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Keep Your Hands Off My Fingerprints: How State Constitutionalism Can Stop On-Site Fingerprinting Dragnets

Roger Antonio Tejada†

Introduction

On August 15, 2011, Denishio Johnson, a fifteen-year-old Black boy, looked at his reflection in a car window before waiting patiently at the bus stop on Burton Street Southeast for his friend.[1] The bus stop was right outside the parking lot of the Michigan Athletic Club (MAC) in Denishio's hometown of Grand Rapids, Michigan.[2] The MAC staff called the police on Denishio.[3] Shortly thereafter, a police officer, Elliot Bargas, drove up to Denishio and asked for his name and birth date.[4] Bargas then proceeded to check Denishio's person, take his fingerprints—without permission—photograph his face and multiple parts of his body—without permission—handcuff him, and place the teenage boy in the back of a police squad car.[5] The police eventually released Denishio once his mother confirmed his identity.[6] Denishio's photographs and fingerprints were processed and remain on file with the Grand Rapids Police Department (GRPD).[7]

Nearly a year later, on May 31, 2012, Keyon Harrison, a sixteen-year-old Black boy, was walking home from school in Grand Rapids when

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1. Johnson v. VanderKooi, 903 N.W.2d 843, 848–49 (Mich. Ct. App. 2017), *rev'd in part*, 918 N.W.2d 785 (Mich. 2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 843–50.

6. *Id.*

7. Plaintiffs-Appellants' Brief at *12–13, Johnson v. VanderKooi, 983 N.W.2d 779 (Mich. 2022) (Nos. 160958, 160959), 2021 WL 4942035 [hereinafter Pls.-Appellants' Brief to Supreme Court].

he met a friend who was struggling to carry his belongings, including a class project, and wheel his bike along at the same time, so Keyon helped by offering to carry his friend's project.[8] As the two parted ways at Union Avenue and Fulton Street,[9] Keyon handed the project back to his friend.[10] Keyon continued to the park, hoping to chase birds on the remainder of his walk home.[11] Within moments of the friends' paths diverging, Captain VanderKooi of the GRPD stopped Keyon because he was acting "suspicious."[12] After asking Keyon what he was doing and not being satisfied with his answer, VanderKooi ordered subordinate officers to search Keyon's backpack and person, finding nothing but school materials.[13] Nonetheless, VanderKooi ordered a subordinate officer to photograph and fingerprint the scared teenage boy before letting him go.[14] Keyon's fingerprints were submitted for processing and currently remain in the GRPD's files.[15]

These stories are illustrative of the hundreds of individuals—a disproportionate number of whom are Black—stopped by the GRPD in 2011 and 2012 alone.[16] The actual number of individuals stopped in Grand Rapids is substantially higher than accessible records, as the on-site photographing and fingerprinting program has existed for decades.[17] The on-site fingerprinting that Denishio and Keyon were subjected to may not have physically hurt them, but it sent a clear message: your person and privacy are less worthy of protection than your white counterparts.[18] When encounters like Denishio's and Keyon's do not end

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8. *Id.* at *9.

9. Plaintiff/Appellant's Brief on Appeal at *1, Johnson v. VanderKooi, 983 N.W.2d 779 (Mich. 2022) (Nos. 160958, 160959), 2016 WL 9331512 [hereinafter Pl./Appellant's Brief to Appellate Court].

10. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *1.

11. Pl./Appellant's Brief to Appellate Court, *supra* note 9, at *1.

12. Harrison v. VanderKooi, No. 330537, 2017 WL 2262889, at *1 (Mich. Ct. App. May 23, 2017), *rev'd in part sub nom.* Johnson v. VanderKooi, 918 N.W.2d 785 (Mich. 2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

13. *Id.* at *1–2.

14. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *10–11.

15. *Id.* at *11.

16. Dan Korobkin & Aaron M. Aksoz, *Grand Rapids' Fingerprinting Policy Is a Constitutional Nightmare. Michigan's Top Court Can End It*, ACLU (May 21, 2021), https://www.aclu.org/news/privacy-technology/grand-rapids-fingerprinting-policy-is-a-constitutional-nightmare-michigans-top-court-can-end-it/ [https://perma.cc/3KR8-7W7L] (reporting that approximately 329 Black individuals were stopped in 2011 and 2012 by the GRPD for its "photograph and print" policy, making up 75% of all individuals stopped).

17. *See id.* ("For more than 30 years, Grand Rapids, Michigan police have engaged in the egregious, unconstitutional practice of detaining people on the street and then fingerprinting and photographing anyone who isn't carrying an ID, all without a warrant.").

18. *See id.*; Sirry Alang, Donna McAlpine, Ellen McCreedy & Rachel Hardeman, *Police*

in the State killing Black and Brown people like they did in the case of George Floyd and countless others,[19] they are less likely to make the news and attract national attention, despite their lasting negative effects on communities of color.[20] However, these seemingly trivial encounters are indicative of the hundreds of years of insidious, racialized surveillance that undergird State violence against Black and Brown bodies.[21] Worse yet, even amidst a growing movement calling for police accountability and reform,[22] the surveillance of Black bodies is an ominously expanding system.[23] The Supreme Court's jurisprudence has, for decades, enabled

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Brutality and Black Health: Setting the Agenda for Public Health Scholars, 107 AM. J. PUB. HEALTH 662, 663 (2017).

19. *See, e.g.*, Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/BC5S-U46W]; German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017), https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video [https://perma.cc/Z2PT-7QU5] (noting that the jury found the police officer who killed Philando Castile, a Black man, not guilty on the charge of manslaughter); Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 12, 2022), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/Q26B-TJTN] (reporting community outrage in response to the police shooting and killing of Breonna Taylor, a Black woman). On average, police officers kill about three people per day. *See Fatal Force*, WASH. POST (Feb. 9, 2022), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/V8L5-CNPM] (presenting a database listing all people killed by police since 2015, and noting that, on average, police shoot and kill more than 1,000 people every year).

20. *See* Alang et al., *supra* note 18 (detailing how fatal injuries, adverse physiological responses, racist public reactions, financial strain, and systematic disempowerment are byproducts of police brutality which cause poor health outcomes in Black communities).

21. *See* SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 9, 13 (2015) (arguing that Blackness is a "key site through which surveillance is practiced" and is informed by the history of surveillance of Black life during slavery); Andrea Dennis, *Mass Surveillance and Black Legal History*, AM. CONST. SOC'Y: EXPERT F. (Feb. 18, 2020), https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history [https://perma.cc/9MC8-XCGN] ("Government monitoring and suppression of Black speech and conduct has been an essential feature of American society far before the public at large realized the potential dangers of widespread surveillance.").

22. *See, e.g.*, Eric Westervelt, *Cops Say Low Morale and Department Scrutiny Are Driving Them Away from the Job*, NPR (June 24, 2021), https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job [https://perma.cc/JAY6-VU7J] (discussing the impacts of "historic calls for police accountability, reform and attempts at racial reckoning" on police departments).

23. *See* Korobkin & Aksoz, *supra* note 16; Nicol Turner Lee & Caitlin Chin, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS (Apr. 12, 2022), https://www.brookings.edu/research/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/#top90 [https://perma.cc/U224-LDWL] (discussing the disproportionate impact the rise in the use of facial recognition and other surveillance technologies will have on communities of color).

this increase of police power at the expense of Americans'—particularly Black Americans'—civil rights and liberties.[24]

This Article argues that "functional state constitutionalism"[25] serves as a vehicle to provide greater protections against on-site fingerprinting in the United States' ever-expanding surveillance infrastructure. Part I discusses the Fourth Amendment and search and seizure jurisprudence related to on-site fingerprinting; it also outlines the concept of state constitutionalism and the role that state constitutions should and do play in protecting civil rights and liberties. Part II then details the photograph and fingerprinting program run by the GRPD as an example of increasingly complex dragnets.[26] It then analyzes limitations of Fourth Amendment challenges, grounded by the arguments in *Johnson v. VanderKooi*, a case that challenged the GRPD program and was recently decided by the Michigan Supreme Court.[27] This analysis reveals how federal search and seizure jurisprudence may not be the right place to stop fingerprinting dragnets, even if they prevailed in this particular case.[28] Lastly, Part III analyzes how state constitutionalism has been used in search and seizure law to date and explains why this approach is likely inadequate to stop on-site fingerprinting dragnets. Part III outlines how functional state constitutionalism can stymie the proliferation of fingerprinting dragnet programs through its emphasis on the role of state courts in our federalist system.

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24. *See* ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 39–58 (2021); MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 79–98, 113–32 (2020) (detailing how the U.S. Supreme Court's protection of civil liberties has changed over time).

25. See *infra* Section I.B.ii.3 for a discussion of functional state constitutionalism. *See also* James A. Gardner, *State Constitutional Rights as Resistant to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1004 (2003) [hereinafter Gardner, *State Constitutional Rights*] ("[T]he identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power."); JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 123–32 (2005) [hereinafter GARDNER, INTERPRETING STATE CONSTITUTIONS] (arguing that state courts should interpret their constitutions with the purpose of fulfilling their role of protecting liberty and defending against federal domination).

26. Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 109 (2010) (defining government dragnets as "programmatic government efforts to investigate, detect, deter, or prevent crime or other significant harm by subjecting a group of people, most of whom are concededly innocent of wrongdoing or of plans to engage in it, to a deprivation of liberty or other significant intrusion"); *see infra* Section II.A (describing dragnets).

27. Johnson v. VanderKooi, 954 N.W.2d 524 (Mich. 2021), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

28. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994).

I. The Fourth Amendment, Search and Seizure, and the Role of State Constitutionalism

Part I provides the necessary background on both Fourth Amendment search and seizure doctrine and state constitutionalism. To that end, Section I.A reviews relevant Fourth Amendment law that impacts the constitutionality of on-site fingerprinting. Subsection I.A.i begins with the history and framing of the Fourth Amendment. Subsection I.A.ii delineates the two most relevant doctrines to on-site fingerprinting: investigative stops, which are a notable exception to the Fourth Amendment's warrant requirement, and the "reasonable expectation of privacy" doctrine. Then, since there is no explicit Supreme Court jurisprudence regarding on-site fingerprinting, Subsection I.A.iii reviews Supreme Court dicta on the topic. Next, Section I.B explains state constitutionalism's origin and past uses, and it then outlines more recent scholarship on the role state constitutionalism can and should play.

A. While the Fourth Amendment as Conceived Would Not Allow On-Site Fingerprinting, Supreme Court Jurisprudence Suggests Federal Constitutional Law Will Allow It

i. The Origin of the Fourth Amendment

The need for protection from government overreach predates the Constitution itself. In fact, these overreaches were a catalyst for the American Revolution and the Constitution that followed.[29] Thus, to appropriately understand the expected realm of the Fourth Amendment, it is appropriate—if not crucial—to begin in precolonial times.[30] The history leading up to the drafting of the Fourth Amendment deeply impacted the form the provision took on.

English Parliament gave customs officers the power to search and seize individuals and their property without any judicial oversight through writs of assistance.[31] The unchecked discretion cultivated abuse,[32] fomenting one of the central frictions that catalyzed the

29. *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 31 (1966).

30. Amar, *supra* note 28, at 757–59; *see also* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 649 (noting that "history will often be relevant" when engaging in constitutional construction to answer "disputed questions of constitutional interpretation"). *See generally* Jack M. Balkin, *Arguing About the Constitution: Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145 (2018) (discussing the link between theories of constitutional interpretation and constitutional construction).

31. Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk,"* 50 OKLA. L. REV. 451, 453 (1997).

32. *Id.* at 454; *see also* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION 1760-1840, at 12 (2021) ("Armed with a writ of assistance . . . a customs officer in Britain could enter and search, forcibly if necessary, any manner of building.").

American Revolution.[33] Leading up to the Revolution, protests and legal battles ensued around the states, leading legislators to create several search and seizure provisions.[34] The state provisions informed, if not outright framed, the discussion of search and seizure doctrine at the Constitutional Convention.[35] In fact, James Madison's original draft of what would become the Fourth Amendment borrowed heavily from the Massachusetts equivalent;[36] Madison's draft read:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[37]

Like its Massachusetts predecessor, the federal provision had a parallel two-clause formulation. This formulation ensured that the "reasonableness" clause retained independent substantive content, while the "warrant clause" required objective judicial officers to issue warrants as an *additional* safeguard.[38] Initially, the House Committee reviewing the provision attempted to remove the "unreasonable searches and seizures" language.[39] However, Egbert Benson, a Federalist New York Representative, objected.[40] If combined into one clause, the "unreasonable searches and seizures" language could be construed to only limit searches and seizures resulting from deficient warrants, thereby severely limiting its breadth.[41] Using his leadership role in the House, Benson ensured the amendment maintained its current, parallel two-clause form, including the unreasonable search and seizure

33. Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. & CRIMINOLOGY 393, 397 n.44 (1963). For example, James Otis—a lawyer, legislator, and political activist—decried the use of writs of assistance in a speech before the Massachusetts State House; following this speech, John Adams wrote: "Then and there was the first scene of the first Act of opposition to the Arbitrary claims of Great Britain. Then and there the child Independence was born." Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 84–86 (1999).

34. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 219–23 (1993).

35. Levy, *supra* note 33, at 98–99.

36. *Id.* at 94.

37. *See* 1 ANNALS OF CONG. 434–35 (1789).

38. Levy, *supra* note 33, at 99 ("The entire provision was split into two parts separated by a semicolon. The first part fixed the right of the people and laid down the standard against unreasonable searches and seizures. The second part required probable cause for the issue of a specific warrant.").

39. Leagre, *supra* note 33, at 397; Levy, *supra* note 33, at 99.

40. Leagre, *supra* note 33, at 397.

41. *Id.*; David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 459–60 (2016).

language.[42] The Fourth Amendment of the U.S. Constitution provides, in its entirety, that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[43]

Therefore, like the original provisions denouncing writs of assistance, the Fourth Amendment requires probable cause *and* a judicial warrant to ensure proper protection against searches and seizures.

ii. Relevant Fourth Amendment Law: The "*Terry*-stop" and "Reasonable Expectation of Privacy" Doctrines

The Supreme Court has accepted the Framers' two-clause formulation and interpreted these clauses in various cases, resulting in three distinct inquiries for any case involving the Fourth Amendment: first, whether there was a search;[44] second, whether a warrant was required for the search;[45] and third, whether the search was reasonable.[46]

All searches, with or without a warrant, are subject to the reasonableness requirement.[47] The Supreme Court has held that warrantless searches are presumptively unconstitutional.[48] However,

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42. Leagre, *supra* note 33, at 398; Saleem, *supra* note 31, at 454 (noting that because the framers "feared an arbitrary, capricious and overreaching government," they created additional requirements for the issuance of warrants: probable cause, oath or affirmation, and a particular description of whatever was to be seized).

43. U.S. CONST. amend. IV.

44. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) (articulating the reasonable-expectation-of-privacy standard for what constitutes a search under the Fourth Amendment); United States v. Jones, 565 U.S. 400, 406–07 (2012) (trespassing upon the areas enumerated by the Fourth Amendment constitutes a search).

45. *See, e.g.*, Gray, *supra* note 41, at 426–29 (discussing the warrant requirement and its exceptions).

46. *See, e.g.*, Chimel v. California, 395 U.S. 752, 765 (1969) (describing what constitutes "reasonableness").

47. *See id.* at 760–62.

48. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1968) (internal citations omitted) ("We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances the failure to comply with the warrant requirement can only be excused by exigent circumstances."); *Katz*, 389 U.S. at 357 (1967) (internal citations omitted) ("Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth

searches absent a warrant are permissible where the Supreme Court has established an exception,[49] including instances where there are exigent circumstances that relax the warrant requirement.[50]

Despite the narrowness of protective search and seizure doctrine generally, the Supreme Court has created several exceptions that allow government intrusion, driven by two phenomena. First, as noted, the Court has created myriad exceptions to the warrant requirement.[51] Second, the Court's jurisprudence has increasingly emphasized balancing the "reasonableness" of a search instead of requiring probable cause and

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Amendment—subject only to a few specifically established and well-delineated exceptions."). It is also useful to consider the Court's framing in *McDonald v. United States*:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

McDonald v. United States, 335 U.S. 451, 455–56 (1948).

49. These exceptions are numerous and include searches that are consented to, searches incident to arrest, vehicle searches under many circumstances, plain view searches, and a pat-down search for weapons if a police officer believes an individual is acting suspiciously. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 338 (2009) ("Among the exceptions to the warrant requirement is a search incident to a lawful arrest."); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citing Davis v. United States, 328 U.S. 582, 593–84 (1946)) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); United States v. Harris, 390 U.S. 234 (1968) (holding that a warrantless inventory search of an automobile is constitutional), *overruled in part by Chimel*, 395 U.S. 752; Cooper v. California, 386 U.S. 58 (1967) (holding that a warrantless search of an impounded car was reasonable); Hudson v. Palmer, 468 U.S. 517, 526 (1984) ("[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."); *see also* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259–69 (2000) (outlining the historical development of the special needs doctrine and providing examples of when the doctrine has been utilized, including searches at the border; searches of prisoners, parolees, and probationers; and searches when national security has been threatened).

50. *E.g.*, Missouri v. McNeely, 569 U.S. 141, 149 (2013) (internal citations omitted) ("A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in 'hot pursuit' of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause.").

51. *See* sources cited *supra* notes 49–50 and accompanying text; *see also* California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) ("[T]he 'warrant requirement' ha[s] become so riddled with exceptions that it [is] basically unrecognizable . . . . There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take."); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1666 (2012) (estimating that just over 1% of the total number of searches conducted by law enforcement are conducted with a search warrant).

a warrant.[52] Both of these phenomena are evidenced in the on-site fingerprinting context.

One notable exception carved out of the Fourth Amendment's protection is the *Terry* investigative stop.[53] Common examples of an investigative stop include a police officer pulling over the driver of a vehicle for a traffic stop or stopping an individual on the sidewalk to ask a few questions related to a nearby crime.[54] Police departments in the United States "have likely conducted investigative stops since the early days" of their departments in the mid-1800s.[55] Nearly a century later, "the investigative stop had already become a core crime prevention tool" whereby officers would stop and interrogate individuals without probable cause under the pretense of the individual being "suspicious."[56] But at what point is this interaction a search or seizure subject to Fourth Amendment protection? The constitutionality of this procedure was undecided until *Terry v. Ohio*.[57]

The Supreme Court's *Terry* decision was a watershed moment in the devolution of the Fourth Amendment.[58] In *Terry*, the Court considered whether an officer's stop and frisk of three men without probable cause

52. Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIA. L. REV. 589, 602 (2014) ("In context after context, the criminal procedure decisions of the Burger and Rehnquist Courts abandoned the clear rules of probable cause and a warrant in favor of an increasingly free-wheeling form of reasonableness balancing."); *id.* at 610–11 ("[A]ll indications are that the Supreme Court is not just accelerating its use of groundless reasonableness, but that totality of the circumstances balancing has become the new normal in Fourth Amendment adjudication."); *see also* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 56–57 (2010) ("Indeed, there is ample evidence that Fourth Amendment reasonableness is only a modern judicial myth . . . . [T]he right-of-center majority that has dominated the Court for the last four decades has used 'reasonableness' to justify the evisceration of constitutional limits on government arrest and search authority.").

53. *See* Terry v. Ohio, 392 U.S. 1, 35 (1968).

54. Editorial, *Train the Police to Keep the Peace, Not Turn a Profit*, N.Y. TIMES (Nov. 20, 2021), https://www.nytimes.com/2021/11/20/opinion/police-traffic-stops-deaths.html [perma.cc/6HX9-TVTJ] ("Traffic stops are far and away the most common point of contact between people and the law . . . . [T]here are tens of millions of such stops each year[.]"); *see also* INT'L ASS'N OF CHIEFS OF POLICE L. ENF'T POL'Y CTR., ARRESTS AND INVESTIGATORY STOPS 1–8 (2019) (providing police agencies with concrete guidance and directives by describing the manner in which actions, tasks, and operations are to be performed in the context of arrests and investigatory stops).

55. Ben Grunwald & Jeffrey A. Fagan, *The End of Intuition-Based High Crime Areas*, 107 CAL. L. REV. 345, 355 (2019).

56. *Id.* at 355–56.

57. *Terry*, 392 U.S. 1.

58. *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 385 (1988) (discussing how the *Terry* decision unjustifiably expanded the scope of the reasonableness test).

or a warrant violated the Fourth Amendment.[59] The Court determined there was no violation; it held that a warrantless search without probable cause was allowed as long as there was an articulable basis for suspecting criminal activity and the officer had a reasonable belief that a crime was about to occur.[60] Further, a frisk was allowed if the officer reasonably believed the person to be armed and dangerous.[61] Therefore, the Court watered down the Fourth Amendment's reasonableness requirement by focusing on the reasonable suspicion standard.[62] Since this *Terry*-stop exception to the warrant requirement was created, and since the Court began emphasizing reasonableness rather than probable cause in investigative stops, federal courts have allowed increased intrusion, "longer detentions[,] and increased police force."[63]

In assessing reasonableness, the Court balances "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[64] Applying this balancing test, the Court in *Maryland v. King*, for example, held that obtaining arrestees' DNA is a "reasonable" search under the Fourth Amendment because it served a legitimate state interest and was not so invasive as to require a warrant.[65] In other words, the use of the reasonableness standard has been applied by the Court "to allow government intrusions of an individual's privacy interests without a warrant or probable cause."[66] However, because the *King* holding was in the arrest context, which does require probable cause,[67] it is unclear exactly how *King* would apply to on-site fingerprinting situations *without* probable cause.

On-site fingerprinting also implicates an individual's privacy interests. The trespass doctrine previously dominated the Court's conception of what constitutes a search under the Fourth Amendment.[68]

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59. *Terry*, 392 U.S. at 6–7.

60. *Id.* at 30.

61. *Id.*

62. *See* Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 1029–30 (2016).

63. Saleem, *supra* note 31, at 460; *see also id.* at 455–56 ("The Court . . . expanded the reasonableness clause of the Fourth Amendment to allow government intrusions of an individual's privacy interests without a warrant or probable cause.").

64. Wyoming v. Houghton, 526 U.S. 295, 300 (1999); *see also* Maryland v. King, 569 U.S. 435, 448 (2013) (weighing privacy interests against governmental interests in Fourth Amendment case involving buccal swabs).

65. *King*, 569 U.S. at 465–66.

66. Saleem, *supra* note 31, at 456.

67. *King*, 569 U.S. at 449–56.

68. *See* Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1305 (2002)

However, the Court has now long included a complementary reasonable expectation of privacy doctrine to define a search, as crystallized in *Katz v. United States*.[69] In *Katz*, the Court created a two-prong test to determine when a person has a reasonable expectation of privacy.[70] To be protected under *Katz*, a person has to exhibit "an actual (subjective) expectation of privacy" and the "expectation of privacy [must be] one that society is objectively prepared to recognize as 'reasonable.'"[71] Importantly for the analysis of the relationship between on-site fingerprinting and the reasonable expectation of privacy, Justice Stewart wrote for the *Katz* majority that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[72] On-site fingerprinting, by its very nature, occurs in public, raising questions of whether an individual has *knowingly exposed* their fingerprints to the public.

iii. The Fourth Amendment and Fingerprinting

Fingerprinting technology was incorporated into the United States criminal justice system shortly after its creation in the late 1800s and has since become a cornerstone in the administration of justice.[73] The use of fingerprinting advances many governmental interests, including public safety.[74] Courts rarely question the technology's accuracy and

(stating that, under the trespass doctrine, "a government surveillance was a 'search' if and only if the law enforcement agents (or their devices) trespassed on the property interests of the defendant"); LAURA HECT-FELELLA, BRENNAN CTR. FOR JUST., THE FOURTH AMENDMENT IN THE DIGITAL AGE 4 (2021) (detailing how the Fourth Amendment protects against physical intrusion of private spaces); United States v. Jones, 565 U.S. 400, 405 (2012) ("Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."); *see also* Olmstead v. United States, 277 U.S. 438 (1928) (holding that wiretapping is not a search or seizure because Olmstead's property rights were not violated); Goldman v. United States, 316 U.S. 129 (1942) (holding that the use of a detectaphone to hear conversations in another room was not a search or seizure under the trespass doctrine). *But see* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 77 (2004) (claiming the Court's decisions through the early twentieth century equally discussed privacy and property).

69. Katz v. United States, 389 U.S. 347, 348 (1967) (finding that the trespass doctrine's emphasis on property rights was overly narrow).

70. *Id.* at 360–61 (Harlan, J., concurring).

71. *Id.* at 361 (Harlan, J., concurring). In *Katz*, entering a phone booth created a "temporarily private place" where the defendant reasonably expected privacy; therefore, the FBI's recording of his phone call violated Katz's Fourth Amendment rights. *Id.*

72. *Id.* at 351–52 (majority opinion) (citations omitted).

73. *See* Jessica M. Sombat, *Latent Justice: Daubert's Impact on the Evaluation of Fingerprint Identification Testimony*, 70 FORDHAM L. REV. 2819, 2827–37 (2002) (outlining the development of fingerprinting as a science and its general acceptance in the justice system).

74. Robert Molko, *The Perils of Suspicionless DNA Extraction of Arrestees Under*

admissibility.[75] Courts have concluded that there is no Fourth Amendment violation in taking fingerprints "in the case of prisoners, probationers[,] and supervised releasees."[76] This is reasonable, courts have argued, largely because "these individuals have a diminished expectation of privacy."[77] Notably, the Supreme Court never directly addressed the constitutionality of fingerprinting incident to lawful arrest, as the practice became normalized in the United States before the development of modern Fourth Amendment jurisprudence.[78] Yet, many courts have upheld the use of fingerprinting because fingerprints are used solely for identification purposes and, potentially through that identification, solving crimes, which is an important government interest.[79]

The Supreme Court's holdings have not yet explicitly addressed the constitutionality of fingerprinting in *on-site* stop scenarios.[80] However,

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California Proposition 69: Liability of the California Prosecutor for Fourth Amendment Violation? The Uncertainty Continues in 2010, 37 W. ST. U. L. REV. 183, 193 (2010) (footnotes omitted) (discussing the governmental interests that fingerprinting advances such as: "1) the need to immediately and accurately identify the arrestees; 2) the ability to solve past and future crimes efficiently and accurately; 3) the need to exonerate innocent individuals; 4) the need to protect innocent individuals from even becoming suspects; 5) the need to prevent future crimes before they occur; 6) the need to protect public safety by more quickly identifying recidivist offenders and 7) the public interest in solving crimes as promptly as possible.").

75. *See, e.g.*, Stevenson v. United States, 380 F.2d 590, 592 (D.C. Cir. 1967) ("The accuracy of fingerprint identification is a matter of common knowledge."); United States v. Gonzalez, No. L-88-510, 1988 WL 139473, at *1 (S.D. Tex. Nov. 14, 1988) (quoting Davis v. Mississippi, 394 U.S. 721 (1969)) (discussing how fingerprint evidence obtained through an illegal arrest will only be suppressed if the fingerprints "provide the sole basis for probable cause").

76. Molko, *supra* note 74, at 194.

77. *Id.*; *cf.* Maryland v. King, 569 U.S. 435, 465 (2013) (extending this line of reasoning to obtaining DNA during the booking process).

78. Adrienne N. Kitchen, *Genetic Privacy and Latent Crime Scene DNA of Nonsuspects: How the Law Can Protect an Individual's Right to Genetic Privacy While Respecting the Government's Important Interest in Combatting Crime*, 52 CRIM. L. BULL., at *12 (2016) (quoting United States v. Kincade, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting)) ("The Supreme Court has never determined the constitutionality of fingerprint collection or analysis because fingerprinting was common prior to 'the modern era of Fourth Amendment jurisprudence.'"); *see also id.* (quoting *King*, 569 U.S. at 479 (Scalia, J., dissenting)) ("No authority supports the assertion that taking fingerprints was constitutional before the FBI's fingerprint database.").

79. *Id.*; *King*, 569 U.S. at 448–49.

80. On-site fingerprinting is like an investigatory stop, with the caveat that the fingerprinting process becomes a part of the stop. *See supra* Section I.A.ii (describing investigatory stops in the context of the Fourth Amendment). In other words, during the stop, a police officer presses an individual's fingers onto a fingerprint inkpad before pressing them onto a fingerprint card, thereby capturing their unique imprint. *See, e.g.*, GRAND RAPIDS POLICE, MANUAL OF PROCEDURES: FIELD INTERROGATIONS 8-1.8(f)(3)–(6) (2016), https://public.powerdms.com/GRANDRAPIDS/documents/89557 [https://perma.cc/M93D-XQ5D] (describing the process by which fingerprints are taken by Michigan law enforcement during a "field interrogation").

Supreme Court dicta indicates that the Court may likely find that on-site fingerprinting is constitutional. First, though the Supreme Court has not directly answered whether fingerprinting in itself constitutes a search,[81] it has indicated in dicta that it is not. For example, in *Davis v. Mississippi*, while the Court did not directly hold that the taking of fingerprints constitutes a search under the Fourth Amendment, it suggested that "[d]etention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."[82] A few years later, the Court cited *Davis* for the proposition that fingerprinting did not implicate a search.[83] The lack of clear Supreme Court precedent has led courts to split on whether fingerprinting constitutes a search under the Fourth Amendment.[84]

Second, the Court has also suggested that detention solely for the purposes of fingerprinting an individual does not necessarily constitute an unreasonable seizure. In *Davis*, the Court opined that "[d]etentions for the sole purpose of obtaining fingerprints" could "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[85] Further, in *Hayes v. Florida*, the Court noted in dicta that:

> There is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.[86]

The Supreme Court's whittling away of Fourth Amendment protection against searches and seizures in the fingerprinting context will likely apply to on-site fingerprinting whenever the Court squarely faces this issue. It seems likely that on-site fingerprinting will not constitute a search, and the seizure from detaining an individual to conduct the fingerprinting will in many cases be found reasonable.

With this background on how the Supreme Court has read the Fourth Amendment in the fingerprinting context, the following section considers the role that state supreme courts have played in expanding

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81. *See supra* note 78; *King*, 569 U.S. at 477 (Scalia, J., dissenting) ("The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question.").

82. Davis v. Mississippi, 394 U.S. 721, 727–25 (1969).

83. United States v. Dionisio, 410 U.S. 1, 14 (1973) (quoting *Davis*, 394 U.S. at 727).

84. *See* Johnson v. VanderKooi, 983 N.W.2d. 779, 795 (Welch, J., concurring).

85. *Davis*, 394 U.S. at 727.

86. Hayes v. Florida, 470 U.S. 811, 817 (1985).

jurisprudence beyond the Supreme Court's reading, and it prefaces possible future uses of state constitutionalism.

B. State Constitutionalism's Origin, Past Uses, and Possible Future Uses

i. State Constitutionalism's Origin and Past Uses

Many rights recognized in the colonies and state constitutions served as a template for the rights recognized in the Bill of Rights to the U.S. Constitution.[87] Consequently, interpretations of state constitutional provisions often predate interpretations of the federal Constitution. However, for a long period, many state courts accepted and applied the Supreme Court's interpretation of federal constitutional matters in state cases.[88] For nearly a century after the United States' founding, there was limited jurisprudential experimentation by state courts.[89]

However, in 1977, Justice Brennan noted that the Supreme Court "has condoned both isolated and systematic violations of civil liberties."[90] Seeing this "breach," he asked state courts to intercede and interpret their state constitutions more broadly than the Supreme Court interpreted parallel provisions of the U.S. Constitution.[91] To defend this position, Justice Brennan noted that "[p]rior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions."[92] Given this fact, the Supreme Court and state courts alike have repeatedly recognized that U.S. Supreme Court holdings on

87. Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1036 (2011).

88. *Id.* at 1036–37.

89. *Id.*

90. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); *see also* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 914–15 (1995) (quoting Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935 (1994)) ("[W]hen Justice William J. Brennan 'first suggested [in 1977] that lawyers turn to state courts and state constitutions, he did so fearing that an increasingly conservative federal judiciary would decline to protect liberty as vigorously in the past.'").

91. Brennan, *supra* note 90, at 503–04 ("With federal scrutiny diminished, state courts must respond by increasing their own."); *see also* David C. Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75, 75 (2002) (citations omitted) ("Justice Brennan, in his now famous *Harvard Law Review* essay, called on state courts to 'step into the breach' left by the Burger Court's rights-narrowing decisions.").

92. Brennan, *supra* note 90, at 501 (citation omitted); *see also* Valerie L. Snow, *State Constitutions and Progressive Crimmigration Reform*, 23 U. PA. J.L. & SOC. CHANGE 251, 258 (2020) (citation omitted) ("[M]any rights recognized in the colonies and states during the seventeenth and eighteenth centuries served as a template for the rights recognized in the Bill of Rights to the U.S. Constitution.").

constitutional protections serve as a "floor" for rights and protections, whether jurisprudential or legislative, and states can exceed those minimum protections.[93] This is particularly true when state courts "appeal to their state constitution's unique history and distinct clauses to vindicate rights on unique grounds."[94]

Since Justice Brennan's call to action, "many state courts have, in fits and starts, come to play the role of rights innovators—recognizing important rights and protections well before the U.S. Supreme Court does so, or extending rights beyond [the] Court's baseline requirements"[95] on multiple civil rights and liberties issues.[96] This development in state constitutionalism has been called New Judicial Federalism (NJF),[97] whereby "state supreme courts rely on their own constitutions to recognize rights that were *more protective* than those recognized by the United States Supreme Court under the Federal Constitution."[98]

ii. State Constitutionalism's Possible Future Uses

State constitutionalism can re-erect boundaries that the Supreme Court has eroded, and the vast majority of state supreme courts have done just that.[99] Given the fact-intensiveness of criminal cases, state

93. Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decisions*, 47 DUQ. L. REV. 503, 505–06 (2009); Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 954 (2020).

94. Snow, *supra* note 92, at 258.

95. *Id.* at 252 (citing John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 27 (2016)). As early as 1988, there were over 400 independent state constitutional decisions. David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 221 (1988).

96. *See* Snow, *supra* note 92, at 252–53 (footnotes omitted) (listing "marriage equality, school funding, capital punishment, criminal procedure and search and seizure doctrine, legislative redistricting, and property rights" as examples of state constitutionalism doctrine being used to expand rights and protections); Brody, *supra* note 91, at 76.

97. Williams, *supra* note 93, at 951. As NJF has aged and become less "new," scholars have begun referring to the enduring phenomenon as simply state constitutionalism. *See id.* at 975–76 (describing how NJF brought attention to state constitutions and has become an enduring element of state constitutionalism). This Article typically refers to state constitutionalism throughout, except for when introducing the topic of NJF or in direct quotations.

98. *Id.* at 951. It is important to note that there has been considerable disagreement about *how* to interpret state constitutions. *See infra* Section I.B.ii.

99. Brody, *supra* note 91, at 79 ("Overall, forty-one . . . states provided protections greater than those required by the U.S. Constitution in at least one doctrinal area."). However, unsurprisingly, not all state supreme courts have been equally active. Of the cases where state supreme courts have expanded civil rights and liberties beyond the federal constitutional floor, a disproportionate number have taken place in Alaska, California, Florida, and Massachusetts. *Id.* at 77. Even decades ago, much closer to the genesis of the

constitutionalism has been especially prominent in this field,[100] including substantive search and seizure law specifically.[101] For example, states have rejected Supreme Court jurisprudence related to surveillance, search warrants, the plain view doctrine, arrests, home entries, bodily intrusions, consent, searches after arrest, *Terry*-line cases, automobile searches, and administrative and regulatory searches.[102]

However, "the state constitutional search and seizure decisions have not developed new and independent approaches to the law. Despite considerable rejection of Supreme Court results, there has been little in the way of independent search and seizure doctrine."[103] That is to say that even when state high courts reject Supreme Court holdings, they tend to follow the lines of inquiry used by the Supreme Court.[104] Put simply, their divergence is in outcome, not necessarily process.[105] Ultimately, "New Federalism is marked by a *selective* revolt against certain portions of search and seizure law."[106] For example, despite the uniqueness of the *Terry* stop doctrine, "no state appears to reject *Terry* principles."[107]

This selective revolt may be in part because Justice Brennan's call for state constitutionalism lacked "a theory of interpretation to guide state courts in deciding when they should depart from federal constitutional decisions."[108] Further, while Justice Brennan pushed for the authority of states to construe their constitutions differently, he did not indicate that states should consider an *independent basis* for departing from federal constitutional decisions.[109] Justice Brennan's conception of state constitutionalism therefore both invited and constrained state courts' interjection into the discussion of constitutionally protected rights.[110]

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state constitutionalism "revolution," courts were not very revolutionary. Instead, multiple studies found that state supreme courts followed federal analysis the majority of the time. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 46 (citing studies which show states followed Supreme Court analysis 69% of the time and followed the Court's holdings in nearly 70% of all cases).

100. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 124 (2009). *See generally* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991) (exploring the effects of state constitutionalism on different individual rights within criminal law).

101. LATZER, *supra* note 100, at 51–88.

102. *Id.*

103. *Id.* at 73.

104. *Id.*

105. *Id.*

106. *Id.* at 74.

107. *Id.* at 66.

108. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017).

109. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 177 (2018).

110. *See id.*

In the years following Brennan's call for state constitutionalism, three prominent theories of state constitutional interpretation have emerged.

1. The Secondary Approach

The most prominent theory of state constitutional interpretation is the "interstitial" or "secondary" approach.[111] "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined."[112] In other words, in the secondary approach, state constitutional law is relegated to a second-tier status, considered only after its primary counterpart of federal constitutional law has been examined.

Under this approach, a court would diverge from federal precedent for one of three reasons: flawed analysis, structural differences between the state and federal governments, or distinctive state characteristics.[113] However, "reliance on debates about the meaning of a federal guarantee is not apt to dignify the state constitutions as independent sources of law."[114] That is to say, if state constitutions are merely another tool for analyzing the federal Constitution, it denigrates any conception of them as another source of protections for our rights. It implies that state constitutions are superfluous, which goes against the very principles of federalism.[115] Indeed, the purpose of horizontal and vertical fragmentation of our government was to divide power sufficiently to ensure it could and would not accumulate in the hands of a single tyrant.[116] The subdivision of power among distinct and separate state and federal courts incorporates a structural and institutional level of security for people's rights.[117] Folding together, if not outright subsuming, state courts' theory of rights into the federal conception takes away this "double security" whereby "different governments . . . controul [sic] each

111. *Id.* at 182.

112. State v. Sanchez, 350 P.3d 1169, 1174 (N.M. 2015).

113. SUTTON, *supra* note 109, at 182. Some other state courts have attempted to develop their own criteria for when to stray from Supreme Court reasoning and precedent. These include differences in the text, the state's constitutional history, preexisting state law, structural differences in the constitutions, matters of particular state or local concern, and documents from the state's constitutional convention(s). Liu, *supra* note 108, at 1314.

114. SUTTON, *supra* note 109, at 177.

115. *Id.* at 182.

116. *See* THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob Ernest Cooke ed., 1961).

117. *See* THE FEDERALIST NO. 51, at 351 (James Madison or Alexander Hamilton) (Jacob Ernest Cooke ed., 1961).

other."[118] Put simply, the secondary approach to constitutional interpretation undermines the Constitution's core federalist principle of a divided government.

2. The Primacy Approach

As opposed to the secondary approach, Court of Appeals judge and state constitutionalism scholar Jeffrey Sutton calls for state courts to focus on their state constitution first—the "primacy approach."[119] State courts should use their "distinct state texts and histories[,] and draw[] their own conclusions from them."[120] In doing so, they can break away from the "unfortunate myth that federal constitutional law remains front and center—the first line of inquiry—leaving state constitutional law as a second thought."[121] With the "primacy" approach, state supreme court justices can offer the level of protection for individual liberty rights that they believe is warranted.[122] Importantly, this perspective allows for ongoing constitutional debate that "modulates the timing, process, and substance of individual-rights enforcement" across the nation.[123]

However, the "primacy approach" may be too limited, as it unnecessarily restricts the ability of state and federal courts across the country to inform each other's readings and conceptions of constitutional principles. Under Sutton's approach, state courts should diverge based on differences between the state and federal text or history.[124] For the constitutional dialogue that Sutton envisions, however, it would be more useful for state and federal courts to engage "in a *single* discourse, interpreting similar texts or principles in their respective constitutions within a common historical tradition or common framework of constitutional reasoning."[125] By having state and federal courts grapple with similar texts and principles, state courts' decisions would be most impactful because they would not be "readily cabined or distinguished on

118. *Id.*

119. SUTTON, *supra* note 109, at 181 (internal quotations omitted) ("[A]pplication of the state constitution is logically prior to review of the effect of the state's total action under the Federal Constitution and indeed first in time and first in logic. By adhering to this natural sequence, state courts claim the rightful independence of their state constitutions.").

120. *Id.* at 177. State courts can bring to bear "all the traditional tools of constitutional analysis: text, structure, history, controlling state precedent, and the values of the state polity." GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 44.

121. SUTTON, *supra* note 109, at 178.

122. *Id.* at 183.

123. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1310 (2019) (reviewing SUTTON, *supra* note 109).

124. *Id.*

125. *Id.* at 1304.

state-specific grounds."[126] "Although state constitutionalism may benefit from 'first-principle inquiries' into 'local language, context, and history,' . . . our system of judicial federalism contemplates redundancy in interpretive authority . . . ."[127] This redundancy is justified not simply because different judges may interpret text differently, but because it serves the crucial federalist principle of vertically disaggregated power.[128]

3. The Functional Approach

An alternative theory of state constitutional interpretation—the functional approach—incorporates elements of Sutton's primacy theory, while encouraging an explicit discourse between state and federal courts. The functional approach emphasizes that, for federalism to work, state and national governments serve different functions, and it is therefore "inevitable that their respective constitutions . . . should also serve somewhat different functions."[129] This approach posits that one of the core functions of state courts, like their federal counterparts, is to monitor and resist actions of their analogues in order to protect the public.[130] They can achieve this goal by construing state constitutions to guarantee greater rights than the corresponding federal Constitutional provision provides.[131] Just like the primacy approach, state courts can do so without following or even acknowledging federal constitutional law.[132]

Crucially, the functional theory of state constitutionalism posits that it can be proper to consider a decision's "federalism effects," and these effects can "furnish a legitimate normative ground on which to rest a construction of the state constitution."[133] In other words, state high court judges need not limit their divergence from federal precedent to different text, history, and structure.[134] What's more, they can construe provisions with the goal of creating a specific impact on federalism, even if other tools of constitutional interpretation indicate a different outcome.[135] To be clear, the primacy approach of considering the state text, framers'

126. *Id.* at 1330 (citing Liu, *supra* note 108, at 1321–22) ("Although state constitutions vary in their language and content, the recurring cross-pollination of constitutional concepts indicates that state constitutions are both sources and products of a shared American legal tradition.").

127. *Id.* at 1338 (quoting SUTTON, *supra* note 109, at 177).

128. *Id.*; *see also supra* notes 116–118 and accompanying text.

129. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 18.

130. *See id.* at 18–19.

131. *Id.* at 19. Additionally, "they may resist national power indirectly by construing the state constitution in ways that facilitate resistance by other organs of state government." *Id.*

132. *Id.* at 20.

133. *Id.* at 195.

134. *Id.*

135. *Id.*

intent, and legislative history would still be used, and federal and sister courts' reasoning could be referenced, but these analyses would be supplemented by the state supreme court considering how its decision would impact current and future abuses of power and intrusions on civil liberties.[136] By interpreting their constitutions functionally, state courts best situate themselves to ensure their holdings can fill gaps left by their federal counterparts.[137]

In summary, there are three overlapping, yet distinct theories of state constitutional interpretation: the secondary, primacy, and functional approaches. The secondary approach looks to state constitutional law only after state courts find that the federal counterpart does not resolve the issue.[138] The primacy approach, as the name suggests, flips this sequence, and state courts begin their analysis with the state constitution.[139] This method allows state courts to provide the level of protection they deem appropriate, irrespective of how the Supreme Court has interpreted the right in question. The functional approach goes a step further and asks state courts to explicitly consider their role in the American federalist structure. In doing so, the functional approach allows state courts to follow suit of the primacy approach and not consider federal constitutional law, or to explicitly consider how federal constitutional law falls short of protecting individuals' rights. Accordingly, this Article joins scholarship suggesting that functional interpretation is the theory state courts should apply when construing constitutional text. Moreover, this Article bolsters this contention by showcasing the importance of the functional approach by focusing on a specific case study: the legality of on-site fingerprinting in Michigan.

II. Racialized Dragnets, On-site Fingerprinting, and Where Federal and State Constitutional Law Fail

This Part uses a case study to showcase the importance of state constitutionalism in the context of the Fourth Amendment. Section II.A details what dragnets are and how increasingly complex dragnets disproportionately impact communities of color, especially as technology continues to advance at lightning speed. Section II.B outlines how various investigatory stop policies have been used as dragnets, including the GRPD investigatory stop policy, which innovatively adds the additional dragnet of on-site fingerprinting to its investigative stops. Section II.C

136. *Id.* at 195–97.

137. See *infra* Section II.C.iii for a case study of state constitutionalism. See *infra* Part III for a discussion of the role functional state constitutionalism can take in the future of law enforcement dragnets.

138. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 44.

139. *Id.*

demonstrates how Fourth Amendment jurisprudence on fingerprinting does not provide adequate protection for the privacy interests in one's fingerprints through a review and analysis of the arguments in *Johnson v. VanderKooi*, a case challenging the GRPD photograph and fingerprint program.[140] Lastly, Section II.D shows how state constitutionalism can fail if it only focuses on the primacy and secondary approaches of state constitutional interpretation.

A. Dragnets Meet Technological Advancement

Dragnets are "programmatic government efforts to investigate, detect, deter, or prevent crime or other significant harm by subjecting a group of people, most of whom are concededly innocent of wrongdoing or of plans to engage in it, to a deprivation of liberty or other significant intrusion."[141] Thanks to the Supreme Court's acquiescence, modern-day law enforcement liberally incorporates and relies on dragnets.[142] For example:

> *Without any individualized suspicion or judicial preclearance*, criminal offenders must submit to strip searches and swabs for DNA analysis, school children must undergo drug testing, motorists are stopped at roadblocks and checkpoints, and pedestrians in our major cities are monitored by camera systems. Data mining programs covertly sweep through hundreds of thousands of records containing all sorts of personal information upon little or no showing of cause. And everyone's personal effects are uniformly scanned and searched at borders, airports, and various other major travel hubs.[143]

Notwithstanding their common usage, these dragnets "pose serious threats to liberty and social stability."[144] Perversely, dragnets incentivize pretextual police action.[145] As previously discussed, the Supreme Court has allowed an investigative stop exception to the warrant requirement as long as there is "reasonable suspicion."[146] However, police departments have abused this discretion and amassed information from large swaths of communities while claiming they suspect *individuals* of nefarious action.[147] For example,

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140. *See* Johnson v. Vanderkooi, 983 N.W.2d 779 (Mich. 2022).

141. Slobogin, *supra* note 26, at 110.

142. *Id.*

143. *Id.* at 108 (emphasis added).

144. *Id.* at 109.

145. *Id.* at 125 ("[B]ecause they are so easy to justify, dragnets provide tempting opportunities for pretextual police actions."). Worse yet, this pretext is not limited to individual spheres of privacy, leading to increasingly complex and overlapping networks of intrusion. *Id.*

146. *See supra* Section I.A.ii; Terry v. Ohio, 392 U.S. 1 (1968).

147. Slobogin, *supra* note 26, at 126 ("[D]ragnets can be disguised as actions based on

> [O]fficers rely on countless other factors in justifying the hundreds of thousands of stops they conduct each year, and officers may very likely be applying some of those factors unfaithfully as well. That's particularly true for softer factors, like suspicious bulges and furtive movements, which officers frequently cite as bases for stops.[148]

These subjective factors are likely vulnerable to cognitive distortion and bias, especially in the context of race or threatening situations.[149] Concerningly, these dragnets are likely to proliferate[150] due to technological advances and "the advent of profiling science mak[ing] dragnets even more tempting to government officials."[151] In turn, dragnet policies have extended from those convicted of violent felonies to those convicted of non-violent felonies,[152] and in the case of the Grand Rapids Police Department, to those merely stopped and frisked.[153]

The negative consequences of dragnets are hard for many law-abiding citizens to conceive. Is it not a good thing that law-abiding citizens' information is being used to catch the bad guys? This line of thinking has a fair amount of logic. However, as the Framers pointed out, is there not something odd about all individuals being treated like

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individualized suspicion. For instance, the federally funded program Operation Pipeline is *designed* to use traffic violations, which all of us commit all of the time, as means of obtaining consent or otherwise gaining authorization to search the car that is stopped, and the purpose behind many antiloitering statutes is to give police authority to arrest people believed to be affiliated with gangs.").

148. Grunwald & Fagan, *supra* note 55, at 398 (footnote omitted).

149. *Id.* at 398 n.157; *see also* Andrew R. Todd, Kelsey C. Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384, 384 (2016) ("[P]articipants had . . . more difficulty identifying nonthreatening stimuli after seeing [images of] Black faces than after seeing White faces . . . ."); Richard R. Johnson & Mark A. Morgan, *Suspicion Formation Among Police Officers: An International Literature Review*, 26 CRIM. JUST. STUD. 99, 100, 107–09 (2013) (discussing how officers use racial characteristics and non-verbal cues in developing suspicion about suspects on the street).

150. Slobogin, *supra* note 26, at 109 ("[G]eneral-warrant-type operations are likely to increase astronomically in the near future . . . .").

151. *Id.* at 121; *see also id.* at 109 (describing the impetus behind the increasing enticement as: "First, technological advances—cameras equipped with zoom and nightscope capacity, computers that can process millions of records in minutes, detection equipment that can see through clothes—have made dragnets more efficient, effective, and economical, or at least government officials think so. Second, concerns about national security, heightened since September 11, 2001, make such dragnets even more alluring than usual. Third, the dragnet mentality dovetails with government's infatuation with profiling . . . .").

152. *Id.* at 123 (citing State v. Martin, 955 A.2d 1144 (Vt. 2008)). Further, "programs aimed at arrestees are probably not far behind." *Id.* (citing United States v. Pool, No. 09-10303, 2010 WL 3554049 (9th Cir. Sept. 14, 2010)).

153. *See infra* Section II.C.

criminals in the hope of finding a smaller subsection of the population that is actually committing crimes?[154] As the Supreme Court has noted:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. *This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.* The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[155]

Many are able to turn a blind eye because they do not feel the weight of these privacy intrusions. Instead, the brunt of this burden is felt by communities of color—whether they are a Latinx person who lives near the U.S.-Mexico Border, an Arab-American trying to travel by airplane, or a Black person simply trying to walk home.[156]

B. Examples of How Investigative Stop Dragnets Disproportionately Impact Communities of Color

Case law and Department of Justice (DOJ) investigations alike reveal that police departments across the country disproportionately violate the Fourth Amendment rights of Black people and of people of color more generally. In *Floyd v. City of New York*, plaintiffs brought a putative class action against New York City alleging that the city's stop-and-frisk policy violated their Fourth and Fourteenth Amendment rights against unreasonable searches and seizures.[157] At the core of this claim was the assertion that officers stop Black and Hispanic people more frequently

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154. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (Da Capo Press 1970) (1937); THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326 (Jonathan Elliot ed., 2d ed. 1836).

155. McDonald v. United States, 335 U.S. 451, 455–56 (1948) (emphasis added).

156. *See* Slobogin, *supra* note 26, at 107, 124–25 (internal citations omitted) ("Many readers may feel perfectly secure from this kind of pressure in their lives. But imagine you are a Mexican American in Southern California who is subjected to document checks on major highways far from the border, or a student who has your blood drawn or urine checked because you want to play in the school band. Or imagine you are an inner-city resident subject to routine checkpoint stops as you walk around your own neighborhood, or an Arab American who is tracked on camera or through digital means, singled out at travel centers, and subject to FBI interviews because a data-mining program indicates that you fit a terrorist profile."); *cf. Surveillance City: NYPD Can Use More Than 15,000 Cameras to Track People Using Facial Recognition in Manhattan, Bronx and Brooklyn*, AMNESTY INT'L (June 3, 2021), https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed/ [https://perma.cc/BKS9-H393] (detailing how the most surveilled neighborhood in New York City has residents who are nearly 90% people of color, and 54.4% are Black residents specifically).

157. Floyd v. City of New York, 959 F. Supp. 2d 540, 583 (S.D.N.Y. 2013).

due to racial discrimination.[158] Ultimately, a comparative statistical analysis validated the plaintiff's claims: the New York Police Department (NYPD) engaged in rampant violations of Blacks' and Hispanics' Fourth Amendment rights over a decade—the magnitude of which "will almost certainly never be known."[159] Statistical evidence indicated that the best predictor for the rate of stops was the racial composition of a given geographical unit, with the NYPD carrying out more stops in areas with a greater number of Black and Hispanic residents.[160] Despite thorough and consistent notice of constitutional problems, New York City's decade-long stop-and-frisk program continued, violating the Fourth Amendment rights of tens of thousands of Black and Latinx individuals.[161]

Similarly, a DOJ investigation into the Ferguson Police Department (FPD) found that Black people are more likely to be stopped, searched, arrested, and subjected to violence.[162] FPD reported 11,610 vehicle stops between October 2012 and October 2014; Black individuals accounted for 85% of those stops despite making up only 67% of the population.[163] In the same two-year period, Black people were the subjects of 97% of *Terry* stop searches, constituted 92% of cases where both passengers were asked to exit a vehicle during a search, and were five times as likely to have a search that lasted more than thirty minutes.[164] Even after controlling for non-race-based variables, Black individuals remained 2.07 times more likely to be searched, be issued citations, and be arrested.[165] As expected, disproportionate targeting is only exacerbated when officers have a high degree of discretion.[166]

Moreover, a DOJ inquiry into the Baltimore Police Department (BPD) found rampant abuses of Black citizens' Fourth Amendment rights.[167] Nearly half of BPD stops occurred in "two small, predominately African-American districts that contain only 11 percent of the City's population."[168] The pattern of racially targeted stops is especially

158. *Id.*

159. *Id.*

160. *Id.* at 589.

161. *Id.* at 572.

162. C.R. DIV., U.S. DEP'T OF JUST., THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 63–64 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/V5HN-Y7UJ].

163. *Id.* at 64.

164. *Id.* at 65.

165. *Id.*

166. *See id.* at 65–67.

167. *See* C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/JB6M-KN4T].

168. *Id.* at 4.

pronounced in the pedestrian context: "BPD stopped African-American residents three times as often as white residents after controlling for the population of the area in which the stops occurred."[169] Despite significant variation in district composition, the proportion of Black individuals stopped exceed their share of population in each of BPD's nine districts.[170] Notably, "[o]ne African-American man in his mid-fifties was stopped 30 times in less than [four] years," not one of which resulted in a citation or criminal charge.[171]

In sum, the Baltimore Police Department, like its counterparts in New York and Ferguson, was found to routinely racially discriminate leading up to and during stops, often using stops as a key method to racially profile Black men. While this data is not exhaustive, it demonstrates a harrowing commonality between the abuses of police departments in three jurisdictions,[172] with Grand Rapids, Michigan likely appropriately added to the list.

Much like their New York, Ferguson, and Baltimore counterparts, the GRPD disproportionately uses investigatory stops on Black people. However, their policy and customs go a step further and allow police officers to photograph and fingerprint individuals who do not have identification when an officer questions them.[173] For over thirty years, GRPD has implemented this photograph and fingerprint program, also known as "photograph and print," or "P&P" for short.[174] Under this policy, GRPD officers may perform a P&P while "writing a civil infraction or appearance ticket" or "in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident."[175] Notably, GRPD officers "are *not* required to make a probable cause determination before performing" the procedure[176]—despite the Fourth Amendment's clear language on the issue. This standard holds true even when these individuals were not charged with a crime or arrested and even when there was no evidence of criminal activity.[177]

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169. *Id.* at 5.

170. *Id.*

171. *Id.*

172. *Cf.* "*Get on the Ground!": Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, HUM. RTS. WATCH (Sept. 12, 2019), https://www.hrw.org/report/2019/09/12/get-ground-policing-poverty-and-racial-inequality-tulsa-oklahoma/case-study-us# [https://perma.cc/XPJ4-DBSR] (reporting on the negative impact of policing on Black communities in Tulsa, Oklahoma, including finding that "black people, even regardless of wealth or poverty, disproportionately receive aggressive treatment by police").

173. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *8.

174. *Id.* at *3.

175. *Id*. at *8–9 (citation omitted).

176. *Id.* at *9 (citation omitted) (emphasis added).

177. *Id.* (describing the process that comes after a "photograph and print" is collected);

Facing public backlash after a lawsuit was filed regarding the P&P policy, the GRPD claimed their program has been mostly discontinued, as they changed their policy to require "highly suspicious" rather than "suspicious" behavior.[178] In other words, it has not been discontinued. Instead, it has swapped one squishy, undefined standard for another—both subject to officers' wide discretion. If the GRPD's behavior is acceptable, it would suggest a blueprint for other cities: photograph and fingerprint Black communities for as long as possible,[179] store the information gathered by the dragnet in perpetuity,[180] offer to largely discontinue the program while still allowing abundant discretion to officers,[181] and then continue to amass a repository of fingerprints without so much as a *mea culpa*.[182]

Put simply, the police can disguise dragnets like fingerprinting by claiming an individual was "suspicious" and possibly linked to a crime, thereby creating the "need" to take and log their fingerprints. If left unchecked, this dragnet, combined with new fingerprinting technology, will spread.[183] This spread will likely once again be at the expense of communities of color.[184]

C. Johnson v. VanderKooi *Suggests Federal Constitutional Law May Not Protect Against Fingerprinting Dragnets*

With this explanation of why fingerprinting dragnets like the GRPD's are worrisome and should be stopped, this section analyzes the arguments made in *Johnson v. VanderKooi*, the case challenging the

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see also Police Photograph and Fingerprint Without Probable Cause, ACLU MICH. https://www.aclumich.org/en/cases/police-photograph-and-fingerprint-without-probable-cause [https://perma.cc/CV4J-3D3R] (explaining that the "photographing and printing" procedure has been used on about "1,000 people per year, many of whom are African American youth").

178. Ryan Boldrey, *Case Against Grand Rapids Police for Targeting Black Youth Heads to Michigan Supreme Court*, MICH. LIVE (Mar. 1, 2021), https://www.mlive.com/news/grand-rapids/2021/03/case-against-grand-rapids-pd-for-targeting-black-youth-heads-to-michigan-supreme-court.html [https://perma.cc/9QM8-NLCW]; Bryce Huffman, *GRPD Says It Won't Go Back to Old "Photos and Prints" Policy Despite Favorable Court Ruling*, MICH. RADIO (Nov. 25, 2019), https://www.michiganradio.org/post/grpd-says-it-wont-go-back-old-photos-and-prints-policydespite-favorable-court-ruling [https://perma.cc/K4DJ-YGSA].

179. Boldrey, *supra* note 178 ("[T]hree out of four instances where the practice is put to use by Grand Rapids Police officers involve innocent Black teens.").

180. *See Police Photograph and Fingerprint Without Probable Cause*, *supra* note 177.

181. Boldrey, *supra* note 178.

182. *See Mea culpa*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining mea culpa as "[a]n acknowledgment of one's mistake or fault").

183. *Cf.* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) (describing how, if allowed, espionage networks can spread and become commonplace to the point of infiltrating your home under existing Fourth Amendment law).

184. *Cf.* Lee & Chin, *supra* note 23 (describing increasing law enforcement surveillance technologies and their effects on communities of color).

GRPD's photograph and fingerprint program, to demonstrate how the Supreme Court's search and seizure jurisprudence may not be enough to stop fingerprinting dragnets in all circumstances.[185] This uncertainty demonstrates the need for state constitutionalism to fill the gap.

i. Background

Denishio Johnson and Keyon Harrison, two of the teenagers who were subjected to the GRPD "photograph and print" program,[186] brought § 1983 claims[187] against the city for violating their rights under the Fourth Amendment.[188] On remand, the Court of Appeals concluded that the challenged policy did not violate Plaintiffs' Fourth Amendment right to be free from unreasonable search and seizures because the on-site photograph and fingerprint program was based on reasonable suspicion during a valid *Terry* stop.[189] This substantive holding was appealed, and the Michigan Supreme Court reversed.[190]

ii. Arguments

This subsection highlights the three key arguments put forth by Plaintiffs' counsel in *Johnson v. VanderKooi*. First, they argued that while the trespass approach to the Fourth Amendment is typically applied to property, it should also apply to government intrusions on a person's body, such as fingerprinting.[191] Second, they argued that Plaintiffs' reasonable expectation of privacy was infringed.[192] Third, Plaintiffs' counsel argued that fingerprinting during a *Terry* stop is unconstitutional because of the fingerprinting's purpose, scope, and duration.[193] An analysis of these arguments reveals—and the Michigan Supreme Court's

185. *See* Johnson v. Vanderkooi, 983 N.W.2d 779 (Mich. 2022).

186. *See supra* notes 1–15 and accompanying text.

187. 42 U.S.C. § 1983 (providing civil actions for the "deprivation of any rights, privileges, or immunities secured by the Constitution," including deprivation which stems from "any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia").

188. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *13–15 (noting that the trial courts granted summary judgment in favor of Grand Rapids because the violations did not derive from a "policy or custom" of the city); *see* Johnson v. VanderKooi, 903 N.W.2d 843, 848–49 (Mich. Ct. App. 2017), *rev'd in part*, 918 N.W.2d 785 (2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022); Harrison v. VanderKooi, 2017 WL 2262889, at *1 (Mich. Ct. App. May 23, 2017) (affirming the trial courts' decisions), *rev'd in part sub nom.* Johnson v. Vanderkooi, 918 N.W.2d 785 (2018) (reversing and remanding to the Court of Appeals to directly address the Fourth Amendment claims in the consolidated appeals), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

189. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *14–15.

190. *Johnson*, 983 N.W.2d 779.

191. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *16–18.

192. *Id.* at *21.

193. *Id.* at *31–32.

consideration of these arguments corroborates—how muddled Fourth Amendment jurisprudence is when it comes to on-site fingerprinting. The ultimate holding of *Johnson v. VanderKooi*—that the fingerprinting constituted a search under the Fourth Amendment, though the court did not determine whether or not the Fourth Amendment was violated—still makes it unclear how successful similarly situated Plaintiffs' claims would fare under the Supreme Court's jurisprudence.

Even though it convinced the Michigan Supreme Court, at least two possible issues befall Plaintiffs' trespass argument that could lead to different rulings in future cases.[194] In *Johnson v. VanderKooi*, the Plaintiffs relied on *Grady v. North Carolina* to say that physical trespass doctrine is not limited to homes and personal property but also includes contact to the human body.[195] First, while the Michigan Supreme Court accepted that fingerprinting is a search under the trespass doctrine,[196] it did not necessarily have to strike the practice down as unreasonable.[197] In *Grady* itself, the Court remanded the case for a determination of the reasonableness of the intrusion.[198] As is detailed later in this discussion, the court in *Johnson v. VanderKooi* found that on-site fingerprinting was not reasonable as part of a *Terry* stop;[199] however, the court remanded the case to the court of appeals to determine whether or not Keyon Harrison freely and voluntarily consented to the fingerprinting, thereby

194. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *16–18 (citing *United States v. Jones*, 565 U.S. 400 (2012)) (arguing that a physical trespass to a constitutionally protected area for the purpose of obtaining information is a search under the Fourth Amendment); *id.* (citing *Grady v. North Carolina,* 575 U.S. 306 (2015)) (arguing that the physical trespass doctrine is not limited to homes and personal property but also includes contact to the human body and that placing ink onto someone's fingers and physically manipulating their hands and digits onto the fingerprint card is a physical intrusion in order to obtain information, beyond what a private citizen may do, and is therefore a search worthy of Fourth Amendment protection).

195. *Grady*, 575 U.S. at 309 ("In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."); *see also Jones*, 565 U.S. at 406 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."); Florida v. Jardines, 569 U.S. 1 (2013) (citing *Jones*, 565 U.S. at 406 n.3) (affirming that a search occurs when the government gains evidence by physically intruding on constitutionally protected areas).

196. *Johnson*, 983 N.W.2d at 787 ("The fingerprinting of each of the plaintiffs in these cases constituted a physical trespass onto a person's body, a constitutionally protected area.").

197. *Id.* at 787 (citation omitted) ("The determination that fingerprinting pursuant to the P&P policy constitutes a search does not end our inquiry. The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.").

198. *Grady*, 575 U.S. at 310.

199. *Johnson*, 983 N.W.2d at 787–89.

making the search reasonable and lawful.[200] Though on-site fingerprinting was properly found to be a search under the Fourth Amendment, the fact-specific inquiry into the reasonableness of this search may distinguish future claims that try to rely on similar theories. Second, there is a clear distinction between the search in *Grady*, on-going and indefinite satellite-based monitoring,[201] and the relatively short taking of fingerprints in the present case. While the Michigan Supreme Court held this intrusion was too long and convincingly defended this holding under *Terry*,[202] the malleability of the *Terry* doctrine and the specifics of the on-site fingerprinting program in particular could allow another court to form a different conclusion.

Further, Denishio Johnson and Keyon Harrison argued that they "had a reasonable expectation that government agents would not take their fingerprints without consent."[203] The Michigan Supreme Court did not address this argument in its majority opinion. However, the concurrence agreed with the Plaintiffs' argument.[204] Yet, it is unclear that other courts would follow the concurrence's *Katz* analysis, especially since this analysis was dependent on fingerprinting procedure as it currently operates at the GRPD. At the core of Plaintiffs' claim was that "[v]irtually any intrusion," even if only a light touch, invades personal security.[205] To bolster the claim, the Plaintiffs also cited to *Cupp v. Murphy*,[206] which held that scraping fingernails to obtain trace evidence is a search.[207] However, to reach that holding, the Court in *Cupp* distinguished scraping under fingernails from voice exemplars, handwriting exemplars, and *fingerprints*, thereby implying there is no reasonable expectation of privacy in fingerprinting.[208] Nonetheless, the

200. *Id.* at 789–90.

201. *See Grady*, 575 U.S. at 310 (describing the continuous satellite-based monitoring program).

202. *Johnson*, 983 N.W.2d at 787–89.

203. Pls.-Appellants' Brief to Supreme Court, supra note 7, at *21.

204. *See Johnson*, 983 N.W.2d at 791–98 (Welch, J., concurring).

205. Pls.-Appellants' Brief to Supreme Court, supra note 7, at *22 (citing Maryland v. King, 569 U.S. 435, 446 (2013)).

206. *Id.* (citing Cupp v. Murphy, 412 U.S. 291 (1973)).

207. *Cupp*, 412 U.S. at 295.

208. *See id.* at 295. Looking more broadly than the present case, new fingerprinting technologies will make it so law enforcement can take individuals' fingerprints both more quickly and more accurately. *See, e.g.*, Danny Thakkar, *Portable Fingerprint Scanners for Law Enforcement: Identify Verification on the Street*, BAYOMETRIC, https://www.bayometric.com/portable-fingerprint-scanners-law-enforcement/ [https://perma.cc/K6JG-MVUW] (describing evolution of portable fingerprint ID scanners). Thus, this line of reasoning, even if it prevailed in the present case, may become largely irrelevant in the near future. *Accord Johnson*, 983 N.W.2d at 791–92 (Welch, J., concurring) (internal citation omitted) ("The collection and use of biometric information, such as

concurrence in *Johnson v. VanderKooi* indicated that fingerprinting could be covered by *Cupp*, as "[l]ike a hair sample or fingernail scrapings, some form of advanced examination, likely involving a trained expert using sense-enhancing technology or computers, is necessary to make a fingerprint useful to law enforcement or fact-finders."[209] With ever-advancing technologies, however, this logic will not always hold true for fingerprinting, as the concurrence acknowledged.[210]

Lastly, Plaintiffs argued that fingerprinting during a *Terry* stop is unconstitutional because of the purpose, scope, and duration of the fingerprinting. Unlike the appellate court, the Michigan Supreme Court agreed.[211] However, this argument may fail in other courts given the U.S. Supreme Court's dicta on fingerprinting and the fact-specific analysis of the GRPD's fingerprinting policy as it was applied to the plaintiffs. Plaintiffs argued that fingerprinting is not permissible during a *Terry* stop because it does not serve the very narrow purpose of discovering weapons that could be used to harm officers or other civilians.[212] Alternatively, they argued that the scope of a *Terry* stop had been exceeded since the detention was not "carefully tailored to its underlying justification," and it lasted "longer than is necessary to effectuate the purpose of the stop,"[213] which is to ensure that there is no criminal activity afoot.

The Michigan Supreme Court agreed that on-site fingerprinting exceeded the scope and duration of a *Terry* stop.[214] In this case, there was no indication that the fingerprinting would "tie either plaintiff to the circumstances that justified each *Terry* stop."[215] However, the court seemed to leave open the opportunity that on-site fingerprinting could be allowed if it is related in scope to the circumstances that justified the

fingerprints, may not always require a physical trespass sufficient to trigger *United States v. Jones*, and thus courts should carefully examine the technologies at issue and how biometric data will be collected and used.").

209. *Johnson*, 983 N.W.2d at 798 (Welch, J., concurring).

210. *Id.* ("There might soon be a time when we are called upon to determine the constitutionality of a nontouching/nontrespassory harvesting of biometric information for investigative purposes prior to arrest. Changing technologies require an evolving lens through which our search and seizure jurisprudence should be viewed.").

211. *Id.* at 788 (majority opinion) ("Fingerprinting pursuant to the P&P policy exceeded the permissible scope of a Terry stop because it was not reasonably related in scope to the circumstances that justified the stop. Having held that fingerprinting constitutes a search, it is clear that fingerprinting does not fall within the limited weapons search that is justified under certain circumstances during a Terry stop; fingerprinting is simply not related to an officer's immediate safety concerns.").

212. Pls.-Appellants' Brief to Supreme Court, supra note 7, at *31–32.

213. Florida v. Royer, 460 U.S. 491, 500 (1983).

214. *Johnson*, 983 N.W.2d at 787–89.

215. *Id.* at 789.

Terry stop.[216] Further, the court found that the on-site fingerprinting exceeded the permissible duration of a *Terry* stop because the officers fingerprinted Keyon Harrison after he had already answered questions about his identity and after officers had already determined that no criminal activity had taken place.[217] This fact-specific analysis leaves open the possibility that an on-site fingerprinting program applied to a different plaintiff might be completely acceptable.

Further, in dicta in *Hayes v. Florida*, the Supreme Court seems to set out a framework for implementing *Terry*'s objective standard for on-site fingerprinting that would allow it.[218] The *Hayes* standard has three requirements: 1) a reasonable suspicion for the stop; 2) a reasonable basis for believing that fingerprinting would confirm or dispel the officer's suspicion; and 3) that the fingerprinting be carried out with dispatch.[219] Given the Court's formulation in *Hayes*, as long as a police officer claims they have "reasonable suspicion" that an individual may be tied to a crime, and there were fingerprints taken at the crime scene, officers can take an individual's fingerprints during a *Terry* stop and add them to their database, as long as it is done quickly. This large loophole in Supreme Court jurisprudence, in the form of a broad *Terry* stop exception to the warrant requirement, makes the trespass theory and reasonable expectation of privacy arguments possibly irrelevant and could allow for on-site fingerprinting in other cases.

iii. How State Constitutionalism Can Fail — The Michigan Case Study

While this Article argues that state constitutionalism can provide protection against on-site fingerprinting, it is not a panacea. In fact, not just any state constitutionalist approach will suffice to stop on-site fingerprinting programs. Before outlining how the functional approach will work in Part III, this section shows why both the primacy and secondary approaches fail.

Again, the primacy approach begins with state's constitutional text and only reviews federal and state high court opinions on the matter for persuasive value.[220] As is typical of constitutional interpretation, the primacy approach analysis begins by looking to the constitutional text before turning to precedent.[221] Like the vast majority of states, Michigan's

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216. *See id.* at 788–89.

217. *Id.* at 789.

218. *See* Hayes v. Florida, 470 U.S. 811, 817 (1985).

219. *Id.*

220. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 1–43 (4th ed. 2006); *see also supra* Section I.B.ii.2.

221. *See supra* Section I.B.ii.2.

constitutional language on searches and seizures clearly mirrors the U.S. Constitution.[222]

The three differences between the Michigan Constitution and the U.S. Constitution, taken together, suggest that the Michigan Constitution does not offer any additional protection relevant for on-site fingerprinting. The first difference between the relevant provisions is a slight grammatical modification.[223] However, while divergent in form, the Michigan and federal constitutions' search and seizure provisions are identical in substance. Therefore, there is no requisite difference, as necessitated by the primacy approach, to warrant diverging from a federal holding. Second, Michigan's Fourth Amendment equivalent was amended to provide that certain objects, like weapons, should be admissible as evidence even if unlawfully obtained or seized outside a dwelling.[224] However, this is dubiously relevant to the on-site fingerprinting context and again does not provide sufficient fodder under the primacy approach to diverge from Supreme Court holdings.[225] Finally,

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222. *Compare* MICH. CONST., art. I, § 11 ("The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."), *with* U.S. CONST. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). *See also* Sydney Goldstein, *Search and Seizure Laws by State*, LAWINFO (Mar. 4, 2021), https://www.lawinfo.com/resources/criminal-defense/search-seizure-laws-by-state.html [https://perma.cc/S3GG-7C65] (listing 48 states that have a provision that someone's person, house, papers, possessions shall be secure from unreasonable searches and seizures, including Michigan).

223. The Michigan Constitution provides that "[n]o warrant . . . shall issue without describing them, *nor without* probable cause" while the the U.S. Constitution provides that "no Warrants shall issue, *but upon* probable cause." MICH. CONST., art. I, § 11; U.S. CONST. amend IV. *Compare* MICH. CONST. art. 2, § 10 (1908), *and* MICH. CONST. art. 1, § 11 (1963), *with* MICH. CONST. art. 6, § 26 (1850) (reverting back to "nor" instead of "or" in the search and seizure provision by 1908, thereby ostensibly rejoining the requirements of a warrant and probable cause cementing the current grammatical structure).

224. *Compare* MICH. CONST. art. 6, § 26 (1850) (no provision providing that certain objects, such as weapons, should be admissible evidence even if unlawfully seized), *with* MICH. CONST. art. 2, § 10 (1908) (containing a provision providing that certain objects should be admissible evidence even if unlawfully seized), *and* MICH. CONST. art. 1, § 11 (1963) (containing provision providing that certain objects should be admissible evidence even if unlawfully seized, but with minor alterations from the 1908 version).

225. If relevant at all, this provision demonstrates a specific local history and suggests the Michigan legislature is more willing to infringe on search and seizure protections, which does not portend well for stopping on-site fingerprinting dragnets. The ultimate holding in

a 2020 amendment that prohibits unreasonable searches and seizures of a person's electronic data and communications similarly has limited applicability because there is (currently) no electronic data involved in on-site fingerprinting.[226] Taken together, these differences do not suggest a necessary divergence from the Supreme Court's indications that on-site fingerprinting may be justifiable without probable cause.

Analyzing Michigan's precedent does not lead to additional constitutional protections. While the Michigan Supreme Court explicitly stated that it would go beyond federal law based on its own constitution in *People v. Bender*,[227] it disclaimed any reliance on the state constitution and its discretion to provide protection beyond the federal constitutional floor in *People v. Hill*.[228] Similarly, in *People v. Long*, the Michigan Supreme Court—analyzing a search and seizure in the *Terry* stop context—rested its analysis entirely on federal constitutional law.[229] Altogether, these holdings suggest an unwillingness of the Michigan Supreme Court to advance independent interpretations of Michigan's constitution.

The secondary approach also does not suggest that the Michigan Supreme Court will diverge from federal jurisprudence. The secondary approach first asks if the Supreme Court has failed to protect a civil liberty,[230] which this Article suggests it has.[231] If a court is to diverge from the federal precedent under the secondary approach, it would be for one of three reasons: flawed federal analysis, structural differences between the state and federal government, or distinctive state characteristics (whether in constitutional text, laws, constitutional convention documents, or other local differences).[232]

To begin with, it is not possible for a state court to proscriptively rebuke the Court's analysis.[233] While the Supreme Court's ambiguous stance on on-site fingerprinting is debatable on a conceptual level, given the Constitution's Supremacy Clause, the Court has the final say on the

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Johnson v. Vanderkooi, 983 N.W.2d 779 (Mich. 2022), focused on interpreting the U.S. Constitution, leaving this question open.

226. *See* MICH CONST. art. 1 § 11 (2020).

227. People v. Bender, 551 N.W.2d 71, 80 (Mich. 1996) ("In so holding, we reiterate that our state constitution affords defendants a greater degree of protection in this regard than does the federal constitution.").

228. People v. Hill, 415 N.W.2d 193 (Mich. 1987).

229. People v. Long, 359 N.W.2d 194 (Mich. 1984).

230. *See* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 44; discussion *supra* Section I.B.ii.3.

231. *See supra* Sections I.A.ii–iii, II.C.

232. *See supra* notes 112–113 and accompanying text.

233. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

interpretation of rights enshrined in the Constitution.[234] Therefore, this element of the secondary approach suggests state courts should follow the Supreme Court's analysis.

Another reason to diverge from the Supreme Court's reasoning is a structural difference in the state constitution. However, as identified earlier, the federal and Michigan search and seizure provisions do not contain structural differences or meaningful divergence in text.[235] Michigan's Constitutional convention documents do not suggest that the framers of the Michigan Constitution hoped to imbue the state's search and seizure provision with any divergent meaning.[236] Scholars have found that liberal, wealthier, and coastal states are more likely to grant rights beyond the federal constitutional floor.[237] However, it is unclear how these factors play out in Michigan,[238] a moderate Midwestern state of slightly below-average wealth.[239]

In sum, state constitutionalism is not a cure-all. By focusing on interpretative methodologies, the primacy and secondary approaches can miss out on a fundamental aspect of state courts: the value state courts add to our federalist system.[240] Namely, these approaches constrain state courts' ability to explicitly consider their role in vertical separation of powers—a role that requires states to consider and advance individuals' rights where federal institutions fail to do so.[241] If we are to stop on-site fingerprinting dragnets, advocates and judges alike

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234. *But see* Williams, *supra* note 93 (explaining that the Supreme Court's rulings on rights provisions serve as a floor that state courts can exceed to be more protective).

235. *See supra* notes 222–225 and accompanying text.

236. *E.g.*, THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835-1836: DEBATES AND PROCEEDINGS 279 (Harold M. Dorr ed. 1940) (noting the search and seizure provision was adopted without amendment in identical form to the federal provision).

237. Brody, *supra* note 91, at 77, 82, 85.

238. It is important to note that this analysis is constrained by the fact that the Michigan Supreme Court has not articulated which local differences they would consider or find compelling.

239. *See Most Liberal States 2023*, WORLD POP. REV., https://worldpopulationreview.com/state-rankings/most-liberal-states [https://perma.cc/2EBJ-YRBQ]; *Richest States 2023*, WORLD POP. REV., https://worldpopulationreview.com/state-rankings/richest-states-in-usa [https://perma.cc/9UNN-8QJB].

240. *See supra* notes 125–137 and accompanying text.

241. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 281; *see also id.* at 122 ("State power exists for the benefit of the people of the state, to be sure, and state constitutions exist in part to translate the state polity's wishes into a satisfying plan of state-level self-government. But state power also exists for the benefit of the people of the nation, and it plays a potentially significant role in securing their liberty. This relationship implies an interdependence between state and national constitutionalism that most theories fail to recognize. My welfare, in other words, depends not only on our shared national Constitution and on my state constitution, but also to some extent on your state constitution as well. State constitutions are thus linked in a web of constitutional relations created by the national system of federalism.").

must look to the functional theory of state constitutionalism to fill the gap left by the primacy and secondary approaches to state constitutionalism.

III. Functional State Constitutionalism's Role in Protecting Against Fingerprinting Dragnets

Part II recounted how Fourth Amendment jurisprudence is generally unfavorable to litigants hoping to stop on-site fingerprint dragnets. Further, Supreme Court dicta suggests the Court is likely to uphold warrantless on-site fingerprinting. Worse yet, state constitutionalism may also fail to protect individuals' rights. What, then, can be done to protect against these unreasonable searches and seizures? Section III.A considers the benefits of state constitutionalism regarding on-site fingerprinting dragnets and details how *functional* state constitutionalism accentuates these benefits. Section III.B argues that the functional theory of state constitutionalism can be utilized to stop on-site fingerprinting throughout the United States, as evidenced by its potential effectiveness in combatting the GRPD's on-site fingerprinting in Michigan.

A. Benefits of Using State Constitutionalism

State courts have a wider breadth of interpretative power than their federal counterparts for multiple reasons. One such reason is that state constitutions often provide more positive rights than the U.S. Constitution. The U.S. Constitution is full of negative rights.[242] Negative rights impose a duty on others to not interfere with a person's freedom.[243] For example, the First Amendment states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[244] While state constitutions also include negative rights, many have created positive and third-generation rights as well.[245] Positive rights impose an affirmative duty on the state to help individuals obtain or do something, such as the right to receive free public schooling.[246] Third-generation rights go a step further and impose communal positive rights, such as the right to a healthy environment or

242. *See* Williams, *supra* note 93, at 967 (implying the presence of negative rights due to the lack of positive rights in the Federal Constitution).

243. *See* Rachel Alyce Washburn, *Freedom of Marriage: An Analysis of Positive and Negative Rights*, 8 WASH. U. JUR. REV. 87, 108 (2015) ("Under a negative rights theory, the government must acknowledge personhood rights and protect a person's innate right to be free from government constraints on that right.").

244. U.S. CONST. amend. I.

245. *See, e.g.*, Williams, *supra* note 93, at 967; EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1–3 (2013).

246. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992) (surveying positive right to education provisions in state constitutions).

to affirmative governmental economic assistance; such third-generation rights "are unheard of in our Federal Constitution."[247]

Furthermore, state constitutions, which are far more amenable to amendment,[248] contain "a wide variety of policy-oriented provisions."[249] In fact, "nationally, state constitutions contain about forty percent policy-oriented clauses."[250] Policy-oriented clauses take on a legislative form and provide detailed solutions to partisan issues instead of espousing fundamental principles like the U.S. Constitution.[251] For example, the Wyoming constitutional convention included a provision that limited the work day to eight hours—a form of regulation typically left to legislatures.[252] Taken together, these differences in the rights provided and goals of state constitutions versus their federal counterpart signal that state constitutions are more expansive. Consequently, state courts interpreting language in their constitutions can, and likely should, assume they can construe these rights more expansively than the Supreme Court can interpret the language in the U.S. Constitution.[253]

Other than their distinctive features, which give additional interpretative breadth, state courts also have several advantages relative to the Supreme Court "when it comes to defining constitutional rights and crafting constitutional remedies."[254] For example, when "announc[ing] rights and remedies," the Supreme Court must be mindful of whether and how they will function across the entire nation.[255] The national impact of the Court's decisions has a limiting effect on the Court, particularly when constitutional claims are innovative.[256] The Court does not want to promulgate a ruling that may be underenforced or have too broad an impact, so the Court instead opts for a "federalism discount."[257] On the other hand, state supreme courts can better account for cultural, geographical, and historical differences, as well as local conditions in

247. Williams, *supra* note 93, at 967.

248. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 820–22 (1992).

249. Williams, *supra* note 93, at 969.

250. *Id.* at 970.

251. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 958–59 (1994).

252. *Id.* at 969–70.

253. *See* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 230 ("[S]tate courts have typically inferred from the federal structure of American government and from the historical circumstances of the founding period that, unlike the U.S. Constitution, state constitutions grant state courts plenary rather than limited judicial power.").

254. SUTTON, *supra* note 109, at 16.

255. *Id.*

256. *Id.* at 17.

257. *Id.* (citations omitted).

their state-specific interpretations.[258] Additionally, a "mistaken or an ill-conceived constitutional decision" can be more easily remedied at the state level through constitutional amendment or, in many states, judicial elections.[259] Therefore, "state courts . . . have far more freedom to 'try novel social and economic experiments without risk to the rest of the country.'"[260] This freedom is particularly important for difficult and practically complex constitutional questions.[261] In fact, this state experimentation may be precisely what is happening with on-site fingerprinting. Perhaps—worried about the ramifications of a more expansive, rights-protective ruling, such as minimizing the states' ability to utilize their police power—the Supreme Court is leaving on-site fingerprinting with a federalism discount. Under that view, dealing with on-site fingerprinting dragnets is a perfect example of when it may be better to allow state-by-state interpretation of constitutionality.

State-by-state interpretation underscores a key aspect of state constitutionalism: the constitutional discussion between state and federal judges helps jurists at all levels across the country develop a stronger understanding of constitutional law.[262] State courts "decide whether to embrace or reject innovative legal claims. Over time, the market of judicial reasoning identifies winners and losers."[263] In turn, "the federal courts (and national legislature) profit from the contest of ideas, as they can choose whether to federalize the issue *after* learning the strengths and weaknesses of the competing ways of addressing the problem."[264] Moreover, state interpretations may illuminate language in the U.S. Constitution that first appeared in state constitutions or "provide pragmatic reasons for following or steering clear of an approach."[265] Further, having both state and federal jurists engage in a single discourse

258. SUTTON, *supra* note 109, at 174; *see also* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 88 ("For example, state law overwhelmingly provides the controlling substantive rules in the laws of tort, contract, commercial transactions, *crimes, property,* wills, and family formation.") (emphasis added).

259. SUTTON, *supra* note 109, at 18 (citation omitted).

260. *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

261. *Id.* at 19 ("The more difficult the constitutional question . . . the more indeterminate the answer may be. In these settings, it may be more appropriate to tolerate fifty-one imperfect solutions rather than to impose one imperfect solution on the country as a whole . . . ."); Liu, *supra* note 123, at 1322 ("Problems with a high level of practical complexity may not be amenable to national solutions or, if resolved by a national court, may result in a federalism discount that dilutes the underlying right.").

262. *See* James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 374 (2016); Liu, *supra* note 123, at 1311; SUTTON, *supra* note 109, at 187.

263. SUTTON, *supra* note 109, at 20.

264. *Id.*

265. *Id.* at 183.

about these constitutional ideas and principles broadens the discourse and forces all jurists to craft a more sound jurisprudence.[266]

The Supreme Court's ruling in *Mapp v. Ohio* provides a tangible example of this principle.[267] The *Mapp* decision was "deeply influenced by an emerging consensus among state courts, which [the Court] carefully and extensively documented."[268] By the time of the Court's holding in *Mapp*, state court decisions in more than half the states made clear that "suppression of illegally seized evidence was the most effective way to deter constitutionally unreasonable searches."[269] At its core, this process of consultation suggests state and federal judges alike accept the proverbial wisdom that two (or more) heads are better than one. That may help explain why "[s]ince *Mapp*, and particularly in the last fifteen years or so, the Court has increasingly exhibited this more robust form of reliance on state court decision-making."[270] Altogether, this redundancy, variation, and jurisprudential discourse plays a crucial role in our federal system.[271]

The functional approach accentuates the benefits of state constitutionalism by explicitly centering the federalist implications of the courts' decisions.[272] Given our nation's vertical separation of powers, state officials are given "the power to resist national authority in appropriate circumstances because they *must* have it—because a properly functioning national system of federalism demands that they have it."[273] As arbiters of the state constitution, state courts play a crucial role in this equation.[274] "Federalism requires that state power be available for deployment outwardly, against threats originating at the national level."[275] Therefore, "state courts should understand themselves presumptively to have been granted such authority. This rebuttable presumption rests on inferences derived from the purposes and operation of the federal system" itself.[276] Consequently, the functional approach takes state constitutionalism's core function—separation of powers—and places it at the center of constitutional interpretation,

266. *See* Liu, *supra* note 123, at 1304, 1311.

267. Mapp v. Ohio, 367 U.S. 643 (1961).

268. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 105.

269. *Id.*

270. *Id.* (emphasis added); *see also id.* ("Rather than merely opening itself to persuasion by the reasoning and experiences of state courts, the Court has used the *content* of state law to provide a baseline against which to measure whether any particular individual right can be considered part of the fundamental liberty protected by the Fourteenth Amendment.").

271. *See* Liu, *supra* note 123, at 1332–40.

272. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 195.

273. *Id.* at 188–89.

274. *See id.*

275. *Id.* at 187.

276. *Id.* at 228.

thereby allowing state courts to best serve their function of rebuffing encroachments on civil liberties and rights, notwithstanding federal jurisprudence on the matter.[277]

B. Functional State Constitutionalism's Role in Stopping On-Site Fingerprinting Throughout the United States

Advocates and courts embracing the functional theory of state constitutionalism can effectively reject the GRPD on-site fingerprinting program and any similar programs that might exist or pop up across the country. Instead of being bogged down by the federal interpretations of the Fourth Amendment and trying to differentiate the state constitution's text, history, or local conditions (as the primacy and secondary approaches require), a state supreme court should center its role in our federal system in its analysis. This role requires state courts to "share responsibility for advancing the people's collective welfare" with the federal government.[278] Therefore, it is crucial that state courts (as well as other state branches) check abuses allowed by the U.S. Supreme Court.[279] Under this approach, state supreme court justices would read identical search and seizure language[280] in their constitution to signal an intent not for conformity[281] but instead as an invitation to innovate as is necessary to ensure protections of citizen's rights as they believe can best "effectuate the guarantee."[282] This approach is crucial to successfully stopping on-site fingerprinting dragnets because it allows for state court justices to account for the on-the-ground reality that investigatory stops and dragnets disproportionately undermine the civil rights and liberties of communities of color.

The case study of the dragnet created by GRPD's on-site fingerprinting program had the potential to demonstrate the importance of the functional approach of state constitutional interpretation. The

277. SUTTON, *supra* note 109, at 189 ("If state courts turn to their constitutions only when the Federal Constitution does not decide the question—or worse, only when they disagree with the U.S. Supreme Court's interpretation of the National Constitution—the documents will collect more dust and become more diminished."). This in turn minimizes the state courts' role in federalism.

278. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 281.

279. *Id.*

280. *See id.* at 254 ("[D]uplicative rights provisions pose no interpretational difficulties whatsoever, and indeed are among the easiest cases, for the functional approach permits them to be recognized for what they are: direct invitations to state courts to monitor federal judicial rulings under the corresponding provisions of the U.S. Constitution, and to exercise their independent judgment concerning the way in which the rights in questions should be best understood and applied.").

281. *Id.* ("[If] the state provisions mean the same thing as their national counterparts, they serve no obvious useful function.").

282. *Id.* at 281–82.

Michigan Supreme Court, in a sense, missed the opportunity to vindicate Keyon and Denishio's rights without having to address Fourth Amendment jurisprudence or the Supreme Court's dicta indicating on-site fingerprinting may be allowed during a *Terry* stop.[283] They could have held that there is a right to privacy to one's fingerprints or even that the scope of a *Terry* stop never allows for on-site fingerprinting without running afoul of the Michigan search and seizure provision. In doing so, they could have been more experimental and brought in more coherent ways of reading the search and seizure language that consciously rebut the Supreme Court's intrusion on individuals' privacy.[284] While it is encouraging that the court found the U.S. Constitution's search and seizure protections apply to on-site fingerprinting, as demonstrated earlier, the Michigan court's holding may not apply in other challenges.[285] Michigan's sister courts around the country still have the chance to explicitly consider their functional role in our federalist system: protecting their citizens from undue incursions on their rights regardless of Supreme Court holdings on the matter.

Johnson v. VanderKooi raises another key aspect of functional state constitutionalism ensuring protections against on-site fingerprinting: transparency. A crucial task for advocates (and judges alike) is to brighten the lines of accountability because the "redundancies built into our structure of government largely serve to channel and manage conflict rather than to facilitate permanent resolution."[286] If state court judges can avoid conflict and hide behind Supreme Court decisions, they can shift the accountability upwards; while politically savvy for judges facing reelection, this conduct limits transparency.[287] Nevertheless, conflict and contestation of ideas is crucial to our federalist system.[288] The jurisprudential conflict among state and federal courts forces both state and federal judges to more thoughtfully engage with different issues that may impact different populations under a certain doctrine.[289] This

283. The court did not consider the Michigan Constitution at all, relying entirely on the Fourth Amendment.

284. *See* SUTTON, *supra* note 109, at 174 ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way. Still less is there reason to think that a highly generalized guarantee, such as a prohibition on 'unreasonable' searches, would have just one meaning over a range of differently situated sovereigns.").

285. *See supra* Section II.C.ii.

286. Liu, *supra* note 123, at 1339–40.

287. *See* SUTTON, *supra* note 109, at 188–189.

288. *Id.* at 175–76.

289. *Id.* ("If the court decisions another sovereign ought to bear on the inquiry, those of a sister state should have the most to say about the point. Two state constitutions are more likely to share historical and linguistic roots. They necessarily will cover smaller

engagement not only has value in shaping coherent constitutional law, but it also helps raise the profile of issues, thereby garnering a better pulse of the public's view of an issue.[290] A state supreme court extending a right farther than the Supreme Court is willing to "register[s] a forceful and often very public dissent."[291]

One example of the importance of public rejection of a Supreme Court holding are the events following the Court's ruling in *Bowers v. Hardwick*.[292] In *Bowers*, the Court upheld a Georgia statute criminalizing sodomy that was challenged under the Due Process Clause.[293] A dozen years later, the Georgia Supreme Court struck down that same law under Georgia's Due Process Clause, which was worded identically to its federal counterpart.[294] The *Powell* ruling "prompted an explosion of news reports, editorials, and opinion pieces" supporting the *Powell* judgment and chastising the Supreme Court's contradictory *Bowers* ruling.[295] Five years after *Powell*, citing both to public disapproval of their *Bowers* holding and to the Georgia Supreme Court's *Powell* decision, the Supreme Court invalidated a Texas sodomy law.[296] Admittedly, "the *Powell* decision and the subsequent media reaction was only one event in a barrage of criticism of *Bowers* that came from many sources over a period of seventeen years, and did not by itself trigger the Supreme Court's reversal of position."[297] However, this shift underscores how state supreme court divergence can help shape and clarify public opinion and eventually state and federal courts' jurisprudence.[298]

Beyond transparency, functional state constitutionalism will push both federal and state supreme courts to create a clearer and more coherent search and seizure jurisprudence that more genuinely faces fingerprinting dragnets' implications for communities of color.[299] Since they would not be bogged down by the Fourth Amendment's

jurisdictions than the National High Court. In almost all instances they will be construing individual-liberty guarantees that originated in state constitutions, not the Federal Constitution.").

290. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 100 ("[W]henever a state court dissents from the reasoning of a U.S. Supreme Court decision it offers a forceful and very public critique of the national ruling, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of the federal ruling.").

291. *Id.*

292. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

293. *Id.*

294. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998).

295. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 102.

296. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

297. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 103.

298. *Id.*

299. Liu, *supra* note 123, at 1339 ("[I]nnovation by state courts can inform federal constitutional adjudication, allowing the U.S. Supreme Court to assess what has worked and what has not.").

jurisprudential complexity, states could more clearly delineate rights or posit novel articulations of how different lines of search and seizure doctrine can interact more coherently.[300] These different articulations could be "persuasive precedent in other states considering the same matter," and at times persuasive to the Supreme Court itself.[301] "Marriage equality and the decision that sodomy laws are unconstitutional come to mind" when considering major U.S. Supreme Court cases preceded by persuasive state constitutional law decisions.[302] Perhaps if advocates commit to making functional state constitutionalist arguments, on-site fingerprinting can be added to this list of doctrines where state courts influenced the Supreme Court to be more rights-inclusive and protective.

Conclusion

The Supreme Court has never clarified under what circumstances on-site fingerprinting would be allowed, but it has made clear that it is possible. The Michigan Court of Appeals decision in the *Johnson v. VanderKooi* case, arising out of the Grand Rapids Police Department's photograph and fingerprinting program, shows how the Supreme Court's current interpretation of the Fourth Amendment has created a template for establishing and maintaining a fingerprinting dragnet.[303] The Michigan Supreme Court's decision in *Johnson v. VanderKooi* shows the case of a state high court ignoring (or perhaps merely sidestepping) the United States Supreme Court's dicta on fingerprinting and rejecting the practice under a trespass theory of the Fourth Amendment.[304] However, the concurrence in that case made clear that many federal courts have "either held that fingerprinting is a search or strongly suggested that it is" and that "the national landscape of Fourth Amendment law in this area is murky at best.[305] If this murkiness is allowed to continue, spurred by technological advancement in fingerprinting technology, this dragnet may proliferate to other jurisdictions, at the expense of communities of color—even if the Michigan Supreme Court found a path under the federal constitution in this case to stop it. If the United States Supreme

300. *See* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25.

301. Williams, supra note 93, at 974 ("Further, in some situations a progression of state constitutional rulings can lead, ultimately, to a change of position by the United States Supreme Court itself, as in its marriage equality decision."); GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 100 ("[S]tate rulings that depart from or criticize U.S. Supreme Court precedents can contribute to the establishment of a nationwide legal consensus at the state level, a factor that the Supreme Court sometimes considers in the course of constitutional decision-making.").

302. Williams, *supra* note 93, at 964.

303. Johnson v. VanderKooi, 903 N.W.2d 843, 848–49 (2017), *rev'd in part*, 918 N.W.2d 785 (2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

304. *Johnson*, 983 N.W.2d at 784–87.

305. *Id.* at 795.

Court's dicta is to be taken seriously, as many lower courts have done, this path may be foreclosed.

Instead of relying on Fourth Amendment jurisprudence, plaintiffs, their lawyers, and state court judges should turn to state constitutionalism. However, all instantiations of state constitutionalism are not necessarily up to the task. Instead, functional state constitutionalism lays the path forward by explicitly considering state courts' roles in our federalist system. In following the functional approach, state courts can be more experimental and bring in more coherent ways of reading the search and seizure language that consciously rebut the Supreme Court's intrusion on individuals' privacy. Since "American constitutional law creates two potential opportunities, not one, to invalidate a state or local law," it seems peculiar to only take one.[306] Ultimately, even if state constitutionalism only offers "second best" opportunities, "second best opportunities to expand civil liberties are better than no chances at all."[307] State constitutional interpretation based on state courts' functional role in federalism is a vital feature of our federal system that will push both the federal Supreme Court and state supreme courts to create a clearer and more coherent search and seizure jurisprudence that more genuinely faces the implications of fingerprinting dragnets for communities of color. In the meantime, moreover, this approach will force state courts, legislatures, and the country writ large to figure out whether or not we truly believe on-site fingerprinting dragnets *should* have a role in our society. While the federal courts may currently allow on-site fingerprinting under specific circumstances, the American people may just say, "keep your hands off my fingerprints!"

306. SUTTON, *supra* note 109, at 8.

307. Williams, *supra* note 93, at 974 (internal quotation omitted).