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I. INTRODUCTION

In 1984, the United States Supreme Court announced a broad exception to the federal exclusionary rule[1] in *United States v. Leon.*[2] The Court held the exclusionary rule inapplicable when police officers obtain evidence in reasonable, good faith reliance on a warrant later found to be defective.[3] Commentators had advised against the creation of the so-called good faith exception before *Leon.*[4] After *Leon,* they promulgated a torrent of commentary criticizing both the *Leon* Court's reasoning and its result.[5] Today, because *Leon* does not

1. First announced in *Weeks v. United States,* 232 U.S. 383 (1914), the exclusionary rule requires courts to suppress evidence that police obtain in violation of a defendant's Fourth Amendment rights. The Court applied the rule to the states in *Mapp v. Ohio,* 367 U.S. 643 (1961).

2. 468 U.S. 897 (1984).

3. Id. at 913.

4. See, for example, Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 Am. Bar Found. Res. J. 611; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?,* 16 Creighton L. Rev. 565 (1983); William J. Mertens and Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 Georgetown L. J. 365 (1981).

5. See, for example, Wayne R. LaFave, 1 *Search and Seizure* § 1.3 (West, 2d ed. 1987); Albert W. Alschuler, *"Close Enough for Government Work": The Exclusionary Rule After* Leon, 1984 S. Ct. Rev. 309; Donald Dripps, *Living with* Leon, 95 Yale L. J. 906 (1986); Steven Duke, *Making* Leon *Worse,* 95 Yale L. J. 1405 (1986); Wayne R. LaFave, *"The Seductive Call of Expediency":* United States v. Leon, *Its Rationale and Ramifications,* 1984 U. Ill. L. Rev. 895;

control state constitutional decisions,[6] the battle over the good faith exception is fought on the state level.

Currently, the highest courts of eight states have rejected the *Leon* exception on state constitutional grounds,[7] representing one of the latest accomplishments of the new federalism movement.[8] In contrast, the highest courts of eleven states have adopted the *Leon* good faith exception under their state constitutions.[9] In addition, four states have adopted statutory good faith exceptions.[10] The highest

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Silas J. Wasserstrom and William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 Am. Crim. L. Rev. 85 (1984).

6. State courts may grant state citizens greater constitutional rights under their respective state constitutions than the United States Constitution requires. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). To insulate their decisions from Supreme Court review, state courts must base their decisions on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 1037-38 (1983).

7. *State v. Marsala*, 216 Conn. 150, 579 A.2d 58, 59 (1990); *State v. Guzman*, 122 Idaho 981, 842 P.2d 660, 671 (1992); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820, 857 (1987); *State v. Gutierrez*, 863 P.2d 1052, 1068 (N.M. 1993); *People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451, 458 (1985); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553, 561 (1988); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 905-06 (1991); *State v. Oakes*, 157 Vt. 171, 598 A.2d 119, 121 (1991). In addition, Georgia has rejected *Leon* on statutory grounds. *Gary v. State*, 262 Ga. 573, 422 S.E.2d 426, 428 (1992).

8. New federalism is a movement advocating state independence in constitutional decisionmaking. See *Edmunds*, 586 A.2d at 895 n.6; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 762 (1992).

9. See *Lincoln v. State*, 285 Ark. 107, 685 S.W.2d 166, 167 (1985); *People v. Camarella*, 286 Cal. Rptr. 780, 818 P.2d 63, 64-65 (1991) (asserting that California adopted the *Leon* exception by virtue of California Constitution, Art. I, § 28(d), which eliminated a judicially created remedy for violations of the federal and state search and seizure provisions, except to the extent that exclusion remains federally compelled); *Bernie v. State*, 524 S.2d 988, 990 (Fla. 1988) (explaining that Florida adoptod the *Leon* good faith exception by virtue of a 1982 amendment to the Florida Constitution providing that the state search and seizure provision must be construed in conformity with the United States Supreme Court's interpretation of the Fourth Amendment); *Crayton v. Commonwealth*, 846 S.W.2d 684, 688-89 (Ky. 1992); *Connelly v. State* 322 Md. 719, 589 A.2d 958, 966-67 (1991); *State v. Sweeney*, 701 S.W.2d 420, 425 n.4, 426 (Mo. 1985) (en banc); *State v. Kleinberg*, 228 Neb. 128, 421 N.W.2d 450, 454-55 (1988); *State v. Wilmoth*, 22 Ohio St. 3d 251, 490 N.E.2d 1236, 1248 (1986); *McCary v. Commonwealth*, 228 Va. 219, 321 S.E.2d 637, 644 (1984); *State v. Saiz*, 427 N.W.2d 825, 828 (S.D. 1988); *Hyde v. State*, 769 P.2d 376, 380 (Wyo. 1989) (recognizing the good faith exception in dicta). Most courts that have adopted the *Leon* exception have done so with little or no analysis of their state constitutions. The District of Columbia likewise appears to have adopted the *Leon* good faith exception. See *Lumpkin v. United States*, 586 A.2d 701, 709 (D.C. App. 1991).

10. The Arizona, Colorado, Illinois, and Indiana legislatures have adopted statutory good faith exceptions. See Ariz. Rev. Stat. Ann. § 13-3925 (West 1989); Colo. Rev. Stat. Ann. § 16-3-308 (West 1990); Ill. Ann. Stat ch. 725, § 5/114-12 (Smith-Hurd 1993); Ind. Stat. Ann. § 35-37-4-5 (Michie 1994). In addition, the Texas legislature adoptod a modified good faith exception. Tex. Code Crim. Proc. Ann. art. 38.23(b) creates an exception to the state exclusionary rule for evidence obtained by the polico acting in objective, good faith reliance on a warrant issued by a magistrato based on probable cause. See *Gordon v. State*, 801 S.W.2d 899, 912-13 (Tex. Crim. App. 1990) (explaining that the statute is not a codification of *Leon*).

courts in twenty-six states have not decided yet whether to incorporate a good faith exception under their state constitutions.[11]

After setting forth the reasoning behind the *Leon* decision in Part II, this Note catalogues the criticisms of *Leon* in Part III, demonstrating that a number of compelling reasons militate in favor of state court rejection of *Leon*. Given this impetus for state courts to reject *Leon*, Part IV of this Note explores the debate among new federalism commentators regarding the proper grounds for state court divergence

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11. The highest courts in Alabama, Alaska, Delaware, Hawaii, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Washington, West Virginia, and Wisconsin have not decided yet whether to adopt *Leon*. See *Mason v. State*, 534 A.2d 242, 254 (Del. 1987) (discussing *Leon*, but finding the good faith exception inapplicable); *State v. Rothman*, 70 Haw. 546, 779 P.2d 1, 8 (1989) (asserting that the court had not adopted the *Leon* exception yet); *State v. Iowa Dist. Court for Black Hawk County*, 472 N.W.2d 621, 624 (Iowa 1991) (stating that the court had not adopted the *Leon* exception yet); *State v. Probst*, 247 Kan. 196, 795 P.2d 393, 401 (1990) (discussing *Leon* but finding the good faith exception inapplicable); *Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514, 517 n.6 (1989) (asserting that it had not adopted the *Leon* exception under state law); *People v. Jackson*, 180 Mich. App. 339, 446 N.W.2d 891, 894 (1989) (finding that other Michigan courts of appeals had declined to follow *Leon*); *State v. Veglia*, 620 A.2d 276, 278 n.3 (Me. 1993) (stating that it had neither accepted nor rejected the *Leon* good faith exception); *State v. Wiley*, 366 N.W.2d 265, 269 n.2 (Minn. 1985) (explaining that the court did not need to consider *Leon* because it found that the warrant was supported by probable cause); *Stringer v. State*, 491 S.2d 837, 841 (Miss. 1986) (Roberston, J., concurring) (criticizing the court for its failure to address *Leon*); *Point v. State*, 102 Nev. 143, 717 P.2d 38, 42-43 (1986) (discussing *Leon* but finding it inapplicable); *State v. Dymowski*, 458 N.W.2d 490, 499 n.2 (N.D. 1990) (declining to address the good faith exception); *State v. Tanner*, 304 Or. 312, 745 P.2d 757, 758 (1987) (discussing *Leon* without explicitly rejecting or accepting the good faith exception); *State v. Taylor*, 621 A.2d 1252, 1255-56 (R.I. 1993) (discussing the *Leon* exception but finding it inapplicable); *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471, 473 (1987) (explaining that even if the court adopted a good faith exception, it would be inapplicable); *Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6, 11 n.10 (Utah 1992) (noting that the court had not decided whether to adopt the good faith exception); *State v. Crawley*, 61 Wash. App. 29, 808 P.2d 773, 776 (1991) (noting that the Washington Supreme Court had not adopted the *Leon* exception yet); *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762, 775 n.20 (1986) (asserting that it would not address *Leon* because the exception was inapplicable); *State v. Higginbotham*, 162 Wis. 2d 978, 471 N.W.2d 24, 28-29 (1991) (holding the *Leon* exception inapplicable).

Lower courts in five of these states, however, have applied the *Leon* good faith exception. See *Colvette v. State*, 568 S.2d 319, 326 (Ala. Crim. App. 1990); *State v. Sidel*, 16 Kan. App. 2d 686, 827 P.2d 1215, 1221 (1992); *State v. Williams*, 608 S.2d 266, 272-73 (La. App. 1992); *State v. Tarantino*, 587 A.2d 1095, 1097 (Me. 1992) (noting that the lower court had applied the good faith exception, but deciding the case on different grounds); *State v. Thompson*, 810 P.2d 415, 419 (Utah 1991) (noting that the lower court had applied the good faith exception to the case but finding the exception inapplicable).

Four of the twenty-six courts that have not decided whether to adopt the *Leon* good faith exception appear likely to reject *Leon*. See *People v. Bloyd*, 416 Mich. 538, 331 N.W.2d 447 (1982) (rejecting a good faith exception under its state constitution prior to *Leon*); *State v. Van Haele*, 199 Mont. 522, 649 P.2d 1311, 1315 (1982), overruled on other grounds by *State v. Long*, 700 P.2d 153 (Mont. 1985) (rejecting a good faith exception under its state constitution before *Leon*); *State v. Tanner*, 304 Or. 312, 745 P.2d 757, 758 n.2 (1987) (stating that it viewed the state exclusionary rule as a constitutional right, not a remedy); *State v. White*, 97 Wash. 2d 92, 640 P.2d 1061, 1069 n.6 (1982) (rejecting a good faith arrest exception under its state constitution prior to *Leon* because it found the good faith standard unworkable).

from Supreme Court precedent. It then concludes that most new federalism commentators agree that reactive rulings—those based solely on their dissatisfaction with Supreme Court reasoning and result[12]—are improper. Instead, commentators suggest a state-specific factor to support divergence. Part V then analyzes the eight decisions rejecting *Leon* on state constitutional grounds, finding that the majority of these decisions are reactive. Part VI defends these reactive decisions by demonstrating that the new federalism commentators' condemnation of reactive rulings is unjustified. Finally, this Note urges the remaining state courts to reject *Leon*'s good faith exception under their state constitutions, regardless of whether state-specific factors support divergence.

II. THE *LEON* DECISION

The facts of *Leon* are straightforward and particularly favorable to support a good faith exception to the exclusionary rule. In *Leon,* the police initiated a drug-trafficking investigation, relying on an informant's tip.[13] Based on an affidavit describing police observations and the tip, a state court judge issued a search warrant for the suspects' residences and automobiles.[14] During the ensuing search, police discovered large quantities of narcotics.[15] The district court suppressed the evidence because it found that the affidavit did not establish probable cause.[16] A divided panel of the Ninth Circuit declined the government's invitation to recognize a good faith exception to the exclusionary rule and upheld the suppression.[17] The Supreme Court reversed in a six-to-three decision, modifying the federal exclusionary rule so that it does not bar evidence seized by police officers in

12. Gardner, 90 Mich. L. Rev. at 772 (cited in note 8).
13. *Leon*, 468 U.S. at 901.
14. Id. at 902.
15. Id.
16. Id. at 903.
17. Id. at 904. In determining that the affidavit in *Leon* did not establish probable cause, the Ninth Circuit used the two-pronged *Aguilar-Spinelli* probable cause test. Id. at 904. Between the time that the Ninth Circuit and the Supreme Court decided *Leon,* however, the Court abandoned the *Aguilar-Spinelli* test. In *Illinois v. Gates,* 462 U.S. 213 (1983), the Court adopted a less stringent totality-of-the-circumstances approach. Id. at 238. Arguably, the Court should have remanded *Leon* to the Ninth Circuit to consider the *Gates* holding or it should have reconsidered the affidavit itself. Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 98 (cited in note 5). It likely would have found the affidavit sufficient under the new probable cause standard. Id. The Court's failure to remand the case or to reconsider the sufficiency of the affidavit demonstrates "how precipitato the unnecessary holding of *Leon* really was." LaFave, 1 *Search and Seizure* § 1.3(c) at 53 (cited in note 5).

reasonable, good faith reliance on a subsequently invalidated warrant.[18]

The *Leon* Court first asserted that the exclusionary rule was not a "necessary corollary" to the Fourth Amendment, despite precedent that suggested otherwise.[19] Rather, the Court explained that the exclusionary rule functions as a judicially created remedy that safeguards Fourth Amendment rights through its deterrent effect.[20] The Court justified its conclusion in two ways. First, it noted that the Fourth Amendment does not expressly provide for the rule.[21] Second, it reasoned that the use of illegally seized evidence does not constitute a new Fourth Amendment violation.[22]

The Court then explained that it would determine whether exclusion is appropriate in a case in which the police reasonably relied on a subsequently invalidated warrant by weighing the costs and benefits of exclusion.[23] The Court identified the "substantial social costs" of the exclusionary rule on the criminal justice system's truth-finding function[24] and its collateral consequences, the nonconviction and nonprosecution of guilty defendants.[25] Although the Court acknowledged that empirical studies demonstrated that the rule's impact was insubstantial,[26] it reasoned that the studies' findings, stated in terms of overall percentages, actually masked large numbers of guilty defendants who are released because of the suppression of evidence.[27]

The Court defined the benefits of the exclusionary rule solely in terms of the rule's deterrent effect on police officers.[28] The Court discounted the rule's effect on issuing judges and magistrates for three reasons. First, the Court explained that the exclusionary rule was

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18. *Leon*, 468 U.S. at 905.

19. Id. at 905-06 (referring to *Mapp v. Ohio*, 367 U.S. 643, 651, 655-57 (1961), and *Olmstead v. United States*, 277 U.S. 438, 462-63 (1928)).

20. *Leon*, 468 U.S. at 906.

21. Id. See U.S. Const., Amend. IV.

22. *Leon*, 468 U.S. at 906. In asserting that a court's admission of illegally seized evidence works no new Fourth Amendment violation, the Court read the Amendment to restrain the police but not the courts. See note 58 and accompanying text.

23. *Leon*, 468 U.S. at 906-07. The Court bolstered its assertion that the exclusionary rule's application properly depends on a cost-benefit analysis of exclusion by explaining, "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Id. at 908 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

24. *Leon*, 468 U.S. at 907.

25. Id.

26. Id. at 908 n.6 (referring primarily to Davies, 1983 Am. Bar Found. Res. J. at 621 (cited in note 4)).

27. *Leon*, 468 U.S. at 908 n.6.

28. See id. at 918.

promulgated to deter police misconduct rather than to penalize judges and magistrates for their mistakes.[29] Second, the Court stated that it had no evidence before it indicating that issuing judges and magistrates abused the principles of the Fourth Amendment.[30] Third, it doubted that the threat of suppression could have any deterrent effect on judges and magistrates because of their role as neutral and detached judicial officers who have no stake in the outcomes of criminal prosecutions.[31]

In contrast to its costs, the Court found that when officers reasonably relied on subsequently invalidated warrants, the benefits of the exclusionary rule were "marginal to nonexistent."[32] Although the Court acknowledged that applying the exclusionary rule in these cases might deter future inadequate presentations or magistrate shopping, it dismissed these possibilities as speculative.[33] The Court also asserted that when the police reasonably rely on warrants, no police illegality exists.[34] Therefore, the Court reasoned, suppression in these cases logically could not have a deterrent effect on police.[35]

The *Leon* majority concluded that the substantial social costs of exclusion outweighed its marginal to nonexistent benefits when police officers rely on subsequently invalidated warrants.[36] Therefore, it approved the good faith exception. The Court stressed, however, that exclusion would be improper only if the officer's reliance on the warrant was objectively reasonable.[37]

III. CRITICISMS OF *LEON*

Criticisms of *Leon* fall into three primary categories, each directed at a different level of the *Leon* Court's analysis. The first

29. Id. at 916.
30. Id.
31. Id. at 916-17.
32. Id. at 922.
33. Id. at 918.
34. Id. at 920-21.
35. Id. at 921.
36. Id. at 922.
37. The Court noted that inquiring into the officer's subjective state of mind would result in "a grave and fruitless misallocation of judicial resources." Id. at 922 n.23 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)). The Court enumerated four situations in which an officer's reliance would not be objectively reasonable: (1) when the affiant knowingly or recklessly falsified the warrant application, (2) when the issuing magistrate abandoned his neutral and detached role, (3) when the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and (4) when the warrant was facially deficient. *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

category disagrees with the *Leon* Court's classification of the exclusionary rule as a judicially created remedy rather than a constitutional right.[38] The second criticism argues that even if the rule is a mere remedy, the application of which depends on a balancing test, the *Leon* Court's cost-benefit analysis was flawed in many respects.[39] The third category of criticisms concerns the unsettling consequences of the *Leon* decision.[40]

A. The Constitutional Right to Exclusion

In the course of the exclusionary rule's history,[41] the Supreme Court has perceived the rule as resting on two different conceptual bases—a substantive constitutional right and a judicially created remedy.[42] Furthermore, it offered three purposes for the exclusionary rule: (1) to vindicate victims of unconstitutional searches and seizures, (2) to deter police misconduct, and (3) to preserve the integrity of the judiciary.[43] The Court's perception of the rule's bases

38. See, for example, *Leon*, 468 U.S. at 931-43 (Brennan, J., dissenting); LaFave, 1 *Search and Seizure* § 1.3(b) at 49-51 (cited in note 5).

39. See, for example, *Leon*, 468 U.S. at 948-59 (Brennan, J., dissenting); LaFave, 1 *Search and Seizure* §§ 1.3(c) & (d) at 51-59 (cited in note 5); Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 102-17 (cited in note 5).

40. One commentator argues that neither of the first two criticisms of *Leon* are ultimatoly persuasive. Dripps, 95 Yale L. J. at 906 (cited in noto 5). Dripps contonds that the categorical objection to the Court's denial of the constitutional right to exclusion rests on a mistaken interpretation of Fourth Amendment rights. Id. at 906-07. The purpose of the Fourth Amendment, he asserts, is the protection of lawful privacy. As such, the Fourth Amendment must be read to condemn only the illegal search, not the admission of evidence, because admission does not itself invade the privacy of the search victim. Id. at 918-22. Dripps rejects the analytical objection to the *Leon* majority's cost-benefit analysis for its failure to consider the costs of the warrant process that, he estimates, probably surpass exclusion as disincentive for abusive warrants. Id. at 907. Because of the costs of the warrant process, he concludes, *Leon* is unlikely te encourage speculative search warrants. Id. at 923-33. Although he rejects both the categorical and analytical criticisms of *Leon*, Dripps objects to the decision from a jurisprudential standpoint. He asserts that *Leon* removes the exclusionary sanction from an entire catogory of Fourth Amendment violations. Id. at 933-39.

41. For a thorough discussion of the history and development of the exclusionary rule, see Potter Stowart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365 (1983); Mertens and Wasserstrom, 70 Georgetown L. J. at 373-89 (cited in note 4).

42. See *Leon*, 468 U.S. at 931-38 (Brennan, J., dissenting) (noting the Court's waffling as to the exclusionary rule's basis and arguing that the rule is a constitutional right rather than a judicially created remedy).

43. See Timothy R. Lohraff, Note, Unitod States v. Leon *and* Illinois v. Gates: *A Call for State Courts to Develop State Constitutional Law*, 1987 U. Ill. L. Rev. 311, 323 & n.70 (noting that both the Court and commentators have mentioned these factors as purposes behind the exclusionary rule).

and purposes has important analytical consequences. Together, they determine the Court's application of the rule.[44]

When the Court first articulated the exclusionary rule in *Weeks v. United States,*[45] it characterized the rule as a constitutional right. The *Weeks* Court clearly stated that the prosecution's use of the illegally seized evidence denied the defendant his constitutional rights.[46] The Court justified its view of the rule by relying on the judicial integrity rationale for the rule, explaining that courts must not sanction unlawful searches and seizures.[47] In *Weeks*'s progeny, furthermore, the Court adhered to the view that the exclusionary rule rested on a constitutional foundation.[48]

In *United States v. Calandra,*[49] however, the Court divorced the exclusionary rule from its constitutional foundation and introduced deterrence as the preeminent purpose of the rule. *Calandra* stated that the rule was a judicially created remedy promulgated to protect Fourth Amendment rights through its deterrent effect, rather than an individual right of the aggrieved party.[50] The Court then explained the significance of the rule's demotion from right to remedy: As with any remedy, the rule's application was limited to those cases in which its purposes would be served most effectively.[51] As a remedy, the rule's application was not automatic but contingent on a balancing of the costs and the benefits of exclusion. Accordingly, *Calandra* narrowed the scope of the exclusionary rule considerably.

Calandra's demotion of the exclusionary rule from right to remedy and its assertion that the only purpose behind the exclusionary rule is the deterrence of police misconduct justified incursions on the exclusionary rule. After *Calandra,* the Court continually narrowed the rule's application. For example, it has held illegally seized evidence admissible: (1) in grand jury proceedings,[52] (2) to impeach the defendant's testimony during his criminal trial,[53] (3) in federal civil tax proceedings when the illegal search was conducted by state

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44. See LaFave, 1 *Search and Seizure* § 1.1(f) at 17-18 (cited in note 5) (explaining that the Court's view of the exclusionary rule's purposes has determined the rule's scope and that in recent years, the Court has relied exclusively on the deterrence rationale for the rule).

45. 232 U.S. 383 (1914).

46. Id. at 398.

47. Id. at 392.

48. See, for example, *Mapp v. Ohio,* 367 U.S. 643, 657 (1961) (holding that the exclusionary rule is "an essential part of both the Fourth and the Fourteenth Amendments").

49. 414 U.S. 338 (1974).

50. Id. at 348.

51. Id. (stating that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served").

52. Id. at 349.

53. *United States v. Havens,* 446 U.S. 620, 627-28 (1980).

officials,[54] and (4) in the trials of defendants who are the targets, but not the victims, of illegal searches.[55]

Following *Calandra*'s lead, the *Leon* Court cast the rule as a remedy applicable only when its deterrent function is served most effectively.[56] The *Leon* Court thereby further restricted the exclusionary rule's application by creating the good faith exception. As the dissenters argued, however, the *Leon* Court's classification of the exclusionary rule as a remedy rather than a right rested on a very narrow reading of the Fourth Amendment.[57] First, it hardly follows from the Fourth Amendment's lack of reference to the exclusionary rule that the rule has no constitutional foundation. Much of our constitutional doctrine is the product of judicial implication.[58]

Second, the *Leon* Court read the Fourth Amendment as prohibiting police from executing illegal searches and seizures but allowing courts to admit illegally obtained evidence.[59] The dissent, however, argued that the Fourth Amendment's prohibition against unreasonable searches and seizures, like other guarantees in the Bill of Rights, should be read to constrain the government as a whole.[60] The dissenters suggested that the artificial line drawn by the *Leon* Court between the constitutional responsibilities of the police and the courts denigrates the integrity of the judiciary.[61] The dissenters explained

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

55. *United States v. Payner*, 447 U.S. 727, 735 (1980).

56. See note 20 and accompanying text.

57. See *Leon*, 468 U.S. at 931-38 (Brennan, J., dissenting).

58. See id. at 932; Kamisar, 16 Creighten L. Rev. at 581-83 (cited in note 4) (citing examples such as the rule barring involuntary confessions).

59. *Leon*, 468 U.S. at 906. Courts may view the government's role in a criminal prosecution in two different ways. The fragmentary model and the unitary model, developed by Professors Schrock and Welsh, represent the differing views of the government's role in a criminal prosecution and explicate a discussion of the constitutional fonndations of the exclusionary rule. See Thomas S. Schrock and Rebert C. Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251 (1974). The unitary model considers the police's illegal search or seizure and the court's subsequent admission of the resulting evidence as a single transaction prohibited by the Fourth Amendment. Id. at 298. Under this paradigm, the Fourth Amendment prohibits not only illegal searches and seizures but also the admission of tainted evidence. Id. at 299. Therefore, the exclusionary rule is constitutionally mandated. In contrast, the fragmentary model severs the illegal police conduct from the judiciary's admission of tainted evidence. Id. at 255. The unconstitutionality ends with the illegal seizure under this view; therefore, courts can admit the fruits without violating the Fourth Amendment. Id. at 256. The Fourth Amendment restrains only the police, not the judiciary, under this view. Thus, the exclusionary rule is a judge-made remedy te deter police misconduct. By reading the Amendment as restraining police but not courts, the *Leon* Court necessarily adopted the fragmentary model of government.

60. *Leon*, 468 U.S. at 932 (Brennan, J., dissenting).

61. See id. at 935-38 (Brennan, J., dissenting); id. at 976-78 (Stevens, J., dissenting).

that by admitting illegally seized evidence, courts condone Fourth Amendment violations.[62]

Furthermore, as Justice Brennan argued, the majority's Fourth Amendment interpretation ignores the fact that the police seize evidence primarily to be used in criminal prosecutions.[63] When this evidentiary link is acknowledged, courts should read the Fourth Amendment to prohibit not only illegal police activity but also the court's admission of this evidence.[64] Therefore, although the *Leon* Court considered the exclusionary rule as a remedy to be used as a deterrent, it based its classification of the rule as a remedy rather than a right on a very narrow reading of the Fourth Amendment's prohibition against searches and seizures.

B. Balancing to a Predetermined Result

The *Leon* Court incorrectly assessed both the costs and the benefits of the exclusionary rule by overstating the rule's costs and understating its benefits.[65] The Court's assertion that the exclusionary rule's costs were substantial[66] contradicted the available empirical data. As Professor LaFave concluded, current assessments

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62. Id. As the dissenters' discussions make clear, many of the Court's earlier cases espoused the judicial integrity rationale for the exclusionary rule. See, for example, *Weeks*, 232 U.S. at 391-92 (asserting that violations of the Fourth Amendment "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenanco of such fundamental rights"); id. at 393-94 (declaring that "to sanction [illegal searches and seizures] would be to affirm by judicial decision manifest neglect if not an open defiance of the prohibitions of the Constitution"); *Elkins v. United States*, 364 U.S. 206, 222-24 (1960) (referring to the "imperative of judicial integrity" and warning that courts must not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold").

63. *Leon*, 468 U.S. at 933 (Brennan, J., dissenting); id. at 978 (Stovens, J., dissenting). See *Weeks*, 232 U.S. at 393 (noting that law enforcement executes searches and seizures to bring "proof to the aid of the Government"). See generally Schrock and Welsh, 59 Minn. L. Rev. at 289-307 (cited in note 59).

64. *Leon*, 428 U.S. at 933 (Brennan, J., dissenting). Justice Brennan explained:

> Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the contoxt of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidenco implicates the same constitutional concorns as the initial seizure of that evidenco. . . . Once that connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court's interpretation becomes more suspect.

Id. He concluded, "The Amendment therefore must be read to condemn not only the initial nnconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained." Id. at 934.

65. LaFave, 1 *Search and Seizure* § 1.3 at 51-59 (citod in note 5). See generally Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 102-17 (cited in noto 5).

66. *Leon*, 468 U.S. at 907.

of available empirical data reveal that the rule's effect on criminal prosecutions is minimal.[67]

Even if the Court's cost assessment had reflected the available data accurately, however, the results still would have been exaggerated because of errors in the Court's analysis. First, the Court measured the costs attributable to exclusion in all cases. The only costs at issue in *Leon*, however, were those that would have been alleviated by the proposed modification to the exclusionary rule. Therefore, to gauge the costs of the exclusionary rule accurately, the Court should have measured the costs only in cases in which the police made objectively reasonable mistakes.[68]

Second, the Court's cost assessment did not consider the impact of *Illinois v. Gates*.[69] Decided one year before *Leon*, *Gates* replaced the *Aguilar-Spinelli* probable cause test[70] with a more relaxed totality-of-the-circumstances standard.[71] Because *Gates* made suppression of evidence seized under a warrant less likely than under the *Aguilar-Spinelli* probable cause test, it reduced the already minimal costs of the rule.[72]

Moreover, the Court's cost assessment is fundamentally flawed. Although the majority repeatedly referred to the costs of the exclusionary rule, attributing those costs to the Fourth Amendment may have been more accurate.[73] The Amendment, not the rule, imposes limitations on the government's ability to secure evidence and, accordingly, demands the suppression of illegally obtained evidence.[74]

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67. LaFave, 1 *Search and Seizure* § 1.3(c) at 52 (cited in note 5) (citing Davies, 1983 Am. Bar Found. Res. J. at 622 (cited in note 4)). See also Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. Bar Found. Res. J. 585, 606 (reaffirming that the exclusion of evidence has a truly marginal effect on the criminal court system); Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. Ill. L. Rev. 223, 238-39 (confirming earlier findings, based on a study of a larger jurisdictional area). But see text accompanying note 27 (explaining that the *Leon* Court reasoned that the small percentages in empirical data actually masked large numbers of guilty defendants who are released because of exclusion).

68. See LaFave, 1 *Search and Seizure* § 1.3(c) at 52 (cited in note 5); Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 103 (cited in note 5).

69. 462 U.S. 213 (1983). See LaFave, 1 *Search and Seizure* § 1.3(c) at 53 (cited in note 5); Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 105 (cited in note 5).

70. *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), established a two-pronged probable cause test. The *Aguilar-Spinelli* test required that an affidavit reveal the informant's "basis of knowledge" and provide sufficient facts to establish either the informant's veracity or reliability. See *Spinelli*, 393 U.S. at 412-13.

71. *Gates*, 462 U.S. at 238.

72. Professor LaFave argues that together *Leon* and *Gates* produce "a form of incomprehensible double counting." LaFave, 1984 U. Ill. L. Rev. at 924 (cited in note 5).

73. *Leon*, 468 U.S. at 940-41 (Brennan, J., dissenting).

74. Justice Stewart explained:

Conversely, the Court discounted the rule's benefits by denying that the exclusionary rule could deter magistrates. Mistakenly focusing on the rule's role in deterring "the occasional ill-spirited magistrate," the Court did not consider the rule's more general role—to encourage magistrates to take their warrant-issuing function seriously.[75] The rule deters magistrates by encouraging them to err in favor of constitutional behavior.[76] Specifically, an appellate court's suppression of evidence seized under an invalid warrant sends a message to the issuing magistrate that her mistakes are of consequence, and accordingly, she must review applications vigilantly.

The Court further minimized the benefits of the rule by narrowly construing the rule's deterrent effect on police misconduct. According to the Court, the rule's deterrent effect operates only when police knew or should have known that they were acting unconstitutionally.[77] By focusing exclusively on the rule's deterrent effect on individual police officers, however, the Court ignored two other important ways in which the exclusionary rule deters police misconduct.[78] First, through its general deterrent effect, the rule deters police officers as a group.[79] Second, through its systemic deterrence function, the exclusionary rule promotes institutional compliance with Fourth Amendment requirements. For example, police departments may develop training programs and guidelines to educate officers on how to

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> Much of the criticism levelled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. . . .
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> . . .
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> The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipatod and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.

Stowart, 83 Colum. L. Rev. at 1392-93 (cited in note 41).

75. See LaFave, 1 *Search and Seizure* § 1.3(d) at 55 (citod in note 5) (quoting *Leon*, 468 U.S. at 916) (explaining that the Court's statoment that it had no evidence before it that magistrates were "inclined to ignore or subvert the Fourth Amendment" revealed that it focused on intentional noncompliance of issuing magistrates rather than noncompliance resulting from carelessness).

76. LaFave, 1 *Search and Seizure* § 1.3(d) at 55 (cited in noto 5) (citing *United States v. Johnson*, 457 U.S. 537, 561 (1982)).

77. LaFave, 1 *Search and Seizure* § 1.3(d) at 57 (citod in note 5). See *Leon*, 468 U.S. at 918-19 (rejecting the notion that the exclusionary rule could have any detorrent effect when police act in an objectively reasonable manner).

78. Professors Mertens and Wasserstrom refer to the rule's effect on individual police officers who have violated the Fourth Amendment and thus had evidence suppressed as its special deterrent function. Mertens and Wasserstrom, 70 Georgetewn L. J. at 394 (citod in note 4) (identifying the three ways in which the exclusionary rule deters police misconduct).

79. Id.

conduct legal searches and seizures.[80] Therefore, the *Leon* Court minimized the exclusionary rule's benefits by focusing exclusively on the rule's special deterrent effect.

The numerous errors and oversights in the Court's cost-benefit analysis suggest that the *Leon* Court manipulated its analysis to reach a predetermined result. Indeed, two commentators accused the Court of balancing these costs and benefits "with its thumb on the scale."[81] Two reasons explain why balancing the costs and benefits of the exclusionary rule necessarily may involve the imposition of a value judgment on the part of the Court. First, the costs and benefits of the rule are not subject to precise empirical quantification.[82] Second, the Court's cost-benefit analysis attempts the impossible task of weighing the defendant's privacy interest against society's interest in the suppression of crime.[83] In any event, *Leon* clearly did not contain a fair and honest assessment of the costs and benefits of exclusion.[84]

C. *The Unsettling Consequences of* Leon

Ultimately, the Court's denial of the constitutional right to exclusion and its faulty balancing analysis permitted it to recognize a constitutional violation to which no sanction attaches.[85] Under *Leon,* a search unsupported by probable cause but executed pursuant to a facially valid warrant is legal. The Court thus failed to treat the Fourth Amendment as law.[86] *Leon* thereby reduces Fourth Amendment protection substantially.

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80. Id. See also *Leon,* 468 U.S. at 953 (Brennan, J., dissenting) (asserting that the rule's chief deterrent function is to promote institutional compliance with the Fourth Amendment on the part of law enforcement agencies).

81. Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 87 (cited in note 5).

82. Id. The benefits are even more difficult to quantify than the costs because they are conjectural, essentially measuring non-events. Kamisar, 16 Creighton L. Rev. at 621 (cited in note 4).

83. Kamisar, 16 Creighton L. Rev. at 646-48 (cited in note 4).

84. As Justice Brennan observed, "[W]e have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand." *Leon,* 468 U.S. at 929 (Brennan, J., dissenting).

85. Dripps, 95 Yale L. J. at 907, 933-34 (cited in note 5). Justice Stevens declared: "Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding." *Leon,* 468 U.S. at 977 (Stevens, J., dissenting). He noted that civil damages are not available in the cases in which the good faith exception would apply. Id. at 977 n.35.

86. Dripps, 95 Yale L. J. at 933-34 (cited in note 5). The majority's disregard of the Fourth Amendment's mandates was so glaring that it prompted Professor Dripps to declare, "I sincerely doubt that the members of the *Leon* majority would have put the Fourth Amendment in the

Leon, furthermore, threatens to erode the probable cause standard because it removes some of the incentives that the exclusionary rule creates for police, magistrates, and police departments.[87] First, it tells police that they only need obtain a warrant, not a warrant that will necessarily stand up on review.[88] The good faith exception thereby encourages police to spend less time establishing probable cause and more time shopping for a sympathetic magistrate.

Second, it tells magistrates that their mistakes are of little consequence because evidence seized under a defective warrant generally will be admissible under the good faith exception.[89] *Leon* thus removes the rule as an incentive to encourage magistrates to be vigilant in performing their warrant-issuing duties.[90] Third, *Leon* renders magistrates' decisions virtually unreviewable because reviewing courts probably will determine the good faith issue before reaching the underlying Fourth Amendment issue in the case.[91] Accordingly, it diminishes the rule's role in guiding magistrates in deciding close Fourth Amendment cases.[92] Fourth, *Leon* places a premium on police ignorance of the law because evidence seized under an invalid warrant generally will be admissible.[93] *Leon*, therefore, encourages police departments to train officers simply to rely on a sigued warrant rather than to scrutinize the magistrate's probable

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Constitution. What after all is the point of a law whose observance is a 'cost' and whose violation is 'objectively reasonable?'" Id. at 948.

87. Although one study conducted after *Leon* tentatively concluded that the short-term effect of the decision was minimal, it emphasized that "[b]ecause of the constraints of the short span of time since the *Leon* decision and the non-experimental design of the study, no determination could be made of the lasting effects of the ruling." Craig D. Uchida, et al., *Acting in Good Faith: The Effects of* United States v. Leon *on the Police and the Courts*, 30 Ariz. L. Rev. 467, 494 (1988). The study then predicted that "a more substantial impact may be observed in the future." Id.

88. Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 109 (cited in note 5).

89. *Leon*, 468 U.S. at 956 (Brennan, J., dissenting).

90. Id. (predicting that "[i]nevitably, the care and attention devoted te such an inconsequential chore will dwindle").

91. Although the majority asserted that "nothing will prevent reviewing courts from deciding [the nnderlying Fourth Amendment] question before turning to the good-faith issue," id. at 925, the dissenters stressed the unlikelihood of busy courts issuing these essentially advisory opinions. Id. at 957 (Breiman, J., dissenting).

92. See Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 112 (cited in noto 5) (explaining that although magistrates and police most need guidance from courts as to what constitutes probable cause in close Fourth Amendment cases, these are precisely the cases that courts are likely te dispose of without reaching the merits of the Fourth Amendment claims).

One commentator argnes that *Leon* ultimately does less te effect an exception to the exclusionary rule than to replace a substantive definition of probable cause with a procedural one: "[P]robable cause within bonnds of plain error is whatever a magistrate says it is." Dripps, 95 Yale L. J. at 907 (cited in note 5).

93. *Leon*, 468 U.S. at 955 (Brennan, J., dissenting).

cause determination independently.[94] As such, *Leon* destroyed some of the rule's institutional incentives.[95]

The most unsettling consequence of *Leon* is its effect on the future of the exclusionary rule.[96] Although the Court made it appear that it only slightly restricted the exclusionary rule, similar to decisions in *Stone v. Powell*,[97] *United States v. Calandra*,[98] and *United States v. Janis*,[99] in fact, it took a much larger leap.[100] The Court in those earlier cases whittled away at the exclusionary rule in proceedings collateral to the criminal prosecution itself, whereas the *Leon* Court concluded for the first time that the costs of the exclusionary rule outweighed its benefits in the prosecution's case-in-chief.[101] *Leon* thus opened the door to further incursions on the exclusionary rule.

IV. THE PROPER GROUNDS FOR STATE COURT DIVERGENCE FROM FEDERAL LAW

Leon provides state courts with several compelling reasons to reject the good faith exception. State courts may challenge *Leon* because it: (1) denied the constitutional foundations of the exclusionary rule, (2) rested on an incorrect assessment of the costs and benefits of exclusion, and (3) substantially reduced Fourth Amendment protection. The central question for courts, therefore, is determining the proper grounds for divergence from federal law. Is disagreement with Supreme Court reasoning and result sufficient to justify

94. Id.

95. For a discussion of the institutional incentives the exclusionary rule creates, see note 80 and accompanying text (discussing the rule's systemic deterrence function).

96. See Duke, 95 Yale. L. J. at 1422 (cited in note 5); LaFave, 1984 U. Ill. L. Rev. at 930 (cited in note 5) (predicting that the temptation will be great to extend the good faith exception to without-warrant cases); Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 91 (cited in note 5) (referring to the bleak future of the exclusionary rule after *Leon*).

97. 428 U.S. 465 (1976).

98. 414 U.S. 338 (1974).

99. 428 U.S. 433 (1976).

100. LaFave, 1 *Search and Seizure* § 1.3(b) at 50 (cited in note 5).

101. Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 90 (cited in note 5); LaFave, 1 *Search and Seizure* § 1.3(b) at 50-51 (cited in note 5).

divergence?[102] New federalism commentators have grappled with this question since the movement's beginnings.[103]

Two decades after the exclusionary rule's inception, commentators have reached an "overwhelming consensus"[104] that reactive rulings—those based merely on disagreement with Supreme Court reasoning and result—are inappropriate.[105] Most commentators, including dissenters in reactive decisions,[106] simply assume that these decisions are inherently unprincipled or illegitimate.[107] Others argue that courts employing reactive decisionmaking do not accord proper respect to the Supreme Court,[108] assume the legislative function,[109]

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102. This question is one of propriety, not right. Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297, 298 (1977). State courts clearly have the right to interpret their state constitutions independently provided they do not violate Supreme Court interpretations of federal law. See note 6.

103. New federalism developed in the mid-1970s in response te the conservatism of the Burger Court. Gardner, 90 Mich. L. Rev. at 771 (cited in note 8). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rov. 489 (1977) (urging state courts to "step into the breach" left by the Supreme Court's retreat from its role as the guardian of individual rights). As the seminal work of the new federalism movement, commentaters have referred to Brennan's article as the "Magna Carta of state constitutionalism." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983). Because dissatisfaction with the Supreme Court's results essentially birthed the new federalism movement, much of the debate naturally focused on the question of whether this dissatisfaction, by itself, justified divergence from federal law.

104. Gardner, 90 Mich. L. Rev. at 772 (cited in note 8).

105. See, for example, Ronald K.L. Collins, *Relevance on State Constitutions—Away from a Reactionary Approach*, 9 Hastings Const. L. Q. 1, 2-3 (1981); George Deukmejian and Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 Hastings Const. L. Q. 975, 988-89 (1979); Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L. Rev. 731, 779, 786 (1982); A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 Emerging Issues in St. Const. L. 1, 12-13 (1988); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denver U. L. Rev. 85, 95 (1985); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399, 418 (1987); Johansen, Note, 29 Stan. L. Rov. at 300 (cited in note 102).

106. For examples of cases in which dissenters have leveled this criticism at the majority opinion, see Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rov. 1141, 1177 (1985); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353, 357-58 n.18 (1984); Johansen, Note, 29 Stan. L. Rov. at 297 n.7 (cited in note 102).

107. See, for example, Deukmejian and Thompson, 6 Hastings Const. L. Q. at 988-89 (cited in note 105); Kaye, 61 St. John's L. Rev. at 418 (cited in note 105); Howard, 1 Emerging Issues in St. Const. L. at 13 (cited in note 105); Hudnut, 63 Denver U. L. Rov. at 95 (cited in note 105); Johansen, Note, 29 Stan. L. Rev. at 297, 300, 318 (cited in note 102).

108. Hudnut, 63 Denver U. L. Rev. at 95 (cited in note 105).

109. Deukmejian and Thompson, 6 Hastings Const. L. Q. at 999-1006 (cited in note 105).

undermine the judicial process,[110] degrade the state constitution,[111] and fail to produce a coherent corpus of state constitutional law.[112]

In response to the widespread condemnation of reactive rulings, state court judges[113] and commentators have formulated criteria to justify state court divergence from federal law.[114] Although the lists vary slightly, they generally include the following: (1) textual difference in the state and federal constitutions, (2) differing legislative history, (3) state law precedents predating the Supreme Court decision, and (4) distinctive qualities of the state or its citizenry.[115] In developing these criteria, state court judges and commentators have produced what has been termed the doctrine of unique state sources.[116] Under this doctrine, divergence is justified only when one of the state-specific factors[117] supports a different outcome. The doctrine of unique

110. Id. at 1006-09.

111. Collins, 9 Hastings Const. L. Q. at 14 (cited in note 105) (arguing that reactive decisionmaking reduces the state constitution to a "plaything").

112. Id. at 16 (asserting that the reactive approach "produces a handful of state constitutional decisions that are no more than aberrations, linked neither in logic nor precedent to any sustaining corpus of state law").

113. Justice Handler's concurring opinion in New Jersey's *State v. Hunt* provides an excellent example of criterion justification. See *State v. Hunt*, 91 N.J. 338, 450 A.2d 952, 965-67 (1982) (Handler, J., concurring). Justice Handler listed seven criteria that would justify reaching a different result than the Supreme Court had reached: (1) a textual difference between the state and federal provisions, (2) legislative history of the provision indicating that the state legislature meant to afford greater protection under the state provision than Congress gave under its federal counterpart, (3) state decisions predating the Supreme Court decision, (4) differences in state and federal structure, (5) matters of particular stato or local interest, (6) state history or traditions, and (7) distinctive public attitudes in the state. Id. In contrast, Justice Pashman, in his concurrence, argued that a state court should not hesitate to reject a Supreme Court opinion even if no state-specific facters support divergence. See id. at 960 (Pashman, J., concurring) (asserting that "[w]hen this Court considers that important constitutional rights are inadequately protected by the federal constitution, we have an obligation under the State Constitution to supply that protection"). See also *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199, 1217 (1980) (Horowitz, J., dissenting).

114. See, for example, Deukmejian and Thompson, 6 Hastings Const. L. Q. at 987-96 (cited in note 105); Galie, 33 Syracuse L. Rev. at 733 (cited in note 105); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873, 933-34 (1976); Hudnut, 63 Denver U. L. Rev. at 103-07 (cited in noto 105); Kaye, 61 St. John's L. Rev. at 420 (cited in note 105); Johansen, Note, 29 Stan. L. Rev. at 318-19 (cited in note 102). See also Ronald K. L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 Wash. L. Rev. 5, 6-7, 10 (1989) (discussing the commentators' insistence on neutral criteria to justify state court divergence from a Supreme Court case); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1360-62 (1982) (explaining that state-specific factors provide one ground for divergence from federal law); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1147, 1152-53 (1993) (asserting that a "doctrine of unique state sources" has developed); Williams, 35 S.C. L. Rev. at 355-59, 385-89 (cited in note 106) (discussing the trend among state court judges and commentators to formulate criteria to justify state court divergence from the federal result).

115. Collins, 64 Wash. L. Rev. at 10 (cited in note 114) (stressing that analytical soundness is the missing criterion).

116. Kahn, 106 Harv. L. Rev. at 1147, 1152 (cited in note 114).

117. 95 Harv. L. Rev. at 1361 (cited in note 114).

state sources implies that a state-specific factor supporting divergence somehow legitimates a state court decision and ensures that it is principled.

V. THE STATES' REJECTIONS OF *LEON*

Five of the eight state supreme courts that have rejected *Leon* on state constitutional grounds have done so purely on the basis of their dissatisfaction with the Supreme Court's reasoning and result. Although some courts have offered more detailed discussions of the *Leon* exception than others, their decisions are all reactive. In contrast, the remaining three state supreme court decisions that rejected *Leon* relied on state-specific factors to justify their divergence from the Supreme Court result.

In its 1985 decision, *People v. Bigelow*, the New York Court of Appeals became the first state supreme court to decline to adopt the *Leon* good faith exception under its state constitution.[118] The *Bigelow* court summarily rejected *Leon,* asserting that the good faith exception frustrates the exclusionary rule's purpose, places a premium on police illegality, and creates an incentive for future unlawful police conduct.[119]

Although the New Jersey Supreme Court offered a more thorough analysis of the good faith exception than the New York court did, its rejection of *Leon* in *State v. Novembrino*[120] was likewise reactive. Ultimately, the *Novembrino* court based its rejection of *Leon* on the unavoidable tension it perceived between the good faith exception and the New Jersey Constitution's guarantee that search warrants "shall not issue except upon probable cause."[121] The court further indicated that the exclusionary rule was constitutionally mandated in New Jersey,[122] but it offered no case law supporting this proposition. Therefore, this assertion does not help *Novembrino* to escape the reactive label.

Similarly, the Connecticut and Vermont courts relied exclusively on criticisms of *Leon* to reject the good faith exception under their state constitutions. In *State v. Marsala,*[123] the Connecticut court thoroughly and persuasively attacked both the *Leon* Court's cost-

118. 66 N.Y.2d 417, 488 N.E.2d 451 (1985).
119. Id. at 458.
120. 105 N.J. 95, 519 A.2d 820 (1987).
121. Id. at 855.
122. Id. at 856-57 n.39.
123. 216 Conn. 150, 579 A.2d 58 (1990).

benefit analysis[124] and the effects of its decision,[125] holding that the Connecticut Constitution does not recognize the good faith exception.[126] In *State v. Oakes*,[127] the Vermont Supreme Court discussed the many flaws in the *Leon* Court's cost-benefit analysis, emphasizing that sufficient empirical data does not exist to assess the costs and benefits of the good faith exception accurately.[128] The court then declined to subject its state exclusionary rule to the "uncertain effects" of the good faith exception.[129]

Most recently, the New Mexico Supreme Court declined to adopt the *Leon* exception under its state constitution in *State v. Gutierrez*.[130] Like the New York, New Jersey, Counecticut, and Vermont courts, the New Mexico court did not rely on a state-specific factor to reject *Leon*. Nonetheless, the New Mexico court apparently did attempt to find a state-specific factor to support its divergence from federal law. The *Gutierrez* court examined its state search and seizure jurisprudence, but concluded that it begrudgingly accepted the federal exclusionary rule and did not analyze the state provision proscribing unreasonable searches and seizures independently.[131] In addition, it reviewed the history of its search and seizure provision but concluded that the history was unclear.[132] Although the New Mexico court found no state-specific factor supporting divergence, it ultimately rejected *Leon*.[133] The court explained that the basis articulated for its state exclusionary rule—to effectuate the constitutional right in the case at bar[134]—was incompatible with the good faith exception.[135]

In contrast to *Bigelow, Novembrino, Marsala, Oakes,* and *Gutierrez,* in *State v. Carter*,[136] the North Carolina court relied on a state-specific factor to reject *Leon*. The *Carter* court based its rejection of the *Leon* exception on the state's public policy to exclude evidence

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124. Id. at 64-67.
125. Id. at 68.
126. Id.
127. 157 Vt. 171, 598 A.2d 119 (1991).
128. Id. at 122-26.
129. Id. at 127.
130. 863 P.2d 1052 (N.M. 1993).
131. Id. at 1061. The court cited the one instance in which it had diverged from federal search and seizure jurisprudence in *State v. Cordova*, 109 N.M. 211, 784 P.2d 30 (1989), in which the New Mexico court rejected *Illinois v. Gates*, 462 U.S. 213 (1989). *Gutierrez*, 863 P.2d at 1061.
132. *Gutierrez*, 863 P.2d at 1064.
133. Id. at 1067.
134. Id. at 1066, 1067. By defining the basis of the state exclusionary rule in this way, the New Mexico court candidly acknowledged that it broke with its own precedent. See id. at 1061 (explaining that it followed the Supreme Court in adopting the deterrence rationale for the exclusionary rule in *State v. Snedeker*, 99 N.M. 286, 657 P.2d 613 (1982)).
135. *Gutierrez*, 863 P.2d at 1068.
136. 322 N.C. 709, 370 S.E.2d 553 (1988).

obtained in violation of its constitution's search and seizure provision. According to the court, the state statute that codified the exclusionary rule expressed this policy.[137] The North Carolina court reasoned that the legislature should be responsible for creating a good faith exception to the exclusionary rule statute.[138] In basing its decision on public policy as revealed by a state statute, the North Carolina court apparently relied on a distinctive state quality to justify divergence.[139] Therefore, *Carter* escapes the reactive label.

The Pennsylvania Supreme Court in *Commonwealth v. Edmunds*[140] also relied on a state-specific factor to support its rejection of *Leon*.[141] It explained that the Pennsylvania Constitution's search and seizure provision, adopted prior to the Fourth Amendment,[142] embodies a strong right of privacy, as case law construing the provision indicated.[143] Accordingly, the court asserted that the purpose behind its state exclusionary rule is to protect the right to privacy of Pennsylvania's citizens rather than to deter police misconduct.[144] The court concluded that the good faith exception would emasculate the strong right of privacy inherent in the state search and seizure provision as well as its probable cause requirement.[145]

Like the Pennsylvania court, the Idaho court in *State v. Guzman*[146] identified state precedent that supported divergence from *Leon*. Specifically, it explained that its state exclusionary rule is constitutionally mandated[147] and that the purposes underlying it are

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137. Id. at 559, 562.

138. Id. at 562.

139. A distinctive state quality is one of the state-specific factors that justifies divergence under the doctrine of unique state sources. See notes 113-17 and accompanying text.

140. 526 Pa. 374, 586 A.2d 887 (1991).

141. Before turning to the issue of whether it would adopt the good faith exception under its state constitution, the Pennsylvania Supreme Court established a four-step methodology to analyze state constitutional issues. It enumerated four factors that it would consider in deciding state constitutional issues: (1) the text of the provision; (2) the history of the provision, including state case law; (3) related case law from other states; and (4) policy considerations, including matters of unique state and local concern. Id. at 895. *Edmunds* thus underscores the trend among state courts te develop criteria that justify divergence from a Supreme Court decision.

142. Id. at 896.

143. Id. at 897.

144. Id. But see id. at 907-08 (McDermott, J., dissenting) (asserting that the state exclusionary rule's purpose always had been to deter police misconduct and criticizing the majority's misuse of precedent); Note, *Pennsylvania Refuses to Take the* Leon *Leap of Good Faith*—Commonwealth v. Edmunds, *586 A.2d 887 (Pa. 1991)*, 65 Temple L. Rev. 733, 746-50 (1992) (discussing the majority's break with precedent).

145. *Edmunds*, 586 A.2d at 899.

146. 122 Idaho 981, 842 P.2d 660 (1992).

147. Id. at 671.

broader than those behind the federal rule.[148] According to the court, the Idaho exclusionary rule is meant to: (1) provide an effective remedy for violations of its search and seizure provision, (2) encourage thoroughness in the warrant-issuing process, (3) prevent the judiciary from committing a second violation of the search and seizure provision by admitting illegally seized evidence, (4) preserve judicial integrity, and (5) deter police misconduct.[149] Because it concluded that the good faith exception was incompatible with the multiple purposes behind its state exclusionary rule, the Idaho Supreme Court rejected *Leon*.[150]

VI. A DEFENSE OF THE REACTIVE RULINGS

The majority of state court decisions that reject *Leon* are reactive because they are based solely on dissatisfaction with the Supreme Court's reasoning and result rather than state-specific factors. According te the "overwhelming consensus"[151] among new federalism commentators, these decisions are inherently unprincipled and illegitimate. The commentators' denunciation of reactive rulings and the resulting doctrine of unique state sources, however, rest on fundamentally flawed premises.

The new federalists' condemnation of reactive rulings is unjustified because it is based on a presumption of correctness accorded to Supreme Court decisions.[152] Although few of the commentators make this presumption explicit,[153] it clearly is present in their writ-

148. Id.
149. Id. at 672.
150. Id. at 671-72.
151. Gardner, 90 Mich. L. Rev. at 772 (cited in note 8).
152. As one commentator explained, "The Supreme Court decision casts a shadow over subsequent state litigation on what otherwise would be purely a question of state constitutional interpretation. The shadow seems te create a presumption of correctness, thus requiring a state court clearly to articulate reasons justifying a contrary result." Williams, 35 S.C. L. Rev. at 356 (cited in note 106). See Collins, 64 Wash. L. Rev. at 6-8 (cited in note 114) (asserting that the new federalism critics assume that federal law is the "analytical yardstick by which te determine the legitimacy of state law decisions" and that state decisions that diverge are seen as "presumptively (if not conclusively) suspect"); George E. Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 Am. J. Crim. L. 109, 124-25 (1983) (observing the tendency to view Supreme Court decisions as presumptively appropriate in state constitutional analysis); Maurice Kelman, *Foreward: Rediscovering the State Constitutional Bill of Rights*, 27 Wayne L. Rev. 413, 421, 431-32 (1981) (describing the analogous pressure or influence of Supreme Court decisions on state courts that leads the courts to view Supreme Court analyses and results as presumptively appropriate). See also Dix, 11 Am. J. Crim. L. at 124-25 n.60 (asserting that the Supreme Court formally recognized the pressure its decisions exerted on state courts in *Michigan v. Long*, 463 U.S. 1032 (1983)).
153. But see Hudnut, 63 Denver U. L. Rev. at 95 (cited in note 105) (arguing that reactive decisions "signal[] a lack of respect by state court judges for precedent and the United States Supreme Court").

ings. Otherwise, the commentators would not suggest that additional justification beyond dissatisfaction with federal constitutional holdings is necessary for state court rejection of a Supreme Court decision. According a Supreme Court decision a presumption of correctness in the context of state constitutional litigation is incorrect for three reasons.

First, the presumption of correctness is not based on the soundness of the Court's reasoning but on its institutional position as the highest court in the land.[154] Accordingly, this approach places a premium on the institutional aspect of constitutional interpretation at the expense of independent state interpretation. Therefore, the presumption accords Supreme Court decisions too much deference in the context of state constitutional decisionmaking.[155] Furthermore, although the presumption arguably rests on the desirability of uniformity between federal and state law,[156] uniformity is not clearly of sufficient importance to support the presumption argument.[157] Particularly in the exclusionary rule context, precedent suggests that uniformity between the state and federal levels is not essential, as the New Jersey Supreme Court noted in *Novembrino*.[158] In short, neither the Court's institutional position nor the uniformity concern justify the presumption.

Second, the presumption disregards the different institutional positions of state and federal courts. Supreme Court decisions are not presumptively appropriate guides for state courts because of the institutional limitations inherent in Supreme Court federal constitutional rulings.[159] Supreme Court decisions, at least those interpreting the Fourteenth Amendment, must operate across the nation; therefore, they invariably represent the "lowest common

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154. Williams, 35 S.C. L. Rev. at 356 (cited in note 106).

155. Id. at 388.

156. See Dix, 11 Am. J. Crim. L. at 125 (cited in note 152) (explaining that the presumption of appropriateness of Supreme Court decisions apparently rests on the uniformity concern). See also Hudnut, 63 Denver U. L. Rev. at 90-93 (cited in note 105) (asserting that state court divergence from federal constitutional precedent creates a lack of uniformity, among other problems, and presenting arguments in favor of uniformity). But see Collins, 64 Wash. L. Rev. at 15 (cited in note 114) (arguing that our dual constitutional system, not state court divergence from federal law, creates the uniformity problems).

157. Dix, 11 Am. J. Crim. L. at 125 (cited in note 152).

158. *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820, 855 (1987) (citing *Wolf v. Colorado*, 338 U.S. 25, 28-33 (1949)).

159. Williams, 35 S.C. L. Rev. at 389 (cited in note 106). For a discussion of the institutional limitations on Supreme Court federal constitutional decisions, see generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 971 (1985).

denominator."[160] Thus, federalism concerns restrain the Court's constitutional analysis.[161] In fact, the resulting underenforcement of federal constitutional guarantees by the Supreme Court has been documented.[162] Because these institutional limitations do not constrain state courts, however, one should not view Supreme Court decisions as presumptively correct in the context of state constitutional decisionmaking.[163]

Third, and most significant, the presumption of correctness accorded Supreme Court decisions misconstrues the essence of constitutionalism. Constitutionalism is not a set of truths but an interpretive enterprise.[164] Interpretations of broad, open-ended constitutional rights are neither presumptively correct nor presumptively incorrect.[165] At least to the extent that a Supreme Court decision rests on factual assumptions with which reasonable persons could differ,[166] it is not entitled to a presumption of correctness.[167]

Likewise, the doctrine of unique state sources rests on a mistaken assumption. As Professor Paul Kahn has argued persuasively, the doctrine of unique stato sources assumes that people of a state have a unique political identity revealed through the text and history of the state constitution.[168] That any meaningful state identity exists

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160. Williams, 35 S.C. L. Rev. at 389 (cited in note 106) (quoting *Alderwood Assocs. v. Washington Envir. Council*, 96 Wash. 2d 230, 635 P.2d 108, 115 (1981)).

161. See Sager, 91 Harv. L. Rev. at 1217-18 (cited in note 159). Professor Sager distinguishes between institutional and analytical limitations on the Supreme Court's constitutional rulings. The institutional limitations derive from the position of the Court in the governing structure while analytical limitations are intrinsic te the particular clause that the Court is interpreting. Sager refers to federalism as an institutional, rather than an analytical, limitation. Id.

162. Id. at 1218-20.

163. See id. at 1221 (arguing that because of state courts' different institutional position, they should be free to expand federal constitutional rights to their analytic limits).

164. "[C]onstitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order." Kahn, 106 Harv. L. Rev. at 1147-48 (cited in note 114). See also id. at 1156-59.

165. See 95 Harv. L. Rev. at 1396 (cited in note 114) (stating that "[a]cross jurisdictions, alternative interpretations of an open-ended right cannot be considered illegitimate"); Williams, 35 S.C. L. Rev. at 402 (cited in note 106) (stating that "[t]he Supreme Court does not have a monopoly on correct constitutional interpretation").

166. *Leon* contains many of these assumptions: (1) the exclusionary rule is a remedy, not a constitutional right; (2) the exclusionary rule does not deter issuing magistrates; (3) the rule can have no deterrent effect on police officors when they act in an objectively reasonable manner. See generally notes 19-35 and accompanying text.

167. Dix, 11 Am. J. Crim. L. at 125-26 (cited in noto 152).

168. Kahn asserts, "To rest state constitutionalism on an idea of the state as an already-defined historical community, with a text that can be interpreted to reflect the unique political identity of members of that community, is to try to build a serious legal doctrine on what may be no more than an anachronism or romantic myth." Kahn, 106 Harv. L. Rev. at 1160 (cited in noto 114).

today, however, is doubtful.[169] As such, the doctrine of unique state sources rests on an anachronistic ideal. Moreover, the text and history of a state constitution likely do not reflect the unique, evolving political identity of the state's citizens.[170] Professor Kahn therefore rejects the doctrine of unique state sources. He argues that state courts must be free to draw on a wide range of factors to develop their best interpretations of state constitutional values.[171]

The commentators' categorical rejection of reactive decisions and the resulting doctrine of unique state sources are both ultimately unpersuasive. Thus, no reason exists to consider reactive decisions less principled or legitimate than those decisions that base their rejections of a Supreme Court decision on a state-specific factor.

VII. CONCLUSION

Reactive rulings are not inherently illegitimate or unprincipled; therefore, state courts should feel compelled to follow Supreme Court precedent only to the extent that they find it persuasive. Although state-specific factors can serve as guides in state constitutional decisionmaking, they must not serve as necessary conditions for divergence.[172] If a state court allows the doctrine of unique state sources to serve as a limitation on its authority to disagree with a Supreme Court result, it effectively abdicates its obligation to interpret its state constitution.[173] Because the Supreme Court's reasoning and result in

169. Id. See also Gardner, 90 Mich. L. Rev. at 828 (cited in note 8) (discussing the "collapse of meaningful state identity").

170. Kahn explains, "Substantively, it would be remarkable if the authors of each of these state sources . . . had resolved and codified distinct answers to our common constitutional problems. Even if they had, given the mobility and changing character of teday's citizens, there is no reason te believe that there is a substantial coherence between the actual community's values and those sources." Kahn, 106 Harv. L. Rev. at 1160-61 (cited in note 114) (footnotes omitted).

171. Id. at 1161.

172. Williams, 35 S.C. L. Rev. at 402 (cited in note 106).

173. See Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 Va. L. Rev. 1085, 1126 n.138 (1982) (arguing that limiting state court independent interpretations of their state constitutions to situations in which a textual difference exists between the federal and state provisions "is to deny state courts the fundamental power to interpret their constitutions as they see fit"). As the Vermont Supreme Court remarked in *State v. Oakes*, 157 Vt. 171, 598 A.2d 119 (1991), the *Leon* Court's assessment of the costs and benefits of exclusion "can inform this Court's decision on the good faith exception only to the extent that it is persuasive. If the assessment is flawed, this Court cannot simply accept the conclusion the Supreme Court draws from it. To do so would be contrary to our obligation to ensure that our state exclusionary rule effectuates Article 11 rights, and would disserve those rights." Id. at 122.

Leon are unpersuasive, state courts should continue to reject *Leon* on state constitutional grounds, even if no state-specific factor supports divergence.

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