In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?

Randall T. Shepard
IN A FEDERAL CASE, IS THE STATE CONSTITUTION SOMETHING IMPORTANT OR JUST ANOTHER PIECE OF PAPER?

RANDALL T. SHEPARD*

Many sources feed the current development in state constitutional law, but the federal judiciary is not among them. Contemplating the role of the federal courts in the enforcement of state constitutional norms prompts recollection of Gandhi's reply when asked what he thought about western civilization: "That would be a good idea."\(^1\)

Only a lull in the federalization of "rights" law has made the recent development possible. Litigants who found the federal courts less willing to embrace their claims than the same courts were during the Warren Court era have taken to heart Justice Brennan's famous entreaty that state courts should look to their own constitutions for civil rights protection.\(^2\) This hunt for a more favorable forum has been a driving force in the expansion of state constitutional litigation. The laboring oars have thus naturally been held by state judges, not by law teachers or federal judges.

Part I of this Article discusses the value of state constitutions in federal civil cases. Part II explains why state constitutional rights should be respected in federal criminal proceedings. Finally, Part III explores certified questions as a means by which federal courts can support the independent value of state constitutions.

---


1. E.F. SCHUMACHER, GOOD WORK 62 (1979) (internal quotation marks omitted).

2. See Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting) (noting that "[e]ach state has power to impose higher standards ... under state law than is required by the Federal Constitution," and suggesting that Michigan do so).
I. The State Constitution Should Be Worth Something in Federal Civil Cases

Traditional doctrines of state and local government law, principles of comity and federalism, and the Guarantee Clause all suggest that state constitutions should be respected by federal courts deciding civil cases. The opinion that Justice Byron White wrote for five justices in Missouri v. Jenkins\(^3\) lamentably brushed aside all such considerations.

Jenkins involved a desegregation order in which the U.S. District Court approved a plan submitted by the Kansas City Metropolitan School District (KCMSD).\(^4\) The plan suggested a novel approach for maintaining racial balance in a large, inner-city school system: turn the entire school district into a massive "magnet school" that would draw in white families from outside the district.\(^5\) Predictably, this proposal was a costly one, initially estimated to require additional operating funds of $143 million, as well as $53 million for capital improvements.\(^6\) Those amounts eventually proved inadequate, and the court later added $187 million for additional capital spending.\(^7\)

After concluding that "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan," the district court determined that "the State and KCMSD were 75% and 25% at fault, respectively, and ordered them to share the cost of the desegregation remedy in that proportion."\(^8\) The board submitted its need for higher taxes to the voters, as required by the Missouri Constitution.\(^9\) Notwithstanding that the improvements in the local schools would be financed by the state government on a three-to-one basis, the voters refused to sanction

---

4. Jenkins v. Missouri, 639 F. Supp. 19, 54 (8th Cir. 1985) ("In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.").
5. See Jenkins, 495 U.S. at 60 (Kennedy, J., concurring).
6. Id. at 40.
7. Id. at 41.
8. Id. at 40 (quoting App. to Pet. for Cert. at 112a).
9. Id. at 41.
10. See id. at 38, 40; see also Mo. Const. art. X, § 11(c) (requiring a two-thirds majority vote for a tax increase).
paying their proposed share.\textsuperscript{11} The court then "ordered the KCMSD property tax levy raised from $2.05 to $4.00 per $100 of assessed valuation through the 1991-1992 fiscal year"\textsuperscript{12} and "imposed a 1.5% surcharge on the state income tax levied within the KCMSD."\textsuperscript{13}

The Eighth Circuit Court of Appeals generally approved the district court's approach but required that, in the future, the district court simply authorize KCMSD to submit a levy to the state tax collection authorities and enjoin the operation of state laws that might prevent KCMSD from adequately financing the remedy, instead of setting the property tax rate itself.\textsuperscript{14} Justice White characterized the decision of the circuit court by saying: "The Court of Appeals reasoned that permitting the school board to set the levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state and local officials."\textsuperscript{15}

Writing the majority opinion for the Court, Justice White said:

The District Court believed that it had no alternative to imposing a tax increase. But there was an alternative, the very one outlined by the Court of Appeals: it could have authorized or required KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power. The difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.\textsuperscript{16}

Justice White's embrace of the Court of Appeals' approach for the declared purpose of protecting the function of state institutions—casually enjoining the operation of state laws that would interfere

\textsuperscript{11} See Jenkins, 495 U.S. at 38 n.5.
\textsuperscript{12} Id. at 41 (citation omitted).
\textsuperscript{13} Id. at 41 n.8 (citation omitted).
\textsuperscript{14} Jenkins v. Missouri, 855 F.2d 1295, 1299, 1315 (8th Cir. 1988).
\textsuperscript{15} Jenkins, 495 U.S. at 43.
\textsuperscript{16} Id. at 51 (emphasis added) (citation omitted).
with the judicially imposed remedy—is reminiscent of the famous Vietnam declaration: "We had to destroy the village in order to save it."  

Justice White later categorized state statutes and constitutional provisions as things that potentially "hinder the process" of implementing a remedy. That a Justice writing a landmark decision, laboring over every turn of phrase, would select the word "hinder" suggests a dismissiveness of the states' constitutions that belies the professed concern over state and local institutions.

There are several reasons to object to Justice White's denigration of state constitutions and laws as mere obstacles to federal remedies. Speaking for the dissenters, Justice Kennedy wrote: "Today's casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions." He identified a flaw in the very foundation of the majority's opinion:

The premise of the Court's analysis, I submit, is infirm. Any purported distinction between direct imposition of a tax by the federal court and an order commanding the school district to impose the tax is but a convenient formalism where the court's action is predicated on elimination of state-law limitations on the school district's taxing authority. As the Court describes it, the local KCMSD possesses plenary taxing powers, which allow it to impose any tax it chooses if not "hinder[ed]" by the Missouri Constitution and state statutes.

Disagreeing with the majority's characterization, Justice Kennedy said, "[l]ocal government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri." He reasoned that because the Missouri Constitution states that "[p]roperty taxes and other local taxes ... may not be increased above the limitations specified herein without direct voter

17. This statement was allegedly made by a U.S. Army officer in Vietnam to Peter Arnett, a journalist covering the war. Peter Arnett, WIKIPEDIA, THE FREE ENCYCLOPEDIA, at http://en.wikipedia.org/wiki/Peter_Arnett (last visited Sept. 6, 2004).
18. Jenkins, 495 U.S. at 57-58.
19. Id. at 58-59.
20. Id. at 63-64 (alteration in original) (citation omitted).
21. Id. at 64 (citation omitted).
approval as provided by this constitution," KCMSD did not have the power to impose the tax, regardless of its willingness to do so. Justice Kennedy was, of course, describing the universal doctrine of state and local government law that municipalities and special districts possess only the powers conferred upon them by the state.

At a minimum, a state’s organic document should not be lightly cast aside because a federal judge finds it inconvenient to a particular remedy. As Justice Kennedy noted: “It cannot be contended that interdistrict comparability, which was the ultimate goal of the District Court’s orders, is itself a constitutional command. We have long since determined that ‘unequal expenditures between children who happen to reside in different districts’ do not violate the Equal Protection Clause.” Kennedy might just as well have cited Pennsylvania v. Union Gas Co., in which the Court observed: “The Fourteenth Amendment does not purport to expand or even change the scope of Article III,” which would be to say here that the power to fashion a remedy does not exceed the bounds of the constitutional violation. It does not ask too much to suggest that, at least when a federal court is deploying its remedial power, the state constitution should not be subsumed by the Fourteenth Amendment and ought to be treated as a matter entitled to separate weight.

Principles of federalism and comity also suggest the need for better treatment. As the State of Missouri argued in Jenkins:

These so-called “structural injunctions” have permitted federal courts, by a gradual process of accretion, to extend their powers at the expense of elected officials. Beginning with the primary power to declare legislative acts void, the courts have moved from enjoining officials to cease unconstitutional behavior to requiring affirmative relief in order to achieve compliance with the Constitution. Now, building upon the exercise of that last power, the courts claim the power to order any necessary funding for its orders by mandating direct taxation. The problem is not that assumption of one power does not follow logically

22. Id. (quoting Mo. Const. art. X, § 16) (first and second alterations in original).
23. Id. at 76 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973)).
25. Id. at 23.
from the one before, but that, measured solely by each incremen-
tal step, the evolution seems to have no foreseeable stopping
point. If the power to order higher state taxes is not beyond the
reach of the judiciary, what rationally would be?26

As the State duly noted, this argument echoes Justice Frankfurter's
cconcern in Youngstown Sheet & Tube Co. v. Sawyer: "'The accretion
of dangerous power does not come in a day. It does come, however
slowly, from the generative force of unchecked disregard of the
restrictions that fence in even the most disinterested assertion of
authority.'"27 Justice Frankfurter was talking about Harry Truman's
dramatic seizure of the steel mills, but the same danger adheres
with regard to "'[t]he wide range of judgment calls' that meet
constitutional and statutory requirements [that] are confided to
officials outside of the Judicial Branch of Government."28

Missouri argued that when a district court imposes its equitable
power on a state government or its officials, the need for judicial
balancing and restraint is particularly strong:

No one questions the power of the federal courts to correct
unconstitutional conditions, Swann [v. Charlotte-Mecklenburg
Bd. of Educ.], 402 U.S. [1,] ... 16 [(1971)], even though the
exercise of that power will place obligations on state and local
officials; at the same time, however, the courts must bear in
mind that their role is to end the unconstitutional conditions
without undue interference with state government. "'[T]he
federal courts in devising a remedy must take into account the
interests of state and local authorities in managing their own
affairs, consistent with the Constitution.'" Milliken [v. Bradley],
433 U.S. [267,] ... 280-81 [(1977)]. And, as this Court has

26. Brief for Petitioner at 32, Jenkins (No. 88-1150) (footnote and internal citation
omitted).
27. Id. at 32 n.36 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594
(1952) (Frankfurter, J., concurring)); see also Donald L. Horowitz, The Judiciary: Umpire or
Empire?, 6 Law & Hum. Behav. 129, 130 (1982) ("That the enlargement of judicial functions
is a qualitative change that has emerged out of many small quantitative changes, one case
at a time, makes it important to stand back and appraise what has transpired and what it
means for the legal system.").
recognized, these interests are at their strongest in matters of state taxation and finances.\textsuperscript{29}

Missouri further noted that "[i]t has long been settled law that, where possible, the federal courts should stay their hands in matters involving state taxation out of 'a scrupulous regard for the rightful independence of state governments ...."\textsuperscript{30} The state argued with some justification that "[t]his principle of restraint 'reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation."\textsuperscript{31}

Finally, the Guarantee Clause of the Federal Constitution obliges all three branches of the federal government to support the essential characteristics of state governments. The clause declares: "The United States shall guarantee to every State in this Union a Republican Form of Government ...."\textsuperscript{32} The judiciary has frequently been reluctant to treat Guarantee Clause claims as justiciable, although in \textit{Baker v. Carr},\textsuperscript{33} the Court reiterated that "the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves ...."\textsuperscript{34}

Although the Court has trotted out the Guarantee Clause on only a few such occasions, some members have held a more fulsome view of the judiciary's obligations. Justice Douglas wrote:

\begin{quote}
The right to vote is inherent in the republican form of government.... The statements in \textit{[Luther v. Borden]} ... that this
\end{quote}

\textsuperscript{29} Brief for Petitioner at 39-40, \textit{Jenkins} (No. 88-1150).
\textsuperscript{30} \textit{Id.} at 40 n.45 (quoting Matthews v. Rodgers, 284 U.S. 521, 525 (1932)) (alteration in original).
\textsuperscript{31} \textit{Id.} (quoting Fair Assessment in Real Estate Taxation v. McNary, 454 U.S. 100, 103 (1981)) (second alteration in original).
\textsuperscript{32} U.S. \textit{CONST.} art. IV, § 4.
\textsuperscript{33} 369 U.S. 186 (1962).
\textsuperscript{34} \textit{Id.} at 223 n.48 (quoting \textit{In re Duncan}, 139 U.S. 449, 461 (1891)). Based on this interpretation, an \textit{amicus curiae} in \textit{Jenkins} argued that the "right of the people to be taxed in accordance with the laws made by their representatives has been completely subjugated by the district court" in violation of the Guarantee Clause. Brief of Amicus Curiae New Mexico at 10-11, \textit{Jenkins} (No. 88-1150).
guaranty is enforceable only by Congress or the Chief Executive is not maintainable. Of course the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course each House of Congress, not the Court, is 'the judge of the elections, returns, and qualifications of its own members.'... But the abdication of all judicial functions respecting voting rights ... indeed is contrary to ... the ... full panoply of judicial protection to voting rights .... The Court's refusal to examine the legality of the regime of martial law which had been laid upon Rhode Island is indefensible.  

Justice Hugo Black wrote: "[I]t seems to me that [a law] which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government.'"  

Judge John Minor Wisdom likewise noted:

The question in this case is whether the constitutional amendment was adopted in an unrepugnant manner; more specifically, whether the ballot was so misleading that the people were deprived of one of the fundamental rights inherent in a republican government, the right to vote on an amendment to their constitution. The same standards "judicially manageable" in determining whether the plaintiffs were deprived of due process would seem to be applicable in determining whether they were deprived of the protection of a republican government. I regard the issue here, therefore, as justiciable under the Guaranty Clause. On the merits, however, and for the same reasons the due process clause was not offended, I would hold that the process by which Amendment 26 to the Louisiana Constitution was adopted does not offend Article IV, Section 4 of the United States Constitution.

The line of judicial development of the republican guarantee, bent and broken since [Luther v. Borden], is not beyond repair.


36. Brief of Amicus Curiae New Mexico at 12, Jenkins (No. 88-1150) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 359 (1966) (Black, J., concurring in part and dissenting in part) (footnote omitted)).
Some day, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as judicially nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism.\footnote{Kohler, 292 F. Supp. at 985 (footnote omitted) (emphasis in original).}

One need accord these views only plausible weight in order to conclude that the Guarantee Clause should be reexamined as a protection of state autonomy and law in federal litigation.

Notwithstanding the views Justice White offered in \textit{Missouri v. Jenkins}, traditional state and local government law doctrine, principles of comity and federalism, and the Guaranty Clause all mandate that more respect be given to state constitutions in federal civil cases.

\section{II. State Constitutional Rights Should Matter in Criminal Law}

The nearly universal conclusion of federal courts is that violations of a defendant’s state constitutional rights are irrelevant if the defendant is charged in a federal forum. For example, evidence seized in violation of the state constitution is routinely admitted in federal cases, even when the evidence was initially seized by state officers.\footnote{See, e.g., United States v. Delaporte, 42 F.3d 1118 (7th Cir. 1994): [I]f Indiana wants to prevent even the rather technical violations of its telephone warrant statute that occurred here, it can punish its law enforcement officers who turn over evidence seized under unlawful warrants to the federal government. If it does not want to do this, that is no concern of ours. Id. at 1120; United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) ("We therefore reject the suggestion ... that federal courts should defer to state law in deciding whether to admit evidence seized by state officers, ... and reaffirm ... that evidence seized in compliance with federal law is admissible without regard to state law.").} The first section of this Part will discuss the history of passing such evidence back and forth between state and federal officers (under the so-called “silver platter” doctrine), and the reasons the U.S. Supreme Court eventually condemned the practice. The second section will discuss the current role of state search and seizure rights in federal cases and argue that the same policy considerations that led the Supreme Court to prohibit the introduc-
tion into state court of evidence seized by federal officers in violation of federal law militates against the admission in federal courts of evidence seized by state officers in violation of state law.

A. History of the Silver Platter Doctrine

More than a century ago, the U.S. Supreme Court laid the foundation for the exclusionary rule when it held that "any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of [a] crime ... is within the condemnation [of the Constitution]." Although it took nearly thirty years, this led to *Weeks v. United States*, which required federal courts to exclude evidence obtained in violation of the Fourth Amendment. The Court said that sanctioning the retention and evidentiary use of illegally seized evidence "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." The stout-hearted declaration of principle in *Weeks* came coupled with an observation that turned out to be a considerable loophole. The Court held that evidence obtained by state officials in violation of the Federal Constitution need not be excluded from federal court: "As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures." This ruling allowed federal prosecutors to use evidence seized by state officers in violation of the U.S. Constitution and the principle established in it became known as the "silver platter" doctrine. True to its doctrinal moniker, it became the habit of state officers to hand over evidence to federal authorities.

Various versions of this loophole proved very popular with law enforcement and the Court began backing away from it. In *Rea v. United States*, the defendant sought to enjoin a federal officer who

40. 232 U.S. 383 (1914).
41. *Id.* at 394.
42. *Id.* at 398.
44. 350 U.S. 214 (1956).
planned to testify in a state prosecution based upon evidence seized under an illegal federal warrant. The Court refused to address the constitutional arguments advanced by the parties and instead based its holding on the federal courts' supervisory powers over federal law enforcement agencies. The Court enjoined the federal officer from testifying in state court, and held that the federal rules "are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings." This decision effectively prevented evidence seized by federal officers in violation of the Federal Constitution from being admitted in state court.

In *Elkins v. United States*, the Court addressed the silver platter doctrine directly and concluded that it could no longer be accepted. The Court held that to prevent the frustration of both state and federal policies, avoid needless conflict between state and federal courts, and protect judicial integrity, federal courts should deny admission of unconstitutionally seized evidence whether the search was conducted by federal or local authorities.

Just one year after *Elkins*, the Supreme Court held in *Mapp v. Ohio*, that the Fourteenth Amendment compelled the states to use the exclusionary rule, rendering evidence obtained in violation of the Federal Constitution inadmissible in both federal and state courts. The Court noted that "the striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction if obtained by government officers through a violation of the Amendment." This march of cases deploying the exclusionary rule had been the

45. *Id.* at 215-16. The defendant had previously been indicted on federal charges, but the district court suppressed the evidence and dismissed the indictment. *Id.*
46. *Id.* at 216-17.
47. *Id.* at 218.
49. *Id.* at 208.
50. *Id.* at 221-24.
52. *Id.* at 655.
53. *Id.* at 649 (quoting Olmstead v. United States, 277 U.S. 438, 462 (1928)) (internal quotation marks omitted).
target of criticism from nearly the beginning, and the *Mapp* Court recognized this fact. Benjamin Cardozo famously opined that under the exclusionary rule "[t]he criminal is to go free because the constable has blundered."\(^\text{54}\) The Court rejected this characterization, however, stating that "the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."\(^\text{55}\) The Court further stated that the rule "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."\(^\text{56}\)

To elucidate the new rule, the Court explained 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.'"\(^\text{57}\) Extending the exclusionary rule to the states, the Court noted: "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."\(^\text{58}\)

Whether this ignoble shortcut is still available now seems to depend on whose officers need deterring. There are a number of permutations, some matters of settled law and others not, including:

(1) Whether evidence gathered by state officials which is inadmissible in that state's courts is admissible in federal court ("new silver platter"). (2) Whether evidence gathered by federal officials, which would be inadmissible in state courts if state officials had gathered the evidence, is admissible in state courts ("reverse silver platter"). (3) Whether evidence gathered by

---

54. *Id.* at 659 (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)) (internal quotation marks omitted). Cardozo was not alone in this. In the 1920s, Professor Wigmore wrote of the development of the exclusionary rule: "the heretical influence of *Weeks v. United States* spread, and evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals." 4 WIGMORE, EVIDENCE § 2184 (2d ed. 1923).
55. *Mapp*, 367 U.S. at 659.
56. *Id.* at 660.
57. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
58. *Id.* at 660 (citation omitted).
officials in state A, which is inadmissible in state A's courts, is admissible in state B's courts] ("interstate silver platter").

These questions present some of the same challenges and policy concerns, such as deterring police misconduct and forum shopping, as the original silver platter doctrine, but cannot be resolved simply by invoking the Supremacy Clause, as federal courts commonly do.

B. State Rights in Federal Courts

Federal courts have consistently held that evidence is admissible in federal courts even if seized by local authorities in violation of state law. United States v. Singer is a signature case for this proposition. In Singer, Milwaukee County sheriffs, carrying a search warrant that included a no-knock provision, entered Singer's residence unannounced and seized weapons, drug paraphernalia, and 3.2 kilograms of methamphetamines. This evidence found its way to the U.S. Attorney, who procured an indictment in the U.S. District Court for the Eastern District of Wisconsin. Singer sought to suppress the evidence, arguing that the sheriffs violated his rights under the U.S. and Wisconsin Constitutions when they failed to knock and announce their purpose before entering his home.

The Seventh Circuit, calling Wisconsin law "irrelevant," held that evidence seized by local authorities was admissible in federal proceedings if it was obtained in a manner consistent with the U.S. Constitution and federal law. The panel held:

As we have noted before, federal standards control the admissibility of evidence in a federal prosecution even though the evidence was seized by state officials and would not be admissi-

---

60. 943 F.2d 758 (7th Cir. 1991).
61. Id. at 759-60. Based on testimony that Singer was distributing large quantities of drugs and possessed handguns, the judge granted the no-knock provision to better ensure the safety of the officers and to prevent Singer from destroying evidence of his illegal activities. Id.
62. See id. at 761.
63. See id. at 760.
64. Id. at 763 n.8 ("Although Wisconsin law is irrelevant to our decision ... ").
ble in state court. 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.\textsuperscript{65}

More recently, in \textit{United States v. Wilson},\textsuperscript{66} a panel of the Seventh Circuit acknowledged that although "states retain a great deal of flexibility in the manner in which they conform their law enforcement procedures to the standards of the Fourth Amendment," federal standards alone determine whether the search was reasonable under the Fourth Amendment.\textsuperscript{67} \textit{Wilson} cites several Seventh Circuit opinions, as well as opinions from nearly every other federal circuit, that support the notion that federal courts should apply only federal law despite the existence of potential state law violations.\textsuperscript{68}

\begin{itemize}
  \item 65. \textit{Id.}, at 761 (citing \textit{United States v. D'Antoni}, 874 F.2d 1214, 1218 (7th Cir. 1989); \textit{United States v. Mealy}, 851 F.2d 890, 907 (7th Cir. 1988)).
  \item 66. 169 F.3d 418 (7th Cir. 1999).
  \item 67. \textit{Id.}, at 423.
  \item 68. Virtually every federal circuit has addressed and confirmed that federal law governs federal criminal proceedings, despite state law:

[T]he First Circuit held that evidence admissible under federal law is admissible in federal court proceedings without regard to state law, even when the evidence is obtained in the course of a state investigation. The Second Circuit has held that evidence that is admissible under federal law will not be suppressed during a federal trial on the basis of a violation of a state exclusionary rule. \textit{See United States v. Pforzheimer}, 826 F.2d 200, 204 (2d Cir. 1987). Furthermore, in \textit{United States v. Rickus}, 737 F.2d 360, 363-64 (3d Cir. 1984), the Third Circuit held that evidence obtained in accordance with federal law is admissible in federal court even if the evidence was obtained by state officers in violation of state law. The Fourth Circuit in \textit{United States v. Clutchette}, 24 F.3d 577 (4th Cir. 1994), declined to address the question of interplay between state law and the exclusionary rule. However, the court stated that the prevailing view appears to be that violations of state law alone do not compel exclusion of the evidence in federal courts. \textit{See id.} at 581. The Fifth Circuit in \textit{United States v. Eastland}, 989 F.2d 760, 766 (5th Cir. 1993), \textit{cert. denied} 510 U.S. 890 ... (1993), held that when evidence is secured by state officials and is to be used against a defendant in a federal prosecution, admissibility of the evidence is determined by federal law.

\end{itemize}
Although state law may play an ancillary role even in Fourth Amendment reasonableness determinations, this role is rarely acknowledged. Typically, in response to a defendant's motion to suppress, the federal tribunal simply says that the legality of an arrest under the Fourth Amendment "does not turn on state law," or that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment ... [that] requires no additional justification," and disregards state law.

Of course, state officers carry out most law enforcement, most arrests, and most prosecutions in the country. Allowing illegally seized evidence to be passed over for use in federal court is the "ignoble shortcut" condemned in Mapp and "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest." As the Supreme Court noted in Weeks v. United States:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Similarly, if rights guaranteed to a criminal defendant by a state's constitution may be disregarded by admitting evidence seized in violation of those rights in federal court, the rights have little value

---

69. See supra note 68.  
71. Id. (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)) (internal quotation marks omitted).  
72. See id. at *8.  
74. 232 U.S. 383, 393 (1914).
and may as well be stricken from the state constitution. Moreover, as the Supreme Court said in *Mapp*, the purpose of the exclusionary rule is to deter unlawful law enforcement conduct\textsuperscript{75} and the federal judiciary should not provide state officers with an incentive to disregard state law. Even though a federal court has the power to admit this evidence under the Supremacy Clause, that does not mean the federal court should do so.\textsuperscript{76}

Evidence seized by state actors in violation of state statutory or constitutional law should be presumptively inadmissible. Rejecting the silver platter doctrine created appropriate distinctions for officer misconduct and helped increase accountability among law enforcement officials. Disallowing these new silver platters would advance the same goals and safeguard state-guaranteed rights.

### III. Respecting State Constitutions Through the Use of Certified Questions

When attempting to determine uncertain state substantive law, federal judges are faced with three basic options: predicting unsettled state law; declining supplemental jurisdiction over cases involving novel or complex state law;\textsuperscript{77} or certifying a question to the state's supreme court for clarification.\textsuperscript{78} Certified questions allow federal courts to resolve all of the issues relevant to the dispute while showing respect for the independence of state law and the state supreme court as the final arbiter of that law.

\textsuperscript{75} *Mapp*, 367 U.S. at 656.

\textsuperscript{76} The appropriate state and federal roles might be illustrated if one re-staged the events of *Rea v. United States*, 350 U.S. 214 (1956), with the roles reversed. The Court in *Rea* reversed the decision of a federal court judge not to enjoin a federal officer from testifying in, or transferring illegally seized evidence to, a state court after that testimony and evidence was suppressed in federal court. The state court might enjoin the state officer from supplying testimony to sponsor illegally gained evidence.

\textsuperscript{77} 28 U.S.C. § 1367(c)(1) (2000). This may not always be practical. For example, in the recent case *Simon v. United States*, 341 F.3d 193 (3d Cir. 2003), the issue of state law was a conflict of laws question and was a threshold issue in the case. *Id.* at 194. The Third Circuit was faced with either predicting unsettled state law or certifying a question to the Supreme Court of Indiana. *See id.* at 195. The Third Circuit chose to certify the question, and the state supreme court resolved the issue, in *Simon v. United States*, 805 N.E.2d 798 (Ind. 2004), so the case was able to proceed.

\textsuperscript{78} *See, e.g.*, IND. APP. R. 64.
In a recent survey, federal judges cited to the following benefits of certification:

"orderly development of law, particularly in diversity cases;" "result produced is a reliable and controlling precedent;" "avoidance of needless conflicts on state law;" "comity;" "allows for judicial economy and cost saving measures to the litigants;" "will usually help other state or federal courts with similar case issues;" "uniformity of results and justice;" "reducing risks of different outcomes depending on forum choice, reducing forum shopping, quicker resolution by state court of last resort of issues affecting many pending decisions in both state and federal courts;" "can avoid useless wheel-spinning;" and "avoiding conflicts between different panels in the same circuit."

Most notably for present purposes, a certified question insures that the state supreme court decides important and often novel issues of state constitutional law and respects the independence of the state law. All but five states now have a valid certification process in place.

In *Arizonans for Official English v. Arizona*, the Supreme Court chastised the Ninth Circuit for avoiding an opportunity to certify a question to the Arizona Supreme Court. Justice Ginsburg stated that the certification process "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."

Unfortunately, although the process is now well established, there are certain impediments to successful certification of state-law

---

80. See Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 373 (2000) (observing that "New York's certification law ... enables [other courts] to send unsettled questions of New York law to the state Court of Appeals for authoritative resolution, thereby eliminating the need for those courts to speculate over the content of New York law necessary to resolve a pending case").
81. Alabama, New Jersey, North Carolina, and Vermont have no certification procedures. See id. at 373 n.1. The Missouri Supreme Court has held that Missouri's statutory certification process violates the state constitution. See Grantham v. Mo. Dep't of Corrections, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990).
82. 520 U.S. 43 (1997).
83. Id. at 76.
questions. In a recent examination, federal judges acknowledged delay, inadequate factual records, incomplete answers, and over-reaching answers as problem areas. State justices identified insufficient factual records, inadequate briefing or oral arguments, unresolved factual disputes, answering abstract and isolated issues, unclear or poorly formed questions, and a tendency to certify questions which, even if unresolved, have little impact on the outcome of the case.

The most significant of these problems is a direct result of the procedural posture of a certified question. First, the phrasing of the question itself can make the court's legal analysis more difficult and the resulting reply less useful. Re-forming the question sometimes makes the state court's task more manageable by permitting it to frame legal issues in terms of its own jurisprudence, but it may not assist the federal court in resolving the controversy before it.

Second, when a certified question squarely places a constitutional issue before the state supreme court, the standard legal progression of resolving issues is bypassed. Whereas normally a court will address constitutional issues only when necessary, a court receiving a constitutional issue as a certified question may decide the issue unaware that it is not necessary to the outcome. In addition, because the court is deciding the issue in isolation, there is a higher risk that it may determine a particular statute to be unconstitutional on its face when, in truth, it is only unconstitutional as applied.

Finally, the court's receipt of the question without a fully developed factual record raises further problems. Without a fully developed record, the precedential value of an opinion regarding a previously unsettled point of constitutional law becomes uncertain. Future litigants may rely on the holding to bolster their position, but without the nuanced analysis typical of a mixed question of fact and law, it is difficult for courts to ascertain the appropriateness of such reliance. Deciding a pure question of law is a somewhat unusual event, and constitutional issues are especially fact-sensitive, requiring a litigant to argue the facts as much as the law.

84. GOLDSCHMIDT, supra note 79, at 54-55.
85. Id. at 55.
86. Id.
Consequently, an opinion stripped of the intricacies of the facts relevant to the issue has less utility for future litigants.\textsuperscript{87}

Despite these problems, certified questions remain the best and most efficient way for a federal court to resolve an unsettled issue of state law arising in one of its cases while demonstrating respect for the state and its law.

\textbf{CONCLUSION}

A central theme in the recent jurisprudence of the U.S. Supreme Court has been reinvigoration of the notion of the United States as a federal nation. The powers retained by states, legislators, and governors have recently been accorded more care than was the case some decades ago. Greater care for the state constitutions, and for the decisions state courts make about them, would build better comity between state and federal courts and otherwise serve the country well.

\textsuperscript{87} I have recently explored some of these issues. See Randall T. Shepard, \textit{Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?}, 38 VAL. U. L. REV. 327 (2004).