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REVERSE SILVER PLATTER: SHOULD EVIDENCE THAT STATE OFFICIALS OBTAINED IN VIOLATION OF A STATE CONSTITUTION BE ADMISSIBLE IN A FEDERAL CRIMINAL TRIAL?

No subject in the criminal law engenders more controversy than the exclusionary rule.[1] If federal or state officials obtained evidence in a manner that violated a criminal defendant's fourth amendment right to be free from unreasonable searches and seizures,[2] the federal exclusionary rule, with several notable exceptions,[3] prevents federal or state prosecutors from using the evidence against the defendant at trial.[4] Similarly, state

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1. *See, e.g.*, United States v. Leon, 468 U.S. 897, 907 (1984) (costs of exclusionary rule long have been source of concern); Illinois v. Gates, 462 U.S. 213, 257-58 (1983) (White, J., concurring) (because exclusionary rule denies jury access to probative evidence, courts carefully must limit exclusionary rule's application); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Justice (then Judge) Cardozo's often quoted distillation of exclusionary rule, in which he noted that "[t]he criminal is to go free because the constable has blundered"); LaFave, *Search and Seizure: "The Course of the Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L. REV. 255, 255 (law relating to searches and seizures has caused judiciary more problems than any other area of law); Note, *The Future of the Exclusionary Rule and the Development of State Constitutional Law*, 1987 WIS. L. REV. 377, 378 (exclusionary rule never has been popular remedy for unconstitutional searches and seizures). *Compare Leon*, 468 U.S. at 907 (unbending application of exclusionary rule impedes functions of judge and jury) *with id.* at 928-29 (Brennan, J., dissenting) (majority's strangulation of exclusionary rule indicates complete victory over fourth amendment).

2. U.S. CONST. amend. IV. The fourth amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Id.

3. *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984) (exclusionary rule is inapplicable if officers rely in "good faith" on subsequently invalidated search warrant); Nix v. Williams, 467 U.S. 431, 448-50 (1984) (adopting "inevitable discovery" exception to exclusionary rule); Stone v. Powell, 428 U.S. 465, 494 (1976) (refusing to apply exclusionary rule in habeas corpus proceedings); United States v. Calandra, 414 U.S. 338, 354 (1974) (exclusionary rule is inapplicable to grand jury proceedings).

4. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 648 (1961) (unconstitutionally seized evidence is inadmissible in state or federal courts); Elkins v. United States, 364 U.S. 206, 223 (1960) (evidence that state officers obtained during search, which would have violated fourth amendment if federal officers had conducted search, is inadmissible in federal court); Amos v. United States, 255 U.S. 313, 316-17 (1921) (federal court should have granted defendant's motion to exclude unconstitutionally seized evidence); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (if search and seizure violates fourth amendment, prosecution shall not use evidence at all in federal court).

In addition to excluding evidence secured solely in violation of the fourth amendment's prohibition against unreasonable searches and seizures, the Supreme Court also has applied

courts exclude evidence that state or federal officials confiscated in violation of a state constitution.[5] Federal courts, however, uniformly refuse to exclude evidence that state or federal officers obtained inconsistently with state constitutions.[6] Federal courts reason that excluding evidence which officers obtained in violation of a state constitution would hamper the enforcement of federal laws and would conflict with the need for uniform evidentiary standards in the federal courts.[7] These federal courts frustrate the right of individual states to provide independent constitutional protection to their citizens, however, and encroach upon state sovereignty and principles of federalism.[8] Additionally, federal courts that refuse to exclude evidence which state officers obtained inconsistently with state

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the exclusionary rule and excluded evidence obtained in violation of other constitutional provisions or federal statutes. *See Mapp*, 367 U.S. at 657 (due process clause of fourteenth amendment renders inadmissible evidence that officers obtained in violation of fourth amendment); Mallory v. United States, 354 U.S. 449, 455 (1957) (if federal officers obtained evidence contrary to Rule 5(a) of Federal Rules of Criminal Procedure, which requires officers to present arrested person before magistrate without unnecessary delay, evidence is inadmissible in federal court); Agnello v. United States, 269 U.S. 20, 33-34 (1925) (fifth amendment protects person from prosecutorial use of evidence obtained in violation of person's rights under fourth amendment).

5. *See, e.g.*, State v. Kaluna, 55 Hawaii 361, ____, 520 P.2d 51, 62 (1974) (excluding evidence that state officers obtained in violation of state constitution); State v. Johnson, 68 N.J. 349, 354, 346 A.2d 66, 68 (1975) (trial court should have determined whether state officers obtained evidence in violation of state constitution and, if so, court should have excluded evidence); State v. Williams, 94 Wash. 2d 531, 541, 617 P.2d 1012, 1018 (1980) (if federal agents do not comply with state privacy standards that are stricter than federal privacy standards, evidence that federal agents obtained is inadmissible in state court).

6. *See, e.g.*, United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) (evidence that officers seized in compliance with federal law is admissible in federal court without regard to state law); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (only federal law applies to federal criminal prosecutions); United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (if state officers conducted state search, federal courts should determine whether search and seizure was reasonable as if federal officers conducted search and seizure). *But see* United States v. Speaks, No. CR-86-273-1 (E.D. Wash. November 17, 1986) (LEXIS, Genfed library, Dist file) (evidence that officers seized in violation of Washington Constitution is inadmissible in federal court). The ruling of the United States Court of Appeals for the Ninth Circuit in *Chavez-Vernaza* effectively overruled the decision of the United States District Court for the Eastern District of Washington in *Speaks*. *See infra* notes 92-124 and accompanying text (discussing Ninth Circuit's departure in *Chavez-Vernaza* from its dicta in previous cases).

7. *See* United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) (excluding from federal court evidence that state officers obtained in violation of state constitution would hamper enforcement of federal laws); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (excluding from federal court evidence that state officers obtained in violation of state constitution would hinder need for uniform evidentiary standards in federal courts); *see also infra* notes 92-154 and accompanying text (discussing *Chavez-Vernaza* and *Pforzheimer* decisions).

8. *See infra* notes 72-86 and accompanying text (discussing reasons that federal courts' refusal to exclude evidence which officers obtained in violation of state constitution is inconsistent with historical concept of federalism).

constitutions sanction a "silver platter" doctrine similar to the practice that the United States Supreme Court invalidated in 1960.[9]

Before 1960 state officials could transfer to federal agents on a "silver platter" evidence that state officials obtained in violation of the United States Constitution, and federal prosecutors could use the evidence in a federal criminal trial.[10] The Supreme Court in 1960, however, determined that federal courts must exclude evidence which either state or federal officers obtained in violation of the federal constitution.[11] The Supreme Court reasoned that, because evidence obtained in violation of the fourth amendment to the federal constitution was inadmissible in federal court, and because the fourth amendment applied to state officials, federal courts must exclude evidence that state officials obtained in violation of the fourth amendment.[12] Despite the Supreme Court's attempt in 1960 to eradicate the silver platter doctrine, by implementing a "reverse silver platter," state officials currently can transfer evidence that they secured in violation of a state constitution to federal agents, and federal officials can use the evidence in federal court.[13] An examination of the United States Supreme Court's repudiation of the original silver platter doctrine demonstrates that federal courts similarly should renounce the new reverse silver platter doctrine.[14]

The original silver platter doctrine developed because the United States Supreme Court initially determined that the fourth amendment to the United States Constitution, and therefore the exclusionary rule, applied only to federal officials.[15] The exclusionary rule that the Supreme Court established in *Weeks v. United States*[16] was much narrower than the modern exclusionary rule, which currently prevents federal or state prosecutors from using evidence that federal or state officials obtained in violation of a criminal defendant's fourth amendment right to be free from unreasonable searches and seizures.[17] The *Weeks* Court determined

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9. *See* Elkins v. United States, 364 U.S. 206, 214 (1960) (repudiating "silver platter" doctrine); *infra* notes 29-38 and accompanying text (discussing *Elkins* decision).

10. *See* Lustig v. United States, 338 U.S. 74, 78-79 (1949) (recognizing, but refusing to repudiate, silver platter doctrine).

11. Elkins v. United States, 364 U.S. 206, 223 (1960).

12. *Id.* at 214.

13. *See, e.g.*, United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (refusing to question in federal court whether state officers obtained evidence in compliance with state law); United States v. Shaffer, 520 F.2d 1369, 1372 (3d Cir. 1975) (same), *cert. denied sub nom., Vespe v. United States*, 423 U.S. 1051 (1976); United States v. Bassford, 601 F. Supp. 1324, 1333 (D. Me. 1985) (same).

14. *See infra* notes 15-28 and accompanying text (discussing original silver platter doctrine).

15. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (framers did not direct fourth amendment toward state officials' misconduct); *infra notes* 16-19 and accompanying text (discussing *Weeks* decision).

16. 232 U.S. 383 (1914).

17. *Compare* Weeks v. United States, 232 U.S. 383, 398 (1914) (authorities should

that, after a defendant made a pretrial motion for the return of property that a United States Marshal had seized in violation of the fourth amendment, the admission of the property at trial as evidence against the defendant also violated his fourth amendment rights.[18] The Court in *Weeks* expressly circumscribed its holding, however, and recognized that the fourth amendment applied only to the federal government and not to state officials.[19] In *Wolf v. Colorado*,[20] however, the Supreme Court reversed course and found that fourth amendment concepts apply to the states through the due process clause of the fourteenth amendment.[21] Although the *Wolf* Court concluded that fourth amendment concepts apply to the states, the Court refused to apply the exclusionary rule to the states as the fourth amendment's enforcement mechanism.[22] Thus, after the Court's decision in *Wolf*, if state officials seized evidence in violation of the fourth amendment, a federal prosecutor still could use the evidence against a defendant in federal court.[23] This double standard had broad implications

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have returned letters to defendant because authorities seized letters in violation of defendant's constitutional rights) *with* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (unconstitutionally seized evidence is inadmissible in state or federal courts). Courts and commentators uniformly credit the United States Supreme Court's decision in *Weeks* with establishing the exclusionary rule. *See, e.g.*, United States v. Leon, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting) (Supreme Court formulated exclusionary rule in *Weeks v. United States*); Linkletter v. Walker, 381 U.S. 618, 629 (1965) (same); Elkins v. United States, 364 U.S. 206, 209 (1960) (same); Abrahamson & Gutmann, *The New Federalism: State Constitutions*, 71 JUDICATURE 88, 95 (1987) (same); Note, *supra* note 1, at 380 (same). The *Weeks* decision technically did not establish the rule prohibiting a federal court from admitting unconstitutionally seized evidence at trial, however, but only determined that, if a defendant made a motion before trial for the return of his property, a court should grant the motion. *See Weeks*, 232 U.S. at 398 (holding that, after defendant made motion for return of property, trial court should have restored property to defendant); *see also* Note, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 469 (1986) [hereinafter Note, *Origin and Development*] (*Weeks* decision established that courts could not admit unconstitutionally seized evidence in face of defendant's motion for return of property). Although the technical holding of *Weeks* is now insignificant, the Supreme Court fully developed the exclusionary rule in 1921 to exclude unconstitutionally seized evidence at trial. *See* Gouled v. United States, 255 U.S. 298, 312-13 (1921) (because defendant had no opportunity to make motion for return of unconstitutionally seized evidence, admission of evidence at trial violated fourth amendment); Amos v. United States, 255 U.S. 313, 316-17 (1921) (court should have granted defendant's motion at trial to exclude unconstitutionally seized evidence).

18. *Weeks*, 232 U.S. at 389.

19. *Id.*

20. 338 U.S. 25 (1949).

21. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (fourth amendment concepts apply to states through due process clause of fourteenth amendment).

22. *See id.* at 28 (exclusionary rule is not binding on states).

23. *See id.* (determining that trial court should not have returned to defendant evidence which state officers seized). Although after the United States Supreme Court's decision in *Weeks v. United States*, evidence that state officials, without the aid of federal officials, obtained in violation of the fourth amendment still was admissible in federal court, if a federal court found that federal officials participated in an unlawful search and seizure, or

because courts uniformly recognized and encouraged cooperation between state and federal authorities in criminal investigation.[24] Because federal officials could prosecute defendants with unconstitutionally seized evidence that state officers turned over to the federal authorities, Justice Frankfurter commented in *Lustig v. United States*[25] that state officers were handing unlawfully seized but functional evidence to federal prosecutors on a "silver platter."[26] Although the *Lustig* Court did not alter the silver platter doctrine's efficacy,[27] the Supreme Court, only a few years later, invalidated the doctrine that had resulted from the dichotomy between *Weeks* and *Wolf*.[28]

The United States Supreme Court invalidated the original silver platter doctrine in *Elkins v. United States*,[29] in which the Court considered whether evidence that state officers obtained in violation of the fourth amendment should be admissible in a federal criminal trial.[30] In *Elkins* state officers had seized evidence under circumstances that the defendant claimed had violated the federal constitution.[31] Federal prosecutors subsequently obtained the evidence from the state officers, and used the evidence to convict the defendant in federal court.[32] The *Elkins* Court reviewed the

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that state officers acted solely on behalf of the federal government in carrying out an unlawful search and seizure, a federal court would apply the exclusionary rule. *See* Byars v. United States, 273 U.S. 28, 33 (1927) (cooperation between federal and state officials in unlawfully obtaining evidence rendered evidence inadmissible in federal trial); Gambino v. United States, 275 U.S. 310, 319 (1927) (court excluded evidence that solely state officials unlawfully seized because defendant's only possible offense was federal offense); *infra* note 35 and accompanying text (discussing federal "participation doctrine").

24. *See, e.g.*, Wilson v. Schnettler, 365 U.S. 381, 386 (1961) (noting that, in Controlled Substances Import and Export Act, Congress expressly commanded that federal officers cooperate with state officials in criminal investigations and prosecutions); Elkins v. United States, 364 U.S. 206, 211 (1960) (cooperation between state and federal agents in investigation of criminal activity is commendable practice); United States v. Coppola, 281 F.2d 340, 345 (2d Cir. 1960) (for effective law enforcement, all state, county, city, or federal agencies must cooperate and exchange information with each other).

25. 338 U.S. 74 (1949).

26. Lustig v. United States, 338 U.S. 74, 79 (1949).

27. *See id.* at 78-79 (recognizing, but refusing to repudiate, silver platter doctrine).

28. *See* Elkins v. United States, 364 U.S. 206, 214 (1960) (repudiating silver platter doctrine); *infra* notes 30-39 and accompanying text (discussing *Elkins* decision).

29. 364 U.S. 206 (1960).

30. Elkins v. United States, 364 U.S. 206, 208 (1960).

31. *Id.* at 207. The United States District Court for the District of Oregon in *Elkins v. United States* did not determine whether the state search and seizure violated the fourth amendment because, under *Wolf*, the exclusionary rule was inapplicable to the states. *Id*; *see* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (exclusionary rule is not binding on states). The trial court in *Elkins* did find, however, that no federal participation in the state search had occurred. *Elkins*, 364 U.S. at 207. The trial court's finding that no federal participation had occurred was significant because federal participation in a state search would have constituted a federal search that was subject to the fourth amendment and the exclusionary rule. *See infra* note 35 and accompanying text (discussing federal participation doctrine).

32. *Elkins*, 364 U.S. at 207. A state court of general criminal jurisdiction previously had suppressed the evidence in *Elkins* after the state court found that the search warrant

Weeks decision and determined that neither *Weeks* nor subsequent cases prevented a federal prosecutor from taking advantage of the silver platter doctrine.[33] Moreover, the *Elkins* Court recognized that the Court in *Weeks* had determined that the fourth amendment did not apply to the conduct of state officers.[34] The Court found, however, that the Court in *Weeks* and its progeny could not have foreseen the practical difficulty that resulted from federal courts' creation of the federal "participation doctrine," under which federal courts, in an attempt to define a federal search, would apply the exclusionary rule if federal officers had participated in an unlawful search with state officers.[35] Because the federal participation doctrine required federal courts constantly to determine what level of federal conduct constituted "participation," federal courts' application of the doctrine was problematic.[36] Additionally, the Court in *Elkins* recognized that, by applying fourth amendment concepts to the states, the *Wolf* decision seriously eroded the principle that state seizures do not violate the federal constitution, a principle which was the foundation upon which rested the admissibility of state-seized evidence in a federal trial.[37] Because the *Weeks* Court had determined that evidence obtained in violation of the fourth amendment was inadmissible, and the *Wolf* Court had applied the fourth amendment to the states, the *Elkins* Court concluded that all evidence which state or federal officers obtained during searches and seizures that violated the federal constitution is inadmissible in federal court.[38]

The *Elkins* decision negated only one variation of the silver platter doctrine, however, because under *Wolf*, state courts still were free to admit evidence that state or federal officers seized in violation of the federal constitution.[39] The Supreme Court's decision in *Rea v. United*

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which the investigating officers used was invalid. *Id.* at 207 n.1. After state authorities withdrew their indictment of the defendants, the federal officers in *Elkins* secured the evidence in issue from a local bank where the state officers had placed the evidence. *Id.* Federal prosecutors then used the evidence to convict the defendants in federal court. *Id.* at 207.

33. *Id.* at 210-11.

34. *Id.*

35. *Id.* at 211. Under the federal participation doctrine that courts followed after *Weeks v. United States*, if federal officers participated in an unlawful search and seizure with state officers, a federal court would apply the exclusionary rule to exclude evidence that the officers obtained. *See* Byars v. United States, 273 U.S. 28, 33 (1927) (if federal and state officials obtained evidence in joint operation by violating federal constitution, court must exclude evidence). The United States Supreme Court subsequently extended the participation doctrine to searches and seizures that solely state officers conducted if the search and seizure appeared to be "on behalf of" the United States. *See* Gambino v. United States, 275 U.S. 310, 316 (1927) (because no possibility of state offense existed, search and seizure by state officers was on behalf of federal government).

36. *Elkins*, 364 U.S. at 211.

37. *Id.* at 213.

38. *Id.* at 214.

39. *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (exclusionary rule is not binding on state courts).

States[40] reflected the Court's continuing difficulty with a silver platter problem that was different than the practice which the *Elkins* Court invalidated.[41] In *Rea* the Court considered whether a United States district court should have enjoined a federal agent both from transferring unlawfully obtained evidence to state authorities and from testifying in state court.[42] The *Rea* Court reasoned that the federal agent had violated a federal rule, and that the power of the federal courts extends to enforcing federal rules.[43] The Court in *Rea* concluded, therefore, that enjoining the federal officer from testifying or transferring the evidence properly would enforce federal rules.[44] Although the *Rea* decision addressed a violation of the Federal Rules of Criminal Procedure rather than the federal constitution, a similar injunction against a federal officer who unconstitutionally obtained evidence plainly would have been consistent with the *Rea* Court's decision.[45] Despite the Supreme Court's attempt to combat various forms of the silver platter doctrine in *Elkins* and *Rea*, unconstitutionally seized evidence remained admissible in state courts.[46] The Court next addressed, therefore, what it thought was the final avenue of admissibility for unconstitutionally obtained evidence.[47]

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40. 350 U.S. 214 (1956).

41. *See infra* notes 42-45 and accompanying text (discussing United States Supreme Court's decision in *Rea v. United States*).

42. Rea v. United States, 350 U.S. 214, 216 (1956).

43. *Id.* at 217. A federal officer in *Rea* had seized marijuana under an invalid search warrant, and a federal district court later suppressed the evidence under Federal Rule of Criminal Procedure 41(e). *Id.* at 215; *see* FED. R. CRIM. P. 41(e) (person aggrieved by unlawful search and seizure may make motion for return of unlawfully seized property). The federal officer then swore out a complaint before a New Mexico state court judge, and the New Mexico court charged the defendant with possession of marijuana. *Rea*, 350 U.S. at 215. After the state proceeding, the defendant moved in the federal district court for an order prohibiting the federal officer from testifying in the state court or transferring the evidence to state officials. *Id.* at 216. The district court denied the motion, and the United States Court of Appeals for the Tenth Circuit affirmed the denial. *Id.*

44. *Rea*, 350 U.S. at 217.

45. *See id.* (injunction preventing federal agent from using, in state court, evidence that federal agent obtained during illegal search and seizure was appropriate). Injunctive relief is completely inadequate in silver platter cases because injunctive relief is effective only if a defendant secures the relief before one sovereign's agents transfer the evidence to another sovereign's agents. *See* Note, *Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?*, 8 LOY. U. CHI. L.J. 186, 207 (1976). A state court must declare evidence inadmissible before injunctive relief can be appropriate. *Id.* If state officers immediately after seizing evidence transfer the evidence to federal officers or give the evidence to federal officials before instituting a proceeding in state court, therefore, injunctive relief offers no remedy to a defendant. *Id.* Once evidence arrives in an independent jurisdiction, a foreign court has no ability to enjoin a trial court from admitting the evidence at trial. *See Rea*, 350 U.S. at 217 (stressing that defendant did not seek injunction against state official).

46. *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (exclusionary rule is not binding on state courts).

47. *See infra* notes 48-57 and accompanying text (discussing United States Supreme Court's decision in *Mapp v. Ohio*).

In determining whether to foreclose the admissibility of all unconstitutionally obtained evidence, in *Mapp v. Ohio*,[48] the Court considered whether state prosecutors could use evidence obtained in violation of the federal constitution against a criminal defendant in a state court.[49] In *Mapp* state officers obtained evidence in a manner that blatantly violated the fourth amendment.[50] The Court reviewed its previous fourth and fifth amendment decisions, and recognized both *Elkins*' rejection of the original silver platter doctrine and *Rea*'s attempt to prevent federal agents from transferring unconstitutionally seized evidence to state officials.[51] Additionally, the *Mapp* Court noted that, although at the time the Court decided *Wolf* almost two-thirds of the states were opposed to the exclusionary rule, in the interim between *Wolf* and *Mapp*, over one-half of the states had adopted some form of an exclusionary rule.[52] The Court in

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48. 367 U.S. 643 (1961).

49. Mapp v. Ohio, 367 U.S. 643, 645-46 (1961).

50. *Id.* at 644-45. After calling her attorney, the defendant in *Mapp v. Ohio* told the police officers who knocked on her door that she would not admit them to her house unless they had a search warrant. *Id.* at 644. The officers left the defendant's premises, but maintained surveillance of the defendant's home. *Id.* The officers returned to the defendant's premises a few hours later and forcibly entered the house. *Id.* The defendant in *Mapp* demanded to see a search warrant and, after one of the officers held up a piece of paper, the defendant grabbed the paper and thrust it into her blouse. *Id.* After a struggle, the officers finally retrieved the paper from the defendant and handcuffed her. *Id.* at 644-45. The officers in *Mapp* then conducted a complete search of the house, and seized some obscene materials that prosecutors later used to convict the defendant of possession of obscene matter. *Id.* at 645. The prosecution never produced a search warrant at the defendant's trial, and never mentioned whether a warrant ever had existed. *Id.* The prosecution in *Mapp* conceded that the search and seizure was unconstitutional, but cited the *Wolf* decision for the proposition that unconstitutionally seized evidence was admissible in a state court. *Id.*

51. *Id.* at 653. In its extensive review of prior decisions, the United States Supreme Court in *Mapp v. Ohio* explored virtually all of the landmark Supreme Court cases that had formulated the exclusionary rule. *Id.*; *see* Elkins v. United States, 364 U.S. 206, 223 (1960) (if state officers obtained evidence and violated fourth amendment, evidence is inadmissible in federal criminal trial); Rea v. United States, 350 U.S. 214, 217 (1956) (determining that lower court should have granted injunction prohibiting federal agent from transferring unconstitutionally seized evidence to state authorities or from testifying in state court); Wolf v. Colorado, 338 U.S. 25, 28 (1949) (concepts of fourth amendment are enforceable against states through due process clause of fourteenth amendment); McNabb v. United States, 318 U.S. 332, 340 (1943) (federal conviction founded upon unconstitutionally seized evidence cannot stand); Olmstead v. United States, 277 U.S. 438, 462 (1928) (decision in *Weeks* effectively proscribed government's introduction of evidence if government officials obtained evidence by violating fourth amendment); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (prosecution cannot use unconstitutionally seized evidence in any manner); Weeks v. United States, 232 U.S. 383, 398 (1914) (prosecution's use at trial of unconstitutionally seized evidence denied accused his constitutional rights); Boyd v. United States, 116 U.S. 616, 630 (1886) (fourth and fifth amendments together extend to all government invasions of person's home and privacy).

52. *Mapp*, 367 U.S. at 651. The *Mapp* Court relied on the states' voluntary adoption of their own exclusionary rules in determining whether the federal constitution required all the states to follow the exclusionary rule. *Id.* The Supreme Court in *Mapp*, therefore, used

Mapp then explicitly addressed the inequity of what it thought was the last vestige of the silver platter doctrine.[53] The Supreme Court recognized that, although *Weeks* prohibited a federal prosecutor from using unlawfully seized evidence in federal court, under *Wolf* a state prosecutor across the street could use the same evidence in state court.[54] The *Mapp* Court determined that this needless inconsistency both encouraged disobedience to the Constitution and undermined sound principles of federalism.[55] In imposing the exclusionary rule upon the states, the Supreme Court in *Mapp* concluded that the exclusionary rule was an integral part of both the fourth and fourteenth amendments,[56] and expressed the Court's intention to foreclose the only remaining method for a court to admit evidence that officials obtained in violation of the Constitution.[57]

The bright line rule that the Supreme Court established in *Mapp* did not signal the end of intersovereign or silver platter problems with the admission of evidence, however, because criminal defendants also have rights under the various state constitutions.[58] The protection of individual liberties under state constitutions ordinarily is similar in content and operation to that of the federal constitution.[59] State courts also enforce

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state constitutional protection as a basis for interpreting the federal constitution. *Id*; *see* Kaye, *Dual Constitutionalism in Practice and Principle*, 42 REC. A.B. CITY N.Y. 285, 309-10 (1987) (recognizing that states' courts sometimes serve as laboratory for federal constitutional development). A federal court's decision to exclude evidence that state officers obtained in violation of a state constitution, therefore, would be consistent with the *Mapp* Court's use of state constitutional interpretation as a basis for developing federal constitutional values. Kaye, *supra*, at 311.

53. *Mapp*, 367 U.S. at 657-58.

54. *Id.* at 657.

55. *Id*; *see infra* notes 72-86 and accompanying text (federal courts' refusal to exclude evidence that state officers obtained in violation of state constitution is inconsistent with established principles of federalism). In *Mapp v. Ohio* the United States Supreme Court recognized that the Court's previous cases demonstrated that the dichotomy between *Weeks* and *Wolf* invited federal officers to approach the state's attorney with unconstitutionally seized evidence because the evidence still would be admissible in state court, and that federal officers often did transfer unconstitutionally seized evidence to state prosecutors. *Mapp*, 367 U.S. at 658; *see* Wilson v. Schnettler, 365 U.S. 381, 386-87 (1961) (distinguishing *Rea* and refusing to restrain federal officer from testifying in state court about evidence that federal officer unlawfully obtained).

56. *Mapp*, 367 U.S. at 657.

57. *Id.* at 654-55.

58. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (state constitutions are source of individual liberties and provide protection beyond United States Supreme Court's interpretation of federal law); Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465, 469 (1985) (function of state constitutions is to provide protection for individual rights beyond federal constitution's protection); Note, *Federalism, Uniformity, and the State Constitution*, 62 WASH. L. REV. 569, 570 (1987) (in federalist system, state declarations of rights afford double security to people).

59. *See, e.g.*, Abrahamson & Gutmann, *supra* note 17, at 90 (drafters of federal Bill of Rights drew upon corresponding provisions in state constitutions); Brennan, *supra* note 58, at 501 (same); Note, *supra* note 45, at 196 (same).

state constitutional protection with state exclusionary rules.[60] If state or federal officials acquire evidence in violation of a state constitution, therefore, state courts will suppress the evidence.[61]

While the rights that state constitutions grant to state citizens often are identical to the rights guaranteed in the federal Bill of Rights, state constitutional rights are not necessarily identical to their federal counterparts because state and federal courts have independent judicial power.[62] Moreover, although the United States Supreme Court ultimately is responsible for interpreting the federal constitution,[63] the highest court of a state is the final authority on that state's constitution.[64] A state supreme court has, therefore, independent and complete authority to interpret the state's constitution.[65] Consequently, a state court may provide greater protection for state citizens than the federal constitution provides.[66] By

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60. *See, e.g.*, People v. Cahan, 44 Cal. 2d 434, ____, 282 P.2d 905, 911 (1955) (California courts must exclude evidence that officers obtained in violation of state or federal constitution); People v. Castree, 311 Ill. 392, 407, 143 N.E. 112, 117 (1924) (if officers obtained evidence in manner that violated defendant's protection under state constitution, evidence is inadmissible in state court); State v. Johnson, 68 N.J. 349, 354, 346 A.2d 66, 68 (1975) (trial court should have determined whether officers violated defendant's state constitutional rights and, if court found violation, court should have excluded evidence).

61. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 552, 531 P.2d 1099, 1114-15, 119 Cal. Rptr. 315, 330-31 (1975) (excluding evidence that officers obtained in violation of California Constitution); Gildrie v. State, 94 Fla. 134, ____, 113 So. 704, 706 (1927) (Florida courts must exclude evidence that officers obtained in violation of Florida Constitution); People v. Winterheld, 359 Mich. 467, ____, 102 N.W.2d 201, 202 (1960) (if state officers obtained evidence in violation of Michigan Constitution, evidence is inadmissible in Michigan courts).

62. *See, e.g.*, Cooper v. California, 386 U.S. 58, 62 (1967) (determining that, under state constitutions, states may impose higher standards on searches and seizures than federal constitution mandates); State v. Kaluna, 55 Hawaii 361, ____, 520 P.2d 51, 58-59 (1974) (interpreting Hawaii Constitution to provide to criminal defendants greater protection than federal constitution provides to criminal defendants in same circumstances); State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975) (interpreting provision of New Jersey Constitution to provide greater protection than federal counterpart).

63. *See* Marbury v. Madison, 1 Cranch 137, 177-78 (1803) (Supreme Court of United States has final authority to interpret federal constitution).

64. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (if state court decision plainly indicates that court based decision on state law, United States Supreme Court will not review decision).

65. *See, e.g., id.* (United States Supreme Court will not review state court decisions that rest on state grounds); State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976) (recognizing that Supreme Court of South Dakota has final authority to interpret South Dakota Constitution); Abrahamson & Gutmann, *supra* note 17, at 88 (state courts have legitimate and independent authority to construe state constitutions).

66. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) (reaffirming California courts' responsibility independently to define and protect rights of California citizens despite conflicting United States Supreme Court interpretation of federal constitution); State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974) (because of principle of federalism, national constitution tolerates state courts' divergence under state law from United States Supreme Court's explication of Constitution if result is greater protection of individual rights under state law than under

determining that its state constitution provides greater protection than the federal constitution, a state court can exclude evidence even though the seizure of the evidence did not violate the federal constitution.[67] A new

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federal law); State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975) (interpreting provision of New Jersey Constitution to provide greater protection for state citizens than federal counterpart provides).

67. *See* State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976) (excluding evidence under South Dakota Constitution although United States Supreme Court previously had held that evidence was admissible under federal constitution). In *South Dakota v. Opperman* the United States Supreme Court considered whether the warrantless search of an impounded automobile for inventory purposes violated the fourth amendment. South Dakota v. Opperman, 428 U.S. 364, 366 (1976). In *Opperman* state police impounded the defendant's car for overtime parking. *Id.* The officers then unlocked the car and conducted an inventory search of the car's entire contents. *Id.* The United States Supreme Court in *Opperman* noted that, before conducting a search of the defendant's impounded car, an officer saw a watch on the automobile's dashboard, as well as other items of personal property in the backseat. *Id.* Although these circumstances ostensibly made the search necessary for the defendant's protection, the Court's holding in *Opperman* did not require that, to conduct an inventory search, officers have reason to believe that something of value was in a car. *Id.* at 376. Rather, the Court broadly validated all inventory searches because the searches were standard police procedure throughout the country. *Id.* The police officers in *Opperman* discovered marijuana in the unlocked glove compartment, and state prosecutors subsequently convicted the defendant for marijuana possession. *Id.* at 366. The defendant in *Opperman* moved to suppress the evidence that the officers had obtained during the inventory search of his impounded automobile on the ground that the inventory search violated the fourth amendment to the federal constitution, but the trial court denied the defendant's motion, finding that the inventory search did not violate the fourth amendment. *Id.* The Supreme Court of South Dakota reversed the defendant's conviction, determining that the officers' inventory search violated the fourth amendment. State v. Opperman, 89 S.D. 25, ____, 228 N.W.2d 152, 159 (1975). Because the Supreme Court of South Dakota reversed the trial court's decision on the ground that the inventory search of the defendant's automobile violated the federal constitution, the United States Supreme Court had jurisdiction to hear an appeal and granted certiorari. South Dakota v. Opperman, 423 U.S. 923 (1975); *cf. supra* note 64 and accompanying text (if state court plainly indicates that its decision rests solely upon state law, United States Supreme Court cannot review decision).

In reversing the Supreme Court of South Dakota's interpretation of the fourth amendment, the United States Supreme Court in *Opperman* reasoned that the Constitution provided less protection for automobiles than for homes or offices because of automobiles' mobility and because people have a lower expectation of privacy in their cars. *Opperman*, 428 U.S. at 367; *see* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (motor vehicles afford less expectation of privacy to vehicle owners because vehicles ordinarily do not serve as residences or repositories for personal effects); Coolidge v. New Hampshire, 403 U.S. 443, 459-60 (1971) (automobiles' mobility renders strict enforcement of warrant requirement impossible); Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (determining that, for constitutional purposes, because officers could immobilize car and seek warrant, officers could conduct immediate search of car without warrant); Cooper v. California, 386 U.S. 58, 61-62 (1967) (because police validly had impounded automobile as evidence, officers' search of automobile without warrant was constitutional); Carroll v. United States, 267 U.S. 132, 153-54 (1925) (because automobiles and vehicles are inherently mobile, officers may search automobiles and vehicles without warrant in certain circumstances). The Court in *Opperman* recognized that, for the public's safety and convenience, police officers must remove vehicles that impede the free flow of traffic. *Opperman*, 428 U.S. at 369. The *Opperman* Court also recognized that officers have a routine practice of securing and inventorying the contents of impounded

reverse silver platter problem occurs, however, if state officials transfer to federal officers evidence that state officials seized unlawfully under a

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automobiles. *Id.* The United States Supreme Court in *Opperman* found that the standard practice of inventory searches developed in response to the need to protect an owner's property while it was in police custody, to protect the police from subsequent claims for lost or stolen property, and to protect the police from possible danger that firearms, explosives, or some other instrumentality might cause. *Id*; *see Cooper*, 386 U.S. at 61-62 (because police validly had impounded automobile as evidence, officers' search of automobile was constitutional); United States v. Kelehar, 470 F.2d 176, 178 (5th Cir. 1972) (standard inventory search of automobiles fulfills goals of protecting defendants' property and protecting police from automobile owners' claims); United States v. Mitchell, 458 F.2d 960, 961 (9th Cir. 1972) (police action that safeguards valuable property in plain sight is constitutional). Because police officers had a legitimate need to conduct inventory searches of lawfully impounded automobiles, and because a majority of courts had found that inventory searches were constitutional, the Court in *Opperman* concluded that inventory searches were reasonable under the fourth amendment and remanded the case to the Supreme Court of South Dakota. *Opperman*, 428 U.S. at 376.

In *State v. Opperman* the Supreme Court of South Dakota considered on remand whether the inventory search of the defendant's automobile violated the South Dakota Constitution. State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976). The *Opperman* court recognized that the United States Supreme Court's decision that inventory searches do not violate the federal constitution was binding on the Supreme Court of South Dakota. *Id.* The court in *Opperman* also recognized, however, that the Supreme Court of South Dakota had the power to provide greater protection of individual rights than the federal constitution mandated because the South Dakota court was the final authority on the South Dakota Constitution. *Id.* After balancing the need for the inventory search against the scope of the intrusion, the *Opperman* court determined that the scope of the officers' search had been too broad. *Id.* at 675. Although the relevant language in the South Dakota Constitution was virtually identical to the language in the fourth amendment to the United States Constitution, the *Opperman* court recognized that the Supreme Court of South Dakota still had the right independently to interpret the language. *Id.* at 674; *see supra* note 2 (setting forth language of fourth amendment to United States Constitution); S.D. CONST. art. VI, § 11 (unreasonable search and seizure provision in South Dakota Constitution). The *Opperman* court then determined that a warrantless inventory search could extend only to articles that were in plain view inside an automobile. *Opperman*, 247 N.W.2d at 675. Because the inventory search was too broad, the Supreme Court of South Dakota in *Opperman* affirmed its original decision that excluded the evidence in issue. *Id.* Significantly, the *Opperman* court reached its conclusion even though the defendant failed to argue for the application of state constitutional law during his first appeal. *Id.* Although the defendant in *Opperman* did not argue or brief the possible application of the South Dakota Constitution to the state search and seizure, the Supreme Court of South Dakota in *Opperman* granted a rehearing to allow both sides an opportunity to address the issue. *Id.* The *Opperman* court determined that it had the inherent power on remand to order a rehearing on a subject that was of great significance to citizens of South Dakota. *Id.* at 675 n.6. By applying state rather than federal constitutional law, therefore, the Supreme Court of South Dakota in *Opperman* effectively declined to follow the United States Supreme Court's ruling on exactly the same facts. *See id.* at 674 (noting United States Supreme Court's decision in *Opperman*, but recognizing that Supreme Court of South Dakota has no obligation to follow United States Supreme Court decisions regarding South Dakota Constitution). *Compare* South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (concluding that complete inventory search of impounded automobile did not violate fourth amendment to United States Constitution) *with* State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976) (concluding that complete inventory search of impounded automobile violated South Dakota Constitution).

state constitution.[68] In determining the admissibility of state-seized evidence, federal courts will examine only whether state officers violated federal law.[69] State officers that violate a state constitution but not the federal constitution in seizing evidence, therefore, can give the evidence to federal officers, who can use the evidence in federal court.[70] A historical analysis of state constitutional protection, however, reveals that federal

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68. *See, e.g.*, United States v. Chavez-Vernaza, 844 F.2d 1368, 1371 (9th Cir. 1987) (state officers transferred to federal officers evidence that state officers obtained in violation of state law); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (same); United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (same); *see also infra* notes 92-154 and accompanying text (discussing *Chavez-Vernaza* and *Pforzheimer* decisions).

69. *See, e.g.*, United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985) (determining that, if evidence is admissible under federal law, federal court cannot exclude evidence); United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982) (same), *cert. denied*, 459 U.S. 1108 (1983); United States v. Shaffer, 520 F.2d 1369, 1372 (3d Cir. 1975) (in criminal cases, federal courts apply federal law to decide evidentiary questions), *cert. denied sub nom., Vespe v. United States*, 423 U.S. 1051 (1976).

70. *See* United States v. Bedford, 519 F.2d 650, 654 (3d Cir. 1975) (affirming defendant's conviction in federal court after state court excluded evidence that state officers obtained in violation of state law). The United States Supreme Court in *Mapp v. Ohio* could not foresee the new reverse silver platter doctrine because, at the time the Court decided *Mapp*, and for several years thereafter, the Supreme Court was expanding the federal constitutional rights of criminal defendants. *See infra* note 75 and accompanying text (noting that, under Chief Justice Earl Warren, United States Supreme Court in 1950s and 1960s applied Bill of Rights to states, thus greatly expanding federal protection of individual liberties). The expansion of federal rights obviated the need for state high courts to engage in independent protection of the individual rights of state citizens. *See infra* note 76 and accompanying text (noting that, because United States Supreme Court was expanding federal protection of individual rights, state courts in 1950s and 1960s had little or no incentive independently to interpret state constitutions as providing greater protection of individual rights than federal constitution). After expanding federal rights for several years, however, the Supreme Court began to curtail the individual rights of criminal defendants, and thus has eviscerated many of its prior rulings. *See infra* note 77 and accompanying text (observing that, under Chief Justice Warren Burger, United States Supreme Court in 1970s and 1980s substantially curtailed federal protection of individual liberties). The Supreme Court has continued this process of limiting its prior decisions and particularly has limited the scope of the exclusionary rule. *See supra* note 3 and accompanying text (listing Supreme Court decisions that have limited application of exclusionary rule). In response, state courts increasingly have held that their own state constitutions provide greater protection to state citizens than the protection that the federal constitution provides, thus effectively refusing to follow United States Supreme Court interpretation of the fourth amendment and the exclusionary rule. *See* State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974) (because of principle of federalism, national constitution tolerates state courts' divergence under state law from United States Supreme Court's explication of Constitution if result is greater protection of individual rights under state law than under federal law); State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976) (recognizing Supreme Court of South Dakota's power to provide greater protection for state citizens under state constitution than federal constitution provides); *supra* note 67 and accompanying text (discussing Supreme Court of South Dakota's refusal to interpret search and seizure clause in South Dakota Constitution consistently with United States Supreme Court's interpretation of fourth amendment to federal constitution, despite identical language of South Dakota Constitution).

courts should repudiate the new reverse silver platter doctrine.[71]

Because recent decisions in which state courts have held that their own state constitutions provide greater protection than the federal constitution do not represent a new trend in state constitutional protection, but rather represent the renewal of an old trend, the reverse silver platter doctrine is incongruous with the origin and purpose of state constitutional protection.[72] State bills of rights preceded the federal Bill of Rights, and several states adopted their own exclusionary rules well before the emergence of the federal exclusionary rule.[73] Because the United States Supreme Court historically had held that the federal constitution applied only to the federal government, the protection of individual liberties under the federal constitution was limited.[74] Under the leadership of Chief Justice Earl Warren, however, the United States Supreme Court gradually applied the federal Bill of Rights to the states, greatly expanding federal constitutional protection of individual liberties.[75] Because federal protection of individual rights greatly was expanding, state courts had little or no incentive independently to interpret state constitutions as providing greater protection than the federal constitution.[76] During the past two decades, however, under Chief Justice Warren Burger, the United States Supreme Court generally has curtailed rather than expanded the federal constitutional protection of individual rights.[77] As a result of this curtailment, state

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71. *See infra* notes 72-90 and accompanying text (explaining why federal courts that admit evidence which state officers seized in violation of state constitution subvert principles of federalism and underlying purpose of federal Bill of Rights).

72. *See* Note, *supra* note 58, at 571 (describing "rebirth" of state court reliance on state constitutions); *infra* notes 73-90 and accompanying text (discussing reasons that reverse silver platter doctrine is incompatible with origin and purpose of state constitutional protection).

73. *See* Sedler, *supra* note 58, at 468 n.14 (prior to United States Supreme Court's decision in *Mapp v. Ohio*, several states had adopted exclusionary rule as matter of state law).

74. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) (federal Bill of Rights applies only to federal government); Weeks v. United States, 232 U.S. 383, 398 (1914) (framers did not intend federal constitution to regulate actions of state officials).

75. *See* Brennan, *supra* note 58, at 193 (Warren Court applied majority of protections contained in Bill of Rights to states through fourteenth amendment).

76. *See* Note, *supra* note 58, at 571 (because federal protection of individual liberties rapidly expanded, state court decisions relying on state constitutions declined in number). The State of Washington adopted the exclusionary rule in 1922. *See* State v. Gibbons, 118 Wash. 171, 188-89, 203 P. 390, 396 (1922) (Washington courts must exclude evidence that officers obtained in violation of defendants' state constitutional rights). After the United States Supreme Court applied the federal exclusionary rule to the states, however, Washington abandoned its own exclusionary rule and exclusively relied on the federally mandated exclusionary rule. *See* Note, *Origin and Development*, *supra* note 17, at 465 (after United States Supreme Court applied exclusionary rule to states, Washington Supreme Court stopped using state exclusionary rule and solely relied on fourth amendment to United States Constitution in excluding unconstitutionally seized evidence).

77. *See, e.g.*, Brennan, *supra* note 58, at 495 (recent United States Supreme Court decisions curtail enforcement of federal Bill of Rights to states); Whitebread & Heilman,

courts have reestablished their independent ability to provide to state citizens greater protection under state constitutions than exists under the federal constitution.[78]

Federal courts that refuse to exclude evidence which state officers obtained in violation of a state constitution, however, impede state courts' historic duty to provide independent protection to state citizens.[79] Each of the original thirteen states had adopted a constitution before the adoption of the United States Constitution.[80] All of these state constitutions contained specific provisions that protected individual liberties from state government encroachment.[81] The drafters of the Constitution, therefore, actually based the federal Bill of Rights upon already existing provisions in various state constitutions.[82] Although the United States Supreme Court's subsequent application of most of the federal Bill of Rights to the states appears inconsistent with established principles of federalism, which mandate separate and independent state and federal sovereigns, state courts retain their historic duty to provide independent protection to their citizens.[83] State constitutional protection is illusory, however, if federal of-

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The Interpretation of Constitutional Rights—Reflections on the Burger Court's Counterrevolution in Criminal Procedure, 4 DET. C.L. REV. 935, 935-46 (1986) (discussing Burger Court's attack on Warren Court's expansion of individual rights); Note, *supra* note 58, at 571 (Burger Court limited protective doctrines that Warren Court developed). *But see* Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1441 (1987) (Burger Court's anticipated attack on Warren Court expansion of individual rights never materialized).

78. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) (reaffirming California Supreme Court's responsibility separately to define and protect rights of California citizens despite conflicting United States Supreme Court interpretation of federal constitution); State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974) (federalism of national constitution tolerates divergence from United States Supreme Court's interpretation of federal constitution if result is greater protection of individual rights under state law than under federal law); State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975) (interpreting provision of New Jersey Constitution to provide greater protection of individual rights than federal constitution provides); Abrahamson & Gutmann, *supra* note 17, at 88 (in 1970s state courts rediscovered their legitimate authority independently to interpret state constitutions); Note, *supra* note 59, at 571 (after Burger Court reversed Warren Court expansion of individual rights, state courts renewed reliance on state constitutions).

79. *See infra* notes 80-82 and accompanying text (state constitutional protection of individual liberties preceded adoption of federal constitution and Bill of Rights).

80. *See* Note, *Individual Rights and State Constitutional Interpretations: Putting First Things First*, 37 BAYLOR L. REV. 493, 497 (1985) (all thirteen states had adopted constitutions by 1784).

81. *See* Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 955 (1982) (original state constitutions guaranteed individual liberties to state citizens); Shapiro, *State Constitutional Doctrine and the Criminal Process*, 16 SETON HALL L. REV. 630, 637-44 (1986) (detailing origins and specific protections of early state declarations of rights).

82. *See* Abrahamson & Gutmann, *supra* note 17, at 90 (in drafting Constitution, framers drew heavily on state constitutions); Kaye, *supra* note 52, at 289 (in drafting federal Bill of Rights, framers mirrored language in corresponding state bills of rights).

83. *See, e.g.*, THE FEDERALIST No. 17 (A. Hamilton) (envisaging that states would

ficials can prosecute state citizens with evidence that state officers obtained unlawfully.[84] Because federal and state prosecutors have concurrent ability to prosecute defendants for the same offenses, federal use of unlawfully obtained evidence does not differ materially from state use of the same evidence.[85] Consequently, federal courts that allow federal prosecutors to use evidence which a state court would have excluded on state constitutional grounds impinge upon state courts' historic ability to provide state constitutional protection to state citizens.[86]

In addition to impeding state courts' historic duty to provide independent constitutional protection to state citizens, federal courts that admit evidence which state officers seized in violation of a state constitution also ignore the reason that the states requested and ratified the federal Bill of Rights.[87] Because state constitutions already contained provisions that protected individual liberties, the protection that a federal bill of rights would afford state citizens at first appeared unnecessary.[88] State guarantees

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remain primary guardians of life and property); Sedler, *supra* note 58, at 469 (function of state constitutions is to provide protection beyond that which federal constitution provides); Note, *supra* note 58, at 570 (nature of federalist system affords double protection to people); Note, *supra* note 80, at 495-96 (because both state and federal governments are sovereign, individual rights receive dual protection).

The United States Supreme Court's application of the federal Bill of Rights to the states is not necessarily inconsistent with original principles of federalism. *See* Brennan, *The Bill of Rights: State Constitutions as Guardians of Individual Rights*, 59 N.Y. ST. B.J. 10, 11 (1987) (enactment of fourteenth amendment represented adoption of James Madison's desire to limit arbitrary state power). Through the fourteenth amendment to the Constitution, the United States Supreme Court applied the Bill of Rights to the states. *Id.* Additionally, the states did not ratify the fourteenth amendment until some 79 years after the adoption of the Constitution. *Id.* The adoption of the fourteenth amendment and its use as a conduit for the Bill of Rights, therefore, did not represent an attack on federalism, but rather the desire of Congress to establish a uniform, minimum level of protection that the states could expand if they wished. *See id.* (although primary concern that led to adoption of fourteenth amendment was fear that former Confederate states would deny protection under state constitutions to newly freed persons, drafters of fourteenth amendment also had in mind more general application of fourteenth amendment to protect individual liberties of all persons).

84. *See, e.g.*, United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) (refusing to exclude from federal court evidence that state officers obtained unlawfully under state law); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (same); United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (same); *see also infra* notes 92-154 and accompanying text (discussing *Chavez-Vernaza* and *Pforzheimer* decisions).

85. *See* T. GARDNER AND V. MANIAN, CRIMINAL LAW 200-01 (2d ed. 1980) (discussing great overlap between nature of state and federal crimes, which causes problems in determining which set of authorities should prosecute given case).

86. *See supra* notes 72-85 and accompanying text (discussing origin and role of state constitutional protection).

87. *See infra* notes 88-90 and accompanying text (because states requested federal Bill of Rights to protect state citizens from federal government, federal courts that admit unconstitutionally gathered state evidence negate underlying purpose of Bill of Rights).

88. *See, e.g.*, Abrahamson & Gutmann, *supra* note 17, at 94 (many delegates at constitutional convention thought pre-existing state guarantees of individual liberty obviated

of individual liberties did not apply to the newly formed federal government, however, so the framers added to the Constitution the federal Bill of Rights to protect citizens from the federal government's actions.[89] Allowing federal prosecutors to use evidence that state officers obtained in violation of a state constitution, therefore, thwarts the underlying purpose of the federal Bill of Rights, which is to protect state citizens' individual liberties from the federal government.[90]

Recent federal decisions that allow federal prosecutors to use evidence which state officers obtained in violation of a state constitution not only ignore historic concepts of federalism and constitutional law, but are grounded on reasoning that is less than compelling.[91] For example, in *United States v. Chavez-Vernaza*[92] the United States Court of Appeals for the Ninth Circuit considered whether the United States District Court for the District of Oregon should have suppressed evidence that state agents obtained in violation of state law.[93] In *Chavez-Vernaza* Oregon police officers obtained copies of the defendant's financial records in a manner that possibly violated state law.[94] A federal grand jury subsequently

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need for federal guarantees of individual liberty); Kaye, *supra* note 52, at 289 (when framers drafted federal constitution, framers thought Bill of Rights was unnecessary because state constitutions already protected individual rights); Note, *supra* note 80, at 497 (because of existing state protection of individual liberties, original draft of federal constitution contained no bill of rights).

89. *See, e.g.*, Abrahamson & Gutmann, *supra* note 17, at 94 (framers wanted federal Bill of Rights to restrain federal government); Ziegler, *Constitutional Rights of the Accused—Developing Dichotomy Between Federal and State Law*, 48 PA. B.A.Q. 241, 245 (1977) (noting James Madison's argument that state bills of rights would not protect individuals from federal government); Note, *supra* note 80, at 497 (purpose of federal Bill of Rights was to provide same protection against federal government that people had against state governments).

90. *See supra* note 89 and accompanying text (framers desired federal Bill of Rights to protect individual rights from federal government abuse).

91. *See infra* notes 92-154 and accompanying text (no compelling reasoning underlies recent decisions that allow federal courts to admit evidence that state officers obtained in violation of state constitutions).

92. 844 F.2d 1368 (9th Cir. 1987).

93. United States v. Chavez-Vernaza, 844 F.2d 1368, 1372 (9th Cir. 1987). Although the state law that the investigating officers violated in *Chavez-Vernaza* was a state statute, the United States Court of Appeals for the Ninth Circuit, both explicitly and by citing cases that dealt with violation of state constitutions, intended its holding to extend to evidence that state officers obtained in violation of a state constitution. *See id.* at 1373-74 (evidence that state officers obtained in compliance with federal law is admissible in federal court without regard to state law).

94. *Id.* at 1371. In *Chavez-Vernaza* state officers investigated the defendant for possible involvement in cocaine distribution. *Id.* at 1370. The officers obtained evidence, including certain financial records, that demonstrated the defendant's involvement in broad drug-related activities. *Id.* Oregon law prohibited financial institutions from providing their customers' financial records to any state or local agency, and prohibited state and local agencies from requesting such information. *Id.* at 1371; OR. REV. STAT. §§ 192.555 (a) and (b) (1987). The Oregon statute additionally provided that any evidence obtained in violation of the statute was inadmissible in any proceeding. *Chavez-Vernaza*, 844 F.2d at 1371; OR.

indicted the defendant on eleven alleged violations of federal drug laws.[95] The United States District Court for the District of Oregon denied Chavez-Vernaza's motions for disclosure of the method by which the state officers obtained the financial records and for suppression of the records.[96] In determining whether evidence that the state officers secured in violation of state law was admissible in federal court, the court in *Chavez-Vernaza* noted that the Ninth Circuit consistently had held that, if federal officers acting together with state officers obtained evidence in violation of state law, but in accordance with federal law, the evidence was admissible in federal court.[97] The *Chavez-Vernaza* court recognized, however, that the Ninth Circuit never explicitly had decided whether evidence that state officers without the aid of federal officers seized in violation of state law was admissible in federal court.[98]

REV. STAT. § 192.590(5) (1987). Neither the district court nor the Ninth Circuit ever determined whether the Oregon officers in *Chavez-Vernaza* actually violated the Oregon statute, because the courts regarded the possible violation of state law as irrelevant. *Chavez-Vernaza*, 844 F.2d at 1374; *see infra* notes 99-124 and accompanying text (discussing Ninth Circuit's reasoning in *Chavez-Vernaza* that violation of state law is irrelevant to determination whether evidence is admissible in federal court).

95. *Chavez-Vernaza*, 844 F.2d at 1370. The federal grand jury in *Chavez-Vernaza* indicted the defendant for violating the Comprehensive Drug Abuse Prevention and Control Act and for attempting to import cocaine. *Id.*; *see* Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 et seq. (1982) (prohibiting unauthorized manufacture or distribution of controlled substances); 18 U.S.C. § 2 (1982) (authorizing same punishment of person that aids, abets, counsels, commands, induces, or procures another to commit crime against United States as for principal wrongdoer).

96. *Chavez-Vernaza*, 844 F.2d at 1370.

97. *Id.* at 1372; *see, e.g.*, United States v. Kovac, 795 F.2d 1509, 1511-12 (9th Cir.) (if state and federal officials acted in concert, evidence that officials obtained in violation of state law but in compliance with federal law is admissible in federal court), *cert. denied*, 107 S. Ct. 951 (1986); United States v. Henderson, 721 F.2d 662, 664 (9th Cir. 1983) (per curiam) (same), *cert. denied*, 467 U.S. 1218 (1984); United States v. Adams, 694 F.2d 200, 201 (9th Cir. 1982) (same), *cert. denied*, 462 U.S. 1118 (1983); *see also infra* notes 106-10 and accompanying text (discussing reasons that courts should differentiate between evidence that state officers obtained alone and evidence that state officers obtained together with federal officers).

98. *Chavez-Vernaza*, 844 F.2d at 1372. Although the United States Court of Appeals for the Ninth Circuit never specifically had determined whether evidence that state officers without federal assistance seized in violation of state law was admissible in federal court, the Ninth Circuit previously had suggested, in dicta, that federal courts should exclude such evidence. *See, e.g.*, United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983) (in interest of comity, federal court should apply state's more stringent exclusionary rule if state officers without assistance of federal officers secured evidence), *cert. denied*, 467 U.S. 1218 (1984); United States v. Cordova, 650 F.2d 189, 190 (9th Cir. 1981) (state law governs admissibility in federal court of evidence that state officers seized); United States v. Orozco, 590 F.2d 789, 792 n.11 (9th Cir. 1979) (traditional rule in Ninth Circuit has been that state search and seizure is subject to both state and federal law in federal prosecution). The Ninth Circuit's apparent predisposition toward the exclusion of evidence that state officials obtained in violation of state law, a predisposition that the court plainly abrogated in *Chavez-Vernaza*, had caused one federal district court in the Ninth Circuit's jurisdiction to exclude such evidence. *See* United States v. Speaks, No. CR-86-273-1 (E.D. Wash. November

The Ninth Circuit in *Chavez-Vernaza* examined four rationales for a federal court to admit evidence that state officers obtained in violation of state law.[99] First, the court reasoned that, because the Ninth Circuit uniformly had admitted evidence which state officers together with federal officers had obtained in violation of state law, no sound reason existed to treat differently a search in which state officers acted alone.[100] Second, the *Chavez-Vernaza* court determined that applying the exclusionary rule to evidence which state officers obtained in violation of state law would hamper the enforcement of valid federal laws by rendering inadmissible in federal court relevant and reliable evidence.[101] Third, the Ninth Circuit reasoned that federal interest in uniform evidentiary standards in the federal courts outweighed possible federal deference to a more stringent state exclusionary rule.[102] Finally, the court in *Chavez-Vernaza* recognized that the other federal circuit courts uniformly admitted evidence that state officers obtained in violation of state law, and expressed the Ninth Circuit's desire not to create an unnecessary conflict with the other circuits.[103] Thus, the Ninth Circuit in *Chavez-Vernaza* concluded that evidence which either state or federal officers seized in compliance with federal law is admissible in federal court without regard to state law.[104]

All four of the Ninth Circuit's bases for admitting into federal court evidence that state officers seized in violation of state law are tenuous.[105] First, the *Chavez-Vernaza* court could find no reason to treat differently evidence that state officers, while acting alone, obtained in violation of

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17, 1986) (LEXIS, Genfed library, Dist file) (citing Ninth Circuit's dicta in *Henderson*, *Cordova*,and *Orozco* and determining that evidence which officers seized in violation of Washington Constitution was inadmissible in federal court).

99. *Chavez-Vernaza*, 844 F.2d at 1373-74.

100. *Id.* at 1373; *see infra* note 107 and accompanying text (listing Ninth Circuit decisions to admit evidence that state officers acting together with federal officers obtained in violation of state law).

101. *See Chavez-Vernaza*, 844 F.2d at 1374 (adopting reasoning of United States Court of Appeals for the Third Circuit in *United States v. Rickus*); *see also* United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) (determining that excluding evidence which state officers obtained in violation of state law would hamper enforcement of federal laws).

102. *See Chavez-Vernaza*, 844 F.2d at 1374 (adopting reasoning of United States Court of Appeals for the Second Circuit in *United States v. Pforzheimer*); *see also* United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (determining that federal interest in uniform evidentiary standards in federal courts outweighed possible deference to principle of federalism); *infra* notes 126-54 and accompanying text (discussing *Pforzheimer* decision).

103. *Chavez-Vernaza*, 844 F.2d at 1373-74; *see, e.g.*, United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (federal policy considerations support application of federal law in federal trials); United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) (applying state exclusionary rule in federal trial would hamper enforcement of valid federal laws); United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (in federal trials courts should measure state officers' conduct against same standard of reasonableness against which courts measure federal officers' conduct).

104. *Chavez-Vernaza*, 844 F.2d at 1374.

105. *See infra* notes 106-24 and accompanying text (discussing Ninth Circuit's lack of convincing reasoning in *Chavez-Vernaza*).

state law and similar evidence that state and federal officers obtained together, which federal courts uniformly admit.[106] As the Ninth Circuit's previous cases reflect, however, a basis for differentiating between the two situations does exist.[107] Because federal officers by virtue of the supremacy clause of the United States Constitution are subject only to federal law, the manner in which federal officers obtain evidence is not subject to state restriction.[108] By specifically regulating the actions of state officers, however, state law restricts state officers' conduct.[109] Federal courts that admit evidence which solely state officers obtained, therefore, render state restriction of state officers ineffective.[110]

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106. *Chavez-Vernaza*, 844 F.2d at 1373; *see infra* notes 107-10 and accompanying text (federal courts should differentiate between evidence that state officers obtained alone and evidence that state and federal officers obtained together).

107. *See, e.g.*, United States v. Kovac, 795 F.2d 1509, 1511-12 (9th Cir.) (if state and federal officials act in concert, evidence obtained in violation of state law but in compliance with federal law is admissible in federal court), *cert. denied*, 107 S. Ct. 951 (1986); United States v. Henderson, 721 F.2d 662, 664 (9th Cir. 1983) (per curiam) (same), *cert. denied*, 467 U.S. 1218 (1984); United States v. Adams, 694 F.2d 200, 201 (9th Cir. 1982) (same), *cert. denied*, 462 U.S. 1118 (1983). The United States Court of Appeals for the Ninth Circuit had determined before the court's decision in *Chavez-Vernaza* that a joint search by state and federal officers was not subject to state constitutional requirements because state participation did not convert a federal search into a state search. *See* United States v. Hall, 543 F.2d 1229, 1235 (9th Cir. 1976) (search that federal officers conducted is subject to federal law even if state officers participated in search); *see also infra* note 108 and accompanying text (supremacy clause of United States Constitution precludes application of state law to federal officers). The traditional rule in the Ninth Circuit before *Chavez-Vernaza*, however, was that a federal court must judge a purely state search and seizure by both state and federal standards. United States v. Orozco, 590 F.2d 789, 792 n.1 (9th Cir. 1979).

108. *See* United States v. Adams, 694 F.2d 200, 202 n.* (9th Cir. 1982) (state courts cannot determine bounds of admissibility of evidence in federal court), *cert. denied*, 462 U.S. 1118 (1983); U.S. CONST. art. VI, cl. 2. The supremacy clause of the United States Constitution provides that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Although the supremacy clause precludes a state from forcing a federal court to exclude evidence that state officers obtained inconsistently with state law, federal courts may nevertheless exclude such evidence out of concern for comity and federalism. *See* Parsons, *State-Federal Crossfire in Search and Seizure and Self-Incrimination*, 42 CORNELL L.Q. 346, 363 (1957) (because federal courts exclude relevant evidence to restrain federal officers from unconstitutional activity, federal courts should respect state courts' attempts to exclude evidence to restrain state officers from unconstitutional activity).

109. *See* Note, *supra* note 58, at 570 (state law protects state citizens from state government's actions).

110. *See* United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983) (if federal courts allow state officers to turn illegally seized evidence over to federal authorities, federal courts will undercut deterrent purpose of state exclusionary rules), *cert. denied*, 467 U.S. 1218 (1984).

The Ninth Circuit's second tenuous basis for admitting the state-seized evidence was that, by excluding evidence because state officials obtained the evidence in violation of state law, a federal court unduly would burden the enforcement of valid federal laws.[111] Because a rule excluding from federal court evidence that state officials secured in violation of a state constitution only infrequently would apply, however, this reasoning of the Ninth Circuit is unconvincing.[112] If federal officers, whose primary responsibility is the investigation and enforcement of federal laws, seized evidence in compliance with federal law, a federal court will admit the evidence.[113] A federal court will exclude evidence only if state officers acting alone seized evidence in violation of state law and then turned the evidence over to federal prosecutors.[114] Because state officers ordinarily seize evidence for state prosecutions, excluding evidence in the rare instances in which state officers transferred unlawfully seized evidence to federal prosecutors would not place an inordinate burden upon the enforcement of federal laws.[115]

The Ninth Circuit's third rationale in *Chavez-Vernaza* for admitting evidence obtained unlawfully under state law, that a need for uniform federal evidentiary standards outweighed interests of comity and deference to state law, also is not persuasive.[116] The Ninth Circuit failed to note that, because of the United States Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,[117] any federal court potentially must apply the law of all fifty states on any number of issues.[118] The *Erie* doctrine requires

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111. *See Chavez-Vernaza*, 844 F.2d at 1374 (adopting reasoning of United States Court of Appeals for the Third Circuit in *United States v. Rickus*); *see also* United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) (determining that excluding relevant and reliable evidence would hamper enforcement of federal laws).

112. *See infra* notes 113-15 and accompanying text (because rule excluding evidence that state officers unlawfully obtained rarely would apply, rule would not burden enforcement of federal laws).

113. *See supra* note 108 and accompanying text (because of supremacy clause of Constitution, federal officers are subject only to federal law, and therefore, evidence that federal officers seized in accordance with federal law is admissible in federal court).

114. *See infra* note 149 and accompanying text (by excluding evidence that state officers obtained in violation of state law, federal courts could eliminate incentive for forum shopping).

115. *See* Note, *supra* note 80, at 496 (state courts and officers owe allegiance to state law).

116. *See Chavez-Vernaza*, 844 F.2d at 1374 (adopting reasoning of United States Court of Appeals for the Second Circuit in *United States v. Pforzheimer*); *see also* United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (federal policy considerations such as need for evidentiary uniformity outweigh interests of comity and deference to state law); *infra* notes 126-54 and accompanying text (discussing Second Circuit's decision in *Pforzheimer*).

117. 304 U.S. 64 (1938).

118. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (in all cases that federal law does not specifically govern, federal courts should apply state law, including state common law). The significance of the Supreme Court's decision in *Erie* is difficult to overstate because federal courts' application of *Erie* is so extensive. *See* J. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 55, at 255 (3d ed. 1976) (*Erie* decision has affected almost all federal civil cases since United States Supreme Court decided case).

federal courts in civil cases to apply state law to all substantive issues.[119] Applying state constitutional law in a search and seizure case undoubtedly would pose no more difficulty for federal courts than does the *Erie* doctrine generally.[120]

Finally, the *Chavez-Vernaza* court disingenuously based its decision to admit in federal court evidence that state officers obtained in a manner contrary to state law on a desire not to create a needless conflict with the other federal circuits.[121] Although a desire not to create conflicts with other circuits is admirable, the federal circuits often conflict on various issues, many of which do not involve constitutional rights or the deprivation of individual liberties.[122] The *Chavez-Vernaza* court failed to explain why creating a conflict based on respect for established principles of federalism and the constitutional protection of individual liberties is any more "needless" than other issues of law about which the circuits disagree.[123] The Ninth Circuit in *Chavez-Vernaza*, therefore, offered little convincing reasoning in support of its refusal to respect state constitutional protection of state citizens.[124]

In reaching its decision to admit in federal court evidence that state officers obtained in violation of state law, the Ninth Circuit in *Chavez-Vernaza* relied upon the decision of the United States Court of Appeals

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119. *See* Note, *supra* note 45, at 201 (*Erie* doctrine requires federal courts to apply state substantive law to civil cases).

120. *See, e.g.*, J. WRIGHT, *supra* note 118, § 55, at 256 (noting lower federal courts' difficulty with application of subsequent Supreme Court cases interpreting *Erie*); Boner, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 TEX. L. REV. 619, 635 (1962) (*Erie* doctrine's status among practicing attorneys rose to that of religion); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 (1954) (*Erie* doctrine has no apparent limitations and decisions interpreting doctrine are unclear).

121. *Chavez-Vernaza*, 844 F.2d at 1373-74.

122. *See* Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1421 (1987) (in determining meaning of amendment to Internal Revenue Code provision, three federal circuit courts found three different meanings, and District of Columbia Circuit itself split three different ways on same issue). Intercircuit conflicts today are prevalent among the circuit courts. *See* Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1407 (1987) (caseload of one federal circuit court in one year included 90 decisions conflicting with decisions of other circuits, 36 of which were original conflicts). The problem of intercircuit conflicts has become so pervasive that, because the United States Supreme Court cannot resolve all of the conflicts, commentators advocate the establishment of a new federal court. *See id.* at 1416 (urgent need exists for new Intercircuit Panel to resolve conflicts among circuits); Ginsburg & Huber, *supra*, at 1417-35 (describing proposed Intercircuit Panel, which would resolve conflicts among federal circuits). Although, as the *Chavez-Vernaza* court suggested, federal circuit courts should not create needless conflicts, that conflicts are so widespread undercuts the ingenuity of conflicts-avoidance as a basis for decision. *Chavez-Vernaza*, 844 F.2d at 1374; *see* Baker & McFarland, *supra*, at 1407 (under "law of the circuit," previous decisions from same circuit are binding while previous decisions from other circuits only are persuasive).

123. *See supra* note 122 and accompanying text (federal circuit courts often disagree on variety of issues).

124. *See supra* notes 99-123 and accompanying text (discussing Ninth Circuit's reasoning in *Chavez-Vernaza*).

for the Second Circuit in *United States v. Pforzheimer*.[125] Like the Ninth Circuit in *Chavez-Vernaza*, however, the Second Circuit in *Pforzheimer* offered little compelling reasoning in reaching its conclusion that a federal court should admit evidence which state officers obtained in violation of a state constitution.[126] The Second Circuit in *Pforzheimer* considered whether, in federal court, state constitutional law applied to a search and seizure that only state officers conducted.[127] In *Pforzheimer* state officers seized a large quantity of marijuana on the defendant's property in a manner that the defendant claimed had violated his state constitutional rights.[128] Although state authorities charged the defendant with violations of state drug laws, the state officials dropped the charges after federal agents charged the defendant with similar violations of federal drug laws.[129] Federal prosecutors convicted the defendant in the United States District Court for the District of Vermont.[130] The defendant appealed the district court's decision in *Pforzheimer* and argued that the Second Circuit should apply state, rather than federal, constitutional law in evaluating the legality of the state search and seizure.[131] Like the Ninth Circuit in *Chavez-Vernaza*, the court in *Pforzheimer* recognized that, although the Second Circuit previously had held that only federal law applied if federal officers had participated in a search and seizure, the Second Circuit never specifically

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125. 826 F.2d 200 (2d Cir. 1987); *see Chavez-Vernaza*, 844 F.2d at 1374 (adopting reasoning of United States Court of Appeals for the Second Circuit in *United States v. Pforzheimer*).

126. *See infra* notes 127-54 and accompanying text (discussing Second Circuit's decision in *Pforzheimer*).

127. United States v. Pforzheimer, 826 F.2d 200, 201 (2d Cir. 1987).

128. *Id.* In *Pforzheimer* Vermont officials had begun investigating the defendant and his brother for drug-related activity three years before the search and seizure in issue. *Id.* State officials had charged the defendant with drug violations after the first investigation, but the state authorities later dropped all charges when a state court suppressed the evidence in question. *Id.* State authorities based the warrant in *Pforzheimer* upon information that state officers obtained by surreptitiously trespassing upon the open fields of the defendant's property. *Id.* The United States Supreme Court previously had determined that a trespass upon "open fields" did not violate the federal constitution. *See* Oliver v. United States, 466 U.S. 170, 181 (1984) (search of open fields does not violate Constitution). The Vermont Supreme Court, however, never had determined whether a search of open fields violated the Vermont Constitution. *Pforzheimer*, 826 F.2d at 202. Because the United States Court of Appeals for the Second Circuit in *Pforzheimer* agreed with the United States District Court for the District of Vermont that federal law, including the decision in *Oliver*, applied, neither court addressed the question of whether the search in issue actually violated the Vermont Constitution. *Id.*

129. *Pforzheimer*, 826 F.2d at 201. State authorities in *Pforzheimer* gave no specific reason for dropping the Vermont drug charges, but stated simply that they dropped the charges because federal officials were prosecuting the defendant. *Id*; *see supra* note 85 and accompanying text (noting great overlap between nature of state and federal crimes).

130. *Pforzheimer*, 826 F.2d at 202. The jury in *Pforzheimer* convicted John Pforzheimer of knowingly and intentionally manufacturing marijuana in an amount less than 50 kilograms. *Id.*

131. *Id.* at 202.

had decided whether only federal law applied if federal officers did not participate.[132] In determining this issue of first impression, the *Pforzheimer* court first cited United States Supreme Court decisions which support the general principle that federal law applies to federal prosecutions.[133] Second, the court in *Pforzheimer* determined that other federal circuit courts uniformly admitted evidence that state officers obtained in violation of a state constitution.[134] Finally, the *Pforzheimer* court reasoned that the need for uniform evidentiary standards in the federal courts outweighed interests of comity in respecting Vermont constitutional law.[135] The Second Circuit in *Pforzheimer* concluded, therefore, that only federal law should apply to a prosecution in federal court, even if only state officials conducted the search and seizure.[136]

All of the Second Circuit's justifications for admitting evidence that state officers unlawfully obtained, however, are unconvincing.[137] The *Pforzheimer* court first cited United States Supreme Court decisions which generally reflect the proposition that, in federal trials, courts should evaluate searches and seizures as if federal officers made the searches and seizures.[138] The Second Circuit in *Pforzheimer* recognized that, in the cited cases, the Supreme Court addressed not whether evidence that state officers obtained in violation of a state constitution should be admissible in federal court, but whether evidence that state officers obtained in violation of the federal constitution should be admissible in federal court.[139] The Second

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132. *Id.* at 203.

133. *Id*; *see* Preston v. United States, 376 U.S. 364, 366 (1964) (in federal trials courts should measure state officers' conduct against same standard of reasonableness against which courts measure federal officers' conduct); Elkins v. United States, 364 U.S. 206, 224 (1960) (federal law governs federal courts' determination of whether search and seizure was unreasonable).

134. *Pforzheimer*, 826 F.2d at 204.

135. *Id.*

136. *Id.*

137. *See infra* notes 138-54 and accompanying text (explaining why Second Circuit's reasoning in *Pforzheimer* is unconvincing).

138. *Id*; *see* Preston v. United States, 376 U.S. 364, 366 (1964) (in federal trials courts should measure state officers' conduct against same standard of reasonableness against which courts measure federal officers' conduct); Elkins v. United States, 364 U.S. 206, 224 (1960) (federal law governs federal court's determination of whether search and seizure was unreasonable).

139. *Pforzheimer*, 826 F.2d at 203. The United States Court of Appeals for the Second Circuit in *Pforzheimer* correctly recognized that *Elkins v. United States*, in which the Supreme Court held that evidence which state officials seized in violation of the federal constitution is not admissible in federal court, did not address the question of whether a state constitution could restrict the admissibility of evidence in a federal trial. *Id*; *see* Elkins v. United States, 364 U.S. 206, 214 (1960) (if state officers seized evidence in violation of United States Constitution, evidence is inadmissible in federal court). The Second Circuit in *Pforzheimer* maintained, however, that *Elkins* reflected the general proposition that federal law governs federal prosecutions. *Pforzheimer*, 826 F.2d at 203. The general premise that federal law governs federal prosecutions is indisputably true, but it is not dispositive, because the *Erie* doctrine alone constitutes an exception that may have swallowed the general rule.

Circuit failed to recognize, however, that, in the cited cases, the Supreme Court expanded the protection of individual liberties by limiting the use of unlawfully gathered state evidence in federal criminal trials.[140] Additionally, the *Pforzheimer* court failed to recognize that the *Erie* doctrine already is a vast exception to the general rule that federal law governs federal trials.[141] Because the Supreme Court's objective in the cited cases was antithetical to the Second Circuit's decision, and because a rule excluding evidence obtained in violation of a state constitution simply would constitute another exception to the general rule that federal law governs federal trials, the Second Circuit's citation of isolated language in Supreme Court opinions constitutes a specious analysis of the admission of evidence obtained in a state search and seizure.[142]

As a second ground for admitting in federal court evidence that state officers seized in violation of a state constitution, the Second Circuit recognized the unanimity among the other circuits on the issue.[143] The

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See supra notes 118-20 and accompanying text (noting vast application of *Erie* doctrine as exception to general rule that federal law applies in federal courts).

140. *See* Preston v. United States, 376 U.S. 364, 368 (1964) (excluding evidence that officers obtained from defendant's automobile because search was too remote in time and place from arrest); Elkins v. United States, 364 U.S. 206, 214 (1960) (determining that evidence which state officers obtained in violation of federal constitution is inadmissible in federal court).

141. *See supra* note 118 and accompanying text (noting United States Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, which, by forcing federal courts to apply state law in most civil cases, is major exception to rule that federal law applies in federal courts).

142. *See supra* note 140 and accompanying text (United States Supreme Court in *Preston* and *Elkins* expanded protection of individual liberties); *supra* note 141 (exceptions already existed to general rule that federal law governs federal prosecutions).

143. United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987); *see, e.g.*, United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985) (federal court should not exclude evidence that is admissible under federal law despite inadmissibility of evidence under state law); United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (in federal trials courts should measure state officers' conduct against same standard of reasonableness against which courts measure federal officers' conduct); United States v. Combs, 672 F.2d 574, 578 (6th Cir.) (states cannot impose state law requirements on federal courts), *cert. denied*, 458 U.S. 1111 (1982). The *Pforzheimer* court recognized, but declined to adopt, the Ninth Circuit's dicta in previous cases that favored excluding evidence which state officers obtained in violation of a state constitution. *Pforzheimer*, 826 F.2d at 203-04; *see* United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983) (in interest of comity, federal courts should apply state's more stringent exclusionary rule if state officers without assistance of federal officers secured evidence in violation of state law), *cert. denied*, 467 U.S. 1218 (1984); United States v. Cordova, 650 F.2d 189, 190 (9th Cir. 1981) (state law governs admissibility in federal court of evidence that state officers seized). After *Pforzheimer*, the Ninth Circuit abandoned its previous language and joined the other federal circuit courts in determining that all evidence which state or federal officers obtained in compliance with federal law is admissible in federal court. *See* United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) (evidence that officers seized in compliance with federal law is admissible in federal court without regard to state law); *supra* notes 92-124 and accompanying text (discussing Ninth Circuit's decision in *Chavez-Vernaza*); *see also* United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) (applying state exclusionary rule in federal trial would

Pforzheimer court failed to note, however, that, although the federal circuits agree that evidence which state officers obtained in violation of a state constitution is admissible in federal court, the United States Supreme Court never has considered the question, and the circuit courts often split on various other issues.[144] Although precedent is an important element in judicial decisions, courts should not substitute a reflexive adherence to precedent for sound, independent reasoning.[145]

The Second Circuit in *Pforzheimer* also evaluated the defendant's argument that the admission against him of unlawfully secured evidence would encourage state prosecutors to turn over their unlawfully obtained evidence to federal prosecutors.[146] The *Pforzheimer* court reasoned that, because state prosecutors have no authority to prosecute in federal court, the defendant's argument was unpersuasive.[147] The Second Circuit did not acknowledge, however, that, whether state or federal authorities prosecute a defendant is of little consequence because the result to the defendant effectively is identical.[148] A state prosecutor does not have authority actually to prosecute a defendant in federal court, but if a court allows a state agent to transfer unlawfully obtained evidence to a federal prosecutor who then can convict a defendant for the same offense with the same evidence, the court encourages prosecutorial forum shopping with evidence that state officers obtained unlawfully under state law.[149]

Finally, the Second Circuit in *Pforzheimer* emphasized the need for uniform evidentiary rules in the federal courts.[150] Because the Vermont Supreme Court never had considered whether the situation in *Pforzheimer* violated the Vermont Constitution, the Second Circuit reasoned that the court had no guidance in determining whether the search and seizure

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hamper enforcement of valid federal laws); United States v. Montgomery, 708 F.2d 343, 344 (8th Cir. 1983) (in federal trials courts should measure state officers' conduct against same standard of reasonableness against which courts measure federal officers' conduct).

144. *See supra* note 122 and accompanying text (noting that federal circuits often disagree on variety of issues).

145. *See, e.g.*, Helvering v. Hallock, 309 U.S. 106, 119 (1940) (although stare decisis constitutes important element of judicial policy, stare decisis must be concept of policy and not of mechanical adherence); Trust Co. of Ga. v. Kenny, 188 Ga. 243, 250, 3 S.E.2d 553, 556 (1939) (quantum of precedent may be on one side while quality of precedent may be on another); 1 W. BLACKSTONE, COMMENTARIES *69-70 (because law is perfection of reason, prior unreasoned decisions are not law); Hanna, *The Role of Precedent in Judicial Decision*, 2 VILL. L. REV. 367, 367-69 (1957) (courts' own precedents do not inexorably bind courts).

146. *Pforzheimer*, 826 F.2d at 204.

147. *Id.* The Second Circuit in *Pforzheimer* recognized that the initiation of a federal criminal trial depended completely upon a federal prosecutor. *Id.*

148. *See supra* note 85 and accompanying text (noting that, because nature of federal and state crimes substantially overlap, either federal or state authorities can prosecute defendants for same offenses).

149. *See* Elkins v. United States, 364 U.S. 206, 221-22 (1960) (if federal courts admit evidence that state officers obtained unlawfully, but exclude evidence that federal officers obtained in same manner, courts induce prosecutors to forum shop).

150. *Pforzheimer*, 826 F.2d at 204.

violated state law.[151] The *Pforzheimer* court did not recognize, however, that, because of the *Erie* doctrine, federal courts often decide issues of state law that a state's courts have not yet decided.[152] Federal courts would have no more difficulty with applying state constitutional law to searches and seizures than federal courts have, under the *Erie* doctrine, with applying state law to substantive issues in civil cases.[153] The Second Circuit's decision in *Pforzheimer*, therefore, like the Ninth Circuit's decision in *Chavez-Vernaza*, rests on uniform precedent but little compelling analysis.[154]

Decisions such as *Chavez-Vernaza* and *Pforzheimer* illustrate federal courts' desire to avoid applying state constitutional law to determine the admissibility of evidence, even if state officers alone obtained the evidence.[155] Although no well-reasoned precedent or policy reasons underlie these decisions, federal courts uniformly refuse to exclude evidence that state officers obtained in violation of state law.[156] Federal courts that refuse to exclude evidence on state constitutional grounds, however, encroach upon state sovereignty by negating states' historic ability independently to protect their citizens' individual liberties.[157] Moreover, federal courts that admit unlawfully obtained evidence contravene the primary purpose behind the states' adoption of the federal Bill of Rights, to protect state citizens from the federal government.[158] Finally, federal courts which refuse to exclude evidence that state officials secured in violation of a

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151. *Id.* The United States Supreme Court established in *United States v. Oliver* that a search without a warrant of a defendant's "open fields" does not violate the fourth amendment to the federal constitution. *See* United States v. Oliver, 466 U.S. 170, 181 (1984) (evidence that officers secured by trespassing upon defendant's open fields is admissible under United States Constitution). The United States Court of Appeals for the Second Circuit in *Pforzheimer* noted that, although the search and seizure clause in the Vermont Constitution differed slightly from the fourth amendment to the federal constitution, no Vermont appellate court ever had addressed the open fields doctrine of *Oliver* under the state constitution. *Pforzheimer*, 826 F.2d at 202.

152. *See supra* note 120 and accompanying text (*Erie* doctrine causes federal courts more difficulty than rule requiring interpretation of state constitution in state search and seizure case would cause federal courts).

153. *Id.*

154. *See supra* notes 92-124 and accompanying text (discussing Ninth Circuit's decision in *Chavez-Vernaza*); *supra* notes 126-53 and accompanying text (discussing Second Circuit's decision in *Pforzheimer*).

155. *See supra* notes 92-124, 126-54 and accompanying text (discussing reasons that courts in *Chavez-Vernaza* and *Pforzheimer* refused to exclude evidence which solely state officers obtained in violation of state law).

156. *See supra* note 6 and accompanying text (listing federal court decisions refusing to exclude evidence that state officers obtained in violation of state law).

157. *See supra* notes 79-90 and accompanying text (by admitting evidence that state officers seized in violation of state constitution, federal courts negate efficacy of state constitutions).

158. *See supra* note 89 and accompanying text (primary reason that states requested and adopted federal Bill of Rights was to protect citizens from newly formed national government).

state constitution encourage forum shopping and sanction a new reverse silver platter doctrine, a doctrine that the United States Supreme Court consistently has attempted to eradicate.[159]

Notwithstanding its detractors, the exclusionary rule continues to achieve the goal of enforcing constitutional rights by deterring official lawlessness.[160] State constitutions and state exclusionary rules are historically more forceful than the federal exclusionary rule, because both state constitutions and state exclusionary rules predate their federal counterparts.[161] Federal courts, therefore, should respect state sovereignty and established principles of federalism by excluding evidence that state officials obtained in violation of a state constitution.[162] Thus, federal courts finally could foreclose one of the last remaining routes for admitting unlawfully seized evidence and could eliminate the forum shopping and deprivation of constitutional liberties that are coextensive with the persistent silver platter doctrine.[163]

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159. *See supra* notes 48-57 and accompanying text (discussing United States Supreme Court's decision in *Mapp v. Ohio*, in which Supreme Court hoped to eliminate final avenue of admissibility for unlawfully obtained evidence).

160. *See* Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016-55 (1987) (documenting exclusionary rule's significant efficacy in deterring police officers from acting unlawfully).

161. *See supra* notes 73, 80-82 and accompanying text (state constitutions and state exclusionary rules preceded federal constitution and federal exclusionary rule).

162. *See supra* notes 79-86 and accompanying text (federal courts that admit evidence which state officers obtained in violation of state constitution ignore established principles of federalism); *supra* notes 87-90 and accompanying text (federal courts that admit evidence which state officers obtained in violation of state constitution subvert underlying purpose of federal Bill of Rights); *cf.* Note, *United States v. McNulty: Title III and the Admissibility in Federal Court of Illegally Gathered State Evidence*, 80 NW. U.L. REV. 1714, 1751 (1986) (rule rendering illegally gathered state evidence inadmissible in any state or federal court would reduce forum shopping and reduce incentives for state officials to violate state law).

163. *See supra* notes 79-90, 148-49 and accompanying text (federal courts that admit evidence which state officers unlawfully seized eviscerate state constitutional protection and foster forum shopping).