PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 26
Issue 4 *Symposium on Reform of the Exclusionary Rule*

Article 5

5-15-1999

How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts

Harold J. Krent

How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts

Harold J. Krent*

The exclusionary rule remains one of the most controversial judicial doctrines of this era. When judges order dangerous criminals released based on seeming technicalities, the public's faith in the judiciary erodes. Moreover, police misconduct may be deterred in a variety of ways, one hopes, without exacting the heavy price of excluding highly probative evidence. And, from a compensation perspective, the exclusionary rule is perverse. Innocent victims of unreasonable searches and seizures generally recover nothing, while those committing the most heinous crimes recover the most–their liberty. At a minimum, sophisticated proposals such as the one presented in the Pepperdine Study[1] should afford all of us–whether judges, legislators, or academics–the occasion to reflect on whether the exclusionary rule should be maintained.[2]

Whatever its strengths and weaknesses–and there are both[3]–the Pepperdine

---

* Professor and Associate Dean, Chicago-Kent College of Law.

1. *See* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV 669 (1998).

2. The proposal for an alternative mechanism to deter unconstitutional searches and seizures is certainly not unique. For a sampling of other suggested alternatives to the exclusionary rule, see MALCOLM R. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE (1982); Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (stressing tort option); Harvey R. Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 75 (1974) (setting forth the alternative called the Joint Liability Plan). Congress for its part often has debated efforts to limit the exclusionary rule.

3. For instance, the proposal excels in bringing to bear relevant empirical studies on the administration of the exclusionary rule. *See* Perrin et al., *supra* note 1, at 678-735. It does not, however, sufficiently grapple with the complex and perplexing problem of issue and fact preclusion. The relationship among administrative adjudication, § 1983 suits, criminal trials, and habeas corpus suits needs to be fleshed out. Moreover, the article does not sufficiently address the costs of the administrative scheme; if nothing else, the exclusionary rule is administratively efficient in avoiding the need for a separate judicial proceeding, and thereby minimizes attorney's fees and court costs.

Study is strangely silent with respect to the question of implementation. Given the United States Supreme Court's precedent in *Mapp v. Ohio*,[4] how can the proposal be enacted? Why would not the *Mapp* precedent invalidate any legislative effort of the sort advocated? Indeed, some have argued that *Mapp* does not permit any legislative experimentation.[5] Even if *Mapp* does not foreclose the legislature's option to implement different approaches, why would the United States Supreme Court permit California to adopt an administrative alternative to the exclusionary rule while mandating that the exclusionary rule be followed in the other states? Does the Constitution tolerate such nonuniformity?

This Article addresses that gap in the Pepperdine Study by arguing that state and federal legislatures have the power to enact the proposed administrative scheme and that the courts may–and perhaps should–uphold any such effort. First, this Article argues, as have others,[6] that the exclusionary rule as a judge-made rule can be superseded by congressional action.[7] Properly understood, there is no inconsistency between *Mapp* and the administrative proposal in the Pepperdine Study. Although *Mapp* has constitutional roots, the Court has over-enforced the Fourth Amendment norm, permitting other institutional actors to participate in determining the best way to enforce the constitutional norm protecting against unreasonable searches and seizures. *Mapp* does not hold that the exclusionary rule is constitutionally enshrined; rather, other institutional actors may devise alternative schemes which obviate the need for the exclusionary rule.

Second, this Article suggests that the United States Supreme Court, despite its lack of exclusive jurisdiction to consider remedial options for the exclusionary rule, properly retains control over legislative reform efforts through its power to review the introduction of illegally obtained evidence in particular cases and controversies.[8] The Court should review the adequacy of any alternative remedial scheme based on all available evidence. This Article further argues that the Court should afford substantial deference to Congress's determination of how best to enforce the Fourth Amendment. As with other constitutional common law remedies, Congress can create alternative means of enforcing constitutional values

---

4. 367 U.S. 643 (1961).

5. Presumably, only a decision based on the Constitution–as opposed to grounded in common law–can bind the states, and states therefore might be powerless to alter the constitutional decision. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-98 (1993) (discussing, in detail, the ramifications of the *Miranda* decisions); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. (forthcoming 1999) (arguing that the gap between remedy and right is grossly overemphasized and thus suggesting implicitly that all Supreme Court judgments, whether based on constitutional right or remedy, are binding on others); *cf.* Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 8-10 (1975) (questioning the Supreme Court's legitimacy in mandating that states adhere to the Supreme Court's formulation of discretionary remedies in constitutional cases).

6. *See, e.g.*, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); Monaghan, *supra* note 5, at 8-10.

7. *See infra* Part I.

8. *See infra* Part II.

based on its presumably greater institutional competence for factfinding. The Court's analysis of when to allow congressional remedies to displace the judicially created remedy under *Bivens v. Six Unknown Named Agents*[9] poses the closest analogy, suggesting the Court's willingness to defer to majoritarian determination of appropriate remedies.[10] Furthermore, the Court should defer even more to the legislative product if it is backed by detailed findings substantiating the benefits expected from the substitute remedy.

Finally, this Article argues that state courts and lower federal courts have independent authority to review the adequacy of legislative alternatives.[11] Change in the exclusionary rule can be implemented prior to any Supreme Court imprimatur. Indeed, my argument is hardly radical in light of the fact that lower federal courts currently make a similar inquiry in *Bivens* cases. The implication for state courts, however, is admittedly more controversial. If state courts may permit legislative alternatives to the exclusionary rule in their own courts, uniformity under our constitutional system would be lost. Although perhaps disconcerting, that result is a product of our federalist system and even today states provide differing protections against unreasonable searches and seizures. Thus, I conclude that the Supreme Court should respect the right of states, based on their own institutional concerns and priorities, to forge different approaches to protect against violation of the Fourth Amendment.

I.

We conventionally understand the Supreme Court's constitutional decisions to be final in the sense that the Court's interpretations will govern in all subsequent cases. Lower federal and state courts must heed the Supreme Court's commands. To be sure, Congress does not need to abide by the Court's interpretations when passing laws; nor need the President follow the interpretation in issuing a pardon.[12] But, until the Justices change their minds,[13] the Court's prior constitutional

---

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

10. *See id.* at 397.

11. *See infra* Part III.

12. *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 S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994) (addressing the Executive's independent obligation to interpret the Constitution).

13. Justices remain free to reverse their prior constitutional rulings, and instances of such reversals are not uncommon. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (reversing National League of Cities v. Usery, 426 U.S. 833 (1976)); Employment Div. v. Smith, 494 U.S. 872 (1990) (reversing in part Sherbert v. Verner, 374 U.S. 398 (1963)).

interpretations will govern in all cases and controversies, whether brought in state or federal court.

However, when the Court formulates constitutional law in a common-law capacity, other actors may play a more direct role in constitutional lawmaking. For instance, consider the Supreme Court's resolution of cases brought under the Dormant Commerce Clause. In *Kassel v. Consolidated Freightways Corp.*[14] the Court invalidated an Iowa statute prohibiting the use of certain large trucks within the state under the Commerce Clause for unduly burdening interstate commerce.[15] The Court reasoned that Iowa's motive in banning the trucks was protectionist and did not yield appreciable safety benefits to Iowa's citizens.[16] But, Congress is not bound by the Court's judgments under the Commerce Clause and can permit state restrictions, such as Iowa's ban, that the Court has invalidated.[17] The Court's constitutional decisions do not necessarily set the boundaries of the right in question.

Moreover, the Court has explicitly upheld constitutional remedies that extend beyond the actual constitutional violation.[18] Such extensive remedies may be needed to prevent future violations of the constitutional right, but are not themselves required by the Constitution. In a different institutional climate, the remedies may no longer be needed.

For instance, in *Hutto v. Finney*[19] the Court considered the propriety of an injunction that, in part, protected Arkansas inmates from being placed in isolation beyond thirty days. In upholding the injunction, the Court did not reason that placement in isolation on the thirty-first day violated the Eighth Amendment's ban against Cruel and Unusual punishments. Rather, the Court justified the injunction on the ground that the bright-line rule represented "a mechanical–and therefore an easily enforced–method of minimizing overcrowding."[20] Given the difficulty of determining just when conditions violated the Eighth Amendment and the Court's understandable mistrust of the Arkansas prison system,[21] the Court imposed a prophylactic remedy to help protect against future violations.[22]

---

14. 450 U.S. 662 (1981).

15. *See id.* at 671; *see also* Stephen C. Kohl, *Constitutional Law*–Kassel v. Consolidated Freightways Corp.*: 'Goodbuddy' Raymond Revisited in Name Only*, 8 J. CORP. L. 543 (1983).

16. *See Kassel*, 450 U.S. at 671-75; *see also* Monaghan, *supra* note 5, at 16-18 (arguing that dormant commerce clause cases should be viewed as a species of common law).

17. Congress partially overruled *Kassel* in amendments to The Surface Transportation Assistance Act of 1982, which permitted states in some circumstances to bar the large trucks from interstate highways. *See* Surface Transportation Assistance Act of 1982, § 411, 49 U.S.C. § 31111 (1997).

18. *See* Kohl, *supra* note 15, at 563-64.

19. 437 U.S. 678 (1978).

20. *See id.* at 688 n.11.

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

22. *See id.* at 688; *see also* Milliken v. Bradley, 433 U.S. 267, 281 (1977) (holding that constitutional remedies can extend beyond remedying the narrow condition that violated the Constitution).

Judges may protect against conduct threatening constitutional violations by formulating broad constitutional rules as well as by fashioning extensive remedies. The motivations are similar. Courts may lack the resources to police unconstitutional conduct in any other way. Over-enforcement of a constitutional right avoids line-drawing in contexts in which courts cannot rely upon other governmental actors to protect the constitutional right asserted. In the case of the exclusionary rule, therefore, the critical inquiry is whether the Court over-enforced the Fourth Amendment norm in choosing that remedy or rather held that exclusion was required by the Constitution itself.[23] The line between the two forms of constitutional lawmaking is not always clear.[24]

Historical evolution of the exclusionary rule suggests that, despite some ambivalence, the judiciary has viewed the exclusionary rule as a court-created remedy as opposed to a constitutionally mandated rule. In *Weeks v. United States*[25] the Supreme Court held that use of evidence that had been unconstitutionally seized in federal trials resulted in "a denial of the constitutional rights of the accused."[26] Accordingly, the Court crafted a rule of exclusion: all evidence collected by federal law enforcement officials in violation of suspects' rights could not be used at trial. The Court's characterization of the decision in subsequent cases was not consistent, and exceptions existed. The Court described the exclusionary rule as a question of evidence[27] as well as a constitutional command.[28] The precise

---

23. Alternatively, the Court may have acted in a lawless manner by imposing its own policy preference upon the states. *See* GRANO, *supra* note 5, at 185-95. Because prophylactic constitutional rules seem so prevalent, however, that view calls into question not only *Mapp* but also *Miranda*, the overbreadth doctrine, constitutional remedies, and arguably much more. The Court's ability to over-enforce a constitutional right seems well entrenched. Moreover, as I have argued elsewhere, the Court's over-enforcement tack is normatively appealing, stemming from the judiciary's own institutional limitations. *See* Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1171-76 (1998).

24. For an argument that consideration of remedies cannot be separated from that of rights, see Levinson, *supra* note 5.

25. 232 U.S. 383 (1914).

26. *See id.* at 398. The roots of the exclusionary rule lie in *Boyd v. United States*, 116 U.S. 616 (1886), which addressed a mixture of Fourth and Fifth Amendment concerns.

27. In *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961), for example, the Court declined to impose the exclusionary remedy on trials in the state court system, even while holding that the Fourth Amendment right was fully applicable. The Court declined to impose the exclusionary rule in part because of the deference owed to state courts in fashioning evidentiary rules within their own jurisdictions and in part because "other means of protection" shielded the right to privacy making application of the exclusionary rule unnecessary. *See id.* at 30. In concurrence, Justice Black explicitly termed the exclusionary rule "a judicially created rule of evidence which Congress might negate." *See id.* at 39-40 (Black, J., concurring).

28. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928); Byars v. United States, 273 U.S. 28 (1927).

moorings of *Weeks* long remained in question.

Even when imposing the exclusionary rule on the states in *Mapp*, the Court's plurality opinion equivocated as to the nature of the exclusionary rule. The Court asserted that its decision "gives to the individual no more than that which the Constitution guarantees him,"[29] suggesting a constitutional basis. But the Court also described the rule as a "judicially implied . . . deterrent safeguard."[30] In concurrence, Justice Black found a constitutional basis to exist "when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination."[31] And Justice Douglas, also in concurrence, stated that imposing the rule upon the states was necessary to ensure that the Fourth Amendment would not become a "dead letter,"[32] even though he acknowledged the theoretical availability of other remedies to enforce the Fourth Amendment.[33] Justice Harlan, in dissent, understood the plurality's argument to rest on the Constitution, as the Court's decision had in *Weeks*: "the rule . . . excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the 'supervisory power' of this Court over the federal judicial system, but from Constitutional requirement."[34] To Justice Harlan, that conclusion was nonsense because the exclusionary rule had no constitutional basis and rested merely on the Justices' contestable policy judgments.[35]

Justice Harlan's view gained partial ascendancy in cases such as *United States v. Calandra*[36] and *Stone v. Powell*.[37] In *Calandra* the Court permitted the use of illegally seized evidence in grand jury proceedings,[38] and in *Stone* the Court held that Fourth Amendment claims based upon the introduction of evidence illegally obtained were not cognizable on habeas.[39] In both decisions, the Court predicated its holdings on the fact that "[t]he exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."[40] After these decisions, the Court's view has been unwavering; the exclusionary rule is a

---

29. *See Mapp*, 367 U.S. at 660.

30. *See id.* at 648.

31. *See id.* at 662 (Black, J., concurring).

32. *See id.* at 670 (Douglas, J., concurring) (quoting Wolf v. Colorado, 338 U.S. at 47 (Rutledge, J., dissenting)).

33. *See id.* (Douglas, J., concurring).

34. *See id.* at 678 (Harlan, J., dissenting).

35. *See id.* at 678-79 (Harlan, J., dissenting).

36. 414 U.S. 338 (1974).

37. 428 U.S. 465 (1976); *see also* Ker v. California, 374 U.S. 23, 33 (1963) ("[T]he demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution . . . .").

38. *See Calandra*, 414 U.S. at 354-55.

39. *See Stone*, 428 U.S. at 494.

40. *See id.*, 428 U.S. at 482; *see also Calandra*, 414 U.S. at 348 ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .").

judicially imposed policy, not a constitutional obligation. Consequently, the Court thereafter has balanced the rule's deterrence value against the benefits to be gained in each relevant context.[41]

For instance, consider the Supreme Court's recent decision in *Pennsylvania Board of Probation and Parole v. Scott*.[42] There, a parolee argued that evidence allegedly obtained illegally from his residence by a parole officer should be excluded in subsequent parole-revocation proceedings.[43] At the outset the Court stressed "that the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution."[44] As "a judicially created means of deterring illegal searches and seizures," the exclusionary rule applies "only where its deterrence benefits outweigh its substantial social costs."[45] The Court concluded that, in the parole context, the exclusionary rule "would provide only minimal deterrence benefits" yet "would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."[46]

Under contemporary doctrine, therefore, the exclusionary rule–though derived from the Constitution–must be considered a judge-made rule. In an appropriate case, the Supreme Court may abandon or continue to modify the rule based not only on a change of heart but on changes in the legal landscape that minimize the need for the rule.

Understanding *Mapp* to rest on an over-enforced constitutional norm has direct consequences principally for the legislative branch. At the time of *Mapp*, the Court explicitly found existing methods of enforcing the Fourth Amendment inadequate.[47] But *Mapp* signals that, if alternative safeguards are created, the Court will reconsider the exclusionary rule. The Court has invited other institutional actors to participate in shaping the ultimate contours of the right to be free from unreasonable searches and seizures.

---

41. For an analysis of evolution of the Court's deterrence rationale, see Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 32 WAKE FOREST L. REV. 261, 263-70 (1998).

42. 118 S. Ct. 2014 (1998).

43. *See id.* at 2018.

44. *See id.* at 2019.

45. *See id.* (citation omitted).

46. *See id.* at 2020; *see also* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding exclusionary rule inapplicable in civil deportation proceeding); United States v. Janis, 428 U.S. 433 (1976) (holding rule inapplicable to civil tax proceeding).

47. *See supra* text accompanying notes 29-35.

II.

The Court's authority to revisit the exclusionary rule does not suggest its willingness to do so. Indeed, the prospect for judicial change may seem dim. The Supreme Court has retained the core of the rule for over thirty-five years, despite a barrage of protests. The Court may be willing to chip away at the rule without extirpating it.

Moreover, administration of the exclusionary rule may itself stymie legislative creativity, given that legislatively spurred reform ultimately may be blocked by the Supreme Court. Legislators cannot gauge the benchmarks that the Supreme Court will use in deciding whether to accept their reforms. The Court in *Mapp* expressed skepticism about the prospect for legislative reform, noting that "other remedies have been worthless and futile."[48] And Chief Justice Burger lamented in *Stone v. Powell* that "even if legislatures were inclined to experiment with alternative remedies, they have no assurance that the judicially created rule will be abolished or even modified in response to such legislative innovations."[49]

Be that as it may, the prospect for Supreme Court change is significant. First, in the last twenty years, the Court has cut back on the rule considerably and individual Justices have condemned it roundly.[50] The Court has overturned other Warren Court precedents, particularly in the habeas context.[51]

Second, the Pepperdine Study or any similar alternative–if adopted–may well prod the Supreme Court to reassess the continuing need for the exclusionary rule.[52] A state or lower court decision upholding the remedial alternative would force the Supreme Court's hand.[53] The Court may be more willing to jettison the rule if it can rely on legislative alternatives. Since *Mapp*, the Court has not considered the adequacy of any legislative alternatives to the exclusionary rule. The Court would need to ascertain whether the legislative alternative provides adequate safeguards to ensure continued deterrence of Fourth Amendment violations.

The *Bivens* context presents the closest analogy. For the first time in *Bivens v. Six Unknown Named Agents*,[54] the Supreme Court recognized a cause of action

---

48. *See* Mapp v. Ohio, 367 U.S. 643, 652 (1961); *see also* 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, 922 (1996) (making similar point in context of *Miranda* warnings).

49. *See* Stone v. Powell, 428 U.S. 465, 501 (1976).

50. *See supra* text accompanying notes 23-44.

51. *See Stone*, 428 U.S. at 480-81; *see also* Brecht v. Abrahamson, 507 U.S. 619 (1993) (limiting harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967), on collateral review); Teague v. Lane, 489 U.S. 288 (1989) (limiting retroactive scope of habeas embraced in cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963)); Wainwright v. Sykes, 433 U.S. 72 (1977) (foreclosing review of defaulted claims that could have been litigated under *Fay v. Noia*, 372 U.S. 391 (1963)).

52. *See* Perrin et al., *supra* note 1, at 743-54.

53. *See also infra* note 118.

54. 403 U.S. 388 (1971).

directly under the Constitution for money damages against federal officials.[55] *Bivens* arose from an unreasonable search and seizure under the Fourth Amendment.[56] Without a warrant, Federal Bureau of Narcotics agents arrested Bivens for alleged narcotics violations.[57] The agents humiliated him in front of his family and proceeded to ransack his apartment in an unsuccessful search for drugs.[58] Furthermore, the agents threatened to arrest his entire family.[59] Bivens subsequently filed an *in forma pauperis* suit seeking relief for the alleged unconstitutional search and seizure.[60]

To redress the Fourth Amendment violation, the Court fashioned a monetary remedy.[61] As with the adoption of the exclusionary rule in *Weeks* and later in *Mapp*, the Court did not make it entirely clear whether the *Bivens* remedy stemmed directly from the Constitution or from the common-law powers of the Court.

In permitting the suit to proceed, the Court cautioned in general that recovery could only be gained where 1) the petitioner has no alternative means of obtaining redress, and 2) there are no "special factors counseling hesitation."[62] *Bivens* further suggested that if there is "an explicit congressional declaration that . . . [plaintiff should be] remitted to another remedy, equally effective in the view of Congress,"[63] then no *Bivens* suit would lie. Like the exclusionary rule, the *Bivens* remedy is not constitutionally compelled *per se* as long as some way to redress constitutional violations exists. The Court apparently invited Congress to join in a dialogue to determine the most efficacious way to remedy constitutional violations.

In *Bivens* the Court considered common-law remedies available for unreasonable searches and seizures such as trespass, false arrest, and assault.[64] The Court concluded that such remedies were too uncertain and incomplete, particularly given immunity doctrines, to provide adequate safeguards.[65] Thus, although the Court created a cause of action, it plainly directed future courts to consider whether sufficient alternative remedies existed to obviate the necessity for the newly created cause of action. Therefore, *Bivens* provides an apt context for gauging the Supreme Court's probable reaction to a legislative effort to create substitute remedies for the exclusionary rule.

---

55. *See id.* at 397.
56. *See id.* at 389.
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.* at 389-90.
61. *See id.* at 395-96.
62. *See id.* at 396-97.
63. *See id.* at 397.
64. *See id.* at 390-95.
65. *See id.* at 394-95.

In the immediate wake of *Bivens*, the Supreme Court demanded that the legislatively crafted remedy provide similar recovery to that obtainable in a *Bivens* suit. For instance, in *Carlson v. Green*[66] the Court considered whether an inmate could sue prison officials directly under the Eighth Amendment for the failure to afford appropriate medical care.[67] The Court recognized that a legislative avenue of recovery existed under the Federal Tort Claims Act (FTCA)[68] but found that alternative deficient.[69] With respect to deterrence, the Court determined that an action against an individual defendant likely served as a more effective deterrent than an action against the United States as under the FTCA.[70] As a related matter, the inability of plaintiffs to recover punitive damages under the FTCA undermined the prospect of effective deterrence under the FTCA.[71] With respect to compensation, the Court noted that no jury trial is available under that Act, limiting the plaintiff's ability to obtain compensation in certain types of cases.[72] Seemingly, the Court required any legislative alternative to grant protection comparable to the Court-crafted remedy.[73]

Following *Bivens* the Court in *Bush v. Lucas*[74] considered whether an aerospace engineer employed by the federal government could sue under the First Amendment for a retaliatory demotion.[75] 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.[76] Even though the congressional remedy was not an equally effective substitute for the judicial remedy sought, the Court concluded that it was constitutionally adequate given Congress's creation of an elaborate system to handle federal personnel matters.[77] *Bush* fused the two initial inquiries from *Bivens*: whether a special factor counselling hesitation existed and whether Congress had created an alternative remedial scheme.[78] In essence, the Court stated that it would find a special factor counselling hesitation if Congress had crafted a comprehensive remedial scheme,[79] even if the remedy provided was not as effective as maintaining a *Bivens* claim.[80]

---

66. 446 U.S. 14 (1980).
67. *See id.* at 16.
68. 28 U.S.C. § 2680 (1998).
69. *See Carlson*, 446 U.S. at 19-20.
70. *See id.* at 20-21.
71. *See id.* at 22.
72. *See id.* at 22-23.
73. *See id.* at 18-19.
74. 462 U.S. 367 (1983).
75. *See id.* at 369.
76. *See id.* at 389-90.
77. *See id.* at 374.
78. *See id.* at 389-90.
79. *See id.* at 388-89.
80. *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1144-45 (1989).

The Court manifested even greater deference to legislative will in *Schweiker v. Chilicky*.[81] Plaintiffs in that case received Social Security benefits and claimed that government officials violated their due process rights by arbitrarily cutting off their benefits.[82] In recognition of abuses in the social security system, Congress had adopted a more comprehensive administrative review system to minimize the continued potential for abuse.[83] Back benefits were available.[84] However, no collateral damages could be obtained for losses resulting from the initial wrongful denial of benefits, such as a house foreclosure or furniture repossession during the period in which benefits were wrongfully withheld.[85] Nonetheless, the Court declined to recognize a due process claim against the program administrators: "[w]hen the design of a Government program suggests that Congress had provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."[86]

Two recent courts of appeals decisions addressing the adequacy of legislative alternatives further suggest the likely judicial response to the Pepperdine Study,[87] if adopted. First, in *Moore v. Glickman*[88] a former employee of the Agricultural Stabilization and Conservation Service (ASCS) sued several agency officials for alleged unconstitutional conduct arising out of an internal agency investigation of the agency office where she had worked.[89] She asserted that the defendants' conduct failed to afford her due process, and that the investigation was launched for retaliatory purposes because she had criticized the performance of an influential state official with whom the agency worked.[90]

In holding the *Bivens* claim precluded, the Ninth Circuit first stated that "where Congress has provided some mechanism for relief that it considers adequate to remedy constitutional violations, *Bivens* claims are precluded."[91] Although the court recognized that employees in Moore's position were not covered by any comprehensive civil service protections, as in *Bush v. Lucas*, the court

---

81. 487 U.S. 412 (1988) (declining to recognize cause of action in light of the Social Security Act's elaborate administrative remedy scheme even though Congress decided to provide *no* remedy in the situation presented).

82. *See id.* at 418.

83. *See id.* at 416.

84. *See id.* at 417.

85. *See id.* at 419.

86. *See id.* at 423.

87. *See* Perrin et al., *supra* note 1, at 673-74.

88. 113 F.3d 988 (9th Cir. 1997).

89. *See id.* at 989.

90. *See id.* at 990.

91. *See id.* at 991.

reasoned that she could rely on the Administrative Procedure Act (APA)[92] to guarantee judicial review of her employment termination.[93] No damages would necessarily be available, but the validity of the termination could be assessed.[94] The court concluded that "[a] finding of preclusion is premised only on an alternative scheme and some indication that Congress deliberately elected not to include complete relief."[95] The standard of review was entirely deferential.[96]

Contrast *Moore* with the Seventh Circuit's decision in *Bagola v. Kindt*.[97] There, an inmate sued prison officials under the Eighth Amendment for injuries he received while working for the Federal Prison Industries.[98] Bagola's hand was severed when he caught his arm in an exposed part of a machine that he was inspecting at the prison facility.[99] He alleged that prison officials were deliberately indifferent to his safety in failing to install minimally acceptable safety devices on the machine.[100]

Before turning to the merits of the *Bivens* claim, the Seventh Circuit considered whether the claim was precluded in light of Congress's creation of an alternative remedial scheme under 18 U.S.C. § 4126, which provides a worker's compensation-type remedy for prison workers.[101] Inmates can apply both for lost wages and for compensation for any injuries received.[102]

According to the court of appeals, "[t]he key inquiry is whether Congress intended to redress constitutional violations with a remedy other than damages–by providing a remedial scheme with procedural safeguards sufficient to protect individual's constitutional rights."[103] The court recognized that the remedies provided by Congress do not have to be comprehensive or as effective as a *Bivens* claim.[104] But the court held that there is a critical difference distinguishing *Bagola* from cases such as *Chilicky* and *Bush v. Lucas*.[105] In those cases "the alternative remedial system . . . provided a significant opportunity to expose allegedly unconstitutional conduct"[106]–the administrative process in *Chilicky* and the civil

---

92. 5 U.S.C. § 701 (1996).

93. *See Moore*, 113 F.3d at 992-93.

94. *See id.* at 993. In addition, the court believed that Congress's failure to extend coverage of the civil service laws to such employees was not inadvertent. *See id.*

95. *Id.* at 994.

96. *See also* Lee v. Hughes, 145 F.3d 1272 (11th Cir. 1998) (holding that a federal employee, also not covered by civil service reform act, was precluded from bringing *Bivens* claim). *But see Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991) (implying *Bivens* remedy in light of the fact that no comprehensive scheme covered federal employee relationship).

97. 131 F.3d 632 (7th Cir. 1997).

98. *See id.* at 634.

99. *See id.*

100. *See id.* at 633-34, 636.

101. *See id.* at 636.

102. *See id.* at 642.

103. *Id.* at 641.

104. *See id.* at 642.

105. *See id.* at 642-43.

106. *Id.* at 643.

service scheme in *Bush v. Lucas*.[107] Although full damages may not have been available, the offending unconstitutional conduct could have been unearthed and sanctioned.[108] In contrast, given the no-fault system of the worker's compensation scheme, unconstitutional conduct would rarely come to light.[109] Under the congressional scheme, the critical factor is injury, not how the injury is caused.[110] Moreover, claims for injuries cannot be made until forty-five days prior to release, which would possibly delay any adjudication for years. Therefore, the court reasoned that "[i]f an administrative scheme that did not safeguard a claimant's constitutional rights precluded a *Bivens* claim, unconstitutional conduct would be insulated from review by any adjudicatory forum."[111] The court concluded that "courts should not readily assume that a *Bivens* claim is precluded" if "the procedural safeguards of an administrative scheme are inadequate protectors of constitutional rights."[112]

Despite the result, the court in *Bagola* manifested considerable deference to legislative judgment. The court demurred only due to the extraordinary limitations inherent in any worker's compensation scheme. Taken together with *Moore*, courts will permit legislative alternatives to supersede the *Bivens* remedy as long as the remedial system is comprehensive and affords some opportunity to root out unconstitutional conduct.

Thus, the *Bivens* analogy suggests that the Court might not require any legislative alternative to the exclusionary rule to provide as full deterrence or as comprehensive relief. Rather, the Court might defer if convinced that the legislative design constitutes a comprehensive effort, even if falling somewhat short, to provide adequate deterrence of and relief from constitutional wrongs. No empirical support is necessary. Under that framework, the administrative scheme advocated in the Pepperdine Study would likely fare well.[113]

To be sure, in *Bivens* the question is what rights to afford individuals challenging governmental action, while in the exclusionary rule context the question is what rights to afford individuals subjected to unconstitutional conduct. Perhaps Congress merits more deference when determining how the Constitution

---

107. *See id.*
108. *See id.*
109. *See id.* at 644.
110. *See id.*
111. *Id.* at 644.
112. *Id.* On the merits of the Eighth Amendment claims, the court decided against the inmate. *See id.* at 645-48.
113. *See* Perrin et al., *supra* note 1, at 743-55. The proposal ensures that unconstitutional conduct will be aired. It predicates recovery in the administrative process on a demonstration of unconstitutionality and preserves the exclusionary rule as an option in the case of intentional wrongdoing. *See id.*

is to be used as a sword instead of as a shield. More deference might be accorded the legislative product when safeguarding the government from intrusive suits as opposed to when the government itself brings the machinery of government to bear upon an individual.

I am not convinced. The same constitutional right is implicated whether the basis is a damages claim as in *Bivens* or a motion to suppress. The Court in the two situations has fashioned procedural rules–*Bivens* claims and the exclusionary rule–to help enforce the right to be free from unreasonable searches and seizures. The question of whether Congress has greater capacity than the courts–due to institutional competence or majoritarian legitimacy–to effectuate Fourth Amendment rights should be the same in both contexts, and the deference owed to Congress should likely be comparable.

In any event, at a minimum the Court will likely defer to carefully crafted legislative findings as to why the alternative remedial scheme was adopted. Explicit legislative documentation of the reasons for alternatives to the exclusionary rule may well help convince the Court that the exclusionary rule should be abandoned.

The Commerce Clause cases pose a helpful analogy. In *United States v. Lopez*[114] the Supreme Court invalidated congressional enactment of the Gun-Free School Zones Act on the ground that Congress lacked the authority under the Commerce Clause to encompass activity that had such an insubstantial connection to interstate commerce.[115] 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."[116] Properly drawn congressional findings can help support statutes that otherwise would be invalidated on constitutional grounds.[117] The Supreme Court therefore might defer substantially to explicit congressional findings supporting an alternative way to remedy Fourth Amendment violations. Conversely, Congress's failure to include findings may lessen, though not completely eliminate, the deference accorded to its legislative product.[118]

---

114. 514 U.S. 549 (1995).

115. *See id.* at 567.

116. *Id.* at 563.

117. *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."); Perez v. United States, 402 U.S. 146, 154-57 (1971) (upholding congressional power to regulate loan sharking).

118. In *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), the Fourth Circuit upheld a congressional determination that *Miranda* warnings were not essential to preserve the right against self-incrimination in federal proceedings. Congress evidently sought to overrule *Miranda* without providing any new ways to prevent constitutional violations. Despite the lack of findings as to why the prior remedial scheme would be effective, the court in *Dickerson* held that the legislation displaced the *Miranda* rule. *See id.* at 671.

Thus, a legislative alternative would spur the United States Supreme Court to consider whether the exclusionary rule is still needed. Based on the *Bivens* analogy, the Court might well defer to any comprehensive legislative scheme, like the one advocated in the Pepperdine Study,[119] even if the remedy provides less deterrence than the exclusionary rule. The presence of legislative findings might prompt the Court to accept the legislative alternative more readily.

Nor would the administrative mechanism be the only relevant change in the legal landscape to consider. First, as previously discussed, the Court in *Bivens*–after *Mapp*–held that individuals could sue government officials directly for constitutional injuries suffered.[120] *Bivens* arose out of an unreasonable search and seizure. After *Bivens*, individuals can recover–contingent upon official immunity doctrine–for injuries arising out of illegal searches and seizures.[121]

Second, Congress, also after *Mapp*, waived the federal government's immunity from such claims in a 1974 amendment to the Federal Tort Claims Act.[122] Congress evidently responded to publicity surrounding several notorious raids by federal law enforcement personnel that included illegal searches.[123] In one instance, Herbert and Evelyn Giglotto awoke in the evening to the sound of someone breaking down the door of their home.[124] Five shabbily dressed men entered and motioned with their pistols for Mr. Giglotto to return to his bedroom.[125] They threw him face down on his bed, and tied his hands behind his back.[126] The men finally identified themselves as federal officers and then forced Mrs. Giglotto, clad only in a negligee, also to lie face down with hands shackled.[127] After a fifteen-minute search, an officer entered the bedroom and exclaimed that they had the wrong people.[128] The officers then left after untying the couple, leaving a broken television, camera, and antique vase in their wake.[129] This story evidently helped galvanize congressional attention to overzealousness on the part of some federal law enforcement officials.

---

119. *See* Perrin et al., *supra* note 1, at 743-55.

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

121. *See id; see also* Lawmaster v. Ward, 125 F.3d 1341 (10th Cir. 1997); Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Ginter v. Stallcup, 869 F.2d 384 (8th Cir. 1989); Tarpley v. Greene, 684 F.2d 1 (D.C. Cir. 1982).

122. *See* 28 U.S.C. § 2671-80 (1994).

123. *See* Jack Boger et al., *The Federal Tort Claim Act International Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 498 (1976).

124. *See id.* at 500.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 501.

Consequently, in 1974 Congress authorized suit under the FTCA for *Bivens* claims as well as some intentional torts based upon acts or omissions of law enforcement officers.[130] Both the government and law enforcement officers can now be sued for abusive interrogation tactics.

Consider the Ninth Circuit's decision in *Arevalo v. Woods*.[131] There, plaintiff was a passenger in a car believed to be transporting illegal aliens across Oregon.[132] An INS official stopped the car because the plaintiff and his passenger looked to be of Mexican descent.[133] Plaintiff, who spoke fluent English and was born in this country, refused the officer's request to produce identification.[134] Without inquiring as to plaintiff's citizenship, the official then handcuffed Arevalo and his passenger and transported them to a location where another official was waiting.[135] After more threats and badgering, the officials finally released plaintiff.[136] Plaintiff successfully recovered under the FTCA for violation of the right to be free from unreasonable searches and seizures.[137]

Moreover, victims of unconstitutional searches and seizures can recover under 42 U.S.C. § 1983 in more contexts than they could at the time of *Mapp*.[138] Although suit for wrongful searches could be maintained against state and local officials at the time of *Mapp*, the Supreme Court had held that no redress was possible against municipalities themselves.[139] Thereafter, in *Monnell v. Department of Social Services*[140] the Court changed direction, holding that municipalities fell within the purview of section 1983.[141] Consequently, victims can now sue local governments as long as they can show some tie between the locality's custom or policy and the injury.[142]

Finally, although the data are hardly conclusive, some evidence exists that law enforcement officials currently abuse suspects' rights far less than during the era preceding *Miranda*.[143] Studies attest to the greater training and internal monitoring

---

130. *See* 28 U.S.C. § 2680(h) (1994).
131. 811 F.2d 487 (9th Cir. 1987).
132. *See id.* at 488.
133. *See id.*
134. *See id.* at 489.
135. *See id.*
136. *See id.*
137. *See id.; cf.* Gasho v. Bell, 39 F.3d 1420 (9th Cir. 1994) (recognizing possible FTCA claim for intentional infliction of emotional stress arising out of arrest by law enforcement officials). Criminal penalties are currently theoretically available against such officials as well. *See generally* United States v. Lanier, 117 S. Ct. 1219 (1997) (construing 18 U.S.C. §§ 241-42 to apply to constitutional injuries inflicted by officers acting under color of law).
138. *See* 42 U.S.C. § 1983 (1994).
139. *See* Monroe v. Pape, 365 U.S. 167, 192 (1961).
140. 436 U.S. 658 (1978).
141. *See id.* at 690-91.
142. *See id.*; *see also* Perrin et al., *supra* note 1, at 748.
143. *See* Perrin et al., *supra* note 1, at 674.

in law enforcement agencies than previously existed,[144] and the Supreme Court has focused on that factor in determining whether to apply the exclusionary rule.[145] Moreover, there may be greater social stigma placed on excessive searches than there was prior to *Mapp*.

In sum, the Supreme Court may well defer to a comprehensive legislative alternative such as the Pepperdine Study in deciding whether to jettison the exclusionary rule.[146] The Court would likely consider whether the combination of possible civil suits against federal officers, constitutional and other tort actions against the federal government, civil rights suits against local governments, and greater internal control over law enforcement personnel has removed the imperative for the prophylactic *Mapp* exclusionary rule.[147] The Court likely will pay heed to any careful effort by the legislature to fashion a different approach.

III.

When confronted with a claim that legislative change has obviated the necessity for the exclusionary rule, the Supreme Court should assess the adequacy of the legislative alternative and consider any legislative findings in support. The degree of deference is open to question, but the *Bivens* analogy suggests that the Court will likely defer to any such legislative effort, as well it should if the legislative alternative ensures sufficient deterrence.[148] The issue remains, however, whether state and federal courts may independently review the efficacy of alternative mechanisms, such as the administrative scheme sketched in the Pepperdine Study, to determine whether to eliminate the exclusionary rule.[149] Or,

---

144. In part, the improved training and increased monitoring may stem from imposition of the exclusionary rule. *See, e.g.*, JEROME H. SKOLNICK AND JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE, 18-20 (1993) (concluding that officers currently use less force than in decades past); Neal A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467 (1971); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992); Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 CRIM. JUSTICE. ETHICS 28, 31 (1982); *see also* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 850-54; Perrin et al., *supra* note 1, at 674.

145. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044-45 (1984) (stressing the safeguard of potential INS disciplinary procedures faced by officers conducting excessive searches).

146. *See* Perrin, *supra* note 1, at 743-54.

147. In *Dickerson*, the Fourth Circuit ruled that federal legislation trumped *Miranda* without inquiring whether the legislative remedy provided was constitutionally adequate. *See supra* note 118. Surely, courts after *Miranda* and *Mapp* must independently consider the adequacy of alternative remedies before jettisoning the court-fashioned rule.

148. *See supra* notes 51-64 and accompanying text.

149. *See* Perrin et al., *supra* note 1, at 743-54.

must the Supreme Court be the sole decision-maker?[150]

There is much to be said for requiring lower courts to adhere to the *Mapp* precedent until the Supreme Court decrees otherwise. Predictability is gained. Defense counsel, prosecutors, and trial judges more readily will be able to gauge the success of various suppression motions. Awaiting a Supreme Court decision will also promote uniformity: the same means for enforcing the Fourth Amendment will apply in all courts, whether federal or state. Moreover, encouraging fidelity to precedent augments the Supreme Court's control over lower courts. In the analogous context of the arguably prophylactic requirement of *Miranda* warnings,[151] the Justice Department's current position is that only the Supreme Court can reexamine the necessity for altering the *Miranda* warnings.[152]

Indeed, the Supreme Court has directed lower federal courts to follow its own precedents even when there is reason to believe that the Court might reexamine them. In *Agostini v. Felton*[153] 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 education to disadvantaged children.[154] In 1985 the Court held such practice unconstitutional, and on remand, the district court issued a permanent injunction.[155] The Court presumably accepted the case for review in light of the substantial changes in Establishment Clause doctrine in the subsequent twelve years.[156] Nonetheless, the Court "reaffirm[ed] that '[i]f 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.'"[157] Even though the Court's own Establishment Clause analysis had changed, the Court reserved to itself the power to reexamine the validity of its prior precedent.[158] The Court's position fosters predictability and helps ensure its own managerial control over lower courts.

However, the *Mapp* context is arguably quite different than that in *Agostini*. Abandoning the exclusionary rule would not overrule *Mapp*. *Mapp*, after all,

---

150. For an analogous inquiry in the *Miranda* context, see Krent, *supra* note 23, at 1181-88.

151. *See* Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court in *Miranda*, similar to its reasoning in *Mapp* and its progeny, stated that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual." *See id.* at 467.

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

153. 521 U.S. 203 (1997).

154. *See id.* at 237.

155. *See* Aguilar v. Felton, 473 U.S. 402, 414 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

156. *See* Agostini, 521 U.S. at 209.

157. *Id.* at 237 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)) (alteration in original).

158. *See id.*

anticipates the possibility of altering the exclusionary rule as conditions change and alternative safeguards are adopted. The Court's repeated stress that the rule constitutes "a judicially created means of deterring illegal searches and seizures"[159] seemingly invites legislative examination of alternative paths to deterrence. Once legislatures have acted, should lower federal courts take the first crack at whether changes in the legal and administrative landscape warrant reexamination of the exclusionary rule?

Lower federal courts routinely assess the adequacy of different remedial schemes in several contexts. For instance, as discussed earlier, lower courts pursuant to *Bivens* determine the adequacy of existing legislative alternatives.[160] Courts assess the comprehensiveness of the alternatives and the suitability of administrative fora for airing constitutional claims. The suggested role for lower courts under *Mapp*, scrutinizing the availability and adequacy of alternative remedial schemes,[161] is hardly novel.

The Supreme Court's call in *Mapp* for a study of alternative remedial schemes should not preclude consideration by lower federal courts. Lower courts have the duty to determine whether, in light of changes in the legal landscape, the exclusionary rule is still required. If Congress passed a nationwide administrative scheme–such as the one advocated in the Pepperdine Study[162]–then federal district courts should, in a properly drawn case or controversy, ascertain whether the exclusionary rule should continue to be applied. Moreover, the Supreme Court would benefit from obtaining the view of the lower courts on the adequacy of any administrative remedial mechanism, just as it benefits from percolation of federal law issues in other contexts.[163] The Supreme Court's power to decide which cases to review presupposes the advantages of affording different circuit courts of appeal the opportunity to consider the same legal issues. The Supreme Court retains the ultimate authority to resolve any split in the circuits or even to review any appellate decisions that seem out of line.

---

159. *See* Pennsylvania Bd. of Probation and Parole v. Scott, 118 S. Ct. 2014, 2019 (1998).

160. *See supra* notes 63-72 and accompanying text.

161. Indeed, the Supreme Court has long directed lower courts to preclude a remedy under one federal statute if a more comprehensive remedial scheme exists. *See* Brown v. Gen. Serv. Admin., 425 U.S. 820 (1976) (holding that Title VII is exclusive judicial remedy for discrimination claims arising out of federal employment); United States v. Demko, 385 U.S. 149 (1966) (declining to find FTCA remedy when more specific worker's compensation remedy existed); Norman v. Niagara Mohawk Power Corp., 873 F.2d 634 (2d Cir. 1989) (holding RICO preempted by comprehensive administrative remedial scheme).

162. *See* Perrin et al., *supra* note 1, at 743-54.

163. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedent*, 46 STAN. L. REV. 817 (1994); Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82-83 (1990).

State courts as well should consider whether to uphold the exclusionary rule in light of legal and institutional changes within their own states. The suggestion that state courts can determine whether the exclusionary rule should be followed within their jurisdictions may appear radical. Yet federalism concerns strongly suggest that states be free to experiment with different controls on law enforcement agencies. State courts fully comply with *Mapp* by considering legislation in their own states that addresses the individual's right to be free from unreasonable searches and seizures.[164] Should California's legislature adopt the administrative remedy advocated in the Pepperdine Study,[165] California's courts should then determine whether the exclusionary rule must still be followed in California's courts.[166] State courts would abide by their duty to apply controlling federal law in cases within their jurisdiction[167] even if they determined that the exclusionary rule was no longer needed to enforce the Fourth Amendment. And, decisions by California's courts on federal law issues are ultimately superintended, through the power of certiorari, by the United States Supreme Court.[168]

Should the United States Supreme Court grant certiorari, the Court then would need to make an independent judgment as to the adequacy of the state legislative alternative to the exclusionary rule. Separation of powers concerns do not counsel deference, and thus the Court is less likely to defer to state legislators than to Congress. The analogy to congressional creation of alternatives to the judicially fashioned *Bivens* remedy does not hold.[169] From *Martin v. Hunter's Lessee*[170] onward, the Court has not trusted state legislative protection of federal rights as much as that initiated by Congress. But federalism principles suggest that the Court at least consider the state legislators' justification for the alternative and any gloss imposed by the superintending state courts.[171] The Court's power to review ensures that the constitutional right not be whittled away by hostile state legislation

---

164. Indeed, it would be somewhat unrealistic to relegate all claims for eliminating or limiting the exclusionary rule to the Supreme Court in the first instance. Such a practice would force litigants to raise arguments in lower courts that they know had to be rejected by those courts. Perhaps, more importantly, the Supreme Court would not be able to benefit from lower courts' views on the important issues raised.

165. *See* Perrin et al., *supra* note 1, at 746.

166. Or, state courts might fashion the alternative remedy themselves. The Alaska Supreme Court in *Stephan v. State*, 711 P.2d 1156 (Alaska 1985), imposed a duty to record electronically every custodial interrogation, lessening the need for *Miranda* warnings to some extent.

167. *See* U.S. CONST. art VI, § cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.").

168. *See* 28 U.S.C. § 1257 (1993) (providing for discretionary review by the Supreme Court over all state court decisions involving federal law issues).

169. *See supra* text accompanying notes 54-65.

170. 14 U.S. (1 Wheat.) 304 (1816) (asserting jurisdiction over state court denial of a claim that state confiscation of land violated federal rights).

171. *See Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367 (1982). Should a case involving local governmental officials be heard in federal court, the federal court must determine whether the state courts would likely find that existence of the legislative alternative obviates the need for the exclusionary rule.

and state courts.

As a result, the exclusionary rule may not be honored in all fifty states. There may be something discomfiting about the fact that the Fourth Amendment will be enforced differently among the several states. But any lack of uniformity should be accepted as the price we pay for our system of federalism. States should be free–subject to monitoring by the United States Supreme Court–to determine the best way to deter Fourth Amendment violations within their respective jurisdictions.[172]

Indeed, the right to be free from unreasonable searches and seizures is not uniform today. State courts have interpreted the same language in their own constitutions to afford more protection than that guaranteed under the Fourth Amendment.[173] The United States Supreme Court in *Cooper v. California*[174] stated that federal standards do "not affect the state's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."[175] Accordingly, many states exclude evidence that would be admissible in federal court.

For instance, in *State v. Guzman*[176] the Idaho Supreme Court considered whether to follow the federal Supreme Court rule in *United States v. Leon*,[177] which had declined to apply the exclusionary rule in contexts where a search based on less than probable cause (and hence unconstitutional) had nonetheless been undertaken in good faith.[178] Idaho parted company with the federal precedent because the court found it "important that the protections accorded under our state constitution not be diminished by a permanently pervading adoption of the federal good faith exception."[179] The Idaho Supreme Court recognized a far greater role for the exclusionary rule than did its federal counterpart: "[e]vidence illegally seized must be suppressed because to admit it would constitute an independent constitutional

---

172. Currently, states have differed in whether to apply the exclusionary rule to violations of the states' own requirements. *Compare* State v. Eubanks, 196 S.E.2d 706, 709 (N.C. 1973) (declining to fashion exclusionary rule for violation of particular misdemeanor arrest warrant requirement) *and* People v. Burdo, 223 N.W.2d 358, 360 (Mich. Ct. App. 1974) (same) *with* State v. Laflin, 627 A.2d 344, 346 (Vt. 1993) (requiring exclusion of evidence) *and* State v. Haigh, 315 A.2d 431, 433 (R.I. 1974) (same).

173. *See generally* Ken Gormley and Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1299-1302 (1992) (discussing various state supreme court decisions affording greater protections than those provided by the Fourth Amendment).

174. 386 U.S. 58 (1967).

175. *Id.* at 62.

176. 842 P.2d 660 (Idaho 1992).

177. 468 U.S. 897 (1984).

178. *See Guzman*, 842 P.2d at 660-61; *see also Leon*, 468 U.S. at 913.

179. *See Guzman*, 842 P.2d at 667-68.

violation by the court in addition to the violation at the time of the illegal search."[180] Many other state courts have departed from federal standards developed under the Fourth Amendment as well.[181] There may be one Fourth Amendment, but there is no uniform right to be free from unreasonable searches,[182] and states are free to afford greater safeguards than mandated by a federal constitutional floor.[183]

Although states may not afford less protection than guaranteed under the Fourth Amendment, they can reject the enforcement strategy in *Mapp* if, as I have argued, the Supreme Court has overenforced the right to be free from unreasonable searches and seizures. States may choose to safeguard the federal right in a different manner than that pursued in the federal courts. While some state courts may utilize the exclusionary rule more than their federal counterparts, others may rely upon alternative schemes such as that proposed in the Pepperdine Study.[184]

---

180. *See id.* at 671.

181. For a representative sampling, see Charnes v. DiGiacomo, 612 P.2d 1117 (Colo. 1980); State v. Miller, 630 A.2d 1315 (Conn. 1993); State v. Kearns, 867 P.2d 903 (Haw. 1994); State v. Hempele, 576 A.2d 793 (N.J. 1990); People v. Class, 494 N.E.2d 444 (N.Y. 1986); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979); State v. Opperman, 247 N.W.2d 673 (S.D. 1976); State v. Larocco, 794 P.2d 460 (Utah 1990); State v. Boland, 800 P.2d 1112 (Wash. 1990).

182. Indeed, if state courts rest their decisions on both state and federal grounds, they immunize themselves from Supreme Court review. Under the independent and adequate state grounds doctrine, the Supreme Court will not review a state court decision, despite a possibly erroneous analysis of a federal constitutional guarantee, if an independent state ground exists. *See* Michigan v. Long, 463 U.S. 1032, 1038 (1983).

183. Not all federal interests need be respected identically by the respective states. In *Johnson v. Fankell*, 520 U.S. 911 (1997), a former liquor store clerk filed in state court a due process action under § 1983 against officials of the Idaho Liquor Dispensary who had terminated her employment. *See id.* at 913. Defendants filed a motion to dismiss on grounds of qualified immunity, which the state trial court denied. *See id.* at 913-14. Defendants appealed the denial on the ground that the denial of a qualified immunity claim is immediately appealable under the collateral order doctrine, as it is in federal court. *See id.* at 914. Plaintiff argued 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. *See id.* The Idaho Supreme Court agreed with the plaintiff, holding that–despite the federal court precedent–Idaho did not permit officials sued for federal constitutional violations to appeal the denial of any claim for immunity. *See id.* The United States Supreme Court affirmed Idaho's decision to deny the appeal, explaining:

> [T]he ultimate purpose of qualified immunity is to protect the State and its officials from over-enforcement 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.

Id. at 919-20. Our system of federalism embraces the possibility that the level of protection afforded federal interests will vary among the several states.

184. *See* Perrin et al., *supra* note 1, at 743-54.

CONCLUSION

We are accustomed to uniform constitutional rights. The federal plan of convention seemingly ensures all citizens the same rights in the several states.

But when the Supreme Court overenforces a constitutional right, it leaves room for both Congress and state legislatures to create alternative means to effectuate that same constitutional interest. Reasons for over-enforcement vary, but stem from the Court's view that alternative safeguards for the constitutional right are wanting. The Court may believe that, in the absence of overenforcement, there may be little way to guarantee respect for the underlying constitutional norm.

Such is the story with *Mapp*. In the absence of the exclusionary rule, the Court determined that the right to be free from unreasonable searches and seizures would be neglected, if not nullified.[185] State immunity doctrines would frustrate all but the most compelling trespass and assault charges.

But times change, and the Court in *Mapp* recognized that the exclusionary rule might not always be required.[186] Alterations in the legal landscape have undermined at least some of the initial impetus for the exclusionary rule.[187] More efficacious tort remedies exist, internal monitoring of law enforcement agencies is more prevalent, and more dynamic proposals–as in the Pepperdine Study–have been raised to rein in law enforcement agencies while still promising redress for unconstitutional conduct.

In short, state and lower federal courts, if confronted by a state's decision to rely on alternatives to the exclusionary rule, should make an independent inquiry into the adequacy of the alternative posed. In so doing, they should defer to legislative factfinding buttressing the reforms, but scrutinize the new mechanism to ensure the vitality of the right to be free from unreasonable searches and seizures.[188] The United States Supreme Court would superintend all such determinations, balancing the need to enforce the Fourth Amendment with the right of Congress and state legislatures to effect deterrence and compensation in innovative ways. The right to be free from unreasonable searches and seizures may be protected without exacting the all-too-often problematic costs of the exclusionary rule.

---

185. *See supra* notes 27-34 and accompanying text.
186. *See* Mapp v. Ohio, 367 U.S. 643, 650-60 (1991).
187. *See supra* notes 27-46 and accompanying text.
188. *See supra* notes 146-83 and accompanying text.