

**Back to the Future:  
Using the Original Understanding  
of the Idaho Constitution to  
Secure Our Liberties Without  
Hampering Criminal Prosecutions**

Presentation to the Idaho District Judges  
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**Outline of Argument**

- The Idaho Constitution tracks the U.S. Constitution's texts on self-incrimination and search and seizure.
- When Idaho adopted its Constitution, recent U.S. Supreme Court decisions interpreted the its Constitution to bar the search and seizure of "mere evidence" and the compulsory production of incriminating documents.
- The original intent of the framers of the Idaho Constitution requires adhering to those then-prevailing limits on governmental power.
- These limits require a remedy for victims of an illegal search, but not suppressing most fruits of the search.

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**Part I—A Comparison of the  
U.S. and Idaho Constitutions**

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### Self-Incrimination

**Idaho Constitution § 13**

No person shall...be compelled in any criminal case to be a witness against himself

**U.S. Constitution amend. V**

No person shall ... be compelled in any criminal case to be a witness against himself

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### Search and Seizure

**Idaho Constitution § 13**

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 warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

**U.S. Constitution 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.

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### Judicial Analysis

- "A statute which is adopted from another jurisdiction will be presumed to be adopted with the prior construction placed upon it by the courts of such other jurisdiction." *Nixon v. Triber*, 100 Idaho 198, 200, 595 P.2d 1093, 1095 (1979)
- This rule existed at the time of the framing. See *Ex parte McLeod*, 23 Idaho 257, 128 P. 1106, 1108 (1913).
- Following that approach, Idaho courts have usually but not always construed Idaho Constitution art. 1 §§ 13, 17 consistently with their federal counterparts.

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**Originalism Here and Elsewhere**

- What's Right About Originalism?
- What's Usually Wrong with Originalism?
- How Is Originalism Here Different?

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**Part II—when Idaho Adopted its Constitution, What Did the Framers Know?**

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**The Law At the Framing:  
Boyd v. United States, 116 U.S. 616 (1886)**

- What did *Boyd* hold?
- What was the "mere evidence" rule?
- What did "self-incrimination" mean?

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### How Did *Boyd* Fit In?

- Why so few prior decisions?
- What were the post-*Boyd* decisions in the United States Supreme Court?

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### Did the Idaho Courts Accept *Boyd*?

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YES!

State v. Peterson, 81 Idaho 233, 236, 340 P.2d 444, 446 (1959):

Our constitutional provisions relating to searches and seizures and due process of law are substantially the same as those of the United States Constitution. It was said in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 343, 58 L.Ed. 652, in quoting from *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746:

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**State v. Peterson, 81 Idaho 233, 236,  
quoted this part of Boyd:**

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

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**A Wrong Turn?**

- What happens to the mere evidence rule?
- What did the Idaho courts do?

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**Recent Ambiguity at the  
Federal Level**

- United States v. Jones, 132 S. Ct. 945 (2012) (property ideas prohibit attaching a GPS device to a car without a warrant).
- Wilson v Arkansas, 514 U.S. 927 (1995) (fourth amendment reasonableness requirement incorporates common-law "knock and announce" rule).

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Doubt at the State Level

- Is Idaho bound by present U.S. Supreme Court determinations?

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A Suggested Resolution

What are the consequences?

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**SUM-UP AND A CHANCE FOR QUESTIONS**

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### Recapitulation of the Problem

- Long-standing precedent holds that incorporating the provisions of an existing statute adopts interpretations existing at the time of that statute.
- The Idaho Constitution's Guarantees Against Searches and Seizures and Self-Incrimination are virtually identical to those of the United States.
- Idaho Courts have been uncomfortable accepting the recent U.S. Supreme Court decisions, but the similarities of the guarantees make this awkward.

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### The Resolution

- At Idaho's framing, federal courts interpreted the fourth amendment based on property rights fourth and regarded the seizure and production of private statements as violating the protection against self-incrimination.
- The Idaho Supreme Court adopted this view.
- Later U.S. Supreme Court decisions are irrelevant to the proper interpretation of the Idaho Constitution.
- State decisions could and should follow the framers' intent, not later inconsistent precedent.

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