Arkansas's Entry into the Not-So-New Judicial Federalism

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I. INTRODUCTION

On November 16, 1998, a law enforcement officer charged Kenneth A. Sullivan with possession of methamphetamines after conducting an inventory search of his Chevy Blazer following a traffic stop for speeding and having illegally tinted windows. On August 25, 1999, law enforcement officers charged David Griffin with possession of methamphetamines after police officers conducting a “knock and talk” entered and searched his home at 10:15 p.m. In a challenge to a local sodomy statute, Elena Picado, a homosexual woman, sued Little Rock prosecuting attorney Larry Jegley in his official capacity for deprivation of her constitutional rights. At first blush the above recounts may seem uneventful. The Arkansas Supreme Court, however, heard arguments in each of these cases, and the details of each case reveal a controversial struggle between state and federal constitutional jurisprudence within the state.

In the late 1970s, scholars identified the struggle between the federal and state constitutions as the “new judicial federalism.” During this era states began to reassert their power to analyze legal issues under their own constitutions. To date over one-half of the states have utilized their own constitutions to acknowledge more individual rights than the Federal Constitution provides.

The new judicial federalism most visibly affected criminal procedure cases. Some scholars attribute the impetus for the new judicial federalism to the ideological differences between the Warren Court and the Burger Court. As the Court became more conservative in the area of criminal defendants’ rights, the states stepped in with their own solutions. The new

4. G. Alan Tarr, The States and Civil Liberties, in ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM 49 (1989) [hereinafter Tarr, States and Civil Liberties].
5. Id.
6. See infra text accompanying note 114.
judicial federalism represents more than a decade of heightened state court activism. It represents states’ reclamation of their role as guardians of individual rights. On another level it represents the recognition of states as unique local governments.

Griffin, Sullivan, and Picado are examples of the Arkansas Supreme Court’s recent decision to enter the not-so-new judicial federalism. In all three of these decisions, the Arkansas Supreme Court decided that the Arkansas Constitution affords more individual rights than similar federal constitutional provisions. In light of the history of the new judicial federalism, it is not surprising that all three cases involve an area of criminal law or criminal procedure. Although the Arkansas Supreme Court’s decision to use the Arkansas Constitution, rather than rely on the Federal Constitution, is not a new concept, Arkansas’s entry into the new judicial federalism will have a significant impact on the state.

The heightened use of the Arkansas Constitution will require a clear development of state constitutional grounds supporting departures from federal constitutional interpretation. This reliance on state constitutional authority will likely lead to criminal procedure doctrines that require more from law enforcement officers and state prosecutors. This comment outlines the history of the judicial federalism movement by examining the importance of the federal and state constitutions, exploring the impetus for the movement, and providing examples of state court activism during the era.

Continuing, this piece analyzes the ramifications of the judicial federalism movement. Next, this comment explores Arkansas’s recent entry into the judicial federalism movement and the resulting implications. In addition, it submits that the development of Arkansas constitutional jurisprudence is only the beginning and proposes ideas for heightened state constitutional awareness and activism, as well as makes suggestions for specific criminal procedure doctrines.

12. See generally discussion infra Part II.C; Tarr, New Judicial Federalism, supra note 10, at 1099–1100.
13. Infra text accompanying note 118.
14. See generally discussion infra Part III.
15. See infra Part II.B.
17. See generally discussion infra Part II.
19. See generally discussion infra Part II.C.
20. See infra Part III.
II. BACKGROUND

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.21

A. Constitutions

To most Americans, the word “constitution” represents a body of federal law.22 Seldom do people think of state constitutions in terms of providing a framework for government.23 In fact, the United States Constitution is thought “to be the oldest, still operative, written constitution in the world.”24 The Constitution of Massachusetts is actually “the oldest, still operative, written constitution in the world.”25 Both the federal and state constitutions work hand in hand.26 Neither body of law can survive alone.27 All of the original thirteen states had constitutions or charters before the Federal Constitution was drafted and adopted.28 These original state constitutions provided the framework for the Federal Constitution.29

1. The Federal Constitution

Although many scholarly discussions concerning American liberties and individual rights begin with a discussion of the Bill of Rights, neither the ideology nor the codification of human freedoms began with those ten

22. See Ellis Katz, Introduction to ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM 7 (1989). In a 1988 public opinion poll, “only forty-four percent of American adults knew that their state has its own constitution” or its own bill of rights. Id.
23. Id.
24. Id.
25. Id. The Massachusetts Constitution was mostly written by John Adams and was adopted in 1780—seven years before the Federal Constitution was written. Id. The United States Constitution is, however, the oldest, still operating national constitution in the world. Id.
27. Id.
28. Id. at 1. All thirteen original states had fully functioning constitutions before 1787. See id. Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia all enacted constitutions in 1776. Id. at 7. In 1777 Georgia and New York both adopted constitutions. Id. Lastly, Connecticut adopted its constitution in 1818, and Rhode Island enacted its constitution in 1824. Id.
29. Id.
amendments.30 While impressive antecedents were available, it was experience that shaped the Bill of Rights.31 Prior to the Revolution, the British Parliament enacted oppressive retaliatory legislation that the colonies endured.32 During these difficult times, the colonies were forced to proclaim entitlement to individual rights and individual government when their English government proved increasingly paternalistic. 33 This experience served as the backdrop for the emancipation of the young colonies and the importance of developing a system of government that protected against abuses of power.34 Protection of individual rights was also important and led to the inclusion of the Bill of Rights in the new Federal Constitution.35 The inclusion of the Bill of Rights is important for two reasons. First, it signifies the importance of individual liberties as a component of the Federal Constitution.36 Second, it demonstrates the importance of state involvement in the adoption of the Federal Constitution.37


31. See id. at 6. Even prior to the proposal and subsequent adoption of the Bill of Rights, the colonies were experimenting in the development of individual rights and liberties. See id. For example some consider the Laws and Liberties of Massachusetts of 1648 “the first modern code of the Western World.” Id. In 1639 Connecticut drafted the “Fundamental Orders of Connecticut,” followed by the codes of Rhode Island and the Carolina colony. Id. at 6–7.

32. Id. at 9–11.
33. Id. at 10–11.
34. Id. at 13–14.
36. Id. at 465. Many scholars agree that the United States Constitution would not have been ratified but for the promise of the inclusion of the Bill of Rights. Id. at 463.
37. See id. at 465. The role of the Bill of Rights in American constitutional history has been “monumental.” Id. The magnitude of the Bill of Rights is surprising considering that the framers considered the amendments to be unimportant. Id. The Fourth Amendment to the United States Constitution is a prime example of the states’ influence on the Federal Constitution. The purpose of the Fourth Amendment was to prevent the use of writs of assistance and general warrants. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE UNITED STATES FOURTH AMENDMENT TO THE CONSTITUTION 80 (1937). The framers of the Federal Constitution were concerned with writs of assistance, which gave the King’s officials unlimited search and seizure power. Id. at 53. After the American Revolution, four states constitutionally forbade general warrants. Elisa Masterson White, Note, Criminal Procedure—Good
2. State Constitutions

The importance of establishing that the Massachusetts Constitution is, in fact, "the oldest, still operative constitution" in the world goes beyond the need to be historically correct. Its existence solidifies the fact that state constitutions predated the Federal Constitution and highlights the importance of state involvement in the drafting of the Federal Constitution. Moreover, its importance lies in understanding "the limited role that the United States Constitution was designed to serve in the American federal system." Because all of the original states had constitutions or state charters prior to the adoption of the Federal Constitution, the framers of the United States Constitution built on the states' experiences. Accordingly, there are references to state constitutions in The Federalist. Understanding the differences between the federal and state constitutions assists in recognizing the full potential underlying state constitutions. For example, because they govern local governments, state constitutions deal with issues that the Federal Constitution barely acknowledges. Also, current state constitutions continue to provide a framework for, and alternatives to, aspects of government not covered by the Federal Constitution. Finally, some state constitutions supplement and extend provisions found in the Federal Constitution.

Second, a number of federal doctrines tend to limit federal intrusions into state affairs. Specifically, the "adequate and independent state grounds" doctrine prevents the Supreme Court of the United States from

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41. Id. at 7–8.
42. Id. at 8.
43. Findings, supra note 26, at 1.
44. Katz, supra note 22, at 11. In addition to differing focal points, state constitutions may be based on different philosophies of government. Id. State constitutions are also easier to amend, provide for direct citizen participation, and include more detail than similar provisions found in the United States Constitution. Id.
46. Findings, supra note 26, at 1, 11; see also Washington v. Ladson, 979 P.2d 833 (Wash. 1999).
47. Findings, supra note 26, at 1–2.
reviewing high state court rulings resting independently on state law grounds. The "dormant commerce clause," "abstention," and "equitable restraint" doctrines are other examples of limitations into state governmental affairs.

B. Judicial Federalism

The importance of state constitutional jurisprudence became increasingly evident during the late 1970s and early 1980s. This era marked a change in constitutional history in which state courts began using their own constitutions as a means of providing increased individual liberties. This section traces the development of the new judicial federalism by examining the historical role of state courts and individual rights, modifications of criminal procedure doctrines, and state courts' response to the resulting modifications.

1. State Constitutions and Individual Rights

All state constitutions contain provisions protecting individual rights. Civil liberties is a debated area of state constitutional jurisprudence. In fact states historically have been the primary protectors of civil liberties. This is because initially the Federal Bill of Rights did not apply to the states.

49. *Findings*, supra note 26, at 2. For example, the Dormant Commerce Clause allows the federal government to show deference to state commercial rulemaking when the rule promotes traditional police power, is non-discriminatory, and does not vary too much from national standards so as to impose conflicting cumulative burdens. *Id.*; *see* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); *see also* United States v. Lopez, 514 U.S. 549 (1995). "Abstention" and "equitable restraint" restrict federal court original jurisdiction in favor of state constitutional and statutory interpretation. *Findings*, supra note 26, at 2; *see* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
50. *See* discussion *infra* Part II.B.2.
51. *See* discussion *infra* Part II.B.2.
tions*]. The Federal Constitution's Bill of Rights was more or less patterned after state constitutions. *Id.* For example, both the federal and state constitutions may contain phrases such as "due process" and "unreasonable search and seizure." *Id.*
54. *Id.* After the Civil War, many feared that the states would not provide protection to the newly freed slaves. Brennan, *Bill of Rights*, supra note 9, at 537. Thus, the Fourteenth Amendment was adopted to ensure that states would continue with their historic trend of protecting individual liberties. *Id.* at 537–38.
The United States Supreme Court interpreted the Bill of Rights as only applying to federal infringements on civil liberties. Thus, "state constitutions were necessarily the primary vehicle for protecting individual rights," and state law and state courts dominated the protection of individual rights until the early 1930s.

In the 1930s a shift occurred that marked the beginning of the federal government's role as the primary protector of individual rights. The application of the Federal Bill of Rights to the states prompted this shift. "Selective incorporation" emerged as the process whereby the United States Supreme Court selectively applied the Bill of Rights to the states. For the next forty years, the Court continued its selective application of the Bill of Rights by examining issues on a case-by-case basis. Therefore, federal courts gradually became more active in this area. As a result, "civil liberties law . . . became almost exclusively federal."

Selective incorporation had a major impact on state constitutional jurisprudence. States not only were obligated to abide by the Federal Bill of Rights, but also diverted from their role as protectors of civil liberties. During this period litigants first sought to have their claims heard in federal court by the people of the United States for themselves, for their own government, and not for the government of the individual states." Brennan, Bill of Rights, supra note 9, at 537 (quoting Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833)).

56. Tarr, States and Federal Liberties, supra note 4, at 49.
57. Tarr, New Judicial Federalism, supra note 10, at 1099.
58. Id. at 1100.
59. Tarr, States and Federal Liberties, supra note 4, at 49. In its first application, the United States Supreme Court held that the First Amendment to the United States Constitution applied to the states under the Fourteenth Amendment Due Process Clause. Id. (citing Gitlow v. New York, 268 U.S. 652, 666 (1925)).
60. Id.
61. Id.
63. Id. By the 1960s the court aggressively incorporated most of the Federal Bill of Rights dedicated to the area of criminal justice to the states. Tarr, States and Federal Liberties, supra note 4, at 49. Prior to 1961, only four amendments of the Federal Bill of Rights were applied to the states—the First, Fourth, Fifth, and Sixth Amendments. Duncan v. Louisiana, 391 U.S. 145 (1968) (applying the Sixth Amendment to the states); Wolf v. Colorado, 338 U.S. 25 (1949) (applying the Fourth Amendment to the states); Gitlow, 268 U.S. at 652 (applying the Fifth Amendment to the states); Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (applying the Fifth Amendment to the states). Later that year, the Court applied the exclusionary rule, the "corollary" to the Fourth Amendment, to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961). Brennan, Bill of Rights, supra note 9, at 539. The exclusionary rule allows courts to suppress evidence obtained in violation of the Fourth Amendment. Id.
64. See Tarr, States and Federal Liberties, supra note 4, at 49.
65. Id.; Tarr, New Judicial Federalism, supra note 10, at 1100.
court. Even in state law forums, litigants began relying on the Federal Bill of Rights, basing their state law claims on federal law and looking to the United States Supreme Court for doctrine and legal precedent.

2. The Revolution

In the early 1970s, a small number of states began to challenge this seemingly exclusive reliance on federal doctrine and precedent for individual rights. This trend, identified as the "new judicial federalism," became increasingly popular among the states. Scholars identify over 300 cases in which state courts based their decisions on their own constitutions or chose to extend individual rights protections further than Federal Constitution counterparts between 1970 and the mid 1980s. In 1997 the number tallied at over 700. Some states also chose to provide protections not found in the Federal Constitution.

3. The New Judicial Federalism, Criminal Justice, and the United States Supreme Court

Vigorous judicial federalism can be seen in the area of procedural rights for criminal defendants. State court decisions often hold that their constitution affords criminal defendants more rights than the corresponding section of the Federal Constitution as interpreted by the United State Su-

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66. Tarr, New Judicial Federalism, supra note 10, at 1100. Litigants began using federal law as a means to having their claims heard in federal court. Id.
67. Id.; Tarr, States and Federal Liberties, supra note 4, at 49.
68. Tarr, States and Federal Liberties, supra note 4, at 49.
69. Id.
70. Id. Some scholars say that the "new judicial federalism" was never new. See Tarr, New Judicial Federalism, supra note 10, at 1099–1100. It was merely a "rediscovery" of a neglected tradition in state constitutional law. Id. Others maintain that history establishes that the new judicial federalism represents not a rediscovery of the past, but an unprecedented use of state power. Id. at 1106.
71. Tarr, New Judicial Federalism, supra note 10, at 1112. Contrast this number with only ten cases between 1950 and 1969. Id. at 1112–13. Further, a survey conducted in 1985 revealed that over seventy-five percent of state judges thought that litigants were raising state constitutional arguments more often than they had in the past. Id. at 1113.
72. Id. at 1114.
73. Tarr, States and Federal Liberties, supra note 4, at 49. There are many interesting examples of distinctive state constitutional protections. Id. at 50, tbl. 1. For example, Pennsylvania provides a constitutional right to pure water. Id. California's state constitution provides a right to safe schools. Id. In both California and Rhode Island, there is a state constitutional right to fish. Id. Also, thirty-nine state constitutions ban or limit imprisonment for debt. Id.
74. Id.
This judicial activism in the area of criminal defendants' rights can be attributed to changes in the composition of the United States Supreme Court and to the resulting limitations on criminal procedure doctrine. The Supreme Court, in the 1950s and 1960s, under the leadership of Chief Justice Earl Warren, is most remembered for its proactive involvement in the area of individual rights. The Warren Court is also remembered for its active protection of criminal defendants' rights. In light of the Court's decisions, "[s]ome have described the Warren Court's far-reaching criminal procedure cases as a 'revolution.'" The Warren Court's expansion of criminal defendants' rights began to slow down when control of the Court shifted to the new Chief Justice—John Burger. While the Court did not explicitly overturn any Warren Court precedent, it did not hesitate in limiting its application. Thus, many new federalism critics dismissed the revolution as being merely an attempt "to evade Burger Court rulings and safeguard the civil libertarian gains of the Warren Court.

While the Burger Court's goal, it seemed, was to limit the expansion of protections for criminal defendants, all members of the bench did not share

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75. Id.
76. Id.
77. Harris, supra note 8, at 370 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)). Brown was the seminal United State Supreme Court case decided during the Warren Court era, holding segregated schools unconstitutional. See Brown, 347 U.S. at 483.
78. Harris, supra note 8, at 370. The Warren court was particularly concerned with racially-tainted police practices. Id. This concern was expressed in the Court deliberations in Terry v. Ohio. Id. at 373–74 (citing Terry v. Ohio, 392 U.S. 1 (1968)). During the Warren Court era, the United States Supreme Court applied the exclusionary rule to the states. See supra note 63 and accompanying text. Interestingly, Oklahoma had long recognized the exclusionary rule. See Hess v. State, 202 P. 310 (Okla. 1921) (discussing the applicability of the exclusionary rule as a state constitutional right). One of the reasons for the broad interpretation of the state constitution was the difference in language found in the Federal Constitution and Oklahoma Constitution. William W. Greenhalgh & Jeanne N. Lobelson, The States and Criminal Procedure, in ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM 69, 70–71 (1989). The Warren Court also held that criminal defendants must be afforded the right to counsel when in custody. Harris, supra note 8, at 367 n.2 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). Lastly, the Court guaranteed that criminal defendants were aware of their rights by requiring the Miranda warning. Id. at 367 n.3 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
79. Harris, supra note 8, at 367. When the Warren Court began its expansive application of Federal Constitution provisions to state regulation of criminal procedures, states abandoned their constitutions and leaned toward the Supreme Court's rulings. Id.
80. Id.
81. See discussion infra notes 86–88.
82. Tarr, New Judicial Federalism, supra note 10, at 1098.
One justice voiced his concern for the Court’s lack of attention to expansive individual rights.83 One such outspoken Justice was William J. Brennan.84 Justice Brennan explicitly encouraged state courts to abandon federal precedent and look to their own constitutions for a solution to the United States Supreme Court’s increasing judicial conservatism.85 Justice Brennan felt that the Supreme Court’s “contraction of federal rights” should be interpreted as a “plain invitation to state courts” to step up and reclaim their role as primary protectors of individual rights.86 Justice Brennan noted that “[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times.”87

The Burger Court’s, and subsequent Supreme Courts’, highly visible change toward criminal procedure doctrines heightened focus on criminal procedure during the new judicial federalism.88 Warrantless searches, particularly those involving consent searches and pretextual stops and arrests, were among the issues addressed during the new judicial federalism. In the following section, this comment discusses the doctrines of consent searches and pretextual stops and arrests, as well as the states’ response to the resulting limitations on criminal defendants’ rights.90

a. The Consent Problem

In *Schneckloth v. Bustamonte*,91 the United States Supreme Court determined that law enforcement officers are not required to inform suspects

84. Id. at 502.
85. Id.
90. See infra Part II.B.3.a-c.
of their right to withhold consent to a warrantless search. The Court held that the validity of a consent search is not measured by whether the law enforcement officer conducting the search informed the suspect that she has a right to refuse consent. Rather, the requirement is that consent be given voluntarily.

An important issue surrounding consent searches is the element of voluntariness. Both judges and scholars note that most people will not reject a police officer's request to search, even when the search would be detrimental to the individual. In fact some believe that obeying authority is a notion so ingrained that "people mechanically obey legitimate authority." Thus, consent becomes an important issue when law enforcement officers conduct warrantless searches.

b. The Pretext Problem

In Whren v. United States, the United States Supreme Court held that defendants may not raise pretextual challenges to Fourth Amendment searches and seizures incident to a traffic stop when the law enforcement

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92. Id. at 234; see Marcy Strauss, Reconstruction Consent, 92 J. CRIM. L. & CRIMINOLOGY 211, 218 (2001).
94. Id. at 223. The Court went on to articulate a set of factors used in determining whether or not consent to warrantless search was voluntary. Id. at 226. The Court looks to the totality of the circumstances. Id.; see Brendan W. Williams, Horizontal Federalism Inches Along: New Jersey's Experiment in State Constitutionalization and Consents and Searches Finally Finds Company, 5 TEX. F. ON C.L. & C.R. 1, 1-2 (2000). The Court will also look to whether the defendants were informed of their right to withhold consent, their intelligence, and their level of education. Strauss, supra note 92, at 218.
95. Strauss, supra note 92, at 236.
96. Id. (citing Adrian J. Barrio, Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent, 1997 U. ILL. L. REV. 215, 231 (1997)). In a study conducted by Leonard Bickman, Bickman found that experiment facilitators wearing uniforms received a greater degree of compliance when compared with facilitators wearing jackets and ties. Id. at 238 (citing Leonard Bickman, The Social Power of a Uniform, 4 J. APPLIED SOC. PSYCHOL. 47, 51–57 (1974)). Further, facilitators wearing guard uniforms, even without weapons, received a greater rate of compliance than facilitators wearing a milkman's uniform. Id. The results of the experiment concluded that when instructed to pick up trash by the various facilitators, eighty-two percent complied when the guard directed the experiment, sixty-four percent complied with directed by the milkman, and only thirty-six percent complied when directed by a regular citizen. Id.
officer had probable cause to make the stop. The Court reasoned that so long as the officer is able to demonstrate probable cause for the stop, pretext has no place. The Court stated "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Thus, the Court concluded that the existence of probable cause was sufficient to remove the case from a pretextual inquiry.

c. The States Resolution

In response to the post-Warren Court's conservatism, state courts took Justice Brennan's advice and began expanding protection for criminal defendants' rights. Following in the Warren Court's footsteps, states took "seriously their obligation as coequal guardians of individual rights." Therefore, faced with a narrowing of individual rights, state courts had to learn to stand on their own two feet, and in the process, they gave criminal defendants a leg to stand on too.

99. Id. at 813.
100. Id.
101. Id. at 810.
102. Id. at 819. There is always, however, a danger that law enforcement officers will abuse warrantless search authority. Catherine Hancock, State Court Activism and Searches Incident to Arrest, 68 VA. L. REV. 1085, 1107 (1982). Unfettered police discretion makes per se search rules easier to manipulate. Id. at 1108. For example, if law enforcement officers want to search a suspect, they only need to find probable cause to arrest him for some minor offense. Id. The fact that officers may concoct minor violations, coupled with the courts' tendency to view officers as highly credible witnesses, makes proving pretextual motive challenging. Edwin Butterfoss, Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine, 79 KY. L.J. 1, 55 (1990-1991). Additionally, discussions of pretext point to racial profiling as an example of the problem surrounding warrantless searches and seizures. See Jack Kearney, Racial Profiling: A Disgrace at the Intersection of Race and the Criminal Justice System, 36 ARK. LAW. No. 2, at 20 (2001). Seventy-two percent of black males between the ages of eighteen and thirty-four report that they have been the victims of racial profiling. Id. Finally, the problem with pretext practices is that they go against the essence of the Fourth and Fourteenth Amendments. Butterfoss, supra, at 15–16. Thus, the question becomes how do courts formulate an adequate pretext test?

103. See Greenhalgh & Lobelson, supra note 78, at 69. Thus, a component of the new judicial federalism movement can be characterized as reactive. Ronald K.L. Collins & Peter J. Galie, Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions, 55 U. CIN. L. REV. 317, 318 (1986). Because judicial federalism emerged as a result of the United States Supreme Court's conservatism, critics have called the trend "unprincipled and result-oriented." Hancock, supra note 102, at 1086 (citing Bice, Anderson and the Adequate State Ground, 45 S. CAL. L. REV. 750 (1972)).

104. Brennan, Bill of Rights, supra note 9, at 548.

105. From 1970 to 1989, over 450 opinions were handed down in which state courts expanded rights under their constitution greater than the identical federal provision. Harris,
Beginning with the Court’s decision in *Illinois v. Gates*, states began their separation from the United States Supreme Court. The departures continued following the *United States v. Leon* opinion. In 1985 alone, over a dozen opinions were handed down involving protections not covered by the Federal Constitution. The United States Supreme Court’s increasing judicial conservatism thus provoked state court’s increasing judicial activism.

Responses to the Court’s increasing judicial conservatism can be seen in state courts’ treatment of warrantless searches. A few state courts have rejected the United States Supreme Court’s determination that voluntary consent does not require a knowledgeable waiver. New Jersey was the first state court to reject the Supreme Court’s holding in *Bustamonte*. The New Jersey Supreme Court decided to apply a more rigorous standard than the one the United States Supreme Court articulated. Using its own state constitution, the New Jersey Supreme Court determined that voluntary consent requires the suspect to have knowledge of her right to withhold con-
sent.\textsuperscript{114} The court stated that a suspect cannot waive a right when he or she is "unaware of its existence."\textsuperscript{115}

Likewise, the Washington Supreme Court departed from the \textit{Bustamonte} holding.\textsuperscript{116} In a case involving a "knock and talk procedure," the Washington Supreme Court held that its constitution extends beyond the United States Supreme Court's interpretation of the Fourth Amendment.\textsuperscript{117} In analyzing the case, the Washington Supreme Court relied on the \textit{Gunwall} factors.\textsuperscript{118} The court determined that the Washington Constitution affords "heightened protection" against intrusions of the home.\textsuperscript{119} Thus, because the law enforcement officers did not inform the defendant of her right to refuse consent to search her home, the "knock and talk" procedure violated the Washington Constitution.\textsuperscript{120}

Additionally, Mississippi has rejected the Supreme Court's reasoning in \textit{Bustamonte},\textsuperscript{121} stating that effective consent to a warrantless search under the Mississippi Constitution requires the suspect be informed of his right to refuse consent.\textsuperscript{122} Continuing its trend-setting judicial activism in the late 1990s,\textsuperscript{123} the Washington Supreme Court, in \textit{Washington v. Ladson},\textsuperscript{124} rejected the United States Supreme Court's holding in \textit{Whren}.\textsuperscript{125} The court opined that pretextual stops are inherently unreasonable and, thus, go against the basic reasonableness standard.\textsuperscript{126} Further, pretextual stops are unreasonable because they are predicated on false reason.\textsuperscript{127}

4. \textit{Important Implications of the New Judicial Federalism}

A product of the new judicial federalism was an emergence of a reconstructed federal doctrine that sought to encourage well-drafted lower court

\textsuperscript{114} \textit{Id.} at 2. Interestingly, the \textit{Johnson} parties did not argue application of the New Jersey Constitution. The court raised it sua sponte. \textit{Id.} at 9.

\textsuperscript{115} \textit{Id.} at 10.

\textsuperscript{116} \textit{Id.} at 17 (citing State v. Ferrier, 960 P.2d 927 (Wash. 1998)).

\textsuperscript{117} Williams, \textit{supra} note 94, at 17 (citing \textit{Ferrier}, 960 P.2d at 927).

\textsuperscript{118} \textit{Id.} at 16–17 (citing State v. Gunwall, 720 P.2d 805, 811 (Wash. 1986)). For an explanation of the \textit{Gunwall} factors see \textit{infra} Part.II.B.4.

\textsuperscript{119} Williams, \textit{supra} note 94, at 16.

\textsuperscript{120} \textit{Id.} at 17.

\textsuperscript{121} Graves v. Mississippi, 708 So. 2d 858, 863 (1998) (citing Penick v. State, 440 So. 2d 547, 549 (Miss. 1983)).

\textsuperscript{122} \textit{Id.} The \textit{Graves} opinion, however, limits Mississippi's departure by placing the burden of proving uninformed consent on the defendant. \textit{Id.} at 863–84.

\textsuperscript{123} See Harris, \textit{supra} note 8, at 377.

\textsuperscript{124} 979 P.2d 833 (Wash. 1999).

\textsuperscript{125} Harris, \textit{supra} note 8, at 377.

\textsuperscript{126} \textit{Id.;} see also \textit{Ladson}, 979 P.2d at 838.

\textsuperscript{127} Harris, \textit{supra} note 8, at 377–78. The Court also noted the racial context surrounding pretextual stops. \textit{Id.} at 378.
opinions. In *Michigan v. Long*, the United States Supreme Court held that the Michigan trial court’s decision in *Long* was not based on adequate and independent state grounds because the opinion was not drafted in a way that specifically set out independent state grounds. Some scholars argue that the Court’s intention in *Long* was not to foster a respect for state court opinions decided on independent state grounds, but to limit the state’s decisions. By choosing to expand the Court’s jurisdiction, rather than presuming adequate and independent state grounds as had been done in the past, the Court positioned itself to review individual rights cases decided on state constitutional grounds.

As a result of the *Long* decision, state courts may consider developing specific methodologies for establishing adequate and independent state grounds. Various scholars have identified specific methodologies that states may use to preserve decisions based on individual state grounds. For example, a self-reliant approach focuses first on state constitutional law. This model relies on state constitutional law as a fundamental source of law. This approach examines state constitutional law, state history, doctrine, and structure. Federal law is no more persuasive than other state

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129. *Id.* at 1032.
130. *Id.* at 1043. In the lower court’s opinion, the Michigan Supreme Court referenced its constitution twice, but otherwise relied on federal precedent. *Id.* at 1037. The case involved a challenge to a search and seizure. *Id.* at 1035. The defendant argued that the Michigan Constitution afforded greater search and seizure protection than the United States’ Supreme Court affords under the Fourth Amendment. *Id.* at 1037–38. The defendant further argued, because the Michigan court’s decision rests on adequate and independent state grounds, the United States Supreme Court does not have jurisdiction to hear the appeal. *Id.* at 1037.
131. See *id.* at 1066, 1072 (Stevens, J., dissenting); Collins & Galie, *supra* note 103, at 339–40.
132. Collins & Galie, *supra* note 103, at 340. By the late 1990s, the new judicial federalism had become a stable part of American federalism. Tarr, *New Judicial Federalism*, *supra* note 10, at 1098. In fact some states suggested that they would entertain state constitutional claims first, resorting to federal constitutional claims only when the state inquiry did not sufficiently resolve the case. *Id.* As a matter of fact, in 1990, state supreme courts decided over 140 individual rights cases, relying exclusively on their state constitution or on a combination of state and federal law. *Id.* at 1113.
135. Utter, *supra* note 133, at 1028. Utter identifies this model as the Primacy model. *Id.* at 1027–28.
136. *Id.*
137. *Id.*
law, so states are free to develop state law that varies from federal precedent.\textsuperscript{138}

Additionally, state courts may choose to highlight differences in their state constitutions and the Federal Constitution. For example, state courts seeking to preserve their rulings may call attention to textual differences between their constitutions and the Federal Constitution.\textsuperscript{139} State courts may also choose to follow federal precedent so long as the federal rule agrees with state jurisprudence or policy.\textsuperscript{140} These categorical approaches may assist states in meeting the adequate and independent state grounds doctrine as outlined by the Supreme Court in \textit{Long}.

In \textit{Washington v. Gunwall},\textsuperscript{141} the Washington Supreme Court articulated six factors to use in determining when the Washington Constitution would afford broader rights than those found in the Federal Constitution: "(1) [T]he textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular local or state concern."\textsuperscript{142} The purpose of the \textit{Gunwall} factors was to assist litigants in briefing and arguing independent state constitutional grounds.\textsuperscript{143} Further, the six factors ensure that decisions to depart from federal precedent will be well reasoned.\textsuperscript{144} Protection of individual rights should also come from an articulable and reasonable process.\textsuperscript{145}

In addition to their own state law, states began looking to each other for guidance in developing state law rulemaking.\textsuperscript{146} This practice is known as "horizontal federalism" and is used when interpreting similar constitutional provisions.\textsuperscript{147} For example, the Washington Supreme Court heavily relied on the New Jersey Supreme Court's interpretation of its own constitution in its departure from the \textit{Bustamonte} holding.\textsuperscript{148} Likewise, scholars argue that when interpreting state constitutional law, interpretation of similar provisions from other states is more persuasive than federal constitu-

\textsuperscript{138} \textit{Id.}
\textsuperscript{139} Collins & Galie, \textit{supra} note 103, at 328. Collins & Galie identify an approach similar to the Primacy model—the non-equivalent analysis model. \textit{Id.} at 333. As a result of the focus on analysis of state law, and the treatment of federal precedent as merely instructional, it is typically clear that decisions arising out of this model rest on independent state grounds. \textit{Id.}
\textsuperscript{140} \textit{See id.} at 325. A number of the new judicial federalism expansions follow this approach. \textit{Id.}
\textsuperscript{141} 720 P.2d 808 (Wash. 1986).
\textsuperscript{142} \textit{Id.} at 811.
\textsuperscript{143} \textit{Id.} at 813.
\textsuperscript{144} \textit{See id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} Williams, \textit{supra} note 94, at 2.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at 2.
tional interpretation. Moreover, states benefit from other state courts' experimentations with provisions of their constitutions.

C. Arkansas Enters the New Judicial Federalism

During its 2002 term, the Arkansas Supreme Court decided three cases in which it applied the principle of the new judicial federalism. The court determined that it would no longer limit its analysis of Arkansas constitutional provisions lockstep with the United States Supreme Court. This section analyzes the court's entry into the new judicial federalism by examining the court's rationale for choosing to analyze legal issues under the Arkansas Constitution.

1. Narrowing Knock and Talk

In Griffin v. State, the Arkansas Supreme Court stated that it would interpret the Arkansas Constitution as providing more rights than those afforded by the Fourth Amendment to the Federal Constitution. Griffin, therefore, became one of the first examples of the Arkansas Supreme Court's recent entry into the new judicial federalism. The Griffin case involved a challenge to a "knock and talk" procedure where the defendant was arrested after a nighttime knock and search of his home.

The court began its analysis with the notion that a "man's home is his castle, and that even the King is prohibited from unreasonably intruding upon that home." The court continued by noting that the concept of prohibiting unreasonable searches and seizures is not foreign to Arkansas state law. The court pointed out that in the original 1836 version of the State's constitution the law stated:

That the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and that general warrants, whereby any officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named whose offenses are not particularly described and

149. Id.
150. See discussion infra Part II.C.
152. See discussion infra Part II.C.1-3.
154. Id. at 791–92, 67 S.W.3d at 584.
155. Id. at 797, 67 S.W.3d at 588.
156. Id. at 792, 67 S.W.3d at 585.
157. Id., 67 S.W.3d at 585.
supported by evidence, are dangerous to liberty, and shall not be granted.\textsuperscript{158}

The above principle is carried over in the current Arkansas Constitution by the language contained in article 2, section 15: "[T]he right of the people of this State to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."\textsuperscript{159} Although the current state constitutional language mirrors the Federal Constitution's Fourth Amendment, the Court chose to depart from the federal interpretation of search and seizure law and the Court's application of the Fourth Amendment.\textsuperscript{160} Thus, the Court made its reliance on state law expressly known.\textsuperscript{161}

After establishing that it was relying on state law, the court noted differences in the federal and Arkansas standard for executing nighttime search warrants.\textsuperscript{162} Thus, the court supplemented its reliance on state law by demonstrating additional state law protections against nighttime searches.\textsuperscript{163} Following its establishment of heightened requirements for executing nighttime searches, the court turned its attention specifically to the knock and talk procedure.\textsuperscript{164} The court stated that an officer may conduct a search without a warrant if consent is given.\textsuperscript{165} Thus, in a situation where consent is voluntarily given, a knock and talk procedure will be upheld.\textsuperscript{166} In its holding the Arkansas Supreme Court adopted the United States Court of Appeals for the Ninth Circuit's definition of knock and talk, as well as the "daytime" and "honest intent to inquire" elements listed in the United States v. Davis\textsuperscript{167} definition.\textsuperscript{168} In its discussion of knock and talk consent searches, the Ninth Circuit court stated:

\begin{itemize}
  \item \textsuperscript{158} Id., 67 S.W.3d at 585.
  \item \textsuperscript{159} Griffin, 347 Ark. at 793, 67 S.W.3d at 585 (quoting ARK. CONST. art. II, § 15).
  \item \textsuperscript{160} Id., 67 S.W.3d at 585.
  \item \textsuperscript{161} Id., 67 S.W.3d at 585. Additionally, the Court pointed out that the defendant's first point on appeal was that his rights were violated under article 2, section 15 of the Arkansas Constitution. Id. at 791, 67 S.W.3d at 584.
  \item \textsuperscript{162} Id. at 792–93, 67 S.W.3d at 585. According to the Arkansas Rules of Criminal Procedure, there are only three situations in which a warrant may be executed at night: (1) when the place to be searched is difficult of speedy access; (2) when there is an imminent threat of removal of contraband; and (3) when safety precautions mandate that the warrant be executed at night. Id. at 793, 67 S.W.3d at 586 (relying on ARK. R. CRIM. P. 13.2).
  \item \textsuperscript{163} Id., 67 S.W.3d at 585.
  \item \textsuperscript{164} Id., 67 S.W.3d at 585.
  \item \textsuperscript{165} Griffin, 347 Ark. at 794, 67 S.W.3d at 586 (citing ARK. R. CRIM. P. 11.1).
  \item \textsuperscript{166} Id., 67 S.W.3d at 586.
  \item \textsuperscript{167} Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).
  \item \textsuperscript{168} Griffin, 347 Ark. at 794, 67 S.W.3d at 586–87 (relying on Davis, 327 F.2d at 301, 303).
\end{itemize}
Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.\(^{169}\)

The court did note, however, that some jurisdictions require law enforcement officers to inform suspects of their right to refuse consent.\(^{170}\)

In its analysis the court found that the knock and talk procedure conducted in *Griffin* did not meet the "high noon" or the "honest intent to ask questions" elements.\(^{171}\) First, the law enforcement officers conducted the knock and talk procedure at night.\(^{172}\) Second, the officers did not persuade the court that they conducted the knock and talk procedure with the honest intent of asking questions.\(^{173}\) Finally, the officers began the search before the defendant could consent.\(^{174}\) Because the defendant was not given the opportunity to voluntarily consent, the court found that the knock and talk procedure was not valid.\(^{175}\)

In addition to the court's proclamation of self-reliance, the concurring opinions are even more revolutionary.\(^{176}\) Several justices, although agreeing with the majority, opined that the Arkansas Constitution requires more than compliance with the *Davis* "high noon" requirement.\(^{177}\) These justices' opinions further illustrate concerns surrounding consent searches.\(^{178}\) Justice Corbin wrote to urge the state to require oral acknowledgement of the right to refuse consent.\(^{179}\) Justice Corbin stated that he is concerned, generally, with the knock and talk procedure.\(^{180}\) The officer's conscious decision not to

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169. *Id.*, 67 S.W.3d at 587 (quoting *Davis*, 327 F.2d at 303 (emphasis added)).
170. *Id.*, 67 S.W.3d at 587 (citing State v. Ferrier, 960 P.2d 927 (Wash. 1998)).
171. *Id.* at 798, 67 S.W.3d at 588. Although the law enforcement officers received an anonymous tip that the defendant was selling drugs earlier in the day, they did not conduct the knock and talk until 10:10 p.m. *Id.*, 67 S.W.3d at 588.
172. *Id.* at 796, 67 S.W.3d at 588.
173. *Id.*, 67 S.W.3d. at 587. One of the officers testified that they carried out the knock and talk procedure because they were certain they would not be able to obtain a warrant. *Id.*, 67 S.W.3d at 587.
174. *Griffin*, 347 Ark. at 796, 67 S.W.3d at 588. The officers walked around the rear of the defendant's home before requesting his consent to the search. *Id.*, 67 S.W.3d at 588.
175. *Id.* at 800, 67 S.W.3d at 590.
176. *Id.*, 67 S.W.3d at 590 (Corbin, Brown, and Hannah, JJ., concurring).
177. *Id.*, 67 S.W.3d at 590 (Corbin, Brown, and Hannah, JJ., concurring).
178. *See supra* notes 95–97 and accompanying text.
179. *Griffin*, 347 Ark. at 801, 67 S.W.3d at 591 (Corbin, J., concurring).
180. *Id.* at 800, 67 S.W.3d at 590 (Corbin, J., concurring). Justice Corbin was also concerned with the lack of probable cause or reasonable suspicion in cases where law enforcement officers conduct a knock and talk. *See id.*, 67 S.W.3d at 590 (Corbin, J., concurring).
inform the defendant of his right to refuse consent disturbed Corbin.181 Thus, in addition to limiting knock and talk procedures to daytime, Justice Corbin recommended that the Arkansas Constitution be interpreted to require an explanation of the right to refuse consent before the court will uphold searches conducted pursuant to a knock and talk procedure.182

Similarly, Justices Brown and Hannah shared concern regarding the knock and talk procedure.183 They believe that defendants should be informed of their right to refuse consent under Arkansas constitutional law and that police officers should be required to have the waiver acknowledging consent in writing.184 Requiring a waiver of consent in writing will provide tangible proof that consent was actually given.185 Further, written consent forms would offer additional assurance that the defendant is aware of his or her right to refuse consent.186 Therefore, the question remains “what will Arkansas do with the knock and talk procedure in the future?”187

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181. Id. at 801, 67 S.W.3d at 590 (Corbin, J., concurring).
182. Id., 67 S.W.3d at 590 (Corbin, J., concurring).
183. Id., 67 S.W.3d at 591 (Brown, J., concurring).
184. Id. at 803, 67 S.W.3d at 592 (Brown, J., concurring).
185. Griffin, 347 Ark. at 803, 67 S.W.3d at 592 (Brown, J., concurring).
186. Id., 67 S.W.3d at 592 (Brown, J., concurring). Justice Brown does note that written consent forms will not cure all concerns involving consent searches. Id., 67 S.W.3d at 592. However, they will provide some additional protection. Id., 67 S.W.3d at 592.
187. Id., 67 S.W.3d at 592. In light of the concerns the three members of the Arkansas Supreme Court addressed, the knock and talk procedure should take a new form in Arkansas. The Arkansas Supreme Court should adopt the approaches Justices Brown and Hannah offered. Id. at 801, 64 S.W.3d at 591 (Brown, J., concurring); Id. at 804, 64 S.W.3d at 592 (Hannah, J., concurring). Justices Brown and Hannah of the Arkansas Supreme Court agreed that more could be done to protect the rights of criminal suspects and defendants. Id. at 801, 64 S.W.3d at 591 (Brown, J., concurring); Id. at 804, 64 S.W.3d at 593 (Hannah, J., concurring). These two justices align their reasoning along with the second alternative to the Bustamonte opinion, which includes requiring a written waiver in addition to the oral acknowledgement. Id. at 801, 64 S.W.3d at 591 (Brown, J., concurring); Id. at 804, 64 S.W.3d at 593 (Hannah, J., concurring) (citations omitted). As Justice Brown noted, requiring written waivers are beneficial for two reasons. Id. at 803, 67 S.W.3d at 592 (Brown, J., concurring). First, there is no question as to whether consent was given. Id., 67 S.W.3d at 592 (Brown, J., concurring). Second, there is no question as to whether the defendant was notified of his right to refuse consent because the waiver would appear directly on the consent form. Id., 67 S.W.3d at 592 (Brown, J., concurring).

On the other hand, it may be argued that merely providing an acknowledgement, oral or written, will not satisfy the concerns involving the voluntary consent factor. Suspects may still be presented with coercive situations. Strauss, supra note 92, at 254–55. This issue is illustrated by the fact that even when required to provide oral acknowledgements, officers are able to continue to attempt to persuade the individual into consenting to the warrantless search. Id. Thus, individuals may involuntarily consent to searches when they interpret the officer’s persistence as a rejection of their earlier disapproval. Id. at 255. Nonetheless, requiring acknowledgement forms is a step in the right direction. Griffin, 347 Ark. at 803, 67 S.W.3d at 592 (Brown, J., concurring). While it may not alleviate all of the concerns surrounding consent searches, it is still needed. Strauss, supra note 92, at 256.
2. **Parting from Pretext**

A local police officer arrested Kenneth Andrew Sullivan at a local service station in Conway, Arkansas. During the search the officer found narcotics and charged Kenneth Sullivan with possession of methamphetamines, narcotics paraphernalia, and intent to distribute methamphetamines. Sullivan sought suppression of the evidence based on a pretextual arrest argument. He argued that the officer opted to arrest, rather than to issue a citation for the traffic offenses, after the officer recognized his name from previous narcotics investigations. Thus, Sullivan theorized that the officer arrested him in order to search his vehicle for drugs and that the arrest was merely a "sham" used to carry out the officer's subjective motive.

On remand from the United States Supreme Court, the Arkansas Supreme Court held that, as a matter of state constitutional law, the United States Supreme Court's decision in *Whren v. United States* was no longer controlling law regarding pretextual arrest. The court announced that article 2, section 15 of the Arkansas Constitution affords more rights than its Federal Constitution counterpart—the Fourth Amendment. Specifically, contrary to the *Whren* holding, pretextual arrests are invalid under the Arkansas Constitution. Thus, *Sullivan v. State* became another example of the Arkansas Supreme Court's decision to enter the new judicial federalism.

In *Sullivan III*, the Arkansas Supreme Court noted that, although the language of article 2, section 15 is "virtually identical" to the language of the Fourth Amendment, state law demonstrates a different interpretation under Arkansas law. Despite the similarity in language, Arkansas has "traditionally treated pretextual arrests differently than have the federal courts." In support of its analysis the court traced over twenty years of

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190. *Id.* at 317, 11 S.W.3d at 527.
191. *Id.*, 11 S.W.3d at 527.
195. *Id.* at 658, 74 S.W.3d at 222.
196. *Id.*, 74 S.W.3d at 222.
197. *Id.* at 650–51, 74 S.W.3d at 217–18.
precedent related to pretextual arrests. After a thorough analysis of that precedent, the court concluded that although it has interpreted article 2, section 15 of the Arkansas Constitution identical to the United States Supreme Court’s interpretation of the Fourth Amendment, in application, the court has differed in its analysis as related to pretextual arrests. Thus, the court established its rationale for explicitly rejecting the United States Supreme Court’s interpretation.

A challenge to an arrest as a pretext for some ulterior motive must now meet the “but for” test. The court will consider whether the arrest would have taken place but for a typically more serious crime. The court went on to state, “[w]here the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant.” Therefore, the court’s question became “would the arresting officer have effected the full custodial arrest but for his suspicion that Sullivan was involved in narcotics?” It appears that to fully analyze a pretextual inquiry, the court will have to look to the subjective intent of the arresting officer. The subjectivity of the but for test is important because some scholars argue that a subjective test is the only way a court can truly evaluate the existence of pretext.

407, 706 S.W.2d 363 (1986); Brewer v. State, 271 Ark. 810, 611 S.W.2d 179 (1981); Smith v. State, 265 Ark. 104, 576 S.W.2d 957 (1979)).

199. Id., 74 S.W.3d at 218–21.


201. Id., 74 S.W.3d at 218–21.

202. Id. at 654, 74 S.W.3d at 220.

203. Id. at 656–57, 74 S.W.3d at 220.

204. Id. at 654, 74 S.W.3d at 220 (citing Hines v. State, 289 Ark. 50, 709 S.W.2d 65 (1986) (holding that in a case where the defendant was suspected of murder but arrested on other charges, no pretext existed where the defendant would have been arrested for the later charge notwithstanding his suspected connection to the murder case); Ray v. State, 304 Ark. 489, 803 S.W.2d 894 (1991) (holding that although the police obtained statements from defendant while in custody for non-related charges, there was no need for pretext analysis when the defendant challenged the use of those statements in a later homicide conviction because the defendant could not show that he would not have been arrested but for pretext given the amount of evidence gathered against him in the homicide investigation)).

205. Id. at 656–57, 74 S.W.3d at 221.


207. Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendments Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007 (1996). The Arkansas Supreme Court should consider explicitly adopting a subjective approach to the Sullivan “but for” test. First, if the court’s inquiry is whether the officer would have effected the arrest “but for” another unrelated suspicion, then the court must question the officer’s subjective intent if it is to fully analyze its own test. Second, as some scholars point out, the subjectivity of the officer’s
3. **Picking Up Privacy**

In *Jegley v. Picado*, the Arkansas Supreme Court considered a challenge to the state's anti-sodomy statute. The plaintiffs argued that the statute violated their right to privacy under the Arkansas Constitution. The court concluded that the Arkansas Constitution affords individuals a greater right to privacy than is guaranteed by the Federal Constitution. It was not until over a year later that the United States Supreme Court reached a similar conclusion, finding that the Federal Constitution's privacy right extended to homosexual activity. The Arkansas Supreme Court's interpretation illustrates the State's entry into the new judicial federalism.

In its departure the *Picado* court first examined the text of the Arkansas Constitution, pointing out textual differences between the Federal and public policy concerns call for aggressive approaches to unconstitutional behavior. For example the *Picado* court used the emphasis on privacy in statutes as a basis for arguing a strong public policy concern for recognizing a constitutional right to privacy under Arkansas law. Jegley v. Picado, 349 Ark. 600, 628–29, 80 S.W.3d 332, 347–48. Pretextual conduct is unconstitutional. *Sullivan III*, 348 Ark. 647, 74 S.W.3d 215 (2002). It results in unjustified government intrusions, sometimes on the basis of race. These concerns are a matter of public policy. Thus, pretextual issues should be dealt with aggressively, even if it means testing them subjectively. See *supra* text accompanying note 206.

208. *Picado*, 349 Ark. at 600, 80 S.W.3d at 332. The plaintiffs challenged the statute on theories of equal protection and privacy. *Id.* at 610, 80 S.W.3d at 334. The author would like to stress the importance of the *Picado* holding, however, the discussion of the case will be limited to its analysis of an individual’s right to privacy under the Arkansas Constitution because a discussion of equal protection is beyond the scope of this article. See Bonnie Johnson, Note, *Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Establishing New Protections for Arkansas Gays and Lesbians*, 25 U. ARK. LITTLE ROCK L. REV. 681 (2003).

209. *Picado*, 349 Ark. at 608, 80 S.W.3d at 334. The statute provided:

(a) A person commits sodomy if such person performs any act of sexual gratification involving: (1) The penetration, however slight, of the anus or mouth of an animal or a person by the penis of a person of the same sex or an animal; or (2) The penetration, however slight, of the vagina or anus of an animal or a person by any body member of a person of the same sex or an animal. (b) Sodomy is a Class A misdemeanor.


211. See *Id.*, 80 S.W.3d at 334.


213. See *Picado*, 349 Ark. at 600, 80 S.W.3d at 332.

214. *Id.*, 80 S.W.3d at 345.
Arkansas Constitutions.\textsuperscript{215} For example, article 2, section 29 states that rights enumerated in the Arkansas Constitution must not be construed to deny rights retained by the people.\textsuperscript{216} The court found that other provisions of the state constitution also recognize a right to privacy.\textsuperscript{217} Additionally, the court cited several criminal procedure rules that afford privacy rights.\textsuperscript{218} The court also looked to other states with similar statutes.\textsuperscript{219} Specifically the Kentucky Constitution contains provisions similar to the Arkansas Constitution,\textsuperscript{220} and Kentucky has invalidated its sodomy statute.\textsuperscript{221} The court concluded, "[I]n considering our constitution together with the statutes, rules, and case law mentioned above, it is clear to this court that Arkansas has a rich and compelling tradition of protecting individual privacy."\textsuperscript{222} Thus, the Picado decision became another example of Arkansas's entry into judicial federalism.

III. WELCOME TO THE FUTURE, NOW WHAT DID IT ALL MEAN?—A PROPOSAL OF GUIDELINES TO FOLLOW IN FUTURE APPLICATIONS OF JUDICIAL FEDERALISM IN ARKANSAS

A practical result of the new judicial federalism is that state courts learned how to approach and interpret their own constitutions.\textsuperscript{223} This learning process involved watching how other courts, state and federal, accomplished this task.\textsuperscript{224} Litigants also took responsibility for seeing to it that new claims and arguments, pioneered in other courts, were brought and heard before their state supreme court.\textsuperscript{225}

The Arkansas Supreme Court seems confident in its decision to grant more rights under the Arkansas Constitution than are allowed under the Federal Constitution.\textsuperscript{226} The court announced that while it previously inter-

\textsuperscript{215} Id. at 627, 80 S.W.3d at 346.
\textsuperscript{216} Id., 80 S.W.3d at 346-47.
\textsuperscript{217} Id. at 627–30, 80 S.W.3d at 347–49 (citing ARK. CONST. art. II, §§ 2, 8, 21).
\textsuperscript{218} Id. at 629, 80 S.W.3d at 348–49 (citing ARK. R. CRIM. P. 2.2, 8.1, 10.1).
\textsuperscript{219} Picado, 349 Ark. at 625–27, 80 S.W.3d at 345–46.
\textsuperscript{220} Id. at 626–27, 80 S.W.3d at 346. The court noted that the two constitutions had similar textual language regarding the right to privacy. Id. at 626, 80 S.W.3d at 346.
\textsuperscript{221} Id., 80 S.W.3d at 346. Similar to the Arkansas Constitution, the Kentucky Constitution bestows certain inalienable rights, including right to privacy. Id., 80 S.W.3d at 348.
\textsuperscript{222} Id. at 631–32, 80 S.W.3d at 349–50.
\textsuperscript{223} Tarr, New Judicial Federalism, supra note 10, at 1110.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 1113. Litigants, however, will only raise state constitutional arguments if they believe they will be well-received. Id.
\textsuperscript{226} The court cites Griffin v. State, 347 Ark. 788, 67 S.W.3d 582 (2002), in its discussion of independent analysis under the Arkansas Constitution. An Arkansas Supreme Court justice has even noted when litigants fail to rely on the Arkansas Constitution and implied
interpreted the Arkansas Constitution lockstep with the United States Supreme Court, it will no longer do so. The Arkansas Supreme Court, however, will not consider state law arguments unless the litigants first offer them. Thus, it is important for litigants to offer state constitutional law arguments. Also, in light of the Arkansas Supreme Court's recent activism, practitioners have a responsibility to look to other sources of state law and rely on them when appropriate.

The litigants are not the only parties with the responsibility of ensuring that the state constitutional reliance is evident. The Arkansas Supreme Court has a part to play as well. In light of the Long decision, the court must make it unequivocally clear that it is relying on state, rather than federal law. Even if the Arkansas Supreme Court wanted to utilize its own constitution, that effort could be trumped by the United States Supreme Court finding that the court did not adequately express its intent in the opinion. Thus, emphasis is placed on the clear and plain statement of self-reliance.

The Arkansas Supreme Court may also consider adopting a methodology for analyzing state constitutional claims. Additionally, litigants may consider proposing specific methodologies and requesting that the court consider adopting them. In Griffin, the court looked to the Arkansas Rules of Criminal Procedure for guidance. The court noted that under the procedural rules nighttime searches have been treated differently than they have under federal law. In Sullivan, the court pointed to analytical differences in state precedent. Further, in Picado, the court analyzed textual differences, state statutes, and case law in determining that the Arkansas Constitution protects privacy interests. Thus, it would seem as though the Arkansas Supreme Court implicitly utilized the primacy model identified by Ronald F. Utter, or alternatively Ronald Collins's non-equivocal analysis.

that the litigant might have found more favorable law under the Arkansas Constitution. See Keenom v. State, 349 Ark. 381, 80 S.W.3d 743 (2002) (Brown, J., dissenting).


228. Tarr, New Judicial Federalism, supra note 10, at 1113. "[M]ost courts refuse to decide cases on the basis of legal arguments not briefed by the parties; indeed most state supreme courts do not allow counsel to raise state constitutional issues if they were not argued in the lower court." Id. Thus, "state constitutional arguments are a prerequisite for decisions based on state declarations of rights." Id.


230. The United States Supreme Court was not persuaded that the Michigan State Supreme Court's holding was based on adequate and independent state grounds. Long, 463 U.S. at 1043. The Court pointed out that the state court only referenced its constitution twice, and relied on federal precedent throughout the remainder of the opinion. Id. at 1037.

231. See supra notes 161-65 and accompanying text.

232. See supra note 162 and accompanying text.

233. See supra note 199 and accompanying text.

234. See supra notes 214-22 and accompanying text.
Although the court did not expressly apply either of these terminologies, the approach is the same.

When breaking new ground or deciding different issues in the future, the Arkansas Supreme Court may consider developing a specific set of factors for identifying appropriate application of the state constitution. In *Sullivan*, the court cited the *Gunwall* opinion, and it would be beneficial to the court and litigants if the Arkansas Supreme Court developed a set of *Gunwall*-like factors. This development would be beneficial for several reasons. First, the traditionally viewed approach, articulated in the *Sullivan* and *Picado* opinions, would be helpful in assisting litigants and the court in areas of law where there exists a traditional view that differs from the federal view. This theory, however, may not always apply. Additionally, outlining a specific set of factors will assist litigants in their briefing and presentation of arguments to the court. Lastly, it appears that the court is already on the verge of consistently looking to specific factors, so perhaps the court should explicitly enumerate these factors. The following subsection outlines four potential state reliance factors developed by examining the Arkansas Supreme Court's analysis in the *Griffin, Sullivan*, and *Picado* decisions.

A. Text

Examining the text of the Arkansas Constitution appears to be one of the most important starting points for analyzing state constitutional departures. In the *Griffin, Sullivan*, and *Picado* decisions, the Arkansas Supreme Court began its analysis by examining the relevant constitutional provi-

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235. See supra note 139 and accompanying text.

236. In *Gunwall*, the Washington Supreme Court listed six factors for determining whether an issue should be analyzed on state constitutional grounds. See State v. *Gunwall*, 720 P.2d 808, 811 (Wash. 1986); Williams, supra note 94, at 12; see supra Part II.B.4 (listing the six factors used by the court).


238. Consider the Arkansas Supreme Court's recent holding in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), where there is not a traditional view against homosexual sodomy.

239. *Sullivan III*, 348 Ark. at 658, 74 S.W.3d at 222 (Glaze, J., dissenting). In his dissenting opinion, Justice Glaze criticizes the court's reliance on the cited precedent as the rationale for departing from the United States Supreme Court's interpretation. *Id.*, 74 S.W.3d at 222 (Glaze, J., dissenting). Justice Glaze opined that the cited precedent analyzed pretext under the Fourth Amendment, and therefore did not support the court's departure from federal interpretation. *Id.*, 74 S.W.3d at 223 (Glaze, J., dissenting).

240. See generally discussion supra Part III.

241. In both the *Griffin* and *Picado* decisions, the court relied on statutes and the Arkansas Rules of Criminal Procedure. See supra notes 161–65, 218, 222 and accompanying text.
sion.\textsuperscript{242} In some instances the court concluded that the constitutional provi-
sion is similar to its federal counterpart.\textsuperscript{243} In other instances the court con-
cluded that the provisions are dissimilar.\textsuperscript{244} The \textit{Picado} court noted that
there were both textual and structural differences between the Federal and
Arkansas Constitutions.\textsuperscript{245} Additionally, the court went to great lengths to
analyze several sections of the Arkansas Constitution.\textsuperscript{246}

B. Constitutional Provisions, Statutes, and Procedural Rules

Similarly, a second factor the court may consider is the particular lan-
guage of other Arkansas constitutional provisions. Although the \textit{Picado}
court found that the Arkansas Constitution does not explicitly confer the
right to privacy, the court did find other provisions of the Arkansas Constit-
tution that specifically mention the right to privacy.\textsuperscript{247} Moreover, the court
expressly stated that in the absence of explicit language, it will look to other
constitutional provisions to gain a better understanding of the issue.\textsuperscript{248}

In addition to other constitutional provisions, the court continued its
analysis by stating that it must also consider statutes. The court discovered
that over eighty-one Arkansas statutes contain references to a right of pri-

The court may also look to procedural rules, such as the Arkansas
Rules of Criminal Procedure.\textsuperscript{250} The court in \textit{Picado} explicitly stated that it
must consider local rules in its analysis of the right to privacy.\textsuperscript{251} Likewise,
the \textit{Griffin} court relied on the Arkansas Rules of Criminal Procedure in its
analysis of the nighttime knock and talk procedure.\textsuperscript{252}

C. Horizontal Federalism

A third consideration available to the Arkansas Supreme Court is to
rely on other courts' experimentations with various methodologies when

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\item \textsuperscript{242} \textit{See}, e.g., \textit{Griffin v. State}, 347 Ark. 788, 793, 67 S.W.3d 582, 585 (2002).
\item \textsuperscript{243} \textit{Id.}, 67 S.W.3d at 585.
\item \textsuperscript{244} Jegley v. Picado, 349 Ark. 600, 624, 80 S.W.3d 332, 345 (2002).
\item \textsuperscript{245} \textit{Id.}, 80 S.W.3d at 345.
\item \textsuperscript{246} \textit{Id.}, 80 S.W.3d at 345.
\item \textsuperscript{247} \textit{Id.} at 627 n.5, 80 S.W.3d at 347 (stating that Arkansas Constitutional Amendment
51, section 6 specifically sets forth a right to privacy as it relates to voter registration).
\item \textsuperscript{248} \textit{Id.} at 628, 80 S.W.3d at 348.
\item \textsuperscript{249} \textit{Id.} at 628--29 n.6, 80 S.W.3d at 348. The Court noted that the General Assembly's
emphasis on the right to privacy indicated a public policy of protecting privacy rights. \textit{Id.} at
628--29, 80 S.W.3d at 347--48.
\item \textsuperscript{250} \textit{See supra} notes 162--65.
\item \textsuperscript{251} \textit{Picado}, 349 Ark. at 628, 80 S.W.3d at 347. The court considered the Arkansas
Rules of Criminal Procedure in its analysis. \textit{See supra} notes 222--23 and accompanying text.
\item \textsuperscript{252} \textit{See supra} note 167 and accompanying text.
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interpreting future state constitutional provisions. In fact, in practice the court is already participating in horizontal federalism. In a 1994 opinion, the Arkansas Supreme Court looked to the Minnesota Supreme Court when it determined that, for all purposes, a jury must be comprised of twelve individuals.\textsuperscript{253} In the\textit{ Griffin} opinion, the court adopted the Ninth Circuit's definition of "knock and talk."\textsuperscript{254} The court went further and determined that the officer's conduct did not comport with the\textit{ Davis} holding, and therefore, was not a valid knock and talk.\textsuperscript{255} In\textit{ Picado} the court analyzed other jurisdictions' decisions regarding privacy and homosexual activity.\textsuperscript{256} In determining whether the Arkansas Constitution affords more privacy rights, the court noted that Georgia, Montana, and Tennessee have all interpreted their state constitutions as affording a right to privacy.\textsuperscript{257} Finally, the court noted that the Kentucky Constitution is similar in wording to the Arkansas Constitution and stated that Kentucky no longer applied its same sex sodomy statute.\textsuperscript{258} In\textit{ Sullivan}, the Court cited, with approval, Washington case law.\textsuperscript{259} Thus, the third factor in the Arkansas Supreme Court's state law reliance factors could be dedicated to the notion of horizontal federalism.

D. Traditionally Viewed

In both\textit{ Sullivan} and\textit{ Picado}, the Arkansas Supreme Court summarized its analysis by concluding that Arkansas traditionally views an issue one way or the other.\textsuperscript{260} Thus, the court may consider adopting a traditionally viewed factor. As in the\textit{ Picado} analysis, the court may analyze all relevant laws, including local rules and case law, to determine whether Arkansas has traditionally viewed the disputed issue differently under Arkansas law. An affirmative answer gives the court grounds for departing from federal precedent.

\textsuperscript{254} See supra note 168 and accompanying text.
\textsuperscript{255} See supra note 171 and accompanying text.
\textsuperscript{256} See supra note 221.
\textsuperscript{257} Jegley v. Picado, 349 Ark. 600, 625–26, 80 S.W.3d 332, 345–46. Additionally, the court observed that nine other states have invalidated sodomy statutes by judicial decisions and twenty-six have invalidated them by legislative action.\textit{ Id.} at 625 n.4, 80 S.W.3d at 346. Only six states have statutes prohibiting same sex sodomy.\textit{ Id.}, 80 S.W.3d at 346.
\textsuperscript{258} See supra notes 220–21 and accompanying text.
\textsuperscript{260} In\textit{ Sullivan III}, the court held that Arkansas has traditionally viewed the issue of pretext differently than the United States Supreme Court, notwithstanding the textual similarities of the two constitutions. See supra note 200 and accompanying text. In\textit{ Picado}, the court concludes that Arkansas has a tradition of acknowledging a right to privacy. See supra note 217 and accompanying text.
On the other hand, a traditionally viewed element may serve as a limitation in the application of the Arkansas Constitution. In *Sullivan* and *Picado*, although the court found that the issues were traditionally viewed differently under state law, arguments were presented that they were not.\(^\text{261}\) Thus, the court may consider adopting the local concern element from the *Gunwall* factors.\(^\text{262}\) Under that analysis the court may determine that an issue is of local concern and deserves attention under the Arkansas Constitution without first establishing a long tradition of such treatment. Thus, although the court seemed to articulate a “traditionally viewed approach,”\(^\text{263}\) nothing would prevent the court from looking to other factors for consideration, such as its sister states, language of the constitutional provision, local and statutory rules, and general state policy.

IV. CONCLUSION

Justice William J. Brennan would be proud of the Justices of the Arkansas Supreme Court and their opinions in *Griffin, Sullivan*, and *Picado*. The revitalization of state constitutional law demonstrates the magnificent potential underlying state constitutional jurisprudence. The Arkansas Supreme Court’s decision to enter the judicial federalism movement will impact the state greatly. First, the emphasis on state constitutional law will bring about an increased awareness of our state constitution. This increased awareness will assist litigants in advocating state constitutional law claims. The revitalization of the Arkansas Constitution has also extended individual rights for criminal defendants, and the possibility of increased civil liberties beyond those recognized in *Griffin, Sullivan*, and *Picado* is not unrealistic. Finally, the revitalization of the state constitution accentuates the state’s identity and symbolizes a willingness to adopt rules that govern the state based on the needs of the state and not the federal government.

*Ka Tina R. Hodge*

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\(^{261}\) *Picado*, 349 Ark. at 610, 80 S.W.3d at 335.

\(^{262}\) *See generally* discussion *supra* Part II.B.4.

\(^{263}\) *See Picado*, 349 Ark. at 631–32, 80 S.W.3d at 349–50; *Sullivan III*, 348 Ark. at 652–55, 74 S.W.3d at 218–21.

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