THE PATH OF THE CONSTITUTION: THE ORIGINAL SYSTEM OF REMEDIES, HOW IT CHANGED, AND HOW THE COURT RESPONDED

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*This Article explores how the path of the common law shaped some of the Supreme Court's most important decisions regarding constitutional remedies. The Article first introduces the original system of common law remedies for constitutional rights. It then explains how these remedies atrophied, both doctrinally and pragmatically, and how this posed deep problems for the constitutional rights that depended on them. The Article selects three cases—*Mapp v. Ohio*,* Monroe v. Pape*, and* Bivens v. Six Unknown Named Agents*—to demonstrate how concerns about those remedies shaped constitutional rights. These cases have been debated many times over, but for all the debate, there has been scarce attention paid to the problem the Court was addressing: the relationship between the Constitution and common law remedies and, more specifically, what to do about constitutional rights that depended on dwindling common law remedies. Indeed, this relationship hardly receives any attention in classrooms or scholarship today, yet it is at the core of the judiciary's role in implementing the Constitution. This descriptive gap has distorted our normative debate about the relative merits of these cases. The last part of the Article suggests four potential methodologies for coherently managing the relationship between the Constitution and common law remedies.*

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Introduction

On September 24, 1766, colonial customs officials, accompanied by a sheriff, knocked on the door of merchant Daniel Malcom. After presumably brief pleasantries, the officials revealed their writ of assistance—a general warrant issued by a customs official. Mr. Malcom inspected the warrant and allowed the men into his home, but he specifically denied them access to a locked cellar. Believing the warrant did not confer authority to enter the cellar, Mr. Malcom informed the officials that they could not lawfully enter and that he would use force against them if they tried. The officials abided and left, but not for long. They returned with a specific search warrant, but this time to a locked home and a crowd numbering between fifty and three hundred people gathered to protest the intrusion.[1] *One scholar called this "the most famous search in colonial America."*[2]

On February 11, 2010, at 8:30 p.m., a fully armed SWAT team in Missouri gathered in the dark outside the residence of Jonathan Whitworth. One officer began knocking on the door, yelling "Police!" and "Search warrant!" When a resident meekly opened the door, a member of the team shoved it open, allowing the entire team to storm the residence. They shot and killed one resident dog, and shot and wounded another. They arrested Mr. Whitworth, who did not resist, and led him out of his home. The entire episode took place before Mr. Whitworth's wife and seven-year-old son. As a result of the search, the SWAT team discovered "a grinder, a pipe and a small amount of

[1] *See* John Philip Reid, In a Rebellious Spirit 10–25 (1979) (describing the incident).

[2] Otis H. Stephens & Richard A. Glenn, Unreasonable Searches and Seizures: Rights and Liberties Under the Law 39 (2006).

marijuana."[3] *There are approximately 40,000 such incidents every year in the United States, and none receive very much attention.*[4]

Much has changed in our constitutional culture, not least of which is how these two men could vindicate their rights in court. This Article describes the original system of remedies, how that system changed, and how those changes affected constitutional rights as we recognize them today. Originally, the Constitution was to be implemented through remedies available for violations of common law rights.[5] For example, if the customs officials had improperly entered Mr. Malcom's home, he could have sued the officials for trespass. If the search were unconstitutional, the officers would have had no defense for their actions and would have been liable for money damages. In the antebellum Union, this was a robust remedy. After the Civil War, however, the availability and effectiveness of the damages remedy declined. Officers committing the same offense were increasingly able to invoke immunity against lawsuits and more generally avoid the prospect of paying damages for such acts.

This trend seriously threatened constitutional rights[6] and implicated a fundamental question that receives little attention today: What is the relationship between the Constitution and the common law? In other words, what, if anything, should the judiciary do when the common law remedies on which constitutional rights had depended begin to change in ways that threaten those rights? If Mr. Whitworth's rights were violated, and if the common law remedy of trespass were no longer available, would he be out of luck? This Article selects three particularly important cases—*Mapp v. Ohio*,[7] *Monroe v. Pape*,[8] and *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau*[9]—as emblematic of how the problem of dwindling common law remedies affected the Court's jurisprudence. Today, Mr. Whitworth would

[3] David Brennan, *Family Questions SWAT Drug Search that Led to Dog's Death*, COLUMBIA DAILY TRIB., Feb. 23, 2010, at A1. A video of this event is available at http://www.youtube.com/watch?v=qpfLLtPJvxA (last visited Feb. 8, 2012).

[4] RADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 1 (2006).

[5] This Article generally refers to these as "common law remedies," but it is worth clarifying that remedies for common law (and statutory) rights were available at both law and equity.

[6] Contemporary discussion of constitutional remedies often focuses on the many intricacies of modern remedies, treating common law remedies as obsolete curiosities. *Cf., e.g.*, MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 11–13 (2002) (devoting fewer than two out of over two hundred pages to an in-depth discussion of common law remedies).

[7] 367 U.S. 643 (1961).

[8] 365 U.S. 167 (1961).

[9] 403 U.S. 388 (1971).

likely find his remedies in these cases: exclusion of evidence (if the evidence was illegally obtained) and money damages (if the officers violated his constitutional rights without qualified immunity). Of course, the Court had other options for how to respond to the challenge of dwindling common law remedies, and the Article will end by briefly describing the alternatives.

A more detailed outline of the Article's structure is as follows. Part I introduces the enumeration principle—the simple idea, implicit in popular sovereignty and explicit in the Ninth Amendment, that powers not given to government are held by the people. The enumeration principle defines "unconstitutional" acts as those that government does not have the power to authorize. Part I then explains how this principle historically interacted with the common law to create a system of remedies for violations of constitutional rights. Throughout the eighteenth and nineteenth centuries, judicial enforcement of constitutional rights took two forms, both of which were dependent on the enumeration principle. The first is familiar today: Defendants can assert constitutional rights as defenses against suits, including criminal prosecutions. The enumeration principle voids unconstitutional laws (or unconstitutional applications of laws), thereby guaranteeing that defendants will not be harmed under the alleged authority of such a law.

This Article focuses primarily on the second form of remedy: Those who suffered a violation of their rights were able to bring suit, in common law or equity, against the responsible agent. The enumeration principle was traditionally understood to flatly prohibit legal recognition of any law seeking to authorize unconstitutional action. As a result, if that agent did something unconstitutional, he would have no legally cognizable defense for violating the plaintiff's rights. This was the original system of constitutional remedies, robust and undisputed in the antebellum Union. In this system, the Constitution was intimately reliant on the common law, and, whether a right was asserted offensively or defensively, that right depended on the enumeration principle to void any unconstitutional laws that were otherwise invoked to justify invading it.

Part II describes how the common law and the Constitution went their separate ways, such that the Constitution's policies were no longer in neat accord with the remedies provided by state common law regimes. In both doctrine and practice, the common law remedies withered as tools for enforcing constitutional rights. This change posed deep challenges for constitutional values. It not only constricted particular constitutional rights but also threatened to dramatically rework the balance of federal and state power.

In light of the history outlined in Part II, Part III reexamines three of the most controversial Supreme Court decisions regarding the adjudication of civil liberties—*Mapp*, *Monroe*, and *Bivens*—to demonstrate how the dynamics of common law remedies most visibly affected the Court's dispositions. For example, the exclusionary rule that was incorporated in *Mapp* had its origins not in the minds of clever jurists, as many now assume, but in a simple property law remedy: If someone took your property, you could sue to get it back. But the waning adequacy of common law remedies increased the salience and appeal of federal remedies that were free from the whims of state common law—thereby giving rise to cases like *Monroe* and *Bivens*. Generally speaking, the logic of these cases—today often characterized as necessary or implied by some, and overreaching or made-up law by others—is actually intimately reliant on the nature and path of common law remedies. Thus, the contribution of Part III, standing alone, is to provide a doctrinal history of these cases that has heretofore been lacking.

The broader ambition of the Article is to renew the vigorous debate over these cases with this history in mind. The literature's failure to describe the motivation behind the outcomes in these cases has accordingly distorted the normative debate about their place in our constitutional system. Those who support these decisions tend to defend them as good policy or perhaps as vaguely implied or inherent in the Bill of Rights. Opponents dismiss these cases as bad policy or unsupported by originalist principles.

Yet this debate dramatically misrepresents the cases and the challenges they posed to the jurists who considered them. The existing literature is at best unable to describe why these cases came out the way they did and at worst simply misguided. The primary mistake is that the scholarship draws a narrative of constitutional rights without considering the role of remedies. This is surprising because the idea that any meaningful discussion of rights ought to consider remedies is not just a central tenet of so-called "legal realism"[10] but an intuition

[10] *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.").

that runs deep in Anglo-American legal thought,[11] and one that retains influence today.[12]

Finally, Part IV seeks to introduce a more useful methodological debate, that is, the "options" for judicial enforcement of constitutional rights. The options in Part IV provide distinct alternatives for how to deal with the problem of the dwindling common law remedies that once serviced constitutional rights. The first option is to accept a net loss in judicially enforced constitutional protections. That is, constitutional rights are only enforceable insofar as their antecedent, nonconstitutional remedies allow, and if those remedies dwindle in scope or availability, and if constitutional rights deflate as a result, then so be it—that is a problem for the political system, not the federal judiciary. For those unwilling to incur deflation of constitutional rights, there are essentially three other options. The second is to adapt—to interpret and recalibrate rights in order to preserve them in the face of otherwise eroding remedies. The third is to require a baseline of specific common law remedies and to have the judiciary ensure their availability. This approach would require a due process right to a remedial process not inconsistent with those available in 1791 and 1868. The fourth is to leave the entire question of remedies to the states, thereby accepting a diversity of approaches while monitoring to ensure that the remedies each state provides are constitutionally adequate.

While this Article does not address the normative question of which option is best, it provides these options as a useful and unexamined methodological starting point for how to handle the Constitution's relationship with the common law. Doing so challenges the way scholars think about and debate the underlying cases. As a descriptive matter, cases like *Mapp*, *Monroe*, and *Bivens* should be viewed not as blatant, politically- motivated expansions of rights, but

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[11] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); Ashby v. White, (1703) 92 Eng. Rep. 126 (H.L.) 136; 2 Ld. Raym 938, 954 (Holt, C.J.) ("[I]t is a vain thing to imagine a right without a remedy."); 1 WILLIAM BLACKSTONE, COMMENTARIES 55–56 (Univ. of Chicago Press 1979) (1765) ("For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law.").

[12] For a particularly compelling recent example, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999), in which the author states that "[n]o less than in contract and property law—where from Holmes to Calabresi and Melamed we have recognized that rights and remedies are functionally interrelated—rights and remedies in constitutional law are interdependent and inextricably intertwined."

rather as decisions based on these options and constraints. As a normative matter, the debate over constitutional rights often assumes that a particular constitutional outcome is available or it is not. For example, scholars speak for and against the exclusionary rule. This is incomplete. One's position on the exclusionary rule is, or at least should be, tied to how one understands the relationship between the Constitution and the common law—as emblematic of a choice given the four options. This Article tells the story of how the Court came to negotiate the contours of that relationship.

I
THE ORIGINAL SYSTEM

The original system of constitutional remedies worked as follows: If an officer violated one of your constitutional rights, you could sue him as an individual, and you would win because he would have no defense for his wrongful act. Behind this simple system, however, lurks an interesting interplay of institutions and legal doctrines. Section A will describe how sovereign immunity and the enumeration principle contributed to making this system the primary means by which constitutional rights were offensively asserted (and thus how remedies for violations of these rights were provided). Section B will then discuss major antebellum cases that demonstrate these principles at work.

A. Judicial Enforcement of Constitutional Rights in a Government of Enumerated Powers

The original system of judicial remedies for constitutional transgressions arose from the interplay of two doctrines. First, the principle of sovereign immunity prohibited individuals from suing the government, state or federal, without first obtaining the government's consent.[13] The act of expelling the Crown, embodied in the Declaration of Independence, made clear that that immunity was not boundless, but this left ambiguity as to whether milder forms of the doctrine survived the Revolution. This became the first issue docketed before the brand new Supreme Court of the United States in *Van Staphorst v. Maryland*,[14] where the Governor of Maryland was issued a summons for a debt owed to Van Staphorst. But before the case could be

[13] *See generally* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (discussing the Founding-era understanding of sovereign immunity as denying individuals the ability to command states to appear in court).

[14] MARCUS MAEVA, 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 7 (1994) ("The question of the suability of states surfaced in

decided, Maryland settled in order to avoid giving the Federalist Supreme Court an opportunity to set a precedent threatening its sovereignty.[15]

The issue did not evade review for long. Two years later, in 1793, the Court handed down its controversial opinion in *Chisholm v. Georgia*,[16] holding that states were indeed amenable to suit. In response, the states rallied and passed the Eleventh Amendment, clarifying that the provision of Article III interpreted by *Chisholm* did not usurp long standing assumptions about immunity as inherent to sovereignty.[17] The logic of sovereign immunity also required that the doctrine of respondeat superior have no application in suits against government officials, meaning that unconsenting states could not be held liable for the conduct of their officers.[18] Government officers who personally committed any wrong, in tort or otherwise, were liable only as individuals, even if that tort was committed within the scope of their employment.

The second relevant doctrine goes to the core of the Constitution and American political philosophy: the enumeration principle. The rest of this Section will briefly discuss the role of that principle in the debate over the Bill of Rights, and the implications of that debate—more precisely its premises—for how the judiciary was drafted to enforce the Constitution.

The idea of enumerated powers—that powers not explicitly conferred are withheld—formed the core of Alexander Hamilton's argument against a bill of rights, "[f]or why declare that things shall not be done which there is no power to do?"[19] This question contained a syllogism premised on the American Revolution's most important contribution to the organization of government: popular sovereignty.[20]

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the very first case entered on the Supreme Court docket, *Van Staphorst v. Maryland*, which commenced in February 1791 and was settled the following year.").

[15] *Id.* at 19. Maryland's House of Delegates reported that allowing the case to go on "may deeply affect the political rights of this state, as an independent member of the union" and that a "compromise" was preferable to permitting a "precedent to be established, by which any individual foreigner may endanger the political and private rights of this state and her citizens." *Id.* (quoting VOTES AND PROCEEDINGS OF THE STATE OF MD. H.D., REPORT OF THE COMM. ON PUB. REVENUES, DEBTS, AND EXPENDITURES, 1st Sess., at 89. (Dec. 13, 1791)).

[16] 2 U.S. (2 Dall.) 419 (1793).

[17] *See* Nelson, *supra* note 13, at 1585–92 (discussing an interpretation of the language of Article III in which unconsenting states would not be amenable to suit).

[18] JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 319 (Boston, Little, Brown & Co. eds., 6th ed. 1863).

[19] THE FEDERALIST NO. 84, at 537 (Alexander Hamilton) (Henry Cabot Lodge ed., New York and London, G.P. Putnam's Sons 1888).

[20] No other nation had realized popular sovereignty so explicitly and so prominently in practice. As Blackstone put it, "[t]he sovereignty, though always potentially existing in the

Legitimacy derives from the people. This means the government has no more power than what is conferred to it by the people. In such a system, a constitutionally recognized right can be understood as a power withheld from the government or an exception to an otherwise granted power. To Hamilton and like-minded Federalists, enumerating a right where the federal government had no power was arguably worse than superfluous for two reasons. First, it would imply a power to regulate the realm protected by that right.[21] Second, the common law had demonstrated that natural rights reveal themselves in endless, fact-specific iterations; an exhaustive list being impossible to create, those rights not listed would be implicitly excluded.[22]

The logic was clean; the application, not. Anti-federalists were quick to respond and, indeed, Hamilton's argument proved too much:

> We find they have, in the ninth section of the first article declared, that the writ of habeas corpus shall not be suspended, unless in cases of rebellion,—that no bill of attainder, or ex post facto law, shall be passed,—that no title of nobility shall be granted by the United States, etc. . . . Does this Constitution any where grant the power of suspending the habeas corpus, to make ex post facto laws, pass bills of attainder, or grant titles of nobility? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted. With equal truth it may be said, that all the powers which the bills of rights guard against the abuse of, are contained or implied in the general ones granted by this Constitution.[23]

This debate was animated by a core tradeoff: The need for specific, enumerated rights becomes more imperative as government is granted more and broader powers. As some saw it, the powers conferred to the federal government were broad and vague. The power to do everything "necessary and proper" in regulating "commerce . . . among the several States"[24] did not, of its own logic, prevent the federal government from convicting defendants for embargo violations through a

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people of every independent nation, or state, is in most of them, usurped by, and confounded with, the government. Hence in England it is said to be vested in the parliament: in France, before the revolution, and still, in Spain, Russia, Turkey and other absolute monarchies, in the crown, or monarch; in Venice, until the late conquest of that state, in the doge, and senate, &c." 1 WILLIAM BLACKSTONE, COMMENTARIES app. at 10 (St. George Tucker ed., William Young Birch & Abraham Small 1803) (1765).

[21] *See* THE FEDERALIST, *supra* note 19, at 537 ("[T]he provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.").

[22] *Id.*

[23] THE ANTIFEDERALIST NO. 84, at 245–46 (Morton Borden ed., Mich. State Univ. Press 1965) (emphasis omitted).

[24] U.S. CONST. art. I, § 8, cl. 18.

trial by affidavit or in a trial without jury. As Blackstone observed, the advantage of a written constitution was that it did not leave power undefined.[25] However, as Hamilton's reasoning demonstrated, there was something of a seesaw dynamic between power and rights: The possibilities were to enumerate broad powers *and* specific rights, or to secure broad rights by circumscribing the government's powers. The broader the powers conferred to the federal government, the more salient the need for a bill of rights.[26] By contrast, if the federal government were given only narrow and well-defined powers, as it was in the Articles of Confederation, the need for specific rights seemed less pressing. Not surprisingly, then, the Articles of Confederation, while focused on limiting the powers of federal government, did not pay much attention to individual rights. By contrast, state constitutions, which conferred broad powers to branches of state government, all contained bills of rights.[27]

This tradeoff was critical. In fact, Madison confided that his support for a bill of rights was based on the understanding that a demand for specifically enumerated rights was in lieu of, or at least staved off, the demand for a more circumscribed federal government.[28]

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[25] According to Blackstone:

> The advantages of a written constitution, considered as the original contract of society must immediately strike every reflecting mind; power, when undefined, soon becomes unlimited; and the disquisition of social rights where there is no text to resort to, for their explanation, is a task, equally above ordinary capacities, and incompatible with the ordinary pursuits, of the body of the people. But, as it is necessary to the preservation of a free government, established upon the principles of a representative democracy, that every man should know his own rights, it is also indispensably necessary that he should be able, on all occasions, to refer to them.

BLACKSTONE, *supra* note 20, at 154–55; *see also id.* at 287 (arguing that notwithstanding Tenth Amendment and Federalist assurances otherwise, the Necessary and Proper Clause immediately "destroy[ed] the effect of the particular enumeration of powers" and citing "the act for establishing a bank; the act authorising the president to appoint officers to volunteer corps of militia; the act declaring that a paper not stamped agreeably thereto, shall not be admitted as evidence in a state court; the alien and sedition laws, &c").

[26] As Thomas Jefferson put it: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 660 (Julian P. Boyd ed., Princeton Univ. Press 1958).

[27] *See, e.g.*, FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS (1906) (compiling state constitutions). In a similar vein, it is perhaps not surprising that the protections offered by the Bill of Rights became more robust, or were at least more often triggered, following incorporation and the Court's expanding interpretation of the Commerce Clause. These shifts required the Bill of Rights to operate alongside a federal government with growing legislative authority and state governments with considerable preexisting legislative authority.

[28] In a letter, Madison wrote:

> The friends of the Constitution . . . wish the revisal to be carried no farther than to supply additional guards for liberty . . . and are fixed in opposition to

This debate, its premises, and its outcome—enumerating broad powers and carving comparatively narrow rights—were immediately relevant to how the Constitution was to be implemented by the branches of government. Whereas William Shakespeare once wrote, "it is excellent, [t]o have a giant's strength; but it is tyrannous, [t]o use it like a giant,"[29] the Constitution reserved from giants the powers it did not want them to use.[30] This idea—that powers not granted were reserved completely—was the enumeration principle, and it can be seen in how laws are passed and enforced. In broad terms, when passing a law, both houses of Congress must determine, by majority vote and in accordance with the strictures of Article I, that Congress has the authority to pass a particular piece of legislation under Article I and that the proposed legislation does not violate other provisions of the Constitution, most notably Article I, Section 9 and the Bill of Rights. The President must conclude the same, and sign the bill into law to signify that conclusion. Then, the executive branch must enforce the law and, to the extent it continues to believe the law is constitutional, defend the law in courts.[31]

From here, the judiciary's involvement takes one of two forms.[32] First, a court may have to determine whether the law is constitutional.

> the risk of another Convention . . . . It is equally certain that there are others who urge a second Convention with the insidious hope of throwing all things into Confusion, and of subverting the fabric just established, if not the Union itself.

Letter from James Madison to Thomas Jefferson (Dec. 8, 1788), *in* THE PAPERS OF THOMAS JEFFERSON, *supra* note 26, at 340.

29 WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2.

30 This commonly held understanding is inherent in the Constitution's structure. The Constitution begins as a grant of power from "We the People" to the government, as "ordain[ed] and establish[ed]" in the Constitution, U.S. CONST. pmbl., and, after enumerating the powers granted to that government, the Constitution proceeds to a Bill of Rights. The Ninth Amendment then provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend X.

31 This responsibility found recent example in President Obama's announcement that he will no longer defend the constitutionality of the Defense of Marriage Act in court. Press Release, Dep't of Justice, Statement of the Att'y Gen. on Litig. Involving the Def. of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

32 These two approaches are often described using the sword-shield metaphor. *See generally* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (describing the alternate uses of constitutional guarantees as "shields" against government action, and as "swords" in affirmative causes of action against the government). As we will see in the Section about the exclusionary rule, this metaphor, while useful, should not overstate the degree of distinction between a constitutional right enforced offensively and one enforced defensively.

To the extent that "enforcement" implies a prosecution or a lawsuit against a party, the defendant can defend himself by challenging the constitutional validity of the law, thus triggering judicial review.[33] The court would then have to find, again, that Congress had authority to pass the law, and that the law, as applied by the executive, did not violate the defendant's constitutional rights.[34] This form of judicial review, affirmed by *Marbury v. Madison*,[35] has hardly been questioned since, and generally remains robust today.[36] Second, a court may be asked to remedy a constitutional wrong. To the extent that executive "enforcement" of a law constitutes harassment, assault, or

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[33] For the most recent example, see *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011), in which the Court concludes that "a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." *See also id.* at 2368 (Ginsburg, J., concurring) ("In short, a law 'beyond the power of Congress,' for any reason, is 'no law at all.' The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact § 229. Her claim that it does not must be considered and decided on the merits." (citing *Nigro v. United States*, 276 U.S. 332, 341(1928))).

[34] Recently this point has been confused in the scholarship. One article, for example, claims that the First Amendment has no application to the executive branch. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1255 (2010). There, it is claimed that "[a First Amendment] violation has nothing to do with the application of the law to any particular person[,]" and that "[t]he violation is complete before the law is applied at all." *Id.* Consequently, the author concludes that

> [a] First Amendment freedom-of-speech challenge cannot be an 'as-applied' or 'as-executed' challenge to executive action; it must be a 'facial challenge'—that is, a challenge to *legislative action*. The alleged constitutional violation must be visible on the face of the statute: *lex ipsa loquitur*. And the claimed remedy is a declaration that the product of the legislative action—the 'law'—is not law at all.

Id. This insight is incomplete because it does not fully account for how the result—that the "law" is "not law at all"—actually does constrain the executive. The First Amendment restrains the executive by prohibiting Congress from passing laws that would provide executive officers with valid authority to abridge the freedom of speech. This means that an executive officer will be liable if he tries to enforce an act of Congress that violates the First Amendment (because, at risk of being redundant, such an act does not provide valid authority for the officer's actions). Because Congress cannot authorize such actions, executive officers cannot claim such authority.

[35] 5 U.S. (1 Cranch) 137 (1803).

[36] After the court passes on constitutional questions that are properly raised in the proceeding, the jury implicitly has the opportunity to pass on the constitutionality of a law or its application through jury nullification. After this, the defendant has at his disposal direct review, habeas, and the possibility of presidential pardon. And finally, aggrieved parties may also look to resuscitate incarnations of popular constitutionalism discussed elsewhere. For example, in the context of an "overly assertive Court," see generally LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). The author states that "[t]he Constitution leaves room for countless political responses . . . Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members . . . ." *Id.* at 249.

other wrongs like trespass, the aggrieved individual has historically been guaranteed due process of law. To secure his life, liberty, and property, he need look no further than the oldest and most celebrated method of vindicating natural rights in English history: the common law. In a suit against an officer "enforcing" a law, the officer would necessarily invoke his authorization as a defense.[37] The plaintiff would then have the opportunity to challenge either the officer's action as outside the scope of authorization, or the authorization itself as unconstitutional. If this challenge were successful, the officer would be defenseless and liable.[38] This was not just a formality, but an outcome dictated by the enumeration principle and by a commitment to popular sovereignty.[39]

The enumeration principle was thus integrated into every step of constitutional implementation, from legislating in Congress to final review on habeas. To say that an action is unconstitutional is to say that it was done without the authority conferred to government by the people—either because the power was not conferred, or because it was specifically withheld in the form of a right. An unconstitutional action is forceless, like a judgment on United States patent law made by a provincial bankruptcy court in Canada, or like the government of France passing a law abolishing the death penalty in the United States.

It is important to note that no particular scheme of remedies necessarily follows from the enumeration principle by itself. The system only works when the enumeration principle is combined with a system of remedies like the common law. The common law provides the remedial mechanism, mainly a forum in which to bring suit and assert one's right. The enumeration principle worked inside that forum. In the context of a suit, it allowed the court to inquire into whether the Constitution permits the officer's actions and to negate the officer's defense if it does not. The force of the enumeration principle seems

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[37] *See, e.g.*, Sina Kian, Note, *Pleading Sovereign Immunity*, 61 STAN. L. REV. 1233, 1246–47 (2009) (describing the dynamics of the pleading requirements in the context of officer suits).

[38] *Id*. at 1247.

[39] Again, this is because popular sovereignty means that power emanates from the people, and, by extension, the enumeration principle means that government can only invoke the power enumerated to it by the Constitution. The contours of that power are defined by general grants of authority (for example, the Commerce Clause) and specific areas where power is withheld in the form of rights reserved for individuals—for example, the federal government was not granted authority to inflict cruel and unusual punishment. Thus, if an officer does inflict such punishment, he cannot avoid liability for assault or battery by asserting his authority as an officer.

simple enough—perhaps too simple—but it will be a critical constraint discussed later in the Article.[40]

B. Original Remedies Applied in the Antebellum Era

The common law remedy found immediate and robust application. Although prominent accounts of the application of these remedies begin with the Supreme Court's decisions in *Cohens v. Virginia*[41] or *Osborn v. Bank of the United States*,[42] the practice had a significantly deeper and richer role in the Republic's history.[43]

One of the most noted examples in British common law involved a trespass action against the King's Chief Messenger, Nathan Carrington, who "with force and arms" broke into the home of John Entick, an associate of the English radical John Wilkes.[44] Carrington did this under the supposed authority of a warrant from Secretary of State Lord Halifax, which instructed him "to make strict and diligent search for . . . the author, or one concerned in the writing of several weekly very seditious papers."[45] Entick sued Carrington and the

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[40] This simple idea also sheds light on other separation of powers questions, or at least clarifies what precisely is at issue. For example, scholars have long debated whether courts can issue advisory opinions. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 79–85 (5th ed. 2003) (discussing various issues associated with advisory opinions). The enumeration principle reorients this inquiry. If the Constitution "prohibits" advisory opinions, this simply means such opinions will have no legal effect; they are void. The question is not whether courts can issue advisory opinions, but what effect is given to these opinions. Thus, according to the enumeration principle, courts can issue all the advisory opinions they like, but these opinions have no legal effect but the power of their reason, like an op-ed or a law review article (this analysis, of course, does not address the ethics or appropriateness of a judge using the imprimatur of her office to issue legal opinions that, in effect, amount to little more than an op-ed). This idea also sheds light on what should be easy cases of wrongly-invoked immunity. For example, there is some evidence that lawmakers believe their legislative immunity extends to private wrongs against other individuals, thus authorizing lawmakers to drink and drive, or physically assault others. *See, e.g.*, Marc Lacey, *A Legal Privilege that Some Lawmakers See Broadly*, N.Y. TIMES, Mar. 11, 2011, at A13 (recounting such instances of claimed immunities). The enumeration principle, of course, embodies the commonsense intuition that such invocations of immunity cannot stand, and it does so by asking a simple question: Was this an authority granted to members of government by the people? As a general matter, it is safe to say that the license to drink and drive or to freely commit domestic violence is not the kind of authority granted to representatives by the federal or state constitutions.

[41] 19 U.S. (6 Wheat.) 264 (1821).

[42] 22 U.S. (9 Wheat.) 738 (1824).

[43] *See, e.g.*, David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 10 (1972) (noting *Cohens* as an early Supreme Court case allowing such a remedy to proceed); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 21 (1963) (describing *Osborn* as "boldly . . . stak[ing]" a wide field for actions against state officers).

[44] Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) 807; 2 Wils. K.B. 275.

[45] *Id.* at 808.

officers in trespass and, because the warrant was unconstitutional, he recovered £1000 against one of the officials who conducted the search, and £4000 against Lord Halifax[46]—serious sums of money when accounting for over 200 years of inflation. This case assumed a legendary status in American jurisprudence; the Supreme Court many years later would refer to it as a "great judgment," a "landmark[ ] of English liberty," a case "welcomed and applauded by the lovers of liberty in the colonies," and a "true and ultimate expression of constitutional law."[47] This practice was not limited to England or post-independence America; it was a primary legal vehicle by which the colonies resisted English tyranny.[48]

A decade after ratification, the Supreme Court reaffirmed the legitimacy of judicially enforcing rights in this manner, its harshness on officers notwithstanding. In *Little v. Barreme*,[49] the President specifically instructed the commander of a U.S. warship to intercept and seize a Danish vessel suspected of violating a nonintercourse law. However, the President misconstrued the relevant statute, and in fact there was no legal authority for the seizure.[50] This meant that the officer's defense would be void; he had no valid authority to excuse his actions. The district court ordered restoration of the vessel and its cargo, but denied damages. The circuit court reversed the denial of damages, and the Supreme Court upheld the decision of the circuit court.[51] The officer, for following executive instruction, was ordered to pay $8504 in damages—approximately $120,000 today. Chief Justice Marshall paused at the legally correct yet intuitively troublesome result. He noted, "I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages,"[52] but he ultimately agreed "that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[53] Key here is that

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[46] *See* Boyd v. United States, 116 U.S. 616, 626 (1886) (describing the outcome of *Entick v. Carrington*).

[47] *Id.*

[48] *See, e.g.*, CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 67–68 (1960) (describing customs officer's seizure of sloop and owner's subsequent use of common law action to preempt admiralty jurisdiction). This monograph also explains how colonists hinted or implied that limitations on that common law action were themselves constitutional infringements, particularly as those limitations applied to the jury right. *See id.* at 76–79, 189–90.

[49] 6 U.S. (2 Cranch) 170 (1804).

[50] *Id.* at 178–79.

[51] *Id.* at 172.

[52] *Id.* at 179.

[53] *Id.*

immunizing an officer from damages is a way of authorizing or "legalizing" his conduct, and because the enumeration principle prohibits an unconstitutional act from being "legalized," it also prohibited immunizing an officer from damages.

Two years later, Chief Justice Marshall addressed the issue again without pause. In *Wise v. Withers*, a court martial had imposed fines on a justice of the peace in the District of Columbia for failing to enroll for militia duty.[54] Though the statute exempted "the officers, judicial and executive, of the government of the United States," the court martial found that a justice of the peace did not qualify.[55] A collector entered the defendant's home and seized property to satisfy the fine. The Supreme Court disagreed with the court martial's reading, held that justices of the peace were exempt from duty,[56] and found that the collector was personally liable. The Court stated quite plainly, "it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it."[57]

Neither *Little* nor *Wise* concerned constitutional rights. Rather, they affirmed a dynamic that had, at its core, an understanding of governmental power. Simply put, government could not exercise power not delegated to it. At the statutory level, as seen in *Little* and *Wise*, this meant that officers enforcing obligations inconsistent with or in excess of those imposed by the law were without authority, without immunity, and subject to suit insofar as their actions violated rights.

It followed, a fortiori, that officers would be subject to suit for acting beyond the bounds of authority conferred to government by the Constitution. And so the case law went. The most prominent example from the Marshall era was *Osborn v. Bank of the United States*, where an officer ignored an injunction requiring otherwise and extracted an unconstitutional tax from the Bank.[58] The state law "authorizing" the tax was no defense, as states were not empowered to authorize unconstitutional laws, so the tax collector could be sued.[59] Likewise, in *Davis v. Gray*, the plaintiff railroad sued officers to enjoin them from authorizing settlers to enter the railroad's land. The defendants pointed to a law as their authorization, a law the plaintiffs challenged as violating the Contracts Clause. And because

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[54] 7 U.S. (3 Cranch) 331 (1806).

[55] *Id.* at 332 (emphasis omitted).

[56] *Id.* at 337.

[57] *Id.*

[58] 22 U.S. (9 Wheat.) 738 (1824).

[59] *Id.* at 870.

that law did violate the Contracts Clause, the defendants were personally enjoined.[60]

The Court was unwavering in its application of the enumeration principle,[61] even in the face of honest mistakes.[62] The strength of its application was best stated in *Woolsey v. Dodge*: "There is no axiom of the law better established than this. A void law can afford no justification to any one who acts under it . . . ."[63]

The enumeration principle guided state supreme courts as well. Perhaps the most interesting and straightforward example came from the Civil War indemnity acts.[64] One of them, the 1863 Act, provided that

> any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress.[65]

This was impossible without abandoning the enumeration principle and, with it, the concept of popular sovereignty. While the Court did not have the opportunity to review the indemnity acts,[66] the Supreme Court of Indiana held the statute unconstitutional because it

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[60] 83 U.S. (16 Wall.) 203 (1872).

[61] *See, e.g.*, Bates v. Clark, 95 U.S. 204 (1877) (upholding a damages verdict for trespass against an army captain and lieutenant who were following seizure orders given from an United States Attorney). There, the Court reasoned:

> [M]ilitary officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority. . . . So the plea that they had good reason to believe that this was Indian country, and that they acted in good faith, while it might excuse these officers from punitory damages, is no defence to the action. . . . [T]heir honest belief that they had is no defence in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property.

Id. at 209.

[62] See, for example, *Amy v. Supervisors*, 78 U.S. (11 Wall.) 136 (1870), in which the Court stated:

> The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.

Id. at 138; *see also Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 836 n.51 (1957) (summarizing this point).

[63] Woolsey v. Dodge, 30 F.Cas. 606, 607 (C.C. Ohio 1854), *aff'd*, 59 U.S. 331 (1856).

[64] *See* Engdahl, *supra* note 43, at 48–50 (citing and discussing the indemnity acts in the context of sovereign immunity).

[65] Act of March 3, 1863, ch. 81 § 4, 12 Stat. 755, 756.

[66] Engdhal, *supra* note 43, at 50.

attempted to immunize *and therefore authorize*, something the Constitution never gave the government power to do.[67] There seemed to be no authorities in antebellum America that contradicted the enumeration principle, or even called its wisdom into question. But that soon changed.

II
Erosion of Common Law Remedies

Part I introduced how common law remedies combined with the enumeration principle to implement constitutional rights. Part II describes how this system was disrupted, as common law remedies began to wither both doctrinally and practically so as to threaten the constitutional rights that the remedies once protected. This breakdown set the stage for the Supreme Court's response, which is discussed in Part III.

America in the 1870s was a union of communities, "a nation of loosely connected islands," where even cities "retained much of the town's flavor."[68] Below this world, there was another nation inhabited by European immigrants, Chinese workers, migratory workers, and, of course, those who by overdue fortunes of history were suddenly experiencing the realities of their emancipation proclaimed. More and more, economic forces began whirling American society, exposing the different worlds to one another and, in the process, challenging the coherence of communities. By the 1880s, the nation was deep in the midst of transformation; as one historian put it, "[a]n age never lent itself more readily to sweeping, uniform description: nationalization, industrialization, mechanization, urbanization."[69]

These trends created others. The breakdown of local communities, an integrating economy, exponentially increasing crime rates, growing state and federal bureaucracies, and growing police forces—local and state at first, and, with Prohibition, federal—all placed enormous stress on the common law system of remedying constitutional harms. These factors worked to increase the number of interactions between individuals and their government and, correspondingly, the number of constitutional transgressions. In 1924, one scholar described the "unexampled expansion of the police power in the United States" as increasing the costs of "defective, negligent, per-

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[67] *Id.* (quoting Griffin v. Wilcox, 21 Ind. 370, 372–73 (1863)).

[68] Robert H. Wiebe, The Search for Order 1877–1920, at 3, 4 (1967).

[69] *Id.* at 12. *See generally id.* at 44–75 (describing social and economic dynamics that undermined the traditional structures of American communities).

verse or erroneous administration" of government functions.[70] As more constitutional rights were violated (or as more people claimed that they were), the remedial system was called to do more and more work.

Under this stress, the common law system of remedies, long assumed to be the vehicle by which the Constitution would be enforced,[71] began to contract and fragment in ways that were inconsistent with constitutional law and policy. The first was an increasing trend toward affording officers immunity from damages.[72] Second, the common law remedies withered to practically nil, in part because plaintiffs were increasingly unsympathetic before local juries. Third, new technologies, such as telephones and wiretapping, implicated constitutional rights that did not give rise to causes of action (and therefore remedies) at common law.

A. Officer Immunity

As Part I demonstrated, the original system of common law remedies for constitutional rights depended on holding officers liable for actions that were inconsistent with the authority granted to government by the Constitution. The whole point of the enumeration principle was that the government could not authorize actions inconsistent with the Constitution. It is not difficult to see how that system—the marriage of common law remedies with the enumeration principle—would be existentially threatened by officer immunity for unconstitutional actions. Immunization is an important form of authorization.

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[70] Edward M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1 (1924). Of course, that trend has continued over time. For example, in 2002, the New York City Police Department stopped, questioned, and sometimes frisked approximately 98,000 people. In 2004, the number was over 300,000, and by 2009, the number had reached 575,000. In 2002, numbers from the New York Attorney General's Office revealed that for every nine people stopped, one person was arrested. Today, that ratio has doubled, counting eighteen stops for every arrest. Over eighty percent of those being stopped were people of color, and in some districts, the odds of any given resident being stopped in a year was roughly one in three. NEW YORK POLICE DEP'T, NYPD STOP, QUESTION, AND FRISK REPORT DATABASE, http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml (last visited Feb. 8, 2012).

[71] For one of many sources on this, see, for example, Bradford P. Wilson, *The Fourth Amendment as More than a Form of Words: The View from the Founding*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 151 (Eugene W. Hickok, Jr. ed., 1991). As Wilson describes, "[t]here is no reason to believe that the draftsmen of the Constitution gave specific attention to the problems of implementation. . . . [T]he Constitution was to be implemented in accordance with the remedial institutions of the common law." *Id.* at 156 (quoting Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131–32 (1969)).

[72] This Article does not discuss claims of expanding sovereign immunity made by Engdahl and others. The focus here is on expanding immunity for officers personally.

Indeed, immunization means that government is allowing its officer to act unlawfully without being held liable. This Section discusses how such immunization increasingly came to threaten the original system of constitutional remedies.

There is a certain philosophy or attitude that underlies a regime where officers are held strictly liable for unconstitutional acts even when doing so in good faith or in the context of following orders. Indeed, this regime may seem jarring to laypersons and lawyers today. As mentioned earlier, while such potential unfairness gave Chief Justice Marshall pause in *Little v. Barreme*, ultimately he (and courts throughout the nineteenth century) believed that the question was to be decided *legally*, as opposed to *morally*.[73] As one court put it, the officer's view of the constitutionality of a statute "is, *in a legal point of view*, of no consequence."[74]

Eventually, however, scholars began to question this regime as a fiction,[75] and often an unfair one. One scholar put it plainly: "If the legislature enacts a statute which it has no power to enact, or does so in a manner forbidden to it, the inferior officers in the judicial and administrative branches of the government should not pay for the mistake."[76] As the twentieth century progressed, commentators began to share this apprehension.[77] As notions of fairness began to compete with a rigorous application of the formal *ultra vires* logic, the doctrine of officer liability wavered, and the enumeration principle seemed threatened.

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[73] *See supra* notes 52–53 and accompanying text (describing Justice Marshall's moral ambivalence regarding the legal outcome in *Barreme*).

[74] Clark v. Miller, 54 N.Y. 528, 532 (1874) (disregarding the view shared by both defendant and officer that a law was unconstitutional) (emphasis added).

[75] *See, e.g.*, Kenneth Culp Davis, *Suing the Government by Falsely Pretending To Sue an Officer*, 29 U. CHI. L. REV. 435, 435–38 (1962) (describing officer liability as a false pretense for suing the government).

[76] Oliver P. Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction*, 77 U. PA. L. REV. 155, 188 (1929).

[77] *See, e.g.*, Oliver P. Field, *Effect of an Unconstitutional Statute*, 100 CENT. L.J. 145, 150 (1927) ("After all, does it not seem sound to give private individuals and ministerial officers the benefit of the view that statutes are to be obeyed until they are declared unconstitutional?"); Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 15 (1978) (referring to the regime of officer liability as based on "draconian principles"); Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 603 (1927) ("It is unfair and socially undesirable that the subordinate officers of the government should assume the risk of constitutionality of legislative enactments."); *cf.* Fleming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 615 (1955) (noting a declining willingness of scholars and commentators to "defend the full extent of governmental immunity" today, but doing so in a broader field of immunity than that conferred for acting under authority of an unconstitutional law).

Officer immunity rose from murky origins. Its history is notoriously complex,[78] and scholars have stumbled in telling it.[79] I tread wearily into that thicket, thread in hand, stepping no farther than necessary to demonstrate that the increasing complexity and prominence of common law officer immunity had significant implications for the adjudication of constitutional rights.[80]

In 1791, official immunities were narrow and precisely selected.[81] For example, the common law provided varying forms of immunity to judges acting within the scope of their jurisdiction.[82] A more prominent example of immunity found express articulation in Article I, Section 6, Clause 1 of the Constitution: "[F]or any Speech or Debate in either House, [United States Senators and Representatives] shall not be questioned in any other place."[83] The idea here is simple: Immunity is necessary both to encourage political discussion and ensuing legislative activity and to discourage politically motivated arrests.[84]

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[78] *See, e.g.*, Mashaw, *supra* note 77, at 10 ("[The] tale [of officer immunity] is indeed long and ultimately ambiguous: the plot reflects a judicial preference for Joyce and Beckett over Lardner and Twain.").

[79] Some of the best accounts are in Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1986), and Jaffe, *supra* note 43.

[80] As a preliminary matter, however, it is important to distinguish conceptually sovereign immunity from officer immunity. Sovereign immunity is a jurisdictional bar against haling states into court without their consent. A suit against an officer should be dismissed on grounds of sovereign immunity only if there is no cause of action against the officer personally. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 21–22 (1890) (dismissing suit on grounds of sovereign immunity because the contract was between plaintiff and State of Louisiana). *See generally* Kian, *supra* note 37 (describing common law foundations of *Hans v. Louisiana*). If a suit against a government official survives sovereign immunity—that is, if the plaintiff spells out a cause of action against the individual defendant—officer immunity may stand as a hurdle against recovery for the plaintiff. Officer immunity is a misleading term insofar as it implies the doctrine is tied to personal jurisdiction. The officer is not immune from being sued; rather, she is privileged against damage awards. While sovereign immunity withholds jurisdiction, officer immunity provides the officer with immunity against damages.

[81] *See generally* Engdahl, *supra* note 43, at 41–47 (reviewing official immunities).

[82] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553–54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."). This immunity extended to a judge's decision about whether the court has jurisdiction, a somewhat entertaining recursion, but any injury imposed by erroneous determinations can usually be allayed by the possibility of appeal. *See, e.g.*, Engdahl, *supra* note 43, at 43–47 (discussing application of judicial immunity rule in various contexts where the bounds of jurisdiction are unclear).

[83] U.S. CONST. art. I, § 6, cl. 1.

[84] *Kilbourn v. Thompson*, 103 U.S. 168 (1880), demonstrates how the contours of this privilege are limited to lawmakers in their legislative capacities. There, the plaintiff had sued members of the House for passing a resolution holding him in contempt. Though the House lacked power to imprison the plaintiff, the Court held that official privilege protected the legislators from suit for false imprisonment. *Id.* at 205. Their unconstitutional

By the 1920s, however, states had begun expanding official immunity to executive officers. This expansion happened slowly, perhaps equitably, and almost without regard for the consequences that such immunities would have on enforcing individual rights. All of this, but not unnoticed.[85] The scholarly consensus is that officer immunity decisively superseded the earlier regime of liability.[86] Prior to 1880 there was nigh "absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts."[87] But, by the mid-twentieth century, "the so-called 'common law' notion of privilege for executive officials was being endorsed by the most reputable judges and scholars, and the whole line of American precedents to the contrary had been virtually forgotten."[88] Scholars, commenting on the rise in crime and full-time police bureaucracies, also noted a "considerable growth in law designed to increase the protection of society by officials."[89] The broader trend was noted in contemporary torts treatises:

> *Even as to officers acting under an unconstitutional statute*, *which can confer no jurisdiction at all*, the courts are being driven slowly to the view that the officer cannot be required to determine legal questions which would perplex a court, and that if he has acted in good faith he must not be liable.[90]

Indeed, that same treatise, decades later, spoke even more confidently about that trend:

> The more modern and better reasoned cases, with many still to the contrary, have extended this [immunity] even to the protection of officers who act under statutes subsequently declared to be unconstitutional, reasoning that the mentality of the average policeman, whose life is traditionally not a happy one, should not be charged with the decisions of questions which baffle the best lawyers in the land.[91]

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enactment, however, did not protect the officer—John Thompson, Sergeant-at-Arms for the House—who took the plaintiff into custody. He was without defense and liable for damages. *Id.* Congress subsequently reimbursed Mr. Thompson. *See* Act of Mar. 3, 1885, ch. 359, 23 Stat. 446, 467 (providing for Thompson's reimbursement "for expenses, labor, and attention in respect to the said case").

[85] For examples of scholars pointing out this trend, see generally Field, *supra* note 76 and Rapacz, *supra* note 77.

[86] Engdahl, *supra* note 43, at 52.

[87] Rapacz, *supra* note 77, at 585.

[88] Engdahl, *supra* note 43, at 52.

[89] Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 363 (1935).

[90] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 25, at 153–54 (1941) (emphasis added).

[91] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 25, at 128 (4th ed. 1971).

The growth of immunity was no doubt real, but its implications for enforcing constitutional rights were overstated. The reason is that immunity grew mostly for when the officer was acting within the scope of constitutionally permissible discretion. That kind of immunity—whatever its merits—is not relevant here. What is relevant, however, is that such immunity spilled over and was increasingly asserted with success against claims that an officer was acting unconstitutionally.[92]

The source of confusion lies primarily in the distinction between unauthorized acts and discretionary acts,[93] famously discussed in *Marbury v. Madison*.[94] The distinction is actually quite intuitive. The government may do many things that harm individuals—for example, tax them or enact bad policies—but there is a distinction between harms that the Constitution allows the government to impose and those that the government has no power to impose. In other words, there is a difference between bad policy and unconstitutional law. The enumeration principle, strictly applied, allows no justification for the latter, but has nothing to say about the former.

This principle drove the distinction in *Marbury*. On the one hand, where the "executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable"[95]—that is, like a misguided tax policy, any consequences or injuries flowing from the exercise of a legally authorized discretion can only be remedied politically.[96] Read properly, this means that officers cannot be held liable for acting within the realm of discretion contemplated by law.[97] On the other hand, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his

[92] The argument in the next Section is that the Court's jurisprudence accounted for the fact that growing officer immunities weakened common-law remedies and thus deflated constitutional rights. For this narrative to be true, it is not entirely necessary that officer immunities *actually* grow; rather, it is sufficient that jurists *perceive* immunities as growing and thus threatening constitutional rights.

[93] *See, e.g.*, Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845) (holding that a "public officer" cannot be held liable "where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake"); William C. Mathes & Robert T. Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 896–97 (1965) (discussing this distinction).

[94] 5 U.S. (1 Cranch) 137, 166 (1803).

[95] *Id.* Alternatively, the plaintiff has a claim against the State, which cannot be sued unless it waives sovereign immunity.

[96] *See* FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 157–58 (3d ed. 1894) (discussing immunity for discretionary actions in the absence of negligence).

[97] *See, e.g.*, Engdahl, *supra* note 43, at 48 (discussing this principle in the context of later cases).

country for a remedy."[98] The distinction is between cases where an officer has discretion and where he does not.[99] There is theoretically nothing besides the two sides of the immunity/liability coin: immunity for acting within the appropriate bounds of discretion, strict liability for acting outside of the authority enumerated by the Constitution.[100]

Scholars have treated immunity for discretionary actions as permitting that which the enumeration principle forbids: immunity for doing something prohibited by the Constitution.[101] But the cases cited throughout the scholarship generally do not stand for the proposition that an officer is immune even when injuring someone in accordance with an unconstitutional statute.[102] The question they ask is whether

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[98] *Marbury*, 5 U.S. (1 Cranch) at 166.

[99] Scholars and treatises have protested this dichotomy, at least in its later applications, as conceptually incoherent, "a way of stating rather than arriving at the result," and "a convenient device for extending the area of nonliablity without making the reasons explicit." Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963); *see also* PROSSER, *supra* note 90, § 25, at 151–53 (1941) (labeling this distinction "rather artificial and scarcely justifiable").

It need not be incoherent, at least for purposes of understanding officer immunity. There are two sources of law that limit an officer's realm of discretion so as to render his actions "ministerial" rather than "discretionary." First, a statute may provide an officer with particular, nondiscretionary duties. For example, in one case, city jailers were required to "keep the jail clean and well ventilated, and in good sanitary condition at all times, and free from bugs and vermin . . . with a bed and bedding cleanly and sufficient . . . ." Clark v. Kelly, 133 S.E. 365, 369 (W. Va. 1926). The West Virginia court held that these were "all positive duties," not discretionary, and thus the jailer was "'liable in damages to any one specially injured either by his omitting to perform the task or duty, or by his performing it negligently or unskillfully.'" *Id.* (quoting Henderson v. Smith, 26 W. Va. 829 (1885)). Second, all government action is limited by the Constitution. Regardless of other obligations, an officer can never have discretion to violate the Constitution—any such action is per se unauthorized, and exposes the officer to liability under the common law.

[100] There is an important distinction between statutory authority and constitutional authority. Statutory rights can be limited by officer immunity—this just amounts to granting narrower statutory rights. Therefore, the West Virginia law mentioned in the previous footnote could, by judicial gloss or legislative amendment, be read to require a clean jail, yet immunize officers for their negligence in providing that cleanliness. At that point, there would be a right (to a clean jail), but no remedy against the officer. But of course, statutory immunity would not protect him from actions that violate the Constitution, if any were committed. This is because there is no legislative authority to authorize unconstitutional actions by immunizing those who commit them.

[101] *See, e.g.*, Mathes & Jones, *supra* note 93, at 912 (not distinguishing between the two ideas in concluding that "the expansion of the official immunity doctrine in recent times makes individual police-officer liability more the exception . . . to what is really a general rule of public officer immunity"); Mashaw, *supra* note 77, at 8 (discussing liability without sensitivity to this distinction).

[102] To argue otherwise, prominent authorities cite a decision by the Iowa Supreme Court, *Henke v. McCord*, 7 N.W. 623 (Iowa 1880), as "the leading case" in support of the view that officers should not be liable for injuries resulting from enforcement of unconstitutional statutes. Rapacz, *supra* note 77, at 591–92. *See also* PROSSER, *supra* note 90, § 25, at 154 n.84 (citing *Henke* for the proposition that "if [the officer] has acted in good faith he must not be liable"); Field, *supra* note 76, at 185–90 (drawing on case law in discussing

the officer has valid discretion to commit the precise action that allegedly harmed the plaintiff—that is, whether the discretion exercised was within the bounds of authority conferred to the government by the Constitution. If the answer is yes, it follows that no constitutional injury has been suffered, insofar as the judiciary is concerned.[103]

But scholars were not entirely wrong. As officer immunity grew, it spilled over into protecting officers who acted unconstitutionally. Some states, like California, went as far as providing such officers with statutory immunity.[104] Whereas precedent from the antebellum period

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when officers should be subject to suit for acting on unconstitutional statutes). Rapacz's view is not entirely clear, as he cites *Henke* for this proposition, Rapacz, *supra* note 77, at 585–86, but later implies its shortcomings, *id.* at 594. The case does not support that view, at least not when put in its specific legal context. In *Henke*, a justice of the peace had issued a search-and-seizure warrant in accordance with a municipal ordinance, and a marshal acted on the warrant and seized the plaintiff's property. *Henke*, 7 N.W. at 623. The Iowa Supreme Court, surprisingly, determined that the ordinance authorizing such warrants was "void for want of authority of the municipal corporation to enact them" but went on to find that both the justice of the peace and the marshal were immune from liability. *Id.* at 625.

Two wrinkles, neither novel in American legal tradition, explain this case. First, judges have been historically afforded immunity for acting within their jurisdiction and capacity as judges. Second, a historically-accepted ancillary immunity has been available for a seizure that meets two conditions: (1) having been "issued by a court or officer having authority of law to issue such process," and there have been (2) "nothing on the face of the process apprising the officer to whom it [was] delivered for service, that in the particular case there was no authority for issuing it." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 199 (2d ed. 1888). In line with this, the court in *Henke* premised the marshal's immunity on the fact that the justice had jurisdiction to issue the warrant, which was "regular on its face." *Henke*, 7 N.W. at 626.

This is not inconsistent with the officer liability regime discussed earlier. *See supra* notes 82–84 and accompanying text. Here, when sued, the marshal could indeed point to a valid authority: a warrant issued by a court of competent jurisdiction. That the court, properly exercising jurisdiction, erred in its legal conclusion about the ordinance was not material. The officer was not relying on the unconstitutional or void statute, but rather on the validly issued warrant. In other words, the warrant, issued by a competent court and not erroneous on its face, *did* confer authority *to the officer* for the seizure. Persuasive or not, this was not a new distinction—indeed, it was inherent to the separation of powers—and posed no threat to the enumeration principle at large. The Court would later build this exception into the exclusionary rule. *See* United States v. Leon, 468 U.S. 897, 926 (1984) (expanding the exception where officers had relied on a seemingly valid warrant as the exclusionary rule's purposes would "only rarely be served by applying it" in such cases).

103 Of course, the plaintiff could pursue any number of political remedies such as petitioning Congress. POLLOCK, *supra* note 96, at 155 ("[T]he remedy of the party who suffers the loss is confined to recovering such compensation . . . as the Legislature has thought fit to give him.").

104 According to the California Civil Code:

> A State, county, district or municipal officer . . . or any officer, agent, or employee of any political subdivision, acting in good faith and without malice under the apparent authority of any law of this State, whether enacted by the Legislature or by the people of the State through initiative action, which law subsequently is judicially declared unconstitutional, as in conflict with the Constitution of this State or of the United States, shall not be held civilly liable

held officers liable for serving process under an unconstitutional statute—recall the Sergeant-at-Arms in *Kilbourn*—the weight of state court authority had significantly shifted by the 1920s.[105] Other cases simply contradicted the enumeration principle. For example, in *Dexter v. Alfred*, the plaintiff sued a town's highway commissioner for cutting fallen trees on his land, removing them from roads, and laying out a "public highway across the lands mentioned in the plaintiff's complaint."[106] Notwithstanding a century of precedent otherwise, the New York court held that the defendant could claim an unconstitutional statute as his defense:

> The defendant, in his answer in this case, undertakes to justify or mitigate the alleged trespass committed by him . . . on the ground that the commissioner of highways was acting under and in pursuance of the provisions of this act, while it was in force, and before it was adjudged to be unconstitutional, and that the defendant was acting under the orders of the commissioner. It was no part of the duty of the commissioner of highways to decide whether the law in question was or was not constitutional. His duty was to execute the law as he found it.[107]

To reach this result, the court cited an earlier New York case asserting that "[u]nder our system of government no power is given to public officers to refuse or suspend their obedience to laws on any opinion of their own that a law is unconstitutional."[108] There, however, the court was reasserting a well-established principle designed for a slightly different context: An officer is liable for *refusing* to act under authority he believes to be unconstitutional if the authority in fact constitutionally imposed a non-discretionary duty on the officer.[109]

The view in *Dexter*, while increasingly common throughout the states,[110] was by no means uniform, not even in New York, which

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> in any action in which he would not have been liable if such law had not been declared unconstitutional, nor shall he be liable to any greater extent than he would have been if such law had not been declared unconstitutional.

CAL. CIV. CODE § 3342 (1933). To my knowledge, the constitutionality of this immunity was not tested.

105 Field, *supra* note 76, at 180 (noting the shift in state court authority by writing about contemporaneous developments in the law regarding officer liability).

106 Dexter v. Alfred, 19 N.Y.S. 770, 770 (1892).

107 *Id.* at 771.

108 Clark v. Miller, 54 N.Y. 528, 532 (1874).

109 *Id.*; *see also* Field, *supra* note 76, at 158–65 (summarizing similar cases regarding an officer's refusal to act).

110 Another notable example is *Goodwin v. Guild*, 29 S.W. 722 (Tenn. 1895). There, the Tennessee court reasoned:

> While we would not be understood as going to this length, still it will not do to apply the same strict rules of liability to an executive officer, whose duty it is to

floundered from case to case.[111] For example, cases almost uniformly held officers liable when dealing with unconstitutional taxes or warrantless arrests conducted under unconstitutional statutes.[112] However, even in the latter cases, state courts expanded officer immunity by massaging other doctrines to that end. For example, the common law rule was that officers were liable for warrantless arrests unless they could otherwise point to a felony or breach of the peace.[113] Courts gave more robust interpretations to those exceptions in order to confer immunity on officers making otherwise illegal arrests. For example, courts began interpreting traditional misdemeanors to be felonies in order to legalize arrests made without a warrant.[114] Moreover, in many jurisdictions, a conviction became "a complete defense to an action of false arrest or imprisonment, on the ground that it establishes a conclusive presumption of probable cause."[115]

And that was the trend, overstated but increasingly true.[116]

> see the laws executed, if he makes a mistake in judgment, that would be applied to an individual who has no public duty to perform in executing its laws. To hold this strict rule would paralyze the arm of every executive and peace officer; and while such officer, for any wanton or malicious abuse of legal process which is set on foot for the oppression of a citizen, must be held liable to the same, or possibly a greater, extent than a private individual, still there must be undoubted evidence of malice, oppression, and wanton persecution, with the absence of all probable cause or excuse, to hold a public official liable for errors in the execution of his official duties.

Id. at 723; *cf.* Shafford v. Brown, 95 P. 270, 271 (Wash. 1908) (upholding the defendant's demurrer on the grounds that he was "acting in good faith under a statute of the Legislature [and] . . . doubtless supposed it to be a valid statute"); Lang v. Mayor of Bayonne, 68 A. 90, 93 (N.J. 1907) ("Every law of the Legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law."); Field, *supra* note 76, at 167–70 (similar). *See generally* Rapacz, *supra* note 77 (discussing similar cases).

111 *See, e.g.*, Saratoga State Waters Corp. v. Pratt, 125 N.E. 834 (N.Y. 1920) (granting an injunction against state officers to prevent them from interfering with the plaintiff's land, and awarding damages to compensate for past interferences with that land); s*ee also* Field, *supra* note 77, at 156–57 (summarizing the state of the law with regard to the effect of unconstitutional statutes).

112 Field, *supra* note 76, at 166–67, 170–73.

113 *See, e.g.*, Tillman v. Beard, 80 N.W. 248, 248 (Mich. 1899) (referring to this proposition as so "elementary" that "[i]t is needless to cite authorities").

114 *Id.* This marked a shift away from the Restatement's position. Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 504 n.65 (1954).

115 Foote, *supra* note 114, at 506.

116 This trend continues today. For example, the Indiana Supreme Court recently held that "a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence . . . ." Barnes v. Indiana, 946 N.E.2d 572, 576 (Ind. 2011), thus admittedly abandoning the "common-law right to resist unlawful police action [that has] existed for over three hundred years, and [which] some scholars trace . . . to the Magna Carta in 1215." *Id.* at 575. Of course, this violates the

B. Pragmatics

The common law remedies also withered practically. Over time, the prospect of actual monetary recovery diminished, sinking with it the prospect of continuing to enforce the Constitution through state common law. It seems obvious that constitutional rights are threatened by a regime where officers are prohibited from acting unconstitutionally but face no actual cost when they do so. This phenomenon, despite being a critical change in how constitutional rights are enforced, has received little empirical attention, and this Article does not fill that gap.[117] Rather, it is sufficient for the Article's purposes to highlight the problem and the fact that scholars recognized it. As the traditional remedy grew inadequate, the pressure to compensate increased.

The seminal work here is an article by Caleb Foote, who describes in some detail the practical challenges facing plaintiffs suing officers.[118] There are two challenges worth recapitulating. First, in order to remedy adequately the violation of constitutional rights, the law must conceive of damages rather broadly. This is how it used to be: Jurisdictions would allow for recovery of punitive damages, and the jury was given "wide scope in attaching a dollar value to immeasurables such as the sense of humiliation, distress, disgrace or outrage, or the usually fictional damages to reputation."[119] But that changed, even where officer immunities were not triggered. Those suffering from illegal searches and false imprisonment[120]—where the officer detained and searched the individual without any valid

enumeration principle unless the same rule applies to all intruders—in which case no one could use reasonable force against any unlawful intruder. To give the officer special legal protection in this context violates the Fourth Amendment, which stands for the proposition that the government is not authorized to unlawfully search or seize and thus, when it does, the perpetrating officer can enjoy no legal privilege and will be treated as any other individual trespasser. The core result of the enumeration principle is that when an officer does something unconstitutional, he will be treated like any other person. On a different front, the trend also manifests itself today in the ever-broadening privileges to which members of government believe themselves entitled. *See, e.g.*, Lacey, *supra* note 40 (recounting instances where lawmakers claim immunity for drunk driving, domestic violence, and speeding).

117 *See, e.g.*, Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (representing "the first attempt to systematically study the success of *Bivens* litigations").

118 Foote, *supra* note 114.

119 *Id.* at 497; *see also, e.g.*, Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) 807; 2 Wils. K.B. 275 (providing large sum of damages for trespass).

120 "False imprisonment" is a legal term of art that refers to "imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 80 (students' ed. 1907).

constitutional authority—found their lawsuits recovering little more than a penny.[121] As Foote noted, by the 1950s, this trend had long buried the trespass action and was beginning to overcome the false imprisonment action as well.[122]

The second challenge is related: The plaintiffs in such cases were perceived as increasingly less sympathetic. Foote argues that this perception was responsible for the declining damages awards. At one level of abstraction, this is no doubt correct.[123] The jury's perception of the equities (or the judge's, in a bench trial) had always been implied in a system where constitutional remedies were enforced through civil actions and, in particular, actions in tort law.[124] As the twentieth century unfolded, those most often litigating their individual rights against officers were of a different sort than the esteemed merchants bringing trespass suits against British officers in the eighteenth century. Rather, they were criminals,[125] drug offenders, minorities of various sorts, and strangers in increasingly estranged

[121] *See, e.g.*, Lowry v. Barker, 190 S.E. 341 (N.C. 1937) (affirming the jury's award of only one penny in suit against the officer for unlawful arrest, false imprisonment, assault, and battery); Clements v. Canon, 40 P.2d 640 (Okla. 1935) (affirming the jury's award of one dollar for two unlawful arrests and false imprisonment lasting several hours in the first instance and overnight in the second instance); McLean v. Sanders, 7 P.2d 981 (Or. 1932) (reversing award of no damages where the jury found false imprisonment but awarded the plaintiff nothing, because the verdict for the plaintiff should reward at least nominal damages lest it be considered a verdict for the defendant); Moore v. Duke, 80 A. 194 (Vt. 1911) (reversing the punitive damages award of $19.33 and awarding the plaintiff one dollar for the trespass action against the town constable); Foote, *supra* note 114, at 498–99 nn.33, 35 (citing two Maryland cases and a Louisiana case where nominal damages were awarded). It is noteworthy that Maryland would have admitted the evidence recovered from such illegal searches. *See id.* at 500 n.42 (citing a Kansas case where the court directed a verdict for the defendant on the grounds that the plaintiff, having a prior criminal record, could not recover damages for having been humiliated by false arrest).

[122] Foote, *supra* note 114, at 499 (noting that if this trend continues "false imprisonment will join trespass for illegal search in the graveyard of useless remedies").

[123] *See, e.g.*, *id.* at 500 n.42 (providing an example of social stigma preventing recovery for a plaintiff's false imprisonment claim).

[124] *See, e.g.*, Ker v. Illinois, 119 U.S. 436, 444 (1886) (noting in dicta that whether one could recover a sufficient sum by bringing a suit for trespass or false imprisonment "would probably depend upon moral aspects of the case").

[125] Local evidence law was particularly relevant here, as defendants could present evidence of "previous arrests and time spent in jail" for purposes of mitigating damages stemming from humiliation and mental anguish. 35 C.J.S. *False Imprisonment* § 63 (2009). As Foote noted, common law actions like false imprisonment are "successful as an inducement to sue only for the respectable plaintiff who can come into court with relatively clean hands." Foote, *supra* note 114, at 500. It was particularly problematic for plaintiffs that if the transgressions nonetheless resulted in a conviction, that conviction could "be shown to impeach the plaintiff's credibility as a witness." *Id.* at 506. Moreover, those in prison often "must wait until they are released to get their tort remedy." *Id.* at 508.

communities, citing liberties that were increasingly seen as in tension with local security.[126]

The result of these two factors is, as one court put it, that "cases involving civil actions against police officers are rare and those involving successful criminal prosecutions against officers are nonexistent. In short, the constitutional provisions are not being enforced."[127] As another noted, despite

> general knowledge of the prohibition against unlawful search, it is not an uncommon thing in this state, for officers of the law . . . to disregard the law upon the assumption that the end sought to be accomplished will justify the means, and therefore no attention need be given to constitutional authority, when public approval will commend the unlawful conduct.[128]

C. The Common Law in a New World

Finally, it is worth noting that the common law's conception of actionable injuries did not keep in neat accord with those contemplated by the Constitution. The easiest example is *Katz v. United States*, in which the Court found an actionable Fourth Amendment injury in warrantless wiretapping.[129] Such an injury was not necessarily a cognizable injury at common law.[130] Similar problems exist with

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[126] As an anecdotal matter, it is interesting to note that state cases grew more explicitly cognizant of law enforcement values. *See, e.g.*, Mason v. Wrightson, 109 A.2d 128, 129 (Md. 1954) (beginning opinion by noting Baltimore's interest in "combat[ting] . . . lawlessness"); Youman v. Commonwealth, 224 S.W. 860, 861 (Ky. 1920) ("[T]here appears to be a growing public sentiment against the observance of or obedience to any constitutional restraint that obstructs or stands in the way of the desires of [officers] who seek to accomplish their purposes . . . ."); *cf.* Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (mentioning the difficulties that automobile searches presented for law enforcement, and implying that the Court had become too sensitive to those difficulties).

[127] People v. Cahan, 282 P.2d 905, 913 (Cal. 1955) (en banc), *superseded by statute*, CAL. CONST. art. I, § 28, pt. (d), *as recognized in* People v. Daan, 161 Cal. App. 3d 22, 26–27 (1984).

[128] *Youman*, 224 S.W. at 861; *see also* Hoyer v. State, 193 N.W. 89, 93 (Wis. 1923) (referring to a trespass action against officers as "bootless and fruitless").

[129] 389 U.S. 347 (1967).

[130] The term "common law" is used to refer to the common law of the several states. Of course the law varied by state, but the point here is that this fragmented approach frustrated the judicial enforcement of constitutional law. With dozens of different approaches, the robustness of the Constitution's protections in any given state became delegated to the niceties of local common law. Thus, even scholars advocating a common law-esque approach to the Fourth Amendment recognize that actions like wiretapping would have to be cognizable. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 798 (1994) [hereinafter Amar, *Fourth Amendment*] (characterizing wiretapping as a modern supplement to the traditional trespass rule).

countless other technologies, including, for example, the introduction of photocopiers.[131]

There was also the problem of the awkward fit between policies pursued by the common law and those required by the Constitution, which became particularly apparent with the civil rights movement. For example, perhaps the common law would settle for damages paid to those suffering from segregated schools (by viewing them as being excluded from a property to which they rightfully have a license), but the Constitution would not.[132] Integration was the mandate. These kinds of tensions rendered the common law a less and less appealing system by which to judicially enforce the Constitution, as they placed constitutional rights valued one way at the whim of local common laws that might value them in another.

III
Rethinking Core Decisions of Constitutional Implementation

Thus far, this Article has introduced the original system of common law remedies and described how this system began to break down. In the backdrop of these changes lurked federalism's elephant: the Civil War. As embodied in the Madisonian Compromise,[133] prior to the Civil War states were generally believed to be the protectors of constitutional rights. Thus, it made perfect sense for the common law to provide remedies for violations of constitutional rights. But the issue of slavery, the brutality of the Civil War, and the persistence of racial prejudice through Jim Crow taught the nascent Republic that all governments, whether state or federal, could pose a threat to liberty. These developments fundamentally changed the perception of the

[131] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (dealing with the problem of police officers making photocopies of private documents that they were not allowed to have). For a modern example, see generally Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 Stan. L. Rev. 1005 (2010). Professor Kerr suggests that judges should distinguish between content and non-content information and limit search warrants to individuals, rather than Internet accounts.

[132] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (requiring desegregation). Of course, the proper analysis at common law would require injunctive relief here because damages would be inadequate, but there was no guarantee that a state would arrive at this conclusion. And that is the point: Leaving the enforcement of constitutional rights to the common law creates a tension, particularly when common law policies are not in perfect accord with the contours of constitutional rights.

[133] That is, the founding agreement that Congress would have discretion over whether to create federal courts other than the Supreme Court. *See* Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1620–22 (2008) (describing how the Madisonian Compromise, in delegating to Congress the decision to create lower federal courts, comprehended the possibility that Congress would create no lower federal courts, thus leaving the interpretation of federal law to state courts).

federal government's role in protecting individual rights, such that federal courts were increasingly called into action. This made the decline in common law remedies all the more significant.

There were two factors in particular that were consequential: First, the growth of the federal government and the number of federal officers, and second, the incorporation of the Bill of Rights. These changes created a situation in which an exponentially increasing potential for constitutional violations was left to a system of common law remedies that no longer neatly aligned itself with the contours of constitutional law and policy. This Part will examine how that dynamic structured the Supreme Court's response, in three cases: *Mapp v. Ohio*,[134] *Monroe v. Pape*,[135] and *Bivens v. Six Unknown Named Agents*.[136]

There are two arguments to be made here. The first is more basic: Simply looking at the relationship between common law remedies and constitutional rights will yield interesting insights. The discussion of the exclusionary rule that follows demonstrates this vividly. The second point is more the focus of this Article: The weakening of common law remedies discussed in Part II created a set of tensions that the Court was forced to address. The thesis is not, however, that the Court consciously undertook a project to revitalize constitutional rights. It is, instead, more subtle: The weakening remedies actually had doctrinal significance that in turn affected the salience and persuasiveness of the arguments that the Court ultimately adopted in these three cases.

A. The Exclusionary Rule

There is hardly a constitutional debate more robust than that inspired by the Fourth Amendment exclusionary rule.[137] The basic idea behind the exclusionary rule is simple: Evidence obtained in violation of the Fourth Amendment will be inadmissible as evidence in a criminal trial. Defenders of the exclusionary rule argue that it is the only meaningful way to realize the Fourth Amendment right.[138] Detractors respond that the rule is judge made, extratextual, and

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134 367 U.S. 643 (1961).

135 365 U.S. 167 (1961).

136 403 U.S. 388 (1971).

137 So robust, in fact, that contemporary scholarship begins with this proposition, then cites the footnotes of previous articles making the same assertion. In that tradition, see Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1821 n.3 (2002).

138 Some have argued that this intuition is in accord with history. For a particularly exhaustive and recent example, see generally Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2010).

simply bad policy. This debate has characterized the exclusionary rule as a policy tool—a *mere* policy tool—drafted by the Court and wielded to service the Fourth Amendment right.[139] Accordingly, the Court has characterized the rule as "prudential rather than constitutionally mandated," and only applicable "where its deterrence benefits outweigh its 'substantial social costs.'"[140] Scholarly discussion has followed suit, as has legal education. Those interested in that debate will not be disappointed by the quality of scholarship devoted to its resolution, but this Article does not attempt to resolve these disagreements.

The focus of this Article is to describe the exclusionary rule as partly a consequence of the common law remedies discussed above. Modern legal minds draw sharp distinctions between criminal and civil law. Criminal procedure textbooks devote at most a few pages to the relationship between criminal procedure and the common law, and the pages they do devote frame common law remedies as yet another alternative to the exclusionary rule. While that framework is not incorrect,[141] it does not capture the intricate role that common law remedies played in defining Fourth Amendment rights.

The following Sections operate in tandem to fill that gap. This Article will first explain how various common law doctrines interacted to generate the federal exclusionary rule. As it turns out, the federal exclusionary rule was not a made-up policy crutch for the Fourth Amendment right. The exclusionary rule actually came to being through problems created by the enumeration principle's core question: Does the government have constitutional authority for what it is doing? For example, if a court ordered an unreasonable seizure of a

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[139] *See, e.g.*, Amar, *Fourth Amendment*, *supra* note 130, at 785 (characterizing the Court as having "concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt"); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 939 (1983) ("A remedy is needed that accomplishes the objectives of crime prevention and justice and that deters police misconduct as well as or better than the exclusionary rule. The growing support for a weakening of the exclusionary rule by the creation of a so-called 'good faith exception' may make it a propitious time for those concerned with deterring police misconduct to pursue such an alternative vigorously."); *cf.* Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 646 (1982) (arguing that courts "have been guided by concerns articulable, if rarely articulated, in terms of economic efficiency").

[140] Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (quoting United States v. Leon, 468 U.S. 897, 907 (1984)); *see also* Stone v. Powell, 428 U.S. 465, 489 (1976) ("The answer [to the question of whether to apply the exclusionary rule] is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.").

[141] Indeed, we are not in the realm of incorrect versus correct. We are instead looking for useful ways to understand what happened in the Fourth Amendment world.

defendant's papers, and the defendant objected, the enumeration principle would require the objection to be upheld, because there is no authority on which to uphold such an order.

A more familiar scenario is when an officer seizes evidence before a trial has even begun. This, as the Article will demonstrate, gets tricky. Suppose an officer unreasonably seizes a defendant's dagger and decides that he will hold the weapon until the government prosecutes the defendant several months later. If, prior to the criminal trial, the defendant were to sue the officer for return of his dagger, the officer would need some sort of defense for why he could in fact keep it. But if he acquired it by constitutionally-prohibited means, he would have no defense. What he needs is a lawfully-acquired license to the property. He could not say, "the government authorizes me to keep evidence seized by means the Constitution prohibits," because the Constitution specifically denies the government that power.

As it turns out, the defendant has a cause of action in property against the officer. But it is not that simple. Suppose the defendant waits until the criminal trial and only then objects to the introduction of the dagger as evidence. Historically, he would lose: Prosecutors and officers are authorized to introduce evidence, and a criminal trial is not the place to stop and sort out property rights. If the defendant had a property claim, he could file that claim in another action, but he could not do so in the middle of a criminal trial.

Eventually, what started as a rule of property became a rule of evidence because of both the Fourth and Fifth Amendments. Below, the first Section will trace this transformation and provide a nuanced account of how the federal exclusionary rule came to be. The Section that follows explains how the Court eventually incorporated the exclusionary rule against the states.

The point of these two Sections is to illustrate how the path of various constitutional rights was intimately shaped by the path of the common law. As we go through this history, we should keep in mind that common law remedies for constitutional rights have diminished over time.[142] This is important because if constitutional rights are shaped by the common law (which the next Section demonstrates in the context of the exclusionary rule), then the dwindling availability of common law remedies threatens to deflate constitutional rights.

This withering of remedies posed a major challenge to the Court: To what extent could it allow changes in the common law to squeeze constitutional rights? The Court had to decide if the common law was

[142] *See supra* Part II (describing factors that led to the withering of common law remedies).

severable from constitutional law or if, to some extent, constitutional law required the preservation of some common law remedies (perhaps as necessary for due process of law). The second Section below explains how the Court handled this problem in the context of incorporating the right against unreasonable searches and seizures. In short, the Court "constitutionalized" the exclusionary rule, both in federal and state courts, by making it a constitutional requirement rather than a remedy available solely by virtue of state property law.

1. The Federal Exclusionary Rule

The assumption in Fourth Amendment scholarship[143] is that *Boyd v. United States*[144] and *Weeks v. United States*[145] introduced the exclusionary rule into federal practice, and these cases were later incorporated against the states by *Mapp v. Ohio*.[146] Before these cases, the story goes, there was no exclusionary rule and, in fact, the exclusionary rule was specifically precluded by the evidentiary principle that allowed evidence to be admitted regardless of how it was obtained.[147] In light of this understanding of contemporary doctrine, *Boyd*, *Weeks*, and *Mapp* are at best judicially creative and at worst, terrible judge-made policy. Few, if any, scholars have studied how these cases may have resulted from the dynamics created by employing common law principles to enforce constitutional values. The result is a general understanding that the exclusionary rule was a remedy devised haphazardly by judges interested in preserving the Fourth Amendment's policies. As one scholar put it, the exclusionary rule "is the product of a series of decisions by the United States Supreme Court which may be traced back to *Boyd v. United*

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143 *See, e.g.*, Amar, *Fourth Amendment*, *supra* note 130, at 787 ("The confusion began with the Supreme Court's landmark 1886 case, *Boyd v. United States*."); Barnett, *supra* note 139, at 938 n.2 (characterizing the exclusionary rule as a "court-created rule," devised in *Boyd* and *Weeks*); Audrey S. Brent, *Illegally Obtained Evidence: An Historical and Comparative Analysis*, 48 SASK. L. REV. 1, 20 (1984) (calling *Weeks* a "landmark judgment" in "a new era of judicial interpretation"); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (beginning the narrative of the exclusionary rule with *Weeks*); Roots, *supra* note 138, at 1 ("The Fourth Amendment exclusionary rule has been the law of the land in all federal jurisdictions since 1914 and in all state jurisdictions since 1961."); Lyle Denniston, *Argument Preview: Police and Changing Law*, SCOTUSBLOG (Mar. 18, 2011, 3:42 PM), http://www.scotusblog.com/2011/03/argument-preview-police-and-changing-law/ ("[The exclusionary rule] began[ ] in the 1914 case of *Weeks v. U.S.* . . . .").

144 116 U.S. 616 (1886).

145 232 U.S. 383 (1914).

146 367 U.S. 643 (1961).

147 *See, e.g.*, Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841).

States."[148] Akhil Amar, for example, criticizes the exclusionary rule as a "concocted[,] . . . awkward and embarrassing remedy"[149] that is essentially divorced from the "text, history, or structure of the Fourth Amendment."[150] In his view, "the Amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials."[151] Amar's perspective actually goes further than most in understanding the relationship between the Constitution and the common law, but artificially limits the nexus to civil damage remedies. The principal contention of this Article is that a more comprehensive understanding of that relationship yields a more nuanced understanding of how the exclusionary rule came to be.

That story begins with a simple but frequently overstated principle of evidence law: The method by which evidence is acquired does not, as a matter of evidence law, affect its competency to be presented in a criminal trial. This principle is iterated in state and federal court opinions[152] and reiterated by leading evidence treatises.[153]

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[148] Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 263 (1998).

[149] Amar, *Fourth Amendment*, *supra* note 130, at 785.

[150] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 91 (1997).

[151] Amar, *Fourth Amendment*, *supra* note 130, at 758; *cf.* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 899 (1991) ("Before 1961 damages were, in many states, the only sanction imposed for illegal searches and seizures.").

[152] For example, in *Commonwealth v. Dana*, the court reasoned that:

> Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them *in evidence*. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; *nor would they form a collateral issue to determine that question*.

43 Mass. (2 Met.) 329, 337 (1841) (emphases added). In *People v. Adams*, the court explained: "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence." 68 N.E. 637, 638 (N.Y. 1903). The court in *United States v. La Jeune Eugenie*, also reasoned similarly:

> In the ordinary administration of municipal law the right of using evidence does not depend . . . upon the lawfulness or unlawfulness of the mode, by which it is obtained. If it is competent or pertinent evidence, and not in its own nature objectionable, as having been created by constraint, or oppression, such as confessions extorted by threats or fraud, the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. . . . In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one

Scholars have interpreted this principle as a rejection of the exclusionary rule. *Boyd* and *Weeks* are seen as departures, partly because the evidentiary principle seemed to reject exclusion so clearly as an appropriate remedy. As Justice Story observed:

> In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. . . . I am not aware, that such evidence has upon that account ever been dismissed for incompetency.[154]

But this is not, in fact, a principle that rejected exclusion in general. Rather, it was just a principle of evidence law. At trial, a defendant could not raise an evidentiary objection to evidence based on the legality of its acquisition, unless the evidence was created or acquired by threat or fraud.[155] In other words, if officers illegally snuck into every home in a neighborhood until they discovered a bloody dagger, and then turned that dagger over to the local prosecutor, they would be guilty of multiple trespasses. But evidence law would not be employed to bar admission of the murder weapon in a prosecution against its possessor.

Boyd and *Weeks* effectively excluded evidence without disturbing this principle. The facts of these cases are critical. In *Boyd*, the district attorney brought a charge against the defendant for forfeiture of property. Then, at trial, "it became important to show the quantity and value of the glass contained in twenty-nine cases previously imported," so *the court then ordered* the defendant, over his constitutional objections, "to produce the invoice of the twenty-nine cases."[156] The issue was whether the *court* could invoke a statute to order a defendant to produce self-incriminating evidence at trial. And the resolution of such a question, as Justice Bradley reasoned, turned on both the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment right against self incrimination.[157]

There are two critical distinctions necessary to understanding *Boyd*. First, it is not uncommon to understand the entire criminal

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> could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.

26 F. Cas. 832, 843–44 (C.C.D. Mass. 1822).

153 *See, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254a (Simon Greenleaf Croswell ed., 14th rev'd ed. 1883).

154 *La Jeune Eugenie*, 26 F. Cas. at 843–44.

155 *See, e.g.*, *Dana*, 43 Mass. (2 Met.) at 337–38.

156 Boyd v. United States, 116 U.S. 616, 618 (1886).

157 *Id.* at 633–34.

process—from investigation to arrest to jail—as a single process carried out by the state. But this is not entirely accurate. Traditionally, when an officer seized evidence, the legality of that seizure was considered a matter separate and independent from the criminal trial where evidence would be employed.[158] If the officer violated the Fourth Amendment to seize that evidence, he did so personally, because the federal government cannot cloak him with authority to violate the Constitution as an officer of the government. By contrast, a trial is something that the government is authorized to conduct. This is where the evidentiary principle would kick in: At trial, courts would not inquire into whether evidence was lawfully obtained. If a police officer acted unlawfully, that would be a collateral issue resolved by a separate lawsuit against the officer, not by an objection to the competence of evidence. Similarly, criminal trials would not pause to adjudicate whether the police officer used unreasonable force in making the arrest.

In *Boyd*, this was not the case because it was not an officer but the district court, in the course of trying the defendant for forfeiture, that ordered the evidence to be produced as part of that trial.[159] The defendant immediately made a constitutional objection to this order. Thus, the defendant was not objecting to evidence as a proxy for challenging the lawfulness of a police officer's prior actions. He was in fact contemporaneously objecting to an order by the trial court. This did not require the court to stop and assess the collateral matter of whether a police officer had, in the past, personally wronged the defendant. Rather, the court was asked to consider the legality of its own order. The court erred in rejecting the objection, and the appropriate remedy was a retrial, with the evidence returned to the defendant and excluded because the district court could not lawfully order its production.[160] The district court was not allowed, during the defendant's trial, to order him to produce papers, when such an order violated his Fourth and Fifth Amendment rights. This was seen as significantly different from stopping a criminal trial to decide the

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[158] That is why courts often denied exclusion on the grounds that it was a collateral matter not appropriately before the court during the criminal trial. *See, e.g.*, *Dana*, 43 Mass. (2 Met.) at 337 ("When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; *nor would they form a collateral issue to determine that question*." (emphasis added)).

[159] Of course, this order was carried out by an officer, but the key point is that because this was part of the forfeiture trial, it was not a collateral issue requiring separate adjudication.

[160] *Cf.* Adams v. New York, 192 U.S. 585, 594 (1904) (finding no Fourth Amendment error where the defendant did not object to a supposedly illegal seizure until witnesses began testifying, despite having notice of the seizure).

separate, civil matter of whether the officer seeking to introduce the evidence was a lawful possessor of the evidence in the first place.

This leads to a second critical distinction: The invoices demanded by the court in *Boyd* were in the rightful possession of the defendant.[161] This is important in understanding how the relevant doctrines intersected. That the invoices were lawfully possessed by the defendant was essentially irrelevant to whether the search was a Fourth Amendment violation per se, but not irrelevant to the question of remedy.[162] Had the defendant lacked rightful possession of the property—for example, if the property were stolen—he would not necessarily be able to demand its return, because the relevant causes of action might require the plaintiff to show that he had rightful possession of the seized items. If the goods were stolen, his remedy would not be return of the goods, but recovery in damages, assuming an unauthorized trespass,[163] and exclusion insofar as there was a Fifth Amendment violation.[164]

This second distinction helps shed light on *Weeks v. United States*,[165] a case commonly, understandably, but erroneously cited as fashioning a novel exclusionary rule for federal criminal trials.[166] The case, decided by a unanimous Court, did something far less. There, the defendant was arrested at his workplace while other officers raided his home without warrant, taking "possession of various papers and articles found there."[167] Before the trial, the defendant filed a petition

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161 116 U.S. at 622–23.

162 It was also relevant to the Fifth Amendment right. *Id.* at 633 ("And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.").

163 As the Court pointed out in *Boyd*, the common law recognized many instances in which seizure of a stolen or counterfeited good was not unreasonable. 116 U.S. at 623–24. This only meant, however, that the primary constitutional question turned on whether there was an *unreasonable* search or seizure, as the Fourth Amendment required.

164 It is worth clarifying the role of the Fifth Amendment here. There are two kinds of self incrimination for purposes of that Amendment. The first is requiring the defendant to take the stand, in response to which an objection at trial is appropriate. That evidence is immediately excluded; if it is not, the defendant has grounds on which to seek a mistrial. The second is unreasonably seizing the defendant's property as evidence against him. Because that approach turns on a Fourth Amendment question, it is incumbent upon the defendant to petition for return of his property—that is, to seek a Fourth Amendment remedy, first. He could not raise a Fifth Amendment issue during the criminal trial without first seeking the Fourth Amendment remedy. Otherwise he would be collaterally attacking the competency of evidence with an issue not relevant to the criminal trial itself.

165 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

166 *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (characterizing the exclusionary rule as having been "made for the first time in 1914"), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

167 *Weeks*, 232 U.S. at 386.

demanding return of his "[p]rivate [p]apers, [b]ooks, and [o]ther [p]roperty."[168] The district court ordered "the return of such property as was not pertinent to the charge against the defendant," but denied the petition insofar as the property was pertinent to trial.[169] As a preview of why the Supreme Court reversed this decision, we should ask a tricky enumeration question: If the property belonged to the defendant, and it was obtained by the officers in violation of the Fourth Amendment, then how could the district court authorize the government to retain possession of the defendant's property when he became a plaintiff properly filing for its return? In other words, how did the government obtain a license to keep his property for the duration of the trial?

In addressing the Fourth Amendment claim, the unanimous Court stressed that this case was not about "testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained."[170] The case was about whether the court could "*retain* for the purposes of evidence" an accused individual's property when that individual "*without awaiting his trial, made timely application* to the court for an order for the return of . . . [his] property."[171] This is a property question: How is the government keeping possession of the property? Does the government have a license to keep any property it obtains for at least the duration of a trial if that property was unlawfully obtained?

In answering these questions, the Court found that the evidentiary principle—that "a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony"—was inapplicable in cases where the accused "applied . . . in due season for the return of papers seized in violation of the [Constitution]."[172] This is because a rule of evidence could not confer a property right, in the form of a temporary license, to government officials who were holding property unreasonably seized. The property had to be *returned* as a matter of property law, even though it would not be excluded as a matter of evidence law. The only limitation is that a defendant could not raise a property claim in the middle of a criminal trial, notwithstanding the strong nexus between the property right and the criminal proceeding; he had to apply in "due season[,]"[173] "without awaiting his trial."[174]

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168 *Id.* at 387.
169 *Id.* at 388.
170 *Id.* at 392.
171 *Id.* at 393 (emphasis added).
172 *Id.* at 396.
173 *Id.* at 393.

At this point, the narrowness of the evidentiary principle in federal court should be abundantly clear. As long as the property belonged to the defendant and was seized illegally, he could have it back through timely petition, in effect excluding it as evidence. In other words, the evidentiary principle did not deprive the accused of his common law causes of action. As discussed earlier, all actions taken against the accused on the basis of an illegal search were without defense, and thus unable to authorize any injuries those actions imposed on the accused. Any such action could constitute assault, battery, false imprisonment, false arrest, trespass, or any other number of common law causes of action. The evidentiary principle did not change this. Thus, if the remedy for unlawfully acquired property included return of that property, the evidentiary principle had nothing to say. It did not confer authority to hold the property, nor did it otherwise purport to limit any rights.

This is not how we understand the modern exclusionary rule. *Weeks* no doubt implicated Fourth Amendment policies about securing one's person and property from seizures, but these policies were, at their core, driven by principles (and thus remedies) of property law. The background principle is a combination of property law and the enumeration principle: If an officer, pursuant to no legal authority, seizes private property, the rightful owner could sue to recover his property. This, by its own terms, implied two scenarios where exclusion would not be available: (1) the plaintiff could not sue to recover property for which she could not demonstrate title (for example, stolen property),[175] and (2) the plaintiff could not sue to recover any property seized pursuant to valid authority.[176]

In addition to these, there was the evidentiary principle that criminal trials would not be halted for collateral issues regarding the source of otherwise competent evidence. *Weeks* did not adopt an exclusionary rule, but reasserted a common law property remedy. In other words, it resolved a question that foiled the tension between

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[174] *Id.* at 396.

[175] Indeed, the defendant in *Weeks* emphasized in his brief that the property rightfully belonged to him. *See* Statement, Specification of Errors and Brief for the Plaintiff in Error at 4, *Weeks*, 232 U.S. 383 (1914) (No. 461).

[176] *Cf.* United States v. Mills, 185 F. 318 (S.D.N.Y. 1911). In *Mills*, the court stated:

> From time immemorial an officer making *a lawful arrest* on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A blood-stained knife or garment, a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure.

Id. at 319 (emphasis added).

property law and criminal evidence law: What if the accused moved to recover his property before the trial began? This question was answered in *Weeks* by the presumption of innocence, the concern about self-incrimination,[177] and the primacy of property rights.

The evidentiary exclusionary rule evolved in this doctrinal thicket from a property-based remedy to a truly evidentiary remedy, the one we recognize today. The first step came in *Silverthorne Lumber Co. v. United States*,[178] in which officers had seized papers, made copies, and returned the originals upon district court order. After all this, however, the court subpoenaed the originals based on evidence gathered from the copies made in the illegal seizure and then held the defendants in contempt for failure to abide.[179] The problem, of course, was that this did in two steps what the government could not do in one. Rather than unreasonably seizing evidence, the government would unreasonably seize it, document it, return it, and then coerce the accused to hand it over on the basis of the unreasonable search and seizure. Accordingly, Justice Holmes's terse opinion took sweeping language, rejecting the idea "that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."[180]

Critical here is that in *Silverthorne*, like in *Boyd*, the accused objected to the *court's* action—holding the accused in contempt for failure to comply with an unauthorized subpoena—and, like in *Boyd*, the property in question belonged to the accused. It was not an attempt to stop the criminal trial to inquire into the unauthorized actions of a police officer. Consequently, this did not implicate the traditional rule of evidence that trials will not be stopped to determine collateral issues, because the validity of the court's contempt holding turned on whether the court could use illegally obtained evidence as the basis for coercing the production of that same evidence.[181] It could not.

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[177] It is worth noting again the intimate relationship between the Fourth and Fifth Amendment rights. The perception in these cases is that a court treads on the accused's Fifth Amendment right against self-incrimination when it violates the Fourth Amendment to coerce the accused into licensing his property to the state for purposes of incriminating himself. The contours of this interaction are interesting and are worth exploring elsewhere but, for purposes of this Article, it is sufficient to highlight this relationship and note that it played some role in conceptualizing the defendant's experience with the criminal justice system.

[178] 251 U.S. 385 (1920).

[179] *Id.* at 391.

[180] *Id.*

[181] Justice Holmes's opinion was to this effect. He rejected the idea that an unwarranted seizure could become warranted by using "two steps . . . instead of one" (here, seizing the

In *Gouled v. United States*,[182] an officer surreptitiously seized evidence, a fact unbeknownst to the defendant until the evidence was introduced at trial. Only then did the defendant object. The Court held that "[t]he objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the Government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable."[183] In another case that same term, the Court found that a petition for return of property was not "too late when presented after the jury was empaneled," and thus the subsequent motion to exclude could not be denied "by the rule that in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained."[184]

These cases more intimately tie property rights with Fourth Amendment rights, the implication being that the remedy afforded by property law was servicing both rights. Specifically, in *Amos*, the Court allowed the defendant to apply for his property even after the jury was empaneled because he did not have a fair chance to do so before that point. This inquiry—whether the defendant had a fair chance to ask for his property back—is not part of "property" law. Rather, it signals that the Court abandoned the fiction that the property right violated by the officer was wholly separate from the criminal prosecution and increasingly understood the two as related. As a result, the Court became increasingly willing to adjudicate "property" issues in the context of criminal trials.

More difficult were trials involving drug possession, where the accused (if guilty) possessed property she had no legal right to possess. This presented an awkward tension between the presumption of innocence and the unpalatable remedy of returning illegal drugs to a drug dealer or consumer. The Court artfully resolved this issue in *Agnello v. United States*, in which the government had illegally seized cocaine from the defendant's home that the defendant denied ever having.[185] The Court held that the evidence was inadmissible, borrowing its primary rationale from *Boyd*: Introduction of illegally seized evidence violates not only the Fourth Amendment right, but also the Fifth Amendment right against self-incrimination. As a result,

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papers, copying them, and basing a legal order on the latter, as opposed to merely seizing them). *Id.*

[182] 255 U.S. 298 (1921).

[183] *Id.* at 305.

[184] Amos v. United States, 255 U.S. 313, 316 (1921).

[185] Agnello v. United States, 269 U.S. 20, 29–30 (1925).

the Court held that "there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized."[186] Of course, the government argued that there was a reason, and a good reason at that: the evidentiary principle that stood against halting a criminal trial to adjudicate whether evidence should be excluded on the basis of how it was obtained. As the government argued, "even if the search and seizure were unlawful, the evidence was admissible because no application on behalf of defendant was made to the court for the return of the can of cocaine."[187]

The Court disagreed for two reasons. First, because the defendant was insisting upon his innocence, "[i]t would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had."[188] What makes the difference here is the Fifth Amendment. If the Court ruled against the defendant, the government would have the benefit of an unconstitutional checkmate: The defendant would be forced either to incriminate himself by applying for the drug's return, or sit on his Fourth Amendment right against unreasonable searches by allowing the prosecutor to use the drugs as evidence. This rationale—which allows the accused to assert a property law remedy while denying an actual property right in the item—underscores that the remedy afforded by property law was by now (if not all along) well understood as a remedy for the Fourth Amendment right. This is not entirely surprising, as the Fourth Amendment protects property (among other things) by securing it from unreasonable invasion.

Second, there was no evidence to suggest that the accused "knew that the government claimed it had searched his house and found cocaine there, or that the prosecutor intended to introduce evidence of any search or seizure."[189] This pushed the Court's jurisprudence with regard to timing to its logical conclusion, which is that the defendant must file for return of his property, as the government suggests, but is not expected to do so insofar as he is not aware that his property was taken. The evidentiary principle was thus dismissed as a "rule of practice [that] . . . must not be allowed . . . to prevail over a constitutional right."[190]

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186 *Id.* at 34.

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.* at 34–35 (quoting Gouled v. United States, 255 U.S. 298, 313 (1921)).

2. *Incorporating the Federal Exclusionary Rule*

As we have seen, the federal exclusionary rule—a principle of evidence in criminal trials—derived essentially from the remedies available for violations of civil property law. But exclusion was not merely the exercise of a civil property right. As we saw, when the defendant had sued or moved to recover his property, the question was whether the government has a right to hold on to that property. When the answer was no, it was because doing so violated the defendant's Fourth Amendment right—that is, the guarantee that he is secure in his person, houses, papers, and effects against unreasonable searches and seizures. This right protected property from unreasonable searches and seizures, but nothing more or less.[191]

In the seminal 1961 case *Mapp v. Ohio*, the Supreme Court incorporated the exclusionary rule against the states. The decision in *Mapp* has been commended,[192] criticized,[193] extended,[194] and, more recently, contracted.[195] But incorporating the right against unreasonable searches and seizures was not as simple as it may now seem. Once incorporated, remedies for Fourth Amendment violations would hinge on a state's configuration of its property law, creating concerns about variation in the right's robustness from state to state. The question would be whether the Fourth Amendment right, once incorporated, would bring with it its property remedy, or whether that right would depend on each state's property law. The story of *Mapp* is the story of how the Court dealt with these concerns. It is, by extension,

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[191] Of course, other property rights are protected elsewhere in the Constitution, for example by the Takings Clause and by the Due Process Clause more generally.

[192] Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983) ("[T]he exclusionary rule is constitutionally required, not as a 'right' explicitly incorporated in the fourth amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact." (emphasis omitted)).

[193] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 498 (1976) ("A more clumsy, less direct means of imposing sanctions is difficult to imagine . . . .").

[194] *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 485 (1963) (excluding presentation of verbal evidence and recovered narcotics where they were both fruits of an illegal entry).

[195] *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2429 (2011) (holding that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule); INS v. Lopez-Mendoza, 468 U.S. 1032, 1042 (1984) (not applying the exclusionary rule to deportation proceedings because "social costs" exceed "deterrence value"); United States v. Havens, 446 U.S. 620, 627–28 (1980) (holding that the exclusionary rule does not bar evidence from being used to impeach a defendant's testimony); Rakas v. Illinois, 439 U.S. 128, 134 (1978) (holding that a passenger does not have standing to object to search of vehicle); *see also The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 183 (2006) ("It remains to be seen how far the Court will go, but *Hudson* is a strong signal that the exclusionary rule is in trouble.").

the story of how the Court dealt with the relationship between the Constitution and a diverging common law.

The story begins with *Wolf v. Colorado*, in which the Court held that the Fourteenth Amendment incorporated the right against unreasonable searches and seizures, but did not compel the exclusionary rule.[196] Justice Frankfurter's opinion for the 6-3 majority began with the premise that the exclusionary rule was an evidentiary device "made for the first time in [*Weeks* in] 1914."[197] As we have seen, this is an overstatement, predicated on employing the term "exclusionary rule" to conflate a variety of interconnecting doctrines.

Wolf incorporated the right against unreasonable searches and seizures because it deemed such a right to be "implicit in 'the concept of ordered liberty,'" thus meeting the standard by which the Due Process Clause incorporates rights against the states.[198] The same standard allowed the Court to deny mandating a particular remedy: "We cannot . . . regard it *as a departure from basic standards* to remand . . . [those illegally searched] to the remedies of private action and such protection as the internal discipline of the police . . . may afford."[199]

This position was practically and logically problematic, given the development of the Fourth Amendment in the federal context. Justice Murphy's dissent recounts some of the pragmatic problems with claiming that injured parties have other remedies[200]—many of which should be familiar after the discussion above. To reiterate, however, this decision took place against a backdrop of growing doctrines of officer immunity found in state law, as well as the declining practicality of actually suing officers for trespass. Thus, those "remedies of private action" that the majority relied upon were in the process of dwindling.

Moreover, the logic of incorporating the Fourth Amendment but not the exclusionary rule was in tension with the enumeration principle, as now the same powers not conferred to the federal government were also withheld from state governments. If the state is not

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196 338 U.S. 25, 28 (1949).

197 *Id.* at 28.

198 *Id.* at 27 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

199 *Id.* at 31 (emphasis added).

200 These problems included the fact that damages were limited to injury incurred by physical property, various states' limitations or bars on punitive damages, the admissibility of evidence of the plaintiff's bad reputation, and the problem of states that made use of evidence at trial a complete justification for the search. Finally, "even if the plaintiff hurdles all these obstacles, and gains a substantial verdict, the individual officer's finances may well make the judgment useless—for the municipality, of course, is not liable without its consent." *Id.* at 42–44 (Murphy, J., dissenting).

given the power to conduct unreasonable searches and seizures, this means, as noted earlier, that there is no cognizable authorization for unreasonable searches or seizures that agents of the state could invoke. It is unclear, then, how agents of the state could, consistent with the Fourth Amendment, retain property unreasonably seized when presented with a timely petition for a return of that property. Their defense, if accepted, would necessarily grant the government privileges with regards to goods unreasonably seized. Whether the property is in the possession of a police officer or a clerk of the court, somewhere an agent is holding the suspect's property without authorization (that is, license). In short, regardless of who ultimately has control of the property, that control would be traced to an unlawful search and seizure that cannot legally convey such a license.[201] This was the teaching of federal case law leading up to and following *Weeks*. Absent this understanding, states could discriminate against the Fourth Amendment right or vastly change the scope of that right by tinkering with their common law, raising an interesting analogy to the Court's jurisprudence generally prohibiting states from discriminating against federal rights.[202]

Wolf avoided this problem by incorporating the policy but not the text or logic of the Fourth Amendment. Allowing damages but not exclusion seemed to satisfy the policy that government should not unlawfully search and seize evidence. But doing so created its own problems. To the extent that the Court was concerned with policy, it had to deal with the problem of declining common law remedies. More fundamentally, *Wolf* implicitly welcomed litigants to bring suits challenging the extent to which state remedies fulfilled Fourth Amendment policy. The Court's logic in declining to incorporate exclusion was that while the Fourth Amendment right was implicit in the concept of ordered liberty, exclusion was not. This invited challenges to various state remedies on the ground that the remedies failed to protect sufficiently a right that was necessary to ordered lib-

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[201] The court in *Hoyer v. State*, alludes to this point:

> To say, then, that when the state itself has thus violated its own pledges, it may use the results thereby obtained for its own purpose, become a party to the trespass by ratification, *trace its title through wrongful acts of its officers*, remain itself immune, in its sovereignty, from legal liability, and then relegate the individual whose rights are thus swept away and made valueless in and by a court of justice, to his bootless and fruitless action of trespass against such trespassing state officials as individuals, is to gibe and to jeer.

193 N.W. 89, 93 (Wis. 1923) (emphasis added).

[202] *See, e.g.*, Testa v. Katt, 330 U.S. 386, 389 (1947) (states may not discriminate against federal rights); Haywood v. Drown, 129 S. Ct. 2108, 2115 (2009) (same, even if federal rights are particularly costly).

erty. In turn, the holding in *Wolf*, which was premised in part on concerns about federalism, threatened vast and unprincipled federal interference with state common law. Incorporating the Fourth Amendment meant imposing a minimum level of protection for the individual right, below which the states could not go. Otherwise, *Wolf* would stand for nothing more than a Supreme Court statement encouraging states to consider the Fourth Amendment. This created the potential for a major jurisprudential problem: The Court would now have to decide which common law features remedying unreasonable searches and seizures—for example, officer immunities, punitive damages, rules of evidence, the availability and robustness of common law causes of action—were necessary to satisfy the Constitution.

Though the question of overruling *Wolf* was not briefed before the Court in *Mapp v. Ohio*,[203] the majority opinion was motivated by these very concerns. As Justice Douglas put it, "[t]he immediate result [of the Court's decision in *Wolf*] was a storm of constitutional controversy which only today finds its end."[204] Indeed, the Court had been petitioned to overrule the *Wolf* decision "Term after Term,"[205] about fifteen times per Term in the three years before *Mapp*.[206]

The Court in *Mapp* began by citing precedent establishing that the exclusionary rule was rooted in a specific, well-recognized constitutional logic: that the essence of the offense was "not the breaking of [one's] doors, and the rummaging of his drawers," but rather "the invasion of [the defendant's] indefeasible right of personal security, personal liberty and private property" committed by holding his private items "to be used as evidence to convict him of crime . . . ."[207] This indefeasible right meant that officers could not be authorized to seize or to retain seized evidence, or any property for that matter,[208] if

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[203] 367 U.S. 643, 646 n.3 (1961).

[204] *Id.* at 670 (Douglas, J., concurring).

[205] *Id.* at 654 (majority opinion).

[206] *Id.* at 676 (Harlan, J., dissenting). Of course, *Mapp* did not actually overrule *Wolf* so much as it extended it. *Wolf*, as mentioned earlier, only somewhat incorporated the Fourth Amendment—its policies, but not its text or logic. *Mapp* went ahead with full incorporation and, in doing so, overruled *Wolf* only insofar as *Mapp* required exclusion.

[207] *Id.* at 646–47 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[208] Note a very interesting point here: The remedy is derived from property law, but the right is something broader than a property right. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. As we saw in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920), the Court did not construe the Fourth Amendment as merely a property right. *See supra* notes 178–81 and accompanying text (discussing *Silverthorne Lumber* as the first step in the evolution of the exclusionary rule from a property-based remedy to an evidentiary remedy). The government was not allowed to document illegally acquired evidence as a means by which to authorize further government action. This decision had consequences beyond what is guaranteed by a prop-

the seizure was done pursuant to an unreasonable search. The Court relied on *Weeks* to assert that the Fourth Amendment stood for, if nothing else, the idea that private belongings could not "be seized *and held* and used . . . against a citizen."[209] The Constitution gives the government power to retain such property only if that property was obtained in a manner consistent with the Fourth Amendment. Thus, by authorizing the officer to hold evidence that was obtained in violation of the Fourth Amendment, the government would be conferring on him a legal privilege that the Fourth Amendment does not allow the government to confer. In short, the government was exercising a power it did not have. This contradicted the enumeration principle in a fundamental and arguably irreconcilable way.[210] Consequently, even Justice Black, not known for extra-textual enthusiasm, found that the Constitution "not only justifies but actually requires the exclusionary rule."[211] Over and over, the Court repeated that the exclusionary rule was not a rule of evidence but a constitutional rule that said that what the Fourth Amendment forbade could not "find . . . sanction in the judgments of the courts," unless of course no timely petition was filed.[212] This rule had implications for evidentiary law insofar as officers or courts attempted to hold property seized in violation of the Fourth Amendment, but it did not "refer[ ] to or limit[ ] the use of evidence in courts." This was a long way of saying that it was not a right to exclusion, but an application of the enumeration principle in the context of Fourth Amendment seizures, which, in turn, had a "striking outcome" for evidence law.[213] Striking, but "logically and

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erty right. For example, it then became arguable that if the government illegally seized information, that information could not satisfy its burden of proof during a prosecution. Put differently, the government could not take action that it would not have been able to take but for the unlawfully seized evidence. This conclusion of course raises questions about proximate cause, but also sheds light on modern intuitions such as the fruit of the poisonous tree doctrine.

209 *Mapp*, 367 U.S. at 648 (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)) (emphasis added).

210 *Cf. id.* at 660 ("The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.").

211 *Id.* at 662 (Black, J., concurring). Justice Black's decision was impressed specifically by the interaction between the Fourth and Fifth Amendments. As mentioned earlier, this does not change the logic presented here that has assumed, like *Boyd*, the relationship between the Fourth and Fifth Amendments.

212 *Id*. at 648–49 (majority opinion) (quoting *Weeks*, 232 U.S. at 392); *see also id.* at 670 (Douglas, J., concurring) (stating that *Wolf* eviscerated the Fourth Amendment by doing exactly what it prohibited: "allow[ing] States to give constitutional sanction to the 'shabby business' of unlawful entry into a home" (quoting Wolf v. Colorado, 338 U.S. 25, 46 (1948) (Murphy, J., dissenting))).

213 *Id.* at 649 (quoting Olmstead v. United States, 277 U.S. 438, 462 (1928)).

constitutionally necessary."[214] The Court took this "logical dictate"[215] seriously,[216] as it downplayed the availability of other remedial schemes as "not basically relevant."[217] It is true that such alternatives had no role to play in the logic of why the exclusionary rule was required by the Fourth Amendment, but they were not exactly irrelevant. A broader historical canvas suggests that the problems with state common law remedial systems actually pushed the Court to incorporate the Fourth Amendment more fully in the first place. The majority's dismissal of *Wolf*'s reasoning as "bottomed on factual considerations"[218] was motivated not by ideology, but by deep jurisprudential concerns—both principled and pragmatic—about both how the Constitution was to interact with local remedial systems and what the Court's role would be in overseeing that interaction.[219] Accepting the *Wolf* rationale would have required the Court to constantly monitor all fifty states to "consider the current validity of the factual grounds upon which *Wolf* was based,"[220] mainly the availability of adequate remedies. That would have been no easy task, and hardly one sensitive to federalism. The Court noted the experience of states that had found that "such other remedies [mentioned by the Court in *Wolf*] have been worthless and futile."[221] As Justice Douglas stated in his concurrence, "[t]he truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies."[222] In sum, the Court in *Mapp* perceived three choices: (1) Essentially unincorporate the Fourth Amendment by abandoning federal enforcement, thus leaving enforcement to dwindling state law remedies, (2) monitor and inject federal standards into state common law regimes, or (3) incorporate the logic of the exclusionary rule. The entirety of the opinion is devoted to why it chose the third.

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214 *Id.* at 656.

215 *Id.* at 657.

216 *See id.* at 659 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

217 *Id.* at 651.

218 *Id.*

219 *See also id.* at 666 (Black, J., concurring) (noting that the Court was "dissipat[ing] the doubt and uncertainty in this field of constitutional law" by rejecting the "confusing" *Wolf* doctrine in exchange for "the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case").

220 *Id.* at 651 (majority opinion).

221 *Id.* at 652.

222 *Id.* at 670 (Douglas, J., concurring).

B. Federal Cause of Action

The relationship between the common law and the Constitution, and the Court's management of that relationship, implicated much more than the application of the exclusionary rule. In the following Sections, this Article uses the lens of common law remedies to understand *Monroe* and *Bivens*. Once again common law remedies provide an interesting and useful lens through which to examine how these cases were shaped. The weakening of the common law remedies drew attention to the difficulties of having constitutional rights rely on them; in turn, this increased the salience of arguments that could avoid these difficulties by, for example, providing some sort of administrable remedy that would not grow or shrink at the whim of state common law. Both of these cases were about preserving the path of the Constitution in the face of an ever-differing route taken by the common law.

1. Monroe v. Pape

The Civil Rights Act of 1871, more popularly known as § 1983, establishes a tort-like remedy for persons deprived of federally protected rights "under color of any statute, ordinance, regulation, custom, or usage."[223] In *Monroe v. Pape*, the Court held that § 1983 provides a remedy to parties deprived of their federal rights "by an official's abuse of his position."[224] In other words, an officer can be acting "under color of" state law even if the officer's conduct is wholly unauthorized by state law.[225] To reach their conclusions, the majority and the dissent both rely heavily on the legislative history of § 1983. Scholars have done the same.[226] Indeed, even beyond the legislative

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[223] 42 U.S.C. § 1983 (2006). In its entirety, § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[224] Monroe v. Pape, 365 U.S. 167, 172 (1961).

[225] *Id.* at 184.

[226] *See, e.g.*, JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 45 n.g (2007) (noting that scholars have reached "diametrically opposed interpretations" of the history of § 1983).

history, almost anything that can be said about *Monroe* has been said in the nearly two thousand law review articles that cite the case. This Article does not weigh in on whether *Monroe* was wise or sound. Instead, it discusses *Monroe* in the context of common law remedies in order to better understand its result.

It is no coincidence that *Monroe v. Pape* came on the heels of growing problems with common law remedies. The majority opinion first identifies three policies in § 1983: (1) to "override certain kinds of state laws," (2) to "provide a [federal] remedy where state law was inadequate," and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[227] As these policy goals imply, the Civil Rights Act was, at least in theory, designed to interact with the system of common law remedies existing in the states; it did so by introducing a federal remedy where state remedies had failed.[228] Without the benefit of *Monroe*, a plaintiff would seek recovery by filing a common law suit against the transgressing officers (for trespass, false imprisonment, battery, or whatever cause of action applied). Upon filing suit, one of two outcomes was possible for a meritorious claim. First, the plaintiff could win in state court and be fairly compensated for his injury. Second, the plaintiff could be denied relief, either by an unfavorable verdict, at the damages stage, or on appeal. This could happen because of bad faith, good faith misapplication of constitutional law, or some other facet of the common law remedy like officer immunity.

The first scenario, where the injured person is compensated, is a happy one, at least as far as the judiciary is concerned. The second provides the logic that drove *Monroe*. In this scenario, there is a plaintiff who was injured by an officer's unconstitutional action, but who loses in court because, for example, the state court misinterpreted the Constitution or provided the officer with immunity for unconstitutional conduct. In these circumstances, the courts are implicitly authorizing the officer's unconstitutional conduct by protecting him against valid legal challenges.[229] There is no doubt that an officer acts under color of law if he searches pursuant to a statute providing that "officers may unreasonably search homes." But a law declaring that

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227 *Monroe*, 365 U.S. at 173–74.

228 The Act's original title is particularly interesting: "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication." Civil Rights Act of 1871, 17 Stat. 13.

229 *Cf.* Weeks v. United States, 232 U.S. 383, 394 (1914) ("To sanction [unconstitutional behavior] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.").

"officers may unreasonably search" is in effect no different than one that declares that "there shall be no legal repercussions for unreasonable searches conducted by officers." Nor are any of these different from a court-made doctrine providing officers with such immunity. They each have the same effect as is relevant here: They establish a legal privilege under which the officer may act. The same is true when a state court misinterprets the Constitution to allow an officer to do something that the Constitution actually prohibits. It creates a legal regime in which an officer may act under the privilege of law, immune from reproach or repercussion.

Put in the language of § 1983, officers act under color of law when state courts authorize or immunize their conduct, or do anything to provide that conduct with a "privileged" status. Accordingly, if a plaintiff brought a meritorious claim against an officer and was denied relief in state court, a § 1983 claim would ripen.[230] That is, after the officer's conduct is blessed by the state court, the officer, who deprived the plaintiff of a constitutional right, can be described as acting under color of state law. This means that after losing in state court, the plaintiff can sue under § 1983, alleging that the officer deprived him of a federal right under color of state law.

In the world before *Monroe*, the logic and operation of § 1983 promised a potentially long but ultimately successful path for meritorious claims. If a plaintiff had a meritorious claim, he would either have his injury redressed in state court, or have a cause of action in federal court under § 1983. And indeed, Justice Frankfurter, who dissented in *Monroe*, concluded that "[a]ll the evidence converges to the conclusion that Congress by § [1983] created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts . . . ."[231] Under that view, the plaintiff was relegated to the state tort system. If he lost on a meritorious constitutional claim, however, then he had a "civil liability enforceable in the federal courts."[232]

But the majority in *Monroe* rejected Justice Frankfurter's vision of the relationship between state courts, federal courts, and § 1983

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[230] *Cf. Monroe*, 365 U.S. at 242 (Frankfurter, J., dissenting) (arguing that "remed[ies] devolve[ ], in the first instance, on the States," but conceding that "[o]f course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state 'statute, ordinance, regulation, custom, or usage' the police are specially shielded," then § 1983 would apply). Such jurisdiction would not be barred by estoppel principles because the elements forming the claim had not yet occurred.

[231] *Id.* at 237.

[232] *Id.*

without ever making its own view entirely clear. The most important lines in the opinion read cryptically:

> 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.[233]

Monroe held that rather than going to state court first, plaintiffs could simply procure the inevitable by filing a § 1983 action in federal court. That is, *Monroe* provided a shortcut.

As an aside, this conclusion accords with the Court's holding decades earlier in *Home Telephone & Telegraph Co. v. City of Los Angeles*.[234] There, the Court held that where a plaintiff was asserting a Fourteenth Amendment due process claim and a state law claim, federal courts need not wait for state courts to adjudicate the state law claim.[235] That case provides an interesting insight into the relationship between federal and state law: An unconstitutional action can be nullified by either state or federal law, and neither the state nor federal question must be answered first. Thus, even if something is unlawful under state law, and thus perhaps not "state action" in the formal sense (because the state does not allow such action), it can still be rendered null by federal law without waiting to see if state law nullifies it first.

Similarly, in *Monroe*, the Court held that a person deprived of her constitutional rights by an officer need not go to state court for redress before filing in federal court.[236] The difference between *Home Telephone* and *Monroe*, of course, is that in *Monroe*, the cause of action arises from a statute that requires the officer to have been acting under color of state law. The majority and Justice Frankfurter agreed that an officer acts under color of state law if (1) he trespasses or otherwise injures a plaintiff without having constitutional authority to do so, and (2) the officer is not held liable just as any other person—that is, non-officer person—would be liable for committing the same act (be it trespass, theft, etc.).[237] In other words, if state

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[233] *Id.* at 183 (emphasis added).

[234] 227 U.S. 278 (1913).

[235] *Id.* at 283–84.

[236] *Monroe*, 365 U.S. at 183.

[237] *Id.* at 242 (Frankfurter, J., dissenting) ("Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state 'statute, ordinance, regulation, custom, or usage' the police are specially shielded—[§ 1983] provides a remedy which dismissal of petitioners' complaint in the present case does not impair.").

courts denied relief against officers who acted unconstitutionally, those officers were acting under color of state law. The majority and Justice Frankfurter parted ways, however, in that the majority was willing to provide a shortcut: Rather than wait for the state court to deny relief first, the plaintiff could just sue in federal court.

But this characterization of *Monroe* as a shortcut to the inevitable is misleading in an important way. To be sure, if a plaintiff has a meritorious constitutional claim against an officer, and the state court denies relief, then the officer can be seen as acting under color of state law. But what if the state court does not (or was not going to) deny relief? *Monroe* allows a federal remedy nonetheless. Thus, *Monroe* is only a "shortcut" insofar as the state court was going to deny adequate relief; otherwise, it is a supplement to the state law remedy.

This result is in part attributable to the difficult question of what relief a state must provide so that it does not legally privilege an officer's unconstitutional conduct. The logic of § 1983 was, in part, premised on the general availability of state forums to adjudicate the rights within § 1983's ambit and to provide adequate relief. In theory, courts should punish the officer as though he was not an officer but an ordinary person violating another person's common law rights. Just as in *Little v. Barreme*, the fact that the officer thought he was doing his job or even following instructions "cannot change the nature of the transaction, or legalize an act which without those instructions would have been [unlawful]."[238] But, of course, in the decades prior to *Monroe*, the common law remedies relied upon in § 1983's logic drifted, fragmented, contracted, and ultimately withered as practical options for relief.

Monroe avoided that problem by passing over state courts altogether. Plaintiffs could seek remedy in federal court, and federal courts could provide this remedy without having to inquire into the adequacy of state law remedies. Thus, the fact that *Monroe* came when it did should not be too surprising. *Monroe*, decided the same term as *Mapp*, was motivated by the same concerns about federalism and judicial administration, and arose from the same problem of diminished common law remedies. If the rights were systematically withering, the alternative seemed an empty formality: Plaintiffs would have to parade through the state system as a formalistic prerequisite to obtaining a ripened § 1983 claim, and even if they were afforded

238 6 U.S. (2 Cranch) 170, 179 (1804).

relief in state court, there would be difficult questions about whether the relief was sufficient.[239]

This was not just an empty formalism and a waste of time and state resources. It was also offensive to federalism, as federal courts would essentially be sitting as courts of constitutional error correction for civil claims in state courts.[240] Justice Harlan reiterated this point in his concurrence, where he noted that interpreting § 1983 otherwise would "reduce the statute to having merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings in cases involving authorized action."[241] Federal courts would have to decide whether state common law practices—including their procedural circumstances, provisions of immunity, and approaches to damages—were interfering with the vindication of federal rights. *Monroe* decided that the intent of § 1983 was to provide a simpler and less intrusive process: sidestep the state courts, and file in federal court.

It is also worth pausing to consider the timing of *Monroe*. As one commentator noted, there were only twenty-one suits under § 1983 between 1871 and 1920.[242] Members of the Court and other commentators have interpreted this fact as suggesting that before *Monroe*, § 1983 was a more humble statute that was interpreted narrowly by courts.[243] The implication is that § 1983 was not intended to be a

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[239] Justice Frankfurter seemed to agree with this logic in theory, but remained factually unpersuaded that the common law remedies for suing officers were more limited than those for suing an "individual hoodlum intruder." *Monroe*, 365 U.S. at 242. Justice Frankfurter goes on to say: "Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state 'statute, ordinance, regulation, custom, or usage' the police are specially shielded—[§ 1983] provides a remedy which dismissal of petitioners' complaint in the present case does not impair." *Id.* at 242–43.

[240] That the writ of certiorari is discretionary only adds to this concern. This also calls to mind James Madison's concerns leading up to the Madisonian Compromise. In response to proposals that federal courts sit as appellate courts over state tribunals, Madison expressed unease regarding the magnitude of work this would create for federal courts. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1911).

[241] *Monroe*, 365 U.S. at 195.

[242] Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

[243] Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("*Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that [generates] tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law."). One scholar writes:

> For decades, Section 1983 received a narrow interpretation by courts hostile to expansive federal enforcement of civil rights. Not until 1961 did the Court firmly hold that Section 1983 could remedy state violations of federal constitutional rights. The combination of this decision and expansive individual rights jurisprudence led to a mushrooming of constitutional claims . . . .

sweeping remedy, but was made so by *Monroe*. The problem with this inference is that until incorporation, there simply were not many federal constitutional rights that could give rise to a cause of action (to say nothing of the pragmatic difficulties of bringing lawsuits during Jim Crow). Equal protection claims were notoriously difficult, the Privileges or Immunities Clause suffered narrow interpretation,[244] and pre-incorporation Fourteenth Amendment due process did little for civil rights plaintiffs. In the First Amendment context, the right to free speech was incorporated in 1925,[245] free assembly in 1937,[246] free exercise in 1940,[247] and establishment in 1947.[248] Even then, many of these clauses did not enjoy robust interpretation until later decisions. Although *Wolf* notably incorporated the right against unreasonable searches and seizures in 1949, it explicitly relegated plaintiffs to state common law remedies, and the Fourth Amendment's warrant jurisprudence was not applied to states until three years after *Monroe* and *Mapp*.[249] This left only a handful of federal rights that could be invoked by § 1983.

It is unsurprising, then, that the recorded cases are few and that those that do exist are about, for example, racial discrimination in voting rights.[250] With so few rights to assert in a § 1983 lawsuit, there were few lawsuits. But incorporation changed that. It suddenly increased the scope of constitutional protections to apply against state officers. In turn, this increased the number of constitutional violations, giving rise to more § 1983 challenges to officers' indiscretions, which, as we have seen, called into question whether the existing remedial system would be up to the task. These questions all came to the surface in *Monroe*, and the Court responded the best it could.

Finally, there is an important point to make about how incorporating the Fourth Amendment contributed to the logic of *Monroe*. Prior to incorporation of the Fourth Amendment, the Constitution had nothing to say about whether *state* officers could unreasonably

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Sasha Samberg-Champion, *How To Read* Gonzaga*: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1842–43 (2003).

244 *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36 (1873).

245 *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States.").

246 De Jonge v. Oregon, 299 U.S. 353 (1937).

247 Cantwell v. Connecticut, 310 U.S. 296 (1940).

248 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

249 *See* Aguilar v. Texas, 378 U.S. 108 (1964).

250 *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927) (striking down a Texas statute prohibiting Blacks from voting in Democratic party primary elections).

search and seize; it only barred federal officers from doing so. But after incorporation, states were denied the power to authorize unreasonable searches. This meant that the enumeration principle now applied to nullify state laws purporting to authorize anything unconstitutional. As noted in the earlier cases, officers acting under unconstitutional authority were acting under no authority at all, a point not lost on either the Congress that passed § 1983 or the Court in *Monroe*.[251] In every case, a plaintiff suing an officer was met by a defense of authorization. Insofar as the officer acted within a constitutionally permissible realm of discretion, there was by definition no constitutional harm and thus no damages.[252]

This created an interesting issue for § 1983. If the law motivating the officer's action were unconstitutional, it could not have been authorized by the state because, quite plainly, states cannot authorize unconstitutional laws or practices. Given that this principle was common knowledge, it is unsurprising that the statute does not use the word "authorize" in any form; the inquiry was not whether the state authorized or did not authorize an unconstitutional action. Such an inquiry confuses the analysis, mainly because the officer can never be authorized to do something unconstitutional. Rather, the inquiry is into whether the officer acted *under color* of state law.

There were two distinct ways in which a person could act "under color of" state law. The first is best understood by analogy to agency law. Agents of the state act under color of state law when acting within the scope of their employment. This includes, for example, law enforcement officers who illegally break into homes, flashing their "star and . . . police revolver"[253] in search of evidence—even if the state expressly forbids its officers from engaging in that kind of behavior. According to the logic of *Monroe*, this is because the officer, by representing herself as an agent of the state, and by using her office to the unlawful end, acts under the color of state law even though she is not and cannot be authorized to act unlawfully. By contrast, if an off-duty officer in Las Vegas were to break into the Bellagio's money

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[251] In his concurrence in *Monroe*, Justice Harlan wrote:

> [I]f one thing is very clear in the legislative history, it is that the Congress of 1871 was well aware that no action requiring state judicial enforcement could be taken in violation of the Fourteenth Amendment without that enforcement being declared void by this Court on direct review from the state courts.

365 U.S. 167, 194 (1961) (Harlan, J., concurring).

[252] Unless the state, through legislation, nonetheless provided for them.

[253] *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting).

vaults in a Rat Pack–inspired heist, she would not be doing so as an agent of the state, and thus her actions would not trigger § 1983.[254]

The second way to act "under color of" state law is to run amok as the Ku Klux Klan once did, depriving individuals of their constitutional rights with reasonable knowledge, from custom, that the state threatened no interference to their anarchy. This view of "under color," elucidated by a crisp understanding of how the enumeration principle operates in the administration of remedies, explains the outcome in *Monroe*.

2. Bivens v. Six Unknown Named Agents

Like *Monroe*, *Bivens* too was a response to changes in the common law. In *Bivens*, the Court held that the Fourth Amendment freedom from unreasonable searches and seizures implied a cause of action for individuals who were deprived of that right.[255] The case, like *Mapp* and *Monroe*, is by its own terms driven by remedies.[256] And like those cases, it can be understood only in the context of fragmenting common law remedies.

The basic premise of the enumeration principle should need no reiteration. A government officer with an unconstitutional defense has no defense at all. But this is a point about government power, not about the cause of action and the facts surrounding it. Just because the enumeration principle invalidates an officer's defense does not mean, *ipso facto*, that the plaintiff would have a remedy against the officer as he would against any other tortfeasor. That is, the enumeration principle is not by itself a remedy against government misfeasance, but rather a core doctrine that enables the system of remedies that was imagined and assumed in 1791.

It goes without saying that a plaintiff who sues for a constitutional harm has faced a government-imposed harm, one that is qualitatively different from injuries imposed by private parties and one that we associate with totalitarian states and George Orwell.[257] Just as the Court (including the dissent) recognized in *Monroe*, the Court in *Bivens* reiterated that despite the enumeration principle, "power, once granted, does not disappear like a magic gift when it is wrong-

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[254] In fact, whether the officer was acting as an agent of the state or not could track common law principles of respondeat superior, with § 1983 only triggered for agents.

[255] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[256] *See generally* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969) (discussing the implications of these cases for judicial understanding of constitutional remedies).

[257] Perhaps a fitting place for a pun about 1983 standing before 1984.

fully used."[258] There is something different about an unlawful trespass when it is committed by the government, rather than a random individual—or at least, many would perceive such a difference.[259]

The Court then described why the common law could not protect against these harms. Every reason provided by the majority opinion relates to the postbellum schism between common law remedies and constitutional rights. First, the Court noted, there was a whole host of conduct proscribed by the Fourth Amendment that was not actionable in many states.[260] The Court had "long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law."[261] Again, the easiest example is illegal wiretapping, which, while a Fourth Amendment violation, did not necessarily give rise to a cause of action under state common law. The underlying concern here is that the scope of the Fourth Amendment could not be relegated to the whims of state tort law. Under the Court's view, the remedy for a clear Fourth Amendment injury should not have to depend on whether the common law is able to keep up and provide redress for new harms such as unauthorized wiretapping.

Second, and related, the Court recognized that as the common law remedies took their own course, they became less and less consistent with, and sometimes "even hostile" to, federal and constitutional policy.[262] Implicit in this analysis is the consideration of several options for navigating the Constitution's relationship with the common law. The analysis implicitly rejects, for example, the idea that constitutional rights ought to depend on state common law remedies, or the idea that the Court should monitor those remedies to make sure that they are consistently servicing constitutional rights. Instead, the Court in *Bivens* chose to provide a cause of action in a federal forum. This cause of action would serve constitutional goals neatly with less anxiety about collateral effects on non-constitutional litigation. Thus, the Court quite literally constitutionalized a cause of action that could independently provide relief for constitutional injuries,

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[258] *Bivens*, 403 U.S. at 392.

[259] *Id.* at 391–92; *see also* Monroe v. Pape, 365 U.S. 167, 238 (1961) (noting that the mere appearance of official authority can be "a factor of significance in dealings between individuals").

[260] *Bivens*, 403 U.S. at 392–94.

[261] *Id.* at 392.

[262] *Id*. at 394–95; *see also id.* at 409 (Harlan, J., concurring) ("It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability.").

without having to rely on the availability of adequate remedies at common law. The next Part explores these options more explicitly.

IV
The Constitutional Options

There was a system of common law remedies that once worked quite nicely as a mechanism for judicial implementation of the Constitution.[263] So nicely, in fact, that the drafters of the Constitution took it for granted, and even assumed a one-to-one relationship between constitutional rights and remedies.[264] Time passed, and entropy undermined that system of remedies, a system into which the Bill of Rights had dug its foundations. Nonetheless, the effects of that change would not have been felt but for major changes in American law and society, set into motion by the usual suspects: the Civil War, the Reconstruction amendments, urbanization and immigration, the rise of organized police forces, the exponential growth of federal government, and of course, incorporation of the Bill of Rights.

These forces and others combined to create two effects relevant to this Article: They increased the number of rights, and they increased the number of infractions. In doing so, they hurled the Bill of Rights into the quotidian business of American courts, transforming the amendments from rights in ink into rights oft invoked. Every day in every state, constitutional rights were violated and are violated. Meanwhile, the common law system of remedies fragmented, and ceased to be the neat system of enforcement it once was.

This was startling to all walks of commentators.[265] Predictably, understandably, and to the benefit of all, commentators had different responses, but none sat unconcerned. The order we knew had slipped to something "simple not yet understood," and jurists were left with

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263 Of course, this system existed at the expense of officers, even those acting in good faith. The word "nicely" here is not intended to comment on the wisdom or fairness of such a system, but rather to suggest that there was a system of remedies ready and available to vindicate constitutional rights.

264 As Chief Justice Marshall put it, in terms that seem too simple today, "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

265 Even the dissenting Justices in many of these cases expressed serious concern. *See, e.g.*, *Bivens*, 403 U.S. at 415, 421–24 (Burger, J., dissenting) (providing a list of suggestions for congressional legislation to deal with inadequate remedies and insisting that "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric").

determining how to "make [it] good."[266] The Court's response came in a series of opinions employing a similar methodology, from which this Article selected three for consideration in light of the declining vitality of the common law system as a vehicle for judicial implementation of the Constitution. And when taking the arch of common law remedies into account, these cases are remarkably explainable, and remarkably transparent about their anxieties.

Scholars have unduly focused on *Mapp*, *Monroe*, *Bivens*, and other such cases as creating an unmitigated, politically-motivated explosion of "rights."[267] This theory would, of course, seem true if we ignore the dwindling availability of state law remedies that preceded the relevant decisions. Rather than understanding these cases as a recalibration aimed at promoting judicial efficiency and preserving the constitutional equilibrium—motivated by concerns categorically indistinct from Rehnquist Court doctrines seeking to preserve federalism in a world that is increasingly connected by interstate commerce[268]—

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[266] EDNA ST. VINCENT MILLAY, *I will put Chaos into fourteen lines*, *in* EDNA ST. VINCENT MILLAY: SELECTED POEMS: THE CENTENARY EDITION 153, 153 (Colin Falck ed., Harper Collins 1991) (1954).

[267] Other consequences have also followed from the failure to account for the decline of common law remedies as a system of judicially enforcing the Constitution. As time goes on, scholarly analysis has become thick with anachronistic assumptions. This process begins with legal education. The Fourth, Fifth, and Sixth Amendments are taught as "criminal procedure," with *Entick* presented as a curious antecedent to modern constitutional law; remedies are afterthoughts, things to consider once we have agreed on the contours of the right. In this analysis, the rich historical role of common law remedies is lost in sharp distinctions drawn between concepts of property and tort on the one hand, and criminal procedure on the other. This is true even though, to this day, most state and federal courts handle both criminal and civil matters. Moreover, incorporation is treated as a series of insular decisions, not a major transition in federalism that gave rise to all sorts of (consequential) procedural friction. Students learn "constitutional law" as its own coherent field, not as a tapestry of enumerated powers that weaves in and out of the common law. As a consequence, an understanding of the role of common law remedies in preserving life and liberty from unconstitutional government interference is lost.

[268] The intuition that the Court should recalibrate so as to keep the Constitution's provisions "meaningful" recently surfaced in Judge Sutton's concurrence rejecting a Commerce Clause challenge to the recent health care law. According to Judge Sutton:

> At one level, past is precedent, and one tilts at hopeless causes in proposing new categorical limits on the commerce power. But there is another way to look at these precedents—that the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so. The stakes of identifying such a limit are high because the congressional power to regulate is the power to preempt, a power not just to regulate a subject coextensively with the States but also to wipe out any contrary state laws on the subject. U.S. CONST. art. VI, cl. 2. The plaintiffs present a plausible limiting principle, claiming that a mandate to buy medical insurance crosses a line between regulating action and inaction, between regulating those who have entered a market and those who have not, one that the Court and Congress have never crossed before.

critics have dismissed this era of decisions as "political." As a result, many have called for overturning or severely limiting these cases.

The Court has not sat agnostic. The exclusionary rule and *Bivens* actions have been significantly scaled back.[269] In potential tension with the enumeration principle, the doctrine of qualified immunity allows courts to announce that an officer has acted unconstitutionally, yet cloak him with immunity if "clearly established law"[270] does not forewarn that the action was unconstitutional.[271] Even the members of

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Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *22 (6th Cir. June 29, 2011) (Sutton, J., concurring). The idea implicit in this analysis is that courts can, and sometimes should, adopt tenable ways to keep the Constitution's provisions meaningful, even if those means are novel or, as Judge Sutton puts it, represent "line[s] . . . that the Court and Congress have never crossed before." *Id.*

269 Most recently, see *Davis v. United States*, 131 S. Ct. 2419, 2419 (2011), which held that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. Such a holding can only be justified because the Court currently views the exclusionary rule as a "policy" tool which is not constitutionally required.

270 In the context of § 1983, qualified immunity is "a defense that shields officials from suit if their conduct 'd[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Ortiz v. Jordan, 131 S. Ct. 884, 888 (2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Supreme Court has established a two-step test for determining whether a government official is entitled to qualified immunity. First, a court should ask whether "the facts alleged show the officer's conduct violated a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001), *modified*, Pearson v. Callahan, 555 U.S. 223, 236 (2009). If so, then the court must determine "whether the right was clearly established" at the time of the alleged violation. *Id.* The Court has qualified this approach, stating that "the sequence set forth [in *Saucier*]," although "often appropriate," is not mandatory. *Pearson*, 555 U.S. at 236.

271 It is important to pause here and explain this concern. The enumeration principle, as laid out in this paper, is an articulation of what it means to have popular sovereignty. Power originates from the people, and the government only has power insofar as the people granted that power to the government. In this system, a right is an exception to conferred power—for example, the federal government has power to regulate interstate commerce, but it may not do so in a way that violates the First Amendment. Thus, the notion that the Court can agree that an officer violated the Constitution and yet "immunize" the officer from a cause of action is in serious tension with the enumeration principle. It allows the government to confer a protected status upon the officer, even though the people never actually conferred this power or privilege onto the government—indeed, a determination that the act was unconstitutional is a determination that such power was actually withheld. Nor, if antebellum Court precedent is any indication, *see supra* Part I, was this power "impliedly" conferred. Of course, there were various immunities at common law which are not inconsistent with the enumeration principle. For example, an officer "who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." Pierson v. Ray, 386 U.S. 547, 555 (1967) (citations omitted). That is because once an officer had probable cause, he was legitimately vested with authority to make an arrest, and that authority could serve as a defense in a false arrest action. *Id.* But modern qualified immunity has not limited itself to this logic. *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (noting that the Court "has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume"). Indeed, in *Pierson*, after noting the common law example that "[a] policeman's lot

the Court who are most historically minded have dismissed *Monroe* as engaging the Court "in a losing struggle to prevent the Constitution from degenerating into general tort law."[272] This is an ironic justification for qualified immunity, as the Constitution was designed to interweave into tort law, so that any officer could be sued for doing something that violated the Constitution, but no officer could raise a legally cognizable defense in such a suit. Thus, the Constitution does not "degenerate" into tort law; it breathes through it. The offensive assertion of constitutional rights, primarily through tort law, is the remedy against officers who inflict harm on individuals without constitutional authority by, for example, harassing speakers for their viewpoints, or engaging in unreasonable searches and seizures without ever pressing charges. The defensive assertion of constitutional rights is limited for those who find themselves in lawsuits or fending off prosecutions.[273] These assertions work in tandem, not as substitutes.

One might still think *Mapp*, *Monroe*, and *Bivens* were all wrong. The purpose of this Article is not to weigh in on that discussion, but to force the debate into more precise contours. The goal, first and foremost, is to understand the context in which these decisions were made.

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is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does," the Court went on to conclude that "the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied." 386 U.S. at 555. Perhaps this reasoning can be reconciled if § 1983 only authorizes relief for "clear" constitutional transgressions, and does not support a cause of action otherwise. There is no doubt that Congress, when enacting supplementary causes of action against those acting under color of state law, is free to require the plaintiff to show that his clearly-established right was violated. This would then leave other violations of constitutional law (those that are unclear) to other causes of action that are available against any individual, rather than just officers, such as assault, false imprisonment, trespass, and other state torts, where an officer acting without constitutional authority is—or, at least, traditionally was—treated as having no defense at all. Assuming this correctly characterizes the text and history of the statute, § 1983 actions seeking damages for the violation of "unclear" constitutional rights are correctly dismissed on Rule 12(b)(6) motions for failure to state a claim—i.e., the reason for dismissal is a failure to allege the appropriate elements of a statutory claim. A different approach is that taken by Justice Scalia: "The § 1983 that the Court created in 1961 [in *Monroe v. Pape*] bears scant resemblance to what Congress enacted almost a century earlier. . . . We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented." *Crawford-El*, 523 U.S. at 611–12 (Scalia, J., dissenting). In other words, it is acceptable, at least in some circumstances, for a court to make up a doctrine to control the consequences of a made-up cause of action. Of course Justice Scalia's view is premised on the fact that the result in *Monroe* was completely invented by the Court.

[272] *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting).

[273] Of course, this Article has not strayed into discussing the writ of habeas corpus, which can be seen as both offensive and defensive. Habeas corpus puts a prisoner or detainee in an offensive posture against his jailor, but for the defensive reason of freeing himself from detainment.

Currently, the debate over these decisions has taken a strange form, one not quite tethered to the problems the Court was addressing. It is a debate over solutions without having first identified the problem. The primary debates about judicial methodology today are, at their most meaningless, about "judicial activism" and "judicial restraint," words that provide almost no uncontroversial guidance. At their most robust, scholars, law students, and the public discuss judicial methodology as a debate between originalism and living constitutionalism, and everything in between.[274]

These methodologies have received their fair share of attention and will no doubt receive more. But this debate inadequately describes cases like *Mapp*, *Monroe*, and *Bivens*—judicial decisions reached in the face of an ever-changing relationship between the Constitution and the common law. In such cases, these "methodologies" are labels for conclusions, not instructions for judges. This Section lays out four potential avenues of jurisprudence. None map cleanly onto originalism or living constitutionalism; all are about the relationship between the Constitution and the common law of the several States. The discussion does not take a position on the wisdom or correctness of the options; rather, it highlights some potential arguments, and seeks to create a starting point for thinking about, debating, and ultimately accepting or rejecting the various options.

A. Option 1: The Stoic Constitution

The first option is for federal courts to distinguish between common law remedies and the Constitution, and to allow constitutional rights to be expanded or contracted in accordance with the state common law remedies that implement them. The only role that a court would play is to uphold the enumeration principle: In any case that comes before them, courts should interpret the Constitution where necessary and consider unconstitutional actions null and void. This allows judges to expound the rights that individuals do have, but outsources the messy business of their implementation to other institutions of American democracy—state courts for interpreting state common law, state legislatures for amending and adding to the common law, and Congress for providing federal remedies where it has authority and where the political process has determined that state remedies are inadequate.

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[274] *Compare, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (presenting an originalist theory of constitutional interpretation), *with* PAMELA S. KARLAN, GOODWIN LIU & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2009) (presenting theory of "constitutional fidelity" that goes beyond the specific intent of the Constitution's authors).

The stoic constitutionalist takes this view, separates the common law from the Constitution, and leaves the former to be implemented and amended by public officials who are informed by (and generally sworn to uphold) the latter. This methodology calls to mind the position famously voiced by Learned Hand, that one should "read [the Bill of Rights] as admonitory or hortatory, not definite enough to be [a] guide[ ] on concrete occasions, prescribing no more than that temper of detachment, impartiality, and an absence of self-directed bias that is the whole content of justice . . . ."[275] Employed in *Mapp*, this methodology would affirm one's right not to be unlawfully searched, but would defer the remedy to the state. The state could employ the exclusionary rule, a common law cause of action for trespass, or any other remedy. But if the state remedy did not provide much—if, for example, the state had robust officer immunities, or provided only nominal damages absent physical injury, or if juries in that state were of the law and order ilk—that would not be an issue for the federal judiciary.[276] While it may seem that way, this is not precisely tantamount to unincorporating the Bill of Rights. State officials, to the extent that they are sworn to uphold the Constitution, are indeed bound by the Bill of Rights. So, while they are free to construe the Bill of Rights, they must at least do so in good faith.

This approach finds some accord in two major moments in federalism. The first is the Madisonian Compromise, where, at the founding debates, it was agreed that Congress would have discretion whether to create federal courts other than the Supreme Court.[277] This contemplated the potential for a Union where federal courts play almost no role in vindicating federal or constitutional rights (other than what fell within the Supreme Court's appellate jurisdiction, which is subject to "Exceptions . . . [and] Regulations as the Congress shall make," and the Court's original jurisdiction, which includes "all cases affecting ambassadors, other public ministers and consuls, and those in which a

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[275] LEARNED HAND, THE BILL OF RIGHTS 34 (1958).

[276] Justice Cardozo, sitting on the high court in New York, articulated this approach in holding that the exclusionary rule was not required by the New York Constitution. People v. Defore, 150 N.E. 585, 589 (N.Y. 1926) ("We do not know whether the public, represented by its juries, is to-day more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy.").

[277] *See* Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–54 (1975) (describing the Compromise as "giv[ing] Congress the option to create or not create [lower federal] courts").

state shall be party"[278]). The federal right, and the person asserting it, would be left to the States.

The second moment is *Erie Railroad Co. v. Tompkins*, in which the Court declared that "[t]here is no federal general common law," and that:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[279]

The implications of this language for the Constitution's relationship with the common law are unclear at best. This Article takes no position on that question, as it is far too vast to explore here. On the one hand, *Erie* could be interpreted narrowly, to hold only that when federal courts sit in diversity, they must apply state law when dealing with substantive areas left to the states (for example, contracts and torts). This would not disturb the application of common law remedies to constitutional rights insofar as those remedies are deemed constitutionally required. In other words, the fact that *Erie* says there is no federal general common law does not foreclose federal particular common law, including the federal common law of remedies for violation of federal rights. On the other hand, *Erie* provides some support for the viewpoint taken by a stoic constitutionalist. The absence of a federal common law might suggest that the vindication of federal rights is not something the courts should improvise in a manner akin to general common law, but rather a matter to be addressed by state common law or, alternatively, statutes that Congress may pass. The Constitution declares the rights, but allows the political process to bring them to fruition.

This, of course, leaves much to the majorities. As Justice Holmes put it in a letter, "I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job."[280] The stoic constitutionalist, like Justice Holmes, will have a preference for the political process. Yes, there are constitutional rights, a stoic constitutionalist will of course acknowledge, but courts are not the place to tease out exact meanings from impossible ambiguities. This view is likely to engender strong feelings. Some will no doubt feel repulsed by the possible consequences of this approach, and remember its failures, such as when the Court deferred to democracy on the practice of

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[278] U.S. CONST. art. III, § 2.

[279] 304 U.S. 64, 78 (1938).

[280] Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tal*e, 82 VA. L. REV. 111, 114 (1996) (quoting Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920)).

mandatory sterilizations.[281] Others will think of its virtues, recalling *Lochner v. New York*, in which Justice Holmes stated in dissent that "[g]eneral propositions do not decide concrete cases."[282]

What scant evidence is available from the Founding suggests that those in 1791 assumed that the common law, coupled with the enumeration principle, would be there to vindicate constitutional rights, as many of them (life, liberty, and property) are and were considered natural rights. And perhaps, then, the Due Process Clause is meant to capture much of this, and to require that these natural rights find some sort of vindication. The history reviewed in this Article cannot answer this question; rather, it reveals only that the Court has, to date, been quite anxious about stoic constitutionalism. Most notably, its short experiment in *Wolf*, overturned by *Mapp*, suggests that it has rejected a world in which constitutional rights are left to the devices of common law.

In responding to concerns about dwindling common law remedies, the stoic constitutionalist believes that the political process should protect these rights, and that that process will be degraded if participants believe the safekeeping of rights is well placed with the federal courts. Leaving rights to federal courts might, in the long run, be a losing proposition. The vitality of rights depends on a culture that respects and jealously guards them; if that culture is relinquished such that the political process is comfortable with stripping remedies for constitutional rights, it is unclear how long judges can hold back the tides of political sentiment, as they too are drawn from the same culture. This, of course, draws in another classic debate in law: whether and to what extent courts actually shape culture.[283] The Court's response to dwindling common law remedies, as seen in *Mapp*, *Monroe*, and *Bivens*, is problematic for the stoic constitutionalist—he will maintain that the response departed from the right course and placed the Court atop a kingdom far too vast.

B. Option 2: Rights Preservation

The second option is to do as the Court did in *Mapp*, *Monroe*, and *Bivens*: adapt constitutional rights in the face of declining

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[281] *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough.").

[282] 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[283] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 343 (1st ed. 1991) (discussing the debate over courts' ability to produce social change); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6, 19–23 (1996) ("[T]he Court's capacity to protect minority rights is more limited than most justices or scholars allow.").

common law remedies with the aim of maintaining some level of equilibrium.[284] In *Mapp*, the Court required states to adopt the exclusionary rule—a rule with origins in common law ideas about property—as a necessary remedy for vindicating the Fourth Amendment right to freedom from unlawful searches and seizures. As many have pointed out, the exclusionary rule is not explicit in the Constitution. But this does not mean that *Mapp* was, ipso facto, a naked policy choice by jurists sympathetic to criminal defendants. Rather, the Court had to select among the options set out here: (1) essentially unincorporate the Fourth Amendment by leaving enforcement to dwindling state law remedies, (2) incorporate the logic of the common law remedy and require it as its own constitutional remedy, namely the exclusionary rule, (3) require the common law remedies that were available in 1868, or (4) leave enforcement to state remedies but monitor those remedies so that they meet some federally acceptable baseline.

The Court chose the second option for reasons made clear in its opinion. It was committed to keeping the Fourth Amendment incorporated and found unpalatable the notion that the contours of that right in practice would be shaped by circumstances of state common law. It rejected the third and fourth options because those would require constant oversight of state remedies, creating administrability issues regarding how to maintain appropriate baselines. This kind of monitoring, for which neutral principles are difficult to discern, could significantly strain the role of federal courts in a federalist system.

So too with *Monroe* and *Bivens*. The choices were to (1) abandon federal enforcement of constitutional rights in the face of withering state law remedies, (2) adapt § 1983 and devise a cause of action so that constitutional injuries would have federal remedies that are not contingent on first spending years pursuing claims in the state systems, (3) require state courts to provide remedies not inconsistent with those available in 1791 and 1868, or (4) have federal courts sit as courts of constitutional error correction for civil claims in state courts, with federal courts deciding whether state common law practices were interfering with the vindication of federal rights. Again, it chose the second option, and for largely the same reasons.

In making these decisions, the Court saw itself in a familiar role, dealing with constitutional rights the way an equity court deals with legally protected interests, designing remedies to ensure that the right

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[284] *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1166 (1993) ("[A]ny complete account of interpretive fidelity must allow—indeed require—changes in constitutional readings even when there has been no change in the constitutional text.").

would be adequately protected. By doing so, the Court has essentially adopted a constitutional theory of remedies that has escaped much explicit attention: that the Constitution states a purpose, as found in its text and in the Bill of Rights, and the role of federal courts is to implement this purpose by providing an adequate remedy for each right. The alternative vision, adopted by the stoic constitutionalist, is that the Constitution delegates its implementation to federalism and the democratic process while leaving courts with only the power to declare unconstitutional actions null and void.

C. Option 3: A Baseline System of Common Law Remedies

The third option would be to require a due process right to a remedial process for constitutional rights that meets certain baseline criteria. This is the equivalent of announcing that a common law remedy for a constitutional injury is constitutionally required, and that state courts, so long as they have general jurisdiction, must hear these claims. Thus, actions necessary to protect constitutional rights, such as trespass or assault, would all be constitutionally required—a state legislature could not pass a law saying, for example, "no trespass actions can result in money damages." Moreover, the Court would enforce a baseline set of procedures guaranteed to protect the vitality of such suits. So, for example, a statute of limitations lasting only one week might be constitutionally suspect insofar as it constrained the constitutional right. In addition, such a view might posit that officer immunities offending the enumeration principle would be unconstitutional, as would any regulations that burden the constitutional right as it is adjudicated in state courts.

The Court hinted in this direction in *Wolf* insofar as it relied on the factual assumption that state courts would provide adequate remedies, but it never committed itself to monitoring those remedies. Indeed, after parties repeatedly called on the Court to monitor those remedies, the Court backed away from *Wolf* entirely. The immediate problem with this approach is apparent: What is constitutionally required and what is not? If a week-long statute of limitations is insufficient, what would be sufficient? A month? And would all immunity be unconstitutional? Could the state cap damages?

These are difficult and perhaps fatal questions. But one might set the baseline as requiring a due process right to a remedial process not inconsistent with the remedies available in 1791 and 1868—those remedies that were available when the Bill of Rights and the Reconstruction Era Amendments were ratified. This is analogous to what the Court has done with the writ of habeas corpus, where it has

held that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[285] But problems remain. Are all of the features of these remedies required? Presumably the goal here is to provide a meaningful remedy, so perhaps the Court could accept any remedy that looks like a common law analogue, unless someone could challenge it as insufficiently meaningful. This approach also resembles the due process requirement that "deprivations of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case."[286] Similarly, in that context, the requirements are vague: Hearings must be "appropriate, fair, adequate, and such as is practicable and reasonable in the particular case."[287] That interpretation could be imported here, requiring that common law remedies be similarly appropriate, fair, adequate, and such as is practicable and reasonable.

While the Due Process Clause surely protects some baseline amount of process, the Court did not adopt this route as a primary way of dealing with dwindling common law remedies. The closest the Court actually came to this approach was in *Bivens*, where it implied a cause of action in federal court for constitutional injuries.[288]

D. Option 4: The Laboratories of Democracy

The fourth approach, like the first, would leave the entire question of rights and remedies to the state, accepting a diversity of approaches. The difference is that here, the Court would monitor and preserve a baseline of remedies in each state. This differs from option three in that the remedies here would not have to be the ones available at common law. For example, Montana may choose to serve the Fourth Amendment by allowing those whose rights are violated to petition the police department to discipline the officer, and by providing state court review of this determination. At the same time, New York may provide a trespass remedy, and Florida could employ the exclusionary rule.

This option better describes the majority disposition in *Wolf*, given that the Court's precise reasoning was that states had adequate remedies insofar as they had the trespass remedy or politically accountable police departments. The Court's legal conclusion—that

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[285] INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996)).

[286] 16B Am. Jur. 2d *Const. Law* § 983 (2009) (citing Jones v. Flowers, 547 U.S. 220 (2006)).

[287] *Id.* § 1007 (citations omitted).

[288] 403 U.S. 388, 389 ("[A] federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.").

the absence of an exclusionary rule did not offend the Fourteenth Amendment's Due Process Clause—was premised on the factual conclusion that states had remedies other than the exclusionary rule that were sufficient to satisfy due process.[289] The implication here is that the Court could review each system of remedies to ensure that they were sufficient to protect the constitutional right at stake. Thus, if a state provided no remedy whatsoever, the Court could default to requiring exclusion or some other remedy so as to satisfy whatever the Due Process Clause may require.

This state-by-state approach also mirrors the Court's general monitoring of constitutional issues in state criminal trials on a case-by-case basis. For example, in *Penry v. Lynaugh*,[290] the Court developed a doctrine designed specifically in the context of Texas's death penalty regime. The Constitution allows Texas to impose the death penalty (even on mentally retarded offenders, at least until the Court's decision in *Atkins v. Virginia*[291]), and to regulate its criminal justice system in general, but cases like *Penry* step in when aspects of that system fall beneath a constitutional threshold—there, the adequacy of the jury instructions as they pertained to mitigating evidence.[292] This, of course, is not unfamiliar. It is, in essence, how federalism works between state and federal courts—the state courts handle matters within their jurisdiction, and the Supreme Court can correct federal or constitutional errors as they arise. There is some reason to think this is how the Court will approach restrictions on Second Amendment rights. Rather than requiring any particular regime, the Court will accept as-applied challenges to particular features of different state regulations.[293] Similarly, in determining the adequacy of state law remedies for constitutional rights, the Court could develop case-by-case doctrines depending on what avenue of relief a state chooses to provide.

Again, the history seems agnostic on this, offering little more than the Court's rejection of this methodology after briefly flirting

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[289] Wolf v. Colorado, 338 U.S. 25, 31 (1949) ("[T]he exclusion of evidence may be an effective way of deterring unreasonable searches, [but] it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.").

[290] 492 U.S. 302 (1989).

[291] 536 U.S. 304 (2002) (holding that death is an "excessive" punishment for a mentally retarded criminal, in violation of the Eighth Amendment).

[292] *Penry*, 492 U.S. at 328 (holding in part that Texas could not execute the defendant because the jury had not been adequately instructed to consider mitigating evidence).

[293] *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (holding that the Second Amendment, by virtue of the Fourteenth, should be applied in a challenge against two Illinois cities' handgun bans and several related city ordinances).

with it in *Wolf*. One major concern, of course, is that this approach would submerge the courts with litigation challenging various aspects of state remedies, particularly tort remedies, until all of the non-frivolous and many of the frivolous challenges had been exhausted. It also invites the Court to rummage around state procedures, inspecting them for overall federal quality. This is something of an uncomfortable position for a federal court, and certainly less administrable than, for example, simply requiring the exclusionary rule.

Conclusion

Perhaps, of the four options available to the Court, we could conclusively decide that one makes the most sense from, for example, an originalist perspective. But that is precisely the question: Which of these options makes the most sense and why? This was the question the Court was tackling in the discussed cases and the question this Article seeks to bring back to prominence. The narrative here began with answering questions—what happened to the original system of remedies and how did the Court respond?—but now ends by posing an even more difficult question: What is the appropriate way to deal with constitutional rights that are being deflated by dwindling common law remedies?

The answer to this question should be the focus of debate. The history highlighted in this Article reveals that these cases have been criticized without a firm understanding of what exactly they were resolving: how to negotiate the changing relationship between the Constitution and the common law remedies that were assumed to implement the Constitution. How we resolve each case in turn defines the relationship between the Constitution and the common law.[294]

Thus, the most important lesson the history may provide is not how to answer each specific question, but that we should answer the specific questions with an overarching and principled understanding

[294] A good example is *United States v. Jones*, No. 10-1259 (U.S. Jan. 23, 2012)—handed down too late for this Article to discuss substantively—in which the Court held that the use of a GPS device to monitor a vehicle's movements for an extended period of time constitutes a search for purposes of the Fourth Amendment. There, Justice Scalia wrote for the majority—which included Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Sotomayor—that the Fourth Amendment protects, "*at a minimum*," slip op. at 10–11, the degree of protection afforded by the 18th-century trespass remedy against searches of "persons, houses, papers, and effects." *Id.* at n.8. By contrast, Justice Alito's concurrence, joined by Justices Ginsburg, Breyer, and Kagan, derided the reliance on "18th-century tort law," concurring op. at 1, suggesting that "it is almost impossible to think of late 18th-century situations that are analogous" to GPS devices. Concurring op. at 3. As the lineup in *Jones* suggests, where one lands on this issue depends not on politics or ideology, but on how one understands the relationship between constitutional rights and the common law remedies that once protected them.

of how the Constitution relates to the common law. It makes little sense simply to endorse or reject the exclusionary rule. That position should be the outcome produced by a defensible theory of constitutional remedies. The relevant question is whether the *Mapp-Monroe-Bivens* approach is correct because the Court is supposed to maintain remedies so as to preserve constitutional rights, or is wrong because, as the stoic constitutionalist would suggest, the common law remedies are severable from the Constitution, and a remedy does not necessarily inhere to constitutional rights.

In other words, we should stop debating these decisions as though they are merely the outcome of policy debates among judges. The problem with doing so is two fold. First, it is descriptively wrong and unfair to the jurists who wrestled with the more complex issues. Second, it implies that such precedent is somehow less legitimate because it is "policy," and thus can be replaced with other "policy" decisions.[295] This unnecessarily politicizes the judiciary by implying that jurists merely determine legal policy. They do not, or at least, they should not be doing so. The task, rather, is to determine what to do when constitutional rights were crafted on the assumption that there would always be common law remedies to address them, particularly now that common law remedies have atrophied in important ways.

Thus perhaps the primary constitutional debate should not be between "living constitutionalists" and "originalists," given that all of the possible options require taking some action (or inaction) that was not contemplated in 1791 or 1868. Rather, the debate should be which set of actions is most consistent with the principle and structure of the Constitution as it was ratified in 1791 and 1868—and that, unfortunately, is not an easy question.

This Article explores the idea of "constitutional rights" by telling the story of their judicial enforcement, particularly how the nature of that enforcement was threatened, and how the Court responded. It does not attack or defend the Court's response, but understands it in the context of these challenges. That exercise ended by teasing out four jurisprudential options. None of these options are entirely satisfying. Deflating the constitutional rights embodied in cases like *Mapp*, *Monroe*, and *Bivens* without restoring the original system of constitutional remedies would result in a net loss for constitutional rights—a

[295] For example, because the Court has come to understand the exclusionary rule as a prudential doctrine and a policy tool, it now determines whether exclusion should apply on the basis of whether its application would constitute sound policy. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (applying the rule that courts should weigh the "real deterrent value" against the "substantial social costs" of exclusion).

result inconsistent, or at least in deep tension with, originalist principles. After all, the Framers preserved these rights not because they are interesting in the abstract, but because they are fundamental to a free life. Yet preserving these liberties by adhering to *Mapp*, *Monroe*, and *Bivens* poses its own challenges for originalism. At the same time, discarding these cases and opting to keep alive the original system of remedies could deeply threaten values inherent in federalism—again, in a way not originally contemplated. At end, there is no easy answer for which methodology most faithfully serves our Constitution, but for those who care about the reality of constitutional rights, this is the question.