Articles

Horizontal Federalism Inches Along: New Jersey's Experiment in State Constitutionalism and Consent Searches Finally Finds Company

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I. Introduction

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." The U.S. Supreme Court has held that "[i]t is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' "[1] One of the "well settled" exceptions that the Court has established to the requirements of both a warrant and probable cause involves consent-based searches.[2] Thus, when law enforcement officers lack the necessary probable cause to support a search warrant, they can obtain voluntary consent to search a suspect's property. The question turns upon what constitutes "voluntariness."

In 1973, in *Schneckloth v. Bustamonte*,[3] the Court declared that a person's voluntary consent to a warrantless search need not be supported by any knowledge of his or her right to refuse to consent. Two years later the New Jersey Supreme Court rejected that proposition. In *State v. Johnson*,[4] that court became the first state court to apply a more rigorous consent search standard under its own state constitution. It held that the

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1. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1976)).
2. *Id.* (citing Davis v. United States, 328 U.S. 582, 593-94 (1946); Zap v. United States, 328 U.S. 624, 630 (1946)).
3. 412 U.S. 218 (1973).
4. 346 A.2d 66 (N.J. 1975).

state, when seeking to rely upon consent to support a warrantless search, must prove that the person providing consent knew that he or she "had a choice in the matter."[5]

Johnson exemplifies the early dawn of independent state constitutional jurisprudence. This movement sprang up to vindicate the individual rights written out of United States constitutional jurisprudence by increasingly conservative Supreme Court decisions. In 1977, for example, the *Harvard Law Review* published a seminal article[6] written by Supreme Court Justice William Brennan calling for state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms."[7] Brennan's advocacy was in keeping with the principle that the Bill of Rights established a foundation for the protection of civil liberties that state courts may not undermine, but may build upon through their own constitutions and the exercise of powers reserved to them by the Tenth Amendment under our federalist system.[8]

Expanding upon Brennan's theme, others, such as New Jersey Supreme Court Justice Stewart Pollock,[9] urged states to look to the examples of sister states in interpreting similar provisions of their own constitutions—a practice known as "horizontal federalism."[10] As an

5. *Id.* at 68.

6. *See, e.g.*, Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (The New Jersey Supreme Court justice refers to Brennan's article as nothing less than the "Magna Carta of state constitutional law"); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 (1992) (crediting the article with giving "birth to a movement advocating state independence in constitutional decisionmaking.").

7. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

8. *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985); U.S. CONST. amend. 10 ("All powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."). This principle does not just flow from the liberal ideology of the late Justice Brennan and like-minded adherents. Supreme Court Justice Anthony Kennedy, who is certainly no liberal, recently wrote a majority opinion in which he noted that inherent in the writing and adoption of the Constitution was the "unique insight that freedom is enhanced by the creation of two governments, not one." Alden v. Maine, 119 S. Ct. 2240, 2268 (U.S. 1999). Accordingly, "[a]lthough the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept." *Id.*

9. Pollock, *supra* note 8, at 992.

10. *See* Roger F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 373 n.90 (1984) (crediting first use of this term to Mary Porter and G. Alan Tarr) (citing MARY CORNELIA PORTER & G. ALAN TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, xxi-xxii (1982)). There is another interesting variation upon this theme that is not a subject of this article, but which deserves study. That is where federal courts rely upon the reasoning of state courts. As one former judge noted: "Just as the opinions of the state courts have been enriched by analysis of and response to the federal cases, so may the opinions of the federal courts be enriched by analysis of and response to

Oregon Supreme Court opinion noted: "Diversity is the price of a decentralized legal system, or its justification, and guidance on common issues may be found in the decisions of other state courts as well as in those of the United States Supreme Court."[11] Indeed, one law professor went so far as to argue that "as a matter of persuasive authority in state constitutional interpretation, Supreme Court interpretations of similar or identical federal constitutional provisions are entitled to *less* weight than decisions of sister state jurisdictions. Horizontal federalism . . . should be more persuasive."[12]

Given these stirring calls to arms by state constitutionalists, one might have supposed that *Johnson* would become a bellwether decision, followed in short order by a procession of state supreme court opinions providing higher procedural standards for proving voluntary consent to warrantless searches. It never happened. Remarkably, for close to a quarter-century, the New Jersey Supreme Court stood alone as the only state court to reject the *Bustamonte* voluntary consent standard. In 1998 another state court finally followed New Jersey's lead. In *State v. Ferrier*,[13] the Washington Supreme Court not only adopted the New Jersey standard by reference, but also built upon it by applying even more protections against warrantless consent searches.

The first part of this article examines the approaches taken by three different courts—the U.S. Supreme Court, the New Jersey Supreme Court and the Washington Supreme Court—confronting the same issue. In doing so, it also describes the influence of New Jersey's high court upon its Washington counterpart—an influence seen in other cases and most recently manifested in the *Ferrier* ruling. The second part of this article examines the lessons of the *Johnson* and *Ferrier* decisions, and how they comport with scholarship on independent state constitutional jurisprudence. This is a story of state constitutionalism. This story illustrates, in a nutshell, both the potential and practical limitations of Justice Brennan's vision.

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the state cases." Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 742 (1988).

11. State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

12. Williams, *supra* note 10, at 403 (footnote omitted). Professor Williams went on to argue that "[t]he Supreme Court, and the Constitution it interprets, differ in too many ways from state courts and state constitutions for that Court's decisions to carry presumptive weight in state constitutional analysis." *Id.*

13. 960 P.2d 927 (Wash. 1998).

II. Three Courts, One Issue, Three Rules

A. The U.S. Supreme Court and Schneckloth v. Bustamonte

Robert Bustamonte was a passenger in a car pulled over by a police officer, James Rand. Five other men were in the vehicle.[14] Officer Rand made the traffic stop after observing two burnt out lights.[15] The driver did not have a driver's license.[16] Passenger Joe Alcala was the only person who produced identification upon Rand's request.[17] He explained to the officer that the car belonged to his brother.[18] The men were asked to step out of the car.[19] Additional officers arrived, and Rand asked Alcala if he could search the car.[20] Alcala responded, " 'Sure, go ahead.' "[21] Prior to the search, there were no threats of arrest and Alcala actually assisted in the search by opening the vehicle's trunk and glove compartment.[22] Under one of the seats, the police officers found three stolen checks.[23]

Bustamonte was charged with possessing a check with intent to defraud.[24] The checks found during the search were used as evidence against him.[25] Bustamonte filed a motion to suppress the checks, arguing they were the fruit of an illegal search.[26] His motion to suppress was denied and he was ultimately convicted.[27]

The California Court of Appeals affirmed Bustamonte's conviction,[28] writing that all the circumstances indicated "Alcala's assent to the search of his brother's automobile was freely, even casually given."[29] The court also pointed out that "[a]t the time of the request to

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14. *Id.*
15. Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973). The State did not "contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants," *id.* at 227-28, factors that would have made this a different case had they been present. "If there had been probable cause for the search of the automobile, a search warrant would not have been necessary in this case." *Id.* at 228 n.10 (citing Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925)).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).
26. *Id.*
27. *Id.*
28. People v. Bustamonte, 76 Cal. Rptr. 17 (Cal. Ct. App. 1969).
29. *Id.* at 20.

search the automobile the atmosphere, according to Rand, was 'congenial' and there had been no discussion of any crime . . . . Alcala even attempted to aid in the search."[30] In his appeal, Bustamonte argued "that there could be no voluntary consent to the search without prior advice to Alcala that he had a legal right to refuse permission to search the car."[31] The California court rejected this argument, noting that other California courts had summarized the rule for voluntary consent searches as follows: " 'When permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the implication that the alternative of a refusal existed.' "[32] The California Supreme Court denied review.[33]

After being denied review, Bustamonte sought a writ of habeas corpus in federal district court.[34] His writ was denied and he appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit Court vacated the order denying the writ, and remanded the matter to the district court.[35] Citing a prior decision, the court held, in assessing the waiver of one's Fourth Amendment "right to be free" from a warrantless search, a " 'court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license[,] which the person knows may be freely and effectively withheld.' "[36] Accordingly, the court wrote, "the 'implication' apparently relied upon by the California courts can hardly suffice as a general rule. Under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a *demand* backed by force of law."[37]

The Supreme Court "granted certiorari to determine whether the Fourth and Fourteenth Amendments require the showing thought necessary by the Court of Appeals."[38] The Court, with Justice Stewart writing, noted it was "evident that neither linguistics nor epistemology provide a ready definition of the meaning of 'voluntariness,' " but that " 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect."[39] The Court reversed the Ninth Circuit, finding that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not

30. *Id.*
31. *Id.*
32. *Id.* (quoting People v. Macintosh, 70 Cal. Rptr. 667, 670 (Cal. Ct. App. 1968)).
33. This decision was unreported. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 221 n.2 (1973).
34. This decision was unreported. *Id.* at 221 n.3.
35. Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971), *rev'd*, 412 U.S. 218 (1973).
36. *Id.* at 700 (quoting Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965)).
37. *Id.* at 700-01 (emphasis added).
38. *Bustamonte*, 412 U.S. at 222.
39. *Id.* at 224-25.

establish such knowledge as the *sine qua non* of an effective consent."[40] Were it otherwise, "[a]ny defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent."[41] Nor, the Court held, would the use of a warning be an appropriate means of assuring such knowledge. The Court wrote that due to the "informal and unstructured conditions" of a consent search "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[42]

Distinguishing the case from *Miranda v. Arizona*,[43] the Court noted, "since consent searches will normally occur on a person's familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite."[44] Accordingly, the Court held that while prosecutors must "demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied," the voluntariness of that consent "is a question of fact to be determined from all the circumstances."[45] Those circumstances include, in addition to the defendant's knowledge of the right to refuse consent, "evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights."[46]

The Court has subsequently added the additional circumstance of a "newcomer to the law" to this list of factors.[47] Remarkably, the Court has also held the mere fact that someone had "been arrested and was in

40. Bustamonte v. Schneckloth, 412 U.S. 218, 227 (1973).
41. *Id.* at 230.
42. *Id.* at 231-32.
43. 384 U.S. 436 (1966). In order to protect the privilege against self-incrimination during a custodial interrogation, *Miranda* requires that the police warn detainees, prior to questioning, that they have the right to remain silent, that anything they say can be used against them in court, that they have a right to an attorney, and that an attorney will be provided if they cannot afford one. *See id.* at 478-79.
44. Bustamonte v. Schneckloth, 412 U.S. 218, 247 (1973) (footnote omitted). One commentator has written, however, that in two respects the case for warnings before consent searches is actually *stronger* than the argument for warnings prior to interrogation:

> First, in the interrogation context a search warrant is not an available option; second, unlike the interrogation situation in which police are reluctant to interrupt a spontaneous exchange with a citizen, in the search context advising a suspect of the right not to consent is unlikely to disrupt any ongoing exchange.

Steven A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 187 n.265 (1980).
45. Bustamonte v. Schneckloth, 412 U.S. 218, 248-49 (1973).
46. *Id.* at 248.
47. United States v. Watson, 423 U.S. 411, 424-25 (1976).

custody" is not, in itself, enough to demonstrate sufficient coercion to affects the voluntariness of consent to a warrantless search.[48]

Three Justices—Brennan, Douglas, and Marshall—dissented by separate opinions. Justice Brennan wrote, "It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence."[49] Similarly, Justice Marshall wrote, "I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made."[50] In light of the majority's holding, he wrote it was his reluctant conclusion that "when the Court speaks of practicality, what it really is talking [about] is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights."[51]

The reaction of commentators to *Bustamonte* was scarcely more charitable than that of its dissenting Justices. Professor LaFave, a leading scholar in the field of search and seizure law, noted in *Bustamonte,* the Court "imported into the consent search area the traditional 'voluntariness' test, which proved so ineffective and unworkable in the confession field that it was largely superceded by the new requirements of *Miranda v. Arizona*."[52] He ironically observed previous Supreme Court opinions where the Court wrote, " 'no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.' "[53] Professor Dix, another authority in criminal procedure, simply stated, "The opinion is an analytical and conceptual disaster . . . . [H]ow should a trial judge weigh evidence of a lack of awareness of the right to refuse consent against or with evidence of the other elements that traditionally have been part of the totality of the circumstances?"[54] He noted, "The Court has taken at least two completely different elements—a subject's awareness of his legal rights and improper influences upon the exercise of his choice—and required that courts interrelate them."[55] A third scholar referred to the "analytical narrowmindedness" of *Bustamonte* and opined, "Its attack on the

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48. *Id.* at 424.
49. *Bustamonte,* 412 U.S. at 277 (Brennan, J., dissenting).
50. Bustamonte v. Schneckloth, 412 U.S. 218, 277 (1973) (Marshall, J., dissenting).
51. *Id.* at 288 (Marshall, J., dissenting).
52. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.2 at 635-36 (3d ed. 1996) (footnote omitted).
53. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1(a) at 604 (quoting Escobedo v. Illinois, 378 U.S. 478, 490 (1964)).
54. George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis,* 55 TEX. L. REV. 193, 203 (1977).
55. *Id.* at 204.

exclusionary rule, albeit latent, is thoroughgoing."[56] Reflecting a "get tough on crime" mentality, the result of *Bustamonte* appears to be the court-sponsored facilitation of police "fishing expeditions" in instances where probable cause is lacking. In these circumstances, officers might be able to obtain evidence by cajoling criminal suspects into consensual searches of their homes and property—all with the imprimatur of the Fourth Amendment and the gloss of constitutional permissibility.

B. The New Jersey Supreme Court and State v. Johnson

In *State v. Johnson*,[57] the New Jersey Supreme Court heard argument on a motion to suppress evidence from a criminal defendant, Arthur Johnson. In the facts and procedural history of the case, Johnson was indicted for possession of narcotics and possession of narcotics with intent to distribute.[58] Police obtained the evidence during a consent search of "an apartment where defendant kept some personal belongings."[59] The "consent was given by a woman who was defendant's fiancée and who occupied the apartment."[60] The parties presented conflicting testimony "as to the circumstances leading up to the search and whether or not consent had been given."[61] Finding the State had not proven "that the consent was knowingly, intelligently, voluntarily and unequivocally given to search the apartment"[62] the trial judge granted the motion to suppress.

After the New Jersey Superior Court's Appellate Division reversed the trial court's ruling, the defendant appealed to the New Jersey Supreme Court, which granted review.[63] The New Jersey Supreme Court noted that *Bustamonte* "rejected the contention that the validity of a consent to a search in a non-custodial situation should be measured in terms of waiver."[64] It conceded that this holding was "controlling on state courts insofar as construction and application of the Fourth Amendment is concerned and is dispositive of defendant's federal

56. Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 546 (1977).
57. 346 A.2d 66 (N.J. 1975).
58. *Id.* at 66.
59. *Id.*
60. *Id.* at 67 n.1.
61. *Id.* at 67.
62. State v. Johnson, 346 A.2d 66, 67 (N.J. 1975).
63. State v. Johnson, 346 A.2d 66 (N.J. 1975). A search in Westlaw's electronic database revealed no record of the Appellate Division's ruling.
64. *Id.* at 67.

constitutional argument."[65] However, the court observed, "each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution."[66]

Although the defendant had not argued New Jersey's constitutional provision against unreasonable searches should be interpreted to provide *greater* protections than those provided by the Fourth Amendment of the United States Constitution, the New Jersey Supreme Court raised the issue *sua sponte*,[67] requesting "supplemental memoranda on the question."[68] With this briefing in hand, the court noted, "It is recognized that art. I, par. 7, is taken almost verbatim from the Fourth Amendment and until now has not been held to impose higher or different standards than those called for by the Fourth Amendment."[69] That, however, was not the end of the story. The court added, "[W]e have the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning."[70] With no analysis,[71] the court then went on to offer the following holding:

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65. *Id.*

66. *Id.* (citing Cooper v. California, 386 U.S. 58, 62 (1967)).

67. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 900 (1976) ("It is noteworthy that the question of whether New Jersey's constitutional provision against unreasonable searches should be interpreted to give the individual greater protection than that afforded by the Fourth Amendment was raised sua sponte by the court.") (footnote omitted).

68. State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975).

69. *Id.* at 68 n.2. (N.J. 1975). The federal and state constitutional provisions are essentially indistinguishable. The Fourth Amendment reads as follows:

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

U.S. CONST. amend. IV. The parallel provision of the New Jersey Constitution is as follows:

> 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 except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. CONST. art. I, ¶ 7.

70. *Johnson*, 346 A.2d at 68 n.2. As one assessment of *Johnson* notes: "The notion of plain meaning is here severed from any imputation that words themselves have invariant meanings." Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 640 (1994).

71. *Johnson* is, in some respects, most remarkable for its brevity. The majority opinion only takes up two pages of the regional reporter. "[S]tate constitutional decisions are rarely judged for their reasoning." Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 223 (1992).

> We conclude that under art. I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; [i].e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.[72]

Mirroring language used by the dissenting Justices in *Bustamonte*, the court stated, "One cannot be held to have waived a right if he was unaware of its existence."[73] Notwithstanding this proclamation, the court specifically rejected the requirement of a warning to establish knowledge of the right to refuse consent. It wrote that "in a non-custodial situation, such as is here presented, the police would not necessarily be required to advise the person of his right to refuse to consent to the search."[74] Instead, the court held "[o]ur decision is only that in such a situation if the State seeks to rely on consent as the basis of the search, it has the burden of demonstrating knowledge on the part of the person involved that he had a choice in the matter."[75] The court then, in a footnote, enigmatically referred to Justice Marshall's dissenting opinion for "[s]everal ways by which the State could satisfy this burden,"[76] without actually sharing those "ways" in its opinion.[77]

Notably, the New Jersey Supreme Court was unanimous in repudiating *Bustamonte*. The sole dissenter, Justice Pashman, advocated an even more liberal construction of the New Jersey Constitution. Pashman argued in favor of a warning requirement explicitly advising the person from whom consent is sought, "that he had a right to refuse consent, that his refusal would be respected, and that anything uncovered by the search could be used in evidence against him."[78] Justice Pashman

72. *Johnson*, 346 A.2d at 68. Though he agreed that voluntary consent must be knowing, Justice Schreiber in a concurrence quibbled with the semantics of the majority opinion: "I would not, as the majority does, rationalize the problem in terms of waiver." *Id.* at 69 (Schreiber, J., concurring). He feared that a waiver theory could lead to requiring warnings. *Id.* (Schreiber, J., concurring).
73. State v. Johnson, 346 A.2d 66, 68 (N.J. 1975).
74. *Id.*
75. *Id.*
76. *Id.* n.3.
77. Those ways are as follows: (1) subject affirmatively demonstrates knowledge of right to refuse consent at time of search; (2) where person providing consent to search is someone other than defendant, requiring "him to testify under oath"; (3) establishing that the subject had shown recent prior awareness of right to refuse consent (e.g., by refusing entry during a previous request for consent by police); (4) prior experience and training of the subject supports "inference that he knew of his right to exclude the police"; and (5) a warning. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 286 (1973) (Marshall, J., dissenting).
78. State v. Johnson, 346 A.2d 66, 75 (N.J. 1975) (Pashman, J., dissenting).

noted that such a "warning would only advise the subject of facts[,] which he is clearly entitled to know."[79]

In becoming the first state court to reject *Bustamonte* under its state constitution, the New Jersey Supreme Court lead the way for other courts to follow. Justice Brennan, who had served on New Jersey's high court, cited *Johnson* approvingly in his 1977 *Harvard Law Review* article advocating more liberal state constitutional jurisprudence.[80] He wrote, "[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach," in keeping with what he referred to as the "manifest purpose" of state courts "to expand constitutional protections."[81] This was an inspiring endorsement to be sure, but there was a problem. Despite the endorsement, for twenty-three years, no other state followed New Jersey's lead by rejecting *Bustamonte*. Indeed, states specifically declined Justice Brennan's invitation to do so.[82]

1. Early Horizontal Federalism Between New Jersey and Washington

Seven years after announcing it's groundbreaking—but nearly analysis-free—opinion in *Johnson*, the New Jersey Supreme Court began to flesh out a standard of independent state constitutional analysis. *State v. Hunt*[83] exemplifies the court's efforts to create a more robust state constitutional jurisprudence. Specifically, "Justice Handler's concurring

79. *Id.*

80. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 499-500 (1977).

81. *Id.* at 503.

82. *See* Henry v. State, 621 P.2d 1, 4 (Alaska 1980) (rejecting *Johnson* and holding that "we do not believe that the Alaska Constitution requires a different standard for noncustodial consent searches"); Reese v. State, 596 P.2d 212, 214 (Nev. 1979) (writing of *Bustamonte* that "[t]his court has never indicated that a different standard should apply in this state," and citing *Johnson* for comparison); State v. Osborne, 402 A.2d 493, 498 (N.H. 1979) (defendant cites *Johnson* but court holds that "[w]e think it would be a good policy for police officers to advise persons that they have a right to refuse to consent to a warrantless search. . . . That procedure is not, however, presently constitutionally required.") (citations omitted); State v. Flores, 570 P.2d 965, 970 n.5 (Or. 1977) (finding no reason to apply a different standard than *Bustamonte* under article I, section 9 of the Oregon Constitution and noting that "[t]he only case we have found to the contrary is *State v. Johnson* . . . where the court, *without stating why the analysis under its constitution should be different*, announced that the New Jersey Constitution requires proof that the suspect know of his right to refuse consent") (emphasis added). Other state courts have declined to reach the issue in the absence of adequate briefing differentiating the Fourth Amendment from its parallel state constitutional provision. *See* State v. Hunt, 555 A.2d 369, 376-77 (Vt. 1988); State v. Bobo, 803 P.2d 1268, 1273 (Utah Ct. App. 1990).

83. 450 A.2d 952 (N.J. 1982).

opinion in *Hunt* undertook the first serious judicial effort in New Jersey to identify and explain standards for when the court should diverge from federal precedent."[84] As shall be discussed *infra,* Justice Handler's concurrence was a major influence in Washington's constitutional jurisprudence.

The supreme courts of New Jersey and Washington have taken "strikingly similar" approaches in conducting independent analyses under their state's constitutions.[85] In fact, both states were first in adopting opinions "alerting the bar and bench to the possibilities of independent state constitutional analysis, and educating them in the techniques of making state constitutional arguments."[86]

In *State v. Gunwall,*[87] for example, the Washington Supreme Court enunciated six nonexclusive criteria in determining when "the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution."[88] In so doing, the court quoted extensively from Justice Handler's concurrence in *Hunt.*[89] Indeed, former Washington Supreme Court Justice Robert Utter, remarked that Handler's writing "greatly influenced our decision in *Gunwall* to adopt neutral criteria for state constitutional interpretation."[90]

Both *Hunt* and *Gunwall* established the framework for future independent state constitutional interpretation in their respective states. Moreover, they also involved an identical legal issue. As the New Jersey court had done in *Hunt, Gunwall* applied its newly-articulated state constitutional analysis—under article I, section 7 of the Washington Constitution—to invalidate the "warrantless seizure of long distance telephone billing records under circumstances where a warrant would not be required under the Federal Constitution."[91] In both cases the New Jersey and Washington courts took a position contrary to that of the U.S.

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84. Ronald Susswein, *The Practical Effect of the "New Federalism" Upon Police Conduct in New Jersey,* 7 SETON HALL CONST. L.J. 859, 866 (1997).
85. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in State Constitutional Rights Adjudication,* 72 NOTRE DAME L. REV. 1015, 1025 (1997).
86. *Id.* at 1019.
87. 720 P.2d 808 (Wash. 1986).
88. *Id.* at 811. The criteria are as follows: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Id.*
89. *See id.* at 812.
90. Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience,* 65 TEMP. L. REV. 1153, 1161 (1992).
91. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in State Constitutional Rights Adjudication,* 72 NOTRE DAME L. REV. 1015, 1024 (1997).

Supreme Court in *Smith v. Maryland*,[92] where the Court declared that under the Fourth Amendment the use of a pen register by a telephone company at police request to record numbers dialed is not a search, and citizens have no legitimate expectation of privacy in the phone numbers they dial. Thus, *Hunt* and *Gunwall* were early signs that the two states' search and seizure jurisprudence was proceeding along parallel tracks.

The approach of the two state supreme courts has been so similar that they both rejected *California v. Greenwood*,[93] a U.S. Supreme Court opinion holding that the Fourth Amendment does not prohibit police from seizing and searching curbside garbage containers, within a four month period of one another. In *State v. Boland*,[94] the Washington case that eventually rejected *California v. Greenwood*, then-Chief Judge Alexander of the Washington Court of Appeals dissented in a 2-1 decision that found no privacy right, to suppress evidence obtained in warrantless searches of the defendant's curbside garbage can. Relying, in part, upon the New Jersey Supreme Court's decision in *State v. Hempele*,[95] his dissenting view was vindicated by the Washington Supreme Court, thus bolstering his reputation as an interpreter of article I, section 7 of the Washington Constitution.

The Washington Supreme Court observed that its *Boland* opinion shared "an identical result" with *Hempele* despite "one important doctrinal difference."[96] It noted that the dissent in *Hempele* attacked the majority opinion on federalism grounds, and had argued that *Greenwood*'s Fourth Amendment standard should apply under New Jersey's constitution.[97] The Washington court opined, "This argument has some merit in that the language of the Fourth Amendment and article I, section 7 of the New Jersey Constitution are *identical*. The same argument, however, does not apply when comparing Washington's constitution and the Fourth Amendment."[98]

In 1985, Justice Stewart Pollock of the New Jersey Supreme Court noted that as "state courts depart from federal analysis, it becomes increasingly important for the courts to communicate with each other about significant decisions affecting fundamental rights. Horizontal federalism, a federalism in which states look to each other for guidance,

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92. 442 U.S. 735 (1979).
93. 486 U.S. 35 (1988).
94. 781 P.2d 490 (Wash. Ct. App. 1989), *rev'd*, 800 P.2d 1112 (Wash. 1990).
95. 576 A.2d 793 (N.J. 1990).
96. State v. Boland, 800 P.2d 1112, 1116 (Wash. 1990).
97. *Id.* (citing State v. Hempele, 576 A.2d 793, 816-17 (N.J. 1990) (Garibaldi, J., dissenting)).
98. *Id.* (emphasis added). The New Jersey court had frankly acknowledged the trend-setting nature of its opinion: "We are aware that our ruling conflicts not only with *California v. Greenwood* . . . but also with the holdings of virtually every other court which has considered this issue." *Hempele*, 576 A.2d at 814 (citations omitted).

may be the hallmark of the rest of the century."[99] In light of their shared approaches in other cases, it was not surprising that the Washington Supreme Court looked to New Jersey for guidance in its own groundbreaking voluntary consent search case.

C. *The Washington Supreme Court and* State v. Ferrier

The Washington Constitutional Convention of 1889 considered a proposed state provision identical to the Fourth Amendment but rejected it in favor of the language in the present article I, section 7.[100] This simple unlawful search provision reads as follows: "No person shall be disturbed in his private affairs or his home invaded, without authority of law."[101]

Prior to *State v. Ferrier*,[102] the Washington Supreme Court broadly construed article I, section 7, interpreting the provision's scope well beyond the traditional protections of the Fourth Amendment. The court held article 1, section 7 protected "against warrantless searches and seizures, with *no* express limitations."[103] With respect to the right to privacy, article I, section 7 "focuse[d] on those privacy interests[,] which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."[104] In a subsequent privacy case, the court reaffirmed the sanctity of one's home, holding, "[I]n no area is a citizen more entitled to his privacy than in his or her home. For this reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.' "[105] Despite the broad construction of article 1, section 7, there was some question as to whether the Washington Supreme Court had reached the outer limits of its protection of the home.[106] *Ferrier* squarely resolved this question.

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99. Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).
100. JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, at 497 (B. Rosenow ed. (1962)).
101. WASH. CONST. art. I, § 7.
102. 960 P.2d 927 (Wash. 1998).
103. Seattle v. Mesiani, 755 P.2d 775, 777 (Wash. 1988) (emphasis added) (citing State v. Simpson, 622 P.2d 1199 (Wash. 1980)).
104. State v. Myrick, 688 P.2d 151, 154 (Wash. 1984).
105. State v. Young, 867 P.2d 593, 599 (Wash. 1994) (citation omitted) (quoting State v. Chrisman, 676 P.2d 419, 423 (Wash. 1984)).
106. *See, e.g.*, State v. Rose, 909 P.2d 280 (Wash. 1996) (5-4 decision upholding search warrant based upon police officer's use of a flashlight to observe a marijuana grow operation through the window of a mobile home at night); J. Michael Keyes, State v. Rose: *The Re-emergence of Colonial Writs?*, 32 GONZ. L. REV. 177, 178 (1997) (criticizing *Rose* and opining that "[i]t appears as though

In *Ferrier*, police officers received a tip from Debra Ferrier's son alleging that Ferrier was growing marijuana in her home.[107] Unable to assess the son's credibility for purposes of a warrant, four officers planned to conduct a "knock and talk" in an effort to enter Ferrier's home.[108] Two officers went to the back of the house and waited while the other two went to the front door.[109] The officers identified themselves and were invited inside.[110] Once inside, the officers noticed two infant children in the front room and radioed for the two officers in back to enter.[111] "Upon their entry into the home, the 15-by-15-foot front room contained Ferrier, her two infant grandchildren and the four Bremerton police officers."[112] The officers told her that they had information regarding her "marijuana grow operation."[113] Given the coercive atmosphere of four armed police officers in such small quarters, it is not surprising that Ferrier signed a form consenting to a search of her home after being requested to do so.[114] Neither the form, nor the officers informed Ferrier of her right to refuse consent.[115]

Marijuana plants were subsequently discovered and seized, as was other evidence.[116] Ferrier was charged with manufacturing a controlled substance.[117] Her motion to suppress the evidence was denied, and Ferrier was subsequently convicted.[118] On appeal, the Washington Court of Appeals affirmed the conviction in an unpublished opinion.[119] The Washington Supreme Court granted review.

Justice Alexander authored the majority opinion in *Ferrier*, and was joined by six of his eight fellow justices.[120] Justice Alexander first disposed of Ferrier's argument that her Fourth Amendment rights had been violated by the consent search of her home, noting that she had

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the public's protection from governmental intrusion is subordinate to the public policy of aiding the 'war on drugs.' ").

107. State v. Ferrier, 960 P.2d 927, 928 (Wash. 1998).

108. *See Id.* One of the officers would later describe this procedure in his testimony: " 'You go to the door, make contact with the resident, ask if you can come in to talk about whatever the complaint happens to be . . . . *Once you're inside*, you talk about why you're there and ask for permission to search the premises.' " *Id.* at 928 (emphasis added). The officer further testified that " '[v]irtually everybody allows you in.' " *Id.*

109. *Id.* at 929.

110. *Id.*

111. *Id.*

112. State v. Ferrier, 960 P.2d 927, 929 (Wash. 1998).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. State v. Ferrier, 960 P.2d 927, 929 (Wash. 1998).

118. *Id.*

119. *See* State v. Ferrier, No. 19280-2-II, slip op. (Wash. Ct. App. Nov. 27, 1996).

120. Eight years earlier as a member of the Washington Court of Appeals, Justice Alexander had distinguished himself through his pioneering article I, section 7 analysis. *See supra* note 94, and accompanying text.

cited no authority for this argument.[121] In any event, the court noted that it had previously applied *Bustamonte* in Fourth Amendment analysis of a consent search.[122] The court then turned to Ferrier's argument that "the knock and talk procedure as employed . . . violated her right to privacy granted by article I, section 7 of Washington's Constitution and thus invalidated the consent she gave to the officers to search her home."[123]

In arguing for independent state constitutional review of her claim,[124] Ferrier briefed the so-called *Gunwall* factors.[125] Because Ferrier was invoking the same constitutional provision as that analyzed in *Gunwall*, only two of the six *Gunwall* factors required attention.[126] Turning first to *Gunwall* factor four, "preexisting state law," the court found that this factor "amply supports independent review" in light of the historic privacy of the home in Washington.[127] With regards to *Gunwall* factor six, "whether the privacy interest at issue is a matter of particular state or local concern,"[128] the court found that this factor, too, supported independent review "due to '[t]he heightened protection afforded *state* citizens against unlawful intrusion into private dwellings [that] places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement.' "[129] Accordingly, "[h]aving

121. *Ferrier*, 960 P.2d at 930.
122. *See* State v. Ferrier, 960 P.2d 927, 930 (Wash. 1998).
123. *Id.*
124. *See id.*
125. The *Gunwall* factors are: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986).
126. *See Ferrier*, 960 P.2d at 930 (citing State v. Boland, 800 P.2d 1112, 1114 (Wash. 1990)). "The fourth and sixth factors . . . are generally unique to the context in which the interpretation question arises. The court thus examines the fourth and sixth factors in light of the new context presented, and then takes these factors into account along with those previously analyzed." State v. Russell, 882 P.2d 747, 770 (1994) (citing *Boland*, 800 P.2d at 1114)).
127. State v. Ferrier, 960 P.2d 927, 931 (Wash. 1998). In its discussion the court looked a bit further afield than New Jersey for an outside authority, sharing a passage that had been quoted in *Miller v. United States*, 357 U.S. 301, 307 (1958), from a 1763 English parliamentary speech given by William Pitt, the Earl of Chatham: " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!' " *Id.* at 931 n.6.
128. *Id.* at 931.
129. *Id.* at 932 (alteration in original) (quoting State v. Chrisman, 676 P.2d 419, 424 (Wash. 1984)). In so finding, the court dismissed two lower court decisions that the State had cited in support of its position that the standard to be applied for consent searches under article I, section 7 was the same as that under the Fourth Amendment. *See id.* at 931-32 (citing State v. McCrorey, 851 P.2d 1234 (Wash. Ct. App.)), *review denied*, 863 P.2d 73 (Wash. 1993); State v. Williamson, 710 P.2d 205 (Wash. Ct. App. 1985), *review denied*, 105 Wash.2d 1012 (Wash. 1986)). While both opinions had addressed the same issue as that in *Ferrier*, the court noted that *Williamson* had exclusively been a Fourth Amendment case while *McCrorey* had (erroneously, as it turned out) concluded that because the Washington Supreme Court "had not yet spoken on whether a separate state constitutional analysis for voluntary consent applied" the state was "in lockstep with the federal rule on this issue." *Id.*

satisfied the need for an independent analysis," the court went on to "conclude that the knock and talk, as carried out here, violated Ferrier's state constitutional right to privacy in her home. This is so because she was not advised, prior to giving her consent to the search of her home, that she could refuse to consent."[130]

"Central to our holding," the court wrote, "is our belief that any knock and talk is inherently coercive to some degree . . . . Indeed, we are not surprised that, as noted earlier, an officer testified that *virtually everyone* confronted by a knock and talk accedes to the request to permit a search of their home."[131] The court emphasized that it did "not entirely disapprove of the knock and talk procedure, and we understand that its coercive effects are not entirely avoidable. They can, however, be mitigated by requiring officers who conduct the procedure to warn home dwellers of their right to refuse consent to a warrantless search."[132] The court then observed its decision was "consistent with that of the New Jersey Supreme Court" in *Johnson*.[133] However, the court noted that it was "faced with a clearer imperative" than that in *Johnson* because, by the New Jersey court's own admission, the New Jersey Constitution's article I, paragraph 7 was nearly identical to the Fourth Amendment and "quite unlike Washington's article I, section 7."[134] Accordingly, it went on to refine the *Johnson* holding:

> We would simply go further to state the obvious—that the only sure way to give such a protection substance is to require a warning of its existence. If we were to reach any other conclusion, we would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the State would be unable to meet its burden of proving that a knowing and voluntary waiver occurred. As the United States Supreme Court has noted in another context: "For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise."[135]

In contrast to the alarums of the Supreme Court in *Bustamonte* concerning the potential impact of a warning requirement on the job of

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130. *Id.* at 932-33.
131. *Id.* at 933 (emphasis added).
132. State v. Ferrier, 960 P.2d 927, 933 (Wash. 1998).
133. *Id.* (citing State v. Johnson, 346 A.2d 66, 68 (N.J. 1975)).
134. *Id.* n.9 (citing *Johnson*, 346 A.2d at 68 n.2).
135. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 468 (1966)).

policing, the Washington court stated it did "not believe that requiring police officers to inform residents of their right to refuse consent to the search will seriously impede the ability of the police to use the knock and talk as an investigative tool."[136] It pointed out, "[T]here are many cases where a suspect consented to the search after being informed of the right to refuse consent."[137] Indeed, the court cited a study that found that "83.7 percent of all criminal suspects waived their *Miranda* rights."[138] Adopting the first police warning required outside of the context of custodial interrogation in the United States,[139] the court laid out its rule in detail that rivaled *Miranda*:

> [W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.[140]

Because the trial court erred in failing to suppress evidence obtained during an illegal search of Ferrier's home, the conviction was reversed.[141]

In her dissenting opinion, Chief Justice Durham wrote, "[W]e have already determined that federal precedent controls in evaluating consent cases under article I, section 7."[142] She referred to *McNear v. Rhay*,[143] a 1965 case "very closely on point," where she asserted the court "utilized an exclusively Fourth Amendment analysis to resolve an article I, section

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136. *Id.* at 933.
137. State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998) (citations omitted).
138. *Id.* (citing Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 U.C.L.A. L. REV. 839, 859 (1996)).
139. Indeed, the significance of *Ferrier* looms even larger given a recent opinion finding that the warning required in *Miranda* was not required by the Constitution and had been superceded by a never-enforced statute, 18 U.S.C. § 3501, adopted by Congress in 1968 "with the clear intent of restoring the voluntariness as the test for admitting confession in federal court." United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *cert. granted*, 68 U.S.W.L. 3361 (U.S. Dec. 6, 1999) (No. 99-5525). The Fourth Circuit found that "Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive." *Id.* at 692 n.22.
140. *Ferrier*, 960 P.2d at 934. In a footnote, the court added that the general use of a signed form giving consent to search "carries with it the advantage of creating evidence that avoids ambiguity over whether consent was actually given." *Id.* at 934 n.10.
141. *Id.*
142. *Id.* at 935 (Durham, C.J., dissenting).
143. 398 P.2d 732 (Wash. 1965).

7 challenge to the voluntariness of a person's consent to search his home."[144] However, in *McNear* the defendant signed a consent form, after a custodial "interview" of "about 30 minutes," which "in broad terms[,]" gave the police the authority to search his "apartment and automobile. Petitioner was thereafter returned to his cell."[145] Given that this search took place in 1961, five years before the *Miranda* decision, one can imagine the atmosphere of the long custodial "interview" precipitating the "voluntary" consent.

The majority retorted that not only did *McNear* predate *Gunwall*, but that it even predated "this court's first real articulation of the differences between the Fourth Amendment and article I, section 7."[146] *McNear* did "not disclose any effort at independent analysis of article I, section 7. Indeed, after this court's sparse summary of the defendant's assertions *McNear* never again mentions article I, section 7. Mere silence cannot signal the adoption, forevermore, of a Fourth Amendment voluntary consent analysis."[147] In any event, the majority wrote, "[A]rticle I, section 7 jurisprudence simply cannot be frozen in time as of 1965."[148] The majority's response illustrates the fluidity of state constitutionalism.

III. Lessons of *State v. Johnson* and *State v. Ferrier*

What lessons can be drawn from *State v. Johnson* and *State v. Ferrier*? Justice Brennan once wrote that, "Federalism does not require that one level of government take a back seat to the other when the question involved is one of individual civil and political rights; federalism is not an excuse for one court system to abdicate responsibility to another."[149] The truth of these words cannot be doubted. What then explains the fact that only two state courts have deviated from the U.S. Supreme Court's much-criticized holding in *Schneckloth v. Bustamonte*?

One answer might be that, as Brennan noted, state court judges are subject to more political accountability than federal judges, in that they

144. State v. Ferrier, 960 P.2d 927, 935 (Wash. 1998) (Durham, C.J., dissenting).
145. *McNear*, 398 P.2d at 734.
146. *Ferrier*, 960 P.2d at 932 n.8 (citing State v. Simpson, 622 P.2d 1199 (Wash. 1980)).
147. *Id.*
148. *Id.* (citing Seattle School Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978)) (where the court had written that "the constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness.").
149. William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986).

are "often elected, or, at the least, must succeed in retention elections. . . . Moreover, state constitutions are often relatively easy to amend; in many states the process is open to citizen initiative."[150] Another scholar wrote evocatively, "[T]he reality is that every justice who faces an election contest to keep his or her job is a tadpole in a pond full of crocodiles."[151] As a result, "[p]erhaps judicial survival is enhanced by judicial invisibility."[152]

Although the perception is that state judicial decisionmaking is colored by the avoidance of notoriety, putting it to the test might prove the belief unduly pessimistic. Washington Supreme Court Justice Richard Sanders, for example, was overwhelmingly re-elected in 1998 despite a heated race against a prosecutor and a well-publicized[153] libertarian record of dissents in criminal cases. That record included, for example, a sole dissent in an 8-1 decision upholding the application of Washington's "Three Strikes and You're Out" citizens' criminal sentencing initiative,[154] a ballot measure that had passed with 76% of the popular vote.[155] Shortly following his re-election, Justice Sanders was again the sole dissenter when the Washington court rejected a motion to stay the execution of a three-time murderer in the hour prior to his execution.[156] Is Sanders merely an exceptional tadpole that ate the crocodiles? Or does his success suggest that state judges need not be so wary of standing upon principle?[157]

150. *Id.* at 551.

151. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1150 (1997).

152. *Id.*

153. *See, e.g.*, David Postman, *Supreme Court Justice Isn't Afraid to Be Different*, SEATTLE TIMES, Sept. 3, 1998, at A1.

154. *See* State v. Rivers, 921 P.2d 495, 513 (1996) (Sanders, J., dissenting) ("[T]he statute is severe, harsh, merciless. Its punishment is imposed without regard to necessity. It is carried out without regard to rehabilitation or even possibility of re-offense. It is cruel for those reasons as well.").

155. *See* State v. Thorne, 921 P.2d 514, 518 (1996). *Compare Rivers*, 921 P.2d at 506 n.6 (Sanders, J., dissenting) ("The three-strikes statute was adopted by popular initiative; however, I do not find this distinction determinative.") *with* Gerberding v. Munro, 949 P.2d 1366, 1388 (1998) (Sanders, J., dissenting) ("Today, six votes on this court are the undoing of 1,119,985 votes that Washingtonians cast at the polls in favor of term limits.").

156. Vargas v. Lehman, No. 67190-7 (Wash. Oct. 12, 1998) (order denying writs of prohibition and mandamus) (Sanders, J., dissenting).

157. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1150 (1997). Shared a number of examples of state supreme court justices supposedly imperiled by their votes on certain issues, but there must often be more to the story. For example, Uelman referred to the celebrated case of former California Supreme Court Chief Justice Rose Bird to illustrate the danger of opposition to the death penalty. *See id.* at 1136. This hardly seems representative. It has been said that the Bird Court "had forsaken even the pretense of an institution engaged in the interpretation of authoritative legal texts or traditions enacted by the people or their representatives whose votes they would need to retain their offices." Paul G. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 80, 86 (1998). "The consequence of that poor judgment was to make their court a political toy and seriously diminish its

What other dangers might state constitutional cases pose? Professor Diehm, a critic of state constitutionalism, warns, "[F]ragmentation has led to an arcane labyrinth of constitutional principles that are not easily understood by law enforcement."[158] According to Diehm, "[E]ven if the United States Supreme Court makes a ruling, the issue will not be settled until it has been decided by the highest court in each of the fifty states."[159] This "could lead to a dramatic increase in state court litigation."[160]

Professor Diehm overstates his case. In any criminal prosecution, the only constitutional law of any significance would be that settled by the U.S. Supreme Court and that of the particular state where the prosecution is occurring.[161] The fact the other forty-nine states have failed to address a legal theory specifically under their constitutions is of no moment and creates no confusion for purposes of prosecuting a state case.

In addition, those familiar with the justice system understand that those convicted of crimes will generally exhaust their appeals regardless of which legal theories the appeals are based upon. For example, the defendants in *Johnson* and *Ferrier* also made federal claims. Thus they would have appealed even in the absence of state constitutional claims. Indeed, the defendant in *Johnson* based his appeal entirely upon a Fourth Amendment claim until the New Jersey Supreme Court, *sua sponte,* requested a state constitutional briefing as well. The claim that additional litigation is being generated through state constitutionalism appears to be unsupportable, although considerations of judicial economy might well prevent other state courts from following examples like *Johnson.*

The constitutional basis of a state court's ruling can sometimes be obscure, which can make it harder to emulate. State constitutional scholar James Gardner noted, "One reason state courts may fail to

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legitimacy as a sober and disinterested interpreter of the state's legal texts." *Id.* at 87. It was certainly notable that "Bird herself was forthcoming in expressing her unwillingness to affirm *any* sentence of death," *id.* at 85 (emphasis added), and that out of seventy-one death penalty convictions that the Bird Court reviewed death sentences were upheld in *only four.* John H. Culver, *The Transformation of the California Supreme Court: 1977-1997,* at 61 ALB. L. REV. 1461, 1486 (1998). However, there were also any number of other areas where the Bird Court "pushed judicial creativity to its limits." *Id.* at 1469. While Bird and two of her associate justices were defeated in 1986, the first time since 1934 that California Supreme Court incumbents were voted off the court, *see id.* at 1466, the defeat of justices who misapply the law for ideological reasons cannot be viewed as chilling principled state judicial decisionmaking.

158. James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?,* 55 MD. L. REV. 223, 245 (1996).

159. *Id.* at 246.

160. *Id.* at 253.

161. Moreover, given the congressional trend of federalizing a great many offenses, today many crimes are prosecuted in federal courts under only federal constitutional standards.

specify when constitutional rulings rest on state or federal grounds is that it often seems not to matter because the two documents have exactly the same meaning—they have been interpreted in what is sometimes called 'lockstep.' "[162] There will unquestionably be cases where this is the correct approach, and it might be quite tempting for risk-adverse state courts. However, it could also amount to a dereliction of duty. As former Washington Supreme Court Justice Utter noted, "State constitutional uniformity with federal constitutional doctrine is a conclusion to be reached after debate and argument, not as an initial premise."[163] Illinois Supreme Court Justice James Heiple agrees: "[W]hen state judges defer to federal interpretation of provisions contained in their state constitutions, they install the United States Supreme Court as the definitive authority on their state constitutions, and thereby abdicate their roles as independent magistrates."[164]

Professor Gardner, one of the foremost critics of state constitutionalism, would disagree and would likely commend those state courts that have refused to follow the *Johnson* example. He wrote, "[T]he overwhelming impression left by an examination of state constitutional decisions is that state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law."[165] Gardner does not believe that this failure is a bad thing. He stated, "[T]here is something vaguely selfish and hostile about the people of a state going off to their own corner and making up rules for their own self-governance that they think superior to the ones the rest of the country has decided to use."[166] Noting that states frequently amend their constitutions, and include policies that may seem frivolous within them,[167] he writes such facts "reveal people who are fickle and unreflective—people who do not know what they want, who change their mind frequently, and who are apparently incapable of learning from their mistakes."[168] These are not, he believes, "a people to whom we can comfortably attribute an overall constitutional plan, a meaningful history

162. Gardner, *supra* note 6, at 788 (1992).
163. Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153, 1166 (1992).
164. James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1513 (1998).
165. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 804 (1992) (crediting the article with giving "birth to a movement advocating state independence in constitutional decisionmaking.").
166. *Id.* at 825.
167. Compared to, say, the substantive right to be free from warrantless search and seizure.
168. *Id.* at 820.

of purposeful debate, or a coherent political theory—the very factors noticeably absent from state constitutional discourse."[169]

A like-minded attorney critical of state constitutionalism overstated the case in the ultra-conservative editorial pages of the *Wall Street Journal* when he wrote, "[B]y any objective measure, state court activism is out of control—judicial imperialism on an awesome scale."[170] He asserted that because they are the ultimate arbiters of their own state constitutions, "the finality of their decisions undoubtedly emboldens state supreme courts."[171] Accordingly, while "Brennan may have lost his activist majority on the Supreme Court," his call to arms resulted in the creation of "50 junior Warren Courts."[172]

In response to Professor Gardner's criticisms, Professor Schuman pointed to the example of one state, his own, in writing that "the Oregon experience demonstrates what every Oregon lawyer knows: state constitutional law does not have to be infrequent, grudging, obscurely reasoned, unoriginal, or silent with respect to local history and culture."[173] He adds, "[A] state—even an out-of-the way and relatively new one like Oregon—can develop a strikingly independent universe of constitutional references and a constitutional culture completely distinct from the one used by the U.S. Supreme Court."[174] Likewise, "courts in most instances should have no difficulty distinguishing between fundamental constitutive provisions and other, statute-like provisions that happen to be located in a document formally labeled 'constitution.' "[175]

Notwithstanding Gardner's sweeping generalizations, a state constitution's core—representing the state's substantive values—remains intact in the midst of change and deserves serious treatment. Nor is a state court necessarily holding its state constitution out to be "better" than others' simply by recognizing the fact that it is obviously "different."

Far from being a revolution, opinions like *Johnson* and *Ferrier* reveal that state constitutionalism has been an exercise in selective gradualism.[176] One scholar researched Washington cases decided during

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169. *Id.*
170. Mark S. Pulliam, *State Courts Take Brennan's Revenge*, WALL ST. J., Jan. 4, 1999, at A11.
171. *Id.*
172. *Id.* Forty-eight of those "junior Warren Courts" have certainly demonstrated a timidity seldom seen in the real Warren Court when it comes to using their state constitutions to reject a rule in *Bustamonte* that is arguably incorrect even under the Fourth Amendment.
173. David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276 (1992).
174. *Id.*
175. *Id.* at 277-78.
176. Even *Johnson* and *Ferrier*, although assuredly on the cutting edge of state constitutionalism, can be looked upon as conferring no new rights but rather simply requiring that an existing right uncontroverted by *Bustamonte*, the right to refuse to consent to a warrantless search, be knowingly waived.

a period of eleven years following the Washington Supreme Court's articulation of the factors for independent constitutional analysis in *State v. Gunwall*.[177] He found, "[W]hen one views all ninety-six Washington Supreme Court cases citing *Gunwall* for its procedural methodology during the eleven years after it was issued, only *two of the twenty-one* sections of Washington's Declaration of Rights with analogous federal constitutional counterparts were interpreted independently."[178]

This record is quite unworthy of the "junior Warren Court" moniker, and is hardly illustrative of the epidemic of judicial activism feared by critics of state constitutionalism.[179] One of the two sections of the Washington Constitution interpreted independently of its federal counterpart was article I, section 7.[180] Indeed, during the period studied "of the eight cases in which the court independently applied Washington's constitution and arrived at a different result than the federal approach, five involved article I, section 7."[181] Accordingly, while it is clear that the battle of state constitutionalism in Washington is not being waged over quite as broad a front as Justice Brennan might have hoped, it is at least being fought in the important area of criminal law in cases like *Ferrier*. The U.S. Supreme Court, in fact, has not discouraged this development. In *California v. Greenwood*, the Court wrote, "[I]ndividual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Fourth Amendment."[182]

If ever a state could be excused for marching in state constitutional "lockstep" with the U.S. Supreme Court's Fourth Amendment jurisprudence, New Jersey seems to have had the perfect excuse. Article I, paragraph 7 of the New Jersey Constitution is, after all, nearly identical to the language of the Fourth Amendment. Yet in *Johnson* the New Jersey Supreme Court chose to deviate from the federal example in *Bustamonte*.

Johnson might have been a more persuasive decision if it had been decided after *State v. Hunt*,[183] the case that established specific criteria

177. Hugh D. Spitzer, *Which Constitution? Eleven Years of* Gunwall *in Washington State*, 21 SEATTLE U. L. REV. 1187 (1998).

178. *Id.* at 1201.

179. *See* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1116 (1997). Professor Tarr notes that "reliance on state grounds to decide cases does not necessarily translate into more rights-affirming decisions." *Id.* He points out that, notwithstanding criticism of the practice, "it is hardly surprising that state judges take account of pertinent federal precedents in interpreting analogous state provisions and at times conform their interpretations to federal precedent." *Id.*

180. *Id.*

181. *Id.*

182. California v. Greenwood, 486 U.S. 35, 43 (1988).

183. 450 A.2d 952 (N.J. 1982).

for diverging from federal constitutional law. Had the New Jersey court left a better roadmap in *Johnson* with clearer reasoning, perhaps more states would have followed. After all, in embracing the example of other states a state court must be cautious. Although a great advocate of state constitutionalism,[184] former Oregon Supreme Court Justice Hans Linde wrote that state courts "care more about citing precedents for their holdings than how the precedents were explained. Constitutional caselaw spreads by osmosis through the legal membranes separating states, much like changes in products liability or intra-family immunity."[185] This often ignores the fact, however, that state constitutional decisions are not common law:

> Recognition that a right may be guaranteed in one state but not in another is an uncomfortable idea. It means that a court has to strike down a desirable law that is valid in other states, and that some courts may have to sustain a bad law that other courts have struck down. Lawyers and judges understand this, but it departs from the civic faith imparted by high school and college classes, by national organizations and media reports, and by our public rhetoric, that 'constitutional rights' must mean rights shared by all Americans.
>
> Yet of course the uncomfortable idea is true . . . Constitutional law indeed is a shared enterprise. But for state courts the enterprise is to apply and enforce the actual guarantees that a state's charter provides, not to substitute a homogenized rhetoric of judicial review.[186]

The approach taken by the Washington Supreme Court in *Ferrier* appears to be consistent with Linde's admonition. The court cited *Johnson* for purposes of illustrating its similar deviation from *Bustamonte*, but its holding was expressly and meticulously based upon Washington's own constitution. This is not to say that its not reassuring for state courts, confronted with the choice of rejecting the guidance of a U.S. Supreme Court ruling, to know that they are not acting within a vacuum or that a well-reasoned authority from one state might not embolden other state courts to do the right thing under similar facts.

184. *See* Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980).
185. Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 226 (1992).
186. *Id.* at 229.

IV. Conclusion

Justice Brennan would likely be disappointed to see that his advocacy of state constitutionalism has yielded such modest returns in safeguarding civil liberties from warrantless consent searches, especially given that he had cited *State v. Johnson* as a model in his visionary 1977 *Harvard Law Review* article.[187] Horizontal federalism can only go so far in effectuating Brennan's vision. After all, due to differences in the structures of state constitutions and the heavier weight of one's own state precedents, not to mention reticence over deviating from the U.S. Supreme Court's path, the guidance provided by outside state opinions will seldom be determinative to a state court. Nonetheless, it seems clear that such guidance can be a helpful piece to solving the puzzle of a state constitutional question, and can tilt the scales against countervailing authority from the Court.

Johnson and *State v. Ferrier* show us how interesting it is to study the influence of state court decisions upon decisions in other states—the "horizontal federalism" that Justice Pollock encouraged. However, as one pathfinding scholar attempting to measure the influence of the Massachusetts Supreme Judicial Court upon other courts observed: "Horizontal federalism is a complex subject that has not received the attention that it deserves from commentators."[188] While more study of significant examples of horizontal federalism like *Johnson* and *Ferrier* is certainly needed,[189] the fact that only one other state court has followed his court's example in *Johnson* would suggest that Justice Pollock was overly optimistic in his 1985 prediction that horizontal federalism would be "the hallmark of the rest of the century."[190]

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187. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 499-500 (1977).

188. *See* David Blumberg, *Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982-1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583, 1610 (1998).

189. *See id.* at 1611.

190. Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).