

SHOULD STATE COURTS DEPART FROM THE FOURTH AMENDMENT? SEARCH AND SEIZURE, STATE CONSTITUTIONS, AND THE OREGON EXPERIENCE

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The symposium poses a question: “Should state courts depart from the Fourth Amendment?” In this article, I answer that question in two ways. First, I address it more or less in the abstract—should any state depart from the Fourth Amendment? Second, I move to a more concrete consideration of the law of my own state, as an example of how one state has departed from the Fourth Amendment regularly and survived to tell the tale.

I. THE QUESTION IN THE ABSTRACT: SHOULD STATES DEPART?

Let us begin with the abstract question whether states, any states, should depart from federal search and seizure law. At the outset, I would like to suggest, perhaps ungraciously, that that is the wrong question. The proper question is not whether state search and seizure provisions *should* depart from Federal Fourth Amendment case law. The proper question is whether state constitutions *do* depart from Federal Fourth Amendment case law.¹

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¹ Even that reformulation of the question is not quite correct, as it arguably assumes that the Federal Constitution is a starting point for search and seizure analysis, from which the state constitution then may or may not depart. In my view, the starting point for search and seizure analysis should be the state constitution. If, and only if, the state constitution is not dispositive should the courts turn to the Federal Constitution because, as a matter of both history and logic, state constitutional analysis should always come first. *See generally infra* Part I.A.1. and accompanying text. The reformulation of the question (as well as the original, for that matter) also appears to assume that the state and federal search and seizure provisions are identically worded, which is not

The question, in other words, is what state constitutions *mean*. They may or may not end up meaning the same thing as their federal counterpart.² But it is not a matter of choice about whether it is a good thing to have a unified system of criminal procedure. It is a question of state constitutional interpretation determined in the way judges on state courts ordinarily determine the meaning of their state constitutions.³

To ask whether state constitutional search and seizure provisions *should* depart from Federal Fourth Amendment case law implicitly assumes one of two things about state constitutional interpretation—namely, either that state constitutions are less than truly “constitutional” (and, consequently, are not subject to the ordinary rules of constitutional interpretation) or that there is something special about the search and seizure provisions of state constitutions that makes their interpretation subject to different rules from the ones that apply to other provisions of state constitutions.

I suggest that neither of those two possibilities is tenable. State constitutions are “constitutional.” They have the force of constitutional law. They must be interpreted and enforced by courts as constitutional law. And search and seizure provisions are no less a part of that constitutional law than any other provisions of a state’s constitution. Let me explain why I suggest such categorical conclusions.

necessarily the case. *See infra* notes 67-68 and accompanying text. *See also* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

² I do not suggest that there is anything wrong with a state court concluding as a matter of state constitutional interpretation that a given provision has the same meaning that a federal court has given a parallel provision of the Federal Constitution. *See* Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991) (“There is nothing improper in concluding that the [United States] Supreme Court’s construction of a similar text is sound. Adoptionism is not per se unjustifiable.”).

³ As Hans Linde explained:

The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the [United States] Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state’s law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it had been raised.

E Pluribus—Constitutional Theory and State Courts, 18 GA. L. REV. 165, 179 (1984).

A. Are State Constitutions "Constitutional"?

I begin with the contention that state constitutions are "constitutional." I am aware of the fact that some eminent constitutional scholars have suggested that state constitutions are not in fact "constitutional" and, as a result, are not subject to the sort of interpretive endeavor in which federal judges engage with respect to the Federal Constitution. Professor Paul Kahn, for example, has suggested that the notion that state constitutions represent independent and unique sources of law reflects "anachronistic beliefs about state sovereignty" that cannot be reconciled with "modern American constitutionalism."⁴ For another example, Professor James A. Gardner, a frequent and thought provoking writer in the field of state constitutional law, has suggested that state constitutions do not satisfy the basic Lockean requirements of "constitutional positivism," that is, the notion that state constitutions have legitimacy as "fundamental" law.⁵

It is tempting to dismiss such suggestions with a quick kick at the bench in my courtroom and, like Dr. Johnson responding to Bishop Berkeley's subjective idealism after kicking a stone, simply declare that "I refute it thus."⁶ But these serious, sometimes elegant, arguments are worth more careful scrutiny.

In brief, it strikes me that each of the arguments proceed, however elegantly, from debatable premises. Kahn, for example, complains that the notion of states as sovereign and inde-

⁴ Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147, 1150 (1993).

⁵ James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1249-53 (2005); see also James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1028-30 (1993) ("[S]tate constitutions, to put it bluntly, are not 'constitutions' as we understand the term."). Gardner developed the point more completely in his recent book, JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005). Gardner, particularly in his more recent work, does not suggest that there is no place for state constitutionalism at all. *Id.* He suggests instead that state constitutional interpretation must be understood in the context of the role of states as "agents of federalism" under appropriate, and limited, circumstances. *Id.* at 228-67; see also Jim Rossi, *Book Review: The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 224 (2006) (questioning whether Gardner's view of federalism "is overly myopic for state constitutionalism and may limit its path").

⁶ JAMES BOSWELL, *LIFE OF JOHNSON* 333 (R.W. Chapman ed. 1998).

pendent sources of law “does not easily fit within the larger trends in the development of constitutional law” that emphasize the centralization of political authority.⁷ He suggests that, public life “is experienced in and through the national community,” while local governments are “now often identified with prejudice, discrimination, censorship, and ideological rigidity,” to be remedied by resort to the federal government for protection against such restraints on personal liberty.⁸ In fact, more recent trends are rather notably to the contrary, as recent United States Supreme Court federalism decisions⁹ and state court decisions concerning the subject of same-sex marriage¹⁰ illustrate.

Gardner’s argument rests conspicuously on a definition of constitutionalism that assumes that constitutions must be the product of a voluntary choice of autonomous and *independent* individuals.¹¹ Because the members of states are subject to the supreme, national government, they are not independent; as a

⁷ Kahn, *supra* note 4, at 1148.

⁸ *Id.* at 1149; see also Michael E. Solimine & James L. Walker, *Federalism, Liberty, and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1468 (1997) (“Whatever may have been true in the past, in this century it is unrealistic to contend that each state has a distinctive political or social culture, especially one that differs in important ways from national culture.”).

⁹ In the last dozen years, for example, the Supreme Court has struck down a number of congressional enactments on the ground that they infringe on state power and authority. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000); *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. Lopez*, 514 U.S. 549, 566-68 (1995). Such recent case law developments have prompted renewed interest in, among other things, state and local government environmental regulation. See, e.g., Scott Josephson, *This Dog Has Teeth . . . Cooperative Federalism and Environmental Law*, 16 VILL. ENVTL. L.J. 109 (2005); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 93 IOWA L. REV. 545 (2007); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

¹⁰ See generally Jeffrey L. Amestoy, *Forward: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004); William R. Castro, *Our Unwritten Constitution and Proposals for a Same-Sex Marriage Amendment*, 38 CREIGHTON L. REV. 271 (2005); Joseph R. Grodin, *Same-Sex Relationships and State Constitutional Analysis*, 43 WILLAMETTE L. REV. 235 (2007); Robert F. Williams, *Old Constitutions and New Issues: National Lessons From Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001).

¹¹ According to Gardner, “[i]f constitutional positivism is to be available as a theoretical framework for an interpretational methodology, the answer must be that a state’s constitution ‘belongs’—uniquely, determinately, and by virtue of a process of independent and voluntary self-construction—to the people of the state, and to them alone.” Gardner, *Whose Constitution Is It*, *supra* note 5, at 1254 (emphasis added).

result, Gardner concludes the government that their state constitutions describe is not “constitutional” in the sense that he defines it.¹² Such reasoning strikes me as circular. If one defines “constitutional” in a way that clearly excludes state constitutions, it comes as no surprise that state constitutions are not “constitutional.”¹³

Arguments that state constitutions are not “constitutional” also seem to be predicated, in substantial part, on refutations of caricatures of arguments in favor of state constitutionalism. Gardner, for example, has spent much energy refuting the notion that a principal justification for state constitutionalism is what he terms “romantic subnationalism,” the idea, supposedly rooted in the German philosophical tradition of Hegel and Fichte, that a state constitution is a reflection of a “unique state character” or a “set of indigenous fundamental values.”¹⁴ He asserts that the notion that any state reflects such a unique character cannot be reconciled with “the most glaringly obvious features of modern American society,” such as its remarkable mobility, the dominance of national media and mass marketing, and increasing globalization of economic activity.¹⁵

Among the problems with this argument is that it does not rest on an accurate portrayal of arguments in favor of state constitutionalism. To be sure, a number of judges and commentators writing in support of state constitutionalism note that state constitutions often reflect “cultural values distinctively their own.”¹⁶ This observation seems unremarkable to me. Some states include in their constitutions guarantees of rights that others do not.¹⁷ It strikes me as rather commonplace to

¹² *Id.* at 1255.

¹³ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 186 (1998) (“The primary problem with Gardner’s critique, however, is its unduly narrow view of constitutionalism.”).

¹⁴ See generally GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 5, at 61-62.

¹⁵ *Id.* at 69.

¹⁶ See, e.g., Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L. REV. 399, 423 (1987).

¹⁷ A number of state constitutions include provisions pertaining to the rights of the poor, rights to public education, rights to housing, and the like. The New York Constitution, for instance, declares that the legislature must “provide for aid, care and support of the needy.” N.Y. CONST., art. XVII, § 1. Other state constitutions, such as Oregon’s, do

suggest that the differences in those constitutional texts may reflect differences in values among those who ratified them. I am not aware of anyone, however, who argues, as Gardner posits, that the legitimacy of state constitutionalism rests on a notion that each of the fifty states represents some sort of unique, uniform, and immutable state “character.”¹⁸ To the contrary, as Professor Jennifer Friesen suggests,

State declarations of individual rights have histories and qualities that differ, to a greater or lesser degree, from each other and from the first ten amendments to the Federal Constitution; however, what really “counts” in state constitutional

not. See generally Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-96 (1989) (discussing such state constitutional provisions and their enforcement in the courts). Closer to the topic of this paper, the Montana Constitution includes a unique provision declaring that “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” MONT. CONST., art. II, § 10. In light of that constitutional wording, the Montana Supreme Court, not surprisingly, has concluded that “the range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment.” *State v. Hardaway*, 36 P.3d 900, 910 (Mont. 2001) (citing *State v. Elison*, 14 P.3d 456 (Mont. 2000)). The Washington Constitution likewise includes a uniquely worded provision that declares that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST., art I, § 7. The Washington courts have concluded that, in light of that wording, “the protections guaranteed by article I, section 7, of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.” *State v. McKinney*, 60 P.3d 46, 48 (Wash. 2002) (citing *City of Seattle v. McCready*, 868 P.2d 134 (1994)).

¹⁸ In any event, it is not clear to me that Gardner has proven that, in fact, the different states do not reflect recognizably different political cultures. It strikes me that the mere facts of increased mobility, nationalized media, and globalized economies do not refute the notion that there nevertheless persist significant differences between the states in their legal and political cultures. To pick only one of many possible examples, two dozen states have adopted some form of direct democracy, while the balance have not. See David B. Magleby, *Direct Legislation in the American States*, in REFERENDUMS AROUND THE WORLD 218 (David Butler & Austin Ranney eds. 1994). There can be no question but that the availability of the initiative and referendum has had profound consequences for those states permitting direct democracy, often expressed on constitutional terms, regarding such matters as of education funding, property tax reform, automobile insurance rates, physician assisted suicide, property rights, and criminal victims’ rights, to say nothing of the process of lawmaking itself. To assert that people are increasingly mobile and watch national news, in other words, does not explain away the very real differences in legal and political culture between, say, Oregon, where, for instance, the powers of initiative and referendum exist, physician-assisted suicide is lawful, same-sex civil unions are permitted, property taxation is constitutionally limited, and Georgia, where none of those is the case.

interpretation is often not truly unique to one state. Independent interpretation does not require uniqueness; nor are differences in a state's political or cultural makeup relevant unless they are differences that demonstrably influenced the making of constitutional choices in an original or amended document.¹⁹

Apart from that, so far as I can tell, the arguments against state constitutionalism *simpliciter* do not address two powerful arguments in support of it, one historical and one logical. Let us turn to those arguments.

1. Historical Argument

Historically, state constitutions came first. Even before the Federal Constitution was ratified, the states had adopted their own constitutions.²⁰ (By 1783, thirteen states had constitutions, all but Rhode Island, which retained its colonial charter.)²¹ The Second Continental Congress actually had contemplated the idea that state constitutions should be uniform, but it rejected the notion in favor of allowing each state to craft its own.²² (Apparently, the delegates could not agree on what a model state constitution should look like.)²³

In that regard, it may be worthwhile recalling that the Federal Constitution was patterned after the state constitutions, not vice versa.²⁴ And, similarly, the Federal Bill of Rights was modeled after state bills of rights.²⁵ As Willi Paul Adams notes in his

¹⁹ Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1074 (1997).

²⁰ See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (expanded ed. 2001); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

²¹ For an excellent overview of eighteenth-century state constitutionalism, see TARR, *supra* note 13, at 60-93 (1998); see also Gordon Wood, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911 (1982).

²² ADAMS, *supra* note 20, at 49; see also FLETCHER M. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860* 52-56 (1930).

²³ ADAMS, *supra* note 20, at 54.

²⁴ *Id.* at 289 ("The Federalists of 1787 created political institutions on the national level that were firmly based on a pattern already existing on the state level.")

²⁵ See BERNARD SCHWARTZ, 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 383 (1971) ("It is a fiction too long accepted that provisions in state constitutions textually

history of early state constitutions, “When the first ten amendments substituted for a formally separate Declaration of Rights in 1791, not a single right was codified that had not previously been listed in one of the state bills of rights or constitutions. . . .”²⁶ More important, the adoption of the Bill of Rights did not supplant the state constitutional guarantees of individual rights.²⁷

In fact, it was not until after the Civil War that the Fourteenth Amendment was adopted, and it was not until the twentieth century that selective incorporation was invoked to apply portions of the Federal Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment.²⁸ In the

identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise; the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.”)

²⁶ ADAMS, *supra* note 20, at 299. See also AKHIL REED AMAR, THE BILL OF RIGHTS 205 (1998) (“With a few exceptions . . . the substance of the federal Bill’s rights and freedoms did not greatly diverge from rights already formally protected under state laws and state constitutions.”).

²⁷ To the contrary, as the United States Supreme Court made clear in *Barron v. City of Baltimore*, 32 U.S. 243 (1833), the Federal Bill of Rights did not apply to the states.

²⁸ The United States Supreme Court rejected the notion that the Fourteenth Amendment Privileges and Immunities Clause made the Federal Bill of Rights applicable to the states in *The Slaughterhouse Cases*, 83 U.S. 36 (1872). For the next quarter century, the Court consistently rejected the contention that the Fourteenth Amendment incorporated the Federal Bill of Rights against the states. See, e.g., *McElvaine v. Brush*, 142 U.S. 155 (1891) (holding that the Fourteenth Amendment did not incorporate the Eighth Amendment Cruel and Unusual Punishment Clause); *Spies v. Illinois (Ex Parte Spies)*, 123 U.S. 131 (1887) (explaining that the Fourteenth Amendment did not incorporate the Fourth Amendment search and seizure clause or the Fifth Amendment right against self-incrimination); *Hurtado v. California*, 110 U.S. 516 (1884) (stating that the Fourteenth Amendment did not incorporate Fifth Amendment right to grand jury indictment). In 1897, the Court held in *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897), that the Fourteenth Amendment *did* incorporate the Takings Clause of the Fifth Amendment. The Court then appeared to reverse course and, for another quarter-century, reverted to its earlier holdings. See, e.g., *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530 (1922) (finding that the Fourteenth Amendment did not incorporate the First Amendment free speech guarantee); *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding that the Fourteenth Amendment did not incorporate Fifth Amendment right against self-incrimination); *Maxwell v. Dow*, 176 U.S. 581 (1900) (finding that the Fourteenth Amendment did not incorporate the Sixth Amendment right to criminal jury trial). It was not until the 1920s that the Court again changed course, this time for good, holding that a number of specific rights enumerated in the Federal Bill of Rights have been “selectively” absorbed into the Due Process Clause of the Fourteenth Amendment. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (applying to the states the Fifth Amendment right against double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying to the states the Fifth Amendment right against self-incrimination); *Wolf v. Colorado*, 338 U.S. 25 (1949) (applying to the states the Fourth

meantime, the states decided matters of individual rights, and, in particular, search and seizure—that did not involve federal law enforcement pursuant to their own constitutions.²⁹ For over one hundred years, no one thought twice about whether state constitutions had the force of law or had legal significance apart from the Federal Constitution or cases construing it.³⁰

To be sure, the state courts often have construed their state constitutions to be coextensive with parallel provisions of the Federal Constitution, but not always. For example, before the United States Supreme Court decided *Weeks v. United States*,³¹ courts in several states recognized an exclusionary rule.³² And, even more interestingly, after *Weeks*, a majority (twenty-seven states by 1949) refused to read their own search and seizure provisions to require the exclusion of illegally obtained evidence.³³

It was not until 1949, in *Wolf v. Colorado*,³⁴ that the United States Supreme Court held that the Fourth Amendment's search and seizure provision applied to the states, and not until 1961, in *Mapp v. Ohio*,³⁵ that it applied the exclusionary rule to them as well. So, for a century and a half, the state courts interpreted their own state constitutional search and seizure provisions to have independent legal significance.

Even with the advent of selective incorporation, it was never suggested that the Fourteenth Amendment superseded the authority of state constitutions or state court interpretation of those

Amendment right to be free from unreasonable search and seizure); *Fiske v. Kansas*, 274 U.S. 380 (1927) (applying to the states the First Amendment guarantee of freedom of speech).

²⁹ For an interesting account of the impact of incorporation of the criminal procedure provisions of the Federal Bill of Rights on state jurisprudence, see generally Kenneth Katkin, "Incorporation" of the Criminal Procedure Amendments: *The View from the States*, 84 NEB. L. REV. 397 (2005).

³⁰ See generally Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as Independent Sources of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1836 (2004) ("[F]or the first 175 years after the adoption of the federal Constitution, state constitutions were the primary guarantors of individual rights.").

³¹ 232 U.S. 383 (1914).

³² See, e.g., *Hammock v. State*, 58 S.E. 66 (Ga. Ct. App. 1907); *State v. Height*, 91 N.W. 935 (Iowa 1902); *Blum v. State*, 51 A. 26 (Md. 1902); *State v. Slamon*, 50 A. 1097 (Vt. 1901).

³³ See Katkin, *supra* note 29, at 415-18 (citing cases).

³⁴ 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁵ 367 U.S. 643 (1961).

constitutions, so long as the state court rulings were at least as protective of individual rights guaranteed by the Federal Constitution. To the contrary, as early as 1940, in *Minnesota v. National Tea Co.*, the Supreme Court noted that “[i]t is fundamental that state courts must be left free and unfettered by us in interpreting their state constitutions.”³⁶ More recently, in *California v. Greenwood*, the Court explained that “[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.”³⁷ In fact, it has long been the law that when a state court decision rests on a clearly stated “independent state ground” such as a state constitutional provision that is more protective of individual rights than the Federal Constitution, the Supreme Court regards itself as lacking jurisdiction even to review the matter.³⁸

With *Wolf* and *Mapp*, however, the federal courts began to interpret the Fourth Amendment more liberally than the states had interpreted their state search and seizure provisions. As a result, a generation of judges began to forget about state constitutionalism.³⁹ It was not until fifteen years later, with the emergence of a more conservative Burger Court, that a “New Judicial Federalism” emerged.⁴⁰ Actually, it was not new at all. If any-

³⁶ 309 U.S. 551, 557 (1940).

³⁷ 486 U.S. 35, 43 (1988). 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.”); *Cooper v. California*, 386 U.S. 58, 62 (1967) (“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.”).

³⁸ *Michigan v. Long*, 463 U.S. 1032, 1038-39 (1983). The rule dates back at least to *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935), in which the Court declared that “where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is . . . adequate to support the judgment.”

³⁹ See generally JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1-1 n.11 (1992) (“A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states.”); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976) (noting that state courts fell “into the drowsy habit of looking no further than federal constitutional law”).

⁴⁰ Justice William J. Brennan, Jr. is usually given credit for initiating the state constitutional “revolution” with the publication of his article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Actually, a number of scholars had been calling for a return to judicial federalism before that. Hans Linde, for

thing, the period of lockstep federal-state constitutionalism was the new phenomenon. Judicial federalism represents a return to fundamentals.⁴¹

2. Logical Argument

Let us turn to the argument about why logic requires independent state constitutional decisions. There are essentially two arguments to consider. First, there is Hans Linde's argument that it is inappropriate even to reach a federal constitutional question until it is first determined that the state constitution does not afford complete relief. According to Linde and to the Oregon Supreme Court, which adopted the argument, provisions of the Federal Bill of Rights apply only when there is a denial of due process.⁴² There can be no denial of due process, however, if state law affords complete relief. As a result, a state court is compelled to look first to its own state constitutional law to determine whether the state law affords relief. Only if the state law does *not* afford complete relief is there the requisite denial of

example, argued for recognition of the independent significance of state constitutions as early as 1970. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). Other early calls for the recognition of state constitutionalism include Jerome B. Falk, *The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969); Howard, *supra* note 39. It is generally recognized that, although some may have been calling for a return to state constitutionalism fairly early on, it was the jurisprudence of the Burger and Rehnquist Courts that precipitated the re-emergence of state constitutionalism. *See, e.g.*, Stanley H. Friedelbaum, *Advances and Departures in the Criminal Law of the States: A Selective Critique*, 69 ALB. L. REV. 489, 489-95 (2006).

⁴¹ *See generally* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Fitzpatrick, *supra* note 30, at 1835-36 ("Although judicial federalism has been a controversial topic since the mid-1970's, invocation of state constitutions to protect individual rights was in fact the historical norm for much of the nation's existence.").

⁴² Linde, *Without "Due Process," supra* note 40, at 133; *see also* Linde, *First Things First, supra* note 20, at 383. Linde's "first things first" approach was expressly adopted by the Oregon Supreme Court in *Sterling v. Cupp*, in which the court explained:

The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

625 P.2d 123, 126 (Or. 1981).

due process that permits reference to the Federal Bill of Rights. Thus, argues Linde, it is necessarily implied not only that state law has independent validity, but also that it has *primacy*.⁴³

The second argument is that it is logically impossible not to give state constitutions independent significance. Consider the following example. Suppose that, some time ago, the United States Supreme Court determined that police searching your garbage at the curb do engage in a “search” within the meaning of the Fourth Amendment. Suppose that, shortly after that decision is handed down, your state supreme court confronts the question whether searching the same sort of garbage at the curb is a search within the meaning of the search and seizure provisions of the state constitution. If you are a “lockstep” state, the answer is easy: The state court follows the federal court, and the state search and seizure provision henceforth applies to a search of garbage cans at the curb.

Now suppose that, some time after that, the United States Supreme Court changes its mind, so that (as it, in fact, determined in *California v. Greenwood*⁴⁴) the search of garbage at the curb *is not* a search within the meaning of the Fourth Amend-

⁴³ Although the logic of state constitutionalism suggests the analytical primacy of state constitutions, not all state courts that have expressed a commitment to the independent significance of state constitutions have followed that commitment to its logical conclusion. A number have determined that, for a variety of policy reasons, something short of primacy is appropriate. Some courts have adopted a “limited lockstep approach,” by which they permit themselves to depart from the Fourth Amendment when differences in wording, history, and common-law context of the state constitutional counterpart suggest a different interpretation is warranted. *See, e.g.*, *People v. Caballes*, 851 N.E.2d 26, 43 (Ill. 2006). In a similar vein, some have adopted what has become known as the “interstitial” approach, by which federal court interpretations of the Fourth Amendment are accorded a presumptive validity with respect to the interpretation of parallel state constitutional provisions, the presumption being rebuttable in reference to a series of factors. *See, e.g.*, *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997); *State v. Williams*, 459 A.2d 641, 653-59 (N.J. 1983). The Minnesota Supreme Court, in fact, has developed a “decision tree” detailing the circumstances under which the court will decide state constitutional issues. *Kahn v. Griffin*, 701 N.W.2d 815, 824-25 (Minn. 2005); *see also* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865 (2007). Some judges and commentators have advocated a “dual sovereignty” approach, requiring analysis of both state and federal grounds. *See, e.g.*, Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Issues on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

⁴⁴ 486 U.S. 35 (1988).

ment. The question becomes, what does the state constitutional search and seizure provision now mean? Before the United States Supreme Court changed its mind, the state provision meant one thing; did it magically transform the moment that the United States Supreme Court decided differently? Of course not. At the very least (certainly, for police and lower courts), the meaning of the state provision remains as the state supreme court previously interpreted it until the state supreme court decides otherwise. In other words, the state constitutional provision has independent significance, and it cannot logically be otherwise.

*B. Is There Something Special About
“Search and Seizure” Provisions?*

Let us move to the question whether—even if state constitutions generally have independent legal significance—there is something about search and seizure provisions in particular that suggests that they should be interpreted in lockstep uniformity with Federal Fourth Amendment cases. I am aware of a number of policy arguments why independent interpretation of state search and seizure provisions is not to be recommended. In general, those arguments may be grouped into two categories—*incoherence* and *fragmentation*. Let us take each one in turn.

1. The Incoherence Complaint

The first argument is that state search and seizure law is incoherent. Professor James Gardner, for example, once characterized state constitutional law generally as “a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”⁴⁵ The criticism may well be warranted. In fact, I have complained that state courts generally, and my own state’s courts particularly, have been inconsistent in their interpreta-

⁴⁵ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992). See also James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 244 (1996) (referring to the “perplexing melange of disparate constitutional principles” reflected in state constitutional decisions).

tions of state constitutions and in their commitments to those interpretations.⁴⁶

But it is one thing to complain that a state's constitutional decisions are incoherent. It is another thing to suggest that, because they are incoherent, *the answer is to turn to federal law*. The assumption of critics of state constitutionalism seems to be that federal search and seizure law is less incoherent. I, for one, have yet to see anyone establish that.⁴⁷ To the contrary, the United States Supreme Court's Fourth Amendment case law is regularly decried on the ground that it is, to quote one authority, "arbitrary, unpredictable, and often border[ing] on [the] incoherent."⁴⁸ To quote another, the Court's case law is "a mass of contradictions and obscurities."⁴⁹ Still another, "The Fourth Amendment today is an embarrassment."⁵⁰ Or my favorite, that each

⁴⁶ See generally Jack L. Landau, *Hurrah for Revolution: A Critical Analysis of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000). See also Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 86 (2006) (examining deviations from state constitutionalism in the case law from Oregon, Washington, New Jersey, and New Hampshire, and concluding that "even states with the greatest rhetorical commitment to consistently autonomous state constitutionalism depart from their stated approach sometimes"); 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).

⁴⁷ As my colleague Judge David Schuman has suggested, "Perhaps I am more reluctant . . . to abandon 'impoverished' state constitutionalism in favor of its 'successful,' 'rich,' and 'vigorous' federal analogue because I find recent *federal* constitutionalism to be impoverished—not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent." David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 277 n.18 (1992). Aside from that, opponents of state constitutionalism appear to assume that adherence to federal *doctrine* will result in consistent *application* of the law, when experience seems to suggest that that is not always the case. See, e.g., Richard C. Miller, *Begging to Defer: Lessons in Judicial Federalism from Colorado Search-and-Seizure Jurisprudence*, 76 U. COLO. L. REV. 865 (2005) (analyzing the tendency of Colorado courts to follow federal search and seizure doctrine, but differ substantially in application of the doctrine). In fact, it appears that, even when a state constitution expressly requires state courts to conform state search and seizure law to Fourth Amendment law, as is the case in Florida, the results are less than perfect conformity. See generally Thomas C. Marks, Jr., *Now You See It, Now You Don't, Privacy and Search and Seizure in the Florida Constitution: Trying to Make Sense Out of a Tangled Mess*, 67 ALB. L. REV. 691 (2004).

⁴⁸ David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005).

⁴⁹ Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

⁵⁰ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

new Fourth Amendment case is like “more . . . duct tape on the Amendment’s frame and a step closer to the junkyard.”⁵¹ The criticism that state court constitutional jurisprudence is less than coherent, then, may justify trying to make it better. However, it hardly justifies abandoning it altogether in favor of lockstep adherence to federal cases.

2. The Fragmentation Complaint

The second argument in favor of lockstep interpretation of search and seizure provisions is that independent state interpretation unnecessarily fragments criminal procedure. As Professor James Diehm complains, “New Federalism has led to the fragmentation of constitutional criminal procedure jurisprudence. On a multitude of issues, the federal courts and the courts of each of the fifty states are reaching different conclusions based on different constitutions.”⁵² This concern about fragmentation has a number of different aspects.

To begin with, there is the assertion that fragmentation is, well, just bad. As Diehm complains,

[o]n an intuitive and theoretical level, maintaining consistency in court decisions on constitutional issues is appealing. . . . [E]ven when specific [constitutional] terms differ, all citizens should be governed by the same constitutional principles. The result is troublesome when an accused in state court is freed as a result of the suppression of evidence, while across the street in federal court another defendant is convicted and sentenced on the same facts.⁵³

Or, as Justice Daniel O’Hern of the New Jersey Supreme Court succinctly put it, “[t]he fourth amendment is the fourth amendment. It ought not to mean one thing in Trenton and another across the Delaware River in Morrisville, Pennsylvania.”⁵⁴

⁵¹ Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787-88 (1999).

⁵² Diehm, *supra* note 45, at 244.

⁵³ *Id.* at 245 (footnotes omitted).

⁵⁴ *State v. Hempele*, 576 A.2d 793, 816 (N.J. 1990) (O’Hern, J., concurring in part and dissenting in part). *See also* *People v. Gonzalez*, 465 N.E.2d 823, 825 (N.Y. 1984) (“We deem it desirable to keep the law of this State consistent with the Supreme Court’s rulings on inventory searches[.]”); *People v. Brisendine*, 531 P.2d 1099, 1117 (Cal. 1975)

Then there is the contention that fragmentation is hard on law enforcement. According to critics of state constitutionalism, “[f]ederal and state agents cannot be expected to master and comply with the conflicting laws of fifty states.”⁵⁵

There is also the contention that fragmentation leads to the manipulation of criminal procedure. Usually cited in that regard is the so-called “silver platter” problem, that is the possibility that state officials who obtain evidence illegally, under state but not federal law, may avoid suppression of the evidence by giving it to federal officials not subject to the same constraints “on a silver platter,” and vice versa.⁵⁶

Finally, there is the contention that fragmentation in criminal procedure law will result in an increase in litigation. According to critics, “an issue will not be finally resolved until all of the highest state courts and the United States Supreme Court have decided the issue. This will require substantially more litigation than was necessary under a unified system.”⁵⁷

Let us respond to those criticisms point-by-point. To begin with, it seems to me that underlying the fragmentation critique is an unabashedly nationalist view that ignores the basic system of dual constitutionalism that is reflected in our federal system of government. States exist.⁵⁸ And state constitutions *are laws*.⁵⁹

(Burke, J., dissenting) (“To have two sets of rules under essentially identical constitutional provisions would create confusion.”) (superceded by constitutional amendment as stated in *In re Lance W.*, 694 P.2d 744 (Cal. 1985)); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 92 (1985) (“Having the interpretation of one’s constitutional rights depend on which state one is in is at odds with this popular conception of immutable constitutional rights.”).

⁵⁵ Diehm, *supra* note 45, at 249; *see also* Hudnut, *supra* note 54, at 93 (“Prosecutors and police need to know the rules of the game . . . [D]ifferent rules would cause confusion. Moreover, regional law enforcement projects, such as drug investigations, could become more difficult.”) (citing *State v. Lowry*, 667 P.2d 996, 1005 (1983) (Jones, J., concurring)); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 995 (1979) (“The need for a single rule understood by all citizens is buttressed by the need for a uniform rule comprehensible to federal and state officers.”).

⁵⁶ Diehm, *supra* note 45, at 246-47. *See also* Tom Quigley, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285 (1988).

⁵⁷ Diehm, *supra* note 45, at 253.

⁵⁸ Even Diehm concedes that some of his proposals requiring uniform state and federal constitutional standards “would involve an attack on the basic tenets of federal-

State court judges have a sworn obligation to give those state laws authoritative interpretation.⁶⁰ That obligation cannot, in effect, be prospectively delegated to the United States Supreme Court.⁶¹ In a similar vein, it strikes me that the fragmentation argument ignores the purpose of dual sovereignty. As Madison noted in Federalist No. 51, “[i]n the compound republic of America . . . a *double security* arises to the rights of the people. The differential governments [state and federal] will control each other, at the same time that each will be controlled by itself.”⁶²

Aside from that, the fragmentation arguments seem to assume, without explanation as far as I can tell, that interpretation of search and seizure provisions is intrinsically different from the interpretation of other provisions of state constitutions. Where

ism and could raise serious Tenth Amendment questions.” Diehm, *supra* note 45, at 264 n.221.

⁵⁹ See *supra* notes 5-44 and accompanying text.

⁶⁰ See, e.g., OR. CONST. art. VII, § 7 (requiring supreme court judges to take an oath promising to support both federal and state constitutions); see also Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 627 (2005) (“State supreme court judges take oaths to support and uphold their state constitutions faithfully and diligently, and are therefore obliged to faithfully and diligently apply them.”); James D. Heiple & Craig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1513 (1998) (state judges violate their oaths if they fail to give independent significance to state constitutions); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1168 (1985) (lockstep adherence to federal constitutional interpretation violates “the state judge’s oath to support the state constitution”) (citing *Roberts v. State*, 458 P.2d 340, 342 (Ak. 1969)); but see Long, *supra* note 46, at 66 (The “oath argument” has “strong rhetorical value, but little persuasive force” because it is “too vague a restraint on judicial power” to have practical significance).

⁶¹ See, e.g., Rex Armstrong, *State Court Federalism*, 30 VAL. U. L. REV. 493, 495 (1996) (“When I became a judge on the Oregon Court of Appeals, I took an oath to support the Oregon Constitution. That means, in a case before our court involving a challenge to the validity of a state statute under the Oregon Constitution, I am obliged to uphold the constitution. To do that, I have to decide what the constitution means. That is the task assigned to me as a state judge. I would act contrary to my oath if I turned that task over to someone else . . .”) (internal footnote omitted). For a nice summary of arguments concerning the problems with “prospective lockstepping,” see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1520-27 (2005).

⁶² THE FEDERALIST NO. 51, at 333 (James Madison) (Robert Scigliano ed., 2000), in THE FEDERALIST PAPERS 323 (Clinton Rossiter ed., 1961) (emphasis added). See also *McCulloch v. Maryland*, 17 U.S. 316, 410 (1819) (“In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”).

did that come from? State constitutions frequently include provisions that find no counterparts in the Federal Constitution. When a state court is required to construe such a provision, say a single-subject provision for proposed constitutional amendments,⁶³ the court will resort to ordinary principles of constitutional interpretation, including presumably an examination of the text and consideration of the historical circumstances surrounding adoption of the provision.⁶⁴ Why would a state search and seizure provision not be construed according to the same interpretive conventions? Especially when a state constitution employs language that is materially different from the Fourth Amendment, it is difficult to understand the argument in favor of lockstep constitutional construction.

In fact, the wording of state search and seizure provisions are sometimes starkly different from the wording of the Fourth Amendment, and those differences are often intentional. In fact, several contain explicit guarantees of a right to privacy that finds no counterpart in the Fourth Amendment. The Montana Constitution, for example, declares that “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”⁶⁵

⁶³ Forty-three state constitutions include such a provision, while the Federal Constitution contains none. For a recent survey of the history of, justifications for, and litigation concerning, the meaning of single-subject provisions see Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006).

⁶⁴ See, e.g., *Armatta v. Kitzhaber*, 959 P.2d 49, 56-64 (Or. 1998) (determining meaning of single-subject and separate-amendment requirements for constitutional amendments by examination of the constitutional text, the historical context, and related case law), *overruled on other grounds by* *Swett v. Bradbury*, 67 P.3d 391 (2003); see also *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237 (Or. 2000) (explaining that the goal of constitutional interpretation in Oregon generally is “to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it” by examining the text, the historical context for adoption, and relevant case law (quoting *Jones v. Hoss*, 285 P. 205 (1930))). It has been observed that it is generally agreed that, at least initially, in construing a provision of a state constitution, the objective is to determine the intended meaning of a particular text. 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, 290 (2003) (“Initially, there is some degree of consensus that the overarching task is to determine the intent of voters who ratified the constitution.”). How courts define “original intent,” however, and extent to which they are bound by it, remain matters in dispute. See generally TARR, *supra* note 13, at 189-99.

⁶⁵ MONT. CONST., art. II, § 10.

New York's Constitution, for another, contains an extensive provision about the "right of the people to be secure against unreasonable interception of telephone and telegraph communications."⁶⁶

If other provisions of the state constitution are given their intended effect, I do not understand by what justification courts would decline even to consider the matter when it comes to search and seizure provisions. Suppose, for example, the citizens of my state decided that they were unsatisfied with the United States Supreme Court's decision in *Greenwood* that examining the contents of garbage at the curb is not a "search" within the meaning of the Fourth Amendment. Suppose further that they adopted an amendment to the search and seizure provisions of the Oregon Constitution to specifically state that "an examination by police officers of the contents of garbage at the curb *is* a search within the meaning of the search and seizure provisions of this constitution." I do not understand the reasoning by which the enactment of that constitutional amendment could be ignored.

Let us examine the more specific fragmentation arguments. The first was that, to quote one critic, "all citizens should be governed by the same constitutional principles."⁶⁷ That argument, as I have already suggested, ignores the fact that, in our system of dual sovereignty it is inevitable that there will be differences in the law from one jurisdiction to another.⁶⁸ Take, for example,

⁶⁶ N.Y. CONST., art. I, § 12.

⁶⁷ Diehm, *supra* note 45, at 245.

⁶⁸ As Professor Barry Latzer correctly has observed, it must be conceded that what he calls "rejectionism," that is, the rejection of lockstep conformity with federal constitutional interpretation, makes criminal procedure confusing:

But the blame rests on federalism itself. Despite many similarities from jurisdiction to jurisdiction, the United States has never had a totally uniform approach to criminal justice. The federal government and each state have always had separate substantive criminal laws and rules of criminal procedure. . . . At bottom, rejectionism is no more than a variation on the theme of state responsibility for the administration of criminal justice. It is a by-product of federalism, and federalism is inherently confusing.

Latzer, *supra* note 2, at 866-67; *see also* TARR, *supra* note 13, at 181 ("[N]either the desire to reduce legitimacy concerns nor prudential arguments for uniformity can justify the lockstep approach; for that approach is inconsistent with the nation's commitment to dual

substantive criminal law. Possession of an ounce of marijuana may be lawful in one state, a misdemeanor in another, and a felony in still another.⁶⁹ Take, for another example, statutory criminal procedure law; in some states, there are statutory limits concerning the authority of police officers to ask questions of a driver during a motor vehicle stop.⁷⁰ Variation is a longstanding and familiar part of our federal system of government.⁷¹ If uniformity were such a good idea, there would be no states.

The same answer applies to complaints that fragmentation can lead to forum shopping and silver platter problems. That may well be true.⁷² If it is, it is an unavoidable consequence of a federal system of government. Apart from that, I am not certain that the forum shopping argument is persuasive on its own

constitutionalism.”); Friesen, *supra* note 19, at 1081 ([D]iversity in state and federal criminal procedure “is a normal incident of separate sovereignties.”).

⁶⁹ In Oregon, for example, it is lawful to possess marijuana in limited quantities for personal medical use. OR. REV. STAT. § 475.319 (2005). In Colorado, possession of more than one ounce, but less than eight ounces, of marijuana may be a misdemeanor as long as the defendant has no prior drug convictions. COLO. REV. STAT. § 18-18-406(4)(a)(I) (2000). In Georgia, the possession of the same amount of marijuana is a felony. GA. CODE ANN. § 16-13-30(j) (2000).

⁷⁰ In Oregon, for example, for many years, statutes limited the scope of questioning in which police officers may engage during the course of a traffic stop. Under OR. REV. STAT. § 810.410(3) (1993), police officers could question the person stopped only to investigate the traffic infraction itself. *See* State v. Dominguez-Martinez, 895 P.2d 306 (Or. 1995) (without some basis other than the infraction, officers cannot ask questions about such matters as the possession of drugs, weapons, contraband, and the like). The statutes were later amended so that officers are now permitted to make inquiries to ensure the safety of the officers, and to determine whether the persons stopped possess weapons. OR. REV. STAT. § 810.410(3) (2005). Other examples of potential variations in state criminal procedure include detention and release, interrogations, and wiretapping.

⁷¹ *See, e.g.,* Saylor, *supra* note 64, at 285 (“The residual quality of state power, and the associated concept of local control, have yielded the metaphor of states as laboratories, free to experiment with novel social and political ideas and thereby create diversity.”).

⁷² It also may not be true. The Court of Appeals for the Ninth Circuit, for example, has suggested that the simple answer is for federal courts to adopt the state court’s exclusionary rule, as a matter of comity:

We believe that it would undercut the deterrent function of a state’s exclusionary rule if state officers were able to turn illegally seized evidence over to federal authorities whenever they suspected the subject of the investigation of an offense susceptible to federal, as well as state, prosecution. We think there is much to be said for the argument that federal courts should, in the interest of comity, defer to a state’s more stringent exclusionary rule with respect to evidence secured without federal involvement.

United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983).

terms. Professor Diehm, for example, complains that law enforcement officers can “evade constitutional strictures” by taking a case to another court.⁷³ But, given that the Federal Constitution provides minimum protections, the constitutional strictures that the officers will be evading are *state* constitutional strictures. In other words, eliminating independent state constitutional analysis only serves to force everyone to the lowest common denominator, federal law, where Diehm and other critics seem to want everyone to go anyway.

As for the argument that fragmentation of criminal procedure law is hard on law enforcement, that may or may not be the case. I have seen no empirical support for the assertion. Critics seem quick to assume that law enforcement officials are not capable of understanding differences in state and federal constitutional procedure. I do not know why. Those same officials are apparently capable of understanding differences in state and federal statutory criminal procedure. Likewise, they are apparently capable of understanding a host of differences between state and federal, to say nothing of municipal, *substantive* criminal law.

Aside from that, it simply does not follow that, merely because different standards may be developed by state and federal courts, state law enforcement officials are required to apply both of them. In all cases, those officials are required to apply only one, namely the one most protective of individual rights.⁷⁴ Moreover, the argument that requiring law enforcement officials to apply only federal law is easier assumes that it is, in fact, easier to apply federal law. As I have noted, that is not an assumption that is obviously correct.⁷⁵

That leaves the contention that independent interpretation of state search and seizure provisions produces more litigation. The argument seems to rest on the assumption that a decision

⁷³ Diehm, *supra* note 45, at 257.

⁷⁴ See FRIESEN, *supra* note 39, §§ 13-17 (writing that officials are required to apply only a single standard, namely, the more protective standard).

⁷⁵ TARR, *supra* note 13, at 181 n.32 (“[S]tate courts’ adoption of the federal standard produces clarity only if the federal law is by definition clearer than the possible state standards. Yet there is little reason to believe that in theory or to expect it in practice . . .”).

from the United States Supreme Court that resolved an issue for all states would obviate the need for each individual state to address a matter. Even taking the argument on its own terms, however, I wonder if it really makes sense. The United States Supreme Court actually takes very few cases each term, and only a few of them are search and seizure cases.⁷⁶ In the meantime, the states are left to litigate matters on their own, with a host of lower federal court decisions, often themselves conflicting, to guide them. It seems to me at least as likely that state constitutionalism would have the opposite effect. Given the independent state grounds doctrine of *Michigan v. Long*, state constitutionalism would reduce the need for federal court intervention to the extent that a judicial decision rests entirely on state constitutional grounds.⁷⁷ Let us pause to recap the bidding so far. I have talked about whether, in the abstract, states should interpret their state search and seizure provisions independently of case law construing the Fourth Amendment. I have suggested that the more appropriate question is not whether state search and seizure law *should* depart from Federal Fourth Amendment law, but instead whether state search and seizure law *does* depart from federal law. In my view, the question is simply one of state constitutional interpretation.

I have addressed what I understand to be the arguments against state constitutional interpretation in general and against independent interpretation of state constitutional search and seizure provisions in particular. I have explained why I have found those arguments unpersuasive.

II. THE QUESTION IN CONCRETE TERMS: HOW HAS OREGON RESPONDED?

What I would like to do in the balance of this article is to provide an overview of the search and seizure law in my own state to illustrate how some of the very issues and arguments that I have just described have played out in the real-world development of a

⁷⁶ In the 2005-06 term, for example, of the Court's eighty-three reported decisions, a total of four were search and seizure cases; three state cases and one federal case. *The Supreme Court, 2005 Term: The Statistics*, 120 HARV. L. REV. 372, 384 (2006).

⁷⁷ See *supra* notes 36-41 and accompanying text.

state's independent constitutional law. Space does not permit an exhaustive analysis of the development of Oregon search and seizure law.⁷⁸ What I propose to do is provide a brief summary with a focus on the gradual acceptance of the independence, and ultimately the *primacy*, of state search and seizure law and then explore how that acceptance affected the development of search and seizure doctrine in a few example cases.

A. *The Oregon Constitutional Revolution*

Article I, Section 9, of the Oregon Constitution provides that “[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”⁷⁹ The text of the provision, adopted in 1857, is nearly, but not completely identical to the text of the Fourth Amendment.

From early on, the scope of Article I, Section 9, nearly always was regarded as identical to the scope of the Fourth Amendment. In an early example, the 1922 decision of *State v. Laundry*, the defendant relied on Article I, Section 9 and the Fourth Amendment.⁸⁰ The Oregon Supreme Court responded that Article I, Section 9, “although not in the identical language, is in effect and meaning the same” thing as the Fourth Amendment.⁸¹ Still, on occasion, the Court gave independent effect to Article I, Section 9, even in those early years. For example, as early as the 1920s, the Oregon Supreme Court recognized the search-incident-to-arrest doctrine, years before the United States Supreme Court recognized it.⁸²

⁷⁸ For a more complete description of Oregon search and seizure law see generally PAUL J. DEMUNIZ, A PRACTICAL GUIDE TO OREGON CRIMINAL LAW & PRACTICE (2005).

⁷⁹ OR. CONST. art I, § 9.

⁸⁰ 204 P. 958, 974 (Or. 1922).

⁸¹ *Id.*

⁸² The matter was first mentioned in *State v. McDaniel*, a case in which, during the arrest of the defendant for murder, the police seized from him a letter. 65 P. 520, 523 (Or. 1901). The defendant objected that the seizure of the letter violated both federal and state guarantees against unreasonable searches and seizures. *Id.* The court concluded that there was a valid search and seizure, commenting that there can be no objection “to the introduction of the letter in question because it was found upon the per-

The 1970s represent something of a transition period in the history of Oregon search and seizure law. The Supreme Court more frequently began to acknowledge expressly the *possibility* that it *could* interpret Article I, Section 9, differently from cases construing the Fourth Amendment, while at the same time choosing to follow the lead of the federal courts construing the Federal Constitution. The best example of this is the 1974 case *State v. Florance*.⁸³ This case is worth talking about for a number of reasons, among others that it illustrates the concern that I mentioned earlier about the problems that occur when a state that follows federal law has to deal with subsequent changes in that federal law.

The Oregon courts had decided earlier to follow United States Supreme Court precedent in defining a lawful search incident to arrest to require that the search be reasonably related to the offense that prompted the arrest.⁸⁴ In 1973, however, the United States Supreme Court decided, in *United States v. Robinson*, that those limitations do not need to apply; that is to say, the Court adopted a new approach to searches incident to arrest, an approach that entailed a less generous view of individual rights.⁸⁵ In the 1974 *Florance* case, the Oregon Supreme Court

son of the defendant at the time of his arrest." *Id.* The doctrine was adopted more explicitly in *Laundy*, 204 P. at 976 ("Stated broadly, the general rule is that the arresting officer may at the time of making the arrest lawfully take articles in the possession or under the control of the prisoner, if they supply evidence of guilt.") (citing *Azparren v. Ferrel*, 191 P. 571 (Nev. 1920)). The United States Supreme Court recognized the doctrine in *Agnello v. United States*, 269 U.S. 20, 30 (1925).

⁸³ 527 P.2d 1202 (Or. 1974), *overruled by* *State v. Caraher*, 653 P.2d 942 (1982). Other examples include *State v. Holt*, 630 P.2d 854 (Or. 1981), *State v. Bishop*, 605 P.2d 642 (Or. 1980), *State v. Nettles*, 597 P.2d 1243 (Or. 1979), and *State v. Heintz*, 594 P.2d 385 (Or. 1979).

⁸⁴ *See, e.g.*, *State v. Cloman*, 456 P.2d 67, 73 (Or. 1969); *State v. Krogness*, 388 P.2d 120, 124 (Or. 1963), *cert. denied*, 377 U.S. 992 (1964); *State v. Chinn*, 373 P.2d 392, 396 (Or. 1962).

⁸⁵ 414 U.S. 218 (1973). The *Robinson* Court explained that

[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect

had to decide whether to stick with the earlier Fourth Amendment decisions or go along with *Robinson*. The Oregon court expressly stated that “[i]f we choose we can continue to apply [the pre-*Robinson*] interpretation. We can do so by interpreting article I, § 9, of the Oregon [Constitution] . . . as being more restrictive” than the Fourth Amendment.⁸⁶ The Oregon court, however, decided not to do that.⁸⁷ The court explained that

[t]here 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 . . . 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 . . .* Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or state prosecution or both. In these instances two different rules would cause confusion.⁸⁸

The Oregon court then overruled its own prior cases following the pre-*Robinson* federal cases and explicitly adopted *Robinson* as Oregon law.⁸⁹

Interestingly, there was a vigorous dissent from Justice, and former University of Oregon Law School dean, K.J. O’Connell.⁹⁰ Among other things, Justice O’Connell complained that “[w]hether any substantial amount of confusion arises out of [declining to track the change in federal law], I am not prepared to say because I have no information on the subject and I suspect

based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a “reasonable” search under that Amendment.

Id. at 235 (emphasis added).

⁸⁶ *State v. Florance*, 527 P.2d 1202, 1208 (Or. 1974), *overruled by State v. Caraher*, 653 P.2d 942 (1982).

⁸⁷ *Id.* at 1208-09.

⁸⁸ *Id.* at 1209 (emphasis added) (citations omitted).

⁸⁹ *Id.* at 1209-10.

⁹⁰ *Id.* at 1213-16 (O’Connell, C.J., dissenting).

that the majority is in no better position than I to make an appraisal of the situation.”⁹¹ O’Connell complained that, “[a]s a logical matter, it is hard to conceive of how the presence of a stricter Oregon view would be confusing. Since evidence seized in violation of our constitution [sic] would be inadmissible in our state courts, Oregon police need recognize only the stricter Oregon rule.”⁹² It should be noted, the dissenting Justice added, “that the federal and state rules governing police conduct have always differed in significant ways.”⁹³

Justice O’Connell was to be vindicated a short eight years later in *State v. Caraher*.⁹⁴ *Caraher* involved a warrantless search of the defendant’s purse, including opening a coin compartment of the wallet within the purse, after an arrest for possession of a controlled substance.⁹⁵ When the defendant moved to suppress the evidence, the state argued that the case was controlled by *Robinson* and *Florance*.⁹⁶ The trial court and the court of appeals agreed.⁹⁷

The Oregon Supreme Court, however, decided that this was the time to declare independence from Federal Fourth Amendment cases. Its earlier decision in *Florance*, the court explained, “does not make article I, section 19, . . . the same as the federal fourth amendment for all times and purposes.”⁹⁸ The court noted the concern expressed in *Florance* for uniformity in criminal procedure. “Eight years of uniformity with United States Supreme Court decisions,” the court observed, “has not . . . brought simplification to the law of search and seizure in this state.”⁹⁹ The court then decided to take a different path:

[W]e remain free, even after *Florance*, to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is

⁹¹ *Id.* at 1214.

⁹² *Id.* at 1214 n.1.

⁹³ *Id.*

⁹⁴ 653 P.2d 942 (Or. 1982).

⁹⁵ *Id.* at 943.

⁹⁶ *Id.* at 947.

⁹⁷ *See id.* at 943-44 nn.5-6.

⁹⁸ *Id.* at 946.

⁹⁹ *Id.*

part of a state court's duty of independent constitutional analysis. That a state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional standards is beyond question. Indeed, the states are "independently responsible for safeguarding the rights of their citizens."¹⁰⁰

The court explained that "[t]his is not a revolutionary idea but one that is founded in the most fundamental principles of federalism and in the history of state constitutions."¹⁰¹

Interestingly, the court still affirmed the denial of the motion to suppress the evidence. The court concluded that *Florance* was wrong in dispensing with the requirement that a lawful search incident to arrest requires that the search be necessary to preserve evidence of the crime for which the defendant was being arrested.¹⁰² Nevertheless, it concluded that, in *Caraher*, the search *was* necessary to preserve evidence of the crime of arrest, that is, possession of a controlled substance.¹⁰³

A lone judge dissented from the rejection of *Florance* and the majority's "depart[ure] on a lonely journey in the dark of the moon and against the wind into the quagmire of the law of search and seizure" without guidance from the federal courts.¹⁰⁴

But that was the last voice of dissent in the Oregon constitutional revolution. Since then, the Oregon courts have never looked back. In the years since *Caraher*, the courts have never questioned the independent significance of the Oregon constitutional search and seizure provision. In fact, the Oregon courts went one step further. In its 1983 decision in *State v. Kennedy*,¹⁰⁵ the Oregon Supreme Court decided that the state constitution is not merely independent, but *primary*. That is to say, the state constitution must be examined first, and the Federal Constitution will be examined only if the state counterpart does not afford

¹⁰⁰ *Id.* at 947 (quoting *People v. Brisendine*, 531 P.2d 1099 (1975) (citation omitted)).

¹⁰¹ *Id.* at 950 n.13.

¹⁰² *Id.* at 952.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (Campbell, J., concurring).

¹⁰⁵ 666 P.2d 1316 (Or. 1983).

complete relief.¹⁰⁶ This “first-things-first” doctrine, the court explained, applied regardless of whether the parties even raised a state constitutional argument.¹⁰⁷ In *Kennedy*, in fact, the parties had barely mentioned the state constitution. The court nevertheless addressed the state constitution before reaching the federal counterpart, explaining that “an Oregon court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state’s government has fallen below a nationwide constitutional standard when in fact the state’s law, when properly invoked, meets or exceeds that standard.”¹⁰⁸

Whether the Oregon courts have remained consistently committed to the first-things-first doctrine can be debated. (I have complained, for example, that the supreme court in recent years seems to be retreating from it in favor of a more prudential practice of addressing state constitutional issues only when raised and briefed.¹⁰⁹) But the court has never exhibited second thoughts about the independence of Article I, Section 9. In the years since *Caraher*, the Oregon courts have developed their own body of case law, consisting of over 700 published opinions, concerning the law of search and seizure under the state constitution.

*B. Example: What is a “Search” Subject to
Constitutional Protection?*

Obviously, I cannot review all 700 opinions. Instead, let me offer a very quick overview of the law concerning one particular issue, to provide at least a flavor of how Oregon search and seizure law has developed independently of Fourth Amendment doctrine.

Let us talk about the very basic question of what constitutes a “search” that is subject to constitutional protection. Fourth Amendment analysis requires an examination of “reasonable ex-

¹⁰⁶ *Id.* at 1320-21.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1320.

¹⁰⁹ Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 WILLAMETTE L. REV. 251, 260-61 (2007).

expectations of privacy.”¹¹⁰ Oregon courts have rejected that test. In *State v. Tanner*,¹¹¹ the Oregon Supreme Court explained that, “[o]ne difficulty with analyzing privacy interests in terms of ‘expectations’ is that the issue is one of *right*, not expectation.”¹¹² The court observed that, if expectations were determinative of privacy rights, the government could diminish those expectations simply by announcing over a period of time that, in the future, all citizens would be subject to electronic surveillance.¹¹³ And, in *State v. Campbell*,¹¹⁴ the court explicitly rejected the test outright. According to the court, the reasonable expectation of privacy test is “a formula for expressing a conclusion rather than a starting point for analysis, masking the various substantive considerations that are the real basis on which Fourth Amendment searches are defined.”¹¹⁵ Either a person has a right to privacy or does not, the court explained.¹¹⁶

¹¹⁰ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (describing prior case law to define a “search” under the Fourth Amendment in terms of a “subjective expectation of privacy” that society is willing to recognize as “reasonable”); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (a “search” within the meaning of the Fourth Amendment occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed”). The “reasonable expectation of privacy” test is usually traced back to Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹¹¹ 745 P.2d 757 (Or. 1987).

¹¹² *Id.* at 762 n.7 (emphasis added).

¹¹³ *Id.*

¹¹⁴ 759 P.2d 1040 (Or. 1988).

¹¹⁵ *Id.* at 1044.

¹¹⁶ *Id.* In a footnote, the court addressed the broader issue of the effect of United States Supreme Court decisions to the contrary:

[T]here is no presumption that interpretations of the Fourth Amendment by the Supreme Court of the United States are correct interpretations of Article I, section 9 [of the Oregon Constitution]. Article I, section 9, and the Fourth Amendment have a common source in the early state constitutions, but they have textual and substantive differences. Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provision independently, though not necessarily differently. Majority opinions of the Supreme Court of the United States may be persuasive, but so may concurring and dissenting opinions of that court, opinions of other courts construing similar constitutional provisions, or opinions of legal commentators. What is persuasive is the reasoning, not the fact that the opinion reaches a particular result.

Id. at 1044 n.7 (citations omitted). The Oregon Supreme Court has not yet explained the source of the difference between state and federal search analysis. Judge David Schuman has suggested the distinction is a result of the underlying differences between the liberal-

The rejection of the reasonable expectation of privacy test has led to some interesting differences between Oregon and federal law about what constitutes a “search” that is subject to state or federal constitutional protection.

For example, in *United States v. Knotts*,¹¹⁷ the United States Supreme Court held that police insertion of a radio transmitter in a drum is not a search within the meaning of the Fourth Amendment. In contrast, in *Campbell*, the Oregon Supreme Court concluded that placing a radio transmitter on a car *is* a search within the meaning of Article I, Section 9.¹¹⁸

To take another example, in *California v. Greenwood*,¹¹⁹ the United States Supreme Court held that a defendant has no reasonable expectation of privacy in garbage bags left at the curbside. Two years ago, in *State v. Galloway*,¹²⁰ the Oregon Court of Appeals concluded that defendants *do* retain a possessory interest in the contents of their garbage cans while the cans sit at the curbside awaiting collection. In an interesting footnote to that decision, more recently, in *State v. Howard*,¹²¹ the court of appeals concluded that, although a defendant may retain a possessory interest in garbage placed in collection cans, once the garbage has actually been collected, the defendant loses any interest in it. “It was, after all, garbage,” the court explained.¹²² The supreme court later affirmed, likening the garbage to abandoned property, in which no person has a protected privacy interest.¹²³

To take a final example, in *Oliver v. United States*,¹²⁴ the United States Supreme Court held that the Fourth Amendment does not apply to “open fields” beyond the curtilage of a home. In *State v. Dixon*,¹²⁵ however, the Oregon Supreme Court concluded

individualist political theory that characterizes federal individual rights cases and the civic-republican, or “communitarian,” political theory that is implicit in Oregon individual rights jurisprudence. See generally David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583 (1990).

¹¹⁷ 460 U.S. 276 (1983).

¹¹⁸ 759 P.2d at 1049.

¹¹⁹ 486 U.S. 35 (1988).

¹²⁰ 109 P.3d 383 (Or. App. 2005).

¹²¹ 129 P.3d 792 (Or. App. 2006).

¹²² *Id.* at 798.

¹²³ *State v. Howard*, 157 P.3d 1189 (Or. 2007).

¹²⁴ 466 U.S. 170 (1984).

¹²⁵ 766 P.2d 1015 (Or. 1988).

that Article I, Section 9, protects the privacy of an individual from government scrutiny on land outside of the curtilage of the individual's dwelling. The court explained that the individual's privacy interest does not "go unprotected simply because of [the land's] location."¹²⁶

I recognize that it can be debated whether these differences in results can actually be justified by principled differences in the wording or intended meanings of the state and federal constitutions. For example, I wonder whether it really makes a difference to rely on the "reasonable expectation of privacy" formulation of Fourth Amendment cases or the "privacy to which you have a right" formulation of the state cases. It strikes me that, notwithstanding what the Oregon Supreme Court said about the federal standard in *State v. Tanner*, the state standard is not much less conclusory than its federal counterpart.¹²⁷

But, as I have said, I regard such criticisms as rather beside the point when the question is *whether* state constitutions have independent significance, apart from their parallels in the Fed-

¹²⁶ *Id.* at 1022.

¹²⁷ For example, in *Campbell*, in which the Oregon Supreme Court held that the placement of a radio transmitter on a private individual's vehicle is a search within the meaning of Article I, Section 9, of the Oregon Constitution, the court eschewed any reliance on a "reasonable expectation of privacy" test. *See supra* notes 114-16 and accompanying text. At the same time, however, it concluded that, although social and legal norms of behavior are not determinative, they are nevertheless relevant to determining the existence of a right to privacy under Article I, Section 9. *State v. Campbell*, 759 P.2d 1044, 1048 (Or. 1988). In the end, the court simply concluded that allowing the state to place a radio transmitter on a car would represent a "staggering limitation upon personal freedom." *Id.* at 1049.

It strikes me that the difference between defining a search by reference to what society deems "reasonable" and by reference to "social and legal norms of behavior" is not easy to articulate. And the principle by which the court arrived at the conclusion that placing a radio transmitter on a car amounts to a search is not obvious. In that regard, it may be useful to observe that, more recently, in *State v. Meredith*, 96 P.3d 342 (Or. 2004), the Oregon Supreme Court held that placing a radio transmitter on a car supplied by an individual's employer did *not* amount to a search under Article I, Section 9. The court's explanation as to why the case was not controlled by *Campbell* was brief. According to the court in *Meredith*, the use of a transmitter in that case "occurred in a factually unique context and employment relationship." *Id.* at 346. According to the court, the defendant did not have a privacy right in the location of his employer's vehicle. *Id.* I do not quarrel here with the result in either case, but it does strike me that the explanations in both are hardly less conclusory than any of the federal cases that are decided under the "reasonable expectation of privacy" analysis required under the Fourth Amendment.

eral Constitution. It seems to me, as I hope this paper has made clear, that they do. Certainly, state courts have work to do in better justifying their decisions. But the fact that such work remains to be done cannot detract from the soundness of the conclusion that it is work worth doing.