STATE CONSTITUTIONAL METHODOLOGY IN SEARCH AND SEIZURE CASES

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> Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law.
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> Justice Hugo Black[1]

> [U]nmistakably, a high state court judge and a United States Supreme Court Justice must often look at the same case with different eyeglasses.
>
> Justice William J. Brennan, Jr.[2]

I. INTRODUCTION

Justice Black's statement above, of course, expresses a truism. Whether one sees federal constitutional search and seizure

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I would also like to thank my colleague, Dennis Braithwaite, for his valuable comments on the article.

[1] Cooper v. California, 386 U.S. 58, 62 (1967). Many state courts make similar statements. *See, e.g.*, State v. Askerooth, 681 N.W.2d 353, 361-62 (Minn. 2004).

[2] William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 227 (1966). See William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 949 (1964), where Justice Brennan contends that the roles of state supreme court justices and United States Supreme Court Justices, even in the same case, are functionally different.

standards as the national "*lowest* common denominator"[3] or the national "*highest* common denominator,"[4] it is clear that state courts are "permitted to reject a federal 'one-size-fits-all' approach to the interpretation of state constitutional rights."[5] This is no longer viewed as a "cute trick,"[6] an exercise of "Chutzpah,"[7] or "simply a flexing of state constitutional muscle."[8] State courts, however, may not impose such higher standards according to their view of *federal* constitutional law.[9]

If one were to pursue a case study of state courts interpreting their state constitutions to be more protective than the Federal Constitution, a phenomenon now referred to as the New Judicial Federalism (NJF),[10] search and seizure cases would provide the best material. This is a good point in time at which to survey and evaluate these methodologies for the benefit of lawyers, state judges,[11] and scholars who will be involved with state constitutional search and seizure cases in the future. In fact, the field of criminal procedure generally has, in many ways, provided the driving force behind the NJF. It is in this area, and more particularly in search and seizure cases, that state courts realized

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[3] Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 115 (Wash. 1981) (citing *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 290 (1973) [hereinafter *Project Report*]) (emphasis added).

[4] Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) (emphasis added).

[5] State v. Stanton, 820 A.2d 637, 664 (N.J. 2003) (Albin, J., dissenting).

[6] H.C. Macgill, *Introduction: Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) ("There probably remains some feeling on the bench as well as in the bar that a state constitutional holding is something of a cute trick, if not a bit of nose-thumbing at the federal Supreme Court, and not 'real' constitutional law at all.").

[7] Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 732 (1991) ("Furthermore, state judges experience a sense of chutzpah in expressing disagreement with the United States Supreme Court.").

[8] State v. Miller, 630 A.2d 1315, 1328 (Conn. 1993) (Callahan, A.J., concurring in part and dissenting in part).

[9] State v. Sullivan, 532 U.S. 769, 772 (2001). *See generally* Robert F. Williams, *The New Judicial Federalism Takes Root in Arkansas*, 58 ARK. L. REV. 883, 886-87 (2006).

[10] Robert F. Williams, *The Third Stage of The New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003) [hereinafter Williams, *Third Stage*]. *See also* Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63 (Spring 1994); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

[11] See Williams, *Third Stage*, *supra* note 10, at 211 n.4, for a list of articles on state constitutional law by state judges.

they could reach results different from those reached by the United States Supreme Court, or at least consider doing so. Early on, this possibility was recognized to provide the opportunity to "evade" more limited holdings of the United States Supreme Court under the Federal Constitution.[12] Then, Justice William J. Brennan, Jr., in his now-famous *Harvard Law Review* article about state constitutional law, used a New Jersey search and seizure case as one of his primary examples.[13] Justice Brennan later noted that the NJF was "probably the most important development in constitutional jurisprudence of our times."[14] Scholarship prior to Justice Brennan's had also pointed to search and seizure as an important element of the NJF.[15]

It is understandable that criminal procedure cases, after the post-incorporation Warren Court years, formed the bulk of the early cases on the New Judicial Federalism. As Jennifer Friesen observed some time ago, criminal procedure "cases applying state constitutions are plentiful, in large part because attorneys are paid to file and brief them."[16] She also noted that criminal proce-

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[12] Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). *See also* Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873 n.2 (1975).

[13] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 499 (1977). Justice Brennan's article, although published only in 1977, is among the "most frequently cited law review articles of modern times." Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State's Rights*, 20 J. MARSHALL L. REV. 1, 2 n.3 (1986). Justice Stewart G. Pollock of the New Jersey Supreme Court referred to Justice Brennan's article as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

[14] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165 (1998) (quoting William J. Brennan, Jr., NAT'L L.J., Sept. 29, 1986, at S1); *accord* William J. Brennan, Jr., *Foreword, Remarks of William J. Brennan, Jr.*, 13 VT. L. REV. 11, 11 (1988) (calling the movement "the most significant development in American constitutional jurisprudence today").

[15] *See, e.g.*, Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 139, 147-150, 170 (1969); *Project Report*, *supra* note 3, at 322.

[16] Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1270 (1985). *See also* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1148-49 (1985) ("The sheer number of state criminal cases and the relation between the protection offered by state and federal constitutions means that the state courts have many opportunities to rule on both federal and state constitutional issues. Thus, state criminal cases provide a rich source of material to study vertical and horizontal federalism." (footnotes omitted)); Ken Gormley, *State Constitutions and Criminal Procedure: A Primer for the 21st Century*,

dure cases were of a "higher visibility and drama" than civil cases.[17] Lawyers are already in court defending criminal charges, so search and seizure arguments are easier to make. Also, often the outcome of a search and seizure argument will dictate the disposition of the entire case and, as then Justice Shirley Abrahamson pointed out, criminal law is of special *state* concern:

> Criminal law is an area of traditional concern for state judges. It is an area of law in which state judges have special experience and expertise. The very bulk of the criminal cases in the state trial court may justify a state's attempt to formulate rules to achieve stability of state law, relatively free of the changes wrought by the United States Supreme Court, and to achieve uniformity within the state judicial system. Because of the state supreme courts' supervisory power over trial courts and procedural rules, it may be easier to develop independence in criminal procedural law than in other areas of constitutional law.[18]

State constitutional search and seizure provisions, however, are not all alike. Former Oregon Supreme Court Justice Hans A. Linde has made the point that state constitutions are not "common law."[19] Although state constitutions do contain unique textural differences, the search and seizure provisions are remarkably similar.[20]

In 1991, Dr. Barry Latzer observed:

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67 OR. L. REV. 689, 695 (1988) ("Perhaps the greatest and most immediate impact of state constitutional law has been in the area of criminal law and procedure.").

17 Friesen, *supra* note 16, at 1270.

18 Abrahamson, *supra* note 16, at 1150.

19 Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 229 (1992).

20 *See* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007); 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 11.02 (4th ed. 2006); BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW chs. 2-3 (1995) [hereinafter LATZER, *Criminal Law*]; BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 193-95 (1991) [hereinafter LATZER, *Criminal Justice*]. *See, e.g.*, State v. Morse, 123 P.3d 832, 837 (Wash. 2005) (state constitution does not use "reasonable"); Bouch v. State, 143 P.3d 643, 648 (Wyo. 2006) (state constitution requires affidavit); State v. Walker, 953 So. 2d 786, 789 (La. 2007) (state constitutional text includes automatic standing). *But see* State v. Davis, 929 A.2d 278, 295-96 (Conn. 2007) (reading state constitutional *possessions* the same as Fourth Amendment's "effects").

> The Supreme Court's Fourth Amendment rulings have been so numerous and so controversial that they have served as virtual lightning rods for state court divergence. The criminal law field in general and the fact-specific Fourth Amendment cases in particular would seem to be natural targets for state judges. . . .
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> Yet examined overall, the state constitutional search and seizure decisions have not developed new and independent approaches to the law. Despite considerable rejection of Supreme Court results, there has been little in the way of independent search and seizure doctrine. Nor have the states completely rejected the work of the Supreme Court. . . .
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> In a sense, the very existence of such a substantial body of state constitutional search and seizure decisions is a referendum on the work of the Burger-Rehnquist Court. However, if the votes are counted—if we are to actually count adoptions and rejections—then Burger and Rehnquist are winning: more cases accept than reject their rulings. . . . In short, the New Federalism is marked by a *selective* revolt against certain portions of search and seizure law.[21]

Even if he was right, and this trend has continued, the area of search and seizure still constitutes probably the single most important area of state constitutional law and will likely continue that way.

In this article, I propose to make a selective case study of search and seizure cases in the period of the New Judicial Federalism, not from the point of view of the *substance*, outcomes, or merits of such decisions, which have been adequately covered elsewhere,[22] but rather to assess the *methodologies* engaged in by state courts in this area. It will not present an exhaustive catalog of cases but instead will present cases illustrating these methodo-

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[21] LATZER, *Criminal Justice*, *supra* note 20, at 73-74; *see generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 76 (1992). Thus, state constitutional search and seizure doctrine could be referred to as "intermittent." *See generally* Justin Long, *Intermittent State Constitutionalism*, 34 PEPPERDINE L. REV. 41 (2006).

[22] FRIESEN, *supra* note 20, at ch. 11; LATZER, *Criminal Justice*, *supra* note 20, at 31-88; Gormley, *supra* note 16, at 702-20; *Special Project: The Continuing Evolution of Criminal Constitutional Law in State Courts*, 47 VAND. L. REV. 795 (1994) [hereinafter *Special Project*]. For example, the *Rutgers Law Journal Annual Issues on State Constitutional Law* have included coverage of state constitutional search and seizure decisions since 1989.

logical points. These approaches, in turn, reflect more generally the methodologies of the NJF.

Actually, there is a strikingly wide range of judicial approaches to the interpretation and application of state constitutional search and seizure guarantees. The many approaches to methodology respond to the central jurisprudential question of the New Judicial Federalism. Dr. Alan Tarr has noted that, in contrast to the great question in federal constitutional law about the legitimacy of judicial review itself, the central question in state constitutional law concerns the legitimacy of state constitutional rulings that diverge from, or go beyond, federal constitutional standards.[23] Is this form of state court "jurisdictional redundancy," to use Robert Cover's term, a good thing?[24] Is it legitimate? These questions also arise with respect to other state constitutional rights cases.

The United States Supreme Court renders two different kinds of decisions on federal constitutional law, including search and seizure issues. Decisions *favoring* asserted federal constitutional rights are the supreme law of the land and must be followed everywhere in the United States.[25] Decisions *rejecting* claims of federal constitutional rights, by contrast, do not end the matter but rather leave the question, quite literally, to the fifty states for their own decisions.[26] These latter kinds of Supreme Court decisions mark the *middle* of an evolving process of constitutional decision-making in our federal system. The continuing state litigation following Supreme Court decisions rejecting federal rights reflects the new paradigm of the NJF in cases concerning search and seizure. Such Supreme Court decisions trigger a series of "second looks" at the question by state decision-makers, most often the courts, based on state legal and policy arguments.[27] During this second stage, the Supreme Court deci-

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[23] TARR, *supra* note 14, at 174-75.

[24] Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interests, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 639 (1981).

[25] Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 165 (1986) [hereinafter Williams, *Methodology*].

[26] *Id.* at 165-66.

[27] Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353, 361 (1984) [hereinafter Williams, *Shadow*].

sion, while certainly not controlling, continues to play an integral role in the resultant state legislative, executive, and judicial decisions.

The search and seizure doctrines of the New Judicial Federalism continue to evolve, both in the legal literature and in the courts. Despite the warning in 1983 by Justice Robert Jones of Oregon, in a search and seizure case, that any "lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice,"[28] many lawyers continue to litigate such cases without adequately raising or briefing state constitutional arguments.[29]

Neither the threat of a malpractice judgment nor a possible finding of ineffective assistance of counsel, of course, is the primary reason to study state constitutional law in criminal procedure. These threats do, however, serve as a kind of "bottom line" warning or signal to criminal lawyers. Competent, zealous, and effective representation, rather, on the part of both the prosecution and defense, is the goal of the legal profession in the criminal justice system. Law schools, therefore, have an important role to play by including the study of *state constitutional* criminal procedure in the curriculum.[30]

Like the broader area of American constitutional law, which has included an almost exclusive focus on *federal* constitutional law, the field of criminal procedure (actually a subcategory of constitutional law) has been dominated by federal constitutional law at the expense of its *state* counterpart. It is long past time for this imbalance to change and for legal education to catch up with the real world of criminal justice litigation.

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[28] State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., specially concurring). *See also* Commonwealth v. Kilgore, 719 A.2d 754, 756-57 (Pa. Super. Ct. 1998). Justice Brennan stated, "I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions." Brennan, *supra* note 13, at 502.

[29] *See, e.g.*, State v. Dean, 76 P.3d 429, 432 n.1 (Ariz. 2003); Myers v. State, 839 N.E.2d 1154, 1158 (Ind. 2005); State v. Holzer, 656 N.W.2d 686, 690-91 (N.D. 2003); Custer v. State, 135 P.3d 620, 623-24 (Wyo. 2006).

[30] Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL ED. 243 (1991).

II. METHODOLOGY ISSUES

A. Evaluating Supreme Court Opinions on Similar or Identical Federal Constitutional Claims

In the area of search and seizure, often when a new question under the state constitutional provision comes to a state court there has already been a determination on the matter at the federal level by the United States Supreme Court. Of course, where the Supreme Court has ruled in favor of the rights claimant that ends the matter for federal constitutional law. Where, however, the Supreme Court has ruled against the Fourth Amendment claim, the matter is left to the states under their own state constitutions or subconstitutional legal material. The "shadow"[31] or "glare"[32] of these United States Supreme Court decisions can cast a powerful influence over the ensuing state constitutional litigation. On a number of occasions, as illustrated by the introductory quote to this article,[33] the Supreme Court majority reminds readers of its opinion rejecting the *Federal* Fourth Amendment claim that states may reach a different result under their *state* constitutions.

In *California v. Greenwood*,[34] the United States Supreme Court held six to three that the Fourth Amendment does not prohibit police from seizing and searching garbage which has been left out for collection. Interestingly, the Supreme Court *majority* reminded us that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."[35] The Court, as noted above, is expressing a truism, but truisms can be useful in reminding state courts and the lawyers who practice before them that they may argue for, and interpret their state constitutions to

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[31] Williams, *Shadow*, *supra* note 27, at 353.

[32] Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1015 (1997) [hereinafter Williams, *Glare*].

[33] *See supra* note 1 and accompanying text.

[34] 486 U.S. 35 (1988).

[35] *Id.* at 43; *see also* Arizona v. Evans, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

be more protective than the Federal Constitution. In addition, however, examination of the Supreme Court majority decision rejecting a Fourth Amendment claim can also be very instructive with respect to the "second look" at the matter under a state constitution. For example, there are a number of instances of "underenforcement" of federal constitutional norms against the states because of the Supreme Court's concerns about federalism, and the difficulties of crafting detailed constitutional rules of criminal procedure for all fifty states.[36]

This point was clearly recognized by the New Jersey Supreme Court when it found that there was state constitutional protection from searches and seizures of curbside garbage.[37] Justice Robert Clifford acknowledged the textual similarity between the federal and state search and seizure provisions.[38] He then noted that the United States Supreme Court may be "'hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.'"[39] Justice Clifford continued by explaining that the Supreme Court must be especially cautious in Fourth Amendment cases.

> When determining whether a search warrant is necessary in a specific circumstance, the Court must take note of the disparity in warrant-application procedures among the several states, and must consider whether a warrant requirement in that situation might overload the procedure in any one state. In contrast, we are fortunate to have in New Jersey a procedure that allows for the speedy and reliable issuance of search warrants based on probable cause. A warrant requirement is not so great a burden in New Jersey as it might be in other states.[40]

Justice Clifford was recognizing not only the possibility of Supreme Court deference to the states based on federalism concerns, but also the possibility of different "strategic concerns" at the state level.

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[36] Williams, *Shadow*, *supra* note 27, at 389-97; Williams, *Glare*, *supra* note 32, at 1046-55.

[37] State v. Hempele, 576 A.2d 793, 800 (N.J.).

[38] *Id.*

[39] *Id.* (quoting State v. Hunt, 450 A.2d 952, 962 (N.J. 1982) (Pashman, J., concurring)).

[40] *Id.* at 800-01 (citation omitted).

Professor Lawrence Sager identified the possibility of state and federal courts employing different "strategies" in constitutional interpretation. State courts, interpreting their own constitutions, may see the need to employ different strategies, even though they are applying similar "norms of political morality." Sager concluded:

> State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgments differ.
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> In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.[41]

Professor Neil McCabe has characterized the garbage search cases as also reflecting differences of opinion among federal and state courts about "legislative or social facts"—whether society views as reasonable a person's expectation of privacy in his garbage.[42] Obviously, state courts, interpreting their own state constitutions, have no federalism concerns; as a result, state courts may adopt different strategies to protect constitutional rights, and may make findings on such legislative or social facts that differ from a federal court's findings under the Federal Constitution.

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[41] Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 975-76 (1985).

[42] Neil Coleman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 TEMP. L. REV. 1229, 1245-51 (1992) (perceptively discussing the Supreme Court's decision in *Greenwood* and its approach to "legislative or social facts"—whether an expectation of privacy in one's garbage is one that society would recognize as reasonable—in the context of state constitutional law).

It is also very important to examine the dissenting opinions in such United States Supreme Court cases. For example, the Michigan Supreme Court, in *People v. Beavers*,[43] rejected the United States Supreme Court's decision in *United States v. White*,[44] which held evidence of a taped conversation did not have to be suppressed where one party to the conversation permits the police to monitor it.[45] The Michigan Supreme Court relied in part on Justice Harlan's dissent in *White*.[46] I commented on the phenomenon in a previous article, stating:

> Supreme Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions. Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis.[47]

B. Adequate and Independent State Grounds

State court decisions are final, and the United States Supreme Court has no jurisdiction to review them, where they are based on adequate and independent state law ground.[48] As the NJF has matured, the adequate and independent state ground doctrine has become a criminal defendant's argument, used to shield protective state constitutional judgments from a prosecutor's petition for United States Supreme Court review.[49] Prior to the NJF, the doctrine was most often used as a prosecutor's argument, used to shield state criminal procedure judgments (ar-

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[43] 227 N.W.2d 511, *cert. denied*, 423 U.S. 878 (1975).

[44] 401 U.S. 745 (1971) (plurality opinion).

[45] *Id.* at 745.

[46] *Beavers*, 227 N.W.2d at 514-15; *see also* State v. Novembrino, 519 A.2d 820, 848-49 (N.J. 1987); State v. Alston, 440 A.2d 1311, 1319 (N.J. 1981).

[47] Williams, *Shadow*, *supra* note 27, at 375-76 (footnote omitted); *see also* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1985-1986).

[48] *See, e.g.*, FRIESEN, *supra* note 20, at § 1.07; LATZER, *Criminal Justice*, *supra* note 20, at 11-30; Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

[49] Robert C. Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983).

guably below federal constitutional standards) from defendants' petitions for United States Supreme Court review.[50]

Because of the dominance of Federal Fourth Amendment doctrine on the area of search and seizure law, it is not surprising that state courts often write opinions mixing state and federal doctrine in a way that makes it difficult, where United States Supreme Court review is sought, to tell if the state decision is based on an adequate and independent state ground. This situation had caused the United States Supreme Court a great deal of difficulty and, in a 1983 search and seizure case, the Court sought to resolve the problem.

In *Michigan v. Long*,[51] Justice O'Connor announced:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[52]

This approach, although criticized by Justice Stevens,[53] and later by Justice Ginsburg,[54] provided guidance for state courts to en-

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[50] *See, e.g.*, Williams v. State, 82 S.E.2d 217 (Ga. 1954), *remanded*, Williams v. Georgia, 349 U.S. 375 (1955), *on remand* Williams v. State, 88 S.E.2d 376 (Ga. 1955), *cert. denied*, 350 U.S. 950 (1956); Walter Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

[51] 463 U.S. 1032 (1983). *See* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

[52] *Long*, 463 U.S. at 1040-41 (emphasis added). *See* Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5-9 (1984-85).

[53] *Long*, 463 U.S. at 1065-72 (Stevens, J., dissenting).

sure their search and seizure and other state constitutional law rulings were final. Oddly enough, many state constitutional decisions since *Michigan v. Long* have not utilized the simple "plain statement."[55] Dr. Barry Latzer has provided a possible explanation for this phenomenon:

> [L]aw-ambiguity may be viewed as a mark of caution: perhaps the failure to "commit" state law to a position is a way of preserving future interpretive options, so that the court could someday say that the previous case was not construing the state constitution after all. In any event, one point is clear beyond question: state constitutional law is not just about broadening rights that the Supreme Court has narrowed.[56]

The famous case of *State v. von Bulow*,[57] portrayed in the movie *Reversal of Fortune*, involved the Rhode Island state constitutional search and seizure clause. After the suspicious death of Claus von Bulow's wife, an admittedly *private* search by the maid, family members and their attorney, without any govern-

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[54] Arizona v. Evans, 514 U.S. 1, 24, 30-32 (1995) (Ginsburg, J., dissenting).

[55] A survey of over 500 decisions, from all fifty states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfeld, *Fulfilling the Goals of* Michigan v. Long: *The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988). See Mathew G. Simon, Note, *Revisiting* Michigan v. Long *After Twenty Years*, 66 ALB. L. REV. 969, 970 (2003), for a similar conclusion many years later. *See also* Donna M. Nakagiri, Comment, *Developing State Constitutional Jurisprudence After* Michigan v. Long: *Suggestions for Opinion Writing and Systemic Change*, 1998 MICH. ST. U. L. REV. 807 (1998).

[56] Barry Latzer, *Into the '90s: More Evidence that the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES ST. CONST. L. 17, 31-32 (1991). By contrast, Ann Althouse has argued that the *Michigan v. Long* "plain statement" requirement eliminates "law ambiguity" as a choice for state judges:

> State judges who want to expand the rights of an unpopular group, such as the criminally accused, may not want to call attention to their independence and thereby make themselves targets for political retaliation. By obscuring the source of the expanded rights they announce, state judges may create the impression that they act under the coercion of federal law and thus deflect voter wrath . . . . Justice O'Connor's presumption forces state judges to endure one form of scrutiny or [possible United States Supreme Court review] and deprives them of the ability to immunize themselves with ambiguity.

Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 988-89 (1993) (footnote omitted).

[57] 475 A.2d 995 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1984).

mental authority, discovered prescription drugs.[58] These were turned over to law enforcement officials who, without obtaining a warrant, tested the drugs and continued the investigation.[59] The Rhode Island Supreme Court excluded the evidence because the state's "expansion" of the private search was unconstitutional.[60]

The court reversed von Bulow's conviction on several grounds including search and seizure.[61] Justice Florence K. Murray's opinion for the court analyzed both federal and state constitutional law. After ruling that federal constitutional guarantees had been violated, Justice Murray turned to the state charter, and explained:

> Article I, sec. 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding that the toxicological testing was an illegal search. That section constitutes "bona fide separate, adequate, and independent grounds," upon which we base our decision to suppress the admission of evidence procured by the state's toxicological analysis.[62]

The Rhode Island Attorney General's petition to the United States Supreme Court for certiorari was denied without comment.[63] The next year, United States Supreme Court Justice John Paul Stevens cited the petition for certiorari in *von Bulow* as an example of "state legal officers [filing] petitions for certiorari in even the most frivolous search and seizure cases."[64]

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[58] *Id.* at 999.

[59] *Id.*

[60] *Id.* at 1012-20; *see also infra* notes 156-60 and accompanying text; State v. Saez, 653 A.2d 1130 (N.J. 1994); *see generally* Robert F. Williams, *The Claus von Bulow Case: Chutzpah and State Constitutional Law?*, 26 CONN. L. REV. 711 (1994).

[61] *von Bulow*, 475 A.2d at 1012-20.

[62] *Id.* at 1019 (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)) (citation omitted). The *von Bulow* opinion has been described as an example of the type of plain statement required by *Michigan v. Long*. *See* Pollock, *supra* note 48, at 981 n.22, 992.

[63] Rhode Island v. von Bulow, 469 U.S. 875 (1984). Interestingly, a student survey of cases found this was the only Rhode Island Supreme Court *explicit* plain statement referring to *Michigan v. Long* between the time *Long* was decided, in 1983, and January 1988. *See* Rosenfeld, *supra* note 55, 1051 n.64, 1071. *See also id.* at 1054 n.83, 1074 (noting two other less explicit Rhode Island plain statements).

[64] California v. Carney, 471 U.S. 386, 396 (1985) (Stevens, J., dissenting). *See also id.* at 396 n.4 (referring to *von Bulow* as "explicitly based on independent state grounds").

C. Sequence of Judicial Analysis

As the NJF has developed, considerable attention has been devoted to the question of sequence, or order, in which state courts should evaluate state constitutional claims that are presented together with similar or identical federal constitutional claims. Although I have maintained that "it is not the *sequence* that matters, but rather the focus on truly *independent* state constitutional interpretation, in whatever sequence it occurs," this is still a question that merits serious attorney and judicial consideration.[65]

1. Primacy or "First-Things-First"

Hans A. Linde, while still a professor at the University of Oregon School of Law, made the important point that state constitutional claims should be evaluated by the courts *before* reaching claims under the Federal Constitution. He contended:

> Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action (including rejection of the state constitutional claim) under the fourteenth amendment. *Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection*.[66]

Later, as a Justice of the Supreme Court of Oregon, Linde reiterated the point:

> The history of this case demonstrates the practical importance of the rule, often repeated in recent decisions, that all questions of state law be considered and disposed of before reaching a

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[65] Williams, *Glare*, *supra* note 32, at 1019 (citing Williams, *Methodology*, *supra* note 25, at 172-73). *See also* Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 639 n.11 (1994).

[66] Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970). See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984), and Hans A Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980), and Hans A Linde, Book Review, 52 OR. L. REV. 325, 332-41 (1973), for other expressions of this point of view.

> claim that this state's law falls short of a standard imposed by the federal constitution on all states.[67]

Interestingly, this approach also contemplates consideration of *subconstitutional* state law claims even prior to the state constitutional law analysis. This point has been made clear by the Oregon court:

> By now, the appropriate method of resolving properly raised issues of criminal procedure in Oregon should be axiomatic. All issues should first be addressed on a subconstitutional level. Courts then should consider any remaining issues under the Oregon Constitution. Finally, if no state law, including the state constitution, resolves the issues, courts then should turn for assistance to the Constitution of the United States.[68]

Following this primacy approach would, most likely, lead state courts to be clearer about whether they intend their decisions to rest on adequate and independent state grounds. This point has led Justice John Paul Stevens to advocate the use of the primacy approach by state courts.[69]

The Supreme Court of New Hampshire has been the most consistent court in applying the primacy approach. Since its influential 1983 decision in a search and seizure case, *State v. Ball*,[70] this court has consistently applied the primacy approach.[71] Justice Stevens noted the New Hampshire methodology:

> Since 1983, in over a dozen cases, the New Hampshire Supreme Court has thereby averted unnecessary disquisitions on the meaning of the Federal Constitution.

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[67] State v. Kennedy, 666 P.2d 1316, 1318 (Or. 1983). *See also* FRIESEN, *supra* note 20, at ch. 1 (surveying states).

[68] State v. Tompkin, 143 P.3d 530, 534 (Or. 2006); State v. Moylett, 836 P.2d 1329, 1332 (Or. 1992). *See also infra* Part II.K (discussing subconstitutional search and seizure protections).

[69] Delaware v. Van Arsdall, 475 U.S. 673, 698-708 (1986) (Stevens, J., dissenting); Massachusetts v. Upton, 466 U.S. 727, 736 (1984) (Stevens, J., concurring). *See generally* Ronald K. L. Collins, *Justice Stevens Becomes Advocate of States' Role in High Court*, NAT'L L.J., August 27, 1984, at 20.

[70] 471 A.2d. 347, 350 (N.H. 1983).

[71] Robert F. Williams, *New Hampshire and the Methodology of the New Judicial Federalism*, 45 N.H.B.J. 6 (Summer 2004), *available at* http://www.nhbar.org/publications/archives/display-journal-issue.asp?id=18.

> The emerging preference for state constitutional bases of decision in lieu of federal ones, in my view, the analytical approach best suited to facilitating independent role of state constitutions and state courts in our federal system.[72]

New Hampshire has followed this method consistently to the present, including its 2003 decision requiring a warrant for the search and seizure of curbside garbage.[73]

Despite this support for the primacy approach, joined by scholars,[74] it has not been embraced consistently by very many state courts.[75]

2. The Supplemental or Interstitial Approach

A number of states follow a methodology that is the exact opposite of the primacy approach: the supplemental or interstitial approach. Here, the federal constitutional claim is examined first, and if the rights claimant prevails, the decision is based on the Federal Constitution and is subject to United States Supreme Court review. In the event that the federal claim fails, however, the state court proceeds to evaluate the state constitutional claim to determine whether it will recognize rights beyond the federal doctrine. When they do recognize rights beyond the national minimum it can seem result oriented. It is, therefore, the use of this approach which is most likely to stimulate the state court to search for criteria or factors to *justify* a divergence from federal constitutional doctrine.[76] Therefore, virtually all states that subscribe to the criteria or factor approach tend to apply the supplemental or interstitial methodology.

Actually, this method should not be surprising given the prior domination of federal constitutional law in areas such as search and seizure. In some sense, the conditioned response of

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[72] *Van Arsdall*, 475 U.S. at 704 (1986) (Stevens, J., dissenting) (footnote omitted).

[73] State v. Goss, 834 A.2d 316 (N.H. 2003).

[74] FRIESEN, *supra* note 20, at ch. 1.

[75] Rachel E. Fugate, *The Florida Constitution: Still Champion of Citizens' Rights?*, 25 FLA. ST. U. L. REV. 87, 102-09 (1997); Daniel Gordon, *Good Intentions—Questionable Results: Florida Tries the Primacy Model*, 18 NOVA L. REV. 759 (1994); John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law: Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993).

[76] *See infra* Part II.D.

lawyers and judges is to look at the Federal Constitution first. Justice Stewart Pollock of the New Jersey Supreme Court explained the rationale of this approach: "One reason for following the supplemental model is that federal constitutional rights . . . establish our national identity. In an increasingly mobile nation, each of us can take comfort in knowing that, throughout the United States, the federal constitution protects a core of basic liberties."[77] In 1997, the Supreme Court of New Mexico specifically adopted the interstitial approach:

> [W]hen federal protections are extensive and well-articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the United States Supreme Court and commentators.[78]

Unlike many courts which utilize the interstitial approach, however, the *Gomez* court specifically rejected use of the "criteria approach":

> We decline to follow those states that require litigants to address in the trial court specified criteria for departing from federal interpretation of the federal counterpart. However, we note that several state courts have outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments.[79]

3. The Dual Sovereignty Approach

Justice Robert Utter of the Supreme Court of Washington has advocated the dual sovereignty approach.[80] Justice Utter correctly noted that, in fact, many state courts made it a regular

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[77] Pollock, *supra* note 48, at 986. *See also* FRIESEN, *supra* note 20, at § 1.06 [3].

[78] State v. Gomez, 932 P.2d 1, 7 (N.M. 1997) (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

[79] *Id.* at 8 n.3; *see also infra* Part II.D.

[80] Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Cases When Disposing of Issues on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

practice to rule on both state and federal constitutional grounds.[81] This technique of analyzing constitutional claims based on both constitutions, of course, is what led to the problems in identifying decisions that were based on adequate and independent state grounds.[82] Justice Utter recognized this problem, and advocated a clear distinction in state court opinions between federal and state constitutional law.[83] Acknowledging that if the rights claimant prevailed on the state constitutional claim, any discussion of federal constitutional law would be dictum, Justice Utter contended that:

> Failure to continue to engage in the federal debate can only weaken the values that underlie our federal system. To engage in the debate can only broaden our understanding of the federal constitution. The result will be a healthy, living document, nourished by the court systems of all fifty states.[84]

The point here is that state courts (and the lawyers who present cases to them) should be cognizant of the sequence in which they approach federal and state constitutional arguments. These methodology questions may serve to highlight other issues in the interpretation of state constitutional rights guarantees.

D. The Criteria or Factor Approach

An example of the criteria approach is New Jersey Justice Alan Handler's concurring opinion in *State v. Hunt*.[85] In *Hunt*, the New Jersey Supreme Court found a defendant's telephone billing records to be protected from a warrantless seizure under the state constitution,[86] rejecting a contrary United States Supreme Court opinion, *Smith v. Maryland*,[87] which held the warrantless seizure of a pen register listing of numbers dialed was

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[81] *Id.* at 1049; *see also* FRIESEN, *supra* note 20, at § 1.04 [4].

[82] *See supra* notes 48-64 and accompanying text.

[83] Utter, *supra* note 80, at 1050.

[84] *Id.* See Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987), for a later version of Justice Utter's views. Additionally, see *State v. Hayes*, 188 S.W.3d 505, 513 (Tenn. 2006), for a Tennessee search and seizure case performing dual analysis.

[85] 450 A.2d 952 (N.J. 1982).

[86] *Id.* at 952.

[87] 442 U.S. 735 (1979).

permitted.[88] Justice Handler's concurring opinion in *Hunt* appeared to consider the state constitution as a secondary source of rights to which state courts may "resort" under certain circumstances. He cautioned: "There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach."[89] He added: "It is therefore appropriate, in my estimation, to identify and explain *standards or criteria* for determining when to invoke our State Constitution as an independent source for protecting individual rights."[90]

Justice Handler identified seven criteria or factors that might justify a result different from the United States Supreme Court's: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the United States Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state.[91] He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."[92]

Justice Handler denied his analysis created a presumption in favor of federal doctrine,[93] but Justice Pashman in a separate

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[88] *Id.* at 735.

[89] *Hunt*, 450 A.2d at 963-64 (Handler, J., concurring). Justice Handler noted the possibility that state court constitutional interpretations could be overruled by state constitutional amendments. *Id.* at 964 n.2.

[90] *Id.* at 965 (emphasis added).

[91] *Id.* at 965-67.

[92] *Id.* at 967. See Williams, *Glare*, *supra* note 32, at 1026-46, for a discussion of other states following this approach after *Hunt*.

[93] *Hunt*, 450 A.2d at 967 n.3 (Handler, J., concurring). In a law review article, Justice Handler stated: "I wrote separately in *Hunt* to express my view that resort to the state constitution as an independent source for protecting individual rights is most appropriate when supported by sound reasons of state law, policy, or tradition." Alan B. Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 204 (1983). *See id.* at 206 n.29; *see also* State v. Williams, 459 A.2d 641, 650 (1983) ("We have not hesitated to recognize and vindicate individual rights under the State Constitution where our own constitutional

concurrence disagreed.[94] Importantly, Justice Pashman observed that such a presumption can actually serve to limit a state court's authority to interpret its constitution where none of the criteria or factors can be identified.[95] This is often the case in search and seizure situations.

These kinds of criteria, factors, and standards do, in fact, reflect circumstances under which state courts have interpreted their constitutions to provide more extensive rights than their federal counterpart.[96] They are important arguments for scholars, courts, and advocates.[97] They should not, however, serve as *limitations on* state court authority to disagree with United States Supreme Court constitutional analysis even if none of the factors are present. A state high court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution despite what the United States Supreme Court has said when interpreting a different constitution under different institutional circumstances.[98]

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history, legal traditions, strong public policy and special state concerns warrant such action.").

[94] *Hunt*, 450 A.2d at 960 n.1, 962 (Pashman, J., concurring). On the question of the presumptive correctness of federal constitutional decisions for state constitutional law compare Honorable Daniel J. O'Hern, *The New Jersey Constitution: A Charter to Be Cherished*, 7 SETON HALL CONST. L.J. 827 (1997) (urging state courts not to diverge from United States Supreme Court rulings), with Robert F. Williams, *Two Visions of State Constitutional Rights Protections*, 7 SETON HALL CONST. L.J. 833 (1997) (urging independent consideration of state constitutional claims).

[95] *Hunt*, 450 A.2d at 960 (Pashman, J., concurring) ("Although the factors listed [by Justice Handler] are potentially broad, they impose clear limits.").

[96] *See, e.g.*, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934-44 (1976); Kent M. Williams, Note, *Property Rights Protection Under Article I, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures*, 75 MINN. L. REV. 1255, 1273-1300 (1991).

[97] See Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence:* "Gunwall *is Dead—Long Live* Gunwall!", 37 RUTGERS L.J. 1169 (2006), for an important analysis of the criteria approach as a blueprint for argument and analysis. *See also* William F. Cook, *The New Jersey Bill of Rights and a "Similarity Factors" Analysis*, 34 RUTGERS L.J. 1125, 1127 (2003) (arguing for the requirement of criteria to justify *following* United States Supreme Court interpretations of the Federal Constitution based on a presumption of "state constitutional distinctness").

[98] *See* Holder v. State 847 N.E.2d 930, 935 (Ind. 2006); State v. Anderson, 733 N.W.2d 128, 140 (Minn. 2007); State v. Burbach, 706 N.W.2d 484, 489 (Minn. 2005); Commonwealth v. DeJohn 403 A.2d 1283, 1289 (Pa. 1979) ("As we believe that *Miller* establishes a dangerous precedent, with great potential for abuse, we decline to follow that case when construing the state constitutional protection against unreasonable searches and sei-

Wisconsin Chief Justice Shirley Abrahamson, in discussing the garbage search cases,[99] directly addressed the matter of disagreement between state judges and the United States Supreme Court:

> But should not different opinions about individual rights in search and seizure cases be expected and accepted? . . .
>
> Differences in interpretation of the state and federal constitutions should be viewed, I believe, as examples of the difficulties of interpreting language, especially the broad phrases of a bill of rights. . . .
>
> We accept division of opinion within the United States Supreme Court on interpretations of constitutional language. . . . Why should state courts not closely examine a federal decision to determine whether it is sufficiently persuasive to warrant adoption into state law?[100]

These views recognize the legitimacy of a reasoned difference of opinion, not as a "mere" result-oriented disagreement, but rather as the product of honestly held alternative ways of looking at a problem of constitutional interpretation under state constitutions and the consequences of resolving it in a certain way. This attitude has to include rejection of the criteria approach. Former

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zures."). See also Honorable Dennis J. Braithwaite, *An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1 (2001), for an important critique of the New Jersey approach.

[99] Abrahamson, *supra* note 7, at 725-33.

[100] *Id.* at 731.

Justice Joseph Grodin of California has made a similar point,[101] as have others.[102]

In *People v. Scott* and *People v. Keta*,[103] in 1992, the New York Court of Appeals parted with the United States Supreme Court in rejecting, respectively, the "open fields" doctrine and the "administrative search" exception in search and seizure cases.[104] Judge Joseph Bellacosa, with Judge Richard Simons and Chief Judge Sol Wachtler in agreement, wrote a bitter, accusatorial dissent aimed at both the substance and methodology of the majority opinions.[105]

> The doctrine that State courts should interpret their own State Constitutions, *where appropriate*, to *supplement* rights

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[101] Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391 (1988). He writes:

> The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds. In the absence of such factors, however, state courts are still obliged to find meaning in the provisions of the state constitutions. And . . . neither logic nor history requires that they accord state constitutional language the same meaning as the United States Supreme Court has accorded a comparable provision of the federal Constitution.

Id. at 400; *see also* Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1584-85, 1607-08, 1610 (1990).

[102] *See, e.g.*, G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841 (1991). He writes:

> [R]ather than blindly following federal precedent, state judges should independently seek their own best interpretation of their state constitutions. This does not mean that they should altogether ignore federal rulings—they may be adopted or rejected, depending on their inherent persuasiveness. But when state judges forthrightly assert their own perspectives, it is argued, the result is a healthier and more vibrant federalism.

Id. at 849; *see also id.* at 847 n.24, 854-55.

[103] 593 N.E.2d 1328 (N.Y. 1992). In *People v. Scott* and *People v. Keta*, the New York Court of Appeals consolidated *People v. Scott*, 565 N.Y.S.2d 576 (N.Y. App. Div. 1991), and *People v. Keta*, 567 N.Y.S.2d 738 (N.Y. App. Div. 1991). *Id.* at 1328.

[104] *Scott*, 593 N.E.2d at 1334, 1341-43. *See generally* Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at The New York Court of Appeals*, 12 TOURO L. REV. 633 (1996); Eve Cary & Mary R. Falk, People v. Scott & People v. Keta: *"Democracy Begins in Conversation"*, 58 BROOK L. REV. 1279 (1993); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK L. REV. 1, 218 (1996).

[105] *Scott*, 593 N.E.2d at 1348-49 (Bellacosa, J., dissenting) ("Simply stated, the common issue is whether this Court has a justifiable basis, within its recently rearticulated method of noninterpretative analysis, to apply New York's mirror equivalent of the Fourth Amendment . . . differently from the United States Supreme Court in these cases.").

> guaranteed by the Federal Constitution is not in dispute. Indeed, we have shown our support for that doctrine *where appropriate* with our votes in a long line of cases . . . . We do strenuously disagree with the Court, however, that the doctrine is being "cautiously exercised" . . . and believe that the applications of the doctrine here create a sweeping, new and unsettling interpretation—not mere application of settled principles.[106]

The majority, according to the dissenters, had simply "superimpose[d] its preferred view of the constitutional universe."[107]

Judge Judith Kaye concurred with the majority opinions to address the methodological issues raised by Judge Bellacosa.[108] Her observations are telling:

> The dissent in this case is distinctive only in the tone of its expression, most especially its accusation that the Court's legal conclusions and analysis are the product of ideology, simply the imposition of a personally preferred view of the constitutional universe. . . .[109]
>
> *First*, however much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether . . . constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court. In that no two cases are identical, it is in the nature of our process that in the end a judgment must be made as to the application of existing precedents to new facts. To some extent that has taken place in the two cases before us . . . .
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> *Second*, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an *ironclad checklist* to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. . . . But where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the

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106 *Id.* at 1356 (second emphasis added) (citations omitted).

107 *Id.*; *see also id.* at 1348-49.

108 *See id.* at 1346 (Kaye, J., concurring). See *State v. Canelo*, 653 A.2d 1097 (N.H. 1995), for a similar New Hampshire case involving search and seizure.

109 *Scott*, 593 N.E.2d at 1346 (Kaye, J., concurring).

> State Constitution when we examine whether we should follow along as a matter of State law–wherever that may fall on the checklist.
>
> . . . .
>
> The Supreme Court is not insulted when we do so.[110]

The Wyoming Supreme Court has been applying the criteria approach in search and seizure cases, emphasizing that the criteria are "non-exclusive," since 1993.[111]

The criteria approach appears to be a response to criticism of state courts for diverging from, or disagreeing with, United States Supreme Court decisions on identical or similar facts under identical or similar constitutional provisions. These attacks on the legitimacy of independent state constitutional interpretation[112] seem, somewhat understandably, to have stimulated the criteria approach. But are state courts not simply doing what they did for all those years before the selective incorporation of the Federal Bill of Rights into the Fourteenth Amendment?

E. State Courts in Lockstep with Federal Search and Seizure Doctrine

As noted earlier,[113] probably a majority of search and seizure claims raised under state constitutions are resolved in accordance with federal search and seizure doctrine. This is, of course, completely acceptable as long as the state courts are aware of the

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[110] *Scott*, 593 N.E.2d at 1346 (Kaye, J., *Id.* at 1347 (emphasis added); *see* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1192-96 (1994).

[111] *See* O'Boyle v. State, 117 P.3d 401, 408-09 (Wyo. 2005) (citing Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993)); *see also* State v. Davis, 929 A.2d 278, 294-95 (Conn. 2007) (same); Fertig v. State, 146 P.3d 492, 496-97 (Wyo. 2006). The *Saldana* opinion is a virtual primer on state constitutional law in the context of search and seizure.

[112] Williams, *Shadow*, *supra* note 27, at 355-58; *see also* Williams, *Glare*, *supra* note 32, at 1055-56.

[113] *See supra* note 21 and accompanying text.

state grounds and the possibility of a more protective interpretation, and they take seriously the arguments.[114]

When a state court adopts federal constitutional search and seizure doctrine and results for the resolution of state constitutional claims, however, it can take several different approaches. First, as noted above, it can decide to follow Fourth Amendment holdings for the case before it, without indicating that in the future, *in other cases*, the same approach will be followed. This latter approach, which I have called "prospective lockstepping," seems to be an improper attempt to prejudge future cases, which will stifle independent arguments in future search and seizure cases.[115] A good example of prospective lockstepping in search and seizure cases is the Ohio Supreme Court's decision in *State v. Robinette*.[116] The court concluded that after incorporation of the Federal Bill of Rights, the "United States Constitution became the primary mechanism to safeguard an individual's rights."[117] Noting the identical state and federal constitutional texts, and relying on earlier decisions, the Ohio Supreme Court decided to adopt the United States Supreme Court's view of the Fourth Amendment as the authoritative judicial interpretation of the state constitutional search and seizure clause.[118] The court relied specifically on its 1981 decision in *State v. Geraldo*,[119] where it stated:

> It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution with respect to the warrantless monitoring of a consenting informant's telephone conversation is coextensive with that of the Fourth Amendment to the United States Constitution. *As a consequence thereof, appellant's failure to prove a violation of the Fourth Amendment dictates the conclusion that*

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[114] Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping*?, 46 WM. & MARY L. REV. 1499, 1506-09 (2005) (discussing "reflective adoption").

[115] *Id.*; *see also* FRIESEN, *supra* note 20, at § 11.06 [2].

[116] 685 N.E.2d 762 (Ohio 1997); *see also* State v. Scarborough, 201 S.W.3d 607, 622 (Tenn. 2006).

[117] *Robinette*, 685 N.E.2d at 766.

[118] *Id.* at 767. *See also id.* at 771 ("Accordingly, we find that Section 14, Article I of the Ohio Constitution affords protections that are coextensive with those provided by the Fourth Amendment . . . .").

[119] 429 N.E.2d 141 (Ohio 1981).

> *his rights under Section 14, Article I, of the Ohio Constitution have not been violated either.*[120]

The court noted the need for uniformity in this area of criminal procedure, and stated that in the future, absent "persuasive reasons to find otherwise," it would follow the United States Supreme Court's interpretations of the Fourth Amendment as a matter of Ohio constitutional law.[121]

The Illinois Supreme Court recently engaged in a searching analysis of its "lockstep" approach to search and seizure cases.[122] It concluded, based on indications it perceived in the history of the adoption of the 1970 Illinois Constitution, that the framers did not intend to protect search and seizure rights beyond federal standards,[123] and that it should continue its "limited lockstep" approach,[124] which recognizes the possibility of divergent opinions if criteria are met.[125] The Michigan Supreme Court has followed a similar approach, based on a reading of that state's constitutional history.[126]

F. Federal-State Uniformity in Search and Seizure

In criminal procedure areas, such as search and seizure, it is sometimes said that there is a special justification for "locksteping" or uniform interpretation where claims under both the

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[120] *Id.* at 146 (emphasis added); *see also* State v. Morris, 72 P.3d 570, 576 (Kan. 2003) (explaining that the state search and seizure provision "provides protection identical to that provided under the Fourth Amendment to the United States Constitution"); State v. Andrews, 565 N.E.2d 1271, 1273 n.1 (Ohio 1991) ("A review of Ohio case law indicates that we have interpreted Section 14, Article I of the Ohio Constitution to protect the same interests and in a manner consistent with the Fourth Amendment to the United States Constitution."); State v. Garcia, 123 S.W.3d 335, 343 (Tenn. 2003) (finding the state and federal search and seizure provisions "identical in intent and purpose") (citation omitted).

[121] *Robinette*, 685 N.E.2d at 767. The court cited two cases for the proposition that it had applied the "persuasive reasons" approach to several other provisions. *Id.* at 766 (citing State v. Gustafson, 668 N.E.2d 435, 441 (Ohio 1996); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 60 (Ohio 1994)). In fact, although both of these cases interpret the Ohio Constitution coextensively with the United States Constitution, neither of them mentions the "persuasive reasons" (criteria) approach.

[122] People v. Caballes, 851 N.E.2d 26 (Ill. 2006). See *Rainey v. Comm.*, 197 S.W.3d 89 (Ky. 2006), for a similar discussion.

[123] *Id.* at 33, 36, 45, 47.

[124] *Id.* at 43-46.

[125] *Id.* at 43.

[126] *See, e.g.*, People v. Collins, 475 N.W.2d 684 (Mich. 1991).

state and federal constitutions are raised. In 1974, the Supreme Court of Oregon stated in a search and seizure case:

> There are good reasons why state courts should follow the decisions of the Supreme Court of the United States on questions affecting the Constitution of the United States and the rights of citizens under the provisions of that Constitution, as well as under identical or almost identical provisions of state constitutions, as in this case. . . .
>
> The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges, provided, of course, that this may be done in such a matter as not to violate the constitutional rights of the individual.[127]

In this case the Oregon Supreme Court reversed its former independent approach and decided to follow the outcome of the United States Supreme Court in *United States v. Robinson*,[128] holding that a search of a person under custodial arrest was not unreasonable under the Fourth Amendment.[129]

In *People v. Gonzalez*,[130] Judge Simons of the New York Court of Appeals stated: "We deem it desirable to keep the law of this State consistent with the Supreme Court's rulings on inventory searches . . . ."[131] Judge Wachtler, dissenting, contended that the United States Supreme Court decisions were distinguishable, and noted: "It is often difficult enough to follow the Supreme Court's decisions in the Fourth Amendment area without also trying to anticipate them."[132] The applicability of two, sometimes

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[127] State v. Florance, 527 P.2d 1202, 1209 (Or. 1974) (footnote omitted).

[128] 414 U.S. 218 (1973). See *State v. Luck*, 312 S.E.2d 791 (Ga. 1984), and *Collins*, 475 N.W.2d at 685, and Williams, *Third Stage*, *supra* note 10, at 219-20, for other cases reversing state constitutional search and seizure doctrine to follow federal constitutional law, but see *State v. Williams*, 193 S.W.3d 502, 507 n.1 (Tenn.2006) (declining to follow United States Supreme Court's change of direction), and *State v. Nicholson*, 188 S.W.3d 649, 658 (Tenn. 2006) (same).

[129] See Richard D. Harmon & Terry J. Helbush, Robinson *at Large in the Fifty States: A Continuation of the State Bill of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE U. L. REV. 1 (1974), and Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982), regarding the reception of *Robinson* by state courts.

[130] 465 N.E.2d 823 (1984).

[131] *Id.* at 825.

[132] *Id.* at 826. *See also* People v. P.J. Video, 501 N.E.2d 556 (1986).

differing, sets of constitutional rules for law enforcement officials does present challenges.[133]

G. Horizontal Federalism

As an alternative to a *vertical* view at what the United States Supreme Court has said in search and seizure cases, state courts and lawyers can and do look *horizontally* at what other state courts have done in these contexts. The New Hampshire garbage search decision, which also reached the opposite conclusion from *California v. Greenwood*, reflects this use of the "horizontal federalism" method of examining other state high court decisions on the matter under their state constitution.[134] In *State v. Goss*,[135] Justice Nadeau stated, "[w]e acknowledge that in finding protection under our State Constitution under these circumstances, we join a small minority of courts. . . . [H]owever, 'we are persuaded that the equities so strongly favor protection of a person's privacy interest that we should apply our own standard rather than defer to the federal provision.'"[136]

Given the large number of search and seizure cases in state courts, and the modern research methods, state courts are remiss if they do not look at what their sibling state courts have concluded about the matter under review.

H. State Action

Scholars, lawyers, and students who are familiar with search and seizure law will recognize that the state action doctrine raises an important question about the reach of the Fourth Amendment and state constitutional search and seizure protections. Are searches and seizures carried out by private persons proscribed by the Fourth Amendment? When the state *extends* a

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[133] *See* Ronald Susswein, *The Practical Effect of the "New Federalism" on Police Conduct in New Jersey*, 7 SETON HALL CONST. L.J. 859 (1997).

[134] G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 2 (1988).

[135] 834 A.2d 316 (2003).

[136] *Id.* at 320 (quoting State v. Hempele, 576 A.2d 793, 814 (N.J. 1990)).

search that was initiated by *private* parties, must it first obtain a search warrant?

Under the Federal Fourth Amendment, a warrantless search by private parties does not require the exclusion of evidence.[137] This is due to the federal constitutional "state action" doctrine which applies as well in various contexts other than search and seizure. However, state constitutional law doctrines, in similar contexts, may have no state action requirement, or at least a *reduced* state action requirement.[138] State constitutional search and seizure protections, therefore, may be applied to exclude evidence obtained by private searches or combined private/public searches under circumstances where the Federal Fourth Amendment would not be applicable.[139] This could be one of the areas where state courts "experiment" by applying their search and seizure provisions at points on the continuum of state action that would not be reached by the rigid federal state action doctrine. Eventually, the results of such experiments might have some reciprocal influence leading to slight modifications in the federal doctrine.

The question of applying the state constitutional exclusionary rule to a search by a *private* security guard arose in California in 1979. In *People v. Zelinski*,[140] the court noted that because

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[137] United States v. Jacobsen, 466 U.S. 109, 113 (1984); Walter v. United States, 447 U.S. 649, 656 (1980); Burdeau v. McDowell, 256 U.S. 465, 475 (1921). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (4th ed. 2004); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 4.02 (4th ed. 2000); John M. Burkoff, *Not So Private Searches and the Constitution,* 66 CORNELL L. REV. 627 (1981); Steven Euller, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649 (1980); Sam Kamin, *Little Brother is Watching You: The Importance of Private Actors in the Making of Fourth Amendment Law*, 79 Den. U. L. Rev. 517 (2002).

[138] On the state action doctrine under state constitutions, see generally Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1990), and John Devlin, *Constructing an Alternative to "State Action" as a limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819 (1990), and Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111 (1989), and Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139 (1989).

[139] *See* FRIESEN, *supra* note 20, at § 11.014; LATZER, *Criminal Justice*, *supra* note 20, at 43-44.

[140] 594 P.2d 1000 (Cal. 1979).

of the tremendous rise in the use of private security services,[141] "we recognize that in our state today illegal conduct of privately employed security personnel poses a threat to privacy rights of Californians that is comparable to that which may be posed by the unlawful conduct of police officers."[142] The court ordered the suppression of evidence obtained in a search by a store detective of a patron's handbag who was suspected of shoplifting because state law only authorized detention until law enforcement officers arrived.[143] This California approach has, however, been overruled by a constitutional amendment barring the exclusion of evidence not seized in violation of the *Federal* Constitution.[144]

The Montana Supreme Court ordered the suppression of evidence seized under a warrant that was issued as a result of a private citizen trespassing on her neighbor's property to take a leaf from a marijuana plant and hand it over to law enforcement authorities.[145] Interestingly, the court relied in addition on the separate, textual privacy guarantee in the Montana Constitution[146] to recognize enhanced protection from private searches beyond Federal Fourth Amendment standards.[147] This is another interesting methodology. The Montana case could also be seen as an *extension* of a private search by law enforcement authorities, a sort of "silver platter" situation.[148]

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[141] *Id.* at 1005 ("[T]he private security sector has become the largest single group in the country engaged in the prevention of crime.").

[142] *Id. See also* State v. Nelson, 354 So. 2d 540 (La. 1978).

[143] *Zelinski*, 594 P.2d at 1005.

[144] CAL. CONST. art. I, § 28(d); *In re* Christopher H., 278 Cal. Rptr. 577, 579-80 (Cal. App. 1991).

[145] State v. Helfrich, 600 P.2d 816 (Mont. 1979), *overruled by* State v. Long, 700 P.2d 153 (Mont. 1985); *see also* State v. Malkuch, 154 P.3d 558, 560 (Mont. 2007). *Contra*, Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992) (finding no state constitutional search and seizure protection from private, employment-related drug testing, but recognizing a common-law privacy right, with the state constitutional privacy right as a source of public policy).

[146] MONT. CONST. art. II, § 10.

[147] *Helfrich*, 600 P.2d at 818 (diverging from Burdeau v. McDowell, 256 U.S. 465 (1921)); *see also* State v. $129,970.00 in U.S. Currency, 161 P.3d 816, 821 (Mont. 2007); State v. Schwarz, 136 P.3d 989, 990 (Mont. 2006).

[148] *See infra* Part II.I.

I. The Reverse Silver Platter Doctrine

Prior to *Mapp v. Ohio*,[149] federal search and seizure doctrine was more liberal than most states' search and seizure guidelines. State law enforcement officials could, usually, hand over to federal officials, evidence that could not have been lawfully seized by those same federal officials.[150] After *Mapp*, for a period, the state and federal standards were the same. Today, in many instances, it is the *states* that are more protective in search and seizure doctrine than federal law. As New Jersey Justice Alan B. Handler has observed:

> This era of constitutional homogeneity faded; however, when various states began to establish search-and-seizure standards more protective than the minimum standards derived from the fourth amendment. *See, e.g.*, *State v. Johnson*, 68 *N.J.* 349, 346 A.2d 66 (1975). With this development of differing standards, the silver platter doctrine surfaced in situations implicating the parallel jurisdiction of federal and state officers. It again became necessary as a condition for use in a state court to sanitize evidence that may have been obtained under less protective federal-constitutional standards. *However, the polarity of the transfer process was reversed*. Instead of evidence being transferred to federal officers from state officers working under more lenient local standards, evidence might now flow to state officers from federal officers governed by more lenient standards.[151]

This has led to what is now called the "reverse silver platter doctrine."[152] In the New Jersey case, mentioned above, the court con-

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[149] 367 U.S. 643 (1961).

[150] Lustig v. United States, 338 U.S. 74, 78-79 (1949); Byars v. United States, 273 U.S. 28, 33 (1927). *See also* Burkoff, *supra* note 137, at 631-43.

[151] State v. Mollica, 114 N.J. 329, 351 (1989). The quote is from the official *New Jersey Reports*, because the italicized sentence is missing from the *Atlantic Reporter*. *See* State v. Mollica, 554 A.2d 1315, 1326-27 (N.J. 1989).

[152] *See* Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 869-84 (1991). *See generally* Jill E. Fisch, *Turf Wars: Federal/State Cooperation and the Reverse Silver Platter Doctrine*, 23 CRIM. L. BULL. 509 (1987); Tom Quigley, Comment, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285 (1988) (discussing silver platter doctrine); Barry A. Spevack, Note, *Expanding State*

cluded that evidence seized legally by *federal* law enforcement officials (telephone billing records that could not have been legally seized by state law enforcement officials without a warrant) could be introduced in a *state* court proceeding after the federal officials declined to prosecute even though it would have been illegal for the state law enforcement officers to seize the evidence. The court reasoned that the deterrence rationale of the state exclusionary rule could not affect federal officials as long as they were not acting in an agency relationship with state officers.[153] The New Mexico Supreme Court, however, has reached the opposite conclusion.[154]

Federal-state or state-federal relationships are usually implicated in considering silver platter problems. However, there are also private-public relationships that must be analyzed under both state and federal constitutional law.[155] The Rhode Island Supreme Court addressed this issue in the *von Bulow* case.[156] The situation surrounding the search and seizure in *von Bulow* illustrates one of the other circumstances—private searches—where evidence seized in a search can be delivered to authorities on a "silver platter." Professor Alan Dershowitz (counsel in the appeal) described the problem as follows:

> The constitutional issue posed by this private search whose fruits were then turned over to the police and public prosecutors was an important one. A wealthy family's hiring its own private police—who are not bound by the Bill of Rights—raised a profound civil liberties issue which had long interested me. The increasing utilization of private security guards and vigilante organizations had already forced several courts to confront this problem with differing results . . . .

Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?, 8 LOY. U. CHI. L.J. 186 (1976).

153 *Mollica*, 554 A.2d at 1326-27; *accord* State v. Bridges, 925 P.2d 357, 364-72 (Haw. 1996). The New Jersey court excluded evidence where state and local officials were working together. State v. Knight, 678 A.2d 642 (N.J. 1996).

154 State v. Cardenas-Alvarez, 25 P.3d 225, 227 (N.M. 2001).

155 Burkoff, *supra* note 137, at 635-43.

156 State v. von Bulow, 475 A.2d 995 (R.I. 1984). *See supra* notes 57-64 and accompanying text.

> I certainly wanted to include this line of argument, but I was concerned about focusing too heavily on it. "It's a guilty man's argument," I told Claus.[157]

The Rhode Island Supreme Court reversed von Bulow's conviction on several grounds including search and seizure.[158] Justice Florence Murray first considered the warrant requirement under federal law. The court distinguished the federal cases upholding "field tests," where "it was a virtual certainty that the substances tested contained contraband and nothing else,"[159] and concluded that the conviction must be reversed on Fourth Amendment grounds.[160] Referring to the "double barrelled source of protection" afforded Rhode Island citizens by the state and federal constitutions, Justice Murray applied the state constitution to conclude that a warrant should have been procured prior to the police expansion of the private search.[161]

J. Direct Cause of Action for Money Damages for State Constitutional Search and Seizure Violations

The standard remedy, of course, for search and seizure violations is the motion to suppress the evidence improperly seized prior to the ensuing criminal trial—the exclusionary rule. What happens where no criminal charges are brought? Could the aggrieved person bring an action for money damages?[162] The United States Supreme Court has answered in the affirmative for Federal Fourth Amendment violations.[163]

In 1996, the New York Court of Appeals held that a class action filed by nonwhite males, alleging that they were subject to a five-day "street sweep" by law enforcement officials trying to

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[157] ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE 66 (1986).

[158] *von Bulow*, 475 A.2d at 1012-20.

[159] *Id.* at 1016, *distinguishing* United States v. Jacobsen, 466 U.S. 109 (1984).

[160] *Id.* at 1021.

[161] *Id.* at 1019-20.

[162] *See generally* Friesen, *supra* note 16, at 1269-70. *See also* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES ch. 7 (4th ed. 2006).

[163] Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1971); Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

solve an aggravated assault by a "black male," stated a claim for money damages under the New York Constitution's search and seizure provision.[164] Referring to the claim as sounding in "constitutional tort,"[165] the court noted:

> Constitutions assign rights to individuals and impose duties on the government to regulate the government's actions to protect them. It is the failure to fulfill a stated constitutional duty which may support a claim for damages in a constitutional tort action.[166]

The court further noted that for a state constitutional provision to support a direct cause of action for money damages it must be "self-executing, that is, it takes effect immediately, without the necessity for supplementary or enabling legislation."[167] Finally, after analyzing the *Restatement of Torts*, *Bivens*, and common-law antecedents of the search and seizure clause, as well as constitutional convention debates on the search and seizure clause that assumed the availability of a damages remedy, the court approved a damages remedy.[168]

The Connecticut Supreme Court, relying heavily on *Bivens*, has reached a similar result in the search and seizure context.[169]

K. Subconstitutional State Search and Seizure Protections

Interestingly, there are a fair number of state search and seizure protections provided by statute or court rule: subconsti-

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[164] Brown v. State, 674 N.E.2d 1129 (N.Y. 1996). *See* Gail Donoghue and Jonathan I. Edelstein, *Life After* Brown: *The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447 (1998); Matthew S. Freedus, Comment, *A Cause of Action for Damages Under the State Constitution:* Brown v. State of New York, 60 ALB. L. REV. 1915 (1997); Martin A. Schwartz, *Claims for Damages for Violations of State Constitutional Rights—Analysis of the Recent Court of Appeals Decision in* Brown v. New York; *the Resolved and Unresolved Issues*, 14 TOURO L. REV. 657 (1998).

[165] *Brown*, 674 N.E.2d at 1132.

[166] *Id.* at 1133.

[167] *Id.* at 1137.

[168] *Id.* at 1138-40.

[169] Binette v. Sabo, 710 A.2d 688 (Conn. 1998). *See also* Newell v. Elgin, 340 N.E.2d 344 (Ill. App. Ct. 1976), *superceded by statute*, ILL. COMP. STAT. 85/2-201 (1986), *as recognized in* Reese v. May, 955 F. Supp. 869 (N.D. Ill. 1996); Moresi v. Dep't of Wildlife & Fisheries, 567 So. 2d 1081, 1091-93 (La. 1990); Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984); Cassady v. Yellowstone Co. Sheriff's Dep't, 143 P.3d 148, 154 (Mont. 2006).

tutional rights protections. For example, Chapter 276, Section 1 of the Massachusetts General Laws provides:

> A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.[170]

This provides more protection, *statutorily,* than *United States v. Robinson*.[171]

The Delaware Supreme Court rejected an argument that the good-faith exception to the warrant requirement should apply because of a Delaware *statute* prohibiting nighttime searches of dwelling houses except in exigent circumstances.[172] The Georgia Supreme Court reached a similar result based on a state statute mandating the suppression of evidence seized without probable cause.[173] Chief Justice Clarke wrote a short concurring opinion:

> I concur with the majority opinion. I write only to emphasize that the extension of the exclusionary rule to the facts in this case rests not on a constitutional right. It simply rests on the statute passed by the legislature and we simply hold that the courts are bound by that statute.[174]

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[170] MASS. GEN. LAWS. ch. 276, § 1 (1986).

[171] 414 U.S. 218 (1973). *See* Commonwealth v. Madera, 521 N.E.2d 738, 740 (Mass. 1988). *See also* Maine Civil Rights Act, ME. REV. STAT. ANN. tit. 5, §§ 4681-4685 (Supp. 1997); John C. Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 268-72 (1989) (discussing state statutes which provide more protection than the Federal Constitution); George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53 (1989).

[172] Mason v. State, 534 A.2d 242 (Del. 1987). *See also* FRIESEN, *supra* note 20, at §§ 11.03 [3][b], [4][b].

[173] Gary v. State, 422 S.E.2d 426 (Ga. 1992). See K.R. Blackwell, Note, Gary v. State: *The Georgia Supreme Court Dodges a Confrontation with the Good Faith Exception*, 32 GA. L. REV. 927 (1998), for a critique of the *Gary* decision.

[174] Gary, 422 S.E.2d at 430 (Clarke, J., concurring). *See also* Dodson v. State, 150 P.3d 1054, 1056-58 (Okla. Crim. App. 2006) (statute barring anticipatory warrants).

Judge-made "prophylactic rules" represent another area of possible state subconstitutional protections from unreasonable search and seizure.[175] The New Jersey Supreme Court recently engaged in an interesting, and unusually candid, discussion of the merits of a prophylactic rule rather than a state constitutional ruling in a search and seizure case.[176]

L. "Forced Linkage" Search and Seizure Amendments to State Constitutions

While a number of state courts interpret their state constitutional search and seizure provisions in "lockstep" with Federal Fourth Amendment jurisprudence, in several states the constitutions have been amended to *require* the courts to interpret such provisions in lockstep with, or to follow a "forced linkage" to, federal constitutional doctrine in search and seizure cases.[177] Florida's search and seizure clause was amended in 1982 to mandate: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."[178]

Surprisingly, Chief Justice Warren Burger wrote a concurring opinion in a Florida search and seizure case where the Court dismissed the writ as improvidently granted because it reflected an interpretation of the Florida Constitution that was likely more protective than federal doctrine, but was based on adequate and independent state grounds.[179] Despite the fact that the Court had no jurisdiction, the Chief Justice noted the "untoward result"[180] in the Florida court and wrote:

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[175] *See generally* Honorable Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283 (2003).

[176] State v. Carty, 790 A.2d 903 (N.J. 2002), *modified by* 806 A.2d 798 (N.J. 2002).

[177] FRIESEN, *supra* note 20, at § 11.02 [3]; Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

[178] FLA. CONST. art. I, § 12. *See* Slobogin, *supra* note 177; *see also* Paul R. Joseph, *No Different Drummer: The Effect of the 1983 Amendment to Article I, § 12 of the Florida Constitution*, 5 ST. THOMAS L. REV. 101 (1992).

[179] Florida v. Casal, 462 U.S. 637, 637 (1983).

[180] *Id.*

> The people of Florida have since shown acute awareness of the means to prevent such inconsistent interpretations of the two constitutional provisions . . . . As amended, that section ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States.[181]

A similar amendment was included in the California Constitution.[182] These amendments illustrate a central feature of state constitutional law: judicial interpretations of state constitutions, including search and seizure provisions, can be "overruled" in the state political process by amendments to the state constitution. Thus, state constitutional rights can be subject to majoritarian, political review subject only to the national minimum standards ("least common denominator") or "floor" of the Federal Bill of Rights.[183]

III. CONCLUSION

Search and seizure litigation can be based on numerous fact-specific distinctions, in a wide variety of specific situations. At each of these myriad decision points are opportunities for state courts to interpret their state constitutions to reach more protective outcomes than those under the Fourth Amendment. The *merits* of these decisions are an extremely important area for study and analysis.

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[181] *Id.* at 638. One state court justice, responding to this suggested interference with state law, objected to the United States Supreme Court's "intrusionary policy," stating:

> The danger of this intrusionary policy is fully exemplified by the arrogance of a concurring opinion in *Florida v. Casal*, – U.S. –, 103 S. Ct. 3100, 77 L. Ed. 2d 277 (1983). There the United States Supreme Court let stand a decision of the Florida Supreme Court that appeared to have relied on a state constitutional provision and state statute in reaching its decision. But the Chief Justice of the United States did not agree with the decision of the Florida Supreme Court and suggested that the United States Supreme Court was the sole repository of judicial wisdom and rationality.

State v. Jackson, 672 P.2d 255, 264 (Mont. 1983) (Shea, J., dissenting).

[182] CAL. CONST. art. I, § 28(d).

[183] Williams, *Shadow*, *supra* note 27, at 381-84.

This article, by contrast, has been a nonexhaustive review of the *methodology* issues that arise in state court litigation of state constitutional search and seizure issues. These varying approaches 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.