Montana Law Review

Volume 82 | Issue 1 Article 10

4-20-2021

State Constitutional Rights Be Damned: Reconsidering the Indifference to State Constitutional Violations in Federal Criminal Proceedings

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STATE CONSTITUTIONAL RIGHTS BE DAMNED: RECONSIDERING THE INDIFFERENCE TO STATE CONSTITUTIONAL VIOLATIONS IN FEDERAL CRIMINAL PROCEEDINGS

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"The respondent's arguments awaken the image of spectral horsemen riding forth from Virginia City to enforce law and order in our communities, but leaving in their dust the trampled remnants of the constitution."[1]

I. Introduction

The United States Supreme Court has warned that "[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."[2] It has also been clear that the "Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom."[3] Despite these principles, freedoms protected by state constitutions are largely irrelevant in criminal prosecutions proceeding through federal court.[4] More precisely, in federal criminal prosecutions a defendant's state constitutional rights provide no redress against blatantly unconstitutional actions of state and local law enforcement.[5] This Comment explores this relatively overlooked area of the law and develops arguments supporting the exclusion of evidence procured in violation of a defendant's state constitutional rights in federal criminal proceedings.

It is worth noting here that such arguments are largely only of value in battles being fought before en banc panels of the United States Circuit Courts of Appeals and the United States Supreme Court. This is so, because nearly every United States Circuit Court of Appeals has concluded that evidence tainted by a state law violation is nonetheless admissible in federal

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1. State v. Christensen, 797 P.2d 893, 896 (Mont. 1990).

2. Mapp v. Ohio, 367 U.S. 643, 658 (1961).

3. Aptheker v. Rusk, 378 U.S. 500, 509 (1964).

4. Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?* 46 Wm. & Mary L. Rev. 1437, 1445 (2005); *see also* United States v. Little, 753 F.2d 1420, 1434 (9th Cir. 1984) (holding "[e]vidence obtained in violation of neither the Constitution nor federal law is admissible in federal court proceedings without regard to state law").

5. *See, e.g.*, United States v. Eastland, 989 F.2d 760 (5th Cir. 1993).

criminal prosecutions.[6] As such, under the current weight of authority, a federal district court must deny any motion to suppress which seeks the exclusion of evidence on the basis of a state constitutional violation. The result is a startling gap in the coverage of an individual's state constitutional protections.

Before we begin, it must be recognized that the number of rights enjoyed under the United States Constitution often dwarf in comparison to the breadth of civil liberties secured by state constitutions.[7] In fact, the importance of state constitutions to those whose liberty is jeopardized cannot be understated. This is especially true in Montana, where the state constitution enumerates a right of privacy.[8] This provision, in combination with the Montana Constitution's search and seizure provision, often requires exclusion of evidence that would remain admissible if only federal law were implicated.[9] In other words, "Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection" than that afforded under the United States Constitution.[10] As noted above, however, these heightened protections evaporate when evidence procured by state or local officials only finds its way into a federal courthouse.

Consider, for example, state or local law enforcement performing a search in a manner violating the Montana Constitution but nonetheless revealing a sizeable amount of illegal drugs. The fruits of this search would undoubtedly be excluded in a criminal proceeding in Montana State Court. The tainted evidence, however, only leads to criminal charges in federal court because prosecutors in the state system know they will not be able to use it against the defendant at trial. In such a situation it would be consid-

6. United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985); United States v. Pforzheimer, 826 F.2d 200, 203–04 (2d Cir. 1987); United States v. Rickus, 737 F.2d 360, 363–64 (3d Cir. 1984); United States v. Clyburn, 24 F.3d 613, 616–17 (4th Cir. 1994); United States v. Eastland, 989 F.2d 760, 766–67 (5th Cir. 1993); United States v. Shields, 978 F.2d 943, 945–47 (6th Cir. 1992); United States v. Singer, 943 F.2d 758, 760–64 (7th Cir. 1991); United States v. Padilla-Pena, 129 F.3d 457, 464 (8th Cir. 1997); United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987); United States v. Miller, 452 F.2d 731, 732–35 (10th Cir. 1971); United States v. Brazel, 102 F.3d 1120, 1154–55 (11th Cir. 1997). This leaves out only the District of Columbia and Federal Circuits, which do not appear to have ever addressed or been presented with the question. This result is properly attributed to the lack of appeals from federal criminal proceedings originating within a state.

7. *See, e.g.*, Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353 (2018–2019).

8. MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

9. *See, e.g.*, State v. Bullock, 901 P.2d 61, 75–76 (Mont. 1995) (excluding evidence procured "in an area of land beyond the curtilage" under the Montana Constitution permissibly obtained under the Fourth Amendment); State v. Tackitt, 67 P.3d 295, 300–01, 304 (Mont. 2003) (excluding evidence procured through use "of a drug-detecting canine to survey the exterior of" a vehicle under the Montana Constitution permissibly obtained under the Fourth Amendment).

10. *Bullock*, 901 P.2 at 75.

ered "most imaginative[ ]" for a defendant to seek suppression of the evidence on the basis that it was obtained in violation of the Montana Constitution.[11] Indeed, as noted above, the United States District Court for the District of Montana, as with nearly every other federal district court, would be unable to suppress the evidence on the basis of the defendant's rights under the Montana Constitution. In essence, this legal outcome leaves state and local law enforcement officials free to violate the citizenry's state constitutional rights as long a criminal prosecution is only initiated in an Article III court. Who knew state constitutional rights were so meaningless?

This Comment argues for the exclusion of evidence in federal prosecutions when state or local law enforcement officers obtained it through a violation of the defendant's state constitutional rights. This limited framework excludes scenarios in which state or local law enforcement officials violate a defendant's state constitutional rights while acting in concert with federal law enforcement entities. This is because basic principles of federalism arguably forbid imposition of state law as a check on federal law enforcement activities that operate within the bounds of federal law.[12] As such, the limited focus of this Comment permits us to bypass the often complex jurisdictional hurdles attendant to situations in which a court attempts to constrain the actions of federal officials through application of state law.

In the author's view, this limited framework also presents the most compelling situation in favor of exclusion. If a federal court is not prepared to exclude evidence derived from state constitutional violations committed by state or local law enforcement officers acting alone, it is hard to imagine a situation in which a state constitution would form the basis of a favorable suppression ruling issued by an Article III judge. With this background in mind, Part II offers a detailed examination of the various silver platter doctrines, which are implicated in cases involving the admissibility of evidence in the court of one sovereign when the evidence would be excluded in the court of another sovereign. Part III surveys the decisions issued by federal courts rejecting a defendant's argument that state law violations in the procurement of evidence justify its exclusion in federal criminal proceedings. Part IV develops arguments supporting the exclusion of such evidence in federal criminal proceedings before a conclusion is offered to the reader.

11. United States v. Dedrick, 840 F. Supp. 2d 482, 491 (D. Mass. 2012).

12. *See* Kentucky v. Long, 837 F.2d 727, 749 (6th Cir. 1988) (holding that federal law enforcement officers are incapable, as a matter of law, of violating state law as long as their "acts are both authorized by the laws of the United States and necessary and proper to the performance of [their] duties").

II. On a Silver Platter: How State and Federal Courts Bypass Pesky Constitutional Constraints

The admissibility of evidence obtained in violation of another sovereign's law is not a novel legal question. On the contrary, prior to the extension of the exclusionary rule to the states,[13] federal courts established a sizeable body of law addressing the admissibility of evidence obtained by state officials in violation of a defendant's rights under the United States Constitution. This jurisprudence falls within the so-called "silver platter doctrine" and provides the framework most analogous to the evidentiary issue discussed in this paper.[14] This section examines the origins and offspring of the silver platter doctrine.

A. Historical Perspective

The silver platter doctrine was derived from the evidentiary loophole that existed from 1914 to 1960 in the Supreme Court's interpretation of the Fourth Amendment. In 1914, the Supreme Court decided *Weeks v. United States*,[15] which held that evidence obtained by federal officials in violation of the Fourth Amendment is inadmissible in an ensuing criminal prosecution.[16] With respect to evidence obtained by state officials in an identical manner, however, the Court held, "What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to [state] officials."[17] And so, the silver platter doctrine became the law of the land. Under this doctrine, evidence seized by state officials contrary to the limitations of the Fourth Amendment could be "turned over to federal authorities on a silver platter."[18]

In 1949, the Supreme Court incorporated the Fourth Amendment, binding the states through the Fourteenth Amendment.[19] However, the Supreme Court held:

> the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.[20]

13. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

14. *See* Tom Quigley, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 Ariz. St. L. J. 285, 286 n.9 (1988).

15. 232 U.S. 383 (1914).

16. *Id.* at 398.

17. *Id.*

18. Lustig v. United States, 338 U.S. 74, 78–79 (1949).

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

20. *Id.* at 28.

Ultimately, the Court declined to adopt the remedy available to defendants whose Fourth Amendment rights were abridged by federal officials, holding that evidence unlawfully obtained by state officials need not be excluded.[21] Consequently, the silver platter doctrine persisted. This doctrinal gap was finally closed in 1960, when the Court decided *Elkins v. United States*[22] and held "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial."[23]

Although the silver platter doctrine perished with *Elkins*, the underlying premise—that a court need not exclude evidence obtained in violation of a defendant's constitutional rights by government officials not obligated to honor those rights—persists to this day. That is, "[t]he underlying concept of the silver-platter doctrine . . . that protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity" is very much alive.[24] Today it takes many forms, including the "reverse silver platter," the "interstate silver platter," and the "new silver platter." The new silver platter is the focus of this Comment and is discussed at length in the Comment's subsequent sections. Nonetheless, it is worth examining the manner in which the reverse silver platter and interstate silver platter doctrines operate.

B. The Reverse Silver Platter

The reverse silver platter doctrine "refers to instances where state courts admit evidence obtained by federal officers in a manner that would not violate federal authority but would violate their own state law or the state constitution."[25] An illustrative example is found in *New Jersey v. Mollica*.[26] There, federal agents "without a search warrant obtained hotel billing records relating to" the defendant's use of the telephone in a room he had rented.[27] The federal agents subsequently "transfer[red] the evidence to state officers for prosecutorial use against" the defendant.[28] The New Jersey Supreme Court concluded the seizure would violate the New Jersey Consti-

21. *Id.* at 33; *see also* Quigley, *supra* note 14, at 286.

22. 364 U.S. 206 (1960).

23. *Id.* at 223.

24. *See* Texas v. Toone, 823 S.W.2d 744, 748 (Tex. Ct. App. 1992) (citing Burdeau v. McDowell, 256 U.S. 465, 475 (1921)).

25. Hawai'i v. Torres, 262 P.3d 1006, 1014 n.15 (Haw. 2011).

26. 554 A.2d 1315, 1325 (N.J. 1989).

27. *Id.* at 1318.

28. *Id.*

tution if conducted by state officials.[29] However, the evidence was ultimately found to be admissible in state court on the basis that "federal officers acting lawfully and in conformity to federal authority are unconstrained by the State Constitution" in the absence of "state action or responsibility."[30] This holding was based on the "inherent jurisdictional limitations" of state constitutions, with the court concluding that "the application of the state constitution to the officers of another jurisdiction would disserve the principles of federalism and comity, without properly advancing legitimate state interests."[31]

It should be recognized, however, that such an outcome is not preordained. On the contrary, state courts in both New Mexico and Hawaii exclude evidence obtained by federal officials in violation of the defendant's state constitutional rights. In *New Mexico v. Cardenas-Alvarez*,[32] the New Mexico Supreme Court held that evidence seized by federal authorities failed to comport with the New Mexico Constitution and was, therefore, inadmissible in any New Mexico state court.[33] The court recognized the reality that "federal agents are incapable of violating a state constitution" but successfully excised this from its analysis by framing the question as "whether the actions of federal agents can implicate the protections of the New Mexico Constitution for purposes of determining the admissibility of evidence in state court."[34]

The New Mexico Supreme Court first examined the New Mexico Constitution's search and seizure clause, finding "no mandate in the text of Article II, Section 10, nor in our jurisprudence interpreting this clause, to selectively protect New Mexico's inhabitants from intrusions committed by state but not federal governmental actors."[35] Ultimately, the court's holding fell short of finding that federal agents are bound by the limitations of state constitutions and was instead rooted in policy considerations. Specifically, the court stated, "We acknowledge the supremacy of the federal government and encourage federal agents to continue to enforce the law in as vigilant a manner as the federal Constitution permits."[36] But the court still found exclusion permissible on the basis of federal agents' failure to comply with the stricter parameters of the New Mexico Constitution, holding, "[a]lthough we do not claim the authority to constrain the activities of federal agents, we do possess the authority—and indeed the duty—to insulate

29. *Id.* at 1328–29.
30. *Id.*
31. *Id.* at 1327.
32. 25 P.3d 225 (N.M. 2001).
33. *Id.* at 232–35.
34. *Id.* at 232.
35. *Id.*
36. *Id.* at 233.

our courts from evidence seized in contravention of our state's constitution."[37] In essence, the court concluded that while federal agents are not bound by the New Mexico Constitution, when they operate within New Mexico, their actions will nonetheless be scrutinized in state court according to the more exacting standards of the state constitution.

In *Hawai'i v. Torres*,[38] the Hawai'i Supreme Court reached an identical conclusion, observing "evidence obtained by federal officers must have been obtained lawfully under the constitutions of the respective states before being admitted in a state court prosecution."[39] Rejecting the adoption of the reverse silver platter doctrine, the court found "it would seem apparent that the question of whether or not the privacy rights of a defendant who is tried in our courts and under our penal law have been violated, should not be governed by the law and constitution of jurisdictions that have deemed privacy rights irrelevant."[40] The court's opinion was similarly rooted in policy considerations. Finding itself "bound to follow the Constitution of Hawai'i," the court acknowledged its acquiescence to the seizure of evidence through violation of the state constitution would erode the judicial integrity of its state court system.[41] These considerations are relevant to any silver platter analysis.

C. Interstate Silver Platter

The interstate silver platter doctrine arises in situations when evidence was procured by the law enforcement officials of one state in violation of a defendant's rights under the constitution of another state. A textbook application of the interstate silver platter doctrine can be found in *Helm v. Kentucky*.[42] In *Helm*, a defendant robbed a gas station in Louisville, Kentucky, before fleeing to Dayton, Ohio.[43] Once in Ohio, the defendant was stopped by Ohio police officers and subjected to a search that he maintained violated his rights under the Kentucky Constitution.[44] The defendant sought to suppress the evidence in a subsequent prosecution initiated in Kentucky state court.[45] The Kentucky Supreme Court rejected the defendant's argument, holding that "the Kentucky Constitution is not applicable in the case before us" because it applies only to Kentucky officials.[46] Thus, under Ken-

37. *Id.*
38. 262 P.3d 1006 (Haw. 2011).
39. *Id.* at 1017.
40. *Id.* at 1020.
41. *Id.* at 1019.
42. 813 S.W.2d 816 (Ky. 1991).
43. *Id.* at 817.
44. *Id.* at 817–18.
45. *Id.* at 818.
46. *Id.*

tucky's adoption of the interstate silver platter doctrine, a defendant's rights under the Kentucky Constitution are irrelevant in Kentucky state courts, unless the action of a Kentucky official is at issue.

The Oregon Supreme Court's decision in *Oregon v. Davis*[47] provides a helpful illustration of a tribunal's rejection of the interstate silver platter. There, a defendant in the Oregon state court system had been arrested in Mississippi, by Mississippi law enforcement officers.[48] The defendant was then subjected to questioning in Mississippi by Oregon law enforcement officers.[49] The defendant challenged both the validity of the arrest by Mississippi officers and the validity of his waiver of counsel during the Oregon officers' interrogation.[50] The court ultimately rejected application of the interstate silver platter doctrine, concluding that the Oregon Constitution was the proper metric for both allegedly unwarranted government intrusions.[51]

The Oregon Supreme Court's holding in *Davis* rests on two important propositions: (1) the rights secured by the Oregon Constitution "are vindicated [in criminal prosecutions] through the sanction of suppression of evidence" (i.e. the exclusionary rule);[52] and (2) the purpose of Oregon's exclusionary rule is not to punish "any particular governmental actor, local or otherwise," but rather to protect "the individual's rights vis-à-vis the government."[53] The court enumerated its reliance on these factors, stating:

> This focus on individual protection under the exclusionary rule, a rule that operates to vindicate a constitutional right in the courts, supports the constitutional rule that we announce here: If the government seeks to rely on evidence in an Oregon criminal prosecution, that evidence must have been obtained in a manner that comports with the protections given to the individual by Article I, section 9, of the Oregon Constitution. It does not matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply.[54]

In short, "the constitutional rights . . . belong to the individual defendant."[55] They are for the accused to invoke and the court to protect. These principles should be remembered as this Comment proceeds.

47. 834 P.2d 1008 (Or. 1992).
48. *Id.* at 1009.
49. *Id.*
50. *Id.* at 1013.
51. *Id.* at 1011–13
52. *Id.* at 1012.
53. *Id.*
54. *Id.* at 1012–13.
55. *Id.* at 1013.

III. On a New Silver Platter: The Inapplicability of State Constitutional Rights in Federal Prosecutions

The so called "new silver platter" refers to a federal court's acquiescence to the violation of a criminal defendant's state constitutional rights during a federal criminal prosecution. Indeed, as noted above, this is the law of nearly every United States Circuit Court of Appeals. A survey of decisions is necessary to understand the analytical basis on which the new silver platter rests.

In the summer of 1984, the United States Court of Appeals for the Tenth Circuit decided *United States v. Rickus*,[56] holding that the violation of defendants' state constitutional rights does not warrant exclusion of the poisoned fruit in an ensuing federal prosecution.[57] In *Rickus*, a defendant was subjected to a search by state police officers that revealed the presence of a firearm.[58] Rickus, a felon, was subsequently indicted in federal court for being a prohibited person in possession of a firearm.[59] Rickus sought suppression of the evidence on the basis that his rights under the Pennsylvania Constitution had been violated.[60] The district court agreed and suppressed the evidence.[61] On appeal, the Tenth Circuit reversed.[62] Its analysis of the issue was both hasty and sparse, limited to the general recognition that federal law governs the admissibility of evidence in federal court and that the "deterrent effect to be gained from excluding this evidence in federal trials for federal offenses is small, and is far outweighed by the costs to society of excluding the evidence."[63]

Similarly sparse is the Seventh Circuit's holding in *United States v. Singer*.[64] There, a defendant facing prosecution in federal court challenged the admissibility of evidence seized by state officers during the execution of a warrant that failed to comply with the Wisconsin Constitution.[65] The Seventh Circuit, in only two paragraphs, rejected the defendant's argument by summarily concluding state constitutional law is "inappropriate for evidentiary determinations in federal criminal cases."[66] The court explained the rule as follows:

56. 737 F.2d 360 (10th Cir. 1984).
57. *Id.* at 363–64.
58. *Id.* at 362–63.
59. *Id.* at 362.
60. *Id.* at 363.
61. *Id.* at 362–63.
62. *Id.* at 363–64.
63. *Id.* at 364.
64. 943 F.2d 758 (7th Cir. 1991).
65. *Id.* at 760–61.
66. *Id.*

> Whether the evidence in the case was seized in contravention of the constitution or laws of the state of Wisconsin does not control its admissibility in federal criminal proceedings; and accordingly, the officers' compliance or lack of compliance with Wisconsin law (as set forth in *Cleveland*) is irrelevant. Rather, the proper standard for federal application provides that evidence seized by state law enforcement officers is admissible in a federal criminal proceeding if it is obtained in a manner consistent with the protections afforded by the United States Constitution and federal law.[67]

The Eleventh Circuit similarly rejected a defendant's argument that evidence procured in violation of his state constitutional rights should be suppressed in his federal criminal prosecution as "utterly without merit."[68] Notably, however, the court's analysis is limited to the conclusory statement that it is "well settled . . . [that] complaints that the evidence was obtained in violation of state law are of no effect."[69] Alas, it appears federal courts take for granted the notion that a defendant's state constitutional rights mean *nothing* in federal criminal prosecutions. More robust holdings, however, can be found in other circuits.

During the 1980s, the Ninth Circuit had numerous encounters with the new silver platter. Early on, the Ninth Circuit clearly established the rule that federal involvement in the contested law enforcement activity negated any claim that exclusion was justified by virtue of state law.[70] In doing so, however, the Court repeatedly left open the question of "whether information acquired by a state officer in violation of state law without federal involvement is admissible in federal court."[71] One case originating within Montana provided significant dictum on the issue, however, and easily constitutes the most favorable commentary on the issue provided by a federal court.

In *United States v. Henderson*,[72] the defendant challenged his conviction for illegally storing a stolen motor vehicle on the grounds that Judge James F. Battin erroneously refused to suppress the vehicle on the basis that it was discovered in violation of the Montana Constitution.[73] After receiving an anonymous tip that the defendant was storing a stolen vehicle, the Sheriff of Carbon County, Montana, conducted an investigation and ultimately gathered evidence in a manner offensive to the Montana Constitu-

67. *Id.* at 761.

68. United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982).

69. *Id.*

70. United States v. Henderson, 721 F.2d 662, 664 (9th Cir. 1983).

71. *Id.* at 664–65; United States v. Daniel, 667 F.2d 783, 785 (9th Cir. 1982); United States v. Underwood, 717 F.2d 482, 483 n.1 (9th Cir. 1983); United States v. Jacobs, 715 F.2d 1343, 1346 (9th Cir. 1983).

72. 721 F.2d 662 (9th Cir. 1983).

73. *Id.* at 663.

tion.[74] With the tainted evidence in hand, the sheriff "met with the county attorney in order to seek a search warrant for the [defendant's] property" and the "county attorney, in consultation with the Montana Department of Justice, concluded that evidence discovered in the course of the investigation, or pursuant to a search warrant based on that investigation, would be inadmissible in the courts of Montana."[75] Undeterred, the county attorney "suggested that the sheriff convey the results of his investigation to federal authorities" who in turn obtained a search warrant for the defendant's property that uncovered the evidence forming the basis of his conviction.[76]

Recognizing that "[w]hether information secured by state officers entirely without federal involvement should be admissible notwithstanding violations of state law is a question that remains undecided," the Ninth Circuit provided its thoughts on the issue.[77] Specifically, the Court concluded the defendant's argument "has merit" and "it would undercut the deterrent function of a state's exclusionary rule if state officers were able to turn illegally seized evidence over to federal authorities whenever they suspected the subject of the investigation of an offense susceptible to federal, as well as state, prosecution."[78] The Court went on to add "there is much to be said for the argument that federal courts should, in the interest of comity, defer to a state's more stringent exclusionary rule with respect to evidence secured without federal involvement."[79] Ultimately, the Court found a conclusive ruling unnecessary because the actions of involved federal officials comported with the United States Constitution.[80]

In 1987, the Ninth Circuit decided *United States v. Chavez-Vernaza*,[81] putting to rest any hope that it would suppress evidence based on state or local law enforcement's violation of state law. There, the Court finally decided the "precise question whether evidence seized by state officials in violation of state law is admissible in federal court where no federal involvement is present."[82] The Court rejected its *Henderson* dictum, dismissing it as "a departure from [its] cases holding that the admissibility of evidence in federal court is governed by federal rather than state standards."[83] Ultimately, the Court found that to conclude otherwise "would create an unnecessary conflict with other circuits" and simplified its rule to

74. *Id.* at 663–64.
75. *Id.* at 664.
76. *Id.* at 664–65.
77. *Id.*
78. *Id.*
79. *Id.* at 665.
80. *Id.*
81. 844 F.2d 1368 (9th Cir. 1987).
82. *Id.* at 1372 (alterations omitted).
83. *Id.* at 1373.

state that "evidence seized in compliance with federal law is admissible without regard to state law" or the identity of the uncovering agency.[84]

Similar openness to the suppressibility of evidence obtained by state officials in violation of state law persisted for some time in the First Circuit. First, in *United States v. Jarabek*,[85] the court was confronted with the question of whether law enforcement's procurement of a recording in violation of a "more restrictive Massachusetts interception statute" required exclusion in an ensuing federal prosecution.[86] Finding that the subject investigation was "at all times [ ] a joint federal-state one; that a federal prosecution always was a possibility; and that the electronic surveillance was conducted properly pursuant to federal practice and procedure," the court held, "the correct disposition of the issue before us follows with unmistakable clarity"—state law had no bearing on the evidence's admissibility.[87] In doing so, however, the court explicitly left open the question of whether state law enforcement acting alone would have been "sufficient reason to look to state law to determine the admissibility of interception evidence."[88]

Second, in *United States v. Pratt*,[89] a defendant pointed to the First Circuit's prior dictum in *Jarabek*, contending that because "the district court found that the investigation 'was primarily a state operation' . . . state law should have" governed the outcome of his suppression motion as to certain "electronically intercepted conversations."[90] In addressing the argument, the court first rejected the conclusion that such conversations were the fruit of state law enforcement efforts, instead concluding that "the disputed evidence [was] . . . at most, the product of a joint federal-state investigation."[91] As such, federal law exclusively governed its admission.[92] Again, however, the First Circuit implied that a case in which state law enforcement acted alone may compel a different result.

The issue finally came to a head in *United States v. Sutherland*,[93] where the First Circuit stated, "we wish to curb speculation as to a 'silver platter' exception stemming from our dicta in *Pratt* and *Jarabek*."[94] The court noted that *Pratt* and *Jarabek* "suggest the following possible excep-

84. *Id.* at 1373–74.
85. 726 F.2d 889 (1st Cir. 1984).
86. *Id.* at 897.
87. *Id.* at 898–899.
88. *Id.* at 900 n.10.
89. 913 F.2d 982 (1st Cir. 1990).
90. *Id.* at 985.
91. *Id.* at 987.
92. *Id.*
93. 929 F.2d 765 (1st Cir. 1991).
94. *Id.* at 770.

tion to the general rule" that federal law alone dictated the admission of evidence in federal prosecutions:

> If state law enforcement officers, acting without federal involvement and in knowing violation of state law, gather evidence which is inadmissible in state court but admissible in federal court, the federal court should not condone the use of such evidence because to do so would permit federal officials to allow illegally seized evidence to be handed them on a silver platter.[95]

Clarifying its prior holdings, the court stated "only that in an extreme case of flagrant abuse of the law by state officials, where federal officials seek to capitalize on that abuse," might the court "choose to exercise its supervisory powers by excluding ill-gotten evidence."[96] Ultimately, the court found such a pronouncement "not ground-breaking" and "merely trac[ing] the contours of a well-established power inherent in the federal courts."[97]

This exception remains alive but has never been successfully invoked.[98] Having surveyed some of the relevant authority, this Comment now proceeds to examine the arguments in favor of suppressing evidence in federal court that was obtained by state law enforcement officers acting alone. As demonstrated below, there are many bases on which a federal court may elect to suppress such evidence.

IV. The Case for Exclusion

This section illuminates six possible arguments a defendant could advance in a federal suppression motion involving evidence obtained in violation of their state constitutional rights by state or local law enforcement. With a little inventiveness, an imperiled litigant can find ample arguments in favor of excluding evidence in federal prosecutions obtained in violation of their state constitutional rights.

A. Comity

First, principles of comity, alone, require the exclusion of evidence in federal court obtained contrary to the defendant's state constitutional protections. Comity recognizes "the fact that the entire country is made up of a Union of separate state governments."[99] Put another way, "[c]omity, in sum, serves to ensure that 'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always en-

95. *Id.* (internal quotation marks and alterations omitted).
96. *Id.*
97. *Id.*
98. *See, e.g.*, United States v. Charles, 213 F.3d 10, 20 (1st Cir. 2000).
99. Levin v. Commerce Energy, Inc., 560 U.S. 413, 421 (2010).

deavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' "[100]

Following this logic, principles of comity dictate that state constitutional protections not become irrelevant in criminal proceedings in federal court. On the contrary, under principles of comity, the federal government has a duty to recognize the unique constitutional tradition enjoyed by each of the 50 states of the Union. While the federal government may be anxious to control federal criminal prosecutions in federal courts, it cannot do so by disregarding state constitutional protections. To do so would be to disregard the basic principles of comity on which our system of federalism is based.

Indeed, it is telling that the closest a litigant has ever come to having their state constitutional rights vindicated in federal court was based on principles of comity. As discussed above, in *Henderson*, a defendant argued the district court had failed to suppress evidence obtained "in violation of Montana's constitution."[101] The critical question on appeal was "[w]hether information secured by state officers entirely without federal involvement should be admissible notwithstanding violations of state law."[102] Interestingly enough, the Ninth Circuit stated that the defendant's argument in favor of exclusion "has merit," and, "We think there is much to be said for the argument that federal courts should, in the interest of comity, defer to a state's more stringent exclusionary rule . . . ."[103] Ultimately concluding "that this is a question we need not reach," the Ninth Circuit failed to forcefully impose its view of comity as controlling authority.[104]

To be fair, there is a compelling argument that principles of comity require federal courts *not* to apply "state constitutional principles in federal criminal cases."[105] The main argument is that such a rule would require federal courts to "decide the breadth of [state] constitutional law" in areas where the outcome is "unclear."[106] In recognition of these realities, the Second Circuit has concluded, "we believe the interests of comity would be served best if we left this issue to the [state] Supreme Court for determination when the issue arises in that court."[107] Yet, federal courts routinely apply state law in diversity actions. As such, this author believes federal courts are up to the interpretive task of expounding state constitutions. The real slight at comity is federal courts treating state constitutions as meaningless in federal criminal prosecutions. Consequently, comity considerations

100. *Id.* at 431 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).
101. 721 F.2d 662, 664 (9th Cir. 1983).
102. *Id.*
103. *Id.* at 665.
104. *Id.*
105. United States v. Pforzheimer, 826 F.2d 200, 204 (2d. Cir. 1987).
106. *Id.*
107. *Id.*

require the vindication of state constitutional rights in federal criminal prosecutions.

B. Deterrence

Second, federal courts should suppress evidence obtained in violation of state constitutional rights because such evidence is necessary to deter (and, more importantly, not reward) the unlawful conduct of state officials. In fact, the entire purpose of excluding evidence obtained in violation of a defendant's constitutional rights is to deter such violations in the first place.[108] The Third Circuit has rejected exclusion of evidence procured through a state constitutional violation under a deterrence theory, concluding "sanctions already exist to control the state officer's conduct," such as the exclusion of such evidence in state court and, in some states, the availability of a civil suit.[109] This author remains unpersuaded. Indeed, the state officer who abridged the defendant's state constitutional rights faces no sanction *at all* where the prosecution ensues only in federal court and no civil action is permitted under applicable state law. With admission preordained in this situation, how is a state actor at all deterred from violating a defendant's state constitutional rights?

The far superior rule would be to return to the principles underlying the initial adoption of the exclusionary rule. Mainly, that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[110] Indeed, as noted by the Ninth Circuit, "it would undercut the deterrent function of a state's exclusionary rule if state officers were able to turn illegally seized evidence over to federal authorities whenever they suspected the subject of the investigation of an offense susceptible to federal, as well as state, prosecution."[111] Yet, under the current weight of authority, state officials lack *any* incentive to respect state constitutional protections if the evidence procured will only find its way into a federal courthouse. The opposite result should occur to deter state constitutional violations by governmental officials.

C. Judicial Integrity

Third, courts should exclude evidence procured in violation of a defendant's state constitutional rights as a matter of judicial integrity. Specifi-

108. Herring v. United States, 555 U.S. 135, 141 (2009).

109. United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984).

110. Mapp v. Ohio, 367 U.S. 643, 656 (1961) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960).).

111. United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983).

cally, by acquiescing and even outright rewarding state constitutional violations, federal courts not only become complicit in the violation, but actively further it. Such a result cannot stand. A federal court should not reward or even outright encourage state constitutional violations by admitting such evidence in prosecutions proceeding before it. The Third Circuit expressed its conflict about acquiescing to state constitutional violations in *Rickus*, where it stated, "[w]e are not insensitive to the claim that we should not encourage state officials to violate principles central to the state's social and governmental order."[112] But by refusing to suppress the tainted evidence, this is precisely what federal courts do.

As outlined above, the hypothetical rule suggested by the First Circuit in dictum in *Sutherland* captures the basis for excluding the evidence as a matter of judicial integrity. There, the court recognized a "possible exception to the general" rule that federal legal standards alone govern the admission of evidence in federal court, stating:

> If state law enforcement officers, acting without federal involvement and in knowing violation of state law, gather evidence which is inadmissible in state court but admissible in federal court, the federal court should not condone the use of such evidence because to do so would permit federal officials to "allow[ ] illegally seized evidence to be handed them on a 'silver platter.' "[113]

Adoption of such a rule would comport with an original justification for the exclusionary rule—the fear of the federal courts becoming implicit in constitutional violations.[114] That is, evidence procured in violation of a defendant's state constitutional rights should be excluded because such violations "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."[115] Refusal to sanction or further state constitutional violations provides a sufficient basis for excluding the tainted evidence in federal prosecutions.

D. Forum Shopping

Fourth, federal courts should endeavor to prevent forum shopping, by which state officials transmit evidence to federal officials for use in a federal criminal prosecution. This would occur either because the evidence supports charges in both forums, or, more sinisterly, because the evidence is useless to state officials because of a state constitutional violation. The Sec-

112. *Rickus*, 737 F.2d at 364.
113. United States v. Sutherland, 929 F.2d 765, 770 (1st Cir. 1991).
114. Weeks v. United States, 232 U.S. 383, 392 (1914).
115. *Id.*

ond Circuit found itself "unpersuaded by this argument" because a "state prosecutor whose case relies on evidence that may be inadmissible in a state court trial has no power or authority to effect a prosecution in federal court. The initiation of a federal prosecution depends entirely on the discretion of the federal prosecutor."[116] It is the court's reasoning, however, that is ultimately unpersuasive.

It is unsurprising that state and federal officials conspire to ensure evidence unavailable to them does not escape the hands of others who may find it useful. In fact, this was the case in *Henderson*, where the Ninth Circuit nearly excluded evidence on the basis of a state constitutional violation. In *Henderson*, Carbon County, Montana sheriff deputies procured evidence in violation of the defendant's rights under the Montana Constitution.[117] Indeed, the sheriff even met with the county attorney and was told that such evidence would be "inadmissible in the courts of Montana."[118] The county attorney "*suggested that the sheriff convey the results of his investigation to federal authorities*."[119] When the circumvention of state constitutional rights is this blatant, federal courts should have no qualms about excluding the evidence. The Second Circuit's skepticism that such evidence would commence a federal prosecution is refuted by the situation in *Henderson*.

E. Supervisory Powers

Fifth, prior authority arguably compels federal courts to exercise their supervisory powers to exclude evidence obtained in violation of a defendant's state constitutional rights. While operating under a different set of facts, Justice Thurgood Marshall forcefully articulated this obligation in his dissenting opinion in *United States v. Payner*.[120] There, Justice Marshall pulled together various Supreme Court opinions to articulate the position that a federal court's supervisory powers must be exercised to "suppress evidence that the Government obtained through misconduct."[121] For example, Justice Marshall cited to *Mesarosh v. United States*,[122] where Justice Warren expressed the Court's view that a federal court's supervisory powers must be exercised to "see that the waters of justice are not polluted," and

116. United States v. Pforzheimer, 826 F.2d 200, 204 (2d. Cir. 1987).

117. United States v. Henderson, 721 F.2d 662, 664 (9th Cir. 1983).

118. *Id.* at 664–65.

119. *Id.* (emphasis added).

120. 447 U.S. 727 (1980).

121. *Id.* at 744–48 (Marshal, J., dissenting).

122. 352 U.S. 1 (1956).

when such pollution does occur, "the condition should be remedied at the earliest opportunity."[123]

In classic Justice Warren fashion, he noted that "the untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . the government of strong and free nation does not need convictions based upon" unlawfully procured evidence, and "[i]t cannot afford to abide with them."[124] Additionally, Justice Marshall relied on the Court's statement in *McNabb v. United States*[125] that "a conviction resting on evidence secured through . . . flagrant disregard" for the law "cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."[126] Most persuasively, Justice Marshall also relied on Justice Brandeis's famous dissenting opinion in *Olmstead v. United States*.[127]

There, Justice Brandeis warned that "government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[128] As such, in Justice Brandeis's view, "[t]o declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."[129]

The foregoing principles easily translate to the situation in which state law enforcement officials knowingly trample a citizen's state constitutional rights, obtain incriminating evidence, and then turn it over to federal prosecutors in search of a grand jury indictment. Mainly, if a federal court's supervisory powers mean anything at all, they certainly justify the exclusion of illegally procured evidence introduced to punish the illegal conduct of a citizen. In other words, a federal court should not in good conscience permit a defendant's conviction for unlawful behavior to rest on the government's own unlawful behavior. Indeed, such supervisory powers exist to prevent this precise outcome, lest the waters of justice become irrevocably polluted.

123. *Id.* at 8.
124. *Id.*
125. 318 U.S. 332 (1943).
126. *Id.* at 345.
127. 277 U.S. 438 (1928).
128. *Id.* at 485.
129. *Id.*

F. The Ninth Amendment

Finally, a novel argument asserted by a prior litigant should be addressed. In *United States v. LaCock*,[130] a defendant facing prosecution in federal court argued that evidence should be suppressed on the grounds that it was obtained in violation of his rights under the New Mexico Constitution.[131] Relevant here, the defendant advanced the argument that, because the New Mexico Constitution would require suppression of the evidence, "for a federal court to [admit the evidence] . . . would 'deny or disparage' [his] state constitutional rights in violation of the Ninth Amendment."[132] Faithful to controlling precedent, the court responded by holding that "[i]ntriguing as Defendant's Ninth Amendment argument is, it is settled law" that state constitutional rights simply do not apply in federal prosecution.[133]

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[134] As a starting point, readers find themselves skeptical of the notion that the Ninth Amendment could possibly have any application to the situation presented by this Comment should first realize the Ninth Amendment largely has no useful application at all in modern constitutional argument.[135] Recent scholarly attention has done little to nudge courts in the direction of actually affording the Ninth Amendment meaning. This author finds it more improbable that the Ninth Amendment was placed into the United States Constitution for no apparent reason than that it actually provides the sort of substantive protection discussed in this section.

Specifically, there exists a somewhat narrow school of thought that the Ninth Amendment actually exists to ensure rights afforded by state constitutions are not cast aside by the federal government. For example, the "State Law Rights Model" of Ninth Amendment interpretation provides that the Ninth Amendment exists to protect the rights secured by state constitutions.[136] Under this model, the Ninth Amendment operates to maintain "rights guaranteed by the law of the states" and "provides that the individual rights contained in state law are to continue in force under the Constitu-

130. No. CR 00-552 JP, 2001 WL 37125321 (D. N.M. Jan. 4, 2001).

131. *Id.* 37125321 at *8.

132. *Id.*

133. *Id.*

134. U.S. CONST. amend. IX.

135. *See generally* Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 186 (2003).

136. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 11 (2006).

tion until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality."[137]

Similarly, the so-called "Anti-Federalist" interpretation, construes the Ninth Amendment as "a device to ensure that the national government would be disabled from intruding upon the fundamental rights of its citizenry" as found, in part, in state constitutions.[138] That is, "that the amendment was intended to guarantee the existence of rights created or preserved in state constitutions."[139] Under this approach, the Ninth Amendment becomes the mechanism by which "the people, through their state governments, . . . limit the ability of any government—state or federal—to invade the individual rights the sovereign people deem precious."[140]

Taking these interpretations as proper, which could easily be the subject of an entire paper in and of itself, federal courts would then be able, or even required, to exclude evidence procured in violation of a defendant's state constitutional rights in federal criminal prosecutions. The conclusion being that it would violate the Ninth Amendment for the federal government to sanction the use of evidence tainted by state constitutional violations. Essentially, "rights contained in state constitutions are federal constitutional rights retained through the ninth amendment."[141] Supremacy clause issues are largely eradicated by the fact that such rights become a part of the United States Constitution itself.[142] This approach is by far the most far flung of the six offered in this section. But more than anything, it argues that the Ninth Amendment actually means something and elevates state constitutional rights from easily disregarded provisions in federal court to binding substantive guarantees.

V. CONCLUSION

Rights secured by state constitutions are currently irrelevant in federal criminal prosecutions. But they do not have to be. Litigants whose state constitutional rights have been abridged should continue to argue in favor of excluding the tainted evidence in federal criminal prosecutions. Redress may be found in principles of comity, deterrence, judicial integrity, the need to prevent forum shopping, and even the Ninth Amendment. Perhaps one

137. *Id.* (quoting Russel L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227–28 (1983)).

138. Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1231–32 (1990).

139. *Id.* at 1232.

140. *Id.* at 1256–57.

141. Gregory Allen, *Ninth Amendment and State Constitutional Rights*, 59 ALB. L. REV. 1659, 1669 (1996).

142. *Id.* at 1667.

day a federal court will fill the gap currently existing in the coverage of state constitutional protections and afford this important body of law the attention it deserves.