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ACCOUNTING FOR FEDERALISM IN STATE COURTS: EXCLUSION OF EVIDENCE OBTAINED LAWFULLY BY FEDERAL AGENTS

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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 has provided more leeway to federal officers in the past few decades by limiting the scope of the exclusionary rule, for example. 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 by federal law enforcement officers legally under federal law but in violation of state law. States that choose to suppress the evidence usually rely on a state evidentiary basis, ignoring federalism concerns. This Article proposes a framework by which state courts can take into account notions of federalism while still providing individual protections under their state constitutions.

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INTRODUCTION

Suppose that FBI agents operating in the State of Oregon obtain a so-called "sneak and peek" warrant (authorized by the U.S.A. Patriot Act, as described below)[1] 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 materials, maps, computer records, documents, and materials relating to terrorism. In executing the warrant, the agents find none of the items listed but discover numerous marijuana plants in plain view.[2] 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 argues that they 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.[3] This is true to a certain extent, and some state courts have ex-

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.) (hereinafter "USA Patriot Act"), *amended by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified in scattered sections of the U.S.C.).

2. 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, 136 (1990); Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971).

3. 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.").

cluded this type of evidence under such reasoning.[4] 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 reserves to the states those rights not specifically delegated to the federal government.[5] The Supremacy Clause declares all federal law supreme.[6] "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."[7]

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 remain in the State governments are numerous and indefinite."[8] The Supreme Court itself has recognized that some of its most difficult cases involve identifying the line between federal and state power.[9]

4. State v. Cardenas-Alvarez, 25 P.3d 225, 230–33 (N.M. 2001); People v. Griminger, 524 N.E.2d 409, 410–12 (N.Y. 1988); State v. Rodriguez, 854 P.2d 399, 403–04 (Or. 1993).

5. U.S. CONST. amend. X.

6. U.S. CONST. art. VI, § 2.

7. 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) (analyzing 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?).

8. THE FEDERALIST NO. 45, 292–93 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 45] (quoted in United States v. Lopez, 514 U.S. 549, 552 (1995)).

9. New York v. United States, 505 U.S. 144, 155 (1992).

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, decisions 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.[10]

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.[11] A federal court dealing with a state official must behave similarly.[12] What is less clear is how a state court can treat a federal official who obtained evidence in accordance with federal law, but in violation of state law. This problem is sometimes referred to as the "reverse silver platter" issue.[13]

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10. *See generally* George D. Brown, *Should Federalism Shield Corruption?: Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 266–67 n.350 (1997) (describing history of the term "new federalism").

11. On Lee v. United States, 343 U.S. 747, 754–755 (1952); United States v. Keen, 508 F.2d 986, 989 (9th Cir. 1974).

12. *See* United States v. Hall, 543 F.2d 1229, 1235 (9th Cir. 1976) ("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 states."); *see also* United States v. Vite-Espinoza, 342 F.3d 462, 471 (6th Cir. 2003); United States v. Chavez-Verrarza, 844 F.2d 1368, 1372–74 (9th Cir. 1987); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 246–47 (1996); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667 (1988).

13. Diehm, *supra* note 12, at 229–30. "Silver platter" refers to a state official handing over evidence to a federal official. *See infra* note 19. "Reverse silver platter" refers to a federal official handing over evidence for a state prosecution. Diehm, *supra* note 12, at 229–30.

This Article begins by briefly tracing the history of the exclusionary rule and the line of cases that made it applicable to the states. It then explores how the 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, after reviewing the *Erie* doctrine and the doctrine of preemption, 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.

I. HISTORY

The Bill of Rights introduced at the Constitutional Convention of 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. State law enforcement officials were restricted only by provisions of state constitutions and statutes, which generally provided fewer protections than the Bill of Rights.[14] The result was that federal defendants enjoyed more rights and protections than did state defendants.

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.[15] This changed in 1914 when the Supreme Court decided in *Weeks v. United States* that evidence obtained by a federal official in violation of the Fourth Amendment must be excluded from federal court, explaining that "[t]he 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."[16] The Court limited the exclusionary rule to federal officers because

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

15. Diehm, *supra* note 12, at 226.

16. Weeks v. United States, 232 U.S. 383, 391–92 (1914).

in 1914 the Fourth Amendment did not apply to state officers.[17] Thus, the Court admitted evidence obtained by state officials but excluded evidence obtained by federal officials.

With the advent of the *Weeks* doctrine in 1914, 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.[18] Federal officials involved in illegally obtaining evidence sought to introduce the evidence in state courts and state officials not subject to the exclusionary rule assisted their Federal colleagues by delivering the evidence to them on a "silver platter."[19]

The adoption of the Fourteenth Amendment Due Process Clause after the Civil War provided the foundation for applying the Bill of Rights to the states. In *Wolf v. Colorado* in 1949, the Supreme Court held that the Fourth Amendment was incorporated in the Fourteenth Amendment and therefore was enforceable against the states.[20] However, the Court refused to find the exclusionary rule was an essential part of the right and thus admitted the illegally obtained evidence in that case.[21] The Court in *Wolf* was reluctant to adopt the remedy of exclusion, partly due to notions of federalism.[22] Ten years later, 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."[23] Then, in *Elkins v. United States*, the Court invalidated the silver platter doctrine in federal courts, holding that evidence lawfully obtained by state of-

17. *Id.* at 398.

18. Elkins v. United States, 364 U.S. 206, 210–213 (1960).

19. The term "silver platter" was used in the Frankfurter opinion of Lustig v. United States, 338 U.S. 74, 78–79 (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.").

20. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

21. *Id.* at 33.

22. 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 the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence." *Wolf*, 338 U.S. at 31–32.

23. 359 U.S. 187, 195 (1959).

ficials pursuant to state law was not admissible in federal courts when its collection violated the Fourth Amendment.[24]

Shortly thereafter, under the leadership of Chief Justice Earl Warren, the Court in *Mapp v. Ohio* held that states must adopt the exclusionary rule as a remedy for illegal law enforcement action because the rule is an essential part of the Fourth Amendment. [25] This decision eliminated much of the remaining intrajudicial conflict by requiring a uniform 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;" the conviction was based upon evidence unlawfully seized during an unlawful search of the defendant's home.[26] The defendant claimed the evidence should be excluded,[27] even though the exclusionary rule previously had not been applied in state actions.[28] The *Mapp* Court made this leap and held that "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."[29] The Court explained:

> 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.[30]

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24. 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, 473–78 (1993).

25. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

26. *Id.* at 643.

27. The defendant argued that evidence obtained in violation of the state search and seizure statute should be excluded when offered against defendants charged with minor offenses and when obtained in a way that plainly violated the defendant's rights. Brief of Appellant on the Merits at *18–22, Mapp v. Ohio, 1961 WL 101783 (Feb. 1, 1961). The amicus curiae ACLU urged the Court to overrule *Wolf v. Colorado*. *Mapp*, 367 U.S. at 646 n.3.

28. Weeks v. United States, 232 U.S. 383, 398 (1914).

29. *Mapp*, 367 U.S. at 655.

30. *Id.* at 660.

Prior to *Mapp*, the dual standard of exclusion resulted in the so-called "silver platter" doctrine.[31] As previously mentioned, *Elkins* eliminated this doctrine[32] and *Mapp* made the exclusionary rule applicable to the state courts.[33] 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 protections to the states, also substantively expanded those protections. Decisions like *Miranda v. Arizona* and *Terry v. Ohio* provided greater protections to individuals as they faced the forces of the state.[34] Beginning with the Warren Court era in the 1960s and continuing 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.[35] This eliminated "needless" conflict between the two sovereigns and contributed to "healthy" federalism.[36]

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.[37] 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

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31. *See supra* note 19.

32. *See supra* note 24.

33. *Mapp*, 367 U.S. at 660.

34. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (making on-the-street police encounters subject to Fourth Amendment protection); United States v. Wade, 388 U.S. 218 (1967) (holding that the accused has a Sixth Amendment right to counsel during a line-up eyewitness identification procedure); Miranda v. Arizona, 384 U.S. 436 (1966) (providing safeguards for interrogation proceedings); Jones v. United States, 362 U.S. 257, 259–67 (1960) (expanding Fourth Amendment protections for the standing requirement).

35. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961); *see also supra* note 34.

36. Elkins v. United States, 364 U.S. 206, 221 (1960) ("The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.").

37. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655–57 (1984) (creating a public safety exception to *Miranda*); United States v. Leon, 468 U.S. 897, 905–25 (1984) (creating a good faith exception to exclusionary rule); Rakas v. Illinois, 439 U.S. 128, 133–48 (1978) (limiting standing opportunities under the Fourth Amendment); United States v. Calandra, 414 U.S. 338, 347–48 (1974) (limiting the extent of the 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 search any items found on a suspect's person and holding that such a search is reasonable under the Fourth Amendment).

afforded their citizens the full protection of the federal Constitution. State constitutions, too, are a fount of individual liberties, their protection often extending beyond those required by the Supreme Court's interpretation of federal law."[38] As Brennan suggests, the U.S. Constitution, which provides the baseline for protections of individual rights, does not prohibit states from expanding on those protections. 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-à-vis the police were the same. Now defendants in some states are enjoying greater protections under state law than federal law,[39] as Justice Stevens, in a recent concurring opinion, observed about the state of Utah.[40] This phenomenon has been characterized as "new federalism."[41]

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38. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

39. *See, e.g.*, State v. Glass, 583 P.2d 872 (Alaska 1978); Commonwealth v. Upton, 476 N.E.2d 548, 555–58 (Mass. 1985); State v. Novembrino, 519 A.2d 820 (N.J. 1987) (rejecting a good faith exception to the exclusionary rule); People v. Johnson, 488 N.E.2d 439, 445 (N.Y. 1985).

40. Brigham City v. Stuart, --- U.S. ---, 126 S.Ct 1943, 1950 (2006) (Stevens, J., concurring).

41. James N. G. Cautlen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1184 (2000); Diehm, *supra* note 12, at 224; Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 93–95 (2000).

In the early years of "new federalism," the Supreme Court, when reviewing state court decisions based on a combination of state and federal law, avoided unnecessary constitutional decisions by remanding to the state courts for clarification. *See, e.g.*, California v. Krivda, 409 U.S. 33, 35 (1972). Then in 1983, in *Michigan v. Long*, 463 U.S. 1032 (1983), the Court adopted a presumption in favor of reviewing state court decisions, perhaps as a way to restrict 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, as the ultimate authority on federal law, a basis for jurisdiction. *Id.* at 1037–44. In finding a reference to federal law, albeit a narrow one, the Court in effect created a presumption that in the absence of clear language to the contrary, a state court decision will be construed as based on federal law. *Id.* at 1043. The Court held that state courts must "make clear by a plain statement" if they were using federal precedent in their analyses but resting their decision on adequate and independent state grounds. *Id.* at 1040–42. The Court thus gave itself greater leeway to review state court decisions. Justice Stevens in dissent argued that, given scarce federal judicial resources, federal jurisdiction should be exercised only when it is clearly necessary and, therefore the presumption created by the Court goes

This new federalism, coupled with increased leeway to federal law enforcement under holdings of the Burger and Rehnquist Courts as well as greater cooperation between federal and state law enforcement officers in their efforts to prevent terrorism,[42] provides the basis for potential conflict between state and federal courts, such as the conflict raised by the example in the hypothetical. The thrust of this Article will look to the federalism issues when a state court seeks to apply its more stringent legal and evidentiary standards to evidence legally obtained by a federal official under more lenient federal standards. It will focus specifically on federal law enforcement actions authorized by the U.S.A. Patriot Act.[43]

II. STATE COURTS AND FEDERALLY-OBTAINED EVIDENCE

This Article proposes a framework for analyzing the question of 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. It is helpful to begin by discussing how state courts have addressed this question. Many 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.[44] State courts ruling in this way have reasoned that it does not make sense to exclude such evidence because state law cannot directly control or deter the

against the important principle of limited federal court jurisdiction. *Id.* at 1067 (Stevens, J. dissenting).

42. *See infra* notes 88–90 and accompanying text.

43. USA Patriot Act, *supra* note 1.

44. People v. Fidler, 391 N.E.2d 210, 211 (Ill. App. Ct. 1979); Basham v. Commonwealth, 675 S.W.2d 376, 381 (Ky. 1984); Dillon v. State, 844 S.W.2d 139, 143–44 (Tenn. 1992); King v. State, 746 S.W.2d 515, 518–19 (Tex. Crim. App. 1988); State v. Dreibelbis, 511 A.2d 307, 308 (Vt. 1986); *In re* Teddington, 808 P.2d 156, 161–63 (Wash. 1991) (*en banc*). The state action requirement asks whether federal and state police were working together so closely that federal officials were agents of the state. In *Commonwealth v Gonzales*, 688 N.E.2d 455, 456–58 (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, MASS. GEN. LAWS ch. 272 § 99 (1993), specifically exempted federal officers from a violation of Massachusetts laws if they were acting pursuant to federal law. *Id.*

conduct of federal officers,[45] and 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.[46] As the Supreme 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."[47]

For example, the Court of Appeals of Texas refused to apply state law to evidence lawfully obtained by a federal official.[48] In *Pena v. Texas*, federal agents operating in conformity with federal standards near the Mexico border turned over evidence to state agents.[49] Even though the federal agents' action did not meet a higher burden imposed by state law, the court affirmed the trial court's admission of the evidence.[50] The court characterized the situation as involving the "reverse silver-platter" doctrine, reasoning that "protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity."[51]

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 now that the Supreme Court has continued to narrow the exclusionary rule[52] and Congress has

45. People v. Phillips, 711 P.2d 423, 455–56 (Cal. 1985); People v. Blair, 602 P.2d 738, 747–48 (Cal. 1979); People v. Fidler, 391 N.E.2d 210, 211 (Ill. App. Ct. 1979).

46. Pooley v. State, 705 P.2d 1293, 1303 (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, 489 (9th Cir. 1989); United States v. Maher, 645 F.2d 780, 782 (9th Cir. 1981) (per curiam); Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965). Foreign officials are governed by the Fourth Amendment when they act as agents of American law enforcement agents, *LaChappelle*,869 F.2d at 489–90, or when their search "shocks the conscience," *Birdsell*, 346 F.2d at 782 n.10.

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

48. *See* Pena v. Texas, 61 S.W.3d 745 (Tex. Crim. App. 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.").

49. *Id.* at 750–51.

50. *Id.* at 757–58.

51. *Id.* at 754 (quoting State v. Toone, 823 S.W.2d 744, 748 (Tex.Crim. App. 1992)).

52. An example of narrowing the exclusionary rule is provided by the Supreme Court's recent decision in *Hudson v. Michigan*, --- U.S. ---, 126 S. Ct. 2159 (2006), and subsequent decisions in the lower courts. In *Hudson v. Michigan*, the Supreme Court held that the exclusionary rule does not apply to violations of the

expanded federal law enforcement powers with the USA Patriot Act.[53] The courts that have excluded this type of evidence

"knock and announce" rule, but left intact the "knock and announce" rule as a part of Fourth Amendment analysis. *Id.* at 2163–70. 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 was too attenuated to apply the exclusionary rule. *Id.* at 2164–65. The Court also reasoned that because 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 2165–68. 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. *Id.* at 2167–68. 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 (Breyer, J., dissenting) (quoting Mapp v. Ohio, 367 U.S. 643, 652 (1961)).

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. United States v. Pelletier, 469 F.3d 194, 198–201 (1st Cir. 2006). In *Hector v. United States*, 474 F.3d 1150 (9th Cir. 2007), 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. *Id.* at 1153–55. In *United States v. Bruno*, 487 F.3d 304, 305–06 (5th Cir. 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*.

E. Martin Estrada, in *The Rise and Fall of the Constitutional "Knock and Announce" Rule*, FEDERAL LAWYER, Feb. 2007, at 52, 52, argues that, since the Court had declined in several previous cases to sever the "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. Because 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.* at 57.

53. For example, the USA Patriot Act, *supra* note 1, section 218, amended the Foreign Intelligence Surveillance Act ("FISA") to extend the availability of 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*, LITIG., Winter 2006, at 18, 18. 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 the issuing magistrate that immediate notification may have an adverse result. 18 U.S.C. § 3103a(b)(1) (Supp. V 2005); Siegler, *supra*, at 19. 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 healthcare fraud case. United States v. Mikos, No. 02 CR 137-1, 2003 U.S. Dist. WL 22462560, at *1, *1–*2 (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

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,[54] have concluded that excluding the evidence does not interfere with the work of the federal government,[55] or have determined that the objective of the state's exclusionary rule was furthered through exclusion of the evidence.[56]

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.[57] There, a U.S. Secret Service Agent sought and obtained a warrant from a federal magistrate to search a defendant's home after an arrested counterfeiting suspect identified the defendant as a drug-dealer.[58] The resulting search corroborated the informant's story and produced ten ounces of marijuana, over six thousand dollars in cash, and drug-related paraphernalia.[59] The Secret Service turned over the evidence to state authorities for prosecution in state court, and the defendant sought to suppress the evidence, arguing that the warrant lacked probable cause because it had not satisfied the reliability prong of the state's *Aguilar-Spinnelli* test.[60] The Court of Appeals of New York agreed, holding that the state was governed by a more stringent probable cause standard[61] than the one adopted by the U. S. Supreme Court.[62] Reasoning that "[s]ince defendant has

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search of a nursing home during a healthcare fraud investigation." Siegler, *supra* at 22. Section 213 is discussed in detail below. *See infra* notes 184–95 and accompanying text.

54. Moran v. State, 644 N.E.2d 536 (Ind. 1994); State v. Harms, 449 N.W.2d 1, 7 (Neb. 1989); People v. Griminger, 524 N.E.2d 409 (N.Y. 1988).

55. *See* State v. Rodriguez, 854 P.2d 399, 404 (Or. 1993).

56. *See* State v. Cardenas-Alvarez, 25 P.3d 227, 231–33 (N.M. 2001).

57. 524 N.E.2d 409 (N.Y. 1988).

58. *Id.* at 410.

59. *Id.*

60. *Id.* In *Aguilar v. Texas* the Supreme Court adopted a so-called two prong test for a magistrate to use to evaluate information provided by an unnamed informant. 378 U.S. 108, 111 (1964). This test was further elaborated on in *Spinelli v. United States*, 393 U.S. 410 (1969). One prong asks whether the informant is reliable and the second prong asks how the informant obtained the information that was provided. *See id.* at 413. The two prong test was subsequently abandoned by the Supreme Court in *Illinois v. Gates*. *See infra* note 62.

61. People v. Johnson, 66 N.Y. 2d 398 (1985).

62. *Griminger*, 524 N.E.2d at 411. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court abandoned the two prong test and adopted a more flexible test so that the prongs are no longer independently evaluated. The Court character-

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 protections," 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.[63] The court did not discuss the issues of federalism arising from its application of the state's standard to the federal official.

Other state courts conduct an analysis of the state's exclusionary rule to determine whether to admit evidence obtained by a federal law enforcement agent pursuant to federal law but in violation of state law.[64] These courts examine the policy reasons underlying their states' exclusionary rules, including deterrence, judicial integrity, and protection of individual rights.[65] States with a deterrent objective typically admit this type of evidence, [66] while states seeking to promote judicial integrity or protect individual rights usually exclude the evidence.[67]

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.[68] There, federal law enforcement officers obtained hotel billing records relating to the defendant's use of his room phone.[69] They gave the records to state officials who used the information to obtain a warrant to search the defendant's hotel room.[70] The procurement of these records is legal

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ized the two prong test as too rigid and opted for a totality-of-the-circumstances approach. *Id.* at 214.

63. *Griminger*, 524 N.E.2d at 412.

64. State v. Mollica, 554 A.2d 1315, 1328 (N.J. 1989); State v. Cardenas-Alvarez, 25 P.3d 227, 231–32 (N.M. 2001); King v. State, 746 S.W.2d 515, 518–19 (Tex. App. 1988).

65. FRIESEN, *supra* note 3 §11.03[4][a]. 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 v. United States, 232 U.S. 383, 392 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

66. *Mollica*, 554 A.2d at 1330.

67. *Cardenas-Alvarez*, 25 P.3d 227, 233 (N.M. 2001).

68. 554 A.2d at 1330.

69. *Id.* at 1319.

70. *Id.*

under federal law[71] but constituted an unreasonable search under New Jersey law.[72] 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 that, in admitting the evidence, "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."[73]

Notably, the New Jersey Supreme Court, commenting on new federalism, reasoned 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 . . . ."[74] The Court reasoned that protections afforded to criminals by an individual state constitution only 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.[75] "Stated simply," the Court wrote, "state constitutions do not control federal action."[76]

An example of a state whose exclusionary rule's purpose is protecting individual rights is New Mexico. In *State v. Cardenas-Alvarez*, 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."[77] The Court reasoned 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.[78] 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 fed-

71. The Fourth Amendment's prohibition on unreasonable searches and seizures does not apply when the state obtains information voluntarily provided to third parties. *See* Smith v. Maryland, 442 U.S. 735, 733–44 (1979).

72. *See* State v. Hunt, 450 A.2d 952, 955 (N.J. 1982).

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

74. *Id.* at 1327.

75. *Id.*

76. *Id.*

77. State v. Cardenas-Alvarez, 25 P.3d 227, 232 (N.M. 2001) (quoting State v. Gutierrez, 863 P.2d 1052, 1067 (N.M. 1993)).

78. *Id.*

eral officers when the state seeks to use it in state court.[79] Thus, the court suppressed evidence obtained by a federal Border Patrol agent pursuant to federal law but in violation of New Mexico law.[80]

The issue of federalism was raised by a concurrence that expressed concern about the court "mak[ing] illegal what federal law makes legal" for federal agents.[81] The concurring justice wrote, "I fear that the majority leads this Court into dangerous territory by interrupting the delicate balance between federal and state power."[82] He stated 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 constitution to apply to federal actors, such application violates federal supremacy.[83] The concurring justice quoted the proposition asserted in *Bivens* that "state law [may not] undertake to limit the extent to which federal law can be exercised."[84] 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.[85]

The concurrence in *Cardenaz-Alvarez* raises federalism concerns that are ignored by the states that apply 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

79. *Id.*
80. *Id.* at 234.
81. *Id.* at 237 (Baca, J., concurring).
82. *Id.* at 234.
83. *Id.* at 235–37.
84. *Id.* at 236 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971)).
85. *Id.* at 232–33 (N.M. 2001); *see also* State v. Rodriguez, 854 P.2d 399 (Or. 1993).

raises questions that touch on the crucial relationship between the state and federal governments: what power does a state have to tell a federal agent how to act?[86] May states through their evidentiary rules reject evidence obtained by federal officers in the discharge of their federal duties?[87] Does the doctrine of preemption 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, 2001, (9/11) attacks and the launch of 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.[88] In fact, one of the primary recommendations of the 9/11 Commission is to increase cooperation between various governmental agencies in order to deter and prevent future domestic terrorist attacks.[89] 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.[90]

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86. The federal government does not have the power to direct state legislatures or officials. *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 149 (1992).

87. *See* Waxman & Morrison, *supra* note 7, at 2202 (arguing 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*).

88. *See* 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"). For further information on these task forces, see Boston Field Office, Federal Bureau of Investigation, http://boston.fbi.gov/ taskforce.htm (explaining that 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").

89. THE 9/11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 399–400 (2004), http://www.gpoaccess.gov/911/pdf/fullreport.pdf.

90. Chisun Lee, *The Force Multipliers*, VILLAGE VOICE, Mar. 4, 2003, at 25.

There is an interesting dynamic at play in the call for greater cooperation between federal and state law enforcement agencies to fight terrorism. Prior to 9/11, on some issues, including racial profiling, the federal government urged states to limit certain practices[91] and many states complied.[92] Since 9/11, however, forcing state law enforcement officials to enforce immigration laws has strained relations with federal agencies.[93]

Terrorism in particular has the potential to change the federalism landscape.[94] 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[95] of what was then the Rehnquist Supreme Court consistently promoted state sovereignty when determining federalism issues in the context of the Tenth Amendment and the Commerce Clause.[96] 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.[97]

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91. *See* U.S. Dept. of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, at 1 (June 2003). In a speech before Joint Session of Congress in February 2001, President Bush directed Attorney General Ashcroft to develop guidelines to end racial profiling. *Id.* Attorney General Ashcroft then ordered the Civil Rights Division of the Department of Justice to develop these guidelines. *Id.* Before guidance was issued, the terrorist events of September 11, 2001, took place. The *Guidance* was then issued by the Civil Rights Division in June 2003, taking into account terrorist concerns. *Id.*

92. *See, e.g.*, An Act Providing for the Collection of Data Relative to Traffic Stops, 2000 Mass. Acts 1043, *available at* http://www.mass.gov/legis/laws/seslaw00/sl000228.htm (state anti-racial profiling law in Massachusetts requiring traffic citations to indicate the race of the violator so that the racial aspect of traffic stops can be monitored).

93. *See* Terry Golway, *Back Into the Shadows*, NY TIMES, Feb. 20, 2005, at 1 (mentioning specifically the Clear Law Enforcement for Criminal Alien Removal Act of 2005, H.R. 3137, 109th Cong. (2005) as a potential source for further tension between federal directives and state enforcement).

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

95. Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor.

96. *See* 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.").

97. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 615 (2000).

A. States' Rights and the Tenth Amendment

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.[98] In doing so, the Court has stressed the importance of the Tenth Amendment. In *New York v. United States*,[99] the Court refused to allow Congress to impose on the states the obligation to take affirmative steps to enact a federal regulatory program for nuclear waste facilities. In *Printz v. United States*, the Court held that Congress cannot direct state law enforcement officials to implement federal legislation.[100] Specifically, the Court in *Printz* considered whether handgun legislation could command the chief state law enforcement officer designated by the state to conduct background checks.[101] 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.[102] 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.[103]

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

The Court's interpretations of the Commerce Clause further demonstrate its willingness to restrict the power of Con-

98. 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.* at 952.

99. 505 U.S. 144, 178 (1992).

100. 521 U.S. 898, 933 (1997).

101. *Id.* at 902.

102. *Id.* at 907–25, 933–35.

103. *Id.* at 940 (Stevens, J., dissenting).

gress and to preserve the state's traditional police power over the enforcement of criminal law. From 1936 to the 1995 decision in *United States v. Lopez*,[104] the Court did not find a single Act of Congress to be in violation of the Commerce Clause.[105] 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.[106] Chief Justice Rehnquist concluded in the opinion of the Court that the act was unconstitutional because it did not substantially affect interstate commerce.[107] Although not specifically mentioning the Tenth Amendment, the Court stressed the importance of the state's power to deal with criminal matters, writing that "[s]tates possess primary authority for defending and enforcing criminal law."[108] 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."[109]

Justice Kennedy, concurring, talked about balancing the scales to ensure the appropriate alignment of power between the state and federal governments.[110] Justice Thomas, also in concurrence, pointed out that the Constitution gives federal government only enumerated powers and was not intended to abrogate state criminal institutions.[111]

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).[112] The Court held that Congress did not have the power to so leg-

104. 514 U.S. 549 (1995), *superseded by statute*, 21 U.S.C. § 860 (2007), *as recognized in* United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996).

105. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 260 (2d ed. 2002). *See also* Judge Louis H. Pollak, *Foreword: Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995).

106. 514 U.S. at 551.

107. *Id.* at 567. In his analysis, Justice 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 about principles of federalism. *See id.*

108. *Id.* at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

109. *Id.* (plurality opinion) (quoting Screws v. United States, 325 U.S. 91, 109 (1945)).

110. *Id.* at 578 (Kennedy, J., concurring).

111. *Id.* at 584 (Thomas, J., concurring).

112. 529 U.S. 598 (2000). This was another 5-4 decision with the same split as in *Lopez*.

islate under the Commerce Clause because domestic abuse did not have a substantial effect on interstate commerce.[113] The majority regarded this as the type of non-economic activity traditionally regulated by the states.[114] To uphold the Act would give Congress the power to regulate all violent crime, an infringement on the states' traditional police power.[115]

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.[116] This might be seen as a setback for the "new federalism."[117] The facial 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, the possession and cultivation of marijuana.[118] Thus, the issue in *Raich* was quite different from those in *Lopez* and *Morrison*, which involved facial 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 Justice Scalia concurring in the judgment, the Court found that Congress could regulate the possession and cultivation of marijuana.[119] 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. She

113. *Morrison*, 529 U.S. at 613.

114. *Id.* at 615.

115. *Id.*

116. 545 U.S. 1, 9 (2005).

117. *See id.* Professor George Brown has 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 D. Brown, *Counterrevolution?—National Criminal Justice After Raich*, 66 OHIO ST L.J. 947, 986 (2005).

118. *Raich*, 545 U.S. at 16.

119. 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. *See Raich*, 545 U.S. at 26–27. 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.

stated, "[B]ecause fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where 'States lay claim by right of history and expertise.'"[120] In O'Connor's view, the federal government should bear the burden to justify its regulation in these areas.[121]

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 trigger a paradigm shift in this regard. With the federal government preoccupied by the War on Terror and the resulting legislation reducing individual liberty, the proponents of a strong central government might now 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. The terrorism threat may change the Justices' alliances on these important federalism issues.[122]

As these cases indicate, the Court is reluctant to allow Congress to impinge on the states' traditional police power over criminal laws. But 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. An examination of the power state courts have over the actions of federal law enforcement agents exposes this tension.

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120. *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)).

121. *Id.* at 51 (O'Connor, J., dissenting).

122. 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 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, 248–49 (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.* at 247. Notably, Justices Thomas and Scalia, who consistently have sought to limit federal power vis-à-vis the state, dissented in the decision. *Id.*

C. *State Control over Federal Law Enforcement*

State courts generally cannot tell federal officials what to do.[123] In *Tarble*, decided in 1871, 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.[124] The Court held that the state had no power to compel the recruiter to act.[125] Reasoning that within each state there were two sovereigns "independent of each other and supreme within their respective spheres,"[126] Justice Field explained that, should a conflict exist, the law of the United States would be supreme as specified in the Constitution.[127] Justice Brennan reiterated this principle in his majority opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 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."[128]

Federal officials are sometimes subjected to state standards, however. For example, federal prosecutors must follow state ethics rules even though they operate in federal courts; this is not a function of federalism but rather the result of the McDade Act, passed by Congress in 1999.[129] 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."[130] 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.[131]

Thus, ethics rules for federal prosecutors vary by state. Similarly, the application of federal criminal law also varies by

123. *In re* Tarble, 80 U.S. 397, 397 (1871); McClung v. Silliman, 19 U.S. (6 Wheat) 598, 598 (1821) (holding that state courts do not have authority to issue a writ of mandamus to a federal officer).

124. *Id.* at 397–98.

125. *Id.* at 411–12.

126. *Id.* at 406.

127. *Id.* at 406–07.

128. 403 U.S. 388, 395 (1971).

129. 28 U.S.C. § 530B (2006). *See generally* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 58 (West 2005).

130. 28 U.S.C. § 530B(a) (2006).

131. United States v. Colo. Sup. Ct., 189 F.3d 1281, 1284 (10th Cir. 1999).

state. This is because the federal government often borrows from state criminal laws and outcomes.[132] 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.[133] In addition, the federal government sometimes borrows actual state criminal laws.[134] In doing so, the federal government infuses its own law "with the normative judgments of the respective states."[135] Rather than being applied uniformly nationwide, the application of federal law varies by state.

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 in the course of 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*, these state courts 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.[136] This area always has been left to the states. How, then, can the states' power to exclude this evidence be reconciled with important issues of federalism?

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132. Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 66 (2006).

133. *Id.* at 75, 78–80.

134. 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 132, at 71. Federal courts also apply state law in civil diversity of citizenship cases under the *Erie* Doctrine. *See infra* notes 137–53 and accompanying text.

135. Logan, *supra* note 132, at 67.

136. *But see* State v. Cardenas-Alvarez, 25 P.3d 225, 237 (N.M. 2001) (Baca, J., concurring) (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)) (arguing that in applying state law to exclude evidence obtained 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).

IV. *ERIE* AND PREEMPTION

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 adopt the approach taken by the *Erie* Doctrine.[137] Although it may resurrect 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.

A. The Erie *Doctrine*

The *Erie* Doctrine generally speaking determines which law a federal court hearing a diversity case should apply when there is a conflict between federal and state law.[138] *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."[139] 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.[140] As the Court has pointed out, "classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging en-

137. The Supreme Court articulated the *Erie* Doctrine in *Erie v. Tompkins*, 304 U.S. 64 (1938).

138. Gasperini v. Center for Humanities Inc., 518 U.S. 415, 416 (1996); Hanna v. Plumer, 380 U.S. 460, 460 (1964); *Erie*, 304 U.S. at 64. 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, 8 (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. *See id.* at 78. Although the decision by Brandeis in *Erie* did not directly refer to the Tenth Amendment, he did state that the *Swift* scheme was unconstitutional. *Id.* at 79–80. Some scholars 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. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 207–10 (4th ed. 2005) (discussing and quoting *Erie*, 304 U.S. at 80).

139. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 55 (5th ed. 1994).

140. *Gasperini*, 518 U.S. at 427 (1996).

deavor."[141] To determine the *Erie* substantive procedural divide, the Court has developed three tests: the outcome-determinative test,[142] the refined outcome-determinative test,[143] and the balancing test.[144] The balancing test works best for the purposes of this Article's analysis.

When using this balancing test, a court weighs the state interest against the federal interest. On the state's 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 in the state's legislative policy.[145] Also on the state's side of the balance is an outcome-determinative analysis—an analysis of the probability that the outcome will be affected by the choice between federal and state law.[146] On the federal side of the balance, the court considers the importance of the law to federal policy.[147]

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.[148] 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.[149] 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.[150] Some commentators have suggested the "unguided" aspect refers to courts employing whatever test provides the desired outcome.[151]

The recent decision of the Supreme Court in *Gasperini v. Center for Humanities Inc.* provides a good illustration of some of these concepts and demonstrates how the Court utilizes

141. *Id.*
142. *See* Guaranty Trust v. York, 326 U.S. 99, 109 (1945).
143. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965).
144. *See* Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 538 (1958).
145. *Id.*
146. *Id.* at 536–37.
147. *Id.* at 538–39.
148. *See* Hanna, 380 U.S. at 473–74 (1965).
149. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438 (1996).
150. *Hanna*, 380 U.S. at 471.
151. Gregory Gelfand and Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 940 (1988).

whatever approach will result in the desired outcome.[152] Indeed, one of the more interesting aspects of *Gasperini* is that it cobbled together various pieces of the *Erie* analysis to arrive at its desired results.[153]

In *Gasperini,* a jury awarded damages in the amount of $450,000 to a plaintiff in federal court in New York.[154] The defendants moved for a new trial, claiming that the damages were excessive.[155] New York state procedure allows a trial judge to set aside a jury damage verdict when it "deviates materially from what would be reasonable compensation."[156] Federal Rule of Civil Procedure 59 does not specifically address excessive damages, but the common law standard allowed for new trials when the verdict "shocks the conscience."[157]

Thus, the conflict in *Gasperini* pitted a lesser state law standard (deviates materially), which 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.[158] 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 might result in forum shopping as plaintiffs might want to avoid a trial judge overturning a jury verdict (outcome-determinative).[159]

The second issue in *Gasperini* involved the appellate process. The New York state tort reform statute directed appellate courts to review the trial judge's determination *de-novo.* The federal standard on the other hand, deferred to the trial court, reviewing a factual decision only if there has been an abuse of discretion by the trial judge. The Court resolved this conflict in

152. *Gasperini*, 518 U.S. 415 (1996).

153. Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 768–75 (1998).

154. *Gasperini*, 518 U.S. at 420.

155. *Id.*

156. *Id.* at 425 (quoting N.Y. C.P.L.R. 5501(c) (1995)).

157. *Id.* at 429.

158. *Id.* at 427–30.

159. *Id.*

favor of the federal standard, finding a strong federal interest and thus implying the use of a balancing test approach.[160]

B. Reverse-Erie

Just as federal courts must decide which law to apply, state courts sometimes must decide whether to apply state or federal law.[161] This occurs when state courts hear federal claims, as required under their concurrent jurisdiction.[162] When state courts hear federal claims, they may apply their own procedural rules unless those rules are preempted under federal law.[163] With regards to the elements and defenses, however, state courts must apply federal law.[164] 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."[165] 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.[166] Of course, many cases lie somewhere in the middle, involving quasi-procedural issues,

160. 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 The Supreme Court, 1995 Term*—Erie *Doctrine*, 110 HARV. L. REV. 256, 265 (1996).

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

162. 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. Co., 223 U.S. 1, 55–57 (1911).

163. *See* Felder v. Casey, 487 U.S. 131, 138 (1988).

164. *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 381–83 (1990) (holding that the state law sovereign immunity defense is not available in § 1983 action brought in state court when such defense would not be available in federal court); Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335 (1988) (holding that the proper measure of damages, including whether prejudgment interest may be awarded, is a substantive issue to which federal law applies).

165. Brown v. Western Ry. of Alabama, 338 U.S. 294, 296 (1949).

166. "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 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.

such as statutes of limitations, but no direct preemption or direct conflict with a federal statute.[167] For those cases, state courts conduct an analysis very similar to Erie in which they balance state interests, federal interests, and outcome differences.[168]

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.

C. 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.[169] The U.S. Supreme 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."[170] 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.[171]

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167. *See* Clermont, *supra* note 161, at 33, 33 n.137.

168. *See* Clermont, *supra* note 161, at 33 ("[R]everse-*Erie* balancing means no more than the 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.* Although still relevant, 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.* at 36–37. 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.

169. Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991).

170. *Id.* at 460.

171. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

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.[172] Neither can it require a state stamp on fertilizer when a federal law authorizes its distribution by a Department of Agriculture official.[173] As discussed above, states may not directly control federal officers.[174] The question posed by this Article is more nuanced, however, as it involves the admissibility of evidence in court rather than the direct control of federal law enforcement agents.

With this general introduction to the *Erie* Doctrine and preemption, this Article now suggests a framework for state courts to use when analyzing motions to suppress evidence obtained by a federal officer pursuant to federal law. Utilizing this *Erie*-like analysis would give the state courts an analytical avenue to reach the desired result while addressing important federalism concerns.

V. PROPOSED FRAMEWORK

The *Erie* balancing test provides a useful framework for resolving the issue addressed by this Article.[175] 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.

If the courts that have had occasion to rule on this issue had used this framework, they may have reached the same results. 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 held that because a federal official's jurisdiction is beyond the state, the deterrent rationale is inapplicable.[176] Similarly, under the

172. Johnson v. Maryland, 254 U.S. 51 (1920).

173. Mayo v. United States, 319 U.S. 441 (1943). These cases involved state laws which directly affected federal officials "in their specific attempt to obey orders." *Johnson*, 254 U.S. at 57.

174. *See supra* notes 123–28 and accompanying text.

175. 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.

176. *See supra* notes 64–76 and accompanying text.

analytical framework proposed by this Article, the state court should admit the evidence because the state's 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 in state court evidence obtained in compliance with federal law but not state law.

Further, where courts have decided to suppress the evidence, those courts have looked to protection of individual rights or promotion of judicial integrity as the purpose of the exclusionary rule, finding that this purpose is furthered by suppression of the evidence.[177] 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.[178] In the criminal context, however, it is difficult to determine if suppression of the evidence actually is outcome-determinative because the remainder of 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.[179] 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?[180] In answering this question, the court would have to examine the other evidence and determine the importance of the evidence 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.

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177. *See supra* notes 77–85 and accompanying text.

178. It should be pointed out that the forum shopping concerns that *Erie* sought to address are not likely to exist in the criminal context.

179. This standard was originally adopted in *Chapman v. California*, 386 U.S. 18, 24 (1967). The burden is on the government to show beyond a reasonable doubt that the evidence did not contribute to the jury verdict, thus demonstrating that the error was harmless. *Id.*

180. *Id.*

VI. 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

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."[181] The Act was enacted at unprecedented speed because members of Congress believed many of its provisions were genuinely and urgently needed to protect Americans against terrorism, and they were also under political pressure to "'do something,' due to the [Bush] administration's repeated complaints of delay and warnings about potential future attacks."[182] The Patriot Act greatly enhanced the investigatory tools available to federal law enforcement agents.[183] The hypothetical focuses on the provision that allows for so-called "sneak and peek" warrants.[184] 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'.[185] Between October 26, 2001, and January 21, 2005, the government requested "sneak and peek" warrants 155 times.[186] Then, in 2005, Congress amended the Patriot Act, including the "sneak and peek" provi-

181. USA Patriot Act, *supra* note 1.

182. Beryl A. Howell, *Seven Weeks: The Making of the USA Patriot Act*, 72 GEO. WASH. L. REV. 1145, 1206 (2004).

183. *See supra* note 53.

184. USA Patriot Act, *supra* note 1, § 213, 115 Stat. at 285–86.

185. *Id.*

186. Charlie Savage & Rick Klein, *Government Nearly Doubles Use of Patriot Act Search Power*, BOSTON GLOBE, April 5, 2005, at A4.

sion.[187] The amended section 114 requires law enforcement officials to give notice of a warrant within thirty days, unless they can show good cause.[188] Each additional delay must be ninety days or fewer unless a longer delay is justified by the facts of the case.[189] There is no restriction on the number of permitted ninety-day delays.[190]

Officers may dispense with notice if they can show reasonable cause that providing notice will result in an "adverse result."[191] Something that may cause an "adverse result" is best understood as anything that "seriously jeopardiz[es] an investigation."[192] Notice also may be delayed when the warrant prohibits the seizure of goods, but seizure still may be justified by "reasonable necessity."[193] The "sneak and peek" warrant is not limited to terrorism and can be utilized whenever the search is for "property that constitutes evidence of a criminal offense" in violation of U.S. law.[194] The Justice Department refers to the "sneak and peek" power as a valuable law enforcement tool that can be utilized in a "wide spectrum of criminal investigations, including those involving terrorism and drugs."[195]

The constitutionality of "sneak and peek" warrants has not been determined.[196] To do so, the Supreme Court would turn

187. USA PATRIOT Improvement and Reauthorization Act of 2005, § 114 (codified as amended at 18 U.S.C. § 3103a (Supp. V 2005)).

188. 18 U.S.C. § 3103a(b)(3)–(c) (Supp. V 2005)).

189. 18 U.S.C. § 3103a(c).

190. *Id.*

191. 18 U.S.C. § 3103a(b)(1).

192. 18 U.S.C. § 2705(a)(2) (2000).

193. 18 U.S.C. § 3103a(b)(2).

194. 18 U.S.C. § 3103a(a).

195. Savage & Klein, *supra* note 186, at A4.

196. *See* Susan N. Herman, *The USA 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 *United States v. Espinoza*, 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.'" No. CR-05-2075-7-EFS, 2005 WL 3542519, at *1 (E.D. Wash. Dec. 23, 2005) (quoting United States 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 both of reasonable cause that immediate notification would have an adverse result, pursuant to § 3103a(b)(1), and of reasonable necessity for any seizure of property, pursuant to § 3103a(b)(3). 2005 WL 3542519, at *2. The court found that these specific findings must be explicit either on the warrant itself or in a

to the reasonableness clause of the Fourth Amendment and engage in a balancing between the nature of the intrusion and the governmental interests involved.[197] This approach was referred to by Justice Brennan as "Rohrschach-like."[198] In *Wilson v. Arkansas*, in considering whether "knock and announce" was required in the execution of a search warrant, the Court turned to the reasonableness clause of the Fourth Amendment to evaluate the validity of the search.[199] Although the Court indicated that the Fourth Amendment does not require notice in every instance (for example, when there is a possibility that

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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*. *See Espinoza*, 2005 WL 3542519, at *2 (describing the Supreme Court's findings in *Dalia*, 441 U.S. 238 (1979)). In *Dalia*, the Supreme Court noted that 18 U.S.C. § 2518(4) requires the issuing court to specify the scope of surveillance, parties and place to be monitored, and the agency conducting the wiretap. 441 U.S. at 249–50. The Court in *Dalia* found that "[t]he plain effect of the detailed restrictions of § 2518 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.* at 250.

In September 2007, a federal district court held that certain provisions of the U.S.A. Patriot Act that amended §§ 1804 and 1823 of the Foreign Intelligence Surveillance Act (FISA) of 1978 violated the Fourth Amendment. *See* Mayfield v. United States, 504 F.Supp. 2d 1023, 1036–43 (D. Or. 2007). The Plaintiff Mayfield was wrongly arrested in connection with the 2004 Madrid train bombings. *See id.* at 1027–29. Prior to his arrest, the FBI obtained an order from the Foreign Intelligence Security Court ("FISC") to conduct covert electronic surveillance and physical searching of Mayfield's home and office. *Id.* at 1028. Where the primary purpose of the electronic surveillance and physical searching of Mayfield's home was to gather evidence for criminal prosecution and not to gather foreign intelligence, the court found that the amendments to FISA allowed the government to avoid showing probable cause when obtaining a search order, in violation of the Fourth Amendment. *See id.* at 1038–43.

On September 6, 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. *See* Doe v. Gonzalez, 500 F. Supp. 2d. 379, 395–96 (S.D.N.Y. 2007). The judge characterized those provisions as "the legislative equivalent of breaking and entering." *Id.* at 413.

197. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968). The Fourth Circuit has held that 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) ("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.").

198. New Jersey v. T.L.O., 469 U.S. 325, 358 (1985) (Brennan, J., dissenting in part).

199. *See* 514 U.S. 927, 931–34 (1995) (holding that "the common law 'knock and announce' principle forms a part of the Fourth Amendment reasonableness inquiry").

evidence will be destroyed or officers injured),[200] the absence of notice for a surreptitious entry "casts strong doubt on constitutional adequacy."[201]

Recently, however, in *Hudson v. Michigan*, 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.[202] 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.[203] 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 the evidence."[204]

Search warrants frequently are executed in homes, the sanctity of which is highly valued in Fourth Amendment jurisprudence.[205] Therefore, when weighing the nature of the intrusion caused by searches authorized by "sneak and peek" warrants, 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.[206] On the other hand, the Court likely would find that the government interest in preventing another terrorist attack is exceptional. On balance, it is likely that the Court would uphold "sneak and peek" warrants, given the importance of the government's interest in fighting terrorism.[207] At any rate, this Article will assume that section 114 is constitutional.[208]

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200. *Id.* at 936–37.

201. U.S. v. Freitas, 800 F.2d 1451, 1456 (1986) (citing Berger v. New York, 388 U.S. 41, 60 (1967)).

202. *See* Hudson v. Michigan, --- U.S. ---, 126 S. Ct. 2159, 2165 (2006).

203. *Id.* at 2162.

204. *Id.* at 2165.

205. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001).

206. Robert M. Duncan, Jr., *Celebrating Student Scholarship: Surreptitious Search Warrants and the U.S.A. Patriot Act: "Thinking Outside the Box but Within the Constitution," Or a Violation of Fourth Amendment Protections?*, 7 N.Y. CITY L. REV. 1, 36–37 (2004).

207. *See generally id.* (discussing history of surreptitious search warrants and exploring possible future uses and restrictions on use).

208. 18 U.S.C. § 3103a (Supp. V 2005); Duncan, *supra* note 206.

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.[209] 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 admitted the evidence found during the search on the grounds that a "statutory violation in obtaining or executing a warrant does not *require* suppression of the evidence."[210] However, the court did indicate that if the violation were aggravated, it would reach state constitutional dimensions and the evidence would be suppressed.[211] 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.

In the state of Oregon, the courts interpret the purpose of their exclusionary rule, derived from article I, section 9 of the Oregon Constitution, as protection of the individual.[212] 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.[213] This protection is triggered whenever "the Oregon government seeks to use the evidence in an Oregon criminal prosecution."[214]

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

209. OR. REV. STAT. § 133.575(3) (2003).
210. State v. Blasingame, 873 P.2d 361, 365 (Or. Ct. App. 1994).
211. *Id.* at 389.
212. *See, e.g.*, State v. Davis, 834 P.2d 1008, 1010 (Or. 1992).
213. *See id.* at 1012–13.
214. *Id.* at 1012.

charge and seeks to suppress the marijuana plants found as a result of the violation. How would a court apply the proposed framework to this hypothetical?

First, a court would determine the nature of the conflict between state and federal law. In this hypothetical, both section 114 of the USA Patriot Act as amended in 2006[215] and section 133.575(3) of the Oregon Revised Statutes are relevant.[216] A court first would ask whether section 114 preempts state law. Under the "plain statement rule," Congress must clearly indicate its intention to preempt state law in matters implicating important functions of the state government.[217] 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.[218] 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.[219] Further, the statute, as amended, specifically mentions that "a warrant may be issued to search for and seize any property that constitutes evidence of a criminal violation of the laws of the United States."[220] The Patriot Act does not specifically prohibit the state from suppressing evidence obtained in violation of state law, and there is no indication that Congress was considering state law.[221] There is no implied preemption, as the Act does not address state prosecutions.[222] Finally, 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.[223]

The hypothetical in this Article is analogous to *Oregon v. Rodriquez*,[224] wherein an agent for the Immigration and Naturalization Service ("INS") obtained an INS administrative arrest warrant for an alien who had previously been convicted of

215. 18 U.S.C. § 3103a (Supp. V 2005).
216. OR. REV. STAT. § 133.575(3) (2003).
217. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991); *see also supra* note 171 and accompanying text.
218. *See* USA Patriot Act, *supra* note 1.
219. *See id.*
220. 18 U.S.C. § 3103a(a).
221. *See id.*
222. *See id.*
223. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
224. 854 P.2d 399 (Or. 1993).

possession of a controlled substance.[225] While executing the warrant, the agent found guns in the alien's home, and the guns were later used as evidence against him.[226] In the state criminal trial, the defendant moved to suppress the guns because the INS warrant did not comply with Oregon law.[227] 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.[228] By applying preemption, the court found no interference with the federal law and thus applied the state law.[229]

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 for the state interests, the court would consider Oregon's interest in passing and upholding its criminal laws, as well as the purpose of its exclusionary rule (protection of the individual), its interest in its 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 the Act's purpose: "to deter and punish terrorist acts in United States and around the world, [and] to enhance law enforcement investigation tools."[230] 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. [231]

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225. *Id.* at 400.
226. *Id.* at 401.
227. *Id.*
228. *See id.* at 403–04.
229. *Id.* at 403–04 (holding that the guns seized during the search were not subject to suppression under statutory law, the Oregon Constitution or the Fourth Amendment).
230. USA Patriot Act, *supra* note 1, § 1.
231. *See, e.g.*, State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001); *see also* State v. Davis, 834 P.2d 1008 (Or. 1992).

If this same scenario occurred in New Jersey and such surreptitious warrants were illegal under New Jersey law,[232] the state court might reach a different result. In New Jersey, the purpose of the state exclusionary rule is to deter state police officials.[233] Under the proposed framework, the court would weigh the purpose of the state exclusionary rule, 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 might apply; at least, the balance does not weigh as heavily in favor of state law as the Oregon example. Although this analysis reaches the same result as the state exclusionary rule rationale, it recognizes the important federalism concerns.

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 would allow

232. 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. STAT. ANN. § 3:5-5 (West 1984).

233. *See* State v. Mollica, 554 A.2d 1315, 1328 (N.J. 1989).

state courts to suppress the evidence while still giving due respect to principles of federalism.