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Barry A. Spevack

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Expanding State Constitutional Protections and the New Silver Platter: After They’ve Shut the Door, Can They Bar the Window?

The United States Supreme Court has declared that a death penalty per se does not constitute cruel and unusual punishment under the eighth amendment.¹ State legislators have already begun to rework former clauses to coincide with the one that passed Supreme Court scrutiny.² When the Supreme Court speaks to an issue under the Bill of Rights, the issue is generally considered to be ultimately decided. Criminal defendants awaiting sentencing or on death row can be expected to believe that the last word has finally been spoken. This conclusion is not necessarily true. It is within the domain of state court jurisprudence to extend individual protections further than the Supreme Court sees fit. In 1972, for example, the Supreme Court of California concluded that a penalty of death was unconstitutional under state law.³ It took a state constitutional referendum to override that decision, and, had that amendment not been passed, the recent Supreme Court decision would have had little effect in California.⁴

Should the Supreme Court decide to restrict prior decisions under the fourth and fifth amendments, state courts would not be required to follow these restrictive readings. Virtually every state constitution contains provisions similar in language and substance to the federal Bill of Rights. This article examines how a state court can rest its decision on the criminal safeguards in the state constitution rather than upon the fourth and fifth amendments. Secondly, it considers Illinois reaction to this option. Finally, the article investigates the potential “silver platter” problem sure to arise in those jurisdictions that rediscover their state constitutions and interpret their protections more broadly for defendants.

⁴. CAL. CONST. art. 1, § 27 (1972) provides in part:

   The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

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PERMISSIBILITY AND SCOPE OF BROADER PROTECTION UNDER STATE CONSTITUTIONS

At the close of his opinion for the court in Cooper v. California,\(^5\) Justice Black indicated that a state may impose higher standards on searches and seizures than the federal constitution requires.\(^6\) Many commentators have criticized the state courts' reluctance to respond to this suggestion.\(^7\) Recently, however, a few state courts have reconsidered their own constitutions in order to impose stricter restraints on law enforcement officers and extend broader protection to the defendant.\(^8\)

If the state court can base its ruling on the state constitution, it will effectively preclude Supreme Court review, because the Supreme Court will not review a decision resting on adequate state grounds.\(^9\) In Aikens v. California,\(^10\) for example, the Court dismissed a grant of certiorari in a death penalty case from California because the state court had in the interim declared the statute unconstitutional under state law, thereby making further consideration unnecessary.\(^11\) Although a state court may expand the rights of the defen-

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\(^5\) 386 U.S. 58 (1967).
\(^6\) Id. at 62:
Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.


\(^8\) Hawaii, California, and Pennsylvania have all circumvented the Supreme Court's interpretation of the fifth amendment which permits use of Miranda violations for impeachment purposes, by interpreting similarly worded clauses in their respective state constitutions. State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971); People v. Disbrow, 16 Cal. 3d 101, 545 F.2d 272, 127 Cal. Rptr. 360 (1976); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975). Hawaii and California have both circumvented Supreme Court interpretation of the fourth amendment which permits a full custodial search after arrest for a minor traffic violation, by using similarly worded clauses in their state constitutions. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 19 Cal. Rptr. 315 (1975). Michigan has circumvented Supreme Court interpretation of the fourth amendment which permits warrantless consensual electronic surveillance by basing its decision on similar language in the state constitution. People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975).


\(^11\) Id. at 814.
dant through interpretation of the state's constitution, it must still recognize the protections guaranteed by the federal constitution. Should a state court fail to recognize these protections, its decision remains subject to Supreme Court review.12

While courts possess authority to broaden individual rights, they risk reversal if the state grounds for their decisions are not clearly expressed.13 Ambiguity in the language of Cooper led some state courts to believe that the state could interpret the Bill of Rights more liberally for the defendant, placing greater restrictions on the state than required by the Supreme Court.14 The Oregon Supreme Court reasoned in State v. Florance:15

If we choose we can continue to apply this interpretation. We can do so by interpreting Article I, § 9, of the Oregon constitutional

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12. 324 U.S. at 125-26:
This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (citations omitted). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

13. There can be quite an interplay between the state and federal supreme courts should the United States Supreme Court decide to inquire where the state based its decision. A frequently cited example is People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971). In Krivda, the Supreme Court of California held that a police inspection of a person's trash was subject to warrant and probable cause requirements, even where the search was delayed until garbage men had hauled the trash away. The United States Supreme Court remanded the case to the California Supreme Court for clarification of the state's decision. California v. Krivda, 409 U.S. 33 (1972). The California court held that it was based on the state constitution. People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 106 Cal. Rptr. 521 (1973). The United States Supreme Court therefore denied certiorari. California v. Krivda, cert. denied, 412 U.S. 919 (1973). See also Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, cert. denied, 417 U.S. 969 (1974). More often than not the Supreme Court will decide for itself whether the grounds are state or federal. See Oregon v. Hass, 420 U.S. 714 (1975).

14. Part of the difficulty may be attributable to general incomprehensibility in the entire area. In People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), the California Supreme Court held that the state's death penalty was unconstitutional under the state constitution, thus pre-dating what was then the definitive death penalty decision by the Supreme Court. Furman v. Georgia, 408 U.S. 238 (1972). In petitioning for certiorari, the California attorney general asserted unsuccessfully that the federal question presented to the United States Supreme Court was:

Whether the Supreme Court of California has incorrectly held that the death penalty constitutes cruel and unusual punishment under the eighth amendment to the federal constitution, notwithstanding that court's attempt to circumvent the jurisdiction of this Court over federal Constitutional questions by purporting to base its difference on a minor difference in wording between otherwise identical federal and state constitutional provisions.

Linde, Book Review, supra note 7, at 335.

prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. Or we can interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court.¹⁹

The Supreme Court in Oregon v. Hass¹⁷ responded to this assertion, and accepted the second sentence as good law but rejected the last sentence since it “surely must be an inadvertent error.”¹⁸

Thus, the states may not demand greater restrictions as a matter of federal constitutional law than the Supreme Court imposes.¹⁹ State courts may nevertheless circumvent Supreme Court decisions they consider insufficient to protect individuals, through provisions in state constitutions similar to those in the Bill of Rights. So long as the courts clearly rely on those constitutions without infringing on federal rights, they will avoid Supreme Court review.

**CONSTITUTIONAL INDEPENDENCE: HAWAII AND CALIFORNIA**

Five years after it decided Miranda v. Arizona,²⁰ the Supreme Court held in Harris v. New York²¹ that admissions obtained in violation of Miranda are generally admissible against a defendant for impeachment purposes. Several state courts have refused to follow Harris and reassessed that question in terms of their state constitutions.²²

¹⁶. Id. at 182, 527 P.2d at 1208.
¹⁸. Id. at 719 n.4.
¹⁹. Id. at 719. The Court cites as authority for this statement two federal court of appeals decisions. Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966); Aftanase v. Economy Baler Co., 343 F.2d 187, 193 (8th Cir. 1965). Oregon is not the only jurisdiction where courts are confused on how to protect their decisions. A lower New York court, in People v. Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 111 (1974), after analyzing the United States Supreme Court’s approach to the fourth amendment and search incident to an arrest for a minor traffic violation, noted that it conflicted with New York Court of Appeals case law. Citing Cooper for the proposition that state courts may not narrow fourth amendment protections more than the Supreme Court dictates, the court held that there was no prohibition against the state extending such protection. This is clearly incorrect in light of Oregon v. Hass. The lower court was reversed on other grounds in People v. Kelly, 79 Misc. 2d 534, 361 N.Y.S.2d 135 (1974).
The Hawaii Supreme Court disavowed *Harris* in *State v. Santiago.* While not contesting the prerogative of the United States Supreme Court to interpret the Constitution authoritatively, the Hawaii court proclaimed itself the final arbiter for interpreting Hawaii's constitutional provisions. The court initially adopted the principles of *Miranda* and held those notions had an independent source in the Hawaii constitutional privilege against self-incrimination. The court declared that in Hawaii, unless the *Miranda* warnings or their equivalent are given to an accused, his statements may not be used to impeach his credibility during rebuttal or cross-examination.

The Supreme Court of California similarly repudiated the *Harris* doctrine in *People v. Disbrow.* In overruling a decision that had
followed the holding in *Harris,* the court criticized the *Harris* rationale as not what *Miranda* envisaged. The court proclaimed the independent nature of the California constitution and reaffirmed its responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal constitution.

The Hawaii and California supreme courts have also renounced the Supreme Court's holdings in *United States v. Robinson* and *Gustafson v. Florida.* Taken together, the cases permit a police officer to conduct unrestricted searches of persons arrested for minor traffic violations. The Hawaii Supreme Court in *State v. Kaluna* was first in refuting this new liberalization of search and seizure policy, and, as in *Santiago,* based its decision on the state constitution.

The court recognized its obligation to follow Supreme Court

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30. People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974). Both *Disbrow* and *Nudd* were 4-3 decisions. The swing vote came from Chief Justice Wright, who could not at the time of *Nudd* conceive that evidence obtained in such flagrant violation of *Miranda* would ever be presented to the trier of fact. People v. Disbrow, 16 Cal. 3d 101, 116, 545 P.2d 272, 282, 127 Cal. Rptr. 360, 370 (1976).

31. 16 Cal. 3d at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367.

32. Id. at 114-15, 545 P.2d at 280, 127 Cal. Rptr. at 368-69. Chief Justice Donald W. Wright of the California Supreme Court answered critics who contended that the California court had usurped Supreme Court authority when it declared the death penalty unconstitutional under state law (see text accompanying notes 3 and 4 supra):

> We also recognize that these people [the 104 California prisoners on death row] were our responsibility. They had committed crimes in California, had been adjudged guilty in California, had been sentenced to death in California, were imprisoned in California, and were to be executed in California under the laws of California. Our duty was to resolve the constitutional question, regardless of its difficulty or magnitude . . . . We could not, in good conscience, avoid the problem by deferring to any other court or any other branch of government.


36. *Kaluna* limited police to searching for weapons if the arrestee is believed to be armed, and to seizing fruits and instrumentalities of the crime for which the suspect was arrested.

Id. The United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. In contrast, the Hawaii constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons
pronouncements interpreting the federal constitution. After conceding the reasonableness of the search under the Supreme Court’s reading of the fourth amendment, the court reiterated its role as the state’s ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii constitution. In Oregon v. Hass the Supreme Court cited *Kaluna* as an example of how a state can legitimately increase protection for criminal defendants within its jurisdiction.

In *People v. Brisendine,* the Supreme Court of California likewise rejected *Gustafson-Robinson.* Justice Mosk, who later wrote the majority opinion in *Disbrow,* held:

> It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

**ILLINOIS AND THE ROAD NOT TAKEN**

*Harris v. New York*

The Illinois constitution also has provisions that resemble the fourth and fifth amendments, but the Illinois Supreme Court has not considered the route taken by the Hawaii and California courts. Instead, it has conformed Illinois constitutional provisions
to Supreme Court interpretations of the Bill of Rights. As a result, Illinois decisions granting broader individual protections have become dependent on Supreme Court treatment of those particular issues.  

Illinois judicial response to Harris is particularly noteworthy. Prior to Miranda and Harris, the Supreme Court of Illinois reasoned that, "fundamental justice will not countenance accomplishment, by indirectness, of that which it will not permit directly." Accordingly, inadmissible confessions did not become competent evidence when offered for impeachment. This view was echoed by the sentiment of the forthcoming Harris dissent which states that no constitutional distinction should be drawn between use of incriminating statements as direct proof of guilt and their use for impeachment. The major objective in the exclusion of such evidence was to safeguard the integrity of the adversary system. 

In People v. Luna, the Illinois Supreme Court held that statements made at a suppression hearing were not admissible for the purpose of impeachment. The court distinguished Walder v. United States, which was the current United States Supreme Court statement on the admissibility of illegally obtained evidence for impeachment. Although Walder permitted use of the statements by the prosecution, the evidence admitted pertained to collateral matters only. In Luna the inadmissible statements related directly to

\[\text{vehicle to follow the Supreme Court into regression (citation omitted) but we need not, as we do here, use it as the means to serve as its vanguard.} \]

58 Ill.2d 211, 220, 317 N.E.2d 545, 550 (1974) (Goldenhersh, J., dissenting). The Justice did not indicate whether he based his assertion on the state or federal constitution. If he believed that the Illinois court could interpret the federal constitution more favorably for the defendant than the Supreme Court, he was clearly mistaken.


44. People v. Pelkola, 19 Ill. 2d 156, 161-62, 166 N.E.2d 54, 58 (1960).

45. Id. at 162, 166 N.E.2d at 58. See also People v. Luna, 37 Ill. 2d 299, 226 N.E.2d 586 (1967); People v. Hiller, 2 Ill. 2d 323, 118 N.E.2d 11 (1954); People v. Maggio, 324 Ill. 516, 155 N.E. 373 (1927); People v. Sweeney, 304 Ill. 502, 136 N.E. 687 (1922).

There appears to be no procedural distinction between an "admission" and a "confession." An admission is an acknowledgment of facts tending to establish guilt, while a confession is acknowledgment of participation in the crime. See Railsback, Self-Incrimination, 51 Ill. Bar J. 278 (1962); Wexler, Pre-Trial Motions, 47 Ill. Bar J. 216, 226 (1958). A major source of controversy had been whether the general rules on admissibility reached only confessions. Dicta in People v. Lefler, 38 Ill. 2d 216, 220, 230 N.E.2d 827, 829 (1967), apparently resolved the question by citing People v. Hiller, 2 Ill. 2d 323, 118 N.E.2d 11 (1954), for the proposition that there should be no distinction between an incriminating statement and a confession.


47. 37 Ill. 2d 299, 226 N.E.2d 586 (1967).

the guilt of the accused. The Illinois Supreme Court relied on this
distinction, refusing to admit the evidence for impeachment
purposes.\textsuperscript{9} The same distinction was offered to the United States
Supreme Court in \textit{Harris}, but the Court was not persuaded that
there was any difference in principle demanding a result contrary
to \textit{Walder}. The \textit{Harris} Court reasoned that the right of the defen-
dant to testify on his own behalf would not be construed as a license
to commit perjury.\textsuperscript{50}

Although the United States and Illinois Supreme Courts were at
odds, the Illinois court was not obligated to overrule \textit{Luna}. Under
the self-incrimination clause of the Illinois constitution, the court
could have adhered to its prior case law without infringing on feder-
ally protected rights. Instead, the Illinois Supreme Court began to
backpedal,\textsuperscript{51} until it finally overruled \textit{Luna} to the extent it con-
flicted with \textit{Harris}.\textsuperscript{52} Thus, Illinois conformed its law to the Su-
preme Court's notions of individual rights.

\textit{Gustafson-Robinson}

Put simply, \textit{Gustafson} and \textit{Robinson} permit identical custodial
arrest procedures whether a person is apprehended for a burglary or
for running a red light. As long as a suspect is placed under arrest,
the police officer is entitled to search the suspect and the area
within the suspect's immediate control.\textsuperscript{53} The Supreme Court of
Illinois has not dealt expressly with the eventualities made possible
by \textit{Gustafson} and \textit{Robinson}.\textsuperscript{54}

In Illinois, following an arrest for a traffic violation, an officer is
entitled to search both the driver and the vehicle only if circumstan-
ces reasonably indicate that he is not dealing with an ordinary
traffic offender.\textsuperscript{55} This contrasts with the Supreme Court procedure,

\begin{itemize}
\item \textsuperscript{9} 37 Ill. 2d at 307-08, 226 N.E.2d at 590.
\item \textsuperscript{50} 401 U.S. at 226.
\item \textsuperscript{51} People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972); People v. Moore, 54 Ill. 2d 33,
\item \textsuperscript{52} People v. Sturgis, 58 Ill. 2d 211, 216, 317 N.E.2d 545, 548 (1974).
\item \textsuperscript{53} Chimel v. California, 395 U.S. 752, 763 (1969).
\item \textsuperscript{54} In People v. Palmer, 62 Ill. 2d 261, 342 N.E.2d 353 (1976), the defendant was stopped
for failure to have a license plate. When he could not furnish a driver's license the police
conducted a pat-down search and discovered a weapon. In upholding the conviction, the
Illinois court relied on prior Illinois cases holding that the absence of license plates suggests
a serious violation of the law. People v. Brown, 38 Ill. 2d 353, 231 N.E.2d 577 (1967); People
v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); People v. Berry, 17 Ill. 2d 247, 161 N.E.2d
\item \textsuperscript{55} People v. Tate, 38 Ill. 2d 184, 230 N.E.2d 697 (1967); People v. Davis, 33 Ill. 2d 134,
210 N.E.2d 530 (1965); People v. Thomas, 31 Ill. 2d 212, 201 N.E.2d 413 (1964).
\end{itemize}
which requires only a probable cause arrest as a prelude to a thorough search. In the area of search and seizure, the comparable Illinois constitutional provisions could be used to maintain the court's independent policy without risking Supreme Court scrutiny of supposedly fourth amendment violations. However, in the past, Illinois courts have chosen to ignore this alternative and have repeatedly conformed their automobile search decisions to those of the Supreme Court. In *People v. Cannon,* the Illinois appellate court noted this acquiescence, and anticipated supreme court acceptance of *Gustafson-Robinson*. The court saw little use in applying prior Illinois standards and turned to *Gustafson-Robinson* for guidance. While the Illinois Supreme Court has yet to sanction the *Gustafson-Robinson* rule, it is instructive when an appellate court behaves as though that approval is a mere formality.

**State Subservience to Supreme Court Authority**

By basing its decision on the state constitution, a state court does more than simply circumvent Supreme Court review. It reasserts its role for the ultimate responsibility in the criminal law decisions within its jurisdiction. The state court also establishes a separate body of state law upon which to build future decisions. Yet, along with Illinois, the overwhelming majority of states defer to the

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56. In *People v. Lewis,* 34 Ill. 2d 211, 215 N.E.2d 283 (1966), the Illinois Supreme Court based a decision to suppress evidence obtained from searching a car trunk on *Preston v. United States,* 376 U.S. 364 (1964). *Preston* had held it unreasonable to search the trunk of a car taken into custody. The United States Supreme Court subsequently decided *Cooper v. California,* 386 U.S. 58 (1967), which upheld the warrantless search of an automobile impounded as evidence. The Illinois court took this as a clarification of the standards in *Preston,* and in *People v. Brown,* 38 Ill. 2d 353, 231 N.E.2d 577 (1967), upheld the search of a car trunk after a traffic arrest. *Lewis* was explicitly overruled in *People v. Jones,* 38 Ill. 2d 427, 231 N.E.2d 580 (1967).


58. In contrast, a lower New York court in *People v. Kelly,* 77 Misc. 2d 264, 353 N.Y.S.2d 111 (1974) chose to follow prior New York law because the New York Court of Appeals had yet to consider *Gustafson-Robinson*. The *Kelly* court cited the latest New York Court of Appeals decision, *People v. Marsh,* 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967). The court held that although the New York Court of Appeals could not narrow fourth amendment protections, there was no prohibition against its extending such protection (see note 19 supra for criticism of the procedural difficulty inherent in this contention). The court concluded that *Marsh* was not replaced by *Gustafson-Robinson* and was still the law in New York. 77 Misc. 2d at 269, 353 N.Y.S.2d at 117.

*Kelly* was reversed on other grounds in *People v. Kelly,* 79 Misc. 2d 534, 361 N.Y.S.2d 135 (1974). The New York court deferred to the authority of *Marsh,* which prohibited a full search by the police after a motorist had been arrested for a traffic violation, but determined that *Marsh* was not controlling, since the defendant had been lawfully arrested for the commission of a felony. *Id.* at 536, 361 N.Y.S.2d at 136.
United States Supreme Court even when such deference is unnecessary. Since scholars have by and large neglected the field of state constitutional law, one can only speculate why more states have not chosen the recent path of Hawaii and California.

It appears that most individual rights provisions already existed in state laws prior to their embodiment in the federal constitution. The early state legislatures conditioned acceptance of this Constitution upon submission and ratification of the protections later known as the Bill of Rights. This Bill of Rights was sculptured from existing state provisions guaranteeing individual freedoms. Thus, the drafters of the first Illinois constitution had not only the federal constitution as a model, but state constitutions from the revolutionary period as well. In fact, the individual rights provisions of the Illinois Constitution of 1818 more closely resemble language of early state constitutions than language of the Bill of Rights. However, in 1932, the Illinois Supreme Court asserted that


Delaware, in its Declaration of Rights (1776), provided that "no Man in the Courts of common Law ought to be compelled to give Evidence against himself." 2 Sources and Documents of the United States Constitutions 198 (W. Swindler, ed. 1973) [hereinafter cited as Swindler].

The amendments were proposed by Congress on September 25, 1789, and ratified by three-fourths of the state legislatures by December 15, 1791. New York State Constitutional Convention Committee, Constitutions of the States and United States 8 n.4 (1938). Most of the original 13 colonies had adopted constitutions with individual rights provisions by 1776. See generally American Charters, Constitutions, and Organic Laws 1492-1908 (F. Thorpe, ed. 1909).

63. Ill. Const. (1818) art. VIII, § 7:

That the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are contrary to liberty and ought not to be granted.

See 3 Swindler, supra note 60, at 244. Compare Pa. Const. (1776), art. X:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

5 American Charters, Constitutions, and Organic Laws 1492-1908, at 3083 (F. Thorpe, ed. 1909).
the fourth amendment was the “prototype” for the state search and seizure law, and therefore should not receive a different interpretation. The court was ignoring state constitutional history.

Perhaps the first submission by the Illinois court to United States Supreme Court interpretation came with the adoption of the exclusionary rule in 1924. The Illinois Supreme Court apparently grounded its decision on both the search and seizure clause of the Illinois constitution and Supreme Court interpretation of the fourth amendment. While creating and expanding this reliance on federal constitutional pronouncements, the court has failed to offer a satisfactory justification for this parallelism. The Illinois Supreme Court has noted the similarity between the fourth amendment and the Illinois search and seizure clause and between the fifth amendment and the Illinois self-incrimination clause. In People v. Grod, the Illinois court, reviewing prior Illinois and Supreme Court opinions in the search and seizure area, determined that the provisions were in effect the same and would be construed alike by the Illinois courts. In People v. Jackson, the court stated unmistakably that it would follow the decisions of the United States Supreme Court on identical state and federal criminal problems. In People v. Cannon, this philosophy reinforced the appellate court’s anticipation of eventual acceptance by the Illinois Supreme Court of the Gustafson-Robinson approach.

In attempting to distinguish the federal and Illinois constitutions, a defendant might stress the semantic dissimilarities between the documents. The California Supreme Court in People v. Anderson emphasized the distinction between “cruel and unusual punishment” (eighth amendment) and “cruel or unusual punishment” (California constitution). In declaring the death penalty unconstitutional under state law, the court reasoned that the use of the disjunction was purposeful, in that it indicated the framers’ desire to prohibit the imposition of a punishment that, by contemporary standards, was either cruel or unusual. However, the Illinois appel-

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64. People v. Reynolds, 350 Ill. 11, 16, 182 N.E. 754, 756 (1932).
65. People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924).
66. People v. Grod, 385 Ill. 584, 53 N.E.2d 591 (1944); accord, People v. Tillman, 1 Ill. 2d 525, 116 N.E.2d 344 (1954). Justice Klingbiel, dissenting in Tillman, a search and seizure case, asserted that the decision made a mockery of the Illinois constitution. Id. at 533, 116 N.E.2d at 349.
67. 385 Ill. 584, 53 N.E.2d 591 (1944).
68. 22 Ill. 2d 382, 176 N.E.2d 803 (1961).
69. Id. at 387, 176 N.E.2d at 805.
70. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
71. Id. at 634, 493 P.2d at 883, 100 Cal. Rptr. at 155.
late court in *People v. Henne* dispelled notions that such distinctions may be valid in Illinois. The defendant there attempted to distinguish the wording of article 1, section 10, of the Illinois constitution from the language of the fifth amendment. The Illinois constitution protects an individual from being compelled "to give evidence against himself," whereas the fifth amendment protects him from being compelled "to be a witness against himself." The defendant argued that the word "give" made the Illinois constitution more restrictive. Characterizing this argument as an exercise in semantics, the court based its rejection on *People ex rel. Hanrahan v. Power* which stated: "The two provisions differ in semantics rather than in substance and have received the same general construction."

In *Halpin v. Scotti*, the Illinois Supreme Court noted that the fifth amendment and its Illinois counterpart "may" be construed alike. This could indicate that the Illinois court has recognized its option to distinguish state constitutional provisions from Supreme Court determinations of federal constitutional protection. Despite apparent recognition of this alternative, Illinois has continually deferred to Supreme Court criminal procedure guidelines. Overriding policy considerations may be the reason for this deference.

It has been argued that the Supreme Court's unique position in the judicial structure makes it better able to interpret individual rights provisions objectively. For instance, Justice Schaefer of the Illinois Supreme Court observed that the United States Supreme Court is more removed from the pressure on local judges in criminal cases:

> The more remote the court the easier it is to consider the case in terms of a hypothetical defendant accused of crime, instead of a particular man whose guilt has been established.

The import from this concept is that the Supreme Court may be in the best position to protect the criminal defendant. As one writer has noted, the state courts have acted more as a brake than an accelerator in the domain of civil liberties. It is difficult to find a

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73. For full provision see note 41 supra.
74. See note 25 supra.
75. 11 Ill. App. 3d at 406, 296 N.E.2d at 770.
76. 54 Ill. 2d. 154, 295 N.E.2d 472 (1973).
77. *Id.* at 160, 295 N.E.2d at 475.
78. 415 Ill. 104, 112 N.E.2d 91 (1953).
79. *Id.* at 107, 112 N.E.2d at 93.
state court decision prior to Gideon v. Wainwright which holds that counsel for the indigent was constitutionally required, or a state court prior to Weeks v. United States which adopted an exclusionary rule.

If there is any reason behind Illinois’ amenability to Supreme Court precedent, perhaps it stems from a desire to maintain conformity between the sovereigns. Conformity also seems to be the rationale guiding the dissents in those jurisdictions which have elected to evade Supreme Court review by basing their decisions on state constitutions. Justice Burke, dissenting in People v. Brisendine, urged that Supreme Court interpretations of the federal constitution should be strongly persuasive as to what interpretations are placed upon similarly worded state constitutional provisions. Justice Richardson, dissenting in People v. Disbrow, asserted that in the absence of countervailing circumstances, state courts should defer to Supreme Court interpretations of nearly identical constitutional language rather than attempt to create a separate echelon of state constitutional interpretations. This reliance on conformity was believed to be necessary to promote “uniformity and harmony in an area of the law which peculiarly and uniquely requires them.”

For most state courts to be so concerned with conformity seems ironic in view of the fact that most state constitutions were adopted long before the Bill of Rights was considered applicable to the states. Before the Warren Court began to incorporate selectively from the first eight amendments, the state constitution was the individual’s major, if not sole, source of protection. The present acquiescence to federal interpretations could well be state court reaction to the gradual retreat from the broader protections de-

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83. 232 U.S. 383 (1914).
84. Mazor, Notes on a Bill of Rights in a State Constitution, supra note 7, at 346.
86. 13 Cal. 3d at 555, 531 P.2d at 1117, 119 Cal. Rptr. at 333 (Burke, J., dissenting).
88. 16 Cal. 3d 119, 545 P.2d 284, 127 Cal. Rptr. at 372 (Richardson, J., dissenting).

It seems ironic, but except for due process, judge-made law or the common law whose beauty was its flexibility and capacity to grow and adapt to changing times through court decisions, was both before and after the passage of the fourteenth amendment the exclusive domain of state courts and not federal judges. The United States Supreme Court is not a common law court. There is no common law constitution.

See also Linde, Book Review, supra note 7.
manded by the Warren Court. State courts, once forced to enlarge procedural safeguards for criminal defendants, may now take comfort in more conservative Supreme Court decisions. These decisions may more closely mirror what most state courts had thought all along.

**Silver Platter Specter**

Once a state court takes advantage of its option and independently extends individual rights, one evidentiary problem sure to arise will be whether evidence obtained in violation of the state's constitution will be admissible in a federal trial. Problems raised by *Gustafson-Robinson* situations are perhaps simplest to conceptualize. For example, if a California policeman oversteps the permissible scope for state searches after traffic arrests, yet manages to remain within the boundaries set by the United States Supreme Court, what will happen if he turns his evidence over to the federal court sitting in that state?

Those jurisdictions rejecting Supreme Court interpretation of similarly worded state constitutional provisions will find themselves with a form of "silver platter" problem comparable in some respects to the one that burdened the federal courts prior to *Elkins v. United States.* The exclusionary rule, adopted by the federal courts in 1914, applied to acts by federal law enforcement agencies. For a time this rule was effectively avoided whenever a state rather than a federal officer obtained the evidence illegally. Permitting such evidence to be admitted in a federal prosecution caused Justice Frankfurter to remark that the federal government was handed the evidence on a "silver platter." For 50 years the Court grappled with this inequity until the Court in *Elkins* ruled that evidence seized by either state or federal officials in violation of the federal constitution was inadmissible in a federal trial.

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90. For a thorough comparison between the Warren Court and Burger Court decisions in the criminal procedure field, see Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* supra note 9, at 423-24 (1974). See also Wilkes, *More On The New Federalism In Criminal Procedure,* supra note 9. In the articles the author explores in detail the adequate state grounds doctrine and the state courts that have recently relied on it to evade restrictive decisions by the Burger Court.


94. Usually the federal court would endeavor to find some federal participation in the illegal action. See, e.g., *Gambino v. United States,* 275 U.S. 310 (1927) (state officials illegally seized liquor where the only offense was a federal one; the evidence was excluded); *Byars v. United States,* 273 U.S. 28 (1927) (joint cooperation between federal and state officers made illegally seized evidence inadmissible in federal trial).

95. 364 U.S. at 223.
Justice Frankfurter, dissenting in *Elkins*, maintained that the decision would disturb federal-state relations by encouraging state illegacies. Justice Frankfurter contended that in a state that already recognized its own form of exclusionary rule, a state officer disobeying a state law need only turn his evidence over to federal prosecutors to evade the disciplinary policies of the state. The *Elkins* decision created two classes of illegally seized evidence: constitutionally inadmissible evidence, and evidence obtained illegally under state law. Once *Mapp v. Ohio* made the exclusionary rule binding on the states, the first class of illegal evidence was not admissible anywhere. However, as to the second category, the problem raised by Justice Frankfurter will reoccur in states which exclude more than is federally required.

Justice Traynor of the California Supreme Court, commenting upon *Mapp*, recognized that local rules and federal rules were not always symmetrical. To replace the local ones mechanically would needlessly impair federal-state relations. He assumed that any violations of state rules would invoke constitutional sanctions since whatever was illegal under state law was necessarily unreasonable under federal standards. He urged the federal courts to look directly to state decisions for guidance.

The federal courts will apply the state substantive law to civil proceedings in federal courts when required by diversity of citizenship. This partial conformity to state law naturally results in a lack of uniformity among decisions in federal district courts. This is tolerated because citizens of different states need assurance that the state laws will be neutrally applied. However, all federal crimes are statutory and based on congressional acts. Unlike civil proceedings, where the conformity must run between the forum state and the federal court presiding therein, in criminal prosecutions the conformity must run between the federal district courts.

It has long been the policy of the Supreme Court that federal law

96. *Id.* at 245-46 (Frankfurter, J., dissenting).
97. *Id.* at 246 (Frankfurter, J., dissenting).
100. *Id.* at 328. Reverse silver platter, whereby evidence seized in violation of the federal constitution was admitted in a state trial, was dealt with differently depending on the jurisdiction. In Illinois, for instance, prior to *Mapp* evidence obtained by persons other than state officers acting under color of authority of the state was not subject to the Illinois exclusionary rule. See, e.g., People v. Touhy, 361 Ill. 332, 347, 197 N.E. 849, 857 (1935).
102. See FED. R. CRIM. P. 26, Advisory Committee Comment.
governs admissibility of evidence in a federal trial. In doing so federal courts have unanimously rejected Justice Traynor's position. Neither the statutes nor decisional law of the forum state control admissibility of evidence in any phase of a federal criminal trial. This policy was codified in Rule 26 of the Federal Rules of Criminal Procedure, which had stated that common law principles as interpreted by federal courts governed admissibility of evidence in federal trials. Although Rule 26 was amended in 1972 in anticipation of the Federal Rules of Evidence, this policy remains.

One deviation from that policy apparently occurred in the 1948 decision of United States v. Di Re, which held that where an arrest without warrant took place, the law of the state would govern in the absence of an applicable federal statute. The Court saw no reason why state law would not be an appropriate standard to test warrantless arrests. Any authority to be gleaned from Di Re, however, has been undermined by Elkins:

In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned

103. Funk v. United States, 290 U.S. 371 (1933), and Wolfe v. United States, 291 U.S. 7 (1934), indicate that in the absence of a statute the federal courts in criminal cases are not bound by state laws of evidence but by common law principles as interpreted by the federal courts. It was on this principle that Rule 26 of the Federal Rules of Criminal Procedure, infra note 105, was based. See Fed. R. Crim. P. 26, Advisory Committee Comment.


105. The former Rule 26 provided:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an Act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.


106. Rule 26 was amended in 1972 to read:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.


109. Id. at 589-90.
out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.110

Thus, the Supreme Court in its supervisory role has the ultimate task of defining the scope to be accorded the various common law evidentiary privileges in federal criminal trials.111 Instructively, in both Elkins and its companion case, Rios v. United States,112 the evidence was seized by state officers without federal participation and was suppressed by a state tribunal under state law. This did not deter the Court from remanding for a separate federal determination of the state officers' conduct.113

In Smayda v. United States,114 the ninth circuit confronted a case under the Assimilated Crimes Act115 in which the laws of California

111. See, e.g., McCray v. Illinois, 386 U.S. 300, 309 (1967). One article, addressing itself to Justice Frankfurter's dissent in Elkins, felt that the difficulty in differentiating that which is constitutionally infirm from that which is merely illegal was no less than the pre-Elkins difficulty in determining whether there was any federal participation:

Why the constant conflict between the policy of exclusionary rule states and federal silver-platterism should be preferred by the dissenting justices to an occasional frustration of a state's efforts under the Elkins rule is difficult to understand.

113. In Elkins the state officers procured a search warrant upon information and belief that petitioner possessed obscene motion pictures. The search uncovered no obscene matter, but various other incriminating evidence was discovered. The county district court held the search warrant invalid and ordered suppression of the evidence. Since the action came after the return of an indictment by a state grand jury, the local district attorney challenged the power of the court to order suppression. When the motion to suppress was argued anew in the circuit court, the evidence was again deemed unlawfully procured and it was ordered suppressed. The state indictment was subsequently dismissed. While this was going on, federal officers acting under a federal search warrant obtained the incriminating matter from a safe deposit box where it was being kept by state officials. Shortly after the state case was dismissed, the federal prosecution began. 364 U.S. at 207 n.1.

In Rios the state officials were following a taxicab that petitioner had entered. When the cab stopped for a red light, the officers approached and identified themselves as policemen. A quick succession of events occurred during which Rios allegedly dropped narcotics to the floor. California, at the time an exclusionary rule state, granted petitioner's motion to suppress the evidence and entered a judgment of acquittal. Thereafter, one of the officers who arrested Rios discussed the case with a supervisor and they decided to turn the evidence over to federal narcotics officials. 364 U.S. at 255-59.
114. 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
applied. The court conceded that the evidence used to convict the defendant would have been inadmissible in the California courts. Nevertheless, it concluded that the question of admissibility in a federal trial was a federal question. The United States Constitution, not that of California, determines the admissibility of evidence. Decisions of the California Supreme Court are not binding on the federal court’s interpretation of the Constitution.

A state court’s decision granting broader rights to criminal defendants will probably be of no help to that defendant in federal court. The federal constitution protects the individual in federal court; Supreme Court interpretations of that Constitution control what evidence will be admissible. A federal court need not look to the state bill of rights when similar rights are present in the federal constitution. The federal courts exist to uphold federal law and recognition of state law is alien to that purpose. In the absence of an abrupt change in federal policy, state courts that broaden criminal rights will have to uncover alternate ways to combat the “silver platter” problem.

The defendant in Smayda was indicted for oral copulation in Yosemite National Park.

116. Defendant could not be convicted in California because the type of surveillance used had been found illegal under the California constitution in similar cases. See Brit v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962); Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962).

117. 352 F.2d at 253.

118. In United States v. Janis, 96 S. Ct. 3021 (1976), the Supreme Court ruled that evidence seized by state officials and subsequently suppressed in a state criminal proceeding, was admissible in a federal civil tax action. Janis did not directly confront the “silver platter” problem for several reasons. First, the state court had ruled the evidence unconstitutional under the fourth amendment rather than under state law. Id. at 3024. Second, the Court dismissed the deterrent effect of the exclusionary rule as minimal in this case since the evidence was admissible in neither a state nor federal criminal proceeding. As a result, the criminal enforcement process, which was the sole concern of the arresting officers, was frustrated. Id. at 3029. However, this rationale would naturally be diluted in cases where the evidence is admissible in a federal criminal trial.

119. Chief Justice Taney is often mentioned for his views on the separation of state and federal power. Chief Justice Taft in Olmstead v. United States, 277 U.S. 438, 469 (1928), reaffirmed Chief Justice Taney’s opinion in United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851), which asserted that the 34th Section of the Judiciary Act did not give the states power to prescribe evidence in a federal trial: “For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another.” Taney was later cited by Justice Frankfurter in Feldman v. United States, 322 U.S. 487, 490-91 (1944), for his opinion in Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1868):

[The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.]
FEASIBILITY OF AN INJUNCTION

One possible way for a state to prevent evidence seized illegally under state law from being admitted in a federal prosecution might be through the use of an injunction. In *Rea v. United States*, decided before the exclusionary rule was applied to the states, the Supreme Court granted an injunction against a federal agent to prevent him from testifying or turning over unconstitutionally seized evidence to a state prosecutor. A federal district court ruled that the federal agent had seized the evidence under an invalid search warrant. Thereafter, the agent swore out a complaint for petitioner's arrest before a state court judge, who charged petitioner with possession of marijuana in violation of state law. The defendant requested the federal court to enjoin the federal narcotics agent from testifying in state court, and to compel the destruction of the illegally seized evidence. The district court refused to grant the injunction and the court of appeals affirmed. The Supreme Court reversed.

In a brief opinion by Justice Douglas, the Supreme Court held that the federal agent had violated the federal rules governing search and seizure, and asserted the Court's authority to command observance of these rules. No injunction was sought against a state official. Therefore, the Court reasoned that to prevent federal agents from testifying or using fruits of illegal searches in state courts, was merely to enforce the federal rules against those required to observe them.

*Rea* has since been confined very closely to its facts. Commentary at the time *Rea* was decided often considered it just another harbinger anticipating the eventual application of the exclusionary rule to the states. Today, *Rea* stands for the proposition that, once

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120. 350 U.S. 214 (1956).
121. *Id.* at 215.
123. 350 U.S. at 217.
124. *Id.*
126. Case Note, 25 FORDHAM L. REV. 157 (1956); Case Note, 44 ILL. BAR J. 639 (1956); Case Note, 41 IOWA L. REV. 709 (1956); Case Note, 5 UTAH L. REV. 115 (1956). Articles critical of *Rea* include Case Note, 8 ALA. L. REV. 391 (1956) (questioning the right of the Court to enjoin a federal agent in the absence of statute); Case Note, 58 W. VA. L. REV. 412 (1956) (questioning judicial control over an employee of the Department of the Treasury); Case Note, 70 HARV. L. REV. 145 (1956).
a federal court has ruled the evidence unconstitutionally seized, it can enjoin federal officials from turning it over to the state prosecutor.

If a federal court can enjoin federal agents from turning over or testifying as to the fruits of illegal searches, can a state court employing its own supervisory power enjoin state officers from delivering evidence to a federal prosecutor? Obviously, the state could not impede a federal prosecution. An injunction of this sort reaches a state official, a person owing allegiance to state law. Such an injunction would not interfere with the federal court per se, but to a limited extent would allow the state court to give its state constitutional decisions broader effect.

A Florida court considered granting such an injunction in 1955, but decided not to do so. The court believed it was necessary for injunctive relief to find "unusual circumstances" or the "strong showing of irreparable loss or damage to complainant's property or other rights." It found neither. Although the evidence had been declared illegally seized under Florida law, the court would not enjoin the offending officer from turning it over to federal authorities.

In theory, it appears that a state court would have the power to restrain its law enforcement officials from flouting state policy. The issue has yet to be litigated. A formidable hindrance to this approach would be the supremacy clause of the Constitution.
a state court did enjoin a state agent from testifying and a federal court issued an order compelling him to testify, under the supremacy clause the federal court would undoubtedly prevail.\textsuperscript{135}

As early as 1867 the Supreme Court was asserting federal supremacy whenever the two powers collided.\textsuperscript{136} Judging from Donovan \textit{v.} City of Dallas,\textsuperscript{137} a civil case, any prospect of a federal court's honoring a state injunction must remain remote. There, the state court issued an injunction to prevent plaintiffs from bringing their suit to federal court. The Supreme Court held that once a federal court has jurisdiction and the plaintiff has a right to prosecute, a state injunction can have no effect on a federal court.\textsuperscript{138} It may likewise be found that the breaking of a federal law establishes federal jurisdiction. A state court injunction could not be used to hamper the separate federal use of the evidence. Because \textit{Rea} permits the federal courts to issue such an injunction to federal officers, it nevertheless appears inequitable to prevent the state courts from exercising similar authority.

Should a reciprocal \textit{Rea} approach be recognized, it only offers a severely limited remedy. The state court must declare the evidence inadmissible before the state officials try to divert it to federal court.\textsuperscript{139} This would not help a defendant where the state police violating the state law immediately turned the evidence over to the federal prosecutor, or where the state prosecutor turned the evidence over to the federal authorities before bringing an action in the state court.

\textsuperscript{135} This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\textsuperscript{136} Parsons, State-Federal Crossfire In Search And Seizure And Self Incrimination, 42 CORNELL L.Q. 346 (1957). Judson Parsons suggests that the federal interest in refusing to honor the injunction would be to assure that the truth be made known to the federal courts.

\textsuperscript{137} But if restraining federal officers from unconstitutional activity is important enough to cause federal courts to keep out relevant evidence, surely state efforts to control state officers are important enough in the federal scheme of things to merit similar treatment.

\textsuperscript{138} Id. at 363.

\textsuperscript{139} Id. at 412-13. The only exception would be where the court has custody of the property; that is, proceedings \textit{in rem} or \textit{quasi in rem}. Id. On the issue of state civil injunctions in federal court, see generally Ginsburg, \textit{Judgments in Search of Full Faith and Credit: The Last-In-Time Rule For Conflicting Judgments}, 82 HARV. L. REV. 798 (1969); Arnold, \textit{State Power To Enjoin Federal Court Proceedings}, 51 VA. L. REV. 59 (1965); Note, \textit{State Injunctions of Proceedings in Federal Courts}, 75 YALE L.J. 150 (1965).
CONCLUSION

A state court, relying on the state constitution, is free to grant broader individual protection than required by the federal constitution, since the Supreme Court will not review a decision resting on adequate state grounds. Supreme Court interpretations of the Bill of Rights should be incorporated by the state supreme court as foundations for interpreting textually similar state provisions. However, the state court must recognize its freedom to build upon these foundations.  

It is reasonable to presume that many jurisdictions welcome the recent restrictive Supreme Court opinions. Yet, the Illinois Supreme Court has indicated that in some aspects of defendants' rights the Illinois courts may have been leaning in other directions. The Bill of Rights is a reflection of early state constitutions and until recently it did not apply to the states. Thus, there is no reason for Illinois to mirror federal law when such conformity is not required. The problems raised by lack of conformity between the sovereigns is a problem for the federal courts, and a state supreme court should not restrict individual protections if logic and good conscience tell it the law should be otherwise.

BARRY A. SPEVACK

140. One view is that part of the difficulty state courts have in resting on the state constitution "even where the court apparently meant to do so" in the search and seizure area, is attributable to the Wolf v. Colorado, 338 U.S. 25 (1949) decision extending federal protection against unreasonable searches to the states. Since Wolf, "all search and seizure cases came to be classed generically as 'fourth amendment cases' without regard to . . . the state constitution." Comment, The Scope Of Searches Incident to Traffic Arrests in California: Rejecting The Federal Rule, 9 U. SAN. FRAN. L. REV. 317, 324 (1974).