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EXPANDED RIGHTS THROUGH STATE LAW: THE UNITED STATES SUPREME COURT SHOWS STATE COURTS THE WAY

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I. INTRODUCTION

Three important cases decided during 2002 show the Arkansas Supreme Court embracing the new judicial federalism with a commitment and panache not previously seen in Arkansas jurisprudence. In one four-month stretch, the court used the search-and-seizure provision of the Arkansas constitution as the basis for affirming the suppression of items seized during an illegal night-time search,¹ affirmed the constitutional invalidity of a pretextual arrest and the

* Associate Justice, Arkansas Supreme Court. I am indebted to my law clerk for the 2001-2002 term, Erin Vinett, who not only did extensive research and analysis for this article but also worked closely with me on the seminal cases that gave rise to it. Additional research, which proved invaluable, was done by one of my 2002-2003 law clerks, Christian Harris, while a second 2002-2003 law clerk, Michael Mosley, offered constructive comments. I further am indebted to two interns who assisted in the research for this article: Frances Caldwell of the University of Arkansas at Little Rock School's William H. Bowen of Law and Jacob Gardner of the University of the South.

1. *Griffin v. State*, 67 S.W.3d 582 (Ark. 2002).

suppression of the drugs obtained incident to it,² and struck down the state's criminal sodomy statute on grounds that it violated both the due process and equal protection clauses of the Arkansas constitution.³

Two primary factors led to this *annus mirabilis* in Arkansas. The first, without question, was the United States Supreme Court's express admonition in *Arkansas v. Sullivan*⁴ that if the Arkansas Supreme Court was to expand individual rights for its citizens, it must do so under its own state law and not by means of a broader interpretation of the United States Constitution. Reversing the alternative holding in *Sullivan*, the Court said:

The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon v. Hass*, 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975). There, we observed that the Oregon Supreme Court's statement that it could "interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court" was "not the law and surely must be inadvertent error." *Id.* at 719, n. 4. We reiterated in *Hass* that while "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them."⁵

Once the Court had spoken, the Arkansas defense bar took heed, and where in the past the Arkansas constitution had been given short shrift as the source of a remedy for governmental infringement of individual rights, now it became a very real resource for constitutional advocacy.

The second factor behind this notable shift to the new judicial federalism was Arkansas's own common law, which in a few distinct areas had already expanded individual rights

2. *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).

3. *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

4. 532 U.S. 769 (2001) (*per curiam*).

5. *Id.* at 772 (emphasis in original).

beyond federal protections. For example, heightened requirements for night-time searches and a skepticism toward pretextual arrests have deep roots in Arkansas law.⁶ With the Supreme Court's direction in *Arkansas v. Sullivan* and the state's tradition of protecting individual rights in certain narrowly defined areas behind it, the Arkansas Supreme Court was primed and ready to expand individual rights on the basis of its own state constitution.

After providing some background about the new judicial federalism, the balance of this article will use an analysis of *Griffin*, *Sullivan*, and *Jegley* to show how the Arkansas Supreme Court, has, at the urging of the United States Supreme Court, begun to apply that strain of jurisprudence to the cases before it.

II. THE NEW JUDICIAL FEDERALISM

A. *Origins*

The new judicial federalism came into vogue in the 1970s, with Justice William J. Brennan sounding the clarion call.⁷ A

6. Rule 13.2 of the Arkansas Rules of Criminal Procedure outlines requirements for obtaining night-time search warrants that are not mandated by federal law. The Arkansas Supreme Court's longstanding antipathy toward pretextual arrests is best illustrated by its decisions in *Richardson v. State*, 706 S.W.2d 363 (Ark. 1986), *Hines v. State*, 709 S.W.2d 65 (Ark. 1986), and *Brewer v. State*, 611 S.W.2d 179 (Ark. 1981).

7. G. Alan Tarr summarizes the emergence of the new judicial federalism in *Understanding State Constitutions* (Princeton U. Press 1998):

Among the most heralded constitutional developments in recent years has been state judges' increased reliance on state declarations of rights to secure rights unavailable under the U.S. Constitution. This new judicial federalism, as it has been labeled, emerged during the early 1970s, following the appointment of Chief Justice Warren Burger to succeed Earl Warren on the U.S. Supreme Court, and was encouraged by Justice William Brennan, a stalwart of the Warren Court. Thus, when state courts began to rely on their state constitutions, critics charged that they were merely attempting to evade Burger Court rulings and safeguard the civil libertarian gains of the Warren Court. This criticism lost force, however, as the new judicial federalism spread, and courts in every state announced rulings based on the rights guarantees of their state constitutions. Some state courts even indicated that they would henceforth address state constitutional claims first and consider federal constitutional claims only when cases could not be resolved on state grounds. By the mid-1990s, then, the new judicial federalism had become an established feature of American federalism and, most likely, a permanent one.

...

primary focal point of this new federalism has been state courts' reliance on state constitutions to provide rights no longer available under the Supreme Court's increasingly restrictive interpretation of the United States Constitution.⁸ Many states began in the 1980s and 1990s to afford additional protections to their citizens,⁹ and it is beyond dispute today that state supreme courts have the authority to apply their own state law, even if it diverges from federal precedent. In doing so, state supreme courts have forthrightly asserted that the United States Constitution provides the minimum national standard for

Writing in 1986, Justice William H. Brennan Jr. enthused that the "[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 in our time." Brennan's claim is supported by the dramatic upsurge in state courts' reliance on state declarations of rights in civil-liberties cases over the past twenty-five years. From 1950 to 1969, in only ten cases did state judges rely on state guarantees to afford greater protection than was available under the federal Constitution. However, from 1970 to 1986, they did so in over three hundred cases.

Id. at 161-62, 165-66 (footnotes omitted). See also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977). (noting the longstanding jurisdictional rule: "[S]tate decisions [grounded in state law] not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such decisions.") (footnotes omitted).

8. See Brennan, *supra* n. 7, at 498.

9. See e.g. *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999) (indicating that statute precluding putative father from seeking to overcome presumption of paternity violated his state due process rights, which are greater than those spelled out in federal Constitution); *Graves v. State*, 708 S. 2d 858 (Miss. 1997) (holding that Mississippi constitution provides greater protection from searches and seizures than that found in federal Constitution); *State v. Ball*, 471 A.2d 347 (N.H. 1983) (stating that New Hampshire constitution bans unreasonable search and seizure to a greater degree than does federal Constitution); *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981) (holding that state constitutional guarantee against "unnecessary rigor" in treatment of persons arrested or jailed overrides federal constitutional claim); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that Vermont constitution's common-benefits clause pre-dates and provides more protections than does the federal Constitution's equal protection clause with regard to marriage licenses for same-sex couples); *State v. Ferrier*, 960 P.2d 927 (Wash. 1998) (holding that Washington's constitution provides greater protections than the federal Constitution in search-and-seizure context); *State v. Gunwall*, 720 P.2d 808 (Wash. 1986) (noting that protection of privacy interests in the state constitution prevent a person's long-distance telephone records from being obtained from telephone company, even though seeking those records is permissible under federal Constitution); see also 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 n. 3 (1986) (collecting cases from Alaska, California, Colorado, Connecticut, Florida, Hawaii, Massachusetts, Mississippi, New Hampshire, New York, Utah, and West Virginia).

individual rights, and that the state courts are free to extend additional protections under their own constitutions. The United States Supreme Court has agreed.¹⁰

B. Why Use The State Constitution?

Two important questions confront a state supreme court as it considers diverging from federal precedent. The first is why a state court should interpret its constitution differently from the United States Constitution. The second is how such a divergence should be accomplished.¹¹

One justification for a break with the federal analysis is result-oriented: State courts should use their state constitutions to avoid federal precedent that denies rights that the state courts believe should be protected. Justice Brennan's seminal recognition of the forces that underlie the new federalism is perhaps the best-known statement of this approach.¹² Not surprisingly, Justice Brennan's view has become associated with a liberal judicial agenda, both in praise and in criticism.¹³

10. See *Mich. v. Long*, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting *Minn. v. Natl. Tea Co.*, 309 U.S. 551, 557 (1940))).

11. Former California Supreme Court Justice Joseph R. Grodin puts the two questions this way:

One issue is the specific, and for some courts, threshold issue as to what role federal Supreme Court constitutional decisions should play in the state court's analysis. Thus, the issue becomes whether the Supreme Court's decision is entitled to some sort of "deference" even though the Court is construing a different document pertaining to a different polity, or whether the state court should feel free to pursue an independent course. The second related issue is how the state court should analyze the state constitutional issue, that is, whether it should analyze a case in terms of the doctrine that the United States Supreme Court has developed for analysis of the cognate federal constitutional issue, or whether it should develop its own, possibly improved, doctrine.

Joseph Grodin, *State Constitutionalism in Practice*, 30 Val. U. L. Rev. 601, 607 (1996) (reviewing *Intellect and Craft: The Contributions of Justice Hans Linde to American Constitutionalism* (Robert F. Nagel ed., Westville Press 1995)).

12. See generally Brennan, *supra* n. 7.

13. See e.g. Marie L. Garibaldi, *The Rhenquist Court and State Constitutional Law*, 34 Tulsa L.J. 67, 68 (1998) (noting that state courts "began to turn to their state constitutions as a means to provide their citizens with greater rights than they were receiving under the Federal Constitution"); Paul W. Khan, *State Constitutionalism and the Problems of Fairness*, 30 Val. U. L. Rev. 459, 464 (1996) (characterizing the early phases of the state constitutional movement as "a kind of forum shopping for liberals"); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const.

A second justification for state constitutionalism has been called process-based, because it is rooted in the idea that state courts are duty bound to look to state constitutions as part of the dual-sovereignty relationship between the federal government and the several states. Many state constitutions were in existence before the creation of the United States Constitution, which suggests to those like former Oregon Supreme Court Justice Hans Linde, an influential figure in the new judicial federalism,¹⁴ that state courts have a duty to undertake this separate analysis:¹⁵

[A] state court should approach its state constitution as a truly independent document . . . it should not only refrain from following “lockstep” in the path of trod by the United States Supreme Court, but . . . it need not and should not insist upon a showing of some special “justification” for departing from that path. . . . State constitutional law is not common law to be molded into a homogeneous body of principles.¹⁶

When the United States Supreme Court reminded the Arkansas Supreme Court in 2001 of its independent authority to construe its own constitution, the Arkansas court responded with *Griffin, Sullivan, and Picado*. Together, these cases illustrate the ways in which its departure from federal precedent can be seen as a matter of duty under a process-based theory.

L.Q. 429 (1988) (charging that judges who deviate from federal precedent do so for unprincipled, liberal reasons rather than principled, jurisprudential ones).

14. See Grodin, *supra* n. 11, at 605-606 (discussing Justice Linde’s analysis of state constitutions).

15. *Id.* at 606 (“Linde makes clear that state courts should consider their own constitutions first.”).

16. *Id.* at 607. Former Justice Tobriner of the California Supreme Court gives a similar justification:

Just as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the responsibility for resolving questions of state law, including the proper interpretation of provisions of the state constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.

People v. Chavez, 605 P.2d 401, 412 (Cal. 1980) (citations omitted). See also Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 202 (1998) (suggesting that state judges who defer unnecessarily to federal precedent “shirk their judicial duties”).

C. How To Use The State Constitution

Various state supreme courts have taken different approaches in their usage of their state constitutions. The initial question is at what point should state supreme courts examine their own constitutions in their decision-making—before claims are analyzed under the United States Constitution or afterward? The primary advocate for examining state constitutions first is Justice Linde, who concluded that state supreme courts have a judicial duty to do so.¹⁷

The second approach in state constitutional analysis comes from the opposite direction: Claims are analyzed under the United States Constitution first, and only if the claimed right fails there is the state constitution considered.¹⁸ This method, followed by the New Mexico Supreme Court,¹⁹ seeks a balance between following federal precedent slavishly and diverging too much from it, and, according to that court, may be the best way to assure that the state does not deviate too radically from federal precedent and create law that lacks cohesiveness with the national constitution.²⁰ Justice David Souter, while sitting on the New Hampshire Supreme Court, characterized the balance sought by this second method with characteristic aplomb:

It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent.²¹

Irrespective of when the state constitution is examined, the next critical question is to determine in what circumstances

17. Grodin, *supra* n. 11, at 606.

18. See Van Cleave, *supra* n. 16, at 209-210.

19. See e.g. *State v. Gomez*, 932 P.2d 1, 7-8 (N.M. 1997).

20. *Id.* at 7.

21. *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially).

federal precedent should be discarded in favor of state law. Many states have identified specific criteria,²² commonly articulating a desire for the state court to maintain its legitimacy.²³ The Washington Supreme Court's announced criteria—all drawn from existing case law and commentary—are illustrative: (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions in the state and federal constitutions; (3) constitutional history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern.²⁴ The court explained that these criteria were designed to ensure that when the court deviates from federal precedent, its decision "will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court."²⁵ Applying them in the case before it, the *Gunwall* court concluded that police officers violated a defendant's right to privacy under the Washington constitution when they obtained her long-distance telephone records and placed a pen register on her telephone line without a warrant.²⁶

New Jersey, another state with a well-developed state constitutional jurisprudence, also uses the criteria approach. Justice Handler first outlined that state's seven criteria when concurring in *State v. Hunt*,²⁷ listing them as (1) the textual language of the state constitution, (2) legislative history of the state constitution, (3) preexisting state law, (4) structural differences between the state and federal constitutions, (5) matters of particular state interest or local concern, (6) state

22. See Van Cleave, *supra* n. 16, at 219-20; see also Garibaldi, *supra* n. 13, at 75-76 (discussing New Jersey's criteria-based approach).

23. See Van Cleave, *supra* n. 16, at 219-22. Cf. Garibaldi, *supra* n. 13, at 80-83 (surveying arguments against the new judicial federalism, and concluding that the New Jersey approach to state constitutionalism best balances the role of the states and the federal government because it is sensitive to the leadership role of the United States Supreme Court).

24. *State v. Gunwall*, 720 P.2d 808, 812 (Wash. 1986).

25. *Id.* at 813.

26. *Id.* at 816.

27. 450 A.2d 952 (N.J. 1982).

traditions, and (7) the distinctive public attitudes of the state's citizens.²⁸

New Mexico, too, uses the criteria approach. In *Gomez*, the New Mexico Supreme Court announced that it would look to the federal constitution first, and if the federal constitution left the right in question unprotected, the court would use the following three factors to determine if a departure from federal precedent was justified: (1) a flawed federal analysis, (2) structural differences between state and federal government, and (3) distinctive state characteristics.²⁹ Unlike Washington's and New Jersey's, the New Mexico factors de-emphasize the importance of historical and textual differences between the state and federal constitutions.³⁰

Although no approach has yet emerged as dominant, Professor Van Cleave regards the New Mexico factors as preferable to the Washington court's *Gunwall* factors, especially as the third New Mexico factor requires the state court to critically evaluate federal decisions in light of local conditions and rely exclusively on "principled analysis."³¹

III. ARKANSAS COMMON LAW

Although Arkansas was late in wholeheartedly embracing its state constitution as a vehicle for expanded individual rights, there were signs during the 1970s and 1980s that its common law was in sync with the new judicial federalism. Arkansas's pre-*Sullivan* broadening of individual rights is typified by two strains of cases, those involving law-enforcement officers' motives for making arrests, and those detailing the requirements for a permissible night-time search.

The Arkansas court's continued examination of law enforcement's motives in making an arrest is particularly worthy of note since the United States Supreme Court long ago abandoned the subjective motives of police officers as a relevant

28. *Id.* at 965-67 (Handler, J., concurring). The entire court later adopted Justice Handler's criteria in *State v. Williams*, 459 A.2d 641 (N.J. 1983).

29. *Gomez*, 932 P.2d at 7.

30. See Van Cleave, *supra* n. 16, at 221-23.

31. *Id.* at 223.

subject of inquiry.³² Since 1973, the Court has focused solely on whether a legitimate basis for the arrest existed, no matter how dubious that basis might have been, or whether it was, in reality, a mere pretext for searching the suspect or his vehicle. The Arkansas Supreme Court disagrees with this approach, and has continued under its state constitution to examine the subjective intent and motivation of police officers when considering the suppression issue.³³

The Arkansas Supreme Court's perennial sensitivity to the showing to be required of law-enforcement officers before the grant of a night-time search warrant is a second example. Since 1976, Rule 13.2(c) of the Arkansas Rules of Criminal Procedure has required law-enforcement officers to jump through specific hoops not required of their federal counterparts before obtaining a night-time search warrant.³⁴ Added to this has been the Arkansas Supreme Court's strict interpretation of Rule 13.2(c) and its holdings that a mere reiteration of the Rule's factors is not sufficient.³⁵ Instead, facts supporting the necessary factors

32. See *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafsen v. Florida*, 414 U.S. 260 (1973). See also *Whren v. United States*, 517 U.S. 806 (1996) (reiterating *Robinson-Gustafsen* doctrine); *Ark. v. Sullivan*, 532 U.S. 769 (2001) (*per curiam*).

33. *State v. Sullivan*, 74 S.W.3d 215, 221 (Ark. 2002) ("Under these authorities [state constitution and common law], pretextual arrests—arrests that would not have occurred *but for* an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule.") (emphasis in original). See also n. 6, *supra*.

34. The rule's requirements are explicit:

(c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

- (i) the place to be searched is difficult of speedy access; or
- (ii) the objects to be seized are in danger of imminent removal; or
- (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;

the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time, not to exceed sixty (60) days from the date of issuance.

35. E.g. *Fouse v. State*, 989 S.W.2d 146 (Ark. 1999); *Garner v. State*, 820 S.W.2d 446, 449-50 (Ark. 1991) (noting that "[t]he privacy of citizens in their homes, secure from nighttime intrusions, is a right of vast importance as attested not only by our Rules, but also by our state and federal constitutions").

must be provided to the magistrate.³⁶ Without such a factual basis, the court has repeatedly held that the results of the search must be suppressed.

Against this backdrop, *Griffin*, *Sullivan*, and *Picado* can be examined as illustrative of the Arkansas court's approach to divergence from federal precedent.

IV. *GRIFFIN V. STATE*: CURTILAGE

It was in a night-time search case³⁷ that the Arkansas Supreme Court first relied on its state constitution³⁸ to invalidate an unreasonable search. In *Griffin*, law-enforcement officers had heard from anonymous sources that Griffin was selling methamphetamine. The officers later acknowledged that they did not have probable cause to obtain a search warrant to search the residence he shared with his parents, but decided to approach it nonetheless and use the knock-and-talk investigative procedure.³⁹ Four of them approached the residence well after sunset one evening, carrying flashlights that they used while visually inspecting parked vehicles and an outbuilding before knocking on the door of the residence and engaging Griffin in conversation about his suspected drug activity. During that conversation, the police secured Griffin's consent to a search of

36. See e.g. *Fouse*, 989 S.W.2d at 148 (discussing *Langford v. State*, 962 S.W.2d 358 (Ark. 1998) and *Coleman v. State*, 826 S.W.2d 273 (Ark. 1992)); *State v. Martinez*, 811 S.W.2d 319 (Ark. 1991); *Hall v. State*, 789 S.W.2d 456 (Ark. 1990); *State v. Broadway*, 599 S.W.2d 721 (Ark. 1980).

37. *Griffin v. State*, 67 S.W.3d 582 (Ark. 2002).

38. Article 2, § 15 of the Arkansas constitution provides:

The 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; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the people or thing to be seized.

Ark. Const. art. 2, § 15.

39. The knock-and-talk procedure has been described as follows:

In recent years, the phenomenon of the "knock and talk" procedure has come into vogue as a substitute for obtaining either a nighttime or a daytime search warrant. Police officers simply accost a person at his or her home, because they do not have sufficient proof to establish probable cause for a search warrant. The police officers obtain a verbal consent to search the home from the homeowner and proceed with the search.

Griffin, 67 S.W.3d at 591 (Brown, J., concurring).

his home, in the course of which they found methamphetamine and drug paraphernalia.

Griffin was arrested and charged with possession of methamphetamine with intent to deliver, simultaneous possession of drugs and a firearm, and possession of drug paraphernalia. He moved to suppress the evidence based on an unlawful search, and the trial court denied his motion. He then entered a plea of guilty conditioned on his appeal. The Arkansas Supreme Court reversed the trial court's decision and held that the police officers' visual inspection of Griffin's curtilage prior to approaching the door of his residence and obtaining his consent was a violation of his expectation of privacy.

The *Griffin* decision was in part a direct response to the United States Supreme Court's ruling in *Sullivan*:

We have in many cases harmonized the protections afforded by Article 2, Section 15, of our state constitution with those provided by the Fourth Amendment to the United States Constitution. *See Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997); *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995). However, we base our analysis of this case upon our own state law as expressed by our state constitution, statutes, and cases, recognizing that while we lack authority to extend the protections of the Fourth Amendment beyond the holdings of the United States Supreme Court, we do have the authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards. *See Arkansas v. Sullivan*, 532 U.S. 769, 121 S. Ct. 1876, 149 L.Ed.2d 994 (2001).⁴⁰

No specific federal case was rejected by the *Griffin* court in reaching its decision, which sets it apart from the other cases analyzed here.⁴¹ In fact, the *Griffin* court acknowledged that federal law might also support invalidating a search like the one

40. 67 S.W.3d at 584.

41. As will be discussed below, *see* §§ V & VI, *infra*, the Arkansas Supreme Court rejected *Whren v. United States*, 517 U.S. 806 (1996), in *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002), and *Bowers v. Hardwick*, 487 U.S. 186 (1986), in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002). In addition, it noted in *Box v. State*, 71 S.W.3d 552, 557 (Ark. 2002), that "greater protection is afforded under our state constitution than that set out in *Estelle [v. Williams]*, 425 U.S. 501 (1976)."

that occurred at Griffin's residence.⁴² Nonetheless, it chose to base its decision solely on the Arkansas constitution.

Griffin is also noteworthy for its constitutional reasoning. The *Griffin* court engaged in a historical analysis of the Arkansas constitution, pointing out that

[i]n many states, the principle that a person should be protected against unreasonable searches and seizures of their persons, houses, papers, and effects was well-established before the 1786 Constitutional Convention adopted a similar restriction, the Fourth Amendment, forbidding the central government from issuing warrants without probable cause. . . . The 1780 Massachusetts Declaration of Rights was the first to use the phrase "unreasonable searches and seizures." . . . The public furor over the issuance by the King of writs of assistance granting customs officials unlimited power of search and seizure had fueled the spirit of independence of the colonies. . . . The principle that a man's home is his castle, and that even the King is prohibited from unreasonably intruding upon that home, was particularly well-developed in the rough-and-ready culture of the frontier, and no less pronounced in the Arkansas Territory. In our 1836 Constitution, the people of our newly admitted state expressed this principle succinctly in the following language:

9. 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 supported by evidence, *are dangerous to liberty, and shall not be granted.*

Id. (emphasis added).

This principle is now articulated in Article 2, Section 15, of the present Arkansas constitution, which provides that "the right of the people of this State to be secure in their

42. *Griffin*, 67 S.W.3d at 584.

persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.”⁴³

The other point of significance in *Griffin* is the stance taken by three of the concurring justices, which may prove, in time, to have augured well for the court’s future rejection of the knock-and-talk procedure as an investigative method when a written consent from the homeowner is absent.⁴⁴ All three concurrences had their foundation in the Arkansas constitution, and all three concurring justices rejected the federal case law on consent searches. Indeed, they took issue particularly with the idea that law-enforcement officers need not, under *Schneckloth v. Bustamonte*,⁴⁵ inform homeowners of their right to refuse to consent to a search. A sampling of the three concurrences follows:

Even more troubling is that the lead officer in this case, Officer Johnson, admitted that he made a conscious decision not to inform Appellant of his right to refuse consent. He explained that he was better off not offering any information because, on some occasions in the past, he has informed suspects of their right to refuse and they denied consent to search. In other words, Officer Johnson intentionally refrained from informing Appellant of his right to refuse because he was afraid that Appellant might actually invoke his right. On this issue, I agree with Justice Brown that we should interpret the Arkansas Constitution as requiring that the right to refuse consent be explained before “knock and talk” searches will be upheld.⁴⁶

...

No state, either by statute or court decision, currently requires that a homeowner sign a *written consent form* advising that homeowner of a right to refuse the search before the search can begin. Yet, such consent forms are being used by individual law enforcement agencies in Arkansas as came to light in a recent “knock and talk” case

43. 67 S.W.3d at 584-85 (internal citations omitted).

44. While the Arkansas Supreme Court has heard cases involving the knock-and-talk procedure, no Arkansas case has squarely raised the state constitutional argument. *See e.g. Scott v. State*, 67 S.W.3d 567 (Ark. 2002) (declining to address state constitutional argument in a knock-and-talk case when the accused failed to raise it).

45. 412 U.S. 218 (1973).

46. 67 S.W.3d at 590-91 (Corbin, J., concurring).

submitted to this Court for decision. *See Scott v. State*, [67 S.W.3d 567 (2002)]. I think using consent forms has merit. Requiring a homeowner to execute a consent form before the search begins would be tangible proof that a consent was given. The language of the form, in addition, would ensure that the individual is presented with the fact that consent can be refused. It would not eliminate all controversy surrounding a “knock and talk” consent, but it would remove some of the credibility battles between police officers and homeowners as well as other evidentiary quagmires that currently afflict our courts in this context, much as the *Miranda* waiver form has done for police interrogations.⁴⁷

...

He also testified that using the method noted above, he got consent up to eighty percent of the time. Officer Johnson further testified that he had consent forms, but that he did not use them, and believed he was under no compulsion to advise a person they need not consent to the search. That statement in and of itself reveals acknowledgment that some persons may well have believed they had no choice but to submit to the search. The “knock and talk” raises significant issues, and unfortunately reinforces the concern that law enforcement should not be acting on their own.

The better approach would be to do the necessary police work to entitle the police to a search warrant. The preference in the law is for a warrant, and it is so strong that less persuasive evidence than would support a warrantless search will justify the issuance of a search warrant.⁴⁸

It also bears noting that the *Griffin* court used a *Gunwall* factor—constitutional history—in interpreting the Arkansas constitution.⁴⁹ The court referred to the text of the now-superseded 1836 version of the state constitution, which contained language condemning unreasonable searches and general warrants as “dangerous to liberty.”⁵⁰ The court

47. *Id.* at 592 (Brown, J., concurring) (emphasis in original).

48. *Id.* at 595 (Hannah, J., concurring) (citation omitted).

49. *See id.* at 585.

50. *Id.*

concluded that this strong language, and the public policy that it represented in the “rough and ready culture of the [Arkansas] frontier,” is “now articulated in Article 2, Section 15, of the present Arkansas constitution.”⁵¹ But of equal significance in *Griffin* are the three concurring opinions raising questions about whether the knock-and-talk procedure passes muster under the Arkansas constitution.

V. *STATE V. SULLIVAN*: PRETEXTUAL ARREST

A few weeks after deciding *Griffin*, the Arkansas Supreme Court handed down a second decision grounded on the Arkansas constitution, *State v. Sullivan*.⁵² This time, in a case on remand from the Supreme Court, the Arkansas court expressly expanded individual rights beyond what federal law would permit.

Sullivan, a disabled roofer, was pulled over for driving just above the speed limit by a police officer who knew that he had previously been involved in narcotics activity. The officer then noticed a roofing hatchet rusted fast to the carpet of Sullivan’s vehicle and arrested him for possession of a weapon, illegal window-tinting, driving an unsafe vehicle, and failing to produce proof of registration and insurance. A subsequent inventory search revealed drugs in Sullivan’s vehicle. The trial court suppressed the drugs as incident to a pretextual arrest on the basis that the arrest was only made so that the police officer could search for drugs. The Arkansas Supreme Court affirmed. The state was unhappy with that result, and so the case meandered through rehearing, a writ of *certiorari* from the United States Supreme Court, reversal and remand, and finally, a second opinion by the Arkansas Supreme Court in which the evidence was again suppressed.⁵³

51. *Id.*

52. 74 S.W.3d 215 (Ark. 2002).

53. The procedural history of this case is somewhat complicated. In the first *Sullivan* case, the Arkansas Supreme Court affirmed the trial court’s suppression of the evidence on the basis that the arresting officer’s actions were pretextual. *State v. Sullivan*, 11 S.W.3d 526 (Ark. 2000). After the court’s decision in the first appeal, the State petitioned for rehearing, arguing that the court did not follow *Whren v. United States*, 517 U.S. 806 (1996). In the original briefing of the issues, neither party had cited *Whren* to the Arkansas Supreme Court, which eventually denied the petition for rehearing but issued a supplemental opinion addressing the *Whren* case. *State v. Sullivan*, 16 S.W.3d 551 (Ark.

Unlike the *Griffin* decision, which focused on constitutional history, the decision after remand in *Sullivan* concentrated on the jurisprudence of pretextual arrests in Arkansas. The *Sullivan* court traced that common-law history back more than twenty years, noting points at which it diverged from prevailing federal precedent, and consequently rejected the Court's decision in *Whren*,⁵⁴ which effectively foreclosed pretextual police conduct as a basis for suppression of evidence under the Fourth Amendment. The Arkansas Supreme Court instead relied on the Arkansas constitution and this state's common law to invalidate the pretextual arrest and resulting search in *Sullivan*.

The *Sullivan* decision after remand also signals the Arkansas Supreme Court's possible retreat from *Atwater v. Lago Vista*,⁵⁵ in which the Supreme Court held that a full custodial arrest was a permissible response to any violation of the penal law, including a fine-only traffic offense. The Arkansas Supreme Court said that *Atwater* "raises potential concerns"⁵⁶ under state law, but declined to break with its holding because *Sullivan* did not squarely raise the issue. It is bound to arise sooner or later, however, and the Arkansas court seems likely to recall when it does that the Supreme Court has authorized it to focus when appropriate on the requirements of its own state law.

VI. JEGLEY v. PICADO: DUE PROCESS AND EQUAL PROTECTION

While *Griffin* was based on the history of Arkansas's constitution and *Sullivan* on Arkansas's common law, *Jegley v. Picado*⁵⁷ combines these two approaches.⁵⁸ The decision,

2000). In this decision on rehearing, the court rejected the rationale of *Whren*, stating that it was free to grant *Sullivan* more protection under the United States Constitution than the federal courts have seen fit to provide. *Id.* at 552 (supplemental opinion on denial of rehearing). After losing on rehearing, the State petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted the petition, and in *Ark. v. Sullivan*, 532 U.S. 769 (2001) (*per curiam*), reversed the decision on rehearing. On remand from the United States Supreme Court, the Arkansas Supreme Court again affirmed the trial court, but this time based its decision on the Arkansas constitution. *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).

54. *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).

55. 532 U.S. 318 (2001).

56. *Sullivan*, 74 S.W.3d at 222.

57. 80 S.W.3d 332 (Ark. 2002).

however, rests in addition on an analysis of the differences between the texts of the state and federal constitutions.

The *Picado* complaint was brought by a group of gay and lesbian Arkansans who sought a declaration that the state's sodomy statute was a violation of their due process and equal protection rights under the Arkansas constitution.⁵⁹ The trial court agreed, and entered an order declaring the statute to be unconstitutional. The Arkansas Supreme Court affirmed, holding that the sodomy statute was unconstitutional on both due process and equal protection grounds, thus rejecting *Bowers v. Hardwick*,⁶⁰ in which the Supreme Court held that the right to privacy did not protect private, consensual, noncommercial sexual behavior.

The due process portion of the *Picado* opinion considered several provisions of the Arkansas constitution as well as case and statutory law. In each of these categories, the court found a strong foundation for privacy protection, and concluded that any

58. The *Jegley* court relied on the common-law history of Arkansas as reflected in its rules of criminal procedure and its criminal-procedure jurisprudence. *Id.* at 348-49. The court also relied on statutory law, noting that "privacy is mentioned in more than eighty statutes enacted by the Arkansas General Assembly," *id.* at 347, and that Arkansas's cases addressing privacy torts indicate that the state has a strong common-law tradition of protecting privacy. *Id.* at 349-350.

59. The sodomy statute, former Ark. Code Ann. § 5-14-122 (Repl. 1997), read:

(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.

60. 487 U.S. 186 (1986). After *Bowers*, several other state supreme courts had already based their decisions invalidating state sodomy statutes on their state constitutions. See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (holding that Kentucky's constitution provides more protection than U.S. Constitution with regard to equal protection and the right to privacy); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (focusing on an individual's right to privacy under the Montana constitution and noting that equal protection guarantees made the case justiciable); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (holding that Pennsylvania's sodomy statute violates equal protection by exceeding the valid bounds of police power); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. 1996) (declaring that the privacy of homosexuals is a fundamental privacy right under the Tennessee Constitution's guarantee of due process). New York's Court of Appeals invalidated that state's sodomy statute even before *Bowers* was decided. *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (invalidating sodomy law by holding that equal protection could be applied to sodomy statutes regardless of a citizen's right to privacy).

infringement upon Arkansans' fundamental right to privacy in their own homes must be justified by a compelling state interest. The court further held that the sodomy statute was not based on an interest sufficiently compelling to justify governmental intrusion into the bedrooms of same-sex couples.

The equal protection portion of the opinion rejected the trial court's reasoning that the sodomy statute represented gender-based discrimination calling for intermediate scrutiny, and used instead a rational-basis review.⁶¹ Despite that less rigorous scrutiny, the *Picado* court found that the sodomy statute violated Arkansas's equal protection guarantee. Holding that the sodomy statute was not supported by any rational basis because the state advanced no justification for it other than a general and vague notion that public morality needed to be protected, the court pointed out that "[t]here is no contention that same-sex sodomy implicates the public health or welfare, the efficient administration of government, the economy, the citizenry, or the promotion of the family unit."⁶²

The *Picado* court looked not only to the history of privacy in Arkansas's constitution but also to its privacy jurisprudence in a variety of contexts, including criminal and tort cases. The court then gave two new reasons for diverging from federal precedent: (1) the proliferation of statutory law in Arkansas that protects privacy, and (2) "the textual and structural differences between the Bill of Rights and our own Declaration of Rights."⁶³ Thus, the court's reasoning in *Picado* added another of the *Gunwall* factors—differences in the text—to its list of criteria for when it will diverge from federal interpretations.

While the *Picado* decision itself is rather narrow, it has a potentially broader application than do the search-and-seizure cases in that its ramifications may extend to other substantive due process areas involving privacy issues. Accordingly, the ripple effect of *Picado* may prove to be wide indeed.

61. *Picado*, 80 S.W.3d at 351.

62. *Id.* at 353.

63. *Id.* at 345.

VII. CONCLUSION

Slow though it may have been to embrace the new judicial federalism, the Arkansas Supreme Court has recently made up for lost time. In both *Griffin* and *Sullivan*, the Arkansas Supreme Court noted that it had authority to diverge from federal precedent where appropriate, but neither opinion stated that the court believed that it had a duty to do so.⁶⁴ In *Picado*, however, the court stated that when there are “textual and structural” differences between the United States Constitution and the Arkansas constitution, it must perform a state constitutional analysis.⁶⁵ Thus, the Arkansas Supreme Court can be counted among those that choose a process-based analysis to justify the use of the state constitution instead of among those courts that are interested only in results.

Accurately predicting the development of the law is always a challenge, but future decisions will no doubt clarify whether Arkansas courts should examine the state constitution first when claims are made under both constitutions. They seem likely also to provide the Arkansas Supreme Court with an opportunity to consider and apply the remaining *Gunwall* factors. It appears as well that the validity of knock-and-talk investigative procedures will soon be contested under the Arkansas constitution, and that the United States Supreme Court’s approval of full arrests for fine-only traffic offenses will, at some point, be questioned in Arkansas on state constitutional grounds.

Now that the levee has been breached, the criminal-defense bar unquestionably will raise a host of suppression arguments and privacy issues under the state constitution, and it is impossible to foresee where those challenges might lead. All of this is to say that with the endorsement of the United States Supreme Court, the Arkansas constitution is now and will continue to be a fertile resource for expanding individual rights

64. See *Griffin*, 67 S.W.3d at 584; *Sullivan*, 74 S.W.3d at 218 (both citing *Ark. v. Sullivan*, 532 U.S. 769, 772 (2001) (*per curiam*)).

65. *Picado*, 80 S.W.3d at 345 (“the textual and structural differences between the Bill of Rights and our own Declaration of Rights *mandate* that we explore whether [a right to private, consensual, noncommercial sexual activity in the home] exists under the Arkansas Constitution”) (emphasis added).

under the guardianship of a newly energized state supreme court.

