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DOCTRINAL DEAD ENDS AND STATE CONSTITUTIONAL RIGHTS INNOVATION

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In his book, *51 Imperfect Solutions*, federal Appeals Court Judge Jeffrey S. Sutton explores an issue quite familiar to state constitutional law scholars: the infrequency with which state courts interpret the individual rights provisions of their own constitutions independently of the U.S. Supreme Court's understanding of the correlative federal constitutional provisions.[1] In Sutton's view, the relative lack of independent state constitutional rights analysis belies its strategic and potentially influential role in the development of constitutional law. "For too long," he observes, "we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions."[2]

Notwithstanding the potential benefits of independent state constitutional rights interpretation, many state courts opt, either as a policy or on a case-by-case basis, to track federal precedent when addressing the provisions of their own constitutions. Responding to Sutton's argument in a recent essay, Joan Larsen—like Sutton, a federal appeals court judge well acquainted with both state and federal constitutional arguments—has offered an explanation for the tendency toward lockstep state constitutional interpretation. She writes:

> [I]f we are talking about a cognate provision . . . then there is a decent argument that when the federal Constitution borrowed the phrase from the state constitution, or vice versa, the drafters

∗ Professor of Law, New England Law | Boston. With thanks to my colleagues, Jordy Singer and Vic Hansen, for their comments and suggestions; and to Gabrielle Mainiero, for her research assistance and proofreading. And with unending gratitude to Bob Williams, who took the time with a lot of balls in the air to read and comment on this essay, which I prepared as a contribution to a Festschrift in his honor. No discussion about the role and scope of state constitutional law and interpretation today would be possible without Bob's foundational work—or without his unflagging generosity and kindness as a scholar, colleague, and friend.

1. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 19–20 (2018).

2. *Id.* at 20.

> and ratifiers of the borrowing constitution would have understood the provision to have the meaning it had in the original document.[3]

It follows, Larsen reasons, that "we would not expect to see divergence in state and federal constitutional meaning."[4]

Larsen's justification for lockstep state and federal constitutional interpretation necessarily privileges the U.S. Supreme Court's interpretation of individual rights protections. This position is problematic. As an initial matter, it discounts the jurisprudential factors that might lead a state court to rely upon the U.S. Supreme Court's understanding of the basic commitments contained in the Bill of Rights. Scott Dodson, for example, has noted "the gravitational force of federal law" on state courts, suggesting that the lack of divergence from federal law may be due to some combination of the need to conserve resources, the desire for vertical uniformity, the greater familiarity with federal law of lawyers and judges, the political cover that reliance upon federal law may provide a court, and, not least, force of habit.[5] Indeed, in respect to both the need to conserve resources and familiarity with federal law, I have argued that strong path dependence may explain a state court's willingness to rely upon federal frameworks, as such reliance over time "leads to the quasi-irreversibility of [the court's] initial investment in adapting federal doctrine to its own ends."[6]

Larsen's view also appears to presume that the members of the U.S. Supreme Court are possessed of superior interpretive skills. Even setting aside the proposition that Supreme Court Justices enjoy some kind of natural advantage when engaging in constitutional interpretation, it remains that the Court, in individual rights cases, must operate within institutional constraints that do not necessarily favor rights innovation. Lawrence Sager has discussed the strategic considerations associated with constitutional decision-making on a national scale, concluding that the Court must entertain "concerns of judicial management that are more extreme than comparable problems within state judiciaries; and these

3. Joan L. Larsen, *State Courts in a Federal System*, 69 CASE W. RES. L. REV. 525, 535 (2019).

4. *Id.*; *see also* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 726 (2016) ("[F]or the most part, state courts construe their own state constitutional protections in lockstep with the Supreme Court's interpretation of analogous federal provisions, slavishly incorporating the Supreme Court's doctrinal standards and buzzwords.").

5. Dodson, *supra* note 4, at 729–45 (discussing "explanatory vectors behind th[e] gravitational force" of federal law).

6. Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 815–17 (2011).

management concerns interact unhappily with the diversity of settings in which the rules established by the Court must operate."[7] As an example, Sager cites *San Antonio Independent School District v. Rodriguez*, in which the Court rejected an understanding of equal protection that would have had consequences for public school systems across the country.[8]

Setting aside the practical and jurisprudential considerations that might undermine a state court's unquestioning reliance upon federal precedent, there is at least one situation in which even a court committed to lockstep interpretation ought to pause: when resolution of a dispute over constitutional implementation shows that the U.S. Supreme Court's doctrinal approach to the issue has effectively led to a dead end. For purposes of this essay, I define a "dead end" as a doctrinal path that, due to changes in extra-constitutional conditions, can no longer effectively serve its original purpose. Consider, in this regard, the third-party doctrine, pursuant to which individuals have no reasonable expectation of privacy under the Fourth Amendment when it comes to information they voluntarily conveyed to third parties, like financial institutions or telecommunications service providers.[9] The third-party doctrine reflects a bargain a majority of the Court struck nearly half a century ago, between respect for individual privacy and the legitimate needs of law enforcement. That bargain failed to contemplate technological developments that would considerably expand the ways in which individuals might share personal information about their lives with third parties.[10] In the face of unquestioning judicial adherence to the third-party rationale, as one commentary put it, "pretty much nothing will be private."[11]

Given that the third-party doctrine might undermine Fourth Amendment protection for an increasing amount of personal information, it was with some relief that a majority of the Court acknowledged the

7. Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 974 (1985); *see also* SUTTON, *supra* note 1, at 17 (noting that, "[t]he more innovative a constitutional claim, the more hesitant the U.S. Supreme Court may be about" embracing it); *id.* at 18 (observing that "[a] mistaken or ill-conceived constitutional decision is also easier to correct at the state level than it is at the federal level").

8. 411 U.S. 1, 55 (1973) (declining to assume "a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States"); Sager, *supra* note 7.

9. *See* Smith v. Maryland, 442 U.S. 735, 743–44, 745–46 (1979) (telephone services); United States v. Miller, 425 U.S. 435, 442–45 (1976) (banking records).

10. *See* Lawrence Friedman, Commonwealth v. Augustine *and the Future of the Third-Party Doctrine*, 41 NEW ENG. J. ON CIV. & CRIM. CONFINEMENT 271, 272 (2015).

11. Alex Kozinski & Eric S. Nguyen, *Has Technology Killed the Fourth Amendment?*, 2011 CATO SUP. CT. REV. 15, 29–30 (2011–2012).

doctrine's limitations in *Carpenter v. United States*. There, the Court reasoned that the acquisition of cell-site location information (CSLI) from a third party service provider could constitute a search for Fourth Amendment purposes, as CSLI represents a "qualitatively different category" of information than what might have been available when the Court first introduced the concept of the third-party doctrine.[12] Indeed, the Court noted that "[t]here is a world of difference between the limited types of personal information" at issue in prior cases "and the exhaustive chronicle of location information casually collected by wireless carriers today."[13]

Carpenter essentially carves out an exception to the third-party doctrine. As Chief Justice Roberts made clear in his decision for the majority, the Court did not seek to "disturb the application" of precedent cases "or call into question conventional surveillance techniques and tools," and neither did it address "business records that might incidentally reveal location information."[14] Aside from the scope of the exception, the Court was clear about the protection CSLI would receive: because individuals have a reasonable expectation of privacy in information about their location, law enforcement agents can acquire such information only with a warrant supported by probable cause.[15]

Given the modern Court's preference for incremental change when addressing settled doctrines, *Carpenter* raises as many questions as it answers—not least whether interposing the warrant requirement between the government and electronic information held by third parties reflects the best balance of privacy and governmental interests. Alan Rozenshtein has noted the price of *Carpenter*'s warrant requirement: lower courts distinguishing cases on their facts in order to avoid it.[16] "If courts have to choose between hamstringing police and allowing privacy intrusions to go unchecked," Rozenshtein suggests, "they will likely choose the latter."[17] Concluding that imposing the warrant requirement in the context of electronic information searches would be a mistake, Rozenshtein advocates instead for a reasonableness test, pursuant to which a court would weigh such factors as the intrusiveness of the search,

12. Carpenter v. United States, 138 S. Ct. 2206, 2216–17 (2018).
13. *Id.* at 2219.
14. *Id.* at 2211, 2220.
15. *See id.* at 2221 (discussing warrant requirement).
16. *See* Alan Z. Rozenshtein, *Fourth Amendment Reasonableness After* Carpenter, 128 YALE L.J.F. 943, 950–51 (2018–2019).
17. *Id.* at 951.

whether the government had an investigatory purpose, and whether the government had a substantial interest in the information sought.[18]

Rozenshtein is likely correct that "either *Carpenter*'s rigid emphasis on the warrant requirement will have to give way to some less demanding requirement, or the third-party doctrine will live on to the extent law enforcement needs it to."[19] This is why he prefers a regulatory regime based upon reasonableness, which would "combine judicial oversight with rigorous internal compliance mechanisms, not slavish adherence to a judicially constructed, one-size-fits-all warrant requirement."[20]

But a resort to reasonableness is not without its own problems. Such a standard inevitably risks unelected judges favoring law enforcement interests at the expense of privacy. As Carol Steiker has observed, a reasonableness standard invites "concerns about official arbitrariness that rules are meant to combat."[21] Rozenshtein is not unaware of these concerns, but suggests that, as in any regulatory regime that relies upon reasonableness as its touchstone, cases will accrue and clear rules eventually will emerge. As a rejoinder, one might point to the "administrative and special-needs cases," in which, Rozenshtein acknowledges, courts "explicitly engage[] in freestanding reasonableness balancing."[22]

Rozenshtein has the choice right: the protection of electronic information held by third parties under the Fourth Amendment likely will turn on either a strict adherence to the warrant requirement, on the one hand; or judicial reasonableness balancing, on the other. Notwithstanding the effort in *Carpenter* to avoid addressing the larger problems with the third-party doctrine in today's digitally interconnected world, the Court may simply have traded one doctrinal dead end for another. Accordingly, there is an argument to be made that, at this point, a state high court addressing the same issue—even a court generally committed to lockstep constitutional analysis—ought to consider doctrinal options with more promise. In other words, the issue of what standard should control government acquisition of CSLI and like information presents state courts an opportunity to engage in rights innovation.

Rights innovation exists on a continuum. At one end, a court may distinguish a precedent case on its facts in order to extend the life of a

18. *See id.* at 953 (discussing the reasoning of a Seventh Circuit Court of Appeals case involving installation of "smart meters" to regulate electricity use).

19. *Id.* at 958.

20. *Id.*

21. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994).

22. Rozenshtein, *supra* note 16, at 955.

doctrinal thread. Consider *Commonwealth v. Augustine*. There, the Massachusetts Supreme Judicial Court ruled that the state constitution protected the defendant's reasonable expectation of privacy in CSLI held by a third party because the defendant had not disclosed this information voluntarily.[23] To the extent *Augustine* can be explained on its facts, it merely foreshadowed *Carpenter*. Farther along the rights innovation continuum is outright rejection of a particular doctrine. For example, soon after the 1979 decision in *Smith v. Maryland*, in which the Supreme Court solidified the third-party doctrine, some state courts refused to apply that rationale under the search and seizure provisions of their own constitutions.[24]

More substantive state constitutional rights innovation may involve reconsideration of an entire doctrinal framework—or, at least of the way in which the framework's elements can be organized to serve the constitutional commitment a court seeks to implement. Consider, in this regard, an earlier decision of the Massachusetts Supreme Judicial Court, *Commonwealth v. LaFrance*. The court's holding in *LaFrance* provides a template for balancing a reasonable expectation of privacy and the government's legitimate investigative needs. The case concerned a special condition of the defendant's probation that required her to submit to searches on the request of her probation officer.[25] The condition satisfied the federal constitutional standard, which requires that probation searches be "carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement."[26]

At the same time, the Massachusetts court declined to adopt a reasonable-regulation requirement under the state constitution. The court recognized that, in light of the need to supervise a probationer to aid in her rehabilitation and to ensure compliance with probation conditions, Part I, Article 14 of the Massachusetts Constitution does not mandate that the government meet a probable cause standard.[27] Reasonable suspicion, the court concluded, "will protect the public interest, while it also protects a probationer from unwarranted intrusions into her privacy."[28] But then the court went a step further and

23. *See* Commonwealth v. Augustine, 4 N.E.3d 846, 862 (Mass. 2014). *See also* Friedman, *supra* note 10, at 281 (discussing constitutional standard for voluntary disclosures).

24. *See*, *e.g.*, State v. Hunt, 450 A.2d 952, 956 (N.J. 1982) (concluding that, from the consumer's perspective, all information conveyed to a telecommunications service provider is private).

25. Commonwealth v. LaFrance, 525 N.E.2d 379, 380 (Mass. 1988).

26. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); *LaFrance*, 525 N.E.2d at 382.

27. *LaFrance*, 525 N.E.2d at 381–82.

28. *Id.* at 381.

reasoned that, even though a lower threshold of individualized suspicion should suffice to trigger a probation search, still the state constitution demands that the government secure a warrant prior to searching.[29] In the court's view, the warrant requirement preserves an essential feature of the protection against unreasonable searches and seizures: by "[r]equiring an officer to articulate reasons for the search" to a neutral magistrate, it will tend to deter "impulsive or arbitrary governmental conduct."[30]

This is what rights innovation looks like: stepping outside whatever doctrinal box the U.S. Supreme Court has created and determining whether, in light of the competing interests at stake, there is another way to implement a constitutional command. *LaFrance*'s probation search regime could serve to address the potential impediments created by *Carpenter*'s approach to electronic information held by third parties, as well as the potential problems with deploying a reasonableness standard. By lowering the threshold for a warrant, a court would recognize the government's legitimate, and occasionally pervasive, regulatory interest in acquiring information in the hands of a third party. Adherence to the warrant requirement would continue to support the essential mechanism by which privacy is protected: the interposition of a neutral decision-maker between the government and the information it seeks.

* * *

At this point, it scarcely needs mentioning that we might not be considering the legitimacy and efficacy of state constitutional rights innovation as an answer to federal doctrinal dead ends without the career-spanning efforts of Bob Williams. He has been arguing, literally for decades, that state constitutionalism has a role to play in our federal system, not just for the citizens of the state who call a particular constitution their own, but for the work of the lawyers and judges who struggle in federal cases to give meaning to the provisions of the Bill of Rights. Larsen's argument that state constitutional interpretation of correlative provisions ought to be deferential to the federal understanding, after all, is not new—it is essentially the position that Bob has been countering across the span of his many articles and essays on the subject of state constitutional law. But Bob's argument is no less powerful for being familiar—and no less important than it was when he first articulated it. As he put it more than two decades ago, "[s]tate

29. *Id.* at 383.

30. *Id.* at 383 (quoting State v. Griffin, 388 N.W.2d 535, 545 (1986) (Abrahamson, J., dissenting)).

constitutional provisions need not, and should not, be reduced to a 'row of shadows' through too much reliance on federal precedent."[31]

With the notable exception of the First Amendment's protections of speech and religious freedom, the U.S. Supreme Court today seems unlikely to take an expansive view of many of the protections contained in the Bill of Rights. This means that there are likely to be more opportunities in the coming years for rights innovation at the state level—more opportunities, that is, for attorneys to press state judges to lead, rather than follow, when it comes to implementing rights commitments common to the state and federal constitutions, by developing rules and standards that will serve to steer the law away from the doctrinal dead ends that could diminish the value of those commitments.

31. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1063 (1997) (emphasis omitted).