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# How Shall the Constitution be Enforced? A Preview of *Minneci v. Pollard*

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# How Shall the Constitution be Enforced?

## A Preview of *Minneci v. Pollard*

By John F. Preis



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 fleeting moment, their cherished Constitution. It's enough to make the Restatement of Torts positively jealous.

But perhaps the Restatement deserves a bit more respect. Tort law,

just like much of constitutional law, protects us from invasions of bodily integrity. If a government officer invades this integrity, maybe a tort action could provide the same relief as a civil rights action. Or maybe not.

That is the question presented in *Minneci v. Pollard*, a case I argued before the United States Supreme Court this term. The plaintiff in *Minneci*, Richard Lee Pollard, suffered several Eighth Amendment violations while a federal prisoner in 2001. After accidentally breaking both his elbows, Pollard was denied adequate medical care, nutrition, and hygiene. Given these constitutional violations, Pollard did what many prisoners do: He brought a civil rights action in federal court seeking damages.

Pollard's suit did not proceed like an ordinary civil rights action, however. The district court dismissed Pollard's suit because Pollard arguably had tort remedies under state law. Where common law remedies are available, the district court appeared to believe, there is no need to, as the saying goes, make a federal case out of it.

The district court's opinion was an interpretation of the Supreme Court's "Bivens doctrine." In a series of decisions starting with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court has defined the circumstances under which federal officers may be sued for constitutional damages. (*Bivens* concerns only the liability of federal officers; the liability of state officers is controlled by the well-known statute, 42 U.S.C. § 1983.)

*Bivens* actions are not popular with the modern Court. Time and again, the Court has turned away *Bivens* plaintiffs, usually with the observation that it is Congress, not the Court, that should be deciding who may sue federal officers. In some cases, the Court has gone so far as to suggest that a constitutional damages remedy is not necessary where a similar remedy could be had under state tort law. These scattered references to state law in the Court's *Bivens* jurisprudence are what doomed Pollard's suit in the district court.

In May 2007, I came across the district court's ruling in Pollard's case. At the time, I was researching the value of state remedies in upholding constitutional norms and felt certain that the district court had made a mistake. I wrote Pollard and offered to represent him *pro bono* on appeal. He accepted and I quickly filed a notice of appeal. Three long years later, Pollard and I prevailed before the Ninth Circuit. Our victory was short-lived, however: This past May, the Supreme Court decided to review the Ninth Circuit's decision.

In *Minneci*, the Court will decide how, at least in some cases, the Constitution shall be enforced. The

Court could decide, as Pollard and I contend, that constitutional rights should be enforced through traditional civil rights actions. Or the Court could decide that tort law protects the same interests covered by constitutional law and that common law actions will therefore keep federal actors in line with constitutional norms.

The core of our argument before the Court is that tort law, though hypothetically applicable in the prison setting, lacks specific content as to prisoners' rights. Take, for instance, one of Pollard's Eighth Amendment claims—the deprivation of food and hygiene. To hold that tort law would provide Pollard and all other federal prisoners with relief, the Court would need to find that tort law *in every state* imposes a duty of care on jailers *and* that this duty encompasses obligations to provide adequate food and hygiene. It is of course possible that state common law might provide such relief, but the case law on this issue is sparse if not nonexistent—principally because constitutional rights have long been enforced on their own terms, not through the proxy of state tort law.

Another problem with relying on state remedies to enforce constitutional rights is that state law will vary between states, and also vary over time within each state. The common law rights of prisoners in California will be different from prisoners in Florida, and the rights in both states will undoubtedly be different in the future than they are today. This variability makes state law a poor replacement for federal law, which by its very nature, is intended to be uniform across the entire country.

None of this is to suggest that states should not attempt to protect civil rights through their common law, or that federal prisoners ought not to press their common law actions. It is simply to say that the Constitution cherished by so many Americans is distinctive both in its content and national reach. The Court should heed this in *Minneci* and hold that Pollard's constitutional rights are enforceable without regard to the content of state law. ■

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