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Judicial Deference to Legislatures in Constitutional Analysis

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JUDICIAL DEFERENCE TO LEGISLATURES IN CONSTITUTIONAL ANALYSIS*

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North Carolina is one of the only states to have a statutory definition of voluntary consent for police searches; it essentially codified the Supreme Court's Bustamonte *rule. In theory, this statute could eventually face a constitutional challenge if the Supreme Court adopted a requirement of informed consent—police warnings of the right to refuse a search—as many have urged. Considering this possibility as a hypothetical, it seems strange that conventional Fourth Amendment analysis has largely ignored whether challenged state actions are legislative, executive, or judicial; attention has focused instead on federalism concerns, interpretive approaches, and tradeoffs between public safety and individual privacy. Nevertheless, there are both policy reasons and anecdotal evidence suggesting that the Supreme Court should, and in fact occasionally does, defer to legislatures in certain matters of criminal procedure, even when it would not defer to identical decisions by police. The potential clash between this statute and constitutional doctrine illustrates these points nicely. This Article uses this localized example as a launching point to address the larger issue of how state legislation can color the Supreme Court's analysis. Separation of powers is an important but unexplored component of criminal procedure, and this Article is a first foray into this inquiry. This missing piece of Fourth Amendment analysis has broad implications for many areas of criminal procedure.*

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INTRODUCTION

In 1974,[1] North Carolina codified the holding of the Supreme Court's opinion in *Schneckloth v. Bustamonte*,[2] statutorily defining what constitutes valid consent to a search in sections 15A-221[3] and 15A-222[4] of the North Carolina General Statutes. It is the only state to have done so,[5] and this remains a unique feature of its criminal procedure. Without explanation, the North Carolina legislature at the last minute dropped a section of the bill that would have required police to inform suspects that they had a right to refuse consent

1. *See* Act of Jan. 16, 1974, 1974 N.C. Sess. Laws 493 (amending the state criminal procedure laws).

2. 412 U.S. 218, 248–49 (1973) (holding that a subject's voluntary consent to a search is not invalidated simply because he does not know that he can refuse to consent).

3. N.C. GEN. STAT. § 15A-221 (2011).

4. *Id.* § 15A-222.

5. *See* Jessica Y. Harrison, Comment, *A Statutory Proposal to Clarify the Meaning of Consent in Wisconsin Search and Seizure Law*, 2000 WIS. L. REV. 403, 424 n.169 (2000) (asserting that North Carolina is the only state to statutorily define "consent" to search and seizure). For a non-legislative federal example of defining consent, see MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part III, Mil. R. Evid. 314(e) (2012).

without fear of retaliatory action.[6] It is hard to measure the impact of this omission; it appears from the reported cases that North Carolina police began using consent-waiver forms regularly around 1979,[7] which inform suspects of their right to refuse the search. It also appears that suspects routinely consent anyway.[8]

The Supreme Court's decisions in this area have been generally consistent since *Bustamonte*, so North Carolina's statute remains in harmony with federal constitutional rules. North Carolina state courts regularly cite both *Bustamonte* and their own statute in resolving consent cases,[9] so the statute has not yielded outcomes that diverge from cases in the federal courts or most other states.

In theory, this alignment could change if the Supreme Court took a step forward in its determination of voluntary consent. Presently, a sudden change to *Bustamonte* seems very unlikely because the rule has proved very stable and workable for courts, especially compared to other criminal procedure rules. At the same time, a few states have started requiring informed consent for warrantless police searches,[10] so it is theoretically possible that this new approach could win out

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6. *Compare* H.B. 256, 1973 Gen. Assemb., Reg. Sess. (N.C. 1974) (requiring an officer to inform the individual that he is under no obligation to consent to a search) (adopted Mar. 5, 1974), *with* H.B. 256, 1973 Gen. Assemb., Reg. Sess. (N.C. 1974) (removing that requirement from the bill text) (adopted Apr. 8, 1974).

7. *See infra* note 90 and corresponding text.

8. *See* L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1523 n.19 (2011); Brian R. Gallini, Schneckloth v. Bustamonte*: History's Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233, 233–34 (2012); Josephine Ross, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1, 9 (2010); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005).

9. *See, e.g.*, State v. Steen, 352 N.C. 227, 239–40, 536 S.E.2d 1, 9 (2000); State v. Smith, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997); State v. Stover, 200 N.C. App. 506, 513–514, 685 S.E.2d 127, 133 (2009); State v. Harper, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67 (2003); State v. Graham, 149 N.C. App. 215, 218–19, 562 S.E.2d 286, 288 (2002); State v. Mandina, 91 N.C. App. 686, 695, 373 S.E.2d 155, 161 (1988).

10. This is an arguably nascent trend, but all the changes are heading in the same direction. *See, e.g.*, W. VA. CODE ANN. § 62-1A-10 to 11 (LexisNexis 2010) (requiring the operator of a motor vehicle to provide written consent stating that she understands that she can refuse to consent to a search); ARK. R. CRIM. P. 11.1 ("A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent."); Penick v. State, 440 So. 2d 547, 549 (Miss. 1983) (requiring the person consenting to a search to be "*cognizant of her rights in the premises* when the officer proposed to her . . . to make the search without a warrant" (emphasis in original) (quoting Smith v. State, 98 So. 344, 345 (Miss. 1923))); State v. Carty, 790 A.2d 903, 907 (N.J. 2002) (noting that, under the New Jersey Constitution, "any consent given by an individual to a police officer to conduct a warrantless search must be given knowingly and voluntarily" (citing State v. Johnson, 436 A.2d 66, 68 (N.J. 1975))).

sometime in the future. Even though the Court has not signaled any intention of reversing *Bustamonte*, such an eventuality is at least possible enough to furnish a useful hypothetical, allowing consideration of a larger issue. More importantly, the growing variance in state laws on this point highlights a larger issue—the level of deference federal courts should give state legislatures that attempt to codify rights or procedures protecting those rights.

In this sense, the North Carolina statute poses an intriguing question regarding the relationship between federal criminal procedure and state legislation, which implicates issues of federalism, incorporation, and separation of powers. Conventional wisdom would suggest that statutes delimiting search and seizure law can serve as a floor but not a ceiling—that is, if the Supreme Court were to relax the standard for valid consent, North Carolina's stricter standard would still prevail, as states can afford greater rights to defendants than the Federal Constitution requires. In contrast, most would assume that if the Court raised the standard for valid consent, perhaps by requiring *Miranda*-like warnings of the suspect's right to refuse a warrantless search, this would invalidate North Carolina's statute, as it falls short of such a requirement.

This Article challenges the last point. The literature on constitutional criminal procedure has focused exclusively on incorporation and federalism issues and has ignored the role that separation of powers concerns may play in the Court's decisions about what procedural safeguards to impose on the states.[11] The vast majority of Supreme Court decisions on the Fourth, Fifth, and Sixth Amendments have addressed only state police action, an executive branch function, or a state judicial rule about admissibility of evidence—rarely do the cases involve a statute enacted by an elected legislature. Moreover, the Supreme Court's mantra that "the purpose of the exclusionary rule is to deter police misconduct"[12] suggests that exclusion—which is always the sole remedy for searches premised on

11. One of the only exceptions is Richard C. Worf, *The Case For Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 109–10 (2007) (arguing that legislatures should decide search and seizure limits rather than the judiciary). This Article takes a much less extreme view: rather than arguing that search-and-seizure rules should be almost the exclusive domain of the legislature, as Worf claims, the idea set forth here is that courts should (and already do, without expressly admitting it) give some weight or deference to legislative enactments in this area, but only as one factor among others.

12. United States v. Leon, 468 U.S. 897, 916 (1984); *accord* Davis v. United States, 131 S. Ct. 2419, 2426 (2011); Herring v. United States, 555 U.S. 135, 139–40 (2009); Arizona v. Evans, 514 U.S. 1, 11 (1995).

involuntary consent—is less appropriate where the legislative branch has already regulated police conduct.

Although this argument contradicts the prevailing view of commentators, there is some support within Supreme Court opinions. The Court often defers to Congress or state legislatures in criminal procedure cases, but has not acknowledged that it has a general preference for such deference. It also frequently cites trends in state law to justify a break with its own precedent or its invalidation of a statutory outlier.[13] Yet the literature has largely ignored the fact that varying levels of deference inform the Court's decisions about applying the Bill of Rights to the states. In line with the Court's usual separation of powers analysis, state legislatures receive more deference than state police (executives) or state judiciaries.[14] Such deference is not dispositive; it is not the sole factor, or even the most important factor, in a case, but it colors the Court's analysis. In other words, it is a mistake to assume that a decision about consent and searches depends entirely on the text of the Fourth Amendment, or even the entrenched jurisprudence surrounding the amendment, such as using the exclusionary rule as the remedy for violations. These are important factors, but it also matters which branch of the state government is facing the constitutional challenge.

Even where these differing levels of deference are not explicit, some of the canons of statutory interpretation push in this direction. For example, the avoidance canon,[15] which instructs judges to avoid finding a statute unconstitutional if there are other grounds for disposing of the case, indirectly gives more incremental deference[16] to

13. *See infra* Part II.C. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313–17 (2002) (citing the national trend in state legislatures to prohibit the use of the death penalty for mentally retarded criminals as reason to invalidate a Virginia law).

14. *See infra* Part II.

15. *See* Bd. of Trs. of Ind. Pub. Emps.' Ret. Fund v. Grannan, 578 N.E.2d 371, 375 (Ind. Ct. App. 1991); *In re* Belk, 107 N.C. App. 448, 455, 420 S.E.2d 682, 685 (1992); NORMAN SINGER & J.D. SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 45:11 (7th ed. 2007) ("In the same spirit a court will not address constitutional claims when the case can be properly disposed of on nonconstitutional grounds . . . . It is presumed that the legislature acted with integrity and with an honest purpose to keep within constitutional limits.").

16. For discussion of the concept of incremental deference in other contexts, see Charles H. Brower II, Mitsubishi, *Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 918–20 (2005) (discussing deference to the actions of foreign states under the Foreign Sovereign Immunities Act); Hon. Andrew M. Mead, *Abuse of Discretion: Maine's Application of a Malleable Appellate Standard*, 57 ME. L. REV. 519, 539 (2005) (discussing deference as it applies to appellate court review of trial court decisions); Aman S. Patel, *Detention and Articulable Cause: Arbitrariness and*

statutes than to police protocols, as it applies to the former and not the latter. In addition, the fact that legislation is text means that it contains some inevitable ambiguity in the verbiage and has room for interpretation by a federal court wanting to avoid a constitutional collision with the states;[17] discrete police actions lack this advantage.

This is not to say that North Carolina's statute would inevitably survive a constitutional challenge if the Court took a new turn in this area. Rather, the point is that North Carolina's codification of consent (as well as other features of search and seizure law) makes survival of a challenge more possible or likely. As such, it highlights the overdue observation that separation of powers concerns can factor into the Court's application of the Fourth Amendment to state actions, and to a lesser extent, the application of the Fifth and Sixth Amendments as well. I believe this deference stems primarily from separation of powers concerns, and only secondarily from federalism concerns.

The same argument would apply to legislative enactments in other states that address any point of law overlapping with Supreme Court precedents. To illustrate, consider a far-removed example: at least twenty-two states enacted legislation[18] reacting to the Court's 2005 decision in *Kelo v. City of New London*.[19] All these statutes pertain to eminent domain, but some codify the Court's holding, while others purport to annul *Kelo* for property within that state.

Growing Judicial Deference to Police Judgment, 45 CRIM. L.Q. 198, 226 (2001) (describing courts' deferential approach to police action regarding *Terry* searches and seizures).

17. *See* Frisby v. Schultz, 487 U.S. 474, 483 (1988) ("[S]tatutes will be interpreted to avoid constitutional difficulties."); SINGER & SINGER, *supra* note 15, § 45:11 ("[A] court should construe legislative enactments to avoid constitutional difficulties if possible [and should,] [i]n considering the constitutionality of a legislative enactment . . . exercise appropriate restraint in recognition of the principle of separation of powers."); *see also* S. Blvd. Video & News, Inc. v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 289, 498 S.E.2d 623, 628 (1998) (noting that "statutes relating to the same subject should be construed . . . in such a way as to give effect . . . to all provisions without destroying the meaning of the statutes involved" (citation omitted)); Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections, 110 N.C. App. 506, 510–11, 430 S.E.2d 681, 684 (1993) ("This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." (citation omitted)); N.C. E. Mun. Power Agency v. Wake Cnty., 100 N.C. App. 693, 699, 398 S.E.2d 486, 490 (1990) ("[I]f the meaning [of a statute whose validity is at issue] is clear from reading the words of the Constitution, we should not search for a meaning elsewhere.").

18. *See generally* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (providing a state-by-state survey of post-*Kelo* legislation and discussing the impact of various enactments); Dru Stevenson, *A Million Little Takings*, 14 U. PA. J.L. & SOC. CHANGE 1, 19–31 (2011) (discussing how post-*Kelo* enactments inadvertently affect the legality of state IOLTA programs).

19. 545 U.S. 469 (2005).

When government takings within these states reach the Supreme Court for review, there is now a significant wrinkle to what otherwise might be a strictly constitutional analysis—the import of the state's new statute about the permissibility of certain takings. It seems clear that the Court cannot simply ignore a relevant state statute in its analysis, even though the question on appeal is likely to be primarily constitutional, and the statute itself may not be the end of the matter. Yet the academic literature has hitherto ignored this problem, treating constitutional questions in a more monochromatic way. This Article argues that such legislation must color the analysis, and the analysis must differ from scenarios where the Court reviews state action (such as property takings) in the absence of such enactments. The argument here proceeds from the context of criminal procedure—using North Carolina's statute as a starting point—but the idea would apply to other areas of law as well.

A more recent example, for purposes of illustration, is the clandestine police practice of using GPS tracking devices on the vehicles of suspects. The Supreme Court's January 2012 decision in *United States v. Jones*[20] held that installing the GPS device constituted a search for Fourth Amendment purposes, requiring a warrant. Before the ruling, this was a common law enforcement tactic—the FBI later announced that it had turned off three thousand GPS tracking devices on private cars in the wake of the Court's decision.[21] Even so, the Court's opinion left significant unanswered questions about the legality of such tracking in other circumstances, such as using a car's manufacturer-installed GPS system; despite the unanimous vote, the split of concurring opinions left uncertainty about what rule the Court would apply in future cases. Since the decision, at least two states, Virginia and New Hampshire, have legislation pending that would require warrants for police to use GPS tracking devices on the vehicles of suspects.[22] This creates the same scenario analyzed in this Article—how the Supreme Court would, or should, respond where a state legislature has filled in gaps in the

20. 132 S. Ct. 945 (2012).

21. *See* Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, WALL STREET J. DIGITS BLOG (Feb. 25, 2012, 3:36 PM), http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/.

22. *See, e.g.*, Ted Seifer, *GPS Tracking, Police and Warrants*, N.H. UNION LEADER, Jan 31, 2012, at 1; *Va. House Passes Bill To Restrict GPS Tracking*, DAILY PRESS, Feb. 14, 2012, at A3.

Court's constitutional jurisprudence on Fourth Amendment questions.

An anticipated objection to my thesis is a well-known counterexample, the Supreme Court's 2000 decision in *Dickerson v. United States*,[23] which invalidated a Congressional attempt to overturn *Miranda* legislatively through 18 U.S.C. § 3501. The case involved a defendant charged with bank robbery and related offenses, who sought to suppress his own confession on the grounds that he had not received *Miranda* warnings before confessing.[24] This Article deals with *Dickerson* more extensively in Part II.A below, but the objection is important enough to merit a brief comment here. The majority in *Dickerson* emphasized that it was treating the matter as a special case of stare decisis[25] due to the universal entrenchment of *Miranda* warnings in our culture. From the standpoint of judicial deference to Congress, *Dickerson* is an exception, not the rule. Moreover, the statute itself was somewhat of a legislative orphan;[26] for thirty years from its enactment to the Court's decision, the Department of Justice had ordered federal prosecutors not to enforce it and had even urged the Court in *Dickerson* to ignore it.[27] In an unusually brash move, the Fourth Circuit on its own initiative invoked the statute to overturn three decades of Supreme Court precedent, leaving the Supreme Court in the awkward position of having to solicit someone uninvolved in the case (Professor Paul Cassell from the University of Utah) to argue in support of the judgment below.[28] Neither of the litigants themselves—the Department of Justice or the defendant—had wanted to bring § 3501 into the case.[29] *Dickerson* is, in this sense,

23. 530 U.S. 428, 443 (2000) (holding that *Miranda* warnings are an entrenched part of the American legal system).

24. *Id.* at 432.

25. *See id.* at 443 ("Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."); *see also id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves.").

26. *See generally* Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999) (discussing the Justice Department's treatment of § 3501 since its inception, including its shift from supporting the statute to opposing it in the *Dickerson* case).

27. *See* United States v. Dickerson, 166 F.3d 667, 681–82 (4th Cir. 1999); *see also* KENNETH W. STARR, FIRST AMONG EQUALS 206 (2002) ("During the Clinton Administration . . . Attorney General Reno had taken the extraordinary step of directing federal prosecutors around the country not to employ the statute.").

28. *See Dickerson*, 530 U.S. at 441 n.7.

29. *See id.*

a unique event in the history of the Court and is therefore an outlier, not a benchmark that should be fatal to the argument here.[30] Finally, *Dickerson* involved the Fifth Amendment rather than the Fourth, which is the primary focus of this Article. As discussed below, the Court explicitly treats Fourth Amendment issues more flexibly, and less reverently, than issues invoking the Fifth. Protecting Fifth Amendment trial rights is arguably more suitable for the judiciary, while protecting against overly-intrusive investigations (the Fourth Amendment's theme) could easily be a legislative task. *Dickerson* is an obvious counterexample to the argument here, but is also easily distinguishable and not very representative of the norm.

The theory proposed here builds partly on recent work by Professor Nicholas Rosenkranz, but expands the analysis of a specific issue—constitutional challenges to state criminal procedure enactments—and applies the new insights to the important example of North Carolina's consent law. In a pair of articles appearing in the *Stanford Law Review*,[31] Professor Rosenkranz argues convincingly that nearly every clause or provision of the Constitution applies to or binds either the President, Congress, the judiciary, or their counterparts on the state level.[32] A combination of grammatical-syntactic features and other contextual clues reveal the subjects and objects in each instance.[33] An early Supreme Court decision, for example, held that passive-voice verbs in the Constitution apply to the federal government and not to the states.[34] Rosenkranz demonstrates that on the federal level, only Congress can actually

30. Kenneth Starr adds to this characterization the fact that the Court was in a "self-defense" mode in *Dickerson*, which in itself is relatively unusual in the Court's history. STARR, *supra* note 27, at 205–06 ("To many, the 1968 law represented 'an act of defiance by the Congress, ridiculing the Court, an unbelievable hostility to the Court.' "). This is the opposite situation from one where the legislation under review was in conformity with the Supreme Court's current rule at the time of enactment.

31. *See* Nicholas Quinn Rosenkranz, *Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011) [hereinafter Rosenkranz, *Objects of the Constitution*]; Nicholas Quinn Rosenkranz, *Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) [hereinafter Rosenkranz, *Subjects of the Constitution*]. *Subjects of the Constitution* is the most downloaded article about constitutional interpretation and judicial review in the history of the Social Science Research Network. *SSRN Top Downloads: All Time Hits—Top 10 Papers for Journal of U.S. Constitutional Law*, SSRN.COM, http://papers.ssrn.com/sol3/topten/topTenResults.cfm?groupingId=945709&netorjrnl=jrnl (last visited May 8, 2012).

32. *See* Rosenkranz, *Subjects of the Constitution*, *supra* note 31, at 1222.

33. *See* Rosenkranz, *Objects of the Constitution*, *supra* note 31, at 1013–14 (pointing out that Chief Justice Marshall first developed the idea of "semantic consistency" as an analytical tool of constitutional interpretation).

34. *Id.* (quoting Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

violate the First Amendment[35] (because the Amendment mentions Congress), while only the Executive can violate the Fourth Amendment's search-and-seizure clause[36] (as only the executive would have been doing searches), and only the courts can violate the probable cause provision regarding warrants[37] (as only magistrates grant warrants). The lines are somewhat blurry when courts incorporate provisions from the Bill of Rights against the states through the Fourteenth Amendment, a point that this Article develops more fully. Rosenkranz is apparently the first scholar to observe that various provisions of the Bill of Rights apply only, or at least primarily, to certain branches of government, even where such constraints are not explicit in the text, and that this insight should (and historically did) influence the approach courts take in criminal procedure cases.

This Article continues with the idea, shared by Rozenkranz, that separation of powers is an important but neglected area of Fourth Amendment analysis, and attempts to fill that gap concerning state legislation, especially on the issue of consent. At the same time, the argument here is not dependent on Rosenkranz' work, even though it finds support there. One could reject his position—that all clauses of the Constitution have particular branches of the government as subjects—and still embrace this Article's central claim that Fourth Amendment analysis should take some cognizance of whether the challenged state action is purely legislative, executive, or judicial.

This Article is primarily descriptive but includes a modest normative component. Descriptively, it explains North Carolina's unique consent statute, including its legislative history, and highlights how the statute has affected judicial decisions in the state. The statute also provides an example for describing the complex relationship between the separation of powers and the application of the Bill of Rights to the states, an issue that up to now has not received adequate attention. Even if the Supreme Court were never to budge from its holding in *Bustamonte*, the issue raised here about incremental deference to the legislature deserves more recognition. The normative angle of this Article is the suggestion that the role of

35. *See* Rosenkranz, *Subjects of the Constitution*, *supra* note 31, at 1253 ("The first question of First Amendment judicial review must be: *who has violated the First Amendment?* And as a matter of text and grammar, there is only one possible answer: 'Congress.' ").

36. *See id.* at 1239–41; Rosenkranz, *Objects of the Constitution*, *supra* note 31, at 1033–35.

37. *See* Rosenkranz, *Objects of the Constitution*, *supra* note 31, at 1036–39.

separation of powers, and varying levels of deference to state action, become more explicit in the Supreme Court's analysis in its criminal procedure decisions. Even though this Article focuses on North Carolina's consent statute specifically, there are countless other statutes codifying judicial rulings pertaining to criminal procedure—as well as other unrelated areas of law—to which this thesis should apply.[38]

This Article contends that there is reason to believe that the Supreme Court shows deference to state legislatures when considering the constitutionality of state statutes in the context of the Fourth Amendment. To illustrate how this deference functions and the reasons behind it, this Article poses a hypothetical based upon a North Carolina statute defining what constitutes valid consent to a search. While North Carolina's consent statute codifies current Supreme Court consent jurisprudence, this Article poses the question: "How would the North Carolina statute be treated if the Supreme Court consent jurisprudence changed, raising the floor for what constitutes valid consent under the Fourth Amendment?" This Article then argues that there is reason to believe that the Supreme Court would show some deference to the North Carolina legislature when assessing the constitutionality of North Carolina's consent statute.

Analysis proceeds as follows: Part I sets the stage with a background of North Carolina's consent statute, the Supreme Court's *Bustamonte* decision, and relevant developments in the law since. Included in this background is a survey of states that have recently adopted various informed consent requirements for police searches, which may signal a trend. The primary utility of this analysis of North Carolina's statute is that it serves as a robust illustration of larger points about judicial deference to legislatures that I will discuss later. Part II foregrounds the varying levels of deference that inform courts in applying the Fourth and Fifth Amendments. This discussion begins by exploring particularly relevant cases where the Supreme Court has either rejected or capitulated to legislative attempts to define boundaries of Fourth Amendment protections, and then proceeds to

38. *See, e.g.*, Michael Stockalper, *Is There a Foreign "Right" of Price Discrimination Under United States Copyright Law? An Examination of the First-Sale Doctrine as Applied to Gray-Market Goods*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 513, 516 n.20 (2010) (noting examples of legislation codifying court rulings); Maria-Daniel Asturias, Note, *Burden Shifting and Faulty Assumptions: The Impact of* Horne v. Flores *on State Obligations to Adolescent ELLs under the EEOA*, 55 HOW. L.J. 607, 616 (2012) (noting that the EEOA codified prior court decisions).

revisit traditional policy rationales for judicial deference to legislatures. Part II also documents the Court's occasional reliance on the acts of state legislatures as a type of persuasive authority to bolster its own conclusions. The discussion then turns to the properties of legislative text, especially definitional statutes, which make this type of state action less susceptible to judicial review and consequent invalidation. Starting with the avoidance canon and the doctrine of severability, this Section explains the pragmatic or logistical problems with a court reaching or overturning North Carolina's statute. Part III briefly revisits the North Carolina statute to illustrate how the foregoing points could apply in practice. If the Supreme Court were to review a statute like this that did not necessarily comport with its preferred rule at the time, it could either use the avoidance canon to skirt the discrepancy, or it could decide to capitulate on the grounds that the rule is coming from a legislature rather than from the executive branch or the police in particular. The Conclusion provides a brief recap and conclusion, pointing out implications of this Article that should be the subject of future research.

I. BACKGROUND

As mentioned at the outset, North Carolina provides a localized example that can serve as a launching point to address the larger issue of how state legislation can color the Supreme Court's analysis. It is one of the only states to have a statutory definition of voluntary consent for police searches; it essentially codifies the Supreme Court's *Bustamonte* rule. Hypothetically, this statute could eventually face a constitutional challenge if the Supreme Court adopted a requirement of informed consent—police warnings of the right to refuse a search—as many have urged. This Section introduces the broader landscape of consent-based searches under *Bustamonte* and then explains how North Carolina's statute fits within this area of law—and how it illustrates a larger issue in constitutional jurisprudence that has received inadequate attention in the literature.

A. Schneckloth v. Bustamonte

Schneckloth v. Bustamonte[39] involved a warrantless police search of a vehicle. The 2:40 AM traffic stop was routine at the outset,

39. 412 U.S. 218, 222–23 (1973) (confirming that searches conducted "pursuant to a valid consent" are constitutionally permissible, and discussing what constitutes "voluntary" consent).

occasioned by a burned out headlight and license plate light.[40] The driver had no license, and the only one of the six men in the car who could verify his own identity was the brother of the car's absent owner.[41] This passenger, Alcala, cheerfully agreed to let the officer search the car, and even assisted in the search by unlocking the trunk and glove compartment.[42] Under the rear left seat lay three stolen checks.[43] The checks provided the basis for charging another passenger, Bustamonte, with their theft.[44] Before trial, Bustamonte moved to suppress the checks, contending that the police obtained the checks through an unconstitutional search and seizure.[45] The judge denied the motion and Bustamonte was convicted of possessing a check with intent to defraud.[46] A subsequent habeas petition brought the consent issue up the chain of appeals.[47]

The Ninth Circuit determined that the Fourth and Fourteenth Amendments require a person's awareness of his right to refuse consent to warrantless police searches.[48] The court concluded Alcala had not voluntarily consented because he lacked this knowledge, despite his verbal assent and lack of police coercion.[49] The Supreme Court reversed the Ninth Circuit and held that the due process clause does not require the state to prove that a person knew of his right to refuse consent to a warrantless search.[50] The Court also explicitly rejected the option of requiring *Miranda*-style warning of a person's right to refuse consent, and instead adopted a "totality of the circumstances" test to assess in each case the voluntariness of the acquiescence.[51] The Court held that a person's knowledge of his right to refuse consent to a search is merely one factor, not a prerequisite and not determinative of the presence of voluntary consent.[52] The Court noted that it was leaving for another day the question of whether consent could be voluntary if the individual agreeing to the search was in custody.[53]

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40. *Id.* at 220.
41. *Id.*
42. *Id.* at 220–21.
43. *Id.* at 220.
44. *See id.* at 219 (discussing the defendant's motion to suppress the checks).
45. *Id.*
46. *Id.* at 220–21.
47. *Id.* at 221.
48. *Id.* at 221–22.
49. *Id.* at 222.
50. *Id.* at 248–49.
51. *Id.* at 227.
52. *Id.* at 249.
53. *Id.* at 247.

In reaching its decision, the Court weighed the legitimate need for police "quick-look" searches[54] against the risk of police coercion

54. To my knowledge, no academic articles have used this moniker to describe cursory, warrantless searches of cars or premises, but the phrase seems to be emerging as part of the nomenclature of appellate courts and seems to be a regular part of police jargon. *See, e.g.*, United States v. Ramstad, 308 F.3d 1139, 1146 (10th Cir. 2002) (finding consent after a police officer "asked if he could take 'a quick look around' "); United States v. Montilla, 928 F.2d 583, 586–87 (2d Cir. 1991) (discussing whether defendant's consent to a "quick look" search constituted informed consent, given the off-hand nature of such a search). The phrase "quick look" appears fairly consistently as part of police requests for consent to a search. United States v. Wald, 216 F.3d 1222, 1228 (10th Cir. 2000) (finding no consent after an officer asked, "[y]ou wouldn't mind if I take a quick look, would you?"). Courts must then analyze the scope of the authorized search when a suspect acquiesces to such verbiage. *See Ramstad*, 308 F.3d at 1146–47. The phrase "quick look" semantically suggests something like a plain view/plain touch search, but some courts hold that the scope is the same as for a full search, including the opening of closed containers. *See, e.g.*, United States v. Wald, 216 F.3d 1222, 1228 (10th Cir. 2000) (holding that the officer's search was excessively intrusive because the officer's statement that he just wanted to take a "quick look inside the vehicle" limited the subject's consent to the interior of the vehicle and did not extend to the trunk).

Courts have often upheld searches as constitutional based on their "quick look" nature. *See* United States v. Purcell, 526 F.3d 953, 957 (6th Cir. 2008) (contrasting "consent for [a] quick look around the room"—allowing officers only to perform a "cursory sweep"—with "authoriz[ation for] a full search"); United States v. Najar, 451 F.3d 710, 720 (10th Cir. 2006) (holding that because the officer "limited the remainder of the search to a quick look into the second bedroom," the entry and search were lawful); United States v. Mendoza-Gonzalez, 318 F.3d 663, 667 (5th Cir. 2003) (holding that consent to a "quick look" constitutes "general consent to search"); United States v. Porter, 49 F. App'x 438, 440–43 (4th Cir. 2002) (finding that an officer's request for permission to take a "quick look" during a roadside vehicle search did not limit authorized scope of subsequent search to plain view); *Ramstad*, 308 F.3d at 1146–47 (holding that consent to let an officer take a "quick look" around motor home authorized a search of closed containers as well); United States v. Ross, 263 F.3d 844, 845–46 (8th Cir. 2001) (consent to "quick look through" the car during roadside traffic stop did not prohibit the use of a drug-detection dog); *Montilla*, 928 F.2d at 587 (officers asked to take a "quick look" at the defendant's bags, and acquiescence constituted consent for complete search, not a mere plain view search); United States v. Zurosky, 614 F.2d 779, 789 (1st Cir. 1979) ("Since the search at sea was restricted to a quick look for weapons and other persons, it was clearly an investigatory stop."); United States v. Johnson, 561 F.2d 832, 841–842 (D.C. Cir. 1977) (holding that a "quick look" by an officer through house window was justified by tip and did not require warrant); United States v. Harris, 435 F.2d 74, 81 (D.C. Cir. 1970) ("The normal reaction in such a situation would be for the officers to move quickly into the room . . . and take a quick look for the third member of the robbery gang . . . ."); United States v. Kee Ming Hsu, 424 F.2d 1286, 1289 (2d Cir. 1970) ("There was no general ransacking or rummaging about in the apartment as a whole although [the officer] took a quick look around to see if a fugitive from justice . . . might possibly be in the apartment."); State v. Washington, 898 N.E.2d 1200, 1207 (Ind. 2008) (upholding the search of a glove box after officer asked if he could "take a quick look" inside the car).

For examples where courts distinguish "quick look" searches from full searches in the context of consent, see *People v. Bernstein*, 890 N.E.2d 1225, 1231–32 (Ill. App. Ct. 2008) (holding that a seven-minute search was "impermissibly prolonged" after police only requested permission for a "quick look" during roadside stop) and *State v. Brown*,

or manipulation in obtaining consent.[55] The Court concluded that there was nothing constitutionally suspect in a person voluntarily consenting to a search.[56]

The Court distinguished the circumstances of Bustamonte's consent from other similar cases with stricter standards for waiver of constitutional rights.[57] Bustamonte's situation was not inherently coercive; he did not need a formal warning or informed consent to protect his privilege against self-incrimination, a protection indispensable to a fair trial.[58] More important to the Court's rationale, however, were two other concepts: the distinct purposes underlying different Amendments in the Bill of Rights, and a stark realism about the nature of nightly police patrols. Regarding the former, the Court drew a large (and rather new) distinction between the Fourth Amendment, which limits police searches and protects the general right to be undisturbed by police, and the fair trial right that the Fifth and Sixth Amendments safeguard so meticulously.[59] Trial-related rights necessitate more formalized, almost ceremonial waiver in order to preserve the integrity of the justice system. Privacy rights, in contrast, are more personal and subjective, subject to everyday informal waivers as people publicize their own interests, activities, and associations.[60] Informal acquiescence is therefore acceptable in Fourth Amendment contexts, where it would not be in Fifth or Sixth Amendment contexts. *Miranda* warnings pertain to trials, as confessions are inherently testimonial.[61] Agreeing to open the car trunk to reassure the patrol police that no crime is afoot is more distant from the courtroom; such rights are more flexible, less tangible, and less sacrosanct. A search that proceeds upon a request

294 S.W.3d 553, 564 (Tenn. 2009) (holding that consent to a "quick look" in the car during roadside stop limited the scope to a plain view/plain touch search).

55. *See Bustamonte*, 412 U.S. at 227–28.

56. *See id.* at 243 (reasoning that "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals" (citation and internal quotations omitted)).

57. *See id.* at 235 (discussing the idea that consent is arguably a "waiver" of a person's rights under the Fourth and Fourteenth Amendment). *Johnson v. Zerbst* requires the State to prove the "intentional relinquishment or abandonment of a known right" for a waiver to be valid. 304 U.S. 458, 464 (1938).

58. *Bustamonte*, 412 U.S. at 240 (citing Miranda v. Arizona, 384 U.S. 436 (1966)) (noting that the "inherently coercive" situation in *Miranda* involved a police interrogation of a person in custody).

59. *See id.* at 236–42.

60. *See id.*

61. *See id.* at 240–43.

by police and consent by the individual is an "informal, unstructured context."[62]

The *Bustamonte* decision was controversial within the Court, garnering two concurring opinions and three separate dissents, verging on the antiquated seriatum-decision format[63] as seven of the nine justices registered views outside the plurality opinion. The reaction in the academic literature was almost uniformly negative.[64] Much of the criticism expressed skepticism about the voluntariness of consent in most police encounters, taking the position that most people assume they are not truly free to refuse a search.[65]

The more sophisticated critiques drew upon psychological and sociological research.[66] For example, psychologist Dorothy Kagehiro conducted extensive experiments on a broad pool of subjects to assess the voluntariness of their "consent" to various types of requests and demands.[67] By varying the differences in presentation and language throughout the experiments, Kagehiro determined that the outcome of a search request depends largely on the style of the request and the perceived depth of the invasion.[68] Yet all of the request forms met a legal standard for voluntariness.[69] Kagehiro's research indicates that the reception of the request directly relates to its presentation;[70] even

62. *Id.* at 245.

63. *See* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1223–25, 1230 (2007) (discussing how the United States Supreme Court originally delivered opinions seriatim, one after the other).

64. *See, e.g.*, Martin R. Gardner, *Consent as a Bar to Fourth Amendment Scope—A Critique of Common Theory*, 71 J. CRIM. L. & CRIMINOLOGY 443–465 (1980); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 554 (2002); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 220–21 (2001); Joseph G. Casaccio, Note, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842, 846, 849–50 (1987) (arguing that police have incentives to seek consent for searches after conducting some initial illegal investigation, so that the suspect will feel that refusing consent is hopeless); Rebecca A. Stack, Note, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 208 (1991) (arguing that true voluntariness "requires that a suspect knows he has the power not to consent and understands the benefits and drawbacks of his decision").

65. *See, e.g.*, Stack, *supra* note 64, at 208.

66. For an excellent survey, see Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 165–97 (2002).

67. Dorothy K. Kagehiro, *Psycholegal Research on the Fourth Amendment*, 1 PSYCHOL. SCI. 187, 188–89 (1990).

68. *See id.* at 189. The request for consent to search came in the form of either an interrogative or a declarative and could be specific or non-specific. The experiment created further control variables by making the respondent either a consenter or a mere observer.

69. *See id.*

70. *See id.*

seemingly active consent to a search may be involuntary due to social pressures and a mistaken understanding of police authority.[71] This creates a significant problem when juxtaposed with the finding from *Bustamonte* declaring that voluntariness of consent merely requires an absence of governmental coercion.[72]

Nevertheless, the Court's decisions in the years after *Bustamonte* have been consistent; no Supreme Court decision since *Bustamonte* has held that a defendant's consent to a search was involuntary.[73] Three years after *Bustamonte*, the Court extended the doctrine to scenarios where the suspect was already in custody when the police ask for consent to a search—again finding, in *United States v. Watson*,[74] that the defendant's consent had been voluntary.[75] The uncertainty that led the Court to entertain the case lay partly in the fact that there had been no arrest warrant, somewhat inexcusable given the sting operation involved, but also because there was no indication that police coerced Watson to give consent apart from having him under arrest in public.[76] The Court did consider the absence of proof that Watson knew he could withhold his consent, but only as a factor.[77] Also relevant for the present subject is the Court's heavy reliance on the federal code in resolving that a warrant was unnecessary for the arrest.[78] The Court strongly hinted that separation of powers, that is, deference to the Congress, colored its analysis of the Fourth Amendment issue in this case. "Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' [o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore

71. *See id.*

72. *See id.* at 188 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

73. Before *Bustamonte*, the Court found consent to be involuntary or at least "coerced" in a single case where police lied to an elderly woman, saying they had a search warrant and that she could not refuse consent, when in fact they had no such warrant. *See* North Carolina v. Bumper, 391 U.S 543, 550 (1968).

74. 423 U.S. 411 (1976).

75. *Id.* at 413. Watson consented to a search of his car, but later claimed the search violated his Fourth Amendment rights because the police did not tell him he could withhold consent. *Id.*

76. *See id.* at 414, 424–25. The police did not use an "overt act" or "threat of force[,]" or even make promises with "subtle . . . coercion." *Id.*

77. *See id.* at 424. The police gave Watson *Miranda* warnings and told him that items found in his car could be used against him. *Id.*

78. *See id.* at 415–17.

unconstitutional."[79] The decision in *Watson* was 6-2 (Justice Stevens took no part in the case).[80]

The Court has recently placed a limit on split consent—situations where one co-tenant agrees to a search, while the other, being present, refuses to give consent to search the same premises. In *Georgia v. Randolph*,[81] the Court held 5-4 that a husband, who was a co-owner of the home and was present when the police requested permission to search, could effectively refuse the search, even though his estranged wife was simultaneously agreeing to the search.[82]

The most recent discussion of *Bustamonte* by the Supreme Court came in 2011 in *Kentucky v. King*.[83] This was not a consent-to-search case, but rather a case about the "exigent circumstances" exception to the Fourth Amendment warrant requirement for entering a home. Police were knocking on the door of a home and, while announcing their presence, they could hear suspects destroying evidence inside.[84] In response, they forced their way in and found narcotics in plain view.[85] The Kentucky Supreme Court had held that the exigent circumstances exception was inapplicable if the police in any way caused the exigency, that is, if the suspects were destroying evidence because of the police announcing their presence.[86] The Supreme Court of the United States reversed, holding that it was constitutionally irrelevant whether the police created the exigency, so long as the officers at least attempted to obtain consent.[87] *Bustamonte* came into the case as part of the rationale for encouraging police to ask for permission to search a home in most cases instead of obtaining a warrant,[88] but the Court's reasoning significantly recasts the import of *Bustamonte*:

> There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired . . . . First, the police may wish to speak with the occupants of a dwelling before deciding whether it is

79. *Id.* at 416 (alteration in original) (citations omitted) (internal quotation marks omitted).
80. *See id.* at 425.
81. 547 U.S. 103 (2006).
82. *See id.* at 103–04.
83. 131 S. Ct. 1849 (2011).
84. *Id.* at 1854.
85. *See id.*
86. *See id.* at 1855.
87. *See id.* at 1863.
88. *See id.* at 1860.

> worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also "may result in considerably less inconvenience" and embarrassment to the occupants than a search conducted pursuant to a warrant. Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application.[89]

This marks a shift, for better or worse. *Bustamonte* was originally a permissive rule, but *King* turns it into the preferred protocol for police by holding that the attempt to obtain consent outweighs or negates the fact that the police created the exigency. Rather than merely allowing police to obtain consent instead of seeking a warrant, the Court has extended the reach of its reasons in *Bustamonte* to other areas of Fourth Amendment law, encouraging police to proceed by asking permission to search as a first recourse and seeking a warrant only when the party will not consent. The underlying assumption seems to be that *Bustamonte* protects the citizenry in two ways—not only does it protect from coercion to obtain consent, but also from investigatory overkill in cases of false leads and dead ends, which can unduly harass the innocent who have no involvement in the crime. Ironically, *Bustamonte* has become its own kind of prophylactic rule.

B. Enactment in North Carolina

North Carolina historically has been ahead of the curve in the area of criminal procedure and civil liberties. The state legislature enacted[90] an exclusionary rule for evidence obtained without a warrant ten years before the Supreme Court adopted the same rule for states in *Mapp v. Ohio*.[91] In 1970, the Criminal Code Commission

89. *Id.* (citations omitted).

90. *See* Barry Nakell, *Proposed Revisions to North Carolina's Search and Seizure Law*, 52 N.C. L. REV. 277, 277 (1974) (citing Act of Apr. 9, 1951, ch. 644, 1951 N.C. Sess. Laws 601 (amending section 15-27 of the North Carolina General Statutes to exclude evidence obtained without a warrant in situations where a warrant would be required)); *see also* N.C. GEN. STAT. § 15-27 (repealed 1973).

91. 367 U.S. 643, 655 (1961).

submitted a proposed overhaul to modernize the state's Rules of Criminal Procedure.[92]

The Commission's proposal included a section about police obtaining consent for searches, anticipating the Supreme Court's decision in *Bustamonte* by several months.[93] Previous decisions by North Carolina's own appellate courts had already staked out most of the position that the legislature now codified. The bottom line of both the Commission's proposal and *Bustamonte* is that voluntary consent to a search eliminates any Fourth or Fifth Amendment concerns, and evidence resulting from the search is admissible at trial. The legislature's enactment, codified at sections 15A-221 through -222 of the North Carolina General Statutes, essentially mirrors the Supreme Court's holding that year in *Bustamonte*.

An important alteration, however, distinguished the Commission's proposal from both the enacted statute and the *Bustamonte* decision. The proposal included a requirement of informed consent as part of voluntariness—the police would have to inform a suspect of her right to refuse a search in order for the "consent" to be valid.[94] The Supreme Court in *Bustamonte* specifically declined to mandate this *Miranda*-like warning, stating explicitly that it seemed unworkable in the daily chaos of crime fighting.[95] The Commission's proposal was, it seems, ahead of its time—four or five other states eventually adopted the warning rule (requiring informed consent in most cases),[96] and it appears that North Carolina police, of their own accord, began routinely using written consent forms with the warning sometime in the late 1970s.[97]

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92. *See* CRIMINAL CODE COMM'N, LEGISLATIVE PROGRAM & REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA (1973) [hereinafter LEGISLATIVE REPORT]; *see also* Nakell, *supra* note 90, at 277.

93. *Bustamonte* was decided May of 1973. *See* 412 U.S. 218, 218 (1973). The Criminal Code Commission submitted its report in January of the same year. *See* LEGISLATIVE REPORT, *supra* note 92.

94. *See* Nakell, *supra* note 90, at 315–16; LEGISLATIVE REPORT, *supra* note 92, at 14.

95. *See infra* Part II.A.

96. *See infra* Part II.D.

97. The first North Carolina case to mention this practice is *State v. Sheppard*, 42 N.C. App. 125, 128, 256 S.E.2d 241, 244 (1979) (defendant refused to sign consent forms on two occasions), followed by *State v. Maines*, 301 N.C. 669, 670, 273 S.E.2d 289, 291 (1981), and *State v. Brown*, 306 N.C. 151, 157, 293 S.E.2d 569, 575 (1982). More recent cases show the extent to which a signed consent form ends the judicial inquiry. *See, e.g.*, State v. McDowell, 329 N.C. 363, 375–77, 407 S.E.2d 200, 207–08 (1991) (stating that police sometimes use a written consent to search form, which courts consider as part of the totality of the circumstances for establishing voluntariness—note that the person who signed the form was mildly retarded); State v. Moore, 316 N.C. 328, 332–33, 341 S.E.2d 733, 736–37 (1986) (stating that police regularly use a written consent to search form,

Nevertheless, the verbiage that the North Carolina legislature adopted in 1973 omitted the proposal's warning requirement, with no explanation in the legislative history for this last-minute change. Section 15A-222 of the North Carolina General Statutes as codified does not include the warning requirement, which the proposal interposed as a subsection (b) in section 15A-222.[98] North Carolina remains the only state with a statutory definition of "consent" pertaining to police searches,[99] but this definition lacks the element of "informed" consent.[100]

The Commission explains in its commentary: "There are indications that the Burger Court will moderate some of the exclusionary rules, and this section is designed not to freeze North Carolina's statutory law into patterns set solely by current case law."[101] In other words, most sections of the proposal contained enough ambiguity to allow it to remain tethered to the Supreme Court's evolving jurisprudence regarding the exclusionary rules. The Commentary adds that particular concern centered on the fruit of the poisonous tree doctrine; the proposal left gaps where the American Law Institute's earlier generic proposal was specific to avoid conflicts with the Supreme Court on the ambit of the poisonous tree concept.[102] The consent section[103] was an exception, as it delineated an explicit requirement that the Supreme Court would soon disavow.[104]

For better or worse, the deletion of the warning requirement in the final enactment allowed the North Carolina statute to track the Supreme Court's consistent holdings on this point over the last four decades.[105] It is possible that the Court could someday move toward

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which courts consider as part of the totality of the circumstances for establishing voluntariness); State v. Hernandez, 170 N.C. App. 299, 310, 612 S.E.2d 420, 427 (2005) (stating that police sometimes use a written "consent to search form[,]" which courts consider as part of the totality of the circumstances for establishing voluntariness (internal citation and quotations omitted)). At the same time, there is some indication that North Carolina police do not use written consent forms consistently. *See, e.g.*, State v. Houston, 169 N.C. App. 367, 369, 610 S.E.2d 777, 779 (2005) (also noting that defendant was already arrested when he gave consent, but not yet *Mirandized*).

98. LEGISLATIVE REPORT, *supra* note 92, at 14.

99. *See* Harrison, *supra* note 5, at 404.

100. N.C. GEN. STAT. §§ 15A-221 to -222 (2011).

101. LEGISLATIVE REPORT, *supra* note 92, at 238.

102. *Id.* at 238–39.

103. *See id.* at 14.

104. Schneckloth v. Bustamonte, 412 U.S. 218, 234 (1973).

105. The rule that the North Carolina legislature codified at sections 15A-221 to -222 generally reflected pre-existing case law from the Supreme Court of North Carolina, indicating that North Carolina's high court had anticipated the Supreme Court's decision

requiring informed consent if the partisan balance on the Court shifted dramatically to the left. In the meantime, the Court will probably leave the current consent rule intact, placing minimal restraints on police.

Section 15A-221(b) defines consent as a statement made to an officer, and the legislature probably intended this to mean a written or oral statement, as opposed to tacit acquiescence.[106] The Commentary of the Code Commission Report is silent in regards to this. Nevertheless, within a few months of the statute's passage, the Supreme Court of North Carolina held that silently submitting to a search constituted consent under the statute.[107]

C. Judicial Gloss in North Carolina

It seems appropriate to mention how North Carolina judges have handled this statute, partly for the sake of completeness in this discussion, and partly because it is inherently interesting to see how judges interpret legislation, which, in turn, was an attempt to codify a judicial holding. The two most recent North Carolina Supreme Court cases to interpret North Carolina's codified consent statute are

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in *Bustamonte* by several years. *See, e.g.*, State v. Vestal, 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971) ("[C]onsent of the owner must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the state to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. However, the warnings required by *Miranda*, in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises." (citations omitted)); State v. Craddock, 272 N.C. 160, 169, 158 S.E.2d 25, 31–32 (1967) ("Where the owner or person in charge of an automobile voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated."). One significant point, however, on which sections 15A-221 and 15A-222 broke from state court precedents was on the issue of wives granting valid consent to search of the family home. As the Supreme Court of North Carolina later explained in *State v. Worsley*, 336 N.C. 268, 283, 443 S.E.2d 68, 75 (1994), prior to the 1973 legislation, married women in North Carolina lacked legal authority to consent to a search of their homes. *See, e.g.*, State v. Woods, 286 N.C. 612, 613, 213 S.E.2d 214, 220–21 (1975), *vacated in part by* Woods v. N.C., 428 U.S. 903 (1976), *overruled by Worsley*, 336 N.C. at 283, 443 S.E.2d at 76; State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), *overruled by Worsley*, 336 N.C. at 283, 443 S.E.2d at 76 (recognizing the continuing validity of *Hall*); State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965), *overruled by Worsley*, 336 N.C. at 283, 443 S.E.2d at 76 (wife did not have the authority to consent to a search of the home and therefore stolen property recovered during the search was inadmissible against the husband at trial). In *Worsley*, however, the court explained: "These cases have been effectively overruled on this point, however, by the enactment of N.C.G.S. §§ 15A-221, -222 . . . . The statute places no express restriction on the authority of a wife to consent to a search of the premises she shares with her husband." *Worsley*, 336 N.C. at 283, 443 S.E.2d at 75.

106. N.C. GEN. STAT. § 15A-221(b) (2011).

107. *See* State v. Allen, 194 S.E.2d 9, 16, 282 N.C. 503, 511–13 (1973). For commentary, see Harrison, *supra* note 5, at 425.

illustrative of its import. The most recent, *State v. Steen*,[108] was an appeal from a murder conviction involving many grounds.[109] Two points of Steen's appeal dealt directly with whether he gave voluntary consent to a police search—his consent to a search of his person during his first police encounter, and his subsequent consent to a search of his clothing worn on the day of a crime.[110] The case began with a police officer responding to a call from a woman concerned that her eighty-year-old neighbor's window had been broken.[111] Upon arrival, the officer found the body of the elderly woman, Virginia Frost, who had been the victim of a rape-murder.[112] Later that day, another officer responded to a call about a man (Steen) weaving and driving recklessly on a bicycle not far from Mrs. Frost's residence.[113] When the police officers stopped the meandering rider, they discovered that his face was injured, that he had what looked like dried blood on his face, and that he smelled of alcohol.[114] Steen consented to a search of his person, which yielded a driver's license and numerous credit cards in another man's name, a crack pipe, and a marijuana pipe.[115] The officers arrested him for credit card theft and possession of drug paraphernalia and sent the arresting information to the detectives working the Frost homicide case.[116] A week later, Steen also gave written consent for the police to search the clothes he was wearing at the time of his arrest.[117] Later that month, police arrested Steen for the murder of Mrs. Frost.[118] Steen sought to suppress the evidence that the police obtained when they stopped him on his bicycle,[119] arguing that under the "totality of the circumstances" the police did not have reasonable articulable suspicion that he was engaged in any criminal activity.[120] The Supreme Court of North Carolina ruled that, because the officers stopped the defendant for his "erratic and reckless manner" while driving his bicycle, the stop itself was justified.[121] As to whether the

108. 352 N.C. 227, 536 S.E.2d 1 (2000).
109. *See id.* at 234, 536 S.E.2d at 6–7.
110. *See id.* at 236, 536 S.E.2d at 7–9.
111. *Id.* at 235, 536 S.E.2d at 6.
112. *Id.*
113. *Id.*
114. *Id.* at 236, 536 S.E.2d at 6.
115. *Id.*
116. *Id.*
117. *Id.* at 236, 536 S.E.2d at 7.
118. *Id.*
119. *Id.* at 236, 536 S.E.2d at 7–8.
120. *Id.* at 237, 536 S.E.2d at 8.
121. *Id.* at 239, 536 S.E.2d at 8.

search was voluntary, the court quoted the controlling statute that "consent to a search requires a voluntary statement to the officer giving the officer permission to make a search."[122] The court also quoted the *Bustamonte* language regarding the totality of the circumstances.[123] The court concluded that his consent was voluntary and affirmed his conviction;[124] in other words, the North Carolina courts seem to be using *Bustamonte* to interpret their own state's statute, treating the two as virtually interchangeable.

Two years earlier, the Supreme Court of North Carolina reached a very different conclusion in *State v. Pearson*.[125] Pearson was convicted of cocaine trafficking, possession with intent to sell, and felonious possession of a controlled substance.[126] On the day of his arrest, he had been driving below the speed limit and drifting in and out of his lane, prompting a routine traffic stop.[127] The officer said he smelled a hint of alcohol, but not enough to presume that the driver was impaired; the conversation with Pearson and his fiancé (a passenger in the car) was polite.[128] Pearson consented to a search and signed a consent form.[129] Another officer then arrived on the scene for assistance, and the first officer asked the second to frisk the defendant while the first searched the vehicle.[130] The frisk turned up cocaine and marijuana.[131] Pearson sought to suppress the contraband evidence from the search of his person, but the trial court noted that he signed the consent form and did not object to the officers searching him or his vehicle and admitted the evidence.[132] The Supreme Court of North Carolina reversed[133] based on the lack of probable cause for the search.[134] The Court added that the signed consent form only applied to the defendant's vehicle and not his person.[135] The officers testified that standard police procedure included a frisk of every person whose car they search,[136] but the

122. *Id.* at 239–40, 536 S.E.2d at 9 (citing N.C. GEN. STAT. § 15A-221(b) (2011)).
123. *Id.* at 240, 536 S.E.2d at 9.
124. *Id.*
125. 348 N.C. 272, 273, 498 S.E.2d 599, 599 (1998).
126. *Id.* at 274, 498 S.E.2d at 599.
127. *Id.*
128. *Id.* at 274, 498 S.E.2d at 599, 601.
129. *Id.* at 274, 498 S.E.2d at 600.
130. *Id.*
131. *Id.* at 275, 498 S.E.2d at 600.
132. *Id.*
133. *Id.* at 276, 498 S.E.2d at 601.
134. *Id.*
135. *Id.* at 277, 498 S.E.2d at 601.
136. *Id.* at 274, 498 S.E.2d at 600.

Court held that "there must be a clear and unequivocal consent before a defendant can waive his constitutional rights."[137] Somewhat ironically, the documentation of the defendant's consent turned out to work in the defendant's favor, as its specific delineation of the search to which he consented placed the discovered contraband outside the scope of the consent.[138]

D. Informed Consent in Other States

It is worth noting that a few other states have adopted, either legislatively or judicially, the augmented rule of consent for police searches, requiring police to inform the potential suspect of her right to decline a search. The section makes a quick survey of the few states with the rule that the North Carolina Criminal Code Commission proposed but that the legislature dropped from the final enacted bill.

The main importance of these examples for the present discussion is that they illustrate that the issue of legislative definitions of rights in the search context is larger than North Carolina's statute. Other states have begun codifying the parameters of various criminal procedure rights, and all present potential questions of the appropriate level of judicial deference. These examples all pertain to consent—the starting point of this discussion—but state variations on other points of law present similar questions of judicial deference.

The other approaches surveyed here also arguably belie the Supreme Court's assertion in *Bustamonte* that informed consent would be unworkable as a police patrol protocol. States are experimenting in this area, as they are in other spheres of criminal procedure, with apparent success. There is no indication that the new approach (which the Court rejected in *Bustamonte*) is creating an unworkable situation for police in these states. Of course, a handful

137. *Id.* at 277, 498 S.E.2d at 601.

138. *Id.* Another recent case, *State v. Stone*, 362 N.C. 50, 653 S.E.2d 414 (2007), is marginally relevant to the present discussion, even though the consent statute itself did not appear in the decision. The defendant consented to a pat-down search for drugs during a routine patrol stop, but the officer proceeded to pull open the waistband of Stone's sweatpants and underwear to peer in with a flashlight, discovering a bottle of contraband there before Stone could articulate an objection to this heightened intrusion. *Id.* at 52, 653 S.E.2d at 417. The Supreme Court of North Carolina held that "a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals." *Id.* at 56, 653 S.E.2d at 418–19. The relevance of this case for the present discussion is that the Supreme Court of North Carolina appears to be supplementing the consent statute with its own common law, which could eventually function as a judicial gloss on the statute itself.

of states may not compel the Court to change immediately, although the Supreme Court sometimes cites a developing "trend" in state legislatures as a justification for reversing itself, even when the innovators are far fewer than those adhering to tradition.[139] Even though *Bustamonte* is likely to remain intact for the time being, the discussion would be incomplete without noting these relevant developments in other states.

1. West Virginia

In 2010, West Virginia enacted a law that outlines the requirements that a law enforcement officer must follow in order to conduct a proper search during a traffic stop.[140] While probable cause is of course required, the West Virginia legislature also added consent as a requirement.[141] The manner in which the officer obtains consent can take one of two forms: oral consent evidenced by an audio recording or written consent.[142] Written consent must be on a form that complies with the statute[143]: "A statement that the operator of the motor vehicle fully understands that he or she may refuse to give the law-enforcement officer consent to search the motor vehicle."[144] The form must also contain a statement that the driver has given consent "freely and voluntarily" and may revoke her consent at any time during the search.[145] In cases of oral consent, the audio recording must include a statement that the driver understands that he or she may refuse consent.[146]

The West Virginia statute provides two exceptions to the consent requirements. First, when an officer has a "reasonable suspicion of dangerousness to his or her safety," the officer need not record consent at the time.[147] Second, and more significantly, "[a] finding by a court that the operator of a motor vehicle voluntarily and verbally consented to a search of the motor vehicle shall make the recordation

139. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 559–60 (2005); Lawrence v. Texas, 539 U.S. 558, 571–72 (2003); Atkins v. Virginia, 536 U.S. 304, 313–15 (2002); Mapp v. Ohio, 367 U.S. 643, 651 (1961). A later subsection addresses this subject in more detail. *See infra* Part III.C.

140. W. VA. CODE ANN. § 62-1A-10 (LexisNexis 2010).

141. *See id.* § 62-1A-10(a)(2), (3).

142. *See id.*

143. *See id.* § 62-1A-10(a)(2).

144. *Id.* § 62-1A-11(b)(1).

145. *See id.* § 62-1A-11(b)(2), (3).

146. *See id.* § 62-1A-11(c)(1).

147. *See id.* § 62-1A-10(c).

requirements of this section inapplicable."[148] This exception is puzzling because it does not mention anything about the officer informing the driver of his right to consent, and could defeat the purpose of the rest of the statute, depending on how courts construe this clause. As the statute took effect very recently (January 2011), there have not yet been any legal challenges to shed light on this exception.

An interesting difference between the West Virginia statute and the North Carolina statute is that West Virginia requires consent from the "operator" of the vehicle[149] while North Carolina's statute requires consent by the "registered owner" of the car *or* "by the person in apparent control of its operation and contents at the time the consent is given."[150] This means that if the operator of the car was not the owner, but the car's owner was in the vehicle and consented, such consent would apparently be invalid in West Virginia, but *would* be valid under the North Carolina law.

2. New Jersey

New Jersey's constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."[151] In *State v. Johnson*,[152] the New Jersey Supreme Court interpreted this constitutional provision to mean that when the State seeks to justify a search based on consent, the State has the burden to show that the search was voluntary.[153] The court also held that an "essential element" of voluntariness is "knowledge of the right to refuse consent."[154]

In 2002, the New Jersey Supreme Court reaffirmed and extended *Johnson*.[155] The court held that in order for an officer to search a vehicle during a routine traffic stop there must be "an articulable suspicion that the search will yield evidence of illegal activity."[156]

148. *Id.* § 62-1A-10(e).
149. *See id.*
150. N.C. GEN. STAT. § 15A-222(2) (2011).
151. N.J. CONST. art. I, ¶ 7.
152. 346 A.2d 66 (N.J. 1975).
153. *See id.* at 68.
154. *Id.*
155. *See* State v. Carty, 790 A.2d 903 (N.J. 2002).
156. *Id.* at 912.

3. Washington

A 1998 Washington Supreme Court ruling on informed consent cited New Jersey's *State v. Johnson* and declared "knock and talk" procedures of the police in performing home searches to be coercive.[157] The court adopted a rule that when police conduct a "knock and talk" for the purpose of obtaining consent to search a home, they must inform the person that he or she can refuse to consent or limit the scope of the house allowed to be searched and also revoke consent at any time during the search.[158]

4. Arkansas

Arkansas has a provision in its Rules of Criminal Procedure allowing a law enforcement officer to conduct searches and seizures without a warrant if consent is given.[159] The provision further specifies that the State must bear the burden of proof by "clear and positive evidence" that the consent was given freely and voluntarily and that there was no actual or implied coercion or duress.[160] Arkansas furthers the protections against unlawful searches and seizures when it comes to one's dwelling: in order for a search of a dwelling to be valid, the person giving consent must have received notice of his right to refuse.[161] Arkansas appears to be the only state that distinguishes between searches of cars and homes regarding consent—for vehicles, the person registered as its owner or in apparent control of its operation or contents at the time of the search must give consent.[162] In contrast, for premises searches, consent can come from a person who is "apparently entitled" to give or withhold consent—by ownership or otherwise.[163] A third tier of consent analysis applies for searches of the person; searches of children under fourteen must be accomplished by a parent's consent in addition to the child's consent.[164]

A person giving consent to a search in Arkansas may also limit the scope of their consent, and if they do so, then the search may not

157. State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998).
158. *See id.*
159. *See* ARK. R. CRIM. P. 11.1(a).
160. *Id.* 11.1(b).
161. *See id.* 11.1(c).
162. *See id.* 11.2(b). Note that this is almost identical language to the North Carolina provision detailing who may give consent. *See* N.C. GEN. STAT. § 15A-222 (2011).
163. ARK. R. CRIM. P. 11.2(c).
164. *See id.* 11.2(a).

exceed "in duration or physical scope" the limits of the consent.[165] Similar to some other states,[166] Arkansas also allows suspects to revoke or limit consent after it is given.[167] A search must cease upon the revocation of consent, but anything found before that time is subject to lawful seizure.[168]

5. Mississippi

In *Penick v. State*,[169] the Mississippi Supreme Court held that informed consent was necessary before a search could commence.[170] The officers in this case intercepted Penick as he deplaned at the airport, suspecting him of drug possession, and asked him to follow them to a private interrogation room where they conducted a strip search and opened his luggage.[171] The facts regarding what Penick actually consented to were ambiguous.[172] Mississippi's state constitutional provision regarding searches and seizures is nearly identical to the Fourth Amendment,[173] but the court emphasized that state courts have the final word on the meaning of their own constitutions.[174] Relying on a 1923 Mississippi case,[175] the court held that the State has the burden of proving that the defendant knowingly waived his rights when he consented to the search.[176] "[W]here an accused neither consents to nor objects to the search, [it] does not constitute a waiver."[177] The court elaborated by asking the question, "in order for there to be a valid waiver of the Constitutional right against an illegal search, is it necessary that the person searched be aware of his right under the law to refuse?"[178] The court answered "yes" and established that the "best way" for the State to prove that a defendant had knowledge of his right to refuse was for the officer to

165. *Id.* 11.3.

166. *See, e.g.*, W. VA. CODE ANN. § 62-1A-11(3) (Lexis Nexis 2010); *see also* State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998).

167. *See* ARK. R. CRIM. P. 11.5.

168. *See id.* For more discussion of consent rules in Arkansas, see Stanley Adelman, *Towards an Independent State Constitutional Jurisprudence II—Arkansas Supreme Court Rules State Constitution Requires Warning Prior to "Knock and Talk" Searches*, 2004 ARK. L. NOTES 3, 5–8 (2004).

169. 440 So. 2d 547 (Miss. 1983).

170. *See id.* at 558.

171. *Id.* at 547–48.

172. *See id.* at 548.

173. *See id.* at 549.

174. *Id.* at 551–52.

175. *See* Smith v. State, 98 So. 344 (Miss. 1923).

176. *See Penick*, 440 So. 2d at 551.

177. *Id.* at 559.

178. *Id.* at 550.

actually tell him.[179] Finally, the court established that there must have been "clear evidence" that the defendant had knowledge of his right to refuse.[180]

As explained at the beginning of this subsection, these examples are relevant for the ensuing discussion because they illustrate how state approaches can vary even when the issues have federal constitutional dimensions. A court reviewing the statute and police action predicated upon it would have to acknowledge in its analysis the presence of relevant legislation as opposed to other forms of state action or rulemaking. This degree of variation on a simple point like consent to police searches suggests the ubiquity of this deference-to-legislatures issue across many areas of law. More narrowly, these other states arguably demonstrate that informed consent is, in fact, workable both for the police conducting investigations and for the courts determining the voluntariness of consent after the fact. The fact that states are taking varying approaches to this and other issues raises the question addressed more fully in the next Part—the degree of deference that the Court should give to state legislatures or courts on criminal procedure.

II. VARYING LEVELS OF DEFERENCE

A state statute that defines some essential terms for analyzing Fourth Amendment rights, as the North Carolina consent statute does, could face a Supreme Court challenge at some point if, for example, the Court's jurisprudence moves to a position of requiring more protections than the statute seems to offer. Such a challenge would present a complex problem touching on issues of federalism, incorporation, and separation of powers.

Conventional wisdom would presume that if the Court raised the standard for valid consent, perhaps by requiring *Miranda*-like warnings of the suspect's right to refuse a warrantless search, then this would invalidate North Carolina's statute, as it falls short of such a requirement. Yet the literature recently has largely ignored the role that separation of powers concerns play in the Court's decisions about what procedural safeguards to impose on the states. The Court has never explicitly acknowledged that its criminal procedure decisions rest partly on whether the challenged state action is legislative versus executive, but there are examples where this issue colors the Court's analysis. Separation of powers has never made it onto one of the

179. *See id.*
180. *See id.*

Court's lists for "totality of the circumstances" factors, but the Court pays attention—and some amount of deference—to statutes when they are relevant to the case, as will be shown.

By "varying levels of deference," this Article means simply that courts, including the Supreme Court of the United States, are *more* deferential to state legislatures than to state and local police forces or other enforcement agencies. The constitutional review conducted by a court is different—more deferential—when there is legislative action involved rather than mere police protocol.

A. *The Supreme Court's Treatment of Statutes in Fourth Amendment Cases*

As mentioned in the Introduction, deference does not necessarily determine the outcome of the case. Even so, it still operates as one factor, even if it is not the sole factor or the most important factor; it is a matter of incremental deference. Decisions about consent and searches do not depend solely on the text of the Fourth Amendment or even the entrenched jurisprudence surrounding the amendment. These factors, while critical, work in conjunction with the question of which branch is facing the constitutional challenge.

In *United States v. Watson*, for example, the Court relied partially on the federal code in holding that a warrant was unnecessary for the arrest.[181] The decision suggests that separation of powers, that is, deference to the legislature, colored the Court's analysis of the Fourth Amendment issue in this case. "Because there is a 'strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' 'obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional.' "[182] The Court also suggested, albeit in a footnote, that state statutes could define circumstances under which no warrant is necessary for an arrest.[183] *Watson* was also the first case in which the Supreme Court held valid the consent given to a search after the defendant was already in custody.[184]

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181. 423 U.S. 411, 415–17 (1976). Watson consented to a search of his car, but later claimed the search violated his Fourth Amendment rights because the police did not tell him he could withhold consent. *Id.* at 412–413.

182. *Id.* at 416 (quoting United States v. Di Re, 332 U.S. 581, 585 (1948)).

183. *See id.* at 420 n.8.

184. *See id.* at 424–25; *see also* Clifford S. Fishman, *Electronic Tracking Devices and the Fourth Amendment:* Knotts, Karo, *and the Questions Still Unanswered*, 34 CATH. U. L. REV. 277, 392 n.487 (1985) (citing *Watson* and indicating the deference given to Congress

The *Watson* Court relied heavily upon an older case,[185] *United States v. Di Re*,[186] which demonstrates an even stronger commitment to separation of powers considerations. There, the Supreme Court employed a two-step approach to assess the legality of a warrantless arrest for federal crimes. First, it announced a policy of general deference to federal statutes authorizing warrantless searches or arrests,[187] but suggested that cases decided under these statutes create no applicable precedent for those where no such statutory authorization exists.[188] Second, the Court set forth a default rule for analyzing the legality of arrests in the absence of a pertinent federal statute: "[I]n absence of an applicable federal statute *the law of the state* where an arrest without warrant takes place determines its validity."[189] Ultimately, the Supreme Court looked to the New York state statute to determine whether the arrest was constitutionally valid and concluded that the federal agents had failed to conform to state law in making this (warrantless) misdemeanor arrest.[190] The Court overturned the federal conviction based on the state statute, to which it deferred.[191]

More ambiguous for the point asserted here is the Court's holding in *Camara v. Municipal Court of City and County of San Francisco*,[192] which involved a municipal code authorizing local building inspectors to conduct regular warrantless searches of residential apartments, and to prosecute tenants who refused access.[193] *Camara*'s relevance for the present discussion is unclear

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in the area of criminal procedure); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1764 (2000) (noting that the court in *Watson* was reiterating the common law rule allowing warrantless felony arrests based on probable cause).

185. *See, e.g.*, 423 U.S. at 416.

186. 332 U.S. 581 (1948). Police found Di Re with hundreds of counterfeit wartime-ration vouchers hidden on his person, and he faced charges under the relevant federal statute. *Id.* at 582.

187. *See id.* at 585.

188. *See id.* The federal prosecutors in *Di Re* argued that the Court's Prohibition-Era ruling in *Carroll v. United States*, 267 U.S. 132 (1925) should create a universal automobile exception for warrants. *Di Re*, 332 U.S. at 584. The Court distinguished *Carroll* on the grounds that it involved an explicit federal statutory authorization for warrantless searches to enforce Prohibition, making its holding inapplicable to searches outside the purview of that statute. *See id.* at 584–85. It also distinguished *Carroll* factually, as *Di Re* did not involve searching a car, but rather the occupant of a car. *See id.* at 585–86.

189. *Id.* at 589 (emphasis added).

190. *See id* at 591–92.

191. *See id.* at 595.

192. 387 U.S. 523 (1967).

193. *See id.* at 526. At issue in *Camara* was section 503 of the San Francisco Municipal Housing Code, which simply stated: "Authorized employees of the City departments or

partly because administrative search cases are a special category with distinct rules and partly because the Court was unclear about invalidating the local law. The Court disapproved of the municipal inspection program as applied and made no mention of its legislative pedigree, if it had any.[194] The holding explicitly decreed that legislative enactments could not absolutely abrogate the need for warrants before entering a home: "We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty."[195] Commentators since *Camara* have mistakenly stated that the Court invalidated or struck down the law at issue;[196] in reality, the Court tacitly skirted the ordinance itself and confined its reversal to the actual criminal conviction for refusing the warrantless search.[197] In fact, the Court concluded at the end of the opinion that legislatures can authorize dragnet administrative inspections as long as citizens can, in the rare situations when they would, demand a warrant before consenting to a search; probable cause for the warrant can be automatic if legislation so authorizes.[198] Thus, the Court on the one hand stated that legislatures do not have absolute authority to dispense with constitutional warrant requirements (at least for searches of dwellings, which was the issue in *Camara*), but on the other hand,

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City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." *Id.*

194. *See id.* at 534. It is unclear whether the Housing Code at issue in *Camara* was adopted legislatively by a city council vote, by decision of a local official, or by an executive committee.

195. *Id.* at 533.

196. *See, e.g.*, William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446 n.28 (1968); Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 132 (2010); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 263 (1971); Michael F. Kiely, Note, Illinois v. Krull: *When Has a Legislature Wholly Abandoned Its Responsibility to Enact Constitutional Laws?*, 1993 U. ILL. L. REV. 411, 444 (1993).

197. *See Camara*, 387 U.S. at 534, 540.

198. *See id.* at 538 (" '[P]robable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards . . . may be based upon the passage of time [or] the nature of the building . . . .").

stated that legislatures *can* declare automatic probable cause for search warrants in certain circumstances.[199]

A case that is harder to reconcile with *Watson* and *Di Re* is *Marshall v. Barlow's, Inc.*,[200] decided two years after *Watson*, in which the Court invalidated warrantless searches (safety inspections) of businesses by the Occupational Safety and Health Administration (OSHA).[201] The Court expressly held the relevant federal statute unconstitutional insofar as it authorized inspections without warrants.[202] Yet even within the opinion, a number of features limit the Court's holding and make it easier to reconcile with the proposal here. First, the Court acknowledged that many other federal statutes validly authorize warrantless searches by federal agencies;[203] but the Court distinguished the OSHA statute from these based on its universal applicability to all industries and lack of internal provisions for obtaining judicial review of unreasonable inspections.[204] In addition, the Court noted: "The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent."[205] This suggests that *Marshall* is no different from *Camara* in allowing warrantless inspections as a default procedure, as long as individuals can demand a warrant in the rare cases where they would want to do so; and that in such cases warrants will issue under a very relaxed probable cause standard, at least compared to criminal investigations.

There is also some reason to think that *Marshall* is an outlier.[206] The opinion never mentions the previous *Watson* case, which upheld warrantless arrests by postal inspectors as authorized by federal statute.[207] Perhaps *Watson* seemed unrelated because its statutory analysis pertained to warrantless arrests rather than searches, or perhaps because the OSHA statute allowed for civil administrative inspections while *Watson* was a criminal investigation.

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199. *See id. Camara* applies to administrative searches or monitoring, which generally receive different treatment from the courts than do criminal investigations. *See* South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (specifying that *Camara* applied to warrants "outside the context of a criminal investigation").

200. 436 U.S. 307 (1978).

201. *See id.* at 324–25.

202. *See id.* at 325.

203. *See id.* at 321.

204. *See id.* at 321–22.

205. *Id.* at 314.

206. Like *Camara*, the *Marshall* case applies to administrative searches, which generally receive different treatment from the courts than do criminal investigations. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 383 (1976).

207. Watson v. United States, 423 U.S. 411, 412–413, 424–25 (1976).

Professor Rosenkranz singles out *Marshall* for special criticism.[208] The Fourth Amendment analysis, he explains, should start with asking who actually violated the Amendment in this case.[209] The usual answer would be that the agents of the executive branch committed the violation by conducting an unreasonable search; this would be a challenge to the statute "as-applied," rather than contending that Congress violated the Fourth Amendment by enacting the statute.[210] Rosenkranz goes on to explicate:

> [T]ext and structure strongly suggest that the Fourth Amendment is concerned with executive and judicial actions rather than legislative actions. The first clause of the Amendment appears to prohibit the executive act of unreasonable *searching*, not the act of *authorizing unreasonable searches* . . . . And the second, Warrants Clause of the Amendment, which *is* concerned with the authorizing of searches, is directed not at Congress but at the Judiciary (and perhaps at the executive branch). So unless a statute can itself be considered a "warrant," it is not quite right to say, as the Court did in *Marshall v. Barlow's, Inc.*, that the "*Act* [of Congress] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent." The act of Congress did not violate the Fourth Amendment; the act of the President did.
>
> To put the point another way, the text of the Fourth Amendment does not follow the model of the First Amendment. It does not say, for example, "Congress shall make no law authorizing unreasonable searches and seizures." If it did, then Congress would indeed be the constitutional culprit. But as written, it seems that Congress might purport to *authorize* a Fourth Amendment violation, but it cannot actually *commit* a Fourth Amendment violation. Indeed, the Court generally seems to realize as much, which explains why *Marshall v. Barlow's, Inc.* is the only case in the Court's history that has purported to strike down an action (or "Act") of Congress under the Fourth Amendment.[211]

Indeed, as Rosenkranz concludes, it would be a milestone for the Supreme Court to strike down a law like North Carolina's consent statute, even if it takes a disliking to the uninformed consent rule. *Marshall* is the only case where the Court has ever explicitly struck

208. *See* Rosenkranz, *Subjects of the Constitution*, *supra* note 31, at 1239–41.
209. *See id.* at 1239.
210. *See id.* at 1239–40.
211. *Id.* at 1240–41.

down a statute on Fourth Amendment grounds; even in *Camara*, as noted above, the Court avoided declaring the ordinance itself invalid and took pains to emphasize that it would take a deferential view to legislation that provided even minimal safeguards for exceptional cases.

Perhaps the best-known criminal procedure case striking down a statute is *Dickerson v. United States*,[212] in which the Supreme Court invalidated 18 U.S.C. § 3501, a statute Congress intended to repeal *Miranda*.[213] Dickerson's charges all related to an armed bank heist, and he confessed to the crime voluntarily at an FBI field station without receiving *Miranda* warnings.[214] Dickerson was not yet under arrest at the time of his confession, but merely at the station for questioning;[215] nevertheless, stationhouse questioning is "custodial" for purposes of the Fifth Amendment. The Fourth Circuit held that the confession was admissible under 18 U.S.C. § 3501's standards for "voluntary"[216] actions, and arguably flouted its repudiation of *Miranda*.[217] The Supreme Court reversed, holding that § 3501 was irreconcilable with *Miranda*, and that the latter was a constitutional rule.[218] *Dickerson* is not completely on point, however, as the case involved the privilege against self-incrimination, which the Court explained in *Bustamonte* was far more sacrosanct and deserving of judicial safeguarding than the right to decide whether to consent to a search.

Moreover, stare decisis weighed heavily in the Court's analysis and conclusion,[219] making this a rather unique case; perhaps no Supreme Court case was as well-known to the general population as *Miranda*. The case presented an awkward (and incredibly rare) scenario for the Court, where the issue on appeal did not have the support of either party, but had been an aggressively independent move by the Fourth Circuit to overthrow *Miranda* single-handedly.[220] Even if the Court had been inclined to restrict *Miranda* or find some

212. 530 U.S. 428 (2000).
213. *See id.* at 432.
214. *See id.*
215. *See* United States v. Dickerson, 166 F.3d 667, 673 (4th Cir. 1999), *vacated*, 530 U.S. 428.
216. *Id.* at 671.
217. *See id.* at 685–89.
218. *See Dickerson*, 530 U.S. 432, 444 (2000).
219. *See id.*
220. *See supra* notes 26–28 and accompanying text; *see also* Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 470 (1999) (detailing the background of this move by the Fourth Circuit).

way to reconcile it with § 3501, it was unlikely that it would do so over the strident objections of the Department of Justice in this case, or do anything that would encourage a renegade lower court in its judicial activism.

Justice Scalia wrote a scathing dissent in *Dickerson*.[221] In it, he argued that *Miranda* was a mistake from the beginning, a deviation from all prior precedent.[222] Of particular relevance for this discussion, Scalia also maintained, with substantial support, that the Supreme Court had a duty to defer to legislation except in cases where a statute is directly "in opposition to the constitution."[223] Scalia lacked the votes to prevail in *Dickerson*, but his dissent is an illustration of the proposal made in this Article—that separation of powers should be a consideration in criminal procedure analysis.

Former D.C. Court of Appeals Judge Kenneth Starr has offered two explanations for what he describes as the "unexpected" result in *Dickerson*.[224] The first is an institutionalist account: the majority made a strategic decision to maintain the status quo and uphold the core of a previous ruling that had "caught the public's attention and imagination,"[225] while fully preserving its ability to limit and undermine *Miranda* through an ever-increasing list of exceptions and caveats.[226] Secondly, Starr believes the Court viewed § 3501 as a legislative fluke, the product of a semi-hysterical "transient popular majority" in 1968,[227] which was a close-race election year.[228] Evincing

221. *See Dickerson*, 530 U.S at 444–65 (Scalia, J., dissenting).

222. *See id.* at 447–50.

223. *Id.* at 446–47 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)) (internal quotation marks omitted).

224. *See* STARR, *supra* note 27, at 203.

225. *Id.* at 205.

226. *See id.*

227. *Id.* at 206.

228. *See* Paul Boudreaux, *The Electoral College and its Meager Federalism*, 88 MARQ. L. REV. 195, 217–18 (2004) ("The college seemed to magnify a very close election again in 1968 when Nixon took a razor-thin plurality of the popular vote over Hubert Humphrey . . . ."); Ernest J. Brown, *The New Age of Political Reform*, 118 U. PA. L. REV. 313, 318 (1969) (book review) ("Otherwise, our history of 180 years of presidential elections—many of them with very close popular votes, as in 1960 and 1968—indicates that an electoral majority follows a popular majority or plurality . . . ."); Robert J. Giuffra, Jr., *A Tribute to Chief Justice William H. Rehnquist*, 58 STAN. L. REV. 1675, 1677 (2006) ("By November [1968], after a close election, Richard Nixon was elected president, and the rest is history."); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 234 (2011) ("The 2000 presidential election was well within that 1% margin . . . as were the 1880, 1884, 1888, 1960, and 1968 elections."); Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2537 (2001) ("As a tangible illustration of this point, consider the difference between Hubert

the unreal nature of the statute was the DOJ's steadfast refusal to use or even acknowledge it for three decades after its enactment,[229] and the entire legal academy's view of it being a Congressional affront to the Court itself, forcing the Court to act in self-defense to preserve its own legitimacy.[230] In fact, President Johnson included a signing statement on the law that purported to undo its terms and reinstate *Miranda*, declaring that *Miranda* warnings would continue as before.[231] Few statutes in recent memory have had a more dubious origin or history. *Dickerson* is not a very representative example of a statute undergoing judicial review.

Interestingly, the Court in *Dickerson* avoided saying that the statute's actual terms violated the Fifth Amendment. Instead, it acknowledged that § 3501 accurately reflected the Supreme Court's Fifth Amendment jurisprudence up to *Miranda*.[232] The end of its opinion mentions that the § 3501 rule would be much more complicated for police to learn and implement than the robotic reading of preprinted *Miranda* rights.[233] At most, therefore, *Dickerson* seems to stand for the proposition that in special circumstances, the Court will find that other factors outweigh the intent of the legislature; *Miranda* is simply too entrenched, and the statute too retrograde, to endorse such a drastic change. Yet this does not mean that the Court finds the intent of Congress insignificant; instead, the *Dickerson* opinion is a pained defense for why this case is exceptional and why the statute is untenable. *Dickerson* is the exception, not the rule, as far as the influence of separation of powers in criminal procedure analysis is concerned.

If the Court were to adopt a new approach to consent for police search, overruling *Bustamonte*, it would create almost a nearly antithetical scenario to that in *Dickerson*. The Court would have to jettison the entrenched case rather than preserve the status quo; and the statute, rather than forcing radical change, would be in line with the existing regime. An additional factor distinguishing *Dickerson* from any potential case regarding informed consent is that the former

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Humphrey's narrow popular-vote/substantial electoral college loss in 1968 and John F. Kennedy's narrow popular-vote/substantial electoral college victory in 1960."). For an excellent history of the Congressional response to *Miranda* that ultimately produced the Omnibus Crime Control and Safe Streets Act, see also Cassell, *supra* note 26, at 194–96.

229. *See* STARR, *supra* note 27, at 206.

230. *See id.* at 205–06.

231. *See* Cassell, *supra* note 26, at 198 (citing 4 WEEKLY COMP. PRES. DOC. 983 (June 24, 1968)).

232. *See* Dickerson v. United States, 530 U.S. 428, 436–37 (2000).

233. *See id.* at 444.

pertains to Fifth Amendment protections and the latter to the Fourth Amendment; the Court has noted that these two Amendments do not merit the same level of judicial protections.[234] Finally, *Dickerson* essentially reaffirms the *Miranda* decision, and *Miranda* explicitly offers state legislatures the opportunity to codify provisions that could serve as adequate substitutes for the Court's prophylactic rule: "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[235]

Even so, the Court does occasionally hold that statutes, including state statutes, violate the Fourth Amendment. For example, in *Payton v. New York*,[236] the Court noted that twenty-three states allowed for warrantless arrests of suspects in their homes[237] but held to the contrary.[238] The case itself was a challenge to a New York statute.[239] Yet the Court did not treat this as an easy case. The *Payton* opinion documents at great length the split in common law authorities on the question of home arrests,[240] and then catalogs how many states have come down for or against warrantless arrests, with a comprehensive breakdown of whether these decisions were legislative or judicial.[241] The Court conceded that "the weight of state-law authority [was] clear"[242] and contrary to the Court's decision, and declared that it was not brushing this aside lightly; the Court considered this as a factor.[243] In fact, the Court still found a way to ground its decision partly on deference to the states, claiming that the "trend" is in the direction of requiring warrants: "Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate."[244]

234. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 241–42 (1973) ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment.").

235. Miranda v. Arizona, 384 U.S. 436, 490 (1966).

236. 445 U.S. 573 (1980).

237. *See id.* at 598 & n.46.

238. *See id.* at 576.

239. *See id.* at 576–78.

240. *See id.* at 591–98.

241. *See id.* at 598–99.

242. *Id.* at 600.

243. *See id.*

244. *Id.* (citation omitted).

Payton, then, seems at first blush to be an obvious counter-example to the argument advanced in this Article that the Supreme Court should give some deference to state legislation related to searches and seizures. At the same time, however, it arguably shows that the Court does not take state law lightly, but rather goes to extra pains to justify invalidating it. Even though the state statute involved in *Payton* did not survive, along the way the Court tacitly acknowledged that state legislation carries some weight.[245] The Court considered this as one factor in its analysis.[246]

B. Separation of Powers and Judicial Deference

The usual arguments in favor of separation of powers—or judicial deference to legislatures—would apply here. The elected legislature represents the citizenry more directly than does the judiciary. Tradeoffs between individual civil liberties and public safety should reflect current societal values, and the majoritarian legislature is best able to capture the values of its constituents.[247] Arguably, the majority itself knows best what the majority of citizens understand when they consent to searches. Legislators have greater political accountability for their decisions.[248] Structurally, the Constitution vests primary lawmaking authority in the legislative branch.[249] Staying within the confines of this structure is necessary for the Constitution's preservation. This is the traditional democratic argument.[250]

Even in cases where the judiciary is reviewing administrative agency actions, bureaucratic actions that are primarily legislative (regulatory rulemaking) receive greater deference than agency adjudications or enforcement.[251] The general applicability and

245. *See* Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1676 (2007).

246. *See id.*

247. *See generally* Worf, *supra* note 11, at 110–30 (discussing the differing roles of the courts and the legislature in representing citizens and why the legislature is better able to promote the values of the citizenry).

248. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1376–86 (2006) (setting forth the democratic arguments for legislative preeminence and against judicial review).

249. *See* U.S. CONST. art. I, § 1. For an excellent discussion of legislative structuralism, see generally Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011).

250. *See* Waldron, *supra* note 248, at 1361–62.

251. *See generally* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973) (holding that setting maximum rail-car charges was not a government action that required individualized hearings on the record); Bi-Metallic Inv. Co. v. State Bd. of Equalization,

prospective nature of rulemaking presents less threat of government abuse or unfairness than individualized decisions and retrospective factfinding.[252] This is a well-settled principle in administrative law, and from a standpoint of symmetry, it seems that courts should treat legislation more deferentially than other state actions.[253]

Legislation pertaining to criminal procedure also provides a benefit to defendants: it streamlines the disposition of criminal cases.[254] When the admissibility of certain evidence is clear, courts can move more quickly to the merits of the case and a verdict, rather than subjecting criminal defendants to longer, less predictable, and more costly litigation to prove their innocence. This benefit is skewed toward defendants who are actually innocent, of course; those acquitted would rather have such verdicts come faster, while the guilty benefit disproportionately from delays, postponing their punishment accordingly.

There is also a safety-in-numbers argument for trusting the collective judgments of a legislature over those of a tribunal like the Supreme Court.[255] Whether expressed as the wisdom of crowds[256] idea or the Condorcet Jury Theorem,[257] commentators have urged that

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239 U.S. 441 (1915) (holding that there is no right to individualized hearings challenging an increase in the mill rate for all property taxes); Londoner v. Denver, 210 U.S. 373 (1908) (holding that there is a right to a hearing to challenge an individualized imposition of special taxes).

252. *See* Club Misty, Inc. v. Laski, 208 F.3d 615, 621–22 (2000).

253. *See* Harrison, *supra* note 5, at 427 (noting the many benefits offered by statutes as opposed to case law, for example).

254. *See* People v. Eid, 36 Cal. Rptr. 2d 835, 843 (Cal. Ct. App. 1994); State v. Berger, 856 P.2d 552, 554 (Mont. 1993); People v. France, 608 N.Y.S.2d 1006, 1008 (Sup. Ct. 1994); State v. Rodriguez, 156 P.3d 771, 778 (Utah 2007); *see also* Harrison, *supra* note 5, at 427–28 (noting how consent statutes, for example, can encourage predictability and certainty in criminal procedure).

255. *See* Worf, *supra* note 11, at 110–19.

256. *See, e.g.*, JAMES SUROWIECKI, THE WISDOM OF CROWDS 3–22 (2004) (discussing laboratory and real-life examples of how the judgment of crowds can be surprisingly effective); Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1065 (2009) ("The Condorcet Jury Theorem shows that if people are better than random guessers, the likelihood that the majority view will be correct increases toward 100 percent as the size of the group expands."). For discussion of the "wisdom of crowds" in other legal contexts, see Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 966 (2009) (discussing multi-judge panels); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 101–02 (2007) (detailing the "wisdom of crowds" argument).

257. *See, e.g.*, Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1462–64 (2011) (noting that the "recent trend in both the scholarly and popular literatures on public decisionmaking emphasizes the advantages of aggregating dispersed information from a large number of parties, as an alternative (or supplement) to reliance on a smaller number of expert decisionmakers"); Adrian

larger groups make better decisions, at least on certain subjects, and this could apply to gauging how "voluntary" it is when people consent to a search. In addition, such legislation provides clearer, more stable guidance to police than the vagaries of fact-intensive appellate court decisions.[258] The long, steady tenure of the statute, and its succinct, explicit text, are easier for police to master and follow over time.[259] In contrast, police are more likely to misunderstand or misapply an ever-evolving line of court cases, applying rules ad-hoc to the facts of each case at hand.[260]

There is also significant historical support for the idea that the Supreme Court should treat state legislation differently than it treats decisions by state courts or executives. Until 1938, the Supreme Court interpreted the Judiciary Act of 1789 to require the Court to give deference to state legislation but not state common law.[261] The

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Vermeule, *The Supreme Court 2008 Term: Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 13 (2009) ("[A] majority of the group will, given the other conditions of the Theorem, necessarily prove more competent than the average individual and perhaps even more competent than the most competent individual."); Waldron, *supra* note 248, at 1392. For applications of the Condorcet Theorem in related domains, see Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 327 (2002) (explaining that the Condorcet Theorem "holds that a majority vote among a suitably large body of voters, all of whom are more likely than not to vote correctly, will almost surely result in the correct outcome"); Sunstein, *supra* note 256, at 1065–66 (discussing trimming in light of the Condorcet Jury Theorem); Adrian Vermeule, *Should we Have Lay Justices?*, 59 STAN. L. REV. 1569, 1586 (2007) (arguing for lay justices on the Supreme Court). Condorcet corresponded with the Framers of the Constitution and probably had some degree of influence on the Constitution's structure and terms. *See* Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to the Law of Other States*, 59 STAN. L. REV. 1281, 1287–92 (2007).

258. *See* Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1374 (2001) ("There is no reason why the Court, as opposed to Congress, necessarily should have the last word on these matters. What police are doing now, and what rules are easy for them to apply, are general questions to which legislatures are better suited to provide answers. Legislatures have experts available to them and advantages stemming from their political accountability.").

259. *See* Harrison, *supra* note 5, at 427.

260. For similar arguments, see *New York v. Quarles*, 467 U.S. 649, 657–658 (1984) (arguing that the public safety exception would be easier for police to apply than an on-the-scene, fact-based determination); Mark A. Godsey, Miranda*'s Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden, *and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1766 (2002) (noting that a benefit of the *Miranda* rule is its easy application by police officers); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 527 (2005) (proposing an "objective penalties test" that would be easier for officers to apply while on the job).

261. *See* Swift v. Tyson, 41 U.S. 1, 18–19 (1842) ("The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.").

adoption of the *Erie* doctrine gave proper place to state common law,[262] but this was in the context of what law to apply, as opposed to reviewing the legitimacy of the state law itself. Post-*Erie* jurisprudence did not change the fact that the Court had long recognized a significant conceptual distinction between state legislation and other genres of state law.[263]

C. *State Legislatures as Persuasive Authority*

Even apart from cases where the Supreme Court has directly addressed the constitutionality of a statute, the Court has referred to other state legislation as a type of persuasive authority, citing state laws that anticipated the Court's eventual move on a point about civil liberties or due process rights. In *Tennessee v. Garner*,[264] for example, Justice White noted: "In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions."[265]

In contrast, state executive guidelines, such as law enforcement manuals, are more likely to appear as a parade of horribles whose cumulative effect is an invitation for the Court to intervene. The seeming reverence with which the Court cites state statutes—those that are relevant but not directly under consideration—suggests that it would have a different starting place in deciding whether to strike down a piece of state legislation as opposed to mere police practices. For example, in *Watson*, discussed in the previous subsection, the Court supported its holding by observing approvingly that authorization for warrantless arrests based on probable cause existed "in almost all of the States in the form of express statutory authorization."[266] In *Payton v. New York*, as discussed above, the Court also acknowledged that the legislation of the states could be "evidence of constitutional validity,"[267] but found that the rule adopted by a few of the legislatures was not unanimous enough to outweigh special countervailing factors.[268] In *Mapp v. Ohio*, the Court noted that a number of states had already adopted an exclusionary

262. *See* CATHERINE M. DONNELLY, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES 293 (Oxford 2007).

263. *See id.*

264. 471 U.S. 1 (1985).

265. *Id.* at 15–16.

266. 423 U.S. 411, 422 (1976).

267. Note, *supra* note 245, at 1676.

268. *See* Payton v. New York, 445 U.S. 573, 600–601 (1980); *see also* Note, *supra* note 245, at 1676.

rule for evidence obtained in violation of the Fourth Amendment, and this became part of its justification in imposing the exclusionary rule on all the states.[269]

The same is true when the Court applies other amendments from the Bill of Rights.[270] In Sixth Amendment cases, such as *Ring v. Arizona*,[271] *Williams v. Florida*,[272] and *Burch v. Louisiana*,[273] the Supreme Court has relied in part on the fact that states legislatures adopted a particular rule.[274] In the Eighth Amendment arena, the Court declared that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[275] That same year, in *Stanford v. Kentucky*,[276] the Court announced that "first among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives."[277] In *McCleskey v. Kemp*,[278] the Court discussed the fact that thirty-five state legislatures had re-enacted death penalty legislation in response to prior Supreme Court decisions.[279] Then, in *Roper v. Simmons*[280] and *Atkins v. Virginia*,[281] the Court reversed its own decisions in *Stanford* and *Penry* after concluding that the consensus among state legislatures had shifted.[282]

Even in Fourteenth Amendment cases, the Court treats state legislatures as persuasive authority.[283] One striking example is the Court's reliance on the majority view among state legislatures in

269. *See* 367 U.S. 643, 651 (1961); *see also* Note, *supra* note 245, at 1676 (observing that in *Mapp* the Court demonstrated a respect for state autonomy).

270. *See* Note, *supra* note 245, at 1676–1679 (discussing the use of state legislation to determine the scope of the Sixth and Eighth Amendments).

271. 536 U.S. 584, 607–08 (2002) (noting that "the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury").

272. 399 U.S. 78, 98–99 (1970) (devoting a footnote spanning two pages to a survey of state legislation on the point).

273. 441 U.S. 130, 138 (1979) (noting the near uniformity of state rules pertaining to unanimous jury verdict requirements for small juries).

274. Justice Harlan even included a "poll" of state legislation as an appendix to his opinion in *Baldwin v. New York* and *Williams*. 399 U.S. 117, 138–44 (1970) (Harlan, J., dissenting in No. 188 and concurring in the result in No. 927).

275. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

276. 492 U.S. 361 (1989).

277. *Id.* at 370 (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)).

278. 481 U.S. 279 (1987).

279. *See id.* at 301.

280. 543 U.S. 551, 564–568 (2005).

281. 536 U.S. 304, 313–15 (2002).

282. *See* Note, *supra* note 245, at 1679.

283. For more discussion, see *id.* at 1674–75.

upholding a sodomy statute in *Bowers v. Hardwick*,[284] followed by a similar reliance on state legislative trends in reversing that decision in *Lawrence v. Texas*.[285] Similarly, the Court struck down an abortion consent law partly because it deviated from the vast majority of other states' statutes in *Hodgson v. Minnesota*.[286] It also treated state legislatures as persuasive authority in striking down Washington's law regarding child visitation rights in *Troxel v. Granville*,[287] and in upholding Washington's anti-suicide statute in *Washington v. Glucksberg*.[288]

Not only do legislatures influence and inform the rules that the Supreme Court adopts, but the presence of legislative-type rules can move the Court to refrain from imposing further procedural protections. In the context of federal enforcement agencies, the Court has also suggested that the presence of rules or regulations protecting civil liberties makes the exclusionary rule less necessary, a logic that would seem to be even more applicable to legislative regulation of police conduct. This point arose in the context of the Court declining to extend the exclusionary rule to immigrant deportation hearings in *INS v. Lopez-Mendoza*,[289] based on the concept of marginal deterrence.[290] The Court concluded that existing regulations already did part of the job that the exclusionary rule purports to do: "The [Immigration and Naturalization Service]'s attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, but it does reduce the likely deterrent value of the exclusionary rule. Deterrence must be measured at the margin."[291] Marginal deterrence analysis[292] would probably find that the existence

284. 478 U.S. 186, 192–94 (1986).
285. 539 U.S. 558, 571–72 (2003).
286. 497 U.S. 417, 425 n.5, 454 (1990).
287. 530 U.S. 57, 69–72 (2000).
288. 521 U.S. 702, 710–19, 723 (1997).
289. 468 U.S. 1032 (1984).
290. *See id.* at 1044–46; for excellent discussion, see Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 523 (2011).
291. *Lopez-Mendoza*, 468 U.S. at 1045.
292. In recent years, the Supreme Court has increasingly relied upon the concept of "marginal deterrence," that is, the additional incremental deterrent effect (discouraging police misconduct) that an extension of the exclusionary rule would provide. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 796 (2009); Herring v. United States, 129 S. Ct. 695, 700–701 (2009); Kennedy v. Louisiana, 554 U.S. 407, 444–46 (2008) (applying the concept of marginal deterrence to the death penalty); Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998); Duckworth v. Eagan, 492 U.S. 195, 208 (1998); Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 112 (1982) (applying the marginal deterrence logic to campaign contribution disclosure requirements); United States v. Janis,

of a statute governing the police conduct in question weighs against applying the exclusionary rule. That is, the incremental benefit of evidence exclusion in the case of uninformed consent (as measured by reduced overreaching by law enforcement, for example) is lower where there is a state statute already cabining in policy activity in this regard, albeit not to the extent the Court would want. Comparing scenarios where the police self-regulate with those where a statute imposes some standards, however minimal, the impact of the exclusionary rule seems far greater in the former scenario than the latter.[293] Typically, the choice for the courts is between letting the police self-regulate and having the courts step in to provide oversight. A criminal procedure statute, however, provides another source of oversight or regulation of police conduct besides the police themselves.

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428 U.S. 433, 450–54 (1976) ("Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation."). Marginal deterrence first entered the Supreme Court's opinions in *Alderman v. United States*, 394 U.S. 165, 188–189 n.1 (1969) (Harlan, J., concurring in part and dissenting in part) (discussing the marginal deterrent effect of extending the exclusionary rule to certain codefendants); *see also* Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 354–55 (1970) (rejecting Justice Harlan's "assumption that the new [exclusionary] rule would only 'marginally' increase . . . [F]ourth [A]mendment protection"). The term "marginal deterrence" was apparently coined in George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

In practice the Court weighs this marginal deterrent benefit (which is, by definition, only incremental) against the social costs of the exclusionary rule, which, according to the Court, include impediments to law enforcement, wrongful acquittal of dangerous criminals, and the public's loss of trust in the legal system. *See* Hudson v. Michigan, 547 U.S. 586, 591–594 (2006). In *Hudson*, the Court held in a 5-4 decision that a violation of Michigan's "knock-and-announce" rule did not automatically require the suppression of all evidence acquired during the subsequent search. *See id.* at 599. The Court quoted language from their earlier decision in *United States v. Leon*, 468 U.S. 897, 907 (1984), in weighing the "substantial social costs" that the exclusionary rule generates. *Hudson*, 547 U.S. at 591. Often the social cost that weighs most heavily on the justices is that invoking the exclusionary rule often "include[s] setting the guilty free and the dangerous at large." *Id.* at 591. The Court also emphasized "truth-seeking" and "law enforcement objectives." *Id.* (quoting *Scott*, 524 U.S. at 364–365).

293. *See Hudson*, 547 U.S. at 598–599 ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. . . . Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline."); *see also* Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1718–1721 (2009) (discussing the opposing views of Justice Scalia in the majority opinion of *Hudson* and Justice Breyer's dissent on the subject of police self-regulation).

D. *Canons of Construction*

Statutes require interpretation and construction, elements that are absent when appellate courts are reviewing police decisions. Most obvious are the canons that prescribe judicial deference to legislation, such as the avoidance canon or the doctrine of severability. Even if one rejects the idea that courts intentionally give greater deference to legislation in Fourth Amendment analysis, this result can come inadvertently merely because of the standard process of judicial interpretation. The process of judicial review makes it less likely that a court will reach the issue of a statute's validity, and less probable that invalidation will occur even if it does, considering it from a purely practical standpoint. Were the Supreme Court to review a state statute, for example, these canons weigh in favor of upholding and preserving it as much as possible, or at least avoiding the need to invalidate it.

In addition, the nature of textual enactments—the ambiguity inherent in all written language—allows a court to construe a borderline statute in a way that fits the constitutional framework, even if this involves stretching the meaning a bit. At the same time, not all legislation receives equal treatment when it comes to judicial deference. This is especially true for statutes that are primarily definitional, rather than proscriptive or injunctive; definitional statutes are inherently more likely to withstand constitutional scrutiny.

1. Avoidance and Severability

The avoidance canon[294] is the jurisprudential rule of thumb that instructs courts to avoid reaching constitutional issues in a case if they can dispose of the dispute on the merits or, better yet, on technical or procedural grounds.[295] This is partly to practice judicial restraint,

294. For background discussion on the avoidance cannon, see generally Philip P. Frickey, *Getting From Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005) (discussing the development of the avoidance cannon throughout the twentieth century); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) (discussing the relationship between the avoidance cannon and the *Erie* Doctrine); Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945 (1997) (defending doctrines of avoidance and severability, but arguing that modern applications of each doctrine have become mutually exclusive).

295. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1333 (2010) ("The avoidance canon, however, 'is a tool for choosing between competing plausible interpretations of a statutory text.' " (quoting Clark v. Martinez, 543 U.S. 371,

partly to preserve stability in the domain of constitutional law by avoiding innovations and disruptions, and partly to make reversal by a higher appellate court (or a subsequent, differently-membered Supreme Court) less likely. Avoidance is one of the least controversial canons of construction, generally in favor with the judiciary and commentators alike.

The avoidance canon, however, allows for some strategic legislating in anticipation of judicial review. Statutes are, in effect, more likely to remain untouched by judicial review than executive decisions or other state action. Often courts will find a procedural basis to dispose of the case and leave the questionable statutory provision for another day.[296] A legislature can predict that codifying a particular rule of criminal procedure could make its approach more permanent because courts are predisposed to avoid reaching the question of a statute's constitutionality. In a related vein, the

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381 (2005))); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 213 (2009) (Thomas, J., concurring) ("[C]onstitutional avoidance . . . allows a court to dispose of an entire case on grounds that do not require the court to pass on a statute's constitutionality." (citations omitted)); Gonzalez v. United States, 553 U.S. 242, 251 (2008) ("Under the avoidance canon, 'when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' " (quoting Harris v. United States, 536 U.S. 545, 555 (2002))).

296. *See* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 868–69 (1996) (Kennedy, J., dissenting) (advocating for avoiding the constitutionality of a statute by interpreting the procedural provisions to make the statute inapplicable); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1310 (2005) ("[T]he Court deploys procedural doctrines to avoid decisions that might settle controversial issues prematurely . . . ."); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1063 (1994) ("In such instances, failure to adhere to a state procedural rule is often deemed an adequate basis to avoid Supreme Court review of a federal constitutional claim. State procedural law is thus allowed to frustrate federal constitutional rights because of the decision to respect state procedural rules."); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) ("The first category [of avoidance by courts] may be termed 'procedural avoidance.' This is perhaps the most general and protean category of avoidance principles, but the core tenet is that courts should order the issues for adjudication, or the rules that determine the forum in which a case should proceed, with an eye to obviating the need to render constitutional rulings on the merits."). *But see* Brown v. Watters, 599 F.3d 602, 610 n.10 (7th Cir. 2010) (noting instances where courts ruled on the merits because the substantive law was actually clearer than the procedural question at issue in the case); Zaffuto v. Peregrine Health Management, 280 F.R.D. 96 (2012) (noting a preference in the Second Circuit for resolving cases on the merits rather than procedural grounds).

Supreme Court has used the avoidance canon repeatedly to skirt *Bustamonte*-related issues.[297]

The doctrine of severability[298] is almost a corollary of the avoidance canon. Severability in this sense refers to a court severing only the unconstitutional portion or phrase of a statute and preserving the remainder, when avoiding the constitutional issue is impossible. In other words, this is a minimalist approach to invalidation, where the court treats subsections and clauses as removable component parts. Severance is not always possible, of course; sometimes the statute becomes meaningless, or functionally inoperative, without the unconstitutional section. Many statutes include a "severability clause" to try to bind reviewing courts into preserving as much of the statute as possible if one section happens to be invalid.[299]

The severability doctrine, like the avoidance canon, lends some staying power to a statute, allowing a court to excise only parts of it

297. *See, e.g.*, Samson v. California, 547 U.S. 843, 852 n.3 (2006) ("Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether 'acceptance of the search condition constituted consent . . . .' "); Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001) ("Because we do not reach the question of the sufficiency of the evidence with respect to consent, we necessarily assume for purposes of our decision—as did the Court of Appeals—that the searches were conducted without the informed consent of the patients."); Cardwell v. Lewis, 417 U.S. 583, 594 n.10 (1974) ("Inasmuch as we hold the seizure to be justified under *Chambers*, we do not reach the issue of Lewis' consent.").

298. *See generally* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993) (providing an overview of the concept of severability and discussing the confusing nature of the jurisprudence surrounding severability); Kenneth A. Klukowski, *Severability Doctrine: How much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. LAW & POL. 1 (2011) (discussing the concepts underlying severability and the proper approach to applying the doctrine); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010) (proposing an improved model for applying severability in practice).

299. *See, e.g.*, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 331 (2006) (discussing the severability clause in New Hampshire's Parental Notification Prior to Abortion Act); Clark v. Martinez, 543 U.S. 371, 398–99 (2005) (Thomas, J., dissenting) (discussing the severability clause in a federal immigration statute); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 882–83 (1997) (discussing the severability clauses of the Communications Decency Act); Leavitt v. Jane L., 518 U.S. 137, 140 (1996) (per curiam) (discussing the severability clauses in Utah's anti-abortion statute); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 487–88 (1995) (discussing the absence of a severability clause in Ethics in Government Act); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 549 (1993) (including a severability clause in the appendix to the opinion of the court). Note that statutes sometimes contain inseverability clauses to try to ward off partial invalidation by forcing reviewing courts to make a more drastic, all-or-nothing choice. *See, e.g.*, Stilp v. Commonwealth, 905 A.2d 918, 970–981 (Pa. 2006) (holding a nonseverability clause of a Pennsylvania statute ineffective); *see generally* Fred Kameny, *Are Inseverability Clauses Constitutional?*, 28 STATUTE L. REV. 131 (2007) (discussing the constitutionality of certain types of inseverability clauses).

while leaving the rest intact. For criminal procedure statutes in general, the severance canon functions as another impediment to judicial invalidation.

This point about the avoidance canon and the doctrine of severability is both descriptive and normative; it describes the path courts usually take when confronted with a challenge to the validity of a piece of legislation.

2. Text and Ambiguity

Even where a court cannot avoid the constitutional issue, and where severance is not feasible for the statute under consideration, a court can often dodge the invalidation option by construing the language to mean whatever will keep it within constitutional bounds.[300] Unlike the police actions that usually give rise to Fourth Amendment challenges, legislation is simply text, and all text contains some ambiguity that allows room for judicial interpretation. Interpretation provides an alternative to invalidation; a court can "cure" a perceived constitutional defect by interpreting the statute either very broadly or very narrowly.[301] Discrete police actions lack this advantage. Executive actions do not present the same opportunity to "cure" the constitutional deficiency; courts simply have more options for saving statutes. Laws have a continuing existence and are always somewhat malleable; executive actions are fixtures of the past.

Assessing the validity of texts is a different enterprise than evaluating the legality of police conduct or other government actions. Determining the constitutionality of a state statute always involves interpretation of its words and phrases. The interpretive approach that a court adopts can often drive the conclusion, either by deriving a meaning that comports with constitutional guidelines or by forcing a reading that runs afoul. Even where a court does not see itself bound to give greater deference to the legislature in a situation, the nature of legislative text—the inherent semantic—provides leeway for a statute to elude invalidation.

Legislation contains both verbal and grammatical ambiguity or imprecision; hence the lengthy repertoire of interpretive canons like

300. *See* Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 857–58 (2010).

301. For an example of this logic, see Justice Alito's dissent from this term in *United States v. Stevens*, 130 S. Ct. 1577, 1595 n.4 (2010) (Alito, J., dissenting) ("While the term 'serious' may also mean 'weighty' or 'important,' we should adopt the former definition if necessary to avoid unconstitutionality." (citations omitted)).

the last antecedent rule,[302] ejusdem generis,[303] in pari materia,[304] expressio unius,[305] and rules about other statutes being incorporated by reference, all of which address grammatical imprecision. The rules for "may/shall" and "and/or" address verbal confusion. A court employing these canons can often obtain the result it desires, not because the canons enable skewing of the results, but because the language does; the canons are merely labels for what type of interpretive logic the court is using.

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302. *See, e.g.*, United States v. Hayes, 555 U.S. 415, 425–26 (2009) ("[T]he Court of Appeals invoked the 'rule of the last antecedent,' under which 'a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.' " (citations omitted)).

303. *See, e.g.*, CSX Transp., Inc. v. Ala. Dept. of Revenue, 131 S. Ct. 1101, 1113 (2011) (discussing whether the canon applies to the present case); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 223–27 (2008) (discussing whether the canon applies to the case under consideration); Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 586 (2008) (informing the interpretive discussion through the ejusdem generis canon); *see also* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 761–62 (2006) (explaining the application of the canon to immigration statutes); Gregory R. Englert, *The Other Side of Ejusdem Generis*, 11 SCRIBES J. LEGAL WRITING 51 (2007) (discussing the canon in detail); BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 190 (2010) (describing the treatment in the Senate Manual on legislative drafting of the canon).

304. *See, e.g.*, Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638 (2009) ("This Court has consistently held that § 1447(d) must be read *in pari materia* with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those that are based on a ground specified in § 1447(c)."); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229 (2007); Wachovia Bank, Nat'l Ass'n v. Schmidt, 546 U.S. 303, 313–16 (2006) (discussing the canon in the context of subject-matter jurisdiction); *see also* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 754 (2012) ("Hence, the Speech or Debate Clause's prohibition on punishing members 'in any other Place' for their congressional speech acts must be read *in pari materia* with the provision that '[e]ach House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.' "); Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1171 (2012) (discussing the application of *in pari materia* to the reading of the twenty-sixth amendment).

305. *See* Setser v. United States, 132 S. Ct. 1463, 1469 (2012) (discussing applicability of the canon); Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1076 (2011); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 678 (2007); Christensen v. Harris Cnty., 529 U.S. 576, 582–83 (2000); *see also* Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1488 (2012) (discussing the application of the canon to 18 U.S.C. § 793(e)); Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2026 (2011) (offering a definition of the canon); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1211 (2010) (discussing expressio unius in the context of efficient legislative drafting); John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1123 (2011) (applying the canon to the Constitution's enumeration of powers).

3. Definition Statutes

Some criminal procedure statutes are primarily definitional, and as such, are inherently more likely to withstand constitutional scrutiny. This genre of legislative text presents special practical issues for reviewing courts.[306] Compared to other legislative forms, definitional statutes are further away along a continuum from regular state action, that is, executive exercises of power.[307]

Proscriptive or prescriptive statutes in criminal procedure actually mandate (or forbid) specific actions by law enforcement. This gives the statute close connection to "state action." The Supreme Court's incorporation rubric—applying the Bill of Rights to the states via the due process clause of the Fourteenth Amendment—anticipates through its verbiage discrete, individualized action on the state's part.[308] An important linguistic difference between the due process clauses of the Fifth and Fourteenth Amendments is the shift from passive to active voice.[309] The latter, which is the channel for incorporating the former against the states, lends itself to active state actions more easily. As the wording of the text frames the Court's analysis, proscriptive statutes are a better fit for the incorporation rubric, more susceptible than definitional statutes to assessment and therefore to invalidation.[310]

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306. *See, e.g.*, Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C. L. REV. 711, 721 (1984) (discussing complex issues with interpreting the state medical malpractice statute); Sally Burnett Sharp, *Step By Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. REV. 2017, 2041–43 (1998) (discussing complex interpretive problems arising from legislative revision of North Carolina's alimony statute).

307. *See* Hardy Myers & Philip Schradle, *The Oregon Law Commission's Judicial Review Act Project: A Reform Effort Still on the Horizon*, 44 WILLAMETTE L. REV. 275, 283 (2007) ("Definition sections have no legal force of their own, but only define the meaning of words that are used in the operational sections of a law.").

308. *See, e.g.*, Christopher B. McNeil, *Executive Branch Adjudications in Public Safety Laws: Assessing the Costs and Identifying the Benefits of ALJ Utilization in Public Safety Legislation*, 38 IND. L. REV. 435, 443 (2005).

309. The Fifth Amendment uses the passive voice: "nor *be deprived* of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V (emphasis added). In contrast, the Fourteenth Amendment uses the active voice: "nor shall any State *deprive* any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added).

310. *See* 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20:8 (7th ed. 2007) ("The definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. And a court must follow a legislative definition unless the necessity for a different one shall 'clearly appear.' ").

On the other hand, definitional statutes seem to engage in the very type of categorization or "deeming" that characterizes judicial constitutional inquiries in general.[311] This fact is a counterweight to the previous point—the vast majority of constitutional criminal procedure consists of the Court simply labeling certain state actions as constitutionally valid or invalid. Nevertheless, the historical rule has been that courts give particular deference to definitional statutes, perhaps more so than other types of legislation.[312]

This creates a practical irony for a court reviewing such a statute—the law is simultaneously harder to reach as an instance of state action, but perhaps more irritating for the appellate judiciary than other genres of legislation as it encroaches on the justices' turf. In the end, however, the attenuated connection to unconstitutional state action could often prevail in this tension.[313] Put another way, there is a dilution or spreading of responsibility between the legislature endorsing certain searches, the police conducting searches, and the trial court admitting evidence pursuant to statutory authority. This dilution makes the constitutional analysis for a reviewing court more oblique, which in turn makes the statute less susceptible to adverse action such as invalidation.

As mentioned in the Introduction, Professor Rozenkranz has recently demonstrated that the Fourth Amendment reasonableness requirement (for searches and seizures) targeted the Executive, not Congress,[314] and that the probable cause requirement for warrants targeted the judiciary, who alone would grant warrants in the federal government.[315] Rozenkranz observes that the distinctions become less clear when courts incorporate the Fourth Amendment against states[316] because some states authorize the state attorney general to issue certain warrants,[317] and many state judges are elected, not

311. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2103–08 (2002) (discussing the constitutionality of definition statutes and arguing in support of them).

312. *See* SINGER, *supra* note 310 ("When a legislature defines the language it uses, its definition is binding upon the court even though the definition does not coincide with the ordinary meaning of the words." (citations omitted)).

313. *See id.* ("Although frequently asserted that the legislative function is to enact law and the judicial function to apply and construe it, legislatures may nevertheless declare how present and past legislation is to be construed without violating the separation of powers." (citations omitted)).

314. *See* Rosenkranz, *Objects of the Constitution*, *supra* note 31, at 1034–36.

315. *See id.* at 1037–40.

316. *See id.* at 1063–64.

317. *See id.* at 1065.

appointed for life terms.[318] Furthermore, the Fourteenth Amendment, the only channel through which the Fourth Amendment applies to states, interposes "state" as the subject and then employs two active verbs—"make" and "enforce"—which appear to implicate the state legislatures, judiciaries, and executives in what follows.[319] Thus, incorporation through the Fourteenth Amendment can drag all three branches into a challenge for violating the Bill of Rights even where only one branch of the federal government would have responsibility. Even so, this does not remove the separation of powers issue from incorporation analysis entirely, even if it blurs the lines. Moreover, the court still has to deal with the verbiage of the Fourth Amendment itself, which addresses non-legislative actions. Even with the explicit reference to state legislation in the opening line of the Fourteenth Amendment, links between a legislative enactment and an unreasonable search remains attenuated. This is particularly true where the statute itself merely sets the legal definition for voluntariness of consent, rather than "making a law" that directly deprives citizens of due process or the privileges and immunities of citizenship.

This is not to say that the Supreme Court never invalidates a law based on its definition section, but rather that when this occurs, it is usually in substantive due process cases rather than procedural challenges.[320] It is difficult to find cases where the Court invalidated a definition statute apart from overbreadth or, less commonly, unconstitutional vagueness. When the Court invalidates a law based on its definition section, it seems more likely to do so because the statute includes too much, not because of what is missing[321]—an impermissible inclusion can jeopardize the constitutionality of a statute, but a missing provision merely invites judicial construction and gap-filling. Overbreadth and vagueness do not appear to be present in statutes like section 15A-221(b) that define consent for purposes of police searches.

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318. *See id.* at 1064.

319. *See id.* at 1060–61.

320. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (addressing overbreadth in definitions of Vermont's Prescription Confidentiality Law); United States v. Stevens, 130 S. Ct. 1577, 1588–91 (2010) (discussing overbreadth in animal cruelty statute); Stenberg v. Carhart, 530 U.S. 914, 941–42 (2000) (discussing overbreadth in anti-abortion statute).

321. City of Lafayette, La. v. La. Power & Light Co., 435 U.S. 389, 393–94, 98 S.Ct. 1123, 1126–27 (1978) (illustrating an example of a case where a missing definition invited judicial construction).

III. APPLYING THE PARADIGM TO CONSENT STATUTES

This Part applies the foregoing discussion about deference to the hypothetical question that launched the discussion: what would happen to the North Carolina statute if the Supreme Court later adopted a requirement of informed consent? The answer is that the Court might actually defer to North Carolina's legislature and uphold the statute, reaching a different result than it would if the case were merely about state police protocols. Deference to the legislature, even if not the dispositive factor, would be at least one of the issues the Court could consider. Even if this expression of the legislature's intent did not control the ultimate holding—which it might—it would exert some influence on the Court's reasoning.

A. Separation of Powers

The core thesis of this Article is that courts should, and do, give more deference (and have more mechanisms to show such deference) when legislatures approach the boundary of Fourth Amendment protections than when the executive branch does. Under our hypothetical, therefore, the Supreme Court would face a different situation if a challenge arose under North Carolina's consent statute than if a similar case arose merely as part of another state's police practices.

As mentioned above, probably the most common argument against judicial deference to legislatures—the idea that the Bill of Rights is supposed to be anti-majoritarian and protective of persecuted minorities[322]—seems relatively inapplicable here. Nothing about North Carolina's consent statute disadvantages any particular group or class of society more than others, or even has the indirect result of making one group face police searches more frequently. The statute lacks any hint of majoritarian oppression of disempowered groups or individuals. Of course, it is easy to imagine hypothetical examples where a consent statute *could* unfairly oppress a minority segment of society, such as requiring that refusals of consent be in English or in writing, without restrictions on the consent side of the equation. In such a case, incremental deference to the legislature would surely give way to countervailing factors related to equal protection; no one is arguing that the legislature has absolute power

322. *See, e.g.*, Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 901 (2006); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1393 (2010).

or unfettered discretion. There is room for moderate deference to legislation with equal protection playing backstop for potential abuses.

Similarly, from a civil libertarian standpoint, there is no evidence that the law is enabling widespread police abuses or breaches of privacy; as mentioned above, police in North Carolina routinely go beyond the requirements of the statute and provide warnings, in written form, of the right to refuse a search.[323] The statute has not created any obvious gap in privacy protections that the Court would need to plug.

A component of constitutional judicial review is the doctrine of notice, a subset of due process.[324] In terms of notice or forewarning, the North Carolina consent statute[325] arguably puts the population on notice that consenting to a search makes any evidence discovered admissible in a prosecution. This is not by any means an airtight or standalone argument. The legislature could not, for example, enact the *Miranda* warnings and thereby eliminate the need for police to deliver those warnings individually and personally. Yet the consent issue, as the Court explained at length in *Bustamonte*, is qualitatively and quantitatively different from the confession issue that underlies *Miranda*.[326] Fourth Amendment protections are simply less sacrosanct, and certainly less rigid, than Fifth Amendment protections.[327] Moreover, criminal confessions are far less frequent than police requests to do a "quick look" around, making warning requirements more feasible and manageable for the former.

The point is that the codification of the consent rule provides some degree of notice and, at the least, somewhat weakens the argument that the defendant was unaware of his right to refuse the search and unaware of the consequences of consenting. By itself, this is probably not a strong enough reason to uphold the statute if it faced a constitutional challenge, but it is an additional consideration supporting the idea that courts should give greater deference to legislative acts than to other state action when analyzing Fourth

323. *See* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2202 (2006) (arguing that uninformed consent rules allow citizens to assert their personal rights more effectively).

324. *See generally* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1585–93 (2005) (discussing the purpose of the notice requirement).

325. N.C. GEN. STAT. §§ 15A-221 to -222 (2011).

326. Schneckloth v. Bustamonte, 412 U.S. 218, 232, 246–247 (1973).

327. *See id.* at 248.

Amendment rights.[328] Legislation differs from the other (more common) actions that furnish the basis of such challenges, like police practices or customs, in that legislation provides official notice to the citizenry of what to expect. This is not the sole factor to determine the outcome, but it is still one valid factor among many. This principle about notice has broad applications for many areas of criminal procedure, and merits more investigation in future scholarly research.[329]

B. Canons of Construction

In addition to the foregoing separation of powers arguments, the fact that North Carolina has a statute presents some logistical or pragmatic issues that push in this same direction. Were the Supreme Court to review North Carolina's consent statute, the canons of judicial avoidance and severability[330] would weigh in favor of upholding the statute or preserving as much of it as possible, respectively, which would probably avert the need to invalidate it. Even apart from the idea of courts explicitly deferring to legislatures in Fourth Amendment analysis, the very process of judicial review makes it less likely that a court will reach the issue of a statute's validity than would be the case with other forms of state action.[331] From a structural standpoint, it is therefore less probable that invalidation will occur.

Related to the avoidance canon, the severability doctrine also bolsters the staying power of North Carolina's consent statute, allowing a court to excise only parts of it while leaving the rest intact. Of course, given that the most likely constitutional challenge to this statute would be over what is missing—a warning requirement—rather than what is there, severance is less likely to be relevant than avoidance. Avoidance and severability would be factors in the judicial review of North Carolina's consent statute, as they would be with any state statute that codified an element of criminal procedure.

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328. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 665 (1994) ("[C]ourts must accord substantial deference to the predictive judgments of Congress . . . . Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing on [complex issues]." (quoting Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985))).

329. *See* Stevenson, *supra* note 324, at 1536 (noting that paradoxes relating to the notice requirement have been inadequately discussed).

330. *See supra* Part II.D and sources cited therein.

331. *See supra* Part II.D and sources cited therein.

As mentioned above, section 15A-221(b) of North Carolina's consent statute is purely definitional,[332] rather than proscriptive or injunctive, and is therefore inherently more likely to withstand constitutional scrutiny. Courts traditionally give especially high deference to definitional statutes, even where this creates friction with the court's policy preferences.[333] The fact that the statute is formatted mostly in definitional terms makes it more likely to receive favorable judicial treatment.

To summarize, in the hypothetical scenario in which the Supreme Court was reviewing North Carolina's consent statute, and in the context of moving toward a policy of requiring consent, it seems that the Court would treat this differently than it would the same practice that was merely a policy of a law enforcement agency. The Court historically has given legislation more deference in the criminal procedure arena than police practices. Canons of interpretation, such as the avoidance canon and the severability doctrine, create structural bulwarks for legislation that are absent in other state action contexts. Finally, the fact that North Carolina's law primarily takes the form of a definitional statute would give it an additional strategic advantage in surviving judicial review.

CONCLUSION

By using legislation to bring its criminal procedure rules into line with the Supreme Court's holdings throughout the 1960s and early 70s, North Carolina took a risk that its statutes might lose this alignment as the Court's jurisprudence continued to evolve. Its consent statute may currently be in step with the *Bustamonte* rule, and a conflict is unlikely to develop anytime soon. There is, of course, room for debate about what practical difference a warning requirement would make in day-to-day law enforcement, given that many North Carolina police already use preprinted consent forms, and the experience of the few states already experimenting with such requirements has generated no reports of epic changes in their criminal justice systems.

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332. *See* N.C. GEN. STAT. § 15A-221(b) (2011) (defining consent as "a statement to the officer, made voluntarily and in accordance with the requirements of G.S. 15A-222, giving the officer permission to make a search"). For another local example of a definition section of a statute featured in an appellate court's decision, see *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 475, 91 S.E.2d 246, 251 (1956).

333. *See supra* Part II.D.3.

Despite this uncertainty about the impact of a rule change, there remain important questions about the prospect of judicial review of North Carolina's statute, and these questions have far-reaching implications for other areas of criminal procedure that states might regulate legislatively. Even if a conflict emerges between the Supreme Court's preferences and a state's legislation about police procedure, it is too simplistic to say that the Court would automatically invalidate any statute that stood in the way of its policy ideals. Deference to legislation, whether as a matter of constitutional jurisprudence or the pragmatics of interpretation, would have some bearing on the Court's analysis—if not as the dispositive factor, at least as one of the issues the Court considers. The fact that a state has codified its rules for voluntary consent should make the analysis different from a case arising in another state where police were following executive-branch protocols. Even if this legislative fact does not change the ultimate holding—which it might—it would at least exert some influence on the Court's reasoning. Moreover, the larger issue here applies far beyond the context of consent to a search—it could apply to any area where states codify a holding of the Supreme Court that later changes or narrows.

This Article has both a descriptive and a normative goal. Of the two, the descriptive aim is the more aggressive: to challenge the conventional wisdom about the Fourth Amendment, arguing that the separation of powers has been a missing topic of discussion in both the relevant literature and in judicial opinions. Moreover, this is a missing piece in many areas of criminal procedure, and the analysis offered here could have significant implications. The normative point of this Article is more modest: courts *should* pay attention to what type of state action is at issue in a constitutional criminal procedure case, whether it is legislative, executive, or judicial. It matters, from a policy standpoint, whether the state legislature has addressed the issue, or if the police are essentially self-regulating. The legislative-executive dichotomy also poses pragmatic, logistical issues for judicial review, as legislative text is more resilient against invalidation or judicial disapproval, due to canons of construction and the linguistic features of statutes. The presence of legislation may not outweigh all other issues or policy concerns, but it should factor into the analysis along with other concerns.