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Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and-Seizure Law

ABSTRACT. The judiciary has long struggled to resolve conflicts of state search-and-seizure law. The issue arises when a search occurs in one state, but the defendant is prosecuted in another. For example, suppose a crime is committed in State A. In the course of investigating an entirely different crime, State B officers perform a search and uncover evidence of the State A crime. The search was unlawful and the evidence would be excluded under State B's constitution, but the search was lawful under State A's constitution. Should the evidence be admitted because forum law applies or excluded because the law of the situs of the search applies? What if State A officers perform a search in State B for a case tried in State A?

State courts have developed at least five distinct approaches, each with its own assumptions and methodology, to resolve these and other search-and-seizure conflicts of law. None is conceptually sound or pragmatically appealing. Courts should instead adopt a novel law-of-the-officer approach. They should first interpret the state constitutions at issue to determine whether more than one constitution reaches the facts of the case. If so, courts should apply the state law of the police officer who performed the search. This two-step approach both capitalizes on the latest insights from the conflict-of-laws literature and comports with the most common purposes behind state exclusionary rules. Most importantly, it maximizes the deterrent value of exclusion by ensuring predictability and simplicity.

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INTRODUCTION

It is almost trite to say that the exclusionary rule is controversial. The federal rule, which allows courts to exclude unlawfully obtained evidence, is fiercely contested. Constitutional scholars continue to debate whether it is constitutionally mandated and, if so, under what theory.¹ Others have focused on the rule's normative appeal, arguing over whether it unfairly immunizes guilty criminals,² has expressive importance,³ or even encourages judges to permit police perjury or otherwise manipulate Fourth Amendment doctrine.⁴ And law-and-economics scholars continue to wage an empirical war, employing statistics and behavioral economic insights to show that the rule does or does not deter police misconduct.⁵

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1. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785-800 (1994) (arguing that the exclusionary rule is neither textually nor historically consistent with the Fourth Amendment); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1887 (2014) (arguing that the exclusionary rule derives from the "historically evolving interrelationship between the Fourth Amendment and the Due Process Clauses"); Potter Stewart, *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, 1380-89, 1396-97 (1983) (discussing different theories as to the source of the exclusionary rule and arguing that the rule is constitutionally mandated so long as other remedies are inadequate to ensure adherence to the Fourth Amendment).
 2. See, e.g., *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (denouncing the exclusionary rule for allowing "[t]he criminal . . . to go free because the constable has blundered"), *abrogated by Mapp v. Ohio*, 367 U.S. 643, 653 (1961), as recognized in *Linkletter v. Walker*, 381 U.S. 618, 634 (1965).
 3. See, e.g., Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393, 397-98 (2013) ("[A]t bottom the rule is a fundamental expression of the 'rule of law' in the criminal procedure context, or, in more colloquial terms, that 'there is a right way and a wrong way' and 'the end does not justify the means.'"); Scott E. Sundby, *Mapp v. Ohio's Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 257 (2010) ("By making suppression hearings necessary, . . . the exclusionary rule provide[s] a forum through which the importance and substance of the Fourth Amendment is reaffirmed on a daily basis in city and county courthouses across the nation.").
 4. See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112-13 (2003) (arguing that judges resolve close cases in favor of the police and look the other way even when they strongly suspect that police commit perjury to avoid exclusion); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 131-34 (2003) (responding to Judge Calabresi's criticisms).
 5. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368 (summarizing the empirical debate).

Yet despite the depth and quantity of this literature, one area of exclusionary doctrine has been largely ignored: state exclusionary rules and, more particularly, conflicts of state exclusionary rules. The Supreme Court incorporated the Fourth Amendment against the states in 1949⁶ and the exclusionary rule as a remedy for Fourth Amendment violations in 1961.⁷ The Federal Constitution therefore serves as a floor for the protection of the right to be free from unreasonable searches and seizures. But every state has a Fourth Amendment analogue in its constitution⁸ and remains free to provide criminal defendants with search-and-seizure rights above the federal floor.⁹ In fact, Justice William Brennan called on state courts to do exactly that: “[S]tate courts cannot rest when they have afforded their citizens the full protections of the Federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”¹⁰

It did not take long for state courts to accept Justice Brennan’s invitation.¹¹ One 1996 study found that nearly half of all states had established search-and-seizure rights broader than those provided by the Federal Constitution.¹² And that study considered state constitutional interpretations that governed only a sampling of common law-enforcement activities (e.g., home entries to effect felony arrests).¹³ The number could be even higher if other search-and-seizure

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6. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *overruled on other grounds by Mapp*, 367 U.S. at 655.
 7. *Mapp*, 367 U.S. at 655. While the *Mapp* Court described the rule as “logically and constitutionally necessary” to vindicate defendants’ Fourth Amendment rights, *id.* at 655-56, subsequent Courts have held that the rule is nothing more than a “prudential doctrine.” *Davis v. United States*, 564 U.S. 229, 236 (2011). As a result, the current Court has recognized that the rule is not mandatory, but rather one possible remedy among others for a Fourth Amendment violation. See *infra* notes 41-46 and accompanying text.
 8. Stephen E. Henderson, *Learning from All Fifty States: How To Apply the Fourth Amendment and Its State Analogs To Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 393 & app. (2006).
 9. See *Cooper v. California*, 386 U.S. 58, 62 (1967) (“[T]he State [has the] power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.”).
 10. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).
 11. 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.12(a) (4th ed. 2016) (discussing the development of state search-and-seizure law).
 12. Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 93-95 (1996).
 13. *Id.*

doctrines are considered. A 2006 study, for example, found that eleven states reject the third-party doctrine, which provides that the Fourth Amendment does not protect information provided to a third party, and ten others have indicated in some way that they may reject it in the future.¹⁴

Similarly, states have adopted a variety of exclusionary rules. Few states have unambiguously rejected any kind of state-law-based exclusionary rule.¹⁵ Far more have recognized rules with various levels of protection ranging from those that are coextensive with the federal rule to those that require exclusion even when a federal exception would otherwise apply. For instance, as of 2007, the highest courts of fourteen states had rejected the so-called “good faith” exception, which prohibits the exclusion of evidence obtained in violation of the Fourth Amendment if the police act in good-faith reliance on a search warrant that later proves to be defective.¹⁶ In sum, there is tremendous variation between the states, not only in terms of the substantive search-and-seizure rights provided but also the exclusionary rules that remedy violations of those rights.¹⁷

This checkered landscape produces an inevitable question: what law applies when a search occurs in one state but the defendant is prosecuted in another? Consider a stylized version of the facts in *People v. Orlosky*.¹⁸ A crime is committed in State A. Before an arrest is made, the defendant moves to State B. In the course of investigating an entirely different crime, State B officers perform a search and uncover evidence of the State A crime. The evidence is admissible under State A’s constitution, but inadmissible under State B’s constitution. Should the evidence be admitted in a proceeding in State A because forum law applies, or excluded because the law of the situs of the search applies? What if State A officers perform a search in State B for a case tried in State A?¹⁹ Or State A and State B officers cooperate to perform a single search in State B for a case

14. Henderson, *supra* note 8, at 413.

15. As of 1996, only two states had unambiguously rejected a state-law exclusionary rule. Latzer, *supra* note 12, at 119. The Maine Supreme Court rejected a state constitutional exclusionary rule and the California Constitution was amended in 1982 to prohibit the exclusion of evidence on state constitutional grounds. *Id.* at 119 & nn.232-33.

16. *United States v. Leon*, 468 U.S. 897, 920-21 (1984); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 *MISS. L.J.* 265, 271-72 (2007).

17. See, e.g., John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 *GEO. L.J.* 1217, 1218 (1985); Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 *MISS. L.J.* 225, 226-30 (2007).

18. 115 Cal. Rptr. 598 (Ct. App. 1974); see also *Helm v. Commonwealth*, 813 S.W.2d 816 (Ky. 1991) (considering similar facts).

19. See, e.g., *State v. Davis*, 834 P.2d 1008, 1009-10 (Or. 1992).

tried in State A?²⁰ When multiple jurisdictions are involved, courts must perform some conflict-of-laws analysis to determine which law governs the officers who perform any relevant searches.²¹

Complicating matters further is the advent of new technologies, which will only make multistate cases more prevalent. State lines are more porous and less practically important than ever before. Not only do people and their possessions regularly cross state lines physically,²² but, with the click of a mouse, one can almost instantaneously send and store information across state lines with no physical movement at all. Consider *State v. Evers*.²³ A California officer investigating online child pornography obtained a search warrant from a California court that required America Online (AOL) – headquartered in Virginia – to turn over the names and billing addresses of various users, including the defendant. The California officer learned that the defendant resided in New Jersey and forwarded the results of his investigation to New Jersey police, who promptly obtained a search warrant for the defendant’s residence and arrested him.²⁴ Among other evidentiary questions raised was whether the New Jersey Constitution protected the account information obtained by the California officer pursuant to a California warrant.²⁵ The facts were different, but the question remained the same: what law applies when a crime and a related search involve multiple jurisdictions?

This Note analyzes current approaches to interstate search-and-seizure conflicts of law, concludes that none are satisfactory, and proposes a novel approach consistent with both conflict-of-laws theory and the values underlying state exclusionary rules. A few caveats are worth highlighting at the outset. First, this Note considers only cases involving the exclusion of evidence as a result of a search-and-seizure violation; it does not address cases involving custodial interrogation²⁶ and other doctrines with exclusionary remedies. Second, this analysis

20. See, e.g., *State v. Briggs*, 756 A.2d 731, 733 (R.I. 2000).

21. I use the terms “conflict of laws” and “choice of laws” interchangeably. While some argue that one particular nomenclature is more accurate than the other, both describe the same field of study. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449-54 (1999).

22. SYMEON C. SYMEONIDES, CHOICE OF LAW 9-10 (2016).

23. 815 A.2d 432 (N.J. 2003).

24. *Id.* at 437-38.

25. *Id.* at 441; see also Susan W. Brenner, *Law, Dissonance, and Remote Computer Searches*, 14 N.C. J.L. & TECH. 43, 55-60, 63-80 (2012) (discussing how traditional conflict approaches might be used to resolve cases involving remote computer searches).

26. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

is limited to cases involving officers from more than one state. Disputes arising from federal-state cooperation may raise additional concerns not addressed here.

Part I provides a brief overview of the federal and state exclusionary rules. While different constitutions may not mandate the exclusion of evidence, federal and state exclusionary rules *are* constitutionally rooted.²⁷ Because of that connection, it does not make sense to apply one state's exclusionary rule to a violation of another state's constitution.

Part II briefly discusses the sparse constitutional constraints on a court's approach as well as the theoretical and judicial insights that have been gleaned over the last century as the conflict-of-laws field has developed. State courts are generally free to engage in almost uninhibited common law making to devise their own approaches to resolving these cases. The resulting experimentation with different theories has revealed a few principles that should guide the development of new theories. Perhaps most importantly, courts should adopt rules that are sensitive to the substance and intended reach of the laws they seek to apply.

Part III assesses the strengths and weaknesses of current approaches. While fact patterns like those discussed above have bedeviled courts for decades, there has thus far been no clear consensus on the appropriate solution. Part III identifies five distinct approaches to the problem. A handful of courts argue that the exclusionary rule is a rule of evidence and, because rules of evidence are procedural, forum law must apply. A few courts opt for universal application of either forum or situs law. Some endorse one of the modern conflict-of-laws theories, such as governmental interest analysis or the most-significant-relationship test. Others perform a type of state-constitutional-law analysis and determine whether, for instance, the forum state's constitution applies extraterritorially to its officers when they perform searches in other states. And still others choose the law that best serves the interests of deterrence, judicial integrity, and any of the other purposes underlying a particular exclusionary rule.

Each of the extant approaches suffers from some degree of theoretical incoherence and, equally concerning, produces results at odds with the reasons the exclusionary rule was created. Rather than persist in applying these flawed approaches, state courts should devise a conflict-of-laws framework that can consistently and appropriately resolve interstate search-and-seizure conflicts of law.

27. For the sake of simplicity, I refer to all search-and-seizure exclusionary rules as constitutionally derived because most of the cases identified when performing the research for this Note involved constitutionally derived rules. Some states, however, have statutory exclusionary rules. See BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 36-37 (2000) (listing examples of statutory exclusionary rules). Whether a particular rule is constitutional or statutory does not affect the analysis here. Either way, the rule should not be divorced from the search-and-seizure right for which it is a remedy.

Part IV proposes and defends one such framework. Courts should first perform a state-constitutional-law analysis to determine whether two laws apply. If so, courts should apply the state law of the police officer who performed the search. This approach is both conceptually sound from a conflict-of-laws perspective and consistent with the most commonly identified goals of state exclusionary rules: deterring police misconduct, preserving judicial integrity, and maintaining the public's trust in government.

I. EXCLUSIONARY DOCTRINE

Exclusionary doctrine is a prime example of the need to know the past to understand the present. The federal exclusionary rule provides that evidence may be inadmissible in a criminal trial if it is obtained in violation of the Fourth Amendment, which provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”²⁸ Although it was originally conceived as a constitutionally mandated remedy,²⁹ the rule has since evolved into a prudential doctrine premised on the theory that exclusion deters police misconduct.³⁰ Following that logic, the Court has carved out a number of exceptions to the rule when exclusion is unlikely to further deterrence. Meanwhile, as the federal rule has evolved, state constitutions have spawned their own exclusionary rules, and state courts have developed exclusionary doctrines that overlap and diverge from the federal doctrine.

This Part traces the development of the federal rule and its state-law counterparts before providing a brief overview of current law. It does not take a side in any of the enduring debates surrounding the rule's constitutionality or normative appeal. Instead, this Part describes the law as it stands to explain how current doctrine should inform conflict analyses. Two observations are significant. First, deterrence has played an outsized role in the development of state and federal exclusionary doctrine. Second, while different exclusionary rules may not be constitutionally mandated, they *are* constitutionally rooted. In other words, they are tied to the particular constitutional provisions that they protect. It would not make sense to employ an exclusionary rule derived from one constitutional provision to remedy the violation of another constitution's analogue.

28. U.S. CONST. amend. IV.

29. See Stewart, *supra* note 1, at 1372-80 (documenting the history of the federal exclusionary rule).

30. See, e.g., Davis v. United States, 564 U.S. 229, 236-37 (2011) (“The rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.”).

The approach proposed in Part IV is faithful to these core features of exclusionary doctrine.

A. The History of the Federal Exclusionary Rule

While the development of the exclusionary rule can be traced at least as far back as the mid-1880s,³¹ most commentators agree that the genesis of the modern rule was the Supreme Court's 1914 decision in *Weeks v. United States*.³² There, the Court excluded evidence unlawfully obtained by federal officers.³³ It reasoned that exclusion was "obligatory upon all entrusted under our Federal system with the enforcement of the laws" in order to give "force and effect" to the Fourth Amendment.³⁴ "To sanction such proceedings," the Court declared, "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against . . . unauthorized action."³⁵

Yet as sweeping as this language seems, the exclusionary rule's application was for years narrowly cabined to federal prosecutions. It was not until *Wolf v. Colorado*³⁶ in 1949 and, more importantly, *Mapp v. Ohio*³⁷ in 1961 that the Court held that the Fourth Amendment and the federal exclusionary rule apply to all prosecutions, state and federal. In *Wolf*, the Court incorporated the Fourth Amendment against the states, but left the states free to devise and apply remedies other than the exclusionary rule to vindicate defendants' Fourth Amendment rights.³⁸ The Court then eliminated state courts' remaining discretion in *Mapp*.³⁹ It held that the states were obligated to impose the same remedy—the exclusionary rule—to state and federal prosecutions involving Fourth Amendment violations. Just as the Fourth Amendment was incorporated against the states, "it was logically and constitutionally necessary that the exclusion doc-

31. See *Boyd v. United States*, 116 U.S. 616, 621-22, 638 (1886) (discussing the privacy protections of the Fourth and Fifth Amendments and excluding business papers obtained by court order).

32. 232 U.S. 383 (1914); see, e.g., Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 357 (2013); Re, *supra* note 1, at 1922.

33. *Weeks*, 232 U.S. at 398.

34. *Id.* at 392.

35. *Id.* at 394.

36. 338 U.S. 25 (1949), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

37. 367 U.S. 643.

38. 338 U.S. at 28.

39. 367 U.S. at 654-55.

trine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right.”⁴⁰ Indeed, because earlier Supreme Courts understood the rule to be constitutionally mandated, its incorporation against the states was virtually inevitable.

But this understanding of the exclusionary rule changed dramatically in 1974. In *United States v. Calandra*,⁴¹ the Supreme Court held that the exclusionary rule was not a “personal constitutional right,” but a mere “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.”⁴² With that decision, the federal rule was both downgraded from a constitutional requirement and repositioned as a remedy applicable only when justified by a single purpose: deterrence.⁴³ The result is that while state⁴⁴ and federal courts are still required to consider the exclusionary rule in the case of a Fourth Amendment violation, they are no longer required to apply it in every case. *Calandra* empowered the Supreme Court to create exceptions to the exclusionary rule when its costs outweigh its potential to deter police misconduct. According to the Court, the rule “is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”⁴⁵ Instead, it is a prudential doctrine that applies only as a “last resort” when “‘its remedial objectives are thought most efficaciously served’—that is, ‘where its deterrence benefits outweigh [the] substantial social costs’” of excluding potentially probative evidence.⁴⁶ As will be discussed, this doctrinal shift was not without repercussions.

40. *Id.* at 655-56; *see also id.* at 655 (“Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.”).

41. 414 U.S. 338 (1974).

42. *Id.* at 348; *see also* Stewart, *supra* note 1, at 1390 (discussing *Calandra*).

43. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(f) (5th ed. 2012) (discussing the impact of *Calandra*); *see also* Davis v. United States, 564 U.S. 229, 246 (2011) (“[W]e have said time and again that the sole purpose of the exclusionary rule is to deter misconduct by law enforcement.”).

44. *Mapp*’s incorporation of the exclusionary rule against the states has not been overturned. *See* 367 U.S. at 655.

45. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

46. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (first quoting *Calandra*, 414 U.S. at 348; and then quoting *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)); *see also*, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (outlining the history of the exclusionary rule and noting that it was not until the twentieth century that the rule “became the principal judicial remedy to deter Fourth Amendment violations”); *Davis*, 564 U.S. at 236 (referring to

B. *The History of State Exclusionary Rules*

As the Supreme Court cut back on the scope of individual rights and remedies in the decades after the Warren Court, states increasingly developed their own, more protective constitutional law.⁴⁷ By 1986, Justice Brennan was able to reflect on the trend and declare that the “[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our time.”⁴⁸

This resurgence is particularly evident in state search-and-seizure law.⁴⁹ All fifty states have some analogue to the Fourth Amendment that protects individuals from unlawful searches.⁵⁰ Textually, the provisions run the gamut from those that are nearly identical to the Fourth Amendment to those that differ dramatically.⁵¹ But the degree of textual similarity to the Federal Constitution has not necessarily determined a particular analogue’s interpretation. State constitutional decisions vary widely, even for provisions that are textually identical to the Fourth Amendment.⁵² Some courts engage in “lockstep” analysis, interpreting their constitutions to provide no more or less protection than the Federal Constitution. Others have taken a more activist approach.⁵³ Consider the third-party

the exclusionary rule as a “prudential doctrine” and declaring that exclusion is “‘not a personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search” (first quoting *Scott*, 524 U.S. at 363; and then quoting *Stone*, 428 U.S. at 486)); *Herring v. United States*, 555 U.S. 135, 139-40 (2009) (assuming that there was a Fourth Amendment violation but nevertheless determining that the exclusionary rule, a “judicially created rule . . . ‘designed to safeguard Fourth Amendment rights generally through its deterrent effect,’” did not apply (quoting *Calandra*, 414 U.S. at 348)).

47. See LAFAYE ET AL., *supra* note 11; Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 337-39 (2011).
48. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 968 (2013) (citing NAT’L L.J. (SPECIAL SEC.), Sept. 29, 1986, at S1).
49. Blocher, *supra* note 47, at 338; Williams, *supra* note 17, at 226-29.
50. Henderson, *supra* note 8, at 393.
51. Compare ALASKA CONST. art. I, § 14 (“The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.”), with ARIZ. CONST. art. II, § 8 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).
52. See, e.g., Henderson, *supra* note 8, at 418-19 (explaining that while the text of Indiana’s Fourth Amendment analogue is “virtually identical” to the Fourth Amendment, the Indiana Supreme Court has interpreted it to provide more robust protections than its federal counterpart).
53. Blocher, *supra* note 47, at 338-39.

doctrine, which under federal law leaves items like telephone records, bank records, and trash without Fourth Amendment protection.⁵⁴ Kentucky has interpreted its constitution to mirror the Fourth Amendment,⁵⁵ but its neighbor, Illinois, has explicitly found that telephone records and bank records do enjoy some protection under its constitution.⁵⁶

Following the Supreme Court's lead, many states have also adopted a state-based exclusionary rule to give effect to their Fourth Amendment analogues.⁵⁷ And like state interpretations of substantive search-and-seizure rights, state exclusionary doctrines differ from the federal rule—both as to the purposes that guide the application of their rules and as to how a particular purpose should be effectuated. Most states have not questioned the Supreme Court's determination that deterrence is the primary—if not exclusive—purpose of exclusionary doctrine.⁵⁸ But some maintain that the exclusionary rule should also be applied to ensure the integrity of the judiciary, to maintain the public's trust in government, or to protect individuals' privacy.⁵⁹ The difference can be consequential. Because the Pennsylvania Supreme Court has held that its exclusionary rule serves to de-

54. Henderson, *supra* note 8, at 373.

55. *Id.* at 410 n.155 (first citing Commonwealth v. Mobley, 160 S.W.3d 783, 784 (Ky. 2005); and then citing LaFollette v. Commonwealth, 915 S.W.2d 747, 748 (Ky. 1996)).

56. *Id.* at 398 n.123 (first citing People v. DeLaire, 610 N.E.2d 1277, 1282 (Ill. App. Ct. 1993); and then citing People v. Jackson, 452 N.E.2d 85, 88-89 (Ill. App. Ct. 1983)).

57. See Clancy, *supra* note 32, at 384 (listing examples of state exclusionary rules).

58. LATZER, *supra* note 27, at 34; see also State v. Boyd, 992 A.2d 1071, 1086 (Conn. 2010) (“[T]he rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures Application of the rule is thus appropriate in circumstances in which this purpose is likely to be furthered.” (quoting Payne v. Robinson, 541 A.2d 504, 506 (Conn. 1988), *cert. denied*, 488 U.S. 898 (1988))); State v. Evers, 815 A.2d 432, 444 (N.J. 2003) (emphasizing deterrence as the “prime purpose” behind the New Jersey exclusionary rule). *But see* State v. Davis, 834 P.2d 1008, 1012 (Or. 1992) (explaining that the Oregon exclusionary rule is not designed to deter police misconduct).

59. See, e.g., State v. Torres, 262 P.3d 1006, 1018 (Haw. 2011) (holding that the Hawaii exclusionary rule is designed to maintain the integrity of the judiciary and protect individuals’ privacy as well as to deter police misconduct); Evers, 815 A.2d at 444 (explaining that exclusion may be appropriate to avoid the appearance that “New Jersey public officers” can “profit[] from their own wrongdoing”).

ter police misconduct *and* to vindicate individuals' privacy rights, it does not recognize a good-faith exception.⁶⁰ Thus, evidence obtained because the police relied in good faith on a warrant lacking probable cause is inadmissible in court.⁶¹ Yet just across the border in Ohio, such evidence is admissible. The Ohio Supreme Court has interpreted its Fourth Amendment analogue to be coextensive with the Federal Constitution and hence the state's exclusionary doctrine turns entirely on whether exclusion will deter future police misconduct.⁶²

Other states agree that deterrence is the primary goal of the exclusionary rule but disagree about how that goal should be operationalized. The New York Court of Appeals, for example, rejected the good-faith exception, finding that exclusion of unlawful evidence, even if obtained in good faith, could deter police misconduct: "[I]f the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action[,] and a positive incentive is provided to others to engage in similar lawless acts in the future."⁶³ In contrast, Missouri, like Ohio, has interpreted its analogue to be coextensive with the Federal Constitution and has therefore fully adopted the Supreme Court's good-faith reasoning.⁶⁴

Of course, this is just a sampling of the variations in state search-and-seizure law. Other states have interpreted both their Fourth Amendment analogues and their derivative exclusionary rules expansively.⁶⁵ But while the multiplicity of state analogues continues to produce interstate search-and-seizure conflicts, it is significant that most of the analogues place particular weight on the deterrence rationale.⁶⁶

60. See *Commonwealth v. Johnson*, 86 A.3d 182, 188 (Pa. 2014) (citing *Commonwealth v. Edmunds*, 586 A.2d 887, 905-06 (Pa. 1988)).

61. *Id.* at 188-89 (discussing *Edmunds* and stating that "*Edmunds* turned on a determination that, under [the state's constitution], the exclusionary rule in Pennsylvania serves other values besides deterrence; it also vindicates an individual's right to privacy").

62. See *State v. Hoffman*, 141 Ohio St. 3d 428, 2014-Ohio-4795, 25 N.E.3d 993, at ¶¶ 11, 46 (2014).

63. *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985).

64. See *State v. Johnson*, 354 S.W.3d 627, 632, 634 (Mo. 2011).

65. See, e.g., *State v. Moats*, 403 S.W.3d 170, 187 n.8 (Tenn. 2013) ("Particularly in the area of search and seizure law, we have often rejected the standards adopted by the United States Supreme Court in favor of more protective doctrines, tests, and rules."), *overruled on other grounds* by *State v. McCormick*, 494 S.W.3d 673 (Tenn. 2016); Friedman, *supra* note 16, at 271-72 (listing states that have rejected the good-faith exception as a matter of state constitutional law); Henderson, *supra* note 8, at 413 (stating that eleven states rejected the third-party doctrine as a matter of state constitutional law); Latzer, *supra* note 12, at 93-94 (listing states that have interpreted their constitutions to provide greater protections than the Federal Constitution for eleven common law-enforcement activities).

66. See *supra* note 58 and accompanying text.

C. *The Connection Between a Constitutional Violation and the Exclusionary Remedy*

Despite their differences, the Fourth Amendment exclusionary rule and state-based exclusionary rules share one crucial feature: though they may not all be constitutionally mandated, they are all constitutionally rooted. Consider the federal rule. Some have argued that it is mandated so long as other Fourth Amendment remedies are inadequate.⁶⁷ Others maintain that it is mandated as a result of the interaction between the Fourth Amendment and other constitutional provisions, like the Due Process Clauses.⁶⁸ And some, like the current Supreme Court, understand the exclusionary rule to be entirely prudential. But even proponents of the prudential view have never suggested that the federal rule is untethered to the Fourth Amendment. The Court, for example, has described it as a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.”⁶⁹ Indeed, modern doctrine must understand the rule to be somehow derivative of the Constitution if only to justify the rule’s continued incorporation against the states.⁷⁰ After *Mapp*, it is taken for granted that the federal remedy follows the federal violation. No state would ever hold that there was a federal violation but then apply its own state rule to remedy that violation. Equally telling, federal courts do not apply the federal exclusionary rule to remedy state constitutional violations.⁷¹

Similarly, no state has suggested that its exclusionary rule exists apart from its Fourth Amendment analogue. States that have adopted their own exclusionary rules agree that the rule is a remedy designed to safeguard defendants’ search-and-seizure rights, though they disagree as to its exact constitutional status.⁷² For its part, the Supreme Court has given states a wide berth in developing their own doctrine. “The States are not foreclosed,” according to the Court, “from using a . . . balancing approach to delineate the scope of their own exclusionary rules.”⁷³ The people of a given state “could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the

67. See, e.g., Stewart, *supra* note 1.

68. See, e.g., Re, *supra* note 1.

69. United States v. Calandra, 414 U.S. 338, 348 (1974); see also Slobogin, *supra* note 5 (discussing different justifications for the exclusionary rule).

70. Re, *supra* note 1, at 1935 & n.266.

71. Virginia v. Moore, 553 U.S. 164, 174, 178 (2008).

72. See Clancy, *supra* note 32, at 383-88.

73. California v. Greenwood, 486 U.S. 35, 45 (1988).

costs when the police conduct at issue does not violate federal law.”⁷⁴ Hence some courts, like Idaho,⁷⁵ maintain that their rules are constitutionally required. Others, like Connecticut,⁷⁶ have implicitly or explicitly followed the Supreme Court’s logic and held that their constitutions do not always require the exclusion of unlawfully obtained evidence and hence their exclusionary rules are not constitutionally mandated. Finally, some, like Utah,⁷⁷ have never resolved the question of whether their rules are constitutionally required.

Nevertheless, while the precise relationship may vary, every state’s exclusionary rule is tied to its constitution. This is clear from the various state court articulations of the remedy. Consider again the exclusionary rules applied in Pennsylvania and Ohio.⁷⁸ Based on its interpretation of its own state constitution, the Pennsylvania Supreme Court has established an exclusionary rule premised on two purposes – deterring police misconduct and vindicating individuals’ privacy rights. In contrast, the Ohio Supreme Court has interpreted its constitution to provide for an exclusionary rule premised only on deterring police misconduct. The two rules apply differently, as they do in the good-faith context, even when the police misconduct at issue is the same.⁷⁹ Such distinctions in how an exclusionary rule is understood are only possible if each exclusionary rule is uniquely derivative of the text the state court is interpreting. In other words, it is impossible to apply an abstract exclusionary rule without first determining which constitution is at play because that constitution provides the applicable exclusionary rule.

This feature of state exclusionary rules has important consequences for conflict analyses. As discussed in Part III, courts frequently err either by ignoring the fact that an exclusionary rule exists to protect an underlying constitutional provision or by attempting to apply an exclusionary rule without first determining which state’s constitution applies. Equally problematic, many courts have adopted conflict rules that fail to deter police misconduct. The following Parts

74. *Id.*

75. See *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992) (“[T]he exclusionary rule [i]s a constitutionally mandated remedy for illegal searches and seizures.”); see also *Clancy*, *supra* note 32, at 386–88 (listing other states with constitutionally mandated exclusionary rules).

76. See *State v. Brocuglio*, 826 A.2d 145, 151 (Conn. 2003) (explaining, in response to a motion to suppress under the United States and Connecticut Constitutions, that “[a]pplication of the exclusionary rule . . . is not automatic”).

77. See *State v. Larocco*, 794 P.2d 460, 473 (Utah 1990) (“We . . . say nothing about the nature of the exclusionary rule (constitutional requirement versus judicial remedy) pursuant to article I, section 14 of the Utah Constitution. We simply hold that it exists.”).

78. See *supra* notes 60–62 and accompanying text.

79. See *supra* notes 60–62 and accompanying text.

demonstrate that these problems are significant and avoidable. But first, some background on the constitutional limitations and theoretical insights that have guided the development of the broader conflict-of-laws field is in order.

II. CONSTITUTIONAL AND THEORETICAL GUIDEPOSTS FOR CONFLICT-OF-LAWS ANALYSES

In an era when constitutional and statutory law increasingly limit judicial discretion,⁸⁰ it may seem strange that state courts have been able to develop so many approaches to resolving interstate search-and-seizure conflicts. As will be shown in Part III, five distinct methods have emerged. Such diversity is not abnormal in the conflict-of-laws field, which remains one of the few areas where judicial discretion is the rule rather than the exception. Congress and state legislatures have largely ignored the field, leaving the Supreme Court to articulate standards based on constitutional text alone.⁸¹ And as currently interpreted, the Federal Constitution provides only minimal constraints on judicial law making. While some have advocated for greater attention to constitutional restrictions,⁸² modern Supreme Court interpretations have effectively left state courts free to exclude or admit evidence based on any of the laws involved. It is not surprising, then, that common law making, heavily influenced by academic scholarship, has filled the void. The resulting history of conflict-of-laws theory and practice, from the rise and fall of the First Restatement to the proliferation of modern theories, offers important insights that should guide the development of new theories. Most importantly, new theories should be sensitive to the purposes and intended reach of the laws in dispute. This Part summarizes the sparse constitutional limitations on a court's choice-of-law approach and outlines the field's theoretical

80. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

81. While Congress has the power to regulate conflicts of law by statute under the Full Faith and Credit Clause, it has declined to exercise the full extent of its power, legislating a mere five times on narrow subjects not relevant here. See SYMEONIDES, *supra* note 22, at 7. Nor have the states stepped in to fill the void. Only two states, Louisiana and Oregon, have enacted comprehensive choice-of-law legislation. *Id.* at 8. Others have enacted a few specific choice-of-law provisions for distinct substantive areas (e.g., insurance and matrimonial property). But ultimately it is still the case that "the great bulk of American conflicts law resides in the law reports, not the statute books." *Id.*

82. See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33 (1963); Michael H. Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U. L. REV. 419, 429-36 (1960); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180-91 (1981); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Roosevelt, *supra* note 21.

and judicial history. As will be discussed, the solution presented in Part IV is faithful to both the Constitution and conflict-of-laws theory.

A. Constitutional Limitations

Under current law, the Full Faith and Credit Clause⁸³ and the Due Process Clause⁸⁴ are the primary constitutional constraints that govern conflicts of law. *Allstate Insurance Co. v. Hague* effectively collapsed the inquiries under both clauses into a single test⁸⁵: “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”⁸⁶ The *Hague* Court applied this standard by considering the number of contacts the forum state had with that particular case, which involved an insurance dispute arising from a car accident in Wisconsin. For example, it noted that the insured decedent, Ralph Hague, had worked in Minnesota and thus that Minnesota had an interest in his welfare.⁸⁷ And it determined that because the insurance company did business in Minnesota, the state had an interest in regulating the company’s Minnesota-related insurance obligations. Finding that these contacts were sufficient, the Court affirmed the application of forum law and ultimately established an enduring doctrine marked by extreme deference to lower courts’ choice-of-law decisions.⁸⁸

The Court has strayed from this highly deferential position in strikingly few cases.⁸⁹ In the words of Justice Jackson, “it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine

83. U.S. CONST. art. IV, § 1.

84. U.S. CONST. amend. XIV, § 1.

85. 449 U.S. 302, 313 (1981); see SYMEONIDES, *supra* note 22, at 24–25; Erin O’Connor & Stephen E. Sachs, *Full Faith and Credit Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 347 (David F. Forte & Matthew Spalding eds., 2014).

86. 449 U.S. at 313.

87. *Id.* at 314–15.

88. See KERMIT ROOSEVELT, CONFLICT OF LAWS 130–32 (2d ed. 2010).

89. Only one lower court decision has ever failed the *Hague* test for insufficient contacts, and there the forum court applied Kansas law to a class action with almost no Kansas contacts at all. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). More recently the Court struck down a decision that evinced a “policy of hostility” to another state, but the Court’s primary concern was the sovereign status of California, a party to the case. *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1279 (2016) (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

what choice of law is required by the Constitution.”⁹⁰ Thus, “it is frequently the case’ that ‘a court can lawfully apply either the law of one State or the contrary law of another.’”⁹¹

Yet despite the laxity of current doctrine, most conflict scholars agree that conflict theories should be sensitive to constitutionally derived federalism concerns.⁹² Most relevant here, a state should not discriminate against another state’s law by favoring forum law. The Second Restatement provides that “[i]n formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states.”⁹³ Put simply, courts should avoid choosing forum law because it is forum law. Such forum bias is at least in tension with the Full Faith and Credit Clause.⁹⁴ And from a policy perspective, it destroys uniformity, encourages forum shopping, and aggravates interstate tensions.⁹⁵

The bottom line for interstate search-and-seizure cases is that states will almost always be doctrinally justified in applying either the law of the situs or the law of the forum to a given dispute. The situs state will always have a satisfactory contact either because the searching officer was from the situs state or because

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90. Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945).
91. *Hyatt*, 136 S. Ct. at 1285 (quoting *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003)). Of course, the Fourth Amendment is also at issue in search-and-seizure cases. But that provision establishes no more demanding a standard for evaluating a state’s choice of law. In *California v. Green*, the Court rejected the argument that “whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.” 486 U.S. 35, 43-44 (1988).
92. Gene R. Shreve, *Conflicts Law—State or Federal?*, 68 IND. L.J. 907, 912 (1993) (noting that scholars agree that modern theories should be “sensitive to the needs of interstate federalism and international cooperation”); see also, e.g., Laycock, *supra* note 82, at 251, 259 (arguing that the Constitution prohibits states from preferring local citizens or local law to foreign citizens or foreign law); Roosevelt, *supra* note 21, at 2535-36 (arguing that the Constitution prohibits courts from adopting conflict rules that privilege forum law); Joseph William Singer, *Multi-state Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1956 (arguing that the comity norm justifies application of non-forum law).
93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. d (AM. LAW INST. 1971).
94. ROOSEVELT, *supra* note 88, at 140.
95. *Id.*; see also, e.g., Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 274 (1996) (“If we believe that results in conflicts cases should be rational, predictable, and fair; if we believe that the sovereign interests accounting for forum and nonforum law alike should be respected whenever possible; and if we believe that all jurisdictions within our system of state and federal courts should strive for uniformity in choice of law in order to promote harmony between jurisdictions and discourage forum shopping; then it is possible to understand the destructive effects of conflicts localism.”).

the search occurred in the situs state. And the situs state will always have a corresponding interest in either the conduct of its officers or the search procedures used within its borders. The same will also be true of the forum state. Because courts only have jurisdiction over criminal matters that occur within their borders or have effects within their borders,⁹⁶ the forum state will always have a sufficient contact and will always have an interest in the prosecution of crimes committed within its borders. Even adding the prescription that courts should, at least as a normative matter if not a constitutional matter, choose a nondiscriminatory conflict rule, the restrictions on a court's choice of approach are minimal.

B. Theoretical Insights

The dearth of constitutional guideposts has given scholars and lower-court judges considerable leeway to decide how conflicts of law should be resolved. In the last century, there has been no shortage of theories designed to bring order to the esoteric field,⁹⁷ and current doctrine continues to bear the fingerprints of the debates that have raged in the academy. Those debates shed light on the complexities of current law and offer valuable insights that can inform new theories.

Joseph Beale authored the First Restatement of Conflict of Laws, the earliest conflict-of-laws approach still used today, in 1934.⁹⁸ Premised on the principles of territoriality and vested rights,⁹⁹ Beale's theory sought to systematize the law by creating rules that turned on where the last act necessary to create a cause of action occurred.¹⁰⁰ Because a state's law was understood to apply only to events that occurred within its borders, that last act was where the parties' rights vested and hence that state's law, according to Beale, should govern the case.¹⁰¹ In torts

96. See *CORR*, *supra* note 17, at 1223 & n.31. See generally LAFAVE ET AL., *supra* note 11 (discussing the complicated law of criminal jurisdiction); Terrence Berg, *State Criminal Jurisdiction in Cyberspace: Is There a Sheriff on the Electronic Frontier?*, 79 MICH. B.J. 659 (2000) (discussing criminal jurisdiction and cybercrimes).

97. SYMEONIDES, *supra* note 22, at 93 ("American conflicts law . . . is one of the few branches of American law that has been heavily influenced by academic writers.").

98. Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1129 (2010).

99. SYMEONIDES, *supra* note 22, at 54.

100. Brilmayer & Anglin, *supra* note 98, at 1129.

101. *Id.*

cases, for example, the crucial last act occurred in the place of injury, so the law of the place of injury was the appropriate choice of law.¹⁰²

While this approach briefly enjoyed widespread acceptance in the courts, it ultimately failed the test of time.¹⁰³ While a handful of states still follow at least some of the First Restatement's rules, most have rejected the approach.¹⁰⁴ The reason is twofold. First, Beale's understanding of law as inherently territorial was increasingly questioned and ultimately rejected.¹⁰⁵ Second, and more importantly for purposes of this analysis, the First Restatement came to be judged more and more on the basis of its practical results as its theoretical justification lost favor.¹⁰⁶ And those results, it turns out, were not satisfactory. A single factor that often did not correspond with any relevant issue in the case took on over-riding importance. Cases involving no contacts with a given state other than the all-important territorial connection were subject to the most criticism for appearing arbitrary and therefore unjust.¹⁰⁷

Of course, any rules-based system is likely to appear unjust in some cases — that is the price the legal system pays for predictability and consistency. While some have maintained that rules are anathema to the just resolution of conflicts,¹⁰⁸ that position has generally become more nuanced over the years. Even the fiercest critics of single-factor theories acknowledge that they can be appropriate when justified by the substance of the competing laws.¹⁰⁹

For this reason, the First Restatement's reliance on rules was not its most damning feature. The First Restatement seemed unjust because its rules could

102. Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 *AJIL UNBOUND* 139, 139 (2016).

103. See SYMEONIDES, *supra* note 22, at 60-61.

104. Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 *U. ILL. L. REV.* 1847, 1882.

105. ROOSEVELT, *supra* note 88, at 6, 35.

106. *Id.*; SYMEONIDES, *supra* note 22, at 131-46.

107. SYMEONIDES, *supra* note 22, at 131-46.

108. See Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper*, 163 *U. PA. L. REV.* 1919, 1925 (2015).

109. See, e.g., Brilmayer & Anglin, *supra* note 98, at 1169 (acknowledging that single-factor theories can be appropriate in certain situations where predictability and uniformity are particularly important); see also Fassberg, *supra* note 108, at 1927 (discussing DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 139 (1965), which proposed single-factor rules based on substantive considerations to resolve conflict questions); Symeonides, *supra* note 104, at 1917 (supporting a flexible rules-based approach to conflicts of law, but opposing “monolithic rules, based on a single connecting factor chosen on metaphysical grounds”).

not be justified by the substance of the laws in dispute.¹¹⁰ The key insight of modern theorists was that law is a tool of state policy. Hence a state would not want its law to apply if a state policy would not be advanced.¹¹¹ According to modern theorists, the First Restatement erred by giving controlling weight not to “economic and social objectives,” but to “technical and arbitrary rules relating to the place” of a particular event.¹¹² This criticism eventually took hold in the judiciary, which was increasingly unwilling to sacrifice state policy objectives on the basis of a single territorial factor.¹¹³ To this day, the consensus view is that conflict approaches should be sensitive to the substantive policies underlying any potentially applicable laws.¹¹⁴

As the First Restatement faded from the limelight, conflict-of-laws scholars began formulating a variety of “modern” theories that rejected unremitting territorialism and instead privileged the policies behind state laws as well as factors like the reasonable expectations of the parties.¹¹⁵ The capstone of the so-called “choice-of-law revolution” was the publication of the Second Restatement, which aggregated a number of modern approaches. The Restatement authors instructed courts to apply, based on the consideration of a number of factors, the law of the state with the “most significant relationship” to the dispute.¹¹⁶ Though often criticized by scholars, the Second Restatement’s approach now dominates the courts.¹¹⁷

This history yields important insights that can and should guide the development of new approaches to conflict cases. In addition to demonstrating sensitivity to federalism concerns, new theories should consider the purpose of the laws they seek to apply.¹¹⁸ Ignoring the substance of the relevant laws risks the same arbitrary results that heralded the downfall of the First Restatement.

110. ROOSEVELT, *supra* note 88, at 31-33.

111. *Id.*; Roosevelt, *supra* note 21, at 2461.

112. Ernest G. Lorenzen & Raymond J. Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555, 587 (1935).

113. Roosevelt & Jones, *supra* note 102, at 140.

114. Shreve, *supra* note 92, at 912.

115. Roosevelt & Jones, *supra* note 102, at 140.

116. *Id.*

117. *Id.* at 141. Note, however, that it is difficult to categorize judicial approaches because so many courts combine elements of more than one modern theory. Symeonides, *supra* note 104, at 1887-89. The Rhode Island Supreme Court, for example, considered factors from at least three different approaches in one conflict-of-laws case. *Id.* at 1888.

118. Shreve, *supra* note 92, at 912. Shreve also notes that scholars agree that conflict theories should respect party expectations and avoid unfairly surprising the litigants. This is largely irrelevant in the search-and-seizure context. Those concerned about party expectations usually focus on

The most recent work in the conflict-of-laws field draws on this and other lessons from the history of conflict-of-laws development. The Reporter for the forthcoming Third Restatement of Conflict of Laws, Kermit Roosevelt III, has argued that conflict-of-laws theories can and should be understood through the lens of a two-step framework.¹¹⁹ Because that model has gained widespread support among scholars and is anticipated to be the foundation for a forthcoming Third Restatement,¹²⁰ it provides the theoretical framework for the search-and-seizure approach proposed in Part IV. Drawing on the work of Brainard Currie and Larry Kramer, Roosevelt argues that courts resolving conflicts of law must first consider the scope of the relevant laws, and second, determine which law should be given priority.¹²¹

To determine the scope of the relevant laws, courts should simply use ordinary legal analysis to determine whether the laws reach the facts of the controversy.¹²² For example, if a state legislature has explicitly provided that its law reaches a given controversy, then the controversy should be understood to fall within the law's scope.¹²³ The proposed Third Restatement explains that this analysis involves "deciding to which people, in which places, under which circumstances, [the state laws] extend rights or obligations."¹²⁴ If only one state's

contractual disputes and other areas where the parties are likely to have expectations about a court's choice of law prior to the dispute. Shreve, *supra* note 95, at 286. They argue that a conflicts theory should avoid applying an unfavorable law if a party "reasonably and to his detriment relied on the application of favorable law." *Id.*; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. g (AM. LAW INST. 1971) ("[I]t would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."). Defendants in search-and-seizure cases are unlikely to have arranged their affairs such that one particular state's constitution would inevitably protect them from police investigation. And even if a particular defendant had taken steps to conceal evidence in this way, those actions are unlikely to be characterized as "reasonable" or "justifiable."

119. Roosevelt & Jones, *supra* note 102, at 142-43 (discussing scholarly support for the two-step process).

120. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 5, topic 1, intro. note (AM. LAW INST., Council Draft No. 1, Sept. 12, 2017) [hereinafter CONFLICTS RESTATEMENT DRAFT].

121. ROOSEVELT, *supra* note 88, at 1-2.

122. *Id.* at 43-44; Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 11-12 (2012); Roosevelt, *supra* note 21, at 2482-88; Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1870-75 (2005) [hereinafter Roosevelt, *Renvoi*]; Roosevelt & Jones, *supra* note 102, at 142-43.

123. Roosevelt, *Renvoi*, *supra* note 122, at 1872-73.

124. See CONFLICTS RESTATEMENT DRAFT, *supra* note 120, § 5.01 cmt. b.

law reaches the facts of the case, there is no conflict, so the analysis ends; the only applicable law controls the case.

On the other hand, if there is a conflict, Roosevelt advises that courts should proceed to the second step: assigning priority, based on forum law, to one of the applicable laws.¹²⁵ Different rules of priority are possible, but the Third Restatement explains that priority rules should be informed by modern conflict-of-laws thought. For example, they should “generally seek to provide sensible, rather than arbitrary, answers to choice-of-law questions, so that states’ policies are not needlessly thwarted.”¹²⁶

In sum, the lack of constitutional or statutory constraints has made space for considerations based on the traditional preoccupations of the common law: reason, history, and experience.¹²⁷ Insights from history and modern scholarship provide a rubric for judging both current and proposed approaches. The discussion that follows elaborates on the importance of performing the two-step analysis described above and uses that framework as the foundation for the novel approach proposed in Part IV to resolve search-and-seizure conflicts of law.

III. EXISTING APPROACHES TO INTERSTATE SEARCH-AND-SEIZURE CONFLICTS OF LAW

Given the lack of theoretical consensus in the broader conflict-of-laws field, it is unsurprising that courts have adopted a variety of approaches to resolving interstate search-and-seizure conflicts of law. This Part outlines and evaluates current approaches. While they are not always distinct and independent,¹²⁸ a few archetypes are discernible. The first is the application of forum law based on the notion that the exclusionary rule is procedural. Alternatively, some courts favor the universal application of either situs or forum law. Others use multifactor tests or perform a type of state-constitutional-law analysis. Finally, there is the ma-

125. See sources cited *supra* note 122.

126. See CONFLICTS RESTATEMENT DRAFT, *supra* note 120, § 5.01 cmt. d.

127. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. b (AM. LAW INST. 1971) (“[A state] derives [its conflicts] law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning.”).

128. For example, in *People v. Orlosky*, 115 Cal. Rptr. 598, 600-01 (Ct. App. 1974), the California Court of Appeals formally applied a type of governmental interest analysis, a modern approach, but it characterized its “interests” solely by reference to the state’s exclusionary-rule purposes. I therefore consider it to be an example of the exclusionary-rule approach.

jority approach: application of the forum state's (or some other state's) exclusionary rule to determine which state's law would best serve the interests of deterrence and any other purposes underlying a particular state exclusionary rule.

A. Application of Forum Procedural Law

Since the days of the First Restatement, courts have adhered to a basic rule: questions of procedure, as opposed to substance, should be resolved according to forum law.¹²⁹ Procedural issues, in contrast to those “concerned primarily with the rights and liabilities of the parties,” involve the “procedure by which controversies are brought into [a state's] courts and by which the trial of these controversies is conducted.”¹³⁰ And according to longstanding practice,¹³¹ the First Restatement,¹³² and the Second Restatement,¹³³ questions regarding the admissibility of evidence are procedural. It follows, according to some courts, that forum law should determine the admissibility of evidence alleged to have been illegally seized.¹³⁴ But despite its appealing simplicity, this approach ignores the constitutional violation that underlies every case involving an exclusionary rule and discounts the significant public policy goals served by different exclusionary rules.

The reasoning of the Texas Court of Criminal Appeals in *Burge v. State*¹³⁵ is typical of this approach. At issue was the admission of evidence obtained by Oklahoma and Texas law enforcement officers who searched the defendant's home in Oklahoma after receiving permission from the defendant's wife. In Texas, spouses could consent to such a search, but in Oklahoma, they could not. The

129. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (AM. LAW INST. 1934); SYMEONIDES, *supra* note 22, at 68-73.

130. SYMEONIDES, *supra* note 22, at 68-73. In a related context, Judge Posner described a “pure rule of procedure” as being “concerned solely with accuracy and economy in litigation [that] should therefore be tailored to the capacities and circumstances of the particular judicial system.” *Id.* at 73 (quoting *Barron v. Ford Motor Co. of Can.*, 965 F.2d 195, 199 (7th Cir. 1992)).

131. See, e.g., *People v. Saiken*, 275 N.E.2d 381, 385 (Ill. 1971) (“Evidentiary questions are generally governed by the laws of the forum.”); see also *Home Ins. Co. v. Dick*, 281 U.S. 397, 409 (1930) (declaring that a state “may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies”).

132. RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 12, intro. note (AM. LAW INST. 1934).

133. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 6, intro. note (AM. LAW INST. 1971).

134. See, e.g., *Saiken*, 275 N.E.2d at 385; *Burge v. State*, 443 S.W.2d 720, 723 (Tex. Crim. App. 1969); see also *People v. DeMorrow*, 320 N.E.2d 1, 3 (Ill. 1974) (“Inasmuch as the question raised by the defendant is one of evidence, the law of Illinois, the forum State, is applicable.”).

135. 443 S.W.2d 720.

court ruled that the evidence was admissible even though it was unlawfully obtained under situs law because “the law of the forum (Texas in this case) governs as to procedure and rules of evidence.”¹³⁶ The Court explained briefly: “[a]ny other view would lead to endless perplexity.”¹³⁷

To be sure, the Second Restatement classifies the “proper form of action, service of process, pleading, rules of discovery, *the admissibility of evidence*, mode of trial and execution and costs”¹³⁸ as procedural. And it makes sense that these issues, including run-of-the-mill evidentiary questions, are governed by forum law. The forum is “more concerned with how its judicial machinery functions and how its court processes are administered than is any other state,” and applying any other law would compromise the efficiency and convenience of trials without “further[ing] [] the values that the application of another state’s local law is designed to promote.”¹³⁹

But characterizing the exclusionary rule as procedural ignores the connection between a state’s Fourth Amendment analogue and its exclusionary rule. Because exclusionary rules remedy a violation of state law, any choice to apply a specific exclusionary rule is also a choice about which state’s Fourth Amendment analogue should apply. And neither the First nor the Second Restatement suggests that the right to be free from unreasonable searches is procedural. Whether that right was violated bears no relationship to “judicial administration.”¹⁴⁰

Similar logic undergirds the consensus view that “remedial issues are so bound up with substantive issues that they ought to be decided according to the

136. *Id.* at 723.

137. *Id.* Other courts have followed the same logic and characterized the exclusionary rule as a procedural issue. *See, e.g.*, cases cited *supra* note 134.

138. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a (AM. LAW INST. 1971) (emphasis added).

139. *Id.*

140. *Id.*; *see also* Commonwealth v. Sanchez, 716 A.2d 1221, 1224 (Pa. 1998) (characterizing a search-and-seizure conflict as “a strict constitutional law question involving the fundamental right to be free from unreasonable searches and seizures” that “must be addressed under the principles of conflicts between substantive laws”); LAFAVE, *supra* note 43, § 1.5(c) (arguing that *Burge*’s summary decision to classify the exclusionary rule as procedural “has been justly criticized for its imprecision”); William H. Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, 44 TENN. L. REV. 1043, 1060–61 (1977) (arguing that *Burge*’s focus on the procedure-substance dichotomy “confuses” the issues involved in an interstate search-and-seizure case); Note, *Conflict of Laws – Criminal Procedure – Law of Forum Applies to Search and Seizure in Accused’s Out-of-State Residence*, 23 VAND. L. REV. 425, 428 (1970) (arguing that the *Burge* court failed to properly distinguish between “the independent issues of wrongful seizure and admissibility”).

same law that governs the substantive issues.”¹⁴¹ Just as questions related to the measure, extent, or amount of damages in tort are treated as substantive,¹⁴² so too should be questions of exclusion under state constitutional law. Treating the question as procedural ignores the exclusionary rule’s remedial purpose and effectively equates the underlying legality of a search with “judicial administration.”¹⁴³

Moreover, even if the underlying constitutional violation is ignored, courts following *Burge*’s logic are valorizing form over substance by treating as procedural a rule that furthers important policy goals like deterrence. Scholars and courts have long criticized unthinking invocations of the “substantive” and “procedural” labels without considering the purposes underlying the relevant laws.¹⁴⁴ According to the Second Restatement, a court should only classify a law as procedural if it is “convinced that the policy underlying the distinction between substance and procedure in choice-of-law dictates such result.”¹⁴⁵ While the line between substance and procedure is far from clear, the Second Restatement suggests that the procedural characterization is generally appropriate for issues related to the administration of court processes. Courts should consider whether “an effort to apply the rules of the judicial administration of another state would impose an undue burden upon the forum,” whether the parties are likely to have relied on a particular law before entering into a legal transaction, whether the choice of law is likely to affect the resolution of the case, and whether “the precedents have tended consistently to classify [an] issue as ‘procedural’ or

141. *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) (citing ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 126 (3d ed. 1977)); see also C. P. Jhong, Annotation, *Conflict of Laws as to Measure or Amount of Damages in Death Actions*, 92 A.L.R.2d 1180 § 2 (1963) (explaining that “the theory that the measure, extent, or amount of damages for wrongful death is a matter of ‘procedure’ or ‘remedy,’ as distinguished from the ‘substance’ of the right to recovery . . . ha[s] subsequently been disapproved”).

142. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (AM. LAW INST. 1971).

143. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (considering the scope of the federal Fourth Amendment and declaring that “[w]hether evidence obtained from respondent’s Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation,” which occurred “solely in Mexico”).

144. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (“Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.”); Walter Wheeler Cook, “Substance” and “Procedure” in the *Conflict of Laws*, 42 *YALE L.J.* 333, 336-37 (1933).

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 cmt. d (AM. LAW INST. 1971).

‘substantive.’”¹⁴⁶ Where a law “goes beyond questions of trial administration and is primarily designed to affect decision of a particular issue,” the forum should treat it as substantive.¹⁴⁷ In particular, if a rule “singles out a relatively narrow issue” and gives it “peculiar treatment,” the rule is likely substantive.¹⁴⁸

Presumably for these reasons, the Second Restatement has classified a number of evidentiary rules as substantive. One example is certain privileged communications. Courts are generally instructed not to apply forum law indiscriminately, but to apply the substantive law of the case to determine whether to admit privileged evidence. They are not simply to apply forum law in all cases.¹⁴⁹ This departure from the general rule that evidentiary questions should be governed by forum law is likely because, unlike other evidentiary rules, privilege rules “subordinate the goal of truth seeking to the broader societal interests of protecting certain relationships and encouraging socially desirable confidences.”¹⁵⁰

State exclusionary rules are at least as substantive as state privilege regimes. Like privileges – and unlike rules of evidence that seek to ensure the accuracy of relevant facts and the efficiency of trials¹⁵¹ – exclusionary rules implicate substantive policy concerns, specifically those surrounding the administration of the criminal justice system. They exist, depending on the interpretation of a particular state’s constitution, to deter police misconduct, to ensure the integrity of the judiciary, and to maintain the public’s trust in the judiciary.¹⁵² Unthinking application of forum law brushes these constitutionally rooted rationales aside and demotes the exclusionary rule to a mere principle of administration.

146. *Id.* § 122 cmt. a. For example, the Comment on section 133 of the Restatement provides that the burden of persuasion should generally be considered procedural because, like other procedural rules, it is “concerned primarily with questions of trial administration” and it is unlikely that the parties “at the time of planning their transaction . . . gave thought to the manner in which possible litigation arising out of the transaction would be conducted.” *Id.* § 133 cmt. b.

147. *Id.* § 133 cmt. b.

148. *Id.*

149. *Id.* § 139 cmt. d.

150. SYMEONIDES, *supra* note 22, at 71; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 cmts. a & c (AM. LAW INST. 1971) (explaining that evidentiary questions are “usually” considered procedural but noting a number of exceptions, including for evidence related to the measure of damages, privileges, integrated contracts, and the statute of frauds).

151. *Cf.* *Barron v. Ford Motor Co. of Can.*, 965 F.2d 195, 199 (7th Cir. 1992) (noting that federal courts should always apply federal procedural rules, but should apply the substantive law of a state where appropriate; and defining procedural rules as “concerned solely with accuracy and economy in litigation,” and substantive rules as “concerned with the channeling of behavior outside the courtroom”).

152. *See generally supra* notes 59-62 and accompanying text.

B. Territorialist Approaches

Other courts confronted with interstate search-and-seizure conflicts of law have adopted essentially per se territorial rules in favor of either forum or situs law. Both territorialist approaches are unsatisfactory. Because neither approach considers the policies underlying the exclusionary rule, both frequently produce arbitrary results that have little to do with the purposes of exclusionary doctrine.

For instance, in *People v. Price*,¹⁵³ the New York Court of Appeals upheld the admission of evidence obtained by Los Angeles officers, allegedly in contravention of situs law. The defendant argued that the police violated California law when they used a trained dog at a Los Angeles airport to detect drugs in his luggage.¹⁵⁴ Instead of considering the applicability of situs law, the court simply declared that the case “d[id] not involve a conflicts-of-law question.”¹⁵⁵ The court held that the dog’s reactions were used to justify a subsequent search warrant issued by a New York court, and thus the case involved “a question of whether or not the use of [a] dog is proscribed by either Federal or New York law, constitutional or statutory.”¹⁵⁶ And because the defendant’s rights had not been violated under either federal or New York law, the evidence was admissible.¹⁵⁷ Other courts have also fallen back on per se rules in favor of forum law, though they have offered little explanation for their choice of approach.¹⁵⁸

John Corr has offered the most sustained and thoughtful justification for consistently applying one law with few exceptions, though he proposes application of situs law.¹⁵⁹ The most important benefit of this approach, according to

153. 431 N.E.2d 267, 270 (N.Y. 1981).

154. *Id.* at 268.

155. *Id.* at 270.

156. *Id.*

157. *Id.*

158. See, e.g., *People v. Taylor*, 804 P.2d 196, 198 (Colo. App. 1990) (applying Colorado (forum) constitutional law to a North Dakota search because the defendant “assert[ed] a [Colorado] constitutional violation”); *State v. Camargo*, 498 A.2d 292 (N.H. 1985) (applying New Hampshire (forum) law without explanation to a search performed in Massachusetts by Massachusetts officers); *Ellis v. State*, 364 S.W.2d 925, 928-29 (Tenn. 1963) (applying Tennessee (forum) law to a Mississippi search based, in part, on dicta in *Mapp v. Ohio*, 367 U.S. 643, 655, 657 (1961), which suggested that evidence resulting from a foreign search should be held inadmissible if it was obtained in violation of the forum state’s constitution); *State v. Platt*, 574 A.2d 789 (Vt. 1990) (applying Vermont (forum) constitutional law without explanation to a search performed in Massachusetts by Massachusetts officers).

159. See Corr, *supra* note 17.

Corr, is its ability to “bring a needed measure of predictability to police work.”¹⁶⁰ To be sure, bright-line rules promote predictability, which is particularly important, as will be discussed, when deterrence is the goal.¹⁶¹

But the onslaught of scholarly and judicial criticism of the First Restatement demonstrates that mechanically applying a territorialist rule will produce unsatisfactory results in some set of cases because the rule will privilege a factor that is generally unrelated to the substance of the relevant laws.¹⁶² Interstate search-and-seizure cases are not immune to this criticism. It is not hard to imagine a situation in which mechanical application of either situs or forum law would result in an arbitrary outcome. Consider a case in which situs officers, operating within the situs state, discover evidence of a forum crime while independently investigating a situs crime. Assume that the evidence was lawfully obtained under situs law but unlawfully obtained under forum law and inadmissible under the forum state’s exclusionary rule. In that case, few would argue that unthinking application of forum law and its exclusionary rule provides a satisfactory answer. At least one key purpose of the forum state’s exclusionary rule – deterrence – would not be furthered: the foreign officers in this and similar future cases could not be expected to know that forum law was involved, let alone what forum law required.¹⁶³ Mechanical application of forum law would therefore needlessly sacrifice probative evidence and, by extension, the effective administration of the forum state’s criminal justice system with no hope of effectuating one of the exclusionary rule’s most important purposes. Nor is it immediately clear that other state-articulated reasons would support application of forum law. It would be hard to argue, for example, that a defendant’s right to privacy mandates application of forum law when the evidence was located in the situs state and discovered during the investigation of a situs crime.

Moreover, the risk of arbitrary application does not run in one direction. Though no court appears to have adopted a *per se* rule in favor of situs law, that too could trigger unjust results. Consider a situation in which forum officers unwittingly follow a defendant into another state before performing a search of the defendant’s automobile. Mechanical application of situs law would require the court to hold the forum officers accountable to situs law, even if they did not know that they had crossed a state line. Again, neither deterrence nor a concern

160. *Id.* at 1234.

161. *Id.*; see also *infra* notes 240-257 and accompanying text (explaining that a rules-based approach is more effective at promoting deterrence than a standards-based approach).

162. See *supra* notes 103-114 and accompanying text.

163. See also Theis, *supra* note 140, at 1048-49 (“It would be unreasonable to require that state officers know the rules of all fifty states More importantly, the officers might not be aware of the foreign nature of their investigation at the time of the investigation and would be in a poor position to apply foreign rules even if they knew the content of foreign law.”).

for the defendant's privacy rights supports this outcome. The forum officers could not be expected to know and abide by situs law, and the defendant's right to privacy should not justify application of situs law merely because he or she changed locations while the police were in pursuit. It is unlikely that the defendant's reasonable expectation of privacy changed the moment he or she crossed a state line.

In fact, Corr, the primary defender of the situs-law approach, admits that mechanical application of situs law will sometimes be inappropriate. He permits exceptions when accompanied by a "coherent" explanation of "why the normal rule of situs should not apply."¹⁶⁴ For example, Corr argues that a court should not apply situs law if forum police officers have manipulated their investigation so that less defendant-protective law applies. He reasons that the police in that hypothetical case are acting as "vigilantes with badges who seek to frustrate the purpose behind their own state's exclusionary rules."¹⁶⁵ Thus, in reality, his preferred approach is a presumption in favor of situs law that can be overcome based on judicial discretion and an analysis of the purposes underlying a particular state's exclusionary rule. This approach resembles the exclusionary-rule approach considered in Section III.E. It is enough to say here that without such safety valves, this type of territorial-based rule is unsatisfactory because it yields arbitrary results with no justification grounded in the substantive policies underlying a state's exclusionary rule.

C. Multifactor Conflict-of-Laws Approaches

A few courts have taken the opposite approach. Rather than resort to a traditional territorial-based rule or the longstanding distinction between substance and procedure, they have adopted one of the multifactor conflict-of-laws approaches that have arisen in the last century (or they have created a unique multifactor approach that draws on the factors used in more than one of the recently developed approaches). These multifactor approaches, which generally reject mechanical rules divorced from the "real reasons relevant to the functions of law in our society,"¹⁶⁶ include state-interest analysis, the better-law approach, and

¹⁶⁴ Corr, *supra* note 17, at 1237-38 ("[A] familiar engine drives us toward developing such principled exceptions: the discretion of trial judges, respectful of the general applicability of situs law and constrained by their obligation to write opinions explaining why, in unusual circumstances, situs law should not apply.").

¹⁶⁵ *Id.* at 1238.

¹⁶⁶ Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 26 (1977).

the center-of-gravity test.¹⁶⁷ Regardless of its exact form, each suffers from a number of common problems as applied in the search-and-seizure context. Few if any of the courts that take this approach perform what should be the first step in any conflict-of-laws analysis: determining whether a particular search and seizure was governed by two state constitutions. More importantly, none of these approaches have been applied in ways that are sufficiently sensitive to the policies underlying exclusionary doctrine. And most of these approaches suffer from some degree of problematic forum bias.

The Rhode Island Supreme Court's decision in *State v. Briggs*¹⁶⁸ is illustrative of a multifactor approach. In *Briggs*, the court upheld the admissibility under Rhode Island (forum) law of evidence seized in New Hampshire by New Hampshire and Rhode Island officers.¹⁶⁹ The police searched the defendant's trash bag after following the defendant's neighbor and watching him dispose of it.¹⁷⁰ Under New Hampshire law, but not Rhode Island law, the defendant claimed he had standing to challenge the search and that the prosecution carried a heavier burden of proof to obtain admission.¹⁷¹ To resolve the dispute, the court declared that Rhode Island had adopted the "interest-weighting approach" to resolving conflicts of law.¹⁷² The court then recited the factors identified in its conflict-of-laws case law: "(1) [p]redictability of results[,] (2) [m]aintenance of interstate and international order[,] (3) [s]implification of the judicial task[,] (4) advance[ment] of the forum's governmental interest[,] and (5) [a]pplication of the better rule of law."¹⁷³ In this case, the court held that the balance of interests favored forum law. The crime was committed in Rhode Island and the trial was held in Rhode Island. The victim was a resident of Rhode Island, the defendant "had at least a friendly relationship with the victim . . . in the State of Rhode Island," and many of the State's witnesses "either reside[d] or [were] employed, or at the least were [in the state], when th[e] homicide took place."¹⁷⁴ And the State "ha[d] an interest in apprehending those who commit[ted] crimes within its borders and prosecuting those accused according to its laws."¹⁷⁵

167. For an extended discussion of the modern choice-of-law revolution and the various theories that arose in the late 1900s, see SYMEONIDES, *supra* note 22, at 93-115.

168. 756 A.2d 731 (R.I. 2000).

169. *Id.* at 733, 739-40.

170. *Id.* at 733.

171. *Id.* at 739.

172. *Id.*

173. *Id.* at 739-40 (quoting *Victoria v. Smythe*, 703 A.2d 619, 620-21 (R.I. 1997) (per curiam)).

174. *Id.* at 740.

175. *Id.*

Other courts have taken similar approaches that require a balancing of various factors.¹⁷⁶ And like the *Briggs* court, none appears to have considered whether another conflict-of-laws approach would be preferable or to have explained why it was appropriate to adopt the particular approach that it did.

As a threshold matter, courts applying these approaches neglect to determine whether two state constitutions apply, and instead proceed directly to the conflict-of-laws analysis.¹⁷⁷ As in other contexts, this is problematic because only when an officer is bound by two conflicting laws is it necessary to perform a full conflict-of-laws analysis. Consider again the facts of *Briggs*. If Rhode Island's Constitution does not bind state actors operating out of state, then only the strictures of the New Hampshire Constitution are relevant.¹⁷⁸ It is thus critical for a court to first interpret the relevant constitutions to determine whether the forum state's constitution applies extraterritorially or the situs state's constitution applies to out-of-state officers acting in the situs state.¹⁷⁹

Moreover, even assuming that two laws conflict, the multifactor choice-of-law theories suffer from additional flaws. Most troubling, courts give too little weight to the purposes of the exclusionary rule and too much weight to factors irrelevant to the administration of the criminal justice system. In theory, multifactor approaches should give different weights to different factors depending on the context of a given case. The drafters of the Second Restatement, for ex-

176. See, e.g., *People v. Saiken*, 275 N.E.2d 381, 385 (Ill. 1971) (noting that “from the viewpoint of ‘significant relationship’ or ‘center of gravity’ rules, the significant contacts were with Illinois. The crime was committed in Illinois; it was being prosecuted there; the defendant was a resident and citizen of Illinois; the great majority of the witnesses, who would testify at the trial, were Illinois residents; Indiana had no vital contact with the crime; and the application of Illinois evidentiary law would not offend the comity of interstate relationships between Indiana and Illinois.”); cf. *Commonwealth v. Sanchez*, 716 A.2d 1221, 1224 (Pa. 1998) (determining that Pennsylvania (forum) law does not apply to a search performed by a federal agent in California because “Pennsylvania has no interest in a canine sniff search conducted within California’s borders, even if the results are later used in the Pennsylvania Courts”).

177. See *supra* notes 120-125 and accompanying text.

178. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990) (analogously determining that the federal Fourth Amendment does not always bind U.S. law enforcement agents operating abroad).

179. See Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 874 (1991) (“Failure to consider as a threshold issue the jurisdictional scope of the applicable state constitutional provision runs the risk of fruitless analysis, or worse, of interpretation by sheer inadvertence.”); Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939, 945 (1993) (“[T]he first question is one of constitutionalism, not conflict of laws . . .”).

ample, wrote that the lists of factors provided in the Restatement are not exclusive.¹⁸⁰ Instead, not only the lists but the weight of the factors in those lists should depend on the case.¹⁸¹ The domicile of the parties, for instance, may be important in some tort cases, but is usually given substantially less weight than the state where the disputed conduct occurred because that state “has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there.”¹⁸² In the interstate search-and-seizure context, the domicile of the parties, the location of the witnesses, and similar factors have nothing to do with either state’s interest in promoting the purposes (e.g., deterrence) that underlie their exclusionary rules.¹⁸³ As a result they should, at the very least, be given substantially less weight than they are currently given in cases like *Briggs*.

To be sure, some courts that adopt one of these approaches do consider some variant of “governmental interest” when performing their analyses, but they often mischaracterize what the governmental interest is. In *Briggs*, for example, the court determined that Rhode Island “has an interest in apprehending those who commit crimes within its borders and prosecuting those accused according to its laws.”¹⁸⁴ This description is too general. Each of the states involved in a conflict case have a specific interest in furthering the purposes underlying their exclusionary rules. Characterizing the relevant interests in any other way risks compromising those purposes,¹⁸⁵ which can include deterrence, ensuring the integrity of the judicial system, and maintaining the public’s trust in government.¹⁸⁶

180. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b (AM. LAW INST. 1971).

181. *Id.* (“Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law . . . [A]nd varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law.”).

182. *Id.* § 145 cmt. d. On the other hand, concerns about issues like uniformity and administrative ease take on greater importance when determining the law governing intestate succession of movables. The Restatement therefore provides that the law of the state where the decedent was domiciled should apply. *Id.* § 260 & cmt. b.

183. See Corr, *supra* note 17, at 1227–30 (arguing that interest analysis is insufficiently sensitive to the unique policies at play in the search-and-seizure context); Latzer, *supra* note 179, at 873 (arguing that interest analysis is “at best, an inelegant fit [in the exclusionary-rule context], because such matters as the domicile of parties and witnesses, important in civil disputes, are irrelevant in criminal cases”); Richard Tullis & Linda Ludlow, *Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule*, 10 U.S.F. L. REV. 67, 88 (1975).

184. *State v. Briggs*, 756 A.2d 731, 740 (R.I. 2000).

185. *Cf.* Corr, *supra* note 17, at 1228 (arguing that courts inaccurately characterize the relevant interests when using interest analysis to resolve interstate search-and-seizure cases).

186. See *supra* notes 58–63 and accompanying text.

Indeed, the *Briggs* court gave no attention to whether the conflict rule it announced would actually further the goal of deterring police misconduct or any of the other values underlying Rhode Island's or New Hampshire's exclusionary rules.

Finally, multifactor conflict-of-law theories usually result in application of forum law.¹⁸⁷ As a result, they raise the same concerns discussed in Section III.B: they will frequently dictate application of forum law even when application of that law offers no deterrence-related or other benefits. Together these flaws make modern multifactor theories, as applied by the courts, a poor fit. Current courts fail to perform the necessary threshold inquiry into whether two laws conflict, mischaracterize the relevant state interests, and are prone to be inappropriately biased in favor of forum law.

D. State-Constitutional-Law Analysis

A fourth approach that has gained traction among courts focuses exclusively on the state constitutional question. Courts that employ this approach typically begin by correctly considering whether the forum state's constitution should be interpreted to apply extraterritorially to the officers or defendants. But the courts end their analyses too soon. Instead of considering whether *both* constitutions apply and, if both apply, determining in a separate analysis which should prevail, they generally ignore the potential applicability of situs law. To be clear, these courts may not consider themselves to be engaging in a conflict analysis. But that is the effect when they explicitly or implicitly refuse to apply a potentially relevant state law. Viewed in that light, the approach is unjustifiably biased in favor of forum law.

In *State v. Davis*,¹⁸⁸ for example, the Oregon Supreme Court upheld the admissibility of evidence obtained in Mississippi by Mississippi officers because there was no violation of Oregon (forum) law. Pursuant to a fugitive warrant issued in Mississippi for arrest warrants issued in Oregon, Mississippi officers

¹⁸⁷. See Corr, *supra* note 17, at 1220–23, 1231. A number of reasons could account for this forum bias. Corr notes that courts frequently view a crime, an associated search, and its prosecution as a single entity, rather than as a series of events that might give rise to different interests. Thus, forum law will usually prevail because of the forum state's interest in prosecuting crimes within its borders, even though another state might have a substantial interest in regulating the relevant police conduct. *Id.* at 1228; see also Tullis & Ludlow, *supra* note 183, at 88–89 (criticizing the *Saiken* court for failing to afford adequate weight to the situs state's search-related contact when it performed the significant-relationship test). In addition, most modern theories are self-avowedly biased in favor of the forum when a particular analysis is otherwise inconclusive. See SYMEONIDES, *supra* note 22, at 103.

¹⁸⁸. 834 P.2d 1008, 1012–13 (Or. 1992).

arrested the defendant in his mother's home in Mississippi.¹⁸⁹ The defendant argued that the arrest violated Oregon law because it was effectuated without a search warrant for his mother's house.¹⁹⁰ Interestingly, the court agreed that the Oregon Constitution applied to the Mississippi officers. Based on constitutional text and precedent, the court concluded that the forum constitution protected all in-state defendants: "It does not matter *where* . . . evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution."¹⁹¹ But the court went on to hold that there was no violation of either the Oregon or Federal Constitution. The evidence, according to the court, was therefore admissible.¹⁹²

In so holding, the court failed to consider the third relevant source of law: the Mississippi Constitution. At no point did it ask whether the officers were bound by the Mississippi Constitution and, if so, why it was appropriate to apply forum law instead of situs law. Nor, for that matter, did it explain why it chose to adopt this particular approach rather than any of the other approaches discussed in this Part.¹⁹³

Courts that hold that the forum constitution does not apply are most likely to resolve the case correctly, in part because they are left without a conflict.¹⁹⁴ The only remaining question is whether the situs state's constitution governs in addition to the U.S. Constitution. In these cases, courts have, to varying degrees,

189. *Id.* at 1009.

190. *Id.*

191. *Id.* at 1012-13.

192. *Id.* at 1014.

193. See also *People v. Nieto*, 746 N.Y.S.2d 371, 378 (Sup. Ct. 2002) (similarly failing to consider the applicability of situs law, in this case New Jersey law, and holding that the forum constitution, here the New York Constitution, controlled the admissibility of evidence obtained by New York officers in New Jersey because the New York Constitution "appl[ies] extra-territorially to every New York defendant").

194. See, e.g., *State v. Bridges*, 925 P.2d 357, 367 (Haw. 1996) (holding, based on an exclusionary-rule analysis, that the Hawaii (forum) Constitution did not govern the admissibility of evidence obtained in California by Hawaii and California officers, in part because "admitting the evidence in the instant case would not tarnish the integrity of the courts" since "no relevant Hawai'i law applies extraterritorially to the conduct of its agents"), *overruled by State v. Torres*, 262 P.3d 1006 (Haw. 2011); *Helm v. Commonwealth*, 813 S.W.2d 816 (Ky. 1991) (holding that the Kentucky Constitution did not apply to Ohio officers operating in Ohio and that the search was lawful under Ohio law); *State v. Mollica*, 554 A.2d 1315, 1324 (N.J. 1989) (holding that forum law did not apply to federal officers unless the officers were acting as agents of forum officers, in part because "a state constitution ordinarily governs only the conduct of the state's own agents or others acting under color of state law").

considered the applicability of situs law. But courts do not always give appropriate weight to situs law, and at least one court has failed to consider whether situs law applies at all – even after it found that forum law did not apply. In *State v. Rivers*,¹⁹⁵ the Supreme Court of Louisiana considered the legality of an automobile search performed by Alabama officers in Alabama. Instead of explicitly determining whether both the Alabama and Louisiana Constitutions applied, the court simply held that “[s]ince th[e] search occurred in Alabama, [the court is] not concerned with provisions of the Louisiana Constitution, Article I, Section 5,” and proceeded to determine only whether there was a Federal Constitutional violation.¹⁹⁶ It offered no explanation for its failure to consider the applicability of the Alabama Constitution.

This tendency to give insufficient attention to situs law contravenes the basic conflict-of-laws principle that forum bias – which destroys uniformity, encourages forum shopping, and aggravates interstate tensions – should be minimized. Whether for constitutional or normative reasons, modern theorists generally strive to craft objective tests that can identify the appropriate law in a way that is rational, predictable, and fair.¹⁹⁷ Perhaps these courts believe that constitutional law deserves special consideration and should be permitted to circumvent this fundamental goal. But thus far, courts and scholars have failed to articulate and defend any such theory. And in practice, courts have treated constitutional provisions no differently than other forms of law,¹⁹⁸ which suggests that there is little support for a special rule permitting forum favoritism in constitutional cases.

To be clear, the instinct to consider whether a constitution applies to a particular search is correct. The problem with this approach is that current courts are failing to consider the applicability of all the potentially relevant laws.

195. 420 So. 2d 1128, 1131-32 (La. 1982).

196. *Id.* at 1132.

197. See *supra* notes 92-95 and accompanying text.

198. See, e.g., *Wahl v. Gen. Elec. Co.*, 786 F.3d 491, 500 (6th Cir. 2015) (applying Tennessee’s statute of repose, rather than the Ohio Constitution’s Right to Remedy Clause, because standard choice-of-law analysis favored Tennessee law); *McMillen v. Winona Nat. & Sav. Bank*, 648 S.W.2d 460, 462 (Ark. 1983) (upholding the validity of a contract that would have been void under a usury provision in the Arkansas Constitution because standard choice-of-law analysis favored Minnesota law); *Vanier v. Ponsoldt*, 833 P.2d 949, 960-61 (Kan. 1992) (applying Kansas constitutional law, rather than Kentucky constitutional law, because standard choice-of-law analysis favored Kansas law).

E. Exclusionary-Rule Analysis

“Exclusionary-rule analysis,” as some courts have called it,¹⁹⁹ enjoys the most widespread judicial and scholarly support.²⁰⁰ Because it is sensitive to the policies behind exclusionary doctrine, it approaches the right answer. But it is still not quite right. While there are analytic variations in the cases that adopt this approach, these courts usually assume that the facts of a given case fall within the territorial scope of the two disputed laws and then admit or exclude the disputed evidence based on whether exclusion would further the exclusionary-rule values (e.g., deterrence) of the forum or some other state. Put differently, the courts fail to distinguish between the many steps needed to resolve a search-and-seizure conflict. They do not decide whether two laws reach the facts of a case; if so, which of those laws should prevail; whether there was a violation of that state’s law; and then finally whether that state’s exclusionary rule demands exclusion. They simply decide the entire question in one analytical step.

As will be discussed, this analysis produces three issues. Most obviously, the courts fail to perform the necessary first step of determining whether two laws apply to a case. This, then, leads to a second problem: by not choosing one law to provide both the constitutional law and the exclusionary doctrine, courts risk mismatching the exclusionary rule designed to protect one constitutional provision with a constitutional provision that has its own, separate exclusionary doctrine. And finally, the results in these cases consistently diverge even though each court ostensibly bases its decision on similar exclusionary-rule purposes. As argued in Part IV, a more predictable approach would better serve at least the deterrence rationale.

The Florida Supreme Court’s decision in *Echols v. State*²⁰¹ exemplifies this type of analysis. At issue was whether forum law should apply to out-of-state officers who had collaborated with an in-state informant.²⁰² The defendant

199. See, e.g., *Torres*, 262 P.3d 1006, 1013 (Haw. 2011); *State v. Lucas*, 372 N.W.2d 731, 737 (Minn. 1985).

200. *State v. Bridges*, 925 P.2d 357, 357 (Haw. 1996) (discussing exclusionary-rule cases and observing that “[a]lthough the cases are fairly rare, the trend appears to be toward using the exclusionary rule analysis. Both courts and commentators have concluded that it is preferable to use an exclusionary rule analysis rather than the traditional conflicts of law approach to determine the admissibility of evidence in the forum state which is obtained in another jurisdiction” (internal quotation marks and citations omitted)), *overruled on other grounds by Torres*, 262 P.3d 1006; see also, e.g., Tullis & Ludlow, *supra* note 183, at 88-91 (advocating for the exclusionary-rule approach).

201. 484 So. 2d 568 (Fla. 1985).

202. *Id.* at 571.

acknowledged that the evidence was lawfully obtained under situs and federal law, but argued that it was unlawfully obtained under forum law and that forum law should govern the case.²⁰³ The court was unpersuaded. Without explaining why it chose the particular approach it did,²⁰⁴ the court declared that exclusion would not serve the “primary purpose of the exclusionary rule” – deterrence – because exclusion “would [not] have any discernible effect on police officers of other states who conduct investigations in accordance with the laws of their state and of the United States Constitution.”²⁰⁵ In this way, the court jumped straight to considering whether exclusion was appropriate without first determining which law to apply. Moreover, because the court did not identify the applicable law, it was unclear about which exclusionary rule it applied. It cited a U.S. Supreme Court case for the “primary purpose” behind exclusionary doctrine, even though the current case apparently turned on whether situs or forum law applied. Other cases are similarly misguided.²⁰⁶

203. *Id.*

204. Few courts have provided any real justification for the use of this approach over any other. The most significant treatment of the methodological question came from the Hawaii Supreme Court, which explained that “the trend [among courts and commentators] appears to be toward using the exclusionary rule analysis” over one of the other conflict-of-law approaches and concluded that the exclusionary-rule approach is the “better approach” because it focuses “specifically on the issues pertaining to conflicts to conflicts issues in interstate search and seizure cases.” *Bridges*, 925 P.2d at 365.

205. *Echols*, 484 So. 2d at 571. Because forum and situs officers had collaborated, the court also noted that Florida’s interests would not be served by “imperially attempting to require that out-of-state police officials follow Florida law . . . when they are requested to cooperate with Florida officials in investigating crimes committed in Florida.” *Id.* at 572.

206. See, e.g., *Pooley v. State*, 705 P.2d 1293, 1303 (Alaska Ct. App. 1985) (adopting *People v. Blair*’s exclusionary-rule analysis and holding that evidence lawfully obtained under California law by a California officer in California was admissible in Alaska notwithstanding its potential illegality under Alaska law); *People v. Phillips*, 711 P.2d 423, 456 (Cal. 1985) (upholding the admission of evidence lawfully obtained under Utah (situs) law by Utah officers because “the purposes of the exclusionary rule would not be served by . . . an extraterritorial application” of California (forum) law); *People v. Blair*, 602 P.2d 738, 748 (Cal. 1979) (upholding the admission of evidence lawfully obtained under Pennsylvania (situs) law but unlawfully obtained under California (forum) law because excluding the evidence would not serve the exclusionary rule’s purposes); *People v. Orlosky*, 115 Cal. Rptr. 598, 601 (Ct. App. 1974) (“This state should not be impeded, in a local prosecution for a local crime, by barring evidence which California law regards as legitimately procured . . . merely to add a wrist slap to a foreign police officer whose personal interest in a California prosecution must be relatively remote. Indiana can control its own officers adequately by applying its rules . . . in Indiana prosecutions.”); *Bridges*, 925 P.2d at 372 (similar); *State v. Lucas*, 372 N.W.2d 731, 737 (Minn. 1985) (determining that “it is preferable to use an exclusionary rule analysis rather than a traditional conflicts of law approach to determine the admissibility of evidence obtained in another state,”

Recent decisions have provided more detailed analyses with slight modifications, but their analyses are still incomplete. In *State v. Torres*,²⁰⁷ for example, the Hawaii Supreme Court held that evidence should be admitted if exclusion would not serve the purposes underlying Hawaii's exclusionary rule. But it declared that in evaluating those purposes, courts should give "due consideration" to Hawaii's constitution and case law.²⁰⁸ When considering judicial integrity, for instance, courts must give "substantial weight" to Hawaii law that would otherwise require exclusion of evidence obtained out of state.²⁰⁹ As in *Echols*, the court did not determine which law to apply. Instead, it immediately performed an exclusionary-rule analysis, this time explicitly based on its own exclusionary doctrine. Interestingly, the *Torres* court did consider whether the search was lawful according to forum law, but it used that analysis to inform its evaluation of the exclusionary rule's purposes. It did not instruct lower courts to determine whether forum or situs law applies and then whether that state's exclusionary doctrine favors exclusion.²¹⁰

A smaller number of courts have not made this same mistake of resolving the entire issue by determining whether the forum state's exclusionary doctrine favors exclusion. Instead, they have used the forum's exclusionary-rule values to determine which state's law to apply. They have then applied that state's constitutional law and would presumably also apply its exclusionary doctrine if they found a constitutional violation. For example, a few courts have adopted the reasoning of the New Jersey Supreme Court in *State v. Mollica*.²¹¹ The *Mollica* court

and holding that the exclusionary rule favors the admission of evidence obtained by situs officers); see also *D'Antonio v. State*, 926 P.2d 1158, 1161 n.4 (Alaska 1996) (citing *Pooley*, 707 P.2d at 1302-03, for the proposition that "the law of the jurisdiction where the search occurred is controlling" absent "ongoing or concerted effort" between Alaska (the forum) and the situs state). *Orlosky* is illustrative of the exclusionary-rule approach even though the court stated that it was applying governmental interest analysis because the court characterized the forum state's "interests" solely by reference to the state's exclusionary-rule purposes.

207. 262 P.3d 1006, 1019 (Haw. 2011). *Torres* involved evidence obtained by federal officers on a federal base. But, the court clarified that its analysis applies whenever "evidence sought to be admitted in state court is the product of acts that occurred on federal property or in another state, by Hawai'i law enforcement officers or officers of another jurisdiction." *Id.* at 1021.

208. *Id.*

209. *Id.* at 1019.

210. See also, e.g., *State v. Evers*, 815 A.2d 432, 441, 444-46 (N.J. 2003) (holding that New Jersey (forum) law does not apply and separately assuming a violation of California (situs) law but applying New Jersey's exclusionary doctrine—not California's—to permit the evidence to be admitted).

211. 554 A.2d 1315 (N.J. 1989); see, e.g., *State v. Cauley*, 863 S.W.2d 411, 416 (Tenn. 1993) (adopting *Mollica*'s reasoning); *State v. Brown*, 940 P.2d 546, 576-78 (Wash. 1997) (same); see also *State v. Boyd*, 992 A.2d 1071, 1089-90 (Conn. 2010) (performing an exclusionary-rule analysis to

held that New Jersey's constitutional safeguards apply only if the officer that performed a search acted as an agent of the New Jersey (forum) officers.²¹² According to the court, applying the New Jersey Constitution to situs officers when there was no agency relationship would not further New Jersey's constitutional goals, which the court defined as the purposes underlying the state's exclusionary rule.²¹³ Then, after determining that New Jersey law did not apply, the court proceeded to hold that the evidence was admissible because the out-of-state officers had abided by their own jurisdiction's constitutional law.²¹⁴ In other words, unlike the *Echols* and *Torres* courts, the *Mollica* court did not simply consider whether exclusion was appropriate based on forum law. The court used the forum's exclusionary-rule values to determine which state's law to apply and then applied all of that state's law.

The difference between *Mollica* on the one hand and *Echols* and *Torres* on the other is subtle but critical to understanding the flaws in the different incarnations of the exclusionary-rule approach. First, all three decisions are flawed because the courts neglected to answer the threshold question of whether two constitutions applied. As a result, each failed to determine whether there was even a conflict to be resolved.²¹⁵

But the decisions in *Echols* and *Torres* have additional problems. Not only did those courts neglect the initial step, they also skipped a number of intermediate steps and went straight to analyzing whether the exclusionary rule requires exclusion. In *Mollica* and its progeny, courts wrongly assumed that more than one law reached the facts of a particular case, used the values underlying the forum's exclusionary rule to determine whether forum law should control the case, determined that it should not, and then applied situs constitutional law. Note that the use of forum law to determine which law to apply is not particularly contro-

determine which of two potentially relevant states' laws governed the case and then applying that state's constitutional law).

212. *Mollica*, 554 A.2d at 1326.

213. *Id.* at 1328 ("None of [New Jersey's exclusionary-rule] values [e.g., deterrence and judicial integrity], however, is genuinely threatened by a search and seizure of evidence, conducted by the officers of another jurisdiction under the authority and in conformity with the law of their own jurisdiction, that is totally independent of [New Jersey's] own government officers."). The court also explained that its holding was consistent with the "inherent jurisdictional limitations" of state constitutions, *id.* at 1327, which "ordinarily govern[] only the conduct of the state's own agents or others acting under color of state law," *id.* at 1324.

214. *Id.* at 1328-29. This case involved federal officers operating out of state, but the court's reasoning applies equally well to conflicts involving state officers (and it has in fact been applied to that context). See sources cited *supra* note 211.

215. See *supra* notes 177-179 and accompanying text.

versial. Under current doctrine, forum law dictates a court's choice-of-law methodology.²¹⁶ What is important is that despite the initial unjustified assumption that both laws reached the case and thus that the only question was which of the two should be given priority, the courts ultimately determined which of two laws should apply and used only that state's law to completely resolve the dispute. To be sure, these courts only confronted cases where situs law was held to apply, and they never determined that there was a constitutional violation. As a result, they were never required to consider the potential applicability of any exclusionary rule, forum or situs. But their logic suggests that if they had determined that situs law was violated, they would have applied the situs state's exclusionary rule, not the forum state's exclusionary rule.

In contrast, the *Echols* and *Torres* courts used the values underlying the forum or some other exclusionary rule not to determine which law to apply, but to determine – regardless of the applicable law – whether to admit or exclude the evidence. In effect, they inappropriately divorced an exclusionary rule from its underlying constitution. Recall that a state's exclusionary rule is tied to its Fourth Amendment analogue.²¹⁷ That is why Hawaii can maintain an exclusionary rule with three purposes – deterrence of police misconduct, preserving judicial integrity, and the protection of individual privacy – and Connecticut can maintain an exclusionary rule with a single purpose – deterrence of police misconduct.²¹⁸ In both *Echols* and *Torres*, the exclusionary rules designed to protect one constitution were potentially mismatched with constitutions that have separate exclusionary rules with distinct substantive values. The *Echols* court did not even attempt to identify the source of the exclusionary rule it applied. And while the *Torres* court did clearly state that it was applying Hawaii's exclusionary rule, it never determined whether Hawaii law applied. As a result, Hawaii's exclusionary rule may have been applied to a case that should have been governed by another state's law.

Lastly, the exclusionary-rule approach has a final flaw: it is unpredictable. Like other balancing tests, the relevant factors can be difficult to apply, and the test permits judicial manipulation.²¹⁹ The dissent in *Torres*, for example, criticized the Hawaii court's "substantial weight" standard, which requires "due consideration" of the Hawaii Constitution, for being "simply too murky for trial

216. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmts. a & b, § 6(1) cmt. a.

217. See *supra* Section I.B.

218. Compare *State v. Torres*, 262 P.3d 1006, 1018 (Haw. 2011), with *State v. Boyd*, 992 A.2d 1071, 1086 (Conn. 2010).

219. See Mary Jane Morrison, *Choice of Law for Unlawful Searches*, 41 OKLA. L. REV. 579, 585-86 (1988).

courts to utilize and apply consistently.”²²⁰ This concern is of even greater importance in the exclusionary-rule context. As elaborated in Section IV.B.1, the deficit of clear guidance regarding what is and is not lawful compromises the goal of deterring police misconduct by sowing confusion and uncertainty.²²¹

The above flaws are substantial. All courts applying a version of the exclusionary-rule approach neglect to first determine whether two laws apply and hence whether a conflict exists. Some further muddy the analysis by applying an exclusionary rule that does not necessarily match the constitution that governs the case. And either way, the approach threatens the deterrent value of the exclusionary rule by producing unpredictable results.

IV. THE LAW-OF-THE-OFFICER APPROACH

By now it should be clear that no current approach provides a satisfactory answer to interstate search-and-seizure conflicts of law. Each suffers from substantial conceptual and practical flaws. To be sure, a perfect solution that is both theoretically sound and pragmatically unobjectionable is unlikely; few common-law doctrines are without defects. But the two-step approach that follows provides a more workable and coherent solution that is consistent with the purpose and intended reach of the relevant laws. Consistent with the two-step framework championed by Roosevelt, Section IV.A argues that courts should first determine whether two constitutions apply. Section IV.B then argues that if a conflict exists, courts should apply the law of the officer who performed the search because that rule best comports with the values underlying exclusionary doctrine – especially deterrence.

This particular two-step process is constitutionally feasible and methodologically distinct. Constitutionally, it is sound because all of the involved states have a legitimate contact with the search and hence application of either *situs* or *forum* law will be constitutionally permissible.²²² Relatedly, the approach is sensitive to federalism concerns.²²³ It does not discriminate against out-of-state citizens or another state’s law because it is inherently reciprocal. Courts are

220. *Torres*, 262 P.3d at 1028 (Nakayama, C.J., concurring in part and dissenting in part).

221. *Cf. Latzer*, *supra* note 179, at 867 (discussing arguments against interpreting state constitutions differently from the Federal Constitution because “the police are less able than the bench or bar to cope with sudden changes in the law, especially changes calling for subtle distinctions”).

222. *See supra* notes 83-96 and accompanying text.

223. *See supra* notes 92-95 and accompanying text.

instructed to apply forum law when a forum officer engages in a search extraterritorially, but, critically, courts must cede control over the resolution of cases involving searches performed by a situs officer to situs law.

A brief note on methodology is also in order. The following rationale is reminiscent of the exclusionary-rule approach currently taken by a majority of courts.²²⁴ That is for good reason. Those courts properly fashioned a rule that takes into account the purpose of exclusionary doctrine, an insight on which the law-of-the-officer approach builds. However, this proposal is theoretically and practically distinct from the exclusionary-rule approach in key ways. First, the law-of-the-officer approach requires courts to first consider whether two laws apply. As a result, courts can identify situations in which no conflict exists because only one law reaches the facts of the case. Second, the proposed conflict rule requires courts to determine which law to apply before determining whether exclusion is appropriate. Put differently, the law-of-the-officer approach results in the decision to apply either situs or forum law. After that choice is made, a court must still determine whether there was a violation of the applicable law and, if so, whether exclusion is appropriate. This contrasts with the approach of many current courts, which apply an untethered exclusionary rule to a case that could be governed by another state's constitutional law.

There is also a salient practical difference between the approach proposed here and the exclusionary-rule approach. Consider cases where two laws apply. To resolve the conflicts in these cases, the courts that have employed the exclusionary-rule approach have thus far adhered to a balancing test that provides little predictability or consistency from case to case – even though predictability and consistency are especially critical to deterrence. By providing a bright-line rule, the law-of-the-officer approach maximizes the deterrent effect of the remedy.²²⁵

A. Step 1: State-Constitutional-Law Analysis

The first step in resolving an interstate search-and-seizure conflict should be to interpret the situs and forum state constitutions to determine which, if any, reach the facts of the search. As Roosevelt makes clear, this is an important first step in any conflict-of-laws analysis because courts must determine whether a conflict exists before applying a conflict rule.²²⁶ Consider a case in which a crime is committed in New Jersey and forum officers perform a related search in New York. The court must interpret the New Jersey Constitution to determine

²²⁴. See *supra* Section III.E.

²²⁵. See *infra* Section IV.B.1.

²²⁶. See *supra* notes 119-126 and accompanying text.

whether it binds state agents acting out of state, and it must interpret the New York Constitution to determine whether it binds all state actors, whether or not they are acting under the authority of New York law.

Few generalizations in this regard are possible. Different constitutions can have different jurisdictional interpretations depending on text, precedent, and state constitutional philosophy.²²⁷ Some might apply to every in-state defendant, no matter where a given investigation took place or the identity of the officer who performed the search. The Oregon Supreme Court determined that this was the correct interpretation of the Oregon Constitution due to, among other things, its unique text and precedent.²²⁸ Others, like the Kentucky Constitution, might apply only to state officers and therefore have no application to searches performed by out-of-state officers.²²⁹ And some might chart a middle course and apply to state officers as well as those acting under color of forum state law, as the New Jersey Constitution does.²³⁰

In the interstate search-and-seizure context, as in other contexts, four scenarios are possible: situs law alone could apply, forum law alone could apply, neither forum nor situs law could apply, or both forum and situs law could apply. If only situs law applies, then the court need only apply the situs constitution and that constitution's exclusionary rule. Thus, the *Helm* court was able to avoid a conflict-of-laws analysis altogether because the Kentucky (forum) Constitution did not apply to out-of-state officers. Similarly, if only forum law applies, the court need only apply the forum constitution and its corresponding exclusionary rule. And if no state constitution applies, then the court should simply apply the Federal Constitution and its exclusionary rule. Only in the fourth scenario, where both situs and forum law applies, is there the need to perform a conflict-of-laws analysis. In other words, many cases that are currently understood to pose a conflict-of-laws question may be easily resolvable without resort to any conflict analysis because they do not fall within this fourth category of cases.²³¹

227. See Brenner, *supra* note 25, at 66-76 (discussing different state constitutional arguments); Latzer, *supra* note 179, at 880-81; Neuman, *supra* note 179, at 945-46.

228. *State v. Davis*, 834 P.2d 1008, 1012-13 (Or. 1992); see also *People v. Nieto*, 746 N.Y.S.2d 371, 376-78 (Sup. Ct. 2002) (adopting a similar interpretation of the New York Constitution).

229. *Helm v. Commonwealth*, 813 S.W.2d 816, 818 (Ky. 1991) ("This Court has recognized that our state's constitution is a limitation only on the state to authorize, and its officers to engage in a search for, and seizure of evidence of crime.").

230. See *State v. Mollica*, 554 A.2d 1315, 1328-29 (N.J. 1989).

231. See ROOSEVELT, *supra* note 88, at 1.

B. Step 2: Application of the Law of the Officer

If both forum and situs law apply, an actual conflict exists. In those cases, courts must fashion some rule of decision that will predictably and justly identify a single law to resolve the conflict. As discussed above, the Federal Constitution provides little guidance.²³² Instead, courts are left to create a rule using the traditional common-law tools of reason, history, and experience.²³³ Those sources support the law-of-the-officer approach. If a forum officer physically obtains the evidence, then forum law should apply, no matter the location of the search. Similarly, if a situs officer physically obtains the evidence, situs law should apply. Finally, if both forum and situs officers cooperate in a single search, the court should apply the law of the situs officer.

This Section describes how this rule is consistent with the values underlying the exclusionary rule, most notably deterrence. Cases involving officers from only one state are discussed first, followed by those involving cooperation between officers from more than one state.

1. The Values Underlying the Exclusionary Rule

Deterrence continues to be the primary determinant of the scope of exclusionary doctrine. The federal exclusionary rule is now justified and applied based entirely on whether the rule's application will deter police misconduct.²³⁴ And a number of states have followed suit, emphasizing deterrence as the central purpose behind their exclusionary rules.²³⁵ Because of its prominence as a justification for most exclusionary rules, deterrence is given substantial weight in the analysis that follows.

A few states have also articulated additional exclusionary-rule purposes. While there is a range of nondeterrence policy rationales,²³⁶ the most common are “the imperative of judicial integrity” and maintaining the public's trust in government by “assuring the people that the government will not profit from its

²³². See *supra* Part II.

²³³. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. b (AM. LAW INST. 1971) (“[A state] derives [its conflicts] law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning.”).

²³⁴. See *supra* notes 41-46 and accompanying text.

²³⁵. See *supra* Section I.B.

²³⁶. At least one state—Hawaii, for example—has articulated an additional purpose: the protection of individual privacy. *State v. Torres*, 262 P.3d 1006, 1018 (Haw. 2011).

lawless behavior.”²³⁷ Section IV.B.1 considers each of these rationales. Because both depend on whether a particular action was lawless, neither has any analytical weight at the conflict-of-laws stage. It does not make sense to argue that application of one or another law would sanction illegality because it is the legality of a particular search that is the fundamental issue in a conflict-of-laws case.

a. Deterrence

The law-of-the-officer approach maximizes the deterrent effect of state exclusionary rules by employing a bright-line rule that, through its predictability, furthers adherence to the law of the officer’s state. Of course, the degree to which the exclusion of evidence actually deters is contested.²³⁸ But whatever the empirical reality, deterrence is the predominant rationale in the case law and applying the law of the officer maximizes whatever deterrent effect exclusionary doctrine does have.

Although many still dispute the virtues of rules versus judicial standards, the consensus view is that the appropriate approach depends on the specific legal context.²³⁹ Rules and standards exist on a continuum of discretion, with standards affording decisionmakers the most flexibility.²⁴⁰ In broad strokes, rules require a given response to a defined set of facts, while standards, including multifactor balancing tests, give decisionmakers greater flexibility by allowing them to apply a generic background principle or policy to a factual situation.²⁴¹ The two forms diverge along a number of metrics. Rules are costlier to formulate but less costly to apply. They afford regulated entities predictability and certainty so that they can order their affairs productively. And they minimize the potential

²³⁷. LAFAVE, *supra* note 43, § 1.5(c).

²³⁸. See Slobogin, *supra* note 5, at 368-69 (collecting citations and concluding that “[n]o one is going to win the empirical debate over whether the exclusionary rule deters the police from committing a significant number of illegal searches and seizures”).

²³⁹. See, e.g., Brilmayer & Anglin, *supra* note 98, at 1167-74 (defending the use of standards to resolve conflict cases); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976) (discussing different perspectives on rules and standards); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287 (2006) (defending rules); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending rules); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-69 (1992) (outlining the debate); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 773-76 (1995) (collecting citations and explaining that the right approach depends on the context).

²⁴⁰. Sullivan, *supra* note 239, at 57-58.

²⁴¹. *Id.* at 58.

for arbitrary choices by decisionmakers.²⁴² In contrast, standards are less costly to develop but costlier to apply. They avoid rules' characteristic over- or under-inclusiveness by allowing decisionmakers to calibrate their responses to the facts at issue. And they permit doctrines to more easily adapt to changing circumstances.²⁴³ These relative virtues and vices naturally lend themselves to different doctrines, including within the conflict-of-laws field.²⁴⁴

In the interstate search-and-seizure setting, a bright-line rule is preferable. The same benefits that generally attend rules are present in this context and support the law-of-the-officer approach. Unlike the exclusionary-rule approach and multifactor conflict-of-laws approaches, the law-of-the-officer proposal is easily administrable and minimizes the risk of arbitrary decisions by lower courts forced to apply vague principles. There is no need to engage in the complicated "significant weight test" set out in *Torres*, the "interest-weighting approach" set out in *Briggs*, or any other highly discretionary analysis based on ambiguous factors.²⁴⁵ Instead, the appropriate law is easily identified based on the identity of the officer who physically performed the search.

But there is an even more important reason why a rule – specifically one that favors the law of the officer who performed the search – is appropriate here. A clear directive would maximize the deterrent effect of the exclusionary rule in the officer's home state, the only exclusionary rule that could plausibly impact his or her behavior. Exclusionary rules deter by punishing.²⁴⁶ Evidence unlawfully obtained is inadmissible and therefore cannot be used in a case against a defendant officers have pursued. This deterrent effect requires both that officers understand what actions are unlawful²⁴⁷ and that the "punishment" (i.e., exclusion) be consistently and predictably applied to cases involving officer misconduct.²⁴⁸ Both goals are served by a bright-line rule.

242. *Id.* at 62-66.

243. *Id.* at 66-69; see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (using an economic analysis to explain the different characteristics of rules and standards).

244. See *supra* notes 108-109 and accompanying text.

245. A number of scholars have advocated such approaches. Professor Morrison, for instance, advocates for the use of "displacement analysis with a mode of better law reasoning." Morrison, *supra* note 219, at 580 (internal quotation marks omitted). Under that approach, courts are to "inquir[e] whether there are circumstances in the case calling for the forum to displace forum law." *Id.*

246. Slobogin, *supra* note 5, at 373.

247. See William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 321 (1991).

248. Slobogin, *supra* note 5, at 374.

William Heffernan and Richard Lovely have argued that there is a cognitive component to deterrence: only officers who understand what the law prohibits can plausibly be deterred from performing prohibited acts.²⁴⁹ Moreover, there is evidence that simplification increases officers' understanding of their legal obligations.²⁵⁰ Based on a 1991 study, Heffernan and Lovely concluded that the dramatic difference between officers' understanding of Fourth and Fifth Amendment law can be attributed to differences in complexity.²⁵¹ Almost a hundred percent of participating officers understood the bright-line rules set out in *Miranda v. Arizona*,²⁵² while only about half of the officers understood the Fourth Amendment's more complex doctrine. According to the authors, "[i]f equally simple rules governed search and seizure, the possibility of deterrence would be substantially enhanced."²⁵³

To be sure, Heffernan and Lovely noted that limited simplification of Fourth Amendment doctrine is unlikely to be effective because of the doctrine's inherent complexity.²⁵⁴ They explained that employing a bright-line rule for one type of intrusion does not produce the same results as *Miranda* because of the sheer number of rules and standards that govern all other intrusions. Individual rules do not always attract officers' attention and are difficult to understand because mastery of any one rule requires an understanding of when that one rule applies and when it does not. In contrast, the *Miranda* rules deal comprehensively with custodial interrogations. This makes them easier to master and gives officers the assurance that if they know the few *Miranda* rules, they will be able to lawfully navigate most situations involving custodial interrogations.²⁵⁵ But it stands to reason that a simple conflict-of-laws rule will clarify the legal requirements for at least some frequently encountered Fourth Amendment situations. Think of the issue in *Burge*: whether a spouse could consent to the search of a defendant's home.²⁵⁶ The question likely comes up frequently, and a rule that a spouse can or cannot consent to a search is easily understood. Consistently enforcing that and similar rules will at least not disturb officers' understanding of the law they

249. Heffernan & Lovely, *supra* note 247, at 321.

250. *Id.* at 339-40.

251. *Id.*

252. 384 U.S. 436 (1966).

253. Heffernan & Lovely, *supra* note 247, at 340.

254. *Id.* at 342-45.

255. *Id.* at 343-44.

256. *Burge v. State*, 443 S.W.2d 720, 723 (Tex. Crim. App. 1969); *see also supra* notes 135-137 and accompanying text (discussing the case).

do know by adding the potential application of another state's law and thus an additional layer of complexity.²⁵⁷

In addition, even assuming that officers fully understand the law, the deterrent effect of exclusion also depends on the consistency of the "punishment." In his analysis of the deterrent effect of the federal exclusionary rule, Christopher Slobogin summarizes a number of punishment-related insights from the field of behavioral economics.²⁵⁸ Two are particularly relevant here: punishment should follow misconduct as frequently as possible and incidental rewards from the misconduct should be kept to a minimum.²⁵⁹

For better or worse, exclusionary doctrine is already inconsistently applied in ways that impact its punishment-related effects. Sometimes police do not make an arrest, so there is no opportunity for illegally obtained evidence to be excluded. Other times an arrest is made but the search-and-seizure issue is never litigated because the defendant accepts a plea deal or the police do not pursue an investigation.²⁶⁰ It would be a mistake to add to this inconsistency by sometimes admitting evidence unlawfully obtained under the law of the officer's home state or excluding evidence lawfully obtained under the law of the officer's state. State courts have enough difficulty communicating clear signals about appropriate behavior without the static of inconsistent and stray pronouncements based on another state's law.

This consideration is not only important to achieve the specific deterrence of individual officers that have already engaged in misconduct, but also the general deterrence of officers who could commit a future search-and-seizure violation. General deterrence is achieved when there is a "perception of real punishment."²⁶¹ Applying a law other than that of the officer's home state — particularly when that law would allow for the admission of otherwise excludable evidence —

257. Cf. Wayne R. LaFare, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 ("A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field." (internal quotation marks omitted)).

258. Slobogin, *supra* note 5, at 373-74.

259. *Id.* at 374. The other identified insights are incapable of being addressed through a conflicts rule. For example, Slobogin notes that all misconduct should ideally be detected and the punishment should be delivered immediately after the misconduct. *Id.* No conflicts rule will bring a given exclusionary rule any closer or farther from achieving these goals.

260. *Id.* at 374-75; see also Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1413-15 (1986) (delineating the many ways in which unlawfully obtained evidence can still prove useful to police officers).

261. Slobogin, *supra* note 5, at 380.

will only make the threat of exclusion seem more unpredictable and remote to other officers. As a result, the incentives to invest in learning to abide by forum law will be compromised.²⁶² Put simply, consistency and predictability—the hallmarks of rules-based doctrines—take on newfound importance when deterrence is the objective. Rules, rather than standards, are best able to facilitate the necessary intergovernmental communication.²⁶³

These prerequisites of deterrence are also why a bright-line rule that favors the law of the officer who performed the search is preferable to a bright-line territorial rule. As discussed above,²⁶⁴ territorial rules are blind to the content of the relevant laws. In this case, a territorial rule will sacrifice the deterrence goal of exclusionary doctrine by setting an unrealistic goal. For a territorial rule to have any deterrent effect, police officers must be capable of internalizing both their own state’s law—which governs the vast majority of their work²⁶⁵—and the search-and-seizure law of any other state involved in the search. This is unrealistic. Instead of achieving this goal, requiring officers to know two different search-and-seizure doctrines will add detrimental complexity and compromise the consistency and predictability of the punishment of exclusion.

Moreover, even if it were possible for police officers to fully comprehend and correctly apply the laws of multiple states, there will always be some set of cases in which it would be impossible for an officer to know which law to apply. Consider again *Orlosky*, in which situs officers obtained evidence of a forum-state crime in the course of investigating an entirely distinct situs-state crime. The situs officers could not have known that some other law would apply before they began the search.

In the digital age, it will only be harder for officers to know which state’s law will apply. Recall the facts of *Evers*.²⁶⁶ Based on interactions in an online chat room, a situs officer obtained a search warrant from a situs court that required AOL to turn over the names and billing addresses of various users, including the

262. *Cf. id.* at 380-81 (arguing, for similar reasons, that the federal exclusionary rule is a poor tool for general deterrence for similar reasons); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 822-23 (2002) (arguing that a “meta-rule” is preferable to a “meta-standard” for determining when *Chevron* deference applies because rules provide greater predictability about legal payoffs and thus facilitate planning and investment by subordinate governmental actors).

263. See Merrill, *supra* note 262, at 823-24 (arguing that rules better facilitate intergovernmental communication in the administrative-law context).

264. See *supra* Section III.B.

265. Latzer, *supra* note 179, at 868 (“[Officers] are attuned to the rules and laws of their own state, and to those Supreme Court decisions that directly affect their work.”).

266. See *supra* notes 23-25 and accompanying text.

defendant. Of course, the officer could not have known beforehand that the defendant resided in New Jersey and therefore that New Jersey law might apply. Remote computer searches pose similar problems.²⁶⁷ Emerging technologies do not just make interstate searches more prevalent, they make *ex ante* determinations regarding the relevant law increasingly difficult or impossible. In those situations, it does not serve deterrence to hold officers accountable to a law they could not have anticipated. The consistency and simplicity of the law-of-the-officer approach, on the other hand, provides clear guidance to officers.

In addition, sacrificing probative evidence in situations like these could risk delegitimizing the exclusionary remedy and further impair compliance with search-and-seizure law. Drawing on Tom Tyler's research, Slobogin argues that if officers view the exclusionary rule as illegitimate, they will be more likely to ignore the judiciary's dictates.²⁶⁸ Some research suggests that officers are already skeptical of exclusionary doctrine.²⁶⁹ Excluding evidence because officers failed to follow a law that they could not possibly have anticipated will likely accelerate the spread of more negative perceptions.²⁷⁰

In recent years, the Supreme Court has also been increasingly concerned about punishing officers who are not truly culpable, and its logic corroborates the reasoning here. In developing the so-called "good-faith" exception to the federal exclusionary rule, the Court has been skeptical that punishing nonculpable conduct is consistent with the value of deterrence.²⁷¹ One of the most recent articulations of the exception, which permits the admission of evidence seized in "good faith" by law enforcement officers, came in *Davis v. United States*.²⁷² There, the Court allowed the admission of evidence obtained during a search conducted in reasonable reliance on appellate precedent that was subsequently overruled. The Supreme Court maintained that exclusion "should not be applied to deter

267. Cf. Brenner, *supra* note 25, at 55-60, 63-80 (discussing how traditional conflict approaches might be used to resolve cases involving remote computer searches).

268. Slobogin, *supra* note 5, at 383-84.

269. *Id.* at 383.

270. Cf. *id.* ("Disregarding the degree of officer culpability is likely to exacerbate that sense of unfairness considerably because then the rule exacts its penalty not only when the officer turns out to be right about the suspect, but even when there was no reason to believe that the collar was bad.").

271. Note that because the Court's reasoning is premised entirely on the deterrence rationale, the Court's analysis is instructive of how any court, state or federal, might evaluate a given exclusionary rule's potential to deter police misconduct in legally ambiguous situations.

272. 564 U.S. 229, 232 (2011) ("Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.").

objectively reasonable law enforcement activity.”²⁷³ Instead, exclusion is only appropriate when a police officer’s actions “are deliberate enough to yield ‘meaningfu[l]’ deterrence, and culpable enough to be ‘worth the price paid by the justice system.’”²⁷⁴ The officers in *Davis* did not act “deliberately, recklessly, or with gross negligence”; nor did the case involve any “recurring or systemic negligence.”²⁷⁵ Because an officer “who conducts a search in reliance on binding appellate precedent does no more than ‘ac[t] as a reasonable officer would and should act’ . . . , [t]he deterrent effect of exclusion in such a case can only be to discourage the officer from ‘do[ing] his duty.’”²⁷⁶ Exclusion was therefore practically and normatively inappropriate.

Similar reasoning supports the law-of-the-officer approach. An officer who is unaware that he or she may uncover evidence related to a crime in another state (as in *Orlosky* and *Evers*) is not culpable. Applying the exclusionary rule in such situations would do little more than “deter . . . conscientious police work.”²⁷⁷ The same is true, though to a lesser degree, of forum officers who pursue an investigation in another state and of situs officers who perform a search that is ultimately relevant to a criminal prosecution in another state. “Responsible law enforcement officers will take care to learn ‘what is required of them’ under Fourth Amendment precedent,”²⁷⁸ as well as precedent interpreting their state’s Fourth Amendment analogue. When that “binding . . . precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities.”²⁷⁹ Applying a different state’s law will often punish “nonculpable, innocent police conduct” when officers reflexively follow the law that governs the vast majority of their professional life.²⁸⁰ Indeed, it is hard to argue that officers act with gross negligence when they fully comply with their own state’s constitutional law.

In sum, the law-of-the-officer approach maximizes deterrence, the primary rationale animating state exclusionary rules. The approach encourages adherence to the law of the officer’s state by ensuring that, where possible, officers receive consistent and simple behavioral signals that facilitate investment in learning and compliance with the law. Equally important, the approach does not

273. *Id.* at 241 (quoting *United States v. Leon*, 468 U.S. 897, 919 (1984)).

274. *Id.* at 240 (citing *Herring v. United States*, 555 U.S. 135, 144 (2009)).

275. *Id.* (quoting *Herring*, 555 U.S. at 144).

276. *Id.* at 241 (quoting *Leon*, 468 U.S. at 920).

277. *Id.* at 241.

278. *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)).

279. *Id.*

280. *Id.* at 240.

unrealistically require officers to understand the intricacies of multiple states' search-and-seizure law.²⁸¹ A rule or standard that purports to hold officers accountable to another state's law would only risk sacrificing probative evidence in exchange for little or no behavioral benefits. In fact, such a rule or standard might even further delegitimize the exclusionary remedy. And finally, any other rule or standard would punish responsible police practice and hence run counter to the Supreme Court's culpability-based analysis in *Davis*.

b. Judicial Integrity and Public Trust

Though deterrence favors the law-of-the-officer approach, it is not necessarily the only principle that guides the application of state exclusionary rules. Some state courts have articulated additional values, most commonly judicial integrity and maintaining the public's trust in government.²⁸² Neither provides any reason to reject the law-of-the-officer approach.

281. Some might argue that in at least one other context—the law of arrest—police officers *are* expected to know the law of another state. At common law, state officers' arrest authority extended only as far as “the territorial jurisdictional limits of the law enforcement entity for which the officer work[ed].” *State v. Updegraff*, 267 P.3d 28, 42 (Mont. 2011); *see also, e.g., United States v. Di Re*, 332 U.S. 581, 589 (1948) (“[I]n absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.”); *Commonwealth v. Limone*, 957 N.E.2d 225, 228–29 (Mass. 2011) (similar); *Boston v. Balt. Cty. Police Dep't*, 744 A.2d 1062, 1065 (Md. 2000) (similar). And still today, arrests made outside of an officer's jurisdiction must be justified as either falling within a common-law exception to the general rule or as statutorily authorized by the state where the arrest was made. A number of courts, however, have carved out exceptions to this rule, suggesting that in certain situations it is not unreasonable to tolerate violations of situs law when forum officers operate extra-jurisdictionally. *See, e.g., People v. Galan*, 893 N.E.2d 597, 616–17 (Ill. 2008); *State v. Dentler*, 742 N.W.2d 84, 90 (Iowa 2007); *State v. Ferrell*, 356 N.W.2d 868, 871–72 (Neb. 1984); *State v. Bonds*, 653 P.2d 1024, 1032 (Wash. 1982). For example, the Illinois Supreme Court adopted similar reasoning to that advanced here when it excused an Illinois officer's failure to comply with Indiana law because the arrest “complied with the [F]ourth [A]mendment, its common-law antecedents, and Indiana statute.” *Galan*, 893 N.E.2d at 617. In other words, compliance with federal and forum law was sufficient.

Moreover, even assuming that arrests should always require compliance with situs law, there is good reason to treat investigations differently. Perhaps policymakers believe that when an individual's bodily liberty is at stake, requiring that police pay greater attention to a different state's arrest law is an acceptable price to pay to protect in-state individuals. At the very least, the fact that some courts and legislatures have required that out-of-state officers comply with a given arrest state's law does not necessarily mean that they would also agree that out-of-state officers should be required to know not just a different state's arrest law but also its entire search-and-seizure doctrine.

282. LAFAVE, *supra* note 43, §§ 1.1(f), 1.5(c). Because this Note considers the appropriate approach in the run of cases, it necessarily considers only the rationales articulated by the majority of

The two rationales derive from language that the Supreme Court has used at one time or another to characterize the federal exclusionary rule. The idea of judicial integrity, for example, is rooted in the *Weeks* decision, in which the Court declared that “unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution.”²⁸³ According to this rationale, courts should refuse to admit unlawfully obtained evidence lest they become accomplices in a constitutional violation.²⁸⁴ In the words of Justice Holmes, it is “a less evil that some criminals should escape than that the Government should play an ignoble part.”²⁸⁵ The Hawaii Supreme Court has embraced the rationale and explained that “[t]he ‘judicial integrity’ purpose of the exclusionary rule is essentially that the courts should not place their imprimatur on evidence that was illegally obtained by allowing it to be admitted into evidence in a criminal prosecution.”²⁸⁶

Advocates of the public-trust rationale, on the other hand, argue that to sanction “lawlessness by officers of the law” by admitting unlawfully obtained evidence would “have [a] tragic effect upon public respect for our judiciary.”²⁸⁷ In other words, application of the exclusionary rule “assur[es] the people – all potential victims of unlawful government conduct – that the government w[ill] not

the states. As a result, the few states that do recognize additional rationales may reject the reasoning here as incomplete. They might argue, for instance, that this analysis gives insubstantial weight to the protection of individual privacy. *Cf.* *State v. Torres*, 262 P.3d 1006, 1018 (Haw. 2011) (recognizing the protection of individual privacy as a purpose underlying Hawaii’s exclusionary rule). As a threshold matter, few states maintain such additional purposes. They would thus, at worst, constitute minor exceptions to the general rule articulated here. But more importantly, even assuming these idiosyncratic factors cut against applying the law of the officer, the law-of-the-officer approach could still be appropriate in these states due to the weight of the deterrence rationale and the indeterminacy of any rationale that turns on a perception that the judiciary is condoning lawlessness.

²⁸³. *Weeks v. United States*, 232 U.S. 383, 392 (1914); *see also* Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 50 (2010).

²⁸⁴. *Elkins v. United States*, 364 U.S. 206, 223 (1960) (“[T]he federal courts [should not] be accomplices in the willful disobedience of a Constitution they are sworn to uphold.”); *see also* Bloom & Fentin, *supra* note 283, at 50.

²⁸⁵. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

²⁸⁶. *Torres*, 262 P.3d at 1018 (quoting *State v. Bridges*, 925 P.2d 357, 366 (Haw. 1996)); *see also* *State v. Mollica*, 554 A.2d 1315, 1328 (N.J. 1989) (implying that “judicial integrity is . . . imperiled” when there is a “misuse or perversion of judicial process”).

²⁸⁷. *Wolf v. Colorado*, 338 U.S. 25, 46 (1949) (Murphy, J., dissenting).

profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”²⁸⁸ Embracing this rationale, the Vermont Supreme Court has declared that its exclusionary rule serves, among other goals, to “promote the public’s trust in the judicial system.”²⁸⁹

Both the judicial-integrity and public-trust rationales, however, turn on the legality of a particular search—a fact determined by reference to the law that governs the case. Only if a search was illegal can the judiciary be said to have placed its imprimatur on illegality. Similarly, the government must have profited from some lawless behavior for the public’s trust to be compromised. But at the conflict-of-laws stage, the court must determine what law to apply and thus whether there was an unlawful search in the first place. Only after a governing law is chosen can a particular action be deemed lawful or unlawful. Put differently, if a court were to adopt the law of a state that does not recognize a particular search as unconstitutional, it cannot be said to have condoned illegality because the alleged misconduct, according to that state’s law, was never illegal.

Understanding the difference at the conflict-of-laws stage between the analytical weight of these rationales and the analytical weight of the deterrence rationale is important. Section IV.B.1 demonstrates that officers can only realistically be deterred from violating their own state’s law, and the possibility of such deterrence is maximized if courts follow the law-of-the-officer approach. But while the application of only one law will allow exclusionary doctrine to have a deterrent effect, the judicial-integrity and public-trust rationales are meaningless at the conflict-of-laws stage. Applying one law over the other will not promote judicial integrity because judicial integrity can only be compromised if a search is held to be unlawful under one of the relevant states’ search-and-seizure laws. That is why the deterrence value alone provides guidance when courts are deciding which law to apply.

2. *Conflicts of Law Involving Multiple States’ Officers*

The above analysis resolves cases that involve cooperation among various states’ law-enforcement officers as long as only a single state’s officers perform a given search. A variation is required for cases in which more than one state’s officers participate in the search.²⁹⁰ In those cases, a bright-line rule favoring the situs officer is most appropriate.

288. *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

289. *State v. Lussier*, 757 A.2d 1017, 1027 (Vt. 2000).

290. *See, e.g., Burge v. State*, 443 S.W.2d 720 (Tex. Crim. App. 1969).

For the reasons discussed above, it is preferable to impose a bright-line rule based on the identity of an involved officer in order to cabin judicial discretion and structure police behavior.²⁹¹ And the law of the situs officer, rather than the forum officer, best comports with the values underlying the exclusionary rule. First, the participation of situs officers should alert forum officers to the possibility that a different law could apply, and should help ensure that the forum officers can reasonably be expected to know the applicable law. After all, there will be at least one officer on the scene who can reasonably be expected to understand situs law and convey that law to forum officers.²⁹² Concerns about requiring the officers to know fifty state-law regimes will therefore be minimized. Second, the rule preserves the deterrent value of the exclusionary rule, at least for the situs officers. Those officers will still be held fully accountable to their own state's law.

That is not to say that this rule is without costs. There may be times, for instance, when forum officers have no ability to obtain information from their situs colleagues before performing a given search. The situs state's exclusionary rule would nevertheless apply and might exclude evidence that forum officers could not have known would be kept out. Unfortunately, this is an inevitable consequence of a conflict-of-laws case involving multiple states' officers. Some set of officers will have to be held accountable to a different state's law. The alternative—holding each individual officer accountable to only her own state's law—would not be administrable. Given the collaborative and often hectic nature of some searches and seizures, it would be difficult to divide a continuous search into distinct acts by individual officers. Moreover, simplicity and ease of application remain important goals for the conflict-of-laws field.²⁹³

It is also true that the rule could permit some bad faith actors to game the system. This concern appears to be particularly salient for a few courts and commentators that have previously considered interstate search-and-seizure conflicts of law. Corr, for example, created an exception to his situs-law rule for situations in which forum officers intentionally wait for a defendant to leave the state in order to take advantage of another state's law.²⁹⁴ And in other contexts,

291. See *supra* Section IV.B.1.a.

292. Cf. Corr, *supra* note 17, at 1234 (arguing for universal application of situs law in part because “there will usually be someone on the scene who understands that law as well as any police officer is likely to understand it”).

293. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. j (AM. LAW INST. 1971).

294. Corr, *supra* note 17, at 1237-38.

courts have suggested that they too are sensitive to the possibility of what Corr refers to as “trickery by forum police.”²⁹⁵

The law-of-the-officer approach ameliorates some of these concerns since forum officers could not simply thwart their state’s constitutional demands by performing a particular search out of state. However, if an officer thought enough about the situation, she could engage in some gamesmanship. An officer might, for instance, know that a defendant was planning to visit an out-of-state acquaintance and seek to search the defendant’s automobile under the more permissive search-and-seizure law of the acquaintance’s state. In that case, the officer could wait to perform the search and ask situs officers to perform it instead. The law-of-the-officer approach would admittedly permit this conduct. But bad-faith cases such as these are likely rare.²⁹⁶ And allowing this conduct in such a narrow sliver of cases is an acceptable price to pay for the predictability and transparency of the law-of-the-officer approach. Moreover, it should be remembered that in all situations, a defendant at least benefits from his or her federal constitutional rights. No matter the police gamesmanship, he or she is never left without any search-and-seizure protection.

CONCLUSION

Current approaches to resolving interstate search-and-seizure conflicts of law have proven inadequate. From resort to the substance-procedure distinction to the exclusionary-rule approach, each is conceptually flawed in its own way. This Note proposes a novel law-of-the-officer approach that has firmer theoretical and practical footing.

Under the law-of-the-officer approach, courts should engage in a two-step analysis. The first step requires interpreting the two potentially applicable constitutional provisions. Only if both apply should the court proceed to the next step and apply the law of the officer who performed the search. This is a simple analysis when only one state’s officers are involved: forum law will govern forum

295. *Id.* at 1238; *see, e.g.*, *People v. Galan*, 893 N.E.2d 597, 620 (Ill. 2008) (allowing the admission of evidence obtained after forum officers violated another state’s arrest law but cautioning that “law enforcement officials should not consider it a certainty that we will find the exclusionary rule inappropriate under a different set of facts, particularly in situations involving willful misconduct”); *State v. Dentler*, 742 N.W.2d 84, 90 (Iowa 2007) (offering a similar admonition).

296. The law-of-the-officer approach is designed to resolve conflicts involving state officers only. The risk of gamesmanship is likely higher when state officers cooperate with federal officers who operate within a state’s borders. *See generally* Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293 (2013) (documenting and criticizing current and historic instances of federal-state cooperation designed to evade state or federal laws).

officers and situs law will govern situs officers. The analysis becomes slightly more complex when more than one officer is involved in the search. In those cases, the court should apply the law of the situs officer. This rules-based approach acknowledges that police officers are unlikely to know the intricacies of fifty state-law regimes and refuses to sacrifice probative evidence when this reality clashes with some theoretic ideal. Moreover, it serves the most common exclusionary-rule value – deterrence – and is consistent with other common justifications for the rule.

To be sure, some courts may be unpersuaded. Perhaps they will believe that the law-of-the-officer approach pays insufficient attention to issues such as individual privacy or other state-specific concerns. This Note argues only that this analysis will appropriately resolve search-and-seizure conflicts of law in most jurisdictions. At the very least, it should be clear that the current approaches to this problem are inadequate; greater attention to devising a conceptually sound framework is needed. The law-of-the-officer approach provides a theoretically satisfying and practically feasible solution.