Lockstep Analysis and the Concept of Federalism

By EARL M. MALTZ

ABSTRACT: Commentators on state constitutional law have been generally critical of those state courts that follow lockstep analysis. Often these criticisms have relied heavily on the concept of federalism. This reliance is misplaced; lockstep analysis is entirely consistent with basic notions of state autonomy. Instead, it is courts using other approaches that have at times ignored the basic theory of federalism.

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THE rhetoric of federalism has played an important role in the discussion of current developments in state constitutional law. In particular, it has dominated criticism of those courts that have adopted lockstep analysis—the theory that state constitutional provisions should be interpreted to provide exactly the same protections as their federal constitutional counterparts. Commentators have consistently contended that adoption of the lockstep approach is inconsistent with basic principles of state autonomy.

This article will challenge that assertion. The article will begin by describing one of the most controversial lockstep cases and the reaction to the case. It will proceed to demonstrate that lockstep analysis is entirely consistent with the basic concept of American federalism. The article will conclude by arguing that concerns of state autonomy are in fact more heavily implicated when courts adopt other approaches to state constitutional adjudication.

THE LOCKSTEP APPROACH

The Montana case of *State* v. *Jackson*[1] engendered a heated dispute over the desirability of adopting the lockstep approach. *Jackson* began as a prosecution for drunk driving; at issue was the admissibility into evidence of the defendant's refusal to take a breathalyzer test at the time of his arrest. The defendant claimed that such a refusal was testimonial and that, therefore, the admission of the evidence would violate his right to be free from self-incrimination. This right was guaranteed by both the federal and the state constitutions.

Initially, the state supreme court found the evidence inadmissible by a 4-3 vote.[2] The dissenters argued that Montana had adopted the lockstep approach to self-incrimination issues and that federal constitutional law did not bar the use of the evidence.[3] The majority opinion, by contrast, concluded that the evidence was inadmissible under the Fifth Amendment and that "the issue is also controlled by the [self-incrimination provision] of our own constitution." The majority did not specifically address the question of whether the state constitutional protections might differ from those provided by federal law; in its discussion of the state provision, however, the opinion cited only federal cases to support its conclusion.[4]

The state petitioned the U.S. Supreme Court for a writ of certiorari. Prior to disposition of the writ, the Court held in *South Dakota* v. *Neville* that admission of the type of evidence at issue in *Jackson* did not violate any federal constitutional norms.[5] The Court then vacated *Jackson* and remanded the case for further consideration in light of *Neville*.[6] The action clearly presaged the adoption of the much-maligned rule of *Michigan* v. *Long*:

> When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy of any possible state ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law *required* it to do so.[7]

1. 637 P.2d 1 (1981), *vacated*, 460 U.S. 1030, *rev'd*, 672 P.2d 255 (1983).

2. 637 P.2d 1 (1981).

3. Ibid., pp. 5-10 (C. J. Haswell, dissenting).

4. Ibid., pp. 4-5. The majority did cite one Montana case for the purpose of distinguishing it from *Jackson*.

5. 459 U.S. 553 (1983).

6. 460 U.S. 1030 (1983).

7. 463 U.S. 1032, 1040-41 (1983).

On remand, the Montana Supreme Court reversed its earlier stance by a 5-2 margin.[8] All members of the majority firmly embraced the lockstep approach to self-incrimination issues, concluding that in this area of law "'the Montana constitutional guaranty affords no greater protection than that of the Federal constitution.'"[9] This conclusion brought a bitter dissent from Justice Daniel J. Shea, the author of the original majority opinion in *Jackson*. He asserted that "the majority has abdicated [its] responsibility by . . . permit[ting] the United States Supreme Court to tell us what our state constitution means."[10]

Advocates of other approaches have often relied on the concept of state autonomy in criticizing cases such as *Jackson*. Echoing Justice Shea, for example, Robert F. Williams has charged that the lockstep approach "constitutes an unwarranted delegation of state power to the Supreme Court and a resultant abdication of state judicial responsibility."[11] Similarly, Ronald K.L. Collins has accused the second *Jackson* majority of "the abdication of an obligation duly imposed on state judges to be the final arbiters of state law."[12] In essence, these and other critics claim that the pure independent approach is a necessary corollary of the theory that each state is a quasi-sovereign entity.

To understand the flaw in this argument, one must first analyze the relationship between state court activism generally and the concept of state autonomy. A minority of commentators seems to believe that such activism per se advances the values of federalism. For example, Justice William J. Brennan claimed that "every believer in our concept of federalism . . . must salute this development [of an increasingly activist posture] in our state courts."[13] Similarly, Donald E. Wilkes has described state court protection of rights not protected by federal law as "a cornerstone of federalism."[14] This argument necessarily rests on the premise that a refusal by a state court to be activist implies that the court is allowing the U.S. Supreme Court to control the interpretation of the state constitution. Given this premise, the negative implications of a lack of judicial activism for the principle of state autonomy are obvious.

The difficulty with the argument is that the premise reflects a fundamental confusion between the decision to take an activist posture and the power to choose whether or not to be activist. Plainly, principles of state autonomy guarantee to the state courts the right to

8. *State* v. *Jackson*, 672 P.2d 255 (Mont. 1983). In part, this decision was a vindication of the *Long* approach to the relationship between the federal courts and state supreme courts. Justice Frank B. Morrison, Jr., whose vote was essential to the original decision, averred explicitly that he had originally voted to suppress only because he had misunderstood the applicable federal law, later authoritatively construed in *Neville*. Thus review by the Supreme Court had served its proper function—correction of state court mistakes in the application of a federal standard.

9. 672 P.2d at 260, quoting *State* v. *Armstrong*, 552 P.2d 616, 619 (1976).

10. Ibid., p. 262.

11. Robert F. Williams, "In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result," *South Carolina Law Review*, 35:353, 404 (1984).

12. Ronald K.L. Collins, "Reliance on State Constitutions—The Montana Disaster," *Texas Law Review*, 63:1095, 1137 (Mar.-Apr. 1985).

13. William J. Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review*, 90:489, 503 (Jan. 1977).

14. Donald E. Wilkes, Jr., "The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?" in *Developments in State Constitutional Law—The Williamsburg Conference*, ed. B. D. McGraw (St. Paul, MN: West, 1985), pp. 166, 183.

adopt any rule of law not inconsistent with the United States Constitution. In exercising this choice, however, a state court may refuse to take a more activist position than that of the U.S. Supreme Court for a variety of reasons. The state court may be persuaded by the reasoning of the Supreme Court on the issue; it may believe that the state constitution provides less protection than the U.S. Constitution; it may even believe that the state constitution does not deal with the relevant issue at all. In any of those cases, the state court will be bound to apply the law as enunciated by the U.S. Supreme Court. This obligation does not imply, however, that the state court accepts the doctrine of the Supreme Court as a binding interpretation of state law; instead, the obligation is derived from the supremacy clause, which binds the state court to honor applicable federal law.

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

The decision of the Utah Supreme Court in *Malan* v. *Lewis*[15] illustrates this point. *Malan* was a challenge to a Utah statute that severely limited the right of nonpaying passengers injured in automobile accidents to maintain negligence actions against their hosts. The U.S. Supreme Court has clearly indicated that such statutes do not violate the equal protection clause of the federal Constitution.[16] The Utah court conceded that the state constitutional provision requiring that "all laws of a general nature shall have uniform operation" embodied the same basic principles as the equal protection clause; indeed, the court purported to derive the appropriate standard of review from federal as well as state case law.[17] Nonetheless, the court found the guest-passenger statute to be inconsistent with the state constitution.

One searches in vain for any enhancement of the autonomy of the state of Utah by the *Malan* decision. The federal government had left Utah free to have a guest statute or not to have a guest statute, at the option of the state. The state legislature had deemed such a statute desirable; the state court found the legislative classification unreasonable. In neither case was any element of the concept of federalism implicated.

Once the link between the concepts of federalism and activism is broken, lockstep analysis emerges in quite a different light. Basically, a decision by a state court to follow such analysis reflects the view that there is no need for additional judicial review in a system where some judicial review is already available in the federal courts. Such a decision does not enhance federal power in any respect; instead, it simply takes account of an unalterable reality—the existence of

15. 693 P.2d 661 (Utah 1984).

16. *Hill* v. *Garner*, 434 U.S. 989 (1977) *dismissing mem.* 561 P.2d 1016; *Silver* v. *Silver*, 180 U.S. 117 (1929).

17. 693 P.2d at 669-74.

federal judicial review—in determining the allocation of authority among state governing bodies. As in *Malan*, the choice is not between federal judicial power and state judicial power, but rather between state judicial power and state legislative power. The courts that advocate lockstep analysis simply choose to allocate maximum power to the state legislature.

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

By contrast, analogous difficulties create very real federalism-related problems for more activist state courts. These difficulties revolve around the application of the concept that federal constitutional decisions create a minimum standard for state court analysis. The remainder of this article will explore the problems that this description has created for some state courts.

THE PROBLEM OF THE FALSE FLOOR

The image of federal constitutional law as a floor in state court litigation pervades most commentary on state constitutional law. Commentators contend that in adjudicating cases, state judges must not apply rules that fall below this floor; courts may, however, appeal to the relevant state constitution to establish a higher ceiling of rights for individuals. Elsewhere I have argued that the entire idea that courts can somehow add to the total volume of rights available to members of society is faced with insuperable analytic difficulties.[18] Even leaving these difficulties aside, however, the concept of the federal floor must be carefully circumscribed.

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

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

State courts following other models are faced with far more difficult problems. Unlike lockstep courts, they cannot claim to be deferring to the state legislatures except when forbidden to do so by the supremacy clause of the federal Constitution; instead, they must make an independent determination of the merits of each claim based solely on

18. Earl M. Maltz, "The Dark Side of State Court Activism," *Texas Law Review*, 63:995, 1007-11 (Mar.-Apr. 1985).

principles of state constitutional law. If that analysis begins with the federal floor, the state court is allowing a federal government body—the U.S. Supreme Court—to define, at least to some extent, the rights guaranteed by the state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a state court deciding whether to expand federal protections as a matter of state law must employ a two-stage process. It must determine independently whether the federal protections themselves are incorporated in the state constitution and only then determine whether those protections are more expansive under state law.[19]

THE PERFORMANCE OF THE COURTS

The plurality opinion of the Oregon Supreme Court in *State* v. *Smith*[20] provides a classic example of proper state court methodology. In *Smith*, two deputy sheriffs came upon the defendant when responding to a report of a vehicle off the road. Prior to either being arrested or receiving his *Miranda* warnings, the defendant admitted that he had been drinking but denied owning the disabled vehicle. After the sheriffs were informed by their dispatcher that the defendant did indeed own the vehicle, the defendant admitted ownership and was then arrested for driving under the influence of intoxicants and given his *Miranda* warnings.

The issue in *Smith* was whether the defendant's prewarning statements were inadmissible as evidence against him. Under the U.S. Supreme Court's ruling in *Berkemer* v. *McCarty*,[21] federal law was no bar to the admission of the statements. Thus the defendant's only viable argument was that the protection against self-incrimination in the Oregon Constitution prevented the statements from being used against him.

The state supreme court rejected this contention. After an extensive review of the Oregon precedents on the subject, Justice J. R. Campbell concluded that state law required only that confessions be voluntary in order to be admitted as evidence.[22] The fact that the defendant incriminated himself prior to receiving *Miranda* warnings thus became irrelevant; because the confession had plainly been voluntary, it could be used against him in court.

The *Smith* result shocked some of those who had hitherto been strong supporters of independent state court analysis. Collins, for example, characterized the decision as "one of the most devastating blows to state constitutional law."[23] Yet the *Smith* opinion merely adopted an approach that reflects the fact that the United States Supreme Court cannot determine the content of state law. Justice Campbell examined the historical development of Oregon law and determined that the federal rule was inconsistent with established state practice. Thus he rejected the federal approach in favor of a different theory.

The *Smith* plurality also demonstrated a commendable sensitivity to the circumstances in which state courts develop their jurisprudence. The opinion suggested that in the absence of a widely applicable federal rule, a different state approach might appropriately be fash-

19. Paul M. Bator, "The State Courts and Federal Constitutional Litigation," *William & Mary Law Review*, 22:605, 605-6 n. 1 (1981).

20. 725 P.2d 894 (1986).

21. 468 U.S. 420 (1984).

22. 725 P.2d at 901-4.

23. *National Law Journal*, 20 Oct. 1986, p. 10, col. 1.

ioned.[24] This observation reflected Campbell's recognition of the reality that state constitutional law does not exist in a vacuum; instead, judges must be aware of the context in which they operate. An important part of this context is the existence of a body of federal constitutional law, which the state courts are powerless to change. In making their decisions, state judges quite properly take the existence of this body of law into account. They cannot, however, allow federal judges to dictate the content of state constitutional doctrine. In short, however one views the precise result in *Smith*, one should admire Justice Campbell's understanding of the basic methodology underlying pure independent analysis.

Unfortunately, the performance of state courts in analyzing search and seizure problems generally has not risen to the same level of excellence. Prior to the decision in *Mapp* v. *Ohio*,[25] state courts were free to consider evidence that was seized in a manner inconsistent with the requirements of the Fourth Amendment. Exercising the discretion available to them under this regime, many states expressly held that as a matter of state law the exclusionary rule did not apply in state criminal prosecutions.[26] *Mapp* changed the rule, holding that evidence seized in violation of the federal Constitution could not be used in any criminal prosecution. In recent years, the U.S. Supreme Court has rendered a variety of decisions that have limited the scope of the *Mapp* requirements. Not surprisingly, litigants often argue that state courts should give a broader reading to the exclusionary rule as a matter of state constitutional law.

These arguments necessarily involve two related but analytically distinct claims. The first claim is that, as a matter of state law, the evidence was seized illegally. The second is that state law requires that illegally seized evidence be suppressed. Given the state of the pre-*Mapp* law and the generally controversial nature of the exclusionary rule itself, one would expect both extensive discussion of the latter issue and substantial disagreement among state courts regarding the appropriate conclusion.

In fact, post-*Mapp* state courts have paid virtually no attention to the question of whether state law bars the admission of illegally seized evidence. Instead, they have generally assumed without discussion that the exclusionary rule should be applied to state constitutional violations as well as their federal counterparts. Even those state courts that had refused to adopt the exclusionary rule prior to 1960 seem to believe that the *Mapp* holding requires that the exclusionary rule be applied to state constitutional claims as well as their federal counterparts.[27] Some of these courts have extended the exclusionary rule beyond the requirements of federal law.

The recent New Jersey Supreme Court decision in *State* v. *Novembrino*[28] provides a dramatic example. In *Novembrino*, the relevant evidence had been seized under a warrant that the court found had been issued without probable cause; the police, however, had acted on the good-faith belief that the warrant was valid. Under these circumstances, the U.S. Supreme Court had held in

24. 725 P.2d at 906.

25. 367 U.S. 643 (1961).

26. See *Elkins* v. *U.S.*, 364 U.S. 206, 224-25 (1960).

27. See, for example, *Wilson* v. *The People*, 398 P.2d 35 (1965); *State* v. *Wood*, 457 So. 2d 206 (La. App. 1984).

28. 519 A.2d 820 (1987).

United States v. *Leon*[29] that the federal Constitution was no obstacle to the admission of the evidence. The New Jersey court was asked to rule that as a matter of state law the evidence should be excluded.

One difficulty with this argument is that prior to *Mapp* the New Jersey courts had consistently held that state law did not embrace the exclusionary rule.[30] Indeed, the 1947 state constitutional convention had explicitly rejected an attempt to write the exclusionary rule into the state constitution. Hostility to the basic principle was not the sole motive for rejection of the constitutional provision; some delegates were simply reluctant to bind the state courts to any position on the subject.[31] Nonetheless, it is fair to say that, prior to 1960, all indications in New Jersey bespoke a hostility to the exclusionary rule.

Nonetheless, the court in *Novembrino* refused to apply the *Leon* principle to state law claims and held that the trial court acted properly in suppressing the evidence. In rejecting the dissent's claim that "New Jersey has no historical attachment to the exclusionary rule," Justice Gary S. Stein's majority opinion cited a number of cases.[32] Primarily, however, Justice Stein relied on *State* v. *Valentin*[33] as having "[e]mbedded [the exclusionary rule] in our jurisprudence."[34]

Obviously, there would be nothing untoward about a state court holding either that pre-*Mapp* case law should be reconsidered in the light of subsequent developments,[35] or even that the case law had been overruled *sub silentio* by later decisions.[36] The heavy reliance on *Valentin*, however, reflects a fundamental misconception regarding the relationship between state and federal law. *Valentin* was an appeal from a denial of a motion to suppress evidence that had allegedly been seized illegally. At the time the motion was denied, New Jersey had no exclusionary rule; thus the prosecuting attorney had submitted no evidence to demonstrate that the search had been reasonable. Before disposition of the appeal, *Mapp* established that state courts were required to suppress evidence seized in violation of federal constitutional norms. Thus the *Valentin* court remanded the case for development of a record on the issue of the legality of the seizure.

Admittedly, *Valentin* made passing reference to the fact that the defendant had raised both state and federal claims[37] and noted that in devising new procedures the courts should consider "the provisions of the constitutions of both sovereignties."[38] The mandate of the court, however, directed only that "both parties [should be permitted] to introduce all relevant proof on the new issue generated by *Mapp*."[39] Thus the *Valentin* decision did not embed the exclusionary rule in New Jersey state constitutional law; it simply purported to apply the rule of federal law established in *Mapp*. Yet that rule by its nature could only apply the exclusionary rule to cases in which the federal Con-

29. 468 U.S. 897 (1984).

30. For example, *Eleuteri* v. *Richman*, 141 A.2d 46, *cert. denied*, 358 U.S. 843 (1958); *State* v. *Alexander*, 83 A.2d 441 (1951), *cert. denied*, 343 U.S. 908 (1952).

31. 519 A.2d at 851.

32. Ibid., p. 851, n. 30.

33. 174 A.2d 737 (1961).

34. 519 A.2d at 851.

35. Ibid., pp. 851-53.

36. For this point, the New Jersey Supreme Court might have relied on *State* v. *Hunt*, 450 A.2d 952 (1982).

37. 174 A.2d at 737.

38. Ibid., p. 738.

39. Ibid.

stitution had been violated; the U.S. Supreme Court is powerless to mandate that the exclusionary rule apply to state constitutional claims. It was thus the obligation of the New Jersey state courts to explore independently the question of whether state law generally required the exclusion of evidence in cases where state law was violated but federal law did not require its suppression. By simply assuming that as a matter of state law *Mapp* and *Valentin* automatically overruled previous state court rejections of the exclusionary rule, the *Novembrino* court acted inconsistently with basic premises of state autonomy and federalism.

In short, the concept of federalism suggests constraints on judges who would adopt some approach other than lockstep analysis in state constitutional adjudication. These constraints are, however, relatively minor. The only necessity is that state courts consult their own preexisting law rather than mindlessly adopting federal constitutional standards as a floor for state constitutional analysis. Once this requirement is satisfied, considerations of state autonomy are simply irrelevant to the ultimate result.

CONCLUSION

Discussions of state autonomy have played far too large a role in state constitutional analysis. Upon close examination, most of the expressed federalism-related concerns prove groundless. Moreover, by focusing on such considerations, courts and commentators divert attention from the real issues involved, issues concerning the allocation of decision-making authority within each state's government.

Analysis of this problem should begin by reference to general constitutional theory.[40] Application of such theory, however, must also take into account the special context in which state courts operate. Many commentators point to state-specific characteristics that they claim should lead state courts to assume greater power in the governing process.[41] These activists typically ignore the central point recognized by the plurality in *Smith*: that state courts operate in an environment in which the legislature will always be constrained by federal judicial review.

This fact generates the central issue of state constitutional theory: do we wish to construct a system in which the judgment of state legislatures is subordinated to the sense of fairness of not one but two sets of judges? The activist response has often been that such a system is a necessary corollary to the American concept of federalism. As I have tried to demonstrate, this argument is totally unsound. Thus, until a more persuasive justification is put forth, the case for state court activism will remain unproven.

40. Some commentators have recognized this point. See David R. Keyser, "State Constitutions and Theories of Judicial Review," *Texas Law Review*, 63:1051 (Mar.-Apr. 1985); Hans A. Linde, "E Pluribus—Constitutional Theory and State Courts," *Georgia Law Review*, 18:165 (Winter 1984); Maltz, "Dark Side."

41. See, for example, Lawrence G. Sager, "Foreword: State Courts and the Strategic Space between the Norms and Rules of Constitutional Law," *Texas Law Review*, 63:959 (Mar.-Apr. 1985); Williams, "In the Supreme Court's Shadow," pp. 389-402.