ACCOUNTING FOR FEDERALISM IN STATE COURTS -

EXCLUSION OF EVIDENCE OBTAINED LAWFULLY BY FEDERAL AGENTS.

Robert M. Bloom* & Hillary Massey**

Abstract

After the terrorist attacks on September 11th, Congress greatly enhanced federal law enforcement powers through enactment of the U.S.A. Patriot Act. The Supreme Court also has provided more leeway to federal officers in the past few decades, for example by limiting the scope of the exclusionary rule. At the same time, many states have interpreted their constitutions to provide greater individual protections to their citizens than provided by the federal constitution. This phenomenon has sometimes created a wide disparity between the investigatory techniques available to federal versus state law enforcement officers. As a result, state courts sometimes must decide whether to suppress evidence obtained legally by federal law enforcement officers but in violation of state law. In deciding these cases the states usually rely on a state evidentiary basis ignoring federalism concerns. This article proposes a framework by which state courts may suppress this evidence while recognizing notions of federalism.

Introduction

---

* Professor of Law, Boston College Law School. I wish to thank Jason Heinrich, a student in the class of 2009 at Boston College Law School, for his research assistance. I also acknowledge with gratitude the generous support provided by the R. Robert Popeo Fund of Boston College Law School. I wish to thank my colleagues Professors Mark Brodin, Michael Cassidy, and George Brown for their thoughtful comments and suggestions.

** J.D., Boston College Law School (2007). Hillary is clerking for Chief Justice Margaret Marshall at the Massachusetts Supreme Judicial Court for the 2007-2008 term. Prior to law school, she served in the Peace Corps in Sub-Saharan Africa and also served twelve years in the Medical Service Corps of the U.S. Army Reserve.

Suppose that FBI agents operating in the State of Oregon obtain a so-called sneak and peek warrant (authorized by U.S.A. Patriot Act, as described below) for the home of Mohammed Jones. They believe he is a terrorist planning to blow-up the Oregon Museum of Science and Industry. The warrant authorizes a search for bomb-making material, maps, computer records, documents, and material relating to terrorism. In executing the warrant, the agents find none of the items listed but discover numerous marijuana plants in plain view.[1] They seize the marijuana plants. Jones receives the search warrant three weeks after the search.

Suppose further that Jones is charged in state proceedings with possession of large quantities of marijuana. Jones seeks to suppress the marijuana, claiming that the search was illegal. The state argues that the plants were seized lawfully by federal officers acting pursuant to a sneak and peek warrant and without any collusion by the state. The defendant concedes that the federal officers acted lawfully pursuant to federal law but violated an Oregon statute requiring officers to present search warrants at the time of the search or to leave copies at the premises.

Should the state court admit the evidence? More generally, should evidence that results from a federal law enforcement agent acting legally under federal law be admitted in state court when the agent's actions constitute a violation of state law? This question raises an important and unexamined topic in federalism jurisprudence. An easy answer is that states may control evidentiary matters in their own courts.[2] This is true to a certain extent and some state courts have excluded this type of evidence under such

[1] A police officer conducting a legal search may seize illegal items in plain view as long as he has justification for the search and the incriminating nature of the item is immediately apparent. Horton v. California, 496 U.S. 128 (1990); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

reasoning.[3] This article suggests, however, that there is a deeper level of analysis required when states impose their own laws or the remedies of their laws on federal officers acting lawfully under federal law. In that situation a state's action necessarily implicates the two principal elements of federalism found in the U.S. Constitution: the reservation clause of the Tenth Amendment and the Supremacy Clause of Article VI. This article examines the implications of those two constitutional provisions on states that must decide whether to admit this type of evidence in state courts.

The Tenth Amendment[4] reserves to the states those rights not specifically delegated to the federal government. The Supremacy Clause declares all federal law supreme.[5] "Together, these provisions describe a straightforward, generally applicable rule: Where Congress and the President act within the powers expressly afforded them by the Constitution, their laws and acts prevail: in all other respects, power and authority reside with the states or with the people themselves."[6]

The boundaries between the Tenth Amendment and the Supremacy Clause are often ambiguous, however, because both provisions speak in generalities rather than specifics. This ambiguity is further complicated by the overlapping responsibilities between the two sovereignties. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to

---

[2] JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW §11.03[4][d] (4th ed. 2006) ("A state judge has the power to control what evidence is admitted in his or her court.").
[3] State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001); People v. Griminger, 524 N.E.2d 409 (N.Y. 1988); State v. Rodriguez, 854 P.2d 399 (Or. 1993).
[4] U.S. CONST. amend. X.
[5] U.S. CONST. art. VI, § 2.
[6] Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2199 (2003). In this article the authors analyze a related issue. When may a state actually prosecute a federal official for acting pursuant to his federal duties but in violation of state law? *Id.*

remain in the State governments are numerous and indefinite."[7] The Court itself has recognized that some of its most difficult cases involve identifying the line between federal and state power.[8]

This article explores some of the Supreme Court's recent decisions elaborating on the intersection between the Tenth Amendment and the Supremacy Clause. It examines the impact of those decisions on state courts seeking to exclude evidence legally obtained by a federal officer pursuant to federal law. This federalism issue is relatively novel in the criminal justice area because only in the last thirty years have states provided greater constitutional protections than the federal government. States have done so in reaction to decisions by the Burger/Rehnquist Courts that have reduced the protections provided by the Bill of Rights. For purposes of this article this phenomenon is called the "new federalism." It should be pointed out that "new federalism" also refers to any devolution of power from the federal government to the states upholding the importance of state autonomy.

With different standards controlling law enforcement officials as a result of the new federalism, a conflict exists between federal and state standards. A federal court must apply federal law when dealing with a federal official regardless of the law of the state in which it is sitting. A federal court dealing with a state official must behave similarly.[9] What is less clear is how a state court can treat a federal official who obtained

---

[7] THE FEDERALIST No. 45, at 292-293 (James Madison) (Clinton. Rossiter ed., 1961), *quoted in* U.S. v. Lopez, 514 U.S. 549, 552 (1995) [hereinafter Federalist No. 45].

[8] New York v. United States, 505 U.S. 144, 155 (1992).

[9] "In the absence of any federal violation, therefore, we are not required to exclude the challenged material [evidence obtained in compliance with federal law but in violation of state standards]; the bounds of admissibility of evidence for federal courts are not ordinarily subject to determination by the state." United States v. Hall, 543 F.2d 1229, 1235 (9th Cir. 1976). *See* United States v. Vite-Espinoza, 342 F.3d 462 (6th Cir. 2003); United States v. Chavez-Verrarza, 844 F.2d 1368 (9th Cir. 1987). *See* James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?* 55 MD. L.

evidence in accordance with federal law, but in violation of state law. This problem is sometimes referred to as the "reverse silver platter"[10] issue.

This article begins by briefly tracing the history of the exclusionary rule and the line of cases that made the Bill of Rights applicable to the states. It then explores how the few states who have dealt with the question posed by this article have chosen to address it. Next it considers the Supreme Court's recent federalism decisions involving other conflicts between the state and federal governments to gain some sense of the balance of power. Finally, this article suggests an *Erie*-type framework to resolve the federalism issues raised by the question it poses, and applies the proposed analytical framework to the above hypothetical situation involving a conflict between state law and the federal U.S.A. Patriot Act.

I. History

The Bill of Rights promulgated at the constitutional conventions in 1787 was designed to protect individuals from the power of the federal government. For much of our history, between state and federal law enforcement officials, only federal officials were subject to these provisions. In contrast, because individuals facing state criminal prosecution were afforded protections by state constitutions or statutory provisions, state law enforcement officials were not restricted by the Bill of Rights.[11] The result was that federal defendants enjoyed more rights and protections than did state defendants.

REV. 223 (1996); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667 (1988).

[10] Diehm, *supra* note 8, at 244-47. Silver platter refers to a state official handing over evidence to a federal official. See *infra* note 13. Reverse silver platter refers to a federal official handing over evidence for a state prosecution. Diehm, *supra* note 8, at 244-47.

[11] Barron v. Baltimore 32 U.S. 243,247 (1833); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 72 (1993)

Although there were conflicts in the rights enjoyed in federal versus state courts during this early history, there were no conflicts in remedies available for illegal action of law enforcement personnel. Neither state nor federal court provided as a remedy the exclusion of illegally obtained evidence. This changed in 1914 when the Supreme Court decided in Weeks v. United States[12] that evidence obtained by a federal official in violation of the Fourth Amendment was excluded from federal court. The Court limited the exclusionary rule to federal officers because in 1914 the Fourth Amendment did not apply to state officers.[13] Thus the Court admitted evidence obtained by state officials but excluded evidence obtained by federal officials. To emphasize the differences between the two sovereignties (state and federal) the Court stated, "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials in the exercise of power and authority, under limitations and restraints as to exercise of such power and authority."[14]

With the advent of the *Weeks* doctrine in 1914,[15] which created the exclusionary rule in federal courts, the disparate treatment of evidence between state and federal courts resulted in forum shopping and cooperation between federal and state officials to avoid the costs of the federal exclusionary rule.[16] Federal officials involved in illegal obtaining of evidence sought to introduce the evidence in state courts and state officials not subject

[12] 232 U.S. 383 (1914).
[13] *Id*. 398
[14] *Id*. at 391.
[15] 232 U.S. 383 (1914).
[16] Elkins v. United States 364 U.S. 206, 210-213 (1960)

to the exclusionary rule assisted their Federal colleagues by delivering the evidence to them on a silver platter.[17]

The adoption of the 14th Amendment Due Process Clause after the Civil War provided the foundation for applying the Bill of Rights to the states. In Wolf v. Colorado[18] in 1949, the Supreme Court held that the Fourth Amendment applies to states. However, the Court refused to find the exclusionary rule is an essential part of the right and thus admitted the illegally obtained evidence. The Court in *Wolf* was reluctant to adopt the remedy of exclusion partly due to notions of federalism.[19] In Abbate v. United States, the Court indicated that states should enjoy considerable flexibility in developing their criminal systems as intended by the Constitution: "the States under our federal system have the principal responsibility for defining and prosecuting crimes."[20] In Elkins v. United States the Court attempted to rectify this disparity in the application of the exclusionary rule between state and federal officials through the use of its supervisory powers with the objective of ending the silver platter doctrine in federal courts.[21]

Shortly thereafter, under the leadership of Chief Justice Earl Warren, the Court in Mapp v. Ohio[22] held that states must adopt the exclusionary rule as a remedy for illegal law enforcement action because it is an essential part of the Fourth Amendment. This decision eliminated much of the remaining intrajudicial conflict by requiring a uniform

---

[17] The term silver platter was used in the Frankfurter opinion of Lustig v. United States, 338 U.S. 74, 79 (1949). "It is not a search by federal official if evidence secured by state authorities is turned over to federal authorities on a silver platter." *Id*.

[18] 338 U.S. 25 (1949).

[19] Speaking about the exclusionary rule the Wolf Court said "We cannot brush aside the experience of States which deem the incidence of such conduct by police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence." Wolf at 31-32

[20] 359 U.S. 187, 195 (1959).

[21] Elkins v. United States, 364 U.S. 206 (1960).For further discussion of supervisory powers *See* Robert M. Bloom, *Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases*, 84 J. Crim. L. & Criminology 462, 473 (1993).

[22] 367 U.S. 643 (1961).

remedy for constitutional violations. Mapp v. Ohio involved a conviction under an Ohio statute that criminalized the possession of "certain lewd and lascivious books, pictures and photographs".[23] Appellant claimed the evidence should be excluded because it was obtained in violation of the Fourth Amendment.[24] Prior to *Mapp*, the Court held the exclusionary rule was applicable only in federal courts.[25] This exclusionary principle had not been applied yet in state actions. The *Mapp* Court made this leap and held, "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[26] The Court wrote:

> "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[27]

Prior to *Mapp*, the dual standard of exclusion resulted in a so-called silver platter doctrine. As previously mentioned, *Elkins*[28] eliminated this in federal court and *Mapp* made the exclusionary rule applicable to the state courts. Finally federal and state law enforcement officials were governed by the same remedy of exclusion.

The Warren Court, in addition to applying the federal constitutional protection to the state, also substantively expanded those protections. Decisions like Miranda v. Arizona and Terry v. Ohio provided greater protections to individuals as they faced the

---

[23] *Id*. at 643.
[24] *Id*.
[25] Weeks v. United States, 232 U.S. 383 (1914).
[26] *Mapp,* 367 U.S. at 655.

forces of the state. [29]For the period of 1960s during the Warren Court era and for much of the 1970s during the early part of the Burger Court era, the same constitutional precepts applied to federal and state law enforcement officials. This eliminated "needless" conflict between the two sovereigns and contributed to healthy federalism.[30]

During the late 1970s and early 1980s, the Burger Court cut back on the exclusionary rule and reinterpreted the Warren Court decisions to limit the protections afforded by the Fourth Amendment to individuals in their dealings with the police.[31] Justice Brennan, concerned about the cut backs to Warren Court decisions, urged states to use their own laws to expand on individual rights: "State courts cannot rest when they have afforded their citizens full protection of the federal Constitution. State constitutions, too, are a part of individual liberties, their protection often extending beyond those required by Supreme Court's interpretation of federal law."[32] As Brennan suggests, the U.S. Constitution provides the baseline for protection of individual rights under the Supremacy Clause. Because the Constitution provides limitations on the power of government vis a vis the individual, however, it does not prohibit states from providing

---

[27] *Id.* at 660.
[28] *See Supra* note 16
[29] *See, e.g.,* Terry v. Ohio, 392 U.S. 1 (1968) (making on the street police encounters subject to the Fourth Amendment); United States v. Wade, 388 U.S. 218 (1967) (attempting to deal with the unreliability of eyewitness identifications); Miranda v. Arizona, 384 U.S. 436 (1966) (providing safeguards for interrogation proceedings); Jones v. United States, 362 U.S. 257 (1960) (expanding Fourth Amendment protections for the standing requirement).
[30] "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal court." Elkins v. United States, 364 U.S. 206, 221 (1960), *quoted in Mapp*, 367 U.S. at 657.
[31] *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (creating a public safety exception to *Miranda)*; United States v. Leon, 468 U.S. 897 (1984) (creating a good faith exception to exclusionary rule); Rakas v. Illinois, 439 U.S. 128 (1978) (limiting standing opportunities under the Fourth Amendment); United States v. Calandra, 414 U.S. 338 (1974) (limiting the thrust of the Fourth Amendment's exclusionary rule); United States v. Robinson, 414 U.S. 218 (1973) (broadening the search incident to arrest exception to the Fourth Amendment warrant requirement by permitting officers to open containers found on a suspect).
[27] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,*90 HARV. L. REV. 489, 491 (1977).

greater protections to the individual. Some states following Brennan's invitation began to interpret their own constitutional provisions to provide for greater rights to individual defendants. An interesting irony has evolved. Prior to the *Mapp* decision, the federal Constitution provided greater rights to individual defendants. Immediately after *Mapp*, rights of federal or state criminal defendants vis a vis the police were parallel. Now defendants in some states are enjoying more protection through state law.[33] With the Burger Court's retraction of the individual protections created by the Warren Court, an interesting juxtaposition has occurred in state courts. Interpreting their own constitutions, some states have become more protective of individual rights than required by the U.S. Constitution. Justice Stevens observed this point in a recent concurring opinion.[34] This phenomenon has been characterized as new federalism.[35]

This new federalism coupled with increased leeway to federal law enforcement under holdings of the Burger and Rehnquist Courts as well as greater cooperation

---

[33] *See for example:* State v. Novembrino 519 A.2d 820 (N.J. 1987); State v. Glass 583 P.2d 872 (Alaska 1978): Commonwealth v. Upton 476 N.E.2d 548 (Mass. 1985); People v. Johnson 488 N.E.2d 439 (NY 1985).

[34] Brigham City, Utah v. Stuart 126 S.Ct 1943 (2006) at 1950.

[35] Diehm, *supra* note 8 at 224; Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism,* 28 HASTINGS CONST.L.Q. 92 (2002), James N.G. Cautlen, *Expanding Rights Under State Constitutions: A Quantative Appraisal,* 63 ALBANY L. REV. 1182 (2000).

We should point out that this trend did not go unnoticed by the Supreme Court, but there was not much they could do about it because the state decisions were based on independent state grounds and the Court only has ultimate authority over Federal Law. When state courts based their decisions on a combination of state and federal law, the Supreme Court sought to avoid an unnecessary constitutional decision by remanding the case back to the state court for clarification. In 1983, in Michigan v. Long, 463 U.S. 1032 (1983), the Court found a way to scrutinize the new federalism trend. In this case, the Court carefully examined a state court decision to see if there was any reference to federal law, which would give the Court a basis of jurisdiction as the ultimate authority on federal law. In finding a reference to federal law, albeit a narrow one, the Court in effect created a presumption that the state court decision was based on federal law. *Id*. at 1043. With regards to any adequate and independent state grounds for the decision, the Court held that state courts must "make clear by a plain statement" if they were using federal precedent in their analyses but resting on adequate and independent state grounds. *Id*. at 1040-42. In this way the Court had greater leeway to review state court decisions. Justice Stevens in dissent argued that given scarce federal judicial resources, federal jurisdiction should be exercised when it is clearly necessary and therefore to presume that adequate state grounds are based on federal decisions goes against a strong sentiment to limit federal court jurisdiction. *Id.* at 1067.

between federal and state law enforcement officers, provides the basis for potential conflict between state and federal courts. The thrust of this article will look to the federalism issues when a state court seeks to apply its own legal and evidentiary standards with regard to evidence legally obtained by a federal official under federal standards. It will focus specifically on federal law enforcement actions authorized by the U.S.A. Patriot Act.[36]

II. State Courts and Federally-obtained Evidence

The question posed by this article is whether evidence seized by federal agents acting lawfully and in conformity with federal standards is admissible in state courts when the search would have been illegal under state law. The majority of state courts have held that this type of evidence is admissible, unless the federal and state police worked together in a manner that satisfies the state action requirement.[37] These courts reason that it does not make sense to exclude such evidence because state law cannot directly control or deter the conduct of federal officers.[38] These courts often analogize the activities of law enforcement personnel of other jurisdictions to actions of private citizens or foreign officials, whom they have no power to control.[39] As the Supreme

[36] USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).
[37] The state action requirement asks whether federal and state police were working so closely so that federal officials were agents of the state. In Commonwealth v Gonzales 688 N.E.2d 455 (Mass.1997) evidence produced by federal DEA agent was allowed into state court because the state involvement did not amount to a combined enterprise. In this case a Massachusetts statute (G.L. c. 272 Section 99) specifically exempted federal officers from a violation of Mass. laws if they were acting pursuant to federal law.
[38] Pooley v. State, 705 P.2d 1293 (Ala. 1985); People v. Phillips, 711 P.2d 423 (Cal. 1985); People v. Blair, 602 P.2d 738 (Cal. 1979); Basham v. Commonwealth., 675 S.W.2d 376 (Ken. 1984); Commonwealth v. Gonzalez, 688 N.E.2d 455 (Mass. 1997)); State v. Hudson, 849 S.W.2d 309 (Tenn. 1993); State v. Dreibelbis, 511 A.2d 307 (Vt. 1986); In Re Teddington, 808 P.2d 156 (Wash. 1991); People v. Fidler, 391 N.E.2d 210 (Ill.Ct.App. 1979).
[39] Pooley v. State, 705 P.2d 1293, 1301 (Alaska Ct. App. 1985). Similarly, in federal courts, foreign officials typically are not governed by constitutional restraints. *See* United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994); United States v. LaChapelle, 869 F.2d 488 (9th Cir. 1989); United States v. Maher, 645 F.2d 780 (9th Cir. 1981); Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965). Foreign

Court of New Jersey stated in State v. Mollica, "a state constitution ordinarily governs only the conduct of the state's own agents or others acting under color of state law."[40]

For example, the Court of Appeals of Texas refused to apply state law to evidence lawfully obtained by a federal official.[41] In *Pena*, federal agents operating in conformity with federal standards near the border turned over evidence to state agents. Even though the federal agents' action did not meet a higher burden imposed by state law, the court admitted the evidence. The court characterized the situation as a "reverse silver-platter" doctrine, writing "protection afforded by the Constitution of a sovereign entity controls the actions only of the agents of that sovereign entity."

Some courts do apply state standards to exclude this type of evidence, however, and it is possible that more states will want to exclude such evidence as the Supreme Court has continued to narrow the Exclusionary Rule[42] and Congress has expanded

---

officials are governed when they acted as agents of American law enforcement agents or when their search "shocks the conscience." *Id.*

[40] State v. Mollica, 554 A.2d 1315, 1324 (N.J. 1989).

[41] Pena v. Texas, 61 S.W.3d 745 (2001).

[42] In Hudson v. Michigan, 126 S.Ct. 2159 (2006), the Supreme Court held that the exclusionary rule does not apply to violations of the knock and announce rule, but left intact the knock and announce rule as a part of Fourth Amendment analysis. The Court held that the interests protected by the knock and announce rule—protecting life and limb, avoiding property destruction, and protecting personal privacy and dignity—would not be served by suppression of the evidence; thus, causation is too attenuated to apply the exclusionary rule. Id. at 2164-65. The Court also reasoned that since the substantial social costs of applying the exclusionary rule to knock and announce violations outweigh its deterrence benefits, the exclusionary rule does not apply. Id. at 2165-66. The Court's majority found that alternative remedies, such as civil suits under 42 U.S.C §1983, could suffice to deter knock and announce violations; the dissent found this unsatisfactory, arguing that the Court's previous inquiries had determined these remedies to be "worthless and futile." Id. at 1274-75.

Several Circuits have applied Hudson to reject the suppression of evidence. The First Circuit held that a knock and announce violation during the execution of an arrest warrant does not trigger the exclusionary rule. US v. Pelletier, 469 F.3d 194 (1st Cir., 2006). In Hector v. United States, the Ninth Circuit rejected suppression, holding that even if a failure to provide a copy of a warrant were a constitutional violation, it would not be the "unattenuated but-for cause" of obtaining the evidence. 474 F.3d 1150. In United States v. Bruno, No. 05-41763, 2007 WL 1454359 (5th Cir. (Tex.) May 18, 2007), the Fifth Circuit held that the exclusionary rule is inapplicable to violations of the statutory knock and announce rule, as well as the Fourth Amendment rule addressed in Hudson.

Martin Estrada, in *The Rise and Fall of the Constitutional Knock and Announce Rule,* 54-FEB Fed. Law. 52, at 56-57, argues that, since the Court had declined in several previous cases to sever the

federal law enforcement powers with the USA Patriot Act.[43] The courts that have excluded this type of evidence have tended not to address the federalism issue in their opinions, however. Instead, they simply have applied their state laws to the federal agents without providing reasoning,[44] or they have determined that the objective of the state's exclusionary rule was furthered through exclusion of the evidence.[45]

One example of a court applying its state laws without addressing federalism is People v. Griminger, decided by the Court of Appeals of New York in 1988. There, a U.S. Secret Service Agent sought and obtained a warrant from a federal magistrate to search the defendant's home after an arrested counterfeiting suspect identified the defendant as a drug-dealer.[46] The resulting search corroborated the informant's story, and produced ten ounces of marijuana, over six thousand dollars in cash, and drug-related paraphernalia. The Secret Service turned over the evidence to state authorities for prosecution in state court and the defendant sought to suppress the evidence citing that

---

knock and announce rule from the exclusionary rule, this decision represents a change in the Court's approach to the exclusionary rule that could reach well beyond knock and announce violations. Since the social costs of applying the exclusionary rule often include a high likelihood of permitting guilty defendants to go free—a substantial social cost—the Court's cost-benefit analysis in Hudson has the potential to restrict further the exclusion of evidence if applied to other Fourth Amendment violations. Id.

[43] For example, Patriot Act §218 amended the Foreign Intelligence Surveillance Act (FISA) to extend its searches and surveillance with reduced protections to cases where criminal investigation is the primary purpose. Alison Siegler, *The Patriot Act's Erosion of Constitutional Rights*, 32 NO. 2 Litigation 18 (2006). Relaxed protections against Fourth Amendment violations under FISA historically had been justified on the basis that its purpose was foreign counter-intelligence investigations. Id.

Section 213 of the Patriot Act permits delayed notification (sneak and peek) search warrants in ordinary criminal cases, as long as the government is able to show to the issuing magistrate that immediate notification may have an adverse result. 18 U.S.C. §3103a; Siegler, *supra*, at 22. In one case, this provision was used to surreptitiously inspect a storage locker during an investigation of the murder of a federal witness in a health care fraud case. United States v. Mikos, No. 02CR 137-1, 2003 WL 22462560, at *1 (N.D.Ill. Oct. 29, 2003). Other instances have "rang[ed] from a secret search of a judge's chambers in an effort to uncover judicial corruption to the clandestine search of a nursing home during a healthcare fraud investigation." Siegler, *supra*, at 22. Section 213 is discussed in detail below. See infra pp. 46-47.

[44] Moran v. State, 644 N.E.2d 536 (Ind. 1994); People v. Griminger, 524 N.E.2d 409 (N.Y. 1988).
[45] State v. Cardenas-Alvarez, 25 P.3d 227 (N.M. 2001); State v. Rodriguez, 854 P.2d 399 (Or. 1993).
[46] People v. Griminger, 71 N.Y. 2d 635 (1988).

the warrant lacked probable cause because it had not satisfied the reliability prong of the state's *Aguillar-Spinnelli* test.[47] The Court of Appeals of New York agreed, holding that the state was governed by a more stringent probable cause[48] standard than the one adopted by the U. S. Supreme Court.[49] Reasoning that "[s]ince defendant has been tried for crimes defined by the State's penal law, we can discern no reason why he should not also be afforded the benefit of our State's search and seizure protection…",[50] the court dismissed the argument that a federal official executing a warrant from a federal magistrate should be governed by the more flexible federal standard.[51] The court did not expressly mention federalism in its decision.

Other state courts conduct an exclusionary rule analysis to determine whether to admit evidence obtained by a federal law enforcement agent pursuant to federal law but in violation of state law.[52] These courts examine the policy reasons underlying their states' exclusionary rules, which typically are deterrence, judicial integrity, and protection of individual rights.[53] States with a deterrent objective typically admit this

---

[47] *Id.* at 638. In Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court adopted a so-called two prong test for a magistrate to evaluate information provided by an unnamed informant. This test was further elaborated on in Spinelli v. United States, 393 U.S. 410 (1969). One prong asks why is the informant reliable and the second prong asks how did the informant get the information provided. *See id.*

[48] People v. Johnson, 66 N.Y. 2d 398 (1985).

[49] In Illinois v. Gates, 462 U.S. 213 (1983), the Supreme Court abandoned the two prong test and adopted a more flexible test so the prongs are no longer independently evaluated. The Court characterized the two prong test as too rigid and opted for a totality-of-the-circumstances approach.

[50] *Id*. at 641.

[51] *Id.*

[52] State v. Mollica, 554 A.2d 1315, 1324 (N.J. 1989); State v. Cardenas-Alvarez, 25 P.3d 227 (N.M. 2001); King v. State, 746 S.W.2d 515 (Tex. Ct. App. 1988).

[53] FRIESEN, JENNIFER, STATE CONSTITUTIONAL LAW, §11.03[4][a] (4th ed. 2006). The Weeks Court introduced the notion of judicial integrity, writing that illegal police behavior "should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks,* 232 U.S. 383, 392 (1914).

type of evidence, [54] while states seeking to promote judicial integrity or protect individual rights typically exclude the evidence.[55]

An example of a state whose exclusionary rule's purpose is deterrence is New Jersey. As previously mentioned, its Supreme Court decided to admit disputed evidence in State v. Mollica in 1989.[56] There, federal law enforcement officers obtained hotel billing records relating to defendant's use of his room phone. They gave the records to state officials who obtained a warrant. The procurement of these records is legal under federal law,[57] but constitutes an unreasonable search under New Jersey law.[58] The court, in refusing to suppress the evidence resulting from the search warrant, looked to the deterrent purpose of the state's exclusionary rule. The court concluded, "no purpose of deterrence relating to the conduct of state officials is frustrated, because it is only the conduct of another jurisdiction's officials that is involved."[59]

Notably, the New Jersey Supreme Court, commenting on new federalism, wrote that its approval of federal action supported federalism. "Because the constitution of a state has inherent jurisdictional limitations and can provide broader protections than found in the United States Constitution…, the application of the state constitution to the officers of another jurisdiction would disserve the principles of federalism."[60] The court reasoned that protections afforded to criminals by an individual state constitution only

[54] Pena v. Texas, 61 S.W.3d 745, 754 (2001). "Because federal officers operate throughout all the various states, in the exercise of federal jurisdiction, under federal authority, and in accordance with federal standards, they are treated in state court as officers from another jurisdiction." *See id. See also* State v. Mollica, 554 A.2d 1315 (N.J. 1989).
[55] State v. Cardenas-Alvarez, 25 P.3d 227 (N.M. 2001).
[56] 554 A.2d 1315 (N.J. 1989).
[57] There is no Fourth Amendment applicability when the state obtains information voluntarily provided to third parties. *See* Smith v. Maryland, 442 U.S. 735 (1979).
[58] State v. Hunt, 91 N.J. 338 (1982).
[59] *Mollica,* 554 A.2d at 1328.
[60] *Mollica*, 554 A.2d at 1327.

apply to the law enforcement personnel of that state and cannot be used to control the actions of police from other states or a foreign jurisdiction. "Stated simply," the court wrote, "state constitutions do not control federal action."[61]

An example of a state whose exclusionary rule purpose is protecting individual rights is New Mexico. There, the Supreme Court of New Mexico interpreted its exclusionary rule to "effectuate…the constitutional right of the accused to be free from unreasonable search and seizure."[62] In *Cardenas-Alvarez*, the court held that the state constitution's exclusionary rule applies to federal officers because those officers possess the authority to subject New Mexico residents to searches and seizures, and therefore those officers are governed by New Mexico law. Because protecting citizens from such an intrusion is the purpose of the exclusionary rule, the court held that the rule must apply to evidence seized by federal officers when the state seeks to use it in state court.[63] Thus, the court suppressed evidence obtained by a federal Border Patrol agent pursuant to federal law but in violation of New Mexico law.

The issue of federalism was raised by a concurrence that expressed concern for the court "making illegal what federal law makes legal for federal agents."[64] "I fear that the majority leads this Court into dangerous territory by interrupting the delicate balance between state and federal power."[65] The concurrence wrote that the New Mexico constitution does not apply to federal agents for two reasons: 1) the provisions of a constitution generally relate only to the sovereign that is the subject of that constitution and 2) given the absence of any federal precedent allowing the provisions of a state

[61] *Id.* at 1327.
[62] *Cardenas-Alvarez*, 25 P.3d at 232.
[63] Id. at 232.
[64] *Id.*at 237.

constitution to apply to federal actors, such application violates federal supremacy.[66] The concurring justice quoted *Bivens* that "state law [may not] undertake to limit the extent to which federal law can be exercised."[67] The majority minimized this concern by noting that the decision only affected evidence introduced in state court and did not preclude federal officials from using the evidence in federal court or otherwise restrict their activities within the border.[68]

The concurrence in *Cardenaz-Alvarez* raises federalism concerns that are ignored by most states applying state law to exclude evidence lawfully obtained by federal agents pursuant to federal law. The next Part explores these federalism issues in detail.

III. Federalism

As highlighted in the decisions above, the issue of when a state court may exclude evidence seized by a federal agent acting lawfully under federal law but unlawfully under state law raises many questions that touch the crucial relationship between the state and federal governments: Should federal law enforcement agents, for reasons of comity, be subject to different standards depending on which state they are in? What power does a state have to tell a federal agent how to act?[69] May states through their evidentiary rules reject evidence obtained by federal officers in the discharge of their federal duties?[70]

---

[65] *Id.* at 234 (Baca, J., concurring).
[66] *Id.* at 235-37.
[67] *Id.* at 236 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 395 (1971)).
[68] Also see State v. Rodriguez, 854 P.2d 399 (Or. 1993) for a similar decision involving evidence obtained by special agents of the INS.
[69] The federal government does not have the power to direct state legislatures or officials.. *See* Printz, v. United States 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).
[70] *See* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003) for an argument that states may not prosecute federal officers acting reasonably within the scope of their employment and may not pass statutes subjecting federal officer to greater liability for Constitutional violations than that provided by *Bivens*.

Does the doctrine of pre-emption ultimately preclude a state court from utilizing its own evidentiary standard in this context?

The questions surrounding this issue are all timely and pressing in the wake of the September 11 attacks and the Bush administration's War on Terror. Federal legislation addressing terrorism gives federal officials greater power, greater flexibility, and greater means to investigate crime. It is likely that some of these new powers are constitutional under the U.S. Constitution, but illegal under an individual state's laws. This tension is especially relevant because terrorism has triggered a new era of cooperation between federal and state law enforcement officers.[71] In fact, one of the primary recommendations of the 9/11 Commission is to increase cooperation between federal and state law enforcement agencies in order to deter and prevent future domestic terrorist attacks.[72] FBI director Robert Mueller in testimony before the Senate Intelligence Committee in February 2003, characterized local police as "important force multipliers" for federal police intelligence gathering.[73]

There is an interesting dynamic at play in the call for greater cooperation between federal and state law enforcement agencies to fight terrorism. On some issues prior to 9/11, including racial profiling, the federal government urged states to limit certain practices[74] and many states complied.[75] Since 9/11, however, state law enforcement

---

[71] John P. Mudd, Deputy Director, FBI, *In Domestic Intelligence Gathering, the FBI is Definitely on the Case*, WALL ST. J., Mar, 21, 2007, at A17 (noting that in recent years the FBI has "shifted massive resources into counterterrorism and counterintelligence, and made commensurate advances in [its] relationships with state and local law enforcement, tripling the number of joint terrorism task forces."). The mission of these task forces, which include local and state police officers, is to "prevent acts of terrorism before they occur, and to effectively and swiftly respond to any actual criminal terrorist act by identifying and prosecuting those responsible." http://boston.fbi.gov/taskforce.htm

[72] THE 9/11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 2004 , www.9-11commission.gov/report, at Chapter 13, 399-400.

[73] Cisun Lee, *The Force Multipliers*, THE VILLAGE VOICE, Feb. 26, 2003, at 25.

[74] In speech before Joint Session of Congress, President Bush in January 2001 directed Attorney General Ashcroft to develop guidelines for racial profiling. Attorney General Ashcroft ordered the Civil Rights

officials have been reluctant to carry out the directives and policies of the federal government, particularly those applying to immigrants.[76] This reluctance might bolster the state courts' purpose to protect individual rights within their borders.[77]

Terrorism in particular has the potential to change the federalism landscape.[78] In the past, liberals traditionally have championed initiatives to make the federal government stronger while conservatives have sought to restrain federal powers through the Tenth Amendment. Indeed, since the early 1990s, a five member majority[79] of what was then the Rehnquist Supreme Court consistently promoted state sovereignty when determining federalism issues through the Tenth Amendment and the Commerce Clause.[80] The majority's concern for states' rights in relation to these two constitutional provisions was particularly heightened in regards to traditional police power in the enforcement of criminal law.[81]

A. *States' Rights and the Tenth Amendment*

Division of the Department of Justice to develop guidance to end racial profiling. Before guidance was issued, terrorist events of September 11, 2001 took place. (The *Guidance* was issued by Civil Rights Division in June 2003, taking into account terrorist concerns. Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), www.usdoj.gov/crt/split/documents/guidance_on_race.pdf.

[75] 2000 state anti-racial profiling law in Massachusetts requires traffic citations to indicate the race of the violator so that the racial aspect of traffic stops can be monitored. Laws for 2000 Act 228 approved by Governor August 10, 2000.

[76] Clear Law Enforcement for Criminal Alien Removal Act of 2005, H.R. 3137, 109th Cong. (2005). Terry Golway, *Back Into the Shadows*, NY TIMES, Feb. 20, 2005.

[77] See Kiera Hay**,** *Calif. Officials Denounce Raids*, ALBUQUERQUE JOURNAL (Santa Fe North Edition), March 1, 2007, at 1; available at http://www.abqjournal.com/santafe/542283north_news03-01-07.htm

[78] Susan N. Herman, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L.REV. 1201 (2004).

[79] Justices Rehnquist, Scalia, Thomas, Kennedy and O'Connor.

[80] Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, April 17, 2005. "The Rehnquist court in recent years has proved more sympathetic to enforcing limits on Congress' power than any court since 1937: between 1995 and 2003, the court struck down 33 federal laws on constitutional grounds-a higher annual rate than any other Supreme Court in history." *See id.*

[81] See Justice Thomas' dissent in Gonzales v. Raich, 545 U.S. 1, 62-64 (2005).

In recent Tenth Amendment decisions, the Court has restricted Congress's ability to regulate state legislatures and executives. Specifically, it has held that Congress may not require the states to act affirmatively.[82] In doing so, the Court has stressed the importance of the Tenth Amendment. In New York v. United States[83] the Court refused to allow Congress to impose on the states the obligation to take affirmative steps to enact a federal regulatory program (nuclear waste facilities). In Printz v. United States, the Court held that Congress cannot direct state law enforcement officials to implement federal legislation.[84] Specifically, the Court in *Printz* considered whether hand gun legislation could command the chief state law enforcement officer designated by the state to conduct background checks. Writing for the majority, Justice Scalia pointed to the history and structure of the Constitution in regards to state sovereignty and held that Congress could not force a state to implement a federal regulatory program. It is interesting to note that Justice Stevens in dissent asked prophetically whether states could be required to perform in a case of national emergency resulting from international terrorism.[85]

These cases do not directly resolve the problem raised by this article. They do, however, demonstrate the Court's concern for the power of states when dealing with traditional Tenth Amendment issues. Certainly the criminal adjudication process within a state court system is the type of responsibility reserved to the state by the Tenth Amendment.

B. *States' Rights and the Commerce Clause*

---

[82] A related question is whether Congress may regulate state courts. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001). Professor Bellia argues that Congress has no authority to prescribe procedural rules for state courts to follow in state law cases. *Id.*

[83] 505 U.S.144, 178 (1992).

Further indications of the Court's willingness to restrict the power of Congress vis a vis the states can be found in the Court's interpretation of the Commerce Clause. From 1936 to the 1995 decision in United States v. Lopez,[86] the Court did not find a single Congressional Act unconstitutional because it violated the Commerce Clause.[87] Then, in *Lopez*, the Court reviewed the Gun-Free School Zone Act of 1990, which made it a federal crime to possess a gun within one thousand feet of a school zone. Chief Justice Rehnquist concluded in the opinion of the Court that the act was unconstitutional because it did not substantially affect interstate commerce.[88] Although not specifically mentioning the Tenth Amendment, the Court stressed the importance of the state's power to deal with criminal matters, writing "States possess primary authority for defending and enforcing criminal law."[89] The Court further explained that "[u]nder our federal system, the administration of criminal justice rests with the State except as Congress, acting within the scope of these delegated powers, has created offenses against the United States."[90]

Justice Kennedy, concurring, talked about the balancing of scales to insure the appropriate alignment of power between the state and federal governments.[91] Justice

---

[84] 521 U.S. 898, 933 (1997).
[85] *Id*. at 940.
[86] *Lopez*, 514 U.S. 549 (1995).
[87] Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 260 (2nd ed. 2002). *See also* Judge Louis H. Pollak, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995).
[88] In his analysis, Rehnquist chose the more narrow "substantially affect" standard as opposed to simple "affect" in declaring the act unconstitutional. This choice indicates his concern for state sovereignty and by inference his attitude for principles of federalism.
[89] *Lopez*, 514 U.S. at 561n.3 (citing Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).
[90] *Id.* (quoting Screw v. United States, 325 U.S. 91, 109 (1945).
[91] *Id*. at 578.

Thomas, also in concurrence, pointed out that the Constitution gives federal government only enumerated powers and was not intended to abrogate state criminal institutions.[92]

Next, in United States v. Morrison in 2000, the Court invalidated the federal Violence Against Women Act (authorizing victims of domestic abuse to sue for monetary damages). The Court held that Congress did not have the power to so legislate under the Commerce Clause because domestic abuse did not have a substantial effect on interstate commerce.[93] The majority felt this was the type of non-economic activity traditionally regulated by the states. To uphold the Act would give Congress power to regulate all violent crime, an area the Court felt was better left to the states.

These Commerce Clause cases indicate the Court's reluctance to allow Congress to regulate criminal conduct. In its most recent decision of Gonzales v. Raich, however, the Court upheld the constitutionality of the federal Controlled Substances Act (CSA) as consistent with Commerce Clause power.[94] This might be seen as a setback for the "new federalism."[95] The validity of the CSA, a comprehensive regulation of the interstate market in drugs, was not at issue in the case. Rather, the plaintiffs challenged the statute as applied to purely intrastate conduct, possession of marijuana. Thus, the issue in *Raich* was quite different from those in *Lopez* and *Morrison*, which involved on its face challenges to statutes having nothing to do with economic or commercial activity.

In a decision by Justice Stevens, joined by his three compatriots who dissented in *Lopez* and *Morrison* (Justices Souter, Ginsburg and Breyer) and Justice Kennedy; with

---

[92] Id. at 584.
[93] *Morrison,* 529 U.S. 598 (2000). Another 5-4, the same split as in *Lopez*.
[94] Gonzales v. Raich, 545 U.S. 1 (2005).
[95] *Id*. Professor George Brown in his article *Counterrevolution?—National Criminal Law after* Raich, characterized the *Raich* decision as "more of a stopping point, a refusal to extend, than any form of serious cutting back of the basic thrust of *Lopez* and *Morrison."* George Brown, *Counterrevolution?—National Criminal Justice After* Raich, 66 OHIO ST L.J. 947, 986 (2005).

Justice Scalia concurring in the judgment, the Court found that Congress could regulate the cultivation of marijuana.[96] Notably, in her dissent Justice O'Connor expressed disappointment that the Court in applying the Commerce Clause did not consider the state's role in the criminal law area. "Because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases it is relevant that this case involves the interplay of federal and state regulations in areas of criminal law and social policy where a state lay claims by right of history and expertise."[97] She wrote that the federal government should bear the burden to justify its regulation in these areas.

Lopez, *Morrison*, and *Raich* provide evidence that the Court splits along ideological lines. Those upholding the power of Congress favor a strong federal government whereas those finding that Congress has overstepped its bounds seek to insure the sovereignty of the individual states. The role of law enforcement in the War on Terror may represent a paradigm shift in this regard. With preoccupation by the federal government on the War on Terror and the resulting legislation that poses a reduction in individual liberty, the proponents of a strong central government now might favor greater state protections of the individual. On the other hand, with the government's focus on national security, centralized federal authority might seem necessary to those who typically favor state authority. Will the terrorism threat have the effect of changing the Justices' alliances on these impartial federalism issues?[98]

---

[96] The decision did not address whether a California law allowing for limited marijuana use for medicinal purposes could be used as a defense if the case were prosecuted in state court. The Court noted that it was not interested in the California criminal statute. *Raich*, 545 U.S. at 16. The decision dealt with the cultivation and production of marijuana, not the criminal conduct associated with it. Unlike Lopez, this case was not brought before the Supreme Court to enjoin criminal enforcement of the CSA, but rather to invalidate the portion of the law enabling DEA agents to destroy marijuana plants.

[97] *Raich,* 545 U.S. at 48 (citing *Lopez*, 514 U.S. at 583).

[98] Susan N. Herman, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L.REV. 1201, 1205-06 (2004). It is interesting to note that the Justices departed from their

The relationship and allocations of power between federal and state entities are constantly in a state of flux. While the Constitution provides the general outline, exact contours remain fluid and ambiguous. This tension is especially apparent in examining what power state courts have over the actions of federal law enforcement.

C. *State Control over Federal Law Enforcement*

State courts generally cannot tell federal officials what to do.[99] In *Tarble*, decided in 1872, a Wisconsin state magistrate issued a writ of habeas corpus directing a recruiter for the United States Army to discharge a soldier on the grounds that the soldier was a minor who had enlisted without the consent of his father.[100] The Court held that the state had no power to compel the recruiter to act. Reasoning that within each state there were two sovereigns "independent of each other and supreme within their respective spheres,"[101] Justice Field explained that should a conflict exist, the law of the United States would be Supreme as enumerated in the Constitution. Justice Brennan reiterated this principle in his majority opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics[102] stating: "For just as state law may not authorize federal agents to violate the Fourth Amendment… neither may state law undertake to limit the extent to which federal authority can be exercised."[103]

---

typical positions regarding states' rights in the 2006 case of Gonzales v. Oregon, in which the Court considered the applicability of the federal Controlled Substance Act (CSA) to a state-created physician assisted suicide law. 546 U.S. 243 (2006). The majority, including Justices who typically favor a strong central government, held that the CSA does not prohibit doctors from prescribing regulated drugs for purposes of suicide. Id. Notably, Justices Thomas and Scalia, who consistently have sought to limit federal power vis a vis the state, dissented in the decision.

[99] In re Tarble, 80 U.S. 397 (1872).

[100] *Id*. at 398.

[101] *Id*. at 406.

[102] 403 U.S. 388 (1971).

[103] *Id* at 395.

Federal officials are sometimes subjected to state standards, however. For example, federal prosecutors are subject to state ethics rules even though they operate in federal courts.[104] This is not a function of federalism, but rather the result of the McDade Act, passed by Congress in 1999.[105] The Act mandates that federal attorneys are bound by states' professional rules "to the same extent and in the same manner as other attorneys in that state."[106] Thus, federal prosecutors must follow rules of professional ethics, but not state substantive or procedural rules that are inconsistent with federal law in violation of the Supremacy Clause.[107]

In addition to ethics rules for federal prosecutors varying by state, the application of federal criminal law also often varies by state. This is because the federal government often borrows from state criminal laws and outcomes.[108] For example, the federal government uses state criminal history information in federal prosecutions to calculate sentences under the Sentencing Guidelines and also uses this information to charge felon-in-possession cases.[109] In addition, the federal government sometimes borrows actual state criminal laws.[110] In doing so, the federal government infuses its own law "with the normative judgments of the respective states."[111] Rather than being applied uniformly nationwide, the application of federal law varies by state.

---

[104] R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (West 2005).
[105] 28 U.S.C. §530B (2006).
[106] §530B (a).
[107] United States v. Colorado Supreme Court, 189 F.3d 1281, 1284 (10th Cir. 1999).
[108] Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65 (2006).
[109] *Id.* at 75-83.
[110] For example, the Assimilative Crimes Act authorizes the use of state criminal law in federal enclaves in certain circumstances. 18 U.S.C. §13(a) (2000). *See* Logan, *supra* note 104 at 71. Federal courts also apply state law in civil diversity of citizenship cases under the *Erie* Doctrine.
[111] Logan, *supra* note 104, at 67.

Given this background, is it appropriate for state courts to exclude the evidence at issue in this article (evidence obtained by federal agents pursuant to federal law but in violation of state law)? Although *Tarble* holds that a state may not directly control or order a federal agent's actions, the situation in *Tarble* is distinguishable from the issue presented by this article. When state courts refuse to accept evidence obtained through a federal agent's legal compliance with a lesser federal standard, they are not controlling the agent, but merely controlling their own judicial system. Unlike the situation presented in *Tarble*, such states are not attempting to regulate the agent's conduct. Instead, they are struggling with how to deal with that agent's completed action in a state criminal proceeding.[112] This area always has been left to the States. How, then, may states exclude this evidence while taking important federalism issues into consideration?

IV. ERIE

The problem raised by this article requires a resolution that addresses the federalism question. One possible answer, and the approach this article suggests, is to apply the approach taken by the Erie Doctrine.[113] Despite resurrecting the nightmares of first-year law students, the Erie doctrine provides an effective framework in determining whether the evidence that results from a federal law enforcement agent acting legally under federal law should be admitted in state court when the agent's actions constitute a violation of state law.

---

[112] But see *Cardenas-Alvarez*, 25 P.3d at 237 (Baca, J. concurring) (writing that in applying state law to exclude evidence obtain legally by a federal official pursuant to federal law, the majority was "not merely promulgating a rule of evidence, but creating a state constitutional right" and noting that individuals whose rights are violated might then invoke the judicial process and seek compensation similar to a *Bivens* claim.)
[113] Erie v. Tompkins, 304 U.S. 64 (1938).

The Erie Doctrine generally speaking determines which law a federal court sitting on a diversity case should apply when there is a conflict between federal and state law.[114] *Erie* "announces no technical doctrine of procedure or jurisdiction but goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government."[115] Under the *Erie* doctrine, federal courts apply state law when the law is regarded as substantive and federal law when the law is regarded as procedural. As the Court points out, "classification of a law as "substantive" or "procedural" for Erie purposes is sometimes a challenging endeavor."[116] To determine the Erie substantive procedural divide, the Court has developed three tests: the outcome determinative test,[117] the refined outcome determinative test,[118] and the balancing test.[119] The balancing test works best for the purposes of this analysis.

In the balancing test, the court weighs the state interest against the federal interest. On the state side of the balance, the court weighs the importance of a particular law to a state's statutory scheme and asks how bound up a particular practice is to the state's legislative policy. Also on the state side of the balance is an outcome determinative

---

[114] Gasperini v. Center for Humanities Inc., 518 U.S. 415, 416 (1996); Hanna v. Plumer, 380 U.S. 460 (1965); *id.* Prior to *Erie*, federal judges sitting in diversity could ignore state law and apply federal common law so as to promote uniformity between federal courts under the Swift Doctrine. Swift v. Tyson, 41 U.S. 1 (1842). Ultimately, this practice resulted in widespread forum shopping because federal and state courts in the same state were applying different laws. *Erie*, 304 U.S. at 76-77. The Erie decision recognized that federal courts were limited by the Constitution in creating general common law applicable to the states because the Tenth Amendment left many matters to the states. Although the decision by Brandeis in *Erie* did not directly refer to the Tenth Amendment, he did state that the *Swift* scheme was unconstitutional and some have interpreted the language "in applying the *Swift* doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."as referring to the Tenth Amendment *Erie*, 304 U.S. at 79-80. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 207-210 (4th ed. 2005

[115] Charles Alan Wright, FEDERAL PRACTICE & PROCEDURE §55 (3rd ed. 1998).

[116] Gasperini v. Center for Humanities Inc., 518 U.S. 415, 416 (1996).

[117] Guaranty Trust v. York, 326 U.S. 99 (1945).

[118] Hanna v. Plumer, 380 U.S. 460 (1965).

analysis—the degree of probability that the outcome will be affected by the choice between federal and state law. On the federal side of the balance, the court considers the importance of the law to federal policy.

In its interpretations of the *Erie* decision, the Supreme Court has been very cognizant of the supremacy of federal law. In the case of a Federal Rule of Civil Procedure in direct conflict with a state rule, the federal rule applies because of the Supremacy Clause.[120] In the event of a conflict between a state practice or law and federal law, the Court has interpreted federal law narrowly to avoid a conflict.[121] In these situations the conflict is with federal practice. When there is no direct conflict with federal legislation that implicates the Supremacy Clause, the Court has engaged in a so-called "unguided *Erie*" analysis.[122] Some commentators have suggested the "unguided" aspect refers to courts employing whatever test provides the desired outcome.[123]

The recent decision of the Court in Gasperini v. Center for Humanities Inc. provides a good illustration of some of these concepts and demonstrates how the Court utilizes whatever approach will result in the desired outcome.[124] Indeed, one of the more interesting aspects of *Gasperini* is that it utilized various pieces of the *Erie* analysis to arrive at its desired results.[125]

In *Gasperini,* a jury awarded damages in the amount of $450,000 to a plaintiff in federal court in New York. The defendants moved for a new trial claiming that the

---

[119] Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,* 356 U.S. 525 (1958).
[120] Hanna v. Plumer, 380 U.S. 460 (1965).
[121] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).
[122] *Hanna, 380 U.S.* at 471.
[123] Gregory Gelfand and Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U.PITT. L. REV. 937 (1988).
[124] 518 U.S. 415 (1996).
[125] Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini*,* 46 U. KAN. L. REV. 751 (1998).

damages were excessive. New York State law allows a trial judge to set aside a jury damage verdict when it "deviates materially from what would be reasonable compensation."[126] Federal Rule of Civil Procedure 59 does not specifically address excessive damages, but courts have allowed for new trials when the verdict "shocks the conscience".[127]

Thus, the conflict in *Gasperini* pitted a lesser state law standard (deviates materially) that allowed the trial judge to set aside the verdict against a more stringent federal standard (shocks the conscience). In resolving this conflict, the Court read FRCP 59 narrowly, holding that there was nothing in the rule that indicated the standard for excessive damages. This interpretation avoided a direct conflict between the two standards that would have necessitated applying the federal standard because of the Supremacy Clause. The Court applied the New York law because it was substantive, part of a tort reform movement to reduce excessive verdicts (bound up with substantive policy), and because the difference in law (outcome determinative) might result in forum shopping as plaintiffs might want to avoid a trial judge overturning a jury verdict.

The second issue in *Gasperini* involved the appellate process. The New York state tort reform statute directs appellate courts to review the trial judge's determination *de-novo*.[128] The federal standard on the other hand, defers to the trial court and reviews a factual decision only if there has been an abuse of discretion by the trial judge. The

[126] *Gasperini,* 518 U.S. at 425.
[127] *Id.* at 429.
[128] Review everything as though it had not been determined previously.

Court resolved this conflict in favor of the federal standard finding a strong federal interest, thus implying the use of a balancing test approach.[129]

Just as federal courts must decide which law to apply, state courts often must decide whether to apply state or federal law.[130] This occurs when state courts hear federal claims, as required under their concurrent jurisdiction.[131] When state courts hear federal claims, they may apply their own procedural rules unless those rules are preempted under federal law.[132] With regards to the elements and defenses, however, state courts must apply federal law.[133] When a state court hears a federally created cause of action, the Supremacy Clause mandates that the "federal right [not] be defeated by the forms of local practice."[134] Thus, just as federal courts sitting in diversity apply state substantive law and federal procedural law, state courts hearing federal claims apply federal law on clearly substantive questions and generally apply state law on clearly procedural questions..[135] Of course, many cases lie somewhere in the middle, involving quasi-procedural issues but no direct preemption or direct conflict with a federal statute.

---

[129] In its case review, however, the Harvard Law Review wrote that *Gasperini* eviscerated the *Byrd* balancing test because the Court declined to apply the approach even though both cases involved conflicts between state laws and judge-made federal practices. *See Erie Doctrine*, 110 HARV. L. REV. 256, 265 (1996).

[130] Kevin M. Clermont, *Federal Courts, Practice & Procedure: Reverse Erie*, 82 NOTRE DAME L. REV. 1, 23-37 (2006).

[131] Testa v. Katt, 330 U.S. 386, 394 (1947). Refusing to hear these federal claims is a violation of the Supremacy Clause. Id. Refusing to apply federal law because of disagreement with its content also violates the Supremacy Clause. Mondou v. New York, New Haven & Hartford R.R., 223 U.S. 1, 55-57 (1912).

[132] *See* Felder v. Casey, 487 U.S. 131, 138 (1988).

[133] Monessen Southwestern R.R. Co. v. Morgan, 486 U.S. 330, 335 (1988) (holding that proper measure of damages, including whether prejudgment interest may be awarded, is substantive issue to which federal law applies); Howlett v. Rose, 496 U.S. 356, 3-23 (1990) (holding that state law sovereign immunity defense not available in §1983 action brought in state court when such defense would not be available in federal court).

[134] Brown v. Western R. Co. of Alabama, 338 U.S. 294, 296 (1949).

[135] "Inverse-Erie" doctrine refers to cases where a state court hears a federal claim under concurrent jurisdiction. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 247-48 (4th ed. 2005). State courts are required to apply federal substantive law, but may apply state procedural rules. *Id.* at 248-49. The

For those cases, state courts conduct an analysis very similar to Erie in which they balance state interests, federal interests, and outcome differences.[136]

Before any court may conduct an Erie analysis, however, it must determine the nature of the conflict between federal and state law. Because federal law is supreme, the court must determine if federal law preempts state law. Thus a preemption analysis is necessary.

V. Preemption

A court conducts a preemption analysis to determine if there is a federal law that trumps the state law. Preemption is just another aspect of federalism as it allocates power between federal and state entities.

When a congressional act implicates important functions of state government there must be a clear indication from Congress that the act was intended to preempt. The Court has indicated that this so-called "plain statement rule" should be applied whenever a statute "upset[s] the usual constitutional balance of federal and state powers."[137] When dealing with the scope of a state's traditional police power, in particular, the Court has been reluctant to find preemption unless there is a clear Congressional purpose. "[T]he

---

Supreme Court has limited the application of state procedural rules, requiring state courts to mirror federal procedure in cases where this is deemed necessary to protect federal rights. *Id.* at 249.

[136] *See* Clermont, *supra* note 125 at 33 ["reverse-Erie balancing means no more than contextualized exercise of judgment in the face of competing interests."] The outcome differences the courts seek to avoid in reverse-Erie analysis vary slightly from those in Erie. *Id*. at 36. In reverse-Erie, the aim is prevention of interstate forum shopping in order to preserve uniformity of federal law from state to state. *Id*. Intrastate forum shopping is less of a concern than in the Erie setting because typically parties have equal access to federal court. *Id.* Thus, in reverse-Erie analysis the outcome determinative test weighs in favor of applying federal law, whereas in the Erie setting it weighs in favor of state law. *Id*. Reverse-Erie is a "more intrusive doctrine" as a result of the Supremacy Clause, in that state courts apply federal procedural law to federally created claims more than federal courts apply state procedural law to state claims. *Id.* at 38, 44.

[137] Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

assumption [is] that the historic powers of the states [are] not to be superseded by …Federal Act unless that is clear and manifest [intent] of Congress." [138]

Preemption can occur when a state law directly restricts the functioning of the federal government. For example a state may not require by statute that a federal postal employee have a state driver's license.[139] Neither can it require a state stamp on fertilizer when a federal law authorizes its distribution by a Department of Agriculture official.[140] As discussed above, states may not directly control federal officers. The question posed by this article is more nuanced, however.

With this general introduction to the Erie Doctrine and Preemption, this article now suggests a way for state courts to suppress evidence obtained by a federal officer pursuant to federal law. Utilizing this *Erie*-like analysis gives the state courts an analytical avenue to reach the desired result while recognizing important federalism issues.

VI. **Proposed Framework**

The *Erie* balancing test provides a useful framework for resolving the issue addressed by this article.[141] Under this framework, state courts deciding whether to admit evidence obtained by federal officers should identify the state interests that would be promoted by excluding the disputed evidence, and weigh those interests against the federal interests at stake.

---

[138] *Id*. at 485.
[139] Johnson v. Maryland, 254 U.S. 51 (1920).
[140] Mayo v. United States, 319 U.S. 441 (1943). These cases involved state laws which directly affects federal officials "in their specific attempt to obey order". *Johnson*, 254 U.S. at 57.
[141] Reverse-Erie does not apply directly because the issue posed by this article is whether a state court hearing a *state* crime should admit evidence obtained by a federal officer. Reverse –Erie refers to civil matters.

Application of this framework to the state cases that have ruled on this issue may lead to the same results reached by those courts under an exclusionary rule analysis. For example, where courts have decided to admit the evidence even though a federal official violated state law, the courts have looked at the purpose of the state exclusionary rule, found that its purpose is deterrence, and then ruled that because a federal official's jurisdiction is beyond the state, the deterrent rationale is inapplicable. "Thus, in that context, no purpose of deterrence relating to the conduct of state officials is frustrated because it is only conduct of another jurisdiction's officials that is involved."[142] Similarly, under the analysis proposed by this article, the state court should admit the evidence because the state substantive interest in regulating the behavior of agents outside its jurisdiction is much less strong than the federal interest in the ability of federal officers to introduce evidence obtained in compliance with federal law but not state law in state courts.

Further, where courts have decided to suppress the evidence, the courts have looked to protection of individual rights as the purpose of the exclusionary rule and found that this purpose is furthered by suppression of the evidence. Under the proposed framework, courts deciding to exclude such evidence would weigh the state substantive interest in protecting individual rights and the outcome determinative effect of any contested physical evidence against the federal interest mentioned above. Here a court reasonably could conclude that the strong state interest outweighs the federal interest.

When considering the state's interests, courts must consider the outcome determinative effect. In the criminal context, however, it is difficult to determine if suppression of the evidence actually is outcome determinative because the remainder of

[142] State v. Mollica, 554 A.2d 1315, 1328 (N.J. 1989).

the evidence might be sufficient for conviction. Therefore, in translating the outcome determinative aspect of the *Erie* balancing test to the criminal context, the harmless error standard presents the best approach.[143] The key question in this analysis is: Can the government demonstrate beyond a reasonable doubt that the introduction of the evidence will have no effect on the jury decision?[144] In answering this question the court would have to examine the other evidence and determine the importance of the evidence in question to the government's case. Because contested physical evidence often is crucial to the government proving its case, it may well have a substantial outcome determinative effect. If this is so, the test weighs in favor of applying state law which would protect the individual.

VII. **Hypothetical**

It may be helpful to restate the hypothetical before applying the proposed analysis. FBI agents in Oregon find marijuana while searching the home of Mohammed Jones pursuant to a sneak and peek warrant authorized by the U.S.A. Patriot Act. In conducting the search, they violate state law by failing to leave a copy of the warrant. State prosecutors want the state court to admit the drugs into evidence. Jones seeks to suppress, arguing that the federal agents violated state law and thus the court should apply the exclusionary rule.

A. *The Patriot Act - Background and Constitutionality*

[143] This standard was originally adopted in Chapman v. California 386 U.S. 18 (1967). The burden is on the government to show beyond a reasonable doubt that the evidence did not contribute to the jury verdict, thus the error would be harmless.
[144] Chapman v. California, 386 U.S. 18 (1967).

Congress passed the U.S.A. Patriot Act just six weeks after the September 11th attacks, without congressional hearings or floor debate.[145] The Act greatly enhanced the investigatory tools available to federal law enforcement agents. The hypothetical focuses on the provision that allows for so-called "sneak and peek" warrants.[146] The version of this provision in effect from 2001 until 2005 allowed a federal law enforcement official to get a warrant to search a person's house or business and seize property without giving notice to the subject of the search for a 'reasonable period'.[147] Between October 2001 and January 21, 2005, the government requested and used delay notification warrants 155 times.[148] Then in 2005, Congress amended the Patriot Act, including the delay notification provision. The new section 114 requires law enforcement officials to give notice of a warrant within thirty days, unless they can show good cause.[149] Each additional delay must be ninety days or fewer except in exceptional circumstances. There is no restriction on number of permitted ninety day delays.[150]

Officers may dispense with notice if they can show reasonable cause that notice will result in adverse results. Adverse results include a catch all phrase "otherwise seriously jeopardizing an investigation."[151] Although seizure of goods seems to be prohibited by Section 3103a (b) (2), there is an exception when "reasonable necessity" exists. The sneak and peek warrant is not limited to terrorism and can be utilized whenever the search is for evidence which constitutes a violation of U. S. law. The

[145] The USA PATRIOT ACT, enacted on October 26, 2001, recently was amended by the USA PATRIOT Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).
[146] USA Patriot Act, Pub. L. No. 107-56, §213, 115 Stat. 272, 285-86 (2001)..
[147] USA Patriot Act, Pub. L. No. 107-56, §213, 115 Stat. 272, 285-86 (2001).
[148] Charlie Savage and Rick Klein, *Government Nearly Doubles Use of Patriot Act Search Power*, THE BOSTON GLOBE, April 5, 2005, at A4.
[149] 18 U.S.C.A. § 3103a(b)(3)–(c).
[150] 18 U.S.C.A. § 3103a(c); 120 Stat. at 210-11.
[151] 18 U.S.C.A. § 2705(a)(2).

Justice Department refers to the "sneak and peek" power as a valuable law enforcement tool that can be utilized in a "wide spectrum of crucial investigations including terrorism and drugs."[152]

The constitutionality of sneak and peek warrants has not been determined.[153] To do so, the Supreme Court would turn to the reasonableness clause of the Fourth Amendment and engage in a balancing between the nature of the intrusion and the governmental interests involved.[154] This type of balance was referred to by Justice

---

[152] Savage and Klein, *supra* note 143 at A4.

[153] Susan N. Herman, *The U.S.A. Patriot Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 100-01 (2006). Professor Herman suggests that the constitutionality has not been litigated because the parties who would have standing often do not learn that they have been the subject of this type of search due to the very secrecy that they would contest. *Id.*

In U.S. v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519, at *1 (E.D.Wash. Dec. 23, 2005), the court noted that "…a valid §3103a search is likely constitutional given that the Supreme Court has ruled 'the Fourth Amendment does not prohibit all surreptitious entries'" (quoting U.S. v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986)). The court in Espinoza strictly interpreted the terms of §3103a, requiring the issuing court to make express findings of reasonable cause that immediate notification would have an adverse result, pursuant to §3103a(b)(1); as well as reasonable necessity for any seizure of property, pursuant to §3103a(b)(3). Id. at 2. The court found that these specific findings must be explicit either on the warrant itself or in a written order accompanying the warrant. Id. This requirement was patterned after the findings required for the issuance of a wiretap order pursuant to 18 U.S.C §2518, as indicated by the Supreme Court in Dalia v. United States, 441 U.S. 238 (1979). Id. In Dalia, the Supreme Court noted that §2510(4) requires the issuing court to specify the scope of surveillance, parties and place to be monitored, and the agency conducting the wiretap. Dalia, 441 U.S. at 250. The Court in Dalia stated, "[t]he plain effect of the detailed restrictions…is to guarantee that wiretapping or bugging occurs only when there is a genuine need for it and only to the extent that it is needed." Id.

On September 10, 2007 U.S. District Judge Ann Aiken heard arguments in Oregon challenging the Patriot Act on Fourth Amendment grounds. A decision is expected shortly. The challenge was raised by Brandon Mayfield, a lawyer who was wrongly arrested in connection with the 2004 Madrid train bombings. Prior to his arrest, federal agents used National Security Letters (authorized by the Patriot Act) to obtain information for its investigation and also searched his home and office with a warrant obtained under the Foreign Intelligence Surveillance Act. **[Note to editing staff: we need a citation here; hopefully the decision will come down soon. If not, see http://www.washingtonpost.com/wp-dyn/content/article/2006/03/10/AR2006031002027.html and http://www.usatoday.com/news/nation/2007-09-10-patriotact-lawsuit_N.htm]**

On September 06, 2007, U.S. District Judge Victor Marrero invalidated on First Amendment and Separation of Powers grounds provisions of the U.S.A. Patriot Act that authorized the F.B.I to issue confidential National Security Letters to obtain email and phone records. Doe, ACLU, & ALCU Foundation v. Gonzalez, ---F.Supp.2d---, 2007 WL 2584559 (S.D.N.Y. 2007). The judge characterized those provisions as "the legislative equivalent of breaking and entering." *Id*. at *27.

[154] Fourth Circuit held failure to give notice did not render a search unreasonable under the Fourth Amendment. United States v. Simons, 206 F.3d 392, 403 (4th Cir. 2000) (writing that "The Fourth Amendment does not mention notice, and the Supreme Court has stated that the Constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice.").

Brennan as "Rorschach-like."[155] In Wilson v. Arkansas, looking at whether knock and announce was required in the execution of a search warrant, the Court turned to the reasonableness clause of the Fourth Amendment. Although the Court indicated that the Fourth Amendment does not require notice in every instance, (for example when there is a possibility that evidence will be destroyed or officers injured),[156] the absence of notice for a surreptitious entry "casts strong doubt on constitutional adequacy."[157]

Recently, however, the Court granted greater leeway to law enforcement agents conducting surreptitious entries when it held that the exclusionary rule does not apply to violations of the "knock and announce" rule.[158] In *Hudson*, police officers executing a search warrant waited only a few seconds after announcing their presence before entering through the suspect's front door.[159] Although this police action violated the common law "knock and announce" rule, the Court held that violation of the rule did not require suppression of the resulting evidence because the interests behind the rule have nothing to do with the seizure of evidence.[160]

Search warrants frequently are executed in homes, the sanctity of which is highly valued in Fourth Amendment jurisprudence.[161] Therefore, when weighing the nature of the intrusion, the Supreme Court might find that the intrusion is severe and might be reluctant to allow for a surreptitious entry when a home is involved. On the other hand, the Court likely would find that the government interest in preventing another terrorist attack is exceptional. In the balance, it is likely that the Court would uphold sneak and

[155] New Jersey v. T.L.O., 469 U.S. 325, 358 (1985).
[156] Wilson v. Arkansas, 514 U.S. 927, 936 (1995).
[157] U.S. v. Freitas, 800 F.2d 1451, 1456 (1986), (*citing* Berger v. New York, 388 U.S. 46, 60 (1967)).
[158] Hudson v. Michigan, 126 S.Ct. 2159, 2165 (2006).
[159] *Id.* at 2162.
[160] *Id.* at 2165.
[161] Kyllo v. United States, 533 U.S. 27 (2001).

peek warrants given the importance of the government interest in fighting terrorism. At any rate, this article will assume Section 114 is constitutional.[162]

B. *Application of Proposed Framework to the Hypothetical*

Assuming the constitutionality of Section 114, let us analyze Oregon's substantive concerns along with the outcome determinative effect and balance them against the important federal interests including fighting international terrorism and preserving tools for federal law enforcement officers investigating it.

The state of Oregon has a specific statute requiring that an officer executing a search warrant read and give a copy of the warrant to the person in control of the premises or, if no one is there, leave a copy of the warrant at the premises.[163] In a case where there was a violation of the statute (no actual warrant was provided at the time of the search) but the defendant was informed at the time of the search of the existence of the warrant and the fact that it had been issued, the Oregon Court of Appeals did not suppress the evidence because it was a minor violation.[164] However, the court did indicate that if the violation were aggravated, it would reach state constitutional dimensions and the evidence would be suppressed.[165] In the hypothetical posited above, the warrant was received some three weeks after the search which would certainly indicate an aggravated violation of the statute.

---

[162] *See* Robert v. Dunbar Jr., *Celebrating Student Scholarship: Surreptitious Search Warrant and the U.S. Patriot Act: "Thinking Outside the Box but Within the Constitution," Or a Violation of Fourth Amendment Protections,* 7 N.Y. CITY. L. REV. 1 (2004).
[163] Or. Rev. Stat. § 133.575 (3) (2003).
[164] State v. Blasingame 873 P.2d 361, 389 (Or. Ct. App.) (cited in State v. Henderson, 113 P.3d 944, 948 (2005)).
[165] *Id.*

In the state of Oregon, the courts interpret the purpose of their exclusionary rule derived from Article I §9 of the Oregon Constitution as a protection of the individual.[166] Thus, when there is a violation of the Oregon Constitution, the exclusionary rule operates not as a deterrent but as a protection to the individual to vindicate Constitutional rights. This protection is triggered whenever "the Oregon government seeks to use the evidence in an Oregon criminal prosecution."[167]

In summary in this hypothetical there is a violation of Oregon law because of the sneak and peek warrant executed by the FBI. Mohammed is being tried in state court for a drug charge and seeks to suppress the marijuana plants found as a result of the violation. How would a court apply the proposed framework in this hypothetical?

First, a court would determine the nature of the conflict between state and federal law. Forty-five days after September 11, 2001, in an atmosphere of high national anxiety, Congress passed the USA Patriot Act, "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." In this hypothetical we have Section 114[168] of the USA Patriot Act as amended in 2006, and Section 133.575 (3) of the Oregon revised statutes.[169] A court first would ask whether the Patriot Act preempts state law. Congress must clearly indicate its intention to preempt state law in matters implicating important functions of the state government under the "plain statement rule." Although the Act recognizes the importance of sharing information between the FBI and CIA and local law enforcement agencies, it does not mandate that state individual protections should be disregarded in the obtaining of the information.

[166] State v. Davis, 834 P.2d 1008 (Or. 1992).
[167] State v. Rodriguez, 854 P.2d at 403 (Or. 1993).
[168] 18 U.S.C.S. §3103(a) (2005).
[169] OR. REV. STAT. § 133.575 (3) (2003).

There is no indication that the law was designed to preempt state law. First, there is nothing in the Patriot Act that expressly states that it preempts state law. Further, the statute specifically talks about a warrant for "evidence for a criminal violation of the laws of the United States."[170] The Patriot Act does not specifically prohibit the state from suppressing evidence obtained in violation of state law. There is no indication that they were considering state law. There is no implied preemption as the Act is not so pervasive as to address state prosecutions. Further, courts have been very reluctant to find preemption in regards to responsibilities traditionally reserved to the states, such as the state criminal prosecution posited in this hypothetical.

This case is analogous to Oregon v. Rodriquez.[171] There, an agent for the Immigration and Naturalization Service obtained an INS administrative arrest warrant. While executing the warrant, the agent found guns. In the state criminal trial, the defendant moved to suppress the guns because the INS warrant did not comply with Oregon law. The Oregon Supreme Court, in addressing the preemption issue, found that the federal immigration law had nothing to do with the precise charges being brought in state court. By applying preemption, the court found no interference with the federal law and thus applied the state law.[172]

With no preemption there is no direct conflict with federal legislation. Consequently, a court could apply the framework proposed by this article by weighing the state and federal interests under an Erie-like balancing test. As to the state interests, the court would consider Oregon's interest in passing and upholding its criminal laws, as

[170] 18 U.S.C. 3103(a) (a) (2005).
[171] 854 P.2d 399 (Or. 1993).
[172] *Id.* at 403-04. The court admitted the evidence because its seizure did not violate state law or the Fourth Amendment.

well as Oregon's exclusionary rule whose purpose is to protect the individual, the traditional Tenth Amendment power to control state criminal prosecutions, and any outcome determinative effect. Here, the outcome determinative effect would weigh towards application of state law because suppression of the marijuana would likely determine the outcome of the case.

A court would balance these substantial state interests against the federal interests. Arguably there is a strong federal interest in allowing federal officers to introduce in state court evidence obtained pursuant to the Patriot Act, which can be found in its purpose—"to deter and punish terrorist acts in United States and around the world, [and] to enhance law enforcement investigation tools."[173] Still, an Oregon state court reasonably could find that Oregon's interests, coupled with the outcome determinative effect, outweigh the federal interests and therefore could apply state law. [174]

If this same scenario occurred in New Jersey and such surreptitious warrants were illegal under New Jersey law,[175] a court might reach a different result. In New Jersey, the purpose of the state exclusionary rule is to deter state police officials. Under the proposed framework, the court would weigh the purpose of the state exclusionary rule,[176] the traditional Tenth Amendment power to control state criminal prosecutions, and the outcome determinative effect just mentioned against the strong federal legislative intent. Because the purpose of the state exclusionary rule would not be implicated in this instance—as there is no desire to deter federal officials—federal law may apply or at least the balance does not weigh as heavily in favor of state law as the Oregon example.

[173] USA Patriot Act, Pub L. No. 107-56, 115 Stat. 272, 272 (2001).
[174] State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001); State v. Davis, 313 Or. 246 (1992).
[175] In reality, New Jersey law does not require a law enforcement officer to leave a copy of a search warrant unless that officer removes property during the search. N.J. R. 3:5-5.

Although this analysis reaches the same result as the state exclusionary rule rationale, it recognizes the important federalism concerns.

VIII. Conclusion

In the past few decades, state courts have provided greater individual protections than the federal constitution. It is likely that they will continue to do so now that the Congress and the Supreme Court are granting greater leeway to federal law enforcement officers through legislation such as the Patriot Act, and through decisions limiting the scope of the exclusionary rule and expanding exceptions to the warrant requirement of the Fourth Amendment. As Congress continues to trade civil liberties for national security, some state courts will seek to protect their citizens from unwarranted government intrusions by limiting the use of evidence obtained pursuant to federal law but in violation of state law. To promote legitimacy, however, state courts must take into account the federalism issues raised by this article when deciding whether to suppress evidence obtained lawfully by federal agents. They may not merely apply state law to suppress the evidence. Rather, they should conduct the Erie-like balancing test proposed by this article to weigh the state substantive interests against the federal interests in a manner consistent with the Supremacy Clause. In many cases this proposed framework will allow state courts to suppress the evidence and also give due respect to notions of federalism.

---

[176] State v. Mollica, 554 A.2d 1215 (N.J. 1989).