
John M. Ryan
University of Nebraska College of Law, jryan@vanblk.com

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Note

Home on the Range: The Vitality of the Open Fields Doctrine Under the Nebraska Constitution


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I. INTRODUCTION

In a recent nationally televised address, President Ronald Reagan declared an all out, no-holds-barred "war on drugs." In the State of Nebraska, however, the war on drugs was already well underway. This note focuses on one battle in that war; a battle wherein state constitutional guarantees against unreasonable searches and seizures were effectively emasculated by a majority of the Nebraska Supreme Court. Through its holding in *State v. Havlat*, the court refused to legitimize privacy expectations in Nebraska's "open fields," and has left law enforcement and litigants uncertain as to when, if ever, state

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1. The relevant provision of the Nebraska Constitution provides:
   
   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 but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

   *NEB. CONST. art. I, § 7.*

2. 222 Neb. 554, 385 N.W.2d 436 (1986).
3. *Id.* at 561, 385 N.W.2d at 441.

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constitutional guarantees will rise above the federal floor.\textsuperscript{4} The court's decision in \textit{Havlat} fails on both substantive and methodological grounds.

In order to analyze the \textit{Havlat} decision, it will be necessary to examine the substantive rationale in \textit{Havlat} and \textit{Oliver v. United States},\textsuperscript{5} upon which the \textit{Havlat} majority relied almost exclusively.\textsuperscript{6} The method of state constitutional interpretation used in \textit{Havlat} will be explored, and suggestions for future state constitutional analysis will be made.

\section*{II. THE HAVLAT DECISION}

\subsection*{A. The Facts}

On July 26, 1983, officers from the Nebraska State Patrol conducted a low-level photographic flight over rural land in eastern Nebraska upon which they suspected marijuana cultivation.\textsuperscript{7} Using a

\textsuperscript{4} The "federal floor" is the level below which, because of the selective incorporation of certain rights by the Fourteenth Amendment, state action cannot fall. In other words, federal constitutional guarantees represent a minimum requirement standard to which the states must adhere. See, Williams, \textit{State Constitutional Law Processes}, 24 WM. & MARY L. REV. 169 (1983). As the Supreme Court has repeatedly noted, however, states are free to interpret their own constitutional provisions more expansively than their federal counterparts. "Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." Cooper v. California, 386 U.S. 58, 62 (1967); See also, Oregon v. Hass, 420 U.S. 714, 719 (1975).

\textsuperscript{5} 466 U.S. 170 (1984). \textit{Oliver} and its companion case, Maine v. Thornton, were heard by the Court "to clarify confusion that has arisen as to the continued vitality" of the "open fields doctrine." \textit{Id.} at 173. The Court went on to hold that the fourth amendment did not proscribe searches of "open fields," even absent a warrant or probable cause. \textit{Id.} at 177.

\textsuperscript{6} After citing only one Nebraska case, and after a brief overview of the rationale advanced in \textit{Oliver}, the court stated:

Without a further recitation of the rationale set forth by the majority in \textit{Oliver}, we find persuasive the reasons advanced in \textit{Oliver} for concluding that no constitutional protection attaches to Havlat's activities occurring in the open fields, that Havlat had no legitimate expectation of privacy under the facts here, and that police could enter and search the open field without probable cause or a search warrant.


\textsuperscript{7} \textit{Id.} at 555, 385 N.W. 2d at 438. The constitutional validity of aerial surveillance is directly tied to the "open fields doctrine" in certain situations. If, as the Supreme Court held in \textit{Oliver}, there can be no legitimate expectation of privacy in an open field, and if the field is not within the purview of fourth amendment protection, then it follows that governmental intrusion into fields can take place in any manner the government chooses to use. A number of courts have specifically relied on the "open fields doctrine" to validate aerial surveillance of farmland. See Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973); State v. Stachler, 58 Hawaii 412, 570 P.2d 1323 (1977).

In \textit{Stachler}, the Hawaii Supreme Court held that, as a matter of state constitu-
telephoto lens, the officers were able to detect and photograph what they believed to be marijuana growing on the farmland of Lumir and Valerie Havlat, the parents of the defendant. The defendant, Terry Havlat, farmed the acreage in partnership with his parents.

On July 28, 1983, State Patrol officers went to the border of the Havlat farm, crawled through a fence (the gates were locked), and walked approximately one quarter of a mile to the area where they believed marijuana to be located. The officers did not possess, nor had they sought, a search warrant to authorize their entry onto the Havlat land. Additional warrantless intrusions upon the farm were made on July 29, and on August 2, 4, 5, and 8, 1983. On all occasions, officers ignored posted “No Trespassing” signs to monitor suspicious activity on the Havlat farm.

On August 8, 1983, Terry Havlat was arrested on the farm by officers equipped with cameras and shotguns. Both officers admitted that their primary purpose in entering upon the farmland was to pursue a criminal investigation, and not merely to eradicate the illicit weeds.

Sectional law, the defendant did not have a reasonable expectation of privacy from aerial surveillance. The Hawaii Constitution contains a provision that protects individuals from “sophisticated electronic surveillance techniques.” Holding that the defendant’s right to be free from unreasonable searches had not been violated, the court concluded that using binoculars from a helicopter to view the defendant’s field was not unreasonable. Id. at 421, 510 P.2d at 1329. In determining whether a defendant had a reasonable expectation of privacy from overflight searches, courts have focused on the altitude of the aircraft, Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973); the speed of the aircraft during surveillance, People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973); and the intensity of the aerial observation. Id.

At least one court has affirmed the possibility that aerial surveillance may be unconstitutional as a matter of state constitutional law. State v. Myrick, 102 Wash. 2d 506, 688 P.2d 151 (1984). In Myrick, police obtained inculpatory evidence by flying at an altitude of 1,500 feet and observing, with the naked eye, marijuana growing on the defendant’s land. After rejecting the state’s claim that the search was legal in light of the open fields doctrine, the court held that the overflight observation was nonintrusive. Id. at 508, 688 P.2d at 155. While the court rejected the Hester and Oliver open fields doctrine, it did so primarily because of textual differences between the state and federal constitutional prohibitions of unreasonable searches and seizures. See infra notes 104 and 105.

9. Id. at 556, 385 N.W.2d at 438.
10. Id.
11. Id. “There is nothing in the record to indicate that with that information [the results of the aerial surveillance] the officers could not have obtained a warrant to search the area; there were no exigent circumstances shown here.” Id. at 567, 385 N.W.2d at 444 (Krivosha, C.J., dissenting).
12. Id. at 556, 385 N.W.2d at 438.
13. Id. at 566, 385 N.W.2d at 445 (Shanahan, J., dissenting).
14. Brief for Appellant at 7-8, State v. Havlat, 222 Neb. 554, 385 N.W.2d 436 (1986). This fact would sufficiently rebut the state’s contention that the searches were
At trial, the defendant successfully moved to suppress evidence obtained as a result of the intrusions, the court basing its decision on fourth amendment grounds. The state perfected an interlocutory appeal, and a single judge of the Nebraska Supreme Court reversed the suppression order.

On remand, the trial court, on its own motion, once again suppressed the evidence as obtained in violation of article I, section 7 of the Nebraska Constitution. Again the state appealed, and again the motion of the trial court was reversed. The defendant was subsequently convicted of manufacturing marijuana, sentenced to a term of not less than 20 months nor greater than 40 months in the Nebraska Penal and Correctional Complex, and fined $1,000 plus the costs of prosecution. The defendant then appealed his conviction, seeking an opinion regarding the constitutionality of the warrantless intrusions from the entire supreme court.

B. The Havlat Decision

A divided court affirmed Terry Havlat's conviction. In so doing, the court enunciated the proposition that "our state constitution does

allowable under Neb. Rev. Stat. § 28-429(1)(d) (1985). That statute authorizes warrantless entries of uninhabited buildings or undeveloped land for the purpose of "locating, eradicating, and destroying wild or illicit growth of plant species from which controlled substances may be extracted." Id. Since the avowed purpose of the officers' warrantless intrusions were apparently not within the ambit of the statute, the statute could not shelter their activities.

16. Interlocutory appeals of this nature are authorized by Neb. Rev. Stat. § 29-824 (1985), which provides:

In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence in the manner herein provided. Where such motion has been granted in district court, the Attorney General, or the county attorney or prosecuting officer with the consent of the Attorney General, may file his or her application with the Clerk of the Supreme Court asking for a summary review of the order granting the motion.

The statute goes on to explain some of the procedural requirements of these interlocutory appeals, and also reserves for the defendant the right to challenge the order of the single judge upon conviction.

19. State v. Havlat, 218 Neb. 602, 357 N.W.2d 464 (1984). While Justice White's holding in the first appeal was based entirely on the Supreme Court's decision in Oliver, the holding in this second appeal was based on Justice White's belief that a majority of the court would choose not to "adopt an exclusionary rule based on the Nebraska Constitution." State v. Havlat, 218 Neb. 602, 603, 357 N.W.2d 464 (1984). The question of the vitality of the exclusionary rule under the Nebraska Constitution is a matter outside the scope of this note.
not afford more protection than does the fourth amendment to the federal constitution as interpreted in Oliver.”22 This statement, as well as the decision in Havlat itself, implicates two separate conclusions drawn by the Oliver Court: 1) fields are not within the “persons, houses, papers, and effects” sought to be protected by the fourth amendment, and; 2) fields do not give rise to a legitimate expectation of privacy and therefore the decision is consistent with prior caselaw.23 The Nebraska Supreme Court explicitly adopted the reasoning and result of Oliver.24

C. The Havlat Dissents

Chief Justice Krivosha and Justice Shanahan both filed dissenting opinions. Chief Justice Krivosha proclaimed that he was “persuaded in part by the dissent of Justice Marshall in Oliver.”25 Focusing primarily upon the inconsistency between the Court’s holding in Oliver and its holding in previous cases,26 the Chief Justice found irreconcilable results. After noting that property rights are still important when determining whether an individual has a legitimate expectation of pri-

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23. “Legitimate expectation of privacy” analysis originated with Justice Harlan’s concurrence in Katz v. United States, 389 U.S. 347 (1967). In Katz, the Supreme Court held that warrantless wiretapping of a public telephone was violative of the fourth amendment. Prior decisions had required actual physical invasion in order for there to be a constitutional violation. Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928). Holding these cases outdated, Justice Stewart declared “the Fourth Amendment protects people, not places.” Katz v. United States, 389 U.S. 347, 351 (1967).

Defining when a person has a “legitimate expectation of privacy,” requires a two-tiered analysis. First the individual must demonstrate a subjective expectation of privacy. Secondly, that expectation must “be one that society is prepared to recognize as ‘reasonable.”’ Id. at 361 (Harlan, J., concurring). In defining the legitimate expectation of privacy, Justice Harlan set the contemporary tone of fourth amendment analysis.

25. Id. at 564, 385 N.W.2d at 442 (Krivosha, C.J., dissenting).
26. In Oliver, the court attempted to fashion its decision in a manner consistent with prior decisions. As the dissent pointed out, however:

[N]either a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation. Katz v. United States, [citations, omitted]. Nor can it plausibly be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private. [citations omitted].

vacy, he concluded that Havlat did have such an expectation. Because the search was conducted without a warrant, it should be *per se* unreasonable.

Justice Shanahan’s dissent distinguished prior Nebraska case law, focused on the subjective attempts by Havlat to assert and preserve privacy on his land, and announced a “more plausible” test for determining whether the state constitution had been violated. Relying on the test outlined by Justice Harlan in *Katz*, Justice Shanahan would ask “1) Has the person exhibited a reasonable expectation of privacy?” If the answer to this question is yes, then the court must determine if 2) such expectation of privacy has been violated by “unreasonable governmental intrusion.” Justice Shanahan also posited an additional reason for excluding the evidence: officers had violated criminal trespass laws in obtaining the evidence. Finally, he noted, the Nebraska Supreme Court “should not exhibit some pavlovian conditioned reflex in an uncritical adoption of federal” decisional law as controlling the meaning of the Nebraska Constitution.

### III. ANALYSIS

#### A. Substantive Analysis: The Wisdom of the Open Fields Doctrine in Nebraska.

The arguments supporting the decision in *Havlat* can be categorized into three general areas: 1) arguments dealing with the intention of the framers (roughly based on literal interpretation of the constitution itself); 2) arguments supporting the need for effective and practical law enforcement; and 3) arguments focusing on the reasonableness of the privacy expectation being asserted.

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28. Id. at 571, 385 N.W.2d at 446 (Shanahan, J., dissenting).
29. See supra note 23.
30. Id. at 571, 385 N.W.2d at 446 (Shanahan, J., dissenting).
31. Id.
32. Id. at 572, 385 N.W.2d at 447 (Shanahan, J., dissenting).
33. Id. at 573, 385 N.W.2d at 447 (Shanahan, J., dissenting).
34. There is some question as to whether the literal constitutional interpretation scheme employed by the *Oliver* and *Havlat* courts has any independent significance. Certainly, this sort of literal interpretation cannot be squared with the liberal interpretation advocated in *Katz*. Even Justice Marshall, dissenting in *Oliver*, opined “that the plain-language theory sketched in Part II of the Court’s opinion will have little or no effect on our future decisions in this area.” *Oliver v. United States*, 466 U.S. 170, 188 n.7 (1984) (Marshall, J., dissenting).
36. The court in *Havlat* relied in part on its earlier decision in *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981), to hold that a person’s capacity to claim state constitutional violation was dependent upon his or her ability to show that a reasonable expectation of privacy had been violated. State v. Havlat, 222 Neb. 554,
The order in which the Oliver Court addressed the issues is illustrative of their reasoning. The Court first declared that real property is not within the plain language of the fourth amendment, then went on to point out that this conclusion was consistent with Katz v. United States.\(^{37}\) In ruling on the plain-language of the amendment, the court noted that the original constitutional framers had rejected James Madison's proposed amendment, which would have protected a person's "possessions" from unlawful intrusion.\(^{38}\) Arguing that "possessions" is more inclusive than "effects,"\(^{39}\) the Court concluded that by rejecting the Madison Language, the framers intended to limit the scope of fourth amendment protection. The unstated implication is that, had the framers used the broader term "possessions" rather than "effects", fields may have been constitutionally protected.\(^{40}\) The Nebraska Supreme Court found nothing in its own constitutional history that would lead to a different conclusion.\(^{41}\)

The literal interpretation approach used in Havlat and Oliver is at odds with prior interpretations of the fourth amendment and article I, section 7. Furthermore, literal interpretation represents a dangerous departure from previous constitutional interpretation methods.

While apparently not overruling Katz, the Oliver Court failed to explain how a public telephone booth had been transformed into a person's "effect", consistent with literal interpretation.\(^{42}\) Additionally, the Nebraska Supreme Court has specifically held that constitutional protection of article I, section 7 extends to pornographic films located in a place of business\(^{43}\) in spite of the fact that the business place cannot be classified as a "house" or "effect".\(^{44}\) Conversely, the

560, 385 N.W.2d 436, 440 (1986). One questions whether this ability is truly crucial in the Havlat case, given the court's subsequent statement that art. I, § 7 cannot be interpreted to mean "more than what it says." \(\text{Id.}\) at 561, 385 N.W.2d at 440. Apparently, the court is attempting to invoke the literal interpretation analysis used in Oliver, which would make the reasonableness of the privacy expectation irrelevant. \(\text{See supra}\) note 34.

38. \(\text{Id.}\)
39. \(\text{Id.}\) at 177 n.7.
40. Interestingly, at least two states have interpreted their constitutional search and seizure provisions, which include protection of "possessions," to nonetheless exclude protection of "open fields." \(\text{See infra}\) notes 104-106 and accompanying text.
42. One cannot help but notice that the literal language of art. I, § 7 and the fourth amendment requires possession for the interest to be protected. The word "their" implies that one must possess in order to claim protection. Since the defendant in Katz had no ownership interest in the telephone booth, strictly literal interpretation would lead inevitably to the conclusion that there could be no constitutional protection.
44. The court's holding in Skolnik is consistent with Supreme Court opinions on the fourth amendment's protection of business places. \(\text{See Marshall v. Barlow's, Inc.}\)
Supreme Court has noted that automobiles, certainly classifiable as "effects" under the fourth amendment, are nonetheless entitled to only limited constitutional protection.45

The literal interpretation used in Havlat and Oliver has an even more disturbing effect: internal inconsistency. The Court has defined "open fields" as including "any unoccupied or undeveloped area outside the curtilage."46 Conversely, the Court defined the curtilage as "the area around the home to which the activity of home life extends."47 Thus, real property inside the curtilage is protected by the fourth amendment, while real property on the outside of the curtilage is not. In order to arrive at this anomalous conclusion, the Court is forced to employ a definitional fiction; while most would define "house" as a structural construct, the Court apparently defines "house" as the construct plus some unspecified area surrounding the construct. Fictions of this sort undermine the rationales which support

436 U.S. 307, 311 (1977); G.M. Leasing Corp. v. United States, 429 U.S. 338, 335 (1977). Even the dissent in Marshall, which advocated denial of constitutional protection on the facts of that case, proclaimed that "businesses are unquestionably entitled to Fourth Amendment protection." Id. at 335 (Stevens, J., dissenting).

45. Carroll v. United States, 267 U.S. 132 (1925). The justification originally given for lessened constitutional protections in autos was the mobility of the automobile. Id. at 153. The Court has since noted that an individual in an auto has reduced expectations of privacy. South Dakota v. Opperman, 428 U.S. 364, 367 (1976). Thus, the justification given for the automobile exception to the warrant requirement is twofold: 1) mobility creates "exigent circumstances" that justify a search without a warrant, and; 2) individuals in automobiles have a reduced expectation of privacy. Neither of these justifications appear to be drawn from the text of the fourth amendment, and neither are consistent with literal interpretation of the Constitution.

One might question whether the second justification, reduced expectation of privacy, carries any weight in the light of California v. Carney, 471 U.S.386, (1985). In Carney, the Court upheld the search of the defendant's mobile home. In upholding the search, the Court stressed mobility factors rather than privacy factors. Id. at 394 n.3. It could be possible, therefore, to recognize an automobile as an "effect" under the fourth amendment, and yet allow warrantless automobile searches on the basis of exigent circumstances alone. One must note, however, that even the exigent circumstances exception to the warrant requirement cannot be derived through literal interpretation. The fourth amendment simply does not include a proviso to the prohibition against unreasonable searches.

46. Oliver v. United States, 466 U.S. 170, 180 (1984). The Court went on to note that an open field "need be neither 'open' nor a 'field' as those terms are used in common speech." Indeed, the open fields doctrine has been used to uphold searches of swamps, Commonwealth v. Lewis, 346 Mass. 373, 191 N.E.2d 753 (1963), cert. denied, 376 U.S. 933 (1964); wooded areas, Bedell v. State, 257 Ark. 895, 521 S.W.2d 200 (1975); beaches, Anderson v. State, 133 Ga.App. 45, 209 S.E.2d 665 (1974); and even a fenced-in cave, Stark v. United States, 44 F.2d 946 (8th Cir. 1939).

literal interpretation: loyalty to the text of the constitution and certainty.

Additionally, literal interpretation fails to mesh with prior philosophies of constitutional interpretation. In Boyd v. United States, Justice Bradley declared that literal interpretation of constitutional provisions "deprives them of half their efficacy and leads to a gradual depreciation of the right." Disfavor of literal interpretation was reiterated in Gouled v. United States, where the Court declared that the guarantees of both the fourth and fifth amendments should be construed liberally.

Literal interpretation, then, fails to fulfill the spirit of a constitution. The court in Havlat relied partially on the Oliver Court's plain-language reasoning, adding that "nowhere in our individual research do we find evidence that the framers intended the explicit language of article I, § 7 to encompass more than what it says." Certainly the court did not expect to find such evidence. Apparently the framers of the Nebraska Constitution modeled their own prohibition against unreasonable search and seizure after the fourth amendment to the United States Constitution. They could not have intended, however, that the meaning of article I, section 7 track precisely with fourth amendment interpretation, no matter how restrictive or broad federal interpretation became. Furthermore, the framers of the Nebraska Constitution would have been aware of the judicial tendency to interpret constitutions broadly and so would have selected language capable of flexibility.

The second major justification given for exempting open fields from the warrant requirement is that the need for effective law enforcement justifies the result. There are several flaws in the reason-

48. 116 U.S. 616 (1885).
49. Id. at 635. One writer has hypothesized that "gradual depreciation" may indeed be the goal of the Court in this area. "Any retreat from Katz must be slow and deliberate, much like the current trend against the exclusionary rule." Note, The Open Fields Doctrine Survives Katz, 63 N.C.L. Rev. 546 (1985).
50. 255 U.S. 298 (1921).
52. When federal fourth amendment law broadened to exclude evidence illegally obtained, state courts were reluctant to read their constitutions as broadly.
53. See McCulloch v. Maryland, 4 U.S. 159, 316 (4 Wheat) 316 (1819). A constitution is not a legal code; "[i]ts nature... requires, that only its great outlines should be marked, its important objects designated..." Id. at 407.
54. Oliver v. United States, 466 U.S. 170, 181 (1984). While not specifically cited as a reason for adopting the open fields doctrine in Havlat, the court's citation to the reasoning of Oliver suggests that they found this justification persuasive. See supra note 6.

One major reason given for law enforcement need was that officers "in the field" would be unable to detect whether a specific tract of land had been sufficiently demarcated to warrant fourth amendment protection. Oliver v. United States, 466 U.S. 170, 181 (1984).
ing supporting this justification. First, law enforcement is not made less complex by the application of the courts' field-curtilage dichotomy. Given the Court's nebulous definition of curtilage, it is no wonder that so many courts have struggled with the application of such a definition. Law enforcement may also be struggling with the field-curtilage issue. That officers on investigation can quickly and accurately make judgments about concepts with which courts struggle seems doubtful.

In announcing this rule, courts have also expressed concern about law enforcement's ability to tell when or if a landowner has subjectively manifested his own privacy interests sufficiently to warrant constitutional protection. This concern is contrary to positive law. Criminal trespass statutes such as Nebraska's provide standards that forbid intrusions onto land that is sufficiently demarcated. Citizens are expected to know and apply these standards in order to conform their behavior to the law; it is doubtful that officers would be unable to abide by the laws that they are expected to enforce. If officers commit criminal trespass, argued Justice Shanahan in dissent in Havlat, they breach article I, section 7 of the Nebraska Constitution.

The majority in Oliver, however, believed that using the criminal trespass standard for determining constitutional violations was erroneous. They argued that "the law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe." Criminal trespass laws, unlike the fourth amendment, it is argued, protect against intruders who "poach, steal livestock and crops, or vandalize property." The fourth amendment, the majority contended, vindicates primarily privacy interests. Thus, it was concluded, property rights protected by the law "of trespass have little or no relevance to the applicability of the Fourth Amendment."

The Court's analysis here fails in two respects. Initially, while it must be conceded that a landowner's right to exclude protects his property rights, it cannot be said that property rights are not somewhat protected by the law of trespass. Clearly, the right to exclude

55. See supra note 47 and accompanying text.
59. Under Nebraska law, one commits second degree criminal trespass if one stays or remains on land as to which trespass notice is given by: (a) actual communication to the intruder; (b) "[p]osting in a manner prescribed by law or reasonably likely to come to the attention of the intruders; or (c) [f]encing or other enclosure manifestly designed to exclude intruders." NEB. REV. STAT. § 28-521(1) (1985).
61. Id.
63. Id. at 184.
protects both privacy and property interests; the two are not mutually exclusive. Secondly, as the Court in Katz noted:

the Fourth Amendment cannot be translated into a general constitutional "right of privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.64

It is, therefore, entirely consistent to protect constitutional rights through application of a criminal trespass standard. Furthermore, this standard is one with which citizens and law enforcement are familiar; there should be no trouble in applying its tenets in the field. Lastly, while the needs of law enforcement may be a legitimate concern, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."65

The final justification given for exempting open fields from the warrant requirement is the conclusion espoused in Havlat and Oliver that, no matter what a person does to exhibit an expectation of privacy in an area outside the curtilage, society is not prepared to recognize that expectation as reasonable.66 Whether an individual could claim a legitimate expectation of privacy,67 the courts reasoned, was dependent upon a number of factors: the intention of the framers of the constitution,68 the uses to which the invaded space are put, and a societal understanding that certain places should remain immune from governmental invasion.

Without a doubt, the fields at issue in these cases harbor less activity than a home, but that in itself fails to justify the assumption that per se no protected activity ever takes place. Given the recent political farm activism, arguably activities contemplated for protection under both the fourth amendment and article I, section 7 of the Nebraska Constitution are on the increase in this state. Furthermore, the dissent in Oliver cited numerous potential open field activities deserving of constitutional protection: "landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor."69

Farming is no less a business than operating a movie theater; yet the court protects one business from governmental intrusion and fails to protect the other. Farming is different from many other business activities in that much of the farming activity takes place out-of-doors

67. While Justice Harlan's concurrence in Katz was the basis for the legitimate expectation of privacy analysis, the term and test of "reasonable expectation of privacy" was first used to decide a case in Terry v. Ohio, 392 U.S. 1, 9 (1968).
68. See supra notes 38-52 and accompanying text.
in areas easily seen by the public. Such activity would not be entitled to fourth amendment protection, as all land easily seen from the farm’s borders would receive diminished constitutional protection under the plain view doctrine.\textsuperscript{70} The “open fields” exception to the warrant requirement, however, extends much further than the plain view exception. The open fields doctrine permits a warrantless search if the area searched is outside the curtilage, regardless of whether the land is easily seen from the farm border. Thus, a farmer engaged in perfectly legal business activity on a remote, secluded portion of his land is nonetheless vulnerable to arbitrary governmental intrusion. Business people working indoors, even in areas less secluded, are appropriately protected from such intrusions.

When analyzing the reasonableness of an asserted expectation of privacy, the courts stress that the focus should be on society’s expectations. If society declares a privacy expectation reasonable, then that interest is worthy of fourth amendment protection. Unfortunately, the court in \textit{Havlat} seemed to adopt the Supreme Court’s conclusion that such expectations in fields are unreasonable.

When analyzing the reasonableness of a privacy interest for state constitutional purposes, the court should confine the definition of “society” to the population of that particular state. The population of Nebraska may, for example, be more prone to respect an asserted right of privacy by a farmer than the population of New Jersey. Indeed, as the appellant noted on brief in \textit{Havlat}, “the welfare of this large community is, for all practical purposes, completely dependent upon the business of agriculture.”\textsuperscript{71} The court in \textit{Havlat} erred by failing to consider the unique population of the State of Nebraska; inquiry into the reasonableness of the right to privacy asserted by Havlat should have been limited to the values and beliefs of the people of Nebraska.

Instead of clearly analyzing the objective reasonableness of the asserted right, the \textit{Havlat} court relied upon a conclusionary statement of dicta from its previous holding in \textit{State v. Cemper}:\textsuperscript{72}

\begin{quote}
In the rural areas of this state it would be difficult to find a landowner who would believe that no person would enter on his open field without permission. Hunters, fishermen, and other technical trespassers are so commonly expected in the rural areas of this state that a failure to post trespassing signs
\end{quote}

\textsuperscript{71} Brief for Appellant at 15, State v. Havlat, 222 Neb. 554, 385 N.W.2d 436 (1986).
\textsuperscript{72} 209 Neb. 376, 307 N.W.2d 820 (1981). In \textit{Cemper}, an officer accompanied by an informant entered through an open gate on farmland to seize marijuana. The defendant, who had no possessory interest in the land, claimed that his fourth amendment rights had been violated by the warrantless intrusion. The court, basing their decision on the lack of a legitimate privacy interest, stated that “[i]t is incomprehensible that an employee, who has no personal ownership or possessory interest in an open field, should have a legitimate expectation of privacy.” \textit{Id.} at 382, 307 N.W.2d at 823.
regarded by many persons as almost an implied permission to enter.\textsuperscript{73}

Justice Shanahan in dissent characterized this assertion as “quixotic, a questionable concept for constitutional law, and an inaccurate characterization of the situation encountered by one without consent hunting and emerging from a field of cornstalks to find a scowling landowner who does not view the interloper as a recreational licensee.”\textsuperscript{74}

The people of Nebraska, through legislative action, have acknowledged the landowner’s right to exclude trespassers.\textsuperscript{75} Given the facts in \textit{Havlat}, it is clear that citizen intrusion would have resulted in violation of the law. Relying on the frequency of these wrongful entries to exempt an area from constitutional protection seems dangerous. The frequency of wrongful intrusions into a home or office will not diminish the reasonableness of an expectation of privacy asserted therein. Why should illegal intrusions into a field be treated any differently?

The right to exclude others from one’s property is a crucial factor in determining the legitimacy of the privacy interests asserted therein. “[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude.”\textsuperscript{76} In certain areas, however, some sort of subjective privacy assertion needs to be made in order to invoke constitutional protection. An “open” field is one of these areas; absent an indication to prospective intruders that their presence on the land is unwelcome, such fields should be presumed accessible.\textsuperscript{77} Under the facts of \textit{Havlat}, however, police and citizens alike should be forced to abide by the reasonable exclusionary powers exercised by a landowner. As the Court in \textit{Katz} stated, what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”\textsuperscript{78}

The substantive shortfalls of the \textit{Havlat} decision are further exacerbated by the facts of \textit{Havlat}. The scope and duration of the warrantless entries onto the Havlat farm were severe; officers entered and surveyed the site no less than four times without a warrant.\textsuperscript{79} Additionally, as Justice Shanahan noted in dissent, officers walked “a half mile to reach the haystack pinpointed at 1,320 feet west of the county

\textsuperscript{73} \textit{Id.} at 381-82, 307 N.W.2d at 823, \textit{quoted in} State v. Havlat, 222 Neb. 554, 560, 385 N.W.2d 436, 440 (1988).

\textsuperscript{74} State v. Havlat, 222 Neb. 554, 572, 385 N.W.2d 436, 447 (1986) (Shanahan, J., dissenting). Justice Shanahan also noted that the \textit{Cemper} opinion, relied upon by the majority, was adopted by only two justices of the court, with the remaining five concurring in the judgment.

\textsuperscript{75} \textit{See supra} note 58.


\textsuperscript{77} \textit{Oliver v. United States}, 466 U.S. 170, 193-94 (Marshall, J., dissenting).


\textsuperscript{79} \textit{See supra} note 12 and accompanying text.
B. Methodological Analysis: The Folly of Following the Federal Lead.

Out of necessity, and in order to show the inconsistency of prior substantive case law, this note has focused not only on the history and interpretation of article I, section 7, but also on the fourth amendment to the United States Constitution. This fact is partially due to a long dry spell of state constitutional interpretation which was due, in turn, to the “selective incorporation” of federal constitutional rights. “Selective incorporation” makes certain federal constitutional rights applicable to the states. As a result of this incorporation, state courts, until recently, have been dormant when it comes to independent interpretation of their own constitutions.

In a sense, then, independent state constitutional interpretation necessitates reference to, at least in part, federal decisions interpreting an analogous federal guarantee. Just how much weight should be accorded those federal decisions is a more controversial matter. Certainly, as the Supreme Court has recognized, state courts are free to ignore federal guidelines when interpreting their own state constitution. Indeed, even before Havlat, one justice of the Nebraska Supreme Court had openly advocated abandoning a federal fourth amendment standard, favoring application of a broader standard based on article I, section 7 of the Nebraska Constitution. In order to determine whether divergence from federal constitutional standards was mandated in the Havlat case, it will be necessary to first examine the justifications given for such divergence, and then turn to the methods of independent constitutional analysis available to the court in Havlat. Lastly, this note will examine the reasoning and result of the few state...
courts that have determined the vitality of the open fields doctrine under their own constitutions.

State constitutional law process has, very recently, become a topic of keen academic interest. Commentators have noted that state court judges often look to their state constitution for justifications to depart from Supreme Court constitutional interpretation. Chief among the justifications offered for divergence are notions of federalism that, in some instances, may indicate a true need for independent constitutional analysis even when no textual differences exist between state and federal constitutions.

At least two justices on the current Court have noted that constitutional guarantees lose some of their efficacy when applied to state rather than federal actions. Some feared that the adoption of the "selective incorporation" doctrine would lead to a dilution of constitutional guarantees. That notions of federalism constrain Supreme Court analysis of governmental action is most obvious in San Antonio Indep. School Dist. v. Rodriguez, where the Court declined to strictly scrutinize Texas' system of public school financing because of "potential impact on our federal system."

No such concerns were voiced in the Oliver decision, however. Nonetheless, a recognition that such factors influence the Court's reasoning provides an impetus for state courts to engage in independent state constitutional interpretation.

Further encouragement for such independence is provided by a variety of other factors. First, state court judges are, in certain areas (such as criminal procedure), more familiar with administering workable procedural formulations. Clearly in Havlat the need for an eas-

87. Justice Harlan was the first to warn of this potential for dilution in Ker v. California, 374 U.S. 23, 45-46 (1963) (Harlan, J., concurring). More recently, Justice Powell expressed his opinion that selective incorporation had actually resulted in the "dilution of federal rights." Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring).
88. 411 U.S. 1, 44 (1973).
89. Williams, In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result 35 S.C.L. Rev. 353, 400 (1984).
ily applied rule was paramount. Second, a dropping "federal floor" can also provide incentive for independent analysis. If, for example, the Supreme Court interprets a federal constitutional right more narrowly than it had in the past, the state court may not see fit to follow. In such circumstances, state constitutional guarantees could "pick up the slack."

Other, less theoretical justifications for divergence have been noted. A New Jersey Justice has noted many, among them: 1) textual differences between the federal and state constitutions; 2) unique state legislative history; 3) state law predating the Supreme Court standard being questioned; 4) subject matter of state or local interest, and; 5) public attitudes prevalent in the state. It has been stressed, however, that the presence of such factors should not be a prerequisite to independent state constitutional analysis; it is justifiable for a state court to disagree with the Supreme Court merely because it finds contrary arguments more persuasive. The Supreme Court has no monopoly on correct constitutional analysis.

The method of state constitutional interpretation relied upon by the majority in Havlat accorded nearly conclusive precedential power to the Supreme Court's decision in Oliver. This method sells short the independent significance of the Nebraska Constitution. If the guarantees of a state constitution are to mean anything, they must derive their meaning from sources independent of the federal constitution.

Commentators have frequently analyzed state constitutional decisionmaking over the past five years. Of the different methods identified, all seem to fit into one of two categories: 1) interpretation based upon "federal orientation," and; 2) "state specific" interpretation. "Federal Orientation" may itself take on a number of variations; discussion might be limited to the competing arguments presented in the most recent Supreme Court pronouncement on the issue, or the court may adopt as its own constitutional interpretation selected past Supreme Court opinions (typically Warren Court opinions). State specific interpretation, on the other hand, will focus either on textual

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90. See supra notes 58-65 and accompanying text.
91. Commentators have noted that the Burger Court's disagreement with the protections granted by the Warren Court have been sharpest in the area of search and seizure. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law 63 Tex. L. Rev. 1141, 1183 n.171 (1985). It seems plausible that the federal floor will continue its plunge in this area during the Rehnquist court era.
92. Williams, supra note 89, at 387, citing State v. Hunt, 91 N.J. 338, 363-68, 450 A.2d 952, 965-67 (1982) (Handler, J., concurring). Justice Handler was also adamant that his approach did not create a presumption of correctness for federal constitutional decision. Id. at 367 n.3, 450 A.2d at 967 n.5.
93. This broad categorization was suggested in Developments in the Law: The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1384-93 (1982).
94. Id. at 1389-91.
distinction (focusing on the language of the provision being interpreted) or upon nontextual distinction (focusing on unique characteristics of a given state).\textsuperscript{95}

The 	extit{Havlart} opinion is federally oriented; moreover, the majority primarily limits its discussion to the arguments presented in \textit{Oliver}.

Obviously, state specific textual distinction was impossible in the \textit{Havlart} case; the fourth amendment and article I, section 7,\textsuperscript{97} are identically phrased. Nontextual state specific factors were, however, considered and summarily rejected by the court.\textsuperscript{98} In attempting to find non-textual factors, the court looked to the historical underpinnings of the constitution.\textsuperscript{99} Unfortunately, history is rarely a good nontextual distinction; most state courts and legislatures have traditionally fallen far short of the federal constitutional guarantees in criminal procedure, especially those guarantees granted by the Warren Court.\textsuperscript{100} Reference to the intentions of state constitutional framers would fail to provide even the minimal constitutional protections now required by the fourteenth amendment. History is therefore rarely helpful when attempting to expand constitutional rights.

Due to the absence of state specific factors in many instances, courts have been encouraged to use "state generic" factors to disassociate themselves from federal law.\textsuperscript{101} Under this theory, states would be entitled and justified to engage in separate constitutional analysis merely because they \textit{are} a state. Diversity between states would provide a number of working models from which future federal standards could be borrowed. "It is one of the happy incidents of federalism that a single courageous state may . . . serve as a laboratory"\textsuperscript{102} for novel interpretations of constitutional guarantees. Such a novel approach could be supplied by interpreting article I, section 7, of the Nebraska Constitution as conferring on the residents of Nebraska a broad "right of security" which would be less restrictive (and coincidentally more

\textsuperscript{95} Id. at 1385-87.
\textsuperscript{96} State v. Havlat, 222 Neb. 554, 561, 385 N.W.2d 436, 441 (1986). \textit{See also supra} note 6.
\textsuperscript{97} For the text of the fourth amendment and art. I, § 7, \textit{see supra} note 1.
\textsuperscript{98} The court rejected the appellant's argument that Nebraska should accord greater protection to open fields by virtue of the state's emphasis on agriculture by stating: "we note that a vast majority of the 50 states, regardless of population, have large areas of land devoted to farming, ranching, mining, and tree production." State v. Havlat, 222 Neb. 554, 561, 385 N.W.2d 436, 440-41 (1986). Instead of focusing on square miles, however, the court's emphasis should have been on the unique characteristics of the people of Nebraska. \textit{See supra} note 71 and accompanying text.
\textsuperscript{99} Id.
\textsuperscript{100} Developments in the Law: The Interpretation of State Constitutional Rights, 95 \textit{Harv. L. Rev.} 1324, 1393 (1982).
\textsuperscript{101} Id. at 1397-98.
\textsuperscript{102} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
in line with the language of the provision) than the current “right to privacy” formulations. Undoubtedly, this would be a brave, risky step toward completely independent state constitutional law. As Justice Brandeis put it, “[i]f we would guide by the light of reason, we must let our minds be bold.”

All six cases that pass upon the vitality of the open fields doctrine under state constitutional guarantees are, unfortunately, cases based exclusively upon textual distinction. Of these six decisions, four were based, interestingly enough, upon the presence of the word “possessions” in place of “effects”. In essence, these state provisions are versions of the Madison formulation discussed above. The Court in Oliver implied that, had the framers used the word “possessions” instead of “effects”, open fields would be included in protection. Courts in New Hampshire and Kentucky have rejected this result, both arguing that if every word of the constitution is to be given some meaning, the term “possessions” cannot swallow the terms “houses, papers”. These courts, therefore, followed the federal open fields doctrine. Mississippi and Tennessee, on the other hand, interpret the word “possession” to encompass “practically everything which may be owned”, and on this basis have included fields that are not “wild or wasteland” for constitutional protection. Of the remaining two cases, State v. Myrick is the only one to provide constitutional protection of open fields. Myrick was based upon a state constitutional clause that protected people “in their private affairs”, which the court interpreted to provide greater protection than the fourth amendment.

IV. CONCLUSION

These cases provide examples of state court independent constitutional interpretation, but their usefulness in the Havlat case is limited by the fact that they rely solely upon textual distinction. In Nebraska, other state specific factors should push the court towards independent analysis. Further, institutional limitations should be kept in mind when considering the precedential weight of Supreme Court decisions.

103. Id.
105. See supra note 39 and accompanying text.
111. Id.
The Nebraska Supreme Court did define the meaning of the Nebraska Constitution in Havlat; they simply tied that meaning to Supreme Court analysis. In so doing, the court left litigants without a meaningful analytical framework upon which to rely when attempting to interpret the meaning of the Nebraska Constitution. Future state constitutional decisions should focus not only on the substantive question presented by the facts of the case, but also on the methodological analysis employed to reach the decision. Only then will the Nebraska Constitution fulfill its role as the primary guardian of the people's rights.

John M. Ryan '88