

## SURVEY: STATE SEARCH AND SEIZURE ANALOGS

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### I. INTRODUCTION

In this article, one will not find analysis or commentary. Rather, this article is a walking stick, a rigid—but sturdy—companion for researchers exploring state constitutionalism. As such, it neither charts the proper path nor identifies potential impasses. Instead, it merely presents the law as it is. As with any trustworthy travel companion, it remains at your side, ready for when you've become fatigued intellectually in your journey and need something to lean on and return to.

This article is a state-by-state breakdown of search and seizure analogs and supporting case law. In describing each jurisdiction, I undertook considerable effort to present that jurisdiction's doctrine as its high(est) court(s) articulated it. The reader will find therefore numerous quotations from those courts.

Before beginning the exposition, the author would like to recognize Associate Professor Stephen E. Henderson, of Widener University School of Law, who recently penned a piece concerning third-party information and state constitutional analogs.<sup>1</sup> That piece, while interesting in its own right, contains a wealth of information on contemporary state constitutional decisions from each state. For his contribution to the state constitutional discussion (and, in no small measure, to the comprehensiveness of this article), Professor Henderson deserves recognition here and in a larger-sized type.

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<sup>1</sup> Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373 (2006).

## II. SEARCH AND SEIZURE ANALOGS, STATE-BY-STATE

For each state, I report: (1) the search and seizure analog, (2) the analog's interpretation (i.e., divergence from or lockstep with constructions of Fourth Amendment protections), (3) if applicable, the *Analytical Framework* employed to construe the state analog, and (4) (again, if applicable) *Representative Departures* from the United States Supreme Court's Fourth Amendment jurisprudence.<sup>2</sup> The number of *Representative Departures* varies with each jurisdiction and is dependent on the volume and suitability of the case law available.

While I have diligently attempted to provide the most current (and concise) restatement of each state's interpretation of its search and seizure analog, my work (as with any human venture) may be incomplete or inaccurate. Therefore, I politely request that the reader bring any errors to my attention so I may take appropriate remedial measures.

### 1. ALABAMA

*Analogue:* {ALA. CONST. art. I, § 5} "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

*Interpretation:* Although the Supreme Court of Alabama recognizes its authority to interpret its state analog differently, it has not diverged from federal interpretations of the Fourth Amendment when construing its state analog.<sup>3</sup>

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<sup>2</sup> For conservation's sake I have omitted space for inapplicable items. So, for example, some states may only have two sub-headings: analog and interpretation. You may therefore presume that an absence of an item here means a corresponding absence there in that state's search and seizure jurisprudence.

<sup>3</sup> See *Ex Parte Caffie*, 516 So. 2d 831, 837 (Ala. 1987) ("[W]e do not mean to imply that there is, of necessity, a one-to-one correspondence between the protections afforded by our state constitution and those afforded by the federal constitution."). *Ex Parte Caffie* focused on whether the exclusionary rule should apply to a probation revocation hearing. *Id.* at 831-32. After an adverse ruling, *Caffie* applied for rehearing to determine whether the court's ruling was valid under the Alabama and Federal Constitutions. *Id.* at 837. In disposing of the petition for rehearing, the Supreme Court of Alabama independently (and

## 2. ALASKA

*Analog:* {ALASKA CONST. art. I, § 14} “The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

And, there is: {ALASKA CONST. art. 1, § 22} “The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.”

*Interpretation:* “As we have frequently noted, the Alaska constitutional guarantee against unreasonable searches and seizures is broader in scope than fourth amendment guarantees under the United States Constitution, at least in part because of the more extensive right of privacy guaranteed Alaskan citizens by article I, section 22 of our state constitution.”<sup>4</sup>

*Analytical Framework:* “[W]e are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”<sup>5</sup> In the search and seizure context, the Alaska Supreme Court often uses Sections 14 and 22 conjunctively, as a means to provide greater rights.<sup>6</sup>

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cursorily) analyzed the issue under the Alabama Constitution, arriving at the same conclusion. *Id.*

<sup>4</sup> Reeves v. State, 599 P.2d 727, 734 (Alaska 1979).

<sup>5</sup> Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (explaining general method of state constitutional interpretation).

<sup>6</sup> See State v. Jones, 706 P.2d 317, 320-22 (Alaska 1985).

*Representative Departures:*

- Alaska rejects the totality of the circumstances test articulated in *Illinois v. Gates*<sup>7</sup>, relying on the *Aguilar v. Texas*<sup>8</sup> and *Spinelli v. United States*<sup>9</sup> tests as a matter of state constitutional law.<sup>10</sup>

### 3. ARIZONA

*Analog:* {ARIZ. CONST. art. II, § 8} “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

*Interpretation:* “[D]espite suggestions that Article 2, Section 8 may exceed the scope of the Fourth Amendment, in general our courts have found Arizona’s Constitutional protection of privacy to be consistent or coextensive with that of the Fourth Amendment.”<sup>11</sup>

*Analytical Framework:* Without articulating a test (or set of criteria), the Arizona Supreme Court looks to the language of its analog, its history, and federal and state precedent, when deciding whether a departure is warranted.<sup>12</sup>

*Representative Departures:*

- Warrantless entries into home are subject to this special rule: “As a matter of Arizona law, officers may not make a warrantless entry into a home in the absence of exigent circumstances . . . .”<sup>13</sup> “The recognized exceptions to the warrant requirement, aside from consent, which can be considered exigent are 1) response to an emergency, 2) hot pursuit, 3) proba-

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<sup>7</sup> 462 U.S. 213 (1983).

<sup>8</sup> 378 U.S. 108 (1964).

<sup>9</sup> 393 U.S. 410 (1969).

<sup>10</sup> *Jones*, 706 P.2d at 321-25.

<sup>11</sup> *Petersen v. City of Mesa*, 63 P.3d 309, 312 (Ariz. Ct. App. 2003), *vacated on other grounds*, 83 P.3d 35 (Ariz. 2004) (en banc).

<sup>12</sup> *See State v. Martin*, 679 P.2d 489, 496-99 (Ariz. 1984).

<sup>13</sup> *State v. Ault*, 724 P.2d 545, 549 (Ariz. 1986).

bility of destruction of evidence, and 4) possibility of violence.”<sup>14</sup>

#### 4. ARKANSAS

*Analogue:* {**ARK. CONST. art. II, § 15**} “The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

*Interpretation:* “[T]here are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; however, there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts.”<sup>15</sup>

*Analytical Framework:* In determining whether to diverge, one “pivotal inquiry” is whether the Arkansas Supreme Court “has traditionally viewed an issue differently than the federal courts.”<sup>16</sup>

*Representative Departures:*

- Pretextual arrests are illegal under the Arkansas Constitution;<sup>17</sup> and,
- Nighttime incursions on an individual’s curtilage are illegal.<sup>18</sup>

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<sup>14</sup> *Id.* at 549. In *Ault*, lacking a warrant and exigency, the officers’ seizure of evidence in plain view, coupled with a spirited argument for inevitable discovery, was insufficient, necessitating suppression. *Id.* at 550-51.

<sup>15</sup> *State v. Sullivan*, 74 S.W.3d 215, 218 (Ark. 2002) (holding that pretextual arrests violate Arkansas Constitution).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 217-18 (rejecting, as a matter of state constitutional law, the objective analysis of *Whren v. United States*, 517 U.S. 806 (1996)).

<sup>18</sup> *Griffin v. State*, 67 S.W.3d 582 (Ark. 2002).

## 5. CALIFORNIA

*Analog:* {CAL. CONST. art. I, § 13} “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.”

*Interpretation:* “[S]ince voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard.”<sup>19</sup>

## 6. COLORADO

*Analog:* {COLO. CONST. art. II, § 7} “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.”

*Interpretation:* To determine whether a particular interest is protected under the Colorado Constitution, the Colorado Supreme Court employs “a two-part inquiry”<sup>20</sup> mirroring the federal inquiry announced in *Smith v. Maryland*.<sup>21</sup> “Although Article II, Section 7 of the Colorado Constitution is substantially similar to its federal counterpart, we are not bound by the United States Supreme Court’s interpretation of the Fourth Amendment when determining the scope of state constitutional protections.”<sup>22</sup>

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<sup>19</sup> *People v. Camacho*, 3 P.3d 878, 882 (Cal. 2000) (“Our state constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the Federal Constitution as interpreted by the United States Supreme Court.”). For the limiting provision, see CAL. CONST. art. I, § 28(d).

<sup>20</sup> *People v. Oates*, 698 P.2d 811, 814 (Colo. 1985).

<sup>21</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>22</sup> *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983).

*Analytical Framework:* While the Supreme Court of Colorado has not articulated a fixed test (or set of factors), it looks to its past precedent when determining whether to provide greater protections under the Colorado Constitution.<sup>23</sup>

*Representative Departures:*

- Governmental use of telephone toll records is a search under the Colorado Constitution;<sup>24</sup>
- Government-installed pen register is a search under the Colorado Constitution;<sup>25</sup> and,
- “[A] dog sniff search of a person’s automobile in connection with a traffic stop that is prolonged beyond its purpose to conduct a drug investigation . . . constitutes a search and seizure requiring reasonable suspicion of criminal activity.”<sup>26</sup>

## 7. CONNECTICUT

*Analog:* {CONN. CONST. art. I, § 7} “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”

*Interpretation:* “It is well settled that we are not bound by the decisions of the United States Supreme Court in interpreting the contours of [the Connecticut Constitution] . . . and federal constitutional law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights.”<sup>27</sup>

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<sup>23</sup> People v. Haley, 41 P.3d 666, 672 (Colo. 2001) (“Based upon our precedent under the Colorado Constitution, we conclude . . .” (emphasis added)).

<sup>24</sup> People v. Corr, 682 P.2d 20 (Colo. 1984).

<sup>25</sup> *Sporleder*, 666 P.2d at 139-40.

<sup>26</sup> *Haley*, 41 P.3d at 672.

<sup>27</sup> State v. Mikolinski, 775 A.2d 274, 278 (Conn. 2001) (quotations and citations omitted).

*Analytical Framework:* “In determining whether the protections secured by [the Connecticut Constitution] extend beyond those secured by the fourth amendment to the United States constitution, we consider several factors: (1) the text of the constitutional provision; (2) holdings and dicta of Connecticut appellate courts; (3) federal precedent; (4) sister state decisions; (5) historical aspects, including the historical constitutional setting and the debates of the framers; and (6) economic and sociological or policy considerations.”<sup>28</sup>

*Representative Departures:*

- Police may not make a warrantless search of an impounded vehicle;<sup>29</sup> and,
- Connecticut does not recognize the “good faith” exception to the exclusionary rule.<sup>30</sup>

## 8. DELAWARE

*Analog:* {**DEL. CONST. art. I, § 6**} “The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.”

*Interpretation:* “The Delaware Constitution, like the constitutions of certain other states, may provide individuals with greater rights than those afforded by the United States Constitution.”<sup>31</sup>

*Analytical Framework:* The Delaware Supreme Court identified these factors: (1) textual language, (2) legislative history, (3) pre-

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<sup>28</sup> *Id.* (adopting the test articulated in *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990), as controlling for analyzing sobriety checkpoints under Connecticut Constitution).

<sup>29</sup> *State v. Miller*, 630 A.2d 1315 (Conn. 1993).

<sup>30</sup> *State v. Marsala*, 579 A.2d 58 (Conn. 1990).

<sup>31</sup> *Jones v. State*, 745 A.2d 856, 863 (Del. 1999) (“For example, we have held that the Delaware Constitution provides greater rights . . . in the preservation of evidence used against a defendant, the right of confrontation, the right to counsel, and the right to trial by jury.” (citations omitted)).



existing state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions, and (7) public attitudes.<sup>32</sup> The Court then added this advisory:

The enumerated criteria, which are synthesized from a burgeoning body of authority, are essentially illustrative, rather than exhaustive. They share a common thread—that distinctive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights.<sup>33</sup>

*Representative Departures:*

- Under the Delaware Constitution, an individual is “seized” when a police officer orders him to stop and remove his hands from his coat.<sup>34</sup>

## 9. FLORIDA

*Analogue:* {**FLA. CONST. art. I, § 12**} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.”

Additionally, there is: {**FLA. CONST. art I, § 23**} “Every natural person has the right to be let alone and free from gov-

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<sup>32</sup> *Id.* at 864-65 (explaining each factor more fully).

<sup>33</sup> *Id.* at 865 (citations omitted).

<sup>34</sup> *Id.* at 856 (rejecting *California v. Hodari D.*, 499 U.S. 621 (1991), as a matter of state law).

ernmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

*Interpretation:* From its text, Florida's search and seizure analog forecloses divergence. However, the Florida Supreme Court may provide greater protections under Section 23. "The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest."<sup>35</sup> The Florida Supreme Court seems reticent to find additional search and seizure protections in the privacy provision of the Florida Constitution, despite its open textured nature.<sup>36</sup>

## 10. GEORGIA

*Analog:* {GA. CONST. art. I, § I, ¶ XIII} "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized."

*Interpretation:* "The Georgia constitutional provisions regarding search and seizure . . . are substantially the same as the Fourth Amendment provisions of the U.S. Constitution."<sup>37</sup>

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<sup>35</sup> Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989) (requiring reasonable suspicion for pen registers as purely a matter of individual privacy).

<sup>36</sup> See State v. Jimeno, 588 So. 2d 233 (Fla. 1991) ("[O]ur right of privacy provision, article I, section 23, does not modify the applicability of article I, section 12, particularly since section 23 was adopted prior to the present section 12.").

<sup>37</sup> State v. Gallup, 512 S.E.2d 66, 69 (Ga. Ct. App. 1999); Smoot v. State, 128 S.E. 909, 910 (Ga. 1925) (noting that state provision follows the Fourth Amendment).

*Representative Departures:*

- As a matter of statutory law, Georgia does not recognize the “good faith” exception.<sup>38</sup>

## 11. HAWAII

*Analogue:* {**HAW. CONST. art. I, § 7**} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.”

*Interpretation:* “We recognize that, as the ultimate judicial tribunal with final unreviewable authority to interpret and enforce the Hawai’i Constitution, we may give broader protection under the Hawai’i Constitution than that given by the federal constitution . . . when logic and a sound regard for the purposes of those protections have so warranted.”<sup>39</sup>

*Analytical Framework:* The Hawaii Supreme Court offers no particular mode of analysis (or set of factors). Rather, it will diverge “when logic and a sound regard for the purposes of those protections [in the Hawaii Constitution] have so warranted.”<sup>40</sup>

*Representative Departures:*

- Under the Hawaii Constitution, an individual has a reasonable expectation of privacy in his trash bags located on his property.<sup>41</sup>

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<sup>38</sup> See *Gary v. State*, 422 S.E.2d 426 (Ga. 1992); GA. CODE ANN. § 17-5-30 (2007).

<sup>39</sup> *State v. Tau’a*, 49 P.3d 1227, 1239 (Haw. 2002) (quotations and citations omitted); see also *State v. Tanaka*, 701 P.2d 1274, 1276 (Haw. 1985) (“In our view, article I, § 7 of the Hawai’i Constitution recognizes an expectation of privacy beyond the parallel provision in the Federal Bill of Rights.”).

<sup>40</sup> *Tanaka*, 701 P.2d at 1276.

<sup>41</sup> *Id.* at 1276-77.

## 12. IDAHO

*Analog:* {IDAHO CONST. art. I, § 17} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.”

*Interpretation:* “Although the wording of the two constitutional provisions is similar, this Court has at times construed the provisions of our Constitution to grant greater protection than that afforded under the United States Supreme Court’s interpretation of the federal Constitution.”<sup>42</sup>

*Analytical Framework:* The Idaho Supreme Court provides “greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence.”<sup>43</sup>

*Representative Departures:*

- Idaho has an expanded definition of “curtilage;”<sup>44</sup>
- Sobriety roadblocks are illegal under the Idaho Constitution;<sup>45</sup> and,
- Government use of a pen register constitutes a “search” under the Idaho Constitution.<sup>46</sup>

## 13. ILLINOIS

*Analog:* {ILL. CONST. art. I, § 6} “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping de-

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<sup>42</sup> State v. Fees, 90 P.3d 306, 313 (Idaho 2004).

<sup>43</sup> *Id.* at 314; *see also* State v. Donato, 20 P.3d 5, 6-9 (Idaho 2001) (discussing when Idaho has departed from United States Supreme Court jurisprudence).

<sup>44</sup> *See* State v. Webb, 943 P.2d 52 (Idaho 1997).

<sup>45</sup> State v. Henderson, 756 P.2d 1057 (Idaho 1988) (decided two years prior to Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990)).

<sup>46</sup> State v. Thompson, 760 P.2d 1162 (Idaho 1988).

vices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”

*Interpretation:* “This court has construed the search and seizure language found in section 6 in a manner that is consistent with the Supreme Court’s fourth amendment jurisprudence.”<sup>47</sup>

*Analytical Framework:* “We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal constitution.”<sup>48</sup>

*Representative Departures:* Despite the Illinois Supreme Court’s statements, it has recognized the following departures under the privacy portion of the state analog:

- An individual has a reasonable expectation of privacy in telephone records under the Illinois Constitution;<sup>49</sup>
- An individual has a reasonable expectation of privacy in financial records;<sup>50</sup> and,
- An individual has a reasonable expectation of privacy in hair samples, necessitating probable cause, or a warrant.<sup>51</sup>

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<sup>47</sup> Fink v. Ryan, 673 N.E.2d 281, 288 (Ill. 1996).

<sup>48</sup> People v. Mitchell, 650 N.E.2d 1014, 1017-18 (Ill. 1995) (“Given the express intent of the drafters to leave unaltered the search and seizure clause of section 6, the additional language in our section 6 [relating to invasions of privacy or interceptions of communications] provides no basis for an interpretation different from the Federal search and seizure clause.”).

<sup>49</sup> People v. DeLaire, 610 N.E.2d 1277, 1282 (Ill. Ct. App. 1993) (“We believe that citizens have a legitimate expectation that their telephone records will not be disclosed. . . . *Miller* and *Smith* are not controlling because the Illinois Constitution provides greater protection than the Federal constitution.” (citing United States v. Miller, 425 U.S. 435 (1976), and Smith v. Maryland, 442 U.S. 735 (1979), respectively)).

<sup>50</sup> People v. Jackson, 452 N.E.2d 85, 88-90 (Ill. Ct. App. 1983). Westlaw’s Keycite feature indicates that *Jackson* is no longer good law. The author, however, was unable to locate an Illinois decision questioning the validity of *Jackson*.

<sup>51</sup> *In re May 1991 Will Co. Grand Jury*, 604 N.E.2d 929, 934-37 (Ill. 1992) (“Appellants assert that the Illinois Constitution offers greater protection against the invasion of an individual’s privacy rights than does the Federal Constitution. We agree.”).

#### 14. INDIANA

*Analog:* {**IND. CONST. art. I, § 11**} “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; 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.”

*Interpretation:* “Although this language [of the Indiana Constitution] tracks the Fourth Amendment verbatim, Indiana has explicitly rejected the expectation of privacy as a test of the reasonableness of a search or seizure. The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances.”<sup>52</sup>

#### 15. IOWA

*Analog:* {**IOWA CONST. art. I, § 8**} “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.”

*Interpretation:* “Cases interpreting the federal constitution are persuasive in our interpretation of the state constitution because the federal and state search-and-seizure clauses are similar. . . . Decisions interpreting the federal constitution, however, are not binding on us with respect to the Iowa Constitution.”<sup>53</sup>

“We have an interest in harmonizing our constitutional decisions with those of the Supreme Court when reasonably possible, even though we recognize and will jealously guard our right and duty to differ in appropriate cases.”<sup>54</sup>

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<sup>52</sup> Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005).

<sup>53</sup> State v. Hoskins, 711 N.W.2d 720, 725 (Iowa 2006) (citations omitted).

<sup>54</sup> State v. Olsen, 293 N.W.2d 216, 219-20 (Iowa 1980).

*Analytical Framework:* Without articulating factors, the Iowa Supreme Court noted that departure requires some basis: “Because [the appellant] has not asserted and we have not found a basis to distinguish the protection afforded by the Iowa Constitution from those afforded by the federal constitution under the facts of this case, our analysis applies equally to both the state and federal grounds.”<sup>55</sup>

## 16. KANSAS

*Analog:* {KAN. CONST. Bill of Rights § 15}: “The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.”

*Interpretation:* “This court . . . can construe our state constitutional provisions independent of federal interpretation of corresponding provisions.”<sup>56</sup> Nevertheless, “this court has never extended state constitutional protections beyond federal guarantees.”<sup>57</sup>

## 17. KENTUCKY

*Analog:* {KY. CONST. § 10} “The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”

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<sup>55</sup> State v. Carter, 696 N.W.2d 31, 37 (Iowa 2005).

<sup>56</sup> State v. Schultz, 850 P.2d 818, 823 (Kan. 1993).

<sup>57</sup> *Id.* at 824. Things do not appear to have changed, as the author finds no contrary, post-1993 Kansas opinion.

*Interpretation:* “Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment.”<sup>58</sup>

## 18. LOUISIANA

*Analog:* {LA. CONST. art. I, § 5} “Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”

*Interpretation:* “This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.”<sup>59</sup>

*Analytical Framework:* The Louisiana Supreme Court considers: (1) the text of the provision; (2) its ratification history; and, (3) federal and sister precedent, to determine whether a departure is warranted.<sup>60</sup>

*Representative Departure:*

- “[T]he search of the defendant’s automobile, without probable cause, and in the absence of any of the circumstances which have been recognized by this court as justifying a narrow exception to the warrant requirement, plainly constituted an

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<sup>58</sup> *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001); *see also Commonwealth v. Mobley*, 160 S.W.3d 783 (Ky. 2005).

<sup>59</sup> *State v. Jackson*, 764 So. 2d 64, 71 n.10 (La. 2000) (overruling *State v. Church*, 538 So. 2d 993 (La. 1989) (prohibiting use of automobile checkpoint stops)).

<sup>60</sup> *Id.* at 70-72.



unreasonable search, seizure or invasion of privacy” in violation of the Louisiana Constitution.<sup>61</sup>

### 19. MAINE

*Analogy:* {**ME. CONST. art. I, § 5**} “The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.”

*Interpretation:* “The Fourth Amendment to the U.S. Constitution, and Article 1, Section 5 of the Maine Constitution, offer identical protection against unreasonable searches and seizures.”<sup>62</sup>

### 20. MARYLAND

*Analogy:* {**MD. CONST. Declaration of Rights art. 26**} “That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.”

*Interpretation:* “Article 26 of the Maryland Declaration of Rights is *in pari materia* with the Fourth Amendment, and decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect in construing Article 26.”<sup>63</sup> However, the Maryland Court of Appeals recognizes its ability to diverge from United States Supreme Court interpretation.<sup>64</sup> Some scholars

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<sup>61</sup> State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1981) (rejecting New York v. Belton, 453 U.S. 454 (1981), as a matter of state constitutional law).

<sup>62</sup> State v. Patterson, 868 A.2d 188, 191 (Me. 2005); see also State v. Gulick, 759 A.2d 1085, 1087 (Me. 2000) (same).

<sup>63</sup> Gadson v. State, 668 A.2d 22, 26 n.3 (Md. 1995); see also Gahan v. State, 430 A.2d 49, 53-55 (Md. 1981).

<sup>64</sup> See, e.g., Gahan, 430 A.2d at 55 (“[A]lthough a clause of the United States Constitution and one in our own Declaration of Rights may be “*in pari materia*,” and thus decisions applying one provision are persuasive authority in cases involving the other, we reiterate

have attributed Maryland's lock-step interpretation to its analog's textual limitation—as written, Article 26 seems to provide less protection.<sup>65</sup>

## 21. MASSACHUSETTS

*Analogy:* {**MASS. CONST. Declaration of Rights pt. 1, art. XIV**} “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.”

*Interpretation:* “It is by now firmly established that, in some circumstances, art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment.”<sup>66</sup>

*Analytical Framework:* “As we do with other provisions of the State Constitution, we construe the language of this constitutional provision in light of the circumstances under which it was framed, the causes leading to its adoption, the imperfections hoped to be remedied, and the ends designed to be accomplished.”<sup>67</sup>

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that each provision is independent, and a violation of one is not necessarily a violation of the other.” (quotations and citations omitted).

<sup>65</sup> See, e.g., Thomas K. Clancy, *A Vision of Search and Seizure Protection*, 34-FEB. MD. BAR J. 11 (2001) (describing textual limitations of Maryland's analog).

<sup>66</sup> *Jenkins v. Chief Justice of the Dist. Court Dep't*, 619 N.E.2d 324, 330 & n.16 (Mass. 1993) (collecting Massachusetts cases providing greater protection under Massachusetts Constitution).

<sup>67</sup> *Id.* at 330 (quotation and citation omitted). *Jenkins* also contains a thorough analysis of these factors, one worthy of reference and imitation. *Id.* at 330-33. As an aside, the Massachusetts Supreme Judicial Court noted that, “Massachusetts has not had an exclusionary rule as part of its common law or under art. 14, and, consequently, there has been little incentive for defendants to challenge the existence of probable cause on State com-

*Representative Departures:*

- Massachusetts rejects *California v. Hodari D.*<sup>68,69</sup> and,
- Similarly, as a matter of state law, Massachusetts has rejected the “totality of the circumstances” approach espoused in *Illinois v. Gates*,<sup>70</sup> concluding that “the principles developed under [*Aguilar v. Texas*<sup>71</sup> and *Spinelli v. United States*<sup>72</sup>], if not applied hypertechnically, provide a more appropriate structure for probable cause inquiries under art. 14.”<sup>73</sup>

**22. MICHIGAN**

*Analog:* {**MICH. CONST. art. I, § 11**} “The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.”<sup>74</sup>

*Interpretation:* “Michigan’s constitutional prohibition against unreasonable searches and seizures ‘is to be construed to provide the same protection as that secured by the Fourth Amendment

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mon law or constitutional grounds.” *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985).

<sup>68</sup> 499 U.S. 621 (1991) (holding that an individual is not “seized” within meaning of Fourth Amendment when a police officer pursues him with intent to question him).

<sup>69</sup> *Commonwealth v. Stoute*, 665 N.E.2d 93, 95-97 (Mass. 1996).

<sup>70</sup> 462 U.S. 213 (1983).

<sup>71</sup> 378 U.S. 108 (1964).

<sup>72</sup> 393 U.S. 410 (1969).

<sup>73</sup> *Upton*, 476 N.E.2d at 556.

<sup>74</sup> The final sentence of Michigan’s analog is assuredly an interesting one. It is an instance in which analog provides less protection than does the Fourth Amendment and, accordingly, when triggered, Michigan courts may only consider Fourth Amendment protections. See *People v. Custer*, 630 N.W.2d 870, 876 n.2 (Mich. 2001) (“[I]f the [narcotic drug] has been seized outside the curtilage of a dwelling house, Michigan’s constitutional prohibition . . . would not be applicable, although the Fourth Amendment’s would be.”).

. . . absent, ‘compelling’ reason to impose a different interpretation.”<sup>75</sup>

*Analytical Framework:* In determining whether a “compelling reason” exists, the Michigan Supreme Court noted this primary factor: “It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it.”<sup>76</sup>

*Representative Departures:* A review of Michigan case law reveals no controlling, precedential search and seizure opinion in which the Michigan Supreme Court found a “compelling reason” justifying departure.<sup>77</sup>

### 23. MINNESOTA

*Analog:* {MINN. CONST. art. I, § 10} “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; 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 things to be seized.”

*Interpretation:* “It is axiomatic that we are free to interpret the Minnesota Constitution as affording greater protection against unreasonable search and seizures than the United States Constitution. . . . But, in independently safeguarding these protections [embodied in Minnesota’s Constitution] we will not cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution.”<sup>78</sup>

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<sup>75</sup> *Id.* at 876 n.2 (quoting *People v. Collins*, 475 N.W.2d 684 (Mich. 1991)).

<sup>76</sup> *Collins*, 475 N.W.2d at 694 (quoting *Holland v. Garden City Clerk*, 300 N.W. 777, 778-79 (Mich. 1941)).

<sup>77</sup> *See, e.g., id.* at 694-95 (demonstrating that history and text of Michigan’s analog make the “compelling reason” argument a tough sell).

<sup>78</sup> *State v. Askerooth*, 681 N.W.2d 353, 361-62 (Minn. 2004) (quotation and citation omitted).

*Analytical Framework:* “Indeed, many principled bases have been articulated for state courts to construe their state constitutions as more protective than their federal counterparts, including: variations in text, constitutional history, early state precedent construing the applicable provision of the state constitution, relatedness of the subject matter to state-level enforcement, presence of issues that are unique to the state, and a determination that a more expansive reading of the state constitution represents the better rule of law.”<sup>79</sup>

Besides these factors, a newly articulated federal doctrine that represents a “sharp departure” from Minnesota’s “traditional understanding of the protections from unreasonable seizure provides a similar principled basis for us to look to”<sup>80</sup> the Minnesota Constitution.

*Representative Departures:*

- Rejecting the analysis in *California v. Hodari D.*,<sup>81</sup> Minnesota adheres to a rule of reasonableness to determine whether an individual is “seized” within meaning of the Minnesota Constitution,<sup>82</sup>
- Minnesota rejects *Michigan Department of State Police v. Sitz*,<sup>83</sup> requiring “police to have an objective individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop[.]”<sup>84</sup> and,
- Minnesota’s Constitution provides distinct protection from the expansion of traffic stops to include intrusive police questioning when there is no reasonable articulable suspicion to justify the questioning.<sup>85</sup>

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<sup>79</sup> State v. Harris, 590 N.W.2d 90, 97-98 (Minn. 1999). Although stating that other state high courts have used these procedures, the Minnesota Supreme Court, if not expressly, then impliedly adopted them. See *id.* at 98 (After outlining the factors, stating: “It is within this context that we proceed . . .”).

<sup>80</sup> *Askerooth*, 681 N.W.2d at 362.

<sup>81</sup> 499 U.S. 621 (1991) (holding that an individual is not “seized” within meaning of Fourth Amendment when a police officer pursues him with intent to question him).

<sup>82</sup> *In re E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993).

<sup>83</sup> 496 U.S. 444 (1990).

<sup>84</sup> *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994).

<sup>85</sup> State v. Fort, 660 N.W.2d 415, 419 (Minn. 2003).

## 24. MISSISSIPPI

*Analog:* {**MISS. CONST. art. III, § 23**} “The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.”

*Interpretation:* “Section 23 of the Mississippi Constitution provides greater protections to our citizens than those found within the United States Constitution.”<sup>86</sup> “[T]he protection afforded by Section 23 of our Constitution should be liberally construed in favor of our citizens and strictly construed against the state.”<sup>87</sup>

*Analytical Framework:* Despite a handful of departures, the Mississippi Supreme Court (and, for sure, the Mississippi Court of Appeals) has not articulated a framework to determine whether to interpret the Mississippi Constitution independently. Nevertheless, in departing, the Court unsurprisingly has looked to precedent.<sup>88</sup>

*Representative Departures:*

- Mississippi’s analog provides greater privacy protection: “Where the proof shows that a portion of a residence is in the sole, separate, and exclusive possession of an individual other

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<sup>86</sup> *Graves v. State*, 708 So. 2d 858, 861 (Miss. 1997); *but see Sasser v. City of Richland*, 850 So. 2d 206, 208-09 (Miss. Ct. App. 2003) (“In view of the striking similarities between the Fourth Amendment and Article 3, Section 23, of the Mississippi Constitution and the lack of a history of differentiation between the two by the Mississippi Supreme Court, we do not find a tenable basis to accept [appellant’s] contention . . .”). The Mississippi Court of Appeals, I respectfully submit, erred in writing this statement, as the Mississippi Supreme Court has in fact provided greater protections under its analog. *See Graves*, 708 So 2d at 861. Moreover, appellant’s counsel failed to inform the Court of Appeals of the *Graves* decision. *See Sasser*, 850 So. 2d at 208-09 (“[W]e observe that Sasser cites the Court to no authority indicating that the Mississippi Supreme Court has held the relevant language of the Mississippi Constitution affords a higher level of insulation from searches and seizures . . .”).

<sup>87</sup> *Scott v. State*, 266 So. 2d 567, 569-70 (Miss. 1972).

<sup>88</sup> *See, e.g., Graves*, 708 So. 2d at 861 (“However, this Court has found that the Mississippi Constitution extends greater protections of an individual’s reasonable expectation of privacy than those enounced under Federal law.”); *see also Scott*, 266 So. 2d at 569-70 (citing past opinions creating a greater privacy protection in state’s search and seizure analog).

than the one named by the search warrant, that individual has a reasonable expectation of privacy in his or her solely occupied portion.”<sup>89</sup>

## 25. MISSOURI

*Analogue:* {**MO. CONST. art. I, § 15**} “That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.”

*Interpretation:* “Missouri’s constitutional ‘search and seizure’ guarantee, article I, section 15, is co-extensive with the Fourth Amendment.”<sup>90</sup>

## 26. MONTANA

*Analogue:* {**MONT. CONST. art. II, § 11**} “The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.”

Additionally, there is: {**MONT. CONST. art. II, § 10**} “The 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.”

*Interpretation:* In considering the validity of a search or seizure under Montana law, the Court:

will look to the Montana Constitution, to applicable Montana statutes and to relevant Montana case law, and, as in the past,

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<sup>89</sup> *Graves*, 708 So. 2d at 861 (rejecting *Maryland v. Garrison*, 480 U.S. 79 (1987)).

<sup>90</sup> *State v. Deck*, 994 S.W.2d 527, 534 (Mo. 1999) (en banc); *see also* *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. 1996) (en banc); *State v. Pike*, 162 S.W.3d 464, 472 (Mo. 2005) (en banc).

will not feel compelled to “march lock-step” with federal courts. States are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution.

...

As long as we guarantee the minimum rights established by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution.

...

In addition, we have held that Montana’s unique constitutional language [its privacy provision, § 10] affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment in cases involving searches of, or seizures from, private property.<sup>91</sup>

*Analytical Framework:* “When analyzing search and seizure questions that specifically implicate the right of privacy, this Court must consider Sections 10 and 11 of Article II of the Montana Constitution.”<sup>92</sup>

Section 11 “protects citizens from unreasonable searches and seizures and requires that search warrants be issued only after probable cause for such a warrant has been established, and that the warrant provides specific information.”<sup>93</sup> Section 10 “grants Montana citizens a specific right to privacy” and “is the cornerstone of protections against unreasonable searches and seizures.”<sup>94</sup> Taken together, the Court has “held 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.”<sup>95</sup>

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<sup>91</sup> State v. Hardaway, 36 P.3d 900, 909 (Mont. 2001) (citations omitted).

<sup>92</sup> *Id.* at 909 (citing State v. Hubbel, 951 P.2d 971, 975 (Mont. 1997)).

<sup>93</sup> *Id.* at 909 (citation omitted).

<sup>94</sup> *Id.* at 910 (quotation and citations omitted).

<sup>95</sup> *Id.* (citation omitted).



*Representative Departures:*

- The warrantless, post-arrest swabbing of blood on defendant's hands was a "search" within the Montana Constitution's meaning;<sup>96</sup>
- The Montana Supreme Court has "held that the defendant had a reasonable expectation of privacy in conversations with an undercover officer, and we rejected the holdings of prior federal cases that stated government agents do not need a warrant to record a conversation where one of the conversants consents;"<sup>97</sup> and,
- "[A] person has an expectation of privacy in his home, even after firefighters have lawfully entered the home and even if the firefighters discover contraband in plain view."<sup>98</sup>

**27. NEBRASKA**

*Analogue:* {**NEB. CONST. art. I, § 7**} "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; 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."

*Interpretation:* "We have previously concluded, however, that the framers of the Nebraska Constitution intended that article 1, § 7, provide no greater rights than those afforded a defendant by the 4th and 14th amendments to the U.S. Constitution."<sup>99</sup>

**28. NEVADA**

*Analogue:* {**NEV. CONST. art I, § 18**} "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or

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<sup>96</sup> See *id.* at 907-10.

<sup>97</sup> *State v. Bassett*, 982 P.2d 410, 418 (Mont. 1999) (citing *State v. Solis*, 693 P.2d 518, 523 (Mont. 1984)).

<sup>98</sup> *Id.* at 418-19.

<sup>99</sup> *State v. Vermuele*, 453 N.W.2d 441, 446 (Neb. 1990); see also *State v. Havlat*, 385 N.W.2d 436, 440-41 (Neb. 1986).

Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.”

*Interpretation:* “[I]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.”<sup>100</sup> “Although the Nevada Constitution and the United States Constitution contain similar search and seizure clauses, the United States Supreme Court has noted that states are free to interpret their own constitutional provisions as providing greater protections than analogous federal provisions.”<sup>101</sup>

*Analytical Framework:* The Nevada Supreme Court offers no criteria, or test, to determine whether a departure is warranted. In the past, the court has looked to past practices in the state,<sup>102</sup> state public policy,<sup>103</sup> and decisions from its sister states.<sup>104</sup>

*Representative Departures:*

- An officer must exercise *reasonable* discretion in deciding whether to execute a custodial arrest for a minor traffic violation,<sup>105</sup> and,
- “We now conclude that, under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest.”<sup>106</sup>

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<sup>100</sup> State v. Harnisch, 954 P.2d 1180, 1182 (Nev. 1998) (quotation and citation omitted).

<sup>101</sup> State v. Bayard, 71 P.3d 498, 502 (Nev. 2003) (quotation and citation omitted).

<sup>102</sup> State v. Camacho, 75 P.3d 370, 374 (Nev. 2003) (“In light of our prior decisions. . .”).

<sup>103</sup> Harnisch, 954 P.2d at 1183 (“Any other interpretation would be contrary to our state’s strong public policy requiring police to obtain a warrant whenever feasible.”).

<sup>104</sup> See, e.g., Osburn v. State, 44 P.3d 523, 525 (Nev. 2002) (considering an Oregon opinion in whether to depart from federal standard concerning electronic monitoring devices attached to a vehicle’s exterior); Bayard, 71 P.3d at 502 (adopting a search and seizure standard from a Montana opinion).

<sup>105</sup> Bayard, 71 P.3d at 502 (rejecting Atwater v. City of Lago Vista, 532 U.S. 318 (2001), as a matter of Nevada constitutional law).

<sup>106</sup> Camacho, 75 P.3d at 374 (rejecting New York v. Belton, 453 U.S. 454 (1981), as a matter of Nevada constitutional law).

## 29. NEW HAMPSHIRE

*Analog:* {**N.H. CONST. pt. 1, art. 19**} “Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.”

*Interpretation:* “[A]lthough we have often treated Federal and New Hampshire constitutional protections similarly, our citizens are entitled to an independent interpretation of State constitutional guarantees.”<sup>107</sup>

*Analytical Framework:* As the final authority on the law of its state, the New Hampshire Supreme Court “will first examine the New Hampshire Constitution [if the parties invoke its protections] and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.”<sup>108</sup> “[W]e interpret part I, article 19, to reflect the intent of the framers that all searches and seizures must be reasonable.”<sup>109</sup>

*Representative Departures:*

- An individual exhibits “an actual expectation of privacy in his trash because he place[s] it in black plastic bags with the expectation it would be picked up by authorized persons for eventual disposal.”<sup>110</sup>

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<sup>107</sup> State v. Ball, 471 A.2d 347, 350 (N.H. 1983).

<sup>108</sup> *Id.* at 351.

<sup>109</sup> *Id.* at 352.

<sup>110</sup> State v. Goss, 834 A.2d 316, 319 (N.H. 2003).

### 30. NEW JERSEY

*Analog:* {**N.J. CONST. art. I, ¶ 7**} “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.”

*Interpretation:* “When the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so.”<sup>111</sup>

*Analytical Framework:* In interpreting the New Jersey Constitution, the court looks:

for direction to the United States Supreme Court, whose opinions can provide valuable sources of wisdom for us. But although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.<sup>112</sup>

Additionally, the New Jersey Supreme Court unsurprisingly looks to its precedent in determining whether to depart anew.<sup>113</sup>

*Representative Departures:*

- New Jersey’s Constitution does not have a “good faith” exception to its exclusionary rule;<sup>114</sup>

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<sup>111</sup> State v. Hemepele, 576 A.2d 793, 800 (N.J. 1990).

<sup>112</sup> *Id.* at 800 (quotation and citation omitted).

<sup>113</sup> See, e.g., State v. McAllister, 875 A.2d 866, 873 (N.J. 2005) (“Despite the similar language [between Federal and New Jersey Constitutions], we have recognized that our Constitution affords our citizens greater protection against unreasonable searches and seizures than its federal counterpart.” (quotation and citation omitted)).

<sup>114</sup> See State v. Novembrino, 519 A.2d 820 (N.J. 1987).

- Likewise, it permits a large class of individuals standing to challenge a search or a seizure;<sup>115</sup> and,
- “In summary, article I, paragraph 7 applies to the search but not to the seizure of a garbage bag left on the curb for collection. Law-enforcement officials need no cause to seize the bag, but they must have a warrant based on probable cause to search it.”<sup>116</sup>

### 31. NEW MEXICO

*Analogy:* {N.M. CONST. art. II, § 10} “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.”

*Interpretation:* “We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures.”<sup>117</sup>

*Analytical Framework:* The New Mexico Supreme Court wrote:

We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures. In so doing, we seek guidance from decisions of the United States Supreme Court interpreting the federal search and seizure provision, from the decisions of courts of our sister states interpreting their correlative state constitutional guarantees, and from the common law. However, when this Court cites federal opinions, or opinions from courts of sister states, in interpreting a New Mexico constitutional provision we do so not because we consider ourselves bound to do so by our understanding of federal or state doctrines, but because we

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<sup>115</sup> See *State v. Alston*, 440 A.2d 1311 (N.J. 1981).

<sup>116</sup> See *Hempele*, 576 A.2d at 814.

<sup>117</sup> *State v. Gutierrez*, 863 P.2d 1052, 1056 (N.M. 1993).

find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions.<sup>118</sup>

What's more, the New Mexico Supreme Court reviews: (1) the framers' intent; (2) historical application of its state search and seizure law; and, (3) the core of the text.<sup>119</sup>

*Representative Departures:* As a matter of state constitutional law, New Mexico rejects:

- the "good faith" exception;<sup>120</sup>
- the totality of the circumstances analysis of probable cause, applying the two-pronged test derived from *Aguilar v. Texas*<sup>121</sup> and *Spinelli v. United States*<sup>122,123</sup> and, requires:
- that a warrantless public arrest must be based upon both probable cause and sufficient exigent circumstances.<sup>124</sup>

## 32. NEW YORK

*Analog:* {**N.Y. CONST. art. I, § 12**} "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and *ex parte* orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the

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<sup>118</sup> *Id.* at 1056-57 (rejecting "good faith" exception to state exclusionary rule).

<sup>119</sup> *See id.* at 1062-66 (engaging in a thorough analysis of state analog).

<sup>120</sup> *Id.* at 1060.

<sup>121</sup> 378 U.S. 108 (1964).

<sup>122</sup> 393 U.S. 410 (1969).

<sup>123</sup> *State v. Cordova*, 784 P.2d 30 (N.M. 1989) (rejecting *Illinois v. Gates*, 462 U.S. 213 (1983), as a matter of state law).

<sup>124</sup> *See Campos v. State*, 870 P.2d 117 (N.M. 1994); *see also* Wendy F. Jones, Trends in New Mexico Law: Note, *State Constitutional Law—New Mexico Requires Exigent Circumstances for Warrantless Public Arrests*: *Campos v. State*, 25 N.M. L. REV. 315 (1995).

particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.”

*Interpretation:* The New York Court of Appeals wrote:

We have observed that because the search and seizure language of the Fourth Amendment and of article I, § 12 is identical, they generally confer similar rights . . . Nevertheless, this Court has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved.<sup>125</sup>

*Analytical Framework:* The court of appeals looks to *inter alia*: (1) the history of the constitutional provisions; (2) the framers’ intent; and, (3) the consistency with precedent.<sup>126</sup>

*Representative Departures:*

- New York rejects the “open field” doctrine articulated in *Oliver v. United States*,<sup>127</sup> providing greater protection under state analog;<sup>128</sup>
- “[R]andom warrantless searches of vehicle dismantling businesses to determine whether such businesses are trafficking in stolen automobile parts” is an unreasonable search under the New York Constitution;<sup>129</sup> and,
- New York rejects the “totality of the circumstances” test.<sup>130</sup>

### 33. NORTH CAROLINA

*Analog:* {N.C. CONST. art. I, § 20} “General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize

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<sup>125</sup> *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001) (citations omitted).

<sup>126</sup> *See People v. Scott*, 593 N.E.2d 1328, 1335-37 (N.Y. 1992) (engaging in thorough analysis of factors).

<sup>127</sup> 466 U.S. 170 (1984).

<sup>128</sup> *Scott*, 593 N.E.2d 1328.

<sup>129</sup> *People v. Keta*, 593 N.E.2d 1328, 1339 (N.Y. 1992) (consolidated with *Scott*, 593 N.E.2d 1328, but decided separately).

<sup>130</sup> *See People v. Griminger*, 524 N.E.2d 409 (N.Y. 1988) (opting instead for two-part *Aguilar-Spinelli* test).

any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.”

*Interpretation:* The North Carolina Supreme Court wrote:

[T]here is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the states by the Fourteenth Amendment. In terms of modern day jurisprudence and actual practice, it is abundantly clear that the language of this provision of our Constitution, relating entirely to “general warrants,” of the past (while still relevant to protect against any recurrence of the historic abuses specified), should not be viewed as a vehicle for any inventive expansion of our law.<sup>131</sup>

*Representative Departures:*

- North Carolina does not recognize the “good faith” exception as a matter of state constitutional and statutory law.<sup>132</sup>

### 34. NORTH DAKOTA

*Analog:* {N.D. CONST. art. I, § 8} “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.”

*Interpretation:* “Although as a matter of state constitutional law [the North Dakota Supreme Court] may provide the citizens of our state greater protection in interpreting [its] State Constitution than the safeguards guaranteed by a parallel provision of the Federal Constitution,” it has not.<sup>133</sup>

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<sup>131</sup> State v. Garner, 417 S.E.2d 502, 506 (N.C. 1992).

<sup>132</sup> See State v. Carter, 370 S.E.2d 553, 559 (N.C. 1988) (concluding that state statute, representing longstanding state public policy to exclude unconstitutionally obtained evidence, justifies a constitutional rejection of “good faith” exception).

<sup>133</sup> State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988).



### 35. OHIO

*Analogue:* {OHIO CONST. art. I, § 14} “The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”

*Interpretation:* “[W]e are disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment. . . . It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution . . . is coextensive with that of the Fourth Amendment.”<sup>134</sup>

*Analytical Framework:* “[W]here the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio’s Constitution are coextensive with those provided by the United States Constitution.”<sup>135</sup>

*Representative Departures:*

- The only departure came when the Ohio Supreme Court rejected *Atwater v. City of Lago Vista*<sup>136</sup> as a matter of state constitutional law.<sup>137</sup>

### 36. OKLAHOMA

*Analogue:* {OKLA. CONST. art. II, § 30} “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or

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<sup>134</sup> State v. Geraldo, 429 N.E.2d 141, 145-46 (Ohio 1981) (quoted in State v. Robinette, 685 N.E.2d 762, 767 (Ohio 1997)).

<sup>135</sup> Robinette, 685 N.E.2d at 766 (citation omitted).

<sup>136</sup> Atwater v. City of Lago Vista, 532 U.S. 218 (2001).

<sup>137</sup> See State v. Brown, 792 N.E.2d 175, 178 (Ohio 2003).

affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.”

*Interpretation:* The Oklahoma Court of Criminal Appeals wrote:

As this Court has repeatedly noted, this provision of our State’s Constitution is derived from the Fourth Amendment to the Federal Constitution. . . . While [we] reserve[] the right to interpret the particular guarantees of the Oklahoma Constitution, we find that the decisions of the United States Supreme Court regarding the Fourth Amendment to be highly persuasive and these decisions will guide our opinions regarding search and seizure.<sup>138</sup>

United States Supreme Court opinions have been so persuasive that Oklahoma has not diverged from them in interpreting its constitution.

### 37. OREGON

*Analogue:* {OR. CONST. art. I, § 9} “No 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.”

*Interpretation:* The Supreme Court of Oregon noted:

that there is no presumption that interpretations of the Fourth Amendment by the Supreme Court of the United States are correct interpretations of Article 1, section 9. . . . 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

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<sup>138</sup> Dixon v. State, 737 P.2d 942, 945 (Okla. Crim. App. 1987).

provisions, or opinions of legal commentators. What is persuasive is the reasoning, not the fact that the opinion reaches a particular result.<sup>139</sup>

Oregon recognizes that its analog protects privacy: “This court has often stated that ‘privacy’ is the interest protected by Article I, section 9, against unreasonable searches but has had little occasion to further define that interest.”<sup>140</sup> Further, “the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a right.”<sup>141</sup>

*Analytical Framework:* In construing the Oregon Constitution generally, the Oregon Supreme Court seems to rely (though not exclusively) on this test: “There are three levels on which that constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.”<sup>142</sup>

*Representative Departures:*

- The Oregon Constitution prohibits warrantless, suspicionless stops of automobiles;<sup>143</sup> and,
- Administration of field sobriety tests constitutes a warrantless “search” under the Oregon Constitution, but is a reasonable search if “conducted with probable cause and under exigent circumstances.”<sup>144</sup>

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<sup>139</sup> *State v. Campbell*, 759 P.2d 1040, 1044 n.7 (Or. 1988) (citations omitted).

<sup>140</sup> *Id.* at 1043.

<sup>141</sup> *Id.* at 1044 (rejecting *Katz v. United States*, 389 U.S. 347 (1967), and its reasonable expectation of privacy); see also *State v. Nagel*, 880 P.2d 451, 454 (Or. 1994) (“Unlike under the federal constitution, a search is not defined by a reasonable expectation of privacy, but in terms of the privacy to which one has a *right*.” (quotation and citation omitted)).

<sup>142</sup> *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992) (en banc). Although Westlaw’s Keycite feature indicates that *Priest* has been abrogated, the constitutional, *Analytical Framework* appears to be sound. See, e.g., *Billings v. Gates*, 916 P.2d 291, 295 (Or. 1996) (en banc) (citing *Priest* for the framework). For a thorough discussion of the frameworks the Oregon Supreme Court has, from time to time, employed, see Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 826-75 (2000).

<sup>143</sup> See *Nelson v. Lane County*, 743 P.2d 692, 694 (Or. 1987) (“A compelled stop of a person on a public road, of course, requires justification.”).

<sup>144</sup> *Nagel*, 880 P.2d at 456.

### 38. PENNSYLVANIA

*Analog:* {PA. CONST. art. I, § 8} “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.”

*Interpretation:* “Pennsylvania has a long and active history of independent enforcement of its state constitution.”<sup>145</sup> “In fact, our state Supreme Court has stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.”<sup>146</sup>

*Analytical Framework:* When asked to interpret its state constitution, the Pennsylvania Supreme Court counsels as follows:

[A]s a general rule it is important that litigants brief and analyze at least the following four factors: 1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; [and,] 4) policy considerations, including unique issues of state and local concern, and applicability with modern Pennsylvania jurisprudence.<sup>147</sup>

*Representative Departures:*

- Individuals have a legitimate expectation of privacy in their bank records;<sup>148</sup>
- Pennsylvania rejects the test articulated in *California v. Hodari D.*<sup>149</sup> to determine a physical seizure, opting instead for a totality of the circumstances test;<sup>150</sup> and,

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<sup>145</sup> Jones v. City of Philadelphia, 890 A.2d 1188, 1193 (Pa. Commw. Ct. 2006) (quotation and citation omitted).

<sup>146</sup> *Id.* at 1193-94.

<sup>147</sup> Commonwealth v. Edmunds, 586 A.2d 887, 895, 895-905 (Pa. 1991) (proceeding to analyze using these four factors).

<sup>148</sup> See Commonwealth v. DeJohn, 403 A.2d 1238 (Pa. 1979) (rejecting United States v. Miller, 425 U.S. 435 (1976), as a matter of state constitutional law).

- Pennsylvania's analog contains no "good faith" exception.<sup>151</sup>

### 39. RHODE ISLAND

*Analogue:* {**R.I. CONST. art. I, § 6**} "The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized."

*Interpretation:* The Rhode Island Supreme Court noted "that although Supreme Court holdings controlled questions of federal constitutional law and established the minimum level of constitutional protection against unreasonable search and seizure, a state constitution may be interpreted to afford greater protection to citizens of that state."<sup>152</sup>

*Analytical Framework:* "We have departed from these minimum standards [of the Fourth Amendment] only when we have determined that our guarantee against unreasonable searches and seizures requires greater protection."<sup>153</sup> The Rhode Island Supreme Court has relied, in the past, on (1) history of its state analog; (2) its case law; (3) sister states' case law; and, (4) public policy.<sup>154</sup>

#### *Representative Departures:*

- "We therefore hold that roadblocks or checkpoints, established to apprehend persons violating the law against driving under the influence of intoxicating beverages or drugs, oper-

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<sup>149</sup> 499 U.S. 621 (1991) (holding that an individual is not "seized" within meaning of Fourth Amendment when a police officer pursues him with intent to question him).

<sup>150</sup> See *Commonwealth v. Matos*, 672 A.2d 769, 774 (Pa. 1996) ("[A] person has been 'seized' . . . only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.").

<sup>151</sup> *Edmunds*, 586 A.2d at 905-06.

<sup>152</sup> *State v. Werner*, 615 A.2d 1010, 1012 (R.I. 1992) (abrogating a prior divergence and marching in-step with the United States Supreme Court hence).

<sup>153</sup> *Pimental v. Dep't of Transp.*, 561 A.2d 1348, 1350 (R.I. 1989)

<sup>154</sup> *Id.* at 1349-52 (considering, though not naming, those factors).

ate without probable cause or reasonable suspicion and violate the Rhode Island Constitution.”<sup>155</sup>

#### 40. SOUTH CAROLINA

*Analog:* {S.C. CONST. art. I, § 10} “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.”

*Interpretation:* “[T]his Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.”<sup>156</sup> The South Carolina Supreme Court continued:

Especially important in this analysis is South Carolina’s explicit right to privacy. . . . Initially, even in the absence of a specific right to privacy provision, this Court could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against “unreasonable invasions of privacy,” the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.<sup>157</sup>

*Analytical Framework:* While not articulating a test (or set of factors), a review of the South Carolina Supreme Court’s *State v. Forrester*<sup>158</sup> opinion reveals that the Court used (and may again use): (1) sister states’ case law (especially those states with an explicit privacy provision<sup>159</sup>); (2) the constitutional provision’s

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<sup>155</sup> *Id.* at 1352.

<sup>156</sup> *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001).

<sup>157</sup> *Id.* at 840-41.

<sup>158</sup> *Id.*

<sup>159</sup> *See, e.g.*, ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; WASH. CONST. art. I, § 7.

ratification history; and, (3) a review of South Carolina case law.<sup>160</sup>

#### 41. SOUTH DAKOTA

*Analog:* {S.D. CONST. art. VI, § 11} “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized.”

*Interpretation:* “At the outset, we note the language prohibiting unreasonable searches and seizures in our state constitution closely tracks the language of the Fourth Amendment. The similarity in language is not by itself dispositive, however, as this Court may interpret the South Dakota Constitution as providing greater protection to citizens of this state than is provided them under the federal Constitution as interpreted by the United States Supreme Court.”<sup>161</sup>

*Analytical Framework:* The South Dakota Supreme Court offers this proviso for those advocating state constitutional departures:

A bare disagreement with the United States Supreme Court’s interpretation of the Federal Constitution imparts no sound doctrinal basis to impose a contrary view under the pretext of separately interpreting our State Constitution. Our Constitution is more than just a device to reject or evade federal decisions. . . . Counsel advocating a separate constitutional interpretation must demonstrate that the text, history, or purpose of a South Dakota constitutional provision supports a different interpretation from the corresponding federal provision.<sup>162</sup>

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<sup>160</sup> See *Forrester*, 541 S.E.2d at 840-43.

<sup>161</sup> *State v. Schwartz*, 689 N.W.2d 430, 435 (S.D. 2004) (citation omitted).

<sup>162</sup> *State v. Kottman*, 707 N.W.2d 114, 119-20 (S.D. 2005) (quotation and citation omitted).

*Representative Departures:*

- “We now conclude that as a matter of protection under S.D. CONST. Art. VI, § 11, ‘minimal interference’ with a citizen’s constitutional rights means that noninvestigative police inventory searches of automobile without a warrant must be restricted to safeguarding those articles which are within plain view of the officer’s vision.”<sup>163</sup>

**42. TENNESSEE**

*Analog:* {TENN. CONST. art. I, § 7} “That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.”

*Interpretation:* “[A]rticle I, section 7 is identical in intent and purpose with the Fourth Amendment, and . . . federal cases applying the Fourth Amendment should be regarded as particularly persuasive.”<sup>164</sup> Nevertheless, “we recognize, as we have in the past, that article I, section 7 may afford citizens of Tennessee even greater protection.”<sup>165</sup>

*Analytical Framework:* The Tennessee Supreme Court has not articulated a test, but considered *inter alia* (1) federal precedent; (2) sister states’ precedent; and, (3) public policy, in determining whether to part company with the United States Supreme Court.<sup>166</sup>

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<sup>163</sup> State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976), *on remand from* South Dakota v. Opperman, 428 U.S. 364 (1976) (United States Supreme Court holding that conduct did not violate Fourth Amendment).

<sup>164</sup> State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quotation and citations omitted).

<sup>165</sup> *Id.* at 106.

<sup>166</sup> *Id.* at 106-11.



*Representative Departures:*

- Sobriety checkpoint, not conducted “in accordance with predetermined guidelines and supervisory authority that minimize the risk of arbitrary intrusions on individuals and limit the discretion of law enforcement officers at the scene,” violates the Tennessee Constitution;<sup>167</sup> and,
- Tennessee rejects the totality of the circumstances test articulated in *Illinois v. Gates*,<sup>168</sup> using instead the *Aguilar v. Texas*<sup>169</sup> and *Spinelli v. United States*<sup>170</sup> tests as a matter of state constitutional law.<sup>171</sup>

### 43. TEXAS

*Analog:* {**TEX. CONST. art. I, § 9**} “The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.”

*Interpretation:* The Texas Court of Criminal Appeals “expressly conclude[d] that [it], when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue.”<sup>172</sup>

*Analytical Framework:* To decide whether to depart company with the United States Supreme Court, the Texas Court of Criminal Appeals will consider: “the text of the [Texas] Constitution, refer to [its] prior decisions, consider the history of the common law, and consider Fourth Amendment jurisprudence.”<sup>173</sup>

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<sup>167</sup> *Id.* at 112.

<sup>168</sup> 462 U.S. 213 (1983).

<sup>169</sup> 378 U.S. 108 (1964).

<sup>170</sup> 393 U.S. 410 (1969).

<sup>171</sup> *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989).

<sup>172</sup> *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). While the court’s statement does not seem novel, determining whether to be in lock-step with the United States Supreme Court was the express purpose of the *Heitman* opinion, arrived at after a thorough analysis. *See id.* at 684-90.

<sup>173</sup> *Hulit v. State*, 982 S.W.2d 431, 435 (Tex. Crim. App. 1998) (declining to provide greater protection under the Texas Constitution).

*Representative Departures:* A review of the case law reveals no decision where Texas courts have exercised their authority to diverge.

#### 44. UTAH

*Analog:* {UTAH CONST. art. I, § 14} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.”

*Interpretation:* “While this court’s interpretation of article I, section 14 has often paralleled the United States Supreme Court’s interpretation of the Fourth Amendment, we have stated that we will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state’s citizens.”<sup>174</sup>

*Analytical Framework:* The Utah Supreme Court has not explicitly identified any factors. Nevertheless, it has considered: (1) federal precedent; (2) sister states’ precedent; and, (3) public policy.<sup>175</sup>

*Representative Departures:*

- Under the Utah Constitution, opening a car door during warrantless search for vehicle identification number may constitute unreasonable search;<sup>176</sup> and,

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<sup>174</sup> State v. DeBooy, 996 P.2d 546, 549 (Utah 2000). Utah’s decision to interpret its constitution independently is a recent one. See State v. Thompson, 810 P.2d 415, 416 (Utah 1991) (“Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment, and thus this Court has never drawn any distinctions between the protections afforded by the respective constitutional provisions. Rather, the Court has always considered the protections afforded to be one and the same.”).

<sup>175</sup> See, e.g., Thompson, 810 P.2d at 416-18 (finding a reasonable expectation of privacy in depositor’s bank records).

<sup>176</sup> See State v. Larocco, 794 P.2d 460, 465-71 (Utah 1990) (plurality opinion). The precedential force of Larocco has been questioned. See State v. Giron, 943 P.2d 1114, 1121 (Utah Ct. App. 1997) (“Because Larocco was only a plurality opinion, its analysis is not binding.”); State v. Anderson, 910 P.2d 1229, 1234-35 n.5 (Utah 1996) (plurality opinion)

- “[S]uspicionless, investigatory, nonemergency checkpoints” may violate the Utah Constitution.<sup>177</sup>

#### 45. VERMONT

*Analog:* {VT. CONST. ch. 1, art. 11} “That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.”

*Interpretation:* “We are a sovereign state, and this Court is entitled to take issue with any constitutional decision of the United States Supreme Court, regardless of whether our constitution provides the same or a different text. Like us, the Supreme Court hands down its decision on paper, not stone tablets.”<sup>178</sup> In another decision, the Vermont Supreme Court emphasized that its task was not to “merely honor words,” but to “discover and protect the core value” of privacy embraced by Article 11.<sup>179</sup>

*Analytical Framework:* The Vermont Supreme Court employs this framework in considering questions of Vermont constitutional law: “(1) historical considerations; (2) the textual differences between [Article 11 and the Fourth Amendment]; (3) sibling state authority; and (4) policy considerations.”<sup>180</sup>

As an aside, in 1985, the court issued a firm notice to its bar, advising them to brief state constitutional issues where implicat-

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(“The plurality opinion in *Larocco* represents the views of only two justices of this court and is therefore not the law of this state.”). *But see DeBooy*, 996 P.2d at 549 (citing *Larocco* for proposition that Utah Constitution has provided greater privacy protection).

<sup>177</sup> *See DeBooy*, 996 P.2d at 554 n.11. It is unclear whether the Utah Supreme Court framed the holding under federal or state constitutional law. *See id.* at 554.

<sup>178</sup> *State v. Morris*, 680 A.2d 90, 101 (Vt. 1996).

<sup>179</sup> *State v. Kirchoff*, 587 A.2d 988, 991-92 (Vt. 1991) (finding reasonable expectation of privacy in posted, open fields).

<sup>180</sup> *State v. Rheaume*, 853 A.2d 1259, 1264 (Vt. 2004) (describing general framework and then applying in the self-incrimination arena).

ed, else the court will order re-briefing.<sup>181</sup> That opinion, *State v. Jewett*, contains Vermont's philosophy on independent state constitutional interpretation and, for that reason alone, is worth attention.<sup>182</sup>

*Representative Departures:*

- The Vermont Supreme Court “will recognize a separate and higher expectation of privacy for containers used to transport personal possessions than for objects exposed to plain view within an automobile’s interior;”<sup>183</sup>
- “[A] defendant need only assert a possessory, proprietary or participatory interest in the item seized or the area searched to establish standing to assert an Article Eleven challenge;”<sup>184</sup> and,
- The Vermont Constitution protects one’s privacy interest in their garbage, qualified as follows:

Although people have an interest in keeping the contents of their garbage bags private, they have no privacy or possessory interest in keeping the bags in any particular location. . . . Ordinarily, the *seizure* of trash bags would be permitted without a warrant given the exigency of the situation. . . . Once the police have seized the bags, however, they cannot search them before obtaining a warrant based on probable cause.<sup>185</sup>

#### 46. VIRGINIA

*Analog:* {VA. CONST. art. I, § 10} “That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.”

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<sup>181</sup> See *State v. Jewett*, 500 A.2d 233 (Vt. 1985).

<sup>182</sup> *Id.* at 233-39.

<sup>183</sup> *State v. Savva*, 616 A.2d 774, 781 (Vt. 1991) (holding officer should have obtained warrant to search closed paper sac in defendant’s automobile).

<sup>184</sup> *State v. Wood*, 536 A.2d 902, 908 (Vt. 1987).

<sup>185</sup> *State v. Morris*, 680 A.2d 988, 100 (Vt. 1996).

*Interpretation:* “The Virginia requirements, under our constitution and the statutes implementing the constitutional provision, are substantially the same as those contained in the Fourth Amendment.”<sup>186</sup>

#### 47. WASHINGTON

*Analogue:* {WASH. CONST. art. I, § 7} “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

*Interpretation:* “It is now well settled that 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.”<sup>187</sup>

*Analytical Framework:* The Washington Supreme Court has articulated six factors (termed “*Gunwall* factors”) to determine whether to interpret the state constitution independently:<sup>188</sup>

The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.<sup>189</sup>

*Representative Departures:*

- “[D]ue to the explicit language of Const. art. 1, § 7, under the Washington Constitution the relevant inquiry for de-

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<sup>186</sup> *Lowe v. Commonwealth*, 337 S.E.2d 273, 274 n.1 (Va. 1985) (quotation and citations omitted); see also *El-Amin v. Commonwealth*, 607 S.E.2d 115, 116 n.3 (Va. 2005) (“The rights El-Amin asserts under the Fourth Amendment are co-extensive with those rights afforded under Article 1, Section 10 of the Constitution of Virginia.”).

<sup>187</sup> *State v. McKinney*, 60 P.3d 46, 48 (Wash. 2002) (en banc).

<sup>188</sup> See *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (en banc).

<sup>189</sup> *Id.* at 811. For a thorough review of Washington search and seizure jurisprudence, see Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 SEATTLE U. L. REV. 467 (2005). The Honorable Charles W. Johnson is a Justice of the Supreme Court of Washington, whose comprehensive treatment reads more like an invaluable treatise than a law review article.

termining when a search has occurred is whether the state unreasonably intruded into the defendant's 'private affairs';<sup>190</sup>

- The Washington Constitution "prevent[s] the defendant's long distance home telephone records from being obtained from the phone company, or a pen register from being installed on her telephone connections, without a search warrant or other appropriate legal process first being obtained";<sup>191</sup> and,
- A defendant's "private affairs were unreasonably intruded upon by law enforcement officers when they removed the garbage of his trash can and transported it to the police station in order to make it available to state and federal narcotics agents."<sup>192</sup> Such action was therefore unconstitutional under the Washington Constitution.

#### 48. WEST VIRGINIA

*Analogue:* {**W. VA. CONST. art. III, § 6**} "The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized."

*Interpretation:* "This Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law construing the Fourth Amendment."<sup>193</sup>

Indeed, the West Virginia Supreme Court does not seem to have broken that custom, as I was unable to locate reported cases where West Virginia has diverged.

#### 49. WISCONSIN

*Analogue:* {**WIS. CONST. art. I, § 11**} "The right of the people to be secure in their persons, houses, papers, and effects against un-

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<sup>190</sup> State v. Myrick, 688 P.2d 151, 153-54 (Wash. 1984) (en banc) (rejecting Katz v. United States, 389 U.S. 347 (1967), test).

<sup>191</sup> Gunwall, 720 P.2d at 813.

<sup>192</sup> State v. Boland, 800 P.2d 1112, 1116 (Wash. 1990) (en banc).

<sup>193</sup> Rogers v. Albert, 541 S.E.2d 563, 569 (W. Va. 2000) (per curiam).

reasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

*Interpretation:* “Typically, this court interprets Article 1, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court. . . . Of course, we do not always follow the Supreme Court’s lead. . . .”<sup>194</sup>

## 50. WYOMING

*Analog:* {WYO. CONST. art. I, § 4} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.”

*Interpretation:* “[O]ur approach to the search and seizure area usually has implied the reading of the state and federal constitutions together and treating the scope of the state provision as the same as that of the federal provision.”<sup>195</sup>

*Analytical Framework:* The Wyoming Supreme Court, first in a concurrence and later in a majority opinion, accepted the Washington Supreme Court’s “*Gunwall* factors”<sup>196</sup> as particularly useful. They are: “(1) the textual language; (2) the differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”<sup>197</sup>

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<sup>194</sup> State v. Young, 717 N.W.2d 729, 739-40 (Wis. 2006). In the search and seizure context, the Wisconsin Supreme Court has not taken a different path. See *id.* at 740 (citing only a state equal protection case for the proposition that Wisconsin does not always follow the United States Supreme Court’s lead).

<sup>195</sup> Callaway v. State, 954 P.2d 1365, 1370 (Wyo. 1998) (citation omitted).

<sup>196</sup> See *Gunwall*, 720 P.2d at 812.

<sup>197</sup> Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (“I recommend this analytical technique to our practicing bar.”).

Wyoming has the factors and an apparent willingness to consider an independent interpretation and, yet, has not diverged, save the one instance noted below.

*Representative Departures:*

- “The provision of the Wyoming Constitution covering search and seizure, being Article 1, § 4, is different than that of the United States Constitution and makes it mandatory that the search warrant be issued upon an affidavit.”<sup>198</sup>

### III. CONCLUSION

Forty years ago, Justice Brennan expressed the inherent value of state constitutionalism, as well as its larger value in our federal structure. He wrote:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>199</sup>

To me, it’s unclear whether Justice Brennan was prescient of, or causing, the state constitutionalism groundswell that many scholars have chronicled since the 1970s.<sup>200</sup> I like to think both.

As a greenhorn, I leave it to scholars, researchers, and practitioners to provide answers to those, as well as other, questions of state constitutionalism. As part of that inquiry, though, I hope the learned find this survey useful.

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<sup>198</sup> *Smith v. State*, 557 P.2d 130, 132 (Wyo. 1976).

<sup>199</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

<sup>200</sup> See, e.g., Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2004).