WHY AND HOW A LOWER FEDERAL COURT'S DECISION THAT A SEARCH OR SEIZURE VIOLATED THE FOURTH AMENDMENT SHOULD BE BINDING IN A STATE PROSECUTION: USING "GOOD SENSE"[1] AND SUPPRESSING UNNECESSARY FORMALISM

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INTRODUCTION

Rob holds up two people at gunpoint, taking their wallets. Rob flees from the scene in his Ford Escape. The robbery victims are unable to provide the police with any meaningful description of Rob or his get-away car. An hour later, the police stop Rob's Escape because he purportedly failed to use a turn signal. The police, ordering Rob out of his vehicle, place him in the back of the squad car. As Rob is sitting in the squad car, the police search the trunk of the Escape and discover cocaine that Rob's friend, Opie, had given to him to transport as well as the wallets and the "hold-up" gun. Rob never consented to this search. Rob, who has a prior felony conviction, may not possess a firearm under either federal or state law. Furthermore, the police allege that prior to the trunk search, they smelled the faint odor of marijuana on Rob. Yet, later tests indicated that Rob did not have any marijuana in his system.

A federal grand jury indicts Rob on federal narcotics and firearm charges based on the evidence obtained from the search of the Escape. Rob's defense attorney files a suppression motion in federal district court arguing that: (1) the police violated Rob's Fourth Amendment rights when they stopped the Escape and searched the trunk; and (2) the evidence is consequently inadmissible at Rob's trial. The federal district court grants the suppression motion, concluding that the police lacked probable cause or reasonable suspicion to stop or search Rob's Escape. As part of this determination, the district court concludes that the Government failed to satisfy its burden of showing that Rob had, in fact, failed to use his turn signal. Additionally, the federal district court makes a factual finding that, regardless of whether probable cause existed, the police were mistaken

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1. United States v. Monsisvais, 946 F.2d 114, 117 (10th Cir. 1991) (quoting Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)).

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when they believed that they smelled marijuana on Rob's person. The federal district court suppresses all "fruits" of the unlawful stop, including the narcotics, the wallet, and firearm. Lacking sufficient evidence for trial, the U.S. Attorney's Office voluntarily declines to prosecute Rob for the federal offenses.

Several months later, however, the county district attorney's office, based on the evidence obtained from this very same search, charges Rob with several state offenses—robbery, unlawful possession of a firearm by a felon, and possession with intent to distribute unlawful substances. Rob's defense attorney files a suppression motion in state court arguing that: (1) the stop and search violated Rob's rights under the Fourth Amendment as well as under the analogous state constitutional provision proscribing unlawful government searches and seizures; and (2) the evidence is consequently inadmissible against him. Furthermore, this motion argues that state prosecutors should not be allowed to relitigate any of the factual or legal determinations that compelled the federal district court to grant Rob's federal suppression motion. Nevertheless, the state trial court rejects these arguments and declines to suppress the evidence. Rob is subsequently convicted of these state offenses.

All of the nine state appellate courts that have confronted a similar procedural situation have decided that where a federal district court has granted a defendant's suppression motion because the search or seizure at issue violated the Fourth Amendment, the defendant may not argue that this determination has any binding effect in a subsequent state prosecution.[2] To illustrate, in *Wing v. State*, the defendant argued that because a federal district court had determined that the police had seized the incriminating burglary tools during an illegal search, this determination was binding on Missouri courts in a subsequent Missouri prosecution; the Missouri Court of Appeals squarely rejected this argument.[3] Consequently, in these nine states, state prosecutors are free to relitigate the legality of the search or seizure under the Fourth Amendment and to present at trial the very evidence that the federal court had suppressed. These state appellate courts have reached this conclusion based on the following considerations.

First, these nine courts, noting the general rule that the federal government and the state government are different sovereign entities, have

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2. People v. Meredith, 15 Cal. Rptr. 2d 285, 285 (Cal. Ct. App. 1992); Wing v. State, 556 S.W.2d 226, 227 (Mo. Ct. App. 1977); State v. Brooks, 446 S.E.2d 579, 588 (N.C. 1994); State v. Proell, 726 N.W.2d 591, 593 (N.D. 2007); Commonwealth v. Gant, 945 A.2d 228, 228 (Pa. Super. Ct. 2008); State v. Chavez, 668 N.W.2d 89 (S.D. 2003); State v. Seay, No. M2002-02129-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 629, at *2 (Tenn. Crim. App. July 11, 2003); Londono v. Commonwealth, 579 S.E.2d 641, 655 (Va. Ct. App. 2003); State v. Mechtel, 499 N.W.2d 662 (Wis. 1993).

3. *Wing*, 556 S.W.2d at 227.

concluded that they are not parties in "privity." Because privity is absent, these courts have declined to allow "collateral estoppel" to bar relitigation in state court of the federal district court's determination that a governmental intrusion violated the Fourth Amendment.[4] Applicable to both civil and criminal litigation, collateral estoppel proscribes the "successive litigation" of an issue that has been "actually litigated and determined by a valid and final judgment" where the determination "is essential to the judgment."[5] A party is bound under collateral estoppel only where it had a "full and fair opportunity" to litigate the issue or where it is in privity with a party that had this opportunity. Privity is often defined as a relationship between two parties, "each having a legally recognized interest in the same subject matter."[6]

As an important component of this reasoning, some of these nine appellate courts have posited that mere cooperation between state and federal law enforcement or between state and federal prosecutors does not create privity. Thus, these courts have applied the same "*Bartkus* sham" analysis that courts use when determining whether "double jeopardy" bars state prosecutors from prosecuting a defendant after a federal prosecution for the same acts.[7] Furthermore, citing the general rule that a state prosecution following a federal prosecution for the same criminal act does not violate a defendant's double jeopardy rights, some of these courts have held that relitigation of a federal court's suppression determination is permissible.[8]

Second, some of these courts have rejected the argument that the supremacy of federal constitutional law renders a federal court's grant of a defendant's suppression motion binding on a state court.[9] It is axiomatic in America's federal system that the U.S. Constitution provides "minimum standards" for the protection of individual rights. Yet, rejecting this consideration, state courts have invoked the general proposition that the lower federal courts[10] exercise no supervisory authority over state courts. Moreover, as at least one court has reasoned, because federal courts may

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4. *See, e.g.*, *Gant*, 945 A.2d at 229–30 (relying on this privity requirement to resolve the issue).

5. Bobby v. Bies, 129 S. Ct. 2145, 2152 (2009) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)); *see also* Joshua M.D. Segal, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. REV. 1305, 1337–41 (2009) (providing comprehensive analysis of collateral estoppel requirements in different jurisdictions).

6. BLACK'S LAW DICTIONARY 1237 (8th ed. 2004).

7. *See, e.g.*, *Londono*, 579 S.E.2d at 654–55 (applying this analysis); *see also infra* Part II.A for an overview of this "sham" analysis.

8. *Gant*, 945 A.2d at 230.

9. *See, e.g.*, People v. Meredith, 15 Cal. Rptr. 2d 285, 291–92 (Cal. Ct. App. 1992); State v. Mechtel, 499 N.W.2d 662, 664 (Wis. 1993)..

10. The lower federal courts constitute the federal district courts and the federal circuit courts of appeals.

ignore the effect of a state suppression determination, state courts should likewise be free to reconsider a federal district court's suppression determination.[11]

This Article does not challenge the wisdom of the "dual sovereignty" doctrine and the permissibility of separate prosecutions by both the United States and a state for the same criminal act.[12] Furthermore, this Article does not argue that the grant of a suppression determination by one state should be binding on the suppression determination of another state.[13] Likewise, this Article does not challenge the general rule that a state court's grant of a suppression motion is not binding on a federal district court.[14] Furthermore, this Article does not contend that a defendant should be able to claim the benefit of the grant of his co-defendant's suppression motion.[15]

Instead, where a lower federal court[16] grants a defendant's motion to suppress evidence under the Fourth Amendment, the defendant, subsequently facing a state prosecution based on this suppressed evidence, should be permitted to claim that this prior federal determination bars

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11. *Meredith*, 15 Cal. Rptr. 2d at 291.

12. *See infra* Part I.A for discussion of the general rule that federal and state governments may separately prosecute a person for the same criminal act without offending double jeopardy protections.

13. *See, e.g.*, State v. Hathaway, No. CR-93-108, 1994 Me. Super. LEXIS 332, at *1 (Me. Super. Ct. Aug. 26, 1994) (refusing to accord full faith and credit to a Massachusetts suppression determination). *Hathaway* stated that "Maine was never a party, or in privity with a party, to the Massachusetts proceeding resulting in the suppression order here at issue." *Id.* at *10–11.

14. Other scholarship has considered this "reverse" scenario, but not the scenario discussed in this Article. *See, e.g.*, Carrie M. Bowden, *The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context after the Antiterrorism and Effective Death Penalty Act of 1996*, 60 WASH. & LEE L. REV. 185 (2003). Bowden argues that a federal court's refusal to defer to a state court's suppression determination is "erroneous and that, alternatively, federal courts should use [the federal habeas] standards of deferential review for evidentiary matters in collateral proceedings that occur under the dual sovereignty exception." *Id.* at 188; *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 10.6 (5th ed. 2009) ("For a ruling on a motion to suppress in a prior case to have either conclusive or presumptive effect in a later case, there must be an identity of parties. Thus, notwithstanding prior suppression by a state court, a federal court may make an independent determination as to admissibility."). For a discussion of these relevant cases, *see infra* Part II.C.

15. *See, e.g.*, Standefer v. United States, 447 U.S. 10, 24–25 (1980) ("'[*C*]*ompeting policy considerations*' . . . outweigh the economy concerns that undergird the estoppel doctrine." (emphasis added) (citation omitted)); *see also* Note*, The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1743 n.85 (1996) [hereinafter Note, *Due Process Roots*] ("[P]ublic interest in law enforcement outweighed the efficiency concerns that motivated the contemporary doctrine of nonmutual collateral estoppel in the civil context." (citing *Standefer*, 447 U.S. at 24–25)); LAFAVE, *supra* note 14 ("[I]f the same evidence is offered in the separate trials of two defendants in the same jurisdiction, the ruling in the first of these cases is not binding in the second."). Yet, these concerns about governmental interests are "not as applicable to the case of relitigation against the *same defendant*." Note, *Due Process Roots*, *supra* note 15, at 1743 n.85 (emphasis added).

16. In this circumstance, a lower federal court includes: (1) a federal district court; and (2) a federal appellate court that: (a) affirms the district court determination that the search or seizure violated the Fourth Amendment; or (b) holds, upon the defendant's appeal of the adverse determination, that the governmental intrusion violated the Fourth Amendment.

relitigation of the Fourth Amendment claim in state court. Thus, the defendant may claim issue preclusion concerning: (1) the legal conclusion that the search violated the Fourth Amendment; and (2) all factual determinations necessary to the legal conclusion that the search violated the Fourth Amendment.

First, the supremacy of federal constitutional law and its accompanying "minimum floor" explain *why* a federal district court's determination that a search or seizure violated the Fourth Amendment should be binding in a subsequent state prosecution.[17] Specifically, the failure of state courts to acknowledge the binding effect of the grant of a federal suppression motion is antithetical to the supremacy of *federal constitutional law.* Through the doctrine of incorporation, the Fourth Amendment is binding on all states and mandates a minimum floor for fundamental constitutional rights. States may not interpret the Fourth Amendment to provide persons with less protection than the quantum of protection that the U.S. Supreme Court has authorized. States, through their own constitutional provisions, may provide greater protections than those that the Fourth Amendment requires. Thus, even if federal courts are not bound by a state court's grant of a suppression motion, a state court should not be permitted to disregard a federal court's grant of a suppression motion.

Contrary to the assertions of some courts, state courts are not wholly insulated from the federal judiciary—particularly where fundamental procedural rights of criminal defendants are implicated. The writ of habeas corpus is a potent mechanism that enables lower federal courts to review the application of federal constitutional law by state courts in criminal prosecutions. Furthermore, lower federal courts are presumed to apply assiduously the precedents of the U.S. Supreme Court interpreting the Fourth Amendment—the same precedents that are binding on all state courts.

Second, the "law of the case" doctrine explains *how,* as a doctrinal matter, the federal district court's grant of a suppression motion should be binding on a subsequent state prosecution.[18] "The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"[19] Notably, all of the nine state courts have analyzed the binding effect of the prior federal determination through only the prism of the collateral estoppel doctrine—not the substantially less formalistic law-of-

17. See *infra* Part II for a discussion of this argument.

18. *See infra* Part IV for an explanation of how the "law of the case" doctrine resolves "how" the determination should be binding.

19. United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998) (quoting United States v. Monsisvais, 946 F.2d 114, 115 (10th Cir. 1991)).

the-case doctrine. The collateral estoppel doctrine is a wholly inadequate mechanism for resolving how the prior federal determination should be binding for several reasons.

Application of the collateral estoppel doctrine in this context has created three main analytical problems.[20] First, an inexorable, formalistic adherence to the element of privity overlooks the intrinsic values that criminal prosecutions implicate—and that are often profoundly distinct from those implicated in civil litigation. Second, the "*Bartkus* sham" analysis is unhelpful for determining the extent to which a federal suppression determination should be binding in a state prosecution. In the suppression context, the *Bartkus* analysis constitutes an indiscriminate reliance on a legal fiction given the dual contemporary realities of: (1) a substantially circumscribed Fourth Amendment exclusionary rule that the U.S. Supreme Court has justified *only* to the extent to which application of the rule deters unconstitutional law enforcement conduct; and (2) the increasing cooperation of federal and local law enforcement.

Third, the use of the collateral estoppel doctrine has led state courts to make a wholly unnecessary error. These courts have rejected the applicability of the prior federal suppression determination by inaptly citing the general rule that collateral estoppel, consistent with double jeopardy protections, does not preclude a subsequent state prosecution from relitigating facts necessary to guilt or innocence that a federal prosecution has previously determined. As a preliminary matter, this reasoning improperly conflates: (1) "double jeopardy-based" criminal collateral estoppel protections focused on factual issues necessary to either guilt or acquittal; and (2) "due process-based" criminal collateral estoppel protections applicable to situations in which double jeopardy has not yet attached. Yet, even more importantly, this reasoning fails to appreciate that unlike those findings necessary to the substantively factual determination of guilt or innocence, suppression rulings inherently articulate minimum constitutional *procedural* standards.

The law-of-the-case doctrine avoids these analytical errors. First, and most importantly, the law-of-the-case doctrine, in contrast to collateral estoppel, effectively recognizes that a conclusion by a federal district court that a search or seizure violated the Fourth Amendment is *inherently a determination of Fourth Amendment law.* This inherent nature fundamentally establishes why the federal court determination should control in a subsequent state prosecution. Consequently, the law-of-the-case doctrine, unlike the collateral estoppel doctrine, analytically focuses on the

20. *See infra* Part III for an explanation of why the collateral estoppel doctrine is unhelpful.

essence of why the federal determination should be at all binding in a subsequent state prosecution—the articulation of Fourth Amendment law.

Because it does not require the element of privity, the law-of-the-case doctrine provides a much more helpful analytical framework that avoids the formalism and rigidity of collateral estoppel. Thus, the law-of-the-case doctrine adeptly resolves several important conflicts created by the issue of whether a federal district court's determination that a search or seizure violated the Fourth Amendment should be binding in a subsequent state prosecution.

First, the law-of-the-case doctrine balances the otherwise antithetical values of federal judicial power and state autonomy. The reasoning of these nine appellate courts creates unnecessary discord between the federal and state judiciaries. Given that both the federal and state judiciaries should cooperatively seek to effectuate fundamental rights, the formalistic reasoning of these courts is, to a certain extent, antithetical to the larger purpose of American judicial federalism.[21]

Second, unlike the collateral estoppel doctrine, the law-of-the-case doctrine accommodates both the sovereign interest in successful prosecutions and the individual interest in protection from unlawful governmental intrusions. Also, the issue remains whether *state prosecutors* during a subsequent state prosecution can claim the benefit of the denial of a federal suppression motion. Because it allows for greater judicial discretion and dispenses with the formalistic privity requirement, the law-of-the-case doctrine provides a more helpful analytical framework to resolve this potential issue.[22]

The reasoning of these nine state appellate courts potentially implicates rights other than the Fourth Amendment proscription on unreasonable government searches and seizures. To illustrate, no court has yet confronted the issue of whether a federal court's determination that the police violated a defendant's Fifth Amendment post-arrest self-incrimination rights binds a state trial court. Similarly, courts have yet to resolve whether a criminal defendant, in a subsequent state prosecution, may claim the benefit of a federal district court's prior determination that a hearsay statement is "testimonial" and that its admission would violate the Sixth Amendment right to confront and cross-examine adverse witnesses. The law-of-the-case doctrine provides a more congruous analytical framework to resolve these issues.[23]

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21. *See infra* Part IV.B for a discussion of how the "law of the case" doctrine resolves this conflict.
22. *See infra* Part IV.C for a discussion of how the doctrine similarly resolves this conflict.
23. *See infra* Part IV.D for a discussion of these Fifth and Sixth Amendment issues.

I. OVERVIEW OF EXISTING LAW

This Part discusses several fundamental constitutional principles necessary to resolving the issue of whether a federal court's suppression determination is binding in a later state prosecution.

A. The Dual Sovereignty Doctrine

The Fifth Amendment of the U.S. Constitution prohibits the government from prosecuting an individual more than once for the "same offense."[24] Nevertheless, under the dual sovereignty doctrine, the same criminal act may constitute an offense against both the laws of a given state and the laws of the United States.[25] Thus, separate prosecutions by the state and federal governments[26] for the same criminal act do not violate the double jeopardy protections of the Fifth Amendment.[27] The dual sovereignty doctrine has become a "firmly-established" constitutional principle.[28] As some courts have explained:

> The states and the national government are distinct political communities, drawing their separate sovereign power from different sources, each from the organic law that established it. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses. When a single act violates the laws of two sovereigns, the wrongdoer has committed two distinct offenses.[29]

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24. U.S. CONST. amend. V; Blockburger v. United States, 284 U.S. 299, 304 (1932) (holding that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not).

25. United States v. Davis, 906 F.2d 829, 832 (2d Cir. 1990) (terming the dual sovereignty doctrine as "[o]ne of the by-products of our nation's federal system"); ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTION: THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE IN STATE AND FEDERAL COURTS 1 (2001) (noting that as a general rule, the dual sovereignty doctrine circumvents double jeopardy concerns when federal and state governments prosecute a defendant for the same conduct).

26. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985) (holding that the Double Jeopardy Clause does not proscribe successive prosecutions by *two states* for the same conduct).

27. KURLAND, *supra* note 25, at 2 ("With the advent of Prohibition, the issue achieved greater prominence . . . .").

28. *Id.* "The Supreme Court has upheld the dual sovereignty doctrine based on its concern that elimination of the doctrine would undermine federalism by jeopardizing the distinct relationship between the federal and state governments." Bowden, *supra* note 14, at 194; *see also* United States v. Lanza, 260 U.S. 377, 382 (1922) (stating that an act condemned "as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each").

29. *Davis*, 906 F.2d at 832 (citing United States v. Wheeler, 435 U.S. 313, 316–20 (1978)).

In *Abbate v. United States*, the U.S. Supreme Court held that a prior state prosecution does not bar a subsequent federal prosecution of the same person for the same acts.[30] Thus, this federal prosecution is constitutionally permissible, and only internal U.S. Department of Justice policy curtails the ability of the federal government to commence this subsequent prosecution.[31]

Analyzing the reverse situation, the U.S. Supreme Court held in *Bartkus v. Illinois* that the Double Jeopardy Clause does not *bar a state* from prosecuting a defendant who has been previously tried for the same acts in federal court.[32] Specifically, *Bartkus* concluded that where a defendant was acquitted in federal court of robbing a federally insured savings-and-loan association, a subsequent state prosecution based on the same acts did not deprive him of due process under the Fourteenth Amendment.[33] In reaching this conclusion, the *Bartkus* Court crucially emphasized that the record did not indicate that the state prosecution was merely a "tool" of federal authorities or that the state prosecution was a "sham" designed to effect a second federal prosecution.[34]

Nevertheless, states are "free to provide additional individual rights protections to limit the state's ability to undertake a second prosecution of an individual after a federal prosecution."[35] As a result, state laws vary concerning the permissibility of a state prosecution after an initial federal prosecution for "essentially the same conduct."[36] "Many states have determined that the value of protecting an individual against the burdens and perceived unfairness associated with defending successive prosecutions

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30. Abbate v. United States, 359 U.S. 187, 193–95 (1959) (delineating the historical origins of this well-established rule).

31. *See* Rinaldi v. United States, 434 U.S. 22, 28 (1977) (per curiam) (holding that "the overriding purpose of [this] policy [was] to protect the individual from any unfairness associated with needless multiple prosecutions"). Regardless of its power to prosecute for the "same act," the U.S. Department of Justice established the "Petite [P]olicy" that recommended that federal prosecutors abstain from using this power "indiscriminately and with bad judgment." *Id.* at 28–29 n.14 (citation and internal quotation marks omitted); *see also* KURLAND, *supra* note 25, at 3–5, 45 (discussing the Petite Policy); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1996, at 72, 72–84 (providing an expansive discussion of the Petite Policy).

32. Bartkus v. Illinois, 359 U.S. 121, 136–37 (1959).

33. *Id.* at 121.

34. *Id.* at 123–24. *See also* United States v. Davis, 906 F.2d 829, 832 (2d Cir. 1990) (noting that the "only legally binding exception to the dual sovereignty doctrine" is the narrow "tool" exception enunciated in *Bartkus*).

35. KURLAND, *supra* note 25, at 3. "Under the supremacy clause, however, the states were powerless to foreclose the rights of the federal government to undertake a successive prosecution after a state prosecution based on the same acts." *Id.*

36. *Id.* at 45.

based on the same conduct *should prevail*, subject to some appropriate limits."[37]

Double-prosecution issues were uncommon during the nascent years of the Republic.[38] By the twentieth century, however, dual sovereignty issues had attained greater importance as Congress increasingly enacted federal criminal legislation.[39] The issue of whether state courts are bound by a federal court's prior suppression determination amply evinces the complexities of this dual sovereign prosecutorial framework.

B. The Supremacy of Federal Constitutional Law

The Supremacy Clause declares that

> [t]his 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.[40]

Terming the Supremacy Clause language "too plain to admit of doubt or to need comment," the U.S. Supreme Court instructed in its 1858 *Ableman v. Booth* decision that "the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution."[41]

Perhaps even more consequentially, however, the U.S. Supreme Court, through the "selective incorporation" doctrine, has effectively used the Fourteenth Amendment to render most of the individual rights in the Bill of

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37. *Id.* at 45–46 (emphasis added).

38. *Id.* at 2.

39. *See id.* (noting that "judicial reinterpretations of the scope of the commerce clause" enabled this expansion of Congress's ability to enact criminal legislation). Other scholars have similarly explained that for most of America's history

> the federal government played a notably limited role in dealing with crime. The states were left with the primary, and nearly exclusive, responsibility of defining criminal conduct, as well as the responsibility of creating and supervising nearly all the agencies that administered that criminal law. Early federal criminal legislation dealt with matters involving more distinct federal interests, such as conduct that undermined federal currency or otherwise serious criminal conduct when it occurred in federal enclaves.

James A. Strazzella, *Preface to the Federal Role in Criminal Law*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1996, at 9, 9–10.

40. U.S. CONST. art. VI, cl. 2.

41. Ableman v. Booth, 62 U.S. (21 How.) 506, 517 (1858). The Court added, "for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences." *Id.* at 517–18.

Rights, including the Fourth Amendment, binding on the states.[42] The process of incorporation under the Fourteenth Amendment has ensured a minimum floor for the protection of federal constitutional rights that states may not descend below. Specifically, the Bill of Rights "establish[es] a foundation for the protection of human liberty. A state may not undermine that foundation, but its constitution may build additional protections above the federal floor."[43] As some scholars have aptly asserted:

> Despite their many differences, Americans have long been bound by a shared sense of constitutional commonality. . . . The sense was first given structural effect with the Constitution's Supremacy Clause and later with the Fourteenth Amendment, which served as a fulcrum to extend the U.S. Bill of Rights to the nation as a whole. As a consequence, federal constitutional rights today serve as a "floor" for the nation's political subunits, which, although permitted to provide their residents more in the way of rights, can provide nothing less.[44]

C. The Fourth Amendment, Supremacy, and the Remedy of Suppression

Guaranteeing one of the "great freedoms established by the American Bill of Rights,"[45] the Fourth Amendment of the U.S. Constitution commands that:

> 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.[46]

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42. Jon Adams, *Applying More Restrictive Search and Seizure Requirements Under State Constitutional Law in Federal Courts Using* Michigan v. Long *and* Erie v. Tompkins, 14 TEMP. POL. & CIV. RTS. L. REV. 201, 216 (2004).

43. Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Court*s, 63 TEX. L. REV. 977, 980 (1985).

44. Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 145 (2009) (citations omitted).

45. PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 5 (2005).

46. U.S. CONST. amend. IV. For a concise historical overview of the Fourth Amendment, see generally PRISCILLA H. MACHADO ZOTTI, INJUSTICE FOR ALL: *MAPP V. OHIO* AND THE FOURTH AMENDMENT 44–59 (2005).

The Framers created the Fourth Amendment in response to "the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, and [it] was intended to protect the 'sanctity of a man's home and the privacies of life,' from searches under unchecked general authority."[47] The other freedoms that the Bill of Rights safeguards "would be greatly diminished if there [were] no guaranteed zone of privacy, such as the home, for a person to retreat to and speak openly, free of arbitrary governmental intrusion and retribution. The Fourth Amendment guarantees precisely this kind of privacy."[48] Under numerous theories of constitutional interpretation, the U.S. Supreme Court and lower federal courts, as well as state appellate courts, have created a substantial and intricate Fourth Amendment jurisprudence.[49]

The "exclusion" or "suppression" of evidence obtained as a result of an unreasonable governmental search or seizure constitutes a "judicially created means of effectuating the rights secured by the Fourth Amendment."[50] In *Boyd v. United States*, the U.S. Supreme Court held that evidence obtained in violation of a defendant's Fourth Amendment rights was inadmissible in criminal proceedings against the defendant.[51]

In the watershed *Mapp v. Ohio* decision, the U.S. Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, *inadmissible in a state court*."[52] *Mapp* explained:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then . . . the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual

47. Stone v. Powell, 428 U.S. 465, 482 (1976) (citations omitted) (quoting Boyd v. United States, 116 U.S 616, 630 (1886)). The U.S. Supreme Court noted in *Stanford v. Texas*:

> The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced [in 1761] by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer."

379 U.S. 476, 481 (1965).

48. HUBBART, *supra* note 45, at 5.

49. *Id.* at 8.

50. *Stone*, 428 U.S. at 482; *see also* ZOTTI, *supra* note 46, at 60–64 (discussing the historical development of exclusionary rule as remedy for Fourth Amendment violations).

51. *Boyd,* 116 U.S. at 638.

52. Mapp v. Ohio, 367 U.S. 643, 655 (1961) (emphasis added).

> charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom implicit in the concept of ordered liberty.[53]

As a result of the *Mapp* decision, "the Fourth Amendment sets the *minimum standard*[*s*] for searches and seizures conducted by agents of all American governmental entities—federal, state and local."[54]

Regardless of whether he is in state court or federal court, a criminal defendant who seeks to exclude or suppress evidence pursuant to a Fourth Amendment claim must argue that the governmental search or seizure violated his legitimate expectation of privacy in the item or place at issue.[55] Thus, for suppression to occur, the search or seizure must be unlawful.[56]

Furthermore, state constitutions protect against unreasonable searches and seizures—creating an "important secondary source[] of search and seizure law."[57] In state criminal prosecutions, defendants may seek to exclude evidence under state constitutional prohibitions on unlawful searches or seizures.[58] Thus, a defendant charged with state offenses may challenge the legality of the government search or seizure and the admissibility of evidence under *both* the Fourth Amendment and the relevant state constitutional provision proscribing unlawful governmental searches or seizures.

When interpreting their own state constitutions or laws concerning unlawful searches or seizures, "state court[s] may *not* interpret [them] to give the individual *fewer* rights than those guaranteed by the Fourth Amendment[—]a contrary rule would allow the states to undermine guaranteed Fourth Amendment freedoms."[59] Yet, "a State is free *as a matter of its own* [*constitutional*] *law* to impose greater restrictions on police activity than those [the U.S. Supreme Court] holds to be necessary upon federal constitutional standards."[60] Indeed, the Fourth Amendment

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53. *Id.* (internal quotation marks omitted).

54. HUBBART, *supra* note 45, at 10.

55. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (citing Katz v. United States, 389 U.S. 347, 359 (1967)).

56. *Id.* (citing Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)).

57. HUBBART, *supra* note 45, at 16.

58. Alan Copelin, *A Time to Act: Statutory Exceptions to State-Created Exclusionary Rules*, 20 AM. J. CRIM. L. 339, 340–43 (1993) (providing a comprehensive overview of the exclusionary remedy in various states as a matter of state constitutional law).

59. HUBBART, *supra* note 45, at 9–10.

60. Oregon v. Hass, 420 U.S. 714, 719 (1975) (citing Sibron v. New York, 392 U.S. 40, 60–61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967); State v. Kaluna, 520 P.2d 51, 58–59 (Haw. 1974)).

provides "less protection against unreasonable search[es] and seizure[s]" than do "identical provisions of many state constitutions."[61]

Nevertheless, a state may not impose greater restrictions *pursuant to the Fourth Amendment* when the U.S. Supreme Court has specifically refrained from imposing them.[62] "[W]hen interpreting the Fourth Amendment, state courts, like lower federal courts, are bound to follow U.S. Supreme Court" rulings concerning Fourth Amendment rights.[63] In short, state courts may interpret a state constitutional prohibition proscribing unreasonable searches and seizures to be more restrictive on governmental conduct than the Fourth Amendment—but never less restrictive. Concomitantly, however, state courts may not interpret the Fourth Amendment more or less restrictively than the U.S. Supreme Court has interpreted it.[64]

D. Criminal Collateral Estoppel

Collateral estoppel fulfills the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[65] The U.S. Supreme Court affirmed in *Ashe v. Swenson* that collateral estoppel is "an extremely important principle in our adversary system of justice."[66]

Although different jurisdictions[67] apply collateral estoppel differently, as a general matter, issue preclusion or collateral estoppel[68] proscribes the

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61. Adams, *supra* note 42, at 210. *See also* United States v. Davis, 906 F.2d 829, 835 (2d Cir. 1990) (noting that in federal court, "evidence should be suppressed only where federal law has been violated and the federal exclusionary rule applies").

62. *Hass*, 420 U.S. at 719; *see also* HUBBART, *supra* note 45, at 9, 17 (noting that states may not "interpret [their] own constitution and laws so as to authorize police conduct that *abridges* Fourth Amendment rights").

63. HUBBART, *supra* note 45, at 9.

64. *Hass,* 420 U.S. at 719; *see also* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (noting this general rule).

65. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328–29 (1971)).

66. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

67. *See* Segal, *supra* note 5, at 1337–41 (2009) (providing a comprehensive analysis of collateral estoppel requirements in different jurisdictions).

68. Under the related doctrine of "res judicata,"

> a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

"successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment.'"[69] As the U.S. Supreme Court has explained, "[i]f a judgment does not depend on a given determination, relitigation of that determination is not precluded."[70] Once a court "actually and necessarily" determines an issue, "that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."[71] Moreover, "the issue in the pending litigation must be identical to the issue in the prior litigation."[72]

Furthermore, "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."[73] A party encompasses "all who are directly interested in the subject-matter, and had a right to make defence [sic], or to control the proceedings, and to appeal from the judgment."[74] Importantly, "to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings."[75]

As the U.S. Supreme Court elaborated in its 1887 *Litchfield v. Goodnow's Administrator* decision,

> privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the

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Parklane Hosiery, 439 U.S. at 326 n.5 (citing Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 326 (1955); Comm'r v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. Cnty. of Sac, 94 U.S. 351, 352–53 (1876)).

69. Bobby v. Bies, 129 S. Ct. 2145, 2152 (2009) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)).

70. *Id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h (1980)).

71. Montana v. United States, 440 U.S. 147, 153 (1979) (citing *Parklane Hosiery Co.*, 439 U.S. at 326 n.5). As some scholars have summarized, collateral estoppel is applicable in both the civil and criminal contexts so long as three elements are present. *See, e.g.*, Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 61 (1995) (noting the various methods employed by courts to determine if the judgment in prior litigation is final).

72. Matthew D. Purcell, *Ninth Circuit Reversal: The Removal of Offensive Collateral Estoppel in Alienage Proceedings*, 16 WM. & MARY BILL RTS. J. 1279, 1281 (2008).

73. Allen v. McCurry, 449 U.S. 90, 95 (1980) (quoting Montana v. United States, 440 U.S. at 153 (1979)); *see also* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) (noting that due process forbids the application of collateral estoppel to litigants who "never had a chance to present their evidence and arguments" even where "one or more existing adjudications of the identical issue . . . stand squarely against their position" (citing Hansberry v. Lee, 311 U.S. 32, 40 (1940); Bernhard v Bank of America Nat'l Trust & Savings Ass'n, 122 P.2d 892, 894 (Cal. 1942)).

74. Litchfield v. Goodnow's Adm'r, 123 U.S. 549, 551 (1887) (quoting 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 523 (Redfield rev. 12th ed. 1866)).

75. *Id.* (quoting GREENLEAF, *supra* note 74).

> proceedings[,] to which he was a party[,] is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded.[76]

Thus, "all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity."[77] To illustrate, "a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust."[78] Providing a more contemporary articulation, other courts have stated, "a non-party to an action can be bound by the determination of issues decided in that action if it 'controls or substantially participates in the control of the presentation on behalf of a party.'"[79] To a certain extent, the term privity is "largely conclusory" because it "is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other [party] within the [preclusion]."[80]

Although the collateral estoppel doctrine developed primarily in the civil litigation context, its "principles . . . apply in criminal, as well as in civil, litigation."[81] In the criminal law context, the doctrine of criminal collateral estoppel "provides that determination of a factual issue in a defendant's favor at one proceeding may estop the prosecution from disputing the fact in another proceeding against the same defendant."[82]

Criminal collateral estoppel exists in two distinct forms: (1) as a function of the Fifth Amendment double jeopardy proscription; and (2) as

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76. *Id.* (alteration in original) (emphasis omitted) (quoting GREENLEAF, *supra* note 74).

77. *Id.* (quoting GREENLEAF, *supra* note 74).

78. Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996).

79. United States v. Davis, 906 F.2d 829, 833 (2d Cir. 1990) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982)) (citing Montana v. United States, 440 U.S. 147, 154 (1979)).

80. Joel deJesus, *Interagency Privity and Claim Preclusion*, 57 U. CHI. L. REV. 195, 199 (1990) (second alteration in original) (quoting Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring)). Importantly, "each state offers its own definition of privity." Segal, *supra* note 5, at 1324.

81. United States v. Laughlin, 344 F.2d 187, 189–90 (D.C. Cir. 1965) (citing, e.g., Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916); Frank v. Mangum, 237 U.S. 309 (1915)).

82. RUSSELL L. WEAVER ET AL., CRIMINAL PROCEDURE: CASES, PROBLEMS & EXERCISES 905 (2d ed. 2004) ("[W]hen different offenses are charged and double jeopardy would normally not bar a second prosecution, collateral estoppel may, in effect, bar the second trial when a fact previously found in the defendant's favor is necessary to the second conviction."). Thus, "[a]pplication of the collateral estoppel doctrine in the criminal context actually protected the individual where double jeopardy fell short." Garrett T. Reece, *Securing One's Fourth Amendment Rights Through Issue Preclusion: Assessing Texas's Application of Collateral Estoppel to Multiple Suppression Motions Filed in Separate Courts*, 37 ST. MARY'S L.J. 241, 258 (2005) (noting that in *Oppenheimer*, 242 U.S. at 85, jeopardy had not yet attached but that collateral estoppel was applicable on due process principles).

an inevitable consequence of general due process guarantees.[83] As a function of the Fifth Amendment double jeopardy protection, collateral estoppel constitutes "a matter of constitutional fact [that a court] must decide through an examination of the entire record."[84] In this double jeopardy context, criminal collateral estoppel limits the relitigation of facts necessary to a determination of guilt or an acquittal.

Nevertheless, collateral estoppel may bar relitigation of an issue in situations where a defendant's double jeopardy rights have not yet attached.[85] To illustrate, a defendant is unable to claim double jeopardy protections "where the indictment was dismissed before the beginning of a trial."[86] Consequently, double jeopardy-based collateral estoppel is irrelevant to factual or legal issues in suppression motions—litigated before double jeopardy attaches.[87] Instead, as one scholar has suggested:

> [A]n argument that the collateral estoppel doctrine of the double jeopardy clause bars relitigation [of a suppression determination] cannot prevail if the charges were dropped in the first case, as then [sic] defendant was never placed in jeopardy. But . . . in such circumstances the defendant might prevail because of collateral estoppel protections flowing from the *due process clause*.[88]

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83. As some scholars have noted, "[t]he doctrine of collateral estoppel was historically of little significance in the criminal law, probably because of the scarcity, until about a century ago, of situations ripe for its application." Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari*: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 29 (1960) (noting the application of collateral estoppel doctrine to the criminal context).

84. Turner v. Arkansas, 407 U.S. 366, 368 (1972) (per curiam) (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)). In *Turner*, "[t]he jury was instructed that it must find [the defendant] guilty of first-degree murder if it found that he had killed the decedent . . . either with premeditation or unintentionally during the course of a robbery." The jury acquitted the defendant, finding that he was not present at the scene of the robbery and murder. *Id*. at 369. The U.S. Supreme Court held that the doctrine of collateral estoppel barred the state from trying the defendant for the robbery. *Id*.; *see also* Sealfon v. United States, 332 U.S. 575, 575–79 (1948) (holding that whether an acquittal of conspiracy to defraud the federal government precluded subsequent prosecution for a commission of a substantive offense depended upon whether a verdict in a conspiracy trial was a determination favorable to a defendant of facts essential to a conviction of a substantive offense).

85. *See, e.g.*, Willhauck v. Flanagan, 448 U.S. 1323, 1325–26 (1980) (holding that double jeopardy attaches when a trial commences, that is, when a jury is sworn or empaneled or, in a bench trial, when a judge begins to hear evidence); Note, *Due Process Roots*, *supra* note 15, at 1731 (noting that after *Oppenheimer*, "criminal collateral estoppel proved to be an important source of protections unavailable in the Double Jeopardy Clause").

86. U.S. *ex rel.* DiGiangierno v. Regan, 528 F.2d 1262, 1265 (2d Cir. 1975) (citing Illinois v. Somerville, 410 U.S. 458, 467 (1973); Green v. United States, 355 U.S. 184, 188 (1957); *Oppenheimer*, 242 U.S. at 87).

87. *See also* Reece, *supra* note 82, at 268–69 (observing that jeopardy does not attach to a suppression motion or a suppression hearing).

88. LAFAVE, *supra* note 14 (emphasis added). "Whether the collateral estoppel doctrine has

Thus, even where due process might forbid the government from relitigating an adversely determined suppression determination, the government is free to prosecute the defendant on the basis of other evidence.[89] Protecting "fundamental notions of fairness, the Due Process Clause provides a more flexible and substantial source for [collateral estoppel] rights without an explicit textual basis."[90]

E. Law-of-the-Case Doctrine

By contrast, as a general matter, "the 'law of the case' doctrine [provides] that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*."[91] Although jurisdictions vary about how strictly they apply it, the "[l]aw of the case [doctrine] belongs to the family of preclusion doctrines including[] collateral estoppel"[92] and "applies in criminal as well as civil cases."[93] As at least one court has aptly summarized:

> Some confusion regarding the contours of the law-of-the-case doctrine arises from the fact that the doctrine is applied in a variety of different circumstances. It may refer to such disparate obligations as [(1)] a trial court's duty to adhere to rulings of an appellate court made in the same case; [(2)] the deference due from one judge to rulings made in the same case by another judge of the same court or a judge of a coordinate court; or [(3)] the

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any application here remains in doubt, but if it does apply surely it is necessary that in the first case the state has had an opportunity for a full hearing on suppression and at least one appeal as of right." *Id.*

89. *Regan*, 528 F.2d at 1266 (emphasis added).

90. Note*, Due Process Roots*, *supra* note 15, at 1740.

91. United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998) (emphasis added) (quoting United States v. Monsisvais, 946 F.2d 114, 115 (10th Cir. 1991)) (internal quotation marks omitted); Copeland v. Merrill Lynch & Co., Inc., 47 F.3d 1415, 1423 (5th Cir. 1995); United States v. Wecht, 619 F. Supp. 2d 213, 222 (W.D. Pa. 2009) (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815–16 (1988)); *see also* John R. Knight, *The Law of the Case Doctrine: What Does It Really Mean?*, 43 FED. LAW. 8, 8 (Oct. 1996) ("The law of the case doctrine is not difficult to define.").

92. Scott Doney, Note, *Law of the Case in Nevada: Confusing Relatives*, 2 NEV. L.J. 675, 675 (2002) (citing Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 598 (1987); *see also* Commonwealth v. Santiago, 822 A.2d 716, 723–24 (Pa. Super. Ct. 2003) ("The law of the case doctrine 'refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phase of the matter.'" (quoting Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995))).

93. United States v. Monsisvais, 946 F.2d 114, 116 (10th Cir. 1991) (citing United States v. Nechy, 827 F.2d 1161, 1164 (7th Cir. 1987)); *see also* Commonwealth v. King, 999 A.2d 598, 600 (Pa. Super. Ct. 2010) (summarizing that the "law of the case" doctrine encompasses the rule that "judges of coordinate jurisdiction should not overrule each other's decisions" and that this rule is applicable in both civil and criminal cases (quoting Zane v. Friends Hosp., 836 A.2d 25, 29 (Pa. 2003))).

> responsibility to promote stability and efficiency by refusing to reconsider its own rulings absent a compelling reason for doing so.[94]

Consequently, the rule applies "not only to judges being asked to reconsider their own rulings but also to successor judges who are asked to reconsider the rulings of their predecessors."[95] As some scholars have summarized, "logic and the forward-looking, preclusive nature of the concept itself suggest that the law of the case doctrine must apply to each decision made by the trial court during the course of a particular case."[96] Indeed, the doctrine "applies as much to the decisions of a *coordinate court* in the same case as to a court's own decisions."[97] Thus, "upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court."[98] Moreover, when a case is appealed and remanded, the decision of the appellate court establishes the "law of the case" that both the trial court on remand and the appellate court in a subsequent appeal will follow.[99] The New Jersey Supreme Court has concisely instructed that the law-of-the-case doctrine provides that "a decision of law made in a particular case [is] to be respected by all *other lower or equal* courts during the pendency of that case."[100]

Although the law-of-the-case doctrine generally precludes reopening a decided question, departure from the doctrine is commonly appropriate "in three exceptionally narrow circumstances: (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice."[101] Where the factual and legal issues surrounding a suppression

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94. United States v. Kayser-Roth Corp., 103 F. Supp. 2d 74, 83 (D.R.I. 2000) (citing Johnson v. Burken, 930 F.2d 1202, 1207 (7th Cir. 1992)).

95. *Wecht*, 619 F. Supp. 2d at 222 (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988); TCF Film Corp. v. Gourley, 240 F.2d 711, 713 (3d Cir. 1957)).

96. Knight, *supra* note 91, at 8.

97. Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power,* 98 COLUM. L. REV. 888, 914 (1998) (emphasis added) (quoting *Christianson*, 486 U.S. at 816).

98. *King*, 999 A.2d at 600 (quoting Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995)).

99. United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998).

100. State v. Reldan, 495 A.2d 76, 85 (N.J. 1985) (emphasis added).

101. *Alvarez*, 142 F.3d at 1247 (citing United States v. Monsisvais, 946 F.2d 114, 117 (10th Cir. 1991)); *see also In re* Ford Motor Co., 591 F.3d 406, 411–12 (5th Cir. 2009) (noting that the doctrine "requires that courts not revisit the determinations of an earlier court unless" one of these three situations is present); George v. Ellis, 911 A.2d 121, 125 (Pa. Super. Ct. 2006) (noting these three exceptions).

determination are different, the law-of-the-case doctrine, like the collateral estoppel doctrine, is inapplicable.[102]

1. Policy Justifications for the Law-of-the-Case Doctrine

The law-of-the-case doctrine constitutes "a restriction self-imposed by the courts in the interests of judicial efficiency. It is a rule based on sound public policy that litigation should come to an end, and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided."[103] As some courts have summarized, the doctrine

> not only serve[s] [sic] to promote the goal of judicial economy . . . but also operate[s] (1) to protect the settled expectations of the parties; (2) to insure uniformity of decision; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end.[104]

The law-of-the-case doctrine merely expresses "common judicial 'practice,'" it does not constrict the power of courts.[105] On a fundamental level, the doctrine constitutes "a convenient means of expressing the practice that courts employ of generally refusing to reopen settled issues."[106] The doctrine recognizes "as a matter of comity, that a successor judge should not lightly overturn the decision of his predecessor in a given case."[107] As the Tenth Circuit has cogently summarized, "the [law of the case] doctrine is not an 'inexorable command,' but is to be applied with good sense."[108]

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102. *See, e.g.*, United States v. Hanhardt, 155 F. Supp. 2d 840, 855 (N.D. Ill. 2001) (holding that the "law of the case" doctrine did not apply because the legal issues differed on appeal).

103. *Alvarez*, 142 F.3d at 1247; *Monsisvais*, 946 F.2d at 116 (quoting Gage v. Gen. Motors Corp., 796 F.2d 345, 349 (10th Cir. 1986)).

104. Commonwealth v. Santiago, 822 A.2d 716, 724 (Pa. Super. Ct. 2003) (quoting Commonwealth v. Starr, 664 A.2d 1326, 1331 (1995)).

105. Castro v. United States, 540 U.S. 375, 384 (2003) (citing Messenger v. Anderson, 225 U.S. 436, 444 (1912)); *see also* Knight, *supra* note 91, at 8 (noting that the doctrine is "not a limit on a court's power to reconsider issues once decided").

106. Knight, *supra* note 91, at 8.

107. United States v. Wecht, 619 F. Supp. 2d 213, 222 (W.D. Pa. 2009) (citing Fagan v. City of Vineland, 22 F.3d 1283, 1290 (3d Cir. 1994)); *see also In re* Ford Motor Co., 591 F.3d 406, 411 (5th Cir. 2009) (noting that a judge "should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently" (quoting United States v. O'Keefe, 128 F.3d 885, 891 (1997))).

108. *Monsisvais*, 946 F.2d at 117 (alteration in original) (quoting Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)); Scheidegger, *supra* note 97, at 914.

2. How the Law-of-the-Case Doctrine Differs from Collateral Estoppel

Consequently, the doctrine is considerably "more flexible" than collateral estoppel or other preclusion doctrines.[109] As one observer has explained:

> [T]he law of the case doctrine, unlike [collateral estoppel], does allow for a quantitative measure of disagreement with the earlier opinion. The second court may conclude that the first court's decision was clearly right, clearly wrong, or in the "gray zone" where reasonable judges may differ. There are many close questions in law, "and close questions, by definition, never have clearly correct answers." In the gray zone, the doctrine of law of the case precludes redecision of the question.[110]

Thus, "the law-of-the-case doctrine is 'more in the nature of a rule of policy and convenience'" and lacks "the issue preclusion finality" of collateral estoppel.[111] In short, whereas the law-of-the-case doctrine "directs discretion," collateral estoppel "supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."[112]

Furthermore, collateral estoppel analyzes the preclusive effect of a judgment within the context of different proceedings. The law-of-the-case doctrine, by contrast, analyzes the preclusive effect of a judgment within *one proceeding*, divided into subsequent stages. Moreover, consistent with judicial and scholarly definitions of the two concepts, the law-of-the-case doctrine concerns itself primarily with determinations of the relevant law.[113] By contrast, the analytical focus of the collateral estoppel doctrine is the underlying factual issues.

3. Applying the Law-of-the-Case Doctrine in the Fourth Amendment Context

Many courts have applied the law-of-the-case doctrine in the Fourth Amendment context, following the general rule that a decision on a pretrial suppression motion constitutes the law of the case for purposes of the trial.[114] As the Connecticut Supreme Court concisely summarized:

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109. Scheidegger, *supra* note 97, at 914.

110. *Id.* at 915 (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 819 (1988)).

111. State v. Presler, 731 A.2d 699, 703 (R.I. 1999) (quoting Salvadore v. Major Elec. & Supply, Inc., 469 A.2d 353, 356 (R.I. 1983)).

112. State v. Hale, 317 A.2d 731, 733 (N.J. Super. Ct. App. Div. 1974) (quoting S. Ry. Co. v. Clift, 260 U.S. 316, 319 (1922)).

113. *See, e.g.*, Commonwealth v. King, 999 A.2d 598, 600 (Pa. Super. Ct. 2010) (noting the rule applies to a legal question).

114. United States v. Dockery, 294 A.2d 158, 163 (D.C. 1972). Although the definition of "law

> Where a matter has already been put in issue, heard[,] and ruled on pursuant to a motion to suppress, the court on the subsequent trial, although not conclusively bound by the prior ruling, may, if it is of the opinion that the issue was correctly decided, properly treat it as the law of the case, in the absence of some new or overriding circumstance.[115]

The Tenth Circuit decision in *United States v. Monsisvais* adeptly illustrates the practical effect of the law-of-the-case doctrine in the suppression context.[116] Although the *Monsisvais* defendant pled guilty in federal district court to possessing more than 100 kilograms of marijuana with the intent to distribute, he reserved his right to appeal the denial of his motion to suppress the marijuana under the Fourth Amendment.[117] The Tenth Circuit panel reversed the district court's determination that the marijuana was admissible, holding that the stop of the *Monsisvais* defendant's vehicle violated the Fourth Amendment.[118] On remand, the government successfully sought to present evidence at a supplemental hearing concerning the vehicle stop, instead of dismissing the case or proceeding to try the defendant without the benefit of the marijuana.[119] Based on this additional evidence, the district court held that the vehicle stop did not violate the Fourth Amendment and that the marijuana was admissible.[120]

In the *Monsisvais* defendant's second appeal, the Tenth Circuit held that the supplemental hearing on the suppression motion was improper because the initial Tenth Circuit decision constituted "the law of the case" and was therefore "binding on the district court on remand."[121] The Tenth Circuit crucially noted that although "[s]ome courts characterize the law of the case doctrine as applying to both findings of fact and conclusions of

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of the case" is "straightforward," the federal courts of appeals are split about whether the doctrine "applies at the trial level to anything short of a final judgment." Knight, *supra* note 91, at 8. As discussed below, however, the disagreement concerning finality is irrelevant in the context of federal suppression determinations. See *infra* Part III.A.2 for a discussion of this inapplicability.

115. State v. Hoffler, 389 A.2d 1257, 1262 (Conn. 1978) (quoting State v. Mariano, 203 A.2d 305, 309 (Conn. 1964)); *see also* Commonwealth v. Santiago, 822 A.2d 716, 723–24 (Pa. Super. Ct. 2003) (holding that pursuant to the "law of the case" doctrine, a defendant may not "relitigate the admissibility of evidence by filing a suppression motion when the same issue was raised and decided previously" (citing Commonwealth v. McEnany, 732 A.2d 1263 (Pa. Super. Ct. 1999))). *But see* State v. Whelan, 91 P.3d 1011, 1014 (Ariz. Ct. App. 2004) (declining to apply the "law of the case" doctrine to a suppression determination).

116. United States v. Monsisvais, 946 F.2d 114, 114 (10th Cir. 1991).

117. *Id.* at 115.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

law,"[122] *the* "*legality of [a] search warrant generally is [a] question of law.*"[123]

In concluding that the law-of-the-case doctrine precluded relitigation, the Tenth Circuit determined that "the different or new evidence exception" was inapplicable because "the additional evidence" that the prosecution provided at the supplemental hearing was evidence it possessed but failed to produce at the initial hearing.[124] At the first suppression hearing, the government failed to provide evidence such as the "characteristics of the area" in which the police had encountered the vehicle and details about "the border patrol agent's experience."[125]

The District of Columbia Court of Appeals decision in *Smith v. United States* is similarly instructive.[126] The *Smith* court held that where a case is dismissed following the denial of a suppression motion, "denial constitutes the law of the case, binding on the parties when the case is brought again and where no new evidence justifying a new hearing is presented."[127] Three months after the trial court denied the *Smith* defendant's suppression motion, it dismissed without prejudice the charges against him due to the failure of a government witness to appear at trial.[128] After the government filed a second information charging the defendant with the same offenses, the defendant refiled his suppression motion.[129]

The *Smith* court held that the previous suppression "ruling endures the dismissal and constitutes the law of the case" for the subsequent proceedings.[130] Reasoning that the dismissal "partakes more of the character of an interruption in the judicial process,"[131] *Smith* asserted that a "contrary holding would exalt form over substance at the expense of judicial time and talents. It would also burden the parties without further safeguarding rights on either side."[132]

F. The Nine State Appellate Courts

All state courts confronting the issue of whether a federal district court's determination that a search or seizure violated the Fourth

122. *Id.* at 115 n.2 (citing United States v. Burns, 662 F.2d 1378, 1384 (11th Cir. 1981)).
123. *Id.* (emphasis added) (citing Mesmer v. United States, 405 F.2d 316, 319 (10th Cir. 1969)).
124. *Id.* at 117 (internal quotation marks omitted).
125. *Id.* at 115 n.1 (quoting United States v. Monsisvais, 907 F.2d 987, 992 (10th Cir. 1990)).
126. Smith v. United States, 406 A.2d 1262, 1262–64 (D.C. 1979).
127. *Id*. at 1262.
128. *Id.* at 1263.
129. *Id.*
130. *Id.*
131. *Id*.
132. *Id.* at 1264.

Amendment is binding upon a state trial court in a subsequent state prosecution of the defendant have concluded that the federal suppression determination has no binding effect.

In its 2008 *Commonwealth v. Gant* decision, the Pennsylvania Superior Court held that a federal district court's order suppressing evidence seized during a vehicle stop was not binding on a state trial court in a state drug prosecution stemming from the same vehicle stop.[133] The police had stopped the defendant's vehicle because he failed to use his turn signal.[134] During the stop, the police discovered a large quantity of counterfeit $20 bills as well as illegal drugs in the vehicle.[135] As a result of the search and seizure, the *Gant* defendant was charged (1) in federal court with federal counterfeiting offenses; and (2) in state court with state drug offenses.[136]

The *Gant* defendant filed a motion to suppress the counterfeit money in federal court and a motion to suppress the drug evidence in state court.[137] Prior to the determination of the state suppression motion, the federal district court suppressed the counterfeit money because the district court discounted "the officers' testimony that they could observe the [defendant's] turn signal from their vantage point."[138] Consequently, the state trial court refused to relitigate the suppression motion, reasoning that the doctrine of collateral estoppel precluded another hearing on the suppression motion.[139]

Concluding that the trial court erred, *Gant* held that collateral estoppel did not preclude another hearing on the defendant's suppression motion.[140] *Gant* termed it a "key factor . . . that the two cases involve[d] separate jurisdictions and separate sovereign entities—the federal government and the state government. Therefore, the prosecuting parties in the two cases [were] not the same for purposes of collateral estoppel."[141] *Gant* also noted the general rule that "acquittal in the court of one 'sovereign' is not [an absolute] bar to a prosecution by another 'sovereign.'"[142] Asserting that "the parties in both proceedings have to be the same," *Gant* posited that the

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133. Commonwealth v. Gant, 945 A.2d 228, 229 (Pa. Super. Ct. 2008).

134. *Id.* at 228–29.

135. *Id.*

136. *Id.* at 229.

137. *Id.*

138. *Id.*

139. *Id.* at 228–29.

140. *Id.* The *Gant* court observed that "[t]he issue before this Court is whether the federal trial judge's finding is binding on the state trial judge, since the testimony would be the same in both cases. The trial court in this case found that collateral estoppel applied and precluded it from hearing the motion. We disagree." *Id.* at 229.

141. *Id.*

142. *Id.* (citing Commonwealth v. Taylor, 165 A.2d 390, 392 (Pa. Super. Ct. 1960)).

"different jurisdictions[] each [had] distinct sovereign authority and different interests to protect."[143]

The North Carolina Supreme Court reached a similar result in *State v. Brooks*.[144] After law enforcement searched the defendant and his vehicle, a federal grand jury indicted him with federal drug and firearms offenses.[145] Granting the *Brooks* defendant's suppression motion, the federal district court concluded that the police unlawfully arrested him and conducted the searches without probable cause.[146] Although federal prosecutors voluntarily dismissed the charges against the defendant, a state grand jury later indicted him on state charges based on evidence obtained from the same search.[147]

Claiming that collateral estoppel barred religitation of the federal suppression determination, the *Brooks* defendant unsuccessfully sought to suppress this same evidence in state court.[148] Affirming the decision of the suppression court, the North Carolina Supreme Court concluded that collateral estoppel did not apply where "separate sovereigns are involved in separate proceedings and there was no privity between the two sovereigns."[149] *Brooks* reasoned that for collateral estoppel to be applicable, either the parties must be identical "or the party against whom the defense is asserted must have been in privity with a party in the prior proceedings in order for the doctrine to apply."[150] *Brooks* elaborated that the North Carolina prosecutors were not

> involved with the federal prosecution. The State was not in a position to appeal the federal court's suppression order and could not have compelled the United States Attorney to do so. The State is not bound by a federal court ruling in a proceeding in which it had no opportunity or standing to be heard.[151]

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143. *Id.* at 231.

144. State v. Brooks, 446 S.E.2d 579, 588 (N.C. 1994).

145. *Id*. at 582.

146. *Id.* The federal district court concluded that the "'fruits' of the search, as well as any incriminating statements that the defendant had made, should be suppressed." *Id.*

147. *Id.*

148. *Id.*

149. *See id*. at 588 (concluding that collateral estoppel does not apply to criminal cases in which "separate sovereigns" are involved in separate proceedings and that no privity exists between these two sovereigns).

150. *Id.* at 589.

151. *Id.* (citing United States v. Pforzheimer, 826 F.2d 200 (2d Cir. 1987)) (noting that a state prosecution deferring to a federal prosecution does not make the state a party to a federal proceeding nor does it create privity between state and federal governments). Like the Pennsylvania and North Carolina appellate courts, the North Dakota Supreme Court in *State v. Proell* similarly focused on privity and sovereign interests. 726 N.W.2d 591, 593 (N.D. 2007). During a search of the *Proell* defendant's home, police officers recovered methamphetamine, drug paraphernalia, and weapons. *Id*. Based on the fruits of

In reaching the same conclusion concerning privity as the Pennsylvania and North Carolina courts, the Virginia Supreme Court indicated that the degree of investigative control affects the privity analysis for suppression purposes.[152] In *Londono v. Commonwealth*, the defendant was initially indicted in federal district court based on evidence obtained during a search.[153] The federal district court granted the defendant's suppression motion, concluding that the police had conducted a search with invalid consent; federal prosecutors voluntarily dismissed the prosecution.[154] Yet a Virginia court later convicted the *Londono* defendant of state drug crimes based on evidence from this same search.[155] The defendant unsuccessfully contended that collateral estoppel barred the state court from relitigating his suppression motion.[156]

Rejecting this argument, the Virginia Supreme Court applied the "*Bartkus* sham" exception and asserted that under the dual sovereignty doctrine, collateral estoppel does not apply where "different sovereigns and, thus, different parties are involved in criminal litigation."[157] Furthermore, the *Londono* court emphasized that:

> [T]he Commonwealth [did not] exercise[] any control over the federal prosecution [and was not] represented in or a party to that prosecution in any manner. Likewise, there is no evidence in the record showing that federal authorities manipulated the Commonwealth into prosecuting [the defendant] for violation of state statutes or otherwise exercised any control over the state prosecution such that the Commonwealth's prosecution was a "sham and a cover for a federal prosecution." Indeed, there is absolutely no evidence that state prosecutors were involved in the prosecution of the federal action or that federal prosecutors were involved in the prosecution of the state action. The record makes

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this search, state prosecutors charged him with drug offenses, and federal prosecutors charged him with weapons offenses. *Id*. at 592. As part of his federal prosecution, the *Proell* defendant unsuccessfully contended that the search of his home was unlawful. After the federal district court denied his suppression motion, the *Proell* defendant appealed to the U.S. Court of Appeals for the Eighth Circuit. *Id*. While his federal appeal was pending, he filed a suppression motion in state court, which was denied. *Id*. The North Dakota Supreme Court rejected the *Proell* defendant's claim that the state court should stay proceedings "pending the outcome of [the] federal appeal." *Id*. Crucially, *Proell* reasoned that "North Dakota is a sovereign, separate from the federal government. . . . As a result of our inherent sovereignty, state court proceedings are not ancillary to federal proceedings and this Court is not in privity with, or bound by, the federal court's decision . . . ." *Id*. at 593 (citing Heath v. Alabama, 474 U.S 82, 88 (1985)).

152. Londono v. Commonwealth, 579 S.E.2d 641, 654–55 (Va. Ct. App. 2003).

153. *Id.* at 647.

154. *Id.*

155. *Id.* at 648.

156. *Id.* at 654–55.

157. *Id.* at 654 (quoting United States v. Kummer, 15 F.3d 1455, 1461 (8th Cir. 1994)).

> clear that, although there were cooperative efforts between the state and federal members of the task force and between the governments' witnesses and the prosecutors, the prosecution of the federal claims was handled entirely by [federal prosecutors] and the state charges were prosecuted strictly by the [state prosecutors]. The record further shows that, following the unsuccessful federal prosecution, the Commonwealth's prosecutors undertook an independent analysis and, acting without influence of the federal prosecutors, concluded that the state interests left unvindicated by the federal proceeding were worth pursuing in state court.[158]

As a result, the Virginia Supreme Court concluded that "because the Commonwealth exercised no control over the federal prosecution, was not represented in or a party to that prosecution, and acted of its own volition as an independent sovereign," the collateral estoppel doctrine was inapplicable.[159] *Londono* thus concluded that the federal district court decision did not bind the Virginia trial court.[160]

Apart from the issue of privity, other state courts have rejected a far more fundamental justification for allowing a defendant to claim that a federal court's grant of a suppression motion bars the relitigation of the motion in state court. These courts have rejected the argument that federal constitutional law sets minimum Fourth Amendment standards that states must follow. To illustrate, the Wisconsin Supreme Court held in *State v. Mechtel* that a federal magistrate's suppression determination was not binding on a state trial court in a subsequent criminal prosecution.[161] In *Mechtel*, the "police executed the [search] warrant, seizing drugs, drug paraphernalia, and firearms from the defendant's home."[162] Facing state drug charges, "the defendant filed a [suppression] motion alleging that the police falsely represented material facts when applying for the warrant."[163] The state trial court denied the motion.

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158. *Id.* at 654–55.

159. *Id.* at 655.

160. *Id.* The Tennessee Court of Criminal Appeals has similarly emphasized that cooperation between state and federal investigations is an irrelevant factor. State v. Seay, No. M2002-02129-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 629, at *11 (Tenn. Crim. App. July 11, 2003). The *Seay* defendant claimed that the state trial court was required to grant his suppression motion because a federal district court, "under the same facts as those presented at the state evidentiary hearing, had suppressed the evidence." *Id.* at *8. The Tennessee Court of Criminal Appeals emphasized that "nothing in the record suggests, and the defendant does not argue, that the state and federal prosecutions had anything to do with each other." *Id.* at *11.

161. State v. Mechtel, 499 N.W.2d 662, 664 (Wis. 1993).

162. *Id.*

163. *Id.*

After his resulting state conviction, the *Mechtel* defendant, awaiting a federal prosecution based on the evidence found during the search, filed a suppression motion in which he claimed that the police had falsely represented material facts when applying for the warrant.[164] The federal magistrate concluded that the officers "had intentionally or recklessly made false statements when applying for a search warrant" and that the warrant application failed to establish probable cause.[165]

After the federal indictment was dismissed, the *Mechtel* defendant filed a motion in state court "for vacation of judgment of conviction, for vacation of order denying motion to suppress fruits of search . . . , for entry of an order suppressing fruits of said search, and for a new trial."[166] Importantly, the *Mechtel* defendant argued that "given the procedural posture of the case and state courts' obligation to accept federal determinations of federal law, the state court had no alternative but to act in accord with the federal determination."[167] Specifically, the *Mechtel* defendant contended that "because the federal constitutional standards as interpreted by the United States Supreme Court are the minimum standards which a state court can apply, evidence excluded in federal court cannot be used in either federal or state proceedings."[168] The trial court rejected these arguments; the defendant ultimately sought post-conviction relief from the Wisconsin Supreme Court.

First, the Wisconsin Supreme Court rejected the defendant's minimum standards claim and observed, "[c]ertainly, the United States Supreme Court's determinations on federal questions bind state courts. It is clear, however, that determinations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts."[169] The *Mechtel* decision elaborated:

> The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

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164. *Id.* at 664–65.

165. *Id.* at 664.

166. *Id.* at 665.

167. *Id.* (internal quotation marks omitted).

168. *Id.*

169. *Id.* at 666 (citing, e.g., Thompson v. Vill. of Hales Corners, 340 N.W.2d 704 (Wis. 1983); State v. Webster, 338 N.W.2d 474 (Wis. 1983); Mast v. Olsen, 278 N.W.2d 205 (Wis. 1979)).

> State courts are not bound by the decisions of the federal circuit courts of appeal or federal district courts.[170]

Additionally, *Mechtel* rejected the defendant's collateral estoppel claim because the state was "not a party to the federal proceeding."[171] *Mechtel* further reasoned that although

> [t]he state and federal prosecutors did cooperate to some degree . . . the state and federal governments are separate sovereigns[] . . . [, and] [t]he federal and state prosecutors prosecuted the defendant for different crimes. The defendant has not persuaded us that the interests of the state and federal prosecutors were so closely related that the state could be said to have had its day in federal court.[172]

The California Court of Appeals decision in *People v. Meredith* is similarly instructive in its rejection of the minimum standards argument.[173] The *Meredith* defendant was initially charged in federal district court with federal drug offenses. The federal prosecutors moved to dismiss the prosecution after the federal district court determined that the evidence against him had been obtained in violation of the Fourth Amendment.[174] Nevertheless, the *Meredith* defendant was charged with state offenses based on this same evidence. He then argued that the suppression of the evidence in federal court barred introduction of the evidence in state court.[175] The state trial court rejected this argument and denied his suppression motion.[176]

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170. *Id.* (quoting U.S. *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir. 1970)).

171. *Id. Mechtel* elaborated:

> In order for issue preclusion to apply, the party who is to be bound from relitigating an issue must have been either a party to or in privity with a party to the prior litigation. . . . The state was not a party in the federal firearms proceeding. The question is thus whether it was in privity with the federal prosecutor. We conclude it was not.

Id. at 667.

172. *Id.* (observing that other courts have concluded "that federal and state prosecutions do not involve the same parties and that, therefore, issue preclusion does not bar relitigation in state court of issues which were previously decided in federal court" (citing State v. LeCompte, 441 So. 2d 249, 260 (La. Ct. App. 1983); People v. Nezaj, 139 Misc. 2d 366 (N.Y. Sup. Ct. 1988); Stewart v. State, 652 S.W.2d 496, 502 (Tex. Ct. App. 1983))).

173. People v. Meredith, 15 Cal. Rptr. 2d 285, 292 (Cal. Ct. App. 1992).

174. *Id.* at 288. The federal district court suppressed the evidence because it found that the initial stop was unreasonable and that the search of his luggage was conducted without consent. *Id.*

175. *Id.* at 289.

176. *Id.* at 288–89. The state trial court made factual findings that the officer's initial stop was reasonable and that the defendant "consented to the search of his luggage, findings that were dramatically at variance with the [district court's] findings on the same factual issues." *Id.* at 289.

The California Court of Appeals held in *Meredith* that the state prosecutors were "not barred from relitigating in state court the legality of a search . . . unless the [state] prosecutors actively participated in the federal proceedings."[177] *Meredith* elaborated that

> [s]uch a rule is compelled by general and well established principles of collateral estoppel, which preclude application of the doctrine unless the party against whom the doctrine is asserted, or one with whom the party is in privity, had a full and fair opportunity to litigate the issue in the earlier proceeding.[178]

Holding that collateral estoppel was inapplicable, the California Court of Appeals reasoned that the U.S. Attorney was not the same party as the California prosecutors.[179]

Furthermore, *Meredith* observed that "[w]here the situation is reversed, and [federal prosecutors] seek[] to relitigate in federal court suppression issues that have been decided against [the state] in state court, the determination in the state prosecution normally does not prevent [federal prosecutors] from relitigating the suppression issues."[180] *Meredith* concluded that

> [c]ommon sense and fundamental principles of due process require that a similar rule must apply where suppression issues are first litigated . . . in federal court and the People of California . . . later seek to litigate the same issues in state court. [California is] bound by the prior determination only if state prosecutors actively participated in the prior litigation.[181]

Finally, like the *Mechtel* defendant, the *Meredith* defendant unsuccessfully "contend[ed] that because a state may not provide less protection against unreasonable searches and seizures than is provided under federal law, the state [trial] court . . . was precluded from admitting . . . evidence that had been excluded by the federal court.[182] The

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177. *Id.* at 287. The court concluded that the People of the State of California was not a party to the federal proceeding and not in privity with United States, the party against whom the federal ruling was made. *Id*.

178. *Id*.

179. *Id.*

180. *Id.* at 291.

181. *Id.* at 291–92. The court noted that, although federal government and state governments have "legitimate and parallel interests in prosecuting persons for crime . . . they are *separate sovereigns* under our federal system, and their interests are not necessarily identical." *Id.* at 292 (citing Rinaldi v. United States, 434 U.S. 22, 28 (1977)).

182. *Id.* at 292 (citing *In re* Lance W., 694 P.2d 744 (1985)).

California Court of Appeals tersely termed this argument as "clever, but specious."[183] *Meredith* reasoned that the state court

> did not apply less stringent standards of reasonableness to the police officer's conduct than were applied by the federal court. The state court merely believed [the officer's] testimony that he complied with well-recognized constitutional standards, whereas the federal court did not. This was a finding of fact, which the state court was entitled to make.[184]

Meredith added: "We have concluded that [California was] not barred from relitigating in state court the issue of the reasonableness of the challenged search. It must therefore follow that the state court was not precluded from determining the relevant issues of fact differently from the federal court . . . ."[185]

Likewise, in *State v. Chavez*, the South Dakota Supreme Court rejected a defendant's arguments that the grant of a federal suppression motion should be binding on a state court.[186] In *Chavez*, the police stopped the defendant for a traffic violation; after a police canine indicated that the defendant's vehicle contained illegal drugs, the police searched the vehicle and discovered large quantities of marijuana, methamphetamine, and cocaine.[187] The defendant was initially charged in federal district court with federal drug offenses, but the court suppressed the evidence.[188] After the federal charges were dismissed, South Dakota sought to prosecute the defendant on state drug offenses based on the same evidence. Despite the prior federal determination, the state trial court reheard arguments concerning the suppression issue. State prosecutors introduced evidence concerning the canine's conduct during the search that the federal prosecutors had failed to present at the federal suppression hearing. After the state court denied the suppression motion, the *Chavez* defendant was convicted.

The *Chavez* defendant fruitlessly argued that state charges should have been dismissed under a collateral estoppel analysis because the federal court had determined that the search violated the Fourth Amendment.[189] The South Dakota Supreme Court rejected this argument, citing the general principle that the dual sovereignty doctrine permits "successive

183. *Id.*
184. *Id.* (emphasis omitted).
185. *Id.*
186. State v. Chavez, 668 N.W.2d 89 (S.D. 2003).
187. *Id.* at 92.
188. *Id.* at 94.
189. *Id.*

prosecutions."[190] Noting the "sham" considerations similarly discussed by the Virginia, Wisconsin, and California courts, the South Dakota Supreme Court concluded that "cooperation between state and federal law enforcement officers does not, by itself, affect the identity of the prosecuting sovereign."[191] *Chavez* elaborated:

> Because double jeopardy does not bar successive prosecutions by dual sovereigns, we proceed to examine whether res judicata or collateral estoppel barred the state trial court from relitigating the suppression issues. In that regard, "it is clearly established that collateral estoppel and res judicata, although applicable to successive prosecutions for the same criminal act by the same sovereign, . . . are not applicable to successive prosecutions by different sovereigns" . . . . The rule is that as long as the initial prosecution is by a different sovereign, there is no reason "why the dual sovereignty doctrine should not leave states free to pursue prosecutions of their own criminal law unencumbered by either the 'same offense' or 'collateral estoppel' branches of federal double jeopardy jurisprudence."[192]

II. "WHY?": SUPREMACY OF FEDERAL FOURTH AMENDMENT LAW ON STATES

A federal district court's grant of a suppression motion should be binding on a state court in a subsequent prosecution because the Fourth Amendment mandates the minimum standards for all governmental searches and seizures. Some of the courts that have rejected the preclusive effect of a federal district court's grant of a defendant's suppression motion in a subsequent state prosecution have criticized this supremacy or "minimum floor" argument. To illustrate, in *State v. Mechtel*, the Wisconsin Supreme Court rejected the defendant's "minimum standards" argument and asserted, "[c]ertainly, the United States Supreme Court's determinations on federal questions bind state courts. It is clear, however,

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190. *Id.* at 99–100.

191. *Id.* at 101.

192. *Id.* at 100–01 (quoting State v. Shafranek, 576 N.W.2d 115, 117 (Iowa 1998); State v. West, 260 N.W.2d 215, 219 (S.D. 1977)) (internal quotations omitted) (citing United States v. Johnson, 169 F.3d 1092, 1096 (8th Cir. 1999); People v. Meredith, 15 Cal. Rptr. 2d 285, 292 n.7 (Cal. Ct. App. 1992)). The Tennessee Court of Criminal Appeals had concluded similarly in *State v. Seay*:

> Obviously, the doctrine of dual sovereignty mandates that even if the defendant had been tried and acquitted in federal court, he still could be tried and convicted in [state court]. Likewise, the fact that the federal court granted his motion to suppress has no effect on his prosecution in state court.

No. M2002–02129–CCA–R3–CD, 2003 Tenn. Crim. App. LEXIS 629, at *11 (Tenn. Crim. App. July 11, 2003).

that determinations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts."[193] *Mechtel* noted that "lower federal courts exercise no appellate jurisdiction over state tribunals."[194] The California Court of Appeals in *People v. Meredith* similarly decried the "minimum floor" argument, terming it "clever but specious."[195]

To a certain extent, the assertions of these courts constitute an imprecise and reductionist view of the relationship between state courts and the lower federal courts within the context of fundamental federal constitutional rights in criminal prosecutions. This reasoning is largely inimical to the fundamental premise that federal courts "define the minimum federal constitutional procedures that must surround both federal and state criminal proceedings."[196] It is certainly true that the lower federal courts—unlike the U.S. Supreme Court—lack any statutory ability or judicial authorization to review state court decisions. Yet, the writ of habeas corpus provides a potent means for lower federal courts to review state court interpretations of constitutional law in criminal prosecutions—including those implicating Fourth Amendment rights.

Furthermore, lower federal courts, like state courts, are presumed to follow the decisions of the U.S. Supreme Court when interpreting the Fourth Amendment as well as other fundamental procedural rights. The function of the lower federal courts is to articulate federal law—consistent with the jurisprudence of the U.S. Supreme Court. Consequently, when a state court fails to follow the decision of a lower federal court that has interpreted the Fourth Amendment, it is implicitly rejecting the determinations of the U.S. Supreme Court as to what constitutes a minimally acceptable floor to effectuate fundamental constitutional rights.

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193. State v. Mechtel, 499 N.W.2d 662, 666 (Wis. 1993) (citing, e.g., Thompson v. Vill. of Hales Corners, 340 N.W.2d 704 (Wis. 1983); State v. Webster, 338 N.W.2d 474 (Wis. 1983); Mast v. Olsen, 278 N.W.2d 205 (Wis. 1979)..

194. *Id.* (quoting United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1076 (7th Cir. 1970)).

195. People v. Meredith, 15 Cal. Rptr. 2d 285, 292 (Cal. Ct. App. 1992). Ironically, the reasoning in *State v. Jones* provides support for the "minimal constitutional" standards argument. 671 A.2d 586 (N.J. Super. Ct. App. Div. 1996). In *Jones*, New Jersey prosecutors sought to preclude a defendant from raising the same motion in his state court proceeding. During his earlier federal prosecution, the defendant had unsuccessfully raised a suppression motion. *Id.* at 588. The state judge "refused to apply collateral estoppel and made an independent analysis of the record before him. He was correct in doing so. *The New Jersey Supreme Court has interpreted the New Jersey Constitution to provide greater protection than the federal constitution in such circumstances.*" *Id.* at 595 (emphasis added) (citing State v. Pierce, 642 A.2d 947 (N.J. 1994); State v. Hempele, 576 A.2d 793 (N.J. 1990)).

196. Strazzella*, supra* note 39, at 13 (emphasis added); *see also infra* Part II.A (discussing "minimum floor" concept).

A. The "Minimum Floor" and Doctrine of Incorporation Refute the Reasoning of the Nine State Appellate Courts

As discussed in Part II.C, the Fourth Amendment sets the *minimum standards* for searches and seizures "conducted by agents of all American governmental entities—federal, state, and local."[197] State constitutions provide guarantees against unreasonable searches and seizures—creating an "important secondary source[]" of search and seizure law.[198] "[A]s a matter of its own [constitutional] law" a state may "impose greater restrictions on police activity than those [that the Supreme Court] holds to be necessary upon federal constitutional standards."[199] Yet, a state may not impose greater restrictions on police activity pursuant to the Fourth Amendment when the U.S. Supreme Court has specifically refrained from imposing them.[200]

Thus, state courts may interpret a state constitutional prohibition on unreasonable searches and seizures to be more restrictive on governmental conduct than the Fourth Amendment; however, state courts may not interpret the Fourth Amendment more or less restrictively than the U.S. Supreme Court has interpreted it.[201] As some scholars have summarized:

> In a federal prosecution, federal law determines whether suppression of evidence is appropriate under the Fourth Amendment regardless of whether state or federal officials seized the evidence. However, because many states' constitutions and laws offer protections greater than those under the Fourth Amendment, evidence obtained in accordance with the Fourth Amendment may still violate state law. Thus, when a federal court considers the suppression of evidence under federal law, it may allow the admission of evidence that violates a particular state's constitutional protections but does not violate the Fourth Amendment.[202]

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197. HUBBART, *supra* note 45, at 10.

198. *Id.* at 16.

199. Oregon v. Hass, 420 U.S. 714, 719 (1975) (citing Sibron v. New York, 392 U.S. 40, 60–61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967); State v. Kaluna, 520 P.2d 51, 58–59 (Haw. 1974)).

200. *Hass*, 420 U.S. at 719.

201. *Id.*; *see also* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (noting this general rule); HUBBART, *supra* note 45, at 10 (noting that "in a bow to federalism," state courts may interpret their "own constitution[s] and laws to give the individual *greater* rights than those guaranteed by the Fourth Amendment, as interpreted by the U.S. Supreme Court").

202. Bowden, *supra* note 14, at 198–99. Thus, "[e]ach of the fifty states may reject a Supreme Court ruling in favor of a preferred state constitutional doctrine, limited only by the Supremacy Clause." Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 865 (1991).

Given that state courts *are required* to apply federal constitutional standards, they "necessarily create a considerable body of 'federal law' in the process."[203] Thus, it is imperative that these "state court created" interpretations of federal constitutional law comport with actual federal constitutional standards.

As a result, when interpreting the U.S. Constitution, state courts are not "free from the final authority" of the U.S. Supreme Court.[204] Pursuant to 28 U.S.C. § 1257, the U.S. Supreme Court exercises some direct appellate review over final judgments on questions of federal law issued by the highest state courts.[205] As the U.S. Supreme Court has clarified, it will not review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the state judgment.[206] Yet, when: (1) "a state-court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law"; and (2) "the adequacy and independence of any possible state law ground is not clear from the face of the [state court] opinion," then the U.S. Supreme Court "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."[207]

Permitting states to wholly disregard a federal court's determination that a search or seizure violates the Fourth Amendment atavistically marginalizes federal Fourth Amendment rights in state prosecutions as well as the incorporation doctrine itself. Specifically, "[p]rior to the advent of

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203. J. Thomas Sullivan, Danforth*, Retroactivity, and Federalism*, 61 OKLA. L. REV. 425, 430 (2008) (quoting Michigan v. Long, 463 U.S. 1032, 1043 n.8 (1983)).

204. Arizona v. Evans, 514 U.S. 1, 8–9 (1995).

205. 28 U.S.C. § 1257 (2006); Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 741 (2010). Nevertheless, several factors, "including institutional constraints inhering in the unique nature of Supreme Court appellate review," inherently limit the frequency of this review. Strazzella, *supra* note 39, at 14. Indeed,

> [s]ection 1257 does not extend as far as the Constitution allows. The Supreme Court has authority under the Constitution to review all state court decisions in cases that fall within the subject matter headings of Article III, including decisions issued by lower state courts, decisions that have yet to reach a final judgment, and pure questions of state law. For example, Article III permits the Supreme Court to review a question of state law arising in a diversity case, even if that question is unrelated to any federal issue.

Frost & Lindquist, *supra*, at 742.

206. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

207. *Evans*, 514 U.S. at 7 (quoting *Long*, 463 U.S. at 1040–41 (1983)) (internal quotation marks omitted). Importantly, this deference to "state court decisions based on state law has become an integral part of federal jurisprudence. . . . By respecting such judgments, the High Court honors state courts as partners in the federalist system, especially when the federal constitution would lead to a different result." Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Court*s, 63 TEX. L. REV. 977, 980 (1985).

selective incorporation in the mid-twentieth century," a "sharp line divided the bundle of constitutional rights available to individuals ensnared in the state and federal criminal justice systems."[208] Prior to the incorporation of the Fourth Amendment in *Mapp v. Ohio*, federal law provided greater protections against government searches and seizures than state law did.[209] As a result, pre-*Mapp* federal law enforcement, barred from using evidence obtained in violation of the Fourth Amendment in a federal prosecution, often provided this ill-begotten evidence to state officials for use in a state prosecution.[210]

Furthermore, in *Elkins v. United States*, the U.S. Supreme Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated . . . the Fourth Amendment[,] is inadmissible . . . in a federal criminal trial."[211] As the Court has explained, admission in a state prosecution of evidence unlawfully seized serves to "encourage disobedience to the Federal Constitution."[212] Consequently, given this compelling reasoning, the admission of evidence in a state prosecution that a federal court has determined was seized in violation of the Fourth Amendment vitiates fundamental rights.

B. The Authority of Lower Federal Courts over State Courts

Contrary to the assertions of the *Mechtel* or *Meredith* courts,[213] lower federal courts exercise limited albeit powerful authority over state criminal prosecutions. This authority substantially strengthens the argument that a federal district court's determination that a search or seizure violated the Fourth Amendment should be binding in a subsequent state prosecution.

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208. Logan, *supra* note 44, at 151.

209. Adams, *supra* note 42, at 216. This "new judicial federalism" emphasizes "reliance on state constitutions for protection of rights and liberties." CAROLYN N. LONG, *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES 194 (2006).

210. Adams, *supra* note 42, at 216.

211. Elkins v. United States, 364 U.S. 206, 223 (1960). Prior to *Elkins*, illegally obtained evidence was admissible in federal courts when obtained by state law enforcement under the so-called "silver platter" doctrine. LAFAVE, *supra* note 14, § 4.6.

212. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

213. People v. Meredith, 15 Cal. Rptr. 2d 285, 292 (Cal. Ct. App. 1992); Wisconsin v. Mechtel, 499 N.W.2d 662, 665–665 (Wis. 1993).

1. Lower Federal Courts Apply U.S. Supreme Court Precedent Binding on Both Federal and State Courts

Although the U.S. Supreme Court has never explicitly addressed the question, individual justices of the Court have declared that states *are not* bound by lower federal courts' interpretations of federal law, including decisions by the federal circuit court with jurisdiction over that state.[214] Furthermore,

> [a]t least twenty-nine state courts have held that they need not follow lower federal courts' pronouncements on questions of federal law. Nonetheless, these state courts generally find federal circuit precedent on questions of federal law to be 'persuasive' authority entitled to 'great weight.' In addition, at least six other state courts have concluded that they *are* obligated to adopt circuit court precedent on questions of federal law, despite the absence of any federal law or judicial decision requiring them to do so, and thus these state courts treat federal circuit precedent as binding.[215]

Likewise, although the U.S. Constitution does not proscribe it, lower federal courts, as a general rule, may not review state court decisions.[216] Thus, lower federal courts exercise no appellate jurisdiction over state tribunals.[217]

Nevertheless, lower federal courts, like state courts, must follow the U.S. Supreme Court's interpretations of federal law. Specifically, the U.S. Supreme Court has supervisory authority over lower federal courts and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."[218] Thus, it should be presumed that lower

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214. Frost & Lindquist, *supra* note 205, at 743, 760; *see, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (explaining that an Arkansas trial court was bound by Eighth Circuit precedent); Steffel v. Thompson, 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring) ("State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties.").

215. Frost & Lindquist, *supra* note 205, at 761.

216. 28 U.S.C. § 1257 (2006) (granting Supreme Court appellate jurisdiction to reverse or modify a state court judgment); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283 (2005); *see also* United States v. Woods, 432 F.2d 1072, 1076 (7th Cir. 1970) (holding that decisions of lower federal courts are not conclusive on state courts).

217. *Woods*, 432 F.2d at 1075–76; *see also* Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

218. Dickerson v. United States, 530 U.S. 428, 437 (2000) (citing Carlisle v. United States, 517 U.S. 416, 426 (1996)) (noting that Congress may not legislatively usurp the Supreme Court's interpretation and application of the Constitution); *see also* Gallegos v. Nebraska, 342 U.S. 55, 63–64 (1951).

federal courts follow the law enunciated by the U.S. Supreme Court. As *Elkins* observed, the U.S. Supreme Court possesses "supervisory power over the administration of criminal justice in the federal courts, under which the Court has 'from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.'"[219] Likewise, some scholars have cogently elaborated that:

> The most important form of power the Court exercises over lower courts is of course the power of precedent, backed up by the distant but ever-present threat of review and reversal. Because the possibility of review is, however, extremely limited, the true force of the Court's precedent must lie in the voluntary, good faith efforts of the lower courts to follow it. And in most cases, there seems no doubt that federal judges do in fact make every effort to apply the Court's precedent, in part no doubt because that precedent is likely to comport with their own inclinations.[220]

Crucially, the fundamental responsibility of the lower federal courts, which includes the federal district courts and federal circuit courts of appeals, *is* to articulate federal law. As the U.S. Supreme Court observed in *Williams v. Taylor*,

> [w]hen federal judges exercise their federal-question jurisdiction [pursuant to Article III], it is "emphatically the province and duty" of those judges to "say what the law is." At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law.[221]

That the lower federal courts are uniquely situated to interpret federal constitutional law is profoundly evident through the potent mechanism of federal habeas corpus review.

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219. Elkins v. United States, 364 U.S. 206, 216 (1960) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)).

220. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 986 (2000) (criticizing the isolation of the Supreme Court from "inferior" federal courts that it supervises).

221. Williams v. Taylor, 529 U.S. 362, 378–79 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Within the context of civil litigation, "factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483–84 (1981) (footnote omitted) (holding that federal courts lack exclusive jurisdiction over personal injury and indemnity cases arising under a federal act).

2. Federal Habeas Review

The mechanism of federal habeas corpus review transcends the general inability of lower federal courts to directly review state court determinations. Instead, federal habeas corpus review endows the lower federal courts with the powerful ability to ensure that state criminal prosecutions, as a procedural matter, comport with minimum federal constitutional standards.[222] Lower federal courts, reviewing federal habeas corpus petitions under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, determine if the state court convictions of prisoners who are incarcerated, on probation, or on parole, violate federal law.[223]

Specifically, prisoners convicted in state court of state offenses can seek a writ of habeas corpus in federal district court that collaterally attacks the

> constitutional underpinnings of the state court's judgment. If the federal court finds a constitutional violation, it issues the writ, forcing the state to release the prisoner from custody. In effect, federal habeas corpus serves as a means of federal appeal for state prisoners, providing a vehicle for federal enforcement of state prisoners' constitutional rights.[224]

As some scholars have cogently explained, "[f]ederal habeas corpus is a collateral remedy and not a replacement for direct appeal. Federal habeas, however, has an 'undeniable appellate flavor.' Indeed, many have concluded that the two are nearly identical."[225] Likewise, some observers have persuasively posited that

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222. Strazzella, *supra* note 39, at 14; *see also* 1 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 726 (5th ed. 2003) ("Another important instrument for federal supervision of state courts is the use of *habeas corpus* review of the constitutionality for holding a person in prison and the law and procedure under which he was convicted and sentenced.").

223. 28 U.S.C. § 2254 (2006); *see also* Stone v. Powell, 428 U.S. 465, 474–75 (1976).

> The authority of federal courts to issue the writ of habeas corpus . . . was included in the first grant of federal-court jurisdiction, made by the Judiciary Act of 1789, with the limitation that the writ extend only to prisoners held in custody by the United States. . . .
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> . . . .
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> In 1867 the writ was extended to state prisoners.

Id. (citation omitted).

224. Sharad Sushil Khandelwal, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 435 (1997).

225. *Id.* at 435 n.10 (emphasis added) (citing Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 403 (1996)).

> the Supreme Court, in view of its limited docket, lacks the capacity adequately to protect constitutional rights by exercising direct review over state court judgments in criminal cases. Habeas jurisdiction, though not technically appellate review by district courts, serves as a substitute for Supreme Court review to ensure that federal constitutional claims are heard by a federal court.[226]

A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly . . . . Rather, that application must be 'objectively unreasonable.'"[227] Consequently, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and requires that federal courts afford these rulings "the benefit of the doubt."[228] Nevertheless, habeas review provides federal courts with a dynamic and effective influence on the "procedural aspects of state criminal cases. This federal judicial role in authoritatively defining federal constitutional rights that must be accorded in both state and federal prosecutions is now well known . . . ."[229]

Of course, it must be conceded that the U.S. Supreme Court held in *Stone v. Powell* that defendants afforded a "full and fair opportunity"[230] in state court to invoke the exclusionary rule may not raise their Fourth Amendment claim on federal habeas review.[231] *Stone* reasoned that any "additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs" to justify federal habeas review.[232] The Court added:

> To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be

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226. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1309 (5th ed. 2003).

227. Renico v. Lett, 130 S. Ct. 1855, 1862 (2010) (quoting Williams v. Taylor, 529 U.S. 362, 411 (2000)).

228. *Id.* at 1862 (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2002); Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997)).

229. Strazzella, *supra* note 39, at 13.

230. Circuits still disagree about what constitutes a "full and fair hearing." *See, e.g.*, Shoemaker v. Riley, 459 U.S. 948, 948–49 (1982) (White, J., dissenting from cert. denial).

231. Stone v. Powell, 428 U.S. 465, 481–82 (1976).

232. *Id.* at 489, 492–95 (weighing the "utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims").

> appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions.[233]

Yet, regardless of this general rule, lower federal courts still retain a limited, albeit effective, degree of authority over state court determinations concerning the Fourth Amendment. In *Kimmelman v. Morrison*, the U.S. Supreme Court held that the restrictions on federal habeas review of Fourth Amendment claims announced in *Stone v. Powell* did not extend to Sixth Amendment claims of ineffective assistance of counsel "where the principal allegation [and manifestation] of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment."[234]

As a preliminary matter, the *Kimmelman* Court observed the basic rule that "an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."[235] To prevail on an ineffectiveness claim, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different."[236] *Kimmelman* concluded that where a

> defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that *his Fourth Amendment claim is meritorious* and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.[237]

Kimmelman stated,

> [w]ere we to extend *Stone* and hold that criminal defendants may not raise ineffective-assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal

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233. *Id.* at 493. *But see* Steven Semeraro, *Enforcing Fourth Amendment Rights Through Federal Habeas Corpus*, 58 RUTGERS L. REV. 983, 986, 1008–14 (2006) (arguing that *Stone* should be overruled).

234. Kimmelman v. Morrison, 477 U.S. 365, 373 (1986).

235. *Id.* at 374 (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); United States v. Cronic, 466 U.S. 648, 655–57 (1984)).

236. *Strickland*, 466 U.S. at 688, 694.

237. *Kimmelman*, 477 U.S. at 375 (emphasis added); *see also id.* (noting that although defendant's "defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values").

> habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel.[238]

The government in *Kimmelman* unsuccessfully asserted that *Stone*'s restriction on federal habeas review would be "stripped of all practical effect" unless it extended to Sixth Amendment claims "based principally on defense counsel's incompetent handling of Fourth Amendment issues."[239] In rejecting this argument, the *Kimmelman* Court ensured that lower federal courts possess an undeniably indirect yet profoundly potent mechanism to ensure the effectuation of Fourth Amendment protections in state court.

Some scholars have summarized that the habeas power of the lower federal courts fulfills "'a quasi-appellate review function, forcing trial and appellate courts . . . to toe the constitutional mark' . . . . [F]ederal collateral review of state convictions is required in order to preserve national uniformity."[240] These persuasive justifications not only contradict the reasoning of the *Meredith* and *Mechtel* courts, but they also underscore the general soundness of allowing a federal district court's determination that a governmental act violated the Fourth Amendment to be binding in a subsequent state prosecution.

C. The Minimum Floor, Supremacy, and the Reverse Scenario

The "tit-for-tat" reasoning of the courts that have rejected the preclusive effect of the grant of a federal suppression determination on a subsequent state prosecution appears antithetical not only to the minimum floor structure of the American federal system, but also to the fundamental relationship between the state judiciary and the lower federal judiciary. Specifically, some courts, such as the California Court of Appeals in

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238. *Id.* at 378.

239. *Id.* at 380. *Kimmelman* stated that:

> Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove . . . that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.

Id. at 382.

240. Anne M. Voights, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1107 (1999) (quoting Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring and dissenting)).

Meredith, have asserted that because the grant of a state suppression motion in state court is not binding on a federal court, a state court should be able to ignore the grant of a federal suppression motion in federal court.[241] *Meredith* observed that where federal prosecutors seek to relitigate suppression issues in federal court that "have been decided against [the state] in state court, the determination in the state prosecution normally does not prevent [federal prosecutors] from relitigating the suppression issues."[242]

As one observer has noted, "[f]ederal courts applying Fourth Amendment protections in federal proceedings are relatively insulated from state courts."[243] In *United States v. Safari*, for example, the Fourth Circuit held that a prior state court grant of a suppression motion did not collaterally estop a federal prosecution arising from the identical set of facts.[244] *Safari* reasoned that the federal government was not a party to the state court action.[245] Likewise, the Eleventh Circuit held in *United States v. Perchitti* that collateral estoppel did not bar the federal government from litigating a suppression issue in a federal proceeding where a state court had previously suppressed this same evidence in an earlier state prosecution.[246] *Perchitti* reasoned that collateral estoppel was inapplicable because no privity existed between Florida and the United States.[247]

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241. People v. Meredith, 15 Cal. Rptr.2d 285, 291 (Cal. Ct. App. 1992).

242. *Id.*

243. Adams, *supra* note 42, at 210. As some have observed:

> Consider a federal prosecution that occurs after a state prosecution. The federal prosecution concerns the very same defendant, conduct, and evidence as did the state prosecution. In the state prosecution, the state court suppressed evidence on federal constitutional grounds; subsequently, a jury acquitted the defendant. In the federal prosecution, the federal court refuses to give collateral estoppel effect to the previous state court suppression ruling. In fact, the federal court does not even consider why the state court suppressed the evidence on federal constitutional grounds; instead, it treats the state court's suppression ruling as if it were a nullity.

Bowden, *supra* note 14, at 186.

244. United States v. Safari, 849 F.2d 891, 893 (4th Cir. 1988).

245. *Id.*; *see, e.g.*, United States v. Wilson, 413 F.3d 382, 390 (3d Cir. 2005) (holding that neither double jeopardy nor collateral estoppel barred the federal government from relitigating issues relating to a search of defendant's car that had been previously litigated in a defendant's favor through a state-court prosecution arising out of the same facts); United States v. Charles, 213 F.3d 10, 21 (1st Cir. 2000) (holding a determination in a "state prosecution will collaterally estop the federal government only if federal authorities substantially controlled the state action or were virtually represented by the state court prosecutor"); United States v. Mejias, 552 F.2d 435 (2d Cir. 1977) (holding that a prior state court grant of a motion to suppress did not foreclose a federal prosecution arising from an identical set of facts); United States v. Panebianco, 543 F.2d 447, 456 (2d Cir. 1976) (holding that "collateral estoppel never bars" the federal government from using evidence previously suppressed in a state proceeding in which the federal government was not a party).

246. United States v. Perchetti, 955 F.2d 674, 676 (11th Cir. 1992).

247. *Id.*

Whether federal courts must give deference to the suppression determinations made in a preceding state prosecution is an issue best reserved for another discussion.[248] Nevertheless, the minimum floor structure, the supremacy of U.S. Supreme Court jurisprudence, the incorporation doctrine, and the limited albeit significant authority lower federal courts possess over state courts through habeas review collectively militate against the soundness of the *Meredith* "tit-for-tat" reasoning.

III. THE COLLATERAL ESTOPPEL ANALYSIS IS FLAWED

All of the state courts that have considered the issue have declined to hold that a federal district court's determination that a search or seizure violates the Fourth Amendment bars relitigation of this same issue in state court. These courts have asserted that the federal and state governments are not the same party and are not in privity with each other. Yet, in actuality, the collateral estoppel doctrine with its attendant privity or party requirement constitutes a less than compelling justification for the inapplicability of issue preclusion in this context. Furthermore, because of the inherent nature of law enforcement conduct, the "sham" exception that some of the nine state appellate courts have applied as part of their collateral estoppel analysis is utterly unavailing in the suppression context. Finally, the use of collateral estoppel in the suppression context has led some of these courts to incorrectly conflate the distinct concepts of double jeopardy-based collateral estoppel and due process-based collateral estoppel.

By contrast, the law-of-the-case doctrine[249] provides a more precise and helpful rationale for the preclusive power of a federal court's prior determination that a search or seizure violated the Fourth Amendment than does the related collateral estoppel doctrine. Pursuant to the law-of-the-case doctrine, courts should view the state suppression determination as a subsequent stage of the initial suppression litigation in federal court. Notably, none of the nine state appellate courts have considered the applicability of the law-of-the-case doctrine.

A. Preliminary Considerations

A determination by a federal district court that a search or seizure violated the Fourth Amendment possesses the characteristics necessary for

248. *See* Bowden, *supra* note 14, at 186–87, for a discussion of scholarship confronting this "reverse" situation.

249. *See supra* Part II.F for an overview of the "law of the case" doctrine.

the applicability of issue preclusion in a later prosecution under either the collateral estoppel or the law-of-the-case doctrines.

1. "Identical Issue" Requirement

First, a federal district court determination that a search or seizure was unlawful under the Fourth Amendment satisfies the "identical issue" requirement for both collateral estoppel and law-of-the-case purposes in a subsequent state proceeding.[250] State courts making suppression determinations confront two distinct issues: (1) whether the Fourth Amendment permits the search or seizure; and (2) whether state constitutional law permits the search or seizure. Where a federal district court determines that a search or seizure violated the Fourth Amendment, this particular determination should be binding on the parties in a state prosecution.

2. "Finality" Requirement

As a further preliminary matter, suppression determinations by federal district courts satisfy the collateral estoppel and law-of-the-case requirements of "finality." Instructively, some courts, concluding that a suppression determination is final for issue preclusion purposes, have noted that a final judgment includes any "prior adjudication of an issue in another action between the parties that is determined to be sufficiently firm to be accorded conclusive effect."[251] Factors supporting a "conclusion that a decision is final" for the purposes of issue preclusion include "that the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal."[252] Ultimate facts are "those which the law makes the occasion for imposing its sanctions."[253]

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250. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (noting the "identical issue" requirement for collateral estoppel); United States v. Hanhardt, 155 F. Supp. 2d 840, 855 (N.D. Ill. 2001) (noting the "identical issue" requirement for the "law of the case" doctrine).

251. U.S. *ex rel.* DiGiangierno v. Regan, 528 F.2d 1262, 1265 (2d Cir. 1975); *see also* Diane Vaksdal Smith, *Finality of Judgment: Issue Preclusion, Claim Preclusion, and Law of the Case*, 35 COLO. LAW. 43, 44 (2006) ("[F]inality of judgment, for purposes of issue preclusion, means that the judgment resolving the issue must be sufficiently firm in the sense that it was not tentative, the parties had an opportunity to be heard, and there was an opportunity for review." (quoting Rantz v. Kaufman, 109 P.3d 132, 141 (Colo. 2005) (internal quotation marks omitted)).

252. *Regan*, 528 F.2d at 1265 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 41 (Tentative Draft No. 1, 1973)).

253. Laughlin v. United States, 344 F.2d 187, 191 (D.C. Cir. 1965) (citing Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944)).

Notably, federal prosecutors may appeal to a circuit court of appeals

> a decision or order of a district court suppressing or excluding evidence . . . in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.[254]

The law-of-the-case doctrine, unlike collateral estoppel, does not require an inexorable adherence to the notion of finality. Instead,

> [t]he decision regarding whether or not to revisit a previously decided issue also is affected by the stage of the case at which the request is made and the extent to which the opposing party may be prejudiced. For example, ordinarily, reluctance to re-examine rulings is less at the pre-trial stage when the interest in finality is less compelling and the opposing party has ample opportunity to deal with the change than it is after the entry of a judgment upon which the parties may have relied when it may be too late for them to adjust.[255]

Nevertheless, many courts have concluded that suppression determinations are sufficiently "final" for law-of-the-case doctrine purposes.[256]

B. The Tenuousness of the "Lack of Privity" Justification

State courts that have rejected the ability of a defendant to claim issue preclusion based on a federal court's earlier grant of a suppression motion have invariably done so because (1) the United States and the given state are not the same parties; and (2) no privity exists between the United States and the given state. Privity is, of course, a necessary element for the application of the collateral estoppel doctrine. Yet, the law-of-the-case doctrine does not require privity.

To illustrate, the North Carolina Supreme Court asserted in *Brooks* that the defendant's collateral estoppel argument lacked merit because the

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254. 18 U.S.C. § 3731 (2006).

255. United States v. Kayser-Roth Corp., 103 F. Supp. 2d 74, 83 (D.R.I. 2000).

256. *See, e.g.*, Smith v. United States, 406 A.2d 1262, 1263 (D.C. 1979) (considering a suppression determination sufficiently final for "law of the case" purposes). Some disagreement exists among federal appellate courts about whether the doctrine "applies at the trial level to anything short of a final judgment." Knight, *supra* note 91, at 8. Yet, this dispute is of little significance in the context of a federal district court's determination that a search or seizure violated the Fourth Amendment because such a determination is considered "final."

doctrine "does not apply where, as here, separate sovereigns are involved in separate proceedings and there was no privity between the two sovereigns in the first proceeding."[257] *Brooks* reasoned that for the collateral estoppel doctrine to apply, either the parties must be identical "or the party against whom the defense is asserted must have been in privity with a party in the prior proceedings in order for the doctrine to apply."[258]

First, privity is a concept that is, as a historical matter, part of the civil litigation context—and is thus largely incongruous to discussions of fundamental constitutional rights or criminal prosecutions.[259] In the 1887 *Litchfield v. Goodnow* decision, the U.S. Supreme Court defined privity as the "mutual or successive relationship to the same rights of *property*."[260] Unsurprisingly, a perusal of nineteenth century U.S. Supreme Court jurisprudence discussing privity illustrates that the Court exclusively applied the doctrine to only tort, property, or contract-related issues.[261]

The nine state appellate courts that have stringently applied "this civil litigation" standard of privity fail to recognize that civil and criminal litigation implicate profoundly distinct values. The U.S. Supreme Court in *Ashe* admonished that

> the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. . . . The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."[262]

Ashe reasoned, "[a]ny test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings."[263] Although *Ashe* made this admonition in the context of double jeopardy-based collateral estoppel relevant to issues of guilt or

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257. State v. Brooks, 446 S.E.2d 579, 588 (N.C. 1994) (concluding that collateral estoppel does not apply to criminal cases in which "separate sovereigns" are involved in separate proceedings and no privity exists between the two sovereigns).

258. *Id.* at 589; *see also* Londono v. Virginia, 579 S.E.2d 641, 647 (Va. Ct. App. 2003) (concluding that collateral estoppel was inapplicable where two separate sovereigns initiated prosecution).

259. *See generally* Vernon V. Palmer, *The History of Privity: The Formative Period (1500–1680)*, 33 AM. J. LEGAL HIST. 3 (1989) (discussing the origins of privity).

260. Litchfield v. Goodnow, 123 U.S. 549, 551 (1887) (emphasis added).

261. *See, e.g.*, Green v. Watkins, 20 U.S. 27, 30 (1822) (noting that a tenant may disprove constructive seisin by showing that the state had previously granted the same land to other persons with whom the tenant claims no privity).

262. Ashe v. Swenson, 397 U.S. 436, 444 (1970) (quoting Sealfon v. United States, 332 U.S. 575, 579 (1948)).

263. *Id.*

acquittal, it is nevertheless applicable to the issue of privity with suppression determinations.

Notably, in *Allen v. McCurry*,[264] Justice Blackmun, joined by Justices Brennan and Marshall, authored a cogent dissent observing:

> A state criminal defendant cannot be held to have chosen "voluntarily" to litigate his Fourth Amendment claim in the state court. The risk of conviction puts pressure upon him to raise all possible defenses. He also faces uncertainty about the wisdom of forgoing litigation on *any* issue, for there is the possibility that he will be held to have waived his right to appeal on that issue. . . . To hold that a criminal defendant who raises a Fourth Amendment claim at his criminal trial "freely and without reservation submits his federal claims for decision by the state courts," is to deny reality. The criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed.[265]

Thus, unlike civil litigants, criminal defendants neither choose to litigate suppression claims nor decide the forum—federal or state court—in which to litigate these claims.

Importantly, the

> weight of the harassment factor is considerably increased in [criminal prosecutions]. Initially one recognizes the increased disparity in the resources of the parties; the government has available relatively large amounts of funds and legal manpower to utilize in successive actions. Further, a new action is a more serious matter for the defendant than in the civil context . . . .[266]

A defendant may place a "legitimate reliance . . . on a prior adjudication, whether or not it was correctly decided."[267] As evidenced by *Chavez*, the

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264. In *Allen v. McCurry*, a defendant, facing state criminal charges, had sought to suppress evidence that the police had seized in his house. After the state trial court denied the motion, he was convicted of the state charges. 449 U.S. 90, 91 (1980). Seeking federal court redress for the alleged constitutional violation pursuant to 42 U.S.C. § 1983, the defendant sued the police officers who had executed the search. The U.S. Supreme Court held that collateral estoppel barred relitigation of the state suppression determination. *Id.* at 91, 94, 99.

265. *Id.* at 115–16 (Blackmun, J., dissenting) (quoting England v. La. Bd. Med. Exam'rs., 375 U.S. 411, 419 (1964)).

266. Mayers & Yarborough, *supra* note 83, at 32.

267. U.S. *ex rel.* DiGiangierno v. Regan, 528 F.2d 1262, 1269 (2d Cir. 1975). The Second Circuit held in *Regan* that due process mandates the application of the doctrine of collateral estoppel in a state criminal prosecution to evidence previously suppressed in another state prosecution. *Id.* Yet, the considerations that the Second Circuit considered are still relevant to determining whether the grant of a federal suppression motion should preclude relitigation of the underlying determinations in state court.

relitigation of a suppression issue may create "the waste of effort by all concerned—defendant, prosecution, witnesses, judge, and jury—involved in . . . a matter once determined."[268]

Furthermore, the insistence that a privity relationship exists between the federal and state governments perpetuates a less than satisfactory legal fiction that tenuously "anthropomorphizes" governmental entities. A legal fiction has been defined as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[269] Courts sometimes create legal fictions based on a "misunderstanding or misreading of empirical reality" or as a recognition of the "general imperviousness" of the law to "social science and change."[270] Judicially created legal fictions often are "devices, conscious or not, for concealing the fact that the judges are making normative choices in fashioning legal rules."[271]

By insisting on the privity requirement courts have questionably bestowed a quality of "personhood" to the federal and state governments.[272] On a basic level, the *Gant, Mechtel,* or *Meredith* decisions constitute generalized affirmations of "states' rights" or "federalist" principles. As some scholars have observed, throughout this Nation's history, "state courts, legislatures, and government officials have balked at enforcing federal law and asserted the power of state nullification."[273] Here, the decisions of these nine state appellate courts indicate—at least implicitly—a distrust towards federal governance. Yet, this distrust is asserted under the unwieldy and formalistic guise of a strict adherence to the collateral estoppel doctrine and the "legal fiction" that no privity exists between the state and federal governments.[274]

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268. *Id.*

269. Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 875 (1986) (quoting LON. L. FULLER, LEGAL FICTIONS 9 (1967)). Other scholars have asserted that courts rely upon legal fictions when "(1) the court offers an ostensibly factual supposition as a ground for creating a legal rule or modifying, or refusing to modify, an existing legal rule; and (2) the factual supposition is descriptively inaccurate." Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1441 (2007).

270. Smith, *supra* note 269, at 1439.

271. *Id.*; *see also id.* at 1495 (discussing the normative choices made by judges).

272. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction,* 114 HARV. L. REV. 1745, 1751–52, 1754 (2001) (discussing the legal fiction of treating abstract entities as "persons" in the context of corporate jurisprudence).

273. O'BRIEN, *supra* note 222, at 725.

274. *See, e.g.*, Daan Braveman, *Enforcement of Federal Rights Against States;* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611, 655 (2000) (criticizing the shift in the "federalism pendulum" in the direction of "states' rights"). Likewise, scholar Wayne A. Logan observed that "contingent constitutionalism highlights the perils of unadulterated majoritarianism: federal constitutional rights are permitted to turn solely on the variable political preferences of state and local governments." Logan, *supra* note 44, at 166.

C. The Inadequacy of the "Sham" Exception in the Suppression Context

In analyzing whether collateral estoppel bars the relitigation of a federal suppression grant in a subsequent state prosecution, courts have applied the same analysis used to determine whether collateral estoppel applies for double jeopardy purposes—the "*Bartkus* sham" test.[275] Specifically, some courts have speculated that privity may potentially exist between separate sovereign entities where sufficient "investigative control" exists.[276] To illustrate, in *Londono v. Commonwealth*, the Virginia Supreme Court analyzed the "cooperative efforts between the state and federal members of the task force and between the governments' witnesses and the prosecutors."[277]

This proposed exception is wholly inadequate for resolving whether a federal district court's conclusion that a search or seizure violated the Fourth Amendment should be binding on a state court in a subsequent prosecution. The contemporary deterrent focus of the exclusionary rule and increasing cooperation between federal and state law enforcement and prosecutors eviscerate any effectiveness from this so-called "exception"—in the suppression context.

The U.S. Supreme Court has repeatedly affirmed that the true purpose of the exclusionary rule is to deter unlawful police conduct.[278] Where the exclusionary sanction fails to produce "appreciable deterrence, then, clearly its use . . . is unwarranted."[279] If the exclusionary rule is to possess "any

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275. *See supra* note 7 and accompanying text for a summary of the "*Bartkus* sham" exception.

276. *See, e.g.*, Wisconsin v. Mechtel, 499 N.W.2d 662, 666 (Wis. 1993) (noting that although state and federal prosecutors cooperated "to some degree," they constitute "separate sovereigns"); State v. Seay, No. M2002–02129–CCA–R3–CD, 2003 Tenn. Crim. App. LEXIS 629, at *11 (Tenn. Crim. App. July 11, 2003) (emphasizing that "state and federal prosecutions" did not have "anything to do with each other"). Likewise, the Second Circuit remarked that, "it must be shown that federal prosecutors actively aided the state prosecutors during the local suppression hearing. Only then can it be said that their interests in enforcing federal law were sufficiently represented." United States v. Davis, 906 F.2d 829, 835 (2d Cir. 1990).

277. Londono v. Virginia, 579 S.E.2d 641, 654–55 (Va. Ct. App. 2003).

278. *See, e.g.*, United States v. Leon, 468 U.S. 897, 916 (1984) (providing a good-faith exception for unlawful police conduct); Herring v. United States, 129 S. Ct. 695, 699 (2009) (asserting that application of the exclusionary rule necessitates considering "actions of all the police officers involved"); Stone v. Powell, 428 U.S. 465, 486 (1976) (stating that the "primary justification" for the exclusionary rule is the deterrence of police conduct that violates Fourth Amendment rights).

279. United States v. Janis, 428 U.S. 433, 454 (1976).

> [T]he Court justifies the use of the exclusionary rule by focusing entirely on the concept of deterrence . . . . [I]f the exclusion of evidence in a particular case would not deter future police misconduct, or would only minimally deter it, then the costs of exclusion are deemed too great, and the exclusionary rule will be disregarded.

Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 460 (2010).

deterrent effect, . . . it must alter the behavior of individual law enforcement officers or the policies of their departments."[280] Specifically, "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve."[281]

The federal decision to exclude evidence has little deterrent effect on law enforcement conduct if state courts are permitted to, in essence, nullify the determination of the federal court. The sham or privity inquiry inaptly focuses on sovereignty to the exclusion of other consequential values implicated in suppression determinations.

Given the increasing cooperation between federal and state law enforcement in recent years, genuine application of the sham exception would mandate privity in a considerable number of Fourth Amendment circumstances. State and federal officials often cooperate on a single investigation in order to create separate prosecutions;[282] unsurprisingly, the "significance of the nexus between federal and state criminal prosecutions is growing."[283] The "post-September 11th environment has provided an opportunity for dramatic increases in cooperation between prosecutors and law enforcement at different levels of government."[284] The investigative resources of federal law enforcement and state and local agencies "are often pooled in a common effort to investigate and solve the cases."[285]

Furthermore, recent criminal statutes, "such as those targeting organized crime and complex fraud schemes," have encouraged federal prosecutors and law enforcement to work closely with their state counterparts.[286] Task forces comprised of federal law enforcement and state and local officers often cooperatively "locate fugitives and . . . address serious threats like terrorism and street violence."[287] Because the sham exception within the context of suppression determinations ignores the reality of inter-sovereign law enforcement cooperation, it constitutes an untenable legal fiction.

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280. *Leon*, 468 U.S. at 918.

281. Hudson v. Michigan, 547 U.S. 586, 593 (2006) (quoting United States v. Ceccolini, 435 U.S. 268, 279 (1978)).

282. Note, *Due Process Roots*, *supra* note 15, at 1743; *see also* Sandra Guerra, *The Myth of Dual Sovereignty: Multi-Jurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1180–92 (1995) (discussing the use of federal resources to conduct domestic policing operations).

283. Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 240 (2005).

284. *Id.* at 241.

285. *Frequently Asked Questions*, FBI, http://www.fbi.gov/aboutus/faqs/faqsone.htm (last visited Dec. 1, 2011).

286. Miller & Eisenstein, *supra* note 283, at 242.

287. FBI, *supra* note 285.

D. Suppression Determinations Inherently Differ from "Guilt or Innocence" Issues That Implicate the Double Jeopardy-Based Criminal Collateral Estoppel Doctrine

Crucially, courts declining to recognize the preclusive effect of a federal suppression determination have reasoned that the dual sovereignty doctrine permits "successive prosecutions."[288] Thus, not only have courts analogized the binding effect of a federal suppression determination to the binding effect of facts determined in a federal prosecution pursuant to the sham exception, but courts have declined to recognize issue preclusion for the former because, under well-established law, no issue preclusion exists for the latter.

This reasoning overlooks the crucial minimum floor[289] structure of criminal procedural rights mandated by the U.S. Constitution. In contrast to "a more restrained view of the limits that should be placed on *conduct* that can be made criminal, the federal courts' role in monitoring federal constitutional *procedural* rights in state cases has been much more expansive."[290] State courts, prosecutors, and law enforcement are not bound by the decision of the federal government to criminalize or not to criminalize an action. Likewise, state courts, prosecutors, and law enforcement are not bound by how the federal government has defined a crime. Although the federal judiciary "defines constitutionally protected conduct, . . . on the whole, the federal courts have expressed caution about *placing constitutional limits on what conduct the states can criminalize*."[291]

As a practical consideration, collateral estoppel in the double jeopardy context is difficult, if not impossible, to apply because the elements of federal offenses and state offenses are inherently different. Consequently, it is analytically incongruous to cite the absence of collateral estoppel for substantive offenses in the inter-sovereign context as evidence that no issue preclusion exists for procedural rights in criminal trials.

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288. State v. Chavez, 668 N.W.2d 89, 100 (S.D. 2003); Commonwealth v. Gant, 945 A.2d 228, 231 (Pa. Super. Ct. 2008); *see also* State v. Seay, No. M2002-02129-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 629, at *11 (Tenn. Crim. App. July 11, 2003) (similarly using the dual sovereignty doctrine to avoid application of issue preclusion in the context of a federal district court grant of a suppression motion based on a Fourth Amendment violation).

289. *See infra* Part IV.A for a discussion of the minimum floor structure.

290. Strazzella, *supra* note 39, at 13–14 (emphasis added). Specifically, the U.S. Supreme Court has "unequivocally affirmed the traditional role of state legislatures in defining criminal offenses and recognizing affirmative defenses upon which the defendant may properly be assigned the burden of proof." Sullivan, *supra* note 208, at 430. By contrast, the incorporation of constitutional criminal procedural protections in state proceedings evinces the crucial "interplay between federal constitutional values and state authority in the criminal process." *Id.*

291. Strazzella, *supra* note 39, at 13 (emphasis added).

IV. "HOW?": THE LAW-OF-THE-CASE DOCTRINE PROVIDES THE APPROPRIATE DOCTRINAL MECHANISM TO ENABLE A DEFENDANT TO CLAIM THE PRECLUSIVE EFFECT OF A FEDERAL SUPPRESSION GRANT IN A SUBSEQUENT STATE PROSECUTION

Were the nine state courts to consider the issue through the analytical framework of the law-of-the-case doctrine, they would avoid many of the attendant difficulties of an overly formalistic application of the collateral estoppel doctrine. Considerably "more flexible" than collateral estoppel,[292] the law-of-the-case doctrine "provides that once a court of competent jurisdiction decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages of the same case."[293] There are three general exceptions to the law-of-the-case doctrine: (1) when the evidence in a subsequent proceeding is substantially different; (2) when controlling authority has subsequently made a contrary decision to the law applicable to such issues; or (3) when the decision was clearly erroneous and would create "manifest injustice."[294]

The law-of-the-case doctrine provides a more helpful analytical framework that avoids the formalism and rigidity of collateral estoppel. Specifically, it eschews (1) the unnecessary and cumbersome "privity issue"; (2) the superficiality of the sham exception; and (3) the incorrect conflation of double jeopardy-based and due process-based collateral estoppel. Instead, the law-of-the-case doctrine properly recognizes that a federal district court grant of a defendant's suppression motion fundamentally constitutes an assertion of Fourth Amendment law.

The issue of whether a federal district court's determination that a search or seizure violated the Fourth Amendment should be binding in a subsequent state prosecution creates several crucial—and seemingly irreconcilable—conflicts. The law-of-the-case doctrine adeptly addresses several of these conflicts. First, the law-of-the-case doctrine provides an analytical framework that effectively balances the otherwise antithetical values of federal judicial power and state autonomy. Second, unlike the collateral estoppel doctrine, the law-of-the-case doctrine accommodates the compelling governmental interest in successful prosecutions while protecting individuals from unlawful governmental intrusions.

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292. Scheidegger, *supra* note 97, at 914.

293. Knight, *supra* note 91, at 8 (quoting Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1423 (5th Cir. 1995)) (internal quotation marks omitted); *see supra* Part II.D for a discussion of the "law of the case" doctrine.

294. *See, e.g.*, United States v. Hanhardt, 155 F. Supp. 2d 840, 855 (N.D. Ill. 2001).

A. Unlike Collateral Estoppel, the Analytical Focus of the Law-of-the-Case Doctrine Is Appropriately the Legal Determination

The law-of-the-case doctrine focuses on the *legal* aspect of a federal district court's determination that a search or seizure violated the Fourth Amendment. Crucially, it is this inherently legal aspect that supports the binding effect of the federal determination on a subsequent state prosecution. Specifically, when a federal district court determines that a search or seizure violated the Fourth Amendment, it is determining, as a matter of law, that a certain action violated a person's federal constitutional rights. Through its determination that a search or seizure violated the Fourth Amendment, the federal district court articulates the minimum floor for the protection of federal constitutional rights—that the state courts *may not* disregard.

Thus, a defendant should be able to claim that the grant of his federal suppression motion precludes relitigation in a state court of (1) the legal determination that a search or seizure violated the Fourth Amendment and (2) the *factual* determinations "essential" to that determination.[295] In determining the legality of a search, the factual and legal determinations are often inextricably linked.[296] To illustrate, courts routinely examine the existence of probable cause as a matter of law based on a "totality of the circumstances" analysis of the relevant facts.[297] In short, the determination by a federal district court that a search or seizure violates the Fourth Amendment should become the "law of the case."[298] As the Tenth Circuit aptly observed, although some courts have applied the law-of-the-case doctrine to factual findings as well as legal conclusions, the legality of a search is fundamentally a "question of law."[299] Furthermore, the law-of-the-case doctrine "does not apply to dicta, but only to points actually presented and necessary to a determination of the case."[300]

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295. *See, e.g.*, Bobby v. Bies, 129 S. Ct. 2145, 2152 (2009) (stating that collateral estoppel proscribes "successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980))).

296. United States v. Carlisle, 614 F.3d 750 (7th Cir. 2010); United States v. Ruckes, 586 F.3d 713 (9th Cir. 2009); United States v. Delfin-Colina, 464 F.3d 392, 396 (3d Cir. 2006).

297. *See, e.g.*, Delfin-Colina, 464 F.3d at 397 (stating that a court reviewing a probable cause determination must "weigh 'the totality of the circumstances—the whole picture.'" (quoting United States v. Sokolow, 490 U.S. 1, 8 (1989))).

298. Christianson v. Colt. Indus. Operating Corp., 486 U.S. 800, 815–16 (1988); United States v. Wecht, 619 F. Supp. 2d 213, 222 (W.D. Pa. 2009).

299. United States v. Monsisvais, 946 F.2d 114, 115 n.2 (10th Cir. 1991) (citing Mesmer v. United States, 405 F.2d 316, 319 (10th Cir. 1969)).

300. State v. Lombardo, 328 S.E.2d 780, 782 (N.C. Ct. App. 1985) (citing Hayes v. Wilmington, 91 S.E.2d 673, 682 (N.C. 1956)).

As a result, in the opening hypothetical, Rob should be able to claim issue preclusion concerning the federal district court's legal conclusion that the search or seizure violated the Fourth Amendment. However, Rob should not be able to claim issue preclusion of those factual issues that were unnecessary to that determination. To illustrate, the federal district court's factual finding that the police were mistaken when they claimed that Rob did not use his turn signal should be binding on a state court *only if* this underlying factual determination was necessary to the district court's conclusion that the search violated the Fourth Amendment. Likewise, the district court's finding as to the credibility of the police officers who purportedly smelled burnt marijuana should be binding only if this factual conclusion was necessary to the district court's ultimate conclusion as to the legality of the search and seizure.

In *People v. Meredith*, the California Court of Appeals, in declining to apply the collateral estoppel doctrine, remarked that the state trial court

> did not apply less stringent standards of reasonableness to the police officer's conduct than were applied by the federal court. The state court merely *believed* [the officer's] testimony that he complied with well-recognized constitutional standards, whereas the federal court did not. This was a *finding of fact*, which the state court was entitled to make.[301]

Thus, the *Meredith* court unwisely overlooked the often inextricable nature of the factual and legal determinations underlying Fourth Amendment claims. Instead, the *Meredith* court should have analyzed whether the credibility determination was essential to the conclusion that the police violated the defendant's Fourth Amendment rights.

Consequently, application of the law-of-the-case doctrine will have the collateral benefit of encouraging federal district courts to give precise explanations for their Fourth Amendment determinations. A federal court must provide the factual and legal justifications for its ultimate assertion of Fourth Amendment law with precision and thoroughness in order to bind a state court in a later prosecution. As a result, the law-of-the-case doctrine would indirectly encourage federal courts to state in either a written memorandum or on the record the specific reasons for its legal conclusion that a search or seizure violated the Fourth Amendment. This memorialization will allow subsequent courts to ascertain: (1) whether the federal court's determinations of facts and law are clearly erroneous; and (2) the precise factual issues necessary to the federal court's legal conclusion that the search or seizure violated the Fourth Amendment.

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301. People v. Meredith, 15 Cal. Rptr. 2d 285, 292 (Cal. Ct. App. 1992).

Under the law-of-the-case doctrine, state courts are not bound to a prior federal decision if the federal court misstated Fourth Amendment law or clearly erred in its factual determinations. A crucial aspect of the law-of-the-case doctrine is that courts are not bound where the initial decision "was clearly erroneous and would work a manifest injustice."[302] Consequently, the law-of-the-case doctrine effectively avoids the assumption that federal courts always reach the correct answer.

B. Resolving Conflict Between Federal Judicial Power and State Autonomy

The less-than-satisfactory reasoning of the nine state appellate courts unavoidably engenders compelling issues that implicate the relationship between the federal and state judiciaries. Because of its inapt rigidity, application of the collateral estoppel doctrine in this context creates unnecessary conflict between the federal and state judiciaries. Instead, courts should use the law-of-the-case doctrine to protect fundamental incorporated constitutional rights, while concomitantly respecting America's federal system—vitally premised on the supremacy of the U.S. Constitution.

Importantly, federalism does not require "blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts."[303] Much of America's history demonstrates "attempts to allocate power between the two indestructible units."[304] To a certain extent, the failure of the nine appellate courts to apply some form of issue preclusion to a federal district court's determination that a search or seizure violated the Fourth Amendment contravenes the delicate balance of power that federalism creates.

Unlike the executive and legislative branches, the federal judiciary is "unique . . . for its dependence on its state counterparts."[305] Specifically, the U.S. Constitution "requires that federal courts rely on, and regularly interact with, their state counterparts."[306] Indeed, as the U.S. Supreme Court

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302. *See, e.g.*, United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998) (noting this exception); George v. Ellis, 911 A.2d 121, 125 (Pa. Super. Ct. 2006) (citing Commonwealth v. Viglione, 842 A.2d 454, 461–62 (Pa. Super. 2004)) (noting this exception).

303. Younger v. Harris, 401 U.S. 37, 44 (1971).

304. Braveman, *supra* note 274, at 611–12.

305. Frost & Lindquist, *supra* note 205, at 740 ("[Congress and the Presidency] are constitutionally constrained from co-opting state institutions to accomplish federal goals on the grounds that allowing the federal government to do so could obscure accountability for federal policy and undermine the integrity of state government.").

306. *Id.* at 740–41 ("Article III assumes that state and federal courts will work together to address the 'cases' and 'controversies' that fall within its subject matter headings.").

sagaciously asserted in *Mapp*, the "very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."[307] Application of the law-of-the-case doctrine furthers the "fundamental premise of the relationship between state and federal courts"—namely, that "the courts in the two judicial systems share the responsibility for the protection of constitutional rights."[308]

Unlike the doctrine of collateral estoppel, the law-of-the-case doctrine emphasizes that courts of equal rank or coordinate jurisdiction may be bound by each other's determinations of law. Specifically, an important component of the law-of-the-case doctrine is that it "applies as much to the decisions of a coordinate court in the same case as to a court's own decisions."[309] The doctrine "requires a decision of law made in a particular case to be respected by all other lower or equal courts during the pendency of that case."[310] In short, when applied to this suppression context, the law-of-the-case doctrine requires the state judiciary to view the federal judiciary as a co-equal.

As one court aptly observed, the law-of-the-case doctrine directs discretion whereas the collateral estoppel doctrine "supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."[311] Furthermore, the law-of-the-case doctrine does not seek to limit judicial power.[312] Instead, the doctrine recognizes that "as a matter of comity, that a successor judge should not lightly overturn the decision of his predecessor in a given case."[313] Thus, the law-of-the-case

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307. Mapp v. Ohio, 367 U.S. 643, 657–58 (1961) (quoting Elkins v. United States, 364 U.S. 206, 221 (1960)).

308. Pollock, *supra* note 207, at 977.

309. Scheidegger, *supra* note 97, at 914 (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)).

310. State v. Reldan, 495 A.2d 76, 85 (N.J. 1985); *see also* United States v. Kayser-Roth Corp., 103 F. Supp. 2d 74, 83 (D.R.I. 2000) ("The law of the case doctrine is 'grounded in important considerations related to stability in the decisionmaking process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy.'" (quoting United States v. Rivera-Martinez, 931 F.2d 148, 151 (1st Cir. 1991))); Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995).

> [The law of the case] doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.

Id.

311. State v. Hale, 317 A.2d 731, 733 (N.J. Super. Ct. App. Div. 1974) (quoting S. Ry. Co. v. Clift, 260 U.S. 316, 319 (1922)).

312. *See, e.g.*, Castro v. United States, 540 U.S. 375, 384 (2003) (holding that the "law of the case" doctrine does not bar consideration of an earlier holding when appropriate).

313. United States v. Wecht, 619 F. Supp. 2d 213, 222 (W.D. Pa. 2009) (citing Fagan v. City of Vineland, 22 F.3d 283, 1290 (3d Cir. 1991)).

doctrine is not premised on unnecessary assertions of power, but rather a regard for the law and judicial comity.

The failure of nine state appellate courts to recognize the preclusive effect of a federal district court's suppression determination may promote needless conflict between the state and federal judiciaries and marginalize this much-needed mutual respect. The reasoning of these nine state appellate courts collectively suggests an undeserved mistrust of the federal judiciary, as well as unnecessary assertions of state autonomy. This prevents the state courts from properly examining constitutional rights in the context of America's dual sovereign system.

Because its analytical focus is the law itself, the law-of-the-case doctrine promotes the values of the federalist system. Where used to render a federal district court's grant of a suppression motion binding on a state court in a subsequent prosecution, the doctrine effectively acknowledges the crucial authority of the lower federal courts to review state court determinations of federal constitutional law in criminal prosecutions as well as the minimum floor structure.

More than 220 years ago, the Framers, attempting to devise a government for the fledgling Republic, divided themselves among Federalists and Anti-Federalists.[314] "Constituting the ranks of the Anti-Federalists were [those] . . . suspicious of any new government that might restrain" the autonomy of states as well as individual liberties.[315] The Anti-Federalists decried the absence of a Bill of Rights in the new Constitution.[316] In contrast, the Federalists promoted the ratification of a Constitution and a strong central government; unlike the Anti-Federalists, many Federalists saw little need for an explicit Bill of Rights.[317] Ultimately, the Federalists could not avoid the reality that the "American people wanted their Constitution to include a specific statement of their personal freedoms, and this turned out to be the price of ratification."[318] It is undeniably ironic, then, that the Federalist desire for a strong central government would constitute the dynamic mechanism that effectuated the solicitous "Anti-

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314. GEORGE BROWN TINDALL & DAVID E. SHI, AMERICA: A NARRATIVE HISTORY 310 (4th ed. 1996).

315. ALLEN WEINSTEIN & DAVID RUBEL, THE STORY OF AMERICA: FREEDOM AND CRISIS FROM SETTLEMENT TO SUPERPOWER 118 (2002). The Anti-Federalists charged that the new constitution eliminated the "sovereignty of the states . . . and that the freedoms of the individual were jeopardized by the absence of a bill of rights." THOMAS A. BAILEY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 144 (1966).

316. TINDALL & SHI, *supra* note 314, at 324.

317. *Id.* at 325.

318. WEINSTEIN & RUBEL, *supra* note 315, at 118. The Anti-Federalists emphasized that "the new Constitution said little or nothing about rights, especially of the individual. But the [F]ederalists admitted this defect, and they agreed that, once the Constitution was ratified, the first thing was to draw up and pass a Bill of Rights . . . ." PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 162 (1997).

Federalist" desire to safeguard personal liberties. Without a strong central government's ability to mandate that the states effectuate fundamental personal rights through the doctrine of incorporation, many of these rights would be rendered largely meaningless. Furthermore, in the decades immediately following the ratification of the Constitution, the U.S. Supreme Court dynamically "moved to reduce governmental power, not at the federal but at the state level. . . . [T]he Court's insistence on the rule of law binding the entire country worked to strengthen [the populace's] feeling of being citizens of the United States and not just their individual state."[319]

In requiring privity where a defendant seeks to preclude the relitigation of a federal district court's suppression determination, courts have relied upon an injudicious and formalistic legal fiction. This legal fiction may adversely affect not only the fragile and centuries-old balance between the federal and state governments, but also the personal freedoms that the Framers sought to safeguard through the Bill of Rights and the imperative mechanism of due process. By contrast, the law-of-the-case doctrine, permits greater judicial discretion and inter-sovereign cooperation.

A federal district court's determination that a search or seizure violates the Fourth Amendment should be binding on a state court faced with that same issue in a subsequent state prosecution. As a practical matter, a state court would remain free to determine the legality of the search under its own constitutional law. Of course, because states may not provide less protection than that mandated by the Fourth Amendment, a state court would have no choice but to conclude that the search or seizure also violated its constitution. Although this result may appear incongruous with the autonomy of the state judiciary, the historical use of federal judicial power to safeguard individual liberties in criminal prosecutions provides compelling assurances about the necessity and correctness of this result.

C. Resolving Conflict Between Governmental Interests and Individual Constitutional Protections

Federalism undeniably intensifies the profound complexities of the American constitutional system—the "competing demands of liberty and

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319. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 455 (2009). Importantly, the early decisions of the U.S. Supreme Court reflected the view that

> the primary role of the general government was to balance the power of the mob which was latent in the states. The Constitution may not have said this explicitly. But the thought was implicit in its provisions, and it was the role and duty of the federal judiciary to reveal the hidden mysteries of the Constitution by its decisions.

JOHNSON, *supra* note 318, at 197.

order, of individual freedom and public safety."[320] As some observers have asserted, federalism constitutes an "institutional arrangement" that furthers the "enjoyment of individual freedom or, stated negatively, [that minimizes] 'the potentialities for evil inherent in power.'"[321] Yet, federalism also has the paradoxical potential to impose additional burdens upon, and limit the freedoms of, a populace "amenable to . . . two governments."[322]

The law-of-the-case doctrine effectively accommodates both (1) the profound governmental need to admit probative evidence in order to effectively prosecute lawbreakers; and (2) the equally compelling individual interest in protection against unreasonable governmental intrusions. In contrast to the collateral estoppel doctrine, which focuses on the interests of one litigant to the exclusion of the interests of another, the law-of-the-case doctrine promotes as its primary goal judicial comity and the integrity of the law itself.

Because the law-of-the-case doctrine views the subsequent state prosecution as a stage in the same litigation that originated in the federal district court, the doctrine effectively accommodates the interests of a defendant—in marked contrast to the collateral estoppel doctrine. It might be persuasively argued that this one-proceeding approach is inapposite where the prosecuting entities are different. To illustrate, in *Smith v. United States*, the previous suppression ruling "endure[d] the dismissal and constitute[d] the law of the case" for subsequent proceedings.[323] The court reasoned that the dismissal possesses "more of the character of an interruption in the judicial process."[324] Moreover, *Smith* instructed that a "contrary holding would exalt form over substance at the expense of judicial time and talents. It would also burden the parties without further safeguarding rights on either side."[325]

Although *Smith* presented a situation involving a single prosecuting authority, the court's reasoning is equally applicable to the dual sovereign prosecution context in which a state prosecution follows a federal prosecution. In short, no compelling reason exists that would permit formalistic notions of dual sovereignty or privity to bar a defendant, facing a state prosecution, from claiming the benefit of a federal court's prior determination that a search or seizure violated the Fourth Amendment.

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320. LEONARD G. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 1 (1968).

321. *Id.* (citing Franz L. Neumann, *Federalism and Freedom: A Critique, in* FEDERALISM, MATURE AND EMERGENT 52 (Arthur W. Macmahon ed., 1955)).

322. *Id.* (citing Knapp v. Schweitzer, 357 U.S. 371, 380 (1958)).

323. Smith v. United States, 406 A.2d 1262, 1263 (D.C. 1979).

324. *Id.*

325. *Id.* at 1264.

Furthermore, the law-of-the-case doctrine, unlike the collateral estoppel doctrine, would encourage federal prosecutors to diligently and completely litigate the suppression issue prior to any subsequent state prosecution. To illustrate, in *State v. Chavez*, state prosecutors introduced evidence concerning a canine's conduct during a search that federal prosecutors had failed to present at an earlier suppression hearing.[326] Had the federal prosecutors in *Chavez* presented this evidence concerning the canine search during the initial federal district court suppression hearing, the federal district court might have denied the defendant's suppression motion. As a result, the federal prosecution would have proceeded, perhaps obviating the need for a subsequent state prosecution. As the Tenth Circuit observed in *Monsisvais*, the different-or-new evidence exception is inapplicable where the additional evidence that the government intends to produce at a "supplemental hearing was evidence it had in its possession, but failed to produce, at the time of the original hearing."[327] Thus, the law-of-the-case doctrine promotes institutional efficiency and encourages federal prosecutors to "do it right" during the initial prosecution.

Importantly, consistent with the finality requirement, a defendant should be allowed to claim some form of issue preclusion regardless of whether the federal suppression determination occurs before or after the litigation in state court.[328] The situation in *State v. Mechtel* is illustrative; subsequent to his state conviction, the defendant, awaiting a federal prosecution based on the evidence found during the same search, filed a suppression motion.[329] The federal magistrate granted the motion, and after the federal indictment was dismissed,[330] the *Mechtel* defendant sought to vacate the state court order denying his suppression motion.[331]

In disallowing a defendant from claiming the benefit of a federal suppression determination that occurred after his conviction, the District of Columbia Court of Appeals cogently asserted in *Burrell v. United States*, that

> collateral estoppel may be applied to criminal cases and that the sequence of time between the two suits is not a sine qua non to the availability of these doctrines as a defense, nevertheless, neither should be invoked where litigation on the particular issue has been completed and the purposes of the doctrines already

326. State v. Chavez, 668 N.W.2d 89, 94 (S.D. 2003).

327. United States v. Monsisvais, 946 F.2d 114, 117 (10th Cir. 1991).

328. *But see, e.g.*, Wisconsin v. Mechtel, 499 N.W.2d 662, 664 (Wis. 1993) (presenting the situation where a federal determination occurred after a state determination).

329. *Id.* at 664–65.

330. *Id.* at 665.

331. *Id.*

> fulfilled. . . . To apply either, under the circumstances of this case, would dilute the quality of finality in criminal proceedings, a quality which must suffer if a subsequent and wholly independent action can cause its reversal. Such an effect should be avoided.[332]

Although the concerns of *Burrell* are compelling, it awkwardly premises the ability of a defendant to claim the benefit of a federal district court's Fourth Amendment determination on the wholly artificial factors of which prosecutor proceeds with the case first or which court resolves issues more expeditiously. A better rule would allow state defendants to seek retroactive application of a subsequent favorable federal suppression determination through some form of reconsideration. At a minimum, in determining whether to reconsider the suppression issue, state courts should treat the subsequent federal determination as a persuasive factor.

Importantly, regardless of its advantages for defendants, the law-of-the-case doctrine intrinsically protects the interests of prosecutors as much as defendants in this suppression context. To illustrate, under the law-of-the-case doctrine, a state prosecutor may be able to avoid the preclusive effect of a prior federal determination where the relevant law has changed in a manner favorable to the government; the law-of-the-case doctrine is inapplicable "when controlling authority has subsequently made a contrary decision of the law applicable."[333]

Furthermore, given the argument of this Article, the question remains whether in a subsequent state prosecution, state prosecutors should be able to claim the benefit of a prior federal court denial of that same defendant's suppression motion. The law-of-the-case doctrine provides a more coherent framework for resolving this potential issue than does the collateral estoppel doctrine.

As a general rule, state courts permit state governments to claim the collateral estoppel benefit of a prior federal suppression determination in subsequent civil proceedings. To illustrate, in *Brown v. State*, the Delaware Supreme Court upheld the application of collateral estoppel against a defendant seeking civil relief in state court.[334] Facing federal charges, the defendant attempted to suppress incriminating evidence found during a search of his residence.[335] After the federal district court denied this suppression motion, the defendant was tried and convicted of the federal

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332. Burrell v. United States, 252 A.2d 897, 900 (D.C. 1969) (footnotes omitted).

333. United States v. Alvarez, 142 F.3d 1243, 1247 (10th Cir. 1998) (noting this exception); George v. Ellis, 911 A.2d 121, 125 (Pa. Super. Ct. 2006) (noting same exception).

334. Brown v. State, 721 A.2d 1263 (Del. 1998).

335. *Id.*

offenses.[336] Pursuant to Delaware law, the defendant subsequently filed a civil petition for return of the property seized during the search. The state court denied the petition, finding that collateral estoppel prevented the defendant from rearguing the illegal-search claims raised during his federal prosecution.[337]

Although the U.S. Supreme Court has not addressed the ability of the government to collaterally estop a defendant from relitigating a particular issue,[338] it has "indicated that it would not allow the application of collateral estoppel against a criminal defendant."[339] To illustrate, in *United States v. Dixon*, the U.S. Supreme Court observed in dicta that "an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one—though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time."[340] Federal appellate courts are currently divided about whether the government should be allowed to claim collateral estoppel in criminal cases.[341] Most circuit courts proscribe governmental use of collateral estoppel against a criminal defendant.[342] Likewise, several state courts have prevented the prosecution from invoking collateral estoppel against a criminal defendant.[343]

Ironically, however, the formalistic insistence on the "same party" or privity central to the reasoning of these nine state appellate courts would permit the state government to claim the benefit of collateral estoppel—

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336. *Id.*

337. *Id.* at 1264–65.

338. Purcell, *supra* note 72, at 1282. Some scholars have suggested that the ability of the government to claim the benefit of collateral estoppel *against a criminal defendant in a criminal prosecution* constitutes a "natural extension of the law of issue preclusion." Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1380 (1994) (asserting that this extension would "display the symmetry dictated by the doctrine's underlying policy, just as it does in the civil context").

339. Kristin C. Dunavant, Comment, *Criminal Procedure*—State of Tennessee v. Scarbrough: *Precluding the Application of Offensive Collateral Estoppel in Criminal Cases*, 37 U. MEM. L. REV. 639, 642 (2007).

340. United States v. Dixon, 509 U.S. 688, 710–11 n.15 (1993). Likewise, in his dissenting opinion in *Ashe v. Swenson*, Chief Justice Warren Burger posited, "in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation. . . . [I]f the defendant] had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial." 397 U.S. 436, 464–65 (1970) (Burger, C.J., dissenting).

341. Purcell, *supra* note 72, at 1282. *But see* Hernandez-Uribe v. United States, 515 F.2d 20, 21–22 (8th Cir. 1975) (holding that the government could invoke collateral estoppel against a defendant to establish that he was an alien where the defendant had already pled guilty to a prior charge).

342. United States v. Smith-Baltiher, 424 F.3d 913, 920 (9th Cir. 2005); United States v. Gallardo-Mendez, 150 F.3d 1240, 1246 (10th Cir. 1998); United States v. Pelullo, 14 F.3d 881, 896 (3d Cir. 1994); United States v. Harnage, 976 F.2d 633, 636 (11th Cir. 1992).

343. Dunavant, *supra* note 339, at 648–50 (citing People v. Goss, 521 N.W.2d 312, 316 (Mich. 1994); State v. Ingenito, 432 A.2d 912, 919 (N.J. 1981)).

even where the defendant would be precluded from doing so.[344] State prosecutors in these nine jurisdictions could potentially argue that where the defendant already had a full and fair opportunity to litigate the legality of the search under the Fourth Amendment in the earlier federal prosecution, state prosecutors could permissibly claim the benefit of collateral estoppel against that same defendant in a subsequent state proceeding.

The law-of-the-case doctrine effectively avoids these problematic aspects of the collateral estoppel doctrine. Instead, in contrast to the collateral estoppel doctrine, both state and federal prosecutors routinely cite the benefit of the law-of-the-case doctrine.[345] To illustrate, in *United States v. McCreary-Redd,* the government successfully argued that the law-of-the-case doctrine barred a defendant from reasserting his earlier suppression motion where a court had previously denied this motion and where the defendant had successfully challenged his guilty plea on appeal but failed to raise the denial of the suppression motion in his appeal.[346] Persuasive due process concerns may militate against the applicability of issue preclusion against a defendant—under either the law-of-the-case or the collateral estoppel doctrines. Yet, the law-of-the-case doctrine, given its flexibility and emphasis on judicial discretion, provides an effective and compelling mechanism for state prosecutors to claim the benefit of a federal court's prior determination that a search or seizure *comported with Fourth Amendment requirements*.

D. Problematic Extensions of These State Court Decisions to the Fifth and Sixth Amendment Context

The reasoning of these nine state courts inherently possesses the potential to transcend the Fourth Amendment context and implicate other fundamental rights, including those under the Fifth and Sixth Amendments.

1. Extending the Nine State Courts' Reasoning to the Fifth Amendment

Suppose that the police, under the Fourth Amendment, lawfully stop Rob's Escape and arrest him. Before they search the Escape, the officers handcuff Rob and place him in the back of the squad car. Peppering him

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344. *See, e.g.*, People v. Meredith, 15 Cal. Rptr. 2d 285, 287 (Cal. Ct. App. 1992) (insisting on this party or privity requirement).

345. *See, e.g.*, United States v. Carr, 557 F.3d 93, 102 (2d Cir. 2009) (allowing the government to claim the benefit of the "law of the case" doctrine where an appellate court had reached a sentencing issue raised by the defendants in their initial appeal); People v. Daniels, 805 N.E.2d 1206, 1212 (Ill. App. Ct. 2004) (presenting a situation in which the government successfully argued that the "law of the case" doctrine barred a defendant from relitigating the admissibility of her statements).

346. United States v. McCreary-Redd, 628 F. Supp. 2d 764, 781 (E.D. Tenn. 2007).

with questions, the police, in their zeal, neglect to provide Rob with *Miranda* warnings.[347] One of the officers remarks to Rob, "You don't look like you just rolled out of some book club meeting. So do you have anything in that car that we should know about, wiseguy?" Rob is silent at first. Then one of the officers snaps at Rob, "If you don't start leveling with us right now, punk, you better start liking iron window treatments." Rob nervously blurts out, "I knew you guys would get me. Look, I needed the money real bad tonight. And the drugs aren't really mine. Opie gave it to me to deliver to some people."

The local U.S. Attorney's Office, deciding to prosecute Rob for federal offenses based on the contraband found in his Escape, intends to use these statements as evidence. Concluding that the police obtained the statements from Rob in violation of the Fifth Amendment, the federal district court grants Rob's motion to suppress these statements. Federal prosecutors voluntarily dismiss the federal charges. Yet, several weeks later, the local district attorney's office decides to prosecute Rob and intends to use these same statements as evidence against him.

No state court has yet confronted this precise situation. Yet, the reasoning of the nine state courts in the Fourth Amendment context creates the possibility that courts might apply this same reasoning in the context of the Fifth Amendment protection against self-incrimination.

Under the Fifth Amendment, "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[348] Pursuant to the incorporation doctrine, the U.S. Supreme Court has "guaranteed the same procedural protection for the defendant whether his confession was

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347. The U.S. Supreme Court mandated in *Miranda v. Arizona*:

> Prior to any questioning, the [defendant] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any matter and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

384 U.S. 436, 444–45 (1996).

348. Bram v. United States, 168 U.S. 532, 542–43 (1897) (quoting 3 SIR WM. OLDNALL RUSSEL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Percival Keep eds., 6th ed. 1896)). The Fifth Amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

used in a federal or state court."[349] Furthermore, not only does federal constitutional law require voluntariness, but state courts have "universally accepted it as a matter of state constitutional doctrine."[350]

In *Miranda v. Arizona*, the U.S. Supreme Court held that under the Fifth Amendment, both state and federal prosecutors could not "use statements, whether exculpatory or inculpatory, stemming from [a] custodial interrogation of the defendant unless [the prosecutor] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[351] A custodial interrogation constitutes "questioning initiated by law enforcement" after officers have taken a person "into custody or otherwise deprived [him] of his freedom of action in any significant way."[352] Unless the prosecution can demonstrate at trial "such warnings and waiver," then "no evidence obtained as a result of interrogation can be used against [the defendant]."[353]

Where a federal district court excludes a defendant's statements, because law enforcement obtained the statements in violation of the defendant's Fifth Amendment self-incrimination rights, that federal determination ought to control in a subsequent state prosecution. Like determinations that a search violated the Fourth Amendment, determinations that the government elicited a post-arrest statement in violation of the Fifth Amendment satisfy the finality requirement.[354] Yet, the reasoning of the state courts that have rejected this argument in the

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349. *Miranda*, 384 U.S. at 464 n.33; *see also* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (noting that constitutional procedural requirements apply to both federal and state cases).

350. FRANK W. MILLER ET AL., CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION 387 (5th ed. 2000).

351. *Miranda*, 384 U.S. at 444.

352. *Id.*

353. *Id.* at 479; *see also* Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*."); Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)) ("Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntary waived [*Miranda*] rights' when making the statement."). Importantly, the U.S. Supreme Court held that unlike Fourth Amendment violations, Fifth Amendment violations do not require that all fruits of the unlawfully obtained evidence must be discarded. *Elstad*, 470 U.S. at 307; *see also* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (refusing to extend the *Wong Sun* fruits doctrine to suppress the testimony of a witness whose identity was discovered as a result of a statement taken from the accused without the benefit of full *Miranda* warnings).

354. *See, e.g.*, United States v. Harrison, 213 F.3d 1206, 1209 (9th Cir. 2000) (holding that federal circuit courts of appeals have jurisdiction pursuant to 18 U.S.C. § 3731 to hear a government appeal of a district court's grant of a motion to suppress statements).

context of Fourth Amendment claims provides little expectation that these courts will view Fifth Amendment self-incrimination rights differently.[355]

2. Extending the Nine State Courts' Reasoning to the Sixth Amendment

Likewise, the possibility exists that these nine state courts might apply their reasoning to claims implicating the Sixth Amendment right to confront and cross-examine adverse witnesses. In the watershed *Crawford v. Washington* decision, the U.S. Supreme Court held that the Sixth Amendment prohibits the admission of testimonial hearsay against a criminal defendant in both federal and state prosecutions, even if such hearsay is reliable, unless the defendant had a prior opportunity to cross-examine the out-of-court declarant.[356] Testimonial statements include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial."[357]

Suppose then that federal prosecutors seek to admit a statement that Opie provided to the police in which she implicated Rob. By the time of the federal trial, Opie left the country and is now unavailable to testify. Given the circumstances in which Opie gave the statement, the federal district court concludes that the hearsay remarks to the police are testimonial. Because Rob and his attorney never had a prior opportunity to cross-examine Opie, the federal district court concludes that the statement is inadmissible under the Sixth Amendment. Should a state court be permitted to disregard this federal district court determination concerning the testimonial nature of a statement?

The reasoning of these nine state appellate courts indicates that a state court, contrary to the determination of the federal district court, may permissibly determine that the same statement is non-testimonial and allow it to be presented as evidence against a criminal defendant. Yet, the Sixth Amendment right of an accused to confront witnesses against him "is . . . a fundamental right . . . made obligatory on the states by the Fourteenth

355. The issue preclusion argument in the Fifth Amendment self-incrimination context is perhaps even stronger than the same argument in the context of Fourth Amendment claims. In *Withrow v. Williams*, the U.S. Supreme Court held that the *Stone* restrictions on exercise of federal habeas jurisdiction in Fourth Amendment cases did not extend to a state prisoner's claim that his conviction rested on statements obtained in violation of *Miranda* safeguards. 507 U.S. 680, 682–83 (1993). Thus, in contrast to the limits on the ability of lower federal courts to review Fourth Amendment claims created in *Stone v. Powell*, lower federal courts exercise considerably greater reviewing power over state court decisions concerning the Fifth Amendment self-incrimination protections.

356. Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

357. *Id.* at 52; *see also* Davis v. Washington, 547 U.S. 813, 822 (2006).

Amendment."[358] Thus, as in the Fourth and Fifth Amendment contexts, the subsequent contrary determination of a state court concerning this confrontation issue, is at a minimum, problematic.[359]

CONCLUSION

Where a federal court decides that a search or seizure violated the Fourth Amendment and grants a defendant's motion to suppress evidence, that same defendant, subsequently facing a state prosecution based on this suppressed evidence, should be permitted to claim that the prior federal determination bars relitigation of the Fourth Amendment claim in state court. State courts that have not yet decided whether collateral estoppel precludes relitigation in state court of a federal district court determination that a search or seizure violates the Fourth Amendment should decline to follow the less-than-compelling reasoning of these nine state courts. Instead, these state courts should rely upon the law-of-the-case doctrine within the context of the minimum floor structure. The law-of-the-case doctrine not only accommodates the otherwise antipodal principles of federal judicial power and state autonomy but also effectively maintains the delicate balance between governmental authority and individual liberty.

358. Dutton v. Evans, 400 U.S. 74, 79 (1970) (quoting Pointer v. Texas, 380 U.S. 400, 403 (1965)).

359. Like Fourth and Fifth Amendment claims, this determination would be considered "final" for purposes of either a collateral estoppel or "law of the case" analysis. *See, e.g.*, 18 U.S.C. § 3731 (2006); *cf.* United States v. Moussaoui, 365 F.3d 292, 298–99 (4th Cir. 2004) (noting that the district court decision concerning the production of witnesses pursuant to the Sixth Amendment was subject to a government appeal pursuant to § 3731).