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REVIVING MAINE'S STATE CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

Jamesa J. Drake

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ABSTRACT

Whatever the merits of new judicial federalism, it has not translated well in practice. Doctrinal reasons are probably partly to blame, but utilitarian factors matter, too. Using the State of Maine as an example, this article develops a litigation roadmap specifically geared to overcoming the pragmatic reasons against reviving the protections embodied in the state constitution's search and seizure clause. This fills a gap in the existing literature, which often argues either for or against state constitutionalism, but neglects the most difficult part: explaining to practicing lawyers how to start a state constitutional dialogue with the court.

THE CONSTITUTIONAL GUARANTEES

ME. CONST. art. I, § 5

Unreasonable searches prohibited. 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, nor without probable cause—supported by oath or affirmation.

U.S. CONST. amend. IV.

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.

INTRODUCTION

In academic circles, the “rediscovery” of state constitutions as a source of individual rights—new judicial federalism—is well-plowed ground.¹ But in practice, state constitutionalism is more theoretical than real. This is especially true in criminal cases. Empirical evidence suggests that nationwide, state courts rarely ground their criminal procedure decisions in state law and, when they do, the source of authority is overwhelmingly state court precedent, not state constitutional law.²

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1. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113-14.

2. Michael Esler, *State Supreme Court Commitment to State Law*, 78 *JUDICATURE* 25, 28 (1994); Justin Long, *Intermittent State Constitutionalism*, 34 *PEPP. L. REV.* 41, 43 (2006) (“Scholars have devoted

There are myriad reasons why courts might eschew the application of state constitutional rights independent from the federal constitution. Scholars have thoroughly vetted the doctrinal justifications: it destroys national unity, it creates complications and uncertainty, and it both evades Supreme Court rulings and encourages the Court to relinquish the field of civil rights, etc.³

There are other utilitarian reasons, too. At bottom, independent state constitutional interpretation requires a “resurgence of state court creativity”⁴ and judges must be receptive to “new opportunities for policymaking.”⁵ Elected judges find this terrifying; appointed judges probably do, too. Empirical evidence shows that state courts “are significantly more likely to adopt dependent interpretations when judges face election, and significantly more likely to adopt independent interpretations when they do not.”⁶

In the criminal procedure context, there is an additional complication: many of these cases involve “not very nice people.”⁷ Courts might have no difficulty interpreting their state constitutions in other contexts, for example when there is no federal constitutional analogue or when other types of individual rights are at issue. But, they might be especially resistant to expand individual rights at the expense of crime victims.

Even within the criminal procedure ambit, certain case types are treated differently. Search and seizure cases are the most difficult to win, and this is largely true regardless of whether the state or federal constitution is in play. In the State of Maine, for example, the state constitution confers broader protection against self-incrimination than the federal constitution.⁸ But, the state’s highest court has not said the same about the state constitution’s search and seizure clause; in the distant past, the court even hinted that the state constitution might confer less protection.⁹ Although the court has never explained why, one reason for the distinction might be that coerced confessions are inherently unreliable. In search and seizure cases, the evidence is reliable but excluded nonetheless.¹⁰ This creates the unsavory impression of a guilty man walking free on a legal technicality.

little attention to explaining the gap between the seemingly logical and persuasive arguments for robust state constitutionalism in law reviews and the actual spotty performance of state constitutionalism in the courts.”).

3. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 1-3(d) (3d ed. 2000); see also, e.g., Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 SYRACUSE L. REV. 79, 80 (2007).

4. See Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L. J. 143, 158 (1984).

5. See *id.* at 150.

6. Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. REV. L. & SOC. CHANGE 749, 790 (2011).

7. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (“It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”).

8. *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982).

9. See *State v. Fredette*, 411 A.2d 65, 67 (Me. 1979).

10. Cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 n.125 (1994).

When courts avoid constitutionalism for doctrinal reasons, and make those reasons known in their decisions, advocates understand what they are up against. But when courts avoid state constitutional interpretation for pragmatic reasons, those reasons may be left unsaid. This makes it particularly difficult for advocates to know how to break the logjam.

Using the search and seizure clause of the Maine Constitution as an example, this article explores the most difficult question in state constitutional decision making—how to begin—and offers a litigation roadmap for doing just that. Recently, the Maine Supreme Judicial Court, sitting as the Law Court, signaled its willingness to consider whether the state constitution offers broader protection than the Fourth Amendment.¹¹ The court may be readying itself to issue a “teaching opinion” that declares the state constitution’s search and seizure clause to be an independent force, and serves as a wake-up call to lawyers and lower courts.¹² Advocates must respond.

The first step is understanding why Maine has eschewed the development of state constitutionalism, generally. Ultimately, the answer is unsatisfactory, but probably typical of other jurisdictions. There is no identifiable explanation—nothing one can point to in the case law—that explains the legal landscape. This suggests that utilitarian or even mundane factors, such as the composition of the court, are to blame. Although this means that advocates will have to shadowbox, the optimistic view is that future development of state constitutional search and seizure jurisprudence is possible.

The next step is motivating the court to act and to disentangle the state and federal constitutions. If a court is hesitant to do this, believing it smacks of judicial policymaking, then it should not worry. A spade is a spade; in the search and seizure context, judicial policymaking is precisely what happens. The outcome of nearly every Fourth Amendment case depends on amorphous notions of “reasonableness,” which by definition requires judges to either balance competing contemporary values or apply the results of that balancing done by some higher court. Maine has adopted a “reasonableness” balancing approach for deciding state constitutional search and seizure issues—which is good. The balancing approach allows Maine-specific concerns to matter in search and seizure cases, and there is no reason to presume that Mainers would object to this.

The third step is to prove that Maine’s search and seizure clause is not “coextensive” with or “identical” to the Fourth Amendment. This requires a hard look at the court’s search and seizure cases from the founding era through the present day. These cases, and the general principles they embody, provide a springboard for

11. See *State v. Hutchinson*, 2009 ME 44, ¶ 18 n.9, 969 A.2d 923 (“Although this provision and the corresponding provision in the Fourth Amendment of the United States Constitution generally offer identical protection, we have also recognized that the Maine Constitution may offer additional protections.”) (internal citations omitted); *State v. Glover*, 2014 ME 49, ¶ 10 n.2, 89 A.3d 1077.

12. Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 418 (2004) (quoting Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1019 (1997)).

crafting arguments tailored to specific cases.

The article concludes by suggesting ways in which the court might ease its way back to an overall revival of state constitutional law. If the court can be convinced to revive the state's search and seizure clause, then this augurs well for other criminal procedure protections.

I.

Step 1: Examine past attempts at independent state constitutional interpretation

If Maine had a robust tradition of independent state constitutional interpretation, then the task would be much easier. Advocates would simply argue that the court should extend its existing case law to the search and seizure context. But that is not the case. The current state of things is much more complex. Maine flirted with new judicial federalism, but it never took root. This section first examines what Maine has said about independent state constitutional interpretation generally, without regard to which provision of the constitution the court was considering. This section concludes by offering possible explanations about why Maine seems resistant to announcing new or broader state constitutional protections.

Two important caveats: first, the analysis that follows concerns Maine's Declaration of Rights. Maine's constitution has many provisions with no federal constitutional analogue, and the Law Court has no difficulty interpreting those provisions;¹³ they play no role in the analysis in this section. Second, Maine interpreted its entire constitution during the lengthy period between statehood and the incorporation of the Bill of Rights against the States. Because the focus here is on what Maine has said about its constitution relative to the federal constitution, the analysis begins with mid- to late-twentieth century case law.

A. Maine's initial attempts at state constitutionalism, generally

In 1972, the U.S. Supreme Court announced in *Lego v. Twomey*, that as a matter of Fifth Amendment law, the prosecution must prove by a preponderance of the evidence that a criminal defendant voluntarily confessed.¹⁴ The Court also acknowledged, however, that: "States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake."¹⁵ In 1977, Justice Brennan urged as much in his influential article calling for a revival of state constitutional law.¹⁶ And in 1983, the Supreme Court reiterated in *Michigan v. Long*, that it is "fundamental that state courts be left free

13. See, e.g., *Morris v. Goss*, 147 Me. 89, 97, 83 A.2d 556, 559-61 (1951) (regarding a constitutional challenge to a matter of state legislative procedure, the court wrote: "[W]e are now interpreting our own Constitution. In so doing, we are not bound by any of the interpretations which other courts may have made of their own Constitutions. Nor do we follow such interpretations except to the extent that the reasoning upon which they rest is convincing to us when applied to our Constitution.").

14. 404 U.S. 477, 489 (1972).

15. *Id.* at 489.

16. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

and unfettered by us in interpreting their state constitutions” and that it would not review “judgments of state courts that rest on adequate and independent state grounds.”¹⁷ These developments spurred the incubation period of new judicial federalism in Maine, which roughly runs from 1970 to 1990.

The Law Court was quick to respond to the Supreme Court’s invitation to “adopt a higher standard” of protection under the Maine Constitution. In 1972, the court cited *Twomey*, for the proposition that the federal constitution “prescribed a mandatory *minimum* standard”; it rejected the federal preponderance-of-the-evidence standard; and it declared that the state constitution required proof of the voluntariness of a confession beyond a reasonable doubt.¹⁸ This was revolutionary.

In 1973, the court held that the state constitution conferred a more expansive right to counsel in criminal cases than the federal constitution and it analyzed the textual, historical, and policy reasons for reaching a different result under the state constitution than the federal constitution.¹⁹ The opinion is infused with strong language about the Law Court’s “devotion to the Constitution of Maine” and its “grant of maximum freedom to the individual citizen.”²⁰ Similar sentiment continued for the next several years.²¹

In 1981, the court announced that the state constitutional protection against double jeopardy was “essentially like” the federal constitutional analogue.²² But that Maine would only “heed” the U.S. Supreme Court decisions “in two respects:” “as precedentially controlling . . . of the federal Constitution’s protection against double jeopardy” and “as most helpful guides regarding the scope of the protection against double jeopardy afforded by the Constitution of Maine.”²³

In 1982, the Law Court held that the state constitution conferred broader protections against involuntary confessions. In *State v. Caouette*, the court instructed that “federal decisions do not serve to establish the complete statement of controlling law but rather to delineate a constitutional minimum or universal mandate for the federal control of every State.”²⁴ The court emphasized that in criminal cases, voluntariness “must be decided by this Court—as a matter of Maine law.”²⁵

In 1984, the Law Court adopted a framework—the primacy approach—for deciding state constitutional questions. In *State v. Cadman*, another case about speedy trial guarantees, the court explained that “judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state

17. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)).

18. *State v. Collins*, 297 A.2d 620, 626-27 (Me. 1972) (emphasis in the original).

19. *State v. Sklar*, 317 A.2d 160, 163-72 (Me. 1974).

20. *Id.* at 171.

21. See, e.g., *Danforth v. State Dep’t of Health and Welfare*, 308 A.2d 794, 795 (Me. 1973) (holding that the Maine Constitution confers greater right-to-counsel protection than the federal constitution in child protective custody cases).

22. *State v. Howes*, 432 A.2d 419, 423 (Me. 1981).

23. *Id.*

24. *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982).

25. *Id.*

constitution.”²⁶ The court also explained that:

There is no deprivation of an accused’s Fourteenth Amendment rights when we determine that he has a remedy under our state constitution. It is only when . . . his claim under the state constitution fails . . . that we must then examine his conviction from a standpoint of federal constitutional law.²⁷

In 1985, the Law Court again applied the primacy approach and instructed in *State v. Flick*, that:

[W]e may use . . . Supreme Court opinions as ‘helpful guides’ to the underlying policy of both double jeopardy provisions, but our citation to those opinions should not be read as an acknowledgement that federal law requires the result we reach, nor to diminish our view of the independent sufficiency of article I, section 8 as the basis for decision.²⁸

Presently, this is the high water mark for state constitutionalism in Maine.

After *Flick*, and without obvious explanation, the court’s enthusiasm for state constitutional interpretation abruptly ended. The court’s own comfort level with state constitutional decision making cooled, for reasons left unsaid.

About a month after the Law Court decided *Flick*, it was confronted with the question of whether an obscenity ordinance was vague or overbroad in violation of the state and federal constitutional guarantees of freedom of expression and due process.²⁹ In *City of Portland v. Jacobsky*, the court began its analysis by reiterating the primacy approach.³⁰ But then it admonished: “Any difference in language between the Maine Constitution and the United States Constitution is, in the context of this case, insufficient to justify striking out on our own to develop a unique answer to the difficult definitional problem that has been long and often litigated under the First Amendment.”³¹ The court added: “It is unnecessary for us to declare, and we intimate no opinion whatsoever, whether in every case that may arise this provision of article I, section 4, and its federal counterpart will be found coextensive.”³²

This was markedly different than what the court had said previously. In the early 1980s, the Law Court instructed that United States Supreme Court case law was only a “helpful guide” for determining the breadth of state constitutional guarantees.³³ The court had specifically declared that the “vigor” of Maine constitutional

26. *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984).

27. *Id.*; see also *State v. Larrivee*, 479 A.2d 347, 349 (Me. 1984) (The state constitution “has been the primary protector of the fundamental liberties of Maine people since statehood was achieved. If we conclude that [a criminal defendant’s] claim . . . fails, we must then examine the failure to suppress from a standpoint of federal constitutional law.”); *State v. Rowe*, 480 A.2d 778, 781-83 (Me. 1984) (reaffirming the primacy approach and holding that defendant’s state constitutional double jeopardy protections were violated).

28. *State v. Flick*, 495 A.2d 339, 344 (Me. 1985).

29. *City of Portland v. Jacobsky*, 496 A.2d 646, 648 (Me. 1985).

30. *Id.* at 648.

31. *Id.* at 648-49.

32. *Id.* at 649.

33. *Howes*, 432 A.2d at 423; *Flick*, 495 A.2d at 344.

guarantees “does not *depend on* the interpretation of the federal Constitution.”³⁴ In other words, state constitutional protection was *sui generis*, not measured in relation to United States Supreme Court case law.³⁵ Nevertheless, in *Jacobsky*, the Law Court refused to consider the meaning of the state constitution independent of the federal constitution—declaring, without any analysis—that textual differences were immaterial.³⁶

State constitutionalism continued to wane for the remainder of the decade. For example, in 1988, the Law Court implicitly abandoned the primacy approach by examining a plaintiff’s free exercise claim first under the federal constitution and then under the state constitution.³⁷

B. Possible explanations as to why new judicial federalism has stalled in Maine

The *Flick* opinion was authored by Justice Louis Scolnik, an especially strident champion of state constitutionalism.³⁸ Justice Scolnik dissented in *Jacobsky*. Reflecting on that case in retirement, Justice Scolnik explained: “[I]n my dissent, and Justice Glassman joined me in that, I wrote that the obscenity ordinance violated the Maine constitution. And the rest of the court didn’t want to deal with the Maine constitution.”³⁹ Justice Scolnik retired in 1988. His absence may explain why some of the positive momentum of state constitutionalism stalled.

The primacy approach may be to blame, as well. The first problem with the primacy approach is that it incentivizes justices who are leery of state constitutional arguments to dispose of them quickly before moving briskly to more familiar territory, such as applying U.S. Supreme Court case law. The easiest way to do that is to simply declare that a state constitutional provision is “coextensive” with or “identical” to the federal constitution. Over time, these “coextensive” holdings become entrenched.

34. *Flick*, 495 A.2d at 343 (emphasis in original).

35. The best articulation of this principle comes from Justice Linde’s influential work: “The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand.” Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984). The Law Court favorably cited Justice Linde’s earlier work in the same vein. See *Flick*, 495 A.2d at 343 n.2 (citing *State v. Kennedy*, 666 P.2d 1316 (Or. 1983) (Linde, J.)); and *State v. Cadman*, 476 A.2d 1120, 1150 (Me. 1984) (citing Hans A. Linde, *First Things First: Rediscovering the States’ Bill of Rights*, 9 U. BALT. L. REV. 379, 383 (1980)).

36. *Jacobsky*, 496 A.2d at 648-49. The court did, however, separately analyze the text of the Maine Constitution in support of its conclusion that “the equal protection and due process clauses of the two Constitutions provide no additional protection in this case beyond that provided by the free exercise clauses.” *Blount v. Dep’t of Educ. & Cultural Servs.*, 551 A.2d 1377, 1385 (Me. 1988).

37. *Blount*, 551 A.2d at 1379-85 (Me. 1988) (remarkably, the Law Court utilized the state constitution to inform the federal constitutional outcome).

38. See, e.g., *Duncan v. Ulmer*, 159 Me. 266, 270-71, 191 A.2d 617, 620 (1963) (even before he ascended to the bench, Justice Scolnik advocated for broad protections under the state constitution).

39. Louis Scolnik, in an interview recorded by Marisa Burnham-Bestor, March 5, 1999, Lewiston, Maine. Transcript available at <http://digilib.bates.edu/collect/muskieor/index/assoc/HASH017d.dir/doc.pdf> (last viewed Jan. 20, 2016).

The other problem with the primacy approach is that it also applies to advocates and trial judges. They, too, are obligated to tackle state constitutional issues head-on, and first. And that really is asking a lot; trial judges have tremendous resource constraints that make it difficult (if not impossible) for them to chart untested constitutional waters in every case where a criminal defendant has asserted his state constitutional rights. The same problem holds true for advocates; the task of drafting original state constitutional arguments is equally daunting for them.⁴⁰ In order for the primacy approach to work—and for state constitutionalism to thrive—appellate courts have to provide ample guidance about what the state constitutional protections entail. If an appellate court is unwilling to consistently and thoroughly engage on state constitutional questions, then lower court judges and lawyers will question whether crafting those arguments is worth the effort. If it is not, then advocates will stop making those arguments; lower courts will not rule on them; and state constitutional arguments will not ascend to appellate courts. Over time, the cycle of avoidance will become engrained.

State constitutionalism may have petered out in Maine, but the news is not all bad. A revival of state constitutional law is still possible. There are ample doctrinal⁴¹ and utilitarian⁴² reasons in favor of state constitutional avoidance, but the court has never seriously discussed them. Thus, Maine has not foreclosed the possibility of a state constitutional revival. In fact, the Law Court has hinted that it is ready to reexamine its search and seizure case law and decide anew whether the state constitution offers broader protection than the federal constitution.⁴³ Advocates should encourage this effort.

II.

Step 2: Motivate the Court to independently interpret the state constitutional search and seizure clause

It is impossible to ignore the elephant in the room. Fourth Amendment jurisprudence is “an embarrassment.”⁴⁴ It is a “mass of contradictions and obscurities”⁴⁵ and “cobbled together from a series of inconsistent and bizarre

40. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980) (“[A]n independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis.”).

41. See, e.g., JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, §1.03[4] (collecting commentary).

42. See, e.g., Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 96-99 (2006) (identifying pragmatic reasons why state constitutionalism has lacked a strong foothold in the vast majority of American states).

43. *State v. Hutchinson*, 2009 ME 44, ¶ 18 n.9, 969 A.2d 923 (“Although this provision and the corresponding provision in the Fourth Amendment of the United States Constitution generally offer identical protection, we have also recognized that the Maine Constitution may offer additional protections.”) (internal citations omitted); *State v. Glover*, 2014 ME 49, ¶ 10 n.2, 89 A.3d 1077 (same).

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

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

results⁴⁶ which the Court does not even bother to defend.⁴⁷ Former and current members of the Court readily acknowledge that problems exist. Justice Harlan believed that “the law of search and seizure is due for an overhauling”⁴⁸ and Justice Scalia said that he “hate[d]” Fourth Amendment cases.⁴⁹ Why then would any state court purposefully tether itself to the U.S. Supreme Court’s Fourth Amendment jurisprudence on a matter of state constitutional concern? State constitutionalism in the search and seizure context has plenty of intuitive appeal.

The Law Court is right to tinker with the idea of a state constitutional revival for search and seizure issues for another reason. Search and seizure law has moved well beyond automobiles and pen registers. Today, courts are inundated with complicated questions about privacy and the continuing validity of the third-party doctrine, and computer searches. Over time, these questions will only increase in frequency and complexity. By design, the U.S. Supreme Court will be much slower to provide answers than state high courts, and answers are sorely needed. Computers are ubiquitous. Beat-level cops need to know what to do with them and citizens need to know whether any expectation of computing privacy exists.

Even if one wanted to, a state high court may not have the luxury of waiting to hear what the U.S. Supreme Court will say. Courts that have thus far either ignored or adopted a lockstep approach to state constitutional law—expressly or by default—may be pressed to chart an independent course.

Of course, courts may be pressed into action regardless of whether they want to ground the source of authority for their decisions in their state constitutions or guesswork about what the federal constitution might protect. But, courts that want to avoid being reversed,⁵⁰ and criminal defense attorneys advocating for the broadest possible protections for their clients, will pick the former over the latter.

Simply declaring that the state and federal constitutions are “coextensive” or “identical,” as the Law Court has done, is no panacea. “Coextensive” is not a constitutional default; rather, it is an affirmative statement of the law which, like everything else, demands support. In criminal procedure cases implicating state constitutional guarantees, lawyers on both sides must engage in state constitutional research and analysis, and a court, through its own examination, must decide which side has the better argument. “Win or lose, state constitutional arguments must still be considered and analyzed.”⁵¹ State constitutional construction is simply

46. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).

47. Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 28 (1988).

48. *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

49. Antonin Scalia, Associate Justice of the United States Supreme Court, in an interview recorded by Susan Swain, June 19, 2009, Washington, D.C. Transcript, <http://www.c-span.org/video/?286079-1/supreme-court-justice-scalia> (last viewed Jan. 20, 2016).

50. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”).

51. Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 420 (2004).

unavoidable and, in a jurisdiction like Maine, most, but not all, of that work will be original.

The task is not as daunting as it sounds. Advocates and judges have no need to fear either originalism or the balancing of contemporary values.

A. History and originalism

There is no need for anyone to spend weeks cramped in dusky archives. In the search and seizure context, history provides a justification for an independent state constitutional analysis, and it suggests whether the state constitution confers broader protections, but it will not supply any meaningful answers about the “right” legal outcome. The lively discussion in academic circles about the merits of an originalist approach to search and seizure issues⁵² should not dissuade front-line lawyers and judges—who anyways lack the time and resources to examine the intricacies of nineteenth century common law—from advancing state constitutional arguments. The historical argument is most relevant to the binary question of whether a state constitutional provision confers greater rights than the federal counterpart, not what that protection precisely entails.

For example, suppose a court must decide whether the Bangor Police Department needs a warrant to search for text messages maintained by a foreign corporation on a server outside the United States. History informs whether the state constitution offers greater privacy protections than the federal constitution, but a historical analysis will not “solve” the problem. The right “answer” to the case does not lay buried in antiquated case law or custom.

Nevertheless, judges almost certainly take comfort in historically-based arguments for pragmatic reasons: decisions anchored by a historical analysis may be perceived by the public as more legitimate, and may better insulate a judge from public accusations of judicial rulemaking.⁵³ This concern is particularly acute in cases recognizing broader constitutional protections for criminal defendants.⁵⁴ But, historical arguments only go so far. Judges who would deny more generous privacy protections equally open themselves to attack for trying to analogize modern technological innovations to some nineteenth century relic. Judges who attempt this feat do so at their own peril.⁵⁵

52. See, e.g., Amar, *supra* note 10; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

53. See Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. REV. L. & SOC. CHANGE 749, 790 (“State courts are significantly more likely to adopt dependent interpretations when judges face election, and significantly more likely to adopt independent interpretations when they do not.”); Sklansky, *supra* note 52, at 1772 (Constitutional originalism legitimizes results by “attributing outcomes not to unelected judges but to the collective determination of an older and particularly revered generation.”).

54. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

55. This problem is not shared by other criminal procedure guarantees. For example, in *Crawford v. Washington*, 541 U.S. 36, 43 (2004), the Court traced the origins of the Confrontation Clause “to Roman times,” and that was appropriate because cross-examination is in no sense innovative.

B. Balancing contemporary values

More to the point, search and seizure jurisprudence—at least in the Fourth Amendment context—reflects the balancing of competing interests.⁵⁶ And the nature of those interests, and whether they are furthered by the challenged law enforcement activity, are evaluated considering contemporary concerns.⁵⁷ For example, when deciding whether a person has a “legitimate expectation of privacy,” the Court has accounted for the fact that the search occurred in a “public school locker room;”⁵⁸ it has considered the “operational realities of the workplace;”⁵⁹ and it has made assumptions about the public’s awareness of the modern booking procedures.⁶⁰ In other words, the inquiry focuses on the present, not the past.

For better or worse, Fourth Amendment balancing is not objective either. Balancing “permits—indeed, requires—judges to rely upon their personal values.”⁶¹ These “values” almost certainly reflect contemporary notions of fairness and justice, as well. Judges who are squeamish about interpreting state constitutional provisions using highly subjective methods should be reassured by the U.S. Supreme Court’s resort to precisely that when discerning the Fourth Amendment’s meaning. Insofar as search and seizure jurisprudence is concerned, decisions that reflect a judge’s contemporary, personal predilections are probably unavoidable.⁶²

Justice Scalia and other members of the Court have at times argued for a historical approach to Fourth Amendment questions.⁶³ Once, Justice Scalia, writing for a majority of six, declared that in applying the Fourth Amendment, the Court must first ask whether the challenged conduct “was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”⁶⁴ But this view

56. See Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 11-14 (2013) (“[C]ourts have used balancing as the primary tool to determine the scope of the Fourth Amendment, the definition of a search, the reasonableness of a search, the reasonableness of a seizure, the meaning of probable cause, the level of suspicion required to support stops and detentions, the scope of the exclusionary rule, the necessity of obtaining a warrant, and the legality of pretrial detention of juveniles.” (citations omitted) (internal quotation marks omitted)); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1178-84 (1988) (documenting the Supreme Court’s increasing use of a Fourth Amendment balancing test).

57. See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 487-88 (2011) (“Equilibrium-adjustment acts as a correction mechanism. When judges perceive that changing technology or social practice significantly weakens police power to enforce the law, courts adopt lower Fourth Amendment protections for these new circumstances to help restore the status quo ante. On the other hand, when judges perceive that changing technology or social practice significantly enhances government power, courts embrace higher protections to counter the expansion of government power.”).

58. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

59. *Nat’l Treasury Emps. v. Von Raab*, 489 U.S. 656, 671 (1989) (citations omitted).

60. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

61. Strossen, *supra* note 56, at 1184.

62. *But see id.* at 1208-54 (discussing the least intrusive alternative analysis as a substitute for the Court’s balancing approach).

63. See Sklansky, *supra* note 52, at 1760.

64. *Id.* (citing *Wyoming v. Houghton*, 526 U.S. 295 (1999)).

has not taken hold since.⁶⁵ “Reasonableness”—the “touchstone” of Fourth Amendment jurisprudence⁶⁶—“is not some set of specific rules, frozen in 1791 or 1868 amber.”⁶⁷

Importantly, the Law Court has also hinted that a balancing approach is the proper methodology for analyzing the breadth of article I, section 5. The Court has instructed that, “weighing the defendant’s right to be secure in his possessions against the interests sought to be advanced by the State, we hold that the search complained of does not offend Article I, § 5 of the Maine Constitution.”⁶⁸ This is utterly uncontroversial; again, it is precisely how the U.S. Supreme Court considers search and seizure questions. Unless or until the U.S. Supreme Court fundamentally changes its approach to Fourth Amendment issues, the Law Court will almost certainly continue to embrace this balancing construct for deciding search and seizure issues. If the Law Court has disdain for the Supreme Court’s balancing analysis it has not said so. This leaves advocates free to expound on modern policy concerns, which can be done without much effort and is not as foreign a task as pouring over historical texts.

III.

Step 3: Interpret the state constitutional search and seizure clause

The prevailing view today is that Maine’s search and seizure clause is “coextensive” with or “identical” to the Fourth Amendment. But an in-depth examination of Maine’s state constitutional search and seizure jurisprudence shows otherwise.

A. Intuition

Are the state and federal search and seizure clauses identical? The question seems to answer itself. Maine’s search and seizure clause is textually different than the Fourth Amendment.⁶⁹ The clauses were not drafted simultaneously (not even close), nor were they drafted by the same authors. The purpose for each clause is markedly different: the Fourth Amendment limits the federal government; article I, section 5 operates as a limitation on state actors. Even post-Incorporation, the function of each clause remains distinct. Whereas the Fourth Amendment embodies bottom-line constitutional safeguards that reflect federalism concerns, thereby empowering states to decide for themselves whether additional protections might

65. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 930 (2002) (in Fourth Amendment cases, the Justices “consult history on a selective, rather than a systematic, basis and remain unsettled about the influence of history when determining the meaning and scope of the Amendment”).

66. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

67. Amar, *supra* note 10, at 818. At most, the definition of “reasonableness” “may be guided”—but not controlled—“by the meaning ascribed to it by the Framers of the Amendment.” *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

68. *State v. Dubay*, 338 A.2d 797, 798 (Me. 1975).

69. Compare U.S. CONST. amend. IV, with ME. CONST. art. I § 5.

exist for their own citizens; article I, section 5 is intended to do precisely that: reflect the rights of “the people of Maine” in order to “provide for *our* mutual defense, promote *our* common welfare, and secure to *ourselves* and *our* posterity the blessings of liberty”⁷⁰ The historical record, though scant, does nothing to contradict the strong intuition that the two constitutions are not “identical.”

The Act of Separation of 1819 granted Maine’s independence from Massachusetts. The creation and adoption of a constitution was a prerequisite for statehood, and on October 11, 1819, 274 delegates assembled at the Cumberland County courthouse in Portland to draft that document.⁷¹ The delegates chose William King to preside, and he in turn appointed thirty-three delegates to a committee to draft the constitution.⁷² The committee completed its work within a week.⁷³ The Constitutional Convention adopted the committee’s draft with only a few changes, unrelated to the search and seizure clause.⁷⁴

The committee’s quick work was made possible, at least in part, because members borrowed heavily from other constitutions: Connecticut, Delaware, Indiana, Kentucky, New Hampshire, and the United States.⁷⁵ Importantly, the committee considered sources other than the federal constitution. Article I, section 5 is a manifestation of the committee’s insular focus: to decide the breadth of constitutional protection afforded to Mainers, considering the particular concerns and anxieties of Maine citizens. It is not surprising or even remarkable that Mainers shared many of the concerns of their nation-wide brethren. This does not mean, however, that the concerns were identical.

Perhaps the most convincing evidence that Maine’s search and seizure clause is not “identical” in meaning to the Fourth Amendment is that for nearly 150 years—between the grant of statehood in 1820 and incorporation in 1961—Maine courts were forced to develop their own search and seizure jurisprudence apart from any federal guarantee. Law Court decisions from that era unambiguously reveal robust privacy protections, mandated by the state constitution. And these rights are not measured—or somehow limited—either by the Fourth Amendment or U.S. Supreme Court decisions from the same era about search and seizure issues, generally. U.S. Supreme Court case law was not consulted at all.

The breadth of article I, section 5 protections was largely—and most notably—defined by Maine’s pioneering temperance movement. Maine passed a variety of different statutes to further that aim, nearly all of which were tested against the guarantees protected by the state constitution. By approving or disapproving of various statutory enactments, vague constitutional outlines begin to appear. More important than that, however, is the methodology the court used for analyzing the constitutionality of the statutes, and the overall tone of the opinions. This informs the general strength of the right at stake.

70. ME. CONST. preamble (emphasis added).

71. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 4-5 (2nd ed. 2013).

72. *Id.* at 5.

73. *Id.*

74. *Id.* at 7.

75. *Id.* at 6-7.

B. Statehood to Incorporation

1. Balancing and accounting for contemporary life

One salient feature of these early cases is the court's willingness to describe and weigh the significance of the right implicated by a search or seizure against the practical limitations facing magistrates and justices of the peace. This augurs in favor of an article I, section 5 "reasonableness" analysis that balances Maine-specific concerns.

For example, recognizing the difficulty of distinguishing between legally and illegally possessed liquor (which turned on what the owner intended to do with it), the court in 1852 relaxed the particularity requirement, noting that the constitution was not designed "to prevent the accomplishment of any useful purpose, by searches and seizures" and that the framers did not intend "to require a designation of the thing to be searched for, so special and particular as to prevent the accomplishment for any beneficial purpose by a search-warrant."⁷⁶ This sentiment may have state-friendly overtones, but the court did not always tack that way.

Balancing cut in the opposite direction when the search of a home was at issue; the court believed that privacy interests there are unsurpassed.⁷⁷ In 1925, Maine had little difficulty embracing the Castle Doctrine and extending it to the curtilage surrounding the home⁷⁸—relying on English common law and other states as sources of authority, without regard for federal case law on the subject.⁷⁹

Importantly, when considering the nature and significance of the right at stake, Maine never looked to federal courts for answers. For example, in 1908, the court sustained exceptions to a warrant authorizing a search of "a valise alleged merely to be in the possession of the defendant, but not alleged to be in any definite and fixed locality or place."⁸⁰ If there was corollary federal case law at the time about the particularity requirement for, or the privacy interests imbued in, mobile objects, the court did not cite it.

Since 1880, Maine has held that the state's limited power to infringe upon the privacy and possessory interests of its citizens "is an extraordinary one, and can only

76. *State v. Robinson*, 33 Me. 564, 572-73 (1852).

77. *Flaherty v. Longley*, 62 Me. 420, 422 (1873); *State v. Duane*, 100 Me. 447, 62 A. 80 (1905) (particularity requirement strictly construed where warrant could be read to authorize the search of three homes); *State v. Brann*, 109 Me. 559, 84 A. 266 (1912).

78. *Marshall v. Wheeler*, 124 Me. 324, 128 A. 692 (1925) (recognizing that a shed, connected with the house and used for household purposes falls within the "curtilage" of the "dwelling house").

79. See Brendan Peters, Note, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 952-58 (2004). The concept of curtilage was prevalent in English common law and in early American cases. See e.g. *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603). Curtilage—more specifically, structures within the curtilage—were first recognized within the ambit of Fourth Amendment protection in *Amos v. United States*, 255 U.S. 313, 314-17 (1921). But, it was not until dictum in *Oliver v. United States*, 466 U.S. 170, 188 (1984), that the curtilage includes not only structures, but also the land surrounding the house.

80. *State v. Fezzette*, 103 Me. 467, 471, 69 A. 1073, 1075 (1908); cf. *State v. Knowlton*, 70 Me. 200, 201 (1879) (warrant alleging that intoxicating liquors were kept "in a certain wagon on the fair ground on the easterly side of Union Hall, in Searsport," was sufficiently particular) (quotations omitted).

be justified on the ground that the public good and the prevention of crime require it.”⁸¹ This is paradigmatic balancing.

2. *Narrow exception(s) to the warrant requirement*

In 1852, Maine recognized that Article I, section 5 did not “forbid the arrest of deserters from the army without warrants.”⁸² Other recognized exceptions are more difficult to discern. None of Maine’s early cases permit a warrantless search for incriminating evidence. However, Maine may have recognized a very “jealously guarded”⁸³ exception to the warrant requirement for the seizure of evidence.

Early Maine cases do not expressly repudiate what we now think of as the plain-view exception to the warrant requirement, but early courts took great care to protect possessory interests and were deeply concerned when property was seized without a warrant. Again, the court did so recognizing the importance of those interests *to Mainers* and without mention of any federal authority. For example, in 1854, the court held that a warrant authorizing the seizure of liquor did not also implicitly authorize the seizure of the casks or vessels that held the liquor; the justice of the peace was not authorized to seize or destroy the vessels.⁸⁴

Troubled by the fact that a Kennebec County deputy sheriff seized the plaintiff’s beer without a warrant, and worried about the possibility of spoilage in the “hot summer weather,” the court in 1880 declared:

What is a reasonable time to enable the officer to procure a warrant, must be determined by the facts of the case; but when no sufficient reason is given for longer delay, we think it should not exceed twenty-four hours from the time of seizure.⁸⁵

Because the deputy sheriff held the beer for six days, he was liable for conversion and ordered to pay for the cost of the beer, plus interest.⁸⁶

The court reached the same result in 1920, in a case involving the Game Warden’s seizure of a bull moose. Because the warden seized the moose without a warrant, and did nothing thereafter to bring suit or take steps to give the plaintiff a hearing before a court of competent jurisdiction, the warden was “an acknowledged trespasser ab initio . . . holding the property without any legal authority or justification whatever.”⁸⁷ These cases also plainly suggest that article I, section 5 confers no inherent authority on an officer to undertake any search or seizure wholly

81. *Weston v. Carr*, 71 Me. 356, 357-58 (1880).

82. *Hutchings v. Van Bokkelen*, 34 Me. 126, 131 (1852).

83. *Woods v. Perkins*, 119 Me. 257, 261, 110 A. 633, 636 (1920) (Article I, section 5 embodies a “fundamental principle of civil liberty [that] still subsists, and must be jealously guarded by the courts against invasion.”).

84. *Black v. McGilvery*, 38 Me. 287, 288-89 (1854).

85. *Weston v. Carr*, 71 Me. 356, 358 (1880); *State v. Riley*, 86 Me. 144, 146, 29 A. 920, 920 (1893) (“Waiting eight days after a seizure is made before process is obtained whereby to justify the seizure is unreasonable.”). *But see* *State v. Nadeau*, 97 Me. 275, 276, 54 A. 725, 726 (Me. 1903) (Where the defendant was arrested 23 days after the arrest warrant issued, “[t]he report of the evidence does not warrant the finding that the officer was either dilatory or negligent in obtaining or serving the warrant.”).

86. *Weston*, 71 Me. at 358.

87. *Woods v. Perkins*, 119 Me. 257, 262, 110 A. 633, 636 (1920).

outside the warrant process.

At best, these cases reveal a very limited exception to the warrant requirement. The state may seize evidence, but within 24 hours thereafter, they must test the constitutionality of that seizure through the warrants process. This is markedly different than the Fourth Amendment's strictures, which impose no obligation on the part of the government to obtain a warrant authorizing the seizure post hoc.⁸⁸

3. Exclusionary rule

It is no surprise that some early cases interpreting article I, section 5 reject the exclusion of evidence as a remedy for an unlawful search or seizure.⁸⁹ There was no need to exclude evidence because the accused had an alternative way to vindicate his interests and remedy his loss: a civil suit for trespass. Time and again, Maine refused to exclude evidence *because* of this other avenue of litigation. For example, in 1873, the court in *State v. McCann*⁹⁰ explained: "If the sheriff has violated any law he is responsible for such violation A severance is made by law and in the proceeding against the person, it is immaterial what has been done with the thing."⁹¹ In 1874, the court reiterated in *State v. Plunkett*: "If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence"⁹²

However, early case law also holds that a court *may* exclude evidence to remedy a state constitutional violation. In *State v. Riley*,⁹³ the officer seized liquors without a warrant and delayed for more than twenty-four hours to procure a warrant and was, therefore, liable as a trespasser to the owner of the liquors for their value.⁹⁴ Nevertheless, in 1893, the court explained that the failure to exclude unlawfully obtained evidence would lead to an absurd result:

It would surely be an odd spectacle to see an owner of liquors punished for having such liquors in his possession for an illegal purpose, and the officer also punished for seizing the liquors from him under a pretended form of law. The two things do not seem consistent with each other.⁹⁵

88. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (discussing the limitations of the plain-view exception; no mention is made of post hoc authorization for the initial seizure through the warrants process).

89. *State v. McCann*, 61 Me. 116, 117-18 (1873) ("It is objected that the seizure was illegal, the officer having proceeded to search without any warrant. Suppose it was so, that is no defense for the defendant's violation of law. If the sheriff has violated any law he is responsible for such violation, but that will not constitute any justification or excuse for the defendant."); *State v. Plunkett*, 64 Me. 534, 537-38 (1874); *State v. Burroughs*, 72 Me. 480, 481 (1881); *State v. Schoppe*, 113 Me. 10, 16, 92 A. 867, 869 (1915).

90. *McCann*, 61 Me. at 117-18.

91. *Id.* at 118.

92. *Plunkett*, 64 Me. at 537.

93. *State v. Riley*, 86 Me. 144, 29 A. 920 (1893).

94. *Id.* at 920.

95. *Id.*

The court noted that, “[a] seizure proceeding without an actual seizure would be an anomaly. And an illegal seizure is no seizure.”⁹⁶

When the evidence was not suppressed, and the accused was forced to avail himself of a civil remedy, the court often did not hesitate to find against a sheriff, even if he was acting under the authority of a warrant. Generally, “[i]t was no part of the officer’s duty to examine into and decide upon the constitutionality or construction of the statute which authorized his warrant,”⁹⁷ but in 1880, it was also true that a warrant could be “so irregular and insufficient upon its face as to afford no protection to the officer who proceeded to make an arrest upon it.”⁹⁸ In other words, liability for trespass was real, not illusory.

The common thread running through this grouping of cases is reassurance that *some* mechanism existed—exclusion or trespass—to vindicate the violation of the accused’s constitutional rights. Deterrence of police misconduct, the current rationale for the Fourth Amendment exclusionary rule,⁹⁹ is the intended consequence of civil liability, but there is no reason to presume that deterrence is the *only* rationale for the article I, section 5 exclusionary rule. Some current members of the Law Court have already recognized this, albeit in the context of confessions:

[T]he judicially-crafted exclusionary rule arising from the due process clauses of our state and federal constitutions was created to deter improper conduct by the State and to prevent the State from using its ill-gotten gains against a citizen.¹⁰⁰

The different motivations behind the state and federal exclusionary rules provides further proof that the search and seizure clauses are not “identical.” In fact, the state constitution offers greater protection. There is no reason the Law Court must follow the U.S. Supreme Court’s exclusionary rule jurisprudence lockstep. Doing so denies the importance of these early cases.

C. Incorporation to 1990

As was true with state constitutionalism generally, the Law Court was already hard at work interpreting the state constitutional search and seizure clause before any academic call for new judicial federalism.¹⁰¹ After the U.S. Supreme Court decided in *Mapp v. Ohio*¹⁰² that Fourth Amendment protections were enforceable against the States, the Law Court was forced to grapple with the relationship between the state and federal constitutional search and seizure clauses. From 1961 to 1980, the Law Court published twenty-five opinions that contained references to both the Fourth

96. *Id.*

97. *State v. McNally*, 34 Me. 210, 221 (1852).

98. *Harwood v. Siphers*, 70 Me. 464, 467 (1880).

99. *United States v. Leon*, 468 U.S. 897, 906 (1987).

100. *State v. Rees*, 2000 ME 55, ¶ 44, 748 A.2d 976 (Saufley, J., dissenting) (emphasis added).

101. See William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977), discussed *supra* in text accompanying note 167.

102. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

Amendment and Maine's state constitutional analogue: article I, section 5.¹⁰³

The best that can be said is that the independence of Maine's search and seizure clause survived the 1970s and 1980s battered, but intact. The Law Court did not articulate any broader state constitutional protections, but it refrained from lockstep adoption of Fourth Amendment jurisprudence for state constitutional purposes. Still, the primacy approach that the court utilized in other state constitutional criminal procedure contexts was never meaningfully extended to search and seizure cases.

In 1970, the Law Court mentioned the primacy rule in a search and seizure case for the first time—and then immediately and forever thereafter ignored it. In *State v. Hawkins*,¹⁰⁴ the court remarked: “While in the first instance, the legality of a search and seizure must be determined under State law, the State standard can be no lower than the constitutional standards applicable to the proceedings in the Federal Courts and under Federal prosecutions.”¹⁰⁵ The court then proceeded to analyze the case by exclusive reference to U.S. Supreme Court case law, while hinting that the state constitution might actually confer less individual protection.¹⁰⁶

In 1973, the Law Court made clear in *State v. Heald*¹⁰⁷ that it would not read the state constitutional Fourth Amendment analogue as expansively as it had the Fifth Amendment analogue, at least insofar as the remedy of evidentiary exclusion was concerned: because there was no textual support for doing so; *Mapp* aimed “to compel consistency” between state and federal criminal procedure; and because the court was “not persuaded” that the state constitution required more than what the Court held in *Mapp*.¹⁰⁸ The court offered no explanation as to why it was not persuaded.

In 1975, the court issued a trio of decisions concerning the relationship between the state and federal search and seizure protections. In *State v. Caron*,¹⁰⁹ a lone dissenting Justice suggested that the court should interpret the state constitutional search and seizure clause to reflect “the public policy of this State,” including its

103. The Law Court mentioned article I, section 5 of the Maine Constitution and the Fourth Amendment together in the same decision twenty-five times before 1980: *State v. MacKenzie*, 161 Me. 123, 210 A.2d 24 (Me. 1965); *State v. Howe*, 219 A.2d 116 (Me. 1966); *State v. Brochu*, 237 A.2d 418 (Me. 1967); *State v. Warner*, 237 A.2d 150 (Me. 1967); *Opinion of the Justices*, 255 A.2d 643 (Me. 1969); *State v. Cadigan*, 249 A.2d 750 (Me. 1969); *State v. Martelle*, 252 A.2d 316 (Me. 1969); *State v. Chapman*, 250 A.2d 203 (Me. 1969); *State Liquor Comm'n v. Gilbert*, 270 A.2d 876 (Me. 1970); *State v. Hawkins*, 261 A.2d 255 (Me. 1970); *State v. Hollander*, 289 A.2d 419 (Me. 1972); *State v. Smith*, 277 A.2d 481 (Me. 1971); *State v. O'Clair*, 292 A.2d 186 (Me. 1972); *State v. Stone*, 294 A.2d 683 (Me. 1972); *State v. Heald*, 314 A.2d 820 (Me. 1973); *State v. Barlow*, 320 A.2d 895 (Me. 1974); *State v. Koucoules*, 343 A.2d 860 (Me. 1974); *State v. Thibodeau*, 317 A.2d 172 (Me. 1974); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Hamm*, 348 A.2d 268 (Me. 1975); *State v. Paris*, 343 A.2d 588 (Me. 1975); *State v. Dubay*, 338 A.2d 797 (Me. 1975); *State v. Foisy*, 384 A.2d 42 (Me. 1978); *State v. Parkinson*, 389 A.2d 1 (Me. 1978); *State v. Fredette*, 411 A.2d 65 (Me. 1979).

104. *State v. Hawkins*, 261 A.2d 255 (Me. 1970).

105. *Id.* at 257.

106. *See id.* at 258; *see also* *State v. Brochu*, 237 A.2d 418, 424 (Me. 1967) (noting that the Supremacy Clause obligated Maine to adhere to the federal exclusionary rule, but searching for ways to avoid its application).

107. *State v. Heald*, 314 A.2d 820 (Me. 1973).

108. *Id.* at 829.

109. *State v. Caron*, 334 A.2d 495 (Me. 1975).

“intended high priority commitment” that article I, section 5 embody “full protection” from “the fruits of all unreasonable searches and seizures . . . in any proceeding.”¹¹⁰ In *State v. Dubay*,¹¹¹ the court, perhaps unintentionally, suggested a methodology—balancing—for deciding the breadth of the state constitutional search and seizure clause: “[W]eighing the defendant’s right to be secure in his possessions against the interests sought to be advanced by the State, we hold that the search complained of does not offend Article I, § 5 of the Maine Constitution.”¹¹² And in *State v. Paris*,¹¹³ the court took a huge step backwards when it framed the issue thusly: “[W]e are called upon to decide . . . whether this Court, in interpreting Article I, Section 5 of the Constitution of Maine, will deviate from the United States Supreme Court’s interpretations of the federal Constitution”¹¹⁴ This, of course, is a far cry from the primacy approach and the notion that the state constitutional guarantee is *sui generis*.

In 1979, the court admonished, again without any discussion, in *State v. Fredette*,¹¹⁵ that it would not suppress evidence under the state constitution if the evidence would not have been suppressed under the federal constitution as a matter of “established policy.”¹¹⁶

State constitutionalism, in the search and seizure context, did not improve in the following decade. Between 1980 and 1990, the Law Court had 14 opportunities to analyze the breadth of article I, section 5.¹¹⁷ Interestingly, two such cases returned to the Law Court on remand from the U.S. Supreme Court for consideration in light of evolving Fourth Amendment jurisprudence.¹¹⁸ But, this obvious instability in federal constitutional law did nothing to move the Law Court to develop its own search and seizure jurisprudence.

In 1981 and 1982, the Law Court made no attempt to disentangle state and

110. *Id.* at 507 (Dufresne, J., dissenting).

111. *State v. Dubay*, 338 A.2d 797 (Me. 1975).

112. *Id.* at 798.

113. *State v. Paris*, 343 A.2d 588 (Me. 1975).

114. *Id.* at 589.

115. *State v. Fredette*, 411 A.2d 65 (Me. 1979).

116. *See id.* at 67.

117. Twice during that time period, the Law Court refused to consider state constitutional arguments raised for the first time on appeal; those cases are not included in the tally. *See State v. Thornton*, 485 A.2d 952 (Me. 1984); *State v. Cote*, 518 A.2d 454, 455 n.1 (Me. 1986). The Law Court mentioned Article I, section 5 and the Fourth Amendment together in the same decision 14 times from 1980 to 1990: *State v. Clark*, 420 A.2d 240 (Me. 1980); *State v. Sweatt*, 427 A.2d 940 (Me. 1981). *See State v. Peakes*, 440 A.2d 350 (Me. 1982); *State v. Bouchles*, 457 A.2d 798 (Me. 1983); *State v. Patten*, 457 A.2d 806 (Me. 1983); *State v. Griffin*, 459 A.2d 1086 (Me. 1983); *State v. Fillion*, 474 A.2d 187 (Me. 1984); *State v. Thornton*, 485 A.2d 952 (Me. 1984); *State v. Thurlow*, 485 A.2d 960 (Me. 1984); *State v. Cote*, 518 A.2d 454 (Me. 1986); *State v. Marquis*, 525 A.2d 1041 (Me. 1987); *State v. Caron*, 534 A.2d 978 (Me. 1987); *State v. Pelletier*, 541 A.2d 1296 (Me. 1988); *State v. Pinkham*, 565 A.2d 318 (Me. 1989); *Hatfield v. Comm’r of Inland Fisheries and Wildlife*, 566 A.2d 737 (Me. 1989); *State v. Patterson*, 582 A.2d 1204 (Me. 1990).

118. *See State v. Patten*, 457 A.2d 806, 807 (Me. 1983) (on remand for reconsideration in light of *United States v. Ross*, 456 U.S. 798 (1982)); *State v. Thornton*, 485 A.2d 952 (Me. 1984) (on remand for consideration in light of *Oliver v. United States*, 466 U.S. 170 (1984)).

federal constitutional interpretation on search and seizure issues.¹¹⁹ Then, in 1983, the court decided its most important decision to date about the relationship between the state constitutional analogue, article I, section 5, and the Fourth Amendment.

In *State v. Bouchles*, the Law Court held that the newly-recognized “closed-container” component of the “automobile exception” to the Fourth Amendment’s warrant requirement announced in *United States v. Ross*,¹²⁰ also existed under the state constitution.¹²¹ The court whipsawed between reasons for and against tacking closely to the Fourth Amendment:

[W]e reject any straitjacket approach by which we would automatically adopt the federal construction of the fourth amendment ban of “unreasonable searches and seizures” as the meaning of the nearly identical provision of the Maine Constitution. On the other hand, the absence of Maine authority on the issue forces us to seek guidance from the precedents of other jurisdictions, including the federal, construing their similar constitutional search-and-seizure clauses. Furthermore, we cannot be blind to the immense body of fourth amendment precedent in both state and federal courts. Nor can we ignore the experience of the Supreme Court that culminated in its *Ross* decision, groping for a rule that would give law enforcement officers and courts clear guidance and at the same time preserve the limits imposed by history upon the *Carroll* exception for automobile searches. This court has had its own share of difficulty in following the doctrinal meanderings of the federal “closed container exception” to the *Carroll* rule.¹²²

The court concluded: “While we acknowledge a duty to declare independently the meaning of the search-and-seizure clause of the Maine Constitution, we should not plunge down doctrinal trails in disregard of the lessons of the federal experience.”¹²³

The court seems to have reached that conclusion with some reluctance, but also a good deal of relief—gratitude, even—that it could heavily rely on the U.S. Supreme Court’s “helpful guides” and avoid forging ahead alone.

The court decided *State v. Patten* the same day as *Bouchles*, and these companion cases raised identical issues.¹²⁴ Instead of repeating what it had said in *Bouchles*, the Law Court summarized it this way:

For the reasons stated . . . in . . . *Bouchles* . . . , we hold that a warrantless search of a vehicle for contraband, that is constitutionally permissible under the long-established “automobile exception,” may be validly extended to a container, found in the vehicle, that is capable of containing the contraband. *In this regard* we find no reason to construe article I, section 5 of the State Constitution any differently that

119. *State v. Sweatt*, 427 A.2d 940, 945 (Me. 1981) (“This Court has never interpreted the Maine Constitution differently from the United States Constitution on the issue of standing to bring a motion to suppress.”); *State v. Peakes*, 440 A.2d 350, 353 (Me. 1982) (“[T]he description [of the place to be searched] in the affidavit provides the necessary reasonable certainty required under our previous interpretations of Article I, § 5 of the Maine Constitution and the Fourth Amendment to the United States Constitution.”).

120. *United States v. Ross*, 456 U.S. 798 (1982).

121. See *State v. Bouchles*, 457 A.2d 798, 799 (Me. 1983).

122. *Id.* at 801-02 (citations omitted).

123. *Id.* at 802.

124. *State v. Patten*, 457 A.2d 806, 807 (Me. 1983).

the fourth amendment of the federal constitution.¹²⁵

The Law Court stretched *Patten* far beyond its original meaning in the resulting decades by repeatedly citing an excerpt of that passage—“we find no reason to construe article I, section 5 of the State Constitution any differently than the fourth amendment to the federal constitution”—in search and seizure cases raising a variety of different questions.

After *Bouchles* and *Patten*, the court’s next search and seizure case to mention the state constitution, *State v. Griffin*, did so only in passing and in the context of an “investigatory stop” on the street.¹²⁶ Despite the decision’s paucity of analysis, successive courts also cited it, like *Patten*, for the proposition that the state and federal constitutional guarantees were synonymous in other search and seizure iterations.¹²⁷

State constitutional search and seizure case law in the 1980s ended on a decidedly low point in 1987, with *State v. Marquis*.¹²⁸ The Law Court found no Fourth Amendment violation; ignored whether a violation might have occurred under the state constitution; and therefore declared it “unnecessary to decide the issue whether there is a separate exclusionary rule under article I, section 5 of the Maine Constitution.”¹²⁹

Importantly, with the exception of *Bouchles*, in the 1970s and 1980s, the court never explained why the result was the same under the state and federal constitutions. If the court was seriously concerned about any of the doctrinal criticisms of state constitutionalism, it never let on.

D. 1991 to the present

The Law Court’s treatment of state constitutional search and seizure issues in the 1970s and 1980s gave advocates no reason to push for the recognition of broader protections. Not surprising, from 1991 to the present, the Law Court has had only thirty-eight occasions to consider the meaning of the state constitutional search and seizure clause. The result can only be described as a full-scale retreat from the state

125. *Id.* at 811 (emphasis added).

126. *State v. Griffin*, 459 A.2d 1086, 1089 (Me. 1983) (“The Fourth Amendment to the United States Constitution and Article I, Section 5 of our Maine Constitution do require that the officer’s objective observations, coupled with any relevant information he may have, together with the rational inferences and deductions he may draw and make from the totality of the circumstances, be sufficient to reasonably warrant suspicion of criminal conduct on the part of the party or parties subjected to the investigatory stop or detention, criminal conduct which has taken place, is occurring, or imminently will occur.”) (citation omitted).

127. *See, e.g.*, *State v. Fillion*, 474 A.2d 187, 189 (Me. 1984) (investigatory stop); *State v. Thurlow*, 485 A.2d 960, 963 (Me. 1984) (investigatory stop); *State v. Caron*, 534 A.2d 978, 978 (Me. 1987) (automobile seizure); *State v. Pelletier*, 541 A.2d 1296, 1296 (Me. 1988) (automobile seizure); *State v. Pinkham*, 565 A.2d 318, 319 (Me. 1989) (automobile seizure); *Hatfield v. Comm’r of Inland Fisheries and Wildlife*, 566 A.2d 737, 740 (Me. 1989) (“riverblock” operation); *State v. Patterson*, 582 A.2d 1204, 1206 (Me. 1990) (automobile roadblock).

128. *State v. Marquis*, 525 A.2d 1041 (Me. 1987).

129. *Id.* at 1043.

constitutionalism of the early 1980s.¹³⁰

Overwhelmingly—twenty-five times—the Law Court simultaneously mentioned article I, section 5 and the Fourth Amendment, and then applied either Supreme Court case law, Maine case law interpreting United States Supreme Court case law, or both, without any recognition or discussion of a possible distinction between the two constitutional provisions. Often, the court expressly decided the Fourth Amendment question and altogether ignored the state constitutional issue.¹³¹ Remarkably, the court has done this even while recognizing uncertainty and division among lower courts about the correct application of United States Supreme Court precedent,¹³² and also while purporting to balance the competing public policy interests at stake in reaching the correct (Fourth Amendment) outcome.¹³³ The promising news for state constitutionalists is that the Law Court appears to have stopped doing this.¹³⁴

Less often—seven times—the Law Court has cited the state and federal search and seizure clauses and declared either that they are “coextensive;”¹³⁵ confer “identical”¹³⁶ protections; or that article I, section 5 confers no broader protection.¹³⁷ On one occasion, the court suggested that article I, section 5 offered less protection than the Fourth Amendment.¹³⁸ Twice, recently, the court has suggested—without

130. During this same time period, the Law Court has reaffirmed its commitment to broader state constitutional protections in other criminal procedure contexts. *See, e.g.*, *State v. Rees*, 2000 ME 55, ¶¶ 5-9, 748 A.2d 976.

131. *State v. Tarantino*, 587 A.2d 1095 (Me. 1991); *State v. Dulac*, 600 A.2d 1121 (Me. 1992); *State v. Burnham*, 610 A.2d 733 (Me. 1992); *State v. Fitzgerald*, 620 A.2d 874 (Me. 1993); *State v. Nelson*, 638 A.2d 720 (Me. 1994); *State v. Cusack*, 649 A.2d 16 (Me. 1994); *State v. Hillsgrove*, 658 A.2d 1100 (Me. 1995); *State v. Allard*, 674 A.2d 921 (Me. 1996); *State v. Dignoti*, 682 A.2d 666 (Me. 1996); *State v. Lehman*, 1999 ME 124, 736 A.2d 256; *State v. Connors*, 1999 ME 125, 734 A.2d 195; *State v. Burgess*, 2001 ME 117, 776 A.2d 1223; *State v. O'Rourke*, 2001 ME 163, 792 A.2d 262; *State v. Mayberry*, 2001 ME 176, 787 A.2d 135; *State v. LaFond*, 2002 ME 124, 802 A.2d 425; *State v. Tozier*, 2006 ME 105, 905 A.2d 836; *State v. Cormier*, 2007 ME 112, ¶¶ 44, 57, 928 A.2d 753 (Levy, J., dissenting); *State v. Rabon*, 2007 ME 113, 930 A.2d 268; *State v. Blackburn*, 2008 ME 1148, 960 A.2d 1148; *State v. Rees*, 2010 ME 30, 991 A.2d 806; *State v. LaPlante*, 2011 ME 85, 26 A.3d 337; *State v. McPartland*, 2012 ME 12, 36 A.3d 881; *State v. Bailey*, 2012 ME 55, 41 A.3d 535; *State v. LaForge*, 2012 ME 65, 43 A.3d 961; *State v. Whitney*, 2012 ME 105, 54 A.3d 1284.

132. *See, e.g.*, *O'Rourke*, 2001 ME 163, ¶¶ 18-19, 792 A.2d 262.

133. *See, e.g.*, *LaForge*, 2012 ME 65, ¶ 10, 43 A.3d 961; *Whitney*, 2012 ME 105, ¶¶ 13-17, 54 A.3d 1284.

134. The last time the Law Court simultaneously cited both state constitutional search and seizure clauses, and then altogether ignored Article I, section 5 was in *Whitney*, 2012 ME 105, 54 A.3d 1284 (2012).

135. *State v. Gulick*, 2000 ME 170, ¶ 9 n.3; 759 A.2d 1085 (identical and coextensive); *Clifford v. MaineGeneral Med. Ctr.*, 2014 ME 60, ¶ 67 n.21; 91 A.3d 567 (coextensive); *State v. Martin*, 2015 ME 91, ¶ 17 n.2, 120 A.3d 113.

136. *State v. Patterson*, 2005 ME 26, ¶ 10, 868 A.2d 188; *State v. Gorneault*, 2007 ME 49, ¶ 6 n.2, 918 A.2d 1207.

137. *State v. Ullring*, 1999 ME 183, ¶ 21 n.7, 741 A.2d 1065 (protection not broader); *State v. Ireland*, 1998 ME 35, ¶ 6 n.2, 706 A.2d 597 (protection not greater).

138. *State v. Hider*, 649 A.2d 14, 15 (Me. 1994) (“there is no ‘knock and announce’ requirement in Maine”). *But see Wilson v. Arkansas*, 514 U.S. 927 (1995) (holding that the Fourth Amendment

further elaboration—that article I, section 5 might confer greater protection than the Fourth Amendment.¹³⁹

In addition, the Law Court has sporadically presumed that article I, section 5 is deserving of its own analysis, at least partially independent from United States Supreme Court case law,¹⁴⁰ and it has attempted to explain how the state and federal guarantees might be different.

In *State v. Melvin*,¹⁴¹ the court considered whether the stop and seizure of the defendant’s tractor-trailer was constitutional pursuant to the administrative inspection exception to the warrant requirement.¹⁴² The United States Supreme Court set out a three-part test for analyzing the question in *New York v. Burger*.¹⁴³ After analyzing the question under the Fourth Amendment, the court explained:

Nor do we ignore that our state constitutional analog to the Fourth Amendment—article I, section 5 of the Maine Constitution—stands as a reminder that, in discharging our constitutional responsibilities, we should not rigidly restrict our inquiry to the *Burger* criteria if, by doing so, we fail to account for the core state constitutional values that all searches and seizures must not be “unreasonable.”¹⁴⁴

The court then inexplicably concluded that the search was reasonable—under both the state and federal constitutions—because it was “based on probable cause and in accordance with the automobile exception to the Fourth Amendment’s warrant requirement.”¹⁴⁵

In *State v. Trusiani*,¹⁴⁶ the court held that the defendant’s garage fell within the state and federal constitutional protection afforded to the curtilage of a home and, in support, it cited to a decision from 1925, in which the court noted that a shed was considered part of the dwelling-house at common law.¹⁴⁷

This history—a decidedly mixed bag of mostly superficial state constitutionalism and outright state constitutional avoidance—is not unique.¹⁴⁸ The salient point is that the Law Court has at times attempted, with various degrees of

incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry).

139. *State v. Hutchinson*, 2009 ME 44, ¶ 18 n.9, 969 A.2d 923 (“Although this provision and the corresponding provision in the Fourth Amendment of the United States Constitution generally offer identical protection, we have also recognized that the Maine Constitution may offer additional protections.”) (internal citations omitted); *State v. Glover*, 2014 ME 49, ¶ 10 n.2, 89 A.3d 1077 (same).

140. *See, e.g., State v. Kremen*, 2000 ME 117, ¶ 29, 754 A.2d 964 (Alexander, J., dissenting) (declaring, but not explaining, that neither the Fourth Amendment, nor the Maine Constitution, permit a valid traffic stop to serve as a general warrant to detain and question on issues unrelated to the stop after the transaction based on the stop has been completed).

141. *State v. Melvin*, 2008 ME 118, 955 A.2d 245.

142. *Id.* ¶ 6.

143. *New York v. Burger*, 482 U.S. 691 (1987).

144. *Melvin*, 2008 ME 118, ¶ 13, 955 A.2d 245.

145. *Id.* ¶ 14.

146. *State v. Trusiani*, 2004 ME 107, 854 A.2d 860.

147. *Id.* ¶¶ 11-12.

148. *See, e.g., Justin Long, Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 96-99 (2006) (identifying pragmatic reasons why state constitutionalism has lacked a strong foothold in the vast majority of American states).

attention and enthusiasm, to interpret the state constitutional search and seizure clause. While the court has not foreclosed the possibility that the state constitution might offer broader protections than the Fourth Amendment, it has not fully embraced the idea, either. In other words, the issue is ripe for additional litigation.

CONCLUSION

A pleading in support of broader search and seizure protections under the state constitution could follow the outline of this paper. First, demonstrate to the Law Court that predecessor courts have said positive things about state constitutionalism, generally. Second, show that an interpretation of the state constitution does not depend on the federal constitution. Third, assure the court that “reasonableness” and the balancing of competing interests is what it should be doing to decide state constitutional search and seizure questions. Fourth, cite cases which demonstrate both the independence and more protective nature of the state constitution. Lastly, build on those cases to convince the court to rule favorably on a specific issue.

Advocates should consider more fundamental questions, too. Should the Law Court abandon the primacy approach? This idea may seem paradoxical—*anathema*, even—to state constitutional adherents. But, as discussed *infra*, the primacy approach may do more harm than good. Maine might borrow the approach used in Minnesota. The Minnesota Supreme Court will independently interpret and apply the state constitution if either: (1) the state constitution protects a right that does not have an identical or substantially similar federal counterpart; or (2) there is an identical or substantially similar federal counterpart, but either the United States Supreme Court has made a sharp and radical departure from its precedent or federal precedent provides insufficient protection for Minnesota citizens’ basic rights and liberties and the Minnesota court does not find a persuasive reason to follow that federal precedent.¹⁴⁹

This approach—dubbed “interstitial” or “supplemental” or “state law second”—has intuitive appeal: if the federal constitution sufficiently protects the individual rights at stake, then there is no need to consider whether the state constitution offers even greater protection; that just gilds the lily. This approach keeps the state and federal constitutions from becoming entangled—if the individual right is protected by the federal constitution, then the analysis ends; the court expresses no opinion on the state constitution. It also keeps state constitutional decisions to a minimum and it avoids conflict with federal law. Other states follow this approach, always or occasionally.¹⁵⁰

Advocates should also remind the Law Court that it has already taken the hardest, first step. All it has to do is repeat what it has already done. The court has declared other criminal procedure guarantees to be, not only independent from the

149. Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 868 (2007).

150. *Id.* at 882 (Indiana, New Jersey, and Massachusetts follow the interstitial approach.); *Friesen*, § 1.4[5] (Opinions from New Mexico, New Jersey, and Rhode Island illustrate the “state law second” sequence.).

federal constitution, but more protective of individual rights. The public did not respond with outrage or indignation. Mainers, in particular, would be surprised to learn that people “from away” are interpreting the Maine state constitution by default. This is especially true when the state constitutional methodology is designed to balance local values and interests.

It is worth repeating that, “[s]tate experimentation with how best to guarantee a fair trial to criminal defendants is an essential aspect of our federal scheme.”¹⁵¹ And, “[t]hat role is particularly important in the criminal arena because state courts preside over many millions more criminal cases than their federal counterparts” and are therefore “more likely to identify protections important to a fair trial.”¹⁵²

There is no reason to presume that Mainers ever intended—or presently desire—that the court robustly interpret only some of the state constitutional criminal procedure protections. The Law Court is well-versed in interpreting state constitutional guarantees that have no federal constitutional corollary. It can do the same for article I, section 5.

The Law Court, for its part, should also consider calling for supplemental briefing or briefing from interested amici—something that it does on a fairly routine basis—if it finds the parties’ state constitutional analysis lacking. This will further two goals: putting the bench on notice that the court expects full briefing on state constitutional issues, and ensuring that it has a comprehensive set of arguments prior to rendering a decision. To the extent it has not done so already, this will reinforce the court’s unwillingness to relegate state constitutional issues to a single-sentence footnote about “identical” or “coextensive” guarantees, in perpetuity.

Finally, it is true that the “dearth of scholarly analysis . . . has unquestionably increased the difficulties that state courts have encountered in their nascent efforts to take state constitutional rights seriously.”¹⁵³ This article aims to do much of that preparatory work for article I, section 5 purposes. But the real heavy-lifting will be done by the advocates and judges who, in Maine, have the opportunity to bring about a second-wave of new judicial federalism generally, and in the search and seizure context, specifically. These actors have the good fortune and “unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophies of the United States Supreme Court may ebb and flow.”¹⁵⁴

151. *Kansas v. Carr*, 136 S.Ct. 633, 648 (2016) (Sotomayor, J., dissenting).

152. *Id.*

153. Ellen A. Peters, *State Constitutional Law: Federalism in Common Law Tradition Developments in State Constitutional Law*, 84 MICH. L. REV. 583, 584 (1986).

154. *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985).