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I. Introduction

Criticism of the Supreme Court as excessively activist abounds in the law reviews,[1] in the political science literature,[2] and in the popular

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1. See the discussions in Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 602 (1998); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748-68 (1991); Michael W. McConnell, *The Supreme Court, 1996 Term – Comment: Institutions & Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 169-95 (1997); Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 69-70; Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1381-1401 (1996).

2. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 129-32 (1990); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING

press.[3] The criticism is neither new nor particularly shocking given that judges, like the rest of us, have political preferences. However, the Court has opened itself to a more intense fusillade by relying on a variety of institutional justifications in interpreting the constitutional text. The Court's invocation of institutional and political factors in construing the Constitution jeopardizes its legitimacy as an independent third branch of government. As a result, the Court seemingly has discarded a mantle of neutrality to don instead an overtly political cloak.

The Court's explicit discussion and consideration of factors other than the merits of a case, however, should not be alarming. The Court not only sits at the apex of the judiciary, but also exists within our system of separated powers and federalism. In addition to analyzing legal issues, the Court must – and would be incredibly naive not to – consider the impact of constitutional rulings on lower courts, coordinate branches, state governments, and society as a whole. The Court may occupy a special role in construing the constitutional text,[4] but political and administrative realities temper the Court's interpretive function.

In essence, the Supreme Court shares many attributes of any enforcement agency.[5] The Court must assess how best, given its limited resources, to control, or at least to influence, constitutional interpretation by others.[6] The

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ABOUT SOCIAL CHANGE? 336-43 (1991); THOMAS G. WALKER & LEE EPSTEIN, THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION 19 (1993); David P. Bryden, *A Conservative Case for Judicial Activism*, 111 PUB. INTEREST 72 (1993).

3. *See, e.g.*, Thomas L. Jipping, *Fighting for Justices*, WASH. TIMES, Aug. 27, 1997, at A15; Anthony Lewis, *Justices on a Mission*, N.Y. TIMES, June 30, 1997, at A11. Even the Senate is taking a turn. *See generally Judicial Activism: Defining the Problem & Its Impact, 1997: Hearings on S.J. Res. 26 Before the Subcomm. on the Constitution, Federalism & Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. 1-3 (1997) (opening comment of Senator Ashcroft).

4. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

5. For a sampling of the literature on enforcement agencies, see generally EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK (1982) (discussing enforcement agencies); STEPHEN BREYER, REGULATION AND ITS REFORM (1982) (same); CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990) (same).

6. One need not join the debate about whether judges attempt to maximize political preference or prestige in discharging their judicial tasks to conclude that judges care that others follow their view of constitutional rights. Judges may care for reasons of institutional provenance, distrust of other would-be interpreters, or personal politics. *See* Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1709-23 (1998) (sketching advice role of judges in constitutional sphere). Indeed, some might consider it the courts' duty to ensure the primacy of their views. *Cf.* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitu-*

enforcement tools of the Supreme Court, however, are limited. Unlike most agencies, the Court cannot engage in substantive rulemaking, it has no enforcement agents, and it cannot institute suit.[7] Instead, the Court must rely almost exclusively upon its power to decide – or not to decide – cases and controversies.

When confronted with a novel or a difficult constitutional claim, the Court, like other enforcement agencies, may decline to act. The Court can deny certiorari, and it also may find a case nonjusticiable even after granting certiorari.[8] Thus, even more than most enforcement agencies, the Supreme Court has great flexibility in choosing its docket. Through exercise of such "passive virtues," the Court can avoid tackling constitutional issues that it is not prepared to address and can allow other actors more direct say in formulating constitutional doctrine.[9]

The Court plays a more direct role by deciding cases and controversies. When resolving issues, the Court, again like any enforcement agency, must fashion rules in a way that will invite obedience by others such as lower courts, Congress, and state legislatures. As has been often noted, bright-line rules serve the Court well by providing a framework for future conduct.[10] In addition, the Court must craft constitutional rules that lower courts can administer – not always a simple task.[11] Moreover, the Court at times will use

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tional Interpretation, 110 HARV. L. REV. 1359, 1369-81 (1997) (arguing that judicial interpretations of Constitution must be predominant).

7. *See* Colin Diver, *Regulatory Precision*, *in* MAKING REGULATORY POLICY 199, 199 (Keith Hawkins & John M. Thomas eds., 1989) (commenting that, for agencies "[t]he framing of a rule is, indeed, the climactic act of the policymaking process").

8. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 113-98 (2d ed. 1986); *see also* H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 40-91 (1991); Samuel Estreicher & John Sexton, *Improving the Process: Case Selection by the Supreme Court*, 70 JUDICATURE 41, 41-45 (1986).

9. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term – Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-43 (1996) (focusing on judicial minimalization of decisions to enhance democratic processes).

10. For a representative commentary on the strategy of choosing between balancing tests and bright-line rules, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 945-72 (1987); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 586-96 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules & Standards*, 106 HARV. L. REV. 22, 56-69 (1992).

11. Commentators have long believed that the Court stopped actively enforcing the nondelegation doctrine, and, until recently, the Commerce Clause limitations on Congress's authority at least in part for reasons of lack of administrability. *See, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 64-72 (1965) (addressing difficulties in judicial application of nondelegation doctrine); Robert L. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 645-53 (1946) (addressing lack of manageable

its certiorari power to superintend the workings of lower federal and state courts. The Court's recent contretemps with the Ninth Circuit illustrate that the Court must manage lower courts as well as exercise its role as the arbiter of constitutional meaning.[12]

The Court can also wield its authority effectively by overenforcing or underenforcing constitutional rights. The Court's enforcement strategy can lead the Court to consider more than just constitutional interpretation and precedent when it is addressing the merits of a constitutional claim. Depending upon the presence of institutional or federalism factors, the Court may either deny a claim and leave it to other institutional actors to provide more constitutional protection, or may grant the claim if it fears that, absent such a ruling, other actors would frustrate recognition of an underlying constitutional norm.

Two relatively familiar examples may prove helpful. First, in *Garcia v. San Antonio Metropolitan Transit Authority*,[13] the Court declined to enforce the Tenth Amendment principally for institutional reasons.[14] The Court previously had struggled in fashioning a test to determine which state functions to preserve from federal interference.[15] In rejecting a challenge to the application of the Federal Labor Standards Act (FLSA) to a municipal body, the Court reasoned that a judicially crafted test to distinguish integral from other state functions was "unsound in principle and unworkable in practice."[16] Despite the Court's decision not to enforce the Tenth Amendment directly, the Court signaled that the Tenth Amendment norm continued to merit consideration.

In legislating, Congress presumably still considers the Tenth Amendment norm to the extent that it considers any constitutional question.[17] Indeed,

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standards to restrict congressional action under Commerce Clause).

12. *See, e.g.*, Calderon v. Thompson, 118 S. Ct. 1489, 1492 (1998) (criticizing court of appeals for recalling mandate denying habeas relief in death penalty case); Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (vacating order staying execution).

13. 469 U.S. 528 (1985).

14. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-55 (1985).

15. *See id.* at 530.

16. *Id.* at 546. The Court justified its refusal to enforce the Tenth Amendment on the ground that political process checks existed to monitor Congress's regulation of state and local governmental authorities, namely that state and local governments enjoyed an ample voice in Congress's affairs. *Id.* at 552; *see* McConnell, *supra* note 1, at 173 (arguing that Court should defer to congressional interpretation of constitutional text when judicially appropriate standards are wanting).

17. Obviously, members of Congress do not usually pore over constitutional law tomes prior to voting on proposals. Most members of Congress are probably inclined to allow the judiciary to resolve any disputed issue. Members of Congress, however, have the obligation to

Congress amended the FLSA after *Garcia* to protect local governments from some of the FLSA's provisions.[18] Thus, a constitutional provision can retain vitality even when not actively enforced by the judiciary.[19] In a system marked by separated powers and federalism, the Court logically may allow institutional factors to shape constitutional rights.[20]

Second, the Supreme Court in *Reynolds v. Sims*[21] concluded that apportionment in state legislatures must conform to a "one person, one vote" rule.[22] The Court predicated its "one person, one vote" ruling on the Equal Protection Clause: "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."[23] The impact of the Supreme Court's ruling was dramatic and immediate – nearly every state reapportioned its legislature in reaction to the decision.

On the merits, however, the Court's decision is quite problematic. The Court itself noted that *Reynolds* prohibits states from adopting the federal electoral model within their own jurisdictions because senatorial elections

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uphold the Constitution. As a result, some may solicit the views of others regarding the constitutionality of various provisions, and others may, in fact, reach an independent view of the constitutional question prior to voting.

18. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985) (codified as amended at 29 U.S.C. § 207(o) (1994)). Moreover, the Court has construed legislation narrowly in light of Tenth Amendment concerns to preserve state sovereignty. In *Gregory v. Ashcroft*, for example, the Court determined that Congress had not evinced a clear enough intent to subject state judges to the Age Discrimination in Employment Act. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991). The Court explained that its clear statement approach to the interpretation of legislation ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461 (quoting United States v. Bass, 404 U.S. 336, 349 (1974)).

19. Recently, however, the Court has more actively enforced the Tenth Amendment. *See* Printz v. United States, 117 S. Ct. 2365, 2380 (1997) (limiting scope of Brady Handgun Violence Prevention Act because Congress cannot compel states to enforce federal law); New York v. United States, 505 U.S. 144, 155-69 (1992) (stating that Congress cannot compel states to enforce federal regulatory programs).

20. One can view the Supreme Court's decision in *Buckley v. Valeo* from a similar perspective. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976). The Court in *Buckley* may have upheld the $1000 contribution limitation on the ground that, despite the First Amendment interests at stake, Congress was institutionally better able to set an appropriate limit. *Id.* at 24-30. For another example, the Court's restrictive interpretation of the Second Amendment also may reflect underenforcement. *See generally* Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719 (1998).

21. 377 U.S. 533 (1964).

22. *See* Reynolds v. Sims, 377 U.S. 533, 565-68 (1964).

23. *Id.* at 560-61.

deviate from a "one person, one vote" principle.[24] In addition, under *Reynolds*, states cannot choose an electoral system that affords greater representation to communities, whether based on geography, ethnicity, or shared political views, that otherwise might not have a sufficient voice.[25] The "one person, one vote" principle sweeps away all such distinctions, even when a supermajority of the state supports affording representation on similar grounds.[26] Despite the questionable pedigree, the Court subsequently applied the *Reynolds* rule to local elections as well.[27]

Whatever the theoretical problems, the "one person, one vote" rule boasts compelling administrative advantages. The rule is easy to administer and it avoids the necessity of secondguessing each state deviation from the "one person, one vote" principle.[28] Given that *Reynolds* was, in part, prompted by the Court's distrust of state legislators,[29] the Court's creation of a bright-line rule made evident sense. Having been "cautioned about the dangers of entering into political thickets and mathematical quagmires,"[30] the Court crafted a one size fits all solution.[31] The Court may therefore have over-

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24. *Id.* at 575-77.

25. *Id.* at 577-81.

26. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 737 (1964) (rejecting apportionment plan passed by considerable majority of electorate). Justice Stewart commented in his dissent in *Lucas* that:

> I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.

Id. at 748-49 (Stewart, J., dissenting).

27. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (applying *Reynolds* rule of close scrutiny to apportionment statute that may dilute effectiveness of some votes); Avery v. Midland County, 390 U.S. 474, 478-79 (1968) (applying *Reynolds* rule to local elections); *see also* Phoenix v. Kolodziejski, 399 U.S. 204, 208-09 (1970) (applying *Kramer* rule to invalidate restrictions on bond issue election).

28. *See* Reynolds v. Sims, 377 U.S. 533, 578 (1964) (acknowledging potential line-drawing difficulties). "No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both." *Id.* at 621 (Harlan, J., dissenting).

29. *Id.* at 583.

30. *Id.* at 566.

31. In a criticism of the Court's application of the "one person, one vote" rule in *Lucas*, Justice Stewart commented that "the Court says that the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic." *Lucas*, 377 U.S. at 750 (Stewart, J., dissenting).

enforced the representation norm. *Reynolds* should have signaled to state legislatures that the Court might be more accommodating if it could be convinced that its fears of legislative self-dealing were unfounded.

The Court has since retreated from *Reynolds* to some extent. The Court has held that the "one person, one vote" principle does not apply in the context of special voting districts.[32] Concerns for legislative entrenchment in such districts presumably are not as great. Courts now look to a variety of factors to determine whether to permit deviations from the "one person, one vote" principle in elections at the local level.[33] Thus, when the Court overenforces a constitutional norm, as in *Reynolds*, the Court sends the flipside of the signal sent in *Garcia* – it may narrow the protection of the underlying right in future cases.[34] Both underenforcement and overenforcement of a constitutional norm spur a dialogue among the Court and other institutional actors regarding the appropriate sphere of protection for the implicated constitutional right.

Viewing the Supreme Court as an enforcement agency leads to striking consequences. To the extent that the Court, because of institutional and federalism concerns, *under*enforces a constitutional holding as in *Garcia*, legislators, and perhaps lower court judges, should be free to adopt different interpretations of the constitutional text.[35] The Court's avowal of limitations on its own authority should carry with it a recognition of a more robust interpretive role for other institutional actors.

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32. *See* Ball v. James, 451 U.S. 355, 371 (1981) (upholding voting restrictions in context of water reclamation district); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 734-35 (1973) (upholding voting restrictions in water storage district).

33. *See* Plowman v. Massad, 61 F.3d 796, 798 (10th Cir. 1995) (upholding geographical districting for election to state dental board); Kessler v. Grand Cent. Dist. Management Ass'n, 960 F. Supp. 760, 775-76 (S.D.N.Y. 1997) (upholding voting restrictions for election to Board of Directors of Grand Central District Management Association); Rice v. Cayetano, 963 F. Supp. 1547, 1555-58 (D. Haw. 1997) (upholding voting restrictions for election for Trustees of Office of Hawaiian Affairs). *See generally* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

34. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 196 (1988) (justifying prophylactic rules on basis that they reduce risk of improper action by state and local officials).

35. The political question doctrine functions in a similar way. The Court often permits and even invites other political actors to interpret particular constitutional terms. *See* Nixon v. United States, 506 U.S. 224, 226-30 (1993) (deferring to Senate's construction of what it means under Article I, § 3 to "try" impeachments). *See generally* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (commenting on political question doctrine); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988) (same); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985) (same).

On the other hand, if the Court has *over*enforced a constitutional norm as in *Reynolds*, the Court may choose to reconsider the parameters of the constitutional norm when convinced that the institutional factors prompting the need for overenforcement have subsided.[36] Legislators may heed the overenforcement signal and impose greater protection for the underlying right in the hope that the Supreme Court will scale back the constitutional ruling. Moreover, lower courts should not mistake the overenforced constitutional norm for a ruling on the merits. Judicial decisions overtly based on factors unrelated to interpretation of the constitutional right at stake logically invite other institutional actors to participate in the ultimate refining of that right.[37]

Part II of this Article explains briefly why the Supreme Court might, for strategic reasons, underenforce constitutional rights. Whether because of its own uncertainty as to the merits or because of institutional obstacles, the Court may welcome other actors' participation in drawing the boundaries of the implicated right. The *Garcia* case presents a paradigm, but one can view other less obvious candidates as underenforcement decisions as well. The remainder of Part II focuses on the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*,[38] which, at first glance, may seem worlds apart from *Garcia*.[39] In *DeShaney*, the Court refused to hold a municipal social services department responsible under the Due Process Clause for standing by and allowing a father to beat his young son senseless.[40] In dismissing the boy's suit, the Court seemingly closed the door on all but the most extraordinary due process claims that are based on the government's failure to protect individuals from harms caused by third parties. Another reading of *DeShaney*, however, is possible. One may view *DeShaney* against the backdrop of judicial hesitancy in tort suits to secondguess governmental

36. By using the term "overenforcement," I am not suggesting that the constitutional right at stake necessarily warrants less protection. Rather, the term signifies that the Court may not afford that same level of protection when other institutional actors furnish additional safeguards. The right itself may receive similar protection, but not at the hands of the Court.

37. Readers of judicial opinions can never know for certain the role that institutional factors play in the Court's decisions. However, when the Court explicitly relies on institutional factors, it sends an unmistakable signal to the coordinate branches and the lower courts. The Court likely will have the opportunity to revisit the constitutional question that it arguably overenforced or underenforced and, at that time, to determine anew whether the prior decision interpreted the constitutional right to its conceptual limits. Arguably, one can understand the Court's decision in *City of Boerne v. Flores* in that vein. *See generally* City of Boerne v. Flores, 117 S. Ct. 2157 (1997); *infra* text accompanying notes 187-92.

38. 489 U.S. 189 (1989).

39. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).

40. *Id.* The son suffered severe brain damage as a result of the abuse. *See id.* at 203 ("The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.").

policies that implicate resource allocation decisions.[41] Institutionally, courts are poorly equipped to evaluate the budgetary and political tradeoffs that exposed the governmental entity to suit. As a result, the Supreme Court in *DeShaney* may well have underenforced the due process norm.

Part III focuses on overenforcement. In addition to *Reynolds*, the decision in *Miranda v. Arizona*[42] poses a helpful illustration.[43] Although *Miranda* warnings stem from the Fifth Amendment right against self-incrimination, the Court has justified *Miranda* warnings on institutional rather than constitutional grounds.[44] According to the Court, the warnings are necessary because of the inability or the unwillingness of state and federal officials to ensure that the right against self-incrimination is preserved.[45] In other words, the Court has left open the possibility that the *Miranda* warnings might no longer be required if state courts or legislatures imposed greater restraints on police officers.[46] *Miranda*, therefore, is not necessarily the last word on what constitutes a voluntary confession.

Part IV addresses the ramifications of predicating constitutional decisions on institutional factors. In the underenforcement context, Congress, through Section 5 of the Fourteenth Amendment, may enforce the constitutional right more robustly than has the Supreme Court in prior decisions such as *DeShaney*. As a consequence, Congress could enact legislation that permits suits in *DeShaney*-type contexts. Moreover, if decisions such as *DeShaney* do not reflect the Supreme Court's view on the merits of the constitutional norm, then state jurists arguably need not follow those cases when reviewing federal constitutional claims within their own states. Federalism concerns do not counsel caution, and the same institutional concerns underlying *DeShaney* may not be present when state judges review the actions of municipal governments or lower courts within their own jurisdictions. State judges generally are more politically accountable than their federal counterparts, and they may wish to exert tighter control upon municipal government and jury discretion. By underenforcing constitutional norms, the Supreme Court can signal solici-

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41. *See* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1002-16 (1996). Professor Armacost attempts what many must believe a futile task – rehabilitating *DeShaney*.

42. 384 U.S. 436 (1966).

43. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (expressing need to create proper safeguards to protect right against self-incrimination).

44. *Id.*

45. Oregon v. Elstad, 470 U.S. 298, 317-18 (1985).

46. For a discussion of the propriety of constitutional prophylactic rules, compare Strauss, *supra* note 34, at 195-207 with JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW, 173-222 (1993).

tude for those norms without facing the institutional costs arising from full-fledged recognition of the constitutional claims.

In the overenforcement context, Supreme Court decisions should spur legislatures and lower courts to consider alternative mechanisms to ensure protection of the constitutional right. For example, two years after the Supreme Court's ruling in *Miranda*, Congress provided in 18 U.S.C. § 3501 that a confession should be admitted into evidence "if it is voluntarily given."[47] Under this statute, the existence of a prior *Miranda* warning, though a factor in proving voluntariness, is not essential.[48] Remarkably, only one court of appeals in over thirty years has assessed the validity of § 3501.[49] Although § 3501 does not provide alternative safeguards to the warnings required in *Miranda*, other changes in the legal landscape may nonetheless suggest that the need for *Miranda* warnings has waned over time. In light of such changes, the Court should now assess whether it should dispense with or at least alter the *Miranda* warnings. And, that responsibility should be shared with lower courts in the federal and state systems, some of which already have imposed alternative safeguards to protect an individual's right against self-incrimination. Decisions overenforcing constitutional norms in *Miranda* and *Reynolds*– much like the decisions underenforcing constitutional provisions in *DeShaney* and *Garcia* – open a dialogue with other institutional actors regarding the ultimate contours of the constitutional right.

II. Underenforcement

Twenty years ago, Lawrence Sager innovatively articulated an underenforcement thesis.[50] Sager expounded the view that constitutional norms are valid even when the judiciary does not enforce the norms because of institutional concerns.[51] Focusing on the Equal Protection Clause[52] and the Takings

47. 18 U.S.C. § 3501(a) (1994).

48. *Id.* § 3501(d).

49. *See* United States v. Crocker, 510 F.2d 1129, 1136-37 (10th Cir. 1975). The dearth of judicial consideration stems in part from the government's reluctance to rely on § 3501 as authority to admit into evidence statements that were not preceded by *Miranda* warnings. *See infra* note 215 and accompanying text.

50. *See* Lawrence Gene Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-28 (1978).

51. *See id.* at 1221. Sager's thesis owes an intellectual debt to the work done by James Bradley Thayer at the end of the last century. *Id.* at 1222. Thayer eloquently championed judicial deference to the legislative branch. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151-56 (1893). Thayer's views in turn built on the work of others. *Id.* at 138-46. For a discussion of Thayer's legacy, see generally Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

Clause,[53] Sager concluded that other institutional actors – principally Congress and the state courts – are obligated to interpret such underenforced norms for themselves.[54]

The underenforcement thesis subsequently flowered in a context that Professor Sager evidently did not anticipate – the Tenth Amendment. Specifically, in *Garcia*, the Court relied on institutional factors in its decision to decline enforcement of Tenth Amendment restrictions on Congress.[55] However, in so doing, the Court stressed the obligation of other actors to give content to the right at stake.[56]

In contrast, the underenforcement thesis has not taken hold in the two individual rights contexts stressed by Professor Sager – equal protection and property rights. On one occasion, the Court explicitly rejected the significance of any underenforcement notion.[57] Nonetheless, the Court's frequent invocation of institutional constraints on its authority warrants renewed consideration of the underenforcement thesis.[58] Underenforcement may occur

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52. U.S. CONST. amend. XIV, § 1.

53. U.S. CONST. amend. V.

54. *See* Sager, *supra* note 50, at 1227-28.

55. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-57 (1985).

56. *See id.* at 551-52.

57. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981) (rejecting underenforcement notion that state court can impose greater restrictions than Supreme Court has enforced in equal protection context). Justices have adverted to the underenforcement thesis on at least one other occasion. *See* Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

58. Justice Kennedy, who wielded the pivotal vote in *Eastern Enterprises v. Apfel*, rejected the plurality's application of the Takings Clause to government regulations that did not disturb traditional property rights. Eastern Enters. v. Apfel, 118 S. Ct. 2131, 2154 (1998). He explained that "extending regulatory takings analysis to the amorphous class of cases" involving fees and taxes "would throw one of the most difficult and litigated areas of the law into confusion, subjecting states and municipalities to the potential of new and unforeseen claims." *Id.* at 2155.

In a joint dissent in *Board of County Commissioners v. Umbehr* and *O'Hare Truck Service, Inc. v. City of Northlake*, Justice Scalia stated that "[a]nother factor that suggests we should stop this new enterprise at government employment is the much greater volume of litigation that its extension to the field of contracting entails." Board of County Comm'rs v. Umbehr, 518 U.S. 668, 697 (1996) (Scalia, J., dissenting). Justice Scalia further warned that the majority opinion that forbade patronage in the independent contractor context would foster a "much greater volume of litigation." *Id.* The majority disputed not the relevance of Justice Scalia's inquiry but rather the empirical basis for his charge. It retorted that it was aware "of no evidence of excessive or abusive litigation" over other government contracting laws. *See id.* at 684.

Concern for opening the floodgates of litigation is not new. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 694-95 (1976). The litigation in *Paul v. Davis* involved tort-like injuries inflicted by municipal officials. *Id.* at 694-97. In rejecting the liberty interest claim, the Court stated that

in individual rights cases as well as in structural cases like *Garcia*, and parallel concerns of federalism and institutional resources can apply in each.

Numerous academics,[59] as well as the dissenters in *DeShaney*,[60] have derided the *DeShaney* majority for its stinting and inhumane construction of the Due Process Clause. Yet, the Court's decision can be understood to rest on institutional and federalism concerns, as well as on the Court's view of the merits. The decision arguably does not close the door on all failure-to-protect claims based on the Due Process Clause, but rather reflects the Court's enforcement strategies.

In a recent article, Professor Armacost defends the Court's decision in *DeShaney* on the ground that courts are institutionally ill-equipped to second-guess the level and the distribution of municipal services.[61] She argues that authorizing suit in the failure-to-protect context would inevitably distort a municipality's political priorities by forcing it to adopt excessive precautionary measures.[62] Her position is at least plausible. Entertaining DeShaney's claim might have forced the Court to ascertain how much money the county should have devoted to child protection services, how often child protection workers should have scheduled follow-up visits, and at what point the Winnebago County Social Services Department should have removed Joshua from his father's custody.[63] Federal judges do not have the expertise to

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if it were to recognize such a claim, then it would be "hard to perceive any logical stopping place" for such litigation. *Id.* at 698-99.

59. *See* Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENTARY 403, 403-06 (1993); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2287-97 (1990); Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078, 1086-1111; Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95, 97-106 (1994); Thomas A. Eaton & Michael Wells, *Governmental Inactions as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 111-27 (1991); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 571 (1991); Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENTARY 379, 382-401 (1993); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514-15 (1989); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 53-54; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 8-14 (1989).

60. *See* DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) ("Poor Joshua!").

61. *See* Armacost, *supra* note 41, at 1002-09.

62. *Id.* at 1009-14.

63. *See DeShaney*, 489 U.S. at 202-03. Municipal authorities had intervened to the extent of counseling the father, directing that Joshua be enrolled in day care, encouraging the father's live-in girlfriend to move out, and, at one point, removing the child from the father's care for a short period of time. *Id.* at 192-93.

evaluate the appropriate level of services that municipal child welfare departments provide.[64] Ultimately, to protect themselves from liability, municipalities might be forced to transform or even to contract out child protection services.[65]

Much of the language in the *DeShaney* opinion suggests a restrictive construction of the Due Process Clause. The Court described the Due Process Clause "as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[66] The Court also stated that the purpose of the clause "was to protect the people from the State, not to ensure that the State protected them from each other."[67] It concluded that because "the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so – though calamitous in hindsight – simply does not constitute a violation of the Due Process Clause."[68]

The Court, however, acknowledged that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care with respect to particular individuals."[69] In several contexts, the Court has recognized that governmental failures to protect individuals while they are in governmental custody violate the Constitution. In *Youngberg v. Romeo*,[70] for example, the Court concluded that the Due Process Clause requires the state to provide a minimum level of services to involuntarily committed mental patients.[71] Similarly, in *City of Revere v. Massachusetts General Hospital*,[72] the Court determined that the Due Process Clause mandates that governmental authorities provide adequate medical care to suspects in police custody who are injured during the police apprehension.[73] As the Court explained in *DeShaney*, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety."[74]

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64. In *DeShaney*, Justice Rehnquist noted that, "had [municipal authorities] moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship." *Id.* at 203.

65. *See* Armacost, *supra* note 41, at 1033-36.

66. DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 195 (1989).

67. *Id.* at 196.

68. *Id.* at 202.

69. *Id.* at 198.

70. 457 U.S. 307 (1982).

71. *See* Youngberg v. Romeo, 457 U.S. 307, 314-19 (1982).

72. 463 U.S. 239 (1983).

73. *See* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-46 (1983).

74. DeShaney v. Winnebago County Soc. Servs. Dept., 489 U.S. 189, 199-200 (1989).

Within one week after the *DeShaney* decision, the Court in *City of Canton v. Harris*[75] held that police departments could be liable for their failure to protect individuals because of the departments' inadequate training of personnel.[76] In *City of Canton*, the plaintiff alleged that police officials exacerbated her injuries by providing her with improper medical care while she was in custody.[77] The Court did not limit its decision to the custody context. Rather, the Court found that liability exists "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[78] In at least some situations, therefore, the Due Process Clause prohibits the government from withholding services or benefits in ways that cause tort-like deprivations of life, liberty, or property.[79]

As several commentators have noted, if the Due Process Clause requires affirmative governmental acts to protect individuals while they are in governmental custody, then the same theory should apply to failure-to-protect claims arising outside of physical custody.[80] *City of Canton,* in fact, suggests as much.[81] Moreover, nothing in the Due Process Clause exonerates the government from protecting individuals from third parties. Indeed, the Court has imposed affirmative government obligations under the Due Process Clause in other contexts.[82] Determining the required level of care in governmental custody cases may be easier than defining that standard in noncustody cases, but the conceptual framework should be the same for both. *DeShaney*, therefore, differs from the other cases in degree, not in kind.

The Supreme Court's subsequent decision in *Collins v. City of Harker Heights*[83] supports the view that the Court stayed its hand in *DeShaney* at least

75. 489 U.S. 378 (1989).

76. *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989). To recover in cases alleging a failure to train, plaintiffs must satisfy an intent standard of deliberate indifference. *Id.* at 389.

77. *See id.* at 381-82 (discussing plaintiff's claim).

78. *Id.* at 388.

79. The Supreme Court also has recognized that failure-to-protect claims under the Eighth Amendment may exist in prison cases. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 832-47 (1994) (discussing prison liability for Eighth Amendment violations).

80. *See* Eaton & Wells, *supra* note 59, at 122-23; Strauss, *supra* note 59, at 63-68. If the Fourteenth Amendment imposes a duty upon the government to protect individuals against violence, then the *DeShaney* decision can be defended only on institutional grounds. *See* Heyman, *supra* note 59, at 570-71.

81. *City of Canton*, 489 U.S. at 386-87.

82. *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872-86 (1986); *see also* Bandes, *supra* note 59, at 2323-26 (critiquing unhelpful distinction between affirmative and negative rights); Richard L. Hasen, Comment, *Efficiency Under Information Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 436-37 (1990) (addressing speculative nature of distinction between action and inaction).

83. 503 U.S. 115 (1992).

partially for institutional reasons.[84] In *Collins*, the widow of a city employee alleged that the city's failure to keep its workplace free from unreasonable hazards violated the Due Process Clause. The employee was asphyxiated while working on underground sewer lines. In affirming the lower court's dismissal of the claim, the Court explained that:

> [d]ecisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.[85]

Federal courts, through the Due Process Clause, should not review municipal policy choices best left to majoritarian governance. *Collins* manifests judicial reluctance to use scarce judicial resources to become embroiled in such tort-like contexts.[86] The decision arguably does not demarcate the limits of the Due Process Clause. The Court decided to conserve its enforcement resources for another day.

Contrast *Collins* with the Supreme Court's decisions that address a due process right to reproductive autonomy. In cases such as *Webster v. Reproductive Health Services*[87] and *Planned Parenthood v. Casey*[88] – decided in the same terms as *DeShaney* and *Collins*, respectively – the Court rejected, in part, substantive due process claims on the merits without mention of the institutional constraints facing the Court.[89] The Court confined the substan-

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84. *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (declining to expand due process to nonprocedural government action). At one point, the Court in *DeShaney* suggested that its holding reflected an understanding that the Due Process Clause "does not require the State to provide its citizens with particular protective services." DeShaney v. Winnebago County Soc. Servs. Dept., 489 U.S. 189, 196 (1989). Rather, it is for the state, "through its courts and legislatures, [to] impose such affirmative duties of care and protection upon its agents as it wishes." *Id.* at 202.

85. *Collins*, 503 U.S. at 128-29. In *County of Sacramento v. Lewis*, the Court followed *DeShaney* and *Collins* and declined to recognize a due process claim that arose from a police cruiser chase. *See* County of Sacramento v. Lewis, 118 S. Ct. 1708, 1713-14 (1998). The Court reached its decision by focusing on the police officers' need for instantaneous judgment when they are pursuing a suspect. *Id.* at 1720. When those institutional concerns are not present, however, the Court suggested that a due process suit – as in *Canton* – might be proper. *See id.* at 1716-18; *supra* notes 75-79 and accompanying text.

86. *Collins*, 503 U.S. at 125.

87. 492 U.S. 490 (1989).

88. 505 U.S. 833 (1992).

89. *See* Planned Parenthood v. Casey, 505 U.S. 833, 967-79 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490, 509-11 (1989).

tive due process right in the two cases because it deemed the state's interest in regulation paramount, not because it feared secondguessing the legislative or municipal actions that restrict access to abortion. In contrast to the failure-to-protect claims, the Court has not underenforced substantive due process claims involving privacy.

A. Institutional Concerns

Several instructive analogies shed light upon the Supreme Court's analysis in *DeShaney*. In her recent article, Professor Armacost relies on the public duty cases in which state court judges, and sometimes legislatures, have crafted doctrines to limit the review of tort actions against municipalities that allege a failure to protect.[90] As the court stated in *Riss v. City of New York*,[91] "[f]or the courts to proclaim a new general duty of protection based on specific hazards would inevitably determine how the limited public resources of the community should be allocated and without predictable limits."[92] Professor Armacost carefully argues that state courts have refused to review such claims in order to avoid secondguessing the level and the distribution of municipal services.[93] On the other hand, courts permit claims to proceed if they avoid excessive intrusion upon local governmental policy. Forcing a municipality to expend more funds on one area of service ineluctably would have a ripple effect on other areas. Judges are poorly equipped to monitor the complex budgetary process that underlies much municipal policymaking.

Two analogies at the federal level further illustrate the Supreme Court's reluctance to secondguess administrative policy that implicates sensitive financial and distributive issues. First, the Court has determined that the discretionary function exception in the Federal Tort Claims Act (FTCA)[94] bars any tort claim that challenges a governmental action that implicates the allocation of agency resources. Second, it has found challenges to an agency's failure to act presumptively unreviewable under the Administrative Procedure Act (APA).[95] Although neither context raises questions of constitutional

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90. *See* Armacost, *supra* note 41, at 995-1002; *see also* Eaton & Wells, *supra* note 59, at 128-30. Doctrinally, municipalities generally retain immunity in the absence of a special relationship between the municipality and the victim.

91. 240 N.E.2d 860 (N.Y. 1968).

92. Riss v. City of New York, 240 N.E.2d 860, 860-61 (N.Y. 1968) (dismissing suit by woman who alleged that police failed to protect her from former boyfriend despite her several requests for protection).

93. *See* Armacost, *supra* note 41, at 1012 (addressing courts' hesitation to look into political decisions behind service allocations).

94. 28 U.S.C. § 2671 (1994).

95. *See infra* notes 109-16 and accompanying text.

propriety, the Supreme Court has blocked review of administrative action in both contexts without denying that critical individual rights existed. Indeed, the Court has recognized that the judge-made bars to review can be overturned by legislative action and has indicated that it would review such claims against the government upon congressional direction.

Consider the discretionary function exception in the FTCA. Although Congress waived immunity for many negligence suits, it excluded claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[96] Many claims under the FTCA mirror the claims that were raised in *DeShaney* which challenged the government's failure to take appropriate protective measures. For instance, in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*,[97] one of the plaintiffs alleged that employees of the Federal Aviation Administration (FAA) negligently certified the installation of a cabin heater fuel line.[98] Because the FAA's method of inspection stemmed from financial policy concerns, the Court determined that the discretionary function exception shielded the employees' inspection activities.[99] Similarly, lower courts have held the government immune from challenges that were based on the government's failure to protect individuals from third parties. For instance, in *Judy v. Department of Labor*,[100] the court of appeals found that the exception barred a challenge based on the Occupational Safety and Health Agency's allegedly negligent inspection of a hydraulic shaping press at the plaintiff's workplace.[101] As long as the government's action is "grounded in social, economic, and political policy,"[102] namely how best to ensure safety, the discretionary function exception bars

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96. 28 U.S.C. § 2680(a).

97. 467 U.S. 797 (1984).

98. The Court in *Varig Airlines* addressed companion cases. *See* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814-15 (1984).

99. *Id.* at 820-21.

100. 864 F.2d 83 (8th Cir. 1988).

101. Judy v. Department of Labor, 864 F.2d 83, 84-85 (8th Cir. 1988) (refusing to review claim based on negligent inspection of hydraulic press); *see* Piechowicz v. United States, 885 F.2d 1207, 1210 (4th Cir. 1989) (alleging failure to protect government witness from third-party harm); Lively v. United States, 870 F.2d 296, 297 (5th Cir. 1989) (affirming plaintiff longshoremen's suit against United States that alleged negligence in failing to warn plaintiffs of asbestos dangers); United States Fidelity & Guar. Co. v. United States, 837 F.2d 116, 122-23 (3d Cir. 1988) (denying recovery when plaintiff alleged that Environmental Protection Agency was negligent in cleaning up third party's toxic waste site); *see also* Smith v. United States, 375 F.2d 243, 244-45 (5th Cir. 1967) (alleging failure to protect juror).

102. *Varig Airlines*, 467 U.S. at 814.

the action.[103] The Court's refusal to review such claims, however, is not tantamount to a finding that the government's failure to protect was reasonable.

Courts, however, can review agency actions that stem from resource allocation questions when Congress so directs. Congress can eliminate or amend the discretionary function exception and expose the government to more intrusive review. The Court has never intimated that the discretionary function exception is constitutionally mandated. Congress determines the extent of judicial oversight over administrative policy.

Even absent revision of the statute, the Court has stated that it will not apply the discretionary function exception if the plaintiff demonstrates that the agency's action transgressed a statute or regulation. Thus, in *Berkovitz v. United States*,[104] the plaintiff suffered severe injury after a polio inoculation.[105] The plaintiff alleged in part that federal officials violated a federal regulation by releasing a specific lot of polio vaccine that did not comply with government standards.[106] The Court suggested that, if the officials had "no rightful option but to adhere to the directive,"[107] then the exception did not apply. Regulations, like statutes, permit review even when "social, economic, and political policy" is implicated.[108]

A similar dynamic can be seen in cases that challenge an agency's refusal to act under the APA,[109] which precludes review of matters "committed to agency discretion by law."[110] In *Heckler v. Chaney*,[111] the plaintiffs challenged the Food & Drug Administration's alleged failure to enforce the Federal Food, Drug and Cosmetic Act.[112] The plaintiffs asserted that the drugs had not been tested for use in lethal injections and that the use of the drug for capital punishment constituted an "unapproved use of an approved drug."[113] The Court declined to review the action, finding agency failures to enforce presumptively

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103. *Id.* at 819-20.

104. 486 U.S. 531 (1988).

105. *See* Berkovitz v. United States, 486 U.S. 531, 533 (1988).

106. *Id.*

107. *Id.* at 536; *see* Collins v. United States, 783 F.2d 1225, 1230 (5th Cir. 1986) (denying application of discretionary function exception to Mine Safety and Health Administration official's decision to reopen mine).

108. *See* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

109. 5 U.S.C. § 500 (1994).

110. *Id.* § 701(a)(2).

111. 470 U.S. 821 (1985).

112. *See* Heckler v. Chaney, 470 U.S. 821, 823 (1985).

113. *See id.*

unreviewable.[114] Justice Rehnquist explained in part that:

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[115]

Courts are poorly equipped to secondguess the priorities supporting the decision against enforcement.[116] Therefore, when confronted with a challenge to the agency's allocation of scarce enforcement resources, the courts should ordinarily decline review. As in the FTCA context, the judicial decision not to review the merits of the agency's action does not suggest approval.

Congress, however, can override the presumption and direct review despite the resource allocation questions involved. The *Chaney* presumption, much like the *Varig Airlines* decision, reflects the Supreme Court's hesitancy to become involved in the myriad resource allocation questions confronting bureaucracies. Should Congress authorize review, then courts must grapple with resource questions, irrespective of the agency's presumed superior expertise. As the Court stated, "we essentially leave to Congress, not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable."[117]

Consider the plaintiffs' challenge in *National Wildlife Federation v. EPA*[118] to the Environmental Protection Agency's (EPA) refusal to initiate proceedings to withdraw a state's enforcement responsibility for safe drinking water after finding excessive contaminants.[119] Despite the resource allocation

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114. *Id.* at 838.

115. *Id.* at 831.

116. Using similar reasoning, the Supreme Court refused to review the Indian Health Service's decision to reallocate resources from the Indian Children's Program in the Southwest, which provided diagnostic and treatment services to handicapped children, to a nationwide effort to assist such children. *See* Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("Like the decision against instituting enforcement proceedings . . . an agency's allocation of funds from a lump-sum appropriation requires a complicated balancing of a number of factors which are peculiarly within its expertise." (citations omitted)).

117. *Chaney*, 470 U.S. at 838.

118. 980 F.2d 765 (D.C. Cir. 1992).

119. *See* National Wildlife Fed'n v. EPA, 980 F.2d 765, 769 (D.C. Cir. 1992) (explaining challenge to EPA's promulgation of rule under Safe Drinking Water Act, 42 U.S.C. § 300f (1994)).

issues implicated, the court of appeals concluded that the challenge to the agency's failure to begin proceedings was reviewable under the APA because Congress had withheld enforcement discretion from the agency. The statute compelled the agency to begin an enforcement action upon finding specified contaminants in the water supply.[120]

Thus, the FTCA and the APA examples illuminate the *DeShaney* decision. *DeShaney* plausibly rests not on interpretation of the Due Process Clause, but on the Court's perception of its institutional limits and on its consequent decision not to enforce the Due Process Clause fully. Federal courts should not secondguess municipal agency resource allocation decisions in the absence of a congressional directive.[121] However, *DeShaney* should not be construed as a definitive construction of the Constitution any more than *Varig Airlines*[122] represents a primer on negligence.

B. Federalism Limits

Unlike the FTCA and the APA examples, the federal court challenge in *DeShaney* directly implicated federalism values, providing further reason for federal judicial caution. Federal courts cannot review failure-to-protect claims without secondguessing the political priorities of a municipality.[123] Our federal system presupposes that municipalities can govern free from excessive federal judicial intrusion.[124] Federal judicial micromanagement prevents local governments from serving the needs of their constituents and from experimenting with different levels and packages of municipal services.[125] Moreover, states cannot "serve as a 'counterpoise' to the power

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120. *See id.* at 773-74; *see also* Davis Enters. v. EPA, 877 F.2d 1181, 1183-86 (3d Cir. 1989) (suggesting that courts can review agency decisions that are otherwise unreviewable under the APA for inconsistency with another statutory command).

121. Most challenges to governmental inaction have some connection to budgetary questions, however attenuated. Some challenges, however, can undoubtedly be reviewed by courts without intruding impermissibly into municipal governance. But, courts may lack confidence in their ability to make case-by-case evaluations in the absence of a congressional directive.

122. *See supra* notes 97-99 and accompanying text.

123. Sovereign immunity bars failure to protect claims directed at federal agencies.

124. *Cf.* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in part and dissenting in part) ("If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.").

125. *Cf.* New State Ice Co. v. Liebmann, 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; and try novel social and economic experiments without risk to the rest of the country.").

of the federal government"[126] if federal court supervision undermines states' initiatives.[127]

DeShaney plausibly reflects the inability of federal courts to consider failure-to-protect claims without secondguessing, and ultimately influencing, the municipality's political priorities. Respect for state and local governmental politics counsels restraint. *DeShaney*, therefore, may not turn solely on the merits of the due process claim presented.

Judicial conservatism in *DeShaney* may parallel the Supreme Court's curtailment of habeas remedies in federal court. Among other changes,[128] the Supreme Court has refused to secondguess a state court conviction unless the petitioner can demonstrate that any asserted constitutional violation was recognized at the time of the alleged infraction.[129] Federal courts will intervene not when constitutional error exists, but only when the error reflects inexcusable misjudgment on the part of state officials. Moreover, the petitioner must demonstrate that any constitutional error at a state court trial "had a substantial and injurious effect or influence in determining the jury's verdict."[130] Denial of a habeas petition often reflects federalism concerns more than the Court's view of the merits of the federal constitutional claim. Apart from the *DeShaney* context, therefore, federal courts resolve challenges raising federal constitutional claims without definitively construing the constitutional rights invoked.

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126. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239 n.2 (1985) (discussing Framers' beliefs about states' role in governmental system).

127. For an exploration of federalism values, see generally Symposium, *Federalism's Future*, 47 VAND. L. REV. 1205 (1994).

128. For instance, the Court has eased a state's burden to demonstrate that a state court decision rests on independent and adequate state grounds. *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991) (construing ambiguous state court decision to rest on state procedural grounds, therefore precluding federal court review); Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (holding that most claims dismissed in state court for procedural default are barred from federal court review). The Court has also made it more difficult to relitigate factual issues decided in state court. *See* Wright v. West, 505 U.S. 277, 306 (1992) (Kennedy, J., concurring) (commenting that *Teague v. Lane* may signal that both questions of law and mixed questions of law and fact are tested in federal court by reasonableness standard); Keeney v. Tamayo-Reyes, 504 U.S. 1, 6-12 (1992) (increasing showing needed to obtain evidentiary hearing in federal court).

129. *See* Teague v. Lane, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (emphasis in original)); *see also* Butler v. McKellar, 494 U.S. 407, 409 (1990) (applying *Teague*). Congress has incorporated *Teague* into its revised habeas framework. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (1996).

130. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 776 (1946)) (discussing standard of review for constitutional error in state court cases).

Federalism concerns support the Supreme Court's reluctance in *DeShaney* to enmesh the judiciary in controversies over the level and the distribution of municipal services. *DeShaney* resembles other recent Supreme Court decisions that limit the ability of individuals to challenge local policies in federal court.[131] Just as in the habeas corpus context, a judgment against a litigant for failure to protect does not decide the merits of the constitutional claim. *DeShaney* thus leaves elaboration of due process protections to other actors within our political system. The actors may interpret the Due Process Clause more broadly than did the Supreme Court in *DeShaney*, unfettered by the Court's federalism and institutional concerns.[132]

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131. The Court has raised substantial justiciability hurdles to prevent much litigation of constitutional questions. *See, e.g.*, Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1068-69 (1997) (dismissing civil rights challenge to state constitutional provision for lack of standing and justiciability); Lewis v. Casey, 518 U.S. 343, 354-58 (1996) (placing substantial obstacles before inmates who challenge inadequate prison law libraries); City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that plaintiff lacked standing to challenge municipal policy of using chokeholds to subdue dangerous suspects); Rizzo v. Goode, 423 U.S. 362, 372-73 (1976) (concluding that challenge to allegedly unconstitutional practices of Philadelphia police department was nonjusticiable).

132. Also, in *BMW of North America, Inc. v. Gore*, the Court for the first time upheld a substantive due process challenge to a punitive damages award. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 585-86 (1996). The Court in *Gore* concluded that the two million dollar award (reduced by the Alabama Supreme Court through remittitur from four million dollars) was excessive. *Id.* at 585. But the majority's opinion, as well as Justice Ginsburg's dissenting opinion, leaves room for state courts to enforce a more activist substantive due process jurisprudence in the punitive damages context.

Although the Justices in *Gore* agreed on little, they all articulated concern for displacing state control over assessment and review of the punitive damages remedy. To Justice Scalia, who dissented in *Gore*, the magnitude of the Court's undertaking was nothing short of startling: "By today's logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition." *Id.* at 607 (Scalia, J., dissenting) (emphasis in original). The federalism concern helped bolster Justice Scalia's conviction that *no* constitutional issue was implicated. *See id.* at 599 (Scalia, J., dissenting).

The majority in *Gore* did not ignore the fact that the authorization of substantive due process challenges to punitive damage awards would interfere with the civil justice systems in the several states. *See id.* at 568-69. The majority recognized that "[s]tates necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* at 568. The majority parted company with Justice Scalia in concluding that the particular award was so "extraordinary" as to warrant invalidation. *See id.* at 586 n.41.

In dissent, Justice Ginsburg echoed the federalism concerns, urging greater "respect due the Alabama Supreme Court." *Id.* at 607 (Ginsburg, J., dissenting). She argued that the Supreme Court should be loathe to intrude "into territory traditionally within the States' domain." *Id.* (Ginsburg, J., dissenting). More than the majority, she would rely upon state court justices, or state legislatures, to cure any flaws in each state's punitive damages system. *Id.* at 613-14 (Ginsburg, J., dissenting). But Ginsburg's opinion also focused on the institutional

Although *DeShaney* appears to rest on federalism and institutional concerns, the Justices may have relied on such reasoning only to bolster their construction of the Due Process Clause. Nonetheless, the language in the decision sends a message. The Justices intentionally may have signaled other actors to afford greater scrutiny to the due process rights at stake. If state courts or legislatures subsequently provide greater due process protection, they then spare the Court the necessity of intruding excessively into state and local politics. By underenforcing constitutional norms, therefore, the Court may facilitate ultimate recognition for those rights without suffering the institutional consequences of increased caseload and increased opportunity for conflict with state and local governance. Just as in *Garcia v. San Antonio Metropolitan Transit Authority*,[133] underenforcement may reflect a strategy of enforcing constitutional rights indirectly to avoid the political or the institutional pitfalls of more direct enforcement.[134]

III. Overenforcement

Underenforcement represents the Court's strategy in the face of institutional barriers to the full recognition of a constitutional right. If the obstacles to recognition instead stem from political actors, then the Court may *over*-enforce a constitutional right to protect the underlying constitutional interest. Given the political interests of state and federal legislatures, judicial intervention may be critical.

Indeed, the Court has explicitly upheld constitutional remedies that extend beyond the actual constitutional violation. For instance, in *Hutto v. Finney*,[135] the Court considered the propriety of an injunction that, in part, prevented Arkansas from isolating inmates for longer than thirty days.[136] The Court did

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obstacles confronting the Supreme Court. The Court, in Ginsburg's view, "is not well equipped for this mission." *Id.* at 612-13 (Ginsburg, J., dissenting). Benchmarks to assess the difference between an excessive and grossly excessive award are wanting. She saw the institutional challenge as more daunting in this context because "the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals." *Id.* at 613 (Ginsburg, J., dissenting). The majority retorted that the institutional "consideration surely does not justify an abdication of our responsibility to enforce constitutional protections." *Id.* at 586 n.41. But the majority then limited that "responsibility" to "an extraordinary case such as this one." *Id.* Although for different reasons, the majority would underenforce the due process guarantees as would Justice Ginsburg.

133. *See supra* notes 13-16 and accompanying text.

134. *Cf.* Barry Friedman, *When Rights Encounter Reality*, 65 S. CAL. L. REV. 735, 767-80 (1992) (arguing, in effect, that federal courts underenforce constitutional remedies in light of majoritarian pressures).

135. 437 U.S. 678 (1978).

136. *See* Hutto v. Finney, 437 U.S. 678, 680-81 (1978).

not defend the restriction solely on the ground that placement in isolation on the thirty-first day violated the Eighth Amendment's ban against cruel and unusual punishments. The Court justified the injunction instead on the ground that the bright-line rule represented "a mechanical – and therefore easily enforced – method of minimizing overcrowding."[137] Because of the difficulty in determining when conditions violated the Eighth Amendment, and in light of the Court's understandable mistrust of the Arkansas prison system,[138] the Court imposed a prophylactic remedy to help protect against future violations.[139]

Judges may protect against conduct threatening constitutional violations by formulating broad constitutional rules as well as by fashioning extensive remedies. Both approaches stem from a similar motivation. Courts may lack the resources to police unconstitutional conduct in any other way.[140] Overenforcement of a constitutional right avoids linedrawing in contexts in which courts cannot rely upon other governmental actors to protect the constitutional right asserted. When the Court chooses not to rely upon legislatures or lower courts to enforce rights – the mirror image of the underenforcement context – overenforcement presents a viable option.

The *Miranda* decision, much like the decision in *Reynolds v. Sims*,[141] constitutes a peculiar type of constitutional ruling. The Court adopted specific constitutional rules out of whole cloth that superseded prior precedent and that were only tenuously connected to the constitutional text.

Prior to *Miranda*, the Court analyzed the admissibility of confessions under a general voluntariness standard derived from the Due Process Clause.[142] *Miranda* changed the inquiry by holding that no statements arising

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137. *Id.* at 688 n.11.

138. The Court pointedly related the grisly conditions in the Arkansas facilities, which included stabbings, rapes, and primitive barracks conditions. *See id.* at 681 n.3.

139. *See id.* at 687-88; *see also* Milliken v. Bradley, 433 U.S. 267, 281-82 (1977) (stating that constitutional remedies may redress more than conditions that were determined to be in violation of Constitution).

140. For a close analogy, consider as well the Supreme Court's resolution of cases brought under the dormant Commerce Clause. Although the Court exercises the authority to invalidate protectionist measures, Congress ultimately may permit state restrictions on interstate commerce that the Court has banned. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669-70 (1981) (finding Iowa statute that limits length of vehicles on state highways unconstitutional). This ruling was overridden, in part, by amendments to the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983).

141. *See supra* notes 21-34 and accompanying text.

142. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513-15 (1963); Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Reck v. Pate, 367 U.S. 433, 434-35 (1961); Crooker v. California, 357 U.S. 433, 438-39 (1958). Courts assessed voluntariness by examining factors such as the degree of police pressure, the suspect's physical and psychological situation, and the length of questioning.

from custodial interrogation of suspects would be admissible at trial unless the suspects were first apprised of their rights.[143] The familiar four-fold warnings include that the suspect has the right to remain silent, that anything said could be used against the suspect, that the suspect has a right to the presence of an attorney, and that if indigent, the suspect has a right to an attorney at the taxpayer's expense.[144] Such safeguards were necessary, the Court reasoned, in light of the inherent coerciveness of custodial interrogations.[145] The Court did not trust law enforcement officials to honor the Fifth Amendment right that protects against self-incrimination.[146] Perhaps the Court feared that, given the social realities of the 1960s, the incentive to obtain incriminating statements would be too strong to resist. The Supreme Court has since applied the *Miranda* requirement to cases arising in the state system as well as to federal habeas corpus challenges.[147] Thus, under one reading, the *Miranda* result appears to be a constitutional requirement.

Yet, other language in *Miranda*, as well as that in subsequent cases, paints a very different picture. The Court hoped that its ruling would "encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[148] The Court further explained:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress and the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect.[149]

In subsequent cases, the Court seemingly has reaffirmed that view. For example, the Court stated in *Oregon v. Elstad*[150] that "a failure to administer

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143. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

144. *Id.* at 479.

145. *See id.* at 467 ("[W]ithout proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

146. *See id.* at 445-56 (outlining police interrogation tactics and procedures).

147. *See* Withrow v. Williams, 507 U.S. 680, 682-83 (1993) (holding that federal habeas jurisdiction extends to state prisoner's claim that rested on *Miranda* violations); *see also* Oregon v. Elstad, 470 U.S. 298, 317-18 (1985) (applying *Miranda* to case appealed from Oregon Court of Appeals).

148. *Miranda*, 384 U.S. at 467.

149. *Id.*

150. 470 U.S. 298 (1985).

Miranda warnings is not itself a violation of the Fifth Amendment."[151] Similarly, in *Michigan v. Tucker*,[152] the Court commented that *Miranda*'s "procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[153] *Miranda* may therefore constitute a prophylactic rule to protect against the admission of involuntary statements.

Institutional concerns arguably support this understanding of *Miranda*. Prior to *Miranda*, the Court had struggled in fashioning an effective test to determine the voluntariness of statements to police.[154] Given the coerciveness inherent in custodial investigations, whether physical or psychological, the Court could not reliably ascertain whether the statement had been voluntary.[155] Moreover, because of difficulties in reconstructing such interrogations,[156] bright-line rules would help "to insure that what was proclaimed in the Constitution had not become but a 'form of words,' in the hands of government officials."[157] The *Miranda* warnings responded to the Court's limited institutional ability to protect, in the custodial context, the voluntariness of a suspect's statements and the suspect's right against self-incrimination.

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151. Oregon v. Elstad, 470 U.S. 298, 306 n.1 (1985).

152. 417 U.S. 433 (1974).

153. Michigan v. Tucker, 417 U.S. 433, 444 (1974).

154. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 515 (1963).

> The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.

Id. The critical inquiry was whether the physical or the psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed." Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

155. *See* Miranda v. Arizona, 384 U.S. 436, 468-69 (1966). The Court in *Miranda* described the difficulty in making "[a]ssessments of the knowledge the defendant possessed" as to the right to remain silent. *Id.* at 468. In addition, the Court noted the "evils" present in the interrogation atmosphere. *Id.* at 456. The Court previously had explained that "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

156. The Court explained that "[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado." *Miranda*, 384 U.S. at 445. The Court also noted that "[p]rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Id.* at 448; *see id.* at 470 (arguing that presence of attorney will enhance trustworthiness of subsequent testimony regarding interrogation).

157. *See id.* at 444 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

The Court acknowledged that any overenforcement of the Fifth Amendment norm prevented states from structuring law enforcement interrogations in a different manner. To assuage the federalism problem, the Court explained that "the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[158] Thus, *Miranda* contemplates a role for states in the ultimate elaboration of the voluntariness inquiry under the Fifth and Fourteenth Amendments.

The overenforcement perspective sheds light on what otherwise poses a substantial puzzle in the Court's *Miranda* jurisprudence: If *Miranda* merely reflects a prophylactic procedural rule, how can the Court compel state courts to follow its terms?[159] The Court has disclaimed the power to impose supervisory rules on state courts. Rather, its power "is limited to enforcing the commands of the United States Constitution."[160] If *Miranda* reflects a procedural rule, the Court cannot easily justify its imposition of that rule on state courts.

Properly viewed, however, *Miranda*'s rules are not merely supervisory but are rooted in the Constitution itself. The Court can describe *Miranda* as based upon its "interpretation of the Federal Constitution"[161] despite its description of *Miranda* in cases such as *Elstad* as sweeping "more broadly than the Fifth Amendment itself"[162] because overenforced constitutional norms retain their constitutional status.[163] The Court must create doctrinal

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158. *Id.* at 490.

159. *See, e.g.*, Stansbury v. California, 511 U.S. 318, 319 (1994); Minnick v. Mississippi, 498 U.S. 146, 156 (1990); Arizona v. Roberson, 486 U.S. 675, 680-81 (1988).

160. *See* Mu'Min v. Virginia, 500 U.S. 415, 422 (1991); *see also* Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

161. Moran v. Burbine, 475 U.S. 412, 427 (1986).

162. Oregon v. Elstad, 470 U.S. 298, 306 (1985).

163. Some commentators have questioned the legitimacy of the Court's *Miranda* jurisprudence. Professor Grano, for instance, has argued extensively that the Court lacks the power to impose what he terms "prophylactic rules" of procedure on the states. *See* GRANO, *supra* note 46, at 173-98. When these prophylactic procedural rules are tied so closely to the exercise of a constitutional right, however, the legitimacy objection recedes. The Court's power to resolve constitutional questions confers upon it the authority to craft constitutional doctrine, and the necessity to formulate doctrine inevitably includes enforcement concerns. Like the choice between standards and bright-line rules, the decision whether to overenforce a constitutional right stems in part from concern over whether others will respect the constitutional norm in the future. Overenforcement, therefore, represents an efficacious means for the Court to ensure sufficient protection for an underlying norm that might otherwise be eroded due to political officials' intransigence.

rules for lower courts and political officials to follow. Enforcement considerations properly influence a great deal of constitutional decisionmaking.[164] The Court's enforcement strategy includes forging rules to protect against future incursions of the right at stake.

The Court's decision in *Withrow v. Williams*[165] can be understood in like vein.[166] In *Williams*, the Court held that a state prisoner who alleges a *Miranda* violation states a constitutional claim that is cognizable on federal habeas review. Unlike the exclusionary rule crafted under the Fourth Amendment,[167] failure to heed the *Miranda* warnings constitutes a violation of "federal law" or the "Constitution" for purposes of the habeas statute. The Court explained that "prophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental trial right."[168] The overenforcement perspective helps make sense out of the Court's otherwise conflicting pronouncements with respect to the voluntariness of statements during custodial interrogations. Prophylactic or not, the *Miranda* warnings are based on the Constitution and they stem from the Court's enforcement choice to create bright-line rules to facilitate compliance with the constitutional right to be free from coercive interrogation. Thus, the Court overenforced the Fifth Amendment norm to promote law enforcement officials' respect for the constitutional rights implicated in custodial interrogation.

IV. Ramifications of the Enforcement Perspective

If *DeShaney* and *Miranda* can be understood in part on institutional grounds, then other actors within our system remain free to interpret the Due Process and Self-Incrimination Clauses to different effect. Of principal significance, Congress and (perhaps) lower courts can reassess for themselves the scope of the failure-to-protect claim rejected in *DeShaney* and the procedural framework mandated in *Miranda*.

In our system of governance, judges do not own a monopoly on constitutional interpretation. Legislators and administrators also interpret the Constitution while performing their functions. Past judicial interpretation may guide

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164. The political question doctrine presents a paradigm. *See supra* note 35.

165. 507 U.S. 680 (1993).

166. *See* Withrow v. Williams, 507 U.S. 680, 683 (1993).

167. *See* Stone v. Powell, 428 U.S. 465, 479 (1976) (distinguishing Fourth Amendment exclusionary rule as one designed to deter illegal searches and seizures).

168. *Williams*, 507 U.S. at 691 (citations and emphasis omitted). In addition, even if *Miranda* claims were not cognizable on habeas, the petitioners could still bring due process claims based on the same factors that the Court hoped to avoid by mandating *Miranda* warnings. *Id.* at 693.

them, but the judicial gloss is binding on legislators and administrators only in particular cases and controversies.[169]

A. Congress and Section 5 of the Fourteenth Amendment

Congress might disagree with the Court's decision in *DeShaney* for a variety of reasons. As an initial matter, it might not accept the Court's interpretation of the Due Process Clause.[170] Moreover, Congress does not confront the same institutional and federalism constraints as does the Court. With respect to federalism concerns, Congress may be more willing to secondguess municipal or state juridical discretion because its members are more accountable to states and municipalities and, presumably, more sensitive to their needs.[171] Members of Congress may be more familiar with the state and local interests that enforcement of the federal rights threatens, and their judgment as to the significance of those interests may diverge from that of the Court.[172] In addition, Congress need not fear the same institutional consequences from encouraging suit because any proliferation of lawsuits will not tap Congress's administrative resources directly. As a result, Congress might determine that a more expansive interpretation of the Due Process Clause is warranted.

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169. *See* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 747 (1985) ("Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221-27 (1994) (discussing shared power among legislative, judicial, and executive branches to "say what the law is"); Neal E. Devins, *The Supreme Court and Constitutional Democracy*, 54 GEO. WASH. L. REV. 661, 662 (1986) (book review) ("Congress and the executive are undoubtedly authorized to interpret the Constitution.").

170. Members of Congress obviously do not always consider independently the constitutionality of legislative proposals. They may prefer courts to make the tough calls in disputed areas. Nonetheless, as a historical matter, there is evidence of quite diligent efforts by Congress to interpret the Constitution and it remains within Congress's prerogative to legislate based upon members' views of constitutional propriety. *See supra* note 169.

171. *See generally* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (analyzing Court's role in democratic political process); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982) (discussing state autonomy as check on congressional power); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341 (discussing status of state-national relations after *Garcia*); Herbert 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) (discussing impact of states on development of national legislation).

172. *See* Wechsler, *supra* note 171, at 548 (noting, for instance, that "the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control").

The tension between decisions of the Court and congressional interpretation of the Due Process Clause is not merely of academic interest. For example, assume that Congress wishes to create a cause of action for individuals injured by a state or local government's failure to protect them from harm at the hands of identifiable third parties. Can Congress through legislation reverse *DeShaney* and subject municipalities to suit for failure to protect their citizens?

Congress might not be able to subject municipalities and states to suit for at least three reasons. First, the Supreme Court's decision in *United States v. Lopez*[173] augurs a far more restrictive realm of congressional power under the Commerce Clause.[174] Subjecting municipalities to suit for their failure to protect individuals from harm may lack a sufficient nexus to interstate commerce.[175] Second, the congressional action, even if consistent with Commerce Clause principles, may, regardless of *Garcia*, violate the Tenth Amendment. Congress may not be able to intrude so markedly into a local government's allocation and distribution of benefits by forcing increased provision of municipal services.[176] Finally, although the Eleventh Amendment does not bar Congress from subjecting municipalities to suit in federal court, Congress cannot, under the Commerce Clause, subject state governments to suit in a federal forum, at least when damages are at stake.[177]

Congress's power to enact such a cause of action, however, might instead rest upon Section 5 of the Fourteenth Amendment. Section 5 provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[178] Thus, Congress might attempt to enforce the Due Process Clause by subjecting municipalities to suit for their failure to protect citizens from known harms, just as § 1983 currently subjects municipalities to suit in other contexts.[179] How can Congress act to enforce due process guarantees that the Court claims do not exist?[179]

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173. 514 U.S. 549 (1995).

174. *See* United States v. Lopez, 514 U.S. 549, 560 (1995).

175. *See id.* (finding that only "[w]hen economic activity substantially affects interstate commerce [will] legislation regulating that activity . . . be sustained").

176. *See* Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (finding unconstitutional federal statue that required local law enforcement officials to conduct background checks on handgun purchases); New York v. United States, 505 U.S. 144, 188 (1992) (finding that Tenth Amendment prohibited Congress from commandeering states in regulatory endeavor); *see also* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998) (affirming decision to strike down part of Driver's Privacy Protection Act); ACORN v. Edwards, 81 F.3d 1387, 1394 (5th Cir. 1996) (striking down mandatory steps imposed on states under Lead Contamination and Control Act of 1988).

177. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996) (concluding that Congress lacks power under Commerce Clause to subject states to suit in federal court).

178. U.S. CONST. amend. XIV, § 5.

179. Congress can subject states to suit when it acts pursuant to Section 5 of the Fourteenth

In *Katzenbach v. Morgan*,[180] the Supreme Court upheld a federal requirement that prohibited states from using English literacy tests to prevent natives of Puerto Rico from voting.[181] The Court had previously acknowledged that the Fourteenth Amendment did not itself prohibit states from conditioning the eligibility to vote on literacy tests.[182] In *Morgan*, the Court did not reach the question of whether New York's literacy requirement, as applied, violated the Equal Protection Clause.[183] Instead, the Court upheld the federal enactment on the ground that the Court would defer to Congress's determination that Section 4(e) of the Voting Rights Act was an appropriate means of enforcing the Equal Protection Clause.[184] More recently, the Court in *City of Boerne v. Flores*[185] reiterated that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[186]

In *City of Boerne*, however, the Court also stated that Congress's interpretive role under Section 5 was limited.[187] The Court explained that, although Congress "has been given the power to 'enforce'" it has not been given "the power to determine what constitutes a constitutional violation."[188] The

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Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976) (upholding attorney's fee award against state because Civil Rights Attorneys Fee Act was based on Section 5 of Fourteenth Amendment).

180. 384 U.S. 641 (1966).

181. *See* Katzenbach v. Morgan, 384 U.S. 641, 643 (1966) (upholding Section 4(e) of Voting Rights Act of 1965).

182. *See* Lassiter v. Northampton Election Bd., 360 U.S. 45, 50 (1959) (finding that English language literacy requirement did not violate either Fourteenth or Fifteenth Amendment).

183. *Morgan*, 384 U.S. at 649.

184. *Id.* at 653-56. For a sampling of commentary on Congress's Section 5 powers, see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

185. 117 S. Ct. 2157 (1997).

186. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2163 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

187. *Id.*

188. *Id.*

Court concluded that "RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[189] Legislators enjoy the power to interpret the Constitution for themselves, yet the Court has no apparent reason to defer subsequently to legislation that is based on a constitutional interpretation different than its own.[190]

The underenforcement thesis, however, provides a different perspective. If the Court has underenforced the Due Process Clause for institutional and federalism reasons, Congress can prohibit conduct pursuant to Section 5 even if the Court has previously held that due process challenges to that conduct are not actionable in federal court.[191] Congress's interpretation would not supersede that of the Court because the Court's initial interpretation did not define the outer boundaries of the right at stake. Thus, in *City of Boerne*, the Court invalidated the legislation only after determining – despite possible arguments to the contrary[192] – that its prior construction of the Free Exercise Clause was not based on institutional or federalism factors. If Congress disagrees with the Court's decision in *DeShaney*, Section 5 of the Fourteenth Amendment may provide a vehicle with which it can remedy the Court's

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189. *Id.* at 2170.

190. The Court left open some of the perplexing questions that have long surrounded Congress's Section 5 powers. For instance, is Congress institutionally better positioned to determine which measures are necessary to enforce rights protected under the Fourteenth Amendment? Should courts defer to congressional interpretations of the Fourteenth Amendment when such interpretations *dilute* the enforcement otherwise attainable in court? The Court in *Morgan* stated that it was willing to defer only when Congress enhanced protection for Fourteenth Amendment rights. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). It explained that although Congress enjoyed discretion in determining how best to enforce equal protection guarantees, it could not "restrict, abrogate, or dilute those guarantees." *Id.* at 651 n.10.

191. *See* Sager, *supra* note 50, at 1239-42; *see also* McConnell, *supra* note 1, at 185-88.

192. *See* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993) (arguing that institutional concerns were central to Court's prior Free Exercise Clause jurisprudence). Indeed, the Court in *Department of Human Resources v. Smith* noted that applying a compelling interest test required it to ascertain whether the state legislation that prevented the individual from observing religious principles was "'central' to the individual's religion," which is like forcing the Court to engage in "the unacceptable 'business of evaluating the relative merits of differing religious claims.'" Department of Human Resources v. Smith, 494 U.S. 872, 886-87 (1990) (citation omitted).

The determination of what decisions address constitutional claims to their full conceptual limits is not free from controversy. As part of its responsibility to decide cases and controversies, the Court must decide whether a constitutional adjudication in a prior decision was underenforced or overenforced. Irrespective of the ultimate resolution of the constitutional question, the intervening dialogue with lower courts and legislatures will have aided the Court in its task.

forbearance.[193] Congress, after all, in other contexts can provide more rights than those recognized by the Supreme Court.[194] Just as enforcement agencies rely on other entities, principally private parties,[195] to enforce statutory provisions, the Supreme Court also at times can rely on Congress to help protect constitutional rights.

B. Congress's Power to Restrict Overenforcement Decisions

Along with the power to expand protection of rights through Section 5 of the Fourteenth Amendment, Congress should be able to alter the means for protecting any right *over*enforced by the Supreme Court. An overenforced norm leaves room for other institutional actors to protect the underlying constitutional right in a different way. If adequate safeguards exist, the Court can reassess its prior ruling and can limit judicial protection for the right at stake. If Congress requires police to record electronically all custodial interrogations,[196] for instance, the Court should reassess the continuing need for

193. Similarly, consider whether Congress can adopt a tort reform measure that circumscribes the award of punitive damages nationwide, for example, to a multiple of compensatory damages received. That measure could rest on Congress's Commerce Clause authority. Legislative proposals to date have evidently rested on that basis. In the 104th Congress, for example, two Senators introduced a bill to limit all punitive damages awards to a multiple of three times the "economic injury on which the claim was based or $250,000," whichever figure is greater. Lawsuit Reform Act of 1995, S. 300, 104th Cong. § 9(a). However, Congress's Commerce Clause authority might not extend to all punitive damages contexts. For example, it is difficult to perceive the nexus to interstate commerce when a state defendant is sued for conduct that occurred solely within that jurisdiction. To remove doubts, Congress could predicate the tort reform measure on Section 5 of the Fourteenth Amendment. In the absence of the institutional constraints confronting the Court, Congress might adopt a more robust view of due process protections that shield litigants from excessive punitive damages awards. The Court should subsequently defer to any congressional interpretation of the claim that is plausible.

194. For example, Congress can direct that greater protection be afforded litigants who are defending against punitive damages claims, despite the discretion otherwise afforded juries under common law systems. Both Houses of Congress voted to implement such an approach through passage of the Common Sense Legal Reforms Act of 1995. H.R. 10, 104th Cong. § 103(c)(2) (limiting punitive damages in product liability cases to three times actual economic injury or $250,000, whichever is greater).

195. Private enforcement of public rights is pervasive, including the Clean Water Act, the Securities Exchange Act, and the False Claims Act. *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 84-93 (1990) (illustrating various delegations to private individuals and groups).

196. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486 (1996) (suggesting, as have others, videotaping alternative); Yale Kamisar, Brewer v. Williams*: A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 233-43 (1977-78) (recommending judicial imposition of mandatory use of sound recording devices in

Miranda warnings, at least in the same form.[197]

Although Congress has passed no such measure, it has not greeted *Miranda* with silence.[198] In 1968, Congress passed 18 U.S.C. § 3501(a).[199] Section 3501(a) provides that "in any criminal prosecution brought by the United States," a confession "shall be admissible in evidence if it is voluntarily given."[200] The statute requires trial judges to make a threshold determination of voluntariness outside the presence of the jury and directs voluntariness to be assessed based on the totality of the circumstances. According to the statute, relevant circumstances include whether the "defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him," and whether the suspect had been advised of the right to counsel.[201] Section 3501(b) cautions that the "presence or absence" of any particular factor "need not be conclusive on the issue of voluntariness of the confession."[202]

On its face, the statute conflicts with *Miranda*. Specifically, under the statute, *Miranda* warnings are no longer mandatory but rather are relegated to factors in the overall voluntariness inquiry. Confessions that would have been thrown out under *Miranda* could well be admitted into evidence under § 3501. The legislation endeavors to recreate the doctrine that existed prior to *Miranda*. To the extent relevant, the legislative history confirms Congress's intent to supersede *Miranda*.[203] However, any congressional attempt to

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interrogations). Other options certainly are possible. Over sixty years ago, Paul Kauper suggested an alternative of bringing an arrest suspect before a magistrate for questioning. *See* Paul G. Kauper, *Judicial Examination of the Accused – A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1228 (1932).

197. Such an enactment would not be viewed universally as an adequate substitute for *Miranda* warnings. *See, e.g.*, Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 556-57 (1996).

198. Great Britain, however, has adopted such a measure. *See* ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT 39 (1993). So, too, have Alaska and Minnesota. *See* Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

199. 18 U.S.C. § 3501(a) (1968).

200. *Id.*

201. *Id.* § 3501(b).

202. *Id.*

203. *See* S. REP. NO. 90-1097, at 51 (1968). The Senate Report explained that:

> [b]y the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors.... No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted.

reverse a Supreme Court constitutional interpretation runs afoul of the bedrock principles enshrined in *Marbury v. Madison*.[204] Otherwise, as the Court recently reiterated in *City of Boerne v. Flores*, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[205]

On the other hand, if *Miranda* can be understood as overenforcing the constitutional norm, then Congress's decision to revisit the admissibility of a suspect's statements to law enforcement investigators may be appropriate. *Miranda* seemingly envisaged that possibility, and subsequent judicial decisions have stressed that *Miranda*'s rules are prophylactic.

For example, in *Michigan v. Tucker*,[206] the Court considered whether to admit testimony from a suspect about a witness who later incriminated the suspect at trial.[207] The suspect had received incomplete *Miranda* warnings.[208] The Court nonetheless upheld admission of the testimony on the ground that the police conduct at issue "did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[209] The Court in *Tucker* stressed that *Miranda* did not "require[ ] adherence to any particular solution for the inherent compulsions of the interrogation process."[210] The Court concluded that *Miranda*

> recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. . . . The suggested safeguards were not intended to create a constitutional straitjacket, but rather to provide practical reinforcement for the right against compulsory self-incrimination.[211]

Subsequent to *Tucker*, the Court has continued to describe the *Miranda* warnings as "prophylactic" rather than as "compelled" by the Fifth Amend-

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Id. Comments on the floor of the House were similar. *See, e.g.*, 114 CONG. REC. 16,066 (June 5, 1968) (remarks of Rep. Celler); 114 CONG. REC. 16,074 (June 5, 1968) (remarks of Rep. Corman).

204. 5 U.S. (1 Cranch) 137, 177 (1803).

205. City of Boerne v. Flores, 117 S. Ct. 2157, 2168 (1997) (striking down Religious Freedom Restoration Act on ground that Congress had exceeded its authority under Section 5 of Fourteenth Amendment).

206. 417 U.S. 433 (1974).

207. *See* Michigan v. Tucker, 417 U.S. 433, 437 (1974).

208. *Id.*

209. *Id.* at 446.

210. *Id.* at 444 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

211. *Id.* (citation omitted).

ment.[212] In *Oregon v. Elstad*, the Court considered whether to exclude, pursuant to the fruit of the poisonous tree doctrine, a statement not preceded by *Miranda* warnings that led to a later confession accompanied by appropriate warnings.[213] In holding that the confession was properly admitted, the Court explained that the *Miranda* rule "sweeps more broadly than the Fifth Amendment itself. . . . *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[214]

In light of such opinions, the only question that remains is whether § 3501 appropriately reflects Congress's efforts to provide alternative safeguards to ensure that statements to law enforcement investigators are voluntary. Taken in isolation, § 3501 cannot satisfy *Miranda*'s call for alternative safeguards for the simple reason that it imposes no alternative constraints upon law enforcement officials to safeguard the voluntariness of statements made by suspects. The United States Department of Justice's continuing refusal to rely on § 3501 might be explicable on the basis that it does not wish to defend the statute.[215] Rather than provide alternative safeguards, the statute attempts to restore the multifactor voluntariness approach that existed prior to *Miranda*. Articulation of a new doctrine cannot satisfy the Court's invitation for imposition of different safeguards during custodial interrogations. Thus, even if some legislation can obviate the necessity for the *Miranda* warnings, § 3501 does not qualify.

Consider, however, the United States District Court for the District of Utah's recent decision in *United States v. Rivas-Lopez*.[216] In *Rivas-Lopez*, state troopers stopped the defendant for a speeding violation.[217] After noticing what appeared to be drug residue, the troopers requested and received permission to search the rest of the vehicle.[218] The troopers advised the defendant

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212. *See, e.g.*, Davis v. United States, 512 U.S. 452, 457 (1994); Duckworth v. Eagan, 492 U.S. 195, 202 (1989); Oregon v. Elstad, 470 U.S. 298, 305 (1985).

213. *Elstad*, 470 U.S. at 300.

214. *Id.* at 306-07; *see* New York v. Quarles, 467 U.S. 649, 656 (1984) (stating that *Miranda* warnings are necessary to "reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation"); United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975) (suggesting constitutionality of § 3501).

215. The Department's position has not been consistent, but overall it reflects, at best, a reluctance to rely on the statute. *See* OFFICE OF LEGAL POLICY, UNITED STATES JUSTICE DEPARTMENT, REPORT TO ATTORNEY GENERAL ON LAW OF PRETRIAL INTERROGATION 72 (1986) (describing implementation of § 3501 as "abortive"); *see also* Davis v. United States, 512 U.S. 452, 462-65 (1994) (Scalia, J., concurring) (castigating Department of Justice for ignoring § 3501).

216. 988 F. Supp. 1424 (D. Utah 1997).

217. United States v. Rivas-Lopez, 988 F. Supp. 1424, 1426 (D. Utah 1997).

218. *Id.*

of his *Miranda* rights, and the defendant twice responded that he did not wish to waive his rights.[219] When the officer later asked whether he would talk "out of Miranda," the suspect agreed and made incriminating statements.[220]

In resolving the subsequent motion to suppress, the district court focused on whether *Miranda* or § 3501 would apply. The troopers apparently violated *Miranda*, but the question of admissibility under § 3501 was unclear. The court stated that "[t]he validity of Sections 3501(a) and (b) therefore depends upon whether *Miranda* imposes constitutional requirements or is an exercise of the Supreme Court's supervisory powers over the administration of criminal justice in the federal courts."[221] The court held that *Miranda* merely was procedural, applied § 3501, and ordered a new evidentiary hearing to explore the relevant factors.[222] The court, however, framed the wrong inquiry, as had the one court of appeals case that previously addressed § 3501.[223] Despite its procedural flavor, *Miranda* plainly has constitutional roots and has been consistently explained in that way.[224] The pertinent question, rather, is whether sufficient alternative safeguards now exist to obviate the need for the *Miranda* warnings.

Since *Miranda*, several significant changes in the legal landscape have occurred. First, in *Bivens v. Six Unknown Named Agents*,[225] the Court held that individuals could sue government officials directly for constitutional injuries suffered.[226] After *Bivens*, individuals can recover – contingent upon official immunity doctrine – for injuries arising out of coercive interrogations. For instance, in *Wilkins v. May*,[227] the Seventh Circuit remanded for trial a claim that police misconduct during a custodial interrogation – questioning at gunpoint – violated the Fifth Amendment: "Interrogation so coercive is a form of criminal procedure incompatible with the traditional liberties of the subject."[228] Coercive questioning may constitute the basis for a *Bivens* claim.[229]

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219. *Id.*

220. *Id.* at 1426-27.

221. *Id.* at 1430.

222. *Id.* at 1436.

223. *See* United States v. Crocker, 510 F.2d 1129, 1137-38 (10th Cir. 1975) (upholding trial court's decision to admit evidence under § 3501).

224. *See supra* text accompanying notes 161-68.

225. 403 U.S. 388 (1971).

226. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

227. 872 F.2d 190 (7th Cir. 1989).

228. Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989).

229. Moreover, victims of police overreaching can now sue municipalities directly under § 1983 for any unconstitutional policy. *See* Monnell v. Department of Soc. Servs., 436 U.S.

Second, Congress itself waived the federal government's immunity from such claims in a 1974 amendment to the FTCA.[230] In response to publicity surrounding several notorious raids by federal law enforcement personnel, Congress authorized suit under the FTCA for *Bivens* claims as well as for some intentional torts that are based upon acts or omissions of law enforcement officers.[231] As a result, both the government and law enforcement officers can now be sued for abusive interrogation tactics.[232]

Finally, although the data are hardly conclusive, some evidence exists that law enforcement officials abuse suspects' rights far less than during the era preceding *Miranda*. Greater training and greater stress on internal disciplinary machinery exist.[233] Moreover, there may be greater social acceptance for the right to be free from coercive interrogations than there was prior to *Miranda*. In sum, the combination of possible civil suits against federal officers, constitutional and other tort actions against the federal government, and greater internal control over law enforcement personnel may have removed the imperative for the prophylactic *Miranda* warnings.

From a process perspective, however, Congress's means of effecting change in police interrogation has been wanting. Congress did not try to impose substitute restrictions upon law enforcement officials to ensure voluntariness. Rather, it tried to overrule *Miranda* without observing such niceties. Congress made no response to the Court's call for alternative safe-

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658 (1989). This option did not exist at the time of the *Miranda* decision. *See generally* Monroe v. Pope, 365 U.S. 168 (1961).

230. 28 U.S.C. § 2671 (1994).

231. *Id.* § 2680(h).

232. *Cf.* Gasho v. United States, 39 F.3d 1420, 1435-36 (9th Cir. 1994) (recognizing possible FTCA claim for intentional infliction of emotional distress arising out of arrest by law enforcement officials). Criminal penalties are currently theoretically available against law enforcement officials as well. *See* United States v. Lanier, 117 S. Ct. 1219, 1226-27 (1997) (construing 18 U.S.C. § 242 to apply to constitutional injuries inflicted by officers acting under color of state law).

233. *See* NEAL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA 208-20 (1971) (describing impact of *Miranda* on interrogation behavior); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 18-20, 58-59 (1993) (asserting that law enforcement officials currently use less force in questioning defendants, due in part to better training, than in decades past); Paul G. Cassell and Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871-76 (1996); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. U. L. REV. 1, 10 (1970) (asserting that Denver police had much improved rate of proper *Miranda* warnings because of better training); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America, in* THE MIRANDA DEBATE 65, 65-66 (1998) (Richard A. Leo & George C. Thomas III eds., 1998).

guards. It was not until after the enactment of § 3501 that Congress made other changes that minimized the need for *Miranda* warnings.[234]

Some might consider the process failure to be dispositive. Courts arguably can force procedural obligations on Congress. If Congress fails to comply with such procedures, then courts need not defer. In light of Congress's failure to debate and adopt alternatives to the *Miranda* warnings, the Court might refuse to reexamine the continuing need for the warnings.

A similar debate over the respective roles of Congress and the Supreme Court has arisen in the context of judicial encouragement of legislative findings in Commerce Clause cases. In *United States v. Lopez*,[235] the Supreme Court invalidated the congressional enactment of the Gun-Free School Zones Act on the ground that Congress lacked the authority under the Commerce Clause to reach activity that had such an insubstantial connection to interstate commerce.[236] In reaching that decision, the Court noted that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[237] Properly drawn congressional findings can help support statutes that courts would otherwise invalidate on constitutional grounds.[238] Congress's failure to include findings may lessen, though not completely eliminate, the deference accorded to its legislative product. In both the Commerce Clause and the Fifth Amendment settings, the Court seems to have signaled to Congress to effect change only through certain procedures. The Commerce Clause precedent suggests that Congress's failure to comply with such procedures may lessen the deference due a coordinate branch of government.

Important differences, however, arguably distinguish the legislative findings context in *Lopez* from that in *Miranda*. *Lopez* required the Court to ascertain the limits of congressional power under the Commerce Clause to infringe state interests. Given that states, at least to some extent, are represented in Congress through the electoral process,[239] the existence of explicit

234. *See supra* text accompanying notes 230-32 (describing amendment of FTCA, most notable of changes made following enactment of § 3501).

235. 514 U.S. 549 (1995).

236. *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

237. *Id.* at 563.

238. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995) (requiring Congress to justify affirmative action legislation with specific findings because "classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified") (citation omitted); Perez v. United States, 402 U.S. 146, 154-57 (1971) (upholding congressional power to regulate loan sharking).

239. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-54 (1985) (noting

legislative findings provides some guarantee that Congress has considered the allocation of authority question fully. The presence of legislative findings, therefore, helps the Court determine whether the legislation stayed within Congress's Commerce Clause confines.

In contrast, the post-*Miranda* issue is not legislative power *per se* but how best to protect Fifth Amendment rights. The Court's responsibility after *Miranda* is to determine whether sufficient alternative safeguards to *Miranda* warnings exist to ensure the voluntariness of statements and to protect the right against self-incrimination. Those safeguards need not be attributable to Congress's action. They might instead stem from reform internal to the relevant law enforcement agencies, from judicial developments as with *Bivens*, or from judicial developments in the several states.[240]

Section 3501's existence, therefore, may be irrelevant except as a spur for courts to reexamine the need for the *Miranda* warnings. The Court has the continuing responsibility to assess change in the broader legal landscape.[241] Plausible, though hardly overwhelming, arguments suggest that such change has indeed occurred.[242]

C. Lower Court Judges

1. State Court Judges and Underenforcement

Viewing *DeShaney* as underenforcing the Due Process Clause may have a profound impact on state judges as well. Arguably, state judges should be free to construe the federal Due Process Clause shorn of the institutional and the federalism restraints that face the Court. State courts need not hesitate for fear of encroaching on the domain of another sovereign, and they may believe that, under the state constitutional framework, a greater judicial role is appropriate. Ascribing an independent role to state courts to enforce federal constitutional rights is no doubt controversial. Nonetheless, the logic of underenforcement suggests that state courts at times should be free to enforce fed-

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that structure of federal system provided inherent protections to state interests); *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE 191-95 (1982) (developing view that Congress protects state sovereignty); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 804-960 (1982) (describing states' role in federal system); Wechsler, *supra* note 171, at 546-47 (describing role of states in selection and composition of Congress).

240. *See infra* text accompanying notes 326-31.

241. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483-1538 (1987) (arguing that courts must consider entire legal landscape when interpreting statutes); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 527-40 (same).

242. *See supra* notes 225-32 and accompanying text.

eral constitutional rights more vigorously than would their federal counterparts.[243] If the Due Process Clause has been underenforced, the Court should not disturb a state court judgment that affords greater rights than those recognized in *DeShaney* as long as the state court decision rests on a defensible interpretation of the clause.[244] The Court, like any federal enforcement agency, beneficially may leave some enforcement activities to lower-level officials, in this instance, the lower courts.[245]

Enforcement at the local level makes sense from a federalism perspective. Unlike the Court in *DeShaney*, state courts face no federalism obstacles when enforcing federal constitutional decrees. If underenforced constitutional claims are brought against state and local officials in state court, then state judges must determine whether officials within their own jurisdiction should be subject to suit.[246] Moreover, the institutional constraints that influenced the Court's decision in *DeShaney* do not inevitably affect state courts similarly. With respect to failure-to-protect claims, some state constitutions value majoritarian rule less than the federal Constitution. In addition, state judges are often more politically accountable for their decisions than are their federal counterparts.

In some jurisdictions, state courts occupy a more fundamental lawmaking role than do the federal courts within the federal system. Many examples of this point exist. For instance, although the Supreme Court decided in 1812

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243. State courts, for instance, could have permitted a *Bivens*-type claim prior to the Supreme Court's decision, and even today could presumably permit wider recovery. *See infra* text accompanying notes 326-31. State courts have permitted *Bivens*-type claims for violation of state constitutional provisions. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. and Tel. Co., 595 P.2d 592, 602 (Cal. 1979); Peper v. Princeton Univ. Bd. of Trustees, 389 A.2d 465, 477-78 (N.J. 1978).

244. For more than a century, Congress declined to give the Supreme Court jurisdiction over state court decisions that relied on an arguably overgenerous construction of federal constitutional provisions. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (1914) (providing, for first time, Supreme Court review of state court decisions that "may have been in favor of . . . title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States"); *see also* Michigan v. Long, 463 U.S. 1032, 1066 (1983) (Stevens, J., dissenting) (questioning importance of Supreme Court jurisdiction when state courts have decided cases in favor of asserted federal right).

245. *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 230-33; Krent, *supra* note 195, at 80-84. Indeed, the Court routinely relies on lower courts, both federal and state, to resolve federal constitutional questions.

246. State courts also should be able to impose limitations on the civil justice system that they superintend regarding punitive damages claims. As Justice Kennedy noted in his concurrence in *Pacific Mutual Life Insurance Co. v. Haslip*, "[w]ere we sitting as state court judges, the size and recurring unpredictability of punitive damage awards might be a convincing argument to reconsider those rules." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (Kennedy, J., concurring).

that federal courts could not develop a common law of crimes without impinging, in part, on congressional authority,[247] state courts well into this century have continued to define new crimes on a common law basis.[248] For example, in 1994, the Michigan Supreme Court decided that the state could prosecute Dr. Kevorkian under a common law prohibition of assisted suicide.[249] Moreover, state courts have continued to fashion common law even after federal courts limited their own authority in *Erie Railroad v. Tompkins*.[250] In addition to exercising more general lawmaking power,[251] many state courts have engaged in far wider rulemaking than their federal counterparts. The state court rulemaking has covered both matters of internal judicial governance and the power to regulate legal practice within the state.[252]

Similarly, justiciability doctrines seldom limit the ambit of state courts to the same extent as they limit federal courts. There is no requirement of Article III standing in state courts. In fact, most states have adopted a far less restrictive test of standing than that adopted by the Court for the federal judiciary.[253] A number of states permit courts to issue advisory opinions as to the legality of proposed legislation,[254] a practice which, if followed under

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247. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). Despite *Hudson & Goodwin*, today federal courts exercise common law power in construing and applying open-ended terms of federal criminal legislation. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347.

248. *See, e.g.*, Commonwealth v. Mochan, 110 A.2d 788, 790-91 (Pa. 1955) (creating crime of making obscene telephone calls).

249. People v. Kevorkian, 527 N.W.2d 714, 716 (Mich. 1994) (fashioning crime of aiding and abetting suicide). The Court relied on the Michigan saving clause, which provided, in part, that "[a]ny person who shall commit any indictable offense at the common law . . . shall be guilty of a felony." MICH. COMP. LAWS § 750.505 (1993). *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 170-71 (1972) (denying enforcement of crime against loitering that statute did not sufficiently demarcate).

250. 304 U.S. 64, 79-80 (1938).

251. *See* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1973) (noting state courts' broad lawmaking powers); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805-06 (1989) (noting general perception of legitimacy of state common law and illegitimacy of federal common law).

252. *See* Jeffrey A. Parness, *Public Process and State-Court Rulemaking*, 88 YALE L.J. 1319, 1319 (1979); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 399 (1984).

253. *See* Williams, *supra* note 252, at 400; *see also* New York State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988) ("States . . . may . . . determine whether their courts may . . . determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case or controversy' be presented for resolution."); City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983).

254. Colorado, Florida, Maine, New Hampshire, Rhode Island, and South Dakota all permit courts to issue advisory opinions regarding the legality of proposed state legislation.

the federal system, would violate Article III.[255]

Finally, state courts are more politically accountable than the courts within the federal system. First, most state court judges are directly responsible to the public through elections.[256] The electorate can mobilize to defeat any judge that it deems insufficiently deferential to the state legislature. Judges have been voted out of office because of public outcry over their decisions.[257] Second, state court decisions are more subject to constitutional amendment than are federal decisions.[258] The barriers to amendment under the state constitutions are lower, and empirical studies have borne out the comparative frequency with which states have amended their constitutions.[259]

In short, state courts have less reason to defer to municipal and state policymaking than their federal counterparts. Our theory of federalism presupposes that states are free to allocate responsibility among their own judiciary, legislature, and executive as they see fit. From a federalism perspective, it may be entirely appropriate for state courts to assume a more aggressive role in monitoring municipal conduct than could a federal court. Historically, some state courts have imposed upon municipalities a duty to protect, elevating that responsibility to the "first duty" of government.[260]

ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 47 n.1 (2d ed. 1994). For instance, Chapter III, Part II, Article II of the Massachusetts Constitution states that "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." MASS. ANN. LAWS ch. III, pt. II, art. II (Law. Co-op. 1997).

255. *See, e.g.*, United States v. Johnson, 319 U.S. 302, 305 (1943); Muskrat v. United States, 219 U.S. 346, 361 (1911).

256. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995).

257. *Id.* at 727-39. Although the vast majority of judges are reelected, notable exceptions exist. Three Supreme Court Justices from California, for instance, lost reelection bids in 1986 principally because of their opposition to the death penalty. *See* PHILLIP E. JOHNSON, THE COURT ON TRIAL: THE CALIFORNIA JUDICIAL ELECTION OF 1986, 2-3 (Supreme Court Project ed., 1985) (discussing, prior to election, impact of controversial decisions on judges' reelection). The impact of voter accountability on death penalty decisionmaking has also been studied in Louisiana. *See* Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1117-23 (1987); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 495-97 (1995).

258. *See* Williams, *supra* note 252, at 381.

259. *See, e.g.*, Janice C. May, *Constitutional Amendment and Revision Revisited*, *in* 17 PUBLIUS: THE JOURNAL OF FEDERALISM 153, 169-79 (1987).

260. *See* Heyman, *supra* note 59, at 520-45 (presenting historical account of imposition of duty to protect).

Consider the California Supreme Court decision in *Garcia v. Superior Court*.[261] In *Garcia*, the court considered a *DeShaney*-type challenge to a parole officer's failure to protect the plaintiff's mother from the threats of a parolee, the plaintiff's former boyfriend.[262] In communicating with the mother, the parole officer allegedly minimized the magnitude of the danger posed by the parolee.[263] Following *DeShaney*, the court refused to find a violation of the Due Process Clause.[264] Nonetheless, the court found that the parole officer could be sued under state negligence law because no institutional obstacles blocked that suit.[265] Therefore, to the extent that the Court in *DeShaney* predicated its decision on institutional concerns, the California court conceivably could have allowed the suit to proceed under the Fourteenth Amendment.[266]

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261. 789 P.2d 960 (Cal. 1990).

262. Garcia v. Superior Court, 789 P.2d 960, 962-63 (Cal. 1990).

263. *Id.* at 962.

264. *Id.* at 966-67. State courts have applied *DeShaney* in a number of contexts. *See, e.g.*, Henderson v. Romer, 910 P.2d 48, 53-54 (Colo. Ct. App. 1995) (barring due process claim against prison for failing to protect prison employee in hostage situation), *aff'd sub nom.* Henderson v. Gunther, 931 P.2d 1150 (Colo. 1997); Cleveland v. Fulton County, 396 S.E.2d 2, 3 (Ga. Ct. App. 1990) (finding that state is under no duty to provide emergency medical treatment); Ashby v. City of Louisville, 841 S.W.2d 184, 190 (Ky. Ct. App. 1992) (finding that state is under no duty to protect victim of domestic violence); Williams v. Secretary of the Executive Office of Human Servs., 609 N.E.2d 447, 457 (Mass. 1993) (finding that *DeShaney* does not require state to provide follow-up care for homeless who are mentally ill); Gazette v. City of Pontiac, 536 N.W.2d 854, 859-60 (Mich. Ct. App. 1995) (following *DeShaney* in finding that police have no duty to assist victim of crime).

265. *See Garcia*, 789 P.2d at 963-66; *see also* California First Bank v. New Mexico, 801 P.2d 646, 657-58 (N.M. 1990) (finding that Due Process Clause does not require state to provide minimum level of highway safety, but permitting state tort suit against county); Brodie v. Summit County Children Servs. Bd., 554 N.E.2d 1301, 1305-09 (Ohio 1990) (finding that municipality's Children Services Board could be sued under state law for failing to protect child from repeated abuse at home, while assuming that no *DeShaney* claim existed); Sabia v. Vermont, 669 A.2d 1187, 1193-97 (Vt. 1995) (finding that *DeShaney* does not permit suit against Department of Social and Rehabilitation Services for failing to protect teenagers from sexual abuse, but allowing state tort suit to proceed).

If adequate state remedies exist, as in *Garcia*, fashioning relief under the federal Due Process Clause may be unnecessary. *See* Hudson v. Palmer, 468 U.S. 517, 534-36 (1984); Ingraham v. Wright, 430 U.S. 651, 676-82 (1977); *see also* Strauss, *supra* note 59, at 84-86. Even if state courts should rely on state grounds whenever possible before reaching the federal claim asserted, adequate state remedies may not always exist. *See infra* text accompanying notes 281-86.

266. Consider as well the Alabama Supreme Court's decision in *Life Insurance Co. of Georgia v. Johnson*, which was subsequently vacated and remanded in light of *Gore*. *See generally* Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685 (Ala. 1996), *vacated*, 117 S. Ct. 288 (1996). In *Life Insurance Co. of Georgia*, an insurance company challenged a punitive damages

Nevertheless, state court interpretations of the Due Process Clause that extend the clause beyond *DeShaney* would jeopardize uniformity. Potentially, the existence of numerous inconsistent interpretations could create a baffling array of constructions and more than "one" Due Process Clause.[267] The uniformity objective is important, but it can be overstated. In important ways, constitutional interpretation is not currently uniform.

First, as mentioned previously, actors within our system may construe constitutional provisions differently. For example, legislators are free to enact measures that restrict the right to bodily autonomy more than the Court's precedents would allow.[268] Similarly, irrespective of judicial precedent, presidents and governors may pardon individuals whom they believe were prosecuted unconstitutionally, or they may veto legislation that they deem unconstitutional.[269] If the controversy winds up in court, then the Court's

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award on substantive due process grounds as well as on state law grounds. *See id.* at 690-91. In addressing the claims, the Alabama court imposed stringent new requirements on punitive damage awards in that state, including a requirement that the jury consider the amount of punitive damages in a separate proceeding. *Id.* at 696. In addition, the court directed the trial judge to instruct the jury as to the factors underlying the punitive damages determination. These factors previously were a consideration for judges in Alabama on review, not for the jury. *Id.* at 696-97. The court also ruled that a portion of a punitive damages award should be judicially set aside for use of the state to minimize windfalls. *Id.* at 697-99. The court did not base its ruling on the federal Due Process Clause, but rather on its inherent powers. *See id.* at 704-07 (Maddox, J., dissenting in part) (arguing that court should have addressed federal constitutional claims more explicitly). Other state courts have reviewed challenges to punitive damages awards under state law principles. *See, e.g.*, Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1086 (Ariz. 1987) (holding punitive damages awards subject to review for excessiveness); Loitz v. Remington Arms Co., 563 N.E.2d 397, 401-07 (Ill. 1990) (increasing scienter requirement for plaintiffs seeking punitive damages awards); Carawan v. Tate, 280 S.E.2d 528, 531 (N.C. Ct. App. 1981) (award of punitive damages "is not to be excessively disproportionate to the circumstances").

To the extent that *Gore* is based on institutional and federalism factors, the Alabama court in *Life Insurance Co. of Georgia* could have relied upon substantive due process principles to effectuate those changes. The court's ruling in *Gore* arguably set a floor for due process rights in the punitive damages setting, not a ceiling for such rights. *Cf.* Adams v. Murakami, 813 P.2d 1348, 1350-56 (Cal. 1991) (relying, in part, on federal due process principles in mandating that evidence of defendant's financial condition be presented to jury before punitive damages award is set). On remand, however, the Alabama court abandoned its prior procedural innovations to conform more closely to the model described in *Gore*. Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524, 525-34 (Ala. 1997).

267. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337-52 (1816) (justifying Supreme Court review of state decisions by virtue of need for uniformity); *see also* Alexander & Schauer, *supra* note 6, at 1372-81 (arguing that settlement function of law strongly supports uniformity of views regarding constitutional text).

268. *See* BARBARA H. CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 73-155 (1993) (discussing legislative efforts in wake of Court's decision in *Roe*).

269. *See* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1105 (9th Cir. 1988) (discus-

interpretation, one hopes, will gain precedence. But not all cases in which there are conflicting interpretations of constitutional provisions will be heard in court.[270]

Second, some state courts have undermined uniformity by construing their state constitutional provisions as more protective of individual rights than the parallel provisions in the federal constitution.[271] In the wake of the Burger Court's pullback from some of its predecessor's criminal procedure rulings, state courts invested their own constitutions with greater protections.[272] States must honor the federal constitutional guarantees as a floor, but they can provide greater safeguards by interpreting their own constitutional provisions more expansively.[273] Each state is free to determine for itself what

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sing President Reagan's direction to agencies to ignore stay provisions in Competition in Contracting Act), *vacated in part en banc*, 893 F.2d 205 (9th Cir. 1989). In 1955, President Eisenhower instructed the Secretary of Defense to ignore a legislative veto clause contained in the Department of Defense Appropriation Act. President Eisenhower stated that the provision "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent jurisdiction." Special Message to Congress Upon Signing the Department of Defense Appropriation Act, PUB. PAPERS 689 (1955). More recently, President Clinton reluctantly signed a 1996 defense authorization bill that required dismissal of HIV-positive members of the military. *See* Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 260, 261 (Feb. 19, 1996). President Clinton explained that the Attorney General would not defend the dismissal provision. *Id.*

270. *See* United States v. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (finding that dispute between Administrator of EPA and Congress over extent of presidential privilege was not justiciable).

271. Some state courts have afforded greater substantive due process protections than the federal Due Process Clause permits. *See, e.g.*, People v. Washington, 665 N.E.2d 1330, 1336-37 (Ill. 1996) (finding that Illinois substantive Due Process Clause confers right upon defendant to show that he was actually innocent of crime for which he was convicted, even though federal Due Process Clause does not afford such protection); Women's Health Ctr. of West Virginia, Inc. v. Panepinto, 446 S.E.2d 658, 663-67 (W. Va. 1993) (finding that statute banning use of state Medicaid funds for abortion violated state but not federal due process guarantee). In addition, the Supreme Judicial Court of Massachusetts suggested that it may, in the appropriate case, construe its state constitutional due process provision more expansively than the federal counterpart. *See In re* McKnight, 550 N.E.2d 856, 863-64 (Mass. 1990) (finding that federal Due Process Clause does not require state to provide specific treatment for mentally ill in state institution). The suggestion sparked a disavowal from Judge Lynch in concurrence. *Id.* at 865 (Lynch, J., concurring). Furthermore, California has interpreted its Due Process Clause to confer greater procedural protections than the federal counterpart. *See* People v. Ramirez, 25 Cal. 3d 260, 265-69 (1979).

272. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-502 (1977). *See generally* Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

273. For example, state courts can restrict the immunity of state officials who are sued for federal law violations by implying a cause of action under federal law and by recognizing only

rights beyond the federal baseline it wishes to guarantee.[274] As a result, there may be only one Fourth Amendment, but no uniform right to be free from unreasonable searches.[275]

When state courts rest their decisions on both state and federal grounds, the potential confusion is exacerbated because state courts immunize themselves from review by the Supreme Court. Under the independent and adequate state grounds doctrine, the Court will not review a state court decision if an independent state ground exists, even if the decision includes an analysis of a federal constitutional guarantee.[276] Thus, pronouncements about the Fourth Amendment and the right to be free from unreasonable searches may be inconsistent.[277]

To be sure, a state court ruling predicated on a federal constitutional guarantee has a different impact than a decision based on a state constitutional provision. The state constitutional amendment process cannot overturn a decision that is based on a federal constitutional guarantee. State courts therefore could insulate themselves from reversal by predicating their decisions on underenforced federal constitutional norms as opposed to state constitutional provisions.

The objection is serious, but it is not devastating to the underenforcement thesis. If state courts construe federal constitutional guarantees in indefensible ways, then the United States Supreme Court can overturn the decisions, despite the underenforcement. Moreover, potent political checks on most

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limited immunity. *See* Jennifer Friesen, *Recovering Damages for State Bill of Rights Claims*, 63 TEX. L. REV. 1269, 1289-98 (1985). To the extent that immunities are fashioned through common-law elaboration, there is no reason that state courts should not be able to subject their officials to liability under federal law in more contexts than the federal courts might allow on their own. *See infra* text accompanying notes 293-305.

274. *See* Sheldon H. Nahmod, *State Constitutional Torts:* DeShaney, *Reverse-Federalism and Community*, 26 RUTGERS L.J. 949, 957-59 (1995) (arguing that because *DeShaney* was, in part, grounded on federalism concerns, state courts can interpret parallel state constitutional provisions more vigorously).

275. Indeed, Justice Harlan was one of many who argued that Bill of Rights provisions should not be fully incorporated into the Fourteenth Amendment, but rather that the states could be allowed to adopt divergent interpretations in applying those protections against state actors. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting).

276. *See* Michigan v. Long, 463 U.S. 1032, 1037-41 (1983); Sager, *supra* note 50, at 1250; *see also* Ronald K. L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 397-413 (1984) (discussing state cases in which state courts insulate their views on federal law from review by United States Supreme Court).

277. *Compare* Ann Althouse, *Federalism Untamed*, 47 VAND. L. REV. 1207, 1215-18 (1994) (debunking uniformity objective) *with* Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539, 559-69 (1988) (addressing allure of uniformity concerns).

state judges still exist, including electoral disapproval.[278] State court decisions too solicitous of federal rights may well precipitate a backlash from the state legislature or executive.

For example, Florida courts interpreted the federal and state constitutional rights against unreasonable searches and seizures more expansively than the United States Supreme Court. Under the independent and adequate state grounds doctrine, those decisions were immune from review by the Supreme Court.[279] The Florida legislature, however, adopted – and voters approved – a constitutional amendment stating that "[a]rticles or information obtained in violation of this right [against unreasonable searches and seizures] shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."[280] Majoritarian pressures reined in the judiciary. Thus, state courts are unlikely to abuse the opportunity to interpret federal constitutional norms more expansively than their federal counterparts.

Nonetheless, some might argue that if state courts choose to hold municipalities liable, then those courts should do so under state law, as California did in *Garcia*. Given a choice, state courts should avoid construing the federal constitution and should instead rest their decisions on state law grounds. Although many state courts would choose to rule on state law grounds, that alternative might not be available. Most states have interpreted their own due process clauses in tandem with the federal analogue.[281] Unless the state courts untether their constitutional provisions from the federal counterpart, they have no choice but to rest their decisions on federal grounds.

Even if the option to decide a case on state law grounds existed, state courts need not travel that path. Under our system, state courts have the full obligation and the responsibility to interpret federal law. Federal courts do not have a monopoly on federal constitutional interpretation. In fact, our system of interlocking sovereignties depends on state courts' willingness to reach federal questions. Under the Supremacy Clause,[282] federal law displaces

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278. *See supra* text accompanying notes 256-58.

279. State v. Lavozzoli, 434 So. 2d 321, 323-24 (Fla. 1983).

280. FLA. CONST. art. I, § 12 (amended 1982); *see* Bernie v. State, 524 So. 2d 988, 991-92 (Fla. 1988) (upholding constitutional amendment); *see also Engler Attacks Judge on Prisoners' Rights*, ANN ARBOR NEWS, Aug. 13, 1994, at A6 (reporting Governor John Engler's attack on state judiciary and Governor Engler's comment, "I think it's time to get tough on liberal judges").

281. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415, 422 (1991); Smith v. Phillips, 455 U.S. 209, 218 (1982).

282. U.S. CONST. art. VI, cl. 2.

any inconsistent state law. As the Supreme Court recently stated in *Howlett v. Rose*:[283] "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are . . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State."[284] State courts must apply their interpretation of federal constitutional provisions whether in harmony with the laws of their state or not.

From a historical perspective, there was no federal question jurisdiction in this country until 1875.[285] State courts resolved almost all federal constitutional questions. The Supreme Court could review only a fraction of the decisions involving federal claims. As a practical matter, therefore, state courts frustrated any goal of uniformity by placing different constructions on federal constitutional guarantees.

Moreover, the Judiciary Act of 1789 declined to vest the Supreme Court with appellate jurisdiction over cases in which state courts upheld federal constitutional claims.[286] Congress did not confer that appellate jurisdiction until 1914. Prior to 1914, there was no mechanism available to make uniform state courts' constructions of federal constitutional guarantees that favored federal claimants.[287] Therefore, a litigant's success could hinge on the forum in which the litigant filed the claim.[288] As a result, for over one hundred years, no uniformity of construction was possible.

Given that history, some state courts might find that the federal Due Process Clause provides greater protection than its state counterpart.[289] For

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283. 496 U.S. 356 (1990).

284. Howlett v. Rose, 496 U.S. 356, 367 (1990) (citations omitted).

285. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

286. *See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; *see also* Sager, *supra* note 50, at 1242-43.

287. For example, some state courts struck down regulations based upon a more expansive construction of the Due Process Clause than the Supreme Court manifested during the *Lochner* era. *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 15 (1991) (discussing state court cases invalidating regulation under Federal Due Process Clause prior to Supreme Court's *Lochner* era jurisprudence); William M. Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 835 (1998) (same).

288. The issue of removal complicates the analysis. Should a party remove a failure-to-protect claim to federal court, federal judges should then construe the Due Process Clause as if they were sitting as state judges. 28 U.S.C. § 1441 (1984). Although state judges would presumptively follow the Court's lead in *DeShaney*, federal courts should apply any previously disclosed state court analyses of failure-to-protect claims that embrace a more expansive view of the federal Due Process Clause. Alternatively, perhaps, state and local officials' right to removal should be limited. *See* Sager, *supra* note 50, at 1255.

289. *Cf.* Smith v. Department of Human Resources, 763 P.2d 146, 148-50 (Or. 1988)

a variety of reasons, the federal constitution might be construed to afford more protection than the state constitution for individuals who challenge punitive damages awards or municipalities' failure to protect them from harm.[290] At a minimum, some state courts likely will continue to interpret the federal Due Process Clause to provide at least as much protection as the state counterpart. Thus, state courts should be free to rely on the federal Due Process Clause in resolving failure-to-protect claims.

Allowing federal constitutional law to develop differently in one state than in another respects the federalist nature of our system. The Court can utilize its power through certiorari to ensure that state court constructions of an underenforced norm do not fall beneath a federal floor. Similarly, the Court can ensure that no state court construction exceeds the bounds of plausibility or misconstrues a prior Court decision, which arguably explains the Court's analysis in *City of Boerne*.[291] Within those broad constraints, state courts arguably should be able to adopt different interpretations of the federal constitutional right that is best suited to their states' political culture and needs.[292]

Indeed, slighting the state courts' ability to apply federal law vigorously would turn federalism concerns on their head. If federal courts decline to enforce federal law due to federalism and institutional concerns, then state courts – unfettered by such constraints – should be free to determine whether their different institutional situations militate for more active enforcement.

The Court's recent decision in *Johnson v. Fankell*[293] can be seen in that light.[294] A former liquor store clerk filed a due process action in state court under § 1983 against officials of the Idaho Liquor Dispensary who had

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(denying unemployment compensation because religious use of peyote violated federal Free Exercise Clause), *rev'd*, 494 U.S. 872 (1990).

290. Currently, municipalities that are sued under § 1983 cannot claim qualified immunity. *See* Owen v. City of Independence, 445 U.S. 622, 635-38 (1980). Although municipal officials can claim the immunity, once the constitutional violation is clearly established, the immunity would not be available. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

291. *See supra* text accompanying note 192. To the extent that recognition of the underenforcement possibility provides state courts with an incentive to depart from Supreme Court precedent, the Court may have to monitor state courts' construction of federal law more closely than it does now. The Court, as *City of Boerne* suggests, is well equipped for this task and the addition to the workload will likely be minimal. *See infra* text accompanying notes 306-07.

292. As Justice Harlan noted, there should be ample room for governmental and social experimentation in a society as diverse as ours, even concerning the content of certain constitutional rights. *See* Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting).

293. 117 S. Ct. 1800 (1997).

294. *See* Johnson v. Fankell, 117 S. Ct. 1800, 1802 (1997).

terminated her employment.[295] The defendants filed a motion to dismiss on grounds of qualified immunity.[296] The state trial court denied the motion.[297] The defendants appealed the denial and argued that the denial of a qualified immunity claim could be appealed under the collateral order doctrine,[298] as it could in federal court under *Mitchell v. Forsyth*.[299] The plaintiff responded that Idaho did not regard the denial of a qualified immunity claim as immediately appealable and, instead, prized more highly the plaintiff's right to vindicate his or her interests without undue delay. The Idaho Supreme Court agreed with the plaintiff and held that, despite the federal court precedent, Idaho did not permit officials who were sued for federal constitutional violations an interlocutory appeal of the denial of any claim for immunity.[300]

Unquestionably, defendants in civil rights actions enjoy the right in federal court to an immediate appeal of a denial of a motion to dismiss on immunity grounds. On the basis of federal law, the Court in *Mitchell* permitted the appeal because the immunity right is so critical to the performance of government functions.[301]

Nonetheless, the United States Supreme Court affirmed Idaho's decision to deny the appeal.[302] Although the Court recognized the importance of the defendants' interest in the quick resolution of their immunity defense, it stated that

> the ultimate purpose of qualified immunity is to protect the state and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.[303]

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295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 1803.

299. 472 U.S. 511 (1985).

300. Johnson v. Fankell, 117 S. Ct. 1800, 1802 (1997).

301. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (recognizing "entitlement not to stand trial or face other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which plaintiff complains violated clearly established law").

302. *Johnson*, 117 S. Ct. at 1805.

303. *Id.*

The Court recognized that state courts, due to different institutional concerns, might afford state officials *less* protection from a federal constitutional claim than the federal courts would provide.[304] Our system of federalism embraces the possibility that states will vary the level of protection that they afford to federal interests.[305]

To be sure, recognizing a more activist state court role in developing underenforced federal constitutional norms will afford state courts cover to ignore any Supreme Court precedent that they find problematic. State courts can defend departures on the ground that the Court had underenforced the relevant constitutional norm. A substantial increase in the number of state court decisions failing to comply with Supreme Court precedent could frustrate the Court's ability to superintend lower court adjudication and ensure evenhanded application of the law.

Nonetheless, there is reason to be skeptical of any avalanche of new cases. First, state courts historically have been unwilling to invest federal constitutional rights with greater content than has the Supreme Court except in rare circumstances. Second, the state courts' ability to depart from Supreme Court precedent should be limited to contexts in which courts can point to explicit language in the opinions – as in *Miranda* and *Garcia* – which presents a colorable case for underenforcement.[306] In any event, state courts, if they choose, now can distinguish controlling Supreme Court precedent on grounds that others would find tenuous. The Supreme Court has cabined such state court activism without exhausting its political and administrative resources. Third, state courts, as discussed previously,[307] may face political repercussions from construing federal rights expansively. Therefore, recognizing a greater role for state courts when addressing an underenforced federal

304. The Supreme Court decided in *Will v. Michigan Department of State Police* that states could not be sued in civil rights suits under § 1983. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 66-71 (1989). Prior to that ruling, several states had permitted suit. *See, e.g.*, Uberoi v. University of Colo., 713 P.2d 894, 899-901 (Colo. 1986); Stanton v. Godfrey, 415 N.E.2d 103, 107 (Ind. Ct. App. 1981); Gumbhir v. Kansas State Bd. of Pharmacy, 646 P.2d 1078, 1084 (Kan. 1982).

305. *But cf.* National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 588-91 (1995) (depriving state courts of power to enjoin state taxing authority sued under § 1983 for violation of dormant commerce clause when adequate legal remedy exists).

306. State courts, for instance, have upheld restrictions on abortion that seemingly fly in the face of Supreme Court precedent. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 898 (1992) (reversing Pennsylvania's spousal notification provision); Hodgson v. Minnesota, 497 U.S. 417, 450-55 (1990) (invalidating Minnesota's two parent notification rule for minors seeking abortions); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 431-39 (1983) (invalidating requirement that certain abortions be performed only in hospitals); *see also supra* note 268.

307. *See supra* text accompanying notes 255-58.

constitutional norm should not precipitate widespread state resistance to binding federal precedent.

Finally, the very dialogue with state courts over the scope of federal rights should benefit our system. The Court will gain from additional discussions in state courts addressing the nature and boundaries of underenforced constitutional rights. State courts can serve as laboratories for exploring the best way to protect federal rights. Should the Supreme Court wish to limit the dialogue, it can eliminate references to institutional and political restraints in its decisions. Recognizing the consequences of underenforcement thus may provide the Court incentive to craft its decisions more carefully in the future.

2. Lower Courts and Overenforcement

The challenge confronting lower courts when they address an overenforced constitutional norm is similar. Are lower courts free to depart from precedents that set prophylactic rules as in *Miranda* or *Reynolds*, or must they instead abide by precedent? Even if the Court has the authority to determine whether the *Miranda* warnings are still required, do the lower courts have any independent role? As with underenforcement cases, the issue turns on the desideratum of uniformity.

Much can be said for requiring lower courts to adhere to precedent. Uniformity and predictability are gained if lower courts apply *Miranda*'s prophylactic rules until such time as the Supreme Court decides on a different path. Law enforcement officers have readily adapted to *Miranda* and can continue to do so.[308] Defense counsel, prosecutors, and trial judges will be able to gauge the success of various suppression motions. Moreover, encouraging fidelity to precedent augments the Court's control over lower courts. Accordingly, the Justice Department's current position is that only the Court can reexamine the necessity for altering the *Miranda* warnings.[309]

In fact, the Court has directed lower federal courts to follow its precedents even when there is reason to believe that the Court might reexamine them. For example, in *Agostini v. Felton*,[310] the Court reconsidered whether the Establishment Clause barred the New York City Board of Education from sending public school teachers into parochial schools to provide remedial

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308. Many law enforcement groups currently support *Miranda*. *See* Schulhofer, *supra* note 197, at 599 n.20 (citing Brief for Police Foundation et al. as Amicus Curiae, Withrow v. Williams, 507 U.S. 680 (1993)).

309. *See* Brief for the United States at 22-24, United States v. Leong, 116 F.3d 1474 (4th Cir. 1997) (No. 96-4876).

310. 117 S. Ct. 1997 (1997).

education to disadvantaged children.[311] In 1985, the Court held such practice to be unconstitutional. On remand, the district court issued a permanent injunction.[312] The Court presumably accepted the case for review in light of the substantial changes in Establishment Clause doctrine in the subsequent twelve years.[313] The Court "reaffirm[ed] that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'"[314] Even though the Court's own Establishment Clause analysis had changed, it reserved to itself the ability to reexamine the validity of its prior precedent. The Court's position maintained its power within the judiciary and fostered predictability.[315]

The *Miranda* context, however, arguably is quite different than that in *Agostini*. Abandoning the specific warnings in *Miranda* would not overrule *Miranda*. *Miranda*, after all, anticipates the possibility of altering the warnings when alternative safeguards have been adopted.[316] Administrative changes within law enforcement agencies or the establishment of compensation schemes may have made reliance on the warnings less critical. Should lower federal courts be able to consider whether changes in the legal and the administrative landscape warrant reexamination of the *Miranda* warnings?

Lower federal courts routinely assess the adequacy of different remedial schemes in several contexts. For instance, in deciding whether to imply a remedy directly under the Constitution, *Bivens* instructs courts to determine whether there is "an explicit congressional declaration that . . . [plaintiff should be] remitted to another remedy, equally effective in the view of Congress."[317] Following *Bivens*, the Court in *Bush v. Lucas*[318] considered whether an aerospace engineer employed by the federal government could sue under

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311. *See* Agostini v. Felton, 117 S. Ct. 1997, 2017-19 (1997).

312. *See* Aguilar v. Felton, 473 U.S. 402, 414 (1985).

313. *See Agostini*, 117 S. Ct. at 2003.

314. *See id.* at 2017 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

315. *See, e.g.*, West v. Anne Arundel County, 137 F.3d 752, 757-60 (4th Cir. 1998) (following *Garcia* despite Court's subsequent decision in *Printz*); Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996) (adhering to Court precedent finding liberty interest in some parole statutes despite subsequent Court cases that call that precedent into question).

316. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1965).

317. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971).

318. 462 U.S. 367 (1983).

the First Amendment for a retaliatory demotion.[319] Assuming that a constitutional violation had occurred, the Court nonetheless held that, in light of the "elaborate remedial system" established by Congress for federal personnel, the Court would decline to recognize a *Bivens* action in that context.[320] Even though the congressional remedy was not an "equally effective substitute" for the judicial remedy sought, the Court noted that it was "constitutionally adequate."[321] Subsequent cases have extended that rationale to cover situations in which Congress considered but implicitly precluded a remedy for the injury suffered.[322] Pursuant to *Bivens* and *Bush*, therefore, lower courts have scrutinized congressional acts to determine the effectiveness, and mere existence, of alternative remedial schemes. Therefore, the suggested role for lower courts under *Miranda* – considering the availability and the adequacy of alternative remedial schemes – is hardly novel.[323]

The Court's call in *Miranda* for the study of alternative remedial schemes should not preclude consideration of *Miranda* warnings by lower courts. Lower courts have the duty to determine whether, in light of changes in the legal landscape, *Miranda* warnings are still required. Moreover, the Court would benefit from obtaining the view of the lower courts on § 3501's relevance to *Miranda*, just as it benefits from percolation of other federal law issues.[324]

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319. *See* Bush v. Lucas, 462 U.S. 367, 373 (1983).

320. *See id.* at 388-90.

321. *Id.* at 378 & n.14.

322. *See* Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (declining to recognize cause of action in light of Social Security Act's elaborate administrative remedial scheme in which Congress decided to provide *no* remedy in situation presented); Brazil v. United States Dep't of Navy, 66 F.3d 193, 197-98 (9th Cir. 1995) (denying *Bivens* claim in light of available Title VII remedy); *see also, e.g.*, Moore v. Glickman, 113 F.3d 988, 990-94 (9th Cir. 1997) (denying *Bivens* claim because there was no evidence that Congress inadvertently failed to provide remedy); Robbins v. Bentsen, 41 F.3d 1195, 1200-03 (7th Cir. 1994) (denying *Bivens* claim because of availability of congressionally created remedy). Whether the Court should adopt such a deferential stance in the face of a similar congressional response to an overenforced norm poses a difficult question. For a discussion of this issue, see Harold J. Krent, *How to Move Beyond the Exclusionary Role: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L REV. (forthcoming 1999).

323. The Supreme Court has directed lower courts to preclude a remedy under one federal statute if a more comprehensive remedial scheme exists. *See* Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976) (Title VII is "exclusive judicial remedy for claims of discrimination in federal employment"); United States v. Demko, 385 U.S. 149, 151-54 (1966) (declining to find FTCA remedy when more specific worker's compensation remedy existed); Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637-38 (2d Cir. 1989) (stating that RICO claim is preempted by comprehensive administrative remedial scheme).

324. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedent?*, 46 STAN. L. REV. 817, 856-69 (1994); Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert S. Cover's* JUSTICE ACCUSED, 7 J.L. & RELIGION 33, 82-83 (1989).

Like federal enforcement agencies, the Court can gain from studying the enforcement efforts of others.[325]

State courts also should consider whether to mandate *Miranda* warnings in light of the legal and institutional changes within their own states. Federalism concerns strongly suggest that states should be free to experiment with different controls on law enforcement agencies. State courts fully comply with the *Miranda* decision by determining that the experimental regulation in their own states satisfies that decision's underlying concern with protecting the voluntariness of suspects' statements in custodial settings and with preserving the right against self-incrimination.[326]

Consider the Supreme Court of Alaska's decision in *Stephan v. State*.[327] In *Stephan*, the Court held that, under the Alaska Constitution, "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process."[328] The court in *Stephan* reasoned that such recording "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial."[329] The court further explained that because "[h]uman memory is often faulty," the taping is critical to permit the judiciary to protect the constitutional rights involved.[330]

In light of *Stephan*'s requirement of an electronic recording, would it be constitutionally permissible for Alaska to excuse one or more of the *Miranda* warnings? Alaska has not taken that step.[331] This Article suggests that Alaska courts should have the power to determine whether such alternative safeguards undermine the continuing need for the *Miranda* warnings in the precise form laid out in the *Miranda* decision.

The consequence ultimately might be that *Miranda* warnings are not required in all fifty states. This lack of uniformity may trouble many. Our system of federalism, however, presupposes such variation among the several

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325. Information is critical to the effective enforcement efforts of any agency. *See* BREYER, *supra* note 5, at 109.

326. Indeed, it would be somewhat unrealistic to relegate all claims for easing the *Miranda* warnings to the Court in the first instance. The Court would be forced to assess, on a state-by-state basis, whether the *Miranda* warnings were still required.

327. 711 P.2d 1156 (Alaska 1985).

328. Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985).

329. *Id.* at 1159-60.

330. *Id.* at 1161.

331. Minnesota also has adopted a recording requirement for custodial interrogations, but has not excused the *Miranda* warning requirement. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

states. A uniform rule on the voluntariness of statements currently does not exist, nor does a uniform rule on the appealability of denials of motions to dismiss based on qualified immunity. Indeed, enforcement of federal statutory schemes, such as the Clean Air Act, differs as well from state to state.[332] Federal enforcement does not ineluctably lead to uniformity. Decisions overenforcing constitutional norms may lead to experimentation in each state as to how best to protect the constitutional value at stake. The Court remains the final arbiter, but the dialogue may well further its enforcement goals.

V. Conclusion

The Supreme Court's enforcement role carries with it an important corollary that is all too often missed. Court decisions that reject or recognize a claim of federal right may rest on institutional concerns rather than on the scope of the federal right itself. Therefore, at times, other political actors faced with a distinct set of institutional constraints can vest that federal right with different content. Underenforcement may reflect a judicial strategy to preserve political capital while nonetheless signaling solicitude for the constitutional rights at stake. Overenforcement, on the other hand, overprotects a constitutional right due to the Court's conviction that it cannot trust other political actors to honor the right at stake. Like agencies generally, the Court makes decisions with an eye toward future enforcement needs.

With respect to underenforcement, *DeShaney* provides a helpful example. The decision can be understood to rest on concerns of both federalism and judicial restraint. The Court's reluctance to scrutinize the claims closely should not be taken necessarily as a decision about the conceptual limits of the federal due process norm.

As a consequence, other actors within our political system are free to interpret the Due Process Clause more robustly. Congress, which does not face comparable institutional constraints, can determine whether duty-to-protect claims should proceed against federal government officials, or whether such actions should be maintained against state and local government officials pursuant to Congress's power under Section 5 of the Fourteenth Amendment. State courts, in the absence of both federalism and institutional concerns, can determine whether to allow federal due process challenges against municipalities that fail to protect their citizens from harm.

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332. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 118 (1992) ("The principal federal pollution control schemes . . . required EPA to establish uniform national standards that can be implemented and administered by states subject to federal supervision. Most federal environmental statutes specify that the standards they require are minimum standards that must be set by every state, while expressly authorizing states to establish more stringent pollution controls if they so desire.").

Similarly, the Court's *Miranda* decision should spur other political actors to debate the best means for protecting the right against self-incrimination. Consequently, state legislators and courts may consider whether procedural innovations apart from the *Miranda* warnings are sufficient to protect the Fifth Amendment right. Because the Court in *Miranda* overenforced the Fifth Amendment, lower courts can – consistent with *Miranda* – rule that the famous warnings are no longer required.

Understanding *DeShaney* and *Miranda* to rest on federalism and institutional concerns potentially has wider impact. They are not the only Supreme Court decisions based at least in part on institutional constraints. In light of its enforcement role, the Court through such decisions signals actors outside the judiciary to debate effective strategies for enforcing constitutional rights. The Court – like federal agencies generally – may share enforcement responsibility with state and local officials. The Court's underenforcement and overenforcement of certain constitutional norms invites other actors to collaborate on the ultimate contours of federal constitutional rights.