

FOREWORD
2007 FOURTH AMENDMENT SYMPOSIUM

**INDEPENDENT STATE GROUNDS:
SHOULD STATE COURTS DEPART FROM
THE FOURTH AMENDMENT IN
CONSTRUING THEIR OWN
CONSTITUTIONS, AND IF SO, ON WHAT
BASIS BEYOND SIMPLE DISAGREEMENT
WITH THE UNITED STATES SUPREME
COURT'S RESULT?**

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The National Center for Justice and the Rule of Law,¹ which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. Perhaps no other amendment has such broad applicability to everyday life as does the Fourth Amendment. The Fourth Amendment is also a very complicated area of jurisprudence and the legal landscape is

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¹ The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the United States Department of Justice. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice. For more information about the Center, please visit www.ncjrl.org.

constantly changing as a result of new technology and court decisions. The purpose of the Center's *Initiative* is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the *Initiative* is its annual symposium on important search and seizure topics. On March 30, 2007, the Center hosted its fifth annual symposium on the Fourth Amendment. The symposium coincided with the second day of a conference entitled *The Fourth Amendment: Contemporary Issues for Appellate Judges*, sponsored by the Center in cooperation with the National Judicial College, which was attended by approximately forty appellate judges from almost as many states. They were joined for the symposium by lawyers, law students, and law professors, along with persons observing the symposium via the Internet. The Center believes that the symposium—and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at that event—significantly further the Center's mission and, more importantly, make significant contributions to the understanding of search and seizure principles. The Center, and I personally, wish to thank the leading legal scholars who participated.

The symposium addressed a difficult question for state courts. Justice Souter, while serving as a justice on the Supreme Court of New Hampshire, aptly described the dilemma facing state courts: "If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent."² As the articles contained in this edition of the *Mississippi Law Journal* demonstrate, the difficulty is particularly acute in the search and seizure area, due to a confluence of many historical and contemporary developments.

² State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially).

State constitutional search and seizure provisions vary significantly. There are some unique textual differences, particularly among the original thirteen colonies, although many of the more modern search and seizure provisions are remarkably similar to the Fourth Amendment. Those provisions are ably analyzed in the final article to this symposium, *Survey: State Search and Seizure Analogs*, written by Michael Gorman. Mr. Gorman provides the reader with a “walking stick, a rigid—but sturdy—companion for researchers exploring state constitutionalism,”³ wherein he sets forth the various constitutional provisions and outlines each jurisdiction’s doctrine, as articulated by its appellate courts.

With few exceptions, state appellate courts did not develop a significant body of search and seizure jurisprudence prior to 1961. In that year, by mandating that the federal exclusionary rule was applicable to the states, *Mapp v. Ohio*⁴ largely federalized search and seizure jurisprudence. To that end, for the better part of a decade, the Warren Court dramatically altered Fourth Amendment principles, including, for example, changing the nature of the protected interest from property to privacy,⁵ expanding coverage of the amendment (ranging from administrative inspections⁶ to many everyday street encounters⁷), imposing new standards by which to measure reasonableness, and articulating a broadly applicable exclusionary rule,⁸ with the apparent ability of defendants to vicariously assert the rights of others.⁹ The Burger and the Rehnquist Courts modified and cut back on much of the Warren Court’s search and seizure jurisprudence, including restricting the concepts of a search¹⁰ and a seizure,¹¹ de-constitutionalizing¹² and restricting the application

³ Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

⁴ 367 U.S. 643 (1961).

⁵ *Katz v. United States*, 389 U.S. 347 (1967).

⁶ *E.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁸ *E.g.*, *Mapp*, 367 U.S. 643.

⁹ *E.g.*, *Jones v. United States*, 362 U.S. 257 (1960).

¹⁰ *E.g.*, *United States v. Place*, 462 U.S. 696 (1983) (excluding dog sniffs from the definition of a search); *United States v. Jacobsen*, 466 U.S. 109 (1984) (excluding chemical testing of substance for presence of illegal drugs from definition of a search).

¹¹ *E.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991).

of the exclusionary rule,¹³ and adapting the Warren Court's reasonableness standards to be very government-friendly.¹⁴

In 1977, Justice Brennan, a chief architect of the Warren Court's search and seizure jurisprudence, urged state courts to turn to their own constitutions to avoid the impact of the conservative counter-revolution.¹⁵ That call has been heeded to some extent but, frankly, much of the state court analysis often appears to be little more than adopting a dissenting view in a United States Supreme Court case or maintaining a Warren Court analysis in lieu of a more current high Court precedent.¹⁶ What strikes me as important is that, prior to *Mapp*, there was little state law-based search and seizure principles being generated that favored individual rights. Thus, to depart from federal precedent in this era, state courts are not returning to a golden age of protecting individual rights. They are, instead, often reacting to a perceived change in federal interpretation that is less favorable to individuals than had been apparent in Warren Court opinions. There was, I posit, little in the pre-*Mapp* case

¹² *United States v. Calandra*, 414 U.S. 338 (1974).

¹³ *E.g.*, *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁴ *See generally* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 (2004).

¹⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹⁶ For example, a large number of state courts reject the Supreme Court's restrictive definition of a seizure contained in *California v. Hodari D.*, 499 U.S. 621 (1991), on state constitutional grounds. *See* *Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992); *Jones v. State*, 745 A.2d 856, 869 (Del. 1999); *State v. Quino*, 840 P.2d 358, 364 (Hawaii 1992); *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999); *Commonwealth v. Stoute*, 665 N.E.2d 93, 94-98 (Mass. 1996); *Welfare of E.D.J.*, 502 N.W.2d 779, 781-83 (Minn. 1993); *State v. Clayton*, 45 P.3d 30 (Mont. 2002); *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994); *State v. Beauchesne*, 868 A.2d 972 (N.H. 2005); *People v. Bora*, 634 N.E.2d 168, 169-70 (N.Y. 1994); *State v. Puffenbarger*, 998 P.2d 788 (Or. Ct. App. 2000); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002); *State v. Young*, 957 P.2d 681, 686-87 (Wash. 1998). The Supreme Court of Louisiana has also rejected *Hodari D.* as the sole standard to determine when a seizure occurs and has added, for the purpose of the Louisiana Constitution, the additional protection against "imminent actual stops." *State v. Tucker*, 626 So. 2d 707, 712 (La. 1993). Indeed, the Court's decision in *Hodari D.* may be the single most important event persuading state courts to depart from Supreme Court opinions in construing their own constitutions. Yet, the reasoning of the courts rejecting *Hodari D.* generally has not broken new ground but has instead simply expressed a preference for pre-*Hodari D.* case law as a more proper measure of when a seizure occurs. The courts typically rely on the dissent in *Hodari D.* and the case law preceding that decision.

law on the state level that offered more protection to individuals than the Fourth Amendment did. On the other hand, a vibrant and principled development of search and seizure principles by state courts, unshackled by current Supreme Court doctrine, may bring new meaning and vibrance, ultimately influencing the high Court's development of Fourth Amendment principles. So what are state courts to do? Where do they turn to find an alternative framework? Hence the title for this symposium: "*Independent State Grounds: Should State Courts Depart from the Fourth Amendment in Construing Their Own Constitutions, and if so, on What Basis Beyond Simple Disagreement with the United States Supreme Court's Result?*"¹⁷

Four appellate judges from four jurisdictions, each with different legal frameworks to analyze search and seizure claims, have taken on the task of addressing this question. The Honorable Jack Landau, of the Court of Appeals of Oregon, comes from a state with perhaps the most highly developed independent state grounds, with strong language in its own constitution supporting its analytical approach. His article, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, begins by addressing the abstract question—should any state depart from the Fourth Amendment? Judge Landau, however, notes at the outset that that is the wrong question. In his view, the proper question is not whether state search and seizure provisions "*should* depart from Federal Fourth Amendment case law. The proper question is whether state constitutions *do* depart from Federal Fourth Amendment case law. The question, in other words, is what state constitutions *mean*."¹⁸ He sees the matter as not one of choice but a "question of state constitutional interpretation, determined in the way judges on state courts ordinar-

¹⁷ States can afford more protection to individuals than the Fourth Amendment does but if the state constitution is construed to offer less, the Fourth Amendment serves as a floor. *E.g.*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001). Hence, for state judges, the question is whether the state constitution should be construed to afford more protection to individuals than the Fourth Amendment.

¹⁸ Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 *MISS. L.J.* 369, 369-70 (2007).

ily determine the meaning of their state constitutions.”¹⁹ He discusses at some length the significance of state constitutions in general and search and seizure provisions in particular. Among other points he makes, he rejects the view that “interpretation of search and seizure provisions is intrinsically different from the interpretation of other provisions of state constitutions.”²⁰ He then provides an overview of the search and seizure law in Oregon and concludes that the Oregon experience is “an example of how one state has departed from the Fourth Amendment regularly and survived to tell the tale.”²¹

The Honorable Joseph Grasso, of the Massachusetts Appeals Court, comes from a state—actually a commonwealth—whose constitution produced the model for the Fourth Amendment. The model was written by John Adams and remains today embodied in Article 14 of the Massachusetts Declaration of Rights. Here is a state with a longer constitutional heritage on search and seizure than the United States Constitution. His article, “*John Adams Made Me Do It: Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*,” traces “the common constitutional DNA in art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment,”²² explores the Massachusetts cases departing from United States Supreme Court interpretation (including the debate whether invocation of Article 14 is a “pure policy judgment or a principled application” of the Massachusetts Supreme Judicial Court’s independent authority to analyze its own state’s constitution),²³ and “posits that the methodological label for assessing the resort to state constitutional principles is less important than whether the resulting decision is faithful to the manner in which judges should decide cases and make law.”²⁴

The Honorable Michael E. Keasler, of the Texas Court of Criminal Appeals, comes from a state that has an analog with

¹⁹ *Id.* at 370.

²⁰ *Id.* at 385.

²¹ *Id.* at 369.

²² Joseph A. Grasso, Jr., “*John Adams Made Me Do It: Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*,” 77 MISS. L.J. 315, 318 (2007).

²³ *Id.*

²⁴ *Id.*

language identical to the Fourth Amendment. Texas courts have, almost uniformly, construed the state provision consistent with United States Supreme Court precedent. His article's premise is stated in its title: *The Texas Experience: A Case for the Lockstep Approach*. Judge Keasler outlines the evolution of Texas search and seizure jurisprudence, including (with limited exceptions) its historical lack of the use of independent state grounds. He observes that "those who advocate state expansion of the protections afforded by the Constitution of the United States often disregard the rights of the victims and potential victims and fail to critically examine the justification for, and ramifications of, the exclusionary rule."²⁵ He asserts that such advocates "do not consider whether legislation permitting lawsuits against governmental entities serves as more of a deterrent to police misconduct than the exclusionary rule."²⁶ Judge Keasler concludes: "The United States Constitution as interpreted by the Supreme Court of the United States adequately protects the right of the individual to be free from unreasonable searches and seizures, while, at the same time, protecting society from predators."²⁷

The Honorable Irma Raker, of the Court of Appeals of Maryland, comes from another of the original thirteen colonies. Maryland's search and seizure provision dates to the colonial era. That provision, Article 26 of Maryland's Declaration of Rights, explicitly regulates only the issuance of warrants; it has no reasonableness clause. Accordingly, Maryland is one of a few states that have a weak linguistic basis for departing from the Fourth Amendment. In her article, *Fourth Amendment and Independent State Grounds*, Judge Raker observes that Maryland has not resolved search and seizure issues on independent state grounds and continues to interpret Article 26 *in pari materia* with the Supreme Court's interpretation of the Fourth Amendment. She traces Maryland appellate court treatment of the two search and seizure provisions, including the evolution of the

²⁵ Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 MISS. L.J. 345, 367-68 (2007).

²⁶ *Id.* at 368.

²⁷ *Id.*

exclusionary rule in Maryland jurisprudence. Surveying those considerations, Judge Raker concludes that, “at least as of today, Maryland continues to resolve search and seizure issues arising under Article 26 of the Maryland Declaration of Rights in accordance with the jurisprudence of the United States Supreme Court and its interpretation of the Fourth Amendment.”²⁸

Professor Thomas Davies, of the University of Tennessee School of Law, who is known for his historical research, offers an article entitled: *Correcting Search and Seizure History: Now-Forgotten Common-Law Arrest Standards and the Original Understanding of “Due Process of Law.”* In the article, Professor Davies states: “Because the Federal Supreme Court has adopted a fairly minimalist view of search-and-seizure protections during recent decades, the practical question is whether it is appropriate for state courts to construe state constitutions to provide stronger state search-and-seizure protections than the federal protections.”²⁹ His article “assesses the implications that the history of search-and-seizure doctrine holds for that question.”³⁰ He extensively analyzes historical events from early times, colonial-era history, the drafting of constitutional provisions, post-framing “transformation of criminal procedure,” to the Supreme Court’s late nineteenth and early twentieth century cases. Professor Davies offers non-conventional interpretations of much of those legal developments. He maintains that much of “the historical claims in recent Supreme Court search-and-seizure rulings usually amount to only fictional originalism” and that “history does not oblige state courts to defer to the Federal Supreme Court’s construction of search-and-seizure rights.”³¹

Robert Williams, a leading scholar on state constitutional law and Distinguished Professor of Law, Rutgers University School of Law, Camden, contributes *State Constitutional Meth-*

²⁸ Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 MISS. L.J. 401, 415 (2007).

²⁹ Thomas Y. Davies, *Correcting Search and Seizure History: Now-Forgotten Common-Law Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1, 3 (2007).

³⁰ *Id.*

³¹ *Id.* at 4.

odology in Search and Seizure Cases to the symposium. In his article, Professor Williams examines the methodologies of state courts and observes that there is “a strikingly wide range of judicial approaches to the interpretation and application of state constitutional search and seizure guarantees.”³² He catalogues those various approaches. Studying those varying approaches, Professor Williams observes, “will contribute to the development of a state’s search and seizure jurisprudence just as surely as will the outcome, reasoning and holdings on the merits of those cases.”³³

Lawrence Friedman, an Associate Professor at the New England School of Law, offers an insightful view of state court responsibilities in interpreting their own constitutions. In his article, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, Professor Friedman observes that many of the decisions departing from federal precedent “can be viewed as reactive, with the state court content to announce disagreement with the Supreme Court’s interpretation of the parallel provision of the Federal Constitution and to hold that the state constitution protects more broadly the individual right or liberty in question.”³⁴ Such decisions, he contends, “typically provide scant explanation for the result beyond a reference to such grand concepts as liberty, equality, or privacy, which the framers of the state constitution held dear.”³⁵ Professor Friedman believes that two distinct “dispiriting effects follow from reactive state constitutional rulings that lack completely theorized rationales.”³⁶ First, “a reactive and incompletely theorized decision is not likely to contribute meaningfully” to the development of search and seizure jurisprudence and, second, they are “likely to fail to supply judges, lawyers, government actors, and citizens with sufficient guidance to settle expectations about the bounds of those constitutional commitments.”³⁷ He therefore challenges

³² Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 230 (2007).

³³ *Id.* at 263.

³⁴ Lawrence Friedman, *Reactive and Incompletely Theorized State Constitution Decision-Making*, 77 MISS. L.J. 265, 266 (2007).

³⁵ *Id.*

³⁶ *Id.* at 268.

³⁷ *Id.*

state courts to develop more “completely theorized justifications” in their opinions, but observes that the “potential for state constitutional individual rights decisions that are more completely theorized depends primarily upon the tenacity and thoughtfulness of the lawyers who argue these matters before state court judges.”³⁸

³⁸ *Id.* at 269.