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I. INTRODUCTION

While the United States Supreme Court's divinations of the United States Constitution dominate national news headlines and capture the popular attention, state courts often get the proverbial short end of the stick. But in the United States, the federal Constitution provides only the bare minimum required protection that the states must afford their citizens. There are in fact fifty other constitutions—state constitutions—that each have independent force. Each of these fifty state constitutions contain individual rights guarantees of their own. State courts can, and often do, choose to interpret their constitutions differently—and sometimes as more expansive in protecting rights—than the Supreme Court does in construing the United States Constitution.

The Constitution's Bill of Rights contains provisions that are echoed in most state constitutions, sometimes verbatim. The Fourth Amendment's prohibition against unreasonable searches and seizures is no exception. Article I, Section 14 of the Ohio Constitution is a near word-for-word copy of the Fourth Amendment. Regardless, our federal system of government empowers state courts to interpret their own Constitutions and laws without regard to the Supreme Court's interpretations of the United States Constitution, if they so desire. However, the Supreme Court of Ohio, like many state courts, often struggles to interpret the state search and seizure provision independently because of the provision's near-identical language to its overbearing federal counterpart. Whether caused by perceptions of federal supremacy, inadequate briefing by litigants, efficiency concerns, or judicial restraint, many state courts are highly deferential to the Supreme Court's interpretation of the rights guaranteed under the Constitution—even when construing their states' independent provisions.

This Comment discusses search and seizure jurisprudence under the Ohio Constitution's independent authority, with special attention to the evolution of the exclusionary rule. The exclusionary rule is a judicially created rule that prohibits the government from using illegally seized evidence and illegal arrests at trial to prosecute citizens in violation of their Constitutional rights. Part II begins by recounting the rise and fall of

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the exclusionary rule's scope under the Fourth Amendment, based on the value considerations and interest-balancing conducted by the Justices of the Supreme Court of the United States. It then describes the Supreme Court of Ohio's approach to search and seizure law and the exclusionary rule under Article I, Section 14 of the Ohio Constitution by focusing on a few recent, seminal cases in this area. Part III discusses the lack of internally consistent reasoning put forth by the Supreme Court of Ohio in those cases. The discussion will draw attention to the lack of a clear rationale by the Supreme Court of Ohio when choosing to either harmonize with or depart from federal Fourth Amendment cases.

Ultimately, this Comment concludes that the Supreme Court of Ohio's purported practice of "harmonizing" Article I, Section 14 of the Ohio Constitution with the Fourth Amendment unless "persuasive reasons" justify otherwise, offers no meaningful guidance to litigants who wish to argue that the Ohio Constitution should offer greater protections than the Fourth Amendment, and argues that the Supreme Court of Ohio's rejection of persuasive reasoning in a recent case puts Article I, Section 14 of the Ohio Constitution at risk of becoming meaningless or redundant.

II. BACKGROUND

While the idea that the government should not benefit from its own constitutional violations is well-trodden legal ground, the rule excluding evidence obtained in illegal searches and seizures is not grounded in the text of the Fourth Amendment. The Fourth Amendment provides 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 . . . ."[1] From the text alone, it is clear that the government may not "unreasonably" search or seize persons, papers, and effects. It does not necessarily follow from this, however, that the remedy for a violation of this right is to prevent the government from introducing illegally seized evidence at trial. That rule, known as the exclusionary rule, developed primarily in the federal courts and later spread to the states, who adopted it both voluntarily and involuntarily over the course of the early Twentieth Century. Ohio was one such state that involuntarily adopted the exclusionary rule, doing so only after the U.S. Supreme Court held that the rule applied to the states via the Fourteenth Amendment's Due Process Clause. This section will describe the development of the rule, some key exceptions articulated by the U.S. Supreme Court, and describe Ohio case law interpreting Article I, Section 14 relative to the Fourth Amendment.

1. U.S. CONST. amend. IV.

A. The Origin of the Federal Exclusionary Rule

The exclusionary rule has its origins in the United States Supreme Court's 1914 decision in *Weeks v. United States*.[2] There, the Court reversed the conviction of a suspected gambler after police searched his home without a warrant and seized various papers containing evidence of his alleged offense.[3] In so holding, the Court reasoned that law enforcement's then-existing tendency to "obtain convictions by means of unlawful seizures . . . should find no sanction in the judgment of the courts, which are charged at all times with the judgment of the Constitution . . . ."[4] In other words, the Court held that courts should not admit evidence which was obtained in violation of the Constitution they are bound to uphold.

For several decades following *Weeks*, the rule applied only to the federal government. In *Wolf v. Colorado*,[5] the Court declined to use the Due Process Clause of the Fourteenth Amendment to extend the exclusionary rule against state governments. While the Court recognized that the right of security against arbitrary police intrusion is both basic to a free society and implicit in the concept of ordered liberty, thereby making the right applicable against the States under the Fourteenth Amendment's Due Process Clause, the Court questioned whether the mandatory exclusion of logically relevant evidence seized in violation of that right was a necessary component to the protection of the right.[6]

The opinion in *Wolf* contains a survey of the states' attitudes towards the exclusionary rule—dubbed the "*Weeks* doctrine"—cataloguing state courts' considerations of the rule before and after *Weeks* was decided.[7] The results are a study in the influence the Supreme Court commands over state courts, even on nonbinding issues: of the twenty-six states that anticipated the exclusionary rule before *Weeks*, only one state—Iowa—adopted the rule.[8] Of the states to consider adopting the exclusionary rule after *Weeks*, however, six states chose to adopt the rule while fourteen states rejected it.[9] Additionally, ten states chose to overrule their pre-*Weeks* decisions and adopt the exclusionary rule.[10] All in all, in 1949, the number of states who adopted the exclusionary rule (thirty-one) nearly

2. 232 U.S. 383 (1914).
3. *Id.* at 386.
4. *Id.* at 392.
5. 338 U.S. 25, 33 (1949).
6. *Id.* at 28.
7. *Id.* at 34-39.
8. State v. Sheridan, 96 N.W. 730 (Iowa 1903).
9. *Wolf*, 338 U.S. at 29.
10. *Id.*

doubled the number who had not adopted it (sixteen).[11] The Court in *Wolf* reasoned that this divide represented a healthy disagreement, and that other remedies for police misconduct could serve just as well as the exclusionary rule to deter constitutional violations.[12]

The underlying premise of *Wolf*—that remedies other than the exclusion of otherwise relevant evidence could prove just as effective in deterring police misconduct—faced closer scrutiny just over a decade later when the Court decided *Mapp v. Ohio*.[13] There the Court held that the Fourteenth Amendment prohibits the use of unlawfully seized evidence in state court to the same extent that such evidence is prohibited in federal court.[14] Expressly overruling *Wolf*, the Court again surveyed the states' attitudes towards the exclusionary rule. Given that the rule existed to deter police violations of the rights protected by the Fourth Amendment, the Court reasoned, whether the exclusionary rule is a fundamental aspect of the rights protected by the Fourth Amendment depends in no small part on how effective other remedies are at vindicating those rights.[15] This time around, the Court found that the states were warming to the exclusionary rule. Most notably, the Court quoted a California decision overruling that state judiciary's prior rejection of the *Weeks* doctrine, wherein the California court observed that other remedies had "completely failed" to secure police compliance with the Fourth Amendment's mandates.[16]

This growing consensus among the states that exclusion was the only effective remedy to deter police misconduct was key in bolstering the Court's rationale in overruling *Wolf*. According to the Court, having states fail to vindicate the rights guaranteed under the Constitution created "needless conflict" between state and federal courts.[17] The Court reasoned that applying the exclusionary rule to the states would avoid such conflict.[18] It made little sense to the Court that a prosecutor in a state proceeding could introduce evidence that his counterpart across the street in the federal courthouse would be forbidden to admit under the restrictions of the very same amendment.[19] From its creation in 1914 to the present, the exclusionary rule reached its peak—in scope and state court endorsement resulting from the dicta of the Court—in *Mapp*. In the following years, the framing of the exclusionary rule and its scope in

11. *Id.* at 30.
12. *Id.* at 31-33.
13. 367 U.S. 643 (1961).
14. *Id.* at 655.
15. *Id.* at 656.
16. *Id.* at 651-52.
17. *Id.* at 657-58
18. *Id.*
19. *Id.* at 657.

several landmark decisions chipped away at the foundation laid by the Court in *Mapp*.

B. The Court cools on the exclusionary rule.

In contrast with the warm language praising the exclusionary rule's protections in *Mapp*, a majority of the Court in subsequent years would temper the rule's scope and call its efficacy into question. In *United States v. Janis*, a federal civil tax proceeding, the Court considered whether the exclusionary rule should prohibit the introduction of evidence seized based on a constitutionally deficient warrant—the catch being that the rule that made the warrant "deficient" had only been announced by the Court weeks prior to the seizure in question.[20] The police in *Janis* obtained a warrant to search the home of a suspected bookmaker by submitting an affidavit of an officer relying on the statements of informants.[21] Based on that warrant, officers arrested the defendant and seized records as well as several thousand dollars in suspected proceeds of illegal gambling.[22] The defendant in *Janis* moved to quash the warrant and suppress the proceeds of the search based on a recently-decided Supreme Court decision which held that an affidavit is defective under the Fourth Amendment when it does not sufficiently allow the magistrate issuing the warrant to assess the reliability of an informant.[23] The trial court "reluctantly" held that the affidavit, and therefore the warrant, was insufficient under current Fourth Amendment jurisprudence, and quashed the subpoena.[24] The Ninth Circuit affirmed.[25]

On review, the Court held in *Janis* that the evidence seized in reliance on the invalid warrant should not be excluded. This decision laid the foundation for the primary exception to the exclusionary rule: the "good faith exception." Under the good faith exception, when an officer executes a search in good faith reliance on a warrant that later turns out to be constitutionally defective, the evidence should not be suppressed.[26] The Court based this on the deterrence rationale for the exclusionary rule laid out in *Mapp*.[27] The framing of the exclusionary rule in *Janis* is striking in the begrudging language the Court employs. By referring to the rule as a "late judicial creation," Justice Blackmun seems to subtly

20. 428 U.S. 433, 448 (1976).
21. *Id*. at 434-36.
22. *Id.* at 434-35.
23. *Id.* at 438 (citing Spinelli v. United States, 393 U.S. 410 (1976)).
24. *Id*.at 439.
25. *Id.*
26. *Id.* at 447.
27. *Id.*

attempt to persuade the reader of the rule's illegitimacy as a Constitutional rule.[28] The opinion further characterizes the debate among the members of the Court as a "warm one," and criticizes the rule's deterrence effect as unsupported by empirical evidence.[29] While deterrence was but one rationale supporting the holding in *Mapp*, the Court synthesized its existing jurisprudence to hold that the rule is *only* applicable when necessary to serve the deterrence purpose.[30] However, *Janis* need not have led the Court down the path of permitting illegally seized evidence in criminal proceedings. After all, a key factor to the analysis in *Janis* was that the case was a civil proceeding, and the exclusionary rule was drafted with criminal prosecutions in mind.[31] That limitation would not hold for long.

Just a few years later, the Court extended the good faith exception to the criminal context in *United States v. Leon*.[32] In that case, like in *Janis*, an officer relied on a warrant to execute a search, this time seizing drugs from the defendant.[33] A district court held that the warrant lacked probable cause and suppressed the evidence, rejecting the government's good faith reliance argument.[34] On review, the Supreme Court chose to recognize the good faith exception in the criminal context.[35] In so holding, the Court weighed the societal cost of excluding otherwise relevant evidence of criminal wrongdoing against the potential deterrent effect of the exclusionary rule to discourage police misconduct.[36] As stated in *Leon*, the good faith exception had two requirements: first, the officer's reliance on the magistrate's determination of probable cause must be objectively reasonable; and second, the officer must not have misled the magistrate in any way to obtain the warrant.[37]

The good-faith exception was the result of a string of decisions that retreated from *Mapp's* language suggesting broad application of the exclusionary rule in favor of a balancing test to determine whether exclusion was the best way to deter the police conduct at issue. Again, no longer was deterrence one of several supporting rationales for the rule—it was *the* rationale for the rule. The new exception permitted the introduction of illegally seized information except where the officer either

28. *Id.* at 443.

29. *Id.* at 446.

30. *Id.* at 448.

31. *Id*. at 459 (concluding that the civil proceeding before the court did not justify the "drastic measure" of the exclusionary rule.)

32. 468 U.S. 897 (1984).

33. *Id*.

34. *Id*.

35. *Id*. at 922.

36. *Id.*

37. *Id*. at 923.

fraudulently obtains the warrant, or the warrant itself is so poorly drafted that no reasonable person would view the warrant as sufficient—a far cry from the Court's proclamation in *Mapp* that the exclusionary rule was fundamental to the enforcement of the Fourth Amendment. The good faith exception and the interest-balancing approach employed by the Court would extend to a variety of other contexts—for example, to permit evidence illegally seized in reliance on an unconstitutional state law,[38] and where an officer relied on a police database that erroneously showed an outstanding arrest warrant, giving rise to an illegal arrest and subsequent discovery of incriminating evidence.[39]

Over time, the exclusionary rule came under even more exacting scrutiny and more skeptical framing by Justices authoring opinions delineating its purpose and scope. To an even greater extent than *Janis* and *Leon*, later exclusionary rule cases would come to be marked by discussion of the rule's deterrent purpose and the Court's seemingly begrudging acceptance of the rule as a "last resort" remedy, only desirable where its deterrent purpose outweighs the costs it inflicts on the truth-seeking function of judicial proceedings.[40] Justice Scalia, writing for a five-to-four majority in *Hudson v. Michigan,* recounted this trend before acknowledging so-called dicta in *Mapp v. Ohio* that suggested broad application of the rule.[41] The Court held in *Hudson* that a violation of the knock-and-announce principal, which requires officers to knock on the door and allow a reasonable time to pass before forcibly entering a building pursuant to a warrant, does not give rise to exclusion of evidence.[42] While *Mapp* proclaimed that "all evidence obtained in violation of the Constitution is, by that same authority, inadmissible in a state court,"[43] the Justices of the Court weaponized *Mapp*'s use of the deterrence rationale for the exclusionary rule as a tool of the rule's destruction.

38. Illinois v. Krull, 480 U.S. 340 (1987) (holding that officer's reliance on a statute requiring motorists to allow police inspection of records without a warrant was reasonable and did not warrant suppression of evidence).

39. Arizona v. Evans, 514 U.S. 1 (1995) (officer ran motorist's license and, due to a clerical error in a police database, erroneously found that there was an outstanding warrant leading to arrest. The Court held that the evidence seized incident to the arrest should not be suppressed due to the officer's good faith reliance on the police database).

40. *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence, however, has always been our last resort, not our first impulse.").

41. *Id.* In fact, the pronouncement that "all evidence" seized in violation of the Fourth Amendment was not dicta, but the core holding of *Mapp*.

42. *Id.* at 589 (describing the Court's adoption of the "ancient" common law knock-and-announce rule).

43. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

C. State Constitutionalism.

Perhaps sensing the oncoming changing of the guard from the rights-expansionist Warren Court to the decidedly more restrained Courts that would follow in the coming decades, in 1977 Justice William Brennan published one of the most influential pieces of literature in the area of state constitutional law, titled *State Constitutions and the Protection of Individual Rights*.[44] In this article, Justice Brennan recounted the paradigm shift occurring during the 1960's and 1970's wherein state courts were required to interpret federal constitutional law with a frequency never before seen as a result of the Court's recent decisions expanding federally-recognized individual rights beyond the thresholds of state protection.[45] "In the beginning of this legal revolution," said Justice Brennan regarding the expansion of federal statutory law under the New Deal, "federal law was not a major concern of state judges."[46] Later, however, "another variety of federal law—that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American concepts of human liberty—has dramatically altered the grist of the state courts."[47] In particular, Justice Brennan gave special recognition to the Warren Court's decisions on the criminal process for the considerable, unprecedented attention they required from state courts.[48]

In the midst of this "legal revolution," Justice Brennan showed no restraint in issuing a call to arms encouraging state courts to continue the charge in expanding individual rights protections:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed.[49]

After recounting the Supreme Court's retreat from the broad declarations of rights protections pronounced in some of the Warren Court's landmark cases, as well as the growing tendency of the Court to close the doors to federal courthouses by disposing of cases on grounds

44. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

45. *Id.* at 492.

46. *Id.* at 490.

47. *Id.*

48. *Id.* at 492.

49. *Id.* at 491.

of justiciability and standing, Justice Brennan turned his attention to another emergent trend in the law. Post-incorporation[50] of certain provisions in the Bill of Rights, many state courts were interpreting their own constitutions to provide greater individual rights protections than the federal constitution—in some cases, outright rejecting the Supreme Court's opinions as unpersuasive as a matter of state law.[51] This, the Justice concluded, was a positive development in American law and represented a healthy form of federalism.[52] Justice Brennan argued that the increasing tendency of states to provide greater protections presented a different picture than the conventional narrative of states depriving citizens of their rights and the federal government stepping in—one where states, not the federal government, fill the role of chief protectors of individual rights against government action.[53] The then-recent federal decisions foreclosing federal remedies for individual rights violations, Justice Brennan argued, called for state courts to step into the breach by expansively interpreting their own constitutions.[54]

In the search and seizure context, many state courts are hesitant to depart from Supreme Court precedent in interpreting their constitutions' equivalents of the Fourth Amendment, despite there being no legal principal stopping them from doing so. Generally, states adopt one of three approaches. First, some state courts interpret their analogues to the Fourth Amendment identically and follow the Supreme Court lockstep. Eighteen states use this approach.[55] Second, some states closely track federal Fourth Amendment precedent in state constitutional jurisprudence but depart from federal precedent when a sufficiently compelling justification exists.[56] Thirteen states, including Ohio, follow this approach—although some states who claim to follow this approach seem unwilling to follow through on their claimed willingness to depart from the Fourth Amendment. Third, some state courts proclaim that they are completely untethered from the Fourth Amendment in how they choose to interpret their constitution's search and seizure provision. Nineteen

50. "Incorporation" refers to the Supreme Court's application of the Bill of Rights against the states via the Due Process Clause of the Fourteenth Amendment. *See, e.g.***,** Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.").

51. Brennan, *supra* note 44, at 495.

52. *Id.* at 502.

53. *Id.* at 495.

54. *Id.* at 503.

55. This number comes from an analysis of a survey of state constitutional search and seizure provisions, and their respective state courts' interpretation relative to the Fourth Amendment. *See* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

56. *See, e.g.***,** State v. Robinette, 685 N.E.2d 762 (Ohio 1997) ("*Robinette II*").

states follow this approach,[57] many of which are the original thirteen colonies whose state constitutions predate the Constitution's ratification.

E. Search and Seizure Jurisprudence under the Ohio Constitution.

The Ohio Constitution contains a search and seizure analogue that is nearly identical to the Fourth Amendment. Article I, Section 14 of the Ohio Constitution states:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.[58]

As one might infer from the name of the case in *Mapp v. Ohio*, Ohio did not adopt a broad exclusionary rule of its own accord.[59] Prior to *Mapp*, Ohio only "sometimes" excluded illegally obtained evidence, but generally adopted the view of most state courts prior to *Mapp*—that courts need not concern themselves with the collateral matter of how evidence was obtained, provided that the evidence was relevant.[60] Ohio's prior rule was to only exclude illegally obtained evidence if the state engaged in "brutal or offensive" physical force in violation of the Fourteenth Amendment when obtaining the evidence.[61] Thus, even when Ohio courts did exclude illegally obtained evidence prior to *Mapp,* they did not do so pursuant to Article I, Section 14, but rather under one of the only federal constitutional provisions at the time that explicitly applied to state government action.

There is scant Ohio case law specifically dealing with the exclusionary rule solely under Article I, Section 14 of the Ohio constitution. However, after *Mapp v. Ohio*'s incorporation of the exclusionary rule onto the states, in a series of fairly recent decisions, the Supreme Court of Ohio has articulated its general approach to construing Article I, Section 14 in relation to the Fourth Amendment. First, in *State v. Robinette* (*"Robinette II"*), the court pronounced that it would "harmonize" its interpretation of Article I, Section 14 with the Fourth Amendment unless "persuasive reasons" justify recognizing more expansive protection under the state constitution.[62] In that case, the court adopted the Supreme Court's holding

57. *See generally* Gorman, *supra* note 55.

58. **OHIO CONST.** Art. I, §14.

59. State v. Bembry, 90 N.E.3d 891, 895 (Ohio 2017) (describing Ohio's inconsistent and infrequent use of the exclusion remedy prior to *Mapp*).

60. *Id*.

61. *Id*. at 985.

62. *Robinette II*, 685 N.E.2d 762, 767 (Ohio 1997).

in *Whren v. United States*[63] that an officer's subjective motivation for a traffic stop is irrelevant to whether prolonging the stop is reasonable. The court also abandoned its earlier proposed first-tell-then-ask rule from its prior ruling in *Robinette I* that would have required officers to inform stopped motorists that they are free to leave before asking for consent to search a vehicle during a traffic stop, instead falling in line with the Supreme Court's totality-of-the-circumstances approach to whether consent was given voluntarily.[64]

In several later decisions, however, the Supreme Court of Ohio held firm on its rulings that conflicted with the U.S. Supreme Court. In *State v. Brown* ("*Brown I*"), the Supreme Court of Ohio held that Article I, Section 14 offers greater protection than the Fourth Amendment by prohibiting full arrests for minor misdemeanors.[65] Over a decade later, in another case named *State v. Brown* ("*Brown II*"), the court reaffirmed *Brown I* in holding that a traffic stop for a minor misdemeanor outside of the arresting officer's jurisdiction violated the defendant's rights under Article I, Section 14, while recognizing that such arrests might not violate the Fourth Amendment.[66] Because the stop itself violated the defendant's Ohio Constitutional rights, the court held that the evidence seized during ensuing arrest and search should be suppressed.[67]

The Supreme Court of Ohio does not always choose to expansively interpret its constitution—particularly when the exclusionary rule is involved. In *State v. Bembry*, the court considered whether a violation of the knock-and-announce principal should lead to suppression under Article I, Section 14.[68] Relying primarily on the U.S. Supreme Court's deterrence rationale analysis from *Hudson v. Michigan*, the court concluded that the exclusionary rule should not apply.[69] In so holding, the Supreme Court of Ohio uncritically accepted the U.S. Supreme Court's begrudging characterization of the exclusionary rule as a last resort remedy that exacts a significant societal toll.[70] In this regard, the Ohio high court's reasoning largely restated the same considerations put forth by the U.S. Supreme Court in *Hudson*, and did not address in a wider sense whether the Ohio exclusionary rule should serve a purpose other than deterrence alone.[71]

63. 517 U.S. 806, 813 (1996).

64. *Robinette II*, 685 N.E.2d at 769.

65. 792 N.E.2d 175 (Ohio 2003).

66. State v. Brown, 39 N.E.3d 496, 501 (Ohio 2015) ("*Brown II*").

67. *Id.*at 502.

68. 90 N.E.3d 891 (Ohio 2017).

69. *Id.* at 900.

70. *Id.* at 897.

71. *Id.* at 898. The court concluded that "suppression will not effectively deter knock-and-announce violations," but fails to explain whether exclusion would vindicate a citizen's privacy rights

While the Supreme Court of Ohio had already adopted the good-faith exception under the state constitution in the 1986 case *State v. Wilmoth*,[72] that decision hardly rested on independent state law grounds. *Wilmoth* almost exclusively discussed the good-faith exception in terms of federal case law and mostly cited Ohio decisions that did the same. The dissent in *Wilmoth* took note of this failure to discuss the state constitution, lamenting that the majority's holding would reduce Article I, Section 14 to a mere "form of words."[73] The majority, however, did not respond to this concern. Thus, *Bembry*, unlike *Wilmoth*, is a rare case where Supreme Court of Ohio addressed the contours of the exclusionary rule by explicitly discussing Article I, Section 14's independent authority.

In *Bembry*, the police violated the state's knock-and-announce statute[74] while executing an otherwise valid search warrant of a suspected drug trafficker's home.[75] The trial court granted a motion to suppress the evidence seized, holding that violation of the knock-and-announce principal was unreasonable under Article I, Section 14.[76] The Ohio Court of Appeals reversed, accepting the State's argument that it was "well-settled" under *Hudson* that the exclusionary rule does not apply to violations of the knock-and-announce principle, while making no mention of the independent authority of Article I, Section 14 versus the Fourth Amendment.[77] On review, the Supreme Court of Ohio affirmed and held that the exclusionary rule should not apply to violations of the knock-and-announce principle. [78]

II. DISCUSSION

Although the Supreme Court of Ohio purported to create a consistent rule in *Robinette II* regarding its intent to harmonize Article I, Section 14 with the Fourth Amendment, subsequent decisions of the court offer no guidance on what is a "persuasive reason" to depart from federal law. Decisions like *Brown I* and *Brown II*, which expanded protection under

independent of the rule's deterrent effect.

72. 490 N.E.2d 1236 (Ohio 1986).

73. *Id*. at 1249 (Sweeny, J., dissenting).

74. "When making an arrest or executing an arrest warrant or summons in lieu of an arrest warrant, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the warrant or summons may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant." **OHIO REV. CODE ANN.** § 2935.12(A) (LexisNexis 2020).

75. *Bembry*, 90 N.E.3d at 893.

76. *Id*. at 894.

77. *Id.*

78. *Id.* at 893.

the Ohio constitution, do little more than put forth their own, different rationale as independently persuasive. Meanwhile, decisions like *Robinette II* and *Bembry*, where the court harmonizes its rationale with the Fourth Amendment, do little more than put forth the Supreme Court's rationale as independently persuasive without explaining what makes those cases different from ones like *Brown I* and *II*.

When applied to the exclusionary rule, the *Robinette II* framework also does not stand up to history. Prior to *Mapp*—a case which forced the exclusionary rule on the states by incorporation of the Fourth Amendment—Ohio had no exclusionary rule. If Article I, Section 14 was truly intended to mean the same thing as the Fourth Amendment in all significant respects, the Supreme Court of Ohio might have adopted the rule from *Weeks* after it was decided in 1914—but the court did not. This is because the exclusionary rule is admittedly a pragmatic judicial creation, untethered by the text of the Fourth Amendment or even the intent of its drafters. Considerations affecting the rule's scope, costs, benefits, and rationale are, therefore, entirely up to judge-performed interest balancing. By uncritically accepting the Supreme Court's rationale on these points, the Supreme Court of Ohio misses an opportunity to truly untether itself from the Supreme Court and exercise its full power as an independent court. Therefore, the court should put forth more concrete guiding principles to aid litigants arguing for a different interpretation of Article I, Section 14's exclusionary rule—one which is based on Ohio's law, history, and experiences, and not the musings of the Justices of the Supreme Court of the United States.

A. State v. Robinette: The Supreme Court of Ohio purports to provide a guiding principal for litigants to argue for more expansive protection under Article I, Section 14.

In the decades after *Mapp* was decided, the Supreme Court of Ohio seemed open to the idea of interpreting the Ohio Constitution as providing broader protection than its federal counterpart.[79] However, in practice, the court's use of this principal has been inconsistent and highly deferential to the U.S. Supreme Court when it comes to the Fourth Amendment. One of the most extensive discussions of the scope Article I, Section 14 of the Ohio Constitution versus the Fourth Amendment came from the court's 1997 decision in *Robinette II*, a case which dealt not with the exclusionary

79. *See, e.g.*, Arnold v. Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) ("In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.").

rule, but with the reasonableness of a traffic stop.[80] Robert Robinette was pulled over by a police officer for speeding in a construction zone and asked to exit his vehicle.[81] The officer decided not to issue a ticket for the speeding, instead issuing only a verbal warning. However, the encounter did not end there: the officer asked Robinette if the car contained any contraband or weapons, to which Robinette answered that it did not.[82] The officer then asked Robinette if he could search the car.[83] Not believing he was at liberty to refuse, Robinette "automatically answered yes."[84] Inside the car the officer found a pill of MDMA, and Robinette was charged with possession of a controlled substance.[85]

In its first decision on the case,[86] the Supreme Court of Ohio held that the officer's continued detention of Robinette after the verbal warning was an illegal seizure because, according to the court, the officer should have first informed Robinette that he was legally free to leave, or something to that effect, before asking for permission to search the car.[87] While the court purported to decide the opinion on both state and federal grounds, the opinion in *Robinette I* made no statement at all about the difference in scope between the Fourth Amendment and Ohio's Article I, Section 14.[88] In fact, the court cited only one Ohio case, *State v. Chatton*,[89] to support the proposition that an officer must tailor his detention of a driver during a traffic stop to the reason the stop was made, unless "articulable facts" justify otherwise.[90] Aside from *Chatton*, every other case cited in *Robinette I* was a federal case decided under the Fourth Amendment. The court pronounced the broad holding of *Robinette I* in paragraphs one and two of the syllabus:[91]

80. 685 N.E.2d762, 762 (Ohio 1997).

81. *Id*. at 764.

82. *Id*.

83. *Id.*

84. *Id*.

85. *Id.*

86. State v. Robinette, 653 N.E.2d 695 (Ohio 1995), *rev'd sub nom.* Ohio v. Robinette, 519 U.S. 33 (1996), *remanded sub nom.* to State v. Robinette, 685 N.E.2d 762 (Ohio 1997) (hereinafter "*Robinette I*").

87. *Id*. at 699.

88. The court did not mention the legal authority it decided the case on until the last two paragraphs of the opinion. *Id.* ("Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions . . . The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty.").

89. 463 N.E.2d 1237 (Ohio 1984).

90. *Robinette I*, 653 N.E.2d at 697.

91. While practices in other jurisdictions differ, at the time of this case, the Supreme Court of Ohio "[spoke] as a court only through the syllabi of its cases." Thus, the syllabus of an Ohio Supreme Court case was binding authority on Ohio courts. *See* Ohio v. Robinette, 519 U.S. 33, 37 (1996). This practice has since changed, where the syllabus and majority opinion text now both form the statement of law. *See* **OHIO SUP. CT. REP. OP. R.** 2.3, 2.4.

> 1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.
>
> 2. The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.[92]

Regarding paragraph one, the United States Supreme Court shortly came to a different legal conclusion in *Whren v. United States.*[93] In that case, the Supreme Court held that an officer's subjective motivation for making a traffic stop is not relevant when an objective justification exists, permitting so-called pretextual traffic stops that lead to searches unrelated to the stop's original purpose.[94] Surely enough, after granting certiorari, the Court reversed the Supreme Court of Ohio.[95] Additionally, based on prior federal cases, the Supreme Court overruled the per se rule in paragraph two requiring an officer to warn a detained driver that they are free to go when the legal justification for a traffic stop has ended, based on prior federal cases holding instead that courts should apply a totality-of-the-circumstances approach to determine whether a purported consensual search is valid.[96] Notably, in concluding that it had jurisdiction to hear the case,[97] the Supreme Court cited the Ohio court's failure to effectively delineate between state and federal law beyond generalities in its opinion.[98] This failure led the Court to conclude that the case presented a federal Fourth Amendment question, rather than a nonreviewable state law question.[99]

On remand, the Supreme Court of Ohio took the initiative to ask the parties to brief the issue of whether its prior decision should be upheld

92. *Robinette I*, 653 N.E.2d at 696.

93. 517 U.S. 806 (1996).

94. *Id*.

95. *Robinette II*, 685 N.E. 2d 762, 765 (Ohio 1997).

96. Ohio v. Robinette, 519 U.S. at 39 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

97. Under the adequate and independent state grounds doctrine, the Supreme Court will only hear an appeal from a state court if the case necessarily turns on a federal question of law. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. 590 (1875).

98. *Robinette*, 519 U.S. at 37 (noting that both the body and the syllabus of the opinion make only general references to the state and federal constitutional provisions).

99. *Id.*

solely under Article I, Section 14 of the Ohio constitution.[100] The result of that effort, *Robinette II*, was a mixed bag. On both paragraphs one and two of the *Robinette I* syllabus, the court fell in line with the Supreme Court's rule statements instead of returning to its prior ruling. Specifically, the court modified the syllabus of its opinion to read:

> 1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.
>
> 2. Under Section 14, Article I of the Ohio Constitution, the totality-of-the circumstances test is controlling in an unlawful detention to determine whether permission to search a vehicle is voluntary.[101]

Luckily for Robert Robinette, even using the federal test, the Supreme Court of Ohio upheld the result of the case.[102] The court concluded that although the officer was justified in ordering Robinette out of the car, his continued detention of Robinette was not based on any articulable facts and was therefore illegal.[103] Next, applying the totality-of-the-circumstances test to the purported consensual search, the court concluded that the power imbalance between an officer and a citizen who is unexpectedly ordered to step out of his car indicated that Robinette would not have felt at liberty to say "no" to the search request.[104] Thus, the search still violated Robinette's right against unreasonable searches and seizures.

There are two notable things in *Robinette II*. First, the court was reluctant to stand its ground on paragraph one of the syllabus, despite the fact that it was entirely consistent with Fourth Amendment and Ohio precedent when it was decided, and was not contradicted by federal law until after it was decided. Presumably, the court had surveyed and analyzed state and federal search-and-seizure jurisprudence as it stood before it decided the case. After such careful review, the Supreme Court of Ohio must have concluded (in its first opinion) that an officer must tailor actions during a traffic stop to the stop's original purpose. Why does the mere fact that the Supreme Court came to a different conclusion justify the court declining to hold to its prior opinion where it has the power to do so? The answer, according to the court, was that Ohio has a

100. *Robinette II*, 685 N.E.2d at 766.
101. *Id*. at 762.
102. *Id*. at 771-72.
103. *Id*. at 768-69.
104. *Id*. at 771-72.

tradition of interpreting Article I, Section 14 as coextensive with the Fourth Amendment because of their nearly–identical language.[105] The court thus concluded that it should "harmonize [its] interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise."[106] This rule is the foundation of the Supreme Court of Ohio's inconsistent approach to independent interpretation of the Ohio search and seizure provision. In no case since *Robinette II* has the court clarified what a "persuasive reason" looks like; there are simply cases where the Ohio court agrees with the Supreme Court, and those where it does not.[107]

The second notable aspect of *Robinette II* from a state constitutional perspective is that the court abandoned the per se informed-consent rule apparently solely because the Supreme Court had rejected such a rule in *Schneckloth v. Bustamonte*.[108] *Schneckloth* had been on the books for over two decades by the time the Ohio court handed down its opinion in *Robinette I*. One can only wonder, assuming the court was aware of *Schneckloth* at the time it decided *Robinette I*, how the court could view its prior ruling consistently with a case that already expressly rejected a near-identical proposed rule? *Schneckloth* is not cited at all in *Robinette I* outside of the dissent,[109] yet the majority discusses it at length in *Robinette II*.[110] Thus, had the Ohio court not had the Supreme Court's influence hanging over it, the Justices clearly believed that reasonable grounds existed for a bright-line informed consent rule two years earlier.

C. Brown I and Brown II: The Supreme Court of Ohio held that Ohio's search and seizure provision provides greater protection than the Fourth Amendment.

Several years after the *Robinette* saga, the Supreme Court of Ohio departed from federal caselaw in *Brown I*.[111] In that case, the court held that Article I, Section 14 of the Ohio Constitution provides greater protection than the Fourth Amendment against a warrantless arrest for a minor misdemeanor.[112] However, to understand the significance of that departure, the timeline of cases preceding *Brown I* is important. Three years earlier in *State v. Jones*, the court held that, absent a statutory

105. *Id.* at 767.
106. *Id.*
107. *See infra* Part III-D.
108. 412 U.S. 218 (1973).
109. *Robinette I*, 653 N.E.2d 695, 699-700 (Ohio 1995) (Sweeny, J., dissenting).
110. *See Robinette II*, 685 N.E.2d at 769.
111. 792 N.E.2d 175 (Ohio 2003).
112. *Id.*

exception, both the Fourth Amendment and Article I, Section 14 protect civilians from full custodial arrests for minor misdemeanor offenses and that evidence seized from such arrests must be excluded, subject to a balancing test of the citizens' right to be free from arrest and the government's law enforcement interest.[113] Shortly after *Jones*, the Supreme Court held in *Atwater v. Lago Vista* that such arrests—even for regulatory traffic offenses—are not unreasonable under the Fourth Amendment.[114] This was the same posture as *Robinette*, where the Ohio court came to a more protective rule which was later contradicted by a Supreme Court holding.

The State asked the Supreme Court of Ohio in *Brown I* to reconsider *Jones* in light of *Atwater*.[115] Given how *Robinette II* turned out, with the court showing strong reluctance to depart from federal caselaw, the State must have felt confident in its chances. However, this time the Supreme Court of Ohio held firm to its prior ruling. The court upheld the balancing test from *Jones*.[116] While the court cited *Robinette II's* purported rule that it should "harmonize" its interpretation of the state provision with the federal unless "persuasive reasons" justify otherwise, it resolved this apparently weighty inquiry in two terse sentences:

> We find that the balancing test set forth in *Jones* provides ample reason for holding that Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors. Thus, Jones is still authoritative as to the Ohio Constitution.[117]

The court in *Brown I* seemed much more willing to simply defer to its prior holding as persuasive in its own right rather than seriously grappling with the reasoning put forth by the Supreme Court in its adverse holding in *Atwater*.

Then-Justice Maureen O'Connor, who would later become Chief Justice, dissented. She argued that the arrest in question did not violate the Fourth Amendment or Article I, Section 14; that the arrest only violated an Ohio statute that prohibited warrantless arrests absent a specific exception; and that the exclusionary rule did not apply to statutory violations alone.[118] On the constitutional question, Justice O'Connor observed that the federal and state search and seizure provisions are "virtually identical," and that "[a]ny difference in the

113. 727 N.E.2d 886, 888 (Ohio 2000) (*modified in part by Brown I*, 792 N.E.2d at 175).

114. 532 U.S. 318 (2001).

115. *Brown I*, 792 N.E.2d at 177.

116. *Id*. at 178.

117. *Id*.

118. *Id*. at 179 (O'Connor, J., dissenting).

protections afforded by them is due strictly to judicial interpretation."[119] The dissenting Justice further justified harmonizing the Ohio provision with the Fourth Amendment on the grounds that the Supreme Court's holding in *Atwater* was "not unreasonable" and "does not infringe on the rights of citizens," and that it is "illogical to suggest that a nearly identical Ohio constitutional provision" would prohibit conduct permitted by the Fourth Amendment.[120]

The Supreme Court of Ohio reaffirmed *Brown I* over a decade later in a case fittingly called *State v. Brown* (*"Brown II"*).[121] In *Brown II*, a municipal police officer made a highway traffic stop leading to a warrantless arrest.[122] The arrest violated an Ohio statute that gave exclusive jurisdiction over highway traffic stops to the state highway patrol[123]—a different statute than the one at issue in *Jones* and *Brown I.* The State attempted to distinguish the case from *Brown I* by arguing that violation of the highway jurisdictional statute did not amount to a constitutional violation, and thus the exclusionary rule should not apply.[124] The State also invoked the same argument made in the *Brown I* dissent that Article I, Section 14 and the Fourth Amendment are virtually identical and should be read in harmony.[125] The court disagreed. It cited common law and statutory traditions from Ohio dating back to the mid-nineteenth century indicating that extraterritorial arrests were long considered unlawful, connecting the Ohio statute at issue to that tradition.[126] Comparing the case to *Brown I*, where it similarly found overlap between constitutional and statutory arrest violations, the court concluded that the highway stop in *Brown II* violated Article I, Section 14 of the Ohio Constitution.[127] The majority opinion makes no mention of the *Robinette II* "persuasive reasons" framework, nor did the court entertain rethinking its decision in *Brown I*. Curiously, Chief Justice O'Connor concurred with the majority in *Brown II*.

Thus far, these decisions have not dealt with the exclusionary rule's scope, but instead have only dealt with the Ohio search and seizure provision generally. This discussion seeks to ascertain the principles on which the Supreme Court of Ohio bases its decisions on whether to "harmonize" Article I, Section 14 with the Fourth Amendment, or

119. ***Id.*** at 179-80.

120. *Id.* at 180.

121. *Brown II*, 39 N.E.3d 496, 496 (Ohio 2015).

122. *Id*.

123. *See* **OHIO REV. CODE. ANN.** § 4513.39 (LexisNexis 2020).

124. *Brown II*, 39 N.E.3d at 498.

125. *Id.*

126. *Id*. at 499-500.

127. *Id*. at 500.

conclude that the state provision offers greater protection. According to *Robinette II*, the court interpreted the two provisions coextensively unless "persuasive reasons" justify a departure. However, in *Brown I*, almost in summary fashion, the court dismissed a contrary federal Supreme Court holding to stand firm on its prior ruling. Finally, in *Brown II*, the court applied an originalist-type analysis of antebellum common law principles to justify its recognition of a protection created under Article I, Section 14—a move it has not even remotely explored in the other search and seizure cases discussed herein. It is therefore difficult to tell what justifications the court considers "persuasive" under the *Robinette* framework when such little analysis justifies its decision to depart from the Fourth Amendment in *Brown I*, and where the court used yet another unique analytical framework in *Brown II*.

D. Bembry: The Supreme Court of Ohio addresses the exclusionary rule under the Ohio Constitution.

Keeping these principles in mind, the Supreme Court of Ohio's rationale in refusing to expansively interpret Article I, Section 14 in *Bembry* is internally inconsistent and further complicates matters. The defendants offered three potential justifications for more expansive protection under Article I, Section 14. First, several trial and appellate level Ohio courts had already held that suppression is a remedy for a knock-and-announce violation.[128] Second, they argued that *Brown I* and *Brown II* supported a more expansive interpretation under the Ohio constitution.[129] And third, they argued that other state courts, which the defendants offered as persuasive authority, had resisted adopting *Hudson* in similar cases.[130] The court dismissed the first point on the grounds that it was simply not bound by lower court decisions and, in any event, that the decisions cited expressly relied on the Fourth Amendment. Next, the court distinguished the case from *Brown I* and *Brown II* by pointing out that those cases concerned warrantless arrests, while the officers in *Bembry* had a valid warrant.[131] Finally, the court dismissed the decisions of other states simply because the rationale of *Husdon* was, in the court's words, "far more persuasive."[132]

The court's reason for rejecting the Ohio lower court decisions undermines the *Robinette* framework. That framework presumes that the Fourth Amendment and the Article I, Section 14 should be interpreted the

128. State v. Bembry, 90 N.E.3d 891, 899 (Ohio 2017).

129. *Id*.

130. *Id*.

131. *Id.*

132. *Id*. at 899-900.

same because their language is near-identical. If anything, the fact that the trial and appellate courts interpreted the Ohio search and seizure provision as requiring suppression only strengthens the conclusion that Article I, Section 14 should provide for suppression in a knock and announce violation. If an Ohio court reaches one conclusion on an exclusionary question, and a federal court reaches a different conclusion, this is not evidence that the Ohio court "got it wrong." These decisions are balancing tests, where courts weight the societal costs of exclusion against a citizen's privacy interest. Differing state and federal outcomes are evidence that Ohio courts' interpretation of search and seizure law simply values citizens' privacy interests differently than federal courts.

As for the persuasive value of the other state courts' decisions, the court in *Bembry* all but summarily rejected those decisions simply because they were from other states, which could be said for any interstate constitutional question. Accordingly, unless the court never plans to refer to another state's case law on a constitutional issue in the future, this should not necessarily dispose of the persuasive value of such decisions. The court appeared to simply adopt *Hudson*, and with it, all of the Supreme Court's accumulated balancing of the costs and benefits of the exclusionary rule, without performing any independent balancing under Ohio law. *Bembry* was a failure of the court to clearly articulate how exactly the defendants' three independent rationales for greater protection under the Ohio Constitution—bolstered by Ohio caselaw—fell short of being "persuasive reasons" under *Robinette II*. The only clear supporting rationale appears to be that the result would contradict the United States Supreme Court's prior holding, and that the Court would disagree with the result. This is an abrogation of the duty of a state court judge. Who should know better what the Ohio Constitution requires in its protection of its citizens' privacy interests—Ohio judges elected by citizens of Ohio, or the nine federally-appointed Justices of the Supreme Court?

IV. CONCLUSION

Culminating with the decision in *Bembry*, Ohio's search and seizure jurisprudence illustrates the confusion that results when litigants and state courts do not adequately explain the difference between state constitutional provisions and their federal counterparts. Ohio only adopted an exclusionary rule at the behest of the Supreme Court to begin with; it did not do so independently—undermining the Supreme Court of Ohio's position that Article I, Section 14 was intended to mean the same thing as the Fourth Amendment simply because their language is virtually identical. The exclusionary rule is not rooted in the language of either the Fourth Amendment or Article I, Section 14. It is a judicial creation

designed to vindicate the rights guaranteed by the text. Any expansion or retraction of its protections, therefore, are entirely up to judicial interest balancing, which only strengthens the case for state independence in this area.

It makes little sense, then, for a state court to hitch itself to the Supreme Court's wagon when ruling on such philosophical issues as the efficacy of the exclusionary rule. The Supreme Court of Ohio must articulate clearer criteria for what reasons it would consider "persuasive" in choosing to depart from federal law in order to allow litigants to better develop this area of the law. One such approach could be an originalist, historically oriented approach, as in *Brown I*. Perhaps the court could hold that Ohio lower court decisions can be instructive, despite the court's dismissal of them in *Bembry*. Currently, the court's decisions are conspicuously unclear, creating the impression that the sole criterion for whether a departure from federal law is persuasive is whether the Justices of the Supreme Court of Ohio agree with the majority or the dissenting opinion of an analogous federal Supreme Court case. If the Supreme Court of Ohio does not fill these gaps and give litigants the tools to effectively argue for an independent Ohio Constitution, then one of Ohio's most crucial provisions protecting its citizens against government overreach is at risk of becoming nothing more than a form of words.