False Prophet—Justice Brennan and the Theory of State Constitutional Law

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Introduction

If one were to choose a patron saint of the revival of interest in state constitutional law, that title would almost surely belong to Justice William J. Brennan of the United States Supreme Court. His article, *State Constitutions and the Protection of Individual Rights*,[1] is the best known and most widely cited of all recent calls for state court activism.[2] Brennan argues that by granting special state constitutional status to interests and groups that the United States Supreme Court has refused to protect, state courts vindicate the values of state autonomy that are implicit in the structure of American federalism.[3]

This Article contends that the focus on federalism is not appropriate in state constitutional analysis. Part I examines the structure of Justice Brennan's argument and concludes that his purported concern for state autonomy is inconsistent with the structure of the remainder of his jurisprudence. Parts II and III explore the role federalism plays in state constitutional analysis generally. The Article concludes that considerations of federalism neither mandate state court activism nor suggest any particular approach to state constitutional analysis. Thus, Brennan's analysis is unsound and perhaps disingenuous.

I. Justice Brennan and the Concept of Federalism

The rhetoric of federalism dominates Justice Brennan's argument for state court activism. In his seminal article, Brennan hails such activ-

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1. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. *See* Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1550 (1985) (Brennan's article, *supra* note 1, is the 19th most-cited law review article).

3. Brennan, *supra* note 1, at 502-04.

ism as a healthy embodiment of the American principle of state autonomy. Indeed, he goes so far as to claim that the newly aggressive posture of state courts must be applauded by "[e]very believer in our concept of federalism."[4]

Although Justice Brennan describes himself as a "devout believer" in the concept of federalism, his judicial record suggests otherwise. His opinions for the Court in *Fay v. Noia*[5] and *Henry v. Mississippi*[6] clearly demonstrate that state autonomy generally does not rank highly in his pantheon of values. *Fay* involved the question of whether a procedural default by a criminal defendant in his original state court proceeding barred inquiry into a constitutional claim in a subsequent federal habeas corpus action. Brennan conceded that the procedural default constituted an "adequate and independent state ground" which would have barred inquiry into the conviction on direct appeal to the Supreme Court.[7] Nonetheless, he concluded that the habeas corpus action should proceed, arguing that "[w]hatever residuum of state interest there may be under [these] circumstances is manifestly insufficient in the face of the federal policy . . . of affording an effective remedy for restraints contrary to the Constitution."[8]

In *Fay*, the Court explicitly relied on the special characteristics of an application for a writ of habeas corpus. However, in subsequent cases Justice Brennan has clearly demonstrated that his views on state autonomy are not limited to that context. In *Henry v. Mississippi*, he relied on similar principles to restrict state autonomy in the context of direct review of a state court judgment. The case arose from a Mississippi criminal trial in which the trial court admitted the testimony of a police officer as competent evidence. Mississippi law required contemporaneous objection to the admission of illegal evidence. Defense counsel had not made a contemporaneous objection at trial, choosing to move instead for a directed verdict at the close of the state's case. The record was unclear on the question of whether the failure to object was tactical or the result of error. Writing for the majority, Brennan conceded that the contemporaneous objection rule served a legitimate state interest in procedural order.[9] Nonetheless, he concluded that in the absence of a conscious waiver of the right to object, a federal constitutional claim could not be

4. *Id.* at 502.

5. 372 U.S. 391 (1963).

6. 379 U.S. 443 (1965).

7. *Fay*, 372 U.S. at 428-29.

8. *Id.* at 433-34.

9. "The Mississippi Rule requiring contemporaneous objection of illegal evidence clearly does serve a legitimate state interest." *Henry*, 379 U.S. at 448.

foreclosed as long as this state interest had been "substantially served" by a motion for directed verdict that challenged the allegedly inadmissible testimony.[10] Thus, Brennan once again restricted the ability of states to enforce concededly rational procedural rules enacted for the governance of the states' own court systems.

Justice Brennan's attitude toward state autonomy is not limited to his analysis of the relationship between state courts and federal courts. The beliefs he evinced in *Fay* and *Henry* carry over to his approach to defining substantive rights. His dissent in *San Antonio Independent School District v. Rodriguez*[11] illustrates this point. *Rodriguez* presented a fourteenth amendment challenge to the school financing system of Texas. Rejecting the challenge, the majority opinion relied heavily on federalism concerns:

> [This case is] nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. . . . [A]ppellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. . . .
>
> [T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education . . . presents a myriad of 'intractable economic, social, and even philosophical problems.' . . . In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap [their] continued research and experimentation . . . .[12]

Justice Brennan did not accept the majority's federalism arguments. In fact, he totally ignored them, implying that such concerns were trivial.[13] Instead, he would have applied a strict scrutiny standard of review to education financing schemes,[14] resulting in the precise "inflexible restraints" on state-centered choices that the majority sought to avoid.

Justice Brennan's attitude toward state autonomy consistently colors his approach to other federalism-related issues as well. For example, he has been one of the most persistent critics of attempts to extend the doctrine of *Younger v. Harris*[15] beyond the narrowest holding that, absent a showing of bad faith harassment by the prosecution, federal courts

10. *Id.*
11. 411 U.S. 1 (1973).
12. *Id.* at 40-43 (citations omitted).
13. *Id.* at 62-63 (Brennan, J., dissenting).
14. *Id.* at 63 (Brennan J., dissenting).
15. 401 U.S. 37 (1971).

generally may not enjoin ongoing state prosecutions.[16] Similarly, he has rejected claims that considerations of state autonomy should limit federal control over state governmental functions.[17] He has also argued that the dormant Commerce Clause forbids states from providing certain benefits only to their respective citizenries.[18]

Given the minimal importance of state autonomy as a value in his decisions, Justice Brennan's appeal to the concept of federalism must reflect a belief that state court activism will advance some other set of values. In fact, even a casual reading of *State Constitutions and the Protection of Individual Rights*[19] reveals his true agenda. With some justification, Brennan fears that the emerging Burger (now Rehnquist) Court majority will erode many of the important principles of individual liberty established by the Warren Court. He views the state courts as a medium by which these principles can be preserved and expanded. Noting that a majority of the Burger Court has often cited principles of federalism as a justification for restrictive readings of the Federal Constitution, Brennan argues:

> [T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.[20]

Brennan's primary message thus becomes clear: state courts should vindicate personal liberties along the lines undertaken by the Warren Court by reading their state constitutions expansively and should justify their actions by referring to the "neutral" principle of federalism.

Brennan makes the point even more plainly in his most recent elaboration of his views on the role of state constitutions in the federal sys-

16. *E.g.*, Trainor v. Hernandez, 431 U.S. 434, 450 (1977) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (1975) (Brennan, J., dissenting).

17. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549-50 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)); *National League of Cities*, 426 U.S. at 858 (Brennan, J., dissenting).

18. South Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 101 (1984) (Brennan, J., concurring); Reeves v. Stake, 447 U.S. 429, 447 (1980) (Powell, J., dissenting) (Justices Brennan, White, and Stevens joined in the dissent); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 817-19 (1976) (Brennan, J., dissenting).

19. *See supra* note 1.

20. Brennan, *supra* note 1, at 503.

tem.[21] Noting that many commentators have raised federalism-based objections to the application of the Bill of Rights to the states, he argues that "[a] *healthy* federalism is not promoted by allowing state officials to violate provisions of the Bill of Rights."[22] On the other hand, he applauds the fact that "the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by decisions of the Supreme Court majority"[23]—decisions from which Brennan has often dissented. In short, Brennan apparently defines "healthy" federalism as a system which enforces the values with which he agrees.

Of course, by appealing to the concept of federalism to justify state court activism, Brennan theoretically leaves open the possibility that state courts will be activist in support of conservative as well as liberal causes. And indeed, occasionally one can identify state constitutional decisions that advance values generally associated with the conservative movement.[24] A number of factors, however, virtually guarantee that state court activism will have an overwhelmingly liberal impact.

First, state courts must comply with the Supremacy Clause.[25] Federal law, especially constitutional precedent, provides standards against which state constitutional guarantees must be measured.[26] While perhaps not as extensive as some would like, these federal standards are constructed primarily of values associated with the liberal wing of American politics.[27] Thus, the potential danger that conservative state judi-

21. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

22. *Id.* at 541 (emphasis added).

23. *Id.* at 549.

24. *See* Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241 (1981), *reprinted in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 94 (B. McGraw ed. 1985) [hereinafter DEVELOPMENTS].

25. U.S. CONST. art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

26. *See* Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 MO. L. REV. 1 (1984); *Development in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982); Part III, *infra*.

27. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (overturning a Texas statute outlawing abortion except when necessary to save the life of the mother); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring the police to warn defendants of their fifth and sixth amendment rights when the defendants are in custody); Mapp v. Ohio, 367 U.S. 643 (1961) (holding the Fourth Amendment's regulation of searches and seizures applicable to the states through the Fifth Amendment Due Process Clause).

There are exceptions. *See e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that the school board's policy of extending preferential protection against layoffs based on race violated the Fourteenth Amendment); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (holding that a Minnesota law, which essentially increased the financial obligations of companies with pension plans no longer operating in that state, violated the

ciaries will, through judicial activism, erode the values Justice Brennan seeks to advance is substantially limited.

Furthermore, contemporary political ideology virtually guarantees that state court activism primarily will favor liberal causes. American conservatism has become associated generally with the concept of judicial restraint. This phenomenon—a reversal of the situation in the Roosevelt era—is no doubt in part a reaction to the aggressive liberalism of Warren Court activism, which consistently cast the judiciary as one of the most powerful enemies of conservatism. It is reinforced by the fact that judicial intervention against measures which restrict the free enterprise system (and are thus antithetical to conservatives) is quite clearly akin to "Lochnering",[28] which virtually all law students are taught is the cardinal sin of constitutional decisionmaking. Thus, both state court adherence to federal precedent and current political thought make it likely that a judge of conservative orientation will express that orientation through judicial restraint rather than conservative activism.

In short, the appeal to federalism provides Justice Brennan and other advocates of Warren Court values with a relatively risk-free device to broaden the appeal of their call for state court activism in support of their agenda. Of course, this observation does not automatically condemn such use of federalism as unsound. Whatever their origins, the arguments based on these concepts must stand or fall on their own merits. Indeed, other commentators are plainly interested in state autonomy for its own sake.[29] The remainder of this paper will explore the fallacies underlying many appeals to federalism in state constitutional analysis.

II. Federalism and the Models of State Constitutional Adjudication

On one level, issues of state constitutional law plainly implicate questions of federalism. After all, state constitutional law becomes prominent only when state courts establish principles which diverge from

Contract Clause); Buckley v. Valeo, 424 U.S. 1 (1976) (drawing a distinction between campaign contributions and expenditures and holding that speech interests in the former are minimal and may be limited to reduce the chance of political corruption).

28. *See* Lochner v. New York, 198 U.S. 45 (1905). *Lochner* held that a New York statute regulating the hours of labor under an employment contract was unconstitutional. Specifically, the Court held that "the freedom of master and employee to contract with each other in relation to their employment, . . . cannot be prohibited or interfered with, without violating the Federal Constitution." *Id.* at 64.

29. *See, e.g.*, Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) [hereinafter Linde, *E. Pluribus*]; Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) [hereinafter Linde, *First Things First*].

the Supreme Court's interpretation of the Federal Constitution. On its face, such divergence seems to raise important issues of federal-state relations. Moreover, the answer to one key question—whether a state court has the power to interpret the state constitution differently from its federal counterpart—is plainly controlled by considerations of federalism.

The power of state courts to interpret their own constitutions, however, is not only fundamental but uncontroversial. All agree that the Federal Constitution in no way constrains state courts in interpreting their local constitutions; that the federal Supreme Court has no power to force state courts to alter these interpretations; and that in the event of an irreconcilable conflict between state constitutional law and federal law, state courts must follow federal law. Discussions of federalism thus figure most prominently in comparisons of the competing approaches to state constitutional adjudication. Three basic models of assessing the relationship between federal constitutional law and state constitutional law have emerged: (1) the pure independent model, (2) the lockstep model, and (3) the reactive/independent model.

A. The Pure Independent Approach

Courts adopting the pure independent position view state constitutional law as entirely distinct from its federal counterpart. Thus, they argue that constitutional pronouncements by the United States Supreme Court are entitled to no greater respect in state constitutional adjudication than those of any other court. In states where this position prevails, courts conduct an entirely independent analysis of each issue before them to determine the proper reach of state constitutional law.

The opinions of these courts follow two basic patterns. Some courts, following Oregon Supreme Court Justice Hans A. Linde's suggestion of "putting first things first," hardly even refer to United States Supreme Court opinions in their state constitutional analysis.[30] The New Hampshire Supreme Court adopted this methodology in *State v. Ball*.[31] *Ball* concerned the sufficiency of cause to believe that a cigarette, observed by a police officer in a traffic stop, contained contraband. Analogous federal law suggested that the search was permissible.[32] Mentioning this view only in passing,[33] the *Ball* court held that the state constitution required

30. *See* Linde, *First Things First*, *supra* note 29, at 387.

31. 124 N.H. 226, 471 A.2d 347 (1983).

32. Texas v. Brown, 460 U.S. 730 (1983).

33. "We note that the United States Supreme Court has recently spoken on the probable cause requirement of the plain view doctrine. . . . Although that decision is binding as a matter of federal constitutional law, we choose not to follow it in interpreting our State Constitution." 125 N.H. at 235, 471 A.2d at 353 (citing *Texas v. Brown*).

probable cause before a police seizure and that the officer had no probable cause to seize what turned out to be a marijuana cigarette. Thus, the court ruled that the cigarette was inadmissible.

By contrast, other courts adopting the pure independent approach examine the views of the United States Supreme Court in greater detail. The Colorado Supreme Court's opinion in *People v. Sporleder*[34] is typical. *Sporleder* involved the admissibility of evidence obtained through the use of a pen register.[35] The issue was whether the police were required to obtain a search warrant prior to installing the device.

The Colorado Supreme Court first looked to *Smith v. Maryland*,[36] in which the United States Supreme Court held that because telephone users voluntarily convey the numbers they dial to the telephone company, users have no "legitimate expectation of privacy" in those numbers.[37] Therefore, the use of a pen register did not constitute a search within the meaning of the Fourth Amendment and the evidence in *Smith* was ruled admissible.[38]

In *Sporleder*, the Colorado court summarized the reasoning of the majority in *Smith* and conceded that the relevant state constitutional provision was "substantially similar"[39] to the Fourth Amendment. Nonetheless, obviously persuaded by the dissent in *Smith*,[40] the Colorado court found that "the defendant's expectation that the numbers dialed would remain free from government intrusion is a reasonable one," and therefore ruled that a warrant was necessary as a matter of state law.[41] On this basis, the court held the evidence was inadmissible.

Of course, the mere fact that a state court has adopted the pure independent approach does not imply that it will automatically deviate from federal constitutional precedent. The action of the North Carolina Supreme Court in *State v. Arrington*[42] illustrates this point. In *Arrington*, the court was required to decide whether affidavits based on informant

34. 666 P.2d 135 (Colo. 1983).

35. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released . . . ." *Id.* at 137.

36. 442 U.S. 735 (1979).

37. *Id.* at 742, 745.

38. *Id.* at 746.

39. 666 P.2d at 140.

40. *Id.* at 140-41 (citing *Smith*, 442 U.S. at 748-49 (Marshall, J., dissenting)). In his dissent in *Smith*, Justice Marshall argued that "[t]hose who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."

41. 666 P.2d at 144.

42. 311 N.C. 633, 319 S.E.2d 254 (1984).

hearsay constituted sufficient probable cause to support the issuance of a search warrant.

The United States Supreme Court had wrestled with the same question in *Illinois v. Gates*[43] when it rejected the analysis of *Aguilar v. Texas*[44] and *Spinelli v. United States*.[45] Under the *Aguilar-Spinelli* rule, affidavits were required both to reveal the basis for the knowledge of the informant and to provide facts establishing the reliability of the informant. By contrast, in *Gates*, the Court adopted an analysis which emphasized the "totality of the circumstances."[46]

As an initial matter, the North Carolina Supreme Court rejected the notion that it was bound by the holdings of the Supreme Court in resolving state constitutional claims: "[w]hether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such issues are questions which can only be answered with finality by this Court."[47] Proceeding to the constitutional claim, the court noted that prior North Carolina decisions had approved the two-pronged *Aguilar-Spinelli* analysis.[48] Nonetheless, finding the *Gates* reasoning "compelling", the court in *Arrington* adopted the totality of the circumstances analysis.[49]

Arrington demonstrates that courts advocating the pure independent approach may still conclude that the relevant state constitutional protections are coterminous with their federal counterparts. Taken together with *Sporleder*, it illustrates that state courts applying the pure independent approach are distinguishable by the methodology they employ rather than the results they reach.

B. The "Lockstep" Approach

At the other end of the spectrum from the pure independents are those state courts adopting the so-called "lockstep" approach to state constitutional adjudication. Courts employing this analysis begin with the premise that state constitutional provisions provide precisely the same level of protection as analogous federal constitutional guarantees. Under the lockstep formulation, changes or clarifications of federal law

43. 462 U.S. 213 (1983).

44. 378 U.S. 108 (1964).

45. 393 U.S. 410 (1969).

46. 462 U.S. at 230.

47. *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260.

48. *Id.* at 637, 319 S.E.2d at 257 (citing State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976); State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972)).

49. *Id.* at 643, 319 S.E.2d at 260.

by the United States Supreme Court lead to parallel changes in state constitutional law.

The Montana Supreme Court's decision in *State v. Jackson*[50] engendered a heated dispute over the desirability of adopting the lockstep approach. *Jackson* began as a prosecution for drunk driving; at issue was the admissibility into evidence of the defendant's refusal to take a Breathalyzer test at the time of his arrest. The defendant claimed his act of refusal was testimonial, and therefore subject to his right against self-incrimination—a right guaranteed by both the federal and state constitutions.

Initially, the Montana Supreme Court ruled four to three that the evidence was inadmissible.[51] Although the majority based its ruling on both the federal and state constitutions, it did not specifically address the question of whether the protection against self-incrimination secured by the state constitution might differ from federal law. In its discussion of the state provision, however, the majority relied only on federal cases to support its conclusion.[52] The dissenters contended that Montana had previously adopted the lockstep approach to self-incrimination issues and that federal constitutional law did not bar the use of the evidence.[53]

The state petitioned the United States Supreme Court for a writ of certiorari. Prior to disposition of the writ, the Court held in *South Dakota v. Neville*[54] that admission of the type of evidence at issue in *Jackson* did not violate any federal constitutional norms. The Court then vacated *Jackson* and remanded the case for further consideration in light of *Neville*.[55]

On remand, the Montana Supreme Court reversed itself by a five-to-

50. 195 Mont. 185, 637 P.2d 1 (1981), *vacated and remanded*, 460 U.S. 1030, *rev'd*, 206 Mont. 338, 672 P.2d 255 (1983).

51. *Id.* at 193, 637 P.2d at 5.

52. *Id.* at 191-93, 637 P.2d at 4-5 (citing Doyle v. Ohio, 426 U.S. 610 (1976); Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964)). The majority did cite one Montana case, State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977), for the purpose of distinguishing it from *Jackson*.

53. 195 Mont. at 193, 637 P.2d at 4 (Haswell, C.J., dissenting).

54. 459 U.S. 553 (1983).

55. 460 U.S. 1030 (1983). This action clearly presaged the adoption of the much-maligned rule of Michigan v. Long, 463 U.S. 1032 (1983). Under this rule,

> when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41.

two margin.[56] All members of the new majority firmly embraced the lockstep approach to self-incrimination issues, concluding that in this area of law, "[t]he Montana constitutional guaranty affords no greater protection than that of the Federal constitution."[57] This conclusion brought a bitter dissent from Justice Shea, the author of the original majority opinion. He asserted that "the majority has abdicated [its] responsibility by . . . permit[ting] the United States Supreme Court to tell us what our state constitution means."[58]

C. The Reactive/Independent Approach

Some judges and commentators have advocated an intermediate approach, which perhaps can best be described as a "reactive/independent" analysis. Under a reactive/independent analysis, authoritative interpretations of federal constitutional law presumptively control the state court's analysis of analogous state constitutional issues. However, the state court will adopt a different analysis if justified by special circumstances.[59]

New Jersey Supreme Court Justice Handler's concurring opinion in *State v. Hunt*[60] clearly illustrates this method of analysis. Like *Sporleder*,[61] *Hunt* dealt with the admissibility of evidence obtained through the use of a pen register. Handler began his argument by asserting that, while not formally controlling state constitutional adjudication, "[t]he opinions of the Supreme Court . . . are nevertheless important guides on the subjects which they squarely address."[62] Handler then set out seven factors that, in his view, would justify the imposition of more

56. 206 Mont. 338, 672 P.2d 255 (1983).

In part, the decision was a vindication of the *Long* approach to the relationship between the federal courts and state supreme courts. *See supra* note 55. Justice Morrison, whose vote was essential to the original decision, averred explicitly that he had originally voted to suppress only because he had misunderstood the applicable federal law, which was later authoritatively construed in *Neville*. 206 Mont. at 349, 672 P.2d at 260 (Morrison, J., concurring). Thus, review by the Supreme Court had served its proper function—correction of state court mistakes in the application of a federal standard.

57. 206 Mont. at 348, 672 P.2d at 260 (quoting State v. Armstrong, 170 Mont. 256, 260, 552 P.2d 616, 619 (1976)).

58. *Id.* at 358, 672 P.2d at 262 (Shea, J., dissenting).

59. For examples of advocacy of such an approach, see Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 986-96 (1979); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 318-19 (1977).

60. 91 N.J. 338, 358-72, 450 A.2d 952, 962-69 (1982) (Handler, J., concurring).

61. *See supra* notes 34-41 and accompanying text.

62. *Hunt*, 91 N.J. at 363, 450 A.2d at 964 (Handler, J., concurring).

stringent state constitutional guidelines.[63] Handler concurred in holding the evidence inadmissible as a matter of state law, concluding that "New Jersey's long history of statutory and legal protection for telephonic communications makes independent resort to the State charter appropriate in the face of conflicting federal law."[64]

Advocates of the pure independent approach have attacked both the reactive/independent and lockstep approaches as inconsistent with basic premises of federalism.[65] Their criticisms of the lockstep analysis have been particularly strident. Professor Williams has charged that the lockstep approach "constitutes an unwarranted delegation of state power to the Supreme Court and a resultant abdication of state judicial responsibility."[66] Similarly, Professor K.L. Collins accused the second *Jackson* majority of "the abdication of an obligation duly imposed on state judges to be the final arbiters of state law."[67] In essence, these and other critics claim that the pure independent approach is a necessary corollary of the theory that each state is a sovereign entity.

To understand the flaw in this argument, one must first analyze the relationship between state court activism and the concept of state autonomy. A minority of commentators seem to believe that such activism per se advances the values of federalism. As already noted, for example, Justice Brennan claimed that "[e]very believer in our concept of federalism . . . must salute this development [of an increasingly activist posture] in our state courts."[68] Similarly, Professor Wilkes has described state court protection of rights not protected by federal law as "a cornerstone of federalism."[69] This argument necessarily rests on the premise that a refusal by a state court to be activist somehow diminishes state autonomy.

The difficulty with this argument is that the premise reflects a fundamental confusion between the *power to choose* whether to be activist and the *decision* to be activist. Plainly, principles of state autonomy guaran-

63. These conditions include: (1) textual language; (2) legislative history; (3) preexisting state law; (4) structural differences; (5) matters of particular state interest and local concern; (6) state traditions; and (7) public attitudes. *Id.* at 364-67, 450 A.2d at 965-67 (Handler, J., concurring).

64. *Id.* at 368, 450 A.2d at 967 (Handler, J., concurring).

65. *E.g.*, Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 5-9 (1981).

66. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 404 (1984).

67. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV 1095, 1137 (1985).

68. Brennan, *supra* note 1, at 502.

69. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix reprinted in* DEVELOPMENTS, *supra* note 24, at 166, 183.

tee to state courts the right to adopt any rule of law not inconsistent with federal law. In exercising this choice, however, a state court may decline to take an activist position for a variety of reasons. The state court may be persuaded by the reasoning of the Supreme Court on the issue; it may believe that the state constitution provides less protection than the federal constitution; or it may even believe that the state constitution does not address the issue at all. In each of these cases, the state court is in fact obliged to apply the law as enunciated by the Supreme Court. This obligation does not imply, however, that the state court has abdicated its responsibility for state constitutional interpretation. Instead, the obligation is derived from the Supremacy Clause, which binds the state court to honor applicable federal law.[70]

Once the distinction between the power to be an activist court and the decision to exercise this power is understood, it becomes clear that state court activism in and of itself does not advance the cause of federalism. Federalism is concerned with the allocation of authority between the state and federal governments. Thus, considerations of federalism are important when the United States Supreme Court reviews state legislation. The question in such cases is whether a state can retain its locally established rule or whether that rule must yield to a paramount national principle. By contrast, state court review under the state constitution raises no such issues. The only question is whether the controlling rule will be that established by the legislature or the court. In either case, the relevant decision will be made at the state level.

The case law dealing with the right of shopping center owners to prohibit political speech on their property illustrates this point. Initially, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[71] the United States Supreme Court held that as a matter of federal constitutional law, shopping centers were the equivalent of city sidewalks for purposes of the Fourteenth Amendment. Thus, the Court concluded that the shopping centers could not prohibit speech protected by the First Amendment. The Supreme Court, however, overruled *Logan Valley* in *Lloyd Corp. v. Tanner*[72] and *Hudgens v. NLRB*,[73] which held that shopping centers were not subject to the limits of the First and Fourteenth Amendments.[74]

70. *See supra* note 25 and accompanying text.

71. 391 U.S. 308 (1968).

72. 407 U.S. 551 (1972).

73. 424 U.S. 507 (1976).

74. *Lloyd Corp.* effectively limited *Logan Valley* to its facts. The Court actually overruled *Logan Valley* in *Hudgens*, but stated that, for practical purposes, *Logan Valley* had already been overruled by *Lloyd Corp. Hudgens*, 424 U.S. at 517-18.

Forced to confront their own state constitutions on this issue, state courts split after the *Lloyd* and *Hudgens* decisions.[75] The California Supreme Court led those courts that essentially reinstated *Logan Valley* as a matter of state law. After initially adopting the reasoning of *Lloyd* in *Diamond v. Bland*,[76] the California court held in *Robins v. Pruneyard Shopping Center*[77] that the state constitution protected speech and petitioning at shopping centers. The *Pruneyard* court argued that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum for exercising . . . rights [of free speech and petition]."[78] The shopping center owners appealed to the United States Supreme Court, arguing, *inter alia*, that the California ruling amounted to a taking of property without compensation in violation of the Federal Constitution. The United States Supreme Court unanimously rejected this contention.[79]

Faced with an analogous problem, the Connecticut Supreme Court declined to follow the California precedent. Like its California counterpart, the provisions of the Connecticut Constitution guaranteeing the right of free speech do not contain any explicit state action limitations.[80] Nonetheless, in *Westfarms Associates v. Cologne*,[81] the state supreme court held that Connecticut shopping centers need not allow political speech on their premises, concluding that the state constitutional provision limited only the actions of the state.[82]

In assessing the impact of the various shopping center cases on federalism concerns, one must distinguish sharply between the decisions of the United States Supreme Court and those of the state courts. Each of the federal constitutional decisions raised important issues of state autonomy: *Logan Valley* imposed a federal standard which overrode any contrary state law, while *Lloyd*, *Hudgens*, and the federal decision in *Pruneyard* established the proposition that states were free of federal constitutional constraints and thus could take any position they pleased on state constitutional free speech protection. By contrast, neither the ac-

75. For a comprehensive discussion of the positions of the state courts on this issue, see Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, *reprinted in* DEVELOPMENTS, *supra* note 24, at 51.

76. 11 Cal. 3d 331, 335, 521 P.2d 460, 463, 113 Cal. Rptr. 468, 471 (1974).

77. 23 Cal. 3d 899, 908-11, 592 P.2d 341, 346-48, 153 Cal. Rptr. 854, 859-61 (1979), *aff'd*, 447 U.S. 74 (1980).

78. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

79. 447 U.S. 74, 80-85 (1980).

80. CONN. CONST. art. I, §§ 4, 5, 14; *compare* CAL. CONST. art. I, § 3; art. II, §§ 8, 9, 13; art. III, § 1.

81. 192 Conn. 48, 469 A.2d 1201 (1984).

82. *Id.* at 64-66, 469 A.2d at 1208-10.

tivist California decision in *Pruneyard* nor the nonactivist decision in *Westfarms Associates* implicated any federalism concerns. In California, the relevant rule was established by judicial action and this result could not be overridden through the normal legislative process. In Connecticut, by contrast, the court held that the action of the legislature would be binding. In each case, it is clear that the ultimate decision was to be made at the state level; the only difference involved the question of which state governmental body should have the final word.

Once the link between the concepts of federalism and state court activism is broken, lockstep analysis emerges in quite a different light. Basically, the decision by a state court to follow the lockstep approach for resolving state constitutional claims reflects the view that there is no need for additional judicial review when some judicial review exists already at the federal level. Such a decision does not enhance federal power in any respect; instead, it simply takes account of an unalterable reality—the existence of federal judicial review—in determining the allocation of authority among state governing bodies. As *Pruneyard* and *Westfarms Associates* exemplify, state court decisions reflect choices between state judicial power and state legislative power, rather than between federal judicial power and state judicial power. State courts employing the lockstep analysis simply choose to allocate maximum power to their state legislatures.

In short, the substance of lockstep analysis is entirely consistent with the basic concept of state autonomy. Of course, one still can attack the standard verbal formulations of the lockstep approach, which seem to suggest that United States Supreme Court decisions somehow create state constitutional law. For lockstep courts, however, these flaws in articulation have little impact on the practical results reached.

By contrast, analogous difficulties create very real federalism problems for state courts taking other approaches. These difficulties arise when federal constitutional decisions are taken as a floor in state constitutional adjudication. The remainder of this Article explores the problems this description has created for some state courts.

III. The Problem of the False Floor

The image of federal constitutional law as a "floor" in state court litigation pervades most commentary on state constitutional law. Commentators contend that in adjudicating cases, state judges must not adopt state constitutional rules which fall below this floor; courts may, however, appeal to the relevant state constitution to establish a higher "ceiling" of rights for individuals. Elsewhere I have argued that the entire

idea that courts can somehow add to the total volume of rights available to members of society is faced with insuperable analytic difficulties.[83] Even leaving these difficulties aside, however, the concept of the federal floor must be carefully circumscribed.

Certainly, as a matter of federal law, state courts are bound not to apply any rule which is inconsistent with decisions of the Supreme Court; the Supremacy Clause of the Federal Constitution[84] clearly embodies this mandate. It would be a mistake, however, to view federal law as a floor for state constitutional analysis; principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally-created principles into their state constitutional analysis; the only requirement is that in the event of an irreconcilable conflict between federal law and state law principles, the federal principles must prevail.

This distinction creates no problems for those courts which follow lockstep analysis. As already noted, this approach rests on the conclusion that state-law-based judicial activism is simply inappropriate in the area under consideration. Thus the state court need not speculate on what rights would be guaranteed if such activism were appropriate.

State courts following either the pure independent model or the reactive/independent model are faced with far more difficult problems. Unlike lockstep courts, pure independent or reactive/independent judiciaries cannot claim to be deferring to the state legislature except when forbidden to do so by operation of the Supremacy Clause. Instead, such courts must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice establishes a "floor", the state court is allowing a federal governmental body—the United States Supreme Court—to define, at least in part, rights guaranteed by the state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a state court deciding whether to expand federally recognized rights as a matter of state law must employ a two-stage process. The court first must determine whether the federally recognized rights themselves are incorporated in the state constitution and *only then* must determine whether those protections are more expansive under state law.[85]

The plurality opinion of the Oregon Supreme Court in *State v.*

83. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1007-11 (1985).

84. *See supra* note 25.

85. *See* Bator, *The State Court and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605 n.1 (1981).

Smith[86] exemplifies proper state court methodology. In *Smith*, two deputy sheriffs discovered the defendant when responding to a report of a vehicle off the road. Prior to being arrested or receiving *Miranda* warnings, the defendant admitted that he had been drinking but denied owning the disabled vehicle. After a dispatcher informed the sheriffs that the defendant did indeed own the vehicle, the defendant admitted ownership. The defendant was then arrested for driving under the influence of intoxicants and was given his *Miranda* warnings.[87]

The issue in *Smith* was whether the defendant's prewarning statements were admissible as evidence against him. Under the Supreme Court's ruling in *Berkemer v. McCarty*,[88] federal law did not bar admission of the statements. Thus, the defendant was constrained to argue that Oregon's constitutional guarantee against self-incrimination prevented the use of the statements against him.

The Oregon Supreme Court rejected the claim. After an extensive review of relevant state precedents, Justice J.R. Campbell concluded that state law permitted all "voluntary confessions" to be admitted.[89] The fact that the defendant incriminated himself prior to receiving *Miranda* warnings thus became irrelevant. Since the confession had plainly been voluntary, it could be used against him in court.[90]

The *Smith* result shocked some of those who, up to that time, had been strong supporters of independent state court analysis. Professor Ronald K.L. Collins, for example, characterized the decision as "one of the most devastating blows to state constitutional law."[91] Yet the *Smith* opinion merely adopted an approach which reflects the fact that the United States Supreme Court cannot determine the content of state law. The mere fact that the *Miranda* rule can be derived from the Federal Constitution does not imply that the same rule is built into the Oregon Constitution. Instead, the status of *Miranda* under state law must be determined independently. Justice Campbell's opinion reflects such an analysis; he examined the historical development of Oregon law and determined that the federal rule was inconsistent with established state practice. Thus, he rejected the federal approach in favor of a different theory.

The *Smith* plurality also demonstrated a commendable sensitivity to the circumstances in which state courts develop their jurisprudence. The

86. 301 Or. 681, 725 P.2d 894 (1986).
87. *Id.* at 681, 725 P.2d at 895.
88. 468 U.S. 420 (1984).
89. 301 Or. at 700, 725 P.2d at 906.
90. *Id.*
91. *Oregon Court Rejects Miranda Approach*, Nat'l L.J., Oct. 20, 1986, at 10, col. 1.

opinion suggested that in the absence of a widely applicable federal rule, a different state approach might appropriately be fashioned.[92] This observation reflected Justice Campbell's recognition that state constitutional law does not exist in a vacuum; instead, state courts must be aware of the context in which they operate. An important part of this context is the existence of a body of federal constitutional law which state courts are powerless to change. In reaching their decisions, state courts quite properly take the existence of this body of law into account. They cannot, however, allow federal courts to dictate the content of state constitutional doctrine. In short, however one views the precise result in *Smith*, one should admire Justice Campbell's understanding of the basic methodology underlying pure independent analysis.

Unfortunately, the general performance of state courts in analyzing search and seizure problems has not risen to the same level of excellence. Prior to the establishment of the federal exclusionary rule in *Mapp v. Ohio*,[93] state courts were free to consider or exclude evidence seized in violation of the Fourth Amendment. Exercising this discretion, many states expressly held that, as a matter of state law, the exclusionary rule did not apply in state criminal prosecutions.[94] *Mapp* changed the rule, holding that evidence seized in violation of the federal Constitution could not be used in any criminal prosecution. In recent years, the Supreme Court has limited the scope of the *Mapp* requirements.[95] Not surprisingly, criminal defendants often argue in state court for a broader reading of search and seizure protections as a matter of state constitutional law.

These arguments necessarily involve two related but analytically distinct claims. The first claim is that, as a matter of state law, the evidence was seized illegally. The second claim is that state law requires that illegally seized evidence be excluded at trial. Given the divergence of state law prior to *Mapp* and the general controversy surrounding the exclusionary rule itself, one would expect both extensive discussion of the latter issue and substantial disagreement among state courts regarding the appropriate conclusion.

In fact, post-*Mapp* state courts have paid virtually no attention to the question of whether state law bars the admission of illegally seized

92. 301 Or. at 701, 725 P.2d at 906.

93. 367 U.S. 643 (1961).

94. *See* Elkins v. United States, 364 U.S. 206, 224-32 (1960) (providing a state-by-state review of the exclusionary rule).

95. *See, e.g.*, United States v. Havens, 446 U.S. 620 (1980) (illegally seized evidence may be used for impeachment purposes); United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness may not invoke exclusionary rule).

evidence. Instead, courts generally have assumed without discussion that the exclusionary rule should be applied to state constitutional violations as well as their federal counterparts. Even state courts that prior to *Mapp* had refused to adopt the exclusionary rule seem to believe that the *Mapp* holding also requires exclusion of evidence obtained in violation of state law.[96] As a result, some of these courts have extended the exclusionary rule beyond the requirements of federal law.[97]

The recent New Jersey Supreme Court decision in *State v. Novembrino*[98] provides a dramatic example of this phenomenon. In *Novembrino*, the defendant challenged the use of evidence seized pursuant to a warrant found to have been issued without probable cause. Despite the defect, the court concluded that the police had acted on the good faith belief that the warrant was valid. Under similar circumstances, the United States Supreme Court held in *United States v. Leon*[99] that exclusion was not required as a matter of federal law. The question before the New Jersey court was whether the evidence should be excluded as a matter of state law.

One difficulty with the defendant's argument was that prior to *Mapp* the New Jersey courts had consistently held that state law did not embrace the exclusionary rule.[100] Indeed, the 1947 state constitutional convention had rejected an attempt to write the exclusionary rule into the state constitution.[101] Hostility to the principle underlying the rule was not the sole motive for its rejection; some delegates were simply reluctant to bind state courts to any position on the subject.[102] Nonetheless, it is fair to say that, prior to 1960, all indications in New Jersey bespoke an opposition to the exclusionary rule.

Despite this earlier opposition, the court in *Novembrino* held that the trial court properly suppressed the evidence.[103] The court argued that creation of a good faith exception "will ultimately reduce respect for

96. *See, e.g.*, Wilson v. People, 156 Colo. 243, 247-50, 398 P.2d 35, 37-39 (1965); State v. Wood, 457 So. 2d 206, (La. Ct. App. 1984).

97. *See, e.g.*, State v. Benoit, 417 A.2d 895 (R.I. 1980) (warrantless search of car four hours after impoundment violated search and seizure clause of state constitution); State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (on remand from United States Supreme Court, South Dakota Supreme Court held that inventory search of car impounded for parking violation was an unreasonable search under state constitution).

98. 105 N.J. 95, 519 A.2d 820 (1987).

99. 468 U.S. 897 (1984).

100. *E.g.*, Eleuteri v. Richman, 26 N.J. 506, 141 A.2d 46, *cert. denied*, 358 U.S. 843 (1958); State v. Alexander, 7 N.J. 585, 83 A.2d 441 (1951), *cert. denied*, 343 U.S. 908 (1952).

101. *See Eleuteri*, 26 N.J. at 511, 141 A.2d at 49.

102. *Novembrino*, 105 N.J. at 147, 519 A.2d at 850-51.

103. *Id.* at 157-58, 519 A.2d at 856-57.

and compliance with the probable cause standard . . . ."[104] Justice Gary S. Stein, writing for the majority, cited a number of cases to refute the dissent's claim that "New Jersey has no historical attachment to the exclusionary rule."[105] However, Stein principally relied on *State v. Valentin*,[106] which he read to have "imbedded [the exclusionary rule] in our jurisprudence."[107]

Obviously, there is nothing untoward about a state court holding that pre-*Mapp* case law should be reconsidered in the light of subsequent developments,[108] or even that that case law had been overruled *sub silentio* by later decisions.[109] The majority's heavy reliance on *Valentin*, however, reflects a fundamental misunderstanding of the relationship between state and federal law. *Valentin* involved an appeal from an unsuccessful motion to suppress evidence that had allegedly been seized illegally. Because New Jersey did not have an exclusionary rule, the prosecuting attorney had submitted no evidence to demonstrate that the search had been reasonable. Before disposition of the appeal, however, *Mapp* established that state courts were required to suppress evidence seized in violation of federal constitutional norms. Thus, the court in *Valentin* remanded the case for development of a record on the issue of the legality of the seizure.[110]

Admittedly, *Valentin* made passing reference to the fact that the defendant had raised both state and federal claims.[111] Further, the court noted that in devising new procedures it should consider "the provisions of the constitutions of both sovereignties."[112] The mandate of the court, however, directed only that "both parties [should be permitted] to introduce all relevant proof on the new issue generated by *Mapp*."[113] Thus, the *Valentin* decision did not imbed the exclusionary rule in New Jersey state constitutional law; it simply purported to apply the rule of federal law established in *Mapp*. Yet, by its nature, that rule requires exclusion only of evidence obtained in violation of the federal Constitution; the Supreme Court is powerless to mandate that the exclusionary rule applies to state constitutional claims. By simply assuming that, as a matter

104. *Id.* at 154, 519 A.2d at 854.
105. *Id.* at 148 n.30, 519 A.2d at 851 n.30.
106. 36 N.J. 41, 174 A.2d 737 (1961).
107. *Novembrino*, 105 N.J. at 147, 519 A.2d at 851.
108. *See id.* at 148-59, 519 A.2d at 851-57.
109. In this regard, the New Jersey Supreme Court might have relied on *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982). *See supra* notes 60-64 and accompanying text.
110. *Valentin*, 36 N.J. at 43-44, 174 A.2d at 738.
111. *Id.* at 42-43, 174 A.2d at 737.
112. *Id.* at 44, 174 A.2d at 738.
113. *Id.*

of state law, *Mapp* and *Valentin* automatically overruled previous state court rejections of the exclusionary rule, the court in *Novembrino* acted inconsistently with basic premises of state autonomy and federalism.

In short, the concept of federalism suggests the existence of constraints on courts that adopt either the pure independent or reactive/independent approach to state constitutional adjudication. These constraints are, however, relatively minor. The only necessity is that state courts consult their own law rather than mindlessly adopting federal constitutional standards as a floor for state constitutional analysis. Once this requirement is satisfied, considerations of state autonomy are simply irrelevant to the ultimate result.

Conclusion—Justice Brennan and State Constitutional Theory

Justice Brennan fails in his attempt to demonstrate that state court activism enhances the autonomy of the states in the American system. While principles of state autonomy *allow* state courts to be more activist than their federal counterparts, nothing in the federal structure suggests that state courts should exercise this power. Indeed, the theory of federalism requires that state courts reexamine the premises on which some activist decisions have been based. Thus, Justice Brennan's argument not only fails to justify state court activism, but also distorts state constitutional analysis generally.