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Constitutional Common Law

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HARVARD LAW REVIEW

THE SUPREME COURT 1974 TERM

FOREWORD: CONSTITUTIONAL COMMON LAW

Henry P. Monaghan *

MR. JUSTICE Powell has publicly characterized the 1974 Term of the Supreme Court as a "dull" one.¹ Whatever the accuracy of that description,² the 1974 Term was, in the public eye, a quiet one. When, late in the Term, the Court ordered the death penalty case³ held over for reargument, it ensured that the 1974 Term would generate few front-page testimonials to the supreme authority of the Supreme Court. But neither a dull nor a quiet Term can obscure the current reality that the Court's claim to be the "ultimate interpreter of the Constitution"⁴ appears to command more nearly universal respect today than at any time since Chief Justice Marshall invoked that document to deny Mr. Marbury the commission to which he was

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¹ Opening remarks at the Judicial Conference of the Fourth Circuit, June 27, 1975.

² No modern Term is, of course, without its significant decisions, ones that frequently contribute far more to the enduring fabric of our law than their more sensational counterparts. In that respect the 1974 Term was far from dull, as is evident from the Court's decisions in the areas of criminal law, *see* pp. 51-70 *infra*, federal jurisdiction, *see* pp. 151-95 *infra*, antitrust, *see* pp. 202-11 *infra*, labor law, *see* pp. 234-54 *infra*, and securities regulation, *see* pp. 254-74 *infra*. In the field of constitutional law some small moves were made in reducing the considerable uncertainty presently enveloping judicial interpretations of due process and equal protection. Apart from the sex discrimination cases—which continue to be a law unto themselves, *see, e.g.,* *Stanton v. Stanton*, 421 U.S. 7 (1975), *noted* pp. 95-104 *infra*—the Court seems to be returning to a "hands off" attitude toward state economic and social legislation. For example, in *Weinberger v. Salfi*, 95 S. Ct. 2457 (1975), *noted* pp. 77-85 *infra*, the Court sounded the death knell for the much criticized irrebuttable presumption doctrine.

³ *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974), *cert. granted sub nom. Fowler v. North Carolina*, 419 U.S. 963 (1974), *restored for reargument*, 95 S. Ct. 2652 (1975).

⁴ *Powell v. McCormack*, 395 U.S. 486, 549 (1969). *See generally* G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 25-34 (9th ed. 1975).

legally entitled.⁵ After a history of far more struggle than is generally remembered,⁶ it is now settled that (absent a constitutional amendment) the Court has the last say, and in that sense its constitutional interpretations are both authoritative and final.⁷

The Court's great prestige has, however, tended to deflect careful inquiry into the limits beyond which its decisions, although authoritative, are not final. Even as the Justices have developed the habit of writing constitutional opinions that look like detailed legislative codes,⁸ the Court's great prestige has fostered the impression that every detailed rule laid down has the same dignity as the constitutional text itself. This impression should be understood as the illusion it is. Indeed, a wide variety of Supreme Court pronouncements are subject to modification and even reversal through ordinary political processes. For example, Congress may validate a state law previously invalidated by the Court as an unreasonable burden upon commerce.⁹ Similarly, in *Miranda v. Arizona*,¹⁰ the Court explicitly recognized that its "Miranda warnings" might be modified by Congress and, perhaps, even by the states.¹¹

Were our understandings of judicial review not affected by the mystique surrounding *Marbury v. Madison*,¹² it might be more readily recognized that a surprising amount of what passes as authoritative constitutional "interpretation" is best understood as something of a quite different order — a substructure of sub-

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The authority most frequently invoked is Chief Justice Marshall's famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703, 705 (1974), noted in *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 50 (1974).

⁶ See G. GUNTHER, *supra* note 4, at 25-34, 47-50.

⁷ But, as *United States v. Nixon*, 418 U.S. 683 (1974), recognizes, the ultimate authority of the Supreme Court does not exclude an interpretative role for Congress in the formulation of legislation, one which, as Professor Brest rightly observes, is not hindered by the important institutional constraints that limit judicial review. See generally Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Judge Friendly has been a persistent critic of this practice. See, e.g., Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1301-02 (1975).

⁹ See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421, 423-24 (1946). Where crucial questions turn not on issues of "law," but on issues of fact, characterization or degree, a decision may be peculiarly subject to revision through the ordinary legislative process. See Cox, *The Role of Congress in Constitutional Adjudication*, 40 U. CIN. L. REV. 199, 205-11 (1970). See also G. GUNTHER, *supra* note 4, at 1033-39.

¹⁰ 384 U.S. 436 (1966).

¹¹ *Id.* at 467.

¹² 5 U.S. (1 Cranch) 137 (1803).

stantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress. I hope to demonstrate that a theory of such a constitutional common law is necessary to explain satisfactorily a number of "constitutional" doctrines, and to outline a principled basis for a specialized common law rooted in the Constitution. Finally, I will suggest some implications of express recognition of a constitutional common law of individual liberty.

I. AN EXAMPLE OF THE PROBLEM

The 1973 and 1974 Terms have witnessed a restructuring of the theoretical underpinnings of the fourth amendment exclusionary rule made binding on the states in *Mapp v. Ohio*.¹³ The *Mapp* majority justified the exclusionary rule as a fourth amendment remedy on a number of grounds,¹⁴ but ultimately held the rule binding upon the states because it was "an essential part of the right to privacy" protected by the due process clause of the fourteenth amendment.¹⁵ Why the rule is "an essential part" of that right has, however, never been made clear,¹⁶ and with increasing frequency individual Justices have come to characterize the rule as simply a matter of remedial detail.¹⁷ Their view, if accepted, raises important questions about the Court's power to require state courts to recognize the exclusionary rule since state courts generally enjoy wide discretion in fashioning the remedial consequences of even federal primary rights.¹⁸ On the other hand, substantive constitutional guarantees can have important remedial dimensions,¹⁹ and it seems clear that state courts must,

¹³ 367 U.S. 643 (1961).

¹⁴ These included: deterrence of violations of the fourth amendment, particularly by federal agents who might turn tainted evidence over to state authorities for use in state trials, *id.* at 658; prevention of the introduction of certain types of evidence where introduction was "tantamount" to a coerced confession, *id.* at 656; preservation of judicial integrity, *id.* at 659; ensuring enjoyment of the fourth amendment right of privacy, *id.* at 655-56.

¹⁵ See *id.* at 655-56.

¹⁶ Commentators have, however, attempted to fill the gap. See, e.g., Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 309 (1974). See also White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Mallock*, 1974 S. CT. REV. 165, 212-214.

¹⁷ See pp. 4-5 *infra*.

¹⁸ See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 547-51 (1970).

¹⁹ See *id.* See also Warth v. Seldin, 95 S. Ct. 2197, 2206 (1975) ("In such

in the exercise of their general jurisdiction, provide remedies thought "indispensable" to the underlying guarantee.²⁰ While the *Mapp* majority may have held the exclusionary rule to be an indispensable remedial aspect of the fourth amendment, the Court's decisions in the last two Terms have cut the exclusionary rule entirely free from any personal right or necessary remedy approach, thereby removing the clearest authority for imposing the rule on the states.

*United States v. Calandra*²¹ is the watershed. There the Court held that a witness could not resist a federal grand jury interrogation on the ground that the questions asked were based upon information resulting from a prior unlawful search and seizure. The use of improperly seized materials as a basis for questioning, said the Court, was not an "independent governmental invasion of one's [Fourth Amendment rights, and] work[ed] no new Fourth Amendment wrong."²² Accordingly, whether that use "should be proscribed presents a question, not of rights, but of remedies."²³ "In sum," wrote Justice Powell for the Court, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."²⁴

United States v. Peltier,²⁵ decided at the end of the 1974 Term, solidified the doctrinal shift. Nominally, the issue was whether the fourth amendment border search doctrine announced in *Almeida-Sanchez v. United States*²⁶ should be applied retroactively to exclude evidence previously seized in "good faith." But the Court's opinion addressed larger concerns, for it began

instances, the Court has found, in effect, that the constitutional [provision] implies a right of action in the plaintiff."), *noted* pp. 189-95 *infra*.

²⁰ See Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1114-16 (1969). Most defenders of the exclusionary rule view the question whether the remedy is an indispensable one in "legal" not factual terms. See, e.g., Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1537-43 (1972); Schrock & Welsh, *supra* note 16. See also Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974) (reviewing and criticizing the literature on the exclusionary rule's lack of actual deterrent effect).

²¹ 414 U.S. 338 (1974).

²² *Id.* at 354.

²³ *Id.*

²⁴ *Id.* at 348 (emphasis added; footnote omitted). See also LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S. CT. REV. 127, 157.

²⁵ 95 S. Ct. 2313 (1975).

²⁶ 413 U.S. 266 (1973) (warrantless search of automobile 25 miles within United States borders is violation of fourth amendment).

by noting that the retroactivity cases²⁷ “tell us a great deal about the nature of the exclusionary rule” itself.²⁸ Relying upon *Calandra* for the proposition that no personal right was at stake,²⁹ Justice Rehnquist, writing for the majority, said that the exclusionary rule should be required only when the underlying policy of deterrence would be furthered, or when required by the often invoked “imperative of judicial integrity.”³⁰

The core of this judicial “clean hands” doctrine is hard to pin down; it seems to assert that the judge who does not exercise his authority to exclude unconstitutionally obtained evidence from his court becomes a “partner in wrongdoing” with the policeman who obtained the evidence.³¹ While the imperative has great rhetorical and even greater mystical appeal, its intellectual underpinning is hardly self-evident. Taken by itself, it has occasioned much scholarly discussion³² and more confusion. Though others may disagree, I think that the imperative cannot readily be squared with the political assumptions underlying the Constitution — particularly the doctrines of separation of power within the federal government and of “federalism” as between the federal and state courts.³³ It seems to me that the limited distributions of authority to the several units of government entail corresponding limits on the responsibility of each independent unit of

²⁷ See generally G. GUNTHER, *supra* note 4, at 546-47.

²⁸ 95 S. Ct. at 2317.

²⁹ See *id.* at 2318.

³⁰ *Id.*

³¹ See *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968) (“Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”). One interesting question is whether there is a similar “imperative” for administrative and executive agencies which “sit under our Constitution.” See the materials cited in note 32 *infra*.

³² Compare Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A.L. REV. 1129 (1973), with Schrock & Welsh, *supra* note 16, at 263-71.

³³ Much existing case law is inconsistent with the judicial integrity rationale. Taken seriously, the rationale implies that courts have the power, perhaps even the duty, to exclude unconstitutionally seized evidence apart from objection by the defendant, or even over his assent to its introduction — a position which, so far as I am aware, no court of last resort has taken. *Cf.* *Henry v. Mississippi*, 379 U.S. 443 (1965) (evidence could be admitted if defendant had knowingly waived his right to object). It would also seem to require both the abandonment of standing limitations on who may object to the use of illegally seized evidence, see Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 734 (1970), and the abatement of judicial proceedings if the defendant's body were unconstitutionally seized, a position the Court went out of its way to deny last Term, see *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). See also *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (exclusionary rule does not apply to sentencing).

government for the activities of others,³⁴ and more specifically, limits with respect to the Court's concern with the conduct of independent federal and state law enforcement officials, to say nothing of the integrity of state courts.³⁵ The underpinning of the "imperative of judicial integrity" rationale need not detain us further, however, for *Peltier* resurrected that rationale in form only; on analysis, said the Court, it "does not differ markedly from . . . the deterrence rationale . . ." ³⁶

In *Peltier*, two dissenting Justices lamented that the majority's emphasis on the deterrence rationale foreshadowed a modification of the form of the exclusionary rule.³⁷ In my view, however, it is not just one form of the fourth amendment exclusionary rule that is threatened by the shift to the deterrence rationale, but the very legitimacy of the rule itself, in whatever form it takes. As a matter of traditional constitutional theory,³⁸ the significant issue is whether the Supreme Court has the authority to mandate the exclusionary rule if the rule is not a necessary corollary of a constitutional right. To put the issue most strongly, suppose a state legislature ³⁹ has created a right of action for the recovery of substantial stipulated damages simply upon a showing that a police officer has violated a person's constitutional rights.⁴⁰ On review of a criminal conviction based on evidence clearly obtained in violation of the fourth amendment, the highest court of the state refuses to exclude the evidence, giving the

³⁴ See pp. 34-35 *infra*; note 39 *infra*.

³⁵ For this reason I find difficult cases like *Rochin v. California*, 347 U.S. 165 (1952). See *Mapp v. Ohio*, 367 U.S. 643, 683 (1961) (Harlan, J., dissenting) (on review of state criminal conviction only federal question is whether defendant received a fair trial).

³⁶ 95 S. Ct. at 2318.

³⁷ 95 S. Ct. at 2324-26 (Brennan, J., joined by Marshall, J., dissenting).

³⁸ By this I mean the classic *Marbury* model in which constitutional issues are decided as part of the process of litigating private rights. See generally Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-68 (1973).

³⁹ The same issue could be raised on the federal level. It is well settled that, where the government seeks to use a federal court to enforce its orders, that court has both the power and the obligation to assess the constitutionality of that order. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 336-38 (2d ed. 1973) (the "Dialogue") [hereinafter cited as *HART & WECHSLER*]. However, a separation of powers question is raised if a federal enforcement court nullifies an order on subconstitutional "common law" grounds. See pp. 34-35 *infra*.

⁴⁰ See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1970) (Burger, C.J., dissenting); *cf.* 42 U.S.C. § 1983 (1970) (similar right of action for violations of fourteenth amendment).

following opinion:

Defendant argues that he has a constitutional right to have evidence seized in violation of the fourth amendment excluded from his trial. If introduction of such evidence constituted an independent constitutional violation, we would not hesitate to require its exclusion. But *United States v. Calandra*, 414 U.S. 338 (1974), and *United States v. Peltier*, 95 S. Ct. 2312 (1975), establish that defendant's personal rights are not implicated by admission of this evidence. *See* 414 U.S. at 348; 95 S. Ct. at 2318. Furthermore, introduction of this evidence does not violate due process because the "truth finding function" of the trial, 95 S. Ct. at 2316, is not impaired. *See* 95 S. Ct. at 2316-18.

Defendant argues in the alternative that exclusion is the only proper remedy for the initial violation of his fourth amendment rights since the statutory damage remedy does not prevent the government from benefiting from its wrong. If failure to apply the exclusionary rule left the defendant without any remedy, *see Ward v. Love County*, 253 U.S. 17 (1920), or left defendant's constitutional rights "so wanting of a remedy as to render [them] a mere 'form of words,'" *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718, 722-23 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1970), *quoting Mapp v. Ohio*, 367 U.S. 643, 655 (1961), then the remedy defendant seeks would quite arguably be constitutionally mandated. But where, as here, the legislature with the clear intent of removing the exclusionary rule has provided an alternative procedure with a remedy clearly more than a mere form of words, we are bound by its choice. *Cf. Yakus v. United States*, 321 U.S. 414 (1944); *Clark v. Gabriel*, 393 U.S. 256 (1968).

Nor is exclusion required even if it is assumed that the states are under a general obligation to provide mechanisms to deter future violations of fourth amendment rights, and that deterrence might be enhanced if this evidence were excluded. This defendant has no *future* interest in deterrence distinct from that of any other member of the public. Plainly, defendant could not obtain an injunction against future police misconduct based upon a single, past, isolated instance of wrongdoing. *Compare O'Shea v. Littleton*, 414 U.S. 488 (1974), *with Allee v. Medrano*, 416 U.S. 802 (1974). This case is in principle no different since defendant relies on unspecified future violations of

the fourth amendment to justify imposition of the exclusionary rule. He is, in either context, asserting that he must be recognized as a private attorney general, protecting the fourth amendment rights of the public at large. Even if the Supreme Court would take a different view of the effectiveness of this state's statutory scheme, it has no general supervisory power over the state courts. *Murphy v. Florida*, 95 S. Ct. 2035 (1975). *See also* *Marshall v. United States*, 360 U.S. 310, 313 (1959). Moreover, nothing in the text of the Constitution gives the Supreme Court authority to require the states to permit a criminal defendant to act as a private attorney general. *Cf.* *Brown v. United States*, 411 U.S. 223 (1973) ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.").

On review of this opinion, can the Supreme Court insist upon exclusion of the evidence?

The Court's authority to do so is not evident. The central issue here is the adequacy of the state ground asserted — whether the states may choose not to recognize standing to raise speculative future violations of third-party rights,⁴¹ or alternatively, the extent to which the states may choose the remedies they will give for violations of the Constitution. Since the defendant's own constitutional rights are not cut off by application of the state law, the only disagreement between the Supreme Court and the state court is over the adequacy of a carefully structured state money damage remedy to deter future violations of the fourth amendment. However this disagreement might be resolved, it is clear that the dispute is over a subconstitutional policy issue that turns largely on an evaluation of debatable legislative facts, namely, the most effective way to deter police misconduct. Even if the fourth amendment imposes a general obligation on the state to deter future fourth amendment violations, there appears to be no basis for the Court to interpose its judgment to void what is, after all, an attempt by the state legislature to provide a specific system for control of state officers.⁴²

⁴¹ When no personal constitutional right is involved, standing to assert rights in a state court is normally a matter of state law, *see* G. GUNTHER, *supra* note 4, at 1572, and there would seem to be a strong state interest in the hypothetical case here in refusing standing to assert the speculative rights of third parties, namely the interest in public safety. Thus the criteria for adequate state procedural grounds announced in *Henry v. Mississippi*, 379 U.S. 443, 447 (1965), appear to be met.

⁴² *See* *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) (recognition of adequate state grounds required by "partitioning of power between the state and federal judicial systems"); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in

The Supreme Court has not explicitly considered why, in the face of these objections, it may insist upon application of the exclusionary rule in state cases. Nor have the commentators. Most writers view the Court's authority to fashion remedial rules admittedly not required by the Constitution as virtually self-evident.⁴³ But I do not see why. Under *Calandra* and *Peltier*, the exclusionary rule implicates no personal rights of the defendant. The rule is simply a remedy to vindicate general fourth amendment values. But, given these decisions, it must be assumed that the Constitution requires no more of the states than, in Professor Kaplan's words, "something that works — presumably at a reasonable cost."⁴⁴ If so, why is the Court not limited to a case-by-case determination of whether the state has provided that something?⁴⁵

More importantly, these cases suggest still another question: To what extent can the Court insist upon adherence to constitutionally inspired, but not compelled, rules without considering as decisive whether the state has provided minimally satisfactory alternatives? Can the Court, in other words, create a sub-order of "quasi-constitutional" law — of a remedial, substantive, and procedural character — to vindicate constitutional liberties?

matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 497 (1954); Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 S. CT. REV. 187, 188 & n.6.

The general point is this: In the federal courts, jurisdiction to decide a dispute does not necessarily imply a coextensive authority to apply federal rules of decision. And implicit in our federal structure is the idea that "the states' views of social policy in the areas of state competence," Mishkin, *supra* at 1686-87, create the law to be applied absent a substantial reason for the judicial creation of federal law, *see id.*; Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1517-31 (1969), or a constitutional limitation. What, therefore, can be the justification for requiring the fourth amendment exclusionary rule if there is no violation of the fourth amendment in the criminal trial itself?

⁴³ For example, Professor Kaplan is content to note the "quasi-constitutional" character of *Mapp's* exclusionary rule, and then to argue that it should be re-shaped. *See Kaplan, supra* note 33, at 1030.

⁴⁴ *Id.*

⁴⁵ At the most, the exclusionary rule can be rationalized only on the assumption that the Court is saying to the states: Here is a practice that, for constitutional purposes, "will work," but you are now free to come up with an alternative. *Calandra* and *Peltier* portend such a rationalization, thereby assimilating the fourth amendment's exclusionary rule to the "alternative methods" for preventing coerced confessions which the Court invited Congress and the states to develop and adopt in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). But even if the rules are so conceptualized, consideration should be given to the source of federal judicial authority to impose them.

If the Supreme Court is not mistaken in its insistence on the application of the exclusionary rule in state cases — and it seems too late in the day to conclude that it is — I think we are driven to conclude that the Court has a common law power. This conclusion raises the central question of how constitutional common law is to be reconciled with traditional constitutional theory and particularly the limits put by federalism and the separation of powers on the authority of the federal courts to create their own rules of decision.

II. CONSTITUTIONAL COMMON LAW AS A SPECIES OF FEDERAL COMMON LAW

A. Federal Common Law in Areas of Plenary National Legislative Authority

Considerations of the allocation of power in a federal system, which led Justice Brandeis to conclude in *Erie R.R. v. Tompkins*⁴⁶ that there is “no federal general common law,”⁴⁷ have not prevented the development by the federal courts of what Judge Friendly has aptly termed a “specialized” federal common law.⁴⁸ Unlike the general law of *Swift v. Tyson*,⁴⁹ this specialized federal common law binds the state courts through the supremacy clause,⁵⁰ and provides a basis for review in the Supreme Court on writs of certiorari.⁵¹ Like the common law of the states, the

⁴⁶ 304 U.S. 64 (1938).

⁴⁷ *Id.* at 78. In a case decided the same day, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), Justice Brandeis held that there was a federal common law of interstate water disputes.

⁴⁸ Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1964). See generally Note, *The Federal Common Law*, *supra* note 42; Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964) [hereinafter cited as *Federal Competence*].

⁴⁹ 41 U.S. (16 Pet.) 1 (1842). An issue decided in a state court, although it would be decided as a matter of “general law” in a federal court, was not reviewable on writ of error by the Supreme Court since the state determination provided an “adequate state ground” for the decision. See Hart, *supra* note 42, at 504-05.

⁵⁰ See, e.g., *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) (federal law of collective bargaining contracts declared in suits brought under jurisdictional grant of Labor-Management Relations Act § 301(a) held binding on state courts); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (law of interstate water disputes binding on states); HART & WECHSLER, *supra* note 39, at 818-19 (admiralty); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1073-74 (1967).

⁵¹ This precise question appears never to have been decided. See Hill, *supra* note 50, at 1073, 1076 n.247. However, certiorari was granted in both *Teamsters*

federal common law is a law of first resort,⁵² subject to revision by subsequent legislation.⁵³

Specialized federal common law exists despite the fact that the allocation of lawmaking competence in our federal system imposes severe limits on the federal judicial authority to displace state law.⁵⁴ The limited powers of the national government were, with some exceptions, granted to Congress, ordinarily leaving to its discretion — and not the courts' — the decision of whether and how these powers were to be exercised.⁵⁵ Moreover, national powers are interstitial powers, exercised "against the background of the total *corpus juris* of the states . . ." ⁵⁶ When exercised, they may therefore alter or reverse preexisting state policy.⁵⁷ Thus, when a federal court announces a federal rule of decision in an area of plenary congressional competence, it exercises an initiative normally left to Congress, ousts state law, and yet acts without the political checks on national power created by state representation in Congress.⁵⁸

Because there is both residual and concurrent lawmaking power in the states,⁵⁹ "[f]ederal intervention has been thought of as requiring special justification, and the decision that such justification has been shown, being essentially discretionary, has belonged in most cases to Congress."⁶⁰ *Erie* fully reflects that perception. It recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congres-

Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), where the only federal law involved was federal common law.

⁵² See generally H.M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 366-68 (tent. ed. 1958) [hereinafter cited as HART & SACKS].

⁵³ Indeed, in admiralty the power of Congress to amend the general maritime law was implied not from article I, § 3, but from the article III grant of jurisdiction to the federal courts to hear admiralty cases. See Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1234-35 (1954). Similarly, the Supreme Court has recognized that Congress might also determine rules of decision for interstate disputes even though the Constitution provides only that the Supreme Court shall have original jurisdiction over such matters. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972).

⁵⁴ See generally Mishkin, *supra* note 42.

⁵⁵ Note, *Federal Competence*, *supra* note 48, at 1085.

⁵⁶ HART & WECHSLER, *supra* note 39, at 471.

⁵⁷ See Note, *Federal Competence*, *supra* note 48, at 1085.

⁵⁸ See Mishkin, *supra* note 42, at 1685-86. See generally Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

⁵⁹ See HART & WECHSLER, *supra* note 39, at 470-71.

⁶⁰ Hart, *supra* note 42, at 497.

sional power.⁶¹ Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.⁶²

Since judicial power to create federal common law admittedly exists where authorized by statute, concern usually centers upon the appropriate criteria for determining whether federal common law is to be fashioned when a congressional determination to displace state law is a possible, but not unmistakable construction. Although the cases are somewhat ad hoc — reflecting a crazy-quilt pattern of statutory,⁶³ constitutional,⁶⁴ and pragmatic⁶⁵ considerations — the analysis is usually framed in terms of whether the congressional purpose embodied in, or indicated by, a statute requires state law to be subordinated.⁶⁶ Congressional purpose is divined by the normal common law techniques of looking to the words of the statute, the problem it was meant to solve, the legislative history, the structure of the statute, its place among other federal statutes, and the need for a uniform national rule of law.⁶⁷ Where the inquiry indicates that application of state law would frustrate congressional policy, state law is subordinated. This is the usual mode of preemption analysis.⁶⁸ The more difficult question is the propriety of developing federal common law in circumstances where no substantial conflict between federal and state law is readily apparent⁶⁹ — especially where

⁶¹ See Mishkin, *supra* note 42, at 1683; Note, *Federal Competence*, *supra* note 48, at 1085-86.

⁶² See Mishkin, *supra* note 42, at 1685-88; Note, *Federal Competence*, *supra* note 48, at 1085-86.

⁶³ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (power based on grant of jurisdiction in Labor-Management Relations Act § 301(a) plus federal interest in labor law).

⁶⁴ See pp. 13-17 & notes 73-75 *infra*.

⁶⁵ One of the most frequently cited reasons for creating a federal rule of decision is the need for national uniformity. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). The need for uniformity, however, is generally not so much analyzed as merely asserted. See generally Note, *The Federal Common Law*, *supra* note 42, at 1529-31.

⁶⁶ See generally Note, *The Federal Common Law*, *supra* note 42.

⁶⁷ See HART & SACKS, *supra* note 52, at 1410-17; Note, *The Federal Common Law*, *supra* note 42, at 1526-31; Note, *Federal Competence*, *supra* note 48, at 1089-94.

⁶⁸ As Professor David Currie observes:

Although the Court has not always said so, it seems proper to say that the question in [preemption] cases is the familiar choice-of-law problem of accommodating conflicting governmental interests: Does the purpose of the federal law require subordination of state policy?

D. CURRIE, *FEDERAL COURTS* 887 (2d ed. 1975). Most recent Supreme Court decisions follow the choice-of-law approach. See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 *COLUM. L. REV.* 623, 639-53 (1975).

⁶⁹ The close relationship between preemption principles and federal common

the principal reason for creating a federal law is a postulated need for national uniformity.⁷⁰

The Constitution is no less susceptible to interpretation through a consideration of its text, structure and purposes than are statutes.⁷¹ There is accordingly no a priori reason to suppose that it should differ from statutes in providing a basis for the generation of federal common law.⁷² Indeed, it is well known that an extensive common law has been built on the constitutional grants of jurisdiction to hear cases in admiralty⁷³ and those in-

law, *see, e.g.*, D. CURRIE, *supra* note 68, at 886; HART & WECHSLER, *supra* note 39, at 800-06, has not been adequately discussed by the Court. Arguably, ambiguous federal statutes should have a displacing impact only when state law is seen to be in *material* conflict with the policies of federal law. This would establish state law as a norm operative until clearly incompatible with the policies of federal law. While this approach seems very much in keeping with the philosophy of the Rules of Decision Act, 28 U.S.C. § 1652 (1970), it finds only occasional support in the case law. *See, e.g.*, Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68-69 (1966). *See also* Note, *The Federal Common Law*, *supra* note 42, at 1519. Federal courts have developed federal common law on a basis which to my mind would not have been justified under a strict preemption analysis. *See generally* D. CURRIE, *supra*, at 869-904; HART & WECHSLER, *supra*, at 756-832. *See also* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

⁷⁰ Cases relying on uniformity have generally not given a principled analysis of peculiar uniformity needs which would offset the central thrust of *Erie*. Why, for example, is it necessary for the negotiable paper of the United States to be governed by a uniform law, *see* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), when General Motors and IBM are remitted to the laws of the several states? If the issue is a matter of the mere inconvenience of responding to differing state laws when a substantial number of transactions are made, then it seems difficult to distinguish these cases. *See* Friendly, *supra* note 48, at 410-11 (criticizing *Clearfield's* uniformity rationale).

⁷¹ *See generally* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, pt. 1, at 1-435 (1975).

⁷² *See* Dellinger, *supra* note 20, at 1549. Professor Black admonishes us that our constitutional tradition focuses too much on textual analysis. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3-7 (1969). More explicit attention, he argues, should be given to "the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part." *Id.* at 7. Indeed, an argument from structure appears to be determinative of the authority of the Court to create its own rules of decision in interstate disputes, *see* p. 14 *infra*; Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1973) ("basic interests of federalism"), in foreign relations law, *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-24 (1964), and in admiralty law, *see* D. CURRIE, *supra* note 68, at 814-16. *See also* C. BLACK, *supra* at 8-23 (demonstrating that, more frequently than supposed, considerations of "structure and relationship" are controlling, not the text nominally invoked). One might observe of this mode of analysis, however, that the traditional method of "interpreting" textual provisions is hardly inconsistent with taking into account structural considerations. The former are often simply the textual embodiment of the latter.

⁷³ *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 381-403 (1970); Panama R.R. v. Johnson, 264 U.S. 375, 385-90 (1924); Currie, *Federal-*

volving disputes among the states⁷⁴ or implicating foreign relations.⁷⁵

The interstate dispute cases present a good example of authority to create federal common law gleaned by implication from the federal structure of the United States. Some tribunal must exist for settling interstate controversies; but it is a basic presumption of the Constitution that the state courts may be too parochial to administer fairly disputes in which important state interests are at issue.⁷⁶ Nor does it seem appropriate to restrict the choice of controlling substantive law to that of one of the contending states.⁷⁷ An acceptable accommodation of interstate, to say nothing of national, interests in a given dispute dictates that the Supreme Court must possess power to fashion substantive law not tied to that of any particular state. Thus the authority to create federal common law springs of necessity from the structure of the Constitution, from its basic division of authority between the national government and the states.⁷⁸

ism and the Admiralty: "The Devil's Own Mess," 1960 S. Ct. REV. 158, 162-63, 165-67.

⁷⁴ *E.g.*, Vermont v. New York, 417 U.S. 270, 277 (1974); Texas v. New Jersey, 379 U.S. 674, 677 (1965); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); Kansas v. Colorado, 206 U.S. 46, 98 (1907); Note, *The Federal Common Law*, *supra* note 42, at 1520.

⁷⁵ See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964). The Supreme Court has requested counsel in *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 416 U.S. 981 (1974), *restored for reargument*, 95 S. Ct. 2624 (1975), to brief and argue whether the specific holding of *Sabbatino* should be overruled. See 95 S. Ct. at 2624.

Professor Hill views the foregoing areas of federal common law as zones carved out by the Constitution from the reach of state power. See Hill, *supra* note 50, at 1030-35, 1042-49. That view has been criticized. See Mishkin, *supra* note 42, at 1683 n.9; Note, *The Federal Common Law*, *supra* note 42, at 1516-17. The difficulty with Hill's zone preemption is that all constitutional restrictions "pre-empt" state law, at least in a limited sense. In practice, we restrict use of the term "preemption" in constitutional cases, largely, I suspect, because "preemption" denotes conflict of a more subtle and indirect order and we tend to assume that unconstitutionality is relatively "clear cut." But differences in usage aside, the fact remains that "conflict is the touchstone of pre-emption," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 250 (1959) (Harlan, J., concurring). See also *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971). Accordingly, the usual mode of preemption analysis is not to carve out a priori zones of preemption but to consider the specific impact of state law upon federal policy. See note 69 *supra*.

⁷⁶ See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346-47 (1816).

⁷⁷ See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁷⁸ The Court has declined to fashion a substantive common law for multistate transactions between private parties, binding on both federal and state courts. See generally Von Mehren, *Special Substantive Rules for Multistate Problems:*

Without carefully evaluating any of the traditional enclaves of federal common law, I would observe that one of the most salient illustrations of the Supreme Court's derivation of federal rules of decision from the Constitution has gone insufficiently recognized—the invalidation of state statutes because of inconsistency with the negative implication of the grant to Congress of power “[t]o regulate Commerce . . . among the several States.”⁷⁹ The commerce clause is framed simply as a grant of authority to Congress, and judges of the stature of Chief Justice Taney⁸⁰ have denied that it authorized judicial displacement of state law. While time has settled the question the other way,⁸¹ the supporting rationalizations leave much to be desired. Numerous decisions indicate that the clause “itself” displaces state regulations inconsistent with its free trade policy.⁸² But this explanation raises serious problems given the “finality” aspect of *Marbury*, for the Court has repeatedly recognized congressional power to overrule judicial judgments in this area.⁸³ How is such a result possible if the Court is, in fact, interpreting the Constitution “itself”?⁸⁴

I do not think this problem can be papered over with the appealing and frequently voiced suggestion that congressional revision in commerce clause cases is simply the result of a different congressional evaluation of facts.⁸⁵ That explanation will

Their Role and Significance in Contemporary Choice of Law Methodology, 88 HARV. L. REV. 347 (1974). Nor has the Court federalized the choice of law process in the context of multistate disputes. See R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 403-45 (1975).

⁷⁹ U.S. CONST. art. I, § 8, cl. 3. Questions of “negative impact” are, of course, not limited to the commerce clause. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 436-41 (1968) (state regulation of foreign affairs).

⁸⁰ See his opinions in *The License Cases*, 46 U.S. (5 How.) 504, 573-85 (1847), and *The Passenger Cases*, 48 U.S. (7 How.) 283, 464-94 (1849) (Taney, C.J., dissenting).

⁸¹ The watershed decision was, of course, *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). See generally F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 12-29, 55-58 (1937); F. RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* 21-85 (1937).

⁸² E.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

⁸³ See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

⁸⁴ The problem is an important one. To hold on the basis of *Marbury* that Congress could not overrule the Court's judgment would have converted the commerce clause—a grant of power to Congress—into a partial limitation upon that body, see *id.* at 421-27, 430-33, requiring Congress to achieve some uniformity where it may have preferred diversity. The net result would be to transfer ultimate control over some aspects of national commerce from Congress to the federal courts.

⁸⁵ E.g., *id.* at 425 n.32 (“[I]n some instances conceivably the reversal might

not suffice for two reasons. First, some of the cases involve "rules of law" as that term is generally understood. This is certainly true of the decisions condemning as per se violations "discriminatory" state taxation and regulation designed to protect in-state economic interests.⁸⁶ Second, there is still the initial premise that the clause has some negative impact, a "legal" determination which, I assume, Congress could wholly suspend.

Another proffered explanation would assimilate commerce clause questions to statutory, rather than constitutional, construction. The argument is that the Court interprets not the Constitution, but congressional "silence."⁸⁷ Accordingly, should the Court mistake the meaning of that silence, Congress simply sets the matter right.⁸⁸ This "negative legislation" theory⁸⁹ may remove difficulties stemming from *Marbury*, but it presents formidable constitutional problems of its own. The Constitution, after all, expressly prescribes the process by which legislation is to be enacted, and it is one which requires both affirmative congressional action and a role for the President.⁹⁰ It is difficult to see how legislation by silence⁹¹ can be squared with this constitutionally prescribed process. The Constitution aside, there are other difficulties. A "silently vocal" Congress is a high fiction as Professor Powell has acidly observed.⁹² More importantly, to

be rationalized as only one of factual judgment . . ."). The Court in *Prudential* itself rejected this rationale. See *id.* at 425-26.

⁸⁶ Since *Welton v. Missouri*, 91 U.S. 275 (1876), the Court has condemned, without considering factual justification, taxes that are facially discriminatory against interstate commerce as well as statutes that pose a great risk of discrimination. In addition, the Court continues to hold invalid per se discriminatory state regulations designed to protect local economic interests. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144-46 (1970); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 373-75 (1964). See generally Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1772-75 (1974). It is no answer to say that these rules rest, in turn, upon some generalized factual assumptions. All rules do, but that does not prevent the rules from operating as "rules."

⁸⁷ See, e.g., *Welton v. Missouri*, 91 U.S. 275, 282 (1876); Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 583-88 (1936). But see *id.* at 593-94 (author concludes that Court should weigh competing policies).

⁸⁸ The Court has referred to this thesis without commitment. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-25 (1946).

⁸⁹ *United States v. Reliable Transfer Co.*, 95 S. Ct. 1708, 1714-15 n.14 (1975).

⁹⁰ U.S. CONST. art. I, § 7.

⁹¹ See HART & SACKS, *supra* note 52, at 1394-97. See also *Train v. City of New York*, 420 U.S. 35, 45 (1975) ("[L]egislative intention, without more, is not legislation."); HART & SACKS, *supra* at 1225. This is not to deny that congressional silence may have some relevance to the construction of *existing* statutes.

⁹²

Now congress has a wonderful power that only judges and lawyers know

attribute affirmative legislative policy to legislative inaction is seldom, if ever, justified, as both commentators⁹³ and the Court⁹⁴ have recognized.

To my mind, the most satisfactory explanation of the commerce clause cases is that the Supreme Court is fashioning federal common law on the authority of the commerce clause. That clause embodies a national, free-trade philosophy which can be read as requiring the Court, in limited circumstances, to displace state-created trade barriers. I suspect that the failure so to view the negative-impact commerce clause cases is largely because the sanction of nullity for violation of the free-trade policy is the same as under a *Marbury*-like invalidation and does not "look like" the affirmative creation of federal regulatory rules. The Court, undoubtedly constrained by traditional limitations on the remedial powers of courts, has simply assumed that freeing the particular business from the challenged state regulation adequately advances the dominant federal free-trade policy. More often than may be appreciated, however, the negative-impact cases result in the subordination of the law of one state to that of another,⁹⁵ even if they do not go quite to the extent, as Professor Horowitz suggests, of permitting the Court to "choose the governing law that would best facilitate multistate commercial transactions."⁹⁶ In any event, I do not see why the Court is not making constitutionally inspired common law. The ultimate source of judicial lawmaking authority is the constitutional text; and like the admiralty, interstate boundary, and foreign affairs cases, the negative-impact cases are wholly subject to congressional revision.⁹⁷

about. Congress has a power to keep silent. Congress can regulate interstate commerce just by not doing anything about it. Of course when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking. If congress keeps silent about the interstate commerce that is not national in character and that may just as well be regulated by the states, then congress is silently silent, and the states may regulate. But if congress keeps silent about the kind of commerce that is national in character and ought to be regulated only by congress, then congress is silently vocal and says that the commerce must be free from state regulation.

Powell, *The Still Small Voice of the Commerce Clause*, in 3 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 931, 932 (1938).

⁹³ See HART & SACKS, *supra* note 52, at 1394-1401; Mishkin, *supra* note 42, at 1687-88.

⁹⁴ See, e.g., *Sampson v. Murray*, 415 U.S. 61, 78 (1974). See also sources cited in HART & SACKS, *supra* note 52, at 1381-1401.

⁹⁵ This was the result in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

⁹⁶ Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 814 (1971).

⁹⁷ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Two exceptions may

B. A Federal Common Law of Civil Liberties

All of the foregoing "constitutional common law" cases involve situations where state interests are ultimately subordinate to plenary national legislative power. Therefore, they do not by themselves establish that the Court may fashion common law rules protecting civil liberties because such a rulemaking authority—which seeks to create federal rules in areas of primary state concern—intersects with federalism concerns in a different way. But neither do they indicate that it would be improper to look to the constitutional guarantees of individual liberties as authorizing the creation of a common law substructure to carry out the purposes and policies of those guarantees.⁹⁸ Indeed, as we shall see,⁹⁹ the Court's traditional role in defining the constitutionally permissible scope of both state and federal power may make judicial creation of a constitutional common law of individual liberties less open to objection than that in areas committed to plenary national legislative power.

Protection of individual liberties has not been left to congressional initiative, but has become the central function of traditional *Marbury*-style judicial review. Moreover, the traditional deference of Congress to the Supreme Court in safeguarding individual liberties makes it both less likely that Congress will act affirmatively to implement the Bill of Rights,¹⁰⁰ and improbable

exist to the power of Congress to revise constitutionally based federal common law. Several old decisions, e.g., *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 225-28 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164-65 (1920), suggest limits on congressional power to revise the content of the maritime law, but it is doubtful that those decisions would be followed today. See D. CURRIE, *supra* note 68, at 897. Professor Hill argues that "a notable exception" to the principle of congressional revision exists in interstate boundary disputes: "[T]here is little if anything that Congress can do about the historic boundaries of states." Hill, *supra* note 50, at 1070; see *id.* at 1070 n.214.

⁹⁸ A majority of the Court has recognized that the specific constitutional guarantees in favor of individual liberty have accompanying "penumbras, formed by emanations from those guarantees that help give them life and substance," *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). My suggestion is more modest—a subconstitutional penumbral area formed by emanations from those guarantees.

⁹⁹ See pp. 34-38 *infra*.

¹⁰⁰ The Bill of Rights is, of course, framed simply as a limitation on congressional power; however, most of its provisions have been made applicable to the states through the first section of the fourteenth amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968). While § 5 of the fourteenth amendment authorizes Congress "to enforce, by appropriate legislation, the provisions of this article," this authorization of power rests on different principles than the plenary congressional grants in article I, § 8. Section 5 is a limited, backstopping authority, allowing the national government to correct state wrongs. The Civil Rights Cases, 109 U.S. 3, 11-14 (1883), are surely right on that point even if they take too

that congressional silence indicates a desire to retain state law. More importantly, the affirmative case for recognizing a constitutional common law of individual liberties is a strong one. The Court's history and its institutional role in our scheme of government, in which it defines the constitutionally compelled limits of governmental power, make it a singularly appropriate institution to fashion many of the details as well as the framework of the constitutional guarantees.¹⁰¹ Finally, the desirability of some such undertaking seems clear. As a general matter, it does not appear appropriate that federally guaranteed rights, particularly when their basis is constitutional, should have materially different dimensions in each of the states when both the source of the right and any ultimate interpretation is unitary. Given the limited and important nature of the rights involved, I find unconvincing any argument that a uniform common law of individual liberty would undermine the values inherent in having fifty different laboratories for social experimentation.¹⁰² Rather, the constitutional rights and their implementing components establish a nationwide floor below which state experimentation will not be permitted to fall. While these considerations may not compel a conclusion that uniformity requires the creation of constitutional common law, they appear to be at least as weighty as considerations of governmental convenience which have justified a uniform federal law in other contexts.¹⁰³

I also propose acceptance of the Supreme Court's power to fashion constitutional common law because recognition of that power is the most satisfactory way to rationalize a large and steadily growing body of Court decisions. I fully recognize that the Court does not usually proceed on the basis that it can review state action other than in interpretative constitutional terms. Having disposed of the constitutional limitation, the Court does not next inquire whether some constitutionally based common law rule should be formulated. Yet the case law, while not extensive and certainly not conclusive, is at least highly suggestive of a sizable body of constitutionally inspired implementing rules whose only sources are constitutional provisions framed as limitations on government.

This can be seen in several decisions in the criminal procedure

narrow a view of the substantive reach of congressional power under the fourteenth amendment.

¹⁰¹ See pp. 35-36 *infra*.

¹⁰² *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .").

¹⁰³ See sources cited at note 70 *supra*.

field. Both the Warren and Burger Courts have explicitly drawn a line between the basic rights authoritatively declared to inhere in the Constitution and the formulation of their specific and admittedly variable components. *Miranda v. Arizona*,¹⁰⁴ for example, did not claim immutable constitutional status for its famous gloss on the privilege against self-incrimination — the prescribed warnings. On the contrary, the Court repeatedly stressed its willingness to accept alternative schemes which would achieve the underlying policies of the constitutional guarantees.¹⁰⁵ Similarly, when the Court prescribed “lineup” rules in 1967,¹⁰⁶ it took pains to declare that those rules were required only in the absence of other devices to protect the underlying constitutional right to a fair trial.¹⁰⁷ The point of the rules set out in both of these areas is to guide primary behavior¹⁰⁸ when existing procedures have failed adequately to protect individual rights.¹⁰⁹

In both *Miranda* and the lineup cases, the Court was exercising, in a constitutional context, a traditional judicial function — protecting individual rights threatened in circumstances not foreseen by statute¹¹⁰ by providing guidance to primary actors¹⁰⁴ 384 U.S. 436 (1966).

¹⁰⁵ See *id.* at 467. *Brown v. Illinois*, 95 S. Ct. 2254 (1975), noted pp. 68–70 *infra*, makes plain that the Court views the warnings as simply a “prophylactic rule,” *id.* at 2260, designed to deter potential police overreaching. There is no suggestion that these measures are deemed indispensable to the underlying privilege against self-incrimination.

¹⁰⁶ See *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁰⁷ See *United States v. Wade*, 388 U.S. 218, 239 (1967). See also *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

¹⁰⁸ Hart and Sacks have characterized primary behavior as “something which [is] expect[ed] or hope[d] to happen when the arrangement works successfully.” See HART & SACKS, *supra* note 52, at 135. This is in contrast to the fourth amendment exclusionary rule which, without defining precisely what a reasonable search should be, defines the consequences of “noncompliance or other deviation,” *id.*, from the required behavior.

¹⁰⁹ In a sense, this is the point of the *Calandra-Peltier* exclusionary rule too. See pp. 4–6 *supra*. But, unlike *Miranda*’s prescribed warnings, the “command” to law enforcement officers is couched in constitutional terms, e.g., “don’t search and seize unreasonably,” rather than in particularized terms, e.g., “it is unreasonable to search a car without a warrant unless there is a chance that it may be moved before a warrant can be obtained.” The former command may not be sufficiently specific to allow a law enforcement official to understand his duty and therefore may not be as protective of individual liberties. See LaFave, *supra* note 24, at 141–43 (emphasizing need for clarity in rules regulating police conduct); note III *infra*.

¹¹⁰ See *D’Oench, Duhme & Co. v. Federal Deposit Ins. Co.*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (“Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.”); HART & SACKS, *supra* note 52, at 367–68.

(law enforcement personnel in these cases) in terms sufficiently specific to allow "self-applying regulation."¹¹¹ Although the function is a traditional one, that alone cannot explain the source of Supreme Court authority to require that state courts adopt a rule, rather than proceed to judge the fairness of the criminal proceeding on a case-by-case basis. In particular, it does not explain why the Court may insist upon a particular form of a rule among the several that might provide protection for the underlying constitutional right.¹¹²

A prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice. This may happen where, for example, there is a substantial danger that a more finely tuned rule may be subverted in its administration by unsympathetic courts, juries, or public officials.¹¹³ But if the point of adopting a rule derives from

¹¹¹ See HART & SACKS, *supra* note 52, at 132. "Self-applying regulation" is an official directive "which is susceptible of correct and dispositive application by a person to whom it is initially addressed . . ." *Id.* at 133.

If official misbehavior is to be controlled, then two things seem necessary. First, the official must be aware of what is required of him in sufficiently concrete terms that he may be able to comply. The generalized rules of interpretation we generally associate with constitutional construction—such as, "the state must provide a fair hearing"—will frequently be inadequate for such a task. Second, the official must have some incentive to comply with the applicable rule. Thus, if the Court is to protect individual liberties from official intrusions, a common law both generating concrete rules of behavior and granting remedies is a necessity. Yet neither the rule nor the remedy may be constitutionally compelled in the sense that some other arrangement or remedy may also adequately guide official behavior.

¹¹² Justice Harlan dissented in *Chapman v. California* on the express ground that there is an absence of federal judicial power "to declare which of the many admittedly constitutional alternatives a state may choose." 386 U.S. 18, 48 (1967).

North Carolina v. Pearce, 395 U.S. 711 (1969), affords yet another illustration of the same troublesome questions. The Court there held that the fourteenth amendment prohibits retaliatory sentencing upon the retrial and conviction of state criminal defendants following their successful appeals. See also *Blackledge v. Perry*, 417 U.S. 21, 24-29 (1974). But instead of proceeding on a case-by-case basis, assessing the challenged state action against the constitutional right to be free from punitive resentencing, the Court held that the basis for any higher sentence must affirmatively appear in the record and must be the result of conduct occurring after the first trial. 395 U.S. at 726. Surely, as the Court itself has expressly recognized, see *Michigan v. Payne*, 412 U.S. 47, 51-53 (1973), these implementing rules, like the *Miranda* warnings, go beyond what the Constitution requires: They are prophylactic measures, regulations of implementing detail. But if the prophylactic rules announced in these cases are not viewed as an integral part of the underlying constitutional right, where is the authority of the Court to require that state courts adopt a rule, rather than proceed on a case-by-case basis, and a particular form of a rule among several arguably adequate ones?

¹¹³ For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it

prudential considerations — such as showing the lower courts the way to decide a spectrum of future cases, charting a reasonably safe course of conduct for public officials to follow, or keeping the Supreme Court out of the exceedingly difficult and unrewarding task of detailed factual analysis¹¹⁴ — then it is difficult to understand why the adequate state ground doctrine does not require the Court to assess the adequacy of state procedures on a case-by-case basis.¹¹⁵

That the *Miranda* prophylactic rule approach is “better” than the burdensome task of normal case-by-case adjudication may be conceded. The question is whether the Court has the authority to require such rules of the state courts where it is unwilling to treat the prophylactic implementing rule as a necessary dimension of an underlying constitutional right.¹¹⁶ The Court undoubtedly has both the power and the duty to fashion “interpretative” implementing rules to fill out the meaning of generally framed constitutional provisions. This is simply an ancient aspect of the

might be conceded that knowingly defamatory and false statements do not materially advance first amendment values. Even so, an absolute privilege might be justified on the ground that any lesser protection would prove insufficient when administered by unsympathetic juries. Indeed, experience seems to confirm this fear, for much of the Court’s work in administering the *Times* rules has been directed to confining jury latitude to infer malice and award excessive damages. See Monaghan, *supra* note 18, at 527–31. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), noted in *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 139 (1974). Similarly, even assuming that the first amendment excludes “worthless” speech, protection of obscenity might be justified on the premise that the administration of obscenity statutes presents excessive risks to protected speech. See Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 134 (1966).

¹¹⁴ See H. WECHSLER, *THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS* 18–19 (1970):

[T]here can be no doubt but that the administration of a standard of due process calling for the closest scrutiny of records to appraise essential fairness has proved to be increasingly intractable and burdensome, and to exert too little impact on the grave abuse in our practice so frequently revealed by the cases in the Court. The pressure to decree more rigid rules more easily applied has grown accordingly apace.

See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, *THE AMERICAN CONSTITUTION: CASES — COMMENTS — QUESTIONS* 437–46 (3d ed. 1970). Of course, the difficulties of a case-by-case approach are not limited to criminal procedure. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 162 (1974) (Brennan, J., concurring) (criticizing Court’s case-by-case approach in obscenity cases); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting) (same). See also *Carlson v. United States*, 418 U.S. 924 (1974) (Brennan, J., dissenting from denial of certiorari); Monaghan, *supra* note 18, at 527–28.

¹¹⁵ See note 42 *supra*.

¹¹⁶ Reference to the supremacy clause, U.S. CONST. art. VI, will not suffice. That clause simply determines how a conflict between a state rule and a valid federal rule is to be resolved. It does not purport to contain criteria for determining the initial question of the validity of the federal rule.

judicial function in construing the meaning of any text—constitutional, statutory, contractual, etc.¹¹⁷ Thus a holding that the constitutionally based freedom from unreasonable searches and seizures embraces electronic eavesdropping,¹¹⁸ whether correct or not on the merits, constitutes an interpretative filling-out of the underlying constitutional guarantee. It is authoritative because the rule is “part and parcel” of the underlying constitutional guarantee. But, to borrow the language of administrative law, does the Court also possess a power to fashion a substructure of implementing “legislative” rules¹¹⁹—rules that are admittedly *not* integral parts of the Constitution and that go beyond its minimum requirements? If the Court possesses that power, what is its source?

I suggest that such legislative rules can be adequately rationalized as constitutional common law. For example, the utility of providing the police with guidance in the *Miranda* and lineup situations so that they may understand (and presumably follow) their duty with regard to individual liberties should be self-evident. Since the states and federal government have apparently not taken steps to create a self-regulating regime, and since the Court is necessarily involved in the definition of the dimensions of the constitutional rights involved,¹²⁰ there seems little reason for the Court not to prescribe rules sufficient to create self-regulation. Furthermore, in the criminal context, a uniform national definition of constitutional liberties seems particularly appropriate.

The functions of protection of constitutionally recognized rights and guidance of officials often recur in the constitutional common law of individual liberties. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹²¹ for example, the Court recognized a right to damages against federal officers who violate the fourth amendment prohibition against unreasonable searches and seizures. By this decision, the Court filled in an incomplete statutory framework that would have

¹¹⁷ “Implementation of the Bill of Rights does not differ from implementation of other constitutional provisions, or indeed statutory provisions, insofar as it involves, generally, the creation of a substructure of subsidiary rules . . .” Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 181 (1969).

¹¹⁸ *Berger v. New York*, 388 U.S. 41 (1967).

¹¹⁹ K. DAVIS, *ADMINISTRATIVE LAW TEXT* 126-31 (3d ed. 1972). This is not to suggest that the distinction between the two types of rules is absolute. See, e.g., *Albemarle Paper Co. v. Moody*, 95 S. Ct. 2362, 2371-72 (1975), noted pp. 225-34 *infra*; L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 406 (1965).

¹²⁰ Since the Courts are being asked to enforce the criminal law, they have an obligation to assess the constitutionality of the whole procedure. See note 39 *supra*.

¹²¹ 403 U.S. 388, 390-97 (1971).

authorized damages had the narcotics agents been state officers.¹²² The majority opinion apparently derives the right to damages from the fourth amendment itself.¹²³ But, unless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee,¹²⁴ it is not constitutional interpretation, but common law.¹²⁵ The latter position commends itself since this would be entirely analogous to the long recognized federal common law process of articulating the remedial implications of federal statutory rights.¹²⁶

The Court's ever-lengthening line of procedural due process decisions, which, as Professor McCormack rightly observes, now embrace "[a]lmost every point of contact between an individual and government,"¹²⁷ also invites analysis in common law terms. To be sure, holdings that due process requires a "fair" hearing in connection with such diverse proceedings as welfare termination,¹²⁸ automobile license suspension,¹²⁹ parole revocation

¹²² See 42 U.S.C. § 1983 (1970).

¹²³ See 403 U.S. at 395-97.

¹²⁴ The Court apparently did not so view the damage remedy:

Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

Id. at 397.

¹²⁵ Hart and Wechsler suggest that *Bivens* is an illustration of judicial "implication of federal remedies." HART & WECHSLER, *supra* note 39, at 798. See also *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); *Dellinger*, *supra* note 20, at 1540-43. My own analysis is different. I think that *Bivens* is an explicit recognition that the constitutional guarantee embraces a right of action, see HART & SACKS, *supra* note 52, at 153-55, which is enforceable by any appropriate remedy including damages, in either the state or federal courts. If the ultimate footing of judicial remedial lawmaking authority is article III's grant of "judicial power," see *Dellinger*, *supra*, at 1540-43, I doubt that the existence of a federal remedy can have any consequence for the states. See pp. 3-4; *Monaghan*, *supra* note 18, at 524 n.23, 547-51. In any event, it seems to me more realistic to focus on the substantive statutory or constitutional provisions being implemented, for they constitute the necessary points of reference for the exercise of any judicial power. Moreover, reference to the substantive statutory or constitutional provision recognizes that state courts too are obliged to formulate and apply federal common law, subject to the ultimate control of the Supreme Court. See, e.g., *A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co.*, 25 N.Y.2d 576, 579-85, 255 N.E.2d 774, 775-79, 307 N.Y.S.2d 660, 662-66, *cert. denied*, 398 U.S. 939 (1970).

¹²⁶ See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). See generally HART & WECHSLER, *supra* note 39, at 798-99.

¹²⁷ McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 52 TEXAS L. REV. 1257, 1257 (1974).

¹²⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹²⁹ *Bell v. Burson*, 402 U.S. 535 (1971).

proceedings,¹³⁰ government employment termination,¹³¹ prison discipline,¹³² school suspension,¹³³ and attachment¹³⁴ are intended as authoritative interpretations of due process. The fair hearing requirement is, accordingly, shielded by *Marbury* from revision by ordinary political processes. But the specific and widely varying procedural components of the required hearings are less evidently of a constitutional order of magnitude, even if one makes every allowance for the proposition that what process is due depends upon the context and nature of the interest involved.¹³⁵

Judge Friendly has recently argued against interpreting every procedural wrinkle required by the Supreme Court as one compelled by due process. Noting the tendency to overjudicialize the administrative process, particularly in areas of mass administrative justice such as welfare,¹³⁶ he argues that¹³⁷

[t]here is no constitutional mandate requiring use of the adversary process in administrative hearings unless the Court chooses to construct one out the vague contours of the due process clause. But that clause does not forbid reasonable experimentation. For a state to experiment with procedures for mass administrative justice wholly different from those required in a felony trial would be a splendid vindication of "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory."

On his main point, I agree. There is no solid basis for concluding that all of the specific components of the right to hearing

¹³⁰ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

¹³¹ *Perry v. Sindermann*, 408 U.S. 593 (1972).

¹³² *Wolff v. McDonnell*, 418 U.S. 539 (1974).

¹³³ *Goss v. Lopez*, 419 U.S. 565 (1975), noted pp. 85-87 *infra*.

¹³⁴ *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

¹³⁵ The process of prescribing the specific components of due process forces the Court to inquire into such matters as: in what circumstances may the prescribed hearing follow, rather than precede, the challenged government action; when must the hearing include confrontation and cross-examination or the right to counsel; when must reasons be stated; and at what point is an impartial decisionmaker required. See Friendly, *supra* note 8, at 1279-1304. Sometimes the Court has avoided passing on these issues; sometimes not. See Note, *Specifying the 'Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1517-18 (1975). And sometimes the Court has provided different answers in contexts which are not evidently dissimilar on grounds of principle. See, e.g., Case Comment, *Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 472, 498 (1975).

¹³⁶ Friendly, *supra* note 8, at 1269.

¹³⁷ *Id.* at 1290-91, quoting *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

cases embody fundamental, immutable constitutional principles. Rather,¹³⁸

a considerable portion of the details of implementation consist of minutiae below the threshold of constitutional concern If details may vary from one jurisdiction to another, it is because they do not materially diminish the effectiveness of the implementation that is constitutionally mandated.

Congressional alteration of any component would pose the same question raised by *Miranda* and the lineup cases: does the net result of the legislative change constitute an "adequate" substitute for what the Court required?

But Judge Friendly's analysis overlooks a possibility. For in the absence of congressional action, the twin goals of ensuring adequate protection of constitutionally rooted interests and of achieving self-regulating official behavior¹³⁹ may make it desirable for the Court itself to frame at least some part of the appropriate procedures. The Court, in short, need not be constrained to the narrow determination of whether the particular state procedures are "minimally adequate." The Court might, instead, proceed on a frankly experimental basis in the hope of achieving the "best" implementing rule on a cost-benefit analysis; alternatively, it might fashion one acceptable procedural scheme without necessarily rejecting all others. The resulting component rules may reflect a blend of reason, analogy, experience, and pure hunch. The important point is that the Court need not assume that any particular rule is a *necessary* component of due process to justify its imposition.

The previous examples seem to me to point to the existence of a rather sizable body of constitutional common law. Taken together, they remind me of the story of old Ezra who, when asked if he believed in infant baptism, replied: "Believe in it? Why, man, I've seen it done!"

C. *The Role of Congress in a Common Law of Civil Liberties*

There is much in the Court's recent work that suggests the emergence of a corpus of constitutionally inspired common law protecting individual liberties. We have seen that the Supreme Court is not without power to round out the edges of the clauses limiting governmental power with rules — like the exclusionary rule — which need not be viewed as of the same order of mag-

¹³⁸ Hill, *supra* note 117, at 191.

¹³⁹ See note 111 *supra*.

nitude as “true” constitutional interpretation. This new common law of individual liberties is significant not only because it enables the Court to act interstitially in protecting private rights, but also because it provides the Court with a means for involving Congress in the continuing process of defining the content and consequences of individual liberties.

Conceivably, the Supreme Court could protect individual liberties simply by announcing rules precisely the same as those here characterized as common law, but under the rubric of the Constitution itself. That, of course, is the familiar model of constitutional adjudication. But, as the development of the fourth amendment exclusionary rule suggests,¹⁴⁰ detailed rules based in significant measure upon debatable policy or factual determinations are inevitably subject to pressures for change once the weight of those policies or the underlying “legislative facts” are seen to change.¹⁴¹ So long as the rules are thought to be constitutional in character, however, pressures for change can be accommodated only through an express overruling of prior doctrine, or the whittling away of an original holding through spurious “distinctions”¹⁴² or through such devices as doctrines of waiver, standing, and harmless error.¹⁴³ None of these tactics is without its institutional costs — both in terms of a break in the continuity of constitutional doctrine and in a departure from the norm of principled adjudication.

Another danger is that the Court, sensitive to the dangers of too much “temporary” constitutional law and the federalism implications of prescribing detailed rules, will confine its activity to a sanction of nullification with the hope that Congress will subsequently fill the void with a constitutional statute that adequately protects individual liberty.¹⁴⁴ But when the problem is

¹⁴⁰ See pp. 3-8 *supra*.

¹⁴¹ One of the side effects of grounding a decision in legislative facts may be that others are stimulated to make empirical tests of facts apparently relied on by the Court. Witness the empirical tests of the exclusionary rule as an element of deterrence, e.g., Oaks, *supra* note 33; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Critique, *supra* note 20, and of the *Miranda* warnings, e.g., Note, *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). The assumption underlying such studies is that the Court should respond to new evidence as it is developed.

¹⁴² E.g., the “distinction” of *Miranda* in *Harris v. New York*, 401 U.S. 222 (1971), criticized in Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1208-11 (1971).

¹⁴³ See, e.g., *Milton v. Wainwright*, 407 U.S. 371 (1972).

¹⁴⁴ Indeed, nullification of malapportioned districts through the device of ordering at large elections has been urged as a way for a court to avoid resolving the many difficult subconstitutional questions involved in drawing districts. See

one to which Congress, for whatever reason, does not or cannot respond with any immediacy, the net result will be that no authoritative governmental organ gives determinate guidance to government officials to prevent unjustifiable intrusions upon individual liberties.¹⁴⁵ If, however, the Supreme Court openly assumed a common law role, there would be little need for any judicial hesitance in prescribing interstitial rules. Pressures for change could then be accommodated either by legislation or by an open reconsideration of the subconstitutional policy concerns underlying an initial formulation of a rule. In either case, it would be unnecessary to reinterpret the Constitution.¹⁴⁶

Moreover, Supreme Court use of constitutional common law, because it allows a coordinate role for Congress in protecting constitutional liberties, should increase the likelihood that Congress' special institutional competence will be brought to bear on the problems of protecting individual liberty. Congress has, for example, a special ability to develop and consider the factual basis of a problem.¹⁴⁷ More importantly, it has the ability to

Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1087 (1958). "[T]he remedy of the election at large is simply a spur to legislative action, not an end in itself. It would be so burdensome . . . that redistricting almost inevitably would result . . ." *Id.* In the reapportionment cases, the interim relief of an at large election is itself something of a remedy for a violation of voting rights, but even so, its recognized drawbacks make it a tolerable short-term expedient at best. See *id.*; cf. *Chapman v. Meier*, 420 U.S. 1, 14-21 (1975) (multi-member districting plan overturned).

¹⁴⁵ The history of the application of the fourth amendment exclusionary rule to the states, set out in *Mapp v. Ohio*, 367 U.S. 643, 650-55 (1961), illustrates this problem. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Supreme Court refused to enforce the exclusionary rule against the states, largely on the ground that the states differed in their approach to the use of unconstitutional evidence and had other methods of protecting the right to privacy recognized by the fourth amendment. 367 U.S. at 651-52. In *Irvine v. California*, 347 U.S. 128 (1954), the Court again sought to defer to the state legislatures for a solution to police misbehavior. 347 U.S. at 134. When a still significant number of states had refused to act, the Court finally enforced the exclusionary rule against the states in *Mapp*.

¹⁴⁶ Any objection that a provision of interstitial rules is an inherently anti-democratic process would be at least partly met by the power of Congress to strike a new balance of policy concerns.

¹⁴⁷ See *Oregon v. Mitchell*, 400 U.S. 112, 247-48 (1970) (opinion of Brennan, J.) (by implication); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 228-29 (1971). One must, however, be careful not to overstate the supposed superiority of legislative factfinding. Professor Wellington, for example, notes that the "traditional statement" of a legislature's institutional competence would be based on its supposed ability to find facts; however, he argues that the type of fact upon which legislative decisions turn are generally available to a court as well in the form of expert testimony so that any advantage may be minimal. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 240 (1973).

make either rough or finely tuned distinctions, justified by practical considerations though perhaps not by principle, in a manner not generally thought open to a court.¹⁴⁸ In addition, Congress has at its command a range of remedies exceeding those available to a court from which it can craft a solution for a problem. These include wholesale suspension of offending state law,¹⁴⁹ the formulation of rules to be enforced by courts, education programs, administrative schemes, and spending programs.¹⁵⁰ In contrast, even taking into account the far-reaching changes resulting from modern class action practice,¹⁵¹ a court is limited in its capacity to affect the behavior of those not before it.¹⁵² And a common law court can seldom do more than announce a rule and create a sanction for its violation.¹⁵³

Extending individual liberty on a common law basis therefore triggers an important shift in the political process. The Court, in effect, opens a dialogue with Congress,¹⁵⁴ but one in which the factor of inertia is now on the side of individual liberty. For instead of requiring an affirmative act by Congress and the President to protect individual liberty, such an act is necessary to deny it. Even so, constitutional common law contains built-in safeguards — where the Court's rule is perceived to have gone too far, it can be rejected or modified by the political process without the necessity of a constitutional amendment.¹⁵⁵ On the other hand, it

¹⁴⁸ See Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 S. CT. REV. 81, 112-14.

¹⁴⁹ See 42 U.S.C. § 1973b (1970).

¹⁵⁰ See Wellington, *supra* note 147, at 240. See generally HART & SACKS, *supra* note 52, at 870-88.

¹⁵¹ See Monaghan, *supra* note 38, at 1382-83.

¹⁵² Recent developments in the use of federal equitable powers to remedy school segregation and other unconstitutional conduct must, however, be taken into account. See, e.g., Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). They make plain that it can no longer be assumed without qualification that most legislative techniques are beyond the scope of federal equitable relief — although it is still true that such extensive measures are available only against parties to a suit.

¹⁵³ See Wellington, *supra* note 147, at 240.

¹⁵⁴ Professor Bickel long ago observed the possibilities of a dialogue even in "true" constitutional interpretation situations. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 143-169 (1962).

¹⁵⁵ A comprehensive analysis of congressional power with respect to a common law of civil liberties is beyond the scope of what can be attempted here. One might, however, explore whether congressional power should be inferred simply from the fact that the Court can fashion constitutional common law — in much the same manner that national legislative power has been inferred from the constitutional grant of judicial jurisdiction in admiralty. See note 53 *supra*. One might also consider whether the existence of a congressional duty, as in the first amendment area, contains an implied grant of legislative power to achieve that duty. Cf. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612-21 (1842) (congres-

is the Court, and not Congress, which in the end decides whether a given rule is common law or something more.

III. SOME OBJECTIONS TO A CONSTITUTIONAL COMMON LAW OF INDIVIDUAL LIBERTY

However persuasive the analogies are between a constitutional common law of individual liberties and more traditional areas of constitutional common law, and however desirable the creation of coordinate roles for the Court and Congress might be, important objections to a constitutional common law of civil liberties are nonetheless not wanting. They seem to run along two lines: first, any distinction between constitutional interpretation and constitutional common law may be far too uncertain to be useful; and, second, a constitutional common law of civil liberties conflicts with our present conceptions of both separation of powers and federalism. These objections, both singly and in combination, are formidable, but I do not see them as insurmountable.

A. The Problem of Definition

It is obviously crucial to the theory advanced here that satisfional power to implement U.S. CONST. art. IV, § 2, cl. 3). One will seldom be required to pursue such lines of inquiry, however, since congressional power will be readily apparent under more conventional theories. Congressional power to define the duties of federal executive and administrative officials certainly includes the power to prevent abuse of office. Similarly, no one doubts that Congress has power to prescribe rules of procedure and evidence for the lower federal courts.

With respect to the states, much congressional legislation expanding civil rights can be tied to conventional article I, § 8 sources, *see, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249-62 (1964), and under § 5 of the fourteenth amendment, Congress can fashion rules which the Court might deem to be neither constitutionally required nor desirable common law. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 648-50 (1966). Any supposed federalism barriers to congressional legislation under the fourteenth amendment seem to me virtually nonexistent as Professors Cox and Cohen demonstrate. *See Cox, supra* note 147; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 618 (1975). *See generally* G. GUNTHER, *supra* note 4, ch. 11. Congressional statutes directed to the state courts do not seem to me any different in principle. *See, e.g.*, HART & WECHSLER, *supra* note 39, at 431-38, 562-73.

Congressional power under the fourteenth amendment need not be used to expand civil rights. If the Supreme Court can prevent the state courts from invoking the Constitution to "overprotect" constitutional liberties, *see Oregon v. Hass*, 420 U.S. 714 (1975), I see no sound federalism objection to recognition of a similar power in Congress. Congressional legislation overturning constitutional common law seems to me just as "appropriate" under § 5 as congressional legislative restrictions upon commerce under article I, § 8. In each case the policy judgment of whether the Supreme Court's common law rule is too costly in terms of other interests should be for Congress.

See also note 217 *infra*.

factory criteria exist for distinguishing between *Marbury*-shielded constitutional exegesis and congressionally reversible constitutional law. This is particularly important if Congress is to play a meaningful role in defining the content of this body of law. The decision to resolve a matter through legislation is for Congress always one of discretion;¹⁵⁶ and, unless a problem area is clearly identified as one in which Congress may prescribe a solution, nothing is likely to be done. Moreover, I think it can be assumed that Congress is reluctant to pass statutes that force a confrontation with the Supreme Court¹⁵⁷ and will therefore be hesitant to exercise a revisionary authority where its power to do so is not clear.

The Court can, of course, announce in future decisions what it considers to be the common law (that is, alterable) elements in its opinion, as it did in *Miranda*.¹⁵⁸ But a busy Court may not, and in any event perhaps should not, regularly focus upon making such distinctions. Moreover, if I am right, many extant decisions constitute common law in the sense that the Court would, if presented with a statute¹⁵⁹ taking a different approach from a previously announced rule, inquire only whether the statute was constitutional under traditional tests — treating the statute's conflict with the Court's own prior rule as a factor to consider, but not as dispositive of unconstitutionality. Accordingly, it is necessary that Congress be able to undertake a revisionary role without waiting for an express invitation in future cases.

Plainly, any distinction between constitutional exegesis and common law cannot be analytically precise, representing, as it does, differences of degree. But I hope that we may be left with something more than the "expert feel of lawyers,"¹⁶⁰ or "I know it when I see it,"¹⁶¹ although I do not denigrate the importance of either feeling in this process.

¹⁵⁶ See HART & SACKS, *supra* note 52, at 186-88.

¹⁵⁷ This can be seen in the congressional process leading to the enactment of the Voting Rights Act Amendments of 1970 and to Title II of the Omnibus Crime Control and Safe Streets Act of 1968. In each case, Congress considered the constitutional implications of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), apparently concluding that its acts were constitutional. See Burt, *supra* note 148, at 125 (Title II); Cohen, *supra* note 155, at 609 (Voting Rights Act). See also Cox, *supra* note 147, at 248-53.

¹⁵⁸ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

¹⁵⁹ See, e.g., 18 U.S.C. § 3501 (1970) (apparently overruling *Miranda* by making failure to give warnings not conclusive).

¹⁶⁰ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

¹⁶¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

It is appealing to seek a distinction in terms of the generality of the rule being considered. Where the Court's rule "is so general and absolute as to require no investigation or judgment of the circumstances of the particular case," it might be characterized as "true" constitutional interpretation.¹⁶² But this distinction will not suffice wherever a common law rule, as in *Miranda*, is designed to avoid a more particularized inquiry.¹⁶³ And it is evident that such rules do not constitute exceptional cases: witness the specific rules developed in the procedural due process cases which relieve the courts of the burden of making a factually precise determination of whether the right to a fair hearing has been violated in a given case¹⁶⁴ — just as per se rules in antitrust law avoid the necessity for more specific inquiry into whether there has been an unreasonable restraint of trade in any particular case.¹⁶⁵ By contrast, a rule barring "unreasonable" searches and seizures or "involuntary" confessions is a true constitutional rule, even though every particular application would require an ad hoc judgment.

Nor do I think much reliance can be placed upon the distinctions among principles, policies, standards, and rules,¹⁶⁶ or on Professor Jaffe's term, "intermediate premises"¹⁶⁷ — concepts necessary to make more concrete such open-ended, indeterminate constitutional guarantees as due process and equal protection. These concepts, useful though they are for many purposes, cannot mean that true constitutional interpretation embraces only principles, policies, standards, and intermediate premises but not specific rules. The crucial point is that some rules, as that term is generally understood,¹⁶⁸ are true constitutional interpretations

¹⁶² Cox, *supra* note 147, at 203.

Similarly, when the application of the equal protection or due process clause turns on a universal and relatively absolute rule of law not requiring evaluation of the surrounding circumstances or resolution of questions of degree . . . the equal protection clause of its own force prohibits [contrary statutes] *absolutely with no room for judgments upon particular conditions or differences of degree.*

Id. at 254.

¹⁶³ Some qualifications of this view of *Miranda* are in order because of *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (failure to give one of *Miranda* warnings held to be harmless error given "facts in [the] case"). Note also how the harmless error rule in fact operates to undermine the "absolute" character of a judicially formulated rule by requiring assessment of the impact of the violation in the individual case. See, e.g., *Milton v. Wainwright*, 407 U.S. 371 (1972).

¹⁶⁴ See Note, *supra* note 135, at 1517-18 & n.36.

¹⁶⁵ See *United States v. Topco Associates, Inc.*, 405 U.S. 586, 609-10 (1972).

¹⁶⁶ See, e.g., HART & SACKS, *supra* note 52, at 155-60; Wellington, *supra* note 147.

¹⁶⁷ See generally Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).

¹⁶⁸ See HART & SACKS, *supra* note 52, at 155-56.

within the meaning of *Marbury v. Madison*, and some are not.

No clear discontinuity separates what are, at best, necessarily differences of degree. Hart and Wechsler describe the situation as follows:¹⁶⁹

The demarcation between "statutory interpretation" or "constitutional interpretation", on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advergence to the issue at hand attenuates. We will use the term, federal common law, loosely, as most judges and commentators do, to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command.

My own view is that the distinction between true constitutional rules and constitutional common law lies in the clarity with which the former is perceived to be related to the core policies underlying the constitutional provision.¹⁷⁰ That defamation in connection with public officials is actionable only if knowingly or recklessly false impresses me as an "interpretative" constitutional rule, if the central thrust of the first amendment is taken to eradicate the law of seditious libel.¹⁷¹ By contrast, most of the specific rules governing what constitutes a reasonable warrantless search of an automobile¹⁷² do not.

The same is true of the *Miranda* warnings. It is, of course, clear that the proposition that no coerced confession is admissible is of constitutional dimension. Perhaps, although less clearly so, it is also a constitutional requirement that police interrogation be consonant with specified rules, so that if a rule is broken, the Court may invalidate a confession, because a court may be unable to ascertain ex post facto whether a confession was voluntary.¹⁷³ However, were Congress to pass a statute requiring the presence of counsel as a condition to introduction of any confession into evidence,¹⁷⁴ the Court should be prepared to abandon the warnings requirement, since counsel's presence during in-

¹⁶⁹ HART & WECHSLER, *supra* note 39, at 770.

¹⁷⁰ Compare Professor Jaffe's "clear purpose" test in describing the point at which courts should set aside "legal" interpretations of administrative agencies. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 569-75 (1965).

¹⁷¹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 386-87 (1974) (White, J., dissenting).

¹⁷² See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974).

¹⁷³ See *Miranda v. Arizona*, 384 U.S. 436, 467-69 (1966). But *Miranda's* rules may not eliminate case-by-case adjudication, for attention will shift to whether the warnings were fairly given, or were nullified by subsequent police misconduct.

¹⁷⁴ Cf. 18 U.S.C. § 3501(b)(5) (1970) (assistance of counsel an element to be considered in judging voluntariness of confession).

terrogation would allow a court to ascertain voluntariness on a case-by-case basis. Finally, the form of a rule which might be made to apprise a suspect of his rights would almost surely be a matter that Congress might change even if the *Miranda* Court had not stated this expressly, since the form of the rule turns on the subconstitutional consideration of the actual effectiveness of the various forms of warning that might be given.¹⁷⁵

I recognize that, in the end, the line drawn here turns on such untidy factors as the source and weight of the considerations that inform a particular rule. The more a rule is perceived to rest upon debatable policy choices or uncertain empirical foundations the more likely it will be seen to be common law. However, in the close case, there does not appear to be any particular reason for Congress to abstain from legislating since controversy with the Court over the characterization of rules at the margin of constitutional liberties should not be disruptive of a productive Court-Congress relationship.¹⁷⁶

B. Separation of Powers and Federalism

Congressional power to revise constitutional common law vitiates any objection that the Supreme Court, in fashioning interstitial rules, violates separation of powers principles vis-à-vis Congress. If Congress feels that the Court has overstepped permissible bounds, it can reverse a position taken by the Court whenever a rule goes beyond constitutional exegesis.

It may nonetheless be objected that separation of powers principles imply that the Court has no power to enforce subconstitutional rules against the executive department by way of such devices as exclusionary rules, *Miranda* warnings, procedural requirements, or judicial door-closing. Professor Hill is surely right that "[w]e do not think of our own judges as heirs to the English practice, such as it was, of constraining the executive branch by rules developed from common law sources, subject to the ultimate authority of the legislature."¹⁷⁷ A general, unde-

¹⁷⁵ See 384 U.S. at 467; cf. Burt, *supra* note 148, at 126 (most effective factual argument in support of 18 U.S.C. § 3501 (1970) — but one Congress did not make — was the almost total ineffectiveness of the Court's prescribed warnings).

¹⁷⁶ Congress' behavior in passing Title II of the Omnibus Crime Control and Safe Streets Act of 1968, which included a provision designed to repeal *Miranda*, see 18 U.S.C. § 3501 (1970), is not to the contrary. The dispute there was not a good faith dispute over the power of Congress to shape a rule protective of the fifth amendment using its own assessment of how subconstitutional policies should be compromised. It was rather "a gesture of defiance at a Court which protected criminals and Communists, and attacked traditional religious, political, and social institutions," Burt, *supra* note 148, at 127.

¹⁷⁷ Hill, *supra* note 117, at 208.

fined, residual judicial power to pass judgment on the propriety of executive law enforcement methods would, by intruding upon executive autonomy, violate sound separation of powers principles,¹⁷⁸ and the Supreme Court has never overtly claimed any such wide-ranging authority.¹⁷⁹ But even if it is conceded that there is no general judicial warrant to apply against the executive “an order of liberties on a level below the Constitution,”¹⁸⁰ I do not see that this necessarily forecloses *limited* judicial lawmaking to vindicate existing constitutional rights.¹⁸¹ Vindication of these rights has been a traditional function of judicial review; and the constitutionally inspired common law described here is similarly designed to effectuate policies found in the text and structure of the Constitution. So understood, constitutional common law does not import a free-wheeling power to impose the judiciary’s views on the executive.

A second objection to a constitutional common law is that it allows Supreme Court intrusion upon areas of state competence in a manner inconsistent with *Erie*’s fundamental presuppositions with respect to the limits of federal judicial power to displace state law.¹⁸² This objection is, I think, of considerable force, because the common law power here asserted goes beyond that exercised when the Court displaces state law in areas of primary national legislative competence. There, the state law is (or should be) displaced only to the extent required by a preemption analysis. A common law of civil liberties goes further; for it postulates that the Court might itself assume primary responsibility for a good part of the subconstitutional dimensions of constitutionally rooted rights, whether or not any given state rule on the subject was “minimally adequate” in a constitutional sense.¹⁸³

One response to this objection has already been suggested.¹⁸⁴ There is arguably a need for a uniform national definition of at

¹⁷⁸ See *id.* at 205–09.

¹⁷⁹ See *id.* at 200.

The Court has developed a limited common law designed to control the discretion of administrative agencies. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–81, 1698–1711, 1781–84 (1975). But the Court has not claimed that authority to develop this body of law derives from a general residual power, but rather that these rules are inherent in such constitutional concepts as due process or delegation. See generally *id.*

¹⁸⁰ Hill, *supra* note 117, at 208.

¹⁸¹ This is hardly the equivalent of inventing new constitutional rights. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 30–34 (1973).

¹⁸² See pp. 10–12 *supra*.

¹⁸³ There may be exceptional circumstances, such as legislative redistricting, where the courts should accept a minimally adequate state plan rather than search for the best remedy. See *Wallace v. House*, 515 F.2d 619, 634–36 (5th Cir. 1975).

¹⁸⁴ See p. 19 *supra*.

least the significant dimensions of individual liberties having their source in the Federal Constitution. The Court has the "final say" in construing the ultimate limits placed on both federal and state government by the Bill of Rights and the fourteenth amendment. The normal operation of judicial review permits the Court to develop understandings about the basic content of constitutional rights and at least arguably enables it to claim a special institutional competence to formulate a coherent, cohesive substructure of implementing rules. By contrast, the claim of judicial competence is much weaker in the areas committed to plenary national legislative power. Here Congress, not the Court, admittedly has the final say.¹⁸⁵ Moreover, the Court, at least in recent times, has not claimed for itself a competence to establish principled criteria for what is "good" for commerce; it has, instead, recognized this to be an area of inherent legislative discretion. It would therefore be anomalous to allow states to upset well-defined expectations about the content of federal rights by insisting on federalism "at the edges," even though one may readily concede full force to federalism concerns in the areas committed to national legislative discretion.

There are, I think, additional considerations that blunt the force of the federalism objection. First, the constitutional common law of individual liberties that has thus far emerged from the cases has been an interstitial law, frequently required because the state lawmaking organs have failed to prescribe specific controls for executive and administrative officials; for example, they have failed to prescribe adequate rules governing searches and seizures or interrogations. There has yet to be a confrontation between a specific, clearly articulated state rule, whether embodied in a statute or otherwise, and the Court in the way in which the commerce clause cases typically present the problem.¹⁸⁶ Indeed, it is quite possible, as will be discussed below, that the Court would generally incorporate state rulemaking into its common law, thus softening any federalism conflict.

Second, the revisionary role of Congress provides a forum in which state interests may be recognized and the Court reversed

¹⁸⁵ See pp. 15-17 *supra*; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

¹⁸⁶ This is somewhat of an oversimplification since the Court is reversing the decisional law of the state when it applies federal common law rules in a situation where state courts would not. State legislatures are entitled to rely on the decisional law of their courts, see HART & SACKS, *supra* note 52, at 186-88, and may legislate at their discretion, see *id.*, thus there is a weak implication that legislative inaction indicates a desire not to enforce rules defined by the Court. This situation does not, however, present the direct confrontation that invalidation of legislation does.

if it delves too deeply in matters the states consider of local concern. Thus, in a classic article, Professor Wechsler has observed:¹⁸⁷

Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states. . . . It is in light of this inherent tendency, reflected most importantly in Congress, that the governmental power distribution clauses of the Constitution gain their largest meaning as an instrument for the protection of the states.

Even though Professor Wechsler's conclusion rests partially on the premise that it is congressional inertia that protects state interests¹⁸⁸ — an assumption that is inapposite here since Congress will have to act affirmatively to undo common law — it remains true that state interests are forcibly represented in Congress. Moreover, since it is unlikely that the federal government would be any less constrained by constitutional common law than the states,¹⁸⁹ the interests of the states and the nation in removing unduly intrusive common law would overlap, thereby maximizing the "clout" which the states enjoy in Congress.¹⁹⁰

Finally, the force of the federalism objection is reduced still further when one focuses upon the flexibility of federal common law. Even though an area of the law is governed by federal authority, the Court is free to incorporate implementing state rules consistent with underlying federal policies.¹⁹¹ *Miranda* and the lineup cases are examples of situations where the Court has, at least formally, envisioned such an adoption of state law: the states are obliged to provide a minimum level of protection — "something that works"¹⁹² — but ultimately the choice of means is left to them. Wherever it seems likely that state rulemaking would provide resolution of a problem superior to that of a court

¹⁸⁷ See Wechsler, *supra* note 58, at 558.

¹⁸⁸ See *id.* at 547-48.

¹⁸⁹ Indeed, the federal government has often been constrained where the states were not; witness the history of application of the fourth amendment exclusionary rule to the states described in *Mapp v. Ohio*, 367 U.S. 643, 650-55 (1961).

¹⁹⁰ To be sure, Congress represents a national constituency as well as the interests of the states as states. It might, therefore, decide that a uniform national law remained appropriate even though the Court's rule was not correct. But nationalization by congressional action does not present the federalism objection raised by the concept of a constitutional common law. See note 155 *supra*.

¹⁹¹ See, e.g., HART & WECHSLER, *supra* note 39, at 768-70.

¹⁹² Kaplan, *supra* note 33, at 1030.

remedy, the Court might adopt state law.¹⁹³ The appeal of adopting state law is reinforced by the powerful current of present academic and extra-judicial commentary that favors state rule-making as the best method for structuring police and other executive and administrative activity.¹⁹⁴

Nonetheless, the Court cannot invariably defer to state rule-making merely because it is consistent with federal policy and provides minimally adequate protection for civil liberties. Since the justification for framing constitutional common law is both the possible need for a nationally uniform law and the Court's admitted competence in creating law consistent with its constitutional precedents and analysis, the Court surely has the power to reject state law—even where the Court is acting in a frankly experimental manner.¹⁹⁵ Alternatively, it might, as a matter of constitutional common law, require additional rulemaking.¹⁹⁶

The federalism objection, therefore, is not decisive when both the affirmative reasons for allowing the Court to make constitutional common law and the checks on the Court in this regard are considered.

C. *One-Way Common Law*

The possibility that some diversity on the state level can be tolerated raises another fundamental question: Should the Court consciously formulate constitutional common law to be applied to the federal government alone? As an example, in order to implement the constitutional right to a speedy trial, the Second Circuit promulgated rules requiring dismissal of criminal charges unless the government is ready for trial within six months of arrest, or within ninety days if the defendant is detained.¹⁹⁷ The

¹⁹³ There appears to be little reason for the Court to adopt a position announced in a decision of a state court (unless it constitutes rulemaking) because there is no reason to suppose that a state court has any greater competence in framing an appropriate rule than the Supreme Court. Furthermore, when a rule is announced, as in *Miranda*, for controlling executive misconduct, the force of the rule can be sapped by allowing its relitigation in each case. If the misbehaving officer can hope to succeed in an individual case, then the deterrent value of the rule is lessened.

¹⁹⁴ See the discussion and authorities collected in K. DAVIS, *POLICE DISCRETION* 98-120 (1975). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 409-39 (1974).

¹⁹⁵ The Court has insisted on a uniform rule in a number of cases. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁹⁶ See K. DAVIS, *supra* note 194, at 129 ("Judicially required rulemaking is destined to become a mainstream of the law.").

¹⁹⁷ Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 28 U.S.C.A. Rules Appendix 81 (Supp. 1975), discussed in Comment, *Speedy Trials*

Supreme Court has, correctly in my judgment, cast considerable doubt on whether these rules could be taken to be a necessary part of the underlying constitutional guarantee.¹⁹⁸ Nonetheless, practical difficulties in administering that guarantee¹⁹⁹ make the Second Circuit's approach an attractive one. The important point here, however, is that the Second Circuit, on federalism grounds, refused to extend its rules to the states, grounding them instead on its "supervisory power."²⁰⁰ The end result is, I submit, a constitutionally based common law rule designed to vindicate a fundamental constitutional guarantee, but one which binds only federal officials. The Second Circuit's action was not without respectable antecedents. It is, after all, surely apparent that the *McNabb-Mallory* rule,²⁰¹ promulgated in the name of the Supreme Court's supervisory power, had substantial constitutional underpinnings²⁰² and could be rationalized completely in common law terms.²⁰³

As the supervisory power cases demonstrate, there seems to be no reason in principle why constitutional common law must invariably extend to state as well as to federal officials. While

and the Second Circuit Rules Regarding Prompt Dispositions of Criminal Cases, 71 COLUM. L. REV. 1059 (1971).

¹⁹⁸ See *Barker v. Wingo*, 407 U.S. 514, 523 (1972). The Second Circuit agrees that the six-month rule is not a constitutional requirement. See *Wallace v. Kern*, 499 F.2d 1345, 1349-50 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975).

¹⁹⁹ See *Barker v. Wingo*, 407 U.S. 514, 533 (1972). See also *Moore v. Arizona*, 414 U.S. 25, 27 (1973).

²⁰⁰ See *United States ex rel. Frizer v. McMann*, 437 F.2d 1312, 1316-17 (2d Cir. 1971) (en banc). Congress has similarly not extended the recently enacted Speedy Trial Act of 1974, 88 Stat. 2076 (1975), to be codified in 18 U.S.C. §§ 3161-74, to the states.

²⁰¹ *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

²⁰² See, e.g., *Frazier v. United States*, 419 F.2d 1161, 1165 (D.C. Cir. 1969). Another example is the extensive judicial control over FBI data collection and dissemination portended by *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974), ostensibly resting upon the construction of a statute, but imposed to vindicate constitutionally rooted policies. See *id.* at 1123-25. See also *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975).

²⁰³ The same is true of the "Jencks rule," *United States v. Jencks*, 353 U.S. 657 (1957), allowing discovery of FBI files relating to the testimony of government witnesses in criminal trials. See *Palermo v. United States*, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring); *United States v. Nobles*, 95 S. Ct. 2160, 2166 (1975) (confrontation considerations give federal courts "inherent power to require [production of] previously recorded statements of . . . witnesses . . ."). Similarly, in *United States v. Hale*, 95 S. Ct. 2133 (1975), the Court exercised its supervisory power to require a new trial because an "evidentiary matter hav[ing] grave constitutional overtones . . .," *id.* at 2138 n.7, quoting *Grunevald v. United States*, 353 U.S. 391, 423-24 (1957), had been improperly sent to the jury.

constitutional common law is informed, but not required, by the underlying constitutional guarantee, this fact still leaves open the question of against whom it applies. Accordingly, recognition of "one-way" common law has important significance for the still ongoing "incorporation" debate. One might adopt the view of Justice Powell that all the bag and baggage of the Bill of Rights does not apply to the states,²⁰⁴ by arguing that the common law components of the right do not necessarily carry over. Whether they do so is a separate issue in which the value of the particular common law rule must be assessed in light of possibly countervailing federalism considerations.²⁰⁵

IV. NEW DIRECTIONS FOR CONSTITUTIONAL COMMON LAW

Recognition of constitutional common law provides a basis for doctrinal development in the context of the guarantees of individual liberty. As an illustration of possible lines of development, I will suggest a number of examples of how common law might be used to extend, or contract, current doctrine — whether any specific example is sound depends upon a more careful assessment that can be given here.

A. *Implementing Specific Guarantees*

1. *Mapp v. Ohio Revisited*. — Recent decisions indicate that *Mapp*'s exclusionary rule is no longer considered part and parcel of the underlying fourth amendment right nor a necessary remedy for it. But *Mapp* might nonetheless be justified in constitutional common law terms as an appropriate remedy, although an imperfect one. Arguments for some form of exclusionary rule possess considerable appeal. "As a visible expression of social disapproval for the violation of [fourth amendment] guarantees," writes Professor Oaks, "the exclusionary rule makes the guarantees . . . credible."²⁰⁶ And, "[o]ver the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies."²⁰⁷ I would not minimize this argument. The Court plays an important role as a teacher in our democracy. Accordingly, to the extent that the

²⁰⁴ See *Apodaca v. Oregon*, 406 U.S. 404, 369-77 (1972) (Powell, J., concurring).

²⁰⁵ The substantive right unsuccessfully sought to be raised in *Costarelli v. Massachusetts*, 421 U.S. 193 (1975), the right to an *initial* jury trial, might be viewed as common law "baggage."

²⁰⁶ Oaks, *supra* note 33, at 711.

²⁰⁷ *Id.* at 756. See also *Amsterdam*, *supra* note 194, at 429-33.

Court is persuaded that the fostering of constitutionally based values is a significant goal and that an exclusionary rule in some form is an effective means of achieving it, the Court could continue to insist upon the rule whether or not a state had provided some other minimally adequate alternative.

More importantly, since the exclusionary rule is now conceptualized as something other than constitutional exegesis, its existing rationales invite consideration of whether the present content of the rule should be reshaped. Proposals for change abound.²⁰⁸ Most have a common foundation: Since the object of excluding evidence is to deter police violations of an individual's right of privacy, the exclusionary rule should be invoked only against egregious or serious police misconduct, and not where the deterrence rationale has only marginal significance. Acceptance of this proposition would lead to a "good faith defense" to the exclusionary rule where, for example, police conduct is in only technical violation of increasingly complex fourth amendment law.²⁰⁹ I see little reason why such a defense should not be allowed in a criminal trial—where the central issue is, after all, not the officer's conduct, but the defendant's guilt—when good faith is recognized as a defense in a suit against a police officer for violation of an individual's right of privacy under 42 U.S.C. § 1983 where the officer's violation is the core of the suit.²¹⁰ In any event, *United States v. Peltier*²¹¹ makes plain that the Court is impressed by considerations of this order²¹² and, unless I misread it, the case already commits the Court to modify the exclusionary rule when the opportunity to do so next permits. Exclusion will no longer automatically be required unless the police have engaged in either wilful or negligent wrongdoing.²¹³

Peltier does not consider still another possible limitation on the exclusionary rule. Since the exclusionary rule is only a remedy, its costs, like the costs of other remedies to vindicate constitutional rights, must be evaluated.²¹⁴ One could conclude, as

²⁰⁸ See, e.g., ALI Model Code of Pre-Arrest Procedure § 290.2(2) (Official Draft No. 1, 1972).

²⁰⁹ See generally *Brown v. Illinois*, 95 S. Ct. 2254, 2265 (1975) (Powell, J., concurring in part), noted pp. 68-70 *infra*.

²¹⁰ See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); cf. *Wood v. Strickland*, 420 U.S. 308 (1975) (Congress did not intend to remove common law immunities of state officers by enacting § 1983), noted pp. 219-25 *infra*; *Scheur v. Rhodes*, 416 U.S. 232, 243-45 (1974) ("reasonable" conduct is immune from § 1983 liability).

²¹¹ 95 S. Ct. 2313 (1975).

²¹² See p. 4 *supra*.

²¹³ The Court might also modify the exclusionary rule where the police had made rules governing search and seizure practice. See note 194 *supra*.

²¹⁴ Cf. *Brown v. Illinois*, 95 S. Ct. 2254, 2264 (1975) (Powell, J., concurring

does Professor Kaplan, that on a cost-benefit analysis the remedy is inappropriate where the defendant is charged with a serious crime.²¹⁵ To be sure, in *Brown v. Illinois*,²¹⁶ decided one day after *Peltier*, the Court did apply the exclusionary rule in a homicide case where the police misconduct was plainly viewed as serious. But *Brown* did not consider whether the limitation suggested by Professor Kaplan should be developed.²¹⁷

2. *Criminal Procedure.*— While the prospects for expansion of the rights of criminal defendants are presently unpromising, a further development would be possible under the rubric of constitutional common law. For example, Justice Brennan's often repeated contention that the constitutional restriction against double jeopardy requires all criminal offenses stemming from a single set of facts to be tried at once,²¹⁸ could plausibly be ad-

in part) ("[I]n some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by [its] deterrent purposes."), noted pp. 68-70 *infra*.

²¹⁵ Kaplan, *supra* note 33, at 1046-49.

²¹⁶ 95 S. Ct. 2254 (1975), noted pp. 68-70 *infra*.

²¹⁷ An analysis of *Miranda* could be made in terms similar to the analysis here of *Mapp*. Indeed, Congress may already have concluded that it is too costly to treat violation of the *Miranda* rules as a per se violation of the fifth amendment. Cf. 18 U.S.C. § 3501(b) (1970) (failure to give warnings does not automatically require exclusion of a confession in a federal prosecution).

Congress' power to revise *Miranda* may not, however, be unlimited. Even where the crucial issue is not one of law, but of fact, characterization, or degree, it is arguable that *Marbury*, when read with a substantive constitutional guarantee, requires considerably more judicial scrutiny than would otherwise exist. See, e.g., *Whitney v. California*, 274 U.S. 357, 374, 378-79 (1927) (Brandeis, J., concurring). On the other hand, such issues are also of a type peculiarly subject to legislative determination, see pp. 28-29 & notes 147-53 *supra*; and once any judicial deference to Congress on these issues is admitted, principled and effective limits on the scope of that deference are difficult to frame beyond a general requirement of reasonableness, see Cohen, *supra* note 155, at 612. Accordingly, a strong argument can be made that the congressional overruling of *Miranda*, by way of statute, is valid. Congress, it would be urged, has only differed on the "facts" surrounding the assumed relationship between custodial interrogation and voluntary confessions. Compare Schrock & Welsh, *supra* note 16, at 251, with *Michigan v. Tucker*, 417 U.S. 433 (1974). But these contradictory positions need not be reconciled to decide *Miranda*; I agree with Professor Cox that *Miranda* is less concerned with factual assessment than with the development of a "prophylactic" rule to minimize the special dangers to the privilege against self-incrimination which are thought to inhere in custodial interrogation, see Cox, *supra* note 147, at 251. The required warnings are, in Professor Cox's language, "not constitutional commands but judge-made regulations for implementing or securing constitutional commands." *Id.* *Miranda* thus holds that "adequate" safeguards are constitutionally required, and this puts a check on what Congress may do. On the other hand, Congress seems free to determine the details of implementing an "adequate" rule.

²¹⁸ See, e.g.; *Waugh v. Gray*, 95 S. Ct. 2622 (1975) (mem.) (Brennan, J., dissenting from denial of certiorari).

vanced as a desirable federal common law rule, one consistent with, if not required by, the double jeopardy and due process clauses. One could also fashion common law, grounded on the right to counsel or due process, reaching such diverse areas as the prosecution's duty to disclose evidence and the appointment of experts at a defendant's request. In short, one could with ingenuity impose on the states through constitutional common law all the best features of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.²¹⁹

3. *Free Speech*.—Justice Stewart has recently advanced the thesis that the protection afforded the press by the first amendment means more than the freedom of speech guaranteed to all citizens. It is, he says, not an individual liberty, but an institutional one; the fourth estate is the one business given explicit protection by the Constitution.²²⁰ Advanced at so late a date in first amendment history as “true” constitutional interpretation, this position is both doubtful and troublesome. But it might serve as a foundation for the development of federal common law rules about the press. Indeed, a different result in *Branzburg v. Hayes*²²¹ can be rationalized along constitutional common law lines—some press privilege, although not constitutionally required, is consistent with the policies inhering in the guarantee of freedom of the press.

The overbreadth doctrine formulated in *Broadrick v. Oklahoma*²²² seems to me a candidate for reassessment in common law terms. There the Court held that a challenger could attack a statute regulating “pure speech” on its face without showing either substantial overbreadth, or the arguably protected character of his own speech.²²³ Without debating the wisdom of either dispensation as a matter of judicially formulated common law, I find it difficult to believe that either is a necessary inference from the first amendment.²²⁴

²¹⁹ But see Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (arguing against imposing an inflexible code of criminal procedure on the states).

²²⁰ See Stewart, “*Or of the Press*,” reprinted in YALE L. REP. 9, 10 (Winter 1974-75) (address to Yale Law School on its 150th anniversary). *Bue see* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

²²¹ 408 U.S. 665 (1972).

²²² 413 U.S. 601 (1974).

²²³ *Id.* at 611-13. See also *Bigelow v. Virginia*, 95 S. Ct. 2222, 2229-30 (1975), noted pp. 111-23 *infra*; *Plummer v. City of Columbus*, 414 U.S. 2, 3 (1974).

²²⁴ See *Brown v. Louisiana*, 383 U.S. 131, 147-48 (1966) (Brennan, J., concurring).

The curious disposition of the overbreadth claim in *Bigelow v. Virginia*, 95 S. Ct. 2222, 2229-30 (1975), noted pp. 111-23 *infra*, lends support to my view. The Court concluded in *Bigelow* that the Virginia courts “erred in denying [the

V. CONSTITUTIONAL COMMON LAW, THE NON-SPECIFIC GUARANTEES, AND JUDICIAL ACTIVISM

Recognition of a congressionally reversible, constitutionally based common law implementing the guarantees of individual liberty might help to bridge the gap between, or at least add another dimension to, the perennial conflict between two divergent views of the substantive scope of judicial review. It may very well be that throughout our constitutional history courts have assumed the power to impose "basic national ideals of individual liberty and fair treatment"²²⁵ on political bodies, national as well as state, and that it is now clear that the decline of economic substantive due process may not have fundamentally altered this fact. There are those who approve of the exercise of such judicial power as consistent with our history and traditions.²²⁶ On the other hand, there is a large and increasingly vocal body of scholars who reject the view, asserting that an appropriate conception of our framework of government precludes general judicial authority to develop an order of constitutional liberties not specified in the Constitution. Professor Ely, an articulate exponent of this view, denies that the Court has any general license to formulate "neutral and durable" principles, and that however "beautiful," if the principle "lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."²²⁷ The assumption common to both camps is, of course, that the judicially fashioned rules are beyond the reach of Congress.

To my mind, the most troublesome feature of constitutional common law is its potential as a vehicle for reading into our law at a subconstitutional level values that judicial activists have "discovered" in the general substantive guarantees of due process

defendant] standing to make [the overbreadth] claim, where 'pure speech' rather than conduct was involved . . ." *Id.* at 2230. Nonetheless, because the statute under which the defendant was convicted had subsequently been repealed, the Court declined to consider the overbreadth question. *See id.* This is a wholly incomprehensible disposition if overbreadth implicates personal rights of the defendant. The disposition of the overbreadth claim in *Erznoznik v. City of Jacksonville*, 95 S. Ct. 2268, 2276-77 (1975), *noted* pp. 123-31 *infra*, is also consistent with a "no personal right" approach.

²²⁵ Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 706 (1975).

²²⁶ *Id.* *See also* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969); Tribe, *Structural Due Process*, 10 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 269 (1975).

²²⁷ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 949 (1973).

and equal protection. It is around these general constitutional clauses — with an occasional reference to that bottomless and empty well, the ninth amendment — that the debate centers. Intellectually and emotionally I stand in the Ely camp. Here, at least, I would draw the line. The general guarantees of due process and equal protection are so indeterminate in character that to develop on their authority a body of subconstitutional law would be to go beyond *implementation* to recognize a judicial power to create a sub-order of liberties without any ascertainable constitutional reference points.

This is not to say that, if the Constitution is used as a springboard for the judicial imagination, there is no place for constitutional common law. The Supreme Court's announcements of hitherto unknown constitutional values are inevitably accompanied by attempts at implementation. *Roe v. Wade's* trimesters²²⁸ are a classic illustration. Although the propriety of the values the Court implements is inevitably a question of constitutional law, the form of the implementation, here as elsewhere, can present questions of common law. Indeed, it is in cases of judicial innovation that the notion of constitutional common law, involving as it does a coordinate role for Congress, may be of most service. Congressional debate concerning the means of implementing new-found values may provide the Supreme Court with much-needed feedback as to the implications, and indeed the propriety, of its activism.

Professor Michelman concluded his activist essay in these pages six years ago with a question — “why education and not golf?”²²⁹ My answer is: neither. But if the Court were to answer, it seems to me better that it do so in a context in which constitutional common law gives Congress a role in fixing the consequences.

²²⁸ 410 U.S. 113, 163-64 (1973).

²²⁹ Michelman, *supra* note 226, at 59.