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STATE ADOPTION OF FEDERAL LAW: EXPLORING THE LIMITS OF FLORIDA'S "FORCED LINKAGE" AMENDMENT

*Christopher Slobogin**

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I. INTRODUCTION

On November 2, 1982, Florida voters adopted an amendment to the Florida Constitution meant to have a profound impact on the ability of Florida courts to develop their own approach to search and seizure law. Before the effective date of the amendment, article I, section 12 of the Florida Constitution read:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.[1]

As amended, effective January 4, 1983, the provision requires that the "right . . . to be secure" described in this language "be construed in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court."[2] The amendment also added the following clause to the last sentence of the provision: "if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."[3] As a result of these changes, Florida courts must abide by fourth amendment decisions of the United States Supreme Court when interpreting article I, section 12.

This article examines the "forced linkage" between state and federal provisions that the 1983 amendment establishes in Florida. It concludes that forced linkage is ill-conceived, because it is inimical to state court

1. FLA. CONST. art. I, § 12 (1968).
2. FLA. CONST. art. I, § 12 (1983).
3. *Id.*

independence. Accordingly, this article argues, the 1983 amendment to article I, section 12 of the Florida Constitution should be repealed. If not repealed, it should be interpreted to permit Florida courts broad discretion in developing their own stance on search and seizure law. So construed, the amendment would only *require* Florida courts to abide by those United States Supreme Court opinions that provide (1) an authoritative holding that is (2) based solely on the fourth amendment to the federal Constitution, (3) consistent with rights available to Florida citizens through other sources of law, and that (4) preceded the vote on the amendment. Furthermore, even when a Supreme Court ruling meets these four requirements, Florida courts would be entitled to conform their opinions to the ruling in the manner least repugnant to the notion of state court independence.

Parts II and III of this article analyze the jurisprudence of state court reliance on state law as a means of providing greater protection of rights than that afforded under the federal constitution. This jurisprudence provides the theoretical justification for repealing the 1983 amendment or, alternatively, construing it as narrowly as possible. Assuming the 1983 amendment will not be repealed, part IV of this article explores how Florida courts can develop their own approach to search and seizure law despite the amendment.

II. State Court Reliance on State Law

Virtually no one contests the notion that, absent state constitutional language to the contrary, state courts can ignore the federal judiciary's stance on subjects over which there is concurrent jurisdiction,[4] if their approach meets the federal "minimum."[5] Although not yet fully

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4. In the constitutional criminal procedure areas at issue in this article, state and federal courts have concurrent jurisdiction. In some areas, *e.g.*, patent law, the federal courts have exclusive jurisdiction. 28 U.S.C. § 1338 (1982). In other areas, *e.g.*, some aspects of labor law, federal law preempts state law and state courts hearing such cases must apply federal law. *See generally* Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 Hastings L.J. 635 (1983) (analyzing the current tests of preemption under federal law and their relationship to the collective bargaining system).

5. Even those who generally disfavor interpretations of state law that are more protective than federal law concede this point. *See, e.g.*, Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1141-43 (1985) (Justices of United States Supreme Court vary in their enthusiasm toward state court experimentation, but all accept state authority to do so); Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985) (although state court activism should be curtailed, "generally accepted legal conventions clearly establish the independence of state court judges on issues of state law."). Note that it is theoretically possible for a state court to interpret the state constitution to provide less protection than the federal minimum, although "having once denied a claim based on state law, state judges must accord to a rights claimant any or all rights guaranteed

explored, the basis of this authority is inherent in the language of the tenth amendment, which states that "[t]he powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people."[6] On several occasions the Supreme Court has explicitly endorsed the idea that state law restrictions on state action may exceed those under federal law. For instance, in *Cooper v. California*,[7] the Court reminded: "Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."[8]

An interesting development in federal-state relations during the last fifteen years has been the eagerness of state courts to embrace this principle. State courts have increasingly relied on their own constitutions as a basis for rejecting Supreme Court pronouncements and announcing standards more solicitous of individual rights.[9] The question remains whether the development of independent constitutional doctrine at the state level is desirable. This part lays the groundwork for answering this question by describing the history of state constitutional interpretation nationwide and in Florida. The next part assesses the lessons to be learned from this history.

A. *The Four Phases of State-Federal Judicial Interplay*

State court views on the relative importance of state and federal law can be divided into four historical phases, the last three of which

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under federal law." Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 327 (1986).

6. U.S. CONST. amend. X (emphasis added).

7. 386 U.S. 58 (1967).

8. *Id.* at 62; *see also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) ("[a] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) ("Our reasoning . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); Lego v. Twomey, 404 U.S. 477, 489 (1972) ("Of course, the states are free, pursuant to their own law, to adopt a higher standard [than the Court's requirement that the prosecution show the voluntariness of a confession by a preponderance of the evidence].").

9. *See generally* Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 372-74 (1984) (since 1970, more than 250 state court opinions hold that constitutional minima under the federal Constitution are insufficient under state law); Collins & Galie, *The Methodology*, Nat'l L.J., Sept. 29, 1986, at S-8 (collecting over 300 such cases decided since 1970).

overlap considerably.[10] The first phase, from the founding of the republic until approximately the middle of this century, has been called the "dual federalism" period, since the Bill of Rights had no binding effect on state courts.[11] The second phase, which peaked during the early 1970s, might be called the "co-option" period, because the advent of the incorporation doctrine,[12] combined with the activism of the United States Supreme Court, created the impression that federal law stated the exclusive standard on constitutional issues.[13] The third phase, from the early 1970s to the present, has been called the "New Federalism" period because state courts have been much more willing to diverge from the federal standard, although recognizing that they must maintain it as the minimum.[14] The final phase, still nascent, could be called the "forced-linkage" era. This term is meant to describe the impact of electoral decisions, such as the ratification of the 1983 amendment to article I, section 12, requiring state courts to equate state constitutional law with federal constitutional law. These four phases describe the dominant trends in state court-federal court interaction on all topics of constitutional importance. The discussion below will focus on constitutional rights associated with the criminal process, particularly search and seizure.

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10. The first three phases described below duplicate phases described both by Collins, *supra* note 9, at 378-79, and Abrahamson, *supra* note 5, at 1144-54.

11. The term "dual federalism" comes from Walker, who notes that few state powers were circumscribed by the federal government until the 1930s. Walker, *American Federalism — Then and Now*, in 24 THE BOOK OF THE STATES 23, 23 (1982). In the criminal procedure area, this hands-off attitude persisted for another thirty years. *See infra* text accompanying notes 15-33.

12. *See infra* note 19.

13. Walker uses the term "cooptive federalism" to describe the period between 1960 and 1980 when the federal government actively sought to regulate several aspects of government affairs that had traditionally been entrusted to local authorities. Walker, *supra* note 11, at 24-25; *see also* Collins, *supra* note 9, at 379.

14. Several commentators have used this term to designate the state court activism described in the text. *See, e.g.*, Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism 1960-1981*, 18 GONZ. L. REV. 221, 221 (1982-83); Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166 (B. McGraw ed. 1985); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977). The term has also been used to describe the United States Supreme Court's attempts to limit state criminal defendant access to federal courts. *See* C. WHITEHEAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 7 (1986). In each context, the goal is to recognize a more significant role for state government, approaching that of dual federalism days; thus the term "new federalism."

1. Dual Federalism

During the first 150 years under the federal Constitution, the criminal process guarantees found in the fourth,[15] fifth,[16] sixth,[17] and eighth[18] amendments applied only to federal cases. Since its ratification in 1868, the fourteenth amendment has provided a vehicle for guaranteeing these rights to state criminal defendants through the "incorporation" principle.[19] But it was not until well into the twentieth century that the Supreme Court indicated any willingness to find the various criminal process rights so fundamental that the states could not abridge them.[20] Only after the Warren Court[21] reinvigorated the incorporation idea, beginning with *Mapp v. Ohio*[22] in 1961, could the state criminal

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15. The fourth amendment protects against "unreasonable searches and seizures" and requires that warrants be issued upon probable cause. U.S. CONST. amend. IV.

16. The fifth amendment provides four protections relevant to criminal cases. The amendment requires a grand jury indictment for capital "or otherwise infamous crimes," and prohibits subjecting any person to double jeopardy for the same offense, compelling one to be a witness against oneself, and depriving a person of "life, liberty, or property, without due process of law." U.S. CONST. amend. V.

17. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and guarantees the accused the rights to notice, to confront prosecution witnesses, to compulsory process, and to assistance of counsel. U.S. CONST. amend. VI.

18. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

19. The fourteenth amendment states in part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. Prior to the adoption of this language in 1868, the Supreme Court held that the guarantees of the Bill of Rights were not directly binding upon the state governments. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). Once the fourteenth amendment was ratified, however, the Court was able to hold that the states may not violate those Bill of Rights guarantees that are necessary to due process. In Palko v. Connecticut, 302 U.S. 319 (1937), for instance, the Court stated that if a Bill of Rights guarantee is "of the very essence of a scheme of ordered liberty," *id.* at 325, and is one of the "fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions," *id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)), then the right is incorporated into the fourteenth amendment and applies to the states. *Id.* at 324-25.

20. The first Supreme Court case that relied on the federal Constitution to overturn a state criminal conviction was Powell v. Alabama, 287 U.S. 45 (1932). There the Court held that the due process clause of the fourteenth amendment required that counsel be provided to criminal defendants charged with capital crimes. *Powell* was strictly limited to capital cases, however. *Id.* at 71. Most of the Court's decisions federalizing constitutional criminal procedure did not come until the 1960s. *See infra* notes 23-27.

21. This term is used to designate the Court from 1953 to 1969, the years Earl Warren served as Chief Justice.

22. 367 U.S. 643 (1961).

defendant depend upon fourth amendment protections,[23] the privilege against self-incrimination,[24] the double jeopardy clause,[25] sixth amendment trial rights,[26] and protection against cruel and unusual punishment.[27]

Before the 1960s, then, state courts were almost entirely free to develop their own rules of criminal procedure, despite the fact that state constitutional provisions were usually similar or identical to the analogous federal provisions.[28] State courts interpreted their provisions in one of three ways. They either explicitly followed federal court interpretations of federal provisions;[29] viewed federal case law as a helpful guidepost, but not dispositive;[30] or ignored it altogether.[31]

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23. In *Mapp*, *id.*, the Court held that illegally seized evidence must be excluded from state as well as federal criminal trials. Wolf v. Colorado, 338 U.S. 25 (1949), a pre-Warren Court decision, had held the fourth amendment applicable to the states. But this holding was essentially meaningless until *Mapp* provided the exclusionary sanction. *See* 367 U.S. at 652 ("other remedies have been worthless and futile").

24. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment applied to states through fourteenth amendment).

25. *See* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy applies to states, overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

26. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial applies to states); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial right); Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

27. *See* Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual clause applies to states).

28. *See, e.g.* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1204 (1971) (table listing state antecedents to clauses in Bill of Rights showing similarity between state constitutional provisions and Bill of Rights). For modern examples of the same tendency, compare FLA. CONST. art. I, §§ 5, 9, 12, 17 with U.S. CONST. amends. I, V, IV, VIII, respectively; N.Y. CONST. art. I, §§ 5, 7, 12 with U.S. CONST. amends. VII, V, IV, respectively; ALASKA CONST. art. I, §§ 4, 9, 14 with U.S. CONST. amends. I, V, IV, respectively.

29. *See, e.g.*, Griggs v. Hanson, 86 Kan. 632, 634, 121 P. 1094, 1095 (1912) ("Due course of law under the state constitution and due process of law under the federal constitution mean the same thing . . . .").

30. *See, e.g.*, State v. Miles, 29 Wash. 2d 921, 926-27, 190 P.2d 740, 745-46 (1948) (relying in part on United States v. Di Re, 332 U.S. 581 (1948)); People v. Exum, 382 Ill. 204, 209-10, 47 N.E.2d 56, 59 (1943) (relying in part on Haywood v. United States, 268 F. 795 (7th Cir. 1920)); Houck v. State, 106 Ohio 195, 199, 140 N.E. 112, 114 (1922) (relying in part on Lambert v. United States, 282 F. 413 (9th Cir. 1922)). All of these cases pointed to the similarity between the state and federal search and seizure provisions.

31. *See* Abrahamson, *supra* note 5, at 1144-46 (during nineteenth century, "state courts routinely resolved constitutional issues without reference to the federal constitution").

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Often, the latter two approaches resulted in state standards that were more prosecution-oriented than those applied at the federal level.[32] But occasionally state courts were more energetic than the federal courts in protecting the rights of criminal defendants.[33] In any event, during this phase, the independence of state and federal law was an accepted fact.

2. Co-option

In the 1960s, the Supreme Court's activism significantly altered the pattern of state constitutional interpretation. The Warren Court not only applied most federal criminal rights guarantees to the states, but also interpreted those guarantees so as to radically restructure the criminal process. Within a decade of its decision in *Mapp* requiring the states to exclude evidence obtained in violation of the fourth amendment, the Court had expanded tremendously the types of searches requiring exclusion.[34] Within seven years of its finding in *Gideon v. Wainwright*[35] that the sixth amendment's counsel guarantee applied to the states, the Court extended the right beyond trial proceedings to police questioning,[36] lineups,[37] preliminary hearings,[38] and sentencing.[39] And two years after the Court found the privilege against

32. For example, numerous state courts refused to follow Weeks v. United States, 232 U.S. 383 (1914), which required that illegally seized evidence be excluded from federal prosecutions. *See* Elkins v. United States, 364 U.S. 206, 224-32 (1960) (appendix listing state decisions following and rejecting *Weeks*).

33. For instance, at least one state court found a right to counsel at criminal trials well before Johnson v. Zerbst, 304 U.S. 458 (1938) guaranteed that right at the federal level. *See* Carpenter v. County of Dane, 9 Wis. 249 (1859).

34. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (adopting armspan rule for determining scope of search incident to arrest); Spinelli v. United States, 393 U.S. 410 (1969) (refining definition of probable cause); Berger v. New York, 388 U.S. 41 (1967) (imposing requirements for search warrant in electronic eavesdropping context); Katz v. United States, 389 U.S. 347 (1967) (broadening definition of search).

35. 372 U.S. 335 (1963).

36. *See* Massiah v. United States, 377 U.S. 201 (1964) (defendant entitled to counsel at post-indictment interrogation).

37. *See* United States v. Wade, 388 U.S. 218 (1967) (defendant entitled to counsel at post-indictment line-up).

38. *See* Coleman v. Alabama, 399 U.S. 1 (1970) (defendant entitled to counsel at preliminary hearing).

39. *See* Mempa v. Rhay, 389 U.S. 128 (1967) (defendant entitled to counsel at sentencing proceeding).

self-incrimination to be a fundamental right,[40] it decided *Miranda v. Arizona*,[41] causing an upheaval in the law of confessions.[42]

This revolution in criminal procedure made state constitutional interpretation seem irrelevant. State litigants and courts were inclined to view the federal standards as the sole source of criminal procedure law.[43] State courts either interpreted similar federal and state standards similarly, or more commonly, simply neglected to consider the independent significance of state constitutional law.[44]

3. New Federalism

Developments at the Supreme Court level also prompted the third phase in state constitutional interpretation. The Burger Court[45] and Rehnquist Court[46] retrenchment on the Warren Court's groundbreaking decisions has made it exceedingly clear that federal standards do not necessarily represent the most "progressive" approach to criminal procedure.[47] As the Court has constricted the scope of the Bill of

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40. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (right against self-incrimination applied to states through fourteenth amendment).

41. 384 U.S. 436 (1966).

42. *See generally* Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985) (describing how *Miranda* marked a legal, attitudinal and practical watershed with respect to interrogations).

43. *See* Howard, *State Courts and State Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976) (during Warren era, state courts were in a habit of looking just to federal constitutional law); Note, *Robinson At Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE U.L. REV. 1, 5-6 (1974) (Warren Court activism created perception that Supreme Court standards were governing mandates and should not be exceeded).

44. For instance, in White v. State, 521 S.W.2d 255, 258 (Tex. Crim. App. 1974), *rev'd sub nom.* Texas v. White, 423 U.S. 67 (1975), the Texas Court of Criminal Appeals held that a car search violated the fourth amendment, making no mention of the state constitutional search and seizure provision. The United States Supreme Court reversed, Texas v. White, 423 U.S. 67 (1975), with Justice Marshall in dissent pointing out that the Texas court could reaffirm its result under state law if it so chose. *Id.* at 72. *See also* Abrahamson, *supra* note 5, at 1147-48.

45. Warren Burger retired from the position of Chief Justice in 1987.

46. William Rehnquist became Chief Justice in September, 1987.

47. The Burger Court adopted several standards that were more prosecution-oriented than the Warren Court's standards. *See* New York v. Quarles, 467 U.S. 649 (1984) (establishing a public safety exception to *Miranda*). *Compare* Spinelli v. United States, 393 U.S. 410 (1969) (adopting two-prong test for assessing reliability of probable cause determination) *with* Illinois v. Gates, 462 U. S. 213 (1983) (rejecting two-prong test as "hypertechnical" and adopting "totality of the circumstances" test); *compare* Chimel v. California, 395 U.S. 752 (1969) (adopting "armspan" rule in search incident cases) *with* New York v. Belton, 453 U.S. 454 (1981) (eliminating armspan rule in search incident cases involving cars). For a general discussion of the Burger Court's retrenchment, see Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471 (1985).

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Rights, state courts have disinterred state law and adopted standards more rigorous than those announced by the Supreme Court. According to Professors Collins and Galie, between 1970 and 1986 over 300 state decisions went beyond Supreme Court pronouncements, and more than half of those decisions involved criminal procedure.[48]

State court reaction against the Supreme Court has been particularly energetic with respect to search and seizure, perhaps because the post-1970 Supreme Court has been especially antagonistic to the fourth amendment.[49] Indeed, the first Supreme Court criminal procedure decision to encounter significant state court resistance involved a search and seizure issue. In *United States v. Robinson*[50] the Supreme Court held that a full search is permissible after a lawful custodial arrest, regardless of the crime giving rise to the arrest. Within four years of *Robinson*, four states' courts had held, based on state constitutional language, that the nature of the offense is relevant to whether a full search is justified.[51] Similarly, the courts of four states have refused to follow *United States v. White*[52] on state law grounds, finding untenable the Court's opinion that monitoring a private conversation with a body bug is not a search.[53] At least three states' courts,[54] again

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The Rehnquist Court has continued this trend. *Compare* Illinois v. Krull, 107 S. Ct. 1160 (1987) (exclusionary rule does not apply to evidence obtained by police in objectively reasonable reliance upon a statute that authorizes warrantless searches but is later found to violate the fourth amendment) *with* Berger v. New York, 388 U.S. 41 (1967) (searches conducted under electronic surveillance statute later found unconstitutional). *Compare also* Colorado v. Connelly, 107 S. Ct. 515 (1986) (due process and *Miranda* not violated unless police "cause" confession by mentally ill individual) *with* Townsend v. Sain, 372 U.S. 293, 309 (1963) (when interrogated suspect is insane, admissions of confession violate due process regardless of whether police purpose was improper).

48. See list of cases in Collins & Galie, *supra* note 9, at S-9.

49. *See* cases cited *supra* note 47; *see also* C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, at 4-5 (concluding that recent Supreme Court decisions create a hierarchy of constitutional criminal procedure rights, with the fourth amendment at the bottom).

50. 414 U.S. 218 (1973).

51. *See* Zehrung v. State, 569 P.2d 189 (Alaska 1977); People v. Briesendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); People v. Clyne, 189 Colo. 412, 541 P.2d 71 (1975); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974). The Oregon Supreme Court joined this group in 1982. State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982).

52. 401 U.S. 745 (1971).

53. *See* State v. Glass, 583 P.2d 872 (Alaska 1978); State v. Sarmiento, 397 So. 2d 643 (Fla. 1981); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975); State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978).

54. *See* State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985); Commonwealth v. Upton II, 394 Mass. 363, 476 N.E.2d 548 (1985); People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

relying on their constitutions, have declined to adopt the Supreme Court's totality of the circumstances approach to the probable cause inquiry established in *Illinois v. Gates*.[55] Other Supreme Court fourth amendment decisions that at least one state court has found unpersuasive include *New York v. Belton*,[56] allowing searches of cars and containers in them when the occupant has been lawfully arrested;[57] *Smith v. Maryland*,[58] holding that a person does not have a reasonable expectation of privacy in the identity of phone numbers called;[59] and *United States v. Leon*,[60] establishing that a search pursuant to an invalid warrant is lawful if the searching officer believed in objective good faith that the warrant was valid.[61] These examples far from exhaust the list of issues on which state courts have come to independent conclusions on search and seizure issues.[62]

Measuring the extent of the New Federalism with a different gauge, at least thirty-five states' courts have flexed state constitutional muscle on at least one issue of constitutional criminal procedure.[63] In the search and seizure area alone, the courts of at least twenty-three states have chosen to adopt one or more standards espousing greater protection than that required under the federal Constitution.[64] A few

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55. 462 U.S. 213 (1983).

56. 453 U.S. 454 (1981).

57. State v. Hernandez, 410 So. 2d 1381 (La. 1982).

58. 442 U.S. 735 (1979).

59. *See* People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); People v. Sporleder, 666 P.2d 135 (Colo. 1983); State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982).

60. 468 U.S. 897 (1984).

61. *See* State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987); People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.W.S.2d 630 (1985).

62. Other Supreme Court fourth amendment decisions that have been repudiated by state courts include Texas v. Brown, 460 U.S. 730 (1983) (plain view seizure permitted when officer has probable cause to believe seized item is evidence); United States v. Ross, 456 U.S. 798 (1982) (automobile exception justifies warrantless search of containers in vehicles); United States v. Salvucci, 448 U.S. 83 (1980) (automatic standing for criminal defendants abolished); United States v. Miller, 425 U.S. 435 (1976) (no reasonable expectation of privacy in bank records). *See* list of cases in Collins & Galie, *supra* note 9, at S-9, S-12.

63. In addition to the 23 state courts that have adopted different search and seizure standards, *see infra* note 64, the courts of the following 12 states have established new standards in other areas of criminal procedure: Alabama, Arizona, Maine, Maryland, New Mexico, North Carolina, Oklahoma, Texas, Vermont, West Virginia, Wisconsin and Wyoming. Collins & Galie, *supra* note 9, at S-9, S-12.

64. Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Pennsylvania, South Dakota, Utah, Washington. Collins & Galie, *supra* note 9, at S-9, S-12.

states' courts have been particularly active. The Washington Supreme Court, for instance, has refused to follow six different fourth amendment standards that the United States Supreme Court has announced.[65] Alaska, California, and New Jersey have also been in the forefront of those states whose courts have supplanted fourth amendment minima with their own.[66]

The New Federalism phase, even when viewed purely from the fourth amendment perspective, is neither insignificant nor isolated. Whether it will continue is open to question. Factors that will fuel further state constitutional developments include the Supreme Court's likely persistence in its prosecution-oriented tendencies[67] and state courts' unwillingness to relinquish the power they have discovered and come to enjoy over the past fifteen years.[68] A factor that could severely curtail the New Federalism, however, is the hostile reaction of state citizens to their courts' activism.[69]

4. Forced Linkage

Linkage of federal and state standards can occur in two ways. Linkage most frequently occurs when state courts interpret their constitutional provisions to conform with the federal courts' interpretation

65. State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984) (rejecting *Illinois v. Gates*); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) (rejecting *Washington v. Chrisman*); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) (rejecting *New York v. Belton*); State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982) (rejecting *Michigan v. DeFillippo*); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980) (rejecting *United States v. Salvucci*); State v. Smith, 88 Wash. 2d 127, 559 P.2d 970 (1977) (rejecting *United States v. Ross*).

66. Alaska's Supreme Court has announced at least four search and seizure rules more protective than the United States Supreme Court's fourth amendment standards, California's Supreme Court at least six, and New Jersey's Supreme Court at least three. *See* list of cases in Collins & Galie, *supra* note 9, at S-9, S-12.

67. *See supra* note 47.

68. The rate at which state courts are adopting their own constitutional standards distinct from federal standards is increasing annually. *See* Collins, Galie, & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 600-01 (1986).

69. Chief Justice Burger, for one, sought to encourage this reaction while he was on the Court. In a concurring opinion to a dismissal of a writ of certiorari, he made the controversial statement that "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement." Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring). One state court justice has criticized the "arrogance" of this opinion's assumption that federal court standards represent the only approach to "rational law enforcement." State v. Jackson, 672 P.2d 255, 264 (Mont. 1983) (Shea, J., dissenting). For further discussion of *Casal*, see *infra* note 305.

of similar federal provisions.[70] This approach does not force linkage on the courts, because state judges control conformity with federal interpretation and can selectively apply it as they see fit.[71] This form of linkage is merely a judicially adopted aid to judicial decisionmaking.

The second type of linkage is that which the electorate imposes on the courts.[72] Many state constitutions provide for amendment through initiative or referendum.[73] The citizens of two states, California and Florida, have used the amendment process to require their courts to follow federal search and seizure law. The California provision accomplishes this objective indirectly by stating that all "relevant evidence" is admissible in criminal proceedings, thus abolishing the state exclusionary rule (although of course leaving intact the exclusionary principle to the extent required by the federal Constitution).[74] The Florida provision, on the other hand, explicitly links Florida's search and seizure and exclusion provisions with the fourth amendment as construed by the United States Supreme Court.

The impetus for these two provisions was the same. In California, law enforcement groups were primarily responsible for the drafting of a number of constitutional measures, ultimately proposed in 1982,

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70. *See, e.g.*, State v. Jackson, 672 P.2d 255 (Mont. 1983) (finding that Montana courts are bound by federal interpretation of federal provisions that are identical to Montana provisions); Brown v. State, 657 S.W.2d 797 (Tex. Crim. App. 1983) (en banc) (linking state and federal search and seizure provisions); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382-83 (1980) (in interpreting state constitutions, most states follow federal interpretations of the federal Constitution).

71. Montana, for instance, has been particularly innovative in this regard. *See* Collins, *Reliance on State Constitutions — The Montana Disaster*, 63 TEX. L. REV. 1095, 1124-30, 1137-39 (1985) (recounting ways in which the Montana Supreme Court has avoided interpreting its constitution congruently with federal interpretations despite its holding in *Jackson*, 672 P.2d at 255 (requiring linkage)). *See also infra* note 273.

72. Theoretically, at least, the legislature could also impose linkage on the courts. *See, e.g.*, FLA. STAT. § 933.19(1) (1985) (providing that the United States Supreme Court opinion in Carroll v. United States, 267 U.S. 132 (1925), is "adopted as the statute law of the state applicable to searches and seizures under § 12, Art. 1 of the State Constitution"). The legislature, however, probably could not enact a statute that made *future* federal decisions the law of the state. This would be an unconstitutional delegation of legislative authority. *See infra* text accompanying notes 342-53.

73. *See, e.g.*, ALASKA CONST. art. XIII, § 1; FLA. CONST. art. XI, §§ 1, 3, 5; N.Y. CONST. art. XIX, § 1. "Initiative" refers to a proposal initiated by the populace. "Referendum" refers to a proposal initiated by the legislature and submitted to the electorate.

74. CAL. CONST. art. I, § 28(d). A key difference between the California provision and the Florida provision is that the former only requires the state courts to follow Supreme Court decisions concerning the exclusionary remedy whereas the latter requires Florida courts to follow substantive fourth amendment law as well.

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which came to be called the Victims' Bill of Rights.[75] The pre-vote literature devoted considerable attention to the exclusionary rule provision, describing it as a means of counteracting the California courts' tendency to be "too concerned with rights of defendants."[76] Thus, approval of the provision was probably in large part a reaction to perceived state court activism in search and seizure law.[77] Law enforcement groups also initiated Florida's amendment, which was even more clearly the result of dissatisfaction with state court rulings on search and seizure law. Because this article's purpose is to assess the impact of the Florida amendment, it will more closely examine the amendment's antecedents.

B. *Florida Search and Seizure Law*

Florida's constitution has included a provision protecting against unreasonable searches and seizures since 1838.[78] Although revised several times,[79] all but the two most recent versions of the provision have been very similar to the fourth amendment.[80] The last pre-modern version, promulgated in 1885 and found in section 22 of the Declaration of Rights, was virtually identical to the fourth amendment.[81] In 1927, thirteen years after the United States Supreme Court's decision in

75. The proposal originated with an assistant attorney general and a state senator. The movement to place the Bill of Rights on the ballot was led by "political conservatives" and received "widespread support among law-and-order forces, including the California Sheriffs Association, the California District Attorneys Association, and more than 150 police chiefs." Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 253-54 (1984) (quoting Cochran, *Paul Gann's Proposition 8: A 'Victims' Bill of Rights' or a Lawyers' Employment Act?*, 13 CAL. J. 133, 133 (1982)).

76. *Id.* at 254 n.168.

77. *But see* Justice Mosk's dissent in *In re* Lance, 37 Cal. 3d 873, 909-10, 694 P.2d 744, 769, 210 Cal. Rptr. 631, 656 (1983) (arguing that Victims' Bill of Rights was too complex to determine whether voters intended to abolish California's exclusionary rule).

78. *See* FLA. CONST. of 1838, art. I, § 7.

79. *See* FLA. CONST. of 1861, art. I, § 7; FLA. CONST. of 1865, art. I, § 7; FLA. CONST. of 1868, Declaration of Rights, § 19; FLA. CONST. of 1885, Declaration of Rights, § 22; FLA. CONST. art I, § 12 (1968); FLA. CONST. art. I, § 12 (1983).

80. *See infra* text accompanying notes 85-87, 116-19.

81. The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

FLA. Const. of 1885, Declaration of Rights, § 22.

Weeks v. United States[82] established the exclusionary remedy in the federal courts, the Florida Supreme Court held that the remedy for violations of section 22 was exclusion of the seized evidence.[83] Florida thus became one of the twenty-six states to adopt the exclusionary remedy as a matter of state law before *Mapp* required the states to do so.[84]

In 1968, the Florida Constitution was revised and a new search and seizure provision went into effect. The new provision, found in article I, section 12, differed from older versions in two significant ways. First, the provision explicitly incorporated the exclusionary remedy as a tenet of state constitutional law.[85] This step made the rule organic rather than a creation of the judiciary, as is the case with the federal rule.[86] Second, the revision added "communications" to the list of items protected from unreasonable searches and seizures, thus diverging from the fourth amendment's language, which refers only to "persons, houses, papers and effects."[87]

The only version of Florida's search and seizure provision construed during the dual federalism period was section 22. Florida courts, like many other states' courts,[88] found the similarity between section 22 and the fourth amendment good reason for following federal precedent when it was available. As the Florida Supreme Court stated in 1934:

> Of course, the Fourth Amendment to the Federal Constitution operates solely upon the actions of the federal government and its agents, and is not binding upon the states. However, our Constitution contains the same provision, and the decisions of the Supreme Court of the United States are therefore very persuasive in construing the meaning and scope of our own constitutional provision.[89]

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82. 232 U.S. 383 (1914).

83. Gildrie v. State, 94 Fla. 134, 138-43, 113 So. 704, 705-06 (1927).

84. *See* Mapp v. Ohio, 367 U.S. 643, 657-60 (1961).

85. The provision states: "Articles or information obtained in violation of this right shall not be admissible in evidence." FLA. CONST. art. 1, § 12 (1968).

86. *See* State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983) (state exclusionary rule is "specifically articulated in our constitution and hence part of organic law," while federal rule is "preeminently a rule of court and only procedural"). *See also* United States v. Leon, 468 U.S. 897, 906 (1984) (federal exclusionary rule is a judicially created remedy).

87. *Compare* FLA. CONST. art. I, § 12 (1968) ("[t]he right of the people to be secure . . . against the unreasonable interception of private communications by any means, shall not be violated") *with* U.S. CONST. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated").

88. *See supra* note 30.

89. Thurman v. State, 116 Fla. 426, 435, 156 So. 484, 487-88 (1934).

Accordingly, federal law was often cited in Florida cases[90] and usually followed. Apparently, only one Florida court even considered rejecting relevant federal precedent during the dual federalism period.[91] In dictum in *Griffith v. State*,[92] the First District Court of Appeal found that although wiretapping probably did not violate the fourth amendment as interpreted by the United States Supreme Court, it did violate section 22 of the Florida Constitution.

Mapp and other 1960s' fourth amendment decisions did more than reinforce the Florida courts' penchant for following federal pronouncements; during this era, Florida courts almost ignored the state search and seizure provision. From the first decision construing section 22, in 1909,[93] to *Mapp* in 1961, 88 percent of the decisions addressing search and seizure issues relied on state law alone or combined with federal precedent. But from 1961 until the amendment to article I, section 12 went into effect in 1983, over two-thirds of Florida's search and seizure decisions made *no* mention of the state constitutional provision, even after the 1968 revision significantly changed the language.[94] These cases relied on the fourth amendment and federal pre-

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90. Roughly half the cases involving search and seizure law decided during the dual federalism period mention the fourth amendment. This conclusion is based on a combination of the following WESTLAW searches conducted on October 26, 1987: (1) Date (> 1884 and < 1962) & search & fourth +4 amendment & "section 22"; (2) Date (> 1884 and < 1962) & fourth +4 amendment & search % "section 22"); and (3) Date (> 1884 and < 1962) & "section 22" & search % fourth +4 amendment).

91. This conclusion is based on a sampling of the 57 cases decided during this period. *See supra* note 90 for the WESTLAW search terms used to find these 57 cases.

92. 111 So. 2d 282, 287 (1st D.C.A.), *cert. denied*, 114 So. 2d 6 (Fla. 1959). Technically, *Griffith* is not a dual federalism case, since the fourth amendment had been applied to the states in 1949. *See* Wolf v. Colorado, 338 U.S. 25 (1949). But it was not until 1961, when *Mapp* required that illegally obtained evidence be excluded from state prosecutions, that the states felt the impact of *Wolf*. *See supra* note 23.

93. Lee v. Van Pelt, 57 Fla. 94, 48 So. 632 (1909) (judge adequately followed constitutional procedures when issuing a search warrant under § 22).

94. This information was obtained from a combination of the following WESTLAW searches: (1) Date (> 1961 and < 1968) & fourth +4 amendment & search & "section 22"; (2) Date (> 1961 and < 1968) & fourth +4 amendment & search % "section 22"; (3) Date (> 1961 and < 1968) & "section 22" & search % fourth +4 amendment; (4) Date (> 1967 & fourth +4 amendment & search & "section 12"; (5) Date (> 1967) & fourth +4 amendment & seach % "section 22"; and (6) Date (> 1967) & "section 12" & search % fourth +4 amendment. A possibly serious limitation on these searches is that they did not pick up cases that cite only past cases and not state or federal constitutional provisions. No effort was made to ascertain the number of such cases.

cedent. In Florida, as in other states,[95] the Warren era stimulated a significant co-option of state law by federal law.[96]

On those rare occasions when Florida courts referred to the state search and seizure provision, they almost always interpreted it to coincide with federal standards. Indeed, in 1980 the Florida Supreme Court adopted as its own a lower court opinion concluding that "the search and seizure provision of the Florida Constitution imposes no higher standard than that of the Fourth Amendment to the United States Constitution."[97] A few Florida decisions did veer from fourth amendment rulings, however, relying on the state constitution as a basis for enunciating more restrictive standards. The first such case was *Grubbs v. State*,[98] in which the Florida Supreme Court held that the exclusionary rule applies in probation revocation proceedings. Noting that federal courts had consistently held that illegally seized evidence was admissible at such proceedings, the court nonetheless found that the Florida Constitution's express statement that unreasonably obtained evidence "shall not be admissible" required a different result.[99] Although the court also noted that the fourth amendment required this result, two years later it clearly stated in *State v. Dodd*[100] that the holding rested solely on article I, section 12.

95. *See supra* text accompanying notes 34-44.

96. Another interesting feature of the post-1961 period, according to the WESTLAW searches described *supra* notes 90 & 94, was the tremendous increase in litigation on search and seizure issues once the Warren revolution had established itself in the late 1960s. Whereas from 1909 to 1968 Florida courts decided only 81 cases involving search and seizure law, from 1968 until the present they decided 590 such cases, or over six times as many cases in about one-fourth the time. Some of this increase, however, may be due merely to an increase in the number of cases officially reported in recent years.

97. State v. Hetland, 366 So. 2d 831, 836 (2d D.C.A.), *aff'd*, 387 So. 2d 963 (Fla. 1980). The Florida Supreme Court made a similar statement in its initial opinion in State v. Rickard, 7 Fla. L. Weekly 193, 196 (April 29, 1982) ("[T]he exclusionary rule embodied in the Florida Constitution [of 1968] was no broader than the federal exclusionary rule."). But that opinion was withdrawn and replaced by a second opinion that was based entirely on federal law. 420 So. 2d 303 (Fla. 1982). At least one lower Florida court also linked the state and federal constitutional provisions. Dornau v. State, 306 So. 2d 167, 169-70 (Fla. 2d D.C.A. 1974) (1968 constitutional revision recognizing an exclusionary rule was not meant to "enlarge" the exclusionary rule established in *Mapp*), *cert. denied*, 422 U.S. 1011 (1975). *But see* Taylor v. State, 355 So. 2d 180, 184 (3d D.C.A.) ("[E]ven if the federal exclusionary rule is changed, this in no way affects the fifty year old rule in Florida that evidence seized in violation of Article I, Section 12, of the Florida Constitution is inadmissible in evidence."), *cert. denied*, 361 So. 2d 838 (Fla. 1978).

98. 373 So. 2d 905 (Fla. 1979).

99. *Id.* at 908-09.

100. 419 So. 2d 333, 335 (Fla. 1982).

A second prominent case repudiating federal precedent was *State v. Sarmiento.*[101] In *Sarmiento,* the Florida Supreme Court held that placing a body bug on an undercover agent was a search. Responding to the dissent's argument that the United States Supreme Court's interpretation of the fourth amendment required the opposite conclusion,[102] the majority observed that "the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution."[103]

A few other Florida decisions recognized the possibility that Florida law could diverge from federal standards.[104] But *Grubbs, Dodd, Sarmiento,* and two decisions affirming *Sarmiento*[105] were the only opinions that rejected a well established federal standard in favor of a

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101. 397 So. 2d 643 (Fla. 1981).

102. *See* United States v. White, 401 U.S. 745 (1971); On Lee v. United States, 343 U.S. 747 (1952). For further discussion of these cases, see *infra* text accompanying notes 375-88.

103. 397 So. 2d at 645.

104. *See, e.g.,* Adoue v. State, 408 So. 2d 567, 577 (Fla. 1981) (Sundberg, C.J., concurring in part and dissenting in part) ("Florida's constitutional mandate is more restrictive than its federal counterpart . . . ."); Croteau v. State, 334 So. 2d 577, 580 (Fla. 1976) (Hatchett, J., concurring) (article I, § 12 "requires the same result [as the majority opinion reached based on the fourth amendment], independently of the Fourth and Fourteenth Amendments."); Norman v. State, 388 So. 2d 613, 614 (Fla. 3d D.C.A. 1980) (United States v. Salvucci, 448 U.S. 83 (1980), which abolished automatic standing, "does not preclude a state from utilizing an automatic standing rule in state court proceedings."). For a discussion of the confusion demonstrated by Florida courts over the relationship between state and federal search and seizure law, see Comment, *The Exclusionary Rule: An Examination of the Case Law and the Present Posture of the Florida Supreme Court,* 10 FLA. ST. U.L. REV. 369 (1982).

105. *See, e.g.,* Odom v. State, 403 So. 2d 936 (Fla. 1981) (warrantless recording of defendant's conversation should be excluded), *cert. denied,* 456 U.S. 925 (1982); Hoberman v. State, 400 So. 2d 758 (Fla. 1981) ("body bug" evidence should be suppressed). An anomaly in Florida search and seizure law is Tollett v. State, 272 So. 2d 490 (Fla. 1973), which, eight years before *Sarmiento* and six years before *Grubbs,* seemed to hold that article I, § 12 requires a warrant in the body bug context even if federal caselaw does not. However, in *Tollett* the court emphasized that the state had failed to allow the defendant to cross-examine the "wired" informant, and indicated that had such cross-examination been allowed and the informant's consent to the wiring been established, no warrant would have been required. *Id.* at 495. Thus *Tollett* arguably went no further than previous United States Supreme Court rulings, which all involved informants who had consented to the body bug. *See, e.g.,* United States v. White, 401 U.S. 745 (1971) (body bug evidence not suppressed when informant consented); Lopez v. United States, 373 U.S. 427 (1963) (recording of defendant's conversations with IRS agent admissible). Additionally, ultimately *Tollett* may have been an interpretation not of Florida's constitutional search and seizure provision but of Florida's wiretap statute, FLA. STAT. § 934.01(4) (1985), which allows electronic eavesdropping when one party to the eavesdrop consents. *See Tollett,* 272 So. 2d at 494.

more protective state standard.[106] Further, the rejection was timid at best. Both *Grubbs* and *Dodd* emphasized that a person's status as a probationer could be taken into account in deciding whether a search was reasonable.[107] And within a year of *Sarmiento*, Florida's lower appellate courts had severely restricted its scope.[108] Compared to the New Federalism activism of many state courts,[109] Florida court treatment of federal precedent barely deserves mention. Thus it is ironic that Florida is the only state in the country to adopt a constitutional amendment explicitly requiring its courts to follow the fourth amendment as the United States Supreme Court construes it; except for cases concerning the exclusionary rule at probation proceedings and the use of body bugs, Florida courts showed little intention of doing otherwise.

Nonetheless, the decisions rejecting federal precedent clearly triggered the push for the amendment. Law enforcement groups and legislators were particularly angered by the *Sarmiento* decision and saw the amendment as a way to overrule it.[110] Florida Governor Bob

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106. Occasionally, a Florida court would apparently take a position relying on state law that might not have been taken by the United States Supreme Court or another federal court had it decided the case under the fourth amendment. *Compare, e.g.*, Norman v. State, 379 So. 2d 643, 646 (Fla. 1980) (state must prove by clear and convincing evidence that consent search is voluntary) *with* Lego v. Twomey, 404 U.S. 477 (1972) (voluntariness of a confession need be proven by only a preponderance of the evidence). Because these types of cases did not reject an established federal standard, however, they were not like *Grubbs* or *Sarmiento*. *Cf. infra* text accompanying notes 244-55 (discussing "predictive" stare decisis). Undoubtedly, an occasional Florida case also interpreted the fourth amendment more liberally than a federal court would have interpreted the amendment had it decided the same case. But again, these types of decisions did not reject any established federal standard; they were good faith attempts at interpreting the fourth amendment that may have been wrong. *Cf.* Meyers v. State, 432 So. 2d 97 (Fla. 4th D.C.A. 1983) (delayed inventory search impermissible under United States Supreme Court precedents), *rev'd sub nom.* Florida v. Meyers, 466 U.S. 380 (1984). *See also infra* text accompanying notes 355-72 (discussing factual-based conformity). To the extent the 1983 amendment was an attempt to prevent either type of decision by Florida courts, it was misconceived.

107. *Grubbs*, 373 So. 2d at 909; *Dodd*, 419 So. 2d at 335.

108. Several decisions held that *Sarmiento* did not apply to eavesdropping outside the home. *See, e.g.*, Hurst v. State, 409 So. 2d 1059 (Fla. 1st D.C.A. 1982) (defendant's truck); Ruiz v. State, 416 So. 2d 32 (Fla. 5th D.C.A. 1982) (parking lot); Padgett v. State, 404 So. 2d 151 (Fla. 1st D.C.A. 1981) (motel room); Pittman v. State, 397 So. 2d 1205 (Fla. 1st D.C.A. 1981) (restaurant, outdoor rural setting, truck); Morningstar v. State, 405 So. 2d 778 (4th D.C.A.) (place of business), *aff'd*, 428 So. 2d 220 (Fla. 1982).

109. *See supra* text accompanying notes 45-66.

110. *Cf.* Lipman, *Revisions on Crime Win Easily*, Orlando Sentinel, Nov. 3, 1982, at 1C, col. 1 (Governor Graham, Attorney General Jim Smith, and a coalition of law enforcement groups led supporters of amendment, the immediate effect of which was to overturn *Sarmiento*); Anderson, *Amendment 2 Passes Justices' Review*, Florida Times-Union, Nov. 2, 1982, at 1B,

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Graham asked the legislature to adopt the proposed amendment and place it before the electorate[111] on the ground that Florida "should extend no more rights to those who would break our laws than the U.S. Constitution would require."[112] A memorandum that the attorney general's office submitted to the state legislature asserted, in support of the amendment:

> Florida courts have construed Florida's prohibition against unreasonable searches and seizures and have applied Florida's constitutionally based exclusionary rule in a very broad fashion. Thus, Florida is one of the most restrictive states in the nation, if not the most, in terms of admissibility of evidence in criminal proceedings. These restrictive evidentiary standards mean it is much more difficult to convict criminals in Florida than in other states and our federal system.[113]

Although in view of the minimal activism Florida courts had exhibited up to that time,[114] these statements are obviously exaggerated, none of the material officially available to the legislature at the time of its vote contradicted these assertions.[115]

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col. 2 ("The primary motive behind the amendment is a desire by the Legislature to overrule a 1981 Florida Supreme Court decision that prohibits police who do not have search warrants from using body bugs to monitor conversations inside private homes."); Pudlow, *Law Enforcement Proposals Stir Lively Debate*, Tallahassee Democrat, Nov. 1, 1982, at 1B, col. 1 (law-enforcement officials frustrated that recordings of conversations electronically intercepted by an officer wearing a body bug are admissible evidence in federal court, but not in state court); Jenne, *Should Voters OK Amendment #2?*: Yes: State Presently Is Losing Vital Evidence in Drug War, Ft. Lauderdale Sun-Sentinel, Oct. 24, 1982, at H1, col. 1 (article by state senator arguing that *Sarmiento* has been "detrimental because [it has] thrown the criminal justice system into turmoil on the issue of warrantless interceptions.").

111. Florida, like many states, provides for constitutional amendment by referendum, which involves initiation of the amendment proposal by the state legislature and then submission of the proposal to the electorate. *See infra* note 353.

112. J. FLA. SENATE., Spec. Sess. 1982, at 3 (June 21, 1982).

113. Revised Memorandum, Office of the Att'y Gen., Proposed Constitutional Amendment Regarding Searches and Seizures and the Exclusionary Rule, at 1 (June 18, 1982) (available in Fla. St. Archives, Dep't of State, Tallahassee, Fla.) [hereinafter Revised Memorandum].

114. *See supra* text accompanying notes 93-109. In support of the statement quoted in the text, the attorney general's office cited only *Sarmiento* and Hoberman v. State, 400 So. 2d 758 (Fla. 1981), which reaffirmed *Sarmiento*. Revised Memorandum, *supra* note 113, at 3.

115. Only three documents concerning search and seizure issues are available from the state archives legislative history division for the period immediately preceding the vote on the governor's proposal: the attorney general's Revised Memorandum, *supra* note 113, and two documents, labled "staff analysis," which deal primarily with the good faith exception to the exclusionary rule. Letter from Nadine Doty-Tessel, Pub. Serv. Section, Div. of Library and Information Servs. Fla. St. Archives, to author (Feb. 5, 1987).

The amendment had an immediate impact. In *State v. Lavazzoli*[116] shortly after the amendment became effective, the Florida Supreme Court found that the amendment linked the Florida exclusionary rule with the federal exclusionary rule, thus removing any independent protection the state law provides.[117] In *State v. Ridenour*,[118] the Third District Court of Appeal held that *Sarmiento* did not survive the amendment, given United States Supreme Court cases to the contrary. The First District Court of Appeal affirmed in *State v. Hume.*[119]

On at least two occasions, however, Florida courts have refused to interpret the amendment broadly. In *State v. Cross*,[120] the Florida Supreme Court declined to overrule the *Grubbs-Dodd* line of cases, stating that the United States Supreme Court had yet to hold specifically that the exclusionary rule does not apply at probation revocation proceedings. In *State v. Small*,[121] the Third District Court of Appeal reaffirmed a 1981 Florida Supreme Court decision requiring that the owner of a car subject to impoundment be told that impoundment can be avoided by making other arrangements for the car. The court rejected the state's argument that United States Supreme Court precedent required a different result, apparently finding that the Court had not yet directly addressed the issue.[122]

Decisions like *Cross* and *Small* notwithstanding, the 1983 amendment to article I, section 12 of the Florida Constitution has re-oriented search and seizure law in Florida. It establishes that Florida courts may not provide any less *or* any more protection than is afforded under the fourth amendment as the United States Supreme Court construes it.

III. An Assessment of the Different Approaches to State Constitutional Interpretation

One conclusion is clear from this synopsis of state court treatment of federal law. With the advent of incorporation, state courts must

116. 434 So. 2d 321 (Fla. 1983).

117. *Id.* at 323-24 (quoting Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)).

118. 453 So. 2d 193, 194 (Fla. 3d D.C.A. 1984).

119. 463 So. 2d 499 (1st D.C.A. 1985), *aff'd as to relevant part*, 512 So. 2d 185 (Fla. 1987).

120. 487 So. 2d 1056, 1057-58 (Fla. 1986), *cert. dismissed*, 107 S. Ct. 248 (1986). *See infra* text accompanying notes 247-63 for a more detailed discussion of *Cross*.

121. 483 So. 2d 783, 784, 788 (Fla. 3d D.C.A. 1986).

122. In Colorado v. Bertine, 107 S. Ct. 738 (1987), decided after *Small*, the United States Supreme Court explicitly held that the owner of an impounded vehicle is not, under the fourth amendment, entitled to make alternative arrangements for the car.

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interpret state law to provide state citizens with at least as much protection as federal law affords. Thus, the dual federalism approach to state constitutional interpretation is untenable. But beyond this basic tenet, at least three options are available, captured in the rubrics "co-option," "New Federalism," and "linkage."[123]

Of the three, a cautious version of the New Federalism best balances the tradition of federalism with principles of judicial decisionmaking. Co-option is clearly an inappropriate response to the need for a policy governing state court consideration of federal law. Linkage, while attractive in some respects, is ultimately repugnant to our notion of parallel systems of government. Forced linkage of the type Florida has adopted is especially so. On the other hand, wide-open state activism runs counter to judicial decisionmaking goals of clarity, efficiency, and principled reasoning. In short, state courts should be allowed to develop standards more protective than those the federal courts have produced, but they should be circumspect in doing so.

A. *The Case for Presumptive Linkage*

Co-option is an inappropriate approach to state court treatment of federal law because it fails to acknowledge the existence of state constitutional provisions. Regardless of the meaning of these provisions, their availability as an independent source of law cannot be denied. As practiced, co-option is most likely the result of unthinking habit, or of the failure of parties to brief state law,[124] than a policy reached after conscious evaluation of the role federal decisions should play in state court analysis.

The difficult question is whether, despite their technical independence from federal law, state constitutional provisions should be inter-

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123. The following discussion assumes that the state and federal texts are identical in subject matter, if not in language, as is the case with the search and seizure provisions of most states. *See supra* note 28. If there is no analogue to the state provision in the federal Constitution or no analogue to a federal provision in the state constitution, then speaking of co-option, New Federalism, or linkage would make little sense, since they all assume some federal standard from which to depart and some state provision upon which to base the departure. *See generally* Collins & Galie, *supra* note 5, at 328-33 (discussing the "nonequivalent text model" of state constitutional analysis).

124. *See, e.g.*, Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596, 620 n.145 (1979) (lawyers characterize state constitutional law arguments as "garbage argument" and a "last resort"). The research of professors Collins, Galie, and Kincaid indicates that one reason state constitutional grounds are not relied upon is that the parties do not argue state constitutional law. *See* Collins, Galie, & Kincaid, *supra* note 68, at 604.

preted differently from analogous federal provisions. Most commentators and jurists agree that interpretive variance is permissible when based on something uniquely local.[125] Thus, for instance, a significant difference in the state constitutional provision's language[126] or its legislative history[127] may be a proper justification for departure from the federal interpretation of the analogous federal provision. Similarly, a distinct local morality is generally a valid reason for diverging from federal standards.[128] Finally, judicial history indicating state court

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125. *See, e.g.*, State v. Hunt, 91 N.J. 338, 364-68, 450 A.2d 952, 965-67 (1982) (Handler, J., concurring) (arguing that departure is justified when textual language, legislative history, preexisting state law, structural differences between state and federal constitutions, matters of particular state interest or local concern, state traditions, and distinctive attitudes of the state's citizenry are present); Maltz, *supra* note 5, at 1013, 1020-23 (although state courts should not often depart from federal interpretations, significant differences in language of state text or local morality justify such departures); Shapiro, *State Constitutional Doctrine and the Criminal Process*, 16 SETON HALL L. REV. 630, 650-54 (1986) (state courts should consider institutional relationships within the state, and text and history of the state provision); Developments in the Law, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1361 (1982) (listing several kinds of "state-specific factors," including "(1) distinctive provisions of the state constitution . . . that characterize particular rights in a significantly different way; (2) distinctive features of a state's history, particularly circumstances surrounding the adoption of the relevant state constitutional provision that can be used to guide textual interpretation; (3) previously established bodies of state law, independent of federal law, that establish or suggest distinctive state constitutional rights; and (4) distinctive attitudes of a state's citizenry"); Note, *supra* note 14, at 318-19 (state courts should look at the similarity of the state and federal provisions, the existence of state precedents, and unique local conditions).

126. *Compare* New York's right to counsel provision, N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . .") *with* U.S. CONST. amend. VI (extending right to counsel "in all criminal prosecutions," which the Supreme Court, in Scott v. Illinois, 440 U.S. 367 (1979), interpreted to mean that counsel is only required when imprisonment results). *See also supra* text accompanying notes 85-87 for a comparison of fourth amendment and 1968 version of Florida's search and seizure provision.

127. *See* Gilbreath v. Wallace, 292 Ala. 267, 292 So. 2d 651 (1974) (relying on convention debates and early state precedents to require twelve-person juries contrary to Williams v. Florida, 399 U.S. 78 (1970)); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970) (based on extensive examination of state constitutional convention records, right to jury trial attaches at all trials, not just trials for "serious" offenses, contrary to Baldwin v. New York, 399 U.S. 66 (1970)); *see also* Utter, *The Right to Freely Speak, Write, and Publish: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 172-80 (1985) for an example of an attempt to base a difference in result between state and federal rulings on legislative history.

128. The best example of this idea is Ravin v. State, 537 P.2d 494 (Alaska 1975), in which the Alaska Supreme Court established a state constitutional right to private, in-home possession and use of marijuana by adults. The court relied in part on the observation that Alaska "has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own life style which is now virtually unattainable in many of our sister states." *Id.* at 504.

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adoption of a standard more expansive than a subsequently established federal standard is clearly a proper basis for ignoring the federal standard.[129]

Beyond these relatively rare situations, the value of the New Federalism is much in dispute. Three considerations support resistance to state court judgments that part from federal standards if the basis for the divergence is pure analysis rather than a local anchor such as textual or historical differences. First is a desire to avoid the uncertainty and confusion among state officials that might result from having two countervailing interpretations of the same text. Second is the notion that having two sets of courts address the same issue is unnecessary unless the state courts offer unique insight on the issue based on local factors. Third is the complaint that state activism that is not based on local factors is a result-oriented reaction to federal precedent and therefore unprincipled.

Jurists frequently make the uncertainty argument. For instance, Chief Justice Erickson of the Colorado Supreme Court has contended that law enforcement officers should be able to rely on United States Supreme Court decisions and not have to guess whether a state court would interpret a state constitutional provision more expansively than the identical federal constitutional provision has been interpreted.[130] In the fourth amendment context, the Arizona Supreme Court has expressed a similar sentiment more pithily, stating "one of the few things worse than a single exclusionary rule is two different exclusionary rules."[131]

The second argument against state court activism, that the dual review contemplated under the New Federalism unnecessarily shackles state legislatures and officials, is most forcefully presented by Professor Maltz.[132] The dual layer of review is unnecessary, he argues, because state courts are no better situated than federal courts to interpret constitutional language, except when textual differences, legislative history, or local morality create special considerations under state law. In all other circumstances, contends Maltz, neither the

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129. *See, e.g.*, People v. Paulsen, 198 Colo. 458, 601 P.2d 634 (1979) (rejecting United States v. Scott, 437 U.S. 82 (1978), on the basis of state precedent); People v. Cunningham, 49 N.Y.2d 203, 209-10, 400 N.E.2d 360, 364, 424 N.Y.S.2d 421, 425 (1980) (holding that in New York, contrary to Miranda v. Arizona, 384 U.S. 436 (1966), waiver of right to counsel is valid only if counsel is present, based on state court recognition of right to counsel long before federal right to counsel was established).

130. *See* 666 P.2d 135, 149-50 (Colo. 1983) (Erickson, C.J., dissenting).

131. State v. Bolt, 142 Ariz. 260, 268, 689 P.2d 519, 527 (1984).

132. *See* Maltz, *supra* note 5, at 1005-06.

competence[133] nor the institutional traits[134] of the state courts distinguish them from the federal courts enough to merit allowing them independent review of constitutional issues and burdening state legislation with another judicial hurdle.

Both the uncertainty argument and the unnecessary review argument are reasons for leaning toward linkage. But they do not persuasively support the conclusion that linkage should be *required* as is the case in Florida and California. Uncertainty is a fact of constitutional adjudication, particularly in the criminal procedure area. Even if state courts were bound to the federal standard, disputes would arise over the meaning of most decisions.[135] State officers would still be confronted with a complex array of rules in these cases. Further, even when clear standards are attainable, the claim that uncertainty results when two different court systems address the same issue is easily exaggerated. Unless a state court announces a more protective standard, the federal minimum applies. In those rare instances when the state court arrives at a different standard, that standard will control. In short, only one standard will apply to state officials at any given time.

The "duplication-of-review" argument is also not a persuasive reason for requiring linkage. As Maltz concedes, the duplication argument loses its force when the text of the state constitution is significantly different from the federal text, when state legislative history differs from the intent behind the federal provision, or when local morality diverges from national morality. Yet forced linkage binds state courts to federal precedent even in these situations. For example, that the Florida Constitution specifically protects communications is probably irrelevant now that the 1983 amendment to article I, section 12 requires Florida courts to follow Supreme Court precedent.[136]

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133. *Id.* at 1011-12 (pointing out that analysis of state court judges is just as fallible as the analysis of the United States Supreme Court).

134. *Id.* at 1016-23 (decisionmaking processes of both state and federal courts are "virtually identical," and state court geographical proximity to issue will rarely result in justifiable divergence from federal standard).

135. For instance, in the fourth amendment area alone, Professor Bradley has identified over 20 exceptions to the probable cause or warrant requirements or both, derived solely from United States Supreme Court opinions. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985). *See also infra* text accompanying notes 355-67 for a discussion of the Court's penchant for adopting totality of the circumstances analysis in fourth amendment cases. This multi-factor approach makes clarity virtually impossible.

136. *See supra* text accompanying notes 117-20 for a discussion of post-amendment treatment of *Sarmiento*. *But see infra* note 204.

More important, forced linkage is inappropriate even when differences between federal and state language or between federal and state history are minimal. Admittedly, in this situation state courts may be no better equipped to exercise judicial review than federal courts, and should therefore be inclined to accept federal interpretation. But there are three related reasons for permitting, if not encouraging, state courts to diverge from federal precedent even when the reason for doing so is not among those Maltz identifies.

First, federal courts, and especially the Supreme Court, may be constrained in interpreting particular constitutional language because their rulings govern more than one state. For example, the Supreme Court might construe the fourth amendment quite differently if freed from the spectre of requiring exclusion in all fifty states every time it announces a new fourth amendment principle.[137] Professor Sager has persuasively argued that the underenforcement that may result from this type of institutional pressure on the Supreme Court justifies more expansive state court interpretations.[138] Non-judicial considera-

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137. Some members of the Court have been explicit about federalism concerns in some contexts. *See, e.g.*, Crist v. Brest, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting) (expressing view that double jeopardy clause can be more stringent when applied to federal rather than state action); Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring) (observing in a case involving the scope of the jury trial right that the incorporation doctrine has contributed to the "dilution of federal rights").

Although the Court has never said as much in the fourth amendment context, the implication is found in many of its opinions. For instance, in Stone v. Powell, 428 U.S. 465 (1976), the Court stated that allowing state criminal defendants to raise fourth amendment claims (as opposed to "guilt-related" claims) in federal habeas courts "results in serious intrusions on values important to our system of government," including "the minimization of friction between our federal and state systems of justice, and . . . the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Id.* at 491 n.31 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)). The Court has also spoken repeatedly of the "cost" of excluding evidence, in a way that suggests that the number of cases in which exclusion occurs is a primary factor in the Court's decisions to limit the scope of the fourth amendment. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 138-39 (1978) ("substantial social cost" of exclusionary rule includes considering "misgivings as to the benefit of enlarging the class of persons who may invoke that rule . . . when deciding whether to expand standing to assert Fourth Amendment violations"); *see also* United States v. Leon, 468 U.S. 897, 907 n.6 (1984); United States v. Ceccolini, 435 U.S. 268, 275 (1978); United States v. Calandra, 414 U.S. 338, 348-52 (1974). This preoccupation with the number of cases affected by a given fourth amendment ruling could very easily lead members of the Supreme Court, consciously or unconsciously, to refuse to adopt a fourth amendment standard that they would have no trouble adopting were it to apply only in the federal courts.

138. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1242-63 (1978). Sager's argument technically only justifies more expansive state court interpretation of the federal Constitution. But his underenforcement contention

tions that are irrelevant to the state should not drive state constitutional law.

Second, linkage denies federal and state courts the benefit of the state court's reasoning on the proper interpretation of particular language. Such reasoning has played a valuable role in the past. At times, state court reasoning has proven influential even at the United States Supreme Court level.[139]

Finally, linkage prevents the experimentation of which Justice Brandeis spoke so fondly in *New State Ice Co. v. Liebman.*[140] According to Brandeis:

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[141]

This refrain, which has appeared in many Supreme Court opinions,[142] is particularly germane when speaking of the rights of the criminal accused. As Judge Abrahamson of the Wisconsin Supreme Court has pointed out, state constitutional provisions concerning criminal procedure are "less encrusted with layers of court decisions . . ." than the

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also provides a persuasive reason for allowing state courts to interpret similar state constitutional language more expansively. *See also* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C.L. REV. 353, 396-97 (1984) ("state courts should always suspect federalism concerns, whether expressed or not, as a contributing factor to the Supreme Court's decision against the asserted federal constitutional right.").

139. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643, 651 (1961) (justifying imposition of the exclusionary rule on the states in part because over half the states had already seen fit to adopt the rule partially or wholly); Griffin v. Illinois, 351 U.S. 12, 19 (1955) (relying on conclusions reached by state courts in finding that indigents are entitled to a free trial record on appeals as of right). *See also* Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds,* 63 TEX. L. REV. 1025, 1040 (1985) ("The Supreme Court has recognized the importance of the variety, breadth, and depth of state court analysis by frequent resort to such analysis in its own decisions.").

140. 285 U.S. 262 (1932).

141. *Id.* at 311.

142. *See, e.g.,* Chandler v. Florida, 449 U.S. 560, 579 (1981); Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980); Whalen v. Roe, 429 U.S. 589, 597 n.20 (1977); Fay v. New York, 332 U.S. 261, 296 (1947).

federal counterpart and thus allow state courts "to rethink the fundamental issues."[143]

For these reasons,[144] duplicative review can fulfill an important role, even when local interpretation factors are absent. But it still might be viewed as improper because it encourages unprincipled decisionmaking. The third argument against state court activism, that it is often result-oriented, is the most prevalent. Many commentators[145] view the current renaissance in state constitutional litigation as an ideological reaction to the retrenchment of the United States Supreme Court, rather than as an objective effort to develop state constitutional doctrine.

One response to this criticism might be that all judicial decisions that part with precedent are by definition result-oriented. One does not have to be an advocate of the critical legal studies movement[146] to believe that ideology exerts a greater influence over judicial deci-

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143. Abrahamson, *supra* note 5, at 1181.

144. Williams suggests additional reasons why state court review might be legitimate and useful despite a relevant United States Supreme Court ruling. These reasons include the state courts' greater authority vis-á-vis the legislative and executive branches, their lighter docket load (producing an enhanced ability to fine-tune decisions), their greater accountability, and their greater experience with certain types of issues. Williams, *supra* note 138, at 397-400.

145. *See, e.g.*, Deukmejian & Thompson, *All Said and No Anchor — Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979) (criticizing the California Supreme Court for result-oriented decisionmaking); Martineau, *Review Essay, The Status of State Government Law in Legal Education*, 53 U. CIN. L. REV. 511, 516 (1984) ("It is significant that this interest [in state constitutional law] arises not from an acknowledgment that state constitutions are by their very nature important but simply from a result-oriented jurisprudence that views a state constitutional provision as an alternate vehicle for achieving a result that previously could be obtained under a federal constitutional claim."); Note, *supra* note 14, at 297 ("[S]tate courts are evading Supreme Court doctrine and engaging in unprincipled, result-oriented use of their state constitutions.").

146. Although defining the essence of the so-called critical legal studies movement is problematic, two principal tenets adopted by most who claim to be part of the movement are that identifying a moral or legal "absolute" is impossible and that law is a product of political and economic allegiances. *See, e.g.*, Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984) (regularities in interpretation and application of legal rules not necessary consequences of adoption of given regime of rules; shift in direction of political winds could lead to exactly opposite results); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 39 (1984) ("Since legal reasoning includes and systematizes all of the conflicting arguments that people find plausible, there is no reason to expect it to provide a basis for decisionmaking that transcends these ordinary value conflicts."); Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEG. ED. 505, 508 (1986) ("Decision-makers are an elite, demographically unrepresentative and socialized into a set of beliefs about society and technology that skew the balance that they reach.").

sions than do neutral principles.[147] Certainly one could conclude that the United States Supreme Court's recent rulings on criminal procedure portray excessive preoccupation with reaching results that favor the prosecution at the expense of long settled doctrine.[148]

A less cynical response to the claim that state court activism is result-oriented is that it overlooks the possibility that a judicial decision can be principled simply because it is analytically persuasive. A state court decision does not have to rely on state constitutional language, history, or precedent to meet this requirement.[149] State courts should not have to accept flawed federal court reasoning. If a state

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147. *See* Perry, *A Critique of the "Liberal" Political-Philosophical Project*, 28 WM. & MARY L. REV. 205, 206 (1987) ("[T]he relation between morality and politics envisioned by liberal political philosophy is impossible to achieve. [Rawls, Ackerman, Dworkin have failed] in portraying a politics that is neutral or impartial among the basic differences — in particular among the competing conceptions of human good — that constitute the moral dissensus of our pluralistic society."); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-21 (1983) (advocates of neutral principles have conceded so many limitations on the doctrine as to make it meaningless). Even Wechsler, one of the principal advocates of the neutral principle concept, conceded that areas remain where courts cannot develop general principles. Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY 290, 299 (S. Hook ed. 1964).

148. Stone has argued, for instance, that the 1983 Term of the Court showed a particularly "aggressive majoritarianism" that signaled a significant shift from the Warren era. *See generally* Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15 (1984). He concludes that

> the Court in the 1983 Term sided with the government in a higher percentage of first, fourth, fifth, sixth, seventh, eighth and fourteenth amendment cases than in any term in the past half century, with the sole exception of the 1938 Term, when the Court was in the throes of dismantling economic substantive due process.

Id. at 17-18. He also concludes that "many of the Court's decisions in the 1983 Term break sharply with the Court's own precedents or with a substantial consensus of opinion in the lower courts." *Id.* at 18. Evidence of result-oriented jurisprudence from the Court is not confined to the 1983 Term. *See* Bacigal, *Dodging a Bullet, But Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 STETON HALL L. REV. 597, 626-28 (1986) (arguing that South Dakota v. Opperman, 428 U.S. 364 (1976), "demonstrates how the bright-line rules of the warrant clause can be eroded by a result-oriented court."). *See generally* Whitebread, *supra* note 47.

149. Several commentators have made this point. Abrahamson, *supra* note 5, at 1180 (disagreeing "with those who suggest that interpreting the state constitution independently of the federal constitution is an unprincipled pro-defendant, result-oriented process"); Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 AM. J. CRIM. L. 109, 125-26 (1983) (no intrinsic reason for calling a federal result more "principled" than a state result); Developments in the Law, *supra* note 125, at 1360 ("[D]isagreement with federal argumentation can be just as principled as any other judicial reasoning (and . . . reliance on other grounds for divergence, such as state-specific factors, can be at least as manipulative as direct criticism of federal results).").

court's result differs from the federal courts' after careful analysis and convincing reasoning, it should not be called result-oriented.[150]

This conclusion does not mean that state court independence should be unbounded. In particular, state courts should examine closely the premise of the federal position before deciding to adopt a different stance. A state court that strikes out on its own path without giving due deliberation to relevant federal precedent is also likely to be forsaking judicial neutrality. This type of decisionmaking is much more likely to create uncertainty and suggest the type of institutional deficiency that prompts criticism of duplicative review.[151] But if the state court deals with federal precedent and persuasively demonstrates that federal court reasoning is unacceptable, its result can no more be called unprincipled than can the original federal holding. In short, the more the state court gives careful attention to federal doctrine, the less concerned one should be about the objectivity of a result that rejects that doctrine.

B. *A Case Study*

The Mississippi Supreme Court's original opinion in *Stringer v. State*[152] (*Stringer I*) typifies the reasoning that can legitimize state repudiation of a federal standard. The opinion, written by Justice Robertson, declined as a matter of state law to adopt the United States Supreme Court's holding in *United States v. Leon*,[153] which interpreted the fourth amendment to allow the introduction of evidence seized pursuant to an invalid warrant if, at the time of its seizure,

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150. It is probable that the real reason many have called state activism result-oriented is that they disagree with particular results reached by state courts. *See* Williams, *supra* note 138, at 357-58.

151. Some have argued for a "self-reliant" approach to state constitutional interpretation, an approach that considers federal reasoning, if at all, as merely one instructive source of reasoning. *See, e.g.*, Collins, *Reliance on State Constitutions — Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Linde, *supra* note 70, at 392-93. To the extent the self-reliant approach encourages state courts to ignore relevant federal precedent, it "can result in questionable and unstable reasoning." Developments in the Law, *supra* note 125, at 1364.

152. No. 54,806 (Miss. 1985) (LEXIS, States library, Miss. file). On petition for rehearing, the Mississippi Supreme Court withdrew its original opinion in *Stringer* and substituted a second opinion upholding the result, but on a different ground. 491 So. 2d 837 (Miss. 1986). The original opinion, written by Justice Robertson, became the concurring opinion in the second *Stringer* decision. For ease of reference, page numbers in the following notes are from the concurring opinion.

153. 468 U.S. 897 (1984).

the seizing officer believed in good faith that the warrant was valid. Justice Robertson's grounds for rejecting *Leon*'s holding illustrate the different bases upon which a state court may properly establish a state standard more protective than the federal rule.

The first ground advanced in *Stringer I* for rejecting *Leon* focused on explicit differences between federal and state law. Justice Robertson noted that the exclusionary rule has been a recognized facet of Mississippi law since 1922,[154] and that state cases since then have continuously affirmed, even after *Mapp*, the availability of the exclusionary sanction under state law.[155] These facts alone justify a decision to reject *Leon*'s good faith exception to the exclusionary rule. Mississippi's pre-*Mapp* judicial history establishes the state's independent interest in excluding illegally seized evidence, regardless of how federal courts choose to sanction illegal searches.

The *Stringer I* court also based its position on a perception that local systemic tendencies differed from those influencing the United States Supreme Court. Justice Robertson found that the good faith exception in *Leon* "more reflects a shift in judicial/political ideology than a judicial response to demonstrable and felt societal needs."[156] In Mississippi, at least, no such societal needs were demonstrable. Justice Robertson noted that only once in thirteen years had the Mississippi Supreme Court used the exclusionary rule to keep out evidence police had seized under a groundless warrant.[157] He also pointed out that the effect of *Leon* could be particularly insidious in Mississippi "where most judges issuing warrants have had no formal legal training."[158]

Finally, *Stringer I* attacked *Leon*'s logic. The majority in *Leon* had justified its holding with a cost-benefit analysis. On the one hand, it reasoned, the loss of convictions due to a blanket exclusionary rule is significant. On the other hand, exclusion would not deter officers acting in good faith reliance on a warrant, and would be unnecessary to deter the magistrate issuing the warrant, assuming the necessary detachment from the law enforcement process.[159] This analysis did not per-

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154. 491 So. 2d at 847 (Robertson, J., concurring) (citing Tucker v. State, 128 Miss. 211, 223, 90 So. 845, 845-48 (1922)).

155. *Id.* at 847-48 (Robertson, J., concurring) (citing, e.g., Hill v. State, 432 So. 2d 427, 434 n.3 (Miss. 1983), *cert. denied*, 464 U.S. 977 (1983); Armstrong v. State, 195 Miss. 300, 303-04, 15 So. 2d 438, 439 (1944)).

156. *Id.* at 850 (Robertson, J., concurring).

157. *Id.* The one case was Washington v. State, 382 So. 2d 1086 (Miss. 1980).

158. 491 So. 2d at 850.

159. 468 U.S. at 920-21.

suade Justice Robertson. He pointed to the Supreme Court's own statistics for the proposition that exclusion of evidence actually aborts few prosecutions.[160] He also noted that the benefit of exclusion is substantial because it motivates the magistrate to carefully calculate probable cause. Conversely, if the good faith rule of *Leon* were adopted, the magistrate would have little incentive to act properly. A warrant is obtained in an ex parte proceeding from which there is no appeal.[161] Moreover, because of judicial immunity, the magistrate does not experience even the slim deterrent effect that fear of civil liability produces.[162]

Ultimately, however, the *Stringer I* court grounded its decision not on cost-benefit concerns but on what it considered the "fundamental logic of the exclusionary rule."[163] Justice Robertson asserted that the exclusionary rule is meant to return the parties to the position they were in before the illegal search and seizure,[164] citing *Nix v. Williams*,[165] a recent United States Supreme Court decision that relied on this proposition in addressing the scope of the exclusionary rule in the derivative evidence context. Because the good faith exception violates this precept, it cannot be countenanced. The *Stringer I* court also restated its adherence to the rationale for the exclusionary rule advanced in *Weeks v. United States*,[166] and endorsed by the Mississippi Supreme Court when it established the state exclusionary rule in 1922.[167] *Weeks* held that admitting illegally obtained evidence "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution."[168]

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160. 491 So. 2d at 849-50 (Robertson, J., concurring). The *Leon* Court had noted that the exclusionary rule "results in the nonprosecution of between 0.6% and 2.35% of individuals arrested for felonies." 468 U.S. 807 n.6.

161. 491 So. 2d at 849 (Robertson, J., concurring).

162. *Id.* (Robertson, J., concurring).

163. *Id.* at 850 (Robertson, J., concurring).

164. *Id.* (Robertson, J., concurring) (citing Nix v. Williams, 467 U.S. 431, 441-43 (1984)).

165. 467 U.S. 431 (1984) (holding that evidence that would have inevitably been discovered through proper police action is not inadmissible because actually found as a result of police misconduct).

166. 232 U.S. 383 (1914).

167. *See* Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

168. 232 U.S. at 394. Justice Robertson also pointed out that the Supreme Court's decision in Illinois v. Gates, 462 U.S. 213 (1983), which emphasized that the probable cause standard is a flexible one, made *Leon* unnecessary; he noted: "For the vast majority of situations, it would appear that the Supreme Court in *Gates* and *Leon* has *killed one bird with two stones*." 491 So. 2d at 850 (quoting State v. Schaffer, 107 Idaho 812, 822, 693 P.2d 458, 468 (Ct. App. 1984)) (emphasis added by Robertson, J.).

Stringer I exemplifies a state court's use of state precedent, local morality, and logical refutation to justify a position different from the United States Supreme Court's. The logical component of its attack on *Leon* is of particular interest. Justice Robertson's opinion evaluated the good faith exception in terms already recognized by the federal courts. He engaged in cost-benefit analysis, as had *Leon*, and relied on the reasoning not only of *Weeks*, but of the Court's recent decision in *Nix v. Williams*. The opinion thus reaches its contrary decision within the parameters previous federal law had sketched out. Although concern about creating uncertainty and engaging in unnecessary duplication of review should make a state court cautious about rejecting federal precedent, it should not prevent principled state court analysis of the type *Stringer I* illustrates.

C. *Summary*

Forced linkage is bad policy because it undercuts state court analytical independence, thus compromising the ability of state courts to reflect local legal and moral preferences, fully enforce constitutional guarantees, stimulate thought among other courts, and experiment with important concepts. Unlimited state activism is also bad policy because it promotes uncertainty, questionable duplication of review, and result-oriented jurisprudence. Presumptive linkage is the preferable approach to state court treatment of federal law. State courts should not lightly repudiate a federal ruling, but they should be free to do so when state precedent, local morality, or careful analysis suggests that the federal standard should not be adopted as the state standard.

IV. THE EFFECT OF THE FLORIDA AMENDMENT

For the reasons stated above, the 1983 amendment to article I, section 12 should be repealed. The amendment's requirement that search and seizure law in Florida conform to United States Supreme Court decisions construing the fourth amendment irresponsibly infringes upon the independence of Florida's courts.[169]

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169. Arguably the 1983 amendment is repugnant to another section of the Florida Constitution. Article V, § 1 provides that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality." FLA. CONST. art. V, § 1. The effect of the 1983 amendment, it could be said, is to surrender Florida judicial power, in violation of article V, § 1, to the United States Supreme Court whenever a decision of that Court governs the issue in a Florida search and seizure case.

If the amendment is not repealed, it can and should be interpreted narrowly. The same reasons that make forced linkage bad policy also justify limiting its impact when it cannot be avoided altogether.

The key question posed by the amendment is whether a Florida decision on search and seizure law conforms with United States Supreme Court decisions on the fourth amendment. The conformity question requires a two-step analysis. First, state courts must determine whether a United States Supreme Court decision exists that controls the case at hand. If not, then Florida courts may develop their own standard. If so, the courts must determine how to achieve conformity with the Supreme Court's rule.[170]

The force of this argument is reduced by principles of constitutional construction, however. First, if possible, constitutional provisions are to be read in harmony with one another. *See* State v. Division of Bond Fin. of Dep't of Gen. Servs., 278 So. 2d 614, 617 (Fla. 1973); Jackson v. Consolidated Gov't of Jacksonville, 225 So. 2d 497, 500-01 (Fla. 1969) ("Unless the later amendment expressly repeals or purports to modify an existing provision, the old and the new should stand and operate together unless the clear intent of the later provision is thereby defeated."). Second, if an amendment and earlier provisions of the constitution are irreconciliable, the amendment prevails. *See, e.g.*, Wilson v. Crews, 160 Fla. 169, 34 So. 2d 114 (1948); State v. Special Tax School Dist., 107 Fla. 93, 144 So. 356 (1932); Board of Pub. Instruction v. Board of Comm'rs, 58 Fla. 391, 50 So. 574 (1909). A final factor that supports the constitutionality of article I, § 12 (but that ultimately significantly curtails its impact) is that, as detailed below, *see* in particular *infra* note 170, Florida courts remain to a large extent the ultimate arbiters of search and seizure law in Florida despite the 1983 amendment.

170. Because it stems from the state constitution, the conformity question, in both its aspects, should be considered an issue of *Florida* law. Thus, a Florida court determination that its decision is in conformity with the fourth amendment as construed by the Supreme Court should be considered an adequate and independent state ground for the judgment that bars Supreme Court jurisdiction over the judgment. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 634-35 (1874). The argument could be made that such a judgment is not really "independent" of federal law because it requires an interpretation of federal law. *See* Collins, *supra* note 71, at 1115 (when interpretations of state constitution are "linked inextricably" to United States Supreme Court opinions, "all state decisions are potential candidates for federal review"); *cf.* Delaware v. Prouse, 440 U.S. 648, 652-53 (1979) (quoting Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977)) (because state court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did," Supreme Court can review Delaware court's interpretation of state law). But this argument should be discounted in light of the Supreme Court's decisions suggesting that a state court interpretation of a state statute that requires construction of federal law is an adequate and independent state ground for the state court judgment. Standard Oil Co. of Cal. v. Johnson, 316 U.S. 481 (1942) (California Supreme Court's finding that a post exchange is not an agency of the United States under federal law is in error; whether this error means that state statute exempting agencies of the United States from license tax applies to post exchanges is up to California court); State Tax Comm'n v. Van Cott, 306 U.S. 511 (1939) (Utah Supreme Court's finding that federal salaries are immune from taxation under federal Constitution erroneous; state court is still the authority in deciding

In deciding the two aspects of the conformity question, state courts should not lightly discard the values associated with state court sovereignty that have been described. Florida courts should surrender their judicial independence only when clear Supreme Court precedent governs the case at hand. Even if they find applicable Supreme Court precedent, courts should heed state tradition, local morality, and the persuasiveness of the Court's opinion when deciding how to conform to it.[171]

An objection to such a narrow interpretation of the amendment is that it violates the intent of the amendment's drafters and ratifiers. It is well established in Florida that the intent of a constitutional provision, as determined by the legislature's intent in proposing it and the people's intent in adopting it, should govern its interpretation.[172] Although no official legislative history of the amendment exists,[173] its

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whether state statute exempting salaries from the United States applies to petitioner). These decisions indicate that, at most, the Supreme Court could review a Florida decision to clarify the proper interpretation of federal law, thereafter leaving it up to Florida courts to make the ultimate decision concerning conformity.

If a Florida court judgment on the conformity question completely misconstrues Supreme Court precedent, it is conceivable that it could be characterized as "inadequate," even though independent. But the prevailing analytical approach to the adequacy prong prohibits Supreme Court review of a state court judgment based on an independent state ground unless the judgment represents an effort to "evade" the command of federal law. Demorest v. City Bank Farmers Trust Co., 64 S. Ct. 384, 388 (1944). *See* 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE 747-54 § 4029 (1977) (discussion of the relevant caselaw). Thus a good faith Florida court assessment of the conformity issue should not be reversible by the Supreme Court.

The Supreme Court has indicated, however, that it will exercise jurisdiction over a state court judgment unless the state court makes clear that it is basing its judgment on state law rather than federal law. Michigan v. Long, 463 U.S. 1032 (1983). Thus, if a Florida court does not make a plain statement to the effect that its judgment is based on an interpretation of the conformity clause of article I, § 12, the adequate and independent state ground doctrine will not bar Supreme Court review of a Florida search and seizure decision.

171. For the reasons stated *supra* note 170, when a Florida court does make a decision on the conformity issue, it should clearly state that it is interpreting article I, § 12 of the Florida Constitution.

172. State v. State Bd. of Admin., 157 Fla. 360, 25 So. 2d 880, 884 (1946) (en banc). *See generally* 10 FLA. JUR. 2d *Constitutional Law* §§ 22-26 (1979) ("[T]he fundamental object in construing a constitutional provision is to ascertain and give effect to the intent of the framers and adopters thereof, and constitutional provisions must be interpreted in such a manner as to fulfill this intention, rather than to defeat it.").

173. The amendment was part of an "anti-crime" package offered by Governor Graham during a special legislative session called to deal primarily with the issue of redistricting. *See* Weiner, *Should Voters OK Amendment #2*: No: That Proposal Would Dilute Constitutional Protection, Ft. Lauderdale News/Sun Sentinel, Oct. 24, 1982, at 1H, col. 4. The amendment

proponents, as noted earlier,[174] wanted to curb Florida court activism and reduce restrictions on police investigation. Moreover, to the extent legislators and voters were aware of the amendment's import,[175] they too probably saw it as a means of facilitating conviction of criminal defendants.[176] As a result, one could argue that Florida courts must opt for the crime control[177] position in analyzing the conformity issue.

passed without debate. *Id.* at 6H, col. 1. The only legislative deliberation relevant to the proposal was testimony taken by the Florida legislature on a nearly identical, earlier version of the proposal. *See id.* at 1H, col. 4. After this testimony, the Florida Senate rejected the earlier proposal by a vote of 20-18. J. FLA. SENATE Reg. Sess. 1982, at 451 (Mar. 15, 1982).

174. *See supra* text accompanying notes 110-15.

175. Ascertaining the "intent" of the legislature and the electorate, especially the intent of the latter, is notoriously difficult. Although newspapers are one source of inference about voter intent, see *infra* note 176, it cannot be assumed that voters read the newspapers' description of the amendment or rely upon that description in deciding how to vote. It is possible that many Florida citizens did not have an accurate idea of the amendment's purpose. For instance, a recent national survey shows that 85% of those polled believe that all important state court judgments can be appealed to the United States Supreme Court. Marcus, *Constitution Confuses Most Americans*, The Washington Post, Feb. 15, 1987, at A13, col. 1. If this percentage holds true in Florida, the amendment may have passed because the voters thought it merely constitutionalized standard practice. This would be a vast misunderstanding of the amendment's purpose. For further discussion of possible nuances in the voters' intent, see *infra* text accompanying notes 342-46.

176. Most newspaper articles and editorials preceding and subsequent to the vote — in addition to describing the proposed amendment as a means of overturning State v. Sarmiento, 397 So. 2d 643 (Fla. 1981), *see supra* note 110 and accompanying text — also noted the claim by the amendment's supporters that the proposal would relax restrictions on the police and cut down on crime. *See, e.g.*, Ollove, *Fear of Crime Shows in State's Amendment Votes*, Miami Herald, Nov. 4, 1982, at 22A, col. 1 (quoting director of Florida Sheriff's Ass'n, who stated that amendment "is a reflection that [the voters are] fed up with crime," and American Civil Liberties Union lawyer, who stated: "If you were for keeping the status quo, you would vote 'no.'"); *Our Views, in Capsule of the General Election*, Fla. Times-Union, Oct. 31, 1982, at F-2, col. 1 (The amendment "would lessen the opportunities of criminals walking free from their crimes because of legal technicalities while at the same time providing citizens with ample protection against abuse of police search and seizure powers."); *Amendment Offers Reasonable Change*, Ft. Lauderdale News & Sun-Sentinel, Oct. 30, 1982, at 22A, col. 1 ("The amendment would make the criminal justice system in Florida more effective."); Reider, *State Voters to Have Say on Bail, Evidence, Measure Would Broaden Law Enforcement Rights*, Miami Herald, Oct. 28, 1982, at 1A, col. 4 (quoting the attorney for the state Senate secretary, who saw amendment as a referendum on whether Florida courts should "be allowed to continue on what is perceived as a 'liberal' course, or . . . be required to adopt the current 'conservative' approach of the federal courts").

177. The phrase "crime control" is borrowed from H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, ch. 8 (1968). Professor Packer distinguished between the crime control model of criminal procedure and a due process model. Advocates of a crime control stance are primarily concerned with accurate determinations of guilt, whereas those who favor a due process model are more willing to sacrific convictions to protect other values. *Id.*

When there is no Supreme Court precedent, Florida courts should nonetheless fashion a decision with the crime control model in mind. When such precedent exists, but there is some degree of flexibility in deciding how to apply that precedent, Florida courts should choose the most prosecution-oriented approach.

This crime control argument is flawed, however. That legislators and voters may generally want to remove impediments to law enforcement does not mandate results in particular cases, even assuming this desire represents local morality.[178] Before legislative and electorate intent can govern judicial decisionmaking, the legislators' and voters' wishes with respect to the precise search and seizure issue before the court must be determined. Given a concrete fact situation, these groups might very likely be willing to accord privacy interests greater weight than concern for the criminal element. Yet determining how Florida citizens would resolve a given search and seizure dispute would be futile, with the possible exception of the body bug issue addressed in *Sarmiento*, which was highly publicized before the vote on the amendment.[179] Absent this information, Florida courts need not adopt a crime control approach to a particular search and seizure issue unless the United States Supreme Court has clearly done so.

The crucial first question, then, is whether the Supreme Court has adopted a standard that Florida courts must follow. Section *A* below discusses the situations in which a Florida court could reasonably conclude that no Supreme Court decision governs. In these situations, stare decisis is inapplicable and cautious activism of the type discussed

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178. Although the wishes of the legislature and the electorate are relevant in discerning the content of "local morality," they are not necessarily dispositive. Professor Perry has argued that morality is as much the province of the courts as it is the domain of the legislature and the electorate, at least when ambiguous constitutional provisions are being interpreted. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985). Because courts are "*relatively* disinterested" observers of the community, *id.* at 573, deal in concrete cases rather than abstract possibilities, *id.* at 573-74, and possess a "far more self-critical political morality," *id.* at 575, they are better equipped to discern society's aspirations than the legislature. While recognizing that this stance may be viewed by some as violating the notion of popular sovereignty, Professor Perry points out that an equally strong tradition in this country has been "liberty and justice for all." *Id.* at 577. Although the courts may not be the best way of effectuating the first tradition, they are probably the best mechanism for achieving the second. *Id.* at 575-85. If one agrees with Perry's position, it would be inaccurate to state that the legislature's and electorate's desire for a "crime control" interpretation of article I, § 12 determines the "local morality" concerning search and seizure, at least when that desire is expressed ambiguously, as the text below argues it was.

179. *See supra* note 110.

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previously is appropriate. If a Supreme Court decision does govern the case, the second question is whether the result that the Florida court reaches conforms to that decision. Section *B* below explores the implications of the New Federalism for Florida courts addressing the second question. Both of these questions deal with the precedential value of Supreme Court opinions. Because the 1983 amendment in effect makes Florida courts lower federal courts for purposes of search and seizure law, a detailed analysis of the extent to which a lower court must follow a decision issued by a superior court is necessary.

A. *When Supreme Court Precedent Is Not Binding*

Arguably, Florida courts may disregard four types of United States Supreme Court decisions construing the fourth amendment, despite the commands of article I, section 12. First, when the Supreme Court decision is not an authoritative opinion of the Court (e.g., a plurality opinion), it binds no lower court. Second, when an authoritative Supreme Court opinion is only partially based on the fourth amendment, article I, section 12 may not require conformity. Third, when the Supreme Court ruling provides less protection than is provided under a Florida constitutional provision other than article I, section 12, or under Florida statutory law, it may be ignored. Fourth, and most controversially, Florida courts might not have to follow a Supreme Court opinion handed down after the vote on the amendment.

1. The Absence of an Authoritative Opinion

When no relevant Supreme Court decision on a search and seizure issue exists, Florida courts are free to develop their own standard based on the state constitution. Even when relevant Supreme Court language construes the fourth amendment, courts need not necessarily follow that language if it is not an authoritative opinion on the issue before the Florida court. If a Supreme Court construction of the fourth amendment does not bind a federal court, then it should not bind Florida courts either, despite article I, section 12.

Determining whether an opinion is binding calls into play the principle of stare decisis and the idea that like cases should be decided alike.[180] The stare decisis principle has four primary objectives. First

180. Stare decisis has been defined as the "[d]octrine that, when [the] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same." BLACK'S LAW DICTIONARY 1261 (5th ed. 1979) (citing to Horne v. Moody, 146 S.W.2d 505, 509-10 (Tex. Civ. App. 1940)).

is predictability; one should be able to rely on previous decisions as an accurate statement of the law to permit planning of one's affairs accordingly. Second is the goal of uniformity; ideally the same case will be treated alike in each jurisdiction to prevent a sense of arbitrariness or disparity. A third goal of the stare decisis principle is to affirm the judicial hierarchy; lower courts should follow superior courts, on the theory that superior courts are better equipped to decide issues of law, and because uniformity is more easily achieved in this way. Finally, a fourth goal is to improve judicial decisionmaking capacity; by ensuring that present decisionmakers consider the reasoning of previous decisionmakers, more objective and reliable decisions should follow.[181] All of these goals — predictability, uniformity, judicial allegiance, and reliability — are relevant to the following attempt to define judicial authoritativeness.

This article discusses three categories of nonbinding opinions: plurality decisions, dicta, and inferences derived from authoritative opinions on related matters.[182] When a Supreme Court pronouncement falls into one of these three categories, a Florida court may disregard it and announce a state standard that is either more, or less, protective of privacy rights than the language found in the Supreme Court's opinion.

a. Plurality Opinions

The traditional wisdom concerning a plurality opinion is that, because it has not commanded a majority of the Court, other courts do not have to follow it.[183] This statement is too simplistic. One must first distinguish between the result of a plurality opinion and the rationales offered for that result. Then one must closely examine the

181. Three of these four objectives — predictability, uniformity and reliability — are gleaned from Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 55 (1979) (predictability, uniformity, deliberateness, correctness, impersonality, objectivity, and efficiency of judicial decisionmaking are goals of stare decisis). *See also* E. BODENHEIMER, JURISPRUDENCE 392 (rev. ed. 1974). The judicial allegiance objective derives from the other objectives discussed in the text (as well as the efficiency objective mentioned by Hardisty) and captures a well-accepted aspect of the judicial system. *See, e.g.*, Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967) ("The doctrine can be stated simply: there is an *absolute* duty to apply the law as last pronounced by superior judicial authority.").

182. Other possible categories of decisions that may be considered less than authoritative are summary dismissals and affirmances and per curiam decisions.

183. *Cf.* Texas v. Brown, 460 U.S. 730, 737 (1983) (Coolidge v. New Hampshire, 403 U.S. 443 (1971), not "binding precedent" because its discussion of the plain view doctrine "has never been expressly adopted by a majority of this Court").

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rationales supporting the result to determine the extent to which they overlap. Generally, courts must follow the result of a plurality opinion. Courts must also follow any rationales that have attracted a majority of the Court, even if that majority does not join any one opinion. No other rationales are binding, however.

The justification for the "result" stare decisis rule[184] is the reasonable assumption that the precedential court will decide similar cases the same way, even if it is unable to agree on a rationale for the result in such cases.[185] Failure to abide by the result of a plurality opinion will needlessly sacrifice predictability, uniformity, judicial allegiance, and reliability. The plurality decision in *United States v. Mendenhall*[186] serves as an example. Five justices of the Court found that federal narcotics agents did not violate the fourth amendment when they stopped the defendant and asked her questions after finding she met certain elements of a drug courier profile. The opinion was a plurality decision because two of the five justices reached this result by concluding that there was no seizure, and thus that the fourth amendment was not implicated at all,[187] while the other three assumed there was a seizure but found that the facts on which the officers relied in stopping the defendant constituted reasonable suspicion.[188] The four dissenters argued that the defendant had been seized and that reasonable suspicion had not existed.[189] Despite the inability of the five justices favoring the result to agree on a rationale, it would be improper to ignore the *Mendenhall* result in a case with similar facts. Given the same facts,[190] the Court would presumably reach the same outcome.

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184. This term comes from Hardisty, *supra* note 181, at 52-57. Hardisty distinguishes between result stare decisis and rule stare decisis, which describes a subsequent court's following the rule, rather than merely the result, of the precedental court. *Id.*

185. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 779 (1980). ("[I]t seems clear that lower courts must adhere at the minimum to the principle of 'result' stare decisis, which mandates that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases.").

186. 446 U.S. 544 (1980).

187. *Id.* at 555. Justice Stewart authored the opinion, which Justice Rehnquist joined. *Id.* at 546.

188. *Id.* at 562-65. Justice Powell wrote the opinion, which Chief Justice Burger and Justice Blackmun joined. *Id.* at 560.

189. *Id.* at 566. Justice White wrote the opinion, which Justices Brennan, Marshall, and Stevens joined. *Id.*

190. Of course, if the facts of the subsequent case diverge significantly from the facts giving rise to the plurality decision, then result stare decisis is inapplicable. For example, if the police in a case subsequent to *Mendenhall* confronted the defendant more aggressively than the police confronted Mendenhall, a court could reasonably find that a seizure had occurred and that the

A more compilcated determination is whether any of the rationales supporting the result in a plurality opinion are binding. In some so-called plurality decisions, a majority agrees not only on the result but also on the rule. For example, only three justices joined Justice Rehnquist's opinion in *Texas v. Brown*,[191] which held that an officer need have only a probable cause belief, rather than virtual certainty, that items seized in plain view are evidence of crime.[192] But both Justice Powell's concurring opinion, in which Justice Blackmun joined, and Justice Stevens' concurring opinion, in which Justices Brennan and Marshall joined, espoused the notion that probable cause is sufficient to justify a plain view seizure.[193] Despite the existence of three separate opinions in *Brown*, the entire Court agreed on a single rationale justifying the result.

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result in *Mendenhall* does not control. *Cf.* Florida v. Royer, 460 U.S. 491 (1983) (a seizure occurs when agents confront defendant in same manner as in *Mendenhall* but retain the defendant's ticket and driver's license). Or regardless of how one decides the seizure issue, a court might find the result in *Mendenhall* inapposite because the facts leading to police action in its case differed from those available to the agents in *Mendenhall* and therefore did not give rise to reasonable suspicion. *Compare* Justice Powell's opinion in *Mendenhall*, 446 U.S. at 560-61 (reasonable suspicion exists when defendant arrives from a source city, is the last to leave the plane, appears nervous, claims no luggage and goes to the desk of an airline other than one on which she arrived) *with* Reid v. Georgia, 448 U.S. 438 (1980) (no reasonable suspicion when defendant arrives from a source city, nervously looks over shoulder, has no luggage other than a shoulder bag, and makes efforts to conceal he is traveling with someone else). Distinctions of this type are easily made in areas of law that are fact-specific (as is the case with the definitions of "seizure" and "reasonable suspicion") and thus significantly undercut the impact of result stare decisis. *See infra* text accompanying notes 355-72.

191. 460 U.S. 730 (1983).

192. The plain view exception to the warrant requirement, which derives from Coolidge v. New Hampshire, 403 U.S. 443 (1971), itself a plurality opinion, permits police to seize an item if it is (1) "immediately apparent" as evidence of crime; (2) discovered "inadvertently"; and (3) located in an area in which police may lawfully be. *See generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, ch. 11 (discussing the three elements of the plain view doctrine). *Brown* focused primarily on the first element and held that *Coolidge*'s "immediately apparent" language "was very likely an unhappy choice of words"; the plain view doctrine requires only a probable cause belief that the evidence seized is related to criminal activity. 460 U.S. at 741. *See also* Arizona v. Hicks, 107 S. Ct. 1149, 1153-54 (1987) (any degree of suspicion less than probable cause insufficient under plain view rule).

193. Justice Powell's opinion stated that he concurred "in the judgment and . . . with much of the plurality's opinion relating to the application in this case of the plain-view exception to the Warrant Clause." *Id.* at 744 (Powell, J., concurring). His only reason for writing separately was to emphasize his disagreement with dicta in Rehnquist's opinion concerning the importance of the warrant clause generally. *Id.* at 744-45.

Justice Stevens also concurred in the result and agreed with Rehnquist's equation, described *supra* note 192, of probable cause and *Coolidge*'s "immediately apparent" language. *Id.* at 747 (Stevens, J., concurring). His sole purpose for writing the opinion was to challenge the lawfulness of the search that followed the seizure. *Id.*

Brown exemplifies a "false" plurality opinon.[194] Many plurality opinions are not, however, so easily labeled. For instance, in *Michigan v. Clifford*,[195] the Court held that evidence obtained from a warrantless search of a burned-down home five hours after the fire was inadmissible. Four members of the Court justified this result on the ground that the fourth amendment requires an administrative warrant before such a search.[196] A fifth justice, Justice Stevens, concurred in the result because he felt that the homeowner should have received advance notice of the search; however, he did not agree that a warrant was required.[197] The remaining four members of the Court believed that neither a warrant nor notice was required in this situation.[198] Thus, five justices would not require a warrant for a post-fire search conducted shortly after the fire. But five justices would require *some* pre-search action by the police, either a warrant or notice. Does this mean that the fourth amendment mandates notice before a post-fire search can take place, even though only one justice supports this position?

The Supreme Court has tried to minimize the problem that such swing opinions create through the "narrowest ground" doctrine. This doctrine requires adoption of the plurality rationale that is most restricted in scope and most closely tailored to the facts of the case.[199] But this approach has several problems.[200] For instance, in *Clifford*, which rationale is the narrowest? Justice Stevens' notice requirement might seem narrower since it does not require a warrant. But as Justice Stevens pointed out, advance notice may provide more protection to homeowners than the plurality's warrant requirement, since a warrant can be obtained *ex parte* and is often a rubber stamp.[201] Thus, in this instance, the narrowest ground approach provides no guidance for deciding which rationale should govern future cases. Since a majority endorsed neither the notice nor the warrant rationales, neither

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194. This denomination is borrowed from Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130 (1981).

195. 464 U.S. 287 (1984).

196. 464 U.S. at 297. Justice Powell wrote the opinion, which Justices Brennan, White, and Marshall joined. *Id.* at 288.

197. 464 U.S. at 303 (Stevens, J., concurring).

198. 464 U.S. at 309-10 (Rehnquist, J., dissenting).

199. *See* Note, *supra* note 185, at 761.

200. *Id.* at 761-67 (narrowest ground doctrine is subject to several interpretations, neglects distinction between result and rationale, hampers development of the law, and gives disproportionate power to the "swing" Justice).

201. 464 U.S. at 303 n.5 (Stevens, J., concurring).

should be considered binding. A lower court is free to choose either rule or develop another.[202]

When careful examination of the rationales in a plurality decision fails to reveal a rule common to a majority of the judges, the rationales are true plurality rules and should not be binding. The court's intentions are not sufficiently clear to trigger the stare decisis doctrine. Such true plurality rules are frequent at the Supreme Court level, even when one looks only at fourth amendment cases.[203] Florida courts do not have to conform their opinions to these rules, despite the 1983 amendment to article I, section 12.[204]

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202. On the other hand, the result in *Clifford* should be honored. Since the officials in *Clifford* neither obtained a warrant nor gave notice, the evidence found during the search was excluded. Because the Court would presumably reach the same result were it to hear another case with similar facts, lower courts must exclude evidence obtained under similar circumstances. *See supra* text accompanying notes 184-90.

203. In addition to cases discussed in the text, *see, e.g.*, O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (only four justices agreed that fourth amendment's application to the workplace is to be decided on a case-by-case basis); Cardwell v. Lewis, 417 U.S. 583 (1974) (only four justices joined opinion stating that warrantless seizure of car in non-exigent circumstances is permissible); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (only four justices agreed to "inadvertency" requirement in plain view seizure cases, *see supra* note 192); United States v. Harris, 403 U.S. 573 (1971) (only four justices joined the Court's discussion of declarations against interest as an indicator of informant reliability).

204. Before leaving plurality opinions, one Supreme Court plurality opinion that raises issues peculiar to Florida should be mentioned. In United States v. White, 401 U.S. 745 (1971), three justices joined Justice White in his opinion finding that the undercover use of body bugs does not require a warrant. *Id.* A fifth justice, Justice Black, concurred in the judgment, reasoning that because it does not specifically mention "communications" as one of the aspects of privacy protected by its provisions, the fourth amendment does not apply to such eavesdropping. *Id.* at 754 (Black, J., concurring) (referring to reasoning set forth in his dissent in Katz v. United States, 389 U.S. 347, 364 (1967)). *White* was repudiated by the Florida Supreme Court in State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981), *aff'g* 371 So. 2d 1047, 1052 (3d D.C.A. 1979), the decision that triggered the 1983 amendment. And *White* was the primary case cited by Florida courts holding that *Sarmiento* did not survive the amendment. *See, e.g.*, State v. Hume, 463 So. 2d 499, 500 (1st D.C.A. 1985), *aff'd as to relevant part*, 512 So. 2d 185 (Fla. 1987); State v. Ridenour, 453 So. 2d 193, 194 (Fla. 3d D.C.A. 1984).

These latter holdings are clearly correct, but only because other Supreme Court cases, both before and after *White*, reached the same result by a clear majority vote. *See, e.g.*, United States v. Caceres, 440 U.S. 741 (1979); Lopez v. United States, 373 U.S. 427 (1963). If, however, these other cases did not exist, and if the "intent" of the amendment's adopters was ambiguous with respect to overturning *Sarmiento*, *but see supra* note 110, then the amendment would not require such a finding. *White*'s pronouncement concerning body bugs attracted only a plurality of the justices. Admittedly, Justice Black provided a fifth vote in favor of *White's* result; one could thus argue that result stare decisis requires Florida courts to follow that result. But the rationale for that fifth vote was the failure of the fourth amendment to mention communications. Florida's constitution, on the other hand, specifically protects communications, *see supra* text

b. Dictum

Even when a majority of the Court supports a rule or rationale, it might not be binding precedent because it is dictum. The traditional test used to distinguish between rules that courts must follow and dicta that courts can ignore is whether the statement is necessary to the decision.[205] But, as one commentator has noted,[206] the only conclusion that is really necessary to any decision is the court's order. In order to define dictum so that Florida courts can meaningfully apply it, one must examine the reasons for according particular legal statements precedential effect and labeling others dicta.

First, the concept of result stare decisis is as relevant here as when determining the precedential significance of plurality opinions. If two cases are factually similar, then the principle of stare decisis dictates that they be decided alike, regardless of whether the rationale in the first case is a holding or dictum. The difficulty arises when the facts of the cases are not substantially similar, yet the rule in the first case appears to govern the subsequent case. When is such a rule dictum with respect to the second case and when is it a holding that the court must follow?

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accompanying note 87, a fact of supreme importance to a strict constructionist like Justice Black and one that, had it been true of the federal Constitution, might have led him to join the four dissenters in *White*. *See* Black's opinion in Lee v. United States, 343 U.S. 747, 758 (1952) (Black, J., dissenting) (arguing that admitting evidence obtained through a body bug should be prohibited under the Court's "supervisory authority over federal criminal justice"). Put another way, despite the general soundness of the result stare decisis principle, construing the 1983 amendment to mean that Florida courts must follow *White* would be a stark abnegation of state sovereignty and constitutional independence, given the basis for Black's position in *White*. While this example involves a plurality opinion, the same kind of situation could arise with a majority opinion if, for instance, a majority of the Court had adopted Black's position in *White*.

205. *See* Hardisty, *supra* note 181, at 58 ("[The] most popular definition of dictum [is] a judicial statement of a legal rule which was not 'necessary' to the judicial result."). Wambaugh suggests another definition: that dictum is an opinion on a question that could have been decided either way without affecting the outcome of the case. E. WAMBAUGH, THE STUDY OF CASES 14 (2d ed. 1894). Wambaugh contends that such statements should be avoided because they "waste [judicial] strength," threaten the adversary process by focusing on issues that may not have been raised by the parties, and violate separation of powers doctrine because they are, in effect, "advisory" opinions in violation of article III of the United States Constitution. *Id.* at 10-11. While these considerations may explain why unnecessary statements should be avoided, they do not explain why, when they are found in an opinion, they should not be accorded precedential weight, nor do they help us decide what dictum is.

206. *See* Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 509 (1952).

To some, dictum is simply any judicial statement that a subsequent court considers wrong.[207] But this cannot be the basis for distinguishing dictum from holding if the principle of stare decisis is to retain any meaning. Predictability and uniformity would obviously be sacrificed by such a notion. So also would any sense of judicial hierarchy; particularly when the context is the extent to which a lower court must follow a superior court, a definition of dictum based on the lower court's perception of the superior court opinion's correctness cannot be countenanced.[208] Finally, the impact of this approach on the reliability of judicial decisionmaking is at the least problematic, given the difficulty of determining whether a decision is right or wrong.[209]

On the other hand, one cannot designate as holdings all judicial statements that enhance predictability, uniformity, and lower court allegiance. Any relatively precise judicial statement meets this test. For the purpose of defining dictum, the most important goal of stare decisis is to ensure reliable decisionmaking. This goal forces one to ask which attributes of a legal statement, apart from its perceived rightness or wrongness, make it a rule worth following.

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207. *See, e.g.*, Spann, *Functional Analysis of the Plain Error Rule*, 71 GEO. L. REV. 945, 989 (1983) (arguing for a "functional" rather than precedential approach to legal analysis because "[t]he propriety of any result can rest upon nothing more than the persuasiveness of the analysis offered to support it").

208. This is not to say, of course, that a previous decision by a superior court cannot be wrong; it is merely to say that the principle of stare decisis means little if a lower court may ignore a superior court decision it considers "wrong." In the context at issue here, the 1983 amendment to article I, § 12 would mean little if Florida courts could ignore a Supreme Court decision they considered wrong.

Green argues, however, that lower courts should have some authority to ignore higher court precedent. Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 40 ILL. L. REV. 303, 319 n.73 (1946) ("if the [lower court] is convinced that the former decision should be reconsidered [it] may refuse to follow it so as to give the appellate court the opportunity to reconsider"). Green's argument assumes the reviewability of the lower court decision, whereas a Florida court decision on the conformity issue would not normally be reviewable by the Supreme Court. *See supra* note 170. It is possible, however, that a Florida court decision that intentionally miscontrues Supreme Court precedent may be considered an inadequate state law basis for the decision. *Id.* While Green's position could therefore be adapted to the situation in Florida, this article will assume that the judicial system generally, and article I, § 12 in particular, require lower courts to abide by official higher court decisions. *See* Kelman, *supra* note 181, at 4.

209. *See supra* note 147 for a discussion of neutral principles.

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Commentators who have addressed this issue have focused on a number of factors.[210] Wambaugh argued that the primary considerations in differentiating holding from dictum are the quality and quantity of thought the precedential court gives the rule.[211] He emphasized the reputation and experience of the precedential court, the extent to which the statement was briefed and argued, and the degree to which the statement is justified in the opinion.[212] Others distrust the importance of these types of factors, preferring to focus on the relation of the rule to the disposition and facts of the case. Oliphant, for instance, believed that a scientific approach to stare decisis requires one to look at what courts do, not at what they say; legal doctrine is not observable, only its application is.[213] Thus, to him, the precedential weight of a rule is gauged by the extent to which it avoids generalizing beyond the facts of the case.[214] Similarly, Goodhart, building on the work of Pollock,[215] stressed that the legal conclusions that merit the strongest

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210. The author is indebted to Professor Charles Collier, Assistant Professor of Law, University of Florida, for making available his unpublished paper, The Concept of Dictum: Redefining the Marginal in Legal Doctrine. The following discussion of Waumbaugh, Oliphant, and Goodhart is derived in part from this paper, although any distortion of their ideas is attributable solely to the author.

211. E. WAMBAUGH, *supra* note 205, at 103 (The precedential value of a rule "var[ies] with the learning of the court and with the amount of thought bestowed by the court upon the point covered by the [rule]."). Elsewhere, Wambaugh states: "What makes decisions of value as precedents is the fact that they are based upon reasoning and not upon chance . . . ." *Id.* at 25.

212. *Id.* at 103, 119. *See also* Wambaugh, *How to Use Decisions and Statutes*, in BRIEF MAKING AND THE USE OF LAW BOOKS 111 (R. Cooley ed. 1909) ("It is true that, as [dicta] are not required as steps toward the decision of the very case, they may have been uttered without full argument from counsel and without full consideration from the court; but if they can be shown to have been considered carefully, or to have been pronounced by unusually skillful judges, already well acquainted with the subject, no lawyer denies that they are of consequence.").

213. Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 n.5 (1928) ("The thesis is that facts are the only stimuli capable of scientific study as a basis of prediction.").

214. Oliphant admitted that a *"[d]ecision* in the sense meant in *stare decisis* must . . . refer to a proposition of law covering . . . as a minimum, the fact situation of the instant case and at least one other . . . ." *Id.* at 72. He also argued, however, that stare decisis "is indifferent to broad generalizations or is made apprehensive by them . . . [and] uses generalizations to suggest and to orient . . . experimentation but not to replace it." *Id.* at 75. Pound expressed a similar sentiment when he stated, "[w]hat needs rectification is a judicial habit of following language extracted from its setting by text writers, of adherence to formulas instead of to the principle of decisions, and the taking of the words for law rather than the judicial action which those words sought to explain." Pound, *What of Stare Decisis*, 10 FORDHAM L. REV. 1, 13 (1941).

215. *See* F. POLLOCK, *The Science in Case-Law*, in ESSAYS IN JURISPRUDENCE AND ETHICS (1882), *reprinted in* F. POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS 169 (A. Goodhart ed. 1961).

precedential authority are those most closely tied to the material facts of the case. According to Goodhart, "[i]t is by his choice of the material facts that the judge creates law."[216] To both Oliphant and Goodhart, a rule loosely connected to the result and the facts is likely to be less reliable, regardless of the degree of justification given for it.[217]

This simple synopsis of some of the leading commentators' thoughts on precedent is not meant to be a comprehensive treatment of this amorphous subject.[218] It is sufficient to suggest, however, factors a court might consider in deciding whether a given rule is dictum or binding. While these factors are not completely compatible, as Oliphant's criticism of Wambaugh's approach indicates, taken together they give a court some tools for determining what is dictum. The remainder of this article's treatment of dictum will examine a number of cases to illustrate how Florida courts might draw the line between dictum and holding, while adhering to the 1983 amendment to article I, section 12.

Consider first *Illinois v. Andreas*.[219] In *Andreas*, police lawfully searched a table that had arrived at an international airport, and found that it contained marijuana. The police then repacked the table and delivered it to the addressee. The addressee took the table into his apartment, but reappeared some thirty to forty-five minutes later with the apparently unopened package. The police searched the package again, without a warrant. The lower court found this second search

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216. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930).

217. For instance, Oliphant states that stare decisis, in its traditional sense, keeps its attention pinned to the immediate problem in order that a wise solution of it may be found. It stoutly refuses to answer future questions, prudently awaiting the time when they enter the field of immediate vision and become issues of reality in order that their solution may be brought the illumination which only immediacy affords and the judiciousness which reality alone can induce.

Oliphant, *supra* note 213, at 75.

Goodhart said much the same thing:

> A divorce of the conclusion from the material facts on which that conclusion is based is illogical, and must lead to arbitrary and unsound results . . . . The first and most essential step in the determination of the principle of a case is, therefore, to ascertain the material facts on which the judge has based his conclusion.

Goodhart, *supra* note 216, at 169.

218. Indeed, one commentator has concluded that dictum "describes so much that it can truthfully be said to describe nothing." Note, *supra* note 206, at 512. The commentator also suggests that this fuzziness is intentional because it allows judges or attorneys to avoid more easily statements of law they do not like. *Id.* at 509. This article merely attempts to provide some handle on the topic; it does not purport to treat definitively the concept of dictum.

219. 463 U.S. 765 (1983).

impermissible because the police were not "absolutely sure" the package still contained the marijuana.[220] The Supreme Court reversed, finding that there need be only a substantial likelihood in such controlled delivery situations that the package still contains contraband.[221]

Although the police in *Andreas* could not be absolutely sure the package contained the drugs, it has been suggested they were "virtually certain" it did.[222] Virtual certainty represents a level of confidence falling somewhere between the lower court's absolute certainty test and the Supreme Court's substantial likelihood standard. Is the substantial likelihood language therefore dictum? That is, would it be permissible for a lower court faced with a similar controlled delivery situation to require virtual certainty that the contents of the delivered item are unchanged before a warrantless search may take place?

The substantial likelihood test was not necessary to resolving *Andreas,* because applying a virtual certainty test could have produced the same result. But in light of the factors developed above, this language should not be considered dictum. First, the Court did not casually adopt the substantial likelihood test. It carefully justified the rule in language that suggested resistance to any standard calling for a very high degree of certainty. Finding that the crucial question is determining at what point, after surveillance is interrupted, one's expectation of privacy revives,[223] the Court concluded that "it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed."[224] Second, although the Court's rule is not as closely tied to the material facts of the case as it could be, since the police probably were virtually certain of the container's contents, the practical difference between the Court's rule and a virtual certainty test is negligible. Few searches authorized by the Court's language will be based on a level of suspicion significantly different from the level of suspicion the police in *Andreas* possessed.

A harder case is *New York v. Belton,*[225] which involved the proper scope of a search incident to the arrest of a car occupant. In *Belton,*

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220. State v. Andreas, 100 Ill. App. 3d 396, 402, 426 N.E.2d 1078, 1082 (1981).

221. 463 U.S. at 773.

222. 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 559 (1987) ("The facts of *Andreas,* it should be noted, are such that the outcome would probably have been the same under a 'virtual certainty' test"). *See* 463 U.S. at 782 (Stevens, J., dissenting).

223. *See* 463 U.S. at 772.

224. *Id.* at 773.

225. 453 U.S. 454 (1981).

a police officer stopped a car, observed signs of marijuana use, directed the four occupants to get out of the car, and arrested them. After positioning the arrestees in four separate areas of the roadside to prevent close contact, the officer searched the interior of the car. He found a jacket that had a zippered pocket containing cocaine. In finding this evidence admissible, the Court stated: "we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[226]

This language was not strictly necessary to the opinion. In order to find the *Belton* search lawful, the Court did not need to state that the interior of a car may be searched *whenever* there is a lawful custodial arrest of its occupant. Moreover, in contrast to *Andreas*, the *Belton* holding is much more likely to cover situations unlike that encountered in *Belton*. Suppose, for instance, that instead of a one-to-four police-to-occupant ratio, the ratio were reversed and three officers physically held the defendant while the fourth officer searched the car. The potential for harm to the police or for destruction of evidence, the traditional bases for the search incident to arrest exception to the warrant requirement,[227] are significantly less on these facts than on the *Belton* facts. Yet the *Belton* holding would permit such a search. Could it therefore be considered dictum? Could a lower court exclude evidence found during such a search?

Despite the reach of *Belton*'s language beyond the material facts of the case, applying the criteria for measuring precedential value suggests the language should be followed even in the hypothesized case. Most important, the *Belton* Court explicitly considered the possibility that its rule was too sweeping. The Court noted that not every arrest of a car's occupant will present obvious danger to the police or give rise to possible destruction of evidence.[228] But the Court concluded that despite the possible overbreadth of the rule, "'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'"[229] This conclusion and others like it[230] show that the Court carefully considered the propriety of a broad rule in this situation.

226. *Id.* at 460.

227. C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, at 164.

228. 453 U.S. at 457.

229. *Id.* at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

230. For example, the Court stated that "the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an

The explanation the Court offered for its broad rule in *Belton* could be seen as a justification for treating any judicial statement as a holding, so long as the statement stems from a recognizable reasoning process rather than an offhand or conclusory remark. This view is especially tempting in the search and seizure context. As Professor LaFave has argued, fourth amendment protections can be realized only under rules that enable police officers to determine correctly beforehand whether an invasion of privacy is justified.[231] Labeling overinclusive language as dictum would stifle such rule-oriented jurisprudence.

But the desire for guidelines should not obscure the importance of ensuring reliable decisionmaking. In order for a broad rule — even a well-justified one — to be considered binding, it should also have some connection to the results and facts of the case in which it is announced. A further ground for regarding *Belton*'s search incident rule as a holding is that the breadth of the rule was needed to justify the specific search upheld in the case. That search involved reaching into a jacket pocket, an area unlikely to contain weapons or evidence easily accessible to the arrested individuals.[232] When the rule is unrelated to the case's material facts, however, its precedential value should be minimal. In these circumstances, as Oliphant and Goodhart pointed out,[233] the rule is much more likely to be ill-considered since the court will have dealt with the issue only in the abstract.[234]

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invasion of privacy is justified in the interest of law enforcement.'" *Id.* at 458 (quoting LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142). The Court also stated, "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." 453 U.S. at 459-60.

231. LaFave, *supra* note 230, at 142.

232. The New York Court of Appeals, in excluding the evidence, had held that "[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article." State v. Belton, 50 N.Y.2d 447, 449, 407 N.E.2d 420, 421, 429 N.Y.S.2d 574, 575 (1980), *rev'd*, 453 U.S. 454 (1981).

233. *See supra* note 217.

234. Justice Blackmun made the same point in his dissenting opinion in O'Connor v. Ortega, 107 S. Ct. 1492 (1987), in which a plurality of the Court held that neither the warrant nor probable cause requirements apply to work-related investigations. *Id.* at 1501-02. Blackmun stated that "[b]ecause [fourth amendment] analysis, when conducted properly, is always fact-specific to an extent, it is inappropriate that the plurality's formulation of a standard does not arise from a sustained consideration of a particular factual situation." *Id.* at 1506 (Blackmun, J., dissenting). Later, he stated, "the plurality's general result is preordained because, cut off from

United States v. Place[235] furnishes an example. There, airport police detained an individual's baggage for ninety minutes while awaiting the arrival of a trained narcotics detection dog. The Court found that this detention violated *Terry v. Ohio*,[236] the seminal decision establishing that individuals may be detained temporarily on reasonable suspicion of criminal activity.[237] The Court reasoned that, even assuming the police in *Place* had reasonable suspicion, their ninety minute detention of the defendant's baggage exceeded the temporary detention *Terry* authorized. Such a detention is permitted only when police have probable cause; in *Place* they did not.[238] The Court also stated, however, that having a trained narcotics dog sniff luggage in a public place is not a search because it detects only contraband and is not particularly intrusive.[239] The latter statement is clearly dictum. Once the Court found the stop unconstitutional, it had decided the case and its comments on dog searches were gratuitous. The majority's conclusion on that issue is not binding precedent because it does not explain the result reached in *Place*, nor is it connected to the case's material facts, all of which concerned the initial stop, not the subsequent search.

One might point out that the conclusion about dog searches is from the United States Supreme Court, not a secondary appellate court, and that the Court's reasoning on the subject occupied over a page of its opinion. Wambaugh in particular considered these types of factors important in deciding whether a rule should be binding.[240] But imagine a case in which the only issue is whether a dog sniff of luggage is a search. Focused on this issue, the Court might decide differently, no longer insulated from the consequences of such a decision by its resolution of the case on other grounds. Even if the Court reaches the same result, the facts of the case before it or the arguments of the dissenting justices may influence the ultimate rule, producing a

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a particular factual setting, it cannot make the necessary distinctions among types of searches, or formulate an alternative to the warrant requirement that derives from a precise weighing of competing interests." *Id.* at 1513.

235. 462 U.S. 696 (1983).

236. 392 U.S. 1 (1968).

237. *See generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, at 199-204 (describing *Terry* doctrine).

238. 462 U.S. at 708-09.

239. *Id.* at 707.

240. *See supra* notes 211-12 and accompanying text. On the other hand, the issue was not presented to or decided by the lower courts, nor did the parties brief it, 462 U.S. at 723 (Blackmun, J., dissenting), factors that might reduce the resulting rule's precedential effect in Wambaugh's eyes.

holding that limits the circumstances under which warrantless intrusions by narcotics dogs may be conducted.[241] Only a case that forces the Court to face directly the import of a decision that a dog sniff is not a search should be considered binding.[242]

From the foregoing, one could construct the following scheme for determining whether a legal conclusion must be followed. First, one should consider whether the conclusion is a clear logical antecedent of the result in the case. This step eliminates as binding precedent rules that have a tenuous connection to the facts of the case, as with the *Place* Court's pronouncement about dog searches. If the rule is necessary, however, the next focus should be on the rule's breadth. This second step involves evaluating the extent to which the rule purports to govern other fact situations that are significantly different from the fact situation before the court announcing the rule. If the rule encompasses only minimally different fact situations, as with the rule announced in *Andreas*, then it should be considered a holding. If the rule purports to govern widely divergent fact situations, as a third step one should examine the extent to which the announcing court justified its broad rule. If the rule is merely an offhand remark or is only vaguely explained, it should be considered dictum. If its breadth is explicitly justified, as in *Belton*, it should be considered a holding.

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241. For instance, the Court might not permit such use of dogs if the owner is present at the time the luggage is sniffed, if the luggage is of a personal nature, or if the use of the dog requires a seizure of either the person or the luggage. *See* 1 W. LAFAVE, *supra* note 222, at 373-74. Similarly, the Court might decide that a dog sniff is a search, but permit such searches on less than probable cause. *Id.* at 375.

242. A second example of what may happen when a holding is not tied to the facts comes from another constitutional arena. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that once an individual who has received the *Miranda* warnings states that he wants an attorney, "the interrogation must cease until an attorney is present." *Id.* at 474. Although carefully justified by the Court as a means of overcoming the coercive atmosphere of custodial interrogation, *id.* at 470, this rule had no connection to the facts of any of the four cases joined together before the Court in *Miranda. See* Westover v. United States, 342 F.2d 684 (9th Cir. 1965) (no warnings given until the end of the interrogating process), *rev'd*, 384 U.S. 436 (1966); State v. Miranda, 98 Ariz. 18, 401 P.2d 721 (1965) (no warnings given, defendant did not request counsel), *rev'd*, 384 U.S. 436 (1966); People v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (no warnings given, no request for an attorney), *cert. granted*, 382 U.S. 937 (1965); People v. Vignera, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857 (1965) (defendant not warned). To view *Miranda*'s rule regarding post-warning requests for an attorney as a holding would force subsequent courts to apply a rule from which the Court easily could, and did, withdraw once confronted with a fact situation directly raising the issue and forced to contemplate the consequences of its decision. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981) (police may interrogate defendant after request for an attorney if defendant initiates conversation).

Rules falling between these two extremes are admittedly hard to categorize.

Many Supreme Court statements about the fourth amendment meet even the relatively narrow definition of dictum advanced here.[243] The 1983 amendment does not require Florida courts to abide by these pronouncements. As with plurality opinions, they are not authoritative.

c. "Predictive" Stare Decisis

This term is meant to convey the notion that, absent an on-point, authoritative superior court opinion, lower courts should try to reach results they think higher courts would reach. Lower courts commonly engage in such predictive decisionmaking. Indeed, one might argue that lower courts are obligated to predict how a superior court would decide the issue being addressed.[244]

Thus, while plurality opinions and dictum may not be binding in a technical sense, perhaps they should be followed nonetheless. A plurality rationale, particularly one that has attracted four members of the Supreme Court, may have an aura of inevitability. Similarly, dictum may be a good indication of the stance the announcing court would take were it to address the issue directly. This type of reasoning has a superficial appeal. Predictability and uniformity would be promoted most easily if lower courts followed *all* pronouncements of the superior court, even nonauthoritative ones. And when a lower court diverges from a plurality opinion or dictum, it arguably displays disrespect for the judicial hierarchy.

But, as pointed out earlier,[245] this reasoning neglects the fourth, and perhaps most important, goal of stare decisis — enhancing the reliability of judicial decisionmaking. When a superior court rule is a

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243. *See, e.g.*, United States v. Johns, 469 U.S. 478 (1985) (suggesting support for a "plain odor" exception to the warrant requirement); Hayes v. Florida, 470 U.S. 811 (1985) (suggesting that, if the purpose is to obtain fingerprints, a brief detention in the field is permissible on mere reasonable suspicion, and a detention in the stationhouse is permissible on less than probable cause when judicially authorized); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suggesting that roadblock stopping all cars is permissible even if no suspicion).

244. Indeed, lower courts are arguably obligated to ignore superior court decisions that are directly on point if, as a result of subsequent superior court precedent, the earlier precedent appears to have been overruled. Note, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH L. REV. 87, 91-93 (1984). However, this implicit overrule doctrine is an extremely limited one. *See infra* notes 391-94 and accompanying text.

245. *See supra* text accompanying note 209-17.

true plurality rationale, or when a superior court's legal conclusion meets the narrow definition of dictum developed above, it has not been subjected to a sufficiently rigorous reasoning process. In such cases, it need not be followed, although predictability, uniformity, and judicial allegiance may be sacrificed to some extent. This is especially true in the context at issue here, where countervailing state interests may be implicated.[246] Thus, article I, section 12 should not require Florida courts to follow inferences from Supreme Court pronouncements that come from true plurality rules or dicta.

For the same reasons, Florida courts should not be obligated to follow rules derived from analogies to Supreme Court decisions. While Supreme Court rulings that are not on point may provide helpful guidance in analogous cases, they should not control. The Florida Supreme Court seems to agree with this conclusion. In *State v. Cross*,[247] the issue was whether section 12 required the renunciation of *State v. Grubbs*[248] and *State v. Dodd*,[249] pre-amendment decisions that had ruled that the exclusionary rule applies at probation revocation proceedings. The state conceded that the United States Supreme Court had not yet addressed this issue.[250] But the state also pointed out that the Court had decided that a probationer is not entitled to the full panoply of rights guaranteed a typical defendant.[251] It further noted that the Court had indicated that the deterrent effect of the rule generally is not enhanced when the rule is applied at proceedings other than criminal trials.[252] In response to these arguments by analogy, the Florida Supreme Court simply stated that the United States Supreme Court had not yet ruled on the exact issue before it.[253] The court held that it would continue to follow *Dodd* despite the 1983 amendment.[254] Although the Florida Supreme Court's opinion in *Cross*

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246. *See supra* text accompanying notes 125-50 for a discussion of the countervailing interests.

247. 487 So. 2d 1056 (Fla.), *cert. dismissed*, 107 S. Ct. 248 (1986).

248. 373 So. 2d 905 (Fla. 1979).

249. 419 So. 2d 333 (Fla. 1982).

250. 487 So. 2d at 1057.

251. *See* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) (differences between criminal trial and revocation hearing justify a case-by-case approach to right to counsel at the latter type of hearing).

252. *See* United States v. Leon, 468 U.S. 897, 918-21 (1984) (police acting in good faith will not be deterred by exclusionary rule); Stone v. Powell, 428 U.S. 465, 489-95 (1976) (applying exclusionary rule in habeas corpus cases will not deter police).

253. 487 So. 2d at 1057.

254. *Id.* at 1058.

could have followed the state's suggestion, it legitimately relied on state judicial history in reaching a contrary result.

It would not be surprising if the United States Supreme Court eventually agreed with the state's arguments in *Cross*.[255] But as *Cross* illustrates, a Florida court need not abide by such a prediction. Put differently, the 1983 amendment does not require predictive stare decisis. Until the United States Supreme Court issues an authoritative opinion, Florida courts are free to develop their own approach to search and seizure law.

As the next several sections show, even when an authoritative Supreme Court opinion exists, Florida courts might not be required to conform.

2. Authoritative Opinion Not Based on the Fourth Amendment

The 1983 amendment to article I, section 12 of the Florida constitution requires Florida courts to conform their rulings to United States Supreme Court decisions construing the *fourth amendment*. It does not require Florida courts to follow Supreme Court decisions construing other sources of law, except as a minimum standard. Thus, for example, through interpretation of the pertinent Florida constitutional provisions Florida courts may provide a criminal defendant a more expansive right to counsel,[256] confrontation,[257] or due process[258] than the Supreme Court presently requires under the federal Constitution.

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255. The Court is much more solicitous of the right to counsel than of the fourth amendment right, *see* C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, at 5, yet in *Gagnon*, 411 U.S. at 778, it was unwilling to find even the former right unequivocally applicable to probation revocation proceedings. Moreover, as *Stone*, 428 U.S. at 465, makes clear, the Court's assessment of the exclusionary rule is now focused entirely on the rule's ability to deter police misbehavior. Applying the exclusionary rule at a probation revocation proceeding, when it will also be applied at any trial stemming from the event that triggered the revocation proceeding, is unlikely to add appreciably to the deterrent effect of the rule.

It should, however, be pointed out (and the Florida Supreme Court could certainly have done so), that when the event triggering the revocation proceeding is not of the type that will lead to criminal charges — for example, possession of a licensed weapon — excluding illegally seized evidence from the revocation proceeding may well exert some deterrent effect. Moreover, even when the event triggering revocation does violate a criminal statute, probation officers may not care if their irregularities in conducting a search reduce the chance for a criminal conviction, so long as probation is revoked and sentence reimposed, again suggesting a need to apply the rule at revocation proceedings as well as at trial. Finally, the Supreme Court's recent relaxation of fourth amendment requirements in the probation context may render elimination of the exclusionary rule redundant. Griffin v. Wisconsin, 107 S. Ct. 926 (1987).

256. *See* FLA. CONST. art. I, § 16.

257. *Id.*

258. *Id.* § 9.

Some Supreme Court decisions that establish rules governing search and seizure are grounded not only on the fourth amendment but also on other constitutional provisions. When the non-fourth amendment predicate in such an opinion is essential to the Court's holding, Florida courts should have the authority to repudiate that particular predicate and arrive at a more protective overall standard. In such cases, Florida courts need not follow a Supreme Court majority holding on search and seizure law, despite the 1983 amendment.

Assume, for example, that the United States Supreme Court explicitly holds that the exclusionary rule does not apply in probation revocation proceedings, basing its decision on the two rationales proffered by the state in *State v. Cross*.[259] That is, the Court holds that illegally seized evidence is admissible in revocation proceedings because (1) excluding such evidence would not significantly increase the deterrent effect on police already achieved by excluding the evidence during the substantive criminal prosecution for the offense and (2) probationers do not deserve the same procedural protections extended to individuals who are not under state control at the time of their offense. Clearly, the first rationale is an interpretation of the fourth amendment. The Court established some time ago that deterrence is the primary purpose for excluding evidence seized in violation of the fourth amendment.[260] But the second rationale stems from the due process clause. The Supreme Court's decision in *Gagnon v. Scarpelli*,[261] the leading case endorsing the proposition that probationers are entitled to less process at revocation proceedings than is due criminal defendants at trial, is imbedded in the fourteenth amendment.[262] If this second rationale were considered essential to the Court's holding on the scope of the exclusionary rule, rather than merely an alternative reason for that holding, then a Florida court construing Florida's constitutional due process provision more expansively could decide to reject the Court's ruling that illegally seized evidence is admissible at probation revocation proceedings.[263] Because the holding is not based exclusively on the fourth amendment, a Florida court need not follow it.

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259. *See supra* text accompanying notes 247-52.

260. *See* cases cited *supra* note 252.

261. 411 U.S. 778 (1973).

262. The Court framed the issue in *Gagnon* as "whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at [probation and parole revocation] hearings." *Id.* at 783; *see also* Morrissey v. Brewer, 408 U.S. 471 (1972) (whether due process requires that a state afford an individual opportunity to be heard prior to revoking parole).

263. As explained *supra* note 255, there are good reasons for doing so in this context.

Several Supreme Court decisions on search and seizure law can be characterized as mixed rationale cases. For example, *United States v. Calandra*,[264] holding that the exclusionary rule does not apply in grand jury proceedings, is based as much on an assessment of the traditional functions of the grand jury as on the purpose of the exclusionary rule.[265] The opinion in *Gerstein v. Pugh*,[266] which held that post-arrest probable cause determinations do not require procedural formalities, is probably best described as an interpretation of the sixth amendment's rights to counsel and confrontation,[267] despite other language in the opinion referring to the fourth amendment.[268] Similarly, *McCray v. Illinois*,[269] which held that the defendant contesting a probable cause determination based on an informant's testimony is not automatically entitled to know the identity of the informant, is premised primarily on an interpretation of the sixth amendment's confrontation clause.[270] In such cases, a Florida court willing to adopt a more protective standard than the Supreme Court's with respect to the non-fourth amendment rationale can justifiably reject the Court's ultimate holding despite its fourth amendment overtones.

3. Authoritative Opinion Superseded by State Law

The 1983 amendment requires only that Florida courts construe the search and seizure provision of the Florida Constitution in conformity with United States Supreme Court decisions on the fourth amendment. If, however, other provisions of the Florida Constitution, or

264. 414 U.S. 338 (1974).

265. *Id.* at 349 ("In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.").

266. 420 U.S. 103 (1975).

267. *Id.* at 122 ("[Because] value [of confrontation and cross-examination] would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause . . ., [such] determination is not a 'critical stage' in the prosecution that would require appointed counsel." (citing Coleman v. Alabama, 399 U.S. 1 (1970) (sixth amendment case)).

268. *Id.* at 120 ("adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment.").

269. 386 U.S. 300 (1967).

270. *Id.* at 312-13 (defendant's argument that the Constitution compels state to abolish the informer's privilege "is based upon the Due Process Clause of the Fourteenth Amendment, and upon the Sixth Amendment right of confrontation [as applied] to the States through the Fourteenth Amendment.").

Florida statutory, regulatory, or common law, mandate greater protection of privacy rights than is required under the Court's fourth amendment decisions, then Florida courts are obligated to provide that protection and disregard Supreme Court precedent. Here the focus will be on available state constitutional and statutory grounds, although it should be recognized that other sources of state law might also provide a basis for decision on search and seizure issues.[271]

a. Constitutional Law

The provision of the Florida Constitution most likely to provide an alternative source of law on search and seizure issues is the right to privacy provision in article I, section 23. Added to the Florida Constitution in 1980, the section reads, in pertinent part: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."[272] Potentially, this provision gives Florida courts an opportunity to evade article I, section 12 altogether.

Montana's experience illustrates how this might occur. For a time, the Montana Supreme Court endorsed linkage whenever provisions of the Montana Constitution were similar to the federal version.[273] Since

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271. *Cf.* Byron, Harless, Schaffer, Reid & Assoc. v. Schellenberg, 360 So. 2d 83 (1st D.C.A. 1978) (establishing common law right to disclosural privacy), *quashed sub nom.* Shevin v. Byron, Harless, Schaffer, Reid & Assoc., 379 So. 2d 633 (Fla. 1980).

272. The full provision reads: "Right of Privacy. — Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

273. The Montana Supreme Court has vacillated considerably on the linkage issue. In State v. Finley, 173 Mont. 162, 164-65, 566 P.2d 1119, 1121 (1977), it appeared to link the state privilege against self-incrimination provision with the federal provision. One year later, however, it stated that "state constitutional provisions [that are] identical or nearly identical with like language in the United States Constitution . . . each constitute separate and enforceable constitutional rights insofar as the jurisdiction of . . . Montana extends." Madison v. Yunker, 180 Mont. 54, 60, 589 P.2d 126, 129 (1978). But during the same term the court seemed to accept the proposition that the search and seizure provision in the Montana Constitution afforded defendants no greater protection than does the fourth amendment. *See* State v. Brackman, 178 Mont. 105, 113, 582 P.2d 1216, 1220 (1978). Moreover, in State v. Jackson, 672 P.2d 255 (Mont. 1983), the court explicitly held that "where the language in the Montana Constitution is identical to the language in the United States Constitution, we should feel bound by the determinations made by the United States Supreme Court in interpreting that language." *Id.* at 260. Finally, two years after *Jackson*, the Montana Supreme Court decided Pfost v. State, 713 P.2d 495, 500-01 (Mont. 1985), which stated that "[f]ederal rights are considered minimal and a state constitution may be more demanding than the equivalent federal constitutional provision . . . . This is true even though our state constitutional language is substantially similar to the language of the Federal Constitution." But though *Pfost* probably means the court has rejected the linkage idea,

Montana's search and seizure guarantee is virtually identical to the fourth amendment,[274] such a policy presumably would have required Montana courts to follow United States Supreme Court search and seizure pronouncements. But the Montana Supreme Court refused to do so on several occasions,[275] stating that the *privacy* provision in the Montana Constitution[276] affords state citizens additional privacy protection and justifies a more expansive version of search and seizure law than the United States Supreme Court espoused.[277] If Florida courts adopted this approach to search and seizure, they could reject virtually any Supreme Court rule despite the 1983 amendment to article I, section 12. Section 23's protection from governmental intrusion could be construed to guarantee a privacy right beyond that afforded by section 12's prohibition of unreasonable searches and seizures, particularly since the Florida Supreme Court has held that a compelling governmental interest must justify infringement of privacy under section 23, while a search under section 12 need only be reasonable.[278]

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the court clearly had adopted linkage from 1983 to 1985, and perhaps from 1977 to 1985, at least in the search and seizure area. For a detailed treatment of this history, see Collins, *supra* note 71.

274. *Compare* MONT. CONST. art. II, § 11:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing

with U.S. CONST. amend. IV.

275. These cases have been decided before, during, and after the linkage period described *supra* note 273. *See, e.g.*, State v. Sierra, 692 P.2d 1273 (Mont. 1985) (holding inventory search unconstitutional); State v. Solis, 693 P.2d 518 (Mont. 1984) (invalidating search because no probable cause to support a warrant for eavesdropping); State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978) (holding electronic interception by private third parties unconstitutional).

276. "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10.

277. For example, in State v. Solis, 693 P.2d 518 (Mont. 1984), decided while the linkage doctrine established in *Jackson*, 672 P.2d at 255, was in force, Justice Morrison stated that the Montana court "has afforded greater rights in search and seizure cases because the Montana Constitution specifically recognizes the importance of the right of privacy." 693 P.2d at 521. The Alaska Supreme Court has followed the same approach. *See, e.g.*, State v. Jones, 706 P.2d 317 (Alaska 1985) (search and seizure law in Alaska more expansive than federal law because of right of privacy clause found in ALASKA CONST. art. 1, § 22); City of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984); Palmer v. State, 604 P.2d 1106 (Alaska 1979).

278. In Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985), the court stated that "[t]he right of privacy is a fundamental right which we believe demands the compelling state interest standard." *Id.* at 547. It also stated that the drafters of the provision wanted "to make the privacy right as strong as possible." *Id.* at 548.

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Applying Florida's privacy provision to search and seizure cases turns out to be a more complicated endeavor, however. First, section 23's guarantee, unlike the Montana privacy provision,[279] applies "except as otherwise provided herein," suggesting that the right can be infringed when other sections of the constitution allow such infringement. The Florida Constitution expressly provides that when used in the constitution, "herein" refers to the entire constitution, thus including section 12.[280] On the other hand, the legislative history of article I, section 23 indicates that the "as otherwise provided herein" clause was included solely to preserve the viability of the Sunshine Amendment,[281] which requires financial disclosure by public officials, and public access to official meetings.[282] Moreover, as Cope points out, because the Florida Constitution confers broad, undefined grants of power on the legislative,[283] executive,[284] and judicial[285] branches, the phrase, improperly construed, could encourage standardless encroachment on the privacy right.[286] Cope notes that a broad construction of the phrase

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279. *See supra* note 276.

280. FLA. CONST. art. X, § 12.

281. *Id.* art. II, § 8.

282. *See, e.g.*, Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 671, 743 (1978) ("except as otherwise provided herein" language "inserted to make clear that the right of privacy does not undercut the constitutional provisions relating to financial disclosure, public records, and open meetings"). Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 609, 656 (1978) ("The language 'except as provided herein' was designed *solely* to preserve the Sunshine Amendment"). It is a well-established principle of construction that judicial interpretation of a constitutional provision should attempt to effect the intent of the provision's adopters. *See supra* note 172 and accompanying text; *see also* 10 FLA. JUR. 2d *Constitutional Law* § 22 (1979) (intent of framers and adopters controlling).

The final version of the privacy provision, adopted after the commentators cited above had written their articles, contains a second sentence stating that the section "shall not be construed to limit the public's right of access to public records and meetings as provided by law." *See supra* note 272. Because the "except as otherwise provided" language was retained even after the addition of this sentence, one could argue that it should now be interpreted more expansively to include as its referent not just the Sunshine Amendment but the entire constitution. The precise reason for adding the second sentence, however, was not to protect the Sunshine Amendment; rather its purpose was to prevent derogation of Florida's Public Records Act, FLA. STAT. § 119 (1979) and the public meeting provision of the Public Business Title of the Florida Statutes. FLA. STAT. § 286.011 (1979). *See* Note, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. FLA. L. REV. 565, 580 (1981). In any event, given the conclusion reached below, resolving the meaning of the "as otherwise provided" clause in § 23 is probably not that important.

283. FLA. CONST. art. III, § 1 (vesting "the legislative power" in the legislature).

284. *Id.* art. IV, § 1 (vesting "the supreme executive power" in the Governor).

285. *Id.* art. V, § 1, (vesting "the judicial power" in the supreme court and specified inferior courts).

286. Cope, *supra* note 282, at 749-50.

would condition the right to privacy on an arbitrary determination as to whether the challenged governmental activity either falls or does not fall within legislative, executive, or judicial power.

The precise import of the "as otherwise provided herein" language is therefore unclear. But even without this language one could argue for narrow construction of section 23. Florida courts have long held that constitutional provisions should be read in harmony with one another whenever possible.[287] Under the harmonizing principle, courts should interpret section 23 so as to avoid overlap with section 12.

Generally, this conclusion has much to recommend it. Adopting the Montana "search-and-seizure-plus-privacy" approach would in effect judicially repeal the 1983 amendment. But the importance of section 23 to search and seizure litigation cannot be completely ignored, both because the legislative history of the provision suggests otherwise and because even those aspects of the right to privacy that are not directly concerned with search and seizure may implicate government investigation techniques. Article 23 should at least retain significance in those search and seizure cases that involve the types of privacy the provision seeks to protect.

The Constitution Revision Commission that drafted the privacy amendment specifically contemplated a possible conflict between section 12 and section 23, and noted that the policies underlying section 23 might call for a different result than would be reached under section 12.[288] Thus, for example, in response to a question about the relationship between the two provisions, Commissioner Shevin stated: "I recognize we will be giving the court a choice between the interpreting of [section 12] and this amendment provision and trying to decide which one prevails."[289] After evaluating the Commission's deliberations on this topic, one commentator concluded that when the reasonableness of a search is unclear, the right to privacy could "tip the balance" for the court and cause it to invalidate the search.[290]

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287. *See supra* note 169; *see also* 10 FLA. JUR. 2d *Constitutional Law* § 44 (1979) ("It is a fundamental rule of construction that, if possible, amendments to the Constitution should be construed so as to harmonize with other constitutional provisions.").

288. *See* Dore, *supra* note 282, at 656.

289. 2 Transcript of Fla. Constitution Revision Commission Proceedings 44 (Jan. 9, 1978) [hereinafter Fla. C.R.C.] (remarks of Robert Shevin) (quoted in Dore, *supra* note 282, at 656 n.289).

290. Dore, *supra* note 282, at 656. Dore also states that

> [w]hile it generally was understood that search and seizure questions would not be affected by [the privacy provision], the record reflects no intention to foreclose the possibility that they might be affected. Rather, it left the issue for judicial resolution, understanding that the competing interests would have to be balanced.

Id.

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As tempting as such a position might be for those who favor a maximum degree of independence for Florida courts, it is probably inappropriate. Limiting the impact of section 23 only to close search and seizure cases does violence both to the intent of those adopting the provision and to the notion that article 12 should be respected as an independent constitutional provision. A more discriminating assessment of the relationship between articles 23 and 12 should take into account the *types* of searches and seizures that the adopters of the former provision believed the language would cover.

Of the many concerns that the drafters of section 23 addressed, a fear of government snooping had the most direct bearing on search and seizure law. For instance, Commissioner Brantley was concerned about undercover operations designed to compile dossiers on everyday behavior of individuals who are not suspected of any particular criminal activity.[291] Similarly, Commissioner Douglas, upon the Commission's adoption of the privacy proposal, stated that the proposal was meant to "prevent[] this nonsense of Big Brother is watching you . . . ."[292] More generally, the Commission was sensitive to the threat to individual privacy posed by technological advances in data collection.[293] Information as to whether the voters who ratified section 23 shared the concerns identified by the Commission is scanty,[294] but Florida courts cannot ignore this legislative history when deciding how to apply the section to search and seizure issues.[295]

This history might prove influential in certain types of search and seizure cases. For example, in *United States v. Miller*,[296] the United

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291. Fla. C.R.C., *supra* note 289 (remarks of Lew Brantley) (described in Cope, *supra* note 282, at 759).

292. Van Gieson, *Protection of Rights Endorsed*, Miami Herald, Jan. 10, 1978, at 2B, col. 5.

293. *See* Address by Commissioner Ben F. Overton to the Constitution Revision Commission (July 6, 1977) ("There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business.") (quoted in Cope, *supra* note 282, at 722); *see also* Cope (who monitored the entire Commission process), *supra* note 282, at 759 ("If the section 23 right of privacy means anything, it must mean that government cannot compile dossiers on citizens without justification, engage in unauthorized surveillance, or collect private information unnecessarily for placement in agency files, whether or not open to the public.").

294. A review of newspapers at the time of the vote on the amendment, which took place on November 4, 1980, reveals little commentary. *See, e.g.*, Matsuda, *Right-of-Privacy Proposal Wins Floridians' Approval*, Miami Herald, Nov. 5, 1980, at 19A, col. 4 (supporters say privacy amendment "would curb excessive, computerized data collection, wiretapping, and eliminate laws prohibiting sexual conduct between consenting adults, homosexual and heterosexual.").

295. *See supra* note 172 and accompanying text.

296. 425 U.S. 435 (1976).

States Supreme Court held that the fourth amendment is not implicated when the government seizes personal records voluntarily surrendered to a bank. According to the Court, one assumes the risk that third parties will gain access to this information. Similarly, in *Smith v. Maryland*,[297] the Court held that under the fourth amendment a person does not have a reasonable expectation of privacy in the identity of phone numbers called, because one knows or should know that the phone company routinely records these numbers. In *United States v. Karo*,[298] the Court found that using a beeper to detect the public movements of a can of ether is not a search. And, as a final example, in *Dow Chemical v. United States*[299] the Court refused to call it a search to use sophisticated camera equipment to take aerial pictures of the defendant's plant, again on the ground that it violates no reasonable expectation of privacy. In each of these cases, the Court permitted government access to personal information without requiring any showing of individualized suspicion. The Commission's concern over illegitimate government snooping could convince a Florida court that despite its obligation under section 12 to follow Supreme Court pronouncements on the fourth amendment, section 23's independent protection of privacy permits it to reject Supreme Court rulings of the type described above.[300]

The focus to this point has been on legislative history that casts light on the extent to which the drafters of section 23 meant to protect the type of privacy implicated in search and seizure cases. The section was also meant to protect aspects of privacy not typically associated with government investigation of criminal offenses. Thus, for instance, section 23 could apply to government invasions of privacy through unauthorized disclosure of private facts[301] or to government interference with individual decisionmaking concerning fundamental in-

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297. 442 U.S. 735 (1979).

298. 468 U.S. 705 (1984).

299. 106 S. Ct. 1819 (1986).

300. Some other areas yet to be addressed by the United States Supreme Court that might implicate § 23 include video surveillance, *see* C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, at 318-20, and cases involving surreptitious, non-electronic eavesdropping ("uninvited ear" cases), *see id.* at 303-04; *see also* State v. Calhoun, 479 So. 2d 241, 244 (Fla. 4th D.C.A. 1985) (finding electronic surveillance permitted by the fourth amendment impermissible in Florida, apparently on the basis of added protection afforded by § 23 and Florida statute). *But see* Madsen v. State, 502 So. 2d 948 (Fla. 4th D.C.A. 1987) (police officer's use of body bug in defendant's bedroom did not violate § 23).

301. *See, e.g.*, Cope, *supra* note 282, at 756 (arguing § 23 would be violated if private information is placed in public files, absent good reason for doing so).

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terests.[302] Although unlikely, some searches or seizures might implicate these interests and therefore implicate section 23. For instance, in *State v. Johnson*,[303] a Florida county court suppressed the results of a nonconsensual roadside sobriety test and videotape on the ground that they violated the suspect's section 23 right to avoid public disclosure of personal matters.[304] Because the analytical focus of the decision is on disclosural privacy rather than on intrusion into one's reasonable expectations of privacy, its holding should stand even if the United States Supreme Court reaches a contrary holding under the fourth amendment.

b. Statutory Law

Despite the 1983 amendment to section 12, courts must follow a statute that provides more protection than the Supreme Court's fourth amendment decisions require. Section 12 only requires linkage between Florida's *constitutional* search and seizure provision and Supreme Court opinions. It does not authorize repeal of duly enacted statutes that place more restrictions on police practices than those opinions. The precept has been accepted, at least implicitly, by the Florida Supreme Court.[305]

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302. *See generally* Note, *supra* note 282, at 581-88.

303. 8 Fla. Supp. 2d 116 (Broward County Ct. 1984).

304. *Id.* at 117, 119-20.

305. *See* State v. Riley, 462 So. 2d 800, 802 (Fla. 1984) (after finding fourth amendment not violated by police securing house before obtaining a search warrant, Florida Supreme Court emphasized that Florida statutes not violated either).

In State v. Casal, 410 So. 2d 152 (Fla. 1982), *cert. dismissed sub nom.* Florida v. Casal, 462 U.S. 637 (1983), decided before the 1983 amendment, the Florida Supreme Court excluded evidence seized from the forward hold of a motored vessel after the occupants had been arrested. The court found that the searching officers did not have probable cause to believe that evidence of criminal activity was in the hold and that the occupants of the vessel did not voluntarily consent to the search. *Id.* at 155-56. As the dissent pointed out, *id.* at 156-57 (Alderman, J., dissenting), this result seems contrary to the fourth amendment decisions of the United States Supreme Court. *See* New York v. Belton, 453 U.S. 454 (1981); Chimel v. California, 395 U.S. 752 (1969) (after lawful arrest, officers justified in making warrantless search of arrested person and vehicle without probable cause). But the majority apparently based its decision on FLA. STAT. § 371.58 (1977), which prohibits initial boarding unless there is probable cause or consent. 410 So. 2d at 155.

Supporting this interpretation of *Casal* is the United States Supreme Court's ultimate refusal to review the decision, stating that it rested on an adequate and independent state ground. Florida v. Casal, 462 U.S. 637 (1983). Although Chief Justice Burger's opinion (concurring in the dismissal of the writ of certiorari as improvidently granted) noted that the independent state basis could have been either the statute or article I, § 12, *id.* at 638 (Burger, C.J., concurring), the Florida court's opinion made no mention of the latter provision.

Several Florida statutes impose more stringent restrictions on searches and seizures than does the fourth amendment as construed by the Supreme Court. For instance, Florida's stop and frisk statute allows a police officer to frisk an individual who has been temporarily detained only if the officer has "probable cause to believe [the person] is armed with a dangerous weapon."[306] Under Supreme Court precedent, on the other hand, police need only meet the lesser reasonable suspicion standard to conduct such a frisk.[307] Florida's electronic surveillance statute requires police to get a warrant before they may obtain information from a communication common carrier.[308] In contrast, *Smith v. Maryland*[309] held that police do not need probable cause, much less a warrant, to obtain telephone numbers from a phone company, because their solicitation of such information is not considered a search.[310] Under the same statute, it would be impermissible to bug a prisoner's cell without obtaining a warrant,[311] despite the Supreme Court's decision in *Hudson v. Palmer*[312] that under the federal Constitution a prisoner has no expectation of privacy in the cell.[313]

A number of other Florida statutes might require a ruling placing more restrictions on police behavior than the fourth amendment presently requires. For example, section 901.21 of the Florida Statutes provides that a police officer may conduct a search incident to arrest

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306. FLA. STAT. § 901.151(5) (1985). *See also* Woody v. State, 464 So. 2d 669, 670 (Fla. 2d D.C.A. 1985) (officer must have reason to believe defendant is armed before frisk may be conducted).

307. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) ("there must be narrowly drawn authority to permit" reasonable search for weapons to protect police officer who has reason to believe individual armed and dangerous, regardless of probable cause to arrest); *see also* Ybarra v. Illinois, 444 U.S. 85, 94 (1979) ("[*Terry*] does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked . . . .").

308. *See* FLA. STAT. § 934.03(2)(a)(2) (1985) (agent of communication common carrier may provide information, facilities or technical assistance to officer authorized to intercept a wire or oral communication"); *id.* § 934.07 (authorization for interception of wire or oral communications requires judicial order).

309. 442 U.S. 735 (1979).

310. *Id.* at 742-44 (no subjective or objective expectation of privacy in phone numbers).

311. The statute only permits warrantless interception by the police when one or both of the parties to a conversation have consented to the interception. FLA. STAT. § 934.03(2)(c), (d) (1985).

312. 468 U.S. 517 (1984).

313. *Id.* at 525-26 ("[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and . . . accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

"for the purpose of: (a) [p]rotecting the officer from attack; (b) [p]reventing the person from escaping; or (c) [d]iscovering the fruits of a crime."[314] Arguably, this statute does not permit the type of search the Supreme Court authorized in *United States v. Robinson*,[315] which allowed a full search even when the arrest is for a minor traffic offense unlikely to involve any danger, possibility of escape, or fruits of crime.[316] As another example, a unique provision of Florida law explicitly adopts the holding in *Carroll v. United States*,[317] a 1925 Supreme Court decision governing searches of vehicles.[318] Although the Supreme Court has not overruled *Carroll*, its more recent decisions have narrowed the protection that decision seemed to afford.[319] Arguably, the Florida statute requires Florida courts to adhere to the original meaning of *Carroll*, rather than more recent glosses on it.

Finally, many Florida statutes establish requirements that the Supreme Court is unlikely to endorse as a matter of federal constitutional law. For instance, Florida law requires that a warrant be executed within ten days,[320] a provision that Florida courts have strictly construed.[321] This statutory provision would apply even if the Supreme Court were to hold, as it is likely to,[322] that a warrant is not stale under the fourth amendment until a much longer period of time has elapsed.[323]

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314. FLA. STAT. § 901.21 (1985).

315. 414 U.S. 218 (1973).

316. *See id.* at 234-35 ("It is the fact of the lawful arrest which establishes the authority of the search . . . . ").

317. 267 U.S. 132 (1925).

318. *See* FLA. STAT. § 933.19 (1985).

319. *See* Gardner, *Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-*Ross *World*, 62 NEB. L. REV. 1, 35 (1983) (United States v. Ross, 456 U.S. 798 (1982), "apparently totally rejected *Carroll*'s dicta that warrants must be obtained where 'reasonably practicable.'"); *see also* Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. 375 (1986).

320. *See* FLA. STAT. § 933.05 (1985).

321. *See, e.g.*, Spera v. State, 467 So. 2d 329, 330 (Fla. 2d D.C.A. 1985).

322. This conclusion stems from the Court's demonstrated reticence about enforcing "technical" search and seizure requirements through the fourth amendment. *See, e.g.*, Maryland v. Garrison, 107 S. Ct. 1013 (1987) (warrant need not correctly state address of searched premises); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (warrant need not describe accurately items being sought).

323. Several other Florida statutes dealing with technical requirements impose more restrictions on police than the United States Supreme Court is likely to impose under the fourth amendment. *Compare* Collins v. State, 465 So. 2d 1266, 1268 (Fla. 2d D.C.A. 1985) (requirement in FLA. STAT. § 933.06 (1983) that officer seeking warrant swear oath to magistrate is not a

An interesting case in this regard is *State v. Bernie*,[324] involving a Florida statutory provision prohibiting search warrants of homes in narcotics cases unless "the law relating to narcotics or drug abuse is being violated therein."[325] An earlier Florida case, *Gerardi v. State*,[326] had held that this provision permitted issuance of a warrant only upon a showing of probable cause to believe evidence of crime existed on the premises to be searched *at the time the warrant was sought*.[327] In *Bernie*, however, the warrant affidavit alleged merely that narcotics *would be* delivered to the residence to be searched pursuant to the warrant. The *Bernie* court recognized that the *Gerardi* holding was applicable, but then admitted the evidence anyway under authority of the good faith exception the United States Supreme Court established in *United States v. Leon*.[328] The court felt compelled to follow *Leon* because of the 1983 amendment.[329]

The *Bernie* decision is wrong. Although as a matter of principle it makes little sense to prohibit warrants based on predictions when probable cause exists to believe the prediction,[330] the fact remains that the Florida statute, as Florida courts presently construe it, prohibits such warrants. *Leon* is irrelevant to the issue unless, as explained below, Florida courts choose to make it applicable as a matter of judicial statutory construction.

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technicality that can be waived, even if officer believed in good faith his obligation to tell truth to judge was a sufficient oath) *with* United States v. Leon, 468 U.S. 897 (1983) (permitting search executed in good faith belief warrant is valid). *Compare also* Rodriguez v. State, 484 So. 2d 1297, 1297-98 (Fla. 2d D.C.A. 1986) (Florida's knock and announce statute, FLA. STAT. § 933.09 (1983), violated when officer did not wait for response after knocking, even though gun and cocaine in residence) *with* Ker v. California, 374 U.S. 23, 40 (1963) (officers' failure to give notice before conducting search justified because officers had reason to believe defendant possessed narcotics that could be easily destroyed and because of defendant's "furtive conduct" one hour before arrest).

324. 472 So. 2d 1243 (Fla. 2d D.C.A. 1985).

325. *Id.* at 1245 (quoting FLA. STA. § 933.18(5) (1983)).

326. 307 So. 2d 853 (Fla. 4th D.C.A. 1975).

327. *Id.* at 855.

328. 468 U.S. 897 (1984) (establishing exception to exclusionary rule when officer conducting search pursuant to a warrant believes in good faith warrant is valid).

329. 472 So. 2d at 1246-47. The court stated that its "research has revealed no United States Supreme Court decision reaching the same result as *Gerardi*. Instead there are recent decisions which announce a 'good faith' exception to the warrant requirement and therefore require us to reach a different result." *Id.* at 1246.

330. *See* 2 W. LAFAVE, *supra* note 222 at 95-96 (better view reflected in "recent cases [that] have consistently held that anticipatory search warrants are not inherently beyond the warrant process permitted by the Fourth Amendment"). *See, e.g.*, Alvidres v. Superior Court, 12 Cal. App. 3d 575, 90 Cal. Rptr. 682 (Ct. App. 1970); People v. Glen, 30 N.Y.2d 252, 282 N.E.2d 614, 31 N.Y.S.2d 656 (1972).

c. Sanctions

Supreme Court precedent governs the remedy for a violation of article I, section 12, as amended. Supreme Court precedent does not, however, govern the proper remedy for violations of article I, section 23 (the privacy provision) or the statutes described above. Because the 1983 amendment applies only to the search and seizure provision in article I, section 12, Supreme Court decisions concerning the scope of the exclusionary rule apply only to violations of that provision.

Some of the statutes noted above, such as the stop and frisk law,[331] the electronic surveillance statute,[332] and the "*Carroll* vehicle-search" statute,[333] expressly provide for exclusion of evidence police obtained in violation of those laws. Florida courts are required to exclude evidence in these situations. The remedy for violations of the other statutes described above and for violations of the privacy provision is more open to question, but exclusion is probably mandated in these situations as well. In *Gildrie v. State*,[334] the 1927 decision that established the exclusionary remedy in Florida, the Florida Supreme Court held that the possibility that defendants might go free "should not deter this court from enforcing the provisions of the Constitution of the State of Florida and the provisions of the statute [sic] of this state which were made . . . as a protection against the invasion of the dwelling house of every man."[335] *Gildrie* thus adopted the exclusionary sanction for all search and seizure violations, both constitutional and statutory, as a matter of state law, at least for a search of a dwelling.

The court broadly reaffirmed this holding in *Sing v. Wainwright*[336] a year after *Mapp v. Ohio*[337] imposed the rule on the states. In *Sing*, the Florida Supreme Court stated that *Mapp* "added nothing whatever

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331. *See* FLA. STAT. § 901.151(6) (1985) ("No evidence seized by a law enforcement officer in any search under this section shall be admissible . . . unless the search which disclosed its existence was authorized by and conducted in compliance with the [preceding] provisions.").

332. *Id.* § 934.09(9)(a):

> Any aggrieved person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that: 1. The communication was unlawfully intercepted; 2. The order of authorization or approval under which it was intercepted is insufficient on its face; or 3. The interception was not made in conformity with the order of authorization or approval.

333. *Id.* § 933.19(2) ("The same rules as to admissibility of evidence . . . as were laid down in [*Carroll*] shall apply . . . in the state . . . .").

334. 94 Fla. 134, 113 So. 704 (1927).

335. *Id.* at 143, 113 So. at 706.

336. 148 So. 2d 19 (Fla. 1962), *cert. denied*, 373 U.S. 922 (1963).

337. 367 U.S. 643 (1961).

to the law of Florida. It created no new procedural right so far as the jurisprudence of this State is concerned. This Court long ago concluded that evidence obtained as the product of an unreasonable search is not admissible in a criminal proceeding."[338] *Gildrie* and *Sing* should still stand as authority for mandatory exclusion of evidence seized in violation of state law other than article I, section 12. But even if they do not support this position, or apply only to certain types of searches (e.g., of dwellings), Florida courts have the *authority* to adopt a blanket exclusionary remedy as the proper method for sanctioning violations of section 23 and statutory provisions concerning search and seizure.

One potentially significant implication of this point involves section 933.04 of the Florida Statutes.[339] This provision, in language almost identical to article I, section 12, requires that warrants issue only upon probable cause and that they particularly describe the place to be searched and things to be seized.[340] If, as Florida courts may hold, violation of this statute is found to require exclusion of the seized evidence, then *Leon* and its companion case, *Massachusetts v. Sheppard*,[341] permitting good faith violation of the fourth amendment particularity requirement, may not have any practical effect in Florida. While these decisions govern the admissibility of evidence seized in violation of the warrant requirement in article I, section 12, they do not determine the admissibility of evidence seized in violation of the warrant requirement in this section of the Florida Statutes, until the Florida courts or the Florida legislature decide otherwise.

It might be argued that section 933.04 of the Florida Statutes, unlike the other statutes discussed, merely codifies constitutional language, and thus should carry the same exclusionary sanction as does the constitutional provision, including the good faith exceptions outlined in *Leon* and *Sheppard*. But, as the next subsection points out, even if this contention is valid, the fact that *Leon* and *Sheppard* were decided in 1984 may undercut from another angle their precedential force under article I, section 12.

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338. *Id.* at 20.

339. FLA. STAT. § 933.04 (1985).

340. The full statute states:

> Affidavits — The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated and no search warrant shall be issued except upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person and thing to be seized.

Id.

341. 468 U.S. 981 (1984).

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4. Authoritative Opinion Subsequent to the Amendment

The vote on the 1983 amendment to article I, section 12 took place on November 2, 1982. The purpose of this section is to suggest reasons why Florida courts need not follow United States Supreme Court opinions decided after this date. The two reasons given here do not necessarily establish that such prospective linkage is inappropriate, but they do at least cast doubt on the wisdom of construing the amendment so as to require it.

First, Florida courts should not feel compelled to follow post-amendment Supreme Court decisions because they cannot be sure the ratifiers intended such prospective linkage. Neither the amendment's language nor the way it was explained on the ballot resolves whether the amendment requires adoption of future Supreme Court opinions. The Florida Supreme Court found the ballot summary of the amendment adequate,[342] but the summary, like the amendment, merely stated that, under the proposal, Florida's search and seizure provision "shall be construed in conformity with" Supreme Court decisions on the fourth amendment.[343] If prospective linkage were really intended, the language of both the amendment and the ballot summary could have more clearly stated that intent. For instance, the amendment could have read, "This right shall be construed in conformity with the fourth amendment to the United States Constitution, as it has been or will be interpreted by the United States Supreme Court." Had the amendment been so phrased, a majority of Florida citizens may have voted against it, uneasy about leaving the future scope of their privacy rights in the hands of a distant federal court.

Admittedly, a preference for the crime control approach to search and seizure issues was a major motivating factor behind the amendment's approval.[344] One could interpret this to mean that the voters wanted to establish Supreme Court opinions, whatever their content, as the ceiling as well as the floor in this area. But many different

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342. Grose v. Firestone, 422 So. 2d 303 (Fla. 1982).

343. The full summary read as follows:

> SEARCHES AND SEIZURES. — Proposing an amendment to the State Constitution to provide that the right to be free from unreasonable searches and seizures shall be construed in conformity with the 4th Amendment to the United States Constitution and to provide that illegally seized articles or information are inadmissible if decisions of the United States Supreme Court make such evidence inadmissible.

Id. at 304.

344. *See supra* note 176.

gradations of the crime control model exist. At its most extreme, a crime control system might place virtually no restrictions on police investigative techniques.[345] The outcome of the 1982 vote may well have been different if Supreme Court decisions at the time had authorized warrantless non-exigent searches of homes or permitted mandatory drug testing of all government employees. Therefore, the vote should be construed as an approval of the crime control approach that the Supreme Court endorsed *at the time of the vote,* not some other crime control approach.[346]

Even if the voters intended to approve all future Supreme Court opinions when they voted for the amendment, they may lack the authority to do so. This second argument against interpreting the 1983 amendment to require prospective linkage focuses on the voters' ability to delegate future lawmaking power to an entity outside the state. Significantly, the legislature clearly cannot do this. In *Freimuth v. State*[347] the Florida Supreme Court construed a Florida criminal statute that defined "hallucinogenic drug" as "'lysergic acid . . . and any other drug to which the drug abuse laws of the United States apply.'"[348] The court found that a drug defined as hallucinogenic by a federal law enacted after the effective date of this statute could not be included

345. Some commentators, for instance, would abolish the exclusionary rule. *See, e.g.,* Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases,* 57 WASH. L. REV. 635 (1982); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?,* 62 JUDICATURE 214 (1978). In many foreign countries, few restrictions on searches and seizures exist. *See generally* Bradley, *The Exclusionary Rule in Germany,* 96 HARV. L. REV. 1032 (1983); Macdougal, *The Exclusionary Rule and Its Alternatives — Remedies for Constitutional Violations in Canada and the United States,* 76 J. CRIM. L. & CRIMINOLOGY 608 (1985); Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternatives,* 57 TUL. L. REV. 648 (1983).

346. Even if the voters intended to endorse the most conservative crime control model allowed by the federal Constitution, the 1983 amendment might not effectively accomplish that goal. Suppose the United States Supreme Court were to overrule Mapp v. Ohio, 367 U.S. 643 (1961). If this occurred, the fourth amendment would no longer require exclusion of illegally seized evidence in state cases, but would continue to require exclusion of illegally seized evidence in federal cases, pursuant to Weeks v. United States, 232 U.S. 383 (1914). Under this scenario, which version of the fourth amendment does the 1983 amendment require the Florida courts to follow? Arguably, Florida courts would have to continue to exclude illegally seized evidence because the amendment requires linkage with Supreme Court cases construing the fourth amendment, not the fourth amendment *as applied to the states through the fourteenth amendment.* Ironically, the amendment would bind Florida courts to a more liberal standard than other states had to follow under the federal Constitution.

347. 272 So. 2d 473 (Fla. 1972).

348. *See* FLA. STAT. § 404.01(3) (1971).

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within the statute's ambit, since it is "an unconstitutional delegation of legislative power to adopt in advance any federal act or the ruling of any administrative body that Congress or such administrative body might see fit to adopt in the future."[349] *Freimuth* and its progeny[350] establish that the Florida legislature may not tie Florida law to as yet unenacted law in another jurisdiction. Presumably, the rationale of this line of cases is that state law should be the preserve of the people of Florida; a rule does not become binding law in Florida until the people, their elected representatives, a duly appointed state agency, or a court so decide.

Similarly, a Supreme Court opinion on the fourth amendment should not become binding in Florida until state voters have had the opportunity to respond to it. The vote on the 1983 amendment provided just such an opportunity with respect to Supreme Court opinions decided before the vote, but not with respect to later Supreme Court decisions. Thus, even if we assume the voters wanted to approve all future Supreme Court decisions, they should not be allowed to do so, because the Supreme Court is not responsive to them in the same way the Florida legislature or judicial system is.[351] To conclude otherwise would in principle allow Florida citizens to surrender future lawmaking power to the State of California or a foreign country.

One response to both the intent and delegation arguments is that the voters have the power to amend the amendment to article I, section 12.[352] The ability to amend means that voters can overrule a Supreme Court decision they find repugnant and that they do retain some control over the lawmaking function even after they have surrendered it to that Court. But the amendment process is extremely cum-

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349. 272 So. 2d at 476 (quoting Florida Indus. Comm'n v. State, 155 Fla. 772, 21 So. 2d 599 (1945)).

350. *See* Hand v. State, 334 So. 2d 601 (Fla. 1976); State v. Camil, 279 So. 2d 832, 834 (Fla. 1973) ("substantive changes incorporating by reference laws of the Congress or those of the legislatures of other states lack requisite initial title notice in the biennial revision required by the Florida Constitution").

351. The citizens of Florida have virtually no say, of course, as to who sits on the United States Supreme Court. In contrast, the Florida legislature is elected by qualified voters in the state of Florida. *See generally* FLA. CONST. art. VI. Judges at the appellate level are appointed initially, but must qualify for retention by a vote of the electors in a general election every six years. *See id.* art. V, § 10(a). Judges at the county and circuit level are elected initially, *see id.* § 10(b), and must qualify for retention through the election process as well. *See id.* § 11(b).

352. FLA. CONST. art. XI, §§ 3, 5.

bersome, and not amenable to fine-tuning.[353] Even if amendment is possible, until the voters act, Florida law on search and seizure will be left to an entity that is not responsive to the Florida polity. Just as the Florida legislature may not prospectively delegate its lawmaking power to a federal agency despite its ability to enact a new statute approving that agency's actions, Florida's citizens should not be able to relinquish prospectively their control over the lawmaking process to a federal court simply because they retain the ability to amend.

It would not be unreasonable, then, for a Florida court to find that construing article I, section 12 to require linkage with post-amendment Supreme Court decisions is contrary to the intent of the voters and the constitutional prohibition against prospective delegation to non-state institutions. Such a finding would mean that only those Supreme Court decisions handed down before the vote on the amendment can bind Florida courts.

B. *Conforming to Binding Supreme Court Precedent*

The previous discussion identified several situations in which Florida courts could reasonably conclude that Supreme Court language construing the fourth amendment is not language to which they need conform their rulings, despite the commands of article I, section 12. The following discussion assumes the existence of a pre-1983 Supreme Court majority holding that does not implicate Florida statutory law or article I, section 23 (the privacy amendment) and that addresses an issue directly relevant to a case before a Florida court. In this situation, the Florida court clearly must conform its ruling to the Supreme Court holding. But the conformity determination itself is not self-executing. Both factual and conceptual distinctions between the

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353. To amend the Florida Constitution through the initiative process, the proposal must be signed by eight percent of the electors in one-half of the congressional districts of the state and by eight percent of the electors in the state as a whole before it may appear on the ballot. *Id.* §§ 1, 5. Moreover, the proposal "shall embrace but one subject and matter directly connected therewith," *id.*, a requirement that has been difficult to meet. *See, e.g.*, Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984). If amendment is attempted through the legislature, the proposal must be passed by three-fifths of the membership of each house before it can be submitted to the general electorate. *See* FLA. CONST. art. XI, § 1. A constitutional revision commission may also propose amendments, but this commission only convenes once every 20 years. *Id.* § 2. Under any of these methods, the electorate must ratify the amendment proposal by a majority vote. The vote may take place only at a general election at least 90 days after the proposal is certified or at a special election called by three-fourths vote of the membership of each house. *Id.* § 5.

Supreme Court decision and the Florida case may exist. In making these distinctions and deciding whether they should make a difference, the previously discussed goals of stare decisis[354] — predictability, uniformity, judicial allegiance, and decisionmaking reliability — are again relevant. At the same time, Florida courts should remember that abject linkage is not good policy, at least when state precedent, local morality, or reasoned analysis suggests a different result.

1. Factually-Based Conformity

Many Supreme Court holdings on the fourth amendment are extremely broad, even though they are not dicta under the analysis previously presented in this article. For instance, consider the Court's decision in *Rakas v. Illinois*[355] that the standing inquiry in fourth amendment cases should depend "upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[356] This language is a holding rather than dictum,[357] and Florida courts must follow it. But the holding remains so amorphous that it has little precedential impact. *Rakas* and later cases[358] rejected earlier, relatively precise Supreme Court standing rules. Determining whether a person has standing to contest a search now involves a multi-factor analysis, including examining the person's authority to exclude others from the area, previous access to the area, efforts to maintain privacy, and subjective expectations of privacy.[359] These cases in effect have made almost any standing case distinguishable on its facts from Supreme Court decisions on the subject, despite the clear obligation to apply the legitimate expectations of privacy test.

In *Rakas* itself the Court found that the two defendants had no standing to contest the search of the car they occupied at the time.[360]

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354. *See supra* text accompanying notes 180-81.

355. 439 U.S. 128 (1978).

356. *Id.*

357. The Court forthrightly justified its adoption of the "legitimate expectations of privacy" standard, *see id.* at 139-40, and applied it to the facts of the case. *Id.* at 148. It also explained its rejection of both "target" standing, *id.* at 133-38, and the legitimate presence test for standing, *id.* at 141-43. This type of reasoning, and its connection to the facts of the case, make it a holding rather than dictum. *See supra* text accompanying notes 210-17.

358. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980).

359. *See generally* Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 399-413 (1981).

360. 439 U.S. at 148.

But the defendants did not have a particularly strong case. They asserted no ownership interest in the car or the items seized, nor was there any suggestion that they had significant previous access to the car. Neither defendant was driving the car, or related to the driver. Finally, the defendants made little effort to protect against discovery of the items seized. While, over time, the Supreme Court's position on standing under these varying conditions will become clearer, the process will undoubtedly be slow.[361] In the meantime, if a Florida court were to hear a case in which any of these facts differed, the court could reasonably find that the defendants did have standing to contest the search.

The current Supreme Court's penchant for case-by-case analysis[362] means that, in a number of fourth amendment areas, Supreme Court precedent does not bind Florida courts in any significant way. In addition to its stance on the standing issue, the Court has explicitly held that the voluntariness of a consent[363] and the validity of a probable cause determination[364] must be determined by the totality of the circumstances. In addition, the issue of when a seizure occurs or when police have reasonable suspicion is largely factbound under the Court's decisions.[365] The Court's holdings as to when a search has taken place,[366] although perhaps providing more guidance than in the areas just noted, also depend heavily on case-by-case treatment.[367]

Even when the Court has attempted to develop a so-called bright-line rule, a lower court is seldom deprived of maneuverability. For instance, *New York v. Belton*[368] held that "when a policeman has made

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361. The Supreme Court has not decided a standing case since *Rawlings*, 448 U.S. at 98, a 1980 decision.

362. *See* C. WHITEBREAD & C. SLOBOGIN, *supra* note 14, at 5-6 (discussing Burger Court's tendency to follow totality of circumstances approach in criminal procedure).

363. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973).

364. Illinois v. Gates, 462 U.S. 213, 230 (1983). *See also* Massachusetts v. Upton, 466 U.S. 727, 732 (1984) (inveighing against artificial standards provided by the two pronged *Aguilar-Spinelli* test).

365. *See, e.g., supra* note 190.

366. *See, e.g.,* cases discussed *supra* in text accompanying notes 296-99.

367. Indeed, the calculus involved in deciding whether a search has occurred is as murky as the analysis in standing cases, *see supra* text accompanying notes 355-61, since both search analysis and standing analysis contemplate an assessment of the reasonableness of one's expectations of privacy. *See* O'Connor v. Ortega, 107 S. Ct. 1492, 1497 (1987) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.").

368. 453 U.S. 454 (1981).

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a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[369] This statement, as discussed previously,[370] probably should not be considered dictum. It binds Florida courts under article I, section 12. But that conclusion does not validate every car search that takes place after the arrest of an occupant. It must still be decided whether the arrest was lawful, whether the detained individual was an occupant of the automobile, whether the search was contemporaneous with the detention, and whether the search strayed beyond the passenger compartment of the car.[371] The idea that any rule, no matter how precise, is subject to interpretation is well-worn and need not be further belabored.[372]

Given the 1983 amendment's intent to impose the Supreme Court's view on Florida courts, those courts should not flippantly distinguish cases on their facts. But, after carefully appraising the facts before it, a Florida court may believe the distinction between its case and the relevant Supreme Court decision is so significant that adherence to the Court's result would not advance the goals of stare decisis. A Florida court may further believe that state precedent, local morality, or reasoned analysis requires a result different from the Court's. In such an instance, the amendment should not inhibit the Florida court from reaching that result.

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369. *Id.* at 460.

370. *See supra* text accompanying notes 225-32.

371. In his dissent in *Belton,* Justice Brennan pointed to several possible ambiguities left after the decision:

> Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? . . . [W]hat is meant by "interior"? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards? . . . Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"?

453 U.S. at 470. *See also* 3 W. LAFAVE, *supra* note 222, at 5-6, 14-18 (further discussion of the ambiguity after *Belton*).

372. *See* Bradley, *The Uncertainty Principle in the Supreme Court,* 1986 DUKE L.J. 1, 2 ("uncertainty will be a by-product of any attempt to decide constitutional disputes"); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart,* 71 HARV. L. REV. 630, 661-69 (1958) (arguing that even simple rules are subject to ambiguity).

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2. Conceptually-Based Conformity

While the infinite variety of factual situations gives Florida courts considerable leeway in deciding how to conform their decisions to Supreme Court precedent, the conceptual framework the Court adopts for resolving a particular type of issue still governs, so long as it is a holding rather than dictum. For instance, *Rakas'* conceptualization of standing as an inquiry into one's legitimate expectations of privacy is clearly the law in Florida.[373] Florida courts cannot resort to a different theoretical analysis in deciding standing cases. Occasionally, however, the Supreme Court substitutes one conceptual framework for another and does not overrule the case or cases that established and applied the now abandoned theory. In this circumstance, does the new theory govern, or do the older cases control?

Given the desire for predictability, uniformity, lower court allegiance, and reliable decisionmaking, a Florida court should usually follow the result of earlier case law, even if that result arguably conflicts with the implications of a more recent Supreme Court holding. In other words, given a choice between factually-based conformity and conceptually-based conformity, the former generally should prevail.

An example of this idea derives from the Supreme Court's body bug cases.[374] The precise issue in these cases is whether a recording obtained through a monitoring device placed on a person with whom the defendant voluntarily converses is admissible at trial when not authorized by a warrant. In *On Lee v. United States*[375] and *Lopez v. United States*,[376] the Court authorized the use of such recordings even though the conversations took place on the defendants' premises. The basis for these holdings was the trespass doctrine developed in *Olmstead v. United States*,[377] which established that the fourth amendment is not implicated unless police commit a technical trespass on a person's premises. *On Lee* and *Lopez* held, first, that no trespass occurs when a defendant invites an individual into his home and voluntarily converses,[378] and, second, that the presence of a body bug does not convert this invitation into a trespass,[379] because the bug is not planted by an unlawful physical invasion of the defendant's home.[380]

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373. *See supra* note 357.
374. *See supra* note 204.
375. 343 U.S. 747 (1952).
376. 373 U.S. 427 (1963).
377. 277 U.S. 438 (1928).
378. *See* 343 U.S. at 751-53; 373 U.S. at 438.
379. *See* 343 U.S. at 753-55; 373 U.S. at 438-39.
380. 373 U.S. at 438-39.

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In 1967, however, the Supreme Court decided *Katz v. United States.*[381] *Katz* rejected the trespass theory of the fourth amendment and adopted instead what has since become known as the reasonable expectation of privacy test for assessing the scope of the amendment.[382] The Court thus explicitly overturned *Olmstead.*[383] But it left *On Lee* and *Lopez* untouched.[384] Suppose a Florida court, obligated by article I, section 12 to follow Supreme Court decisions on the fourth amendment, were faced with a body bug case, and that *On Lee, Lopez,* and *Katz* were the only relevant Supreme Court decisions.[385] Should the court follow the result in *On Lee* and *Lopez*? Or would it be permissible to rely on the reasonable expectation of privacy theory advanced in *Katz* and find that using body bugs without a warrant violates the fourth amendment because one does not reasonably expect that an unseen eavesdropper will use an electronic device to monitor one's private conversations?[386]

A Florida court placed in this dilemma must follow *On Lee* and *Lopez,* despite the conceptual flux in the law. The definition of search found in *Katz* and progeny is a holding and governs the inquiry.[387] But relying on that definition to require a warrant before wiring an informant for sound would result in a disavowal of established, even though perhaps partially discredited, Supreme Court precedent.[388]

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381. 389 U.S. 347 (1967).

382. Although the expectation of privacy language appeared only in Justice Harlan's concurrence, *id.* at 361 (Harlan, J., concurring), a majority of the Court soon adopted it as the standard for determining whether a search had occurred. *See, e.g.,* United States v. Dionisio, 410 U.S. 1, 14 (1973); United States v. White, 401 U.S. 745, 752 (1971); Mancusi v. DeForte, 392 U.S. 364, 369 (1968); *see also* Smith v. Maryland, 442 U.S. 735, 740-41 (1979) (elaborating on Justice Harlan's reasonable expectation of privacy test).

383. 389 U.S. at 353.

384. As Justice White noted in his concurring opinion in *Katz, On Lee* and *Lopez* were "undisturbed by today's decision." 389 U.S. at 363 n.** (White, J., concurring).

385. After *Katz,* the Supreme Court upheld *On Lee* and *Lopez* under the new reasonable expectation of privacy analysis. *See* United States v. Caceres, 440 U.S. 741 (1979); United States v. White, 401 U.S. 745 (1971) (plurality).

386. The Florida Supreme Court followed this latter rationale in State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981) ("To assume the risk that one who participates in a conversation held in the home might later reveal the contents of that conversation is one thing, but to assume the risk that uninvited and unknown eavesdroppers might clandestinely participate in the conversation and later reveal its contents is another . . . .").

387. *See supra* note 382.

388. Indeed, the Court eventually made clear that *Katz* did not disturb its ruling in *On Lee* and *Lopez. See supra* note 385.

While this type of conformity analysis results in the retention of a crime control holding, it might result in retention of a defense-oriented holding as well. For instance, although it reconceptualized the standing inquiry, *Rakas* did not overturn any of the Court's earlier cases on standing.[389] One of these earlier cases is *Jeffers v. United States*,[390] in which the Court found that a defendant who possessed a key to the searched apartment and enjoyed occasional access to it had standing to contest seizure of contraband from that apartment. Florida courts are bound to reach the same result on similar facts, even though it could easily be argued that one does not possess a legitimate expectation of privacy in an apartment one does not occupy and only occasionally visits.[391]

The one caveat to the conclusion that factual conformity should be preferred over conceptual conformity occurs when Supreme Court precedent is so weakened by subsequent Supreme Court deliberations on related matters that the precedent has been implicitly overruled.[392] In this situation, the goals of stare decisis are best served by following the more recent Supreme Court decisions. But, as many commentators have pointed out, a determination that a Supreme Court decision has been implicitly overruled by subsequent decisions should be extremely rare.[393] This resistance to a broad doctrine of implicit overruling is particularly appropriate where, as in Florida, the lower court is under a constitutional mandate to follow Supreme Court decisions.[394] It also

389. The Court stated that "[w]e can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that [the standing inquiry] is more properly subsumed under substantive Fourth Amendment doctrine." 439 U.S. at 139-40.

390. 342 U.S. 48 (1951).

391. Indeed, one Florida court appears to have improperly accepted this argument. *See* State v. Mallory, 409 So. 2d 1222 (Fla. 2d D.C.A. 1982) (defendant had no standing with respect to premises in which he kept personal belongings, occasionally stayed, and had freedom of ingress).

392. *See* Note, *supra* note 244, at 91-93 (discussion of the implicit overrule doctrine).

393. *Id.* at 92 n.23 (canvassing various standards adopted by courts or suggested by commentators, ranging from "near certainty" that Supreme Court has overruled precedent to a "rebuttable presumption" that precedent continues to be valid). *See also* Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494, 501 (1974) (lower court disavowal of Supreme Court precedent most appropriate "when it appears to a certainty that subsequent Supreme Court decisions in an area have rendered a precedent obsolete, so that the precedent serves only to confuse unwary litigants or judges").

394. *See* FLA. CONST. art. I, § 12. The question remains how Florida courts should respond to the situation described in the text. One commentator suggests a test that would allow a finding of implicit overrule if the lower court is "reasonably certain" the precedent has been overruled. *See* Note, *supra* note 244, at 92 n.23. This test he considers "high enough to give effect to the notion that the Supreme Court should make its intention to devitalize a precedent clear and unequivocal [and to support] the notion that lower courts should have good reason to disregard on point Supreme Court precedent." *Id.*

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dovetails with this article's contention that the 1983 amendment to article I, section 12 does not require predictive stare decisis.[395]

In short, Florida courts may ignore a reconceptualization of a fourth amendment issue by the Supreme Court if it is dictum with respect to the case before them and usually *must* ignore its possible import if earlier, countervailing and unreversed Supreme Court decisions clearly govern the case at hand. Of course, whether the earlier case does govern depends on its factual similarity.

V. CONCLUSION

This article has argued that the forced linkage approach to search and seizure issues established by the 1983 amendment to article I, section 12 is an irresponsible surrender of state court prerogatives and independence. Assuming that the amendment nonetheless will continue to require adherence to Supreme Court decisions construing the fourth amendment, this article has attempted to pinpoint a number of situations in which Florida courts could find either that no relevant Supreme Court precedent exists or that existing precedent does not dictate a particular result in the case in question.

The underlying premise of these arguments is the belief that when Supreme Court precedent does not clearly direct otherwise, Florida courts should be permitted to fashion their own approach to search and seizure law in order to maintain their analytical integrity and preserve the preferences expressed in Florida legislative, judicial, or social history. Of course, Florida courts may decide to follow Supreme Court rulings even when not required to do so. But they should only be required to do so under limited circumstances.

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395. *See supra* text accompanying notes 244-55.