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## ARTICLES

### CONSTITUTIONAL PRIVILEGING

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#### INTRODUCTION

CONSTITUTIONAL law trumps nonconstitutional law, and not the other way around. To constitutionalize a rule is thus to impose a restriction on the makers of nonconstitutional law that they are powerless to override. This principle underlies judicial review. When courts invalidate laws on constitutional grounds, they pay heed to the lexical priority of constitutional law, choosing to enforce a constitutional norm and not the nonconstitutional norm with which it conflicts.

This is a familiar and uncontroversial feature of our legal system. But the constitutional-nonconstitutional divide sometimes carries significance in a second, subtler respect, which relates not to the hierarchical relationship between conflicting legal rules but instead to the allocation of judicial resources in the resolution of legal claims. In a divergent range of doctrinal fields, courts have extended specialized forms of procedural or remedial treatment to claims involving constitutional law. To be sure, this phenomenon is far from universal; courts very often craft procedural rules in a way that draws no distinction between the underly-

ing constitutional or nonconstitutional character of the claims to which they apply.<sup>1</sup> But it is a point of much importance—though also a point not often recognized<sup>2</sup>—that courts have departed from this evenhanded approach in a variety of ways.

Consider some examples: The harmless error standard is less forgiving with respect to constitutional, as opposed to nonconstitutional, errors.<sup>3</sup> The rules of habeas corpus make it easier for federal prisoners to challenge their convictions on constitutional, as opposed to nonconstitutional, grounds.<sup>4</sup> Courts have expressed greater reluctance to deem constitutional claims forfeited on appeal,<sup>5</sup> and less reluctance to exclude evidence obtained in violation of constitutional rules.<sup>6</sup> And so on.<sup>7</sup> Several seemingly disparate legal doctrines in fact share this important unifying trait. Each doctrine employs a form of *constitutional privileging*, treating the constitutional status of a claim as a reason to give it a greater degree of judicial attention than it otherwise would receive.

Why do courts engage in constitutional privileging? Sometimes the reasons relate to the hierarchical superiority of constitutional law. The Supreme Court, for instance, has an established practice of “not . . . apply[ing] *stare decisis* as rigidly in constitutional cases as in nonconstitutional cases,”<sup>8</sup> which is based on the fact that “Congress can rectify our mistake, if such it was,” in only the latter sort of cases.<sup>9</sup> In some doctrinal settings, however, constitutional privileging is not so easily explainable. Nothing in the nature of harmless error review self-evidently suggests why courts should privilege constitutional over nonconstitutional claims. Nor does the lexical supremacy of constitutional rules indicate why federal habeas review should be easier to obtain when petitioners assert constitutional grounds for relief. Indeed, the Court has

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<sup>1</sup> See *infra* Section I.A (discussing the “trans-substantive” nature of many procedural rules).

<sup>2</sup> But see Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L.J.* 408, 461 (2007) (noting that “[t]he law distinguishes sharply between constitutional and nonconstitutional norms in any number of areas”).

<sup>3</sup> See *infra* Section II.A.

<sup>4</sup> See *infra* Section II.B.

<sup>5</sup> See *infra* Section II.E.

<sup>6</sup> See *infra* Section II.D.

<sup>7</sup> See, e.g., *infra* Section II.C (constitutional fact review); *infra* Section II.F (waiver); *infra* Section II.G (hypothetical jurisdiction).

<sup>8</sup> *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (internal quotations and alterations omitted).

<sup>9</sup> *United States v. S. Buffalo Ry. Co.*, 333 U.S. 771, 775 (1948).

often emphasized the need to *avoid* rendering judgments on constitutional issues—a principle that many forms of constitutional privileging would seem to violate outright. So how do we account for the practice in these sorts of contexts?

The answer to this question, I believe, involves something that many of us intuitively sense at a high level of generality—namely, that there is something special about the substance of constitutional law. On this view, what distinguishes constitutional from nonconstitutional norms is not just that the former trump the latter, but also that the former have a quality that renders them especially deserving of meticulous obedience, careful implementation, and full vindication. This idea surfaces often in our legal rhetoric. The Supreme Court, for example, has spoken of its “heightened regard . . . for constitutional protections.”<sup>10</sup> Judges routinely highlight the “constitutional magnitude”<sup>11</sup> and “constitutional gravity”<sup>12</sup> of legal errors, while also characterizing such errors as “ris[ing] to a constitutional dimension”<sup>13</sup> or being “magnif[ie]d . . . to constitutional proportions.”<sup>14</sup> And commentators have expressed similar sentiments, referencing the “intrinsic value,”<sup>15</sup> “inherent value,”<sup>16</sup> or “special value”<sup>17</sup> of constitutional rights. The idea is perhaps best captured by Justice Brennan’s observation that “every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value.”<sup>18</sup> Constitutional law, in other words, represents not just supreme law, which is legally prior to nonconstitutional law, but also *preeminent law*, which commands heightened attention and respect.

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<sup>10</sup> United States v. Lane, 474 U.S. 438, 446 n.9 (1986).

<sup>11</sup> E.g., Groh v. Ramirez, 540 U.S. 551, 565 n.9 (2004).

<sup>12</sup> E.g., United States v. Seale, 600 F.3d 473, 505 (5th Cir. 2010) (DeMoss, J., concurring in part and dissenting in part).

<sup>13</sup> E.g., Ashworth v. Bagley, 351 F. Supp. 2d 786, 789 (S.D. Ohio 2005).

<sup>14</sup> Sunal v. Large, 332 U.S. 174, 182 (1947).

<sup>15</sup> Josh Blackman, The Constitutionality of Social Cost, 34 Harv. J.L. & Pub. Pol’y 951, 962 (2011) (noting that the “intrinsic value of a constitutional right places it on a different plane with respect to cost-benefit analysis”).

<sup>16</sup> E.g., James Edward Wicht III, There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal, 12 BYU J. Pub. L. 73, 99 (1997).

<sup>17</sup> Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 Geo. L.J. 887, 936 n.241 (1999).

<sup>18</sup> Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting); see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 35 (1991) (Scalia, J., concurring in judgment) (“[W]hat is important enough to have been included within the Bill of Rights has good claim to being an element of ‘fundamental fairness’ . . .”).

In this Article, I aim to make the case that this highly generalized notion of constitutional preeminence cannot justify the practice of constitutional privileging. However we may intuitively feel about the specialness of constitutional rules, that sense of things, without more, fails to provide a good reason to give them more judicial attention than their nonconstitutional counterparts receive.

A nutshell version of my argument appears in Justice Scalia's dissenting opinion in *Webster v. Doe*.<sup>19</sup> *Webster* presented the question whether the Administrative Procedure Act ("APA") permitted judicial review of termination decisions issued by the Director of the Central Intelligence Agency under the National Security Act of 1947.<sup>20</sup> The six-Justice majority answered "yes and no," holding that judicial review was available for constitutional, but not statutory, challenges. Struggling to identify a basis for this distinction, Justice Scalia proposed—and then pilloried—one related to constitutional preeminence:

Perhaps . . . a constitutional right is by its nature so much more important to the claimant than a statutory right that a statute which plainly excludes the latter should not be read to exclude the former unless it says so. That principle has never been announced—and with good reason, because its premise is not true. An individual's contention that the Government has reneged upon a \$100,000 debt owing under a contract is much more important to him—both financially and, I suspect, in the sense of injustice that he feels—than the same individual's claim that a particular federal licensing provision requiring a \$100 license denies him equal protection of the laws, or that a particular state tax violates the Commerce Clause. A citizen would much rather have his statutory entitlement correctly acknowledged after a constitutionally inadequate hearing, than have it incorrectly denied after a proceeding that fulfills all the requirements of the Due Process Clause. The *only* respect in which a constitutional claim is necessarily more significant than any other kind of claim is that, regardless of how trivial its real-life importance may be in the case at hand, it can be asserted against the action of the legislature itself, whereas a nonconstitutional claim (no matter how significant) cannot. . . . But [that distinction] has no relevance to the question whether, as between executive violations of stat-

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<sup>19</sup> 486 U.S. 592 (1988).

<sup>20</sup> *Id.* at 594 (addressing the National Security Act of 1947, 50 U.S.C. § 403(c) (1982) (current version at 50 U.S.C. § 403-4a(e)(1) (2006))).

ute and executive violations of the Constitution—both of which are equally unlawful, and neither of which can be said, *a priori*, to be more harmful or more unfair to the plaintiff—one or the other category should be favored by a presumption against exclusion of judicial review.<sup>21</sup>

This argument is on the right track, but it requires elaboration. For one thing, it oversimplifies the idea it attacks. Without question, a rational individual would prefer a nonconstitutional entitlement to \$100,000 over a constitutional entitlement to \$100, just as she would rather win a statutory lawsuit with constitutionally deficient procedures than lose one with constitutionally adequate procedures. But to say these things is to miss the central question. We are not asking whether a constitutional ground for relief can ever matter less to a claimant than a nonconstitutional one. We are instead asking whether, all else equal, constitutional claims merit an added measure of concern that their nonconstitutional counterparts do not—whether, for instance, as between a nonconstitutional entitlement to \$100 and a constitutional entitlement to \$100, a court should be more inclined to vindicate the latter. The key issue, in other words, is whether constitutional law is in some general sense more deserving of judicial attention than nonconstitutional law, enough so, at least, to justify certain forms of constitutional privileging.

How then might we defend the practice on preeminence-based grounds? I see two possible lines of reasoning. The first defense would appeal to the *intrinsic* preeminence of constitutional law, contending that certain properties innate to the constitutional form necessitate the privileging of constitutional over nonconstitutional claims. Such an argument would begin from some fixed feature of constitutional law and derive from it the further notion that courts should take special care in adjudicating constitutional claims. It would characterize constitutional preeminence as nothing less than a natural offshoot of some basic characteristic of the Constitution itself: a corollary of constitutionalism, firmly grounded in the founding charter and its place within our political culture.

In my view, no defense along these lines is likely to succeed. To be sure, proponents of constitutional privileging have some facially attractive arguments at their disposal. They may say, for instance, that the preeminence of constitutional law follows from Article VI—claiming

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<sup>21</sup> Id. at 618 (Scalia, J., dissenting).

that constitutional rules are preeminent rules because they occupy the top place within the hierarchy of laws. Alternatively, they may say that the preeminence of constitutional law follows from the special processes of constitutional enactment—claiming that constitutional rules are preeminent rules because they are the product of uniquely supermajoritarian voting mechanisms and a special sort of politics marked by mobilized and high-minded civic awareness. Or they may say that the preeminence of constitutional law follows from the Constitution’s symbolic importance—claiming that constitutional rules are preeminent rules because the Constitution qua Constitution enjoys a special measure of respect, even veneration, within our political culture. In the pages that follow, I contend that each of these claims for constitutional privileging, based on the supposedly intrinsic preeminence of constitutional law, is weak. As a result, proponents of the practice must rely on a different line of defense.

As it turns out, another line of defense is available. This defense does not hypothesize the intrinsic preeminence of constitutional rules. Instead, it proceeds from the premise that courts can and should privilege those rules that are most “important” or “fundamental” in a sense that is *extrinsic* to the Constitution. From this premise, it might be said that many (though not necessarily all) constitutional rules do in fact qualify as most important or fundamental in this extrinsic sense, and that the constitutional-nonconstitutional distinction thus serves as a workable proxy for the distinction between preeminent and non-preeminent law. What is more, the argument goes, we are better off adhering to a categorical distinction between constitutional and nonconstitutional law than we would be if we gave courts free rein to privilege claims on an individualized basis. In short, the argument from extrinsic preeminence justifies constitutional privileging based on: (1) a present-day judgment concerning the fundamental or important character of many constitutional norms; and (2) a partiality for rules over standards, at least for purposes of determining when and how to privilege some claims over others.

I will argue that, while constitutional privileging is potentially justifiable on these pragmatically driven, extrinsic-preeminence grounds, strong considerations counsel against this approach. Whether constitutional privileging is defensible as a proper means of favoring rules of especially high importance or fundamentality turns out to be a complex question that requires an assessment of many variables. Those variables

include: (1) the criteria by which we measure the importance or fundamentality of legal rules; (2) the extent to which we regard constitutional and nonconstitutional rules as important or fundamental according to these criteria; and (3) the extent to which we favor rule-based over standard-based approaches to the privileging of claims. All three variables are likely to implicate issues on which there are deep differences in opinion, and for this reason, I do not purport to offer a definitive rebuttal of constitutional privileging. Instead, I aim only to draw attention to its downsides—downsides, I believe, that have been pushed out of view by our intuitions, as well as by loose and unhelpful rhetoric in our law.

One such downside bears emphasis: Constitutional privileging undermines what Professor Alexander Bickel called the “passive virtues” of *not deciding* contested constitutional issues.<sup>22</sup> The political irreversibility of constitutional law has long been treated as a reason to avoid rendering unnecessary constitutional judgments, and courts have relied on a number of techniques—such as avoidance canons, justiciability doctrines, and discretionary docket control—to achieve this result. Constitutional privileging, however, often pushes courts in the opposite direction, requiring them to reach out and decide constitutional questions they might otherwise be able (and inclined) to evade. This tension with avoidance norms may further counsel against continued reliance on many forms of constitutional privileging. The countermajoritarian difficulty can be mitigated—and the passive virtues better promoted—by disassociating the variable of constitutional status from the distinct concept of legal preeminence.

The Article proceeds as follows. Part I provides definitional details, explaining more precisely what I mean by the idea of constitutional preeminence and the practice of constitutional privileging. Part II offers doctrinal examples, demonstrating the varied ways in which courts have employed constitutional privileging in formulating procedural and remedial law. The remainder of the Article offers a normative appraisal and proposals for reform. Part III rejects the intrinsic-preeminence defense of constitutional privileging, dispatching in turn claims based on constitutional supremacy, the special processes of Constitution-making, and the sacred public status of the document itself. Part IV outlines and then challenges the extrinsic-preeminence defense, suggesting that the

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<sup>22</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (1962).

fit between constitutional law and preeminent law may be looser than is commonly assumed, and that a rule-oriented (as opposed to standard-oriented) approach to the privileging of legal claims may discourage valuable forms of legal dialogue. Part V then addresses tensions between constitutional privileging and longstanding tenets of constitutional avoidance, identifying ways in which constitutional privileging can frustrate realization of the passive virtues. Finally, Part VI proposes doctrinal reforms.

The central suggestion I offer, however, is far more basic. Legal actors should begin to undertake a serious inquiry into why courts have privileged constitutional over nonconstitutional claims in the past and whether they should continue to do so in the future. By drawing together different forms of this practice, by questioning its theoretical underpinnings, and by highlighting its practical downsides, I hope at least to demonstrate that the phenomenon of constitutional privileging merits closer attention than it has thus far received.

## I. CONSTITUTIONAL PRIVILEGING AND CONSTITUTIONAL PREEMINENCE

### A. *Constitutional Privileging*

What does it mean to “privilege” one claim over another? The idea is perhaps best understood by reference to the baseline norm of transsubstantivity within procedural law.<sup>23</sup> Procedural rules typically apply uniformly across different substantive domains. Pleading standards are no less liberal in employment cases than in environmental cases, evidentiary restrictions no different in narcotics prosecutions than in fraud prosecutions, and jurisdictional limits no stricter in tort cases than in contract cases. But this condition is merely a default, and one occasion-

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<sup>23</sup> See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 699 (2006) (noting that the “[t]he Supreme Court has relied . . . reflexively on trans-substantive justiciability doctrines, especially standing, to address the hazards of practically unacceptable remedies”); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 13 (1996) (noting that “procedural rules are almost always transsubstantive”). Indeed, the Court has sometimes expressly called for equal treatment of constitutional and nonconstitutional claims. See, e.g., *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (finding that “damages based on the abstract ‘value’ or ‘importance’ of constitutional rights are not a permissible element of compensatory damages” in constitutional tort cases); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that 42 U.S.C. § 1983 covers violations of both constitutional and nonconstitutional law). But see *infra* Section II.H (discussing subsequently adopted limitations on the *Thiboutot* holding).

ally finds departures from the trans-substantive norm. Securities fraud actions are subject to heightened pleading requirements.<sup>24</sup> Some types of suits—for instance, actions to enforce arbitration awards or to collect on federally guaranteed student loans—are exempt from the pre-discovery disclosure requirements of Federal Rule of Civil Procedure 26(a)(1).<sup>25</sup> In these contexts, and some others,<sup>26</sup> courts apply different procedural rules according to the type of claim being adjudicated, extending to some claims a specialized sort of treatment that others do not receive.

From here, the concept of *constitutional* privileging should be easy to grasp. Constitutional privileging occurs when courts favor certain claims on account of their constitutional character, differentiating between constitutional and nonconstitutional law for purposes of identifying claims entitled to special procedural treatment. This practice, as we will see, can assume different forms. Some forms of constitutional privileging, for instance, are designed to reduce the risk of constitutional error in the lower courts: Several states, for example, provide for automatic state supreme court review of cases involving constitutional issues,<sup>27</sup> thus attempting to ensure that all claims of a constitutional nature are resolved with high levels of judicial input and care. A related sort of constitutional privileging involves the relaxation of otherwise applicable procedural bars. Harmless error rules, as well as forfeiture and waiver rules, reflect this approach: Where, under normal circumstances, jurisdictional or remedial restrictions would preclude litigants from asserting constitutional claims, the constitutional status of a claim increases the likelihood that courts will nonetheless reach its merits. A third category involves the extent of remediation. Having recognized that a legal violation has occurred, courts might look to the constitutional (or nonconstitutional) status of the violated law in determining the form that the remedy should take; courts, for instance, have expressed greater willingness to apply the

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<sup>24</sup> 15 U.S.C. § 78u-4(b)(1) (2006); Fed. R. Civ. P. 9(b).

<sup>25</sup> Fed. R. Civ. P. 26(a)(1)(B).

<sup>26</sup> See, e.g., Christopher M. Fairman, Heightened Pleading, 81 Tex. L. Rev. 551, 553 (2002) (discussing, inter alia, the federal Y2K Act, which imposed special procedural burdens on lawsuits tied to disruptions caused by the Y2K computer bug); Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 Duke L.J. 669, 706 (2010) (noting that “we already have some substance-specific provisions within the generally transsubstantive Civil Rules”).

<sup>27</sup> See, e.g., Ill. Const. art. VI, § 4(c); Ohio Const. art. 4, § 2(B)(2)(a)(iii); Kan. Stat. Ann. § 60-2101(b) (2012); N.C. Gen. Stat. § 7A-30 (2012); N.J. Ct. R. 2:2-1(a); N.Y. C.P.L.R. 5601(b) (Consol. 2011).

exclusionary rule where evidence has been obtained in violation of constitutional, as opposed to nonconstitutional, requirements.<sup>28</sup> In short, where finality, economy, and deference to coordinate branches would normally dictate judicial forbearance, constitutional privileging calls for heightened judicial attention to constitutional claims, which thus become more likely to generate a full, accurate, and on-the-merits vindication of the legal interests at stake.

### *B. Constitutional Preeminence*

To show that constitutional privileging occurs, however, is not yet to uncover the curiosity that this Article addresses. To do so, we must further investigate the reasons why constitutional claims are privileged over others. As I noted earlier, some forms of constitutional privileging are easy to explain: Relaxing the strictures of *stare decisis* in constitutional cases, for example, makes sense in light of the political irreversibility of constitutional judgments. So too, Justice Scalia's protestations notwithstanding, the distinction drawn in *Webster* between constitutional and nonconstitutional rights may reflect nothing more than a special concern about safeguarding Article V amendment procedures. There, as we saw, the Court interpreted a congressional statute to preclude judicial review of certain statutory claims, but not constitutional claims. Like Justice Scalia, one might view this result as built on the questionable assumption that constitutional claims are simply more important than other claims. But one might also defend this result by pointing out that constitutional jurisdiction stripping, unlike statutory jurisdiction stripping, would enable Congress to achieve indirectly what it cannot achieve directly: the dilution of constitutional guarantees through a non-Article V enactment process.<sup>29</sup>

Arguments of this kind are not invulnerable to criticism. The key point for our purposes, however, is that such arguments do not account for the full range of constitutional privileging that exists within the law.

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<sup>28</sup> See *infra* Part II.

<sup>29</sup> Members of the Senate deployed arguments along these lines in opposing enactment of the Helms Amendment, which would have prohibited federal court adjudication of Establishment Clause challenges to voluntary school prayer. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 Harv. L. Rev. 869, 904 n.193 (2011) (quoting one Senator's concern that the Helms Amendment would "bypass[] article V of the Constitution" by providing a "back door for changing the organic law of the country" (citing 125 Cong. Rec. 7579 (1979) (statement of Sen. Charles Mathias, Jr.))).

Instead, many forms of the practice appear to stem from an altogether different premise, according to which the boundary between constitutional and nonconstitutional law captures a normatively significant distinction between laws that are more and less deserving of judicial attention. This is what I mean by the idea of constitutional preeminence.

An analogy may help. Courts apply specialized procedures in capital cases, thus, in effect, giving the average capital case greater judicial attention than the average noncapital case receives.<sup>30</sup> Why? The simple answer is that “death is different”—that is, given the heightened individual and societal interests at stake, special measures are needed to ensure that capital cases are handled in a meticulous and error-free manner.<sup>31</sup> A similar understanding of “difference” underlies the notion of constitutional preeminence. From such a vantage point, constitutional cases appear to implicate heightened social and individual interests, and, *for this reason*, warrant special attention from the courts. “Preeminence-based” constitutional privileging, in other words, does not respond—at least directly—to the irreversibility of constitutional precedents, the exclusivity of Article V procedures, or some other distinctive formal property of constitutional law. Instead, it reflects the idea that constitutional rules are by their nature more worthy or deserving of judicial attention than their nonconstitutional counterparts. As the next Part shows, this idea has come to influence the shape and substance of the law in a variety of ways.

## II. DOCTRINAL EXAMPLES

This Part identifies real-world examples of preeminence-based constitutional privileging. While the set of examples is not exhaustive,<sup>32</sup> the

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<sup>30</sup> See, e.g., Wayne R. LaFare et al., *Criminal Procedure* § 26.1(b) (5th ed. 2009).

<sup>31</sup> See *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring in judgment) (noting that the Court has often “relied on the premise that ‘death is different’ from every other form of punishment to justify rules minimizing the risk of error in capital cases”).

<sup>32</sup> Other examples not discussed at length here involve the political question doctrine, see, for example, *Bancoult v. McNamara*, 445 F.3d 427, 437 (D.C. Cir. 2006) (noting, in a case involving the political question doctrine, that “while the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches, no such constitutional claims are at issue in this case”); see also Recent Case, D.C. Circuit Holds Claims of Harms to Native Inhabitants of the British Indian Ocean Territory Caused by the Construction of a U.S. Military Base Nonjusticiable: *Bancoult v. McNamara*, 120 Harv. L. Rev. 860, 864 (2007) (criticizing *Bancoult* for “elevat[ing] a select segment of [individual] rights—namely, ‘constitutionally-protected liberties’—for which judicial review must be preserved,” while “relegating the rest

discussion should help to establish that (1) courts sometimes rely on the variable of constitutional status in privileging some claims over others; and (2) insofar as they have attempted to justify this practice, they have tended to articulate little more than conclusory appeals to the notion of constitutional preeminence.

#### *A. Harmless Error*

Federal harmless error doctrine distinguishes among three sorts of errors for purposes of evaluating harmless error on direct appeal: (1) “structural” constitutional errors,<sup>33</sup> (2) constitutional trial errors, and (3) non-constitutional trial errors.<sup>34</sup> For structural constitutional errors—that is, errors that “affect[] the framework within which the trial proceeds” or whose prejudicial effect cannot easily “be quantitatively assessed”—a rule of per se harmfulness applies.<sup>35</sup> Constitutional trial errors, by contrast, are subject to the rule of *Chapman v. California*, which permits a

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to more facile political question dismissal” (emphasis in original)); appellate review of evidentiary errors, see Fred O. Smith, Jr., Note, *Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 *Stan. L. Rev.* 1497, 1525 (2008) (“[S]tatutory evidence admission is governed by an abuse of discretion standard, whereas constitutional errors are generally reviewed de novo.” (internal footnote omitted)); and legislative rules governing the mandatory jurisdiction of state supreme courts, see *supra* note 27.

<sup>33</sup> It is not clear whether the “structural” error category includes only constitutional errors, though the Court has sometimes implied as much. See *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (describing structural errors as “constitutional errors which are not subject to harmless error”); *Chapman v. California*, 386 U.S. 18, 23 (1967) (noting “that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error”). And lower courts have stated the point more clearly. See, e.g., *United States v. Lindsey*, 634 F.3d 541, 549 (9th Cir. 2011); *United States v. Gonzalez-Huerta*, 403 F.3d 727, 734 (10th Cir. 2005). Of course, Congress may always itself require automatic reversal for statutory violations. See, e.g., *Zedner v. United States*, 547 U.S. 489, 507 (2006) (finding that the Speedy Trial Act effectuated an “implied repeal” of the harmless error rule). The discussion here, however, concerns courts’ adoption of *default* rules, which apply when Congress has not addressed the issue one way or the other.

<sup>34</sup> In habeas corpus proceedings, by contrast, the *Kotteakos v. United States* standard governs harmless error review of all legal claims. 328 U.S. 750 (1946); see also *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

<sup>35</sup> *Fulminante*, 499 U.S. at 308, 310. For cases recognizing structural error, see, for example, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–50 (2006) (right to choice of counsel); *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993) (right to beyond-a-reasonable-doubt jury instruction); *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984) (agreeing with the “consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee”).

finding of harmlessness only when the court determines “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”<sup>36</sup> And nonconstitutional errors are subject to what the Court has characterized as the “more forgiving standard” of *Kotteakos v. United States*,<sup>37</sup> which links harmlessness to a “fair assurance . . . that the judgment was not substantially swayed by the error,”<sup>38</sup> or, in the simplified formulation of some lower courts, a finding that it was “more probable than not that the error did not materially affect the verdict.”<sup>39</sup> Constitutional privileging thus manifests itself (1) in the Court’s withholding of the “structural” label from all errors of a nonconstitutional nature, and (2) in its application of a “considerably more onerous” form of review to constitutional trial errors.<sup>40</sup>

Why does harmless error doctrine call for constitutional privileging?<sup>41</sup> The answer does not lie in the text of Federal Rule of Criminal Proce-

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<sup>36</sup> *Chapman*, 386 U.S. at 24. Prior to *Chapman*, most courts had held that *all* constitutional errors warranted automatic reversal. See Roger J. Traynor, *The Riddle of Harmless Error* 55 (1970). Although that rule no longer applies, some scholars have advocated for its reinstatement (thus endorsing a very strong form of constitutional privileging). See, e.g., David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 Utah L. Rev. 483, 484; Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 441–42 (1980); Wicht, *supra* note 16, at 75.

<sup>37</sup> 328 U.S. at 765. The “more forgiving” language comes from *Fry v. Pliler*, 511 U.S. 112, 116 (2007).

<sup>38</sup> 328 U.S. at 765.

<sup>39</sup> *United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010); see also *Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 799 (6th Cir. 2007) (holding that nonconstitutional error is harmless “unless it is more probable than not that the error materially affected the verdict” (internal quotation omitted)).

<sup>40</sup> *United States v. Lane*, 474 U.S. 438, 446 n.9 (1986). Some scholars have suggested that the *Kotteakos* and *Chapman* standards “though doubtlessly different, turn out not to be that different.” E.g., John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 Wm. & Mary L. Rev. 163, 164 (1993). Not everyone agrees, however. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 14 n.46 (1997) (characterizing *Chapman* as a “much tougher threshold”), and the Court itself at least purports to treat the distinction as a real one.

<sup>41</sup> The original impetus for distinguishing between constitutional and nonconstitutional claims within harmless error law may have stemmed in part from practical concerns about federal-state relations. Professor Meltzer has suggested, for instance, that the Warren Court’s implementation of the *Chapman* standard arose largely from its “fear that state courts, left to their own devices, would unduly dilute federal constitutional norms by too easily finding errors to be harmless.” Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 28 (1994). To put the point somewhat differently, the vast majority of federal restrictions on state court criminal proceedings are constitutional in nature, so *Chapman*’s heightened standard of harmlessness for constitutional errors may have indirectly fa-

ture 52(a), which provides only that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”<sup>42</sup> Nor does it seem to involve a special justification tied to the formal properties of constitutional law. Instead, the constitutional privileging reflected within harmless error doctrine makes sense only by reference to the Court’s self-stated “heightened regard” for constitutional protections<sup>43</sup>—the idea, in other words, that constitutional errors are qualitatively more offensive than their nonconstitutional counterparts. Hence, as Professors Fallon and Meltzer have suggested, the “rationale” for the privileging “must . . . lie in differing conceptions of the importance of the violation, which in turn gives rise to differing conclusions about the importance of remediation and the balance of interests.”<sup>44</sup>

### B. Collateral Relief Under 28 U.S.C. § 2255

Preeminence-based constitutional privileging also occurs within the case law implementing 28 U.S.C. § 2255, which authorizes post-conviction challenges to federal detentions based on violations “of the Constitution or laws of the United States.”<sup>45</sup> As the Supreme Court has explained, “[u]nless [a habeas] claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited” than it otherwise would be.<sup>46</sup> *Hill v. United States* articulates the standard: When a Section 2255 petitioner asserts a nonconstitutional (and nonjurisdictional) ground for relief, the claim is cognizable only if it alleges a “fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure.”<sup>47</sup> Thus, in the words of the Wright and

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cilitated more aggressive Supreme Court monitoring of state court enforcement of federal law. See *id.* This explanation, however, has no bearing on the question whether *Chapman*’s constitutional-nonconstitutional distinction—which governs appellate review of trial proceedings in state *and* federal courts—is conceptually sound.

<sup>42</sup> Fed. R. Crim. P. 52(a) (emphasis added).

<sup>43</sup> *Lane*, 474 U.S. at 446 n.9.

<sup>44</sup> Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1772 n.222 (1991).

<sup>45</sup> 28 U.S.C. § 2255(a) (2006). Section 2255’s sister provision, 28 U.S.C. § 2254 (2006), governs federal collateral relief for state prisoners.

<sup>46</sup> *Reed v. Farley*, 512 U.S. 339, 354 n.13 (1994) (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)).

<sup>47</sup> *Hill v. United States*, 368 U.S. 424, 428 (1962). Though technically applicable in both § 2254 and § 2255 proceedings, the *Hill* standard is more relevant to § 2255, since very little federal nonconstitutional law governs state court trials. That is not to say, however, that *Hill*

Miller treatise, the Court's Section 2255 case law embraces a "distinction between constitutional and jurisdictional errors on the one hand and 'mere' errors of law or fact on the other."<sup>48</sup>

*Hill* poses a significant obstacle to the assertion of nonconstitutional claims under Section 2255. For example, it has spurred the refusal of some lower courts to grant collateral relief based on misapplications of the Federal Sentencing Guidelines.<sup>49</sup> In *United States v. Mikalajunas*, for instance, the Fourth Circuit reversed a district court's granting of such relief to two petitioners, reasoning, inter alia, that the petitioners had alleged "an ordinary misapplication of the guidelines that does not amount to a miscarriage of justice."<sup>50</sup> And this was so even though everyone involved in the case—the petitioners, the prosecutors, the district court, and the Fourth Circuit panel—agreed that the "ordinary misapplication" had caused the two petitioners to serve a combined five years' worth of extra jail time.<sup>51</sup>

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never has bite in the § 2254 context. In *Reed*, for instance, the Court reviewed a § 2254 challenge based on a state court's erroneous application of the Interstate Agreement on Detainers, which it characterized as a form of federal nonconstitutional law. 512 U.S. at 342, 347. Applying *Hill*, a plurality found collateral relief unavailable, reasoning that the petitioner had alleged only "[a]n unwitting judicial slip [that] ranks with the nonconstitutional lapses we have held not cognizable in a postconviction proceeding." *Id.* at 349 (plurality opinion); see also *id.* at 357 (Scalia, J., concurring in part and concurring in the judgment). Dissenting Justice Blackmun appeared to question the wisdom of constitutional privileging: "[E]ven if [*Hill* and its predecessor cases were] read to establish a line between 'important' and 'merely technical' violations," he argued, "this line is not identical to the line between statutory and constitutional violations." *Id.* at 364 n.7 (Blackmun, J., dissenting).

<sup>48</sup> 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 625 (4th ed. 2011); see also *Reed*, 512 U.S. at 353–54 ("*Hill* controls collateral review—under both §§ 2254 and 2255—when a federal statute, but not the Constitution, is the basis for the post-conviction attack."); Larry W. Yackle, *Federal Courts: Habeas Corpus* 60 (2003) (noting that the *Hill* rule limits consideration of nonconstitutional claims "notwithstanding the open-ended language of the jurisdictional statutes").

<sup>49</sup> See, e.g., *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999); *Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998); cf. *Gilbert v. United States*, 640 F.3d 1293, 1321–22 (11th Cir. 2011) (en banc) ("However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. . . . Sometimes a cigar is just a cigar, and sometimes an error is just an error.").

<sup>50</sup> *United States v. Mikalajunas*, 186 F.3d 490, 496 (4th Cir. 1999). The Fourth Circuit reversed the district court's granting of collateral relief on the alternative ground of procedural default, *id.* at 492–95, though, as the dissenting opinion pointed out, the majority's application of *Hill* rendered its procedural default analysis "irrelevant" to the outcome of the case, *id.* at 497 (Murnaghan, J., dissenting).

<sup>51</sup> *Id.*

This decision and others are susceptible to the criticism that they misapplied *Hill*—that is, that a lengthy deprivation of liberty resulting from an erroneous application of the Guidelines *is* in fact a miscarriage of justice warranting habeas review.<sup>52</sup> But the more fundamental point is that under *Hill* and its progeny, Guidelines-based claims face an extra procedural hurdle solely on account of their nonconstitutional nature. If the petitioners in *Mikalajunas* had alleged sentencing defects based on, say, a *Brady* violation or a Sixth Amendment error, the court would not have asked whether the alleged errors amounted to a “miscarriage of justice”; the constitutional status of their claims would have automatically advanced them to the next stage of the analysis. But because their claims involved “ordinary,” nonconstitutional law, the *Mikalajunas* petitioners faced an especially stringent form of habeas review, notwithstanding the obvious seriousness of the errors they alleged.<sup>53</sup>

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<sup>52</sup> See *id.* at 500–02.

<sup>53</sup> Federal habeas corpus law reveals other examples of constitutional privileging. Some circuits, for instance, have suggested that the cause-and-prejudice standard does not govern procedural default of nonconstitutional claims, holding instead that such default should be excused under an even narrower set of circumstances. See, e.g., *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (noting that “the cause and prejudice exception does not apply to nonconstitutional or nonjurisdictional claims,” and that instead “[a] petitioner simply cannot raise a nonconstitutional or nonjurisdictional issue in a § 2255 motion if the issue could have been raised on direct appeal but was not”); see also *Lanier v. United States*, 220 F.3d 833, 842 (7th Cir. 2000). But see *Lynn v. United States*, 365 F.3d 1225, 1232–33, 1235–44 (11th Cir. 2004) (applying the cause-and-prejudice standard to several nonconstitutional claims not raised on direct appeal). In addition, at least two provisions of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) distinguish between constitutional and nonconstitutional claims. First, the statute provides that certificates of appealability from district court denials of § 2255 petitions may issue only upon a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (2006) (emphasis added); see also *Medellin v. Dretke*, 544 U.S. 660, 666 (2005); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Second, the statute permits consideration of successive petitions only when they involve either newly discovered evidence or a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” 28 U.S.C. § 2244(b)(2)(A) (2006) (emphasis added); *id.* § 2255(h)(2); see also *infra* Subsection IV.B.2.

One rule from the habeas context arguably goes the other way. In *Bousley v. United States*, 523 U.S. 614, 619–21 (1998), the Court held that the nonretroactivity restrictions set forth in *Teague v. Lane*, 489 U.S. 288, 310 (1989), did not bar habeas petitioners from seeking retroactive application of (nonconstitutional) judicial holdings that narrowed the scope of substantive criminal statutes. This holding, however, rested primarily on a distinction between *procedural* and *substantive* rules, rather than constitutional and nonconstitutional rules. 523 U.S. at 620. *Bousley* never purported to suggest, in other words, that habeas petitioners would face a relaxed retroactivity bar when invoking nonconstitutional rules of criminal procedure (or, for that matter, face a heightened retroactivity bar when invoking substantive constitutional freedoms). What is more, as we will later see, *Bousley*’s holding has been un-

*C. Constitutional Fact Review*

Nearly eighty years ago, the Supreme Court first suggested that reviewing courts possessed enhanced fact-finding responsibilities in constitutional cases.<sup>54</sup> With this pronouncement, the Court laid the groundwork for what would later become known as the doctrine of “constitutional fact.”<sup>55</sup> Applied with some inconsistency,<sup>56</sup> the doctrine calls for especially searching appellate scrutiny of factual findings (and mixed question findings)<sup>57</sup> underlying the constitutional determinations

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dercut somewhat by the AEDPA bar on successive habeas petitions for nonconstitutional claims. See *infra* Subsection IV.B.2.

<sup>54</sup> *Crowell v. Benson*, 285 U.S. 22, 60 (1932).

<sup>55</sup> See Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229, 230 (1985). This is not to say that *Crowell* created constitutional fact review. Rather, *Crowell* “both confirmed and generalized” a rule that the Court had already embraced in earlier cases. See *id.* at 249–54; see also Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 *Duke L.J.* 1427, 1445–50 (2001) (recounting this history).

<sup>56</sup> See, e.g., A. Christopher Bryant, *Foreign Law as Legislative Fact in Constitutional Cases*, 2011 *BYU L. Rev.* 1005, 1011 (2011) (characterizing constitutional fact review as “indefensibly ad hoc and, frankly, intellectually incoherent”).

<sup>57</sup> Professor Steven Childress has argued, “[t]o the extent that [constitutional fact] cases merely restate the oft-cited rule that legal conclusions or mixed law-fact questions fall outside complete factfinding protections, such as the clearly erroneous standard of Federal Rule 52(a), they are not revolutionary or particularly necessary as a separate exception.” Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 *Tul. L. Rev.* 1229, 1240 (1996). As Adam Hoffman has noted, however, even though all “mixed questions of fact and law are in theory subject to plenary review, . . . the Supreme Court in practice applies deferential review where constitutional rights are not implicated,” thus suggesting that “the constitutional implications of the facts involved are an important, if sometimes unstated, motivation for the application of this standard of review.” Hoffman, *supra* note 55, at 1452–53; see also *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1113 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (“We have heretofore sensibly assumed that the independent examination rule calls for us to do something more than we would normally do. After all, it hardly ‘preserve[s] the precious liberties established and ordained by the Constitution’ to treat a First Amendment case the same as a slip-and-fall.” (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984))); Bryan Adamson, *Critical Error: Courts’ Refusal To Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 *Yale L. & Pol’y Rev.* 1, 24 (2009) (“Independent appellate judgment entails something more than de novo review.”); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 *Yale L.J.* 2431, 2460 n.167 (1998) (suggesting that some of the Court’s constitutional mixed question cases have been “treated . . . differently” from other mixed question cases that “involved nonconstitutional matters that were peripheral to the merits”).

of lower courts and administrative agencies.<sup>58</sup> The reach of this rule is uncertain, but its core remains intact. Within First Amendment doctrine, for instance, the Court has called for plenary appellate review of factual and mixed question findings underlying defamation judgments,<sup>59</sup> obscenity prosecutions,<sup>60</sup> and other judicial proceedings implicating the free speech right.<sup>61</sup> In the criminal procedure context, the Court has disclaimed deference to lower court findings on the presence of probable cause<sup>62</sup> and the voluntariness of confessions.<sup>63</sup> And the doctrine also has influenced the Court's posture toward legislative fact-finding, as, for instance, when it refused to accord "dispositive weight" to congressional findings underlying the Partial-Birth Abortion Act of 1993, making reference to its "independent constitutional duty to review factual findings where constitutional rights are at stake."<sup>64</sup>

Many bytes have been burned on the subject of constitutional fact review, but at least one feature of the doctrine seems settled and uncontroversial: The "independent appellate review" rule does not generally extend to nonconstitutional cases.<sup>65</sup> The presence of a constitutional claim,

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<sup>58</sup> An especially astute commentator has classified constitutional fact doctrine as a subspecies of "quasi-structural rules of adjudicative procedure," which shares the common characteristic of implementing specialized procedural requirements as "safeguards of substantive constitutional protections." Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 *Wm. & Mary L. Rev.* 1575, 1813, 1823 (2001). Also falling within this category are *New York Times v. Sullivan*'s requirement that defamation plaintiffs demonstrate "actual malice" with "convincing clarity," 376 U.S. 254, 285–86 (1964), and third-party standing rules, which "the Court has carefully structured . . . in such a way as to facilitate the vindication of substantive due process, equal protection, free speech, and other personal rights that might otherwise go unprotected." Coenen, *supra*, at 1819 (footnotes omitted).

<sup>59</sup> *Bose*, 466 U.S. at 514.

<sup>60</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).

<sup>61</sup> See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 567 (1995) (applying constitutional fact review to a state court's conclusion that a First Amendment claimant's expression lacked essential attributes of protected speech); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (reviewing independently a lower court's assessment of whether defendant's speech presented a clear and present danger).

<sup>62</sup> *Ornelas v. United States*, 517 U.S. 690, 696–98 (1996).

<sup>63</sup> *Miller v. Fenton*, 474 U.S. 104, 109–11 (1985).

<sup>64</sup> *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

<sup>65</sup> *City of Houston v. Hill*, 482 U.S. 451, 458 n.6 (1987) ("An independent review of the record is appropriate where the activity in question is arguably protected by the Constitution."); see also David L. Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* 125–26 (2008) (suggesting that the value of appellate deference to lower court fact-finding "is largely limited to ordinary litigation" and noting that "[i]n constitutional cases, a rule of deference is not worth the costs it imposes on basic liberties").

while not a sufficient condition to trigger intensified fact review, does appear to be a necessary one, as courts have suggested only rarely that nonconstitutional facts might be subject to an equivalent form of appellate scrutiny.<sup>66</sup> This special treatment extended to constitutional cases follows naturally from the idea of constitutional preeminence: Constitutional fact doctrine, as the Court has explained, “reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise [independent appellate] review in order to preserve the precious liberties established and ordained by the Constitution.”<sup>67</sup>

#### D. Exclusionary Remedies

Constitutional privileging is also evident in decisions concerning the admissibility of unlawfully acquired evidence.<sup>68</sup> Where a nonconstitutional rule of evidence does not directly specify the remedial consequences of its violation, courts must determine whether to apply the exclusionary remedy—that is, whether to forbid introduction of the evidence during trial. In so doing, courts have sometimes reasoned that exclusion is simply too harsh a remedy to impose for evidentiary viola-

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<sup>66</sup> See, e.g., *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008). I discuss this decision at greater length in Section V.C.

<sup>67</sup> *Bose*, 466 U.S. at 510–11; see also Faigman, *supra* note 65, at 127 (“The primary basis for the Court’s assumption of the burdensome task of independent review is the fact that case-specific fact resolutions in constitutional cases affect the exercise of basic rights and help establish the parameters of the Constitution’s boundaries.”). Professors Eugene Volokh and Brett McDonnell have described *Bose* as holding that “[u]nder most circumstances, . . . Rule 52(a) requires deference to lower courts (at least as to pure questions of fact), and the Seventh Amendment requires similar deference to juries; but where constitutional liberties are involved, the rule must be different.” Volokh & McDonnell, *supra* note 57, at 2465; see also Monaghan, *supra* note 55, at 267 (suggesting that “[a]ll questions of constitutional law application could be viewed as demanding independent appellate review because of the ‘importance’ of constitutional rights and immunities coupled with the central role of courts in preserving the constitutional order,” but noting that “[i]t is . . . not obvious that all constitutional rights are more valuable than other rights simply because they are mentioned in the Constitution”).

<sup>68</sup> The constitutional exclusionary rule, of course, is itself riddled with exceptions, with the end result being that unconstitutionally obtained evidence often ends up being admitted at trial. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 592–93 (2006) (knock-and-announce exception); *James v. Illinois*, 493 U.S. 307, 308–09 (1990) (impeachment exception); *Nix v. Williams*, 467 U.S. 431, 439–40 (1984) (inevitable discovery); *United States v. Leon*, 468 U.S. 897, 905 (1984) (good faith exception); *Rakas v. Illinois*, 439 U.S. 128, 129–30 (1978) (standing). That fact alone, however, does not affect the central observation here, which is simply that, relative to the already weak constitutional exclusionary rule, the nonconstitutional exclusionary rule is even weaker.

tions of a “merely” nonconstitutional nature. The Sixth Circuit, for example, has proclaimed that “[s]tatutory violations, absent any underlying constitutional violations or rights, are generally insufficient to justify imposition of the exclusionary rule,”<sup>69</sup> and that “[t]here must be an exceptional reason, typically the protection of a constitutional right, to invoke the exclusionary rule.”<sup>70</sup> Likewise, the Ninth Circuit has explained that “this and other circuits have held in recent years that an exclusionary rule is typically available only for constitutional violations, not for statutory or treaty violations.”<sup>71</sup> The Supreme Court itself has lent support to this view, explaining that “[w]e have applied the exclusionary rule primarily to deter constitutional violations,”<sup>72</sup> and that in “[t]he few cases in which we have suppressed evidence for statutory violations[,] . . . the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests.”<sup>73</sup>

### *E. Forfeiture*

The “plain error” rule restricts appellate review of claims that criminal defendants have failed to assert at trial. The federal standard is codified at Rule 52(b) of the Federal Rules of Criminal Procedure, which provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”<sup>74</sup> Beginning with *United States v. Olano*,<sup>75</sup> the Supreme Court has held that

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<sup>69</sup> *United States v. Ware*, 161 F.3d 414, 424 (6th Cir. 1998).

<sup>70</sup> *Id.* (quoting *United States v. Harrington*, 681 F.2d 612, 615 (9th Cir. 1982)); see also *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) (“Although exclusion is the proper remedy for some violations of the Fourth Amendment, there is no exclusionary rule generally applicable to statutory violations.”); *United States v. Baftiri*, 263 F.3d 856, 857 (8th Cir. 2001) (“It makes no sense for evidence obtained in violation of a mere statute to be more severely restricted than evidence obtained in violation of the Constitution.”).

<sup>71</sup> *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir. 2000); see also *United States v. Burke*, 517 F.2d 377, 386 (2d Cir. 1975) (“[C]ourts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude.”).

<sup>72</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006).

<sup>73</sup> *Id.*; see *United States v. Caceres*, 440 U.S. 741, 754–55 (1979); David A. Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1266 (1999) (noting that the “Court consistently has found no constitutional right to suppression for nonconstitutional violations” but that it “has never satisfactorily explained this result, and neither has anyone else”); see also George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 *Am. Crim. L. Rev.* 53, 63–82 (1989).

<sup>74</sup> Fed. R. Crim. P. 52(b).

<sup>75</sup> 507 U.S. 725, 732–34 (1993).

courts may review unpreserved claims when they allege “(1) error, (2) that is plain, and (3) that affects substantial rights,” and (4) that “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.”<sup>76</sup>

As the final two prongs of this test make clear, one cannot conduct plain error review without making some estimation of the importance or fundamentality of the claim at issue. And in conducting this evaluation, some courts have embraced a distinction between constitutional and nonconstitutional claims, explaining that they apply the plain error rule “less rigidly when reviewing a potential constitutional error,”<sup>77</sup> and that “errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors.”<sup>78</sup> A similar idea has cropped up

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<sup>76</sup> *United States v. Cotton*, 535 U.S. 625, 631–32 (2002) (internal quotations and citations omitted).

<sup>77</sup> *United States v. James*, 257 F.3d 1173, 1182 (10th Cir. 2001).

<sup>78</sup> *United States v. Torres*, 901 F.2d 205, 228 (2d Cir. 1990) (quoting *United States v. Brown*, 555 F.2d 407, 420 (5th Cir. 1977)), recognized as overruled on other grounds in *United States v. Marcus*, 628 F.3d 36, 41 (2d Cir. 2010); see also *United States v. Lilly*, 37 F.3d 1222, 1225 (7th Cir. 1994) (similar); *Virgin Islands v. Smith*, 949 F.2d 677, 682 (3d Cir. 1991) (similar); *State v. Scruggs*, 905 A.2d 24, 31 (Conn. 2006) (similar); *State v. Kirwin*, 203 P.3d 1044, 1046 (Wash. 2009) (quoting Wash. R. App. P. 2.5(a)(3)) (similar). But see *United States v. Osborne*, 345 F.3d 281, 284 n.2 (4th Cir. 2003) (declining to decide whether the plain error rule applies “less rigidly” to constitutional claims).

The constitutional-nonconstitutional distinction within plain error law is well illustrated by the Tenth Circuit’s review of sentencing errors in the aftermath of *Booker v. United States*, 543 U.S. 220 (2005). Among the earliest beneficiaries of *Booker* were defendants who had been sentenced pre-*Booker* but who had not yet exhausted direct appeals when the decision came down. Some of these defendants alleged a direct violation of *Booker*’s Sixth Amendment holding, asserting “constitutional *Booker* error.” Other defendants, whose sentences derived from mandatory (rather than advisory) application of the Guidelines (but did not exceed Sixth Amendment maximums), alleged a violation of *Booker*’s remedial holding, asserting “nonconstitutional *Booker* error.” See Peter A. Jenkins, *Requiring the Unknown or Preserving Reason: United States v. Gonzalez-Huerta and the Tenth Circuit’s Compromise Approach to Booker Error*, 83 *Denv. U. L. Rev.* 815, 820 (2006). On plain error review, the Tenth Circuit regularly expressed a heightened willingness to reverse for *Booker* constitutional errors, as opposed to *Booker* nonconstitutional errors. See, e.g., *United States v. Gonzalez-Huerta*, 403 F.3d 727, 743 (10th Cir. 2005) (Ebel, J., concurring) (“If there had been constitutional error here that affected [the defendant’s] sentence, it would be much more likely to cast judicial proceedings in disrespect and would be much harder for us to uphold.”); *United States v. Dazey*, 403 F.3d 1147, 1178 (10th Cir. 2005); *United States v. Sierra-Castillo*, 405 F.3d 932, 941–42 (10th Cir. 2005). Indeed, a subsequent study of these cases reported that *Booker* constitutional claims enjoyed a significantly higher success rate on plain error review than did *Booker* nonconstitutional claims. See Michael W. McConnell, *The Booker Mess*, 83 *Denv. U. L. Rev.* 665, 670 (2006) (documenting a thirty-three percent success rate for constitutional *Booker* claims on plain error review, as opposed to a seven percent success rate for nonconstitutional *Booker* claims on plain error review).

in the civil context,<sup>79</sup> where the First Circuit has stipulated that when a “belated proffer raises an issue of constitutional magnitude,” the constitutional nature of the issue counts as “a factor that favors review notwithstanding the procedural default.”<sup>80</sup> The rationale for these distinctions seems to be clearly rooted in the sensed preeminence of constitutional law; as the Supreme Court long ago explained (in connection with a former plain error rule of its own), courts have “less reluctance to act under [the plain error rule] when rights are asserted which are of such high character as to find expression and sanction in the Constitution or [B]ill of [R]ights.”<sup>81</sup>

#### F. Waiver

Unlike unpreserved claims, claims that have been validly waived—that is, affirmatively relinquished by the party who otherwise might have asserted them—cannot be reviewed. Thus, to the extent that constitutional privileging has figured into waiver doctrine, it has done so in connection with questions related to the validity of waiver procedures. Here, the case law is murkier than in the forfeiture context, but some courts have suggested that the standard of *Johnson v. Zerbst*—which requires the “indulge[nce]” of “every reasonable presumption against waiv-

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<sup>79</sup> Rule 52(b), as a Federal Rule of *Criminal Procedure*, does not formally govern the forfeiture of claims in civil appeals. Nonetheless, judges in civil cases sometimes still take guidance from the Supreme Court’s Rule 52(b) precedents. See, e.g., *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 639 n.17 (1st Cir. 1995) (Lynch, J., dissenting).

<sup>80</sup> *Harwood*, 69 F.3d at 628; see also *In re Net-Velázquez*, 625 F.3d 34, 41 (1st Cir. 2010) (noting that whether a claim should be deemed forfeited depends in part on “whether the omitted argument raises an issue of constitutional magnitude”); *Harvey v. Veneman*, 396 F.3d 28, 45 (1st Cir. 2005) (similar); *Castillo v. Matesanz*, 348 F.3d 1, 12 (1st Cir. 2003) (similar).

<sup>81</sup> *Weems v. United States*, 217 U.S. 349, 362 (1910). The Court has not officially weighed in on whether Rule 52(b) should apply “less rigid[ly]” to constitutional claims. See, e.g., *United States v. Munoz*, 430 F.3d 1357, 1373–74 (11th Cir. 2005), cert. denied, 547 U.S. 1149 (2006). It came close to doing so in *United States v. Robinson*, where the parties had briefed the question, but the Court ultimately did not reach it. 485 U.S. 25, 30 (1988). Writing separately, however, Justice Blackmun noted that “[a]ccounting for the constitutional magnitude of the error is, of course, appropriate.” *Id.* at 36 (Blackmun, J., concurring in part and dissenting in part). It is also perhaps worth noting that as a circuit court judge, Justice Alito once noted that “[w]hile I certainly agree that it is appropriate to consider whether an alleged plain error implicates a constitutional right, this factor alone is not dispositive.” *Virgin Islands*, 949 F.2d at 688 (Alito, J., dissenting).

er”<sup>82</sup>—applies only to constitutional rights, while a weaker standard applies to nonconstitutional rights.<sup>83</sup>

Consider *Libretti v. United States*.<sup>84</sup> The case involved a defendant’s waiver of his right to a post-trial jury determination of property forfeitability, a right that was then guaranteed to him by Federal Rule of Criminal Procedure 31(e).<sup>85</sup> The circuits’ treatment of this issue had gone every which way, both as to whether the Rule 31(e) right was constitutionally required and as to what the proper waiver standard should be.<sup>86</sup> Resolving these disputes, the Court in *Libretti* first held that Rule 31(e) was not constitutionally mandated, while at the same time purporting not to “disparag[e] the importance of the right.”<sup>87</sup> But it then went on to reject “Libretti’s suggestion that the plea agreement must make specific reference to Rule 31(e),” offering only the cursory explanation that “a jury determination of forfeitability is merely statutory in origin.”<sup>88</sup> The Court, in other words, relied on the “merely” nonconstitu-

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<sup>82</sup> 304 U.S. 458, 464 (1938) (internal quotation marks omitted).

<sup>83</sup> *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993); see also *Peters v. Kiff*, 407 U.S. 493, 512 n.\* (1972) (Burger, C.J., dissenting) (“The Court has spoken of a presumption against the waiver of fundamental, constitutional rights, but has never intimated that a similar presumption should apply with respect to statutory rights.” (internal citation omitted)); *United States v. Gomez*, 67 F.3d 1515, 1520 (10th Cir. 1995); *United States v. Busche*, 915 F.2d 1150, 1151 (7th Cir. 1990).

<sup>84</sup> 516 U.S. 29 (1995).

<sup>85</sup> *Id.* at 31–32. The right is now codified elsewhere in the Federal Rules. See Fed. R. Crim. P. 32.2(b)(5)(A).

<sup>86</sup> In the decision below, the Tenth Circuit had evaded the issue of whether the Rule 31(e) right was constitutionally based, finding that “specific reference to a jury trial on forfeiture issues was not necessary in light of the unambiguous plea agreement and defendant’s knowing and voluntary plea.” *United States v. Libretti*, 38 F.3d 523, 531 (10th Cir. 1994), *aff’d*, 516 U.S. 29 (1995). The Eleventh Circuit, meanwhile, had found that a jury determination was constitutionally required and that, “[i]n order to . . . protect[] the underlying constitutional guarantee,” reversal would be warranted “where there is no written waiver signed by the defendant in the record and the defendant asserts either that he was unaware of his jury right or that he did not consent to its waiver.” *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984). And the Seventh Circuit had taken a third approach, finding that, while Rule 31(e) codified a statutory right, a defendant’s waiver of that right should still be expressly memorialized in the plea agreement. *Robinson*, 8 F.3d at 421 (“We are not convinced that the fact that the right in this case is statutorily rather than constitutionally created diminishes its importance.”).

<sup>87</sup> *Libretti*, 516 U.S. at 49.

<sup>88</sup> *Id.*

tional nature of the Rule 31(e) right—and nothing else—to justify application of a relaxed waiver rule.<sup>89</sup>

Other opinions in the waiver context reveal similar forms of constitutional privileging. Courts have debated, for instance, whether the *Zerbst* standard governs waivers of the nonconstitutional right to appeal from adverse immigration decisions. The Third Circuit recently said “no,” emphasizing the distinction between “fundamental constitutional rights . . . and rights granted by statutes, such as the administrative and appellate rights at issue here.”<sup>90</sup> Relatedly, the Tenth Circuit recently rejected a defendant’s challenge to his earlier waiver of a statute of limitations defense, noting that he had “proceed[ed] from the mistaken premise that the waiver of the statute of limitations involves, or is interrelated with, the waiver of a constitutional right.”<sup>91</sup> Language of this sort leaves little doubt that constitutional privileging—undergirded by notions of constitutional preeminence—remains a part of waiver law.

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<sup>89</sup> The Court also held that district court judges were not required to apprise defendants of the Rule 31(e) right during plea colloquies. Specifically, it explained that the colloquy requirements of then-applicable Federal Rule of Criminal Procedure 11(c) had codified the result of an earlier decision, *Boykin v. Alabama*, 385 U.S. 238 (1969), and that *Boykin* in turn had held only that “a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.” *Libretti*, 516 U.S. at 49–50 (citing Fed. R. Crim. P. 11 advisory committee’s notes (1974 Amendment) (emphasis in court’s opinion)). Accordingly, the Court “decline[d] Libretti’s invitation to expand upon the required plea colloquy.” *Id.* at 50.

<sup>90</sup> *Richardson v. United States*, 558 F.3d 216, 221 (3d Cir. 2009). The *Richardson* court relied in part on a strongly worded opinion that had been joined by a cadre of Ninth Circuit judges dissenting from a denial of rehearing en banc. *Id.* (citing *United States v. Lopez-Vasquez*, 1 F.3d 751, 759 (9th Cir. 1993) (O’Scannlain, J., dissenting from denial of rehearing en banc)). As that opinion reasoned:

Let us repeat: the right to an appeal is *not* protected by the Constitution, even for criminal defendants. The right to an appeal is a *statutory* right . . . period. What is it, then, that justifies “indulging every reasonable presumption against waiver” of the right to appeal, as we would waiver of the right to counsel, or the right to jury trial, or the right to confront one’s accusers? Again, the panel does not provide an answer.

*Lopez-Vasquez*, 1 F.3d at 759 (O’Scannlain, J., dissenting from denial of rehearing en banc).

<sup>91</sup> *United States v. Flood*, 635 F.3d 1255, 1259–60 (10th Cir. 2011); see also *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc) (noting that “[i]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute” (internal citations omitted)).

*G. Hypothetical Jurisdiction*

Prior to *Steel Co. v. Citizens for a Better Environment*,<sup>92</sup> lower courts routinely exercised “hypothetical” jurisdiction—dismissing cases on their merits without first confirming jurisdiction over them—as a means of circumventing knotty jurisdictional questions tied to meritless requests for relief.<sup>93</sup> In *Steel Co.*, however, the Court “decline[d] to endorse such an approach”<sup>94</sup> and, practicing what it preached, addressed an Article III standing issue instead of first asking whether the merits furnished an independent ground for dismissal.<sup>95</sup> The decision thus made clear that federal courts could no longer hypothesize Article III standing. But did it go further?<sup>96</sup> Some passages of Justice Scalia’s majority opinion implied a universal and unconditional abolition of hypothetical jurisdiction.<sup>97</sup> But other passages—including, most notably, the majority’s observation that “[t]he statutory and (*especially*) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers”—suggested something less.<sup>98</sup> Did this language mean to ban hypothetical jurisdiction across the board? Or was the Court suggesting more flexibility with respect to nonconstitutional limits?<sup>99</sup>

The Court has not resolved this ambiguity, but some courts have interpreted *Steel Co.* to bar hypothetical jurisdiction only with respect to

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<sup>92</sup> 523 U.S. 83 (1998).

<sup>93</sup> See, e.g., Joan Steinman, *After Steel Co.*: “Hypothetical Jurisdiction” in the Federal Appellate Courts, 58 Wash. & Lee L. Rev. 855, 858 (2001).

<sup>94</sup> *Steel Co.*, 523 U.S. at 94.

<sup>95</sup> *Id.* at 102–10.

<sup>96</sup> See Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 Vand. L. Rev. 235, 322 (1999) (noting “disagreement over the extent to which the *Steel Co.* mandate applies to non-Article III jurisdictional questions”).

<sup>97</sup> See, e.g., *Steel Co.*, 523 U.S. at 94 (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868))); *id.* at 101–02 (“For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”); *id.* at 96–97 (distinguishing away a prior precedent on the ground that it addressed “an issue of *statutory* standing” and “ha[d] nothing to do with whether there [wa]s [a] case or controversy under Article III”).

<sup>98</sup> *Id.* at 101 (emphasis added).

<sup>99</sup> As one commentator has suggested, “[t]he Court is obviously hedging here, not wanting to invite assumptions of nonconstitutional jurisdiction but obviously realizing that its preceding analysis . . . does not permit it to foreclose such assumptions.” Idleman, *supra* note 96, at 299 n.276.

constitutional requirements.<sup>100</sup> Citing *Steel Co.*, these courts continue to dismiss cases without establishing statutory jurisdiction,<sup>101</sup> while unswervingly forsaking the practice with respect to Article III jurisdiction.<sup>102</sup> They are, in effect, privileging one set of restrictions over another, “distinguish[ing] between Article III jurisdiction (which may never be bypassed) and statutory jurisdiction (which may occasionally be bypassed).”<sup>103</sup> The rationale for this distinction remains unarticulated.<sup>104</sup> Given the reasoning of *Steel Co.* itself, however, the practice may stem from the notion that jurisdictional transgressions of a constitutional nature are qualitatively worse than those of a nonconstitutional nature—in other words, that the “constitutional elements of jurisdiction” are “especially . . . essential” to the “separation and equilibration of powers.”<sup>105</sup>

#### *H. Privileging Sub Silentio*

Thus far, I have discussed doctrines that expressly record the preeminence-based privileging of constitutional over nonconstitutional claims.

<sup>100</sup> See, e.g., *McBee v. Delica Co.*, 417 F.3d 107, 127 (1st Cir. 2005) (“Although the Supreme Court in [*Steel Co.*] generally barred the practice of hypothetical jurisdiction, we have noted that the rule does not appear to be an absolute one, and we have consistently interpreted the rule as applying in its strict form only to issues going to Article III’s requirements.” (internal citations and quotations omitted)); *Bowers v. NCAA*, 346 F.3d 402, 415 (3d Cir. 2003); *Fama v. Comm’r of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000) (reading *Steel Co.* to “bar[] the assumption of ‘hypothetical jurisdiction’ only where the potential lack of jurisdiction is a constitutional question”); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663 n.4 (7th Cir. 1998); see also *Idleman*, supra note 96, at 297 (“*Steel Co.* also preserved the authority of a court to bypass a nonconstitutional jurisdictional question and reach a merits question, as long as the court’s constitutional subject-matter jurisdiction is first established.”). Not all circuits, however, have unqualifiedly endorsed this approach. See *Edwards v. City of Jonesboro*, 645 F.3d 1014, 1017 (8th Cir. 2011) (noting that “[w]hether [*the Steel Co.*] rule also applies to statutory jurisdiction . . . is a matter of some dispute”).

<sup>101</sup> See, e.g., *Ajlani v. Chertoff*, 545 F.3d 229, 238 (2d Cir. 2008) (bypassing a question related to the district court’s naturalization jurisdiction under 8 U.S.C. § 1447(b), “mindful that the concerns we identify implicate statutory rather than constitutional jurisdiction”).

<sup>102</sup> See, e.g., *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 156 (2d Cir. 2003).

<sup>103</sup> *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007).

<sup>104</sup> As the First Circuit has explained, “[a] federal court acts ‘ultra vires’ regardless of whether its jurisdiction is lacking because of the absence of a requirement specifically mentioned in Article III, such as standing or ripeness, or because Congress has repealed its jurisdiction to hear a particular matter.” *Seale v. INS*, 323 F.3d 150, 156 (1st Cir. 2003). Why the former sort of ultra vires action is more problematic than the latter is not self-evident.

<sup>105</sup> *Steel Co.*, 523 U.S. at 101 (parentheses omitted).

It may be, however, that the process also occurs behind closed doors, influencing decisions that do not overtly acknowledge its influence.

Take the Court's Section 1983 jurisprudence. The statute creates a cause of action for state-level violations of "the Constitution and laws" of the United States, and in *Maine v. Thiboutot*, the Court interpreted this language to authorize claims based on federal nonconstitutional law.<sup>106</sup> In recent years, however, the Court has retreated from *Thiboutot*, limiting the circumstances under which plaintiffs may use Section 1983 to seek redress for nonconstitutional violations. In so doing, the Court has not explicitly relied on arguments rooted in the perceived non-preeminence of nonconstitutional law. It has instead pointed out that some statutes do not create individually enforceable rights,<sup>107</sup> and that other statutes have displaced Section 1983 with their own comprehensive remedial schemes.<sup>108</sup> Nevertheless, as Professor Ernest Young has suggested, there may be more to this story than first meets the eye:

The principles that statutes must create individually enforceable rights and that a more specific remedial scheme may supersede § 1983 are sensible enough on their own terms. But they are principles that may be applied either more or less aggressively: one may, as a matter of doctrinal application, raise or lower the threshold for finding an individually enforceable right, or be more or less ready to find that Congress intended a specific statutory remedy to supersede the § 1983 framework. The comparatively aggressive recent application of these principles may reflect a more general sense that these federal statutory claims are not what § 1983 is really *for*.<sup>109</sup>

Thus, even if Section 1983 doctrine may not outwardly embrace the notion of constitutional preeminence, judges applying the doctrine might inwardly feel its pull. If, in other words, a judge regards constitutional law as more worthy of enforcement than nonconstitutional law, then she is more likely to apply Section 1983 doctrine in a manner that systematically disfavors the assertion of nonconstitutional rights relative to the assertion of constitutional rights. And that remains the case even when her stated reasons for doing so reference other considerations.

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<sup>106</sup> 448 U.S. 1, 4–8 (1980).

<sup>107</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

<sup>108</sup> *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005).

<sup>109</sup> Young, *supra* note 2, at 466–67.

That is just one example, but analogues are not difficult to identify. Should courts more readily imply rights of action under the Constitution than under statutes?<sup>110</sup> To what extent should courts defer, if at all, to an agency's interpretations of constitutional, as opposed to statutory, law?<sup>111</sup> How and when should courts employ interpretive canons as a means of enforcing important constitutional and nonconstitutional values?<sup>112</sup> Should courts be more willing to guarantee judicial review of constitutional, as opposed to statutory, claims?<sup>113</sup> These are all questions we can answer without recourse to some background notion of constitutional preeminence.<sup>114</sup> That constitutional preeminence *need* not figure into these decisions, however, hardly means it always *will* not. And when close cases arise, perhaps judges sometimes fall back on the feeling, reinforced by rhetoric in the case law, that constitutional rules are the rules whose enforcement they ought to care about the most. If that is so, then a critical examination of preeminence-based constitutional privileging stands to implicate not only those doctrines that have enshrined the practice for all to see, but also those many other doctrines in which the practice may exert a less visible, but still substantial, influence.

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<sup>110</sup> Compare *Davis v. Passman*, 442 U.S. 228, 252 n.1 (1979) (Powell, J., dissenting) (“[T]he federal courts have a far greater responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of rights created solely by Congress.”), with *Minneeci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring) (arguing that “[w]e have abandoned th[e] power [to imply causes of action] in the statutory field, and we should do the same in the constitutional field, where (presumably) an imagined ‘implication’ cannot even be repudiated by Congress” (internal citations and quotations omitted)).

<sup>111</sup> See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113, 194 (1998) (noting that “courts never defer to agencies in reading the Constitution”).

<sup>112</sup> See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *Tex. L. Rev.* 1549, 1593 (2000) (suggesting that “the [constitutional] avoidance canon is best understood as a normative canon of construction protecting a particular substantive value”); Young, *supra* note 2, at 467 (suggesting that “where a statutory scheme plays a constitutive role in the constitutional structure, courts should not hesitate to employ normative canons of statutory construction that reflect the constitutional values underlying the relevant aspect of the structure”).

<sup>113</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); see also Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority To Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17, 45, 66–67 (1981).

<sup>114</sup> I have argued, for instance, that *Webster’s* distinction between constitutional and non-constitutional claims may be grounded in the exclusivity of Article V amendment procedures. See *supra* Section I.A. The *Webster* majority, however, never made clear the rationale for this distinction, so it is possible that preeminence-based reasoning exerted some measure of influence on the case’s holding.

## III. INTRINSIC CONSTITUTIONAL PREEMINENCE

Preeminence-based constitutional privileging thus exists within the law. But can the practice be justified? The next two Parts of this Article seek to answer that question. In this Part, I propose, and ultimately reject, several *formalist* defenses of constitutional privileging that attempt to ground the practice in the supposedly *intrinsic* preeminence of constitutional law. These defenses identify a distinctive—or sometimes only seemingly distinctive—feature of the Constitution and then ask whether that feature renders constitutional law inherently more deserving of judicial attention than nonconstitutional law. The next Part, by contrast, outlines an alternative *pragmatic* defense, which combines a considered, present-day judgment about the *extrinsic* importance of constitutional norms, with a practical argument in favor of rule-oriented (as opposed to standard-oriented) approaches to the privileging of legal claims. The difference, in short, is between regarding constitutional preeminence as a necessary feature of our constitutional order, inextricably linked to the Constitution's status as binding, supreme law, and regarding constitutional preeminence as a contingent feature, whose validity depends on the substance of constitutional law and our attitudes towards it.

While I offer only a qualified rejoinder to the pragmatic defense of constitutional preeminence, my argument against the formalist defense is stronger: Simply put, nothing about the constitutional form requires us to treat constitutional rules as intrinsically preeminent. To establish this point, I identify what seem the three most plausible theories of intrinsic constitutional preeminence—one grounded in the supremacy of constitutional law, one grounded in the processes of constitutional enactment, and one grounded in the Constitution's symbolic significance—and I explain why none of these theories can succeed. In sum, I hope to show that we can accept the legitimacy of constitutional law without further accepting the intrinsic preeminence of that law.

A. *Preeminence and Supremacy*

Constitutional law is supreme law. Courts, legislators, and executives at federal, state, and local levels must abide by its terms, and they cannot override these terms through the enactment of nonconstitutional law. As Chief Justice Marshall explained:

[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disre-

garding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. . . .

If then . . . the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.<sup>115</sup>

An initial account of constitutional preeminence might begin with this premise. If the Constitution occupies the top spot within our legal hierarchy, then perhaps constitutional law is necessarily worth privileging over nonconstitutional law.

Supremacy and preeminence, however, are two different things. The supremacy principle governs circumstances in which constitutional and nonconstitutional requirements *conflict*; it mandates that all such conflicts come out in the Constitution's favor.<sup>116</sup> Rules of constitutional privileging, by contrast, govern circumstances where constitutional and nonconstitutional requirements *coexist*, mandating that courts devote more time and energy to the resolution of constitutional, as opposed to nonconstitutional (and nonconflicting), claims. These two ideas are logically distinct.

Consider the relationship between state and federal law. Just as the Supremacy Clause renders constitutional law hierarchically superior to nonconstitutional law, so too does it elevate federal over state law, mandating that the former prevail over the latter in cases of conflict.<sup>117</sup> It would be strange, however, to infer from this fact the further notion that federal law is more worthy of enforcing than state law. To be sure, some problems may be more amenable to nationwide, rather than statewide, legal responses. But as between peacefully coexisting forms of state and federal law, there is no reason to suppose that the hierarchical superiority of the latter tells us anything about whether courts should privilege federal law claims over state law claims. And if that is true of the relationship between federal law and state law, the same should be true of the relationship between constitutional and nonconstitutional law.<sup>118</sup> In both contexts, supremacy does not equal preeminence.

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<sup>115</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

<sup>116</sup> See U.S. Const. art. VI, cl. 2.

<sup>117</sup> See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011).

<sup>118</sup> For similar reasons, it hardly makes sense for an appellate court to enforce its own precedents any less carefully or rigorously than Supreme Court precedents on the ground that the latter are hierarchically superior to the former.

But why would we make law supreme if we did not wish for courts to treat it as preeminent? Many considerations, in fact, could come into play. We may constitutionalize some legal norms not because we regard them as especially worthy of judicial attention, but because they establish a stable set of “rules of the road” for institutional actors to follow,<sup>119</sup> mitigate collective-action or incumbent self-dealing problems that non-constitutional rules cannot well control,<sup>120</sup> or otherwise facilitate the enactment of good nonconstitutional law. Indeed, as Professor Frederick Schauer has demonstrated, many constitutional provisions and many constitutional decisions by the courts “are not so much about reflecting the deepest aspirations, goals, and ideals of a polity” as they are about “entrenching those long-term values—not necessarily the most important of our values—that are especially likely to be vulnerable in the short term.”<sup>121</sup> Conferring legal supremacy on a rule can thus serve many ends, not all of which are furthered by requiring courts to prioritize the enforcement of constitutional claims.

Even if not all supreme laws are preeminent, perhaps all preeminent laws are supreme, on the theory that any rule commanding deep and widespread societal support would have at some point received reification in the constitutional text.<sup>122</sup> This argument, however, faces several difficulties. For one thing, even deep and widespread societal support may be insufficient to satisfy the exacting requirements of Article V. In addition, some widely popular nonconstitutional rules are functionally entrenched against legislative repeal,<sup>123</sup> and our failure to constitutionalize these rules may stem from nothing more than a sense that bestowing formal supremacy on them would make them no more difficult to elimi-

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<sup>119</sup> See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv. L. Rev.* 1457, 1486–90 (2001); see also Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 *U. Chi. L. Rev.* 361, 366 (2004) (suggesting that constitutionalizing some rules of congressional procedure “can eliminate the need for a future legislature to pull itself up by its own bootstraps and resolves coordination problems”) (internal footnote omitted).

<sup>120</sup> See Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 *Calif. L. Rev.* 1045, 1056 (2004).

<sup>121</sup> *Id.* at 1055 (internal citations omitted).

<sup>122</sup> Cf. *Rose v. Lundy*, 455 U.S. 509, 543 n.8 (1982) (Stevens, J., dissenting) (“It may be argued, with considerable force, that a rule of procedure that is not necessary to ensure fundamental fairness is not worthy of constitutional status.”).

<sup>123</sup> See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv. L. Rev.* 657, 687–88 (2011).

nate as a matter of practice.<sup>124</sup> Finally, it is not clear why, even if a past generation went out of its way to accord supremacy to a rule that it regarded as preeminent, present-day generations should continue to honor that particular expectation.<sup>125</sup>

A final supremacy-based argument for constitutional privileging might take a different tack. The preeminence of constitutional law, on this view, arises from the fact that constitutional errors, as errors involving supreme, irreversible law, cannot be corrected by the legislature. For instance, we might favor stricter harmless error and plain error standards for constitutional claims on the ground that the failure to correct a constitutional error on appeal ensures the persistence of that error through time, whereas the failure to correct a nonconstitutional error on appeal still leaves open the possibility of legislative redress. Put more generally, this view would hold that constitutional law qualifies as preeminent law for the simple reason that incorrect articulations of constitutional law are more likely to endure in the face of legislative disapproval and hence are more worth correcting in the first place.

We should initially note that to the extent this point holds, it would not provide a defense of constitutional privileging within all of the doctrinal contexts discussed in Part II. The argument would sound quite odd, for example, as applied to waiver doctrine: In what sense do more rigorous procedural requirements for the waiver of constitutional rights help to prevent lower courts from issuing erroneous pronouncements of constitutional law? But even as applied to doctrines for which the point seems apt, the argument fails. For one thing, legislatures often *are* capable of rectifying what they perceive as judicial underenforcement of a constitutional norm. They cannot, to be sure, overrule constitutional

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<sup>124</sup> Cf. Young, *supra* note 2, at 427 (suggesting that “constitutional change through the Article V gauntlet may, in some circumstances, be politically easier than eliminating or revising a longstanding statutory scheme backed by powerful constituencies”).

<sup>125</sup> This last point, taken to its logical extreme, might be understood to deny the legitimacy of constitutionalism altogether. Cf. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in *Thomas Jefferson: Political Writings* 593 (Joyce Appleby & Terence Ball eds., 1999) (noting that “the earth belongs in usufruct to the living” and “the dead have neither powers nor rights over it” (emphasis omitted)). I do not mean to go so far here. Some measure of “dead hand control” may be an inevitable price to pay for the benefits that a constitutional system can provide—that is, the protection of minority rights, the facilitation of long-term planning, the prevention of legislative self-dealing, and so forth. I here suggest only that, to the extent the dead hand problem is an inevitable byproduct of constitutionalism, we need not make the problem any worse than it is by ceding to our ancestors not only the power to create supreme law but also the power to create preeminent law.

judgments directly, but they often can create nonconstitutional law enshrining guarantees that constitutional judgments failed to recognize. More important, the “privilege-because-of-permanence” argument is in some sense self-defeating, because higher courts, like lower courts, might end up creating new constitutional errors of their own. Indeed, as we will see in Part V, the irreversibility of constitutional errors typically functions as a reason *against*, rather than *for*, adjudicating constitutional claims on their merits. Thus, if we worry about the irreversibility of constitutional judgments, we may well prefer to tolerate the occasional constitutional slip-up of a lower court than to heighten the risk of erroneous constitutional pronouncements from above.

*B. Preeminence and the Processes of Constitutional Creation*

*1. Supermajoritarianism*

One process-based theory of constitutional preeminence would point to the supermajoritarian voting procedures governing ratification of the original Constitution and the enactment of subsequent amendments.<sup>126</sup> I am not familiar with any commentary advancing this specific claim, but an analogous argument appears in the important and thought-provoking scholarship of Professors John McGinnis and Michael Rappaport, who argue that the Constitution’s distinctly supermajoritarian pedigree entitles it to special normative weight.<sup>127</sup> While theirs is a theory of constitutional legitimacy and constitutional interpretation—they aim to show “why the Constitution is rightly regarded as fundamental law that takes priority over statutes” and why it should be interpreted in accordance with its original meaning<sup>128</sup>—their theory rests on the claim that “[t]he

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<sup>126</sup> U.S. Const. art. VII (requiring the assent of at least nine of the thirteen original colonies for ratification); U.S. Const. art. V (conditioning enactment of constitutional amendments on the approval of two-thirds of each House of Congress, *plus* three-quarters of the states, or on the satisfaction of an alternative procedure, by which two-thirds of the states petition Congress for an amendment, a convention is held, and three-quarters of the states then ratify the convention’s proposals). Note that not everyone characterizes Article VII as having operated as a strictly supermajoritarian rule, given that each of the state ratification conventions employed majority voting. See, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 487 n.112 (1994).

<sup>127</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 791–805 (2002) [hereinafter McGinnis & Rappaport, *Supermajoritarian Constitution*].

<sup>128</sup> *Id.* at 709; see also John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw. U. L. Rev. 383, 385 (2007) [hereinafter McGinnis & Rappaport,

strict filter through which the Constitution and amendments had to pass produced higher quality provisions than if those enactments had been passed under mere majority rule.”<sup>129</sup> This claim, if true, might also support constitutional privileging. If supermajority voting means that constitutional rules are of a “higher quality” than are nonconstitutional rules,<sup>130</sup> we may have reason to take special care in ensuring their vindication.

I am skeptical, however, that any such argument could succeed. To begin with, it is contestable that supermajority voting does in fact yield “higher quality” law than the law produced by majority voting.<sup>131</sup> Even granting this premise, however, we would still face difficulties in linking supermajoritarianism to intrinsic constitutional preeminence. For one thing, the Constitution is very old, and its oldness may undermine whatever special bona fides it derived from its supermajoritarian genesis.<sup>132</sup>

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Pragmatic Defense]; John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va. L. Rev. 385, 418 (2003) (“We argue that measures enacted under a supermajority rule are of higher quality than those enacted under majority rule.”).

<sup>129</sup> McGinnis & Rappaport, *Supermajoritarian Constitution*, supra note 127, at 709.

<sup>130</sup> *Id.* at 791 (“The Constitution properly enjoys authority over ordinary legislation because the process for constitution-making generally produces results superior to ordinary lawmaking.”); see also McGinnis & Rappaport, *Pragmatic Defense*, supra note 128, at 385–86 (“If the Constitution were simply enacted by majority rule, like statutes, there would be no strong reason to privilege provisions that happen to be in a document called ‘the Constitution.’ The supermajority rules of the Constitution’s enactment, however, make them good enough to enforce when they conflict with mere majoritarian enactments.”).

<sup>131</sup> Certainly, supermajoritarian rules have their benefits. Among other things, as McGinnis and Rappaport have noted, supermajority voting can prevent enactment of special interest legislation, reduce overtly partisan decision making, and foster beneficent forms of civic involvement. See McGinnis & Rappaport, *Supermajoritarian Constitution*, supra note 127, at 737–39; John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 445–48 (1999). But supermajoritarianism has its downsides as well. Among other things, it can empower small minorities to frustrate the pursuit of popular and socially desirable policies and, in the words of Professor Ethan Leib, “result[] in compromises no one really wants because ideas and policies get thinned out to garner substantial agreement.” Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 *Hastings Const. L.Q.* 141, 153 (2006). Given these tradeoffs, laws that have cleared supermajoritarian hurdles are not necessarily the laws most deserving of judicial attention. Instead, they may reflect troubling compromises or bland guarantees marked more by political palatability than intrinsic importance.

<sup>132</sup> McGinnis and Rappaport have acknowledged this point, but they respond that (a) the Constitution leaves most legal issues unsettled; (b) the Framers did a good job of “set[ting] out long-term principles that can be applied to changing circumstances”; and (c) the Constitution can be amended. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 *Geo. L.J.* 1693, 1736–37 (2010). Even accepting these claims for the

In addition, the original Constitution's ratification (and the ratification of many subsequent amendments) excluded large portions of the U.S. population—including women, Native Americans, African Americans, and property-less white men—all of which receive far better representation in the "ordinary" lawmaking of the present.<sup>133</sup> Thus, as Professor Ethan Leib has put it, "it is hard to see the consequentialist benefit of choosing supermajoritarianism in 1787, even if we are prepared to agree that supermajoritarianism [today] could produce better results than mere majoritarianism [today]."<sup>134</sup>

That is not to suggest that all nonconstitutional enactments are preferable to all constitutional enactments. Many constitutional provisions,

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sake of argument, however, I am not sure they provide a strong reason for regarding constitutional law as *more preeminent* than comparatively less supermajoritarian but more modern and representative forms of nonconstitutional law.

<sup>133</sup> To their credit, McGinnis and Rappaport have proposed ways around this difficulty. See, e.g., McGinnis & Rappaport, *Pragmatic Defense*, supra note 128, at 394–96. Their arguments on this point, however, have been subject to serious criticism. See Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 *Nw. U. L. Rev.* 1905, 1909 n.19 (2007). Nor, as best as I can tell, have Professors McGinnis and Rappaport addressed the partisan politicking and rule bending that accompanied some states' ratification struggles, see, e.g., Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 59–64 (2010) (describing Federalist efforts to achieve quorum in the Pennsylvania state legislature for purposes of calling forth a ratification convention, which involved rounding up absent legislators and carrying them into the gallery), or malapportionment problems attending several of the state ratifying conventions, cf. Michael J. Klarman, *The Founding Revisited*, 125 *Harv. L. Rev.* 544, 557 (2011) (reviewing Maier, supra) ("In South Carolina especially, and in New York and Rhode Island to a lesser degree, representation in the ratifying conventions was malapportioned in favor of regions that were bastions of Federalism."); see also Daniel Okrent, *Last Call: The Rise and Fall of Prohibition 104–05* (2010) (noting connection between malapportionment and successful ratification of Eighteenth Amendment).

<sup>134</sup> Leib, supra note 133, at 1909; see also Andrew B. Coan, *Talking Originalism*, 2009 *BYU L. Rev.* 847, 852 (2009); Michael J. Klarman, *Antifidelity*, 70 *S. Cal. L. Rev.* 381, 383–85 (1997). Further complicating the supermajoritarian case for intrinsic constitutional preeminence is the fact that federal statutory law also derives from supermajoritarian procedures (including the bicameralism and presentment requirements of Article I, and the increasingly de facto requirement of sixty-vote cloture motions in the Senate), whereas the original ratifying conventions proceeded by majority rule. For a development of this claim, see Leib, supra, at 1911–14.

Another problem emerges in connection with the 1789 Constitution, which was ratified in bulk, rather than provision by provision. As Professor Mitchell Berman has explained, "This fact would seem to mitigate very substantially the extent to which its supermajoritarian passage bears on the goodness of any given part of the text, making [McGinnis and Rappaport's] argument as a whole much less persuasive with respect to . . . the articles than with respect to the amendments." Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1, 81 n.202 (2009).

though enacted long ago by limited parts of the population, accomplish important and laudatory ends, and many nonconstitutional provisions, though enacted recently by more adequately representative assemblies, no doubt accomplish trivial or wrongheaded ones. Indeed, problems of agedness and non-representativeness do not in and of themselves provide reason to reject preeminence-based constitutional privileging; perhaps other features of constitutional law are sufficient to justify the practice, notwithstanding these problems. But they are, I believe, reasons to reject any attempt to ground the practice in supermajoritarianism alone.

## 2. *Constitutional Politics*

Rather than emphasize the special voting procedures governing constitutional enactment, a process-based account of intrinsic constitutional preeminence might instead emphasize the special *politics* underlying the creation of constitutional law. Constitutional law, we might argue, is preeminent not because supermajorities created it, but because “the People” created it, during moments of spirited debate, deep self-reflection, and detached civic-mindedness. Invoking Professor Bruce Ackerman’s distinction between “normal politics” and “constitutional politics,”<sup>135</sup> this argument would characterize constitutional law as the product of uniquely deliberative public action—expressing the choices and commitments that the People have thought most seriously about.<sup>136</sup>

As a general matter, the creation of constitutional law may well activate a more careful and mature form of political thinking than the day-to-day passage of ordinary legislation. For one thing, as Professor Jack Balkin (among others) has noted, the political irreversibility of constitutional enactments “force[s] majorities to think hard about the consequences of what they want to do,” and “creates a sort of temporal veil of ignorance,” encouraging framers and ratifiers to “imagine themselves as potential minorities in the future.”<sup>137</sup> In addition, the drawn-out and geo-

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<sup>135</sup> 1 Bruce Ackerman, *We the People: Foundations* 6 (1991) (distinguishing between “a decision by the American people” and a decision “by their government”); see also *The Federalist* No. 78, at 512 (Alexander Hamilton) (Cass R. Sunstein ed., 2009) (distinguishing between acts of the people and acts of their representatives).

<sup>136</sup> Cf. Levinson, *supra* note 123, at 703 (noting, with respect to Ackerman’s theory, that “[t]here is certainly a case to be made that the heightened public attention and democratic deliberation that accompany certain political changes and enactments should invest them with normative priority over the products of ordinary politics”).

<sup>137</sup> Jack M. Balkin, *Living Originalism* 30 (2011); see also Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 42

graphically decentralized voting mechanisms of Articles V and VII may foster heightened public involvement in the enactment of constitutional rules.<sup>138</sup> And indeed, our constitutional history to some extent bears these theories out. “Much of the Constitution,” as Professor Akhil Amar has explained, “is the product of considerable incubation,” marked by a decision-making process “conducive to thoughtful discussion and sharp crystallization of issues.”<sup>139</sup>

For a few reasons, however, the argument from constitutional politics seems unlikely to establish the intrinsic preeminence of constitutional law. As an initial matter, the argument must—like the argument from supermajoritarianism—confront difficulties stemming from the passage of time and the limited representativeness of the early framers and ratifiers. More important, the link between constitutional politics and constitutional law is not ironclad. Indeed, as Professor Ackerman has demonstrated, “the People” have sometimes achieved momentous legal transformations through the enactment of formally nonconstitutional law.<sup>140</sup> A similar premise underlies Professors William Eskridge and John Ferejohn’s scholarship on “super-statutes,” which, as they persuasively show, can emerge “in a reflective and deliberative manner over a long period of time,” take form only “after a lengthy period of public

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(2000) (“[T]he temporal ambition of the document may lift the People’s eyes upward, inclining Americans to imagine a better world for their grandchildren and to embrace language and principles capable of withstanding the test of time. Here, too, there may be an attractive veil of ignorance at work.”); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *Yale L.J.* 399, 416, 416–19 (2001) (noting that “Article V’s relatively onerous procedures for constitutional amendment have been said to produce a veil effect because amenders have to abide by the amendment in remote future circumstances that they are unable to predict at the time of amendment,” while identifying problems with this view). Some of McGinnis and Rappaport’s work has also highlighted this effect of supermajoritarian voting. See, e.g., McGinnis & Rappaport, *supra* note 132, at 1708–10.

<sup>138</sup> See, e.g., Lawrence G. Sager, *The Incurable Constitution*, 65 *N.Y.U. L. Rev.* 893, 951 (1990) (“Part of what makes constitutional politics distinct . . . is the ratification process, which insists upon an extraordinarily broad geographical base of support as the precondition of popular approval.”). But see Klarman, *supra* note 134, at 390 (noting that “voter turnout in elections for the state ratifying conventions that approved the Constitution was not significantly higher than for ordinary elections”).

<sup>139</sup> Amar, *supra* note 137, at 39.

<sup>140</sup> Professor Ackerman’s primary example of politically constitutional, formally nonconstitutional law is the New Deal legislation, Ackerman, *supra* note 135, at 47–48, but he also identifies variants of constitutional politics at work in the Jeffersonian and Jacksonian revolutions, the women’s suffrage movement, the civil rights movement of the 1960s, and the election of Ronald Reagan. *Id.* at 108–09, 196, 268.

discussion and official deliberation,”<sup>141</sup> and eventually come to “penetrate public normative and institutional culture in a deep way.”<sup>142</sup> The flip side is also true: Something more akin to normal politics has sometimes given rise to formally constitutional law. Several important amendments, to be sure, materialized after lengthy periods of national soul searching; others, however, have attracted little public attention, sailing through ratification either because they involved issues of low salience<sup>143</sup> or because they merely codified preexisting legal arrangements on which a national consensus had already developed.<sup>144</sup> In short, legal norms may be formally constitutional without arising from constitutional politics, just as legal norms may arise from constitutional politics without being formally constitutional.

A final problem with the “constitutional politics” argument lies in the supposition that the laws generated in moments of heightened civic alertness should be the laws most demanding of vindication.<sup>145</sup> In fact, a connection to constitutional politics does not guarantee the production of preeminent, much less desirable, law. For one thing, while the machinery of higher lawmaking boasts some great triumphs, it has not always succeeded. The constitutional politics of the Founding perpetuated slavery, the constitutional politics of the Progressive Era launched Prohibition,<sup>146</sup> and we cannot be sure that, going forward, mobilized and high-minded majorities will never again misfire. Meanwhile, other legal norms can achieve great significance without bursting forth at the culminating moment of an epic political struggle. Many of our most important legal rules have emerged quietly, gradually, and without much direct public engagement. Important procedural safeguards within criminal law—the presumption of innocence, for instance—cannot be traced back to a “big bang” in constitutional politics.<sup>147</sup> But just because these latter sorts of laws may not have emerged from the crucible of constitu-

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<sup>141</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L.J.* 1215, 1231 (2001).

<sup>142</sup> *Id.* at 1215.

<sup>143</sup> See Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 *Wm. & Mary L. Rev.* 1731, 1748 (1999) (highlighting the “frequency with which higher law has been made—at least in the form of amendments—without significant public input, support, or interest”).

<sup>144</sup> Strauss, *supra* note 119, at 1460–61.

<sup>145</sup> See Klarman, *supra* note 134, at 390–91 (questioning the assumption that “special normativity flows from mass mobilization”).

<sup>146</sup> See Ackerman, *supra* note 135, at 13–14.

<sup>147</sup> See, e.g., John H. Langbein, *The Origins of Adversary Criminal Trial* 261–62 (2003).

tional moments does not mean that we should discount their significance in determining which claims to privilege over others.

### 3. *Judge-Made Law*

The previous two Subsections focused on processes through which “the People” author the Constitution’s text. In reality, constitutional law acquires much of its content through the work of judges, who develop formulas, balancing tests, and other sorts of decision rules to assist them in applying open-ended constitutional provisions to concrete cases.<sup>148</sup> Notice, however, that the examples of constitutional privileging I discussed in Part II do not distinguish between judge-made and People-made constitutional law; within these contexts, judges furnish specialized procedural treatment to constitutional claims regardless of the strength of their connection to the constitutional text. Indeed, the dominance of doctrine within constitutional law<sup>149</sup> suggests that, in practice, the primary beneficiary of constitutional privileging has not been the Constitution itself, but the Supreme Court’s constitutional precedents. These precedents, to say the least, are not generally the products of supermajoritarian decision making or of constitutional moments.<sup>150</sup> That being so, a process-oriented defense of constitutional privileging would

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<sup>148</sup> See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 35 (2004); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 56, 57 (1997); Strauss, *supra* note 119, at 1459. Professor Henry Monaghan’s classic Harvard Law Review foreword referred to this body of law as “constitutional common law”—“a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . . [and] subject to amendment, modification, or even reversal by Congress.” Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 2–3 (1975). As Professor Gillian Metzger has noted, however, the Court recently “has become more reluctant to characterize its constitutional rulings as contingent or acknowledge a robust role for Congress in constitutional individual rights interpretation.” Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum. L. Rev. 479, 481–82 (2010) (citing *United States v. Dickerson*, 530 U.S. 428, 437–43 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 519, 536 (1997)).

<sup>149</sup> See Amar, *supra* note 137, at 46–47.

<sup>150</sup> It is true, as some scholars have shown, that the Supreme Court often responds to public opinion and social movements, see, e.g., Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 16 (2009), but that is different from saying that judge-made constitutional law is—relative to other forms of lawmaking—the product of uniquely participatory and deliberative forms of democratic decision making.

seem to account for only a small body of rules that the practice actually prioritizes.

I see two potential responses to this point. The first is to deny a rigid distinction between People-made and judge-made constitutional law, claiming that when judges do their job correctly they apply constitutional law in a manner consistent with the People's original objectives. McGinnis and Rappaport have argued, for instance, that courts can preserve the Constitution's supermajoritarian goodness through a particularly strict form of originalism, which helps to "[s]ustain[] [the] good consequences" of "[p]rovisions created through the strict procedures of constitutional lawmaking."<sup>151</sup> A similar point could be made with respect to constitutional politics. By enforcing the original expected applications of the Constitution's enactors, for instance, judges could preserve the Constitution's preeminence by giving due recognition to the aims and intentions that "the People" expressed during a heightened state of political consciousness. Even assuming, however, that judges are up to this daunting task,<sup>152</sup> there remains the question of what to do with non-originalist precedents, or even originalist precedents based on historical inaccuracies.<sup>153</sup> We are nowhere close to a world in which all judge-made law reflects perfectly the expectations of the Constitution's ratifiers. Consequently, much of constitutional doctrine is difficult to trace back specifically to the special, supermajoritarian politics of constitutional enactment.

The second argument would concede that point but would press forward: True, the argument goes, we do not know how the framers and ratifiers of the past would apply the Constitution today, and true, the framers and ratifiers would likely not have anticipated—much less signed off on—many of the Supreme Court's interpretations of their handiwork. Even so, it continues, judge-made constitutional law grap-

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<sup>151</sup> McGinnis & Rappaport, *Pragmatic Defense*, supra note 128, at 384; see also *id.* at 389–90.

<sup>152</sup> Leib, supra note 133, at 1916 ("Of course, it is perfectly plausible, in theory, to imagine that we might someday be able to divine an exhaustive list of the drafters' and ratifiers' interpretive conventions. Still, in practice, there is reason to be skeptical about the prospect because we are bound to run into aggregation problems."); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 *Const. Comment.* 159, 160 (1996); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781, 786–87 (1983).

<sup>153</sup> See Richard H. Fallon, Jr., *Implementing the Constitution* 15 (2001) ("[A] great deal of existing constitutional doctrine—including much that we are likely to think most important—cannot be justified on originalist principles.").

ples with the values, principles, and aspirations that originally inspired moments of constitutional politics and supermajority voting, and for that reason judge-made constitutional law should count as intrinsically preeminent.<sup>154</sup> Understood this way, judge-made constitutional law does not so much preserve the constitutional politics of the past as it strives to carry it forward. Constitutional adjudication modernizes, operationalizes, and perhaps even expands upon legal norms that first sprang forth from supermajoritarianism and constitutional moments, while still honoring the core commitments that these moments enshrined. Put another way, the distinguishing hallmark of judge-made constitutional law is that it seeks to realize broadly worded ideals that supermajorities of the People once endorsed. And that, perhaps, is all one needs to establish the process-based preeminence of judge-made constitutional doctrine.

This argument, however, faces a major underinclusiveness problem. The difficulty is that courts are not the only institutions that put the Constitution's principles into practice; other institutions do much the same thing, and they rely on nonconstitutional law to make it happen. The Equal Protection Clause may not have mandated enactment of the Americans with Disabilities Act or the Civil Rights Act of 1964, but its animating principles find expression in these statutes, along with many other nonconstitutional antidiscrimination laws.<sup>155</sup> Similarly, while the Court has shown reluctance to protect "informational privacy" interests under the Fourteenth and Fifth Amendments,<sup>156</sup> Congress has forged ahead in creating nonconstitutional privacy protections through statutes like the Family Educational Rights and Privacy Act of 1974 and the Privacy Act of 1974.<sup>157</sup> Not all requirements of the Speedy Trial Act stem

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<sup>154</sup> I understand this account of constitutional interpretation to coincide, albeit roughly, with some theories of living constitutionalism, see, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993); David Strauss, *The Living Constitution* (2010); as well as certain contemporary accounts of originalism, see, e.g., Balkin, *supra* note 137.

<sup>155</sup> See, e.g., Eskridge & Ferejohn, *supra* note 141, at 1237 (noting that the Civil Rights Act of 1964 "embodies a great principle (antidiscrimination)" and "has pervasively affected federal statutes and constitutional law"); John F. Preis, *Constitutional Enforcement by Proxy*, 95 *Va. L. Rev.* 1663, 1696–703 (2009) (showing how constitutional rights are often enforced through litigation involving formally nonconstitutional law).

<sup>156</sup> See, e.g., *NASA v. Nelson*, 131 S. Ct. 746, 756 (2011).

<sup>157</sup> 20 U.S.C. § 1232g (2006); 5 U.S.C. § 552a (Supp. IV 2010); see also Metzger, *supra* note 148, at 510 (suggesting that several "statutory and regulatory enactments [of administrative law] sometimes reflect the political branches' understandings of what the Constitution demands").

from the Sixth Amendment, but they surely further its goals.<sup>158</sup> The judicial review rules of the Administrative Procedure Act comport with our foundational scheme of checks and balances, while helping to vindicate due process protections as well.<sup>159</sup> The Religious Freedom Restoration Act (“RFRA”) furthers free exercise values.<sup>160</sup> Hearsay rules effectuate Confrontation Clause values.<sup>161</sup> And so on.<sup>162</sup>

My point, to be clear, is not to lavish praise on nonconstitutional actors and the laws they have generated; rather, it is to note that many nonconstitutional rules intertwine with the underlying “values” and “ideals” of the Constitution in important ways. We may not like some of these rules, and we may even think they reflect misunderstandings of the Constitution. But the fact that nonconstitutional lawmaking can promote constitutional values disrupts the link between the special processes of constitutional enactment and the supposed preeminence of judge-made constitutional doctrine. Even if these processes of constitutional enactment are in fact special, even if their specialness makes the Constitution intrinsically preeminent, and even if constitutional adjudication preserves its process-based preeminence over time, judicial interpretation of the Constitution is not the only means by which present-day actors carry forward past constitutional commitments into the present. If the Constitution’s special procedural glow continues to radiate from modern con-

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<sup>158</sup> *United States v. Taylor*, 487 U.S. 326, 352 (1988) (Stevens, J., dissenting) (noting that “Congress enacted the Speedy Trial Act because of its concern that this Court’s previous interpretations of the Sixth Amendment right to a speedy trial had drained the constitutional right of any ‘real meaning’” (quoting H.R. Rep. No. 93-1508, at 11 (1974))).

<sup>159</sup> See, e.g., Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Ga. L. Rev. 117, 177 (2011) (“[I]n a variety of contexts the APA’s procedural requirements are plausibly far *more* effective in protecting the public from arbitrary lawmaking than the checks and balances outlined in Articles I and II.”).

<sup>160</sup> See, e.g., *City of Boerne*, 521 U.S. at 512–13 (noting connection between Congress’s enactment of RFRA and the Court’s denial of free exercise protection in *Employment Division v. Smith*, 474 U.S. 872 (1990)).

<sup>161</sup> See, e.g., *California v. Green*, 399 U.S. 149, 155 (1970) (noting that “hearsay rules and the Confrontation Clause are generally designed to protect similar values”).

<sup>162</sup> For instance, as Professor John Preis has pointed out, the Court has “found comprehensive remedial schemes to displace constitutional actions in a wide variety of circumstances, including access to information, veterans’ benefits, federal employee rights, tax refunds, and numerous other situations.” Preis, *supra* note 155, at 1680–81 (internal footnotes and quotations omitted). One need not agree with the Court’s decision to deny relief in any of these cases in order to recognize what is for our purposes the critical point: The cases help to highlight the substantial overlap that exists between nonconstitutional enactments and constitutional values.

stitutional doctrine, then it radiates from much nonconstitutional law as well.

### *C. Preeminence and Reverence*

But maybe we are missing the forest for the trees. Putting aside fancy theories of constitutional supremacy, supermajoritarianism, constitutional politics, and judicial interpretation, this fact remains: Americans cherish their Constitution.<sup>163</sup> Perhaps that is all we need to know. If constitutional law occupies a special place in our civic culture, then perhaps too it should occupy a special place within our procedural and remedial rules. Preeminence-based constitutional privileging, in other words, might be warranted for the simple reason that it gives practical effect to a deep and widespread sense of constitutional reverence.

This argument may have some force, but it suffers from significant weaknesses.<sup>164</sup> First, the kind of respect that the Constitution actually receives may be different from the kind of respect that constitutional privileging reflects. An expression of reverence for “the Constitution” may convey any number of different attitudes. It might communicate approval of the idea of constitutionalism itself, or of related ideas such as popular sovereignty, minority rights, the rule of law, and so on. It might communicate love of the framers, nostalgia for the Founding Era, pride in our constitutional history, or an endorsement of the lofty aspirations of the Preamble. One might harbor these and many other beliefs—beliefs accurately described as forms of constitutional veneration—without further believing that courts should privilege constitutional

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<sup>163</sup> For accounts of this phenomenon, see, for example, Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* 381–82 (1986); Sanford Levinson, *Constitutional Faith* 9–17 (1988); Steven G. Calabresi, “A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 *B.U. L. Rev.* 1335, 1397–404 (2006); Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 79–81 (2009); Thomas C. Grey, *The Constitution As Scripture*, 37 *Stan. L. Rev.* 1, 3 (1984); Richard Primus, *Constitutional Expectations*, 109 *Mich. L. Rev.* 91, 95 (2010); see also Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *The Portable Thomas Jefferson* 552, 558–59 (Merrill D. Peterson ed., 1975) (“Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched.”).

<sup>164</sup> We can quibble over whether sociological reverence counts as a fixed, “intrinsic” property of constitutional law, as opposed to a contingent, “extrinsic” feature of modern-day political culture. Either way, though, the important point is that even if sociological reverence does count as an intrinsic feature of American constitutionalism, it would still fail to justify preeminence-based constitutional privileging.

claims over nonconstitutional claims in the workaday world of applying and articulating the rules of waiver, appellate fact review, and hypothetical jurisdiction.

That is not to say that widespread public beliefs about the Constitution are incompatible with constitutional privileging; perhaps, if asked to consider the matter, the average American would in some way endorse the prioritization of constitutional over nonconstitutional claims. But such a position, I suspect, is not really what most people have in mind when they pay homage to the Constitution's greatness, nor is it a conclusion that an especially reverential attitude toward the Constitution would require anyone to draw. There may be good reasons to celebrate "Constitution Day,"<sup>165</sup> to carry copies of the Constitution in our coat pockets,<sup>166</sup> and to safeguard the document in a bomb-proof vault,<sup>167</sup> but these reasons seem only distantly related to the more technical question of whether (and to what extent) courts ought to favor the enforcement of constitutional over nonconstitutional claims in applying procedural and remedial rules.

The discussion thus far has addressed a sociological argument for constitutional privileging that works in the direction *from* public attitudes *to* judicial actions. But a related argument might work in the other direction, defending constitutional privileging as a means of shaping worthy social attitudes, rather than responding to ones already in existence. If, in other words, we view public veneration for the Constitution as a desirable phenomenon—because, for instance, it promotes a sense of political identity, helps to bind us together as a people,<sup>168</sup> or otherwise fosters what Alexander Hamilton once called "that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country"<sup>169</sup>—then perhaps courts should look for ways of sig-

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<sup>165</sup> 36 U.S.C. § 106 (2006).

<sup>166</sup> Calabresi, *supra* note 163, at 1400 (noting that Justice Hugo Black "was famous for carrying his pocket copy of the Constitution everywhere he went").

<sup>167</sup> Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *Colum. L. Rev.* 606, 607–08 (2008).

<sup>168</sup> In arguing against frequent amendments to the Constitution, for instance, James Madison suggested that the practice would "deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." *The Federalist* No. 49, at 332 (James Madison) (Cass R. Sunstein ed., 2009).

<sup>169</sup> *The Federalist* No. 25, at 159 (Alexander Hamilton) (Cass R. Sunstein ed., 2009).

nalizing the document's momentousness. And constitutional privileging might provide them with one such means of doing so.<sup>170</sup>

By now, we are getting pretty far afield from a formalist defense of constitutional privileging, based on an appeal to intrinsic constitutional preeminence; this argument is more pragmatic in character, built on the instrumental virtues of encouraging others to treat the Constitution as a sacred political object. But regardless of how we characterize it, the argument fails on the merits. For one thing, too much Constitution worship may be a bad thing; it may, for instance, discourage us from improving the Constitution itself,<sup>171</sup> and it may come at the expense of due attention to the need to generate good nonconstitutional law.<sup>172</sup> More importantly, I doubt that much of sociological significance turns on the rules that govern the privileging of claims within the doctrines discussed in Part II. These are technical, low-visibility legal domains, about which the average non-lawyer probably knows or cares little. It is hard to imagine that reforming the rules of harmless error, hypothetical jurisdiction, or habeas corpus, to name a few, would in any significant measure affect constitutional attitudes, for better or for worse.

#### IV. EXTRINSIC CONSTITUTIONAL PREEMINENCE

Having rejected several formalist defenses of constitutional privileging, based on the notion of intrinsic constitutional preeminence, I now turn to an alternative, and in my view more promising, line of argument: a *pragmatic* defense of constitutional privileging, based on an *extrinsic* account of constitutional preeminence. This defense, unlike the formalist defense, cannot be definitively rebutted, as it implicates issues on which there are sure to be differences of opinion. But the pragmatic defense is certainly not immune to criticism, and its weaknesses are sufficient to raise serious doubts as to its validity.

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<sup>170</sup> In other words, the notion of intrinsic constitutional preeminence, even if theoretically unsound, might operate as a useful sort of legal fiction. See Lon L. Fuller, *Legal Fictions* 9 (1967) (noting that a fiction may be an "*expedient* but false assumption").

<sup>171</sup> Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1096 (1988).

<sup>172</sup> Cf. Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. Ill. L. Rev. 783, 785 (noting that "a large domain for constitutional discourse" can "crowd[] out nonconstitutional argument," leaving citizens "further divided, not united, by easy recourse to constitutional claims").

Before evaluating the pragmatic defense, one preliminary point merits emphasis: However we may feel about its validity, the move towards an extrinsic account of constitutional preeminence represents an important step forward. If our reasons for constitutional privileging are pragmatic (that is, based on goals extrinsic to the Constitution), rather than formalist (that is, rooted in features intrinsic to the Constitution), then we may more freely tailor the ways in which, and the extent to which, we privilege some claims over others. We may, for instance, more adaptively determine that constitutional privileging makes sense in some legal contexts but not in others, and that constitutional privileging might sometimes be wisely supplemented with (if not wholly supplanted by) other forms of privileging. In particular, the extrinsic defense forces us to justify constitutional privileging by reference to the values and priorities of today, rather than reflexively characterize the practice as a necessary response to choices and decisions of a distant legal past.

#### *A. The Argument in Favor*

Suppose that I woke up this morning having forgotten what laws were constitutional in form and what laws were not. Having labored over this Article for months on end, however, I did know about the privileging of claims, and I had developed my own understanding of what it meant for a law to be preeminent. So, with not much better to do, I began to rattle off a list of rights and rules that, based on my own considered judgment, I regarded as worthy of special judicial attention. “Certainly the freedom of speech,” I thought, “certainly the right to a jury trial, certainly the right to bear arms, and certainly the right to due process.” I continued in this vein for quite some time until, lo and behold, I had managed to reproduce a fairly comprehensive statement of the legal protections guaranteed by the U.S. Constitution. When informed of this result, I thought to myself, “Well, I guess it turns out that constitutional law is preeminent law *after all*, so I have no problem with courts privileging constitutional over nonconstitutional claims.”

One can defend constitutional privileging along these lines. Constitutional law is preeminent law, we may argue, not because it is constitutional in form, but because so much of its content relates to norms and values that—by standards extrinsic to the Constitution—seem to be of a

highly fundamental nature.<sup>173</sup> And that is by no means an unreasonable conclusion to draw. We do not need the variable of constitutional status to tell us that protections like the freedom of speech, security from unreasonable searches, and prohibitions on cruel and unusual punishment, just to name a few, are of great importance. And when we look further into doctrinal specifics, the argument gains traction. Courts have interpreted some constitutional guarantees to prohibit government conduct of the very worst sort, setting forth minimum levels of acceptable behavior that nonconstitutional rules cannot push further downward. To take one example, some of the Court's due process holdings have defined the right as prohibiting conduct that "shocks the conscience,"<sup>174</sup> and as safeguarding "the fundamental elements of fairness in a criminal trial."<sup>175</sup> So understood, many claims under the Due Process Clause implicate rights that are fundamental by their very definition.

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<sup>173</sup> The most extended such argument that I have found comes from Professor Steven Goldberg's defense of the constitutional-nonconstitutional distinction within harmless error law. See Goldberg, *supra* note 36, at 433. Professor Goldberg identifies "three major differences between nonconstitutional and constitutional rights which demand distinction between them when the appropriateness of harmless error analysis is at issue": (1) "nonconstitutional rights . . . are transitory and political," while "[c]onstitutional rights . . . are immune to the political process"; (2) "nonconstitutional rights likely to be implicated in trial error are, generally, of a kind which society has little, if any, interest outside of the conduct of the trial," while "[c]onstitutional rights often implicate substantial societal interests"; and (3) "nonconstitutional rights . . . are usually neutral," in that they "are as likely to benefit the government in a given trial as they are the defendant," while "[c]onstitutional rights . . . are always beneficial to the defendant." *Id.* I have explained why I do not think the first of these differences carries much significance for purposes of constitutional privileging, see *supra* Section III.A (discussing problematic relationship between constitutional supremacy and constitutional preeminence), and the ensuing discussion will explain further why I think the second distinction, based on societal interests, is overdrawn, see *infra* Subsection IV.B.2. As to the third difference, I am somewhat doubtful that nonconstitutional rules are as systematically neutral towards defendants as Professor Goldberg suggests. Even granting the point, however, I have doubts as to whether the variable of "neutrality" should matter in the way that Goldberg supposes. All legal rights, whether or not "always beneficial to the defendant," can be erroneously applied in a manner that disfavors defendants. And if that is so, then the supposed "neutrality" of any given right seems unrelated to the question whether that right should be subject to a heightened standard of harmless error review. Certain hearsay rules, for instance, may not seem particularly helpful to a criminal defendant, but the misapplication of such rules can still substantially prejudice a defendant's case. That may be reason enough to apply just as strong a harmless error standard for "neutral" hearsay rules as for more defendant-friendly constitutional rules.

<sup>174</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>175</sup> *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (quoting *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967)).

But the pragmatic argument for constitutional privileging is not finished yet. For while a proponent of this practice need not rely on the constitutional status of a legal rule to conclude that it is preeminent, she is asking courts to do just that. The proponent must then explain why courts should privilege claims via categorical distinctions between constitutional and nonconstitutional law when they could instead simply apply the extrinsic criteria of preeminence directly.

The proponent has a ready response: This inquiry, she would say, is best governed by hard-and-fast rules rather than loose-and-malleable standards. Rules of constitutional privileging, on this view, may require us to sacrifice flexibility, but they offer in return such offsetting benefits as predictability, reduced decision costs, constrained judges, and fewer errors in application. “Sure,” the proponent would concede, “the fit between constitutional law and preeminent law is not perfect; I acknowledge that constitutional privileging may well underprivilege some rules of great importance and overprivilege some rules of not-so-great importance.” “Still,” she would continue, “all things considered, it is better for courts to apply a simple and predictable rule of constitutional privileging, rather than evaluate the preeminence of claims on a case-by-case basis.”

#### *B. The Argument Against*

It should be apparent by now why we cannot definitively refute the pragmatic defense of constitutional privileging. At issue are at least three questions whose answers seem far from self-evident: First, by what “extrinsic” criteria should we evaluate the preeminence of a given legal claim? Second, given these criteria, what proportion of constitutional and nonconstitutional claims are rightly regarded as “preeminent”? And third, is it better to embrace a rule-oriented approach to the privileging of claims, which gives dispositive effect to the variable of constitutional status, or a standard-oriented approach, which asks directly whether any given claim is worth privileging? These questions will no doubt generate substantial disagreement. But they are also questions, I think, that reveal some downsides to pragmatic constitutional privileging, as well as the competing virtues of doctrinal approaches that privilege claims by reference to variables other than constitutional status.

*1. What Are the Criteria?*

The pragmatic defense of constitutional privileging relies on criteria of preeminence that are extrinsic to the constitutional form.<sup>176</sup> But it is not clear what those criteria ought to be. In a broad sense, we might suppose that the preeminence of a rule corresponds to its “importance” or “fundamentality,” but “important” or “fundamental” in what respect?

An initial stab at an answer might focus on the interests of individual litigants. Perhaps preeminent legal rules are the rules that matter most to the claimants who invoke them. That notion, however, will not help very much, because different rules matter to different degrees to different litigants at different times. Litigants, after all, tend to care more about the “bottom line” of judicial outcomes than the particular laws and claims that get them there. Recall Justice Scalia’s suggestion in *Webster* that civil claimants will prefer winning on a \$100,000 contract claim than on a \$100 equal protection claim.<sup>177</sup> So too, the typical criminal defendant will care more about claims attacking the validity of his conviction, as opposed to, say, claims challenging the length of his sentence. Any litigant-oriented perspective on the notion of legal preeminence thus seems likely to generate a subjective and context-dependent calculus, giving us very little to say about the general importance or fundamentality of a given legal norm.

The idea of preeminence becomes somewhat easier to grasp, however, when we recall that adjudication is not solely a mechanism for resolving individual claims, but also, as Professor Owen Fiss has noted, a means of “explicat[ing] and giv[ing] force to the values embodied in authoritative texts such as the Constitution and statutes.”<sup>178</sup> In this respect,

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<sup>176</sup> It is possible, I suppose, to construct a pragmatic defense of constitutional privileging that relies primarily on an intrinsic criterion of constitutional preeminence. For example, one may argue (a la McGinnis and Rappaport) that supermajority rules *generally* produce better consequences than majority rules, and that these good supermajoritarian consequences are *sufficiently* present within the Constitution to warrant a hard-and-fast rule of constitutional privileging. Notice, however, that this argument must at some level fall back on an extrinsic criterion of “goodness,” for purposes of demonstrating that supermajoritarian voting rules tend to produce “good” law. And the argument must also incorporate the pragmatic judgment that our supermajoritarian Constitution is good enough to justify a categorical approach to constitutional privileging, as compared to an approach that identified supermajoritarian goodness on a case-by-case basis.

<sup>177</sup> See *Webster v. Doe*, 486 U.S. 592, 618 (1988) (Scalia, J., dissenting).

<sup>178</sup> Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976);

a judge's resolution of any given case implicates both the interests of the litigants before her and, indirectly, the interests of society as a whole. And while it may be impossible to rank various legal norms against one another from a given individual's perspective, we may still be able to do so from a societal perspective.

At a very general level, this seems right. We would all agree, I suspect, that the rules against coerced confessions are more important than the rules governing the page limits of briefs, just as we would probably agree that the ban on cruel and unusual punishments is more important than bans on wearing flip-flops in the courtroom. But when we put easy comparisons to one side, a societal evaluation of legal preeminence presents indeterminacy problems of its own. Is the right to bear arms "more important" than the right to Social Security benefits? Does the Confrontation Clause "matter more" than the protections of the Speedy Trial Act? These are extremely difficult questions to answer, if they can be answered at all.<sup>179</sup>

One could ponder these issues at length, but I will not pursue them further here. For now, it suffices to say that any clear, coherent, and rigorously derived criteria of preeminence, generalizable across varying doctrinal contexts, are not readily identifiable. That may initially look like more of a problem for me than for the proponent of constitutional privileging; she might say, "Aha! You can't even tell courts how to privilege claims without looking to constitutional status. So your theory can't be very good." To which I say: "But you haven't told me why the variable of constitutional status is not arbitrary." Lots of concepts are difficult to define—from reasonableness to unconscionability to probable cause to unfair competition—but that does not mean we can use any proxy we want as a stand-in for their meaning.<sup>180</sup> And this is especially

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Fallon & Meltzer, *supra* note 44, at 1787–88 (noting that remedies for constitutional violations serve both individual and structural interests).

<sup>179</sup> Cf. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 *Colum. L. Rev.* 309, 372 (1993) (noting, with respect to substantive due process doctrine, that "assessment of the fundamentality of interests does more to confuse than to advance analysis").

<sup>180</sup> Questions of this sort have arisen in the Court's "incorporation" case law, where the Justices have asked whether a given provision of the Bill of Rights warrants enforcement against the states. Justice Hugo Black advocated for a "total incorporation" approach, which would have fully enforced *all* provisions of the Bill of Rights as part of the Fourteenth Amendment. See, e.g., *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting). The Court, however, has never heeded Justice Black's urgings, and has instead opted for a "partial incorporation" approach, which conditions incorporation on "whether a particu-

so where, as here, the common law process stands ready to flesh out definitional details gradually and on a case-by-case basis.

Recall too that the ultimate question we want to answer is not whether constitutional claims are more important than nonconstitutional claims in some ethereal sense, but whether, within the various areas of doctrine I discussed in Part II, constitutional claims should be privileged over nonconstitutional claims. In fact, we may be able to get a better handle on this question by looking to the goals of a specific doctrinal inquiry, rather than simply gauging legal preeminence in an across-the-board way. The claims worth privileging for purposes of harmless error analysis may look different from the claims worth privileging for purposes of independent appellate fact review, just as the claims worth privileging for purposes of habeas law may look different from the claims worth privileging for purposes of applying the exclusionary rule. Maybe there will be overlap; perhaps even the most amorphous set of extrinsic criteria can show us that some legal norms qualify as “important” enough to warrant special treatment under any and all circumstances. Even so, we should not expect convergence on the same set of privileged norms across different doctrinal contexts. And one of the disadvantages of constitutional privileging is that it pushes toward such an outcome.

## 2. *How Close Is the Fit?*

Recognizing that we are not likely to settle on a detailed account of extrinsic preeminence, I think we can still identify some problems of fit that are likely to emerge from courts’ adherence to the practice of constitutional privileging. I can appeal only to intuitions here, recognizing that such intuitions will vary from person to person. But my strong sense is that privileging by reference to a rigid distinction between constitutional and nonconstitutional law will too often result in the underprotection of seemingly “important” nonconstitutional norms and the overprotection of seemingly “less important” constitutional norms.

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lar Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010). While Justice Black’s position has something to be said for it as a matter of history, see, e.g., Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 181–214 (1998), what is perhaps more interesting for our purposes is that many Justices have been reluctant to view constitutional status as a be-all-end-all determinant of incorporation-worthiness, and the Court’s case-by-case application of the more open-ended “fundamental to . . . ordered liberty” formulation has not given rise to radical problems of indeterminacy.

Begin with the former. A commitment to constitutional privileging requires us to deprioritize the enforcement of many laws that can carry great personal and social significance. The criminal law contains non-constitutional protections such as the right to an appeal,<sup>181</sup> the right to peremptory challenges,<sup>182</sup> the protections of the Speedy Trial Act,<sup>183</sup> statutory wiretapping limits,<sup>184</sup> and the sentencing requirements of 18 U.S.C. § 3553(a),<sup>185</sup> just to name a few.<sup>186</sup> Nonconstitutional evidence law provides for attorney-client privilege,<sup>187</sup> spousal privilege,<sup>188</sup> limitations on irrelevant and prejudicial evidence,<sup>189</sup> and the panoply of hearsay restrictions, exclusions, and exceptions.<sup>190</sup> Within administrative law, there are the procedures of the APA (including rules providing for judicial review of agency action and notice-and-comment rulemak-

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<sup>181</sup> 28 U.S.C. § 1291 (2006); Fed. R. App. P. 4; see also *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993) (characterizing the right to appeal as a “prime example” of a right that, though statutory, is “so important that . . . [it] can only be waived voluntarily and knowingly”).

<sup>182</sup> 28 U.S.C. § 1866(c) (2006); Fed. R. Crim. P. 24(b); see also *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (recognizing that “[t]he peremptory challenge is part of our common-law heritage” and that “[i]ts use in felony trials was already venerable in Blackstone’s time,” while also noting that “peremptory challenges are not of federal constitutional dimension”).

<sup>183</sup> 18 U.S.C. §§ 3161–3174 (2006).

<sup>184</sup> E.g., 18 U.S.C. §§ 2510–2522 (2006); see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 840 (2004) (“[L]egislation rather than the Fourth Amendment has provided the primary protection against invasions of privacy from wiretapping.”).

<sup>185</sup> 18 U.S.C. § 3553(a) (2006); see *United States v. Irey*, 612 F.3d 1160, 1184 (11th Cir. 2010) (noting that § 3553(a) factors play “a critical role” in federal sentencing).

<sup>186</sup> For instance, there is the large body of substantive federal criminal law, which defines and circumscribes the crimes for which individuals can be convicted.

<sup>187</sup> See *Mohawk Indus. Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009) (“We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications.” (internal quotation marks omitted)); *Maness v. Meyers*, 419 U.S. 449, 466 n.15 (1975) (denying recognition of a “constitutionally protected attorney-client privilege” (internal quotation marks omitted)).

<sup>188</sup> *Trammel v. United States*, 445 U.S. 40, 53 (1980) (noting that spousal privilege “furthers the important public interest in marital harmony”); *Carty v. Quarterman*, 345 F. App’x 897, 908 (5th Cir. 2009) (“[T]he marital privilege has never been placed on a constitutional footing.” (quoting *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985))).

<sup>189</sup> Fed. R. Evid. 402; Fed. R. Evid. 403.

<sup>190</sup> Fed. R. Evid. 801–807; see Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 989 (1973) (“Although the Constitution may commonly be considered the source of fair judicial procedure, the nonconstitutional evidentiary rules may actually be a defendant’s primary protection.”); see also *Fahy v. Connecticut*, 375 U.S. 85, 94 (1963) (Harlan, J., dissenting) (“Erroneously admitted ‘constitutional’ evidence may often be more prejudicial than erroneously admitted ‘unconstitutional’ evidence.”).

ing),<sup>191</sup> Freedom of Information Act disclosure requirements,<sup>192</sup> and basic protections of environmental law.<sup>193</sup> There are so-called “super-statutes,” including the Civil Rights Act of 1964,<sup>194</sup> the Endangered Species Act of 1973,<sup>195</sup> and the Sherman Anti-Trust Act of 1890.<sup>196</sup> There are special human rights protections—including with respect to administrative imprisonment, isolation, and torture—derived from treaties such as the Geneva Convention and from norms of customary international law.

As to the risk of overprivileging constitutional norms, there are also problems. No doubt, some constitutional requirements, such as the freedom of expression, equal protection, birthright citizenship, and due process, will strike many readers as very important, and rightfully so. But other constitutional requirements may seem less important. The Supreme Court’s “incorporation” case law suggests as much, recognizing, for instance, that the right to a grand jury indictment and the civil jury trial provision of the Seventh Amendment are of an insufficiently “fundamental” nature to warrant application against the states.<sup>197</sup> The Vicinage Clause of the Sixth Amendment—which requires that all jurors come from the “state” and “district” in which a crime occurred—creates protections of some value, but may no longer be essential.<sup>198</sup> Some Fourth Amendment rights, such as protections against non-aerial surveillance of one’s curtilage,<sup>199</sup> may be of far less significance than any num-

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<sup>191</sup> 5 U.S.C. §§ 551–559 (2006).

<sup>192</sup> 5 U.S.C. § 552 (2006).

<sup>193</sup> See, e.g., 42 U.S.C. §§ 7408–7409 (2006) (requiring promulgation of clean-air standards based on “latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare”).

<sup>194</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.).

<sup>195</sup> Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.).

<sup>196</sup> 15 U.S.C. §§ 1–2 (2006); see generally Eskridge & Ferejohn, *supra* note 141, at 1231–46.

<sup>197</sup> See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (civil jury trial); *Hurtado v. California*, 110 U.S. 516, 535 (1884) (grand jury).

<sup>198</sup> See *United States v. Hart-Williams*, 967 F. Supp. 73, 79 (E.D.N.Y. 1997) (characterizing this provision as “a relic of a bygone era when jurors decided cases on the basis of personal knowledge”).

<sup>199</sup> Compare *United States v. Kyllo*, 533 U.S. 27 (2001) (holding that Fourth Amendment prohibits warrantless use of thermal-imaging device from the street to discern activities occurring within private home), with *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that Fourth Amendment permits aerial surveillance of private home).

ber of statutory and regulatory restrictions on electronic eavesdropping.<sup>200</sup> To be clear, these rules may represent perfectly sensible legal protections that, all else equal, we would prefer to have around. My only point is that relative to other legal protections, they may not always warrant the same sort of specialized treatment that a rule-based, extrinsic account of constitutional preeminence would have to accord them.

Lest these examples seem unilluminating, consider some important thematic differences between constitutional and nonconstitutional law. For example, constitutional law primarily governs state actors; it has much to say about what government entities can do to private individuals and little to say about what private individuals can do to one another.<sup>201</sup> Nonconstitutional law, by contrast, concerns both private and public action: It prohibits employers from discriminating, industries from polluting, stockbrokers from lying, and so forth. To privilege constitutional rules over nonconstitutional rules is thus to privilege some legal restrictions on public action over virtually all legal restrictions on private action.

Nonconstitutional law also regulates public action, but here too it differs from constitutional law in an important respect. With only a few exceptions, courts have not read the Constitution to guarantee social or economic rights, tending instead to view the document as “a charter of negative liberties,” whose primary purpose is to prohibit the government from interfering with walled-off spheres of individual autonomy.<sup>202</sup> As a consequence, most social and economic entitlements—ranging from education to housing to health care to Social Security—are creatures of state and federal statutes, not the Constitution.<sup>203</sup> Thus, just as constitutional privileging favors public rights over private rights, it also favors negative liberties over positive ones. Many people, I suspect, would regard these sorts of outcomes as problematic.<sup>204</sup>

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<sup>200</sup> See supra note 184.

<sup>201</sup> The exceptional constitutional provision, which does regulate private action, is the Thirteenth Amendment.

<sup>202</sup> *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

<sup>203</sup> See Young, supra note 2, at 424.

<sup>204</sup> See, e.g., Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (2004); Robin West, *The Limits of Process*, in *Getting to the Rule of Law* 32, 48 (James E. Fleming ed., 2011); Frank I. Michelman, *Constitutional Essentials 7* (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 12-06, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1976580](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976580).

Many (though not all) forms of preeminence-based constitutional privileging occur within the criminal context, where restrictions on private actors—and, to a lesser extent, guarantees of positive rights—are not often at issue.<sup>205</sup> Here too, however, lies an important thematic distinction between constitutional and nonconstitutional rules. Scholars of U.S. criminal law have long noted the imbalance between the vast body of constitutional rules governing criminal *procedure* and the comparatively scant body of such rules governing the *substance* of criminal law.<sup>206</sup> Constitutional doctrine, in other words, has much more to say about what investigators and prosecutors may do in pursuing criminal convictions, as compared to what legislators may do in defining crimes and assigning sentences. The upshot is that defendants who raise substantive challenges to charges, convictions, and sentences must rely primarily on *statutory* boundaries defining the scope of federal crimes and the severity of federal sentences, rather than constitutional checks on Congress's ability to set these boundaries in the first place.

This fact can interact with constitutional privileging in some strange and troubling ways. We already saw how the nonconstitutional nature of the federal Sentencing Guidelines led the Fourth Circuit to characterize as “ordinary” a legal error that forced two defendants to endure, collectively, five extra years of prison time.<sup>207</sup> Another example involves the statutory rule, enacted as part of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), that authorizes successive habeas petitions based on a “new rule of *constitutional* law, made retroactive to cases on collateral review by the Supreme Court.”<sup>208</sup> In the late 1990s, some federal prisoners brought successive petitions seeking relief under *Bailey v. United States*, in which the Supreme Court substantially—and retroactively—narrowed the scope of a federal criminal statute.<sup>209</sup> The post-*Bailey* petitioners raised compelling claims; though they were originally convicted under the statute, *Bailey* removed their conduct from its

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<sup>205</sup> But see David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 Va. L. Rev. 1229, 1238–39 (2002).

<sup>206</sup> See, e.g., William J. Stuntz, The Collapse of American Criminal Justice 212 (2012) (noting that the “Constitution is not written with substantive criminal law in mind”).

<sup>207</sup> See *United States v. Mikalajunas*, 186 F.3d 490, 495–96 (4th Cir. 1999).

<sup>208</sup> 28 U.S.C. § 2244(b)(2)(A) (2006) (emphasis added); *id.* § 2255(h)(2).

<sup>209</sup> 516 U.S. 137, 150 (1995), superseded by statute, Armed Career Criminal Act, 18 U.S.C. § 924(c)(1) (2006); see also *Bousley v. United States*, 523 U.S. 614, 620–21 (1998) (making clear that *Bailey* carried retroactive effect).

scope.<sup>210</sup> But AEDPA forbade them from filing successive petitions, because the “new rule” of *Bailey* involved nonconstitutional law.<sup>211</sup> Remarkably, these prisoners, now legally innocent of a crime for which they had been convicted, could not obtain habeas review under AEDPA. Had *Bailey*, by contrast, involved a new, retroactive ruling on one of the Constitution’s many procedural protections, other prisoners—regardless of their culpability for the underlying crime—could have filed successive petitions and, in some circumstances, obtained their release.<sup>212</sup>

With “fancy judicial footwork,”<sup>213</sup> some lower courts found a way around this strange and unfair result.<sup>214</sup> That the courts had to expend so

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<sup>210</sup> See Lyn S. Entzerth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. Miami L. Rev. 75, 76–77 (2005) (noting that the *Bailey* petitioners “had been convicted for conduct that did not constitute active employment of a firearm during a drug-related offense” and hence was, under *Bailey*, “noncriminal”). It should be noted that Congress subsequently amended the firearm statute so as to supersede the Court’s holding in *Bailey*. See *Abbott v. United States*, 131 S. Ct. 18, 25 (2010) (discussing this change). In my view, however, Congress’s subsequent amendments to the statute (which, of course, were prospective in application) do not render any less problematic the difficulties faced by the *Bailey* petitioners, who were convicted well before the amendments went into effect.

<sup>211</sup> See, e.g., *In re Vial*, 115 F.3d 1192, 1195–96 (4th Cir. 1997).

<sup>212</sup> I am not the first person to identify problems of this sort. Similar thoughts were on Professor Bator’s mind, for instance, when he criticized the constitutional-nonconstitutional distinction within federal habeas corpus law, as it stood circa 1960. “Why should we pay so little attention to finality with respect to constitutional questions,” he asked, “when, in general, the law is so unbending with respect to other questions which, nevertheless, may bear as crucially on justice as any constitutional issue in the case?” Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 509 (1963). Judge Friendly offered similar criticisms, noting that “[a] judge’s overly broad construction of a penal statute can be much more harmful to a defendant than unwarranted refusal to compel a prosecution witness on some peripheral element of the case to reveal his address.” Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 157 (1970).

<sup>213</sup> Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1114 (1999).

<sup>214</sup> See, e.g., *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); *Triestman v. United States*, 124 F.3d 361, 368–69 (2d Cir. 1997). But cf. *Prost v. Anderson*, 636 F.3d 578, 580, 597 (10th Cir. 2011) (denying a successive § 2255 petition based on the narrowing of a federal money laundering statute). The key move, in short, was to invoke the savings provision of § 2255, which allows a prisoner to seek collateral relief under the statute’s predecessor provision, 28 U.S.C. § 2241, when a § 2255 motion “is inadequate or ineffective to test the legality of [a petitioner’s] detention.” 28 U.S.C. § 2255(e) (2006). All of these holdings, however, were limited in scope and did not purport to guarantee § 2241 review for all successive petitions based on new, retroactive rules of nonconstitutional law. As one commentator has noted, “The circuit courts may have opened the courthouse to successive petitions

much energy on the issue, however, is a telling indicator of the problems of fit that constitutional privileging can cause. We cannot know for sure why Congress chose to favor constitutional over nonconstitutional law in limiting judicial review of successive Section 2255 petitions. But if Congress's intention was to distinguish between preeminent and non-preeminent legal rules, the post-*Bailey* case law suggests that the statute missed the mark.<sup>215</sup>

### 3. Rules Versus Standards?

The final component of the extrinsic account of constitutional preeminence takes us into well-trodden territory: the debate over rules versus standards. For even if the constitutional-nonconstitutional distinction does not perfectly match the distinction between preeminent and non-preeminent law, constitutional privileging may remain justifiable on the ground that it furthers the benefits of rule-oriented judging.

The tradeoffs between rules and standards have been exhaustively documented and need no detailed restatement here.<sup>216</sup> Those who value

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raising *Bailey* claims of actual innocence, but they opened it only a crack." Entzerth, *supra* note 210, at 103; see also Yackle, *supra* note 48, at 41 n.126 (noting that "[c]ases in which a § 2255 petition is inadequate in this sense are virtually non-existent").

<sup>215</sup> Perhaps, though, we need not lose sleep over problems of fit. When the case law threatens untoward results, courts can find ways around these results. If honest application of *Hill*'s "fundamental defect" standard would underenforce a seemingly important nonconstitutional provision in a § 2255 collateral proceeding, courts could just apply the *Hill* standard less rigorously. And if *Chapman*-style harmless error review would overenforce a seemingly unimportant constitutional rule, courts could just say the error was harmless beyond a reasonable doubt, even if it really was not. Courts are not automatons, and doctrine does not control their every move. When doctrine instructs them to reach an undesirable outcome, they can contort doctrine (or ignore it altogether) in the service of avoiding this result.

These may be partial solutions to the mismatch between constitutional law and preeminent law, but they are hardly a panacea. For one thing, any attempt to contort doctrine to avoid bad results at Time 1 might risk a different bad result at Time 2. If, for instance, one panel secretly relaxes *Chapman* review so as to avoid overenforcement of a constitutional rule, then future panels might apply the precedent to support relaxation of *Chapman* review in some other set of cases where we would not want them to do so. Additionally, such contortions would undermine the transparency of judicial opinions and the accountability of judicial actors. Courts are supposed to give honest reasons for the decisions they make, so that litigants (and other courts) may better comprehend the law, predict the outcomes of future cases, and hold judges accountable for decisions they do not like. All of this becomes harder to do when courts secretly manipulate doctrine to avoid the problems created by constitutional privileging.

<sup>216</sup> For a small sampling of the voluminous literature, see, for example, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1687–713 (1976);

predictability and low decision costs will tend to favor the rule-like nature of constitutional privileging, while those who value flexibility and nuance will tend to disfavor it. And, of course, perceptions of fit influence this calculus as well; the looser we perceive the correlation between constitutional law and preeminent law to be, the less enthusiastic we will be about rigid rules of constitutional privileging.

Beyond these familiar tradeoffs, however, a further point seems worth highlighting. A superficial allure of constitutional privileging is that it allows courts to sidestep the difficult task of explaining precisely why one sort of claim ought to be privileged over another. We already saw how difficult it was to identify with any precision what it means for one rule to be more “important” or “fundamental” than another; hence, we might argue, constitutional privileging is desirable because it prevents courts from getting mired down in vexing issues on which consensus is not likely to emerge. On closer examination, however, the mechanical simplicity of the inquiry may be more of a minus than a plus. The problem is that—by automatically favoring a law in light of its constitutional status—rule-like constitutional privileging discourages active reflection on what the ordering of our legal priorities ought to be.

Under harmless error law, for instance, courts can often figure out quite quickly whether to apply the more rigorous standard of *Chapman* or the less rigorous standard of *Kotteakos*: The constitutional status of the claim will answer that question for them. But in identifying the applicable standard, courts skip over some potentially useful inquiries into the nature of the claims at issue and the functions that harmless error analysis is intended to serve. If, alternatively, *Chapman* review applied to alleged errors of, say, an “important”—rather than “constitutional”—nature, courts would be forced to confront questions such as: “Would the frequent dismissal of these claims on harmless error grounds disserve critical procedural and substantive values?” Or: “Are errors such as this one especially likely to prejudice the outcome of a case, thus justifying a general rule that tilts the scale in favor of a prejudice finding?” These questions, in my view, should occupy the attention of appellate judges, who apply harmless error analysis all the time. Constitutional privileging, however, provides an easy excuse for not asking them at all.

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Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 Calif. L. Rev. 953 (1995).

This is not, to be clear, a recapitulation of the point that constitutional privileging creates problems of fit. The problem is different: In determining whether to privilege one claim over another, courts are not generating useful and relevant insights as to why some claims merit closer attention than others.<sup>217</sup> That may in turn deny them a fuller understanding of the purposes of various doctrines that employ constitutional privileging and, more generally, of the reasons why some sorts of legal rules merit special levels of enforcement. Constitutional privileging is problematic, in other words, not just because it achieves an inadequate alignment between the rules that are being privileged and the rules that should be privileged, but also because it executes this alignment in a manner that is non-deliberative, non-dialogic, and otherwise unrelated to the sound evolution of the law.<sup>218</sup>

### C. Conclusion

In my view, the pragmatic case for constitutional privileging, based on an extrinsic account of constitutional preeminence, is not persuasive. As to each of the doctrines I identified in Part II, I would prefer that courts avoid calibrating procedural standards based on rough-and-ready appeals to the preeminence of constitutional law. Although I cannot purport to have established this point definitively, I hope at least to have clarified the stakes of the choice, and to suggest that the case in favor of constitutional privileging is not as strong as it may initially seem. And this is especially so when we consider, as the next Part does, the uneasy relationship between constitutional privileging and constitutional avoidance.

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<sup>217</sup> Professor Seana Shiffrin has suggested that an underappreciated virtue of standards is that they help to induce deliberation that is “important for our moral health and for an active, engaged democratic citizenry.” Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 Harv. L. Rev. 1214, 1217 (2010). Her argument focuses on *private citizens*, who must shape their conduct to comply with legal standards. *Id.* at 1217–18. But it applies with equal force, I believe, to the judicial actors who conclusively determine how standards should apply in concrete cases. Cf. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 34 (1986) (suggesting that open-ended balancing tests can engage the Court in the “project of resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit”).

<sup>218</sup> Cf. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649, 1692–93 (2005) (demonstrating ways in which doctrinal rules originally adopted as a means to an end can, once mechanically applied over long periods of time, begin to look like ends in themselves).

## V. CONSTITUTIONAL PRIVILEGING AND CONSTITUTIONAL AVOIDANCE

“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication,” the Supreme Court has said, “it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”<sup>219</sup> This rule derives not from the sensed preeminence of the Constitution, but rather from the supremacy and irreversibility of constitutional law. As Professor Bickel put it, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”<sup>220</sup> The mere availability of judicial review may have long-term negative effects, “adding a certain impetus to measures that the majority enacts rather tentatively,”<sup>221</sup> and, in James Bradley Thayer’s words, “dwarf[ing] the political capacity of the people” and “deaden[ing] its sense of moral responsibility.”<sup>222</sup> So understood, constitutional decision making is not, as proponents of constitutional privileging would have it, an urgent judicial imperative to be undertaken whenever possible, but rather a delicate and dangerous task, to be undertaken only sparingly and with the utmost caution.

The techniques of constitutional avoidance are many and varied. For purposes of this discussion, we can group them into two categories: (1) “Brandeisian” techniques, by which courts evade resolution of constitutional issues in a manner not affecting a claimant’s ultimate entitlement to judicial relief; and (2) “Bickelian” techniques, by which courts evade resolution of constitutional issues in a manner that often does render relief unavailable.<sup>223</sup> The former involve, for instance, considering non-

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<sup>219</sup> *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (quoting *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 570 n.34 (1947)).

<sup>220</sup> Bickel, *supra* note 22, at 16–17.

<sup>221</sup> *Id.* at 31.

<sup>222</sup> *Id.* at 22 (quoting James Bradley Thayer, *John Marshall* 107 (1901)); see also Mark Tushnet, *Taking the Constitution Away from the Courts* 57–65 (1999) (discussing the problem of “judicial overhang”).

<sup>223</sup> I derive this nomenclature from a comparison of Justice Brandeis’s concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 346–49 (1936) (Brandeis, J., concurring), with Professor Bickel’s *The Least Dangerous Branch*. See Bickel, *supra* note 22, at 126–27. The correlation is only a rough one, however, as there is some overlap in the techniques that each source discusses. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 9–10 (1964) (criticizing Bickel for “invoking the well-known *Ashwander* statement by Brandeis, regarding avoidance of constitutional questions in adjudication, to assert an amorphous authority to withhold ad-

constitutional grounds for relief before turning to alternative constitutional grounds,<sup>224</sup> construing statutes so as to avoid potential constitutional defects,<sup>225</sup> and issuing narrow rather than broad rulings on questions of constitutional law.<sup>226</sup> The latter, by contrast, involve the strategic use of certiorari denials, justiciability rules (for example, mootness, ripeness, standing, or political question doctrine), or other jurisdictional limitations in a manner that precludes consideration of constitutional claims on their merits.<sup>227</sup>

While a detailed examination of these avoidance techniques lies beyond the scope of this paper, it suffices to note here that although constitutional avoidance strategies—particularly those of the Bickelian variety—have been subject to serious criticism,<sup>228</sup> they remain widely utilized by the courts. With that in mind, it is worth asking how these avoidance strategies accord with various doctrines of constitutional privileging. The answer is: not too well.

Consider first Brandeisian avoidance. Constitutional privileging sometimes challenges the “nonconstitutional first, constitutional second” issue-ordering paradigm, forcing courts to render constitutional judgments in order to identify threshold standards of review. Suppose, for instance, that a litigant alleges on appeal that the district court erred in admitting some piece of unlawful hearsay testimony. The government concedes error but claims it was harmless. The government wants *Kotteakos* review, applicable to nonconstitutional errors, while the defendant wants *Chapman* review, applicable to constitutional errors, and the two parties thus argue over the question whether the hearsay error amounted to a Confrontation Clause violation.<sup>229</sup> Perhaps the court can

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judication altogether—a power far broader than any suggested by the examples given by Brandeis” (internal footnote omitted)).

<sup>224</sup> See Adrian Vermeule, *Saving Constructions*, 85 *Geo. L.J.* 1945, 1948 (1997).

<sup>225</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

<sup>226</sup> They might also include forms of “second-look” constitutional review, through which suspect policies are “remanded” back to their creators for a reconsideration of their potential constitutional problems. See Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 *Harv. L. Rev.* 80, 103–08 (1991); Coenen, *supra* note 58, at 1583.

<sup>227</sup> See Bickel, *supra* note 22, at 126–27.

<sup>228</sup> See, e.g., Gunther, *supra* note 223, at 1.

<sup>229</sup> See, e.g., *United States v. Ramirez*, 479 F.3d 1229, 1245–48 (10th Cir. 2007), overruled in part by *Davis v. Washington*, 547 U.S. 183 (2006); cf. *Dalton v. Specter*, 511 U.S. 462, 471–74 (1994) (asking whether presidential action in excess of statutory authority also violates constitutional separation of powers doctrine, for purposes of determining whether

avoid deciding the question, by saying that the error qualifies as harmless (or harmful) under both standards. But if the question of harmlessness presents a close call, then the Confrontation Clause issue may be dispositive. And if we want to avoid issuing irreversible pronouncements on the meaning of the Confrontation Clause, that result is no good. If we know the admission of hearsay testimony violated statutory law, why bother asking whether it violated constitutional law as well, especially when doing so would create new precedent regarding a legislatively unalterable rule? We could instead simply ask whether the undisputed violation of a hearsay rule warrants a more or less forgiving form of harmless error review, and thus avoid the making of new constitutional law without in any way altering the claimant's eligibility for relief.<sup>230</sup>

Consider next Bickelian avoidance. Constitutional privileging, by definition, requires courts to take special care in policing constitutional boundaries. Constitutional claims are less likely to be deemed forfeited or waived, less likely to be disposed of on harmless error grounds, more likely to fall within the mandatory jurisdiction of state supreme courts, and more likely to come up for review in Section 2255 proceedings. Viewed from the Bickelian perspective, these rules seem to have things backwards, treating the constitutional status of a claim as a reason *for* rather than *against* reaching its merits.

Of course, constitutional privileging is not responsible for the fact that courts often face tough choices in balancing their institutional obligation to enforce legal commitments of the past against the need not to impede society's ongoing efforts to govern itself in the present. But constitutional privileging can needlessly exacerbate the tension between these two demands, requiring courts to reach out at *any and all* constitutional issues regardless of their objective importance. We have seen, for in-

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action was reviewable under the APA); *United States v. Caceres*, 440 U.S. 741, 749–55 (1979) (asking whether an undisputed government violation of IRS regulations amounted to a Fourth Amendment error, for purposes of deciding whether evidentiary breach warranted exclusionary relief).

<sup>230</sup> A corollary benefit to this approach, also related to the avoidance point, is that it would reduce claimants' incentives to raise constitutional issues in the first place. Rational litigants will respond to rules of constitutional privileging by looking for ways to allege error in constitutional rather than nonconstitutional terms, and thereby benefit from the heightened procedural/remedial standards afforded to constitutional claims. By jettisoning constitutional privileging, courts would alter these incentives in a more avoidance-friendly manner; litigants would simply raise their most promising arguments on appeal, without straining to characterize these arguments as grounded in constitutional law.

stance, that several states provide for mandatory state supreme court review of all constitutional decisions by intermediate-level courts.<sup>231</sup> In so doing, they withhold from their courts of highest instance a key means of non-decision—the denial of certiorari—and instead require supreme court resolution of all constitutional cases brought before it. So too with forfeiture, waiver, and harmless error rules; at the margin, constitutional privileging may push courts to resolve delicate questions of constitutional law even when the underlying rights at issue are not especially “fundamental” or “important” in an extrinsic sense. To be clear, it is and will always be extremely difficult to determine when the need for judicial resolution of an open constitutional issue—or for judicial enforcement of an established constitutional limit—becomes significant enough to overcome Bickelian concerns about countermajoritarian action; that, perhaps, is the \$64,000 question of constitutional theory. And to be equally clear, the abolition of constitutional privileging would not necessarily assuage Professor Bickel’s concerns, especially if it were accomplished by “leveling up” the procedural treatment of nonconstitutional claims to the standards that already exist for constitutional claims (rather than, say, leveling down their treatment of constitutional claims to the standards that currently exist for nonconstitutional claims).<sup>232</sup> Even so, it can at least be said that hard-and-fast doctrines of constitutional privileging make the balancing of these delicate tensions a more difficult task than it needs to be.

In sum, whatever the validity of the intrinsic and extrinsic accounts of constitutional preeminence, any defense of constitutional privileging must contend with the challenges it poses to longstanding and oft-lauded norms of constitutional avoidance. If we worry about the antidemocratic effects of constitutional decision making and, like Bickel, we see virtue in judicial passivity, then we ought to think twice about procedural rules

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<sup>231</sup> See *supra* note 27. It bears emphasizing that these states mandate supreme court review of lower court constitutional decisions regardless of whether they uphold or invalidate government action on constitutional grounds. This is in contrast to some other states, which guarantee supreme court review of only those lower court decisions that *invalidate* laws on constitutional grounds. See, e.g., La. Const. art. 5, § 5(D).

<sup>232</sup> Notice that the same point would *not* hold with respect to Brandeisian avoidance problems, which arise from the *identification* question of whether a claim involves constitutional or nonconstitutional law. Regardless of whether courts leveled up or leveled down, the identification question would disappear, because the baseline level of procedural treatment would no longer depend on the constitutional status of the claim itself.

that call for a comparatively aggressive implementation of politically unalterable rules.

## VI. IMPROVEMENTS

So what should we do? As the above discussion makes clear, we are not likely to find an adequate, one-size-fits-all replacement for preeminence-based constitutional privileging. But we can pursue context-sensitive changes to areas of doctrine that currently call for the privileging of constitutional over nonconstitutional claims. The reforms, moreover, need not be revolutionary; there is room for incremental progress, which builds on doctrinal foundations that already exist, rather than displacing these foundations with something entirely new.

### *A. Substance*

The departure from constitutional privileging should be easiest to achieve where the law has simply layered the constitutional-nonconstitutional distinction on top of separate, form-neutral criteria for privileging claims. The fourth prong of the *Olano* test, for instance, instructs courts to recognize plain error only when the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”<sup>233</sup> Not surprisingly, federal plain error doctrine abounds with holdings expounding on what sorts of errors do and do not satisfy this standard,<sup>234</sup> and common law adjudication will continue to flesh out its meaning going forward. A distinction between constitutional and nonconstitutional claims may provide some additional clarity in guiding courts’ application of this test, but jettisoning the distinction altogether seems unlikely to throw courts into the wilderness. An analogous point applies to the First Circuit’s handling of the forfeiture of civil claims. The court is already asking whether an unpreserved claim “implicates matters of great public moment,”<sup>235</sup> and it could keep asking this question without also looking into the claim’s constitutional status. Similarly, state supreme courts could abandon appeal-as-of-right rules without creating major indeterminacy problems, since those courts already exercise

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<sup>233</sup> *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks omitted).

<sup>234</sup> See, e.g., *United States v. Marcus*, 130 S. Ct. 2159, 2166–67 (2010); *United States v. Cotton*, 535 U.S. 625, 632–33 (2002); *Johnson v. United States*, 520 U.S. 461, 469–70 (1997).

<sup>235</sup> *Harvey v. Veneman*, 396 F.3d 28, 45 (1st Cir. 2005).

discretionary control over large portions of their dockets. In these and other circumstances, constitutional privileging provides meager marginal benefits in the way of clarity and predictability, and courts would be well equipped to proceed in its absence.

Sometimes, the move away from constitutional privileging will create greater uncertainty, but here too courts can turn to form-neutral considerations already present within the doctrine. Recall that under current harmless error law, so-called “structural” errors trigger per se reversal, while non-structural, “trial” errors are subject to one of two prejudice standards, based on their constitutional status. Three potential improvements could be achieved without great difficulty. First, the Supreme Court should make clear that top-level, “structural” errors can be either constitutional or nonconstitutional in nature. That way, lower courts would rightly apply automatic reversal in response to all errors—not just constitutional ones—that “necessarily render[] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,”<sup>236</sup> or whose effect on the verdict cannot “be quantitatively assessed in the context of other evidence presented.”<sup>237</sup> Second, within the category of non-structural errors, the Court could eliminate altogether the distinction between constitutional and nonconstitutional rules, subjecting all non-structural errors to *Chapman*’s stricter standard of review, *Kotteakos*’s more lenient standard of review, or some intermediate standard between the two. Finally, if the Court wished to preserve the three-tiered structure of the doctrine, it could reformulate the bottom two tiers of the test to better line up with the top tier. Thus, for instance, rather than limiting *Chapman*-level review to errors of a constitutional nature, the Court might extend such review to nonconstitutional errors of a “quasi-structural” nature—that is, errors bearing some of the hallmarks of a structural error, but not sufficiently so that they qualify as per se harmful.

What about collateral relief under Section 2255? One possibility would simply be to universalize application of the *Hill* standard, permitting collateral review of only those claims—constitutional or nonconsti-

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<sup>236</sup> *Washington v. Recuenco*, 548 U.S. 212, 218–19 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 2 (1999)).

<sup>237</sup> *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). But see *United States v. Lindsey*, 634 F.3d 541, 544 (9th Cir. 2011) (reading *Rivera v. Illinois*, 556 U.S. 148 (2009), to overrule a previous Ninth Circuit holding, under which one form of nonconstitutional error, relating to peremptory challenges, was deemed to trigger automatic reversal).

tutional—that allege a “fundamental defect” in the proceeding below. Another suggestion would be to axe *Hill* altogether, leaving it up to the already demanding rules of procedural default and non-retroactivity, and nothing more, to prevent a flood of demands for nonconstitutional habeas relief. I take no position as between one or the other approach; either way, however, it seems to me that constitutional and nonconstitutional claims ought to receive the same treatment.

I would also favor two legislative reforms to AEDPA. We have already seen how the statute privileges constitutional over nonconstitutional claims with respect to successive petitions,<sup>238</sup> and it does something similar for purposes of permitting appeals from district court denials of first-time petitions.<sup>239</sup> Even assuming some filtering mechanism is needed here, the constitutional status of a claim should not play such a make-or-break role. Perhaps, for instance, rather than permitting successive petitions based on “new rules of constitutional law,” Congress could allow successive petitions based on “new rules of law affecting a defendant’s fundamental liberties” or, more incrementally, “new rules of constitutional law, or new rules of nonconstitutional law affecting a defendant’s fundamental liberties.” The latter reform would still, of course, retain some version of constitutional privileging, but in a somewhat weakened form.

### *B. Method*

Another move away from constitutional privileging might focus on analogical reasoning, emphasizing comparisons based on substance rather than form. A good example of this technique comes from the Tenth Circuit’s decision in *United States v. Friday*.<sup>240</sup> The case involved a statutory question under the Religious Freedom Restoration Act, and the Tenth Circuit applied intensified fact review to the district court’s findings.<sup>241</sup> Noting that “[t]he statute asks courts to draw on constitutional doctrines developed under the Free Exercise Clause” and citing to First Amendment free exercise cases in which courts had applied independent appellate review, the Tenth Circuit explained that independent examination of the record was warranted in light of the “essential” nature of the

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<sup>238</sup> See *supra* Subsection IV.B.2.

<sup>239</sup> See 28 U.S.C. § 2253(c)(2) (2006).

<sup>240</sup> 525 F.3d 938 (10th Cir. 2008).

<sup>241</sup> *Id.* at 949.

“[f]reedom of religion.”<sup>242</sup> It was of no significance that the parties were disputing a statutory, rather than constitutional, claim; what mattered instead was that the claim implicated an important constitutional value, thus warranting intensified “constitutional” fact review.<sup>243</sup>

Compare *Friday* with the Supreme Court’s decision in *United States v. Caceres*.<sup>244</sup> During a bribery investigation, federal agents covertly recorded (and transmitted by radio) seemingly private conversations between an IRS official and an unsuspecting citizen, in violation of IRS regulations requiring authorization from the Department of Justice. The district court suppressed the evidence, and the Ninth Circuit affirmed in almost all respects.<sup>245</sup> The Supreme Court, however, reversed in full. Emphasizing that “the IRS was not required by the Constitution to adopt these regulations,” and that “the violations of agency regulations disclosed by this record do not raise any constitutional questions,”<sup>246</sup> the Court concluded that “our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule’s application in this case.”<sup>247</sup>

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<sup>242</sup> *Id.* at 950.

<sup>243</sup> Ultimately, the *Friday* court’s independent review of the factual record led it to deny the defendant’s RFRA claim. *Id.* Even so, the intensified review applied still embodied a form of “privileging,” insofar as the court resolved the claim with a heightened level of care and attention. Cf. Volokh & McDonnell, *supra* note 57, at 2442 (noting, with respect to the *Bose* rule, that “[w]hoever won, independent review should produce more refinement of the legal standard, something *Bose* says is constitutionally valuable”).

<sup>244</sup> 440 U.S. 741 (1979).

<sup>245</sup> *Id.* at 743.

<sup>246</sup> *Id.* at 751–52.

<sup>247</sup> *Id.* at 755. According to the Court, the defendant had claimed that “the regulations concerning electronic eavesdropping, even though not required by the Constitution or by statute, are of such importance in safeguarding the privacy of the citizenry that a rigid exclusionary rule should be applied to all evidence obtained in violation of any of their provisions.” *Id.* While making clear that it did “not doubt the importance of these rules,” the Court responded that it could not “ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.” *Id.* at 755–56. It thus concluded that “it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.” *Id.* at 756.

A similar point has been made, however, about exclusionary remedies and constitutional decision making: the harsher the sanction attached to constitutional violations, the greater the courts’ reluctance to identify such violations in the first place. See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 *Harv. J.L. & Pub. Pol’y* 111, 112 (2003) (arguing that “liberals ought to hate the exclusionary rule because the exclusionary rule, in my experience, is most

Perhaps there were good reasons in *Caceres* for not applying the exclusionary rule, just as there were good reasons in *Friday* for applying independent appellate fact review. But either way, the form-based analogical reasoning of *Caceres* is less persuasive than the content-based analogical reasoning of *Friday*. Rather than ask whether the violation was constitutional or nonconstitutional in form, the *Caceres* Court should have asked whether the violation was of a sufficiently severe nature to warrant exclusion of evidence that was, without question, unlawfully obtained. To say that the IRS regulation did not raise a “constitutional question,” however, was simply to beg the question of whether the evidentiary violation in *Caceres*—involving a rule whose “importance” the Court “d[id] not doubt”—was substantively analogous to evidentiary violations that had warranted exclusion in the Court’s prior cases. Is it as important to deter unauthorized IRS agents from recording and broadcasting seemingly private conversations as it is to deter warrantless police officers from eavesdropping on statements made in a public phone booth?<sup>248</sup> I don’t know. But that seems to me the sort of question that the Court should have been grappling with in *Caceres*—not whether the IRS agents broke a constitutional or nonconstitutional rule.

In one sense, *Friday* represents a mere baby step away from the unhelpful analogizing one finds in *Caceres*; *Friday* did, after all, emphasize the close connection between RFRA and the First Amendment, and it was careful to characterize the RFRA claim as bearing on an important *constitutional* value. Still, the court’s focus was admirably unmoved by the nonconstitutional form of the law at issue. Congress, through the statute, had offered its own gloss on an important legal protection, and that fact, in the Tenth Circuit’s view, was enough to warrant application of intensified fact review. It was the content of the claim at issue, not the type of law underlying it, that necessitated the elevated scrutiny.

#### CONCLUSION

An emerging view within U.S. constitutional scholarship holds that our large-c, or “canonical,” Constitution does not exhaust the content of

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responsible for the deep decline in privacy rights in the United States”); see also Sklansky, *supra* note 205, at 1266. But the *Caceres* Court did not explain why its willingness to “tolerate occasional erroneous administration” for the sake of preserving legal protections extended to regulatory, but not constitutional, rulemaking.

<sup>248</sup> *United States v. Katz*, 389 U.S. 347, 354 (1967).

our small-c constitutional law. This observation has prompted some commentators to endorse the expansion of constitutional boundaries, so that, within doctrines that privilege constitutional over nonconstitutional claims, “functionally” constitutional norms may receive the same sort of special treatment as their formally constitutional counterparts.<sup>249</sup>

I sympathize with this position, especially insofar as it rejects the idea that all preeminent law resides within the Constitution proper. But, in my view, the better conclusion to draw from this observation is not that “constitutional” law exists beyond the boundaries of the document itself. Rather, the better response is to reject the notion of constitutional preeminence altogether. To be sure, a more nuanced and functionally-oriented definition of constitutional law is not without its uses; it may have something to tell us about the processes of legal change and the actual workings of our legal system. But when it comes to making choices regarding what sorts of legal claims to privilege over others, courts are better off simply disentangling the variable of legal preeminence from the separate variable of constitutional status. The solution, in other words, is not to redraw the borderline between constitutional and non-constitutional law, but rather to lessen the significance of what that borderline connotes.

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<sup>249</sup> See, e.g., Young, *supra* note 2, at 464 (noting, with respect to “the problem of constitutional limits on jurisdiction stripping,” that “wherever the boundary lies, it should not be predicated on a sharp distinction between constitutional and statutory claims—or, more precisely, between claims under the canonical Constitution and claims under the extracanonial one”); see also Ackerman, *supra* note 135, at 44 (outlining a “dualist” theory of constitutional change, through which the People can enact “higher law” through processes outside Article V); Eskridge & Ferejohn, *supra* note 141, at 1217 (suggesting that super-statutes “might be considered ‘quasi-constitutional’”).