VERTICAL FEDERALISM, ORIGINALISM, AND WARRANTLESS TRASH SEARCHES: IOWA'S RADICAL RE-CONCEPTION OF SEARCH AND SEIZURE DOCTRINE

STATE V. WRIGHT, 961 N.W.2D 396 (IOWA 2021).

*Tyler J. Garrison**

TABLE OF CONTENTS

* J.D. Candidate, May 2023, Rutgers Law School—Camden.

I. INTRODUCTION

In *State v. Wright*,[1] the Iowa Supreme Court held that the Iowa Constitution prohibits warrantless searches of trash left outside the home for collection.[2] Although *Wright* is not the first state supreme court decision to reach this result, this case is an interesting development for state constitutional and search and seizure scholarship. For the state constitutional angle, this case is important because the court interpreted the Iowa Constitution to depart from the U.S. Supreme Court's directly on-point precedent—*California v. Greenwood*[3]—where the Court held that the Fourth Amendment did not protect trash from warrantless searches.[4] This departure is particularly notable because Iowa followed federal Fourth Amendment jurisprudence in lockstep until *Wright*, including in two cases regarding the constitutionality of warrantless trash searches.[5] *Wright* is also an interesting chapter in search and seizure jurisprudence because the court pronounced a new framework for defining a search in Iowa: if a private person could not lawfully perform the questioned search, it would be unreasonable for the police to do so without a warrant.[6]

The *Wright* court also rebuked the reasonable expectation of privacy test derived from *Katz v. United States*[7] to determine whether a search occurred, holding instead that this test will be used to determine whether a search was reasonable.[8] The court embraced a return to an originalist, property-based approach in determining whether a search occurred, ending a decades-long practice of lock stepping its search and seizure jurisprudence with federal Fourth Amendment cases.[9] Independently interpreting the text and history of the Iowa Constitution, the *Wright* court found both that Wright's property rights were trespassed upon and that he had a reasonable expectation of privacy in his trash.[10] Three justices dissented, taking issue with the majority's new framework, fearing its implications for law enforcement, and believing the issue

1. 961 N.W.2d 396 (Iowa 2021).
2. *Id.* at 420.
3. 486 U.S. 35 (1988).
4. *Id.* at 37.
5. *See infra* notes 41–45 and accompanying text.
6. *See Wright*, 961 N.W.2d at 416–17.
7. 389 U.S. 347 (1967).
8. *Wright*, 961 N.W.2d at 414.
9. *See infra* text accompanying note 94.
10. *Wright*, 961 N.W.2d at 417–19.

settled under federal law, Iowa precedent, and traditional common law principles.[11]

This Comment outlines the various approaches to state constitutional interpretation taken by the majority, concurrence, and dissents in *State v. Wright*. It also analyzes the soundness of the majority's constitutional search and seizure jurisprudence and discusses the impact this decision may have on law enforcement in Iowa. Ultimately, this Comment concludes that *Wright*'s approach was mistaken for three primary reasons. First, the decision to depart from federal and Iowa precedent, though legally acceptable as a matter of state constitutional jurisprudence, was unconvincing; both existing strands of search and seizure jurisprudence—property rights and reasonable expectations of privacy—counsel the opposite result and are not nearly as unworkable together as the majority suggests. Next, the reasonable expectation of privacy test is more important to enhancing rights in modernity than an originalist property-trespass test. And finally, the *Wright* court's analysis may further confuse courts and police and invite an unnecessary rehashing of Iowa's search jurisprudence in response to challenges to long-standing and important police conduct.

II. STATEMENT OF THE CASE

In *Wright*, the Iowa Supreme Court was prompted by the appellant, Nicholas Wright, to consider whether the Iowa Constitution prohibits warrantless searches of trash left outside a suspect's home for collection.[12] Leading up to Wright's arrest, Officer Heinz of the Clear Lake Police Department received information that a man with a specific nickname lived in a certain neighborhood and distributed drugs.[13] After investigating and learning Wright matched this description, Officer Heinz sought to gather more concrete evidence from Wright's residence.[14]

On three occasions between September and December of 2017, Officer Heinz entered the alley next to Wright's home, saw lidless cans filled with opaque trash bags, and collected the bags.[15] On the first occasion, Officer Heinz found stained squares of fabric and sent them for laboratory analysis, which confirmed the presence of morphine and cocaine.[16] On the third occasion, he found a large bag filled with poppy

11. *See infra* Part IV, Section B.
12. *Wright*, 961 N.W.2d at 400.
13. *Id.*
14. *See id.* at 400–01.
15. *Id.*
16. *Id.*

seeds.[17] Officer Heinz applied for and received a search warrant with the probable cause predicated on the evidence gathered from Wright's trash.[18] Upon searching Wright's home, Officer Heinz found two grams of marijuana and a few Vyvanse capsules.[19] Wright was arrested and charged with three counts of drug possession.[20]

At trial, he moved to suppress the evidence gathered from his trash based on two arguments: Officer Heinz physically trespassed on his property, and Officer Heinz intruded on the reasonable expectation of privacy he had in his garbage.[21] The trial court denied the motion, and the Iowa Court of Appeals affirmed, holding that Officer Heinz neither trespassed on a constitutionally protected area nor violated Wright's reasonable expectation of privacy.[22] Wright appealed to the Iowa Supreme Court, advancing arguments based on the Iowa and federal constitutions.[23] The Iowa Supreme Court exercised its jurisdiction to decide the case based solely on Iowa law.[24]

III. BACKGROUND

Wright is at an intersection of legal issues: search and seizure under the Fourth Amendment, as interpreted by the U.S. Supreme Court; search and seizure under the Iowa Constitution, as interpreted by the Iowa Supreme Court; and vertical and horizontal federalism, i.e., the relationship between state and federal constitutions and the relationship between co-equal states interpreting their respective constitutions. Setting this background forth now will help illuminate the discussion of the five opinions in *Wright*.

A. Federal Search and Seizure Precedent

Although *Wright* was decided under the Iowa Constitution, federal Fourth Amendment jurisprudence is particularly relevant because Iowa had always followed it in its search and seizure jurisprudence.[25] For that reason, several U.S. Supreme Court cases are key to *Wright* and are discussed heavily in all five opinions. The first is *Katz v. United States*,

17. *Id.* at 401.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 401–02.
23. *Id.* at 402.
24. *Id.*
25. *See infra* notes 41–45 and accompanying text.

where the Court held that the police's warrantless use of a covert listening device to eavesdrop on a phonebooth conversation was an unreasonable search.[26] Most important is Justice Harlan's concurrence where he formulated the well-known, two-part reasonable expectations of privacy test: for police action to be a search, an individual must have a subjective expectation of privacy from the intrusion and society must accept that expectation as objectively reasonable.[27]

The reasonable expectation of privacy test guided the Court's holding in *California v. Greenwood* that warrantless trash searches do not violate the Fourth Amendment.[28] The Court explained that an expectation of privacy in trash is not objectively reasonable because society acknowledges that trash set out for collection is exposed to "snoops," animals, and is abandoned to trash collectors.[29] Also relevant to *Greenwood* and *Wright* is the third-party doctrine, under which the Court has declined to find privacy rights in items or information voluntarily conveyed to non-police third parties.[30] This doctrine came into question in *Carpenter v. United States*, where the Court recently held that police could not use cell-phone tracking information from cell companies, despite the third-party doctrine.[31] Justice Gorsuch's dissent in *Carpenter* is also particularly relevant to *Wright*, in which he cast doubt on the constitutional basis for the reasonable expectation of privacy test, particularly its application in *Greenwood*.[32] Most important, though, is *Greenwood*'s natural loom over *Wright*, with the majority taking pains to explain why they did not follow it and dissenters arguing why it should be followed.[33]

While the reasonable expectation of privacy test has proven immensely influential, it has also faced a great deal of criticism.[34] Many view the test as unworkable and wholly detached from the original understanding of Fourth Amendment searches, which are tied to property rights and trespass.[35] The U.S. Supreme Court recently

26. 389 U.S. 347, 359 (1967).
27. *Id.* at 361 (Harlan, J., concurring).
28. 486 U.S. 35, 37 (1988).
29. *Id.* at 40–41.
30. *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 566–70 (2009).
31. 138 S. Ct. 2206, 2223 (2018).
32. *Id.* at 2266 (Gorsuch, J., dissenting).
33. *See infra* notes 56–61 and accompanying text.
34. *See e.g.*, Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504–06 (2007) (criticizing the reasonable expectation of privacy doctrine as loosely defined; unpredictable and inconsistent in its application; and detached from a historical understanding).
35. *Id.*

embraced a return to a property-based understanding in two cases: *United States v. Jones*[36] and *Florida v. Jardines*.[37] In both cases, the Court held that a trespass to common law property rights could be the basis for an unreasonable search.[38] Federal search jurisprudence now operates with two strands: police action can be a search if it violates a reasonable expectation of privacy, or if it is a trespass on property rights.[39] The *Wright* majority heavily discusses these cases and doctrines but shifts their importance in Iowa.

B. History of Search and Seizure in Iowa

Iowa's search and seizure law derives from article I, section 8 of the Iowa Constitution. The text of that provision is as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.[40]

Except for a few meaningless changes, this text mirrors the text of the Fourth Amendment.[41] And since its ratification, Iowa courts have interpreted the provision to provide the same protections as the Fourth Amendment.[42] Following Fourth Amendment jurisprudence in a "lockstep approach," Iowa's search jurisprudence has tracked the federal approach in its doctrinal developments, including the advent of the reasonable expectation test, the third-party doctrine, and the return to the property/trespass approach.[43] Most importantly, Iowa courts had explicitly followed *Greenwood* in two factually analogous cases; in *State*

---

36. 565 U.S. 400, 404–05 (2012) (holding that a GPS device attached to the bottom of a suspect's car was an unreasonable search because the physical placement of the GPS on the car was a trespass).

37. 569 U.S. 1, 11–12 (2013) (holding that the police committed an unreasonable search by bringing a sniffing dog to a homeowner's front door without a warrant because this was a trespass).

38. *Jones*, 565 U.S. at 405–06; *Jardines*, 569 U.S. at 10–11.

39. *Jones*, 565 U.S. at 401 ("The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.").

40. IOWA CONST. art. 1, § 8.

41. *Compare id.*, *with* U.S. CONST. amend. IV.

42. *See* JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE 43–44 (1998).

43. State v. Wright, 961 N.W.2d 396, 408 (Iowa 2021).

v. Henderson[44] and *State v. Skola*,[45] the Iowa Court of Appeals held that warrantless trash searches did not violate article I, section 8. Thus, given *Greenwood*, Iowa's history of lock stepping, and the existence of *Henderson* and *Skola*, *Wright* presented a seemingly easy case.

C. *Vertical and Horizontal Federalism*

Finally, *Wright* touches on two important concepts in state constitutional law: vertical and horizontal federalism. Vertical federalism refers to the principle that state supreme courts are not beholden to federal constitutional law in interpreting their state constitutions.[46] In fact, state courts are free to interpret their constitutional provisions, even ones that track federal constitutional provisions exactly, to provide greater protections than the U.S. Supreme Court has found in similar cases.[47] "Following *Greenwood*" is itself a case study of this phenomenon; despite the Court's holding in *Greenwood*, several state courts, including New Jersey's, have held that their state constitutions prohibit warrantless trash searches.[48] In this regard and many others, state courts and state constitutions often serve as the basis for enhancing civil rights protections beyond what exists in federal law.[49]

The second concept is horizontal federalism, which refers to the interrelation of state constitutional law between the states.[50] State constitutional decisions serve as influential support for each other; for example, each opinion in *Wright* spends time discussing the other state courts that have ruled on the trash search issue post-*Greenwood*.[51] The results have been decidedly mixed on the issue,[52] but *Wright*'s ample discussion of other state courts illustrates the importance of horizontal federalism jurisprudence in making state constitutional law.

---

44. 435 N.W.2d 394, 396–97 (Iowa Ct. App. 1988).
45. 634 N.W.2d 687, 689–91 (Iowa Ct. App. 2001).
46. *See* Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RSRV. L. REV. 567, 571 (2015).
47. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 121 (2009).
48. *Id.* at 163.
49. *Id.* at 121.
50. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008).
51. *See infra* Part IV.
52. *See* State v. Wright, 961 N.W.2d 396, 456–58 (Iowa 2021) (Waterman, J., dissenting).

IV. THE COURT'S REASONING

As previously discussed, the constitutionality (or not) of warrantless trash searches has been widely presented and decided in different ways by courts across the country. But the Iowa Supreme Court's reasoning and holding are original—particularly the new rule that police act unreasonably in the search context if their actions would be unlawful for a citizen to perform (for brevity's sake, this is hereinafter referred to as the "police-private citizen rule").[53] To fully present these issues, this section walks through the court's opinions—the majority, special concurrence, and three dissents.

A. The Majority Opinion

The majority opinion, authored by Justice McDonald, consists of two equally important analyses, beginning with the court explaining its duty to independently interpret the Iowa Constitution.[54] Noting perceived problems with Fourth Amendment jurisprudence, the majority concluded that adhering to *Greenwood* and continuing to follow federal Fourth Amendment cases in lockstep was untenable.[55] The court returned to a conception of search in the Iowa Constitution rooted in property rights and trespass, relegating *Katz*'s reasonable expectation of privacy test to a consideration in the reasonableness analysis.[56] Applying this new framework, the court went on to hold that warrantless trash searches intrude on property rights and reasonable expectations of privacy, therefore violating the Iowa Constitution.[57]

1. Departing from Federal Precedent

In explaining its departure from *Greenwood*, the majority made clear that state courts are not bound by federal precedent in interpreting their state constitutions, even when a case is as directly on-point as *Greenwood*.[58] State courts give "respectful consideration" to federal precedent, but the duty to independently interpret state constitutional provisions persists even if the state and federal provisions have "nearly identical language and have the same general scope, import, and

53. *Id.* at 416–17 (majority opinion).
54. *Id.* at 402–04.
55. *Id.* at 410–12.
56. *Id.* at 411–12.
57. *Id.* at 417–20.
58. *Id.* at 402–03.

purpose."[59] Ultimately, the only task is to determine what result the state constitution compels, whether that result provides equal or greater rights than the Federal Constitution.[60]

After making clear that *Greenwood* was not controlling, the majority turned to article I, section 8, looking to the "text of the constitution as illuminated by the lamp of precedent, history, custom, and practice."[61] The original understanding of unreasonable searches—both in Iowa and in the common law—did not incorporate a reasonableness balancing standard, but was based on common law trespass principles and the warrant requirement.[62] As originally understood, it was unreasonable for police to trespass against a citizen without first obtaining a warrant based on probable cause.[63] The majority discussed three old search cases decided under the Iowa Constitution to illustrate that original understanding, each focusing on property and trespass to determine if a search occurred.[64]

Iowa's lockstep approach followed federal law in what the majority viewed as two significant (and mistaken) departures from the original, property-based understanding of search and seizure. First, the U.S. Supreme Court moved to a relativistic interpretation of the word "reasonable" that focused on the totality of circumstances, balancing individual privacy interests against the promotion of government and policing interests.[65] Second, Justice Harlan's opinion in *Katz* produced the now seminal reasonable expectation of privacy test.[66] It was not until recently that the originalist, property-based conception of searches returned in *Jones* and *Jardines*, which Iowa also followed.[67] The majority then spent pages discussing scholarly critiques of the reasonable expectations of privacy test, concluding that current federal Fourth Amendment law is a "mess," burdened by two "competing, inconsistent doctrines."[68] In furtherance of a return to a property and trespass test, the majority discussed how most sitting U.S. Supreme Court Justices have at some point criticized or called for an end to the reasonable expectations test.[69]

---

59. *Id.* (quoting State v. Brooks, 888 N.W.2d 406, 411 (Iowa 2016)).
60. *Id.* at 403–04.
61. *Id.* at 402.
62. *Id.* at 404–05.
63. *Id.* at 405.
64. *Id.* at 405–06.
65. *Id.* at 407.
66. *Id.* at 408.
67. *Id.* at 409–11.
68. *Id.* at 410–11.
69. *Id.* at 411; *see also* Nicholas A. Kahn-Fogel, Katz, Carpenter, *and Classical Conservatism*, 29 CORNELL J. L. & PUB. POL'Y 95, 106 (2019).

After considering the groundswell of criticism and the possible future change in federal search jurisprudence, the majority concluded that the lockstep approach was no longer tenable, instead pronouncing: "we hold a peace officer engaged in general criminal investigation acts unreasonably under article I, section 8 when the peace officer commits a trespass against a citizen's house, papers, or effects."[70] This part of the opinion repudiated the reasonable expectation of privacy test and recentered on the property and trespass-based approach, which the Court then applied to Wright's case.[71]

2. Search and Seizure Under the Iowa Constitution

Turning to the substance of Wright's appeal, the court began by determining how a search and seizure occurs under a trespass-focused standard. After noting that these terms were not terms of art at the founding,[72] the court defined seizure as "'some meaningful interference' with the property," and quickly concluded that Wright's garbage was seized.[73] Constitutionally, search has always meant a trespass on a property right.[74] This part of the opinion has important implications: in Iowa, whether the police trespassed upon a property right is now the exclusive test for whether a search occurred.[75] The reasonable expectation of privacy test in Iowa is now "relevant only to the question of whether a seizure or search was unreasonable within the meaning of article I, section 8 and not whether a seizure or search has occurred."[76]

The majority tabled the case-resolving question of whether Officer Heinz did commit a trespass for a few paragraphs, first turning to whether the trash bags were "papers [or] effects" deserving of constitutional protection.[77] It applied a definition of effects as "[m]ovable property; goods."[78] This step caused the majority little trouble because the bags and cans were certainly property under this definition.[79] But the more problematic step was determining whether the property still "belonged" to Wright such that he maintained a property right in it.[80] Generally, if there was proof that the owner intended to abandon the

70. *Wright*, 961 N.W.2d. at 412.
71. *Id.* at 412.
72. *Id.* at 413.
73. *Id.* (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).
74. *Id.* at 414.
75. *Id.* at 413–14.
76. *Id.* at 414.
77. *Id.*
78. *Id.* (quoting *Effects*, BLACK'S LAW DICTIONARY (11th ed. 2019)).
79. *Id.*
80. *Id.* at 415.

property and voluntarily relinquish all right to it, the property would be deemed abandoned, and any possessory interest in it lost.[81] According to the majority, Wright did not relinquish his property rights to the trash because an ordinance in the town of Clear Lake made it "unlawful for any person to . . . [t]ake or collect any solid waste which has been placed out for collection on any premises, unless such person is an authorized solid waste collector."[82] Because of this ordinance, Wright maintained an interest in his trash and did not abandon it to anyone but the trash collector, and he retained a right to exclude all others from this property.[83]

Finally, the majority turned to the decisional part of its opinion: whether Officer Heinz committed a trespass, and if so, whether it was unreasonable.[84] To start, the majority outlined the police-private citizen standard: "an officer acts unreasonably when [he], without a warrant . . . trespasses on protected property or uses means or methods of general criminal investigation that are unlawful, tortious, or otherwise prohibited."[85] And again, the court turned to the Clear Lake ordinance: because Officer Heinz violated the Clear Lake ordinance by collecting Wright's trash bags, he engaged in unlawful investigative tactics and thus committed a trespass.[86]

Next, the court determined that the search violated Wright's reasonable expectation of privacy.[87] On one analytical end, *Greenwood* and Iowa precedent determined that an expectation of privacy in trash was not objectively reasonable because trash was conveyed publicly to snoops and trash pickers.[88] On the other hand, Justice Gorsuch's *Carpenter* dissent explained the view that it was an objective social norm to expect strangers to stay out of your trash.[89] The majority agreed with

81. *Id.*

82. *Id.* (quoting CLEAR LAKE, IOWA, CODE OF ORDINANCES § 105.11(4) (2003)).

83. *Id.* This conclusion was based primarily on an old California case and Justice Gorsuch's *Carpenter* dissent. *See* People v. Edwards, 458 P.2d 713, 718 (Cal. 1969) (holding trash was not abandoned to anyone but the trash collectors); Carpenter v. United States, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting) ("I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager.").

84. *Wright*, 961 N.W.2d at 416.

85. *Id.* The police-private citizen test came almost entirely from a law review article. *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825–26 (2016).

86. *Wright*, 961 N.W.2d at 417.

87. *Id.* at 417–19.

88. *Id.* at 418; *see also* California v. Greenwood, 486 U.S. 35, 39–41 (1988); State v. Henderson, 435 N.W.2d 394, 396 (Iowa Ct. App. 1988).

89. Carpenter v. United States, 138 S. Ct. 2206, 2266 (Gorsuch, J., dissenting); *Wright*, 961 N.W.2d at 418.

Justice Gorsuch's view, stating that trash "contains intimate and private details of life" and is objectively private and safe from inspection "in certain ways."[90] While one conveys trash to another—the trash collector—one does not expect to convey it to everyone.[91] This holding was also partially based on the Clear Lake ordinance; because that ordinance prohibited everyone but the trash collector from searching trash bags, Wright maintained an even greater expectation of privacy from searches by anyone but the trash collector.[92]

The court's analysis was unique and brought change in several respects. First, in its decision to not follow *Greenwood*; second, in its decision to abandon the lockstep approach and recenter Iowa's search test around property and trespass; third, in its substantial reliance on a municipal code to make constitutional law; and fourth, in its creation of the police-private citizen test. After making these radical alterations to Iowa's search and seizure jurisprudence, *Wright*'s fact-specific holding naturally followed—the Iowa Constitution protects trash from warrantless searches.[93] The judgment itself is not altogether surprising, as it joins six other state supreme courts that have departed from *Greenwood* and held trash to be protected from warrantless searches under their respective state constitutions.[94] However, the judgment pales in scope to the majority's analytical reconception of constitutional search jurisprudence in Iowa, which no state court has done in response to the trash search issue.

B. Justice Appel's Special Concurrence

Justice Appel joined the majority but wrote separately to explain his methodology and disagreement with the majority's originalist reasoning.[95] He began with the historical importance of protecting the people from an over-intrusive government, tracing this right through the Revolution and other parts of the world.[96] Once construed more liberally, the Fourth Amendment and its protections against government intrusion have been reined in by what Justice Appel called the U.S. Supreme Court's "rights-restricting" decisions.[97] Disagreement with federal search

90. *Wright*, 961 N.W.2d at 418–19 (citations omitted).
91. *Id.* at 419.
92. *Id.*
93. *Id.* at 420.
94. *Id.* at 419–20. The six states are California, Vermont, Washington, New Jersey, New Mexico, and New Hampshire. *See infra* note 142 and accompanying text.
95. *Id.* at 420–21 (Appel, J., concurring).
96. *Id.* at 421–22.
97. *Id.* at 422.

and seizure jurisprudence led Justice Appel to his next point of discussion—the Iowa Supreme Court's authority to depart from federal precedent.[98] He turned to history to show that adherence to federal constitutional law in state constitutional jurisprudence is not just unnecessary but entirely misplaced.[99] At the founding, the federal system was considered an "irrelevant backwater [when] compared to sophisticated and experienced state governments."[100] The modern fascination with the federal courts would have stunned the founders, who intended for state governments to have broad constitutional autonomy.[101]

Aside from the elevated importance now placed on the federal courts, Justice Appel pointed to efficiency as another reason why he believed state courts often resort to federal precedent.[102] His view is that the simple reality of overworked state judiciaries (and some less than stellar advocacy) leads many state judges to rely on federal precedent.[103] While this may have become habit, the authority of state courts to independently interpret their decision is "well settled."[104] To reinforce this point, he pointed to the tradition of this very practice in Iowa, when the court decided not to follow *Plessy v. Ferguson*.[105] According to Justice Appel, the only compelling reason to follow federal precedent is "when it is persuasive on the merits."[106] He discussed a few of what he again referred to as "rights-restricting" cases to show that current Fourth Amendment jurisprudence is not persuasive on the merits.[107] Following those decisions would prevent Iowa courts from giving the search and seizure provision of the Iowa Constitution a "broad and liberal" construction, as commanded by Iowa precedent.[108]

After flushing out his views on departing from federal precedent, Justice Appel turned to methodology. He criticized originalism, especially in the search and seizure context; simply too many technologies now exist that the founders could not have possibly considered.[109] Rather than try to discern the hypothetical thinking of the founders on topics like cell phone surveillance or data privacy, courts should give meaning to the

98. *Id.*
99. *Id.* at 423–24.
100. *Id.* at 422.
101. *Id.* at 423.
102. *Id.* at 424.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 423.
107. *Id.* at 424–27.
108. *Id.* at 427 (quoting State v. Height, 91 N.W. 935, 937 (1902)).
109. *Id.* at 428.

thrust of the constitutional doctrine, as interpreted through the years, considering modern technologies and changing social attitudes.[110]

Justice Appel then quickly turned to the specifics of this case. Without much elaboration, he concluded that Wright's rights were violated because the officers trespassed on his trash and because he had a reasonable expectation of privacy.[111] He then refocused back to the warrant clause of the provision, which he believed to be the central tenet of search and seizure,[112] now improperly replaced by an excessive focus on reasonable expectations of privacy.[113] Because the police lacked a warrant to conduct this search, it was an unreasonable trespass and violated Wright's rights.[114]

C. Dissenting Opinions

On top of Justice Appel's concurrence, all three dissenting justices filed opinions, each joined by the other two.

1. Chief Justice Christensen's Dissent

Chief Justice Christensen's dissenting opinion was the most comprehensive. She began by refocusing on appellate procedure and Wright's actual arguments on appeal.[115] She noted that he did not invoke the standards that Iowa courts have typically applied in the last decade to determine whether to depart from federal constitutional precedent.[116] These considerations—"the text of the Iowa Constitution; the history of [the] state constitutional provision; the structural differences in the State and Federal Constitutions; related decisions of other states, especially when interpreting similar constitutional text; and the practical consequences of departure"—would not warrant departing from *Greenwood* and finding that the Iowa Constitution offered greater protection.[117] Instead of invoking Iowa's departure standards, Wright based his argument to depart from *Greenwood* and Iowa precedent on the Clear Lake ordinance.[118] Justice Christensen took issue with what Wright did not argue: he did not argue for the police-private citizen rule, nor did he invoke *Carpenter*, specifically Justice Gorsuch's concurrence,

110. *Id.*
111. *Id.*
112. *Id.* at 421.
113. *Id.* at 429.
114. *Id.*
115. *Id.* (Christensen, C.J., dissenting).
116. *Id.* at 430.
117. *Id.*
118. *Id.*

which the majority discussed heavily.[119] Further, the majority improperly focused on these unbriefed and unpreserved issues at oral argument and ultimately decided the case on this basis.[120] Given the majority opinion's possible impact on law enforcement, Chief Justice Christensen believed the majority's holding—specifically the police-private citizen rule—was dangerously lacking a thorough vetting in the adversarial process.[121]

Chief Justice Christensen then turned to precedent and the reasonable expectation of privacy doctrine, focusing on *Greenwood* and *State v. Henderson*—where the Iowa Court of Appeals followed *Greenwood*'s reasoning—to hold that the Iowa Constitution did not prohibit warrantless trash searches.[122] She saw no reason to depart from these precedents and viewed the majority's reliance on the Clear Lake ordinance to do so as entirely misplaced.[123] To prove this point, she discussed the two expectations within the reasonable expectations test, objective and subjective.[124] And in her view, the Clear Lake ordinance did nothing to create either expectation of privacy because the purpose of the ordinance was to streamline waste collection and promote public health, not create rights for the trash possessor.[125] Moreover, the trash collectors who had license to collect the trash could simply turn it over to the police at their request.[126] She looked at pertinent decisions from other states: multiple state courts have encountered this very argument about a municipal trash ordinance, each holding that the ordinance does not alter constitutional privacy rights.[127] And in *Greenwood*, California had a trash ordinance similar to Clear Lake, yet the Supreme Court gave it no constitutional importance.[128] Ultimately, she thought the majority expanded the purpose of the Clear Lake statute by "judicial fiat" and elevated the importance of an ordinance beyond their recognized place in a dozen other state constitutions and the Federal Constitution.[129]

Moreover, she contended, Wright had no subjective expectation of privacy—there was no indication that he even knew of the Clear Lake

119. *Id.* at 430–31.
120. *Id.* at 431.
121. *Id.* at 431–32.
122. *Id.* at 432–34; *see also* State v. Henderson, 435 N.W.2d 394, 396–97 (Iowa Ct. App. 1988).
123. *Wright*, 961 N.W.2d at 434–35.
124. *Id.* at 435–38.
125. *Id.* at 435–39.
126. *See id.* at 437.
127. *Id.* at 435–37.
128. *Id.* at 437 (citing California v. Greenwood, 486 U.S. 35, 43 (1988)).
129. *Id.* at 435.

ordinance.[130] And even if he did know of it, his decision to place his trash in a public alley in lidless cans indicated a lack of a subjective privacy expectation.[131] Finally, Wright abandoned his trash when he set it out for trash collectors and did not retain property rights in it, based on the lack of property rights historically afforded to discarded effects.[132] She cemented this view with a two-page string cite of cases from other states—over twenty—where state supreme courts have held opposite *Wright* under the reasonable expectations test.[133]

With regard to departing from precedent, Chief Justice Christensen concluded that the majority "read the tea leaves" of future Fourth Amendment jurisprudence, eager to deaden the reasonable expectation test and third-party doctrine to produce the holding it wanted in *Wright*.[134] However, even if the majority was correct to depart from federal precedent and rebuke the reasonable expectations test, she argued that the majority's common law property and trespass analysis was also deeply flawed.[135] She returned to abandonment and trespass doctrine, concluding once again that Wright abandoned his property and that the police could not have trespassed on it.[136] Rather than clarify search and seizure jurisprudence, she insisted the majority further confused the issue by retreating from the reasonable expectation of privacy test, settling on a property and trespass test but mistaking settled property doctrine, and then returning to reasonable expectation of privacy anyway.[137] She concluded by turning her ire to the police-private citizen rule. This test, she concluded, was cut out of whole cloth, and threatens the viability of numerous police tactics; *Terry* stops, investigative detentions of witnesses, committing crimes undercover, and roadblocks were all constitutionally questionable under this new standard, as private parties could not lawfully do these things.[138]

Justice Christensen's dissent focused on each aspect of the majority's analysis, thoroughly illustrating the problems in the majority's opinion. The other two dissents are much shorter and focus more narrowly on certain aspects of the case, with Justice Waterman also taking issue with

130. *Id.* at 437.
131. *Id.* at 437.
132. *Id.* at 437–38. Chief Justice Christensen relies on *Abel v. United States* for this point, where the Court held that a defendant abandoned his property by discarding it in a hotel trash can and thus had no Fourth Amendment rights in the trash. *Id.* at 437; *see also* 362 U.S. 217, 240–42 (1960).
133. *Wright*, 961 N.W.2d at 440 n.11.
134. *Id.* at 445.
135. *Id.* at 448–50.
136. *Id.* at 448–49.
137. *Id.* at 450–51.
138. *Id.*

the majority's departure from precedent and police-private citizen test and Justice Mansfield discussing property and trash at the common law.

2. Justice Waterman's Dissent

Justice Waterman's dissent primarily criticized the majority's historical discourse and decision to depart from precedent. First, he pointed to history to show that both police and private citizens had long been able to scavenge trash lawfully.[139] Second, he cited sources showing that the original understanding of the Fourth Amendment prohibited searches of the home, not searches of private property outside the home.[140] The majority's analysis, he contended, "involve[d] sleight of hand" by equating the historical prohibition against warrantless home-trespasses with the search of garbage, a lawful phenomenon and not a trespass at the founding.[141]

Moving away from originalism, Justice Waterman turned to the majority's departure from Iowa and federal precedent. He derided the majority's decision to independently interpret the Iowa Constitution as "[c]hest-thumping . . . simply to evade federal precedent we don't like."[142] Because the majority failed to identify differences from the Fourth Amendment in the text, history, or purposes of the Iowa search and seizure provision, he believed that the correct decision was to adhere to *Greenwood* and that failing to do so constituted "judicial activism."[143] And even if *Greenwood* was not fully controlling, Iowa's appellate courts had previously held that the police could lawfully perform warrantless trash searches.[144] Absent a compelling reason to depart from these decisions, Justice Waterman believed that *stare decisis* drove the result in this case.[145]

Like Chief Justice Christensen's dissent, Justice Waterman also surveyed the history of this issue in other states. Six states have not followed *Greenwood*—California, New Hampshire, New Jersey, New Mexico, Vermont, and Washington.[146] Of those six, three relied on privacy clauses in their state constitutions that are absent from the Iowa

139. *Id.* at 453–54 (Waterman, J., dissenting).
140. *Id.*
141. *Id.*
142. *Id.* at 454.
143. *Id.* at 455–56 (citations omitted).
144. *Id.* at 456 (citing State v. Skola, 634 N.W.2d 687, 689–91 (Iowa Ct. App. 2001) (applying *Greenwood* under the United States and Iowa Constitutions to uphold a police search of the defendant's garbage)); State v. Henderson, 435 N.W.2d 394, 396–97 (Iowa Ct. App. 1998) (same)).
145. *Wright*, 961 N.W.2d at 456.
146. *Id.* at 456–57.

Constitution.[147] California's decision came before *Greenwood* and involved a search of trash kept within the home's curtilage.[148] Finally, New Jersey and New Mexico held opposite *Greenwood* based simply on a contrary analysis of reasonable expectations; these decisions did not create the police-private citizen rule, nor did they explicitly rebuke what has been the dominant search and seizure standard for decades.[149]

Finally, Justice Waterman invoked fears that the police-private citizen test is an unmanageable, confusing standard that will confuse law enforcement and hamper evidence-gathering abilities.[150] In his view, the test invites criminals to challenge the constitutionality of other long-accepted policing tactics like *Terry* stops and the automobile exception to the warrant requirement.[151] But most importantly, this test had no basis in history and was never even argued by Wright.[152] These fears and the lack of compelling reason to depart from precedent drove Justice Waterman's well-reasoned dissent.

3. Justice Mansfield's Dissent

Striking a more colloquial tone in his dissent, Justice Mansfield focused largely on property rights and littered his writing with lines about trash from Shakespeare's *The Tempest*.[153] Unlike the other dissenters, Justice Mansfield agreed with the majority's criticism of the reasonable expectations test and took no issue with abandoning it to not follow *Greenwood*.[154] But in his mind, this case was easily decided based on traditional property and abandonment law, while the police-private citizen test had no place in search and seizure jurisprudence.[155]

Justice Mansfield considered Wright's trash clearly abandoned.[156] Because Wright had abandoned his property once he set his trash out for collection, he lacked standing to complain about what happened to it.[157]

---

147. *Id.* at 457. The states with constitutional privacy clauses are New Hampshire, Vermont, and Washington. *Id.*

148. *Id.* at 456–57 (citing People v. Edwards, 458 P.2d 713, 718 (Cal. 1969)).

149. *Id.* (first citing State v. Hempele, 576 A.2d 793, 810 (N.J. 1990) (holding defendant had reasonable expectation of privacy in garbage under New Jersey Constitution); then citing State v. Crane, 254 P.3d 117, 123 (N.M. Ct. App. 2011) (holding defendant had reasonable expectation of privacy in garbage under New Mexico Constitution)).

150. *Id.* at 456.

151. *Id.*

152. *Id.* at 453.

153. *Id.* at 458 (Mansfield, J., dissenting).

154. *Id.* at 459.

155. *Id.* at 459–60.

156. *Id.* at 460.

157. *Id.* at 459.

The majority's basis for finding non-abandonment and physical trespass came in the Clear Lake anti-scavenging ordinance, but, similarly to Chief Justice Christensen, Justice Mansfield concluded that the ordinance was meant to promote public health, not establish legal property rights on behalf of the trash's owner.[158] Accordingly, based on traditional abandonment principles, he concluded that Wright had abandoned his garbage and could not complain of a trespass to it, as the ordinance did not change Wright's legal interest in his trash.[159]

Absent a sufficient analysis of property and abandonment, the majority's real holding, in Justice Mansfield's view, was the police-private citizen test.[160] He listed several common policing tasks that immediately call the validity of that test into question—searching parks after dark, parking on streets after curfew, and so on.[161] Further, he criticized the precedent the majority used to support this position; *Jardines* involved a common law trespass on traditional property rights whether committed by the police or a citizen, and it did not reflect the police-private citizen test.[162] Justice Mansfield's issue was not solely with the police-private citizen test because he believed the majority abandoned it midway through the opinion by writing, "this is not to say article I, section 8 rises and falls based on a particular municipal law," and discussing reasonable expectations of privacy anyway.[163] He viewed this as the majority's inability to completely abandon the reasonable expectations of privacy test, leaving a great deal of uncertainty in Iowa's search jurisprudence where none existed before.[164]

Finally, Justice Mansfield addressed Justice Appel's special concurrence, particularly his words on adapting to modern technology.[165] Trash was not modern and had been addressed aptly by Justice Frankfurter in *Abel*: "There can be nothing unlawful in the Government's appropriation of such abandoned property."[166] Long-standing precedent and historical property law resolved this case for Justice Mansfield. In his view, the majority mistakenly "shift[ed] ground" and tried to "hide

158. *Id.* at 461.
159. *Id.*
160. *Id.*
161. *Id.* at 461–62.
162. *Id.* at 462.
163. *Id.* at 463; *see also id.* at 417 (majority opinion).
164. *Id.* at 463–64 (Mansfield, J., dissenting). Justice Mansfield also criticizes the majority's reliance on Justice Gorsuch's *Carpenter* dissent, viewing trash-picking as an objectively accepted social norm. *Id.* at 463.
165. *Id.* at 464.
166. *Id.* at 465 (quoting Abel v. United States, 362 U.S. 217, 241 (1960)).

itself" between trespass, privacy, and the newfound police-private citizen rule.[167]

V. ANALYSIS

This analysis proceeds in a similar sequence to the majority opinion but with opposite views on the issues. First, this Comment argues that the dissents were correct to criticize the majority's treatment of precedent and its decision to depart from it. Second, it furthers the arguments that the majority erred in applying common law property doctrine. And finally, it takes up and further elaborates on the dissenters' fears about the police-private citizen test and the future of Iowa's search jurisprudence.

A. Departing from Established Search Precedent is Mistaken

To be certain, the majority's description of its duty to independently interpret the Iowa Constitution, despite *Greenwood*, is entirely correct. The independent authority of state constitutions is well established, aptly captured in the oft-used metaphor of state courts acting as "laboratories" of constitutional jurisprudence.[168] And, though perhaps worn out, this metaphor might be perfect for *Wright*. The majority opinion discusses the volume of scholarship disparaging the reasonable expectation of privacy doctrine, some coming from U.S. Supreme Court Justices themselves.[169] So, on one hand, Iowa may well be prescient to serve as a predictive experiment in returning to an originalist, property-based approach.[170]

However, while state constitutional independence is a well-trodden path for state constitutional scholars, it is likely a more ephemeral concept for law enforcement officers and criminal defendants. This point is to suggest that decisions like *Wright*—where a state court interprets an identical constitutional provision to have the opposite result as the U.S. Supreme Court in a factually identical case despite a history of

167. *Id.* at 464.

168. James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 475 (1996) ("No contemporary discussion of state constitutional law, it seems, is considered complete without some invocation of the metaphor of 'states-as-laboratories.'").

169. *See supra* text accompanying notes 69–70.

170. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16 (2018) (advocating for state constitutions as the main protectors of individual liberties, often moving constitutional jurisprudence forward before the U.S. Supreme Court).

lockstep interpretation[171]—deserve a fuller exploration of defined departure principles.[172] Chief Justice Christensen outlined these criteria, and they do not counsel departure here.[173] The text of article I, section 8 matches the Fourth Amendment.[174] Nothing about the structure of the Iowa Constitution significantly affects the interpretation of article I, and the provision had been historically interpreted in lockstep with the Fourth Amendment.[175] As Chief Justice Christensen discussed, close to thirty state supreme courts have held opposite of Iowa; several cases also involved trash ordinances like Clear Lake's.[176] Only six state courts held similarly to *Wright*, and half of them relied substantially on constitutional privacy provisions not present in the Iowa Constitution.[177] Certainly, the weight of authority on this issue is contrary to *Wright*—including in Iowa's itself.[178]

But the practical consequences of this specific analytical departure are most impactful. To depart from *Greenwood* and Iowa precedent, *Wright* elevated the importance of a local ordinance, rebuked the reasonable expectation of privacy test in favor of the property-trespass test, and formulated that test with the police-private citizen standard. Reaching this conclusion required an exposition of the majority and concurrence's fundamental disagreement with Fourth Amendment jurisprudence, what Justice Appel calls "rights-restricting."[179] Unfortunately for Iowans, however, the reasonable expectations test has proven extremely important in protecting individuals from the police's use of modern technology to invade privacy rights. If the *Wright* majority were concerned with rights-enhancing search protection in Iowa, it was almost certainly mistaken to shirk the long-standing bifurcated search framework in favor of an approach focused on property rights. On this front, a better approach would have been to follow other state supreme

171. This feels especially true in the search and seizure context, an area of constitutional law that can have next-day impacts on law enforcement and criminal suspects.

172. *But cf.* WILLIAMS, *supra* note 47, at 162 (discussing the drawbacks to the criteria approach to departing from federal precedent, calling it "counterproductive").

173. State v. Wright, 961 N.W.2d 396, 430 (Iowa 2021) (Christensen, C.J., dissenting). Restated here, the factors for departing from federal precedent are: "the text of the Iowa Constitution; the history of [the] state constitutional provision; the structural differences in the State and Federal Constitutions; related decisions of other states, especially when interpreting similar constitutional text; and the practical consequences of departure." *Id.*

174. *See supra* note 41 and accompanying text.

175. *See* STARK, *supra* note 42, at 43–44.

176. *Wright*, 961 N.W.2d at 436, 440 n.11 (Christensen, C.J., dissenting).

177. *Id.* at 456–57 (Waterman, J., dissenting).

178. *Id.* at 433–34 (Christensen, C.J., dissenting) (first citing State v. Skola, 634 N.W.2d 687 (Iowa Ct. App., 2001); then citing State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App., 1988)).

179. *Id.* at 422 (Appel, J., concurring).

courts—particularly the Supreme Court of New Jersey—that have persuasively departed from *Greenwood*'s holding under the reasonable expectation of privacy test.[180]

To illustrate this point, one need only turn to the seminal search cases discussed in *Wright*. After and including *Katz*, the U.S. Supreme Court has decided many "was this a search?" cases; several involve the U.S. Supreme Court stretching search doctrine to create rights-enhancing protections against powerful and intrusive search methods made possible by growing modern technology. In *Katz*, it was the police using eavesdropping technology to record conversations in a public phone booth.[181] There was no trespass, but the Court protected privacy.[182] Applying the reasonable expectations test in *Kyllo v. United States*, the Court held that the police's warrantless use of thermal scanning technology to detect heat signatures from outside the home was an unreasonable search.[183] And most recently, the Court held in *Carpenter* that the police may not use phone tracking records from a cell phone company to track a suspect's whereabouts without a warrant.[184]

These cases all have two things in common: the Court enhanced protection against technology-based intrusions, and the property and trespass strand of search jurisprudence was nowhere to be found, for good reason—there was simply no trespass in any of these three cases. The reasonable expectation of privacy test was the sole safeguard against intrusion by technology. Thus, if a court is concerned with enhancing rights in a modern world, a privacy-based test seems a good deal more effective than a trespass test. Or, as under the Fourth Amendment, it makes sense to allow both tests to operate, even if this results in trash searches being constitutional. Predicting the demise of the reasonable expectations of privacy test and ending the lockstep approach based on scholarship and U.S. Supreme Court dissents feels premature and unnecessary. The majority's criticism of *Katz* is also overblown; the reasonable expectations test and the property-trespass test are not "competing" or "inconsistent," but operate together as two important kinds of protection from different types of intrusions.[185]

Despite the criticisms offered here, the majority's authority to spurn *Greenwood* and other federal precedent is well-accepted as a matter of state constitutional law. Practically speaking, it also may well be a fine

180. *See, e.g.*, State v. Hempele, 576 A.2d 793 (N.J. 1990).
181. Katz v. United States, 389 U.S. 347, 348 (1967).
182. *Id.* at 353.
183. Kyllo v. United States, 533 U.S. 27, 40 (2001).
184. Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018).
185. *Wright*, 961 N.W.2d at 411.

experiment if it streamlines search jurisprudence without losing much of its current protections, however unlikely this seems. If anything, returning to a property-trespass approach finds strong support from originalist jurists, particularly Justices Gorsuch and Thomas.[186] Even so, while embracing history and returning to an originalist approach, the majority's conclusions as to common law property and trespass law are still tough to understand. First, the Clear Lake ordinance probably did nothing to alter Wright's property rights. Support for this view can come from the many state courts that have placed no import on local trash ordinances.[187] But more importantly, the majority's very use of the ordinance was problematic; Chief Justice Christensen discussed the interpretation of municipal ordinances in state constitutional cases, restating the principle that courts should not "read something into" an ordinance if not explicitly noted by the city.[188] At a more basic level, it is strange that the constitutional rights of Iowa's police officers and citizens hinge upon municipal ordinances that vary from town to town and that a very small minority of the population is likely even to be aware of.

Ordinance aside, common law property doctrine should work opposite the majority's analysis. The court brushes over the abandonment issue, largely relying on the Clear Lake ordinance.[189] And while it insists that its holding does not hang on the ordinance, Iowans' rights in ordinance-less towns remain largely confused by the majority's brief abandonment analysis.[190] The majority relies substantially on Justice Gorsuch's *Carpenter* dissent, but societal norms do not counsel a right to exclude trash-pickers in ordinance-less towns.[191] Without the ordinance, centuries of precedent show that trash left for collection is abandoned property.[192]

So, the majority ends up stuck between two difficult positions: ordinances can be the bedrock of property rights in Iowa's search jurisprudence, leaving individual constitutional rights beholden to city councils, or Iowa's abandonment doctrine differs from centuries of common law. Nothing about this result clears up search jurisprudence or enhances the protections of Iowans, except for the protection against trash searches if you live in a town with an ordinance like Clear Lake's.

---

186. *See Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting); *Id.* at 2267–68 (Gorsuch, J., dissenting).

187. *Wright*, 961 N.W.2d at 436 n.10 (Christensen, C.J., dissenting).

188. *Id.* at 435 (quoting State v. Childs, 898 N.W.2d 177, 184 (Iowa 2017)).

189. *Id.* at 415 (majority opinion).

190. *Id.* at 417.

191. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting).

192. *Wright*, 961 N.W.2d at 459–63 (Mansfield, J., dissenting) (collecting common law sources about abandonment and trespass).

Ultimately, this Comment concludes that *Wright*'s departure from precedent required the majority to make several radical and unfavorable changes to its search jurisprudence, further confusing the law and weakening the rights of Iowans despite trying to do the opposite. Yes, vertical federalism is a well-accepted doctrine—state constitutions are independent. But when there is precedent as directly on point as *Greenwood*, the practical effects of rewriting search jurisprudence to get around precedent do little to bolster the value of independent state constitutionalism, and perhaps weaken it. A better answer was simply following *Greenwood,* not because Iowa is beholden to federal law, but simply because *Greenwood* resolves the issue under a more rights-enhancing framework.

B. Wright Creates an Unclear Standard for Courts and Law Enforcement

Wright can be broken into two impactful holdings: first, departing from precedent by recentering on property and trespass, and second, formulating the police-private citizen rule as the test for trespass. For one, adopting this latter rule was problematic not just as precedent moving forward but also as an exercise of appellate procedure looking backward. As Chief Justice Christensen discusses, Wright never argued for this new rule and did not brief it, and the Justices in the majority focused on minimally briefed and argued issues and cases (like *Carpenter*).[193] Appellate procedure aside, the police-private citizen test is divorced from the entire history of search and seizure jurisprudence.[194] As discussed earlier, the test comes not from any case but from a single law review article.[195]

The criticisms offered by the dissenters drive home the practical problems with this test, but they are worth expanding upon briefly here. For one, the police-private citizen rule makes little sense when considering the need for many constitutional police tactics: roadblocks, *Terry* stops, entering parks after dark, the list goes on. Further, considering the likely plethora of ordinances regulating conduct besides trash in other towns, police officers and citizens will be subjected to disparate constitutional rights from town to town based on the views of city councils. This situation will only rear its head through a rise in suppression motions challenging police conduct. Given the inherent problems with this test and problems it may cause, one hopes it is treated

193. *Id.* at 430–31. (Christensen, C.J., dissenting).
194. *Id.* at 452–53 (Waterman, J., dissenting).
195. *See* Baude & Stern, *supra* note 86, at 1825–26.

as dictum, as Justice Waterman suggested, or otherwise quickly repudiated by the Iowa Supreme Court in another case.[196]

So far, this Comment has been quite critical of *Wright*. Ultimately, though, the problems are with the reworking of Iowa's search framework rather than the ultimate judgment. To conclude that trash is protected by article I, section 8 of the Iowa Constitution, the majority essentially rewrote over a hundred years of jurisprudence. This level of experimentation is bold in almost any event, but it feels especially unwise when it throws law enforcement and constitutional rights into limbo. Rather than rewrite Iowa's search jurisprudence, the court could have followed the reasoning of New Jersey and New Mexico to hold that an individual has a reasonable expectation of privacy in their trash.[197] *Greenwood*'s reasoning is not definitively persuasive, and given Justice Gorsuch's view, the case could have been decided oppositely by reasonable jurists applying the same test.[198] If *Wright* had taken this path and simply found a reasonable expectation of privacy in trash, it would have been more in line with other state decisions, reaching the same judgment while still providing increased privacy protection in Iowa.

Of course, however, the majority ditched the reasonable expectations test in favor of the originalist property and trespass approach. But because this approach could not lead to *Wright*'s holding on its own, the court relied on the Clear Lake ordinance and fashioned the police-private citizen test to determine that a trespass occurred. Both of these steps are detached from any accepted search jurisprudence in American history. If the majority wanted to return to a trespass approach, it could have defined the test as it always had been defined: a police officer commits a trespass if they commit a common law trespass.[199] Injecting the added police-private citizen rule, which extends the definition of trespass well beyond its common law definition, will likely lead to a years-long process of law enforcement difficulties and search and seizure litigation.

The above is all to say that the majority had three better options than the result it reached. The first was to decide the case based on precedent—*Greenwood* settled this issue forty years ago, and two Iowa cases settled it identically to *Greenwood*.[200] Applying stare decisis here would have turned zero heads. The second option was simply holding that Wright had a reasonable expectation of privacy in his trash, like New

196. *Wright*, 961 N.W.2d at 456 (Waterman, J., dissenting).

197. *See supra* text accompanying note 150.

198. Carpenter v. United States, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting).

199. *See* Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 909–10 (2014) (discussing the common law conception of police trespass).

200. *See supra* notes 44–45 and accompanying text.

Jersey and New Mexico.[201] This option would have resulted in the same judgment without the new search and seizure framework. The final option was to depart from precedent and reconceptualize searches around property and trespass, as the court did, but with a focus on common law trespass and without the completely unsupported reliance on municipal code and the police-private citizen test. Inverse to the second option, this would have reconceptualized the search framework but reached the same judgment as *Greenwood*, as Wright abandoned his trash and did not suffer a trespass at the common law. However, the court took none of these options. Instead, it produced a unique and unvetted search and seizure framework in Iowa, the effects of which will surely be felt by law enforcement and in Iowa's appellate courts beyond the narrow context of trash searches.

VI. CONCLUSION

On one hand, *Wright* is simply another state constitutional case that departs from on-point federal jurisprudence. *Wright* is clearly in the minority of the many cases that have decided the trash search issue, but the fact-specific result is within reason. However, when it comes to the analytical search framework, *Wright* stands alone. State constitutional independence is certainly beneficial and well-established, but the questionable analysis undertaken by the *Wright* court fails to showcase this bedrock principle in a clear and positive light. Instead of a thorough exhibition of state constitutional independence, *Wright* offers a pastiche of federal and state cases applied in a mission-like manner to create the desired judgment, with little regard for history, the future of law enforcement, and search and seizure litigation in Iowa. Like Justice Mansfield's dissent,[202] this Comment concludes with a prediction: *Wright* will be short-lived as Iowa's defining search precedent.

201. *See supra* text accompanying note 150.
202. *Wright*, 961 N.W.2d at 464 (Mansfield, J., dissenting).