that a large number and a wide variety of constitutional rights will be addressed in motions to exclude.

Trial-Based Rights. Some constitutional rights apply only at trial. For example, the right to a trial by jury[303] and the right to confront adverse witnesses[304] are issues that will only arise during trial or litigation more generally. These issues will no doubt present themselves to federal courts quite often, regardless of a decrease in civil rights actions.

Petitions for Habeas Corpus. A state or federal prisoner may challenge the lawfulness of his detention in federal court by petitioning for a writ of habeas corpus.[305] Petitions that demonstrate a constitutional violation connected to the arrest, prosecution, or conviction of the defendant will merit a new trial, or else the defendant will be freed.[306] It is true, however, that some constitutional violations are not cognizable in habeas. Fourth Amendment violations committed during the defendant's arrest, even if grounds for

assert constitutional claims under the Fourth, Fifth, and Sixth Amendments" as a defense because those claims are "relatively costless" to assert and "may be the only way of avoiding a criminal conviction and the disastrous consequences that follow").

[300] See Hudson v. Michigan, 547 U.S. 586 (2006) (holding that violation of the "knock-and-announce" rule does not require suppression of evidence found in a search).

[301] United States v. Patane, 542 U.S. 630, 642–44 (2004) (holding that failure to give *Miranda* warnings does not require suppression of the nontestimonial fruit of a suspect's voluntary statements).

[302] For example, if the constitutional violation occurred in "good faith," the evidence obtained will not be excluded. United States v. Leon, 468 U.S. 897, 922–26 (1984). Similarly, if the evidence obtained was sufficiently attenuated from the violation, Wong Sun v. United States, 371 U.S. 471, 487–88 (1963), was obtained from an independent source, Murray v. United States, 487 U.S. 533, 537–38 (1988), or would have been inevitably discovered during a lawful investigation, Nix v. Williams, 467 U.S. 431, 442–44 (1984), the evidence is admissible. Finally, evidence will not be excluded if it is offered in a non-criminal proceeding, such as a parole board hearing. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 359 (1998).

[303] Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 573–74 (1990).

[304] Crawford v. Washington, 541 U.S. 36 (2004).

[305] 28 U.S.C. §§ 2254–2255 (2006).

[306] Brown v. Allen, 344 U.S. 443, 463–65 (1953).

excluding inculpatory evidence at trial, will not be considered on habeas.[307] More relevant to the elaboration concern, habeas petitioners may not typically take advantage of, or attempt to establish, new rules of constitutional law.[308] While this limits the role of habeas actions in constitutional elaboration, there can be little doubt that habeas actions still provide a significant opportunity for the articulation of current law.[309]

Cases in Which Proxy Enforcement Is Impermissible. In Part II, I explained that courts may enforce the Constitution by proxy only where (1) Congress has not prohibited the practice, and (2) the alternative law will be sufficient to maintain the constitutional order.[310] Thus, there will be many instances where proxy enforcement is impermissible and constitutional elaboration will therefore occur. Section II.C noted that tort law will rarely, if ever, displace the Constitution in Section 1983 suits, which means that the Constitution will be adjudicated anytime a federal statute does not prohibit a Section 1983 suit or is inadequate to the task of maintaining constitutional order. There are a great many areas of government action addressed by constitutional rules, but unaddressed by federal statutes, such as police practices covered by the Fourth, Fifth, Sixth, and Eighth Amendments. This means that there will still likely be considerable adjudication of constitutional questions in these and other similarly qualified areas.

In sum, these five different instances of adjudication will likely provide federal courts with significant—and most important, sufficient—opportunities for constitutional elaboration. It is thus difficult to argue that significant areas of constitutional law will decay into a state of desuetude if certain civil rights actions are handled through alternative legal regimes.

[307] Stone v. Powell, 428 U.S. 465, 494–95 (1976).

[308] Teague v. Lane, 489 U.S. 288, 310–11 (1989) (holding that new rules do not apply in habeas cases unless the rule declares lawful the behavior for which the defendant was convicted or is a "watershed" rule of constitutional law—a rarely declared rule of constitutional law comparable to *Miranda* or *Gideon*).

[309] For example, the rights to effective assistance of counsel, see Strickland v. Washington, 466 U.S. 668, 687–91 (1984), and access to exculpatory evidence, see Brady v. Maryland, 373 U.S. 83, 87 (1963), have been helpfully articulated in countless habeas actions, even though the petitions attempted to invoke "new law."

[310] See supra Section II.C.

D. Debating the Constitution

According to some, civil rights actions not only provide the opportunity to develop the meaning of the Constitution, but also provide an opportunity for us to *debate* the core values that bind us together as a nation. Debate is good, the theory goes, because it leads to informed decisionmaking and, ultimately, change. *Brown v. Board of Education* was good for America because it increased the debate over racial equality,[311] and *Roe v. Wade* was good because it spurred debate—even "rage" perhaps—over women's autonomy.[312] If constitutional adjudication is to be limited by proxy enforcement, there arises the fear that our national debate, and therefore our public policy choices, will suffer as well.

This argument is disproved in two principal ways. First, as explained just above in Section IV.C, constitutional litigation, and thus debate, will not be stymied by proxy enforcement. The process of determining whether proxy enforcement is permissible will involve questions of constitutional law, and even where proxy enforcement is chosen, numerous adjudicative opportunities to debate the Constitution will still remain.

Second, those who favor the value of constitutional debate often place too much emphasis on constitutional litigation. Professors Schauer and Alexander have called this "the conceit of American constitutionalism"—that is, the belief "that Americans need the Constitution in order to debate affirmative action, criminal justice, abortion, religion and state, privacy, or capital punishment."[313] Moreover, even if America depends on litigation to focus its attention on a particular issue, there is no reason to think that *statutory*

[311] See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 421–42 (2004) (arguing that *Brown* instigated racial change by antagonizing Southern segregationists who reacted in often violent fashion, therefore eliciting widespread support for comprehensive civil rights legislation).

[312] Robert Post & Reva Siegel, *Roe* Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007) (using the backlash caused by *Roe* to argue that "interpretive disagreement [is] a normal condition for the development of constitutional law").

[313] Alexander & Schauer, supra note 12, at 468 ("[I]t appears to us far from certain that a constitution is either a necessary or a sufficient condition, or even a significant causal contributor, to fruitful public debate about matters of great political and moral moment.").

litigation cannot fulfill this role.[314] Indeed, many federal statutes are so far-reaching and comprehensive that they can be seen, according to Professors Eskridge and Ferejohn, as an "intermediate category of *fundamental* or *quasi-constitutional* law."[315] Federal statutes outlawing racial discrimination, for example, reach much further into our personal lives, and in doing so, demand greater attention than the Court's entire body of Equal Protection jurisprudence.[316] So too do many other statutes.[317] Thus, although constitutional litigation may decline to some degree, there is little reason to believe that the overall level of public debate will diminish.

E. Administrative Efficiency

I have argued thus far that enforcement by proxy is permissible where Congress has explicitly or implicitly approved the practice and where the alternative law would uphold constitutional norms. I have also argued that, among those circumstances, proxy enforcement will be desirable where interpretational tension exists or where state innovation is valued. What I have not yet considered, however, is whether proxy enforcement is even practical. Below, I explain that proxy enforcement is likely to impose an onerous burden on courts where state law is the putative proxy, a burden that outweighs any benefit provided by state innovation. With respect to federal law, however, the costs of the practice will be much lower, thus making it desirable on the whole.

[314] Young, supra note 13, at 424 ("[M]any rights that are fundamental for individuals in modern America are entirely creatures of statute."). Justice Scalia expressed a similar point in his dissent in *Webster v. Doe*, 486 U.S. 592, 619 (1988), arguing that it is foolish to assume that "every constitutional claim is *ipso facto* more worthy, and every statutory claim less worthy, of judicial review."

[315] Eskridge & Ferejohn, supra note 13, at 1275; id. at 1237 ("[T]he Civil Rights Act [of 1964] is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law.").

[316] See Civil Rights Act of 1964 tit.7, 42 U.S.C. § 2000e. (2006).

[317] See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621. (2006); Voting Rights Act of 1965, 42 U.S.C. § 1971. (2006); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2006).

1. State Law as Proxy

Proxy enforcement is likely to prove quite difficult in cases where the alternative law is state law for two main reasons: (1) the ambiguous nature of tort law where constitutional rights are concerned, and (2) the number of sub-national lawmaking bodies. Among various types of state law that might be invoked in a proxy situation, tort law is the most common.[318] Tort law focuses chiefly on the interactions between private persons; it instructs persons how to behave with each other, and imposes liability when people fail to adhere to its edicts. Constitutional law is different. Its primary focus is on the behavior of the government.[319] It instructs government officers how to behave, whether they are enacting legislation or policing the streets. In some instances, it will be clear that tort and constitutional law will both apply. Thus, where an officer, having no justification, hits a pedestrian over the head with a nightstick, the officer has violated both tort and constitutional law. Similarly, it will also be clear sometimes that tort law will not apply. Thus, where a government official denies food stamps to an individual because of her race, tort law will not be available for relief.

If these instances were representative of the whole, courts could coherently implement a proxy enforcement system. That is, courts could determine whether tort law would, or would not, deter unconstitutional behavior to the degree necessary to maintain the constitutional order. But, a court cannot make this determination unless it is able to ascertain the content of tort law. Yet, tort law and constitutional law often vary in subtle ways, making it difficult to know in advance whether tort law will actually apply to uncon-

[318] See supra Subsection I.B.1.

[319] Commentators have noted the problems caused by applying tort concepts to constitutional claims. See Sheldon Nahmod, Section 1983 Discourse: The Move from Constitution to Tort, 77 Geo. L.J. 1719, 1738–50 (1989) (addressing the deleterious "implications of tort rhetoric"); Richard Henry Seamon, U.S. Torture as a Tort, 37 Rutgers L.J. 715, 758 (2006) ("Using tort law to remedy torture [by the U.S. government] is like using nuisance law to handle the generation and disposal of hazardous wastes. In each situation, the problem is simply much bigger and badder than the problems for which the law was designed."); Christina Brooks Whitman, Emphasizing the Constitutional in Constitutional Torts, 72 Chi.-Kent L. Rev. 661, 686 (1997) ("It is dangerous to define constitutional claims as a narrow subset of tort law because tort law has been particularly ineffective in dealing with precisely the sorts of interests and injuries that are at the center of constitutional law.").

stitutional conduct. It will often be unclear, for example, whether using thermal imaging to search a house will be an intrusion upon seclusion under state tort law,[320] or whether denying a prisoner access to a toilet in violation of the Eighth Amendment will violate an innkeeper law,[321] or whether an unconstitutional stop-and-frisk will be a battery.[322]

Though problematic, this ambiguity in tort law, taken alone, is not enough to make proxy enforcement unwise. If it were, proxy enforcement based on federal statutes might also be problematic, since such statutes may often be ambiguous with respect to their regulation of unconstitutional behavior. Moreover, a court could adopt a proxy enforcement system and simply disregard all tort law that did not *clearly* provide deterrent force. Such a "clear statement rule" might curtail the number of instances in which proxy enforcement was used, but it would keep the practice alive and available.

Yet even this accommodation to the ambiguity inherent in tort law is likely to be more effort than federal courts are capable of expending. This owes to the large number of sub-national govern-

[320] For example, the intent of the intruder will often have a role in intrusion upon seclusion claims but be irrelevant to Fourth Amendment claims. Compare Plaxico v. Michael, 735 So. 2d 1036, 1039–40 (Miss. 1999) (refusing to impose liability on ex-husband who, concerned about the "welfare of his daughter," secretly took photos of ex-wife's lesbian partner in state of undress), with Katz v. United States, 389 U.S. 347, 353 (1967) (disregarding officer's intent in finding a wiretap in violation of the Fourth Amendment). See also Shulman v. Group W Prods., Inc., 955 P.2d 469, 493 (Cal. 1998) ("We agree . . . that all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element [of intrusion upon seclusion]."); Linda Ross Meyer, Unruly Rights, 22 Cardozo L. Rev. 1, 35 (2000) ("The case law is clear that the offensiveness of the invasion . . . turns on the reasons and intentions of the invader.").

[321] Innkeeper laws require prisons to protect inmates "against unreasonable risk of physical harm." Restatement (Second) of Torts § 314A(1)(a), (2) (1965). While a beating in violation of the Eight Amendment will likely violate this duty, it is anybody's guess whether depriving an inmate of adequate nutrition, also an Eighth Amendment violation, will violate the common law duty as well. See Hutto v. Finney, 437 U.S. 678 (1978) (holding that prisoners have an Eighth Amendment right to adequate nutrition).

[322] Under many state laws, liability for an "offensive touching" requires proof that the defendant intended the touching and intended it to be offensive. See Dobbs, supra note 220, at 58–59 n.4 (discussing Restatement (Second) of Torts § 13). It will often be difficult to tell whether an officer, mistakenly believing he has reasonable suspicion to stop and frisk a person, see Terry v. Ohio, 392 U.S. 1, 20–21 (1968), nonetheless intended to offend that person.

ments empowered to make law. In our federal system, the U.S. government enjoys relatively limited lawmaking authority. In contrast, sub-national governments—including state governments, counties, and municipalities—enjoy a great deal of authority. A police officer in a particular city is therefore obligated to obey not just the Fourth Amendment, but also any state constitutional provisions, state statutes, and county or municipal laws. A federal court that has adopted a proxy enforcement practice—even one that requires the alternative law to *clearly* provide relief—must therefore sort through a large number of state and local laws to determine whether any of them will provide relief. Moreover, once a court makes that determination, the decision will have little or no precedential effect outside that particular locality. Thus, federal courts would not be able to develop a single system of proxy enforcement, or even fifty different systems of proxy enforcement, but instead would be forced to develop *several hundred* such systems. Proxy enforcement based on state law would work one way in Los Angeles County, California; a different way in Cody, Wyoming; and still a different way in Yuma, Arizona, even though the localities are all part of the Ninth Circuit. Innovation at the local level has value, but this value is overcome when the avenues of constitutional enforcement hinge on the shifting policies of Garfield County, Montana (population 1,215).[323]

Thus, the costs of proxy enforcement using state law are likely to be too onerous to justify their use. It will be difficult to ascertain the meaning of tort law in numerous instances and, even if the law were clear, it would prove difficult to monitor the changes in local law that will inevitably occur over time.

2. Federal Law as Proxy

The difficulties arising from using state law as a constitutional proxy are much less pronounced with regard to federal statutes or regulations. While these laws can be ambiguous, they emanate from a much smaller set of sources—that is, Congress or administrative agencies. This is not to say that the overall number of appli-

[323] U.S. Census Bureau, Population Estimates, http://www.census.gov/popest/counties/CO-EST2007-01.html (last visited Aug. 18, 2009) (providing population estimates for counties as of July 1, 2007).

cable laws will be small (though they will be far less numerous than all state laws), just that the laws will apply uniformly throughout the nation. Thus, the role of Title IX in peer-on-peer Equal Protection claims can be completely resolved with *one* case.[324] Such resolution could never be accomplished where state law was concerned.

It is true that proxy enforcement will increase the work of the federal courts to some degree. Under a direct enforcement scheme, federal courts would just adjudicate the claim instead of determining, in the first instance, whether the claim could be enforced with sub-constitutional law. This increased work, however, will yield significant benefits in mediating supremacy and populism interests. Moreover, the burden should decrease over time as precedent dictates which laws may, or may not, permissibly stand in for the Constitution. As noted above, this issue has been resolved for the foreseeable future in the Title IX context; it need not be re-litigated at all unless Congress initiates a change in the law. Should Congress do so, a judicial reassessment of the proxy enforcement, while marginally increasing judicial workloads, nonetheless would offer Congress a seat at the constitutional table, something it would otherwise lack.

F. Illustrations

In Section III.D, I reviewed a variety of cases in which the practice of proxy enforcement might apply and identified the cases in which it was permissible. Those cases included *Correctional Services Corp. v. Malesko*, *Carlson v. Green*, *Schweiker v. Chilicky*, and *Johnson v. Bibb County*. Based on the normative considerations addressed in this Part, it is thus possible to conclude that federal courts should enforce the Constitution directly in *Malesko* and *Carlson* and enforce it by proxy in *Chilicky* and *Johnson*.[325]

Malesko and *Carlson* both involved state tort law. As such, practicing proxy enforcement in those cases would embroil federal courts in the ongoing assessment of state law, which is bound to change over time and between different jurisdictions. One might dispute this conclusion by arguing that *Carlson* actually involved *federal* law—specifically the Federal Tort Claims Act. While it is

[324] See Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788 (2009).
[325] See supra Section III.D.

true that the FTCA was potentially applicable in *Carlson*, the "federal" nature of the FTCA should not obscure the fact that enforcing the Constitution by proxy in such cases would require the federal courts to delve deeply into state law. The FTCA does not contain any tort law of its own, but simply adopts the tort law of the state in which the lawsuit is brought.[326] Thus, in the curious instance where federal law essentially replicates state law, proxy enforcement is inappropriate for all of the reasons it would be inappropriate to apply state law on its own.

Chilicky and *Johnson*, however, are ripe for proxy enforcement. They both involve a federal regulatory scheme that protects the same rights at stake had the cases been brought under the Constitution. Further, approving proxy enforcement in these cases is a ruling that can apply nationwide without necessarily impinging on constitutional development or debate regarding public benefits or employment matters. These cases also illustrate the significance of Congress' power to articulate the contours of constitutional enforcement without, at the same time, depriving the judiciary of its structural role. It is a power that could lawfully reach any number of different constitutional norms currently exclusively maintained by the federal courts. Most important, it is a power supported by democratic legitimacy.

CONCLUSION

The Constitution deserves our honor, whether it be in the course of a trip to Washington, D.C., or a civil rights action. But in honoring the Constitution, it is important to discern exactly *what* we are honoring. There is nothing wrong with honoring the First Amendment, for example, through a civil rights action upholding the right to free expression. But when a court honors free expression through a federal statute, it does not *dishonor* the First Amendment. Instead, it honors a principle that lies at the very heart of the Constitution—democratic rule. A court can honor the Constitution in more than one way, and proxy enforcement holds great promise

[326] 28 U.S.C. § 1346(b)(1) (2006) (imposing liability on the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [negligent or wrongful] act or omission occurred").

as a way to honor the popular roots of our Constitution without neglecting the protection of individual rights for which it has become revered.