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The Search for the Meaning of Oregon's Search and Seizure Clause

In celebrating the sesquicentennial of the Oregon Constitution, it is fitting to take a few moments to consider what is one of the most significant provisions in the entire document: article I, section 9, which provides that

> [n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.[1]

Certainly, in terms of the number of judicial opinions, the search and seizure provision of the Oregon Constitution has received the most attention. More than 800 Oregon appellate court opinions have been authored concerning the meaning and application of article I, section 9—more than any other single provision of the state constitution. Moreover, article I, section 9 served as one of the principal battlefields of the state constitutional revolution for which Oregon is justly famous.[2] The story of the provision's interpretation, in fact, is a microcosm of the interpretation of the Oregon Constitution generally. In that regard, it is a story marked by halting acceptance of state constitutionalism, followed by occasional bold departures from

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[1] OR. CONST. art. I, § 9.

[2] *See, e.g.*, David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES ST. CONST. L. 275, 275 (1989) ("[A] report from Oregon is not from some provincial and primitive venue, but—with respect to state constitutional law—from the capital of the future itself.").

federal doctrines while accompanied by continued adherence to other federal doctrines with no explanation of the decision to do so.

In this Article, I trace the history of the interpretation of article I, section 9. That history provides a useful lens through which to examine larger questions about the nature of the Oregon appellate courts' commitment to state constitutionalism and the techniques with which they determine the meaning of the Oregon Constitution.

One problem with tracing that history is that, precisely because the search and seizure jurisprudence of this state covers so much territory, I need to sharpen the focus more narrowly than merely describing the course of judicial interpretation of article I, section 9 generally.[3] So, I limit my account of the history of the provision's judicial interpretation to the development of a single doctrinal point, namely, the foundational question whether the state constitution creates the same sort of preference for warrants that has come to be recognized as the basis for search and seizure analysis under the Fourth Amendment to the U.S. Constitution.

My account proceeds in three parts. In Part I, I discuss the origins of article I, section 9, including the origins of its Fourth Amendment precursor and some of the historiographical debates about the intended meaning of state and federal search and seizure guarantees. I explain that there are widely divergent views about the origins of state and federal search and seizure guarantees. Some scholars suggest that the framers of the state and federal guarantees would have understood those guarantees to require, at least implicitly, a preference for warrants. Others suggest that such a notion turns the historical record "on its head" and that early search and seizure guarantees were intended to impose only a broad reasonableness requirement. Still others suggest that the historical record reveals that the framers would have understood early search and seizure guarantees to impose a requirement of particularity on the issuance of warrants, but otherwise to impose no requirements on warrantless police conduct.

In Part II, I turn to the judicial construction of article I, section 9, tracing in particular the development of the warrant-preference rule. The story of that construction turns out to be—to borrow a phrase—a rather long and winding road. There is, as it turns out, no overarching

[3] For a more complete description of Oregon search and seizure law, see generally PAUL J. DE MUNIZ, A PRACTICAL GUIDE TO OREGON CRIMINAL PROCEDURE & PRACTICE (3d ed. 2008).

story line; rather, the doctrine has developed by fits and starts, with no real analysis and a surprising tendency to rely on federal search and seizure law.

In Part III, I offer some personal observations about the development of Oregon search and seizure law and suggest that the doctrine's current condition is puzzling. The Oregon courts profess a commitment to state constitutionalism, that is, the significance of state constitutional doctrine apart from, and independent of, federal constitutional doctrine. In particular, the Oregon Supreme Court professes a commitment to a jurisprudence of original intent in giving the Oregon Constitution its separate and independent significance. Yet, at the same time, the court largely adheres to federal constitutional search and seizure doctrine when it interprets article I, section 9, at least with respect to the warrant-preference rule. Why the court has failed to apply its usual originalist approach to the warrant-preference issue is a mystery. Moreover, that the court has chosen simply to parrot the federal warrant-preference rule without further analysis or explanation is, I submit, odd for a state in which the state constitutional revolution was virtually born.

I suggest that these anomalies have practical rather than merely theoretical significance. How the court sorts through the historical debate concerning the intended meaning of state and federal search and seizure guarantees could make a difference; the result could be continued adherence to a warrant-preference rule, abandonment of the rule in favor of a broader rule of reasonableness, or adoption of the conclusion that the guarantees do not constrain warrantless police conduct at all. Moreover, federal search and seizure doctrine is not static. The U.S. Supreme Court has shown little hesitation to overturn well-settled doctrines to more closely hew to the intentions of the framers of the Federal Constitution. If the Court were to do so with respect to the Fourth Amendment warrant-preference rule, it would leave the Oregon courts in something of a pickle.

In the end, I suggest that the answer is to treat article I, section 9 as the free-standing, state constitutional guarantee that it is. I suggest that—whether because originalism is an untenable interpretive method or because of the provision's peculiar wording—resolving the historiographical debate about the provision's origins is not necessary. The courts can and should determine whether article I, section 9—independently of Federal Fourth Amendment doctrine—presumptively requires warrants for searches and seizures to be reasonable.

I
THE ORIGINS OF ARTICLE I, SECTION 9

Oregon's search and seizure guarantee, like any constitutional provision, was not adopted in a vacuum. It has a history, which begins with the adoption of the Fourth Amendment after which the guarantee was patterned. Much of the Fourth Amendment's history is well known and unremarkable. That said, there is much that remains the subject of considerable debate among historians and legal scholars—debate that has largely escaped the attention of the Oregon appellate courts. Because that debate has potential significance for the interpretation of article I, section 9, I briefly describe not only the events leading up to the Fourth Amendment's adoption, but also, in broad outline, the historiographical dispute about the significance of those events. I then focus more particularly on what we know about the origins of article I, section 9.

A. The Adoption of the Fourth Amendment

The Fourth Amendment provides:

> 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.[4]

It is generally accepted that, although the amendment's wording can be traced to revolutionary era state constitutions, the source for both was a concern about the misuse of general warrants in England and the colonies during the mid-eighteenth century.[5] "General warrants" referred to writs that authorized the bearer to search unspecified places or arrest persons suspected of having been involved with a

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[4] U.S. CONST. amend. IV.

[5] *See, e.g.*, William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396 (1995) ("[L]ike other items in the Bill of Rights, the Fourth Amendment echoed several state constitutional provisions. But its real source, historians seem to agree, was the same as the source of those state provisions: a trio of famous cases from the 1760s, two in England and one in the colonies." (footnote omitted)). *But see* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1707–08, 1715–16 (1996) (book review) (criticizing "lawyers' histories" of the Fourth Amendment as incomplete and tending to focus only on incidents in the decade before the American Revolution). For a useful summary of the history of the Fourth Amendment, see generally THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 23–43 (2008).

criminal offense.[6] Three well-known instances of abusive use of general warrants are commonly cited as the sources for state and federal constitutional search and seizure guarantees.

The first of the three is known as the *Writs of Assistance Case*.[7] A "writ of assistance" was a form of general warrant used to authorize customs officials to search houses and other buildings.[8] In 1761, a group of sixty-three Boston merchants challenged the lawfulness of the writ. Arguing on behalf of the merchants, James Otis, Jr.—who was, according to John Adams, "by far the most able, manly and commanding Character of his Age at the Bar"[9]—asserted that the writ of assistance "is against the fundamental Principles of Law. . . . A Man, who is quiet, is as secure in his House, as a Prince in his Castle—notwithstanding all his Debts, & civil processes of any Kind."[10] In particular, Otis argued, the writ conferred unlimited discretion on customs officials who executed them.[11] As such, he contended, the writ and the statute that authorized it would be, in the words of Lord Coke's famous *Dr. Bonham's Case*, "against common right and reason" and therefore void.[12] The argument was not

6 "General warrants command either apprehension for unstated causes or the arrest, search, or seizure of unspecified persons, places, or objects." William J. Cuddihy, *General Warrants*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1185–86 (2d ed. Leonard W. Levy & Kenneth L. Karst eds., 2000). Until the late-eighteenth century, they had been used commonly in England to combat vagrancy, regulate publications, pursue felons, collect taxes, and reclaim stolen goods. *Id.*

7 There is no official case report. Although the case is sometimes referred to by the names of the customs officials involved (in particular, Charles Paxton, the Surveyor and Searcher of the Port of Boston and one of the most unpopular government officials of the era), *see, e.g.*, William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1034 (1994) (referring to *Paxton's Case*), it is most often simply referred to as the *Writs of Assistance Case*. Probably the most detailed account may be found in M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978).

8 SMITH, *supra* note 7, at 39. The name originates with the function of the writ, namely, to obtain assistance in carrying out the customs officials' duties. *Id.* at 38–39. Although the writs did not actually provide search authority, they have long been considered a type of general warrant. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 11 (2007).

9 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 275 (L.H. Butterfield ed., 1961).

10 John Adams's Contemporaneous Notes of the Writs of Assistance Hearing in February 1761, *reprinted in* SMITH, *supra* note 7, app. I, at 543, 544.

11 *Id.*

12 The careful cite-checker will not find a reference to *Bonham's Case* in Adams's notes. The notes are:

successful. The colonial court upheld the validity of the writ, although popular opposition did not relent.[13]

The second of the trio of general warrant abuses is a collection of lawsuits that arose in England shortly after the *Writs of Assistance Case* involving John Wilkes and other like-minded opponents of the Tory government.[14] Secretary of State Lord Halifax issued general warrants authorizing government officers—somewhat ominously known as "messengers"—to arrest any person who was involved in the publication of seditious libel. The warrants did not identify any particular persons to be arrested or places to be searched. Under the authority of those general warrants, the messengers arrested Wilkes and his friends, searched their homes, and seized their papers. Wilkes and his friends, however, did not take the affront to what they thought were their rights lying down; they brought trespass actions in the Court of Common Pleas against the messengers and won. In several cases concluded between 1763 and 1769, the court instructed the juries that searches and seizures conducted pursuant to general warrants violated common-law rights, and, following those instructions, the juries awarded damages to Wilkes and his friends.[15] The following year, Parliament passed resolutions condemning the

> As to Acts of Parliament. an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The Executive Courts must pass such Acts into disuse—8. Rep. 118. from Viner.—Reason of the Com Law to control an Act of Parliament.

Id. The reference to "8. Rep. 118. from Viner." is generally taken to refer to Charles Viner's commentary on Lord Coke's own commentary on the case, reported at 8 Coke's Rep. 107, 118 (1609). *See also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 58–59 (1937) (discussing Otis's reference to *Bonham's Case*); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 690 nn.407–08 (1999) (explaining the connection to *Bonham's Case*).

13 The Massachusetts colonial legislature even passed a bill outlawing general warrants, but the bill was vetoed by the governor. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 35 (1966).

14 For summaries of these events, see generally *id.* at 28–30 and LASSON, *supra* note 12, at 43–50.

15 The cases most commonly cited are: *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763); *Entick v. Carrington*, 95 Eng. Rep. 807 (1765); *Leach v. Money*, 97 Eng. Rep. 1050 (1765); and *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763). The *Entick* case, in particular, later proved to be a popular citation by nineteenth- and twentieth-century jurists for the trial court's instructions to the jury, although it has been pointed out that there is some question whether the reported version of those instructions was known in the colonies until well after the revolution. *See* Davies, *supra* note 12, at 565 n.25 (noting that the version of the trial court's statements most often later quoted was not published until 1781).

use of general warrants, at least without prior parliamentary approval.[16] Meanwhile, Wilkes took on Lord Halifax himself, eventually winning a judgment of four thousand pounds for the Secretary's use of "nameless" warrants.[17] The cases—usually referred to collectively as the "Wilkesite" or just "Wilkes cases"—were to be very influential in the development of Fourth Amendment jurisprudence.[18]

The third of the abuses of general warrants arose with the enactment of the Townsend Duties Act of 1767. Recall that, following the judgments in the Wilkesite cases, Parliament condemned the use of general warrants without prior legislative authorization. In 1767, Parliament gave such approval when it enacted the Townsend Duties Act,[19] which authorized the use of general writs of assistance for customs searches in the American colonies. The enactment created a considerable stir in the colonies over the legality of general warrants, at least outside of Massachusetts (where the matter had already been decided).[20] Some colonial courts declared that the general writs of assistance were "unconstitutional"; others simply did not act on requests to issue them.[21]

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[16] The Parliamentary debates on the use of general warrants prompted William Pitt's now-famous speech that:

> [t]he poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Quoted in THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 611 n.1 (8th ed. 1927).

[17] There is no case report for *Wilkes v. Halifax*, although practically every account of the Wilkesite cases includes a reference to the verdict. *See, e.g.*, LANDYNSKI, *supra* note 13, at 28; LASSON, *supra* note 12, at 45; Davies, *supra* note 12, at 630–31 n.222. The usual reference, *Wilkes v. Halifax*, 19 How. St. Tr. 1406 (C.P. 1769), refers to an addendum to reports of the *Wilkesite* cases, which includes a short summary of the judge's instructions in that case.

[18] *See, e.g.*, Davies, *supra* note 12, at 562–65 (referring to "Wilkesite" cases); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 933–34 (1997) (referring to "Wilkes cases").

[19] 7 Geo. III, ch. 46, § 10 (Eng. 1767).

[20] As Leonard Levy explains, the Townsend Duties Act "expanded the controversy over writs of assistance to all of the thirteen colonies. What had been a local controversy, centering mainly on Boston, spread continent-wide." LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 233 (1988). Even in Massachusetts, as Lasson recounts, the enforcement of writs of assistance under authority of the Townsend Acts caused riots. LASSON, *supra* note 12, at 72.

[21] *Id.* at 73–76.

Colonial concerns about the abuse of general warrants were among the most prominent in the lengthening list of grievances against the King and Parliament that led to the American Revolution.[22] Not surprisingly, when the newly independent colonies adopted their own constitutions—as did twelve of the original states—most included in those constitutions declarations of individual rights, including provisions concerning search and seizure specifically condemning the use of general warrants.[23]

Virginia's first constitution, for example, provided 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.[24]

The Virginia provision served as a model for other states, in particular Maryland and North Carolina.[25] Pennsylvania used as its model an earlier draft of the Virginia Constitution, with the addition of a preamble declaring "[t]hat the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure," followed by the declaration that, "therefore, warrants without oaths or affirmations first made . . . are contrary to that right and ought not to be granted."[26] Vermont, in turn, used the Pennsylvania Constitution as its model, including the preamble.[27] John Adams's draft of the

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22 The subject of unreasonable searches and seizures, however, is not on the list of grievances that comprise the Declaration of Independence, an omission that a number of scholars have remarked is surprising. *See, e.g.*, *id.* at 80.

23 For general accounts of the adoption of early state constitutions and, in particular, early state declarations of rights, see generally WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (expanded ed. 2001); MARC W. KRUMAN, STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 125–257 (1969). Unfortunately, those accounts focus on larger issues of political ideology and government structure and spend scant attention, if any, to the particulars of early search and seizure guarantees. The best summary of the early development of state search and seizure guarantees that I have seen to date is Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law*,*"* 77 MISS. L.J. 89–127 (2007); *see also* LEVY, *supra* note 20, at 236–40.

24 VA. CONST. of 1776, Declaration of Rights, § 10.

25 MD. CONST. of 1776, Declaration of Rights, art. XXIII; N.C. CONST. of 1776, Declaration of Rights, art. XI.

26 PA. CONST. of 1776, Declaration of Rights, art. X.

27 VT. CONST. of 1777, ch. 1, § XI.

Massachusetts Constitution followed suit, incorporating the Pennsylvania preamble with some slight alterations of his own. For the first time among state constitutions, Adams inserted the word "unreasonable" into the search and seizure vocabulary:

> 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 his right, if the cause or the foundation of them be not previously supported by oath or affirmation; . . . 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.[28]

When James Madison took on the task of drafting the first set of proposed amendments to the newly adopted Federal Constitution, he did not write on a blank slate; he worked from the many bills of rights that already had been adopted in state constitutions. That certainly was the case in drafting what would become the Fourth Amendment, which was largely based on the Massachusetts prohibition against general warrants.[29] Interestingly, Madison's first draft introduced some significant innovations, including merging the two separate statements of the Massachusetts provision into a single sentence, phrasing the declaration in terms of rights held by "the people," and inserting a standard of "probable cause" for the issuance of warrants:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[30]

The committee that reviewed Madison's draft made further changes. Significantly, although it retained the single-clause format that Madison had proposed, it rephrased the connection between the preamble setting out the rights of the people and the prohibition against general warrants. Where Madison's draft said that the rights of the people "shall not be violated by warrants issued without probable cause," the committee draft proposed instead—and

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[28] MASS. CONST. of 1780, pt. 1, art. I, § 14.

[29] For summaries of the Fourth Amendment's drafting history, see generally LEVY, *supra* note 20, at 240–45; LASSON, *supra* note 12, at 97–105; LANDYNSKI, *supra* note 13, at 40–44; Davies, *supra* note 23, at 127–72.

[30] EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 206 (1979).

somewhat more ambiguously, as we will see—that the rights of the people "shall not be violated, and no warrants shall issue" except upon probable cause.[31]

B. The Debate About the Intended Scope of the Fourth Amendment

The events that I have described, including the various borrowings from one draft constitution to another, are well known and not much debated. What *is* the subject of a heated debate—particularly in the last decade—is the significance of those events in reconstructing the intended scope and meaning of the Fourth Amendment. That debate tends to focus on the relationship between what are generally recognized as the two clauses of the Fourth Amendment—the "reasonableness clause," which states that the people have a right to be secure from unreasonable searches and seizures; and the "warrants clause," which provides that warrants may not issue except upon probable cause.

Three schools of thought have emerged concerning the intended relationship between those two clauses. One such school—clearly the orthodox view—asserts that the two clauses were intended by the framers to function independently, the first guaranteeing a comprehensive right to be free from unreasonable searches and seizures and, concomitantly, requiring that any searches and seizures be reasonable; and the second, requiring that warrants not issue except upon probable cause. According to this view, the requirement that searches and seizures not be unreasonable imposes a legal obligation separate and apart from the requirement that warrants not issue except upon probable cause. That reasonableness requirement consists of a presumption that, to be reasonable, a search or seizure must be supported by the issuance of a judicially approved warrant. This is commonly known as the "warrant-preference" rule or doctrine.

The historical support for the conventional view was first marshaled by Nelson B. Lasson in *The History and Development of the Fourth Amendment to the United States Constitution*.[32] Several decades later, the view was again asserted by Jacob W. Landynski in his *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation*.[33] It must be said that, in both cases, the actual historical evidence on which both authors relied was fairly

[31] *Id.* at 213–14.

[32] *See* LASSON, *supra* note 12.

[33] *See* LANDYNSKI, *supra* note 13.

skimpy.[34] Lasson, for example, concluded that the reasonableness clause of the Fourth Amendment obviously was intended to be "given a broader scope" than a mere preface, based on the change in wording from Madison's original single-clause format to what he (somewhat circularly) characterized as a two-clause format.[35] In a similar vein, Landynski traced the conventional history of the amendment, including last-minute textual alterations—which Landynski said no one apparently noticed at the time—and then concluded that, "[f]rom the foregoing historical account, the relationship of the two clauses seems clear enough."[36] He then proceeded to reason, not from the historical evidence but from the juxtaposition of the two clauses, that the reasonableness clause "was evidently meant to re-emphasize (and, in some undefined way, strengthen) the requirements for a valid warrant set forth in the second clause. The second clause, in turn, defines and interprets the first, telling us the kind of search that is *not* unreasonable . . . ."[37]

In contrast, independent scholar William J. Cuddihy produced a much more thorough examination of the historical evidence in 1990. His massive, three-volume Ph.D. dissertation on the origins of the Fourth Amendment has been circulating in unpublished form for some years and is now regularly cited by supporters of the conventional, warrant-preference view.[38]

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[34] *See, e.g.*, Cloud, *supra* note 5, at 1708 (Lasson's account, although "the pre-eminent history of the Fourth Amendment for more than half a century," like other "lawyers' histories," is "incomplete in the scope and depth" of his research).

[35] LASSON, *supra* note 12, at 103. The entirety of the discussion, in fact, consists of the following:

> As reported by the Committee of Eleven and corrected by [Elbridge] Gerry, the Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That [Egbert] Benson interpreted it in this light is shown by his argument that although the clause was good as far as it went, *it was not sufficient*, and by the change which he advocated to obviate this objection. The provision as he proposed it contained *two* clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope.

Id.

[36] LANDYNSKI, *supra* note 14, at 41–43.

[37] *Id.* at 43.

[38] An edited and revised version of the thesis was finally published in January 2009. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING

A second school of thought concurs with the conventional view that the Fourth Amendment consists of two separately enforceable clauses. But this school takes issue with the conventional view that the reasonableness clause can be read to imply a preference for warrants. This alternative view first emerged in the 1960s with the publication of Telford Taylor's *Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance and Fair Trial and Free Press*.[39] According to Taylor, the framers of the Fourth Amendment feared warrants and did not prefer them, and the conventional warrant-preference doctrine "stood the fourth amendment on its head."[40] More recently, Akhil Amar has proposed

602–1791 (2009). Cuddihy's thesis was extensively summarized in Maclin, *supra* note 18, at 929 (comparing Cuddihy's research with research of proponents of competing views of the Fourth Amendment, in particular Akhil Amar), and in Cloud, *supra* note 5, at 1712–1720. Cuddihy's principal contention is that the Fourth Amendment was intended by its framers to mandate the use of specific warrants as the conventional method of search and seizure and that the amendment was not intended to be limited to the subject of general warrants. "Many kinds of searches and seizures were unreasonable within the original meaning of the amendment," he asserts, "not just general warrants." Cuddihy, The Fourth Amendment, *supra*, at civ. In particular, Cuddihy emphasizes the fact that, although the framers may have focused on the problem of general warrants in the revolutionary era, in the 1780s, attention turned to the use of specific warrants as the preferred mechanism for accomplishing searches and seizures. This preference was evidenced by the adoption of specific warrant statutes by a number of states in the years immediately preceding the ratification of the Constitution. *Id.* at 882–83, 1338–40.

Not surprisingly, Cuddihy's thesis has been embraced by proponents of the warrant-preference view. *See, e.g.*, Maclin, *supra* note 18; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 154–56 (1999) (Levy was Cuddihy's dissertation advisor.). Cuddihy's work also has been cited in U.S. Supreme Court opinions. Justice Sandra Day O'Connor, for example, described the dissertation as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Although universally hailed for its thoroughness, Cuddihy's thesis still has not proved to be the last word on Fourth Amendment history. In fact, the very thoroughness of his research has revealed that the amendment's history may be much more complex and subtle than the conventional accounts have suggested. As Morgan Cloud observed in his review of the thesis, "for all its richness of detail, or perhaps because of it, the work is difficult to use." Cloud, *supra* note 5, at 1720. Cuddihy, for example, demonstrates that much of the historical record is ambiguous and even inconsistent, leaving much room for further interpretation and debate. *Id.* at 1717 ("Inconsistent rules were applied inconsistently in differing circumstances. This was as true in the century preceding the adoption of the Fourth Amendment as it was in earlier centuries.").

[39] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS (1969).

[40] *Id.* at 23–24. According to Taylor,

> [O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the

that, although Taylor was correct that the framers of the Fourth Amendment viewed warrants with suspicion—and, hence, certainly intended no preference for warrants—Taylor missed the larger point that they intended a generalized reasonableness requirement to provide a "global" standard by which all searches are to be evaluated.[41]

In support of this view, Amar first notes that the Fourth Amendment itself simply does not say what the proponents of the conventional warrant-preference view contend, namely, that warrants are presumed to be necessary for searches and seizures to be reasonable.[42] To the contrary, the amendment says only that searches and seizures must not be unreasonable. Moreover, he observes, the historical record shows that not a single reported decision, state or federal, read the Fourth Amendment or its state constitutional counterparts to require warrants until nearly 100 years after the amendment's adoption.[43] To the contrary, he notes, state court decisions interpreting state constitutional search and seizure provisions based on the Fourth Amendment held that the reasonableness clauses of state search and seizure guarantees did *not* require warrants.[44]

More recently, there has emerged a third school of thought about the relationship between the two clauses of the Fourth Amendment.

> prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods . . . .

Id. at 41. Taylor relied on, among other things, the wording of early state constitutional search and seizure guarantees, which specifically condemned general warrants issued without probable cause and did not address at all the issue of warrantless searches or seizures. *Id.* at 41–43. According to Taylor, the framers "took for granted" that arrested persons would be searched without a warrant, as such had been the law for centuries and remained so until the late-nineteenth century. *Id.* at 27–29, 43.

41 Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–64 (1994).

42 As Amar sees it,

> The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures. They do not require probable cause for all searches and seizures without warrants. They do not require—or even invite—exclusions of evidence, contraband, or stolen goods.

Id. at 761.

43 *Id.*

44 *Id.*

Led by Thomas Davies, this school holds that there is a remarkable absence of historical evidence to support either the warrant-preference view or the comprehensive reasonableness view of the Fourth Amendment.[45] According to Davies, the reasonableness clause was never intended to function as anything other than a preamble to the amendment's only operative provision, namely, a limitation on the issuance of general warrants.[46] In Davies's view, the Fourth Amendment was never understood nor intended by its framers to operate as a limitation on warrantless searches and seizures at all. Such matters, he contends, were to be governed by common-law restrictions on warrantless arrest, which were understood by the framers to be constitutionally embraced by the guarantee that no person's life, liberty, or property may be taken except by "due process of law."[47] Search and seizure doctrine became hopelessly disconnected from its historical moorings, he contends, when nineteenth-century courts essentially hijacked the Due Process Clause for other purposes and were left to shoehorn an ahistorical warrant-preference doctrine into the Fourth Amendment to address abusive

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[45] *See generally* Davies, *supra* note 12, at 551; Davies, *supra* note 23, at 34. In the first of the two articles, Davies sets out his account of "authentic" Fourth Amendment history, emphasizing the fact that the framers were concerned with "too-loose warrants" and not warrantless searches. Davies, *supra* note 12, at 552. In the latter article, he turns his attention to his corollary contention, that is, that the subject of warrantless law enforcement conduct was understood by the framers of the Fourth Amendment to have been the subject of the Due Process Clause. Davies, *supra* note 23, at 7. He also describes the development of revolutionary era state constitutional search and seizure and due process guarantees, which he contends confirms his characterization of the views of the Fourth Amendment framers. *Id.* at 8.

[46] According to Davies, in drafting the Fourth Amendment, Madison borrowed from existing state constitutional search and seizure provisions, like the Massachusetts provision, drafted in explicit, "two-clause" format—that is, an initial general statement of the right to be free from unreasonable searches and seizures, followed by a warrant clause stating that, "therefore," warrants must not be issued except on oath or affirmation setting out the bases for its issuance. Davies, *supra* note 12, at 696–97. Madison, Davies suggests, altered the format only slightly, removing the reference to "therefore" and stating the entire amendment in a single clause, for what were "likely stylistic" reasons. *Id.* at 697.

[47] Davies suggests that:

> [T]he state declarations of rights and the Federal Bill of Rights set out constitutional limits on what we now call "search-and-seizure" authority *in two provisions* rather than one. The general search-and-seizure provision, which regulated warrantless arrests as well as other requisites for initiating criminal prosecutions, was stated in the traditional invocative language of "the law of the land" or "due process of law," while the ban against general warrants was stated separately, explicitly, and in detail.

Davies, *supra* note 23, at 11.

law enforcement practices that emerged with post-Civil War developments in criminal investigatory procedures.[48] A warrant-preference doctrine may be justified on many grounds, he contends, but history is not among them.[49]

In support of his theses, Davies traced the development of state and federal constitutional due process (or, in some cases, "law of the land") and search and seizure clauses, including interpretation of those provisions by early nineteenth-century courts and contemporaneous legal treatises.[50] According to Davies, that research conclusively demonstrates that the conventional warrant-preference view is "only the product of relatively recent, ideologically-driven judicial choices, not a rendition of the original understanding" of the Fourth Amendment.[51]

Interestingly, one scholar, David E. Steinberg, believes that Davies has not gone far enough.[52] According to Steinberg, the history surrounding the adoption of the Federal Bill of Rights shows that the framers intended the Fourth Amendment to be limited not only to correcting the abusive use of general warrants but also to the use of such warrants to search *houses*, as opposed to ships and other structures.[53] "Outside of house searches," Steinberg asserts, "the Fourth Amendment was simply inapplicable."[54]

In the wake of these proposals, a not-surprisingly vigorous debate has ensued, with each side suggesting that another has incompletely or inaccurately interpreted the historical evidence.[55] Who is right? I

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48 *Id.* at 172–95.

49 *Id.* at 223.

50 *Id.* at 87–127.

51 *Id.* at 224. It should be noted that, although Davies is a critic of the historical basis for current Fourth Amendment doctrine, he is no originalist. To the contrary, Davies contends that even "authentic history" of the Fourth Amendment "cannot provide us with a basis for deciding the specific search-and-seizure issues that arise today" because of the great gulf that separates framing era doctrinal conceptions and criminal justice institutions from those of our own era. *Id.* at 222–23.

52 David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008).

53 *Id.* at 581–82.

54 *Id.* at 583.

55 The articles on Fourth Amendment history seem to be multiplying like rabbits, particularly recently. For years, Lasson's and Landynksi's conventional accounts of the origins of the Fourth Amendment were unquestioned. That changed in 1969 with the publication of Taylor's revisionist view of Fourth Amendment history. His criticism of the conventional view itself generated some criticism, but not much. Everything changed, however, in the early 1990s. No doubt, much of that can be traced to Amar's deliberately

do not know. And it would take a very, very long article even to attempt to sort out the matter.

I will venture to state, however, that I find Davies's thesis intriguing in that it seems most consistent with early nineteenth-century case law and with contemporaneous treatises. As he points out, early cases do suggest that courts understood that state search and seizure counterparts to the Fourth Amendment simply did not apply to warrantless searches and arrests.[56] Indeed, even critics of the general warrants school concede that "it is well-known that states showed a marked interest in minimizing search and seizure protections" in the nineteenth century.[57]

The 1850 Massachusetts Supreme Judicial Court's decision in *Rohan v. Sawin*[58] provides a good example. In that case, the plaintiff brought an action for assault and false imprisonment arising out of an incident in which a constable arrested him and took him to jail on suspicion of having committed theft. The constable, without a

provocative 1994 essay, which, since then, has spawned something of a cottage industry of criticism on its own. *See, e.g.*, Steinberg, *supra* note 52, at 582; Maclin, *supra* note 18; David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227 (2005); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again*," 74 N.C. L. REV. 1559 (1996); Cloud, *supra* note 5, at 1730–31; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994). Contributing to this controversy, the U.S. Supreme Court increasingly—though not consistently—has resorted to historical analysis in its Fourth Amendment decisions. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 326 (2001) (in reading the Fourth Amendment, "we are guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing" (internal quotation marks removed)); Wyoming v. Houghton, 526 U.S. 295, 299 (1999) (whether the Fourth Amendment has been violated depends on "whether a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed"); Florida v. White, 526 U.S. 559, 563 (1999) ("In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."); Wilson v. Layne, 526 U.S. 603, 604 (1999) (same); Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (there is "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure"). For a discussion of the U.S. Supreme Court's increasing reliance on eighteenth-century common law in its evaluation of the scope of the Fourth Amendment, along with an increase in scholarly commentary on the same, see generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

[56] Davies, *supra* note 23, 178–79.

[57] Fabio Arcila, Jr., *A Response to Professor Steinberg's Fourth Amendment Chutzpah*, 10 U. PA. J. CONST. L. 1229, 1254 (2008).

[58] 59 Mass. 281 (1850).

warrant, not only arrested the plaintiff, but also went to his place of business and seized what he thought to be the stolen property. The jury returned a verdict for the plaintiff. The constable appealed, and the Supreme Judicial Court reversed, holding that the constable was authorized to arrest the plaintiff, to search his business, and to seize the evidence of the crime as long as the constable had reasonable cause to suspect that a felony had been committed. The court then added:

> It has been sometimes contended that [a warrantless arrest] was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches [and seizures] and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies.[59]

And, as Davies (and Amar, for that matter) points out, contrary to conventional warrant-preference doctrine, early nineteenth-century treatises likewise reflect the view that the Fourth Amendment was understood and intended to have the limited effect of constraining the use of general warrants. Joseph Story, for example, explained in his famous *Commentaries* that the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law" requiring warrants to state with particularity "not only the name of the party, but also the time, and place, and nature of the offense with reasonable certainty."[60] Nowhere does Story mention constitutional constraints on warrantless searches or seizures.

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[59] *Id.* at 284–85. Other similar cases exist as well. In *Wakely v. Hart*, 6 Binn. 315 (Pa. 1814), for example, the defendant was arrested without a warrant. He later sued for false imprisonment, alleging that the constable had violated the constitutional prohibition against unreasonable searches and seizures. The court rejected the claim, explaining that warrantless arrests were permissible at common law, and the search and seizure provision "was nothing more than an affirmance of the common law." *Id.* at 318. According to the court, the provision's focus was on the issuance of general warrants, not the lawfulness of warrantless arrests. To similar effect is *Mayo v. Wilson*, 1 N.H. 53, 60 (1817), in which the New Hampshire Supreme Court concluded that the state's search and seizure provision "does not seem intended to restrain the legislature from authorizing arrests without warrant, but to guard against the abuse of warrants issued by Magistrates."

[60] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 678–80 (3d ed. 1858). Thomas Cooley's treatise on *Constitutional Limitations* likewise devotes extended attention to the

For my purposes, however, it is not necessary to resolve the debate over the intended meaning of the Fourth Amendment. It is sufficient to establish the fact that the debate exists. Resolving the historiographical controversy becomes important only to the extent that the courts feel constrained to interpret the constitution to conform to the original intentions of its framers, a subject to which I will turn shortly.

C. The Adoption of Article I, Section 9

With that background in mind, let us turn to the adoption of article I, section 9 of the Oregon Constitution. The provision dates back to the original constitution adopted in 1857. Unfortunately, there is little in the way of an official record of the state constitutional convention. Charles Carey sifted through the many newspaper articles that had been prepared by reporters for the Portland *Oregonian* and the Salem *Statesman* who, as it turned out, were also delegates to the convention.[61] His compilation of those articles often serves as the principal source of information about the debates over the wording of what would become the Oregon Constitution. What Carey reports about article I, section 9, however, is that the provision was adopted without amendment or discussion.[62] Claudia Burton and Andrew Grade, in their excellent *A Legislative History of the Oregon Constitution of 1857*,[63] supplement Carey's compilation with references to the Journal of the Convention, recently discovered committee reports and amendment histories, and subsequent

problem of general warrants, including a lengthy note on the Wilkesite cases, but says nothing about warrantless searches. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299–308 (1868). As late as the 1880s, John Norton Pomeroy described the import of the Fourth Amendment in similar terms, explaining that "[t]his clause of the Constitution was particularly aimed at what were known in the English law as general warrants." JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 153 (1883).

61 THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Charles Henry Carey ed., 1926) [hereinafter OREGON CONSTITUTION AND PROCEEDINGS]. For a nice summary of the convention proceedings, see generally David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611 (1995).

62 *Bill of Rights*, OREGONIAN, Oct. 10, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 61, at 343.

63 Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857— Part I (Articles I & II)*, 37 WILLAMETTE L. REV. 469 (2001).

newspaper coverage of the constitution's ratification.[64] But, again, they report that article I, section 9 was adopted with no recorded discussion.

It has been suggested on the basis of similarity in wording that article I, section 9 was taken from the 1851 Indiana Constitution, as were so many other provisions of the Oregon Constitution.[65] There is no direct evidence of that connection, though, as Burton and Grade suggest, "[t]he evidence is circumstantial, but strong."[66] One delegate, Delazon Smith, urged the use of Indiana's recently adopted bill of rights as a model for Oregon's, asserting that the former "is gold refined; it is up with the progress of the age."[67] And the wording of article I, section 9 is indeed similar with its counterpart in the 1851 Indiana Constitution.[68] If Oregon's provision was patterned after Indiana's, however, it is clear that both were patterned after the Fourth Amendment, which was the common practice in mid-nineteenth-century constitutional drafting.[69]

Although patterned after the Fourth Amendment, article I, section 9 includes a couple of interesting variations. For example, the provision departs from the single-clause structure of the Fourth Amendment. Article I, section 9 consists of two clauses—a reasonableness clause and a warrants clause—separated by a

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[64] *Id.* at 514–15.

[65] *See, e.g.*, State v. Dixson, 87 Or. App. 1, 23, 740 P.2d 1224, 1236 (1987) (Van Hoomissen, J., dissenting) (observing that the wording of the Oregon and 1851 Indiana constitutional search and seizure provisions are "virtually identical"). The standard work on the sources for the Oregon Constitution generally is W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200 (1926).

[66] Burton & Grade, *supra* note 63, at 483.

[67] OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 61, at 101.

[68] The Indiana Constitution of 1851 declared:

> 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.

1 CONSTITUTION MAKING IN INDIANA: A SOURCE BOOK OF CONSTITUTIONAL DOCUMENTS WITH HISTORICAL INTRODUCTION AND CRITICAL NOTES (1780–1851), at 297 (Charles Kettleborough ed., 1916). The difference between the wording of the Oregon and Indiana versions is that the former is not stated in the passive and declares, instead, that "No law shall violate" the right of the people, *etc.*

[69] In the mid-nineteenth century, it was common for states to pattern their constitutional provisions after the Federal Constitution. As Alan Tarr explains, "[d]uring the nineteenth century the federal Constitution achieved an almost sacred status as the crowning work of an extraordinary political generation." G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 97 (1998).

conjunction and a semicolon.[70] An argument could be made that the alteration signals that, whatever may have been understood to be the effect of the reasonableness clause in the Fourth Amendment, the framers of article I, section 9 seem to have had in mind an independently enforceable provision. Consistent with that surmise is the fact that the reasonableness clause, unlike the Fourth Amendment, is not phrased in the passive voice. It is phrased instead in more direct fashion, declaring that "[n]o law shall violate" the search and seizure rights of the people. This phrasing is very interesting, for it suggests that the focus of the framers was on limiting the power of *the legislature*, not on abuses by executive branch law enforcement officials. The necessary consequence of this interpretation, however, is that the provision was not intended to apply to warrantless searches, at least not those conducted in the absence of statutory authority. But more about that in a bit.

I previously mentioned the suggestion that article I, section 9 finds its more direct source in the parallel provision of the Indiana Constitution of 1851. I have searched in vain, however, for any clues as to the intended meaning of the Indiana provision. It seems that the Indiana search and seizure provision, like its Oregon offspring, was adopted with limited discussion.[71] Apparently, the dearth of debate about the provision was typical of the Indiana convention's lack of interest in the subject of individual rights generally; the focus of the 1850–51 convention was the state's financial woes and a focus on

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[70] I do not want to suggest that too much emphasis be given to the placement of a single punctuation mark by the state constitution's mid-nineteenth-century framers. But the fact remains that the semicolon, first introduced to the English language in the mid-sixteenth century, had in the course of the next century become quite a popular device with which to divide compound sentences. *See generally* Paul Bruthiaux, *The Rise and Fall of the Semicolon: English Punctuation Theory and English Teaching Practice*, 16 APPLIED LINGUISTICS 1 (1995) (tracing the history of the semicolon usage over four centuries). And, unlike commas—which had come to be sprinkled in seventeenth- and eighteenth-century prose somewhat indiscriminately—the semicolon had a well-understood function as a divider of separate, independent clauses. *See, e.g.*, J. ROBERTSON, AN ESSAY ON PUNCTUATION 77 (1785) ("A semicolon . . . is used for dividing a compounded sentence into two or more parts, not so closely connected, as those, which are separated by a comma; nor yet so independent o[f] each other, as those, which are distinguished by a colon.").

[71] CONSTITUTION MAKING IN INDIANA, *supra* note 68, at 297. The only differences between the 1816 version of the Indiana search and seizure provision and the one adopted in 1851 were punctuation and the changing of several words from plural to singular forms (for example, the "rights of the people" in the 1816 version was changed to the "right of the people" in 1851). *Id.* at 86, 297. The slightly revised version was introduced to the 1850 Constitutional Convention by a Committee on Rights and Privileges and then adopted by the convention without amendment by a vote of 120–1. *Id.* at 297 n.42.

limiting the authority of the legislative branch, in particular, its authority to enact local and special laws.[72]

One pre-war Indiana Supreme Court decision deserves mention, though. In *Herman v. State*,[73] the defendant challenged the constitutionality of a state statute prohibiting whiskey production, and the court declared the statute unconstitutional. In support of its conclusion, the court relied on—among several other things—the state's search and seizure guarantee. That guarantee, the court observed, provided that the people have the right to be secure in their "persons, houses, papers, and effects, against unreasonable search and seizure."[74] Such provisions, the court declared, "fairly construed, will protect the citizen in the use of his industrial faculties, and in the enjoyment of his acquisitions."[75] This is a fascinating assertion, particularly for its time. It is among the only antebellum judicial opinions that appear to recognize that the reasonableness clause of a state search and seizure guarantee has some, albeit undefined, independent and enforceable significance.[76]

That said, it is not at all certain that the case had any influence on the drafting of the Oregon Constitution. There is no indication from the historical record that anyone was even aware of the decision, much less that they interpreted it to signify that the Fourth Amendment and its state counterparts had broader application beyond the regulation of general warrants. Moreover, Matthew Deady later commented that the framers of article I, section 9 understood the

[72] *See, e.g.*, Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994) (discussing the fact that Indiana's search and seizure guarantee was included in the state bill of rights with little debate); Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 299–300 (Ind. 1994) (the main catalysts for the drafting of the 1851 Indiana Constitution were financial concerns and the desire to limit the authority of the General Assembly).

[73] 8 Ind. 545 (1855).

[74] *Id.*

[75] *Id.* at 558.

[76] The only other such case of which I am aware is *Mayo v. Wilson*, 1 N.H. 53 (1817), which involved the warrantless arrest of the defendant for Sabbath-breaking. The court ultimately held that the statute authorizing the warrantless arrest did not violate the state constitutional search and seizure guarantee. Indeed, the court concluded that the New Hampshire search and seizure provision "does not seem intended to restrain the legislature from authorizing arrests without a warrant, but to guard against abuse of warrants issued by Magistrates," a statement perfectly in line with what Davies suggests was the predominant view of founding era and early nineteenth century courts. But the court also commented that an arrest based on "open and manifest guilt" was "no more unreasonable" than an arrest by a valid warrant. The rather ambiguous statement arguably suggests that, implicitly, the evaluation of the validity of the arrest was subject to a constitutional standard of reasonableness.

provision to have a more modest effect. Writing as a federal judge some years after the adoption of the constitution, Deady explained that article I, section 9 was

> copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England [the Wilkes cases], shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law.[77]

The statement rather remarkably conforms to what Davies suggests would have been understood to have been the Fourth Amendment's limited focus, namely, the abuse of general warrants, not the reasonableness of law enforcement conduct generally.

The evidence from the time of the framing of article I, section 9 then, is something of a mixed bag. On the one hand, there are textual differences between the Oregon provision and its Fourth Amendment parent that could be read to suggest that the state framers had in mind a broader guarantee than may have been understood to have been afforded by the Federal Constitution at the time. And it is at least temporally possible that such an effect was signaled by the Indiana Supreme Court's interpretation of that state's search and seizure provision, which was presumably the direct model for article I, section 9. Yet, on the other hand, there is nothing in the debates concerning the Oregon search and seizure provision to suggest that its framers understood or intended it to have such novel and broad-reaching effect. And, to the contrary, Deady recounts that the goal more modestly was to duplicate the Fourth Amendment's regulation of abusive use of general warrants.

II
THE INTERPRETATION OF ARTICLE I, SECTION 9

A. Early Appellate Court Decisions

Having examined the origins of article I, section 9, let us turn to the manner in which the Oregon courts interpreted the provision. Interestingly, the *Oregon Reports* barely mention article I, section 9 for the first four decades following statehood. In one 1885 case, *Dahms v. Sears*, the court ventured an opinion, in *dictum*, that money taken from a prisoner "would probably be regarded . . . as a

[77] Sprigg v. Stump, 8 F. 207, 213 (C.C.D. Or. 1881).

reasonable search and seizure."[78] Because at that time the Fourth Amendment had not yet been held to apply directly to the states, it is clear that the court was referring to article I, section 9.[79] Still it is not so clear where the court's conclusion about the application of that section came from. The next case in which the court addressed the lawfulness of a search or seizure did not occur until 1901.[80]

That there were initially so few appellate court decisions is not that surprising. In the nineteenth century, law enforcement misconduct was regarded as a private trespass for which the officer might be personally liable.[81] But such misconduct was not regarded as implicating constitutional search and seizure guarantees. There was, as yet, no exclusionary rule, and the constitutional search and seizure provisions were understood to operate as limits on legislative authority—that is, to limit the extent to which legislatures could authorize unreasonable searches and seizures, not as limits on the behavior of executive branch or local law enforcement officers.[82] As

[78] Dahms v. Sears, 13 Or. 47, 56, 11 P. 891, 895 (1886).

[79] It was not until 1949, in *Wolf v. Colorado*, 338 U.S. 25 (1949), that the U.S. Supreme Court held that, by incorporation through the Fourteenth Amendment, the Fourth Amendment applied to the states; and it was not until 1961, in *Mapp v. Ohio*, 367 U.S. 643 (1961), that the Court held that the exclusionary rule applied to the states as well. On the impact of the incorporation doctrine on state constitutional practice and, specifically, the incorporation of the criminal procedure provisions of the Federal Bill of Rights see generally Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397 (2005).

[80] State v. McDaniel, 39 Or. 161, 65 P. 520 (1901).

[81] Recall that the Wilkesite cases—in which the abuses of general warrants were famously decried by the courts—were civil actions for damages brought against the messengers who executed them. *See supra* notes 15–19. This was based on the common-law notion that an officer who conducts an unlawful arrest or search commits trespass. *See generally* Davies, *supra* note 12, at 624–26; Amar, *supra* note 41, at 774–75.

[82] *See, e.g.*, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120 (2d ed. 1829) (the first eight amendments to the Federal Constitution "fall within the class of *restrictions on the legislative power*") (emphasis added). In a similar vein, Davies observes that, during the founding period and the early nineteenth century, state constitutional framers had an entirely different conception of governmental action from the one that is familiar to modern sensibilities. According to Davies,

> The current notion that constitutional standards, such as search-and-seizure standards, address the conduct of ordinary officers dates back only to the beginning of the twentieth century. Under framing-era doctrine, legislation and court orders were governmental in character, so it was possible to conceive of an "unconstitutional" statute or an "unconstitutional" general warrant issued by a court. However, there was no conception that an ordinary officer could act "unconstitutionally"; rather, an ordinary peace officer acted as the government only when he acted *within* the lawful authority of his office . . . .

I have noted, Oregon's clause expresses this interpretation explicitly ("[n]o *law* shall violate"), and it was not until the twentieth century that the courts construed article I, section 9 to apply directly to police conduct.[83] The *Dahms* case, for example, was a trespass action against the arresting officers, not a direct appeal from a criminal conviction based on the evidence seized.[84]

In the meantime, the federal courts began to turn their attention to the Fourth Amendment for the first time in nearly 100 years. Three decisions in particular proved especially significant to the development of search and seizure law in Oregon.

The first is *Boyd v. United States*,[85] an 1886 case in which the Court, for the first time, held that the reasonableness clause of the Fourth Amendment was more than a preamble. At issue was the constitutionality of a federal statute that authorized federal courts in customs proceedings to order importers to produce invoices for

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Davies, *supra* note 23, at 90 (footnotes omitted). The ordinary officer who acts in excess of authority was regarded as having acted in "deceit" of that authority, subjecting the officer to a private action for damages, usually for trespass or false imprisonment. *Id.* at 90–91.

83 The Oregon Supreme Court first addressed this issue in *State v. McDaniel*, 115 Or. 187, 209, 231 P. 965, 972 (1925):

> Our attention is called to the proposition that the Constitution is addressed only to the legislature, and there being no law of the state authorizing unconstitutional searches, the officers, at most, were trespassers, and the remedy is against them. But the Constitution is addressed not only to the legislature, but to every officer of the state, including the judiciary.

Interestingly, the case was decided by a 4–3 vote. *Id.* The dissenters objected that:

> [t]he inhibition in this section is directed to the legislature. No law is assailed in this appeal. There is no claim that the search and seizure complained of were made by virtue of any unconstitutional statute or law of the state. It is agreed that the search and seizure were both made without warrant. The officers making the search and seizure were acting without a warrant or other writ. There is no claim by the state that the officers were authorized by any order of any court or any law in conflict with said Section 9 of Article I of our state Constitution. If the officers exceeded their authority, they are subject to civil and criminal liability.

McDaniel, 115 Or. at 217, 231 P. at 927.

Even more interesting, on rehearing, the court reversed itself on the merits, on slightly different grounds. 115 Or. 234, 237 P. 373 (1925). The opinion on rehearing did not address the question whether article I, section 9 was a limitation on legislative power alone. Since then, however, so far as I am aware, the Oregon courts have never revisited the question. Instead, they have proceeded under the assumption that the state guarantee, notwithstanding its rather more limited phrasing, acts as a limitation on the authority of all governmental actors, not just the legislature.

84 Dahms v. Sears, 13 Or. 47, 11 P. 891 (1888).

85 116 U.S. 616 (1886).

imported goods.[86] The Court concluded that such orders were tantamount to an unreasonable "search" for papers, contrary to the Fourth Amendment, and a violation of the privilege against self-incrimination.[87] Interestingly, the Court invoked the historical origins of the Fourth Amendment in support of its conclusion, in particular, the jury instructions that were delivered in one of the Wilkesite cases in England in the 1760s.[88]

The second case is *Weeks v. United States*.[89] *Weeks* is perhaps best known for being the first case in which the U.S. Supreme Court recognized that evidence seized in violation of the Fourth Amendment is subject to exclusion at trial. But it is important for an additional—and then equally novel—proposition, namely, that the reasonableness clause of the amendment applies to warrantless police conduct.[90]

The third case is the Court's 1925 decision in *Carroll v. United States*.[91] As every law student knows, *Carroll* is the first case in which the Court recognized an "automobile exception" to the Fourth Amendment's warrant requirement.[92] In actuality, the Court's opinion is somewhat broader. Addressing the constitutionality of the warrantless search of automobiles used to transport liquor during the Prohibition Era, the Court concluded, after recounting the holdings of both *Boyd* and *Weeks*, that

> [o]n reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when

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86 *Id.*

87 *Id.* at 626.

88 The Court placed particular emphasis on the instructions to the jury in the *Entick* case, which the court said was "in the minds of those who framed the Fourth Amendment." *Id.* at 626–27. As Davies points out, however, there is some doubt that the framers of the Fourth Amendment were aware of the instructions in *Entick*, given the relatively late publication of those instructions. Davies, *supra* note 23, at 202 n.636.

89 232 U.S. 383 (1914).

90 *Id.* at 388–89.

91 267 U.S. 132 (1925).

92 *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2(a), at 459–66 (3d ed. 1996).

> it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.[93]

This is a much broader reasonableness test than the test for which *Carroll* is now customarily remembered.

Thus, by the 1920s, the U.S. Supreme Court had come to conclude that the reasonableness clause of the Fourth Amendment was not merely a preamble, but an independently enforceable guarantee of individual rights. The guarantee, moreover, was enforceable in criminal cases, requiring the exclusion of evidence seized in violation of its terms. Precisely what constituted a "reasonable" search or seizure, however, the Court had not yet determined. There were hints of a warrant requirement, but, as *Carroll* makes clear, nothing as clear as an outright presumption that judicially approved warrants were necessary had yet emerged. "Reasonableness" was still determined on a case-by-case basis.

By the early twentieth century, the Oregon courts also began to recognize that the state constitutional search and seizure guarantee required the exclusion of evidence seized in violation of the constitution.[94] The Oregon courts also concluded—rather more explicitly than did the federal courts—that the reasonableness clause did *not* necessarily require police to act pursuant to warrants, only that searches and seizures be reasonable under the circumstances.

Interestingly, the Oregon courts often cited the U.S. Supreme Court's Fourth Amendment cases as authority for their interpretations of article I, section 9 even though, as I have noted, the Fourth Amendment had not yet even been applied to the states. One of the distinctive features of Oregon search and seizure cases in the first half of the century, in fact, is that the courts frequently referred to article I, section 9, the Fourth Amendment, and cases construing each rather interchangeably.

For example, in one of the earlier article I, section 9 decisions, *State v. McDaniel*,[95] the defendant challenged the lawfulness of the

[93] 267 U.S. at 149.

[94] The Oregon Supreme Court first recognized an exclusionary rule rooted in article I, section 9 in *State v. Laundy*, 103 Or. 443, 204 P. 958 (1922). The court noted that, in the past, it had held that "the relevancy of a given article is not affected by the circumstances that it was wrongfully seized." 103 Or. at 494, 204 P. at 975. But, after discussing the U.S. Supreme Court's decision in *Weeks*, the Oregon court concluded that "[t]his rule of practice sanctioned by the Supreme Court of the United States ought, for the same reasons which recommended it to the court, be adopted and followed by the courts of this state." *Id.*

[95] 39 Or. 161, 65 P. 520 (1901).

police seizure of an inculpatory letter in the course of his arrest. He challenged the seizure on both state and federal constitutional grounds. The Oregon Supreme Court concluded that a search incident to a valid arrest was reasonable, without making clear which constitution the court was referring to. In a similar vein is *State v. Laundy*,[96] in which the court noted that "[t]he defendant also relies upon article I, § 9, of our state Constitution, which, although not in the identical language, is in effect and meaning the same as [Amendment] IV of the federal Constitution."[97]

That is not to say that, even very early on, the Oregon Supreme Court did not appreciate the independent legal significance of the state constitution. In *State v. McDaniel*,[98] for example, the state argued that the Oregon court was not bound by the exclusionary rule that the U.S. Supreme Court in *Weeks* had recognized the Fourth Amendment to require. The Oregon Supreme Court agreed with the larger principle, commenting that "state courts are not bound by the federal authorities."[99] Having said that, however, the court went on expressly to adopt the *Weeks* exclusionary rule, "not as necessarily binding upon this court, but for 'the same reasons which recommended it'" to the U.S. Supreme Court.[100]

Oregon search and seizure decisions from the first third of the twentieth century are especially interesting as they relate to the question whether the reasonableness clause of article I, section 9 presumptively required warrants. Following the lead of the U.S. Supreme Court in *Carroll*, the Oregon court said—with a categorical emphasis that sounds foreign to modern, warrant-preference sensibilities—"no."

Consider *State v. De Ford*,[101] a Prohibition-era case in which the defendant challenged the constitutionality of the warrantless stop and search of his vehicle for illegal liquor. The defendant contended that the state constitution required a warrant and, without one, the exclusion of the damning evidence. The Oregon Supreme Court disagreed. The court began by summarizing the U.S. Supreme

96 103 Or. 443, 204 P. 958 (1922).

97 103 Or. at 492, 204 P. at 974.

98 115 Or. 187, 231 P. 965 (1925), *rev'd on reh'g*, 115 Or. 234, 237 P. 373 (1925).

99 115 Or. at 200, 231 P. at 970.

100 115 Or. at 203, 231 P. at 970.

101 120 Or. 444, 250 P. 220 (1927).

Court's decisions in *Boyd* and *Carroll*.[102] It then distilled (excuse the pun) from those decisions the following guiding principle: "It thus appears that the possession of the warrant is not the controlling consideration of whether a search is reasonable or unreasonable. An officer armed with a warrant may make an unreasonable search. An officer without a warrant may make a reasonable search."[103] Quoting from a recently decided Mississippi Supreme Court decision on the same point, the court explained that the lawfulness of a search or a seizure is not determined by the presence or absence of a warrant; rather, "[i]t is a judicial question to be determined by the court in each case, taking into consideration . . . the circumstances under which the search or seizure was made, and the presence or absence of probable cause therefor."[104]

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[102] 120 Or. at 450–52, 250 P. at 222–23.

[103] 120 Or. at 452, 250 P. at 223.

[104] *Id.* (quoting Moore v. State, 103 S. 483, 485 (1925)). The court's decision in this case is especially interesting given the disposition of an earlier one involving the same issue. In *State v. McDaniel*, 115 Or. 187, 231 P. 965 (1925), the court addressed the lawfulness of a warrantless search and seizure of unlawful liquor found on the defendant at the time of arrest. Initially, the court reversed the conviction. Justice Martin Pipes, joined by two other justices (a fourth justice concurred in the result only), concluded that, subject to limited exceptions, article I, section 9 requires law enforcement officers to act pursuant to the authority of a warrant. 115 Or. at 194, 231 P. at 967–68. The court specifically addressed the question whether a warrantless search can be reasonable in the following terms:

> It is said that a search with a warrant may be unreasonable, and a search without a warrant be reasonable and lawful, if reasonable. The first proposition is a legal impossibility. . . .
>
> Nor is the second proposition any sounder. If he makes a search without a warrant, however polite, gentle, or considerate he may be, the search is unreasonable, because it is unlawful. The standard of reasonableness is not the conduct of the officer, but the possession of the warrant.

115 Or. at 210, 231 P. at 972. Justice Oliver Coshow, joined by two other justices, dissented. Among other things, he contended that the "[t]he inhibition of [Article I,] Section 9 is not against all searches but only against unreasonable searches. The presence of a warrant is not the sole test of the reasonableness of a search. A search, with a warrant, may be unreasonable, and without a warrant, reasonable." 115 Or. at 218, 231 P. at 975 (Coshow, J., dissenting). On rehearing, one of the justices in the majority switched sides, and the case flipped on the ground that the warrantless search was reasonable, because it was incident to the defendant's arrest. State v. McDaniel, 115 Or. 234, 237 P. 373 (1925). In *State v. De Ford*, the court's opinion was drafted by none other than Justice Coshow, and the opinion includes the very same lines about the scope of article I, section 9 that appeared in his dissenting opinion in *McDaniel*. There was no dissent in *De Ford*. 120 Or. 444, 250 P. 220 (1926).

To the same effect is *State v. Lee*,[105] decided the same year as *De Ford*. In that case, a county sheriff secured a warrant to search the premises of a person who had been suspected of operating an unlawful still. After searching the premises, the sheriff went outside to the barnyards where he smelled the odor of mash, apparently emanating from a barn on a neighbor's property. Without a warrant to search that property, the sheriff entered onto the neighbor's land and searched the neighbor's barn, where of course he found a still. After being arrested for the unlawful operation of a Prohibition-era still, the neighbor challenged the lawfulness of the search of his barn. The Oregon Supreme Court concluded that the search was reasonable and, thus, not unlawful. Quoting from the same Mississippi case that the court had relied on in *De Ford*, the court concluded that the reasonableness of a search does not depend on the presence of warrant, but on the circumstances of each case.[106] In this case, the court said, the sheriff reasonably believed, through the operation of his olfactory senses, that a crime was being committed, and that was enough to justify the search, arrest, and seizure.[107]

That would remain the state of things for at least two decades. Both *De Ford* and *Lee* were cited as recently as 1959 for the proposition that "there is no constitutional barrier to a search based upon information alone," so long as the officer had probable cause before engaging in the warrrantless search or seizure.[108]

B. The State Constitutional Revolution

By the 1960s, however, the Oregon Supreme Court began viewing article I, section 9 in different terms. In contrast with *De Ford* and *Lee*, the court began characterizing the Oregon Constitution as presuming that warrants are required, unless a search or seizure occurred incident to a lawful arrest. Still, the signals were somewhat mixed.

In *State v. Chinn*,[109] for example, the court addressed the lawfulness of a warrantless police search of the defendant's apartment on a tip that a man who had committed sexual abuse lived there. The police knocked on the door and were allowed to enter by one of the

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105 120 Or. 643, 253 P. 533 (1927).

106 120 Or. at 649, 253 P. at 535.

107 120 Or. at 650–51, 253 P. at 535.

108 State v. Hoover, 219 Or. 288, 299, 347 P.2d 69, 75 (1959).

109 231 Or. 259, 373 P.2d 392 (1962).

occupants, who told them that the defendant was not present. The police proceeded to search the premises, and, when finished, decided to remain at the apartment, watch television, and wait for the defendant to return. When the defendant returned, they arrested him and took with them evidence that they had discovered during the search. When the defendant challenged the lawfulness of the warrantless search, the state argued that the evidence was constitutionally seized during an arrest. The Oregon Supreme Court agreed.

The court began with the declaration that the Oregon Constitution "protects the home against invasion by the police unless the police first have procured a search warrant."[110] Cited as authority for that proposition was a Fourth Amendment case, *United States v. Lefkowitz*,[111] which, interestingly, did not quite go that far.[112] The court then observed that a "notable exception to the demand for a search warrant is, of course, the search made as an incident of a lawful arrest."[113] Turning its attention to the question whether the search was, indeed, "incident" to the arrest, the court held that the answer depended upon whether the officers acted reasonably. The court explained that a relevant factor was whether the officers had the opportunity to obtain a warrant. Noting that the officers did have such an opportunity (while they were watching television), the court nevertheless commented that that was not dispositive:

> We cannot say the failure to obtain a search warrant rendered the search or the seizure unreasonable. If the mere failure to obtain a search warrant makes every search and seizure illegal even though a perfectly reasonable accompaniment of a lawful arrest, then the word "unreasonable" has been read out of the constitution.[114]

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[110] 231 Or. at 265, 373 P.2d at 395.

[111] 285 U.S. 452 (1932).

[112] *Lefkowitz* actually was a case in which the police obtained a warrant to arrest the defendant, went to his residence to effect the arrest, and proceeded to search the premises incident to that arrest. The Court said that the lawfulness of the search depended on whether it was either authorized by the warrant or reasonably incident to the arrest. The Court ultimately said that the warrantless search was not reasonably incident to the arrest. In the process, the Court commented that "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *Id.* at 464.

[113] 231 Or. at 266, 373 P.2d at 395.

[114] 231 Or. at 273, 373 P.2d at 398.

In the meantime, however, the federal courts were beginning to characterize their own Fourth Amendment case law as recognizing a preference for warrants. At least as early as the late 1940s, the U.S. Supreme Court claimed from the Fourth Amendment an implicit requirement that searches and seizures be authorized by warrants.[115] By the 1960s, the Court went so far as to say that, in cases that might otherwise be regarded as unreasonable, the presence of a warrant can make the difference.[116] There emerged from the federal cases of the era what became known as the "per se rule" of warrants, derived from *Katz v. United States*,[117] in which the Court declared,

> Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[118]

The Oregon courts quickly followed suit, and reference to the per se rule—often with the foregoing quote from *Katz*—became a regular feature of state search and seizure opinions.[119]

By the 1970s, however, the Oregon courts began to acknowledge at least the possibility that Fourth Amendment decisions did not control their interpretation and application of article I, section 9, even if they ultimately chose to follow the pattern of the federal constitutional cases. In *State v. Florance*,[120] for example, the Oregon Supreme Court faced the question whether to follow the lead of the U.S. Supreme Court in relaxing the requirements for a valid search incident to arrest under the Fourth Amendment.[121] The Oregon court

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115 *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14–15 (1948).

116 United States v. Ventresca, 380 U.S. 102, 106 (1965) ("[I]n a doubtful or marginal case [of probable cause] a search under a warrant may be sustainable where without one it would fall.").

117 389 U.S. 347 (1967).

118 *Id.* at 357 (alteration original) (citation omitted) (internal quotation marks omitted) (footnote omitted).

119 *See, e.g.*, State v. Peller, 287 Or. 255, 260, 598 P.2d 684, 687 (1979); State v. Greene, 285 Or. 337, 340–41, 591 P.2d 1362, 1363–64 (1979); State v. Miller, 269 Or. 328, 333, 524 P.2d 1399, 1401–02 (1974); State v. Douglas, 260 Or. 60, 67, 488 P.2d 1366, 1369–70 (1971).

120 270 Or. 169, 527 P.2d 1202 (1974).

121 In *United States v. Robinson*, 414 U.S. 218, 235 (1973), the Supreme Court redefined the scope of a lawful search incident to arrest so that the search need not be reasonably related to the particular offense for which the defendant was arrested or necessitated by officer safety concerns.

noted that the U.S. Supreme Court had chosen to depart from earlier precedent in relating those requirements. The court explained that it could choose to follow that path or adhere to the earlier line of cases. "We can do so," the court explained, "by interpreting Article I, § 9, of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution."[122] Having said that, the court chose to follow the lead of the U.S. Supreme Court, because of what the Oregon court characterized as a "need of simplification for law enforcement personnel, lawyers and judges."[123] There was a vigorous dissent, authored by Chief Justice K.J. O'Connell, who questioned the need for such simplification of criminal procedure and proposed that the Oregon courts instead boldly determine, independently of federal cases interpreting the Fourth Amendment, what article I, section 9 means.

Eight years later, in *State v. Caraher*,[124] the Oregon Supreme Court did just that. The case involved the warrantless search of the defendant's purse (and the coin compartment inside) during an arrest for possession of a controlled substance. When the defendant challenged the constitutionality of the search, the state responded that the case was controlled by *Florance*. The Oregon Supreme Court decided that it had been wrong in *Florance* to follow so rigidly Federal Fourth Amendment precedents, particularly in the name of uniformity and simplicity. "Eight years of uniformity with U.S. Supreme Court decisions," the court tartly observed, "has not . . . brought simplification to the law of search and seizure in this state."[125] The court then openly declared independence from the Fourth Amendment:

> [W]e remain free, even after *Florance*, to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is part of a state court's duty of independent constitutional analysis. That a state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional

[122] 270 Or. at 182, 527 P.2d at 1208.

[123] 270 Or. at 183, 527 P.2d at 1209.

[124] 293 Or. 741, 653 P.2d 942 (1982).

[125] 293 Or. at 749, 653 P.2d at 946.

> standards is beyond question. Indeed, the states are "independently responsible for safeguarding the rights of their citizens."[126]

The court explained that "[t]his is not a revolutionary idea but one that is founded in the most fundamental principles of federalism and in the history of state constitutions."[127]

During this period of state constitutional revolution, the Oregon Supreme Court declared not only the independence of the Oregon Constitution, but also its primacy. This preeminance meant that, in constitutional cases, the courts *always* would turn first to the state constitution and resort to federal constitutional analysis only if the state constitution did not afford complete relief.[128] Known as the "first-things-first" doctrine, this meant that the Oregon courts were obligated to examine applicable state constitutional provisions before turning to the Federal Constitution even in cases in which the parties neglected to mention, or intentionally disclaimed, state constitutional grounds for their arguments.[129]

Resort to the state constitution then became common, especially in search and seizure cases. The Oregon courts often departed from Federal Fourth Amendment analysis and concluded that article I, section 9 affords greater protections to individual rights than does its federal counterpart. Thus, for example, the Oregon Supreme Court

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[126] 293 Or. at 750–51, 653 P.2d at 946–47 (quoting People v. Brisendine, 531 P.2d 1099 (1975)) (citations omitted).

[127] 293 Or. at 756 n.13, 653 P.2d at 950 n.13.

[128] The classic explanation of the "primacy" approach to state constitutionalism may be found in *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123, 126 (1981):

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

[129] *See, e.g.*, State v. Kennedy, 295 Or. 260, 265, 666 P.2d 1316, 1320–21 (1983) (courts are obligated to address applicable state constitutional provisions even when parties fail to address them); State v. Clark, 291 Or. 231, 233 n.1, 630 P.2d 810, 812 n.1 (1981) (courts are obligated to address issues of state constitutional law even when parties disclaim reliance on the state constitution). On the theoretical basis for the first-things-first approach to state constitutional interpretation, see generally Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641 (1983); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). For a nice summary of the arguments about the first-things-first approach, as well as competing views of state constitutional interpretation in the specific area of search and seizure, see generally Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225 (2007).

has expressly repudiated the familiar federal "reasonable expectation of privacy" analysis for determining what is a "search" within the meaning of article I, section 9.[130] It has also rejected the federal "open fields doctrine" and extended article I, section 9 protection to the curtilage of an individual's property.[131] And it has rejected deterrence as the justification for an exclusionary rule under article I, section 9, contrary to federal cases applying the exclusionary rule derived from the Fourth Amendment.[132]

In the ensuing years, as resort to the state constitution became the norm, the Oregon courts became more self-conscious about *how* they were determining the meaning of the constitution. The Oregon Supreme Court eventually articulated a preference for a jurisprudence of original intent as the basis for judicial interpretation of provisions of the original 1857 constitution. That intent, the court explained, is ascertained by examining the wording of the provision at issue, "the historical circumstances that led to its creation," and the "case law surrounding it."[133] Cases construing provisions of the original constitution—including provisions related to the right to a jury

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130 *See, e.g.*, State v. Tanner, 304 Or. 312, 321 n.7, 745 P.2d 757, 762 n.7 (1987) ("One difficulty with analyzing privacy interests in terms of 'expectations' is that the issue is one of right, not expectation. Rights under section 9 are defined not by the privacy one expects but by the privacy one has a right to expect *from the government*.") (emphasis in original); State v. Campbell, 306 Or. 157, 164, 759 P.2d 1040, 1044 (1988) ("This court has expressed doubts about the wisdom of defining Article I, section 9, searches in terms of 'reasonable expectations of privacy.' Because the phrase continues to appear so often in arguments, we here expressly reject it for defining searches under Article I, section 9." (citations omitted)).

131 State v. Dixson/Digby, 307 Or. 195, 208, 766 P.2d 1015, 1022 (1988).

132 *See, e.g.*, State v. Smith, 327 Or. 366, 963 P.2d 642 (1998) (exclusion is not predicated on a policy of deterrence but is instead a personal right); *Tanner*, 304 Or. at 315, 745 P.2d at 758 (unlike the Fourth Amendment exclusionary rule, the rule of article I, section 9 "is predicated on the personal right of a criminal defendant to be free from an 'unreasonable search, or seizure'").

133 Priest v. Pearce, 314 Or. 411, 415–16, 840 P.2d 65, 67 (1992). The practice of interpreting the Oregon Constitution in light of the intentions of its framers actually dates back at least to the 1930s. *See, e.g.*, Jones v. Hoss, 132 Or. 175, 178, 285 P. 205, 206 (1930) (the object of constitutional interpretation is "to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it"). But, until the state constitutional revolution, the Oregon courts were never very consistent about adhering to that interpretive approach. There is, in fact, some question whether—even after the revolution—the courts have been consistent in their approaches to the interpretation of the state constitution. *See generally* Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000) (following the state constitutional revolution, the Oregon courts apply at least six different interpretive approaches to the Oregon Constitution).

trial,[134] the right to bear arms,[135] the right to remedies,[136] the right to proportional punishment,[137] and the prohibition against *ex post facto* laws[138]—commonly relied on extensive inquiries into the historical circumstances surrounding the adoption of the state's nineteenth-century constitution with a view to reconstructing what the framers would have understood those provisions to mean.

C. The Post-Revolution Warrant-Preference Rule

Interestingly, though, the Oregon courts have not often applied that originalist interpretive approach to cases arising under article I, section 9. In fact, on the specific question whether the reasonableness clause of the Oregon search and seizure guarantee implicitly states a preference for warrants, the Oregon courts have never ventured beyond citations to Federal Fourth Amendment cases. Instead, even after the revolutionary decision in *Caraher*, the Oregon Supreme Court adopted the federal warrant-preference rule wholesale, without discussion, and with only citations to Fourth Amendment cases.

The post-revolution decision usually cited for Oregon's warrant-preference rule is *State v. Davis*.[139] The precise issue in that case was the lawfulness of the warrantless entry into the defendant's home, which the state contended was reasonable under article I, section 9 because of circumstances amounting to an emergency. The court began its analysis with the statement that "[w]e start with the proposition that warrantless entries and searches of premises are *per se* unreasonable unless falling within one of the few 'specifically established and well-delineated exceptions' to the warrant

[134] Lakin v. Senco Products, Inc., 329 Or. 62, 69, 987 P.2d 463, 468 (1999) ("[W]hatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today.").

[135] State v. Hirsch, 338 Or. 622, 114 P.3d 1104 (2005) (tracing extensive history of right to bear arms in resolving dispute over constitutionality of felon-in-possession statute); State v. Delgado, 298 Or. 395, 400, 692 P.2d 610, 612 (1984) ("The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted." (footnote omitted)).

[136] Smothers v. Gresham Transfer, Inc., 332 Or. 83, 94–115, 23 P.3d 333, 340–51 (2001) (tracing history of Oregon's remedy clause from Magna Carta, to Sir Edward Coke's *Second Institute*, to Blackstone's *Commentaries*, to early state constitutions and declarations of rights).

[137] State v. Wheeler, 343 Or. 652, 175 P.3d 438 (2007).

[138] State v. Cookman, 324 Or. 19, 29–30, 920 P.2d 1086, 1092–93 (1996).

[139] 295 Or. 227, 666 P.2d 802 (1983).

requirement."[140] The internal quotation was, of course, the familiar phrasing of the U.S. Supreme Court's opinion in *Katz*. The Oregon court also cited two other pre-revolution decisions, *State v. Peller*[141] and *State v. Matsen/Wilson*,[142] both of which cited Fourth Amendment cases for a warrant-preference rule. The case contained no examination of the wording of article I, section 9 nor of the historical circumstances surrounding its adoption, only citation to the three cases mentioned. Since then, the court has never reexamined the question.[143]

Not that the Oregon courts have completely abjured references to history and original intentions when interpreting and applying article I, section 9. Even before the state constitutional revolution, the Oregon Supreme Court occasionally referred to the historical origins of article I, section 9 and of the Fourth Amendment. *State v. Blackburn/Barber* is a good example.[144] At issue in that case was the extent to which a search warrant was sufficiently particular under the state and federal constitutions. The Oregon Supreme Court noted that

> [b]oth the Fourth Amendment to the United States Constitution and Article I, § 9, of the Oregon Constitution require a search warrant "particularly describing the place to be searched." It has been explained that "the historical motivation for this constitutional mandate was a fear of 'general warrants,' giving the bearer an unlimited authority to search and seize." More specifically, the aim of the requirement of particularity is to protect the citizen's interest in freedom from governmental intrusion through the invasion of his privacy. If the search warrant describes premises in such a way that

140 295 Or. at 237, 666 P.2d at 809.

141 287 Or. 255, 260, 598 P.2d 684, 687 (1979).

142 287 Or. 581, 601 P.2d 784 (1979).

143 The usual practice is to declare the warrant preference rule, and cite either *Davis* or a more recent case that relied on *Davis*. *See, e.g.*, State v. Meharry, 342 Or. 173, 177, 149 P.3d 1155, 1157 (2006) ("[A] search conducted without a warrant is deemed unreasonable unless it 'fall[s] within one of the few specifically established and carefully delineated exceptions to the warrant requirement.'" (citing State v. Bridewell, 306 Or. 231, 235, 759 P.2d 1054 (1988)) (second alteration original); State v. Snow, 337 Or. 219, 223, 94 P.3d 872, 874 (2004) ("Under Article I, section 9, '[w]arrantless entries and searches of premises are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement.'" (citing State v. Bridewell, 306 Or. 231, 235, 759 P.2d 1054 (1988) (alteration original)). In some cases, even after *Davis*, the court has referred to the warrant preference rule and cited *Katz* as authority. *See, e.g.*, State v. Miller, 300 Or. 203, 225, 709 P.2d 225, 241–42 (1985) ("Warrantless entries and searches of premises are *per se* unreasonable unless they fall within one of the few, carefully circumscribed exceptions to the warrant requirement.") (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

144 266 Or. 28, 511 P.2d 381 (1973).

> it makes possible the invasion of this interest in privacy without the foundation of probable cause for the search, the warrant is too broad and therefore constitutionally defective.[145]

Interestingly, the court cited as authority for its brief historical digression the U.S. Supreme Court's decision in *Boyd*, which, it will be recalled, relied on the asserted importance of the eighteenth-century Wilkesite cases in the framing of the Fourth Amendment. The court has relied on that statement from *Blackburn/Barber* in a number of subsequent cases concerning the particularity requirement of article I, section 9.[146]

More often than not, the historical origins of state and federal search and seizure guarantees find prominence in dissenting opinions. Notable in that respect is Chief Justice Edwin Peterson's dissent in *State v. Bridewell*.[147] At issue in that case was the lawfulness of the police entry onto the defendant's land without a warrant. The state argued that the police were justified in entering the defendant's premises without a warrant because of a reasonable concern for his safety, based on information supplied by a friend some twelve hours earlier. The majority disposed of the case in short order. It started with the familiar declaration that "[w]arrantless entries and searches of premises are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement."[148] Cited as authority was a single case: *State v. Davis*. The court recognized that the presence of exigent circumstances could provide just such an exception, but it concluded that, on the facts of that case, insufficient exigency existed.

Chief Justice Peterson dissented. He argued that, because the police entered the defendant's premises to investigate a report of a friend who was concerned that the defendant might have been hurt, the entry "was not a 'search' as that term was understood in the state and federal constitutions in 1791 and 1859 and is not a search within the present day meaning of that term."[149] In support of that assertion,

[145] 266 Or. at 34, 511 P.2d at 384.

[146] *See, e.g.*, State v. Reid, 319 Or. 65, 69–70, 872 P.2d 416, 418 (1994); State v. Ingram, 313 Or. 139, 144, 831 P.2d 674, 676–77 (1992); State v. Devine, 307 Or. 341, 343–44, 786 P.2d 913, 914 (1989).

[147] 306 Or. 231, 241–47, 759 P.2d 1054, 1060–64 (1988) (Peterson, C.J., concurring in part and dissenting in part).

[148] 306 Or. at 235, 759 P.2d at 1057.

[149] 306 Or. at 253, 759 P.2d at 1067–68 (Peterson, C.J., concurring in part and dissenting in part).

Chief Justice Peterson supplied a lengthy account of the origins of state and federal search and seizure provisions. In particular, the discussion included an account of the jury instructions in the eighteenth-century English Wilkesite cases and reference to the American colonial resistance to the use of writs of assistance before the Revolutionary War.[150] The essence of the historical events that led to the adoption of the state and federal search and seizure guarantees, he generalized, was that government was using search and seizures "to persecute nonconformists and repress the rights of the governed," which he asserted simply was not the case when the modern police entered the defendant's property.[151] The majority ignored the dissent's historical analysis.

The same thing occurred in another Oregon Supreme Court case, *State v. Atkinson*.[152] The issue in that case was whether a warrantless police inventory of the contents of an impounded car violated article I, section 9. The majority, in an opinion authored by Chief Justice Peterson, concluded that, in general, a warrantless inventory is permissible under article I, section 9 if it is conducted "pursuant to a properly authorized administrative program, designed and systematically administered so that the inventory involves no exercise of discretion by the law enforcement person directing or taking the inventory."[153] The majority concluded that the lawfulness of the particular inventory at issue, however, could not be determined because the record did not reveal the authority under which the police in that case had impounded the vehicle.[154]

Justice Betty Roberts dissented. She read the majority opinion to hold that noncriminal or regulatory searches are not subject to the restrictions of article I, section 9, a position with which she vigorously disagreed. According to Justice Roberts, "[h]istorically, the government abuses which sparked enactment of our federal fourth amendment were carried out against the American colonies by government officials fulfilling what we would probably consider today to be an administrative or regulatory function, that is, customs

150 306 Or. at 241–47, 759 P.2d at 1060–64 (Peterson, C.J., concurring in part and dissenting in part).

151 306 Or. at 247, 759 P.2d at 1064 (Peterson, C.J., concurring in part and dissenting in part).

152 298 Or. 1, 688 P.2d 832 (1984).

153 298 Or. at 10, 688 P.2d at 837.

154 298 Or. at 11, 688 P.2d at 837–38.

control and the regulation of commerce."[155] At that point, Justice Roberts recounted the history of the origins of the Fourth Amendment. Citing both Lasson and Landynski, she gave particular emphasis to the *Writs of Assistance Case* and to the importance of early state constitutional prohibitions against the use of general warrants.[156] The majority, however, did not even mention the dissenting opinion, much less respond to it.

A similar fate also befell a dissenting opinion in *State v. Dixson/Digby*,[157] an Oregon Court of Appeals case about whether to depart from the federal "open fields" doctrine. A plurality concluded that the guarantee against unreasonable searches and seizures in article I, section 9 extended beyond the curtilage of a residence and included as well the "open fields" beyond. The plurality based that conclusion on, among other things, the historical view that

> Article I, section 9, and the Fourth Amendment are the direct product of the experience that Americans had during the pre-revolutionary period with uncontrolled executive power. The colonists (and their supporters in England) looked to safeguards against arbitrary searches and seizures as one of the bulwarks of the liberty for which they fought the Revolution.

According to the plurality, there is inherent in that history a concern for protecting the right to privacy, "and we must construe the state constitution to protect that right."[158]

Judge George Van Hoomissen dissented. Among other things, he took issue with the plurality's resort to the history of the state and federal search and seizure guarantees. According to Judge Van Hoomissen, the history of those guarantees shows that the principal concern was "[t]he requirement that all search warrants be specific."[159] The antecedent history of the Fourth Amendment, he observed, "has two princip[al] sources: the colonists' antipathy for the general search warrant and the provisions in the early state constitutions designed to prevent general warrants."[160] Quoting an early federal district court decision concerning the origins of the Fourth Amendment, Judge Van Hoomissen urged that, in fact, the

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155 298 Or. at 14, 688 P.2d at 840 (Roberts, J., dissenting).

156 298 Or. at 15–16, 688 P.2d at 840–41.

157 87 Or. App. 1, 740 P.2d 1224 (1987).

158 87 Or. App. at 6–7, 740 P.2d at 1226–27.

159 87 Or. App. at 26, 740 P.2d at 1238 (Van Hoomissen, J., dissenting).

160 87 Or. App. at 27 n.11, 740 P.2d at 1239 n.11 (Van Hoomissen, J., dissenting).

search and seizure guarantees were never intended to apply to warrantless police conduct at all.[161]

The Oregon Supreme Court had the last word on the subject, deciding not to adopt the federal distinction between curtilage and open fields. The court mentioned the fact that Judge Van Hoomissen had dissented, but it did not otherwise address his historical argument that the search and seizure provision was never intended to apply to warrantless police activity in the first place.

I once ventured to mention in an opinion the subject of history and the intentions of the framers of the Fourth Amendment and of article I, section 9. In *Weber v. Oakridge School District 76*,[162] I observed that, although the Oregon Supreme Court had broadly stated a commitment to originalist constitutional interpretation, it had never turned its attention to the intended meaning of the state's constitutional search and seizure guarantee.[163] I suggested that, if the court were truly committed to that task, it might prove to have serious consequences for the development of search and seizure doctrine, particularly in light of recent scholarship suggesting that the framers might not have understood that state and federal search and seizure guarantees included a preference for search warrants.[164] The Oregon Supreme Court, however, denied a petition for review of the decision.[165]

Curiously, in *State v. Carter*,[166] one of its most recent article I, section 9 opinions, the court resorted to the history of state and federal search and seizure guarantees. Indeed, the court—for the first time, so far as I can determine—expressly interpreted the provision by applying the originalist approach of *Priest v. Pearce*.[167] At issue in that case was the validity of a warrant that authorized the police to *search* for specified items, but did not authorize the police to *seize* those items. The defendant argued that the warrant was invalid in light of the requirement in article I, section 9 that warrants "particularly describ[e]" both the "place to be searched, and the . . .

[161] 87 Or. App. at 26 n.10, 740 P.2d at 1238 n.10 (quoting United States v. Snyder, 278 F. 650, 652 (D.C.W. Va. 1922)) (Van Hoomissen, J., dissenting).

[162] 184 Or. App. 415, 56 P.3d 504 (2002).

[163] 184 Or. App. at 429–30, 56 P.3d at 512–13.

[164] 184 Or. App. at 430 n.3, 56 P.3d at 513.

[165] 335 Or. 422, 69 P.3d 1233 (2003).

[166] 342 Or. 39, 147 P.3d 1151 (2006).

[167] 314 Or. 411, 415–16, 840 P.2d 65, 67 (1992).

thing to be seized."[168] The Oregon Supreme Court, quoting *Priest*, responded that, "[i]n analyzing defendant's argument, we consider the specific wording [of article I, section 9], the case law surrounding it, and the historical circumstances that led to its creation."[169] The court then did just that. After carefully examining the precise wording of the participial phrase that is the warrant clause of article I, section 9, the court concluded that the text of the provision simply does not state that authorization of both search and seizure is required. The court then turned to the history of the provision, but limited its discussion to reciting the familiar quotation from *Blackburn/Barber* and, interestingly, a citation to Chief Justice Peterson's dissent in *Bridewell*.[170] On the basis of that brief historical analysis, the court concluded that "[t]he history confirms what the text of Article I, section 9, and this court's cases construing it demonstrate."[171]

III
PARTING THOUGHTS

As I mentioned at the outset, the story of the interpretation of article I, section 9 is the story of Oregon constitutionalism writ small. What that means is that the interpretation of the provision, like much of Oregon constitutionalism, is a bit of a muddle. The Oregon Supreme Court convincingly declared independence from Fourth Amendment analysis in *Caraher*, but, as the ink dried on the reporters for that decision, the same court declared that the state constitution embodies a warrant-preference rule, citing as authority—of all things—Fourth Amendment decisions. Meanwhile, the court has developed a marked interest in interpreting the original provisions of the Oregon Constitution with a view to implementing the understandings and intentions of its nineteenth-century framers. Yet the court has shown an odd and unexplained disinclination to apply that very analysis to article I, section 9. The court, however, has not totally avoided referring to history in its search and seizure cases. As its recent decision in *Carter* makes clear, the court does resort to such originalist interpretive technique in article I, section 9 cases, just not very often. We are left to wonder why.

[168] *Carter*, 342 Or. at 42, 147 P.3d at 1152.
[169] *Id.* (second alteration original) (internal quotation marks omitted).
[170] 314 Or. at 43–44, 840 P.2d at 1152–53.
[171] 314 Or. at 44, 840 P.2d at 1153.

The answer to the question, I submit, is of more than just academic interest. As I have attempted to demonstrate, resort to the intentions of the framers of article I, section 9 could require a major overhaul of the state's search and seizure jurisprudence. In particular, it could well be the case that the framers of the Oregon Constitution had no notion that article I, section 9 would apply to warrantless seizures at all. Or it could be that the framers understood that, if it applied, it stated no particular preference for warrants, rather—as the early twentieth-century Oregon cases categorically held—a broad requirement of reasonableness. Depending on how the courts sort through the historiographical debate about the origins of the Fourth Amendment and the transformation of such basic conceptions as "reasonableness" and "due process" over the course of the nineteenth century, the resulting law of search and seizure could be quite different.

In my view, these problems are unnecessary. In the first place, the Oregon Supreme Court's professed commitment to a constitutional jurisprudence of original intent is, as I have observed on other occasions, mystifying.[172] The court has never explained why it feels limited by the understandings and intentions of the nineteenth-century framers of the Oregon Constitution.[173] Certainly, the historical

[172] Landau, *supra* note 133, at 836 ("In no case of which I am aware has any Oregon court attempted to defend the legitimacy of originalist constitutional interpretation. Its legitimacy is taken for granted."). The literature on the arguments for and against originalism as a method of state or federal constitutional interpretation is truly enormous. For a good introduction to the debate, see generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

[173] The closest the court has come to providing an explanation seems to be the court's opinion in *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 54–55, 11 P.3d 228, 237 (2000), in which the court stated that "it long has been the practice of this court 'to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it.'" (alteration original) (quoting Jones v. Hoss, 132 Or. 175, 178, 285 P. 205, 206 (1930)). Actually, there are probably even older cases that the court could have cited to. *See, e.g.*, Simpson v. Bailey, 3 Or. 515, 517; Noland v. Costello, 2 Or. 57, 58–59. The problem is that, in countless other cases decided before *Stranahan*, the court had interpreted the Oregon Constitution without mentioning the intention of its framers. *See, e.g.*, Dodd v. Hood River County, 317 Or. 172, 855 P.2d 608 (1993) (state constitutional takings clause interpreted without reference to framers' intentions); State v. Mai, 294 Or. 269, 272, 656 P.2d 315, 317 (1982) (state constitutional compulsory process clause is construed "in the same way as the [U.S.] Supreme Court construed the virtually identical federal counterpart" and without reference to meaning intended by Oregon constitutional framers); State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982) (seminal analysis of state constitutional free expression guarantee without mention of framers' intentions as the basis for the analysis). *Stranahan* did not address the existence of such cases. Nor did it provide an explanation why the court apparently feels bound by the intentions of the framers in some cases, but not in others.

circumstances surrounding the adoption of a constitutional provision are relevant and informative. But, as Oregon Supreme Court Justice Hans Linde once observed, although it may not be possible to argue intelligently about specific clauses of the constitution without knowing their histories, "it does not follow that larger principles are confined to what the generation that adopted them was ready to live by."[174]

But one does not have to reject a jurisprudence of original intent *simpliciter* to conclude that it should have no place in the construction of the search and seizure provisions of article I, section 9. An argument—a good argument, in my view—could be made that the wording of the provision, with its reference to "reasonableness," invites analysis that is not historically bound, but instead requires constant reassessment in the light of changing circumstances.[175] In fact, it strikes me that, whatever the merits of originalism generally or as applied to other constitutional provisions, it is impossible to apply that interpretive approach to the law of search and seizure in any meaningful way. There is too great a chasm between modern and nineteenth-century conceptions of law, reasonableness, criminal investigatory procedure, and technology. As one scholar noted, after surveying the history of state and federal search and seizure guarantees,

> the authentic history of search and seizure reveals that a large gulf separates framing-era doctrinal conceptions and criminal justice institutions from our current conceptions and institutions. The story is not one of simple changes in particular rules or standards; rather it is a story of a fundamental transformation amounting to a paradigm shift. Modern investigatory procedure confers powers on police officers that *contravene and violate* not only the specific rules of framing-era common law, but also the basic principles and values that led the Framers to endorse accusatory procedure.

174 Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 184 (1984).

175 *See, e.g.*, Steiker, *supra* note 55, at 824 ("[T]he Fourth Amendment, more than many other parts of the Constitution, appears to require a fairly high level of abstraction of purpose; its use of the term 'reasonable' (actually, 'unreasonable') positively invites constructions that change with changing circumstances."); Sklansky, *supra* note 55, at 1791 ("[E]ven most dyed-in-the-wool originalists concede that certain constitutional provisions seem to cry out for open-ended interpretation . . . . And few parts of the Constitution seem to call more loudly for this kind of interpretation than the opening clause of the Fourth Amendment."); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399 (1974) ("What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past.").

> The bottom line is that there is no way that we can now "return" to the original understanding of the constitutional limits on government arrest and search power—and it is quite doubtful that it would be desirable to do so, even if we could. Too much has changed.[176]

The Oregon Supreme Court's lockstep adherence to the federal warrant-preference rule is equally puzzling. Nothing in the wording of article I, section 9 suggests anything close to a requirement that, in the words of *Davis*, "warrantless entries and searches of premises are *per se* unreasonable unless falling within one of the few specifically established and well-delineated exceptions to the warrant requirement."[177] As I have noted, the rule is taken *verbatim* from the U.S. Supreme Court's Fourth Amendment decision in *Katz*. Beyond that citation to federal case law, the Oregon courts have never explained the basis for the conclusion that article I, section 9 requires warrants.

That is an odd thing, I submit, for a state that touts itself as the vanguard of the state constitutional revolution. It is an especially odd thing in light of cases from earlier in the twentieth century that rejected outright the notion that the Oregon Constitution presumes the necessity of warrants to justify a search or seizure as reasonable. In cases such as *De Ford* and *Lee*, the Oregon Supreme Court expressly held that article I, section 9 does *not* require warrants and, instead, requires only that searches and seizures be reasonable in light of the circumstances of each case. The court has never overruled either case as to that issue and has never explained the shift in its reading of the constitution.

That is not to say that the court could not provide such an explanation. The court could adopt the position that the framers of the Oregon Constitution understood and intended such a warrant-preference rule. I think that the court would have a difficult time making a historical case for that. As I have noted, the wording of article I, section 9 certainly does seem to suggest that—whatever the framers of the Fourth Amendment may have understood seventy years earlier—the framers of the Oregon Constitution intended that the reasonableness clause have enforceable effect. But it is another thing entirely to suggest that the evidence demonstrates that the clause was intended to impart a preference for warrants.

[176] Davies, *supra* note 23, at 222.

[177] State v. Davis, 295 Or. 227, 237, 666 P.2d 802, 809 (1983) (internal quotation marks omitted).

Or I suppose that the court could do what it has done in other contexts, that is, take the position that, because of the passage of time since the adoption of the warrant-preference rule, it is incumbent on opponents of such a rule to demonstrate affirmatively that the framers did not intend it.[178] Given that article I, section 9 was adopted without discussion or amendment, it would be difficult indeed to meet that burden. But taking the position that an error that is repeated often enough can thereby become correct seems a poor basis for so foundational a principle of constitutional law. It also seems contrary to the practice of the court in the years following the state constitutional revolution, particularly in search and seizure cases—cases in which the court has said that "[t]his court is not required blindly to follow earlier 'rules' of constitutional law. Our responsibility for constitutional interpretation is an ongoing one which we will not sidestep by relying on" prior cases that were decided with little or no analysis.[179]

Yet another option is that the court could take a more functional approach and explain that, given its evaluation of the policies underlying the state search and seizure guarantee, it makes sense to require—subject to limited exceptions—police to comply with a warrant process. I think that a good case can be made for reaching such a conclusion, although there certainly are arguments to the contrary.[180] Resolving that particular debate is beyond the scope of

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[178] The court's decision in *State v. Ciancanelli*, 339 Or. 282, 121 P.3d 613 (2005), provides an example. In that case, the state suggested that current doctrine under the free expression guarantee of article I, section 8 could not be squared with evidence of nineteenth-century views about the authority of states to regulate speech and expressive conduct. The court held that, to overturn existing doctrine—which dates back to a 1982 decision, *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982)—the state was required to prove not merely what the framers most likely intended article I, section 8 to mean, but that the framers affirmatively did *not* intend the provision to develop as it did. "A decent respect for the principle of *stare decisis*," the court said, required no less. *Ciancanelli*, 339 Or. at 290, 121 P.3d at 617. Given that there is almost no direct evidence about the intentions of the framers of the Oregon Constitution in adopting article I, section 8 it will come as no surprise that the court concluded that the state had failed in its burden.

[179] State v. Dixson/Digby, 307 Or. 195, 203, 766 P.2d 1015, 1019 (1988).

[180] The principal arguments in favor of a warrant requirement, briefly stated, are that it provides an objective, ex ante determination by a neutral magistrate who is in the best position to weigh the needs of the police against the rights of the individual under the particular circumstances of each case. The requirement, it is argued, avoids the problems associated with police officers making such reasonableness determinations on an ad hoc basis, including the problem of leaving law enforcement officers without clear guidance as to the scope of their authority, and the problem that an absence of such clear guidance creates a danger of arbitrary enforcement of the law. As one scholar noted, inviting law enforcement officers to make ad hoc judgments about the reasonableness of their own

this Article, however. My point is that the Oregon courts have never engaged in such an analysis of the state constitutional search and seizure guarantee.

Admittedly, it could be argued that my concerns about the failure of the courts to address the warrant preference rule as a matter of state constitutional law are purely academic, because, whether or not article I, section 9 imposes a warrant requirement, the fact remains that the Fourth Amendment does. I submit that there is less to that argument than might meet the eye, however. First, if the state constitution happens to provide less protection of individual rights than the federal constitutional counterpart, the Federal Constitution will control.[181] But, either way, the state constitution means what it means.[182] In point of fact, it is not that unusual for the courts to find

conduct "converts the fourth amendment into one immense Rorschach blot." Amsterdam, *supra* note 175, at 393. The requirement further avoids the potential biases and distortions (including potential incentives to commit perjury to justify otherwise unlawful searches and seizures) that result in evaluating determinations of reasonableness after the fact. *See generally* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 911–13 (1991). The articles concerning Fourth Amendment theory and the justifications for a warrant requirement are too numerous to cite completely. For a sample of scholars arguing in support of a warrant preference rule, see generally Steiker, *supra* note 55; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984). There are, as I have noted, criticisms of the warrant-preference rule and arguments often offered in its favor. For a useful critique of the usual arguments in favor of warrants (by a scholar who nevertheless supports warrants for other reasons), see generally Stuntz, *supra*, at 890–97. One particularly frequent criticism is that the assumption that neutral magistrates actually evaluate the grounds for the issuance of warrants cannot be supported on empirical grounds. *See, e.g.*, George R. Nock, *The Point of the Fourth Amendment and the Myth of Magisterial Discretion*, 23 CONN. L. REV. 1, 6 (1990) ("Every observation of the realities of the warrant-issuing process suggest sthe unsoundness of the belief that magistrates typically exercise the reasoning and discretionary functions" so often cited by supporters of a warrant-preference rule.); Wayne R. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire*,*"* 8 CRIM. L. BULL. 9, 27 (1972) ("What empirical studies are available suggest that the [Supreme] Court's oft-stated preference for warrants is based more upon myth than fact. Arrest warrants are commonly issued in the absence of any meaningful participation by a judicial officer . . . .").

181 *See generally* Williams, *supra* note 129 (reviewing basics of state judicial federalism in the context of search and seizure decisions).

182 As Hans Linde explained in *E Pluribus*, *supra* note 174, at 179:

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

that the state constitution does not afford the same rights as the Federal Constitution.[183] Second, whatever may be the rhetoric of Federal Fourth Amendment cases, the reality is that the so-called warrant-preference rule is so riddled with exceptions that, as some scholars have complained, it can hardly be asserted seriously that there is a presumption that warrants are required.[184] Third, and aside from that, there is always the possibility that the U.S. Supreme Court will change its mind. As I stated at the outset, federal constitutional doctrine is not static. The Supreme Court, in fact, has shown little hesitation to overturn decades of settled doctrine in the name of more closely adhering to the intentions of the framers of the Federal Constitution. Recent decisions with respect to the Sixth Amendment Confrontation Clause and right to a jury trial come to mind.[185] The

See also Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1125–30 (1992) ("[N]othing in federal constitutional law prevents state courts from interpreting state law more narrowly than federal, despite the fact that they are barred from enforcing the less-protective state law.").

183 *See, e.g.*, State v. Ice, 343 Or. 248, 170 P.3d 1049 (2007), *cert. granted*, ___ U.S. ___, 128 S. Ct. 1657 (2008) (article I, section 11 of the Oregon Constitution does not require jury findings as predicate for imposition of consecutive sentences, although Sixth Amendment does); State v. Smith, 301 Or. 681, 725 P.2d 894 (1986) (article I, section 12 of the Oregon Constitution does not require police to give *Miranda* warnings that the Federal Constitution does).

184 This has been a regular complaint from scholars for years. *See, e.g.*, Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 236 (1993) ("The warrant rule no longer is the central conceptual tool for determining whether government conduct is reasonable for fourth amendment purposes. The rule now is the exception . . . ." (footnote omitted)); Robert M. Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691, 744 (1982) ("[T]he Court's preference is in words, not in deeds."). The current state of Fourth Amendment doctrine has become an object of outright ridicule among legal scholars. Amar has remarked that "[t]he Fourth Amendment today is an embarrassment." Amar, *supra* note 41, at 757. Steinberg has commented that current doctrine is "arbitrary, unpredictable, and often border[ing] on incoherent." David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005). Another scholar complains that the Supreme Court's case law is "a mass of contradictions and obscurities." Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985). Still another complains that each new Fourth Amendment case is like "more duct tape on the Amendment's frame and a step closer to the junkyard." Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787–88 (1999).

185 *See, e.g.*, Blakely v. Washington, 542 U.S. 296 (2004) (Sixth Amendment guarantees right to a jury trial on factual predicates to imposition of departure sentences from presumptive sentences under state sentencing guidelines); Crawford v. Washington, 541 U.S. 36 (2004) (Sixth Amendment guarantees that out-of-court statement may not be admitted without right of confrontation if the statement is "testimonial" in nature); Apprendi v. New Jersey, 530 U.S. 466 (2000) (Sixth Amendment guarantees right to a jury trial as to any fact that increases the penalty for a crime beyond the prescribed statutory maximum).

cases wholly revolutionized federal doctrine and left lower courts scrambling to deal with the consequences.[186] Nothing prevents the Court from bringing the same sort of revolutionary fervor to its Fourth Amendment doctrine. If the Court, for example, were to adopt the view that, based on a reexamination of the historical record, the framers never intended the Fourth Amendment to apply to warrantless police conduct, what would be the state of Oregon search and seizure doctrine, which has cited only federal case law in support of its current warrant-preference rule?

One way or the other, then, it seems to me manifestly important that the Oregon courts not simply continue to rely on Federal Fourth Amendment case law for a warrant-preference rule. Instead, the courts should treat article I, section 9 as the separate and independent constitutional provision that it is. They should decide whether warrants are presumptively required for a search or seizure to be "reasonable," purely as a matter of Oregon constitutional law.

[186] The articles on *Apprendi*, *Blakely*, and *Crawford* and their impact on state and federal courts are legion. For a sample of the commentary, see generally Joanna Shepherd, Blakely*'s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533 (2007); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006); Jerome C. Latimer, *Confrontation After* Crawford*: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327 (2006); Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-*Blakely *Era*, 4 OHIO ST. J. CRIM. L. 27 (2006); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005); Robert M. Pitler, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005).