

The Need for “Knowing”: Why the Iowa Supreme Court Should Reject *Schneckloth v. Bustamonte*

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*ABSTRACT: More than 40 years ago, the United States Supreme Court decided *Schneckloth v. Bustamonte*. The decision, imposing a “totality of the circumstances” test to evaluate the voluntariness of consent to a search, remains the binding federal standard and the subject of pervasive criticism. In addition, consent continues to be law enforcement’s most common method to evade the constitutional requirements of both a warrant and probable cause. In its wake, state supreme courts remain free to independently interpret analogous state provisions and to either adhere to, or provide greater search protection than, the “totality of the circumstances” standard. Iowa has not yet resolved which standard article I, section 8 of the Iowa Constitution necessitates. This Note argues that five recent Iowa Supreme Court decisions considering the relationship between the federal and state search provisions demonstrate a perceptible shift away from the federal model. The analytical faults of *Schneckloth*, coupled with the numerous benefits and increased protections that a heightened standard provides, further dictate that the Iowa Supreme Court should adopt a “knowing” standard. Under this test, a suspect must know of his right to refuse consent to a search. Finally, this Note suggests that written consent forms, which either the legislative or executive branch could implement, provide the most effective method of enforcing this heightened standard of proof.*

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I. INTRODUCTION

Both the Fourth Amendment and analogous provisions in each state’s constitution possess the same objective: to protect individuals from unreasonable searches.¹ The provisions prohibit a government actor—typically a police officer or other law enforcement member—from conducting a “search” without both probable cause and a warrant.² This general rule, however, is not absolute; exceptions exist that may render a “search” lawful even if both of the above requirements are absent.³ One such exception is utilized more than any other: consent to search.⁴ That is, law enforcement may conduct a “search” with neither probable cause nor a warrant if an officer first receives consent or approval from the individual to be searched.⁵ To be

1. The Fourth Amendment to the United States Constitution states:

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

U.S. CONST. amend. IV (emphasis added); *see also* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 374 (2006) (“[E]ach of these [state] constitutions includes . . . a ‘cognate’ or ‘analog’ to the Federal Fourth Amendment.”). The issue of what constitutes a “seizure,” including when a seizure becomes unlawful, is beyond the scope of this Note.

2. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). However, not every governmental intrusion constitutes a “search” within the meaning of the Fourth Amendment. JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 86 (5th ed. 2013). In the Fourth Amendment realm, “a police officer may act as arbitrarily or unreasonably as she wants, as long as she does not ‘search.’” *Id.* (emphasis omitted); *see also* *United States v. Jones*, 132 S. Ct. 945, 949–53 (2012) (discussing what a court must consider to determine whether a “search” occurred). A “search” instead occurs only when a government actor violates an individual’s “constitutionally protected reasonable expectation of privacy.” *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). While Justice Harlan stated this standard in a non-binding concurrence, the Court has continually applied the test. *See Jones*, 132 S. Ct. at 950. However, the Court has recently reiterated that “the *Katz* . . . test has been *added to*, not *substituted for*, the common-law trespassory test” that previously controlled. *Id.* at 952.

3. *See Schneckloth*, 412 U.S. at 219 (quoting *Katz*, 389 U.S. at 357 (majority opinion)) (internal quotation marks omitted) (noting the general rule is “subject only to a few specifically established and well-delineated exceptions”).

4. Orit Gan, *Third-Party Consent to Search: Analyzing Triangular Relations*, 19 DUKE J. GENDER L. & POL’Y 303, 307 (2012). Other exceptions to the warrant requirement include “plain view, stop and frisk[, and] exigent circumstances.” Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvalidate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 308 (1996) (citations omitted) (internal quotation marks omitted).

5. *Schneckloth*, 412 U.S. at 219.

valid, the individual must voluntarily give consent.⁶ Debate abounds, however, regarding which standard for evaluating voluntariness should control.

More than 40 years ago, the United States Supreme Court resolved the issue as it relates to the Fourth Amendment. In *Schneekloth v. Bustamonte*, the Court faced an analytical choice: whether to implement a “knowing” or a “totality of the circumstances” standard.⁷ Under a “knowing” test, the state must demonstrate that a person knew he had the right to refuse consent in order for consent to be voluntary.⁸ A “totality of the circumstances” standard, in contrast, requires consideration of all factors surrounding the consent encounter,⁹ including the searched individual’s characteristics and the nature and setting of the request. Importantly, knowledge of a right to refuse consent is only one factor of many.¹⁰ In *Schneekloth*, a majority of the Court rejected this heightened, “knowing” standard and imposed the “totality of the circumstances” test.¹¹ This remains the binding federal standard to this day.¹²

As the Court only addressed consent searches arising under the Fourth Amendment of the United States Constitution, the issue of which standard controls analogous state constitutional provisions remained unresolved. However, as state supreme courts began to construe such provisions in the wake of *Schneekloth*, three interpretive approaches emerged.¹³ Many states expressly adopted *Schneekloth*’s standard.¹⁴ Others imposed “totality,” but in a more demanding manner, including heightened requirements or standards of proof.¹⁵ Still others adopted the “knowing” standard that the Supreme Court rejected.¹⁶

The Iowa Supreme Court, in contrast, has not yet resolved which standard the state search provision—article I, section 8 of the Iowa Constitution¹⁷—necessitates. Historically, few Iowa cases have explicitly

6. *Id.* at 222 (citation omitted). The government actor, including law enforcement or a prosecutor, “has the burden of proving that the consent was, in fact, freely and voluntarily given.” *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (reiterating that when the state uses consent to justify a warrantless search, it has the burden of showing the consent was voluntarily obtained)).

7. *Id.* at 223.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 248–49.

12. *State v. Pals*, 805 N.W.2d 767, 777 (Iowa 2011) (“The starting point in the modern federal law of consent to search is *Schneekloth v. Bustamonte*.” (citation omitted)).

13. *See infra* Part III.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. *See infra* Part III.C.

17. Article I, section 8 of the Iowa Constitution states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant

considered how the provision relates to its federal counterpart.¹⁸ Instead, in the vast majority of consent-to-search decisions, affected parties either did not make a state claim or did not contend that the state provision should be interpreted differently from the Fourth Amendment.¹⁹ However, this trend has recently shifted. In five decisions in the past five years, the Iowa Supreme Court has addressed, often at length, the relationship between the Fourth Amendment, Iowa’s search provision, and *Schneckloth*’s longstanding “totality of the circumstances” standard.²⁰ In each case, the court did not answer which test Iowa’s provision commands and instead decided the consent issue on narrower grounds.²¹ As a result, despite a flurry of activity, the question of which standard controls remains “left open.”²²

This Note argues that the Iowa Supreme Court should expressly adopt the heightened, “knowing” standard to evaluate the voluntariness of all consent searches arising under article I, section 8.²³ That is, in order for consent to be voluntary under the Iowa Constitution, law enforcement must demonstrate that the individual knew he had a right to refuse consent. Part II briefly traces the history of the United States Supreme Court’s consideration of voluntary consent arising under the Fourth Amendment, including adoption of the “totality of the circumstances” test. Part III discusses the three interpretive approaches state supreme courts adopted following *Schneckloth* when construing parallel state search provisions. Part IV argues that five recent Iowa decisions, which addressed consent searches and the relationship between the state and federal search provisions, reiterated and reaffirmed an independence from the federal model. Part IV further contends that the analytical mistakes of *Schneckloth*, in addition to the numerous benefits and protections a more stringent standard provides, dictate that the Iowa Supreme Court should adopt a “knowing” standard. Finally, the Part proposes that written consent forms, which either the legislative or executive branch could implement, are the most effective method of enforcing the heightened “knowing” standard.

shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

IOWA CONST. art. I, § 8.

18. *State v. Ochoa*, 792 N.W.2d 260, 265 (Iowa 2010).

19. *State v. Pals*, 805 N.W.2d 767, 779–80 (Iowa 2011).

20. *See infra* Part IV.A.

21. *See infra* Part IV.A.

22. *State v. Leaton*, 836 N.W.2d 673, 677 (Iowa Ct. App. 2013).

23. The power of a state supreme court to independently interpret state constitutional provisions is unquestioned and long-held. The United States Supreme Court has continually affirmed the need for “state courts [to] be left free and unfettered . . . in interpreting their state constitutions.” *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940). Similarly, a state supreme court may, if it chooses, provide broader search protection under a state provision than under the Fourth Amendment. *Cooper v. California*, 386 U.S. 58, 62 (1967).

II. THE HISTORY OF VOLUNTARY CONSENT AND THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches.²⁴ Reflecting a “[f]ear of government [that] is fused deep within the American soul,”²⁵ the Amendment limits the authority of a government actor to invade one’s “person[], house[], papers, and effects.”²⁶ Following the failure of the Articles of Confederation, early American leaders sought the stability a central government provided but feared the all-encompassing power such a regime could possess.²⁷ The Bill of Rights, and the Fourth Amendment within it, functioned as a compromise between these two seemingly incompatible interests.²⁸

Specifically, the Fourth Amendment requires that prior to conducting a “search,”²⁹ law enforcement must first obtain, from “a neutral and detached magistrate,”³⁰ a search warrant based on probable cause detailing the area to be searched.³¹ A search conducted without both a warrant and “probable cause is ‘*per se* unreasonable.’”³² These prerequisites, however, are not absolute; instead, the United States Supreme Court has long recognized certain circumstances in which a warrant is not necessary.³³ Law enforcement cites, claims, and relies upon one exception to the warrant requirement more frequently than any other: searches conducted pursuant to consent.³⁴ That is, law enforcement may conduct a search lacking both a warrant and probable cause if an officer first receives consent from the individual to be searched.³⁵ The individual may consent to a search of one’s home,³⁶ person,³⁷ car,³⁸ or

24. U.S. CONST. amend. IV.

25. DRESSLER & THOMAS, *supra* note 2, at 9.

26. U.S. CONST. amend. IV; *see also* Terry v. Ohio, 392 U.S. 1, 28–29 (1968) (“The Fourth Amendment proceeds . . . by limitations upon the scope of governmental action . . .”).

27. DRESSLER & THOMAS, *supra* note 2, at 9.

28. *See id.* (“Part of the price of ratification was the promise of a Bill of Rights that would protect Americans from government.”).

29. For a discussion of what constitutes a “search,” *see supra* note 2.

30. Beci, *supra* note 4, at 304.

31. U.S. CONST. amend. IV.

32. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

33. *Id.*

34. Gan, *supra* note 4, at 307.

35. *Schneckloth*, 412 U.S. at 219.

36. *See Bumper v. North Carolina*, 391 U.S. 543, 546–48 (1968) (considering whether a woman voluntarily granted consent to a search of her home).

37. *United States v. Mendenhall*, 446 U.S. 544, 559–60 (1980) (holding that a woman voluntarily consented to a search of her person due, in part, to the fact that officers twice told her she could refuse).

38. *See Ohio v. Robinette*, 519 U.S. 33, 35–36 (1996) (considering consent to search a driver’s car following a verbal warning for speeding).

even another person’s car.³⁹ For consent to be valid, the individual must have granted it voluntarily.⁴⁰ This Part traces the history of the Court’s jurisprudence regarding voluntary consent. It first examines the pre-*Schneckloth* era, when the Court adhered to two different standards. This Part then addresses the “totality of the circumstances” test *Schneckloth* espoused, as well as Justice Marshall’s dissent. Finally, this Part considers post-*Schneckloth* decisions, which reiterated and extended both its holding and central rationales.

A. LACK OF A CONTROLLING STANDARD CREATES CONFUSION AMONG COURTS

Before *Schneckloth*, the role of consent within the Fourth Amendment was provisional and unsettled,⁴¹ as the Court, much like a pendulum, oscillated between two distinct approaches. Some decisions tied consent to waiver principles.⁴² In 1921, in *Amos v. United States*, the Court held a warrantless search invalid and rejected the government’s claim that a wife waived her husband’s constitutional rights when she allowed law enforcement to enter the home.⁴³ The Court did not resolve whether a wife could waive her husband’s rights in another factual context because “it [was] perfectly clear that . . . no such waiver was intended or effected.”⁴⁴ In 1946, in *United States v. Davis*, the Court instead evaluated consent as an individual’s choice to allow a search to occur and required only the absence of coercion.⁴⁵ In *Davis*, the Court held that a filling station operator validly consented to a search that revealed unlawful rationing coupons.⁴⁶ Despite the operator’s initial refusal, the Court found his later consent valid after considering the circumstances surrounding the request, including its time and location, and determining that law enforcement used neither force nor threat.⁴⁷ As *Schneckloth* similarly requires an analysis of the circumstances surrounding a search request, one scholar argues the *Davis* decision “planted the seeds for the ‘voluntariness’ test” the Court would eventually adopt in *Schneckloth*.⁴⁸ However, in 1964’s

39. *Schneckloth*, 412 U.S. at 220–21. The concept of third-party consent, however, is beyond the scope of this Note.

40. *Id.* at 222.

41. See Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 36 (2008).

42. Brian R. Gallini, *Schneckloth v. Bustamonte: History’s Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233, 254 n.163 (2012).

43. *Amos v. United States*, 255 U.S. 313, 316–17 (1921); see also Maclin, *supra* note 41, at 36–37 (discussing *Amos* and the Court’s apparent treatment of consent as a waiver).

44. *Amos*, 255 U.S. at 317.

45. See Gallini, *supra* note 42, at 254 n.163; see also *Davis v. United States*, 328 U.S. 582, 593–94 (1946).

46. *Davis*, 328 U.S. at 593–94.

47. *Id.*; see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973) (discussing the facts, holding, and reasoning of *Davis*).

48. Maclin, *supra* note 41, at 37.

Stoner v. California, the Court once again utilized waiver principles.⁴⁹ In *Stoner*, the Court held that a hotel employee's consent to search a guest's room, without the guest's consent, was insufficient to render a warrantless search of the room lawful.⁵⁰ The Court concluded that because "it was the [hotel guest's] constitutional right which was at stake," only the guest or the guest's agent could waive the right by consenting.⁵¹ As a result of the Court's adherence to two standards, "a square conflict of views" existed immediately prior to *Schneckloth*—particularly "between the state and federal courts."⁵²

B. SCHNECKLOTH V. BUSTAMONTE: IMPOSITION OF "TOTALITY OF THE CIRCUMSTANCES"

Schneckloth provided the Supreme Court an opportunity to resolve this disagreement relating to the relationship between consent and the Fourth Amendment.⁵³ The search stemmed from a routine traffic stop. While on patrol, a police officer spotted a car with a burned-out license plate light and headlight.⁵⁴ The officer stopped the car and attempted to obtain identification from its six occupants.⁵⁵ Only one passenger, Joe Alcala, produced a license. He then stated that the car belonged to his brother.⁵⁶ After the six men stepped out of the car per the officer's request, the officer asked Alcala for consent to search the car.⁵⁷ He agreed and even assisted in various ways, including opening the car's trunk and glove compartment.⁵⁸ Soon after, the officers discovered three stolen checks.⁵⁹ The state then charged another passenger, Robert Bustamonte, with possession of "a check with intent to defraud."⁶⁰

The procedural history of the case provides a telling example of the disagreement among courts at the time and the confusion the existence of two standards produced. The trial court convicted Bustamonte, and a state appellate court affirmed.⁶¹ The voluntariness of Alcala's consent, the appellate court reasoned, was a question of fact requiring consideration of all of the circumstances surrounding the search encounter.⁶² The state appellate

49. *Stoner v. California*, 376 U.S. 483, 489–90 (1964).

50. *Id.*

51. *Id.* at 489.

52. *Schneckloth*, 412 U.S. at 223.

53. *See id.*

54. *Id.* at 220.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 219.

61. *Id.* at 220–21.

62. *Id.* at 221.

court further concluded that the prosecution had demonstrated that the consent obtained was voluntary under this standard, as Alcala consented "freely, even casually."⁶³ Following Bustamonte's appeal, the United States Court of Appeals for the Ninth Circuit, in contrast, reasoned that consent constituted a waiver.⁶⁴ For consent to be voluntary, the Ninth Circuit concluded that the state must not only show an absence of coercion and verbal assent,⁶⁵ but also that Alcala knew consent could be "freely and effectively withheld."⁶⁶ As the California courts did not resolve whether Alcala possessed this requisite knowledge, the Ninth Circuit remanded.⁶⁷ The United States Supreme Court then granted certiorari to resolve a single issue: "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given."⁶⁸

In Justice Stewart's majority opinion, the Supreme Court expressly eschewed the waiver-based standard the Ninth Circuit imposed and adopted the model the California state courts employed.⁶⁹ Knowledge of a right to refuse consent is not, the Court held, essential to voluntary consent.⁷⁰ Rather, it simply serves as one of many factors,⁷¹ as voluntariness must be determined from the "totality of all the circumstances."⁷² Justice Stewart's opinion stated numerous rationales for this conclusion. First, a "totality of the circumstances" standard accommodates two seemingly disparate interests: "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."⁷³ Second, while the Ninth Circuit's approach lacks support in Court precedent,⁷⁴ the "totality of the circumstances" test adheres to prior decisions addressing the voluntariness of confessions under the

63. *Id.* (quoting *People v. Bustamonte*, 270 Cal. App. 2d 648, 652 (1969)).

64. *Bustamonte v. Schneckloth*, 448 F.2d 699, 700 (9th Cir. 1971), *rev'd sub nom. Schneckloth*, 412 U.S. 218. Following the state appellate court's affirmance, the California Supreme Court chose not to review the decision. *Schneckloth*, 412 U.S. at 221. Bustamonte then attempted to obtain a writ of habeas corpus in federal court, which the federal district court denied. *Id.* After Bustamonte's appeal, the Ninth Circuit set aside the district court's denial. *Id.*

65. *Bustamonte*, 448 F.2d at 700-01.

66. *Id.* at 700 (quoting *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965)).

67. *Id.* at 701.

68. *Schneckloth*, 412 U.S. at 223.

69. *Id.* at 248-49.

70. *Id.* at 249.

71. *Id.* at 248-49. The majority stated specific factors that should be considered by discussing those factors courts employ to determine the voluntariness of a confession. *See id.* at 223 ("The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment."). Such factors include, but are not limited to, the individual's age, education or intelligence level, the length of the detention, and the nature of the questioning. *Id.* at 226.

72. *Id.* at 227.

73. *Id.*

74. *Id.* at 229.

Fourteenth Amendment.⁷⁵ Third, courts typically only require satisfaction of the heightened “knowing and intelligent waiver” standard when a criminal defendant relinquishes those rights afforded “to preserve a fair trial.”⁷⁶ Reasoning that there is a key distinction between those rights that stem from the guarantee of a fair trial and one’s right to be free from unreasonable searches, the Court declined to extend the “knowing” standard to the Fourth Amendment.⁷⁷ Fourth, requiring an officer to inform a subject of his right to refuse a search “would be thoroughly impractical” and would hinder the informality of a commonly used and relied upon law enforcement technique.⁷⁸

Justice Marshall, one of three justices writing separately in dissent, rejected both the majority’s conclusion and reasoning.⁷⁹ At the outset, Justice Marshall deemed the majority’s conclusion a “curious result.”⁸⁰ “I cannot agree,” Justice Marshall stated, “that one can choose to relinquish a constitutional right . . . without knowing that he has the alternative of refusing to accede.”⁸¹ He similarly rejected the claim that the Fourth Amendment authorizes consent searches lacking both probable cause and a warrant because of their importance to effective law enforcement.⁸² Rather, such searches are only permissible “because we permit our citizens to choose whether or not they wish to exercise their constitutional rights.”⁸³ As consent constitutes a choice, Justice Marshall argued the prosecution should demonstrate “at a minimum” that the subject knew he could refuse.⁸⁴

75. *Id.* at 223–27.

76. *Id.* at 237. For example, the Court cites waiver of “the right to confrontation, to a jury trial, and to a speedy trial” as examples of waivers that, due to their effect on a defendant’s right to a fair trial, must be “knowing and intelligent.” *Id.*

77. *Id.* at 241, 246.

78. *Id.* at 231–32. The Court reasoned that because consent searches typically occur in informal settings, like in a person’s home or on a public street, such searches differ from a trial or other, more structured environment. *Id.*

79. *Id.* at 277 (Marshall, J., dissenting). Justices Douglas and Brennan also both dissented and wrote separately. *Id.* at 275–76 (Douglas, J., dissenting); *id.* at 276–77 (Brennan, J., dissenting). Here, discussion is limited to Justice Marshall’s opinion, as it is so commonly discussed and cited. Also, scholars frequently argue that Justice Marshall’s dissent, rather than the majority opinion, correctly addressed and resolved the Fourth Amendment implications of the consent-to-search issue. *See, e.g.,* Arnold H. Loewy, *Knowing “Consent” Means “Knowing Consent”: The Underappreciated Wisdom of Justice Marshall’s Schneckloth v. Bustamonte Dissent*, 79 MISS. L.J. 97, 98 (2009) (arguing that the majority’s opinion was “woefully wrong,” while Justice Marshall’s dissent was “clearly correct”); Maclin, *supra* note 41, at 81–82 (quoting *Schneckloth*, 412 U.S. at 218, 289–90 (Marshall, J., dissenting)) (stating that Justice Marshall’s concerns that the majority had created a situation “in which the police always have the upper hand” have been validated).

80. *Schneckloth*, 412 U.S. at 277 (Marshall, J., dissenting).

81. *Id.*

82. *Id.* at 282–83.

83. *Id.* at 283.

84. *Id.* at 285.

In addition to rejecting the majority's holding, Justice Marshall questioned the analysis used. Justice Marshall found reliance on "voluntariness" in confession cases misplaced, as consent and coercion are different notions historically subject to different standards.⁸⁵ He rebuffed the claim that requiring law enforcement to inform a subject of his right to refuse is impractical or that it would alter the interaction's informal nature.⁸⁶ Citing examples where law enforcement already successfully employed such a requirement,⁸⁷ Justice Marshall concluded that the majority was not truly concerned with protecting the informality of the interaction; rather, the majority wanted to maintain law enforcement's ability to obtain an advantage by "capitaliz[ing] on the ignorance of citizens."⁸⁸ To Justice Marshall, the majority's conclusion not only altered the necessary balance between police and individual interests, but it also "obscured the Court's vision of how the Fourth Amendment was designed to govern the relationship between" the two.⁸⁹

C. *POST-SCHNECKLOTH*: "TOTALITY" EXTENDED

Following *Schneckloth*, the Supreme Court has not attempted to renounce the "totality of the circumstances" standard. In fact, later decisions have both reiterated the approach's correctness and extended its reach to other contexts.⁹⁰ In *Ohio v. Robinette*, an officer stopped a motorist for speeding, issued a verbal warning, and discovered drugs after the motorist consented to a search of his car.⁹¹ The Ohio Supreme Court held that police must first end a traffic stop by informing a driver he is "free to go" before attempting to obtain consent.⁹² The United States Supreme Court, citing *Schneckloth*, reversed.⁹³ It would "be unrealistic," the Court reaffirmed, "to require police officers to always inform detainees that they are free to go."⁹⁴ In *United States v. Drayton*, the Court came to a similar conclusion when addressing a random

85. *Id.* at 282–84.

86. *Id.* at 286–88.

87. *Id.* at 287–88. Justice Marshall noted that the Federal Bureau of Investigation informs individuals of the right to refuse and that recorded cases demonstrate a rule requiring police to do the same does not disrupt "the casual flow of events." *Id.* at 287.

88. *Id.* at 288.

89. *Id.* at 290.

90. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (addressing the issue of whether consent of a present party is valid when another present party refuses consent); *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (addressing the validity of consent when a third party, who did not have the authority, grants consent).

91. *Ohio v. Robinette*, 519 U.S. 33, 35–36 (1996).

92. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995), *rev'd*, 519 U.S. 33. By so holding, the Ohio Supreme Court affirmed the Ohio Court of Appeals' decision that reversed the conviction and held the search unlawful. *Id.*

93. *Robinette*, 519 U.S. at 36, 39–40.

94. *Id.* at 39–40.

search of bus passengers.⁹⁵ Following a scheduled stop, officers boarded a bus and requested consent to search the passengers and their belongings.⁹⁶ Holding the search voluntary, the Court once again cited *Schneckloth* and reiterated its extensive history of rejecting “in specific terms the suggestion that police officers must always inform citizens of their right to refuse” consent.⁹⁷ Further, the Court reasserted that the absence of such a warning does not enjoy extra weight in a “totality of the circumstances” analysis.⁹⁸

III. STATE SUPREME COURTS RESPOND: THREE THREADS EMERGE

While “totality of the circumstances” is the controlling Fourth Amendment standard,⁹⁹ in the decades since its adoption, state supreme courts have implemented different tests to assess voluntariness under analogous state provisions.¹⁰⁰ While a state cannot choose to provide less protection than the Fourth Amendment as interpreted by the United States Supreme Court, it may supply more.¹⁰¹ As state supreme courts began to interpret voluntary consent arising under state search provisions in the wake of *Schneckloth*, three standards evolved. This Part examines the three interpretive approaches state supreme courts implemented, as well as the rationales provided in support of each.

A. ADHERENCE TO SCHNECKLOTH

Following *Schneckloth*, a majority of state supreme courts that have considered the issue have adopted its “totality of the circumstances” standard to evaluate voluntariness under the state search provision.¹⁰² These states

95. United States v. Drayton, 536 U.S. 194, 197–200 (2002).

96. *Id.* at 197–98. During the encounter, one officer knelt in the driver’s seat facing the passengers, another remained stationed in the rear, and a third moved up the aisle. *Id.*

97. *Id.* at 206.

98. *Id.* at 207.

99. State v. Johnson, 346 A.2d 66, 67 (N.J. 1975) (“*Schneckloth* is controlling on state courts insofar as construction and application of the Fourth Amendment is concerned . . .”).

100. See State v. Pals, 805 N.W.2d 767, 779 (Iowa 2011) (listing and discussing the various approaches state supreme courts have adopted); Commonwealth v. Cleckley, 738 A.2d 427, 432 (Pa. 1999) (discussing states that have considered whether or not to adopt *Schneckloth*’s “totality” standard under the state search provision).

101. See Cooper v. California, 386 U.S. 58, 62 (1967).

102. See, e.g., Cleckley, 738 A.2d at 432 (“Those states that have addressed this issue, however, have, for the most part [chosen] to follow the federal voluntariness standard which focuses on the totality of the circumstances as opposed to any one factor.”); see also Scott v. State, 782 A.2d 862, 876–77 (Md. 2001) (holding that a *per se* rule requiring an officer to first advise of a right to refuse consent prior to knock-and-talk is “diametrically inconsistent with *Schneckloth*” and the Maryland Declaration of Rights, which “is to be read *in pari materia* with the Fourth Amendment”); State v. Osborne, 402 A.2d 493, 497 (N.H. 1979) (“We are not at this time convinced . . . that the added [warning] requirement . . . is necessary.”).

include Montana,¹⁰³ Pennsylvania,¹⁰⁴ Tennessee,¹⁰⁵ and Wisconsin.¹⁰⁶ Of the states choosing to implement the Court’s test, many had previously “adopted a lockstep approach” to constitutional interpretation.¹⁰⁷ The lockstep approach dictates that “the state court binds itself to following prior [United States] Supreme Court interpretation of the federal constitutional text” when interpreting parallel state provisions.¹⁰⁸ That is, the lockstep approach dictates that state-level interpretive “analysis begins and ends with . . . the U.S. Supreme Court’s interpretation . . . and deviation is for all intents and purposes impossible.”¹⁰⁹

In addition to the lockstep approach, state supreme courts provided numerous other justifications for adhering to “totality.” The New Hampshire Supreme Court, for example, simply concluded that a higher standard than *Schneckloth* was not necessary.¹¹⁰ The Supreme Court of Pennsylvania similarly noted an absence of “policy issues unique to” the state “that would cause [the state] to depart from the federal standard.”¹¹¹ The Tennessee Supreme Court praised the “totality” standard for striking an appropriate balance between the needs of law enforcement and the right of individuals “to be free from unreasonable searches.”¹¹² Notably, while these state courts chose to adhere to the federal standard, some also noted an ability to impose a heightened standard at a later time or in a specific factual context.¹¹³

B. STRIKING A BALANCE: A MORE DEMANDING “TOTALITY” STANDARD

In contrast to those states that adopted *Schneckloth*’s test unchanged, another group imposed the standard “in a fashion more demanding than the United States Supreme Court.”¹¹⁴ The Iowa Supreme Court has deemed this approach “*Schneckloth* ‘with teeth.’”¹¹⁵ The Supreme Court of South Dakota,

103. *State v. Hurlbert*, 211 P.3d 869, 877 (Mont. 2009) (“This Court has adopted the United States Supreme Court’s totality-of-the-circumstances test for determining whether consent was given freely, voluntarily and without duress or coercion.”).

104. *Cleckley*, 738 A.2d at 433 (“[P]rivacy rights are sufficiently protected where the federal standard of ‘voluntariness’ has been met.”).

105. *State v. Cox*, 171 S.W.3d 174, 183–84 (Tenn. 2005).

106. *State v. Rodgers*, 349 N.W.2d 453, 459 (Wis. 1984).

107. *State v. Pals*, 805 N.W.2d 767, 779 (Iowa 2011).

108. *People v. Caballes*, 851 N.E.2d 26, 41 (Ill. 2006).

109. *Id.* at 41–42 (quoting Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102–03 (2000)).

110. *State v. Osborne*, 402 A.2d 493, 497 (N.H. 1979).

111. *Commonwealth v. Cleckley*, 738 A.2d 427, 433 (Pa. 1999).

112. *State v. Cox*, 171 S.W.3d 174, 183–84 (Tenn. 2005).

113. *See, e.g., Osborne*, 402 A.2d at 497 (“It would be possible for this court to impose a heavier burden on the State under the New Hampshire Constitution, pt. 1, art. 19.”); *Cleckley*, 738 A.2d at 431 (“Certainly this court has accorded greater protection to the citizens of this state under Article I, section 8 of our constitution under certain circumstances.”).

114. *State v. Pals*, 805 N.W.2d 767, 779 (Iowa 2011).

115. *Id.*

for example, expressly adopted “totality of the circumstances.”¹¹⁶ However, the “[s]tate must establish voluntariness by *clear and convincing* evidence that the search was the result of free, intelligent, unequivocal[,] and specific consent without any duress or coercion, actual or implied.”¹¹⁷ Texas courts also require “the State [to] demonstrate the voluntariness of . . . consent by clear and convincing evidence” for searches arising under the state search provision.¹¹⁸ This heightened standard of proof demands more of the state than preponderance of the evidence, the lesser burden well-established in the Fourth Amendment context.¹¹⁹

C. ESCHEWING “TOTALITY” FOR “KNOWING”

Finally, in addition to those state supreme courts adhering to *Schneckloth* or a heightened “totality” test, a third group of states have instead adopted the standard *Schneckloth* expressly rejected when interpreting the federal search provision: “knowing.” In these states, for consent to be deemed “voluntary” under the state search provision, an individual must know he has a right to refuse consent.¹²⁰ That is, knowledge of a right to refuse consent to search one’s house, person, belongings, and the like is not simply one factor to determine voluntariness, but rather the determinative criterion.¹²¹ At least four states have adopted the “knowing” standard to various degrees: Arkansas, Mississippi, New Jersey, and Washington.¹²² Arkansas and Washington reiterated the sanctity of one’s home and limited the “knowing” standard to consent to search a home following a knock-and-talk procedure.¹²³ Mississippi and New Jersey adopted the heightened standard without this limitation.¹²⁴

116. *State v. Nemeti*, 472 N.W.2d 477, 478 (S.D. 1991) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (“The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances.”).

117. *Id.* (emphasis added).

118. *State v. Ibarra*, 953 S.W.2d 242, 243 (Tex. Crim. App. 1997) (en banc).

119. *United States v. Matlock*, 415 U.S. 164, 177 (1974) (holding “that the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff’s voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the \$4995 found in the diaper bag”).

120. *See Pals*, 805 N.W.2d at 779 (explaining that such a waiver must be “knowing”).

121. *See id.*

122. *Id.*

123. *State v. Brown*, 156 S.W.3d 722, 731–32 (Ark. 2004) (holding that under the state constitution an officer attempting to obtain consent to search a home during a “knock and talk” procedure must first inform the homeowner of his right to refuse consent); *State v. Ferrier*, 960 P.2d 927, 933–34 (Wash. 1998) (en banc) (holding that under the Washington Constitution, when law enforcement uses “knock and talk” to obtain consent to search an individual’s home, the officer must inform the person that she has a right refuse consent).

124. *Penick v. State*, 440 So. 2d 547, 551 (Miss. 1983) (holding that section 23 of the Mississippi Constitution requires that the State prove by clear evidence or beyond a reasonable doubt that the individual knew of his right to refuse consent); *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

New Jersey was the first state to reject *Schneckloth's* conclusion and analytical underpinnings.¹²⁵ In *State v. Johnson*, decided two years after *Schneckloth*, the New Jersey Supreme Court held the *Schneckloth* standard inapplicable to the New Jersey Constitution by stating, "under Art. I, par. 7 of our State Constitution the validity of a consent to a search . . . must be measured in terms of waiver . . . an essential element of which is knowledge of the right to refuse consent."¹²⁶ The court imposed the heightened standard even though: (1) the New Jersey search provision tracks the language of the Fourth Amendment "almost verbatim";¹²⁷ (2) the court had never before held that the state provision requires "higher or different standards than" the Fourth Amendment;¹²⁸ and (3) the defendant did not argue that the state constitution provided greater protection.¹²⁹

The New Jersey Supreme Court in *Johnson* provided various rationales for its deviance from the United States Supreme Court, which may provide vital guidance for other states.¹³⁰ First, the court stated that most individuals would consider a police officer's request to "search as having the force of law."¹³¹ Second, one cannot waive a right, the court reasoned, if the individual is "unaware of its existence."¹³² The court stressed, however, that the heightened standard does not require law enforcement to first advise a person of his right to refuse consent.¹³³ The state must instead demonstrate "knowledge on the part of the person involved that he had a choice in the matter."¹³⁴ The court

125. The New Jersey Supreme Court decided *State v. Johnson* in 1975. The Mississippi Supreme Court decided *Penick v. State* in 1983, the Washington Supreme Court decided *State v. Ferrier* in 1998, and the Arkansas Supreme Court decided *State v. Brown* in 2004. See *supra* notes 123–24 (listing the four decisions).

126. *Johnson*, 346 A.2d at 68.

127. *Id.* at 68 n.2. Article I, paragraph 7 of the New Jersey Constitution states:

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

N.J. CONST. art. I, para. 7. There are two differences between article I, paragraph 7 of the New Jersey Constitution and the Fourth Amendment of the United States Constitution. First, the New Jersey provision includes a semicolon after the phrase "shall not be violated," while the Fourth Amendment has a comma. U.S. CONST. amend. IV. Second, New Jersey's clause states "warrant," while the Fourth Amendment states the plural version ("Warrants"). *Id.*

128. *Johnson*, 346 A.2d at 68 n.2.

129. *Id.* at 67–68.

130. See *id.* at 68.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

cited Justice Marshall's dissent in *Schneekloth* as providing various means for law enforcement to satisfy this burden.¹³⁵

After *Johnson*, the New Jersey State Police created a written "Consent to Search" form in response to the decision, which authorizes an officer to search a car "or other premises as described by the officer."¹³⁶ However, a search may not occur until the individual reads and signs the form, which states, among other provisions: "I have been advised by [the investigating officer] and fully understand that I have the right to refuse giving my consent to search."¹³⁷ The consent form thus effectively requires police to advise individuals of their right to refuse.

IV. IOWA AND THE NEED FOR "KNOWING"

A. IOWA SUPREME COURT RECONSIDERS BLIND ADHERENCE TO THE FEDERAL MODEL

In addition to those states implementing one of the three interpretive standards previously discussed, various state supreme courts, including Iowa's, have not yet directly resolved the issue of which test the state search provision necessitates. That is, despite the large number of Iowa Supreme Court decisions addressing voluntary consent in the decades following *Schneekloth*, few have addressed whether Iowa should adopt the "totality of the circumstances" standard under article I, section 8, or impose a different standard.¹³⁸ This pattern, however, has recently shifted. Five times in the last five years, the Iowa Supreme Court has considered—often with detailed discussion and debate—the relationship between the Iowa search provision, its federal parallel the Fourth Amendment, and the "totality of the circumstances" standard.

First, in 2010, *State v. Ochoa* addressed the scope of article I, section 8's protection for individuals on parole.¹³⁹ During a routine check of a motel, a police officer learned that an individual on parole was in one of the motel's rooms.¹⁴⁰ The officer then conducted a warrantless, suspicionless search of the individual's room.¹⁴¹ The individual had previously signed a parole agreement that stated the parolee must submit to a search "at any time, with or without a search warrant, warrant of arrest[,] or reasonable cause."¹⁴²

135. *Id.* at 68 n.3 (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 286 (1973) (Marshall, J., dissenting)).

136. *State v. Carty*, 790 A.2d 903, 907 (N.J. 2002), *modified*, 806 A.2d 798 (modifying retroactivity).

137. *Id.* (alteration in original).

138. *State v. Pals*, 805 N.W.2d 767, 779 (Iowa 2011).

139. *State v. Ochoa*, 792 N.W.2d 260, 262 (Iowa 2010).

140. *Id.*

141. *Id.* at 262–63.

142. *Id.* at 263.

Following a discussion of the relationship between Iowa search and seizure law and the federal doctrine¹⁴³ as well as a canvass of precedent arising under article I, section 8,¹⁴⁴ the Iowa Supreme Court held that the search violated Iowa’s search provision.¹⁴⁵

Second, one year later in *State v. Pals*, the Iowa Supreme Court considered the voluntariness of a motorist’s consent to search his vehicle following a traffic stop.¹⁴⁶ The majority opinion discussed *Schneckloth*,¹⁴⁷ the extensive academic commentary it created,¹⁴⁸ the three categories of state adherence to the test,¹⁴⁹ and prior Iowa case law addressing consent searches.¹⁵⁰ However, the court “reserved for another day” a resolution of “whether a knowing or intelligent waiver of search and seizure rights, such as that adopted in New Jersey, Washington, Mississippi, or Arkansas, is required to establish consent under . . . the Iowa Constitution.”¹⁵¹ The court instead “decide[d] the case on a narrower ground” and held the motorist’s consent was involuntary under article I, section 8, even if “an Iowa version of the *Schneckloth*-type ‘totality of the circumstances’ test” applied.¹⁵²

Third, in *State v. Lowe*, decided a year later in 2012, a defendant attempted to suppress evidence under both the Iowa and United States constitutions.¹⁵³ The majority refused, however, to consider the state claim under a different standard from the Fourth Amendment “based upon a *mere citation* to the applicable state constitutional provision.”¹⁵⁴ By only examining the consent under the federal standard, the court once again left unresolved whether article I, section 8 requires a different approach.¹⁵⁵ Importantly, three justices argued that the Iowa court should abandon *Schneckloth*’s “totality-of-the-circumstances” test in the “knock-and-talk” context¹⁵⁶ and

143. *Id.* at 264–67.

144. *Id.* at 284–86.

145. *Id.* at 292.

146. *State v. Pals*, 805 N.W.2d 767, 770 (Iowa 2011).

147. *Id.* at 777–78.

148. *Id.* at 780–82.

149. *Id.* at 779.

150. *Id.* at 779–80.

151. *Id.* at 782.

152. *Id.*

153. *State v. Lowe*, 812 N.W.2d 554, 566 (Iowa 2012).

154. *Id.* (emphasis added) (quoting *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., specially concurring)).

155. The Iowa Supreme Court held that the consent in question was voluntary under both the state and federal constitutions using a “totality of the circumstances” analysis. *Id.* at 581.

156. *Id.* at 593 (Appel, J., concurring in part and dissenting in part). Justices Wiggins and Hecht joined Justice Appel’s concurrence in part and dissent in part. *Id.* at 594. A “knock and talk” exchange

involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting

instead “adopt a requirement that a citizen must be advised of his or her right to refuse consent before a knock-and-talk search is valid.”¹⁵⁷

Fourth, in 2013, *State v. Baldon* required the Iowa Supreme Court to once again evaluate the voluntariness of a consent-to-search provision within a parole agreement.¹⁵⁸ Unlike *Ochoa*, which only involved a parolee’s motel room, *Baldon* considered a search of a parolee’s car.¹⁵⁹ A parolee signed a parole agreement, which “provided that [he] would submit his ‘person, property, place of residence, vehicle, [and] personal effects to search at any time.’”¹⁶⁰ The court, after examining the *Schneckloth* standard and other courts’ conclusions regarding similar agreements, held the consent involuntary under article I, section 8.¹⁶¹ Finally, in 2014, *State v. Short* considered a related issue: whether the warrantless search of a *probationer’s* home, as opposed to that of a parolee, violates the Iowa search provision.¹⁶² Prior to a search, law enforcement obtained a warrant, yet the document contained various errors, including an incorrect description of the area that was to be searched.¹⁶³ The state argued that despite this inaccuracy, the search was still valid because, among other reasons, the probation agreement authorized warrantless searches of the individual’s apartment.¹⁶⁴ Relying on a decision the Iowa Supreme Court rendered more than 40 years earlier,¹⁶⁵ the court rejected the state’s argument and held the warrantless search to be invalid.¹⁶⁶

The importance of these holdings cannot be doubted. However, the arguments espoused, the debate among the justices, and the sheer amount of attention afforded to the relationship between the Iowa search provision and its federal counterpart are perhaps the most telling aspects of these five decisions. The cases demonstrate a “continu[ing] batt[le] in a tug of war on searches and seizures between Iowa and federal constitutional protections”

permission to search the house. If successful, it allows police officers who lack probable cause to gain access to a house and conduct a search.

State v. Reinier, 628 N.W.2d 460, 466 (Iowa 2001) (citations omitted).

157. *Lowe*, 812 N.W.2d at 593.

158. *State v. Baldon*, 829 N.W.2d 785, 787 (Iowa 2013).

159. *Id.* at 788. While the officers also conducted a search of the individual’s person and motel room, these searches did not produce incriminating evidence. *Id.* In contrast, law enforcement found marijuana during the vehicle search. *Id.* As a result, it was the vehicle search in particular that was the focus of the suppression claim and, consequently, the Iowa Supreme Court’s analysis and holding. *See id.* at 803.

160. *Id.* at 787.

161. *Id.* at 803.

162. *State v. Short*, 851 N.W.2d 474, 476, 481 (Iowa 2014).

163. *Id.* at 476.

164. *Id.* at 477.

165. *State v. Cullison*, 173 N.W.2d 533, 540–41 (Iowa 1970) (invalidating a warrantless search of a parolee’s home).

166. *Short*, 851 N.W.2d at 506.

among those on the court.¹⁶⁷ This Part argues that while at least two justices have expressly condemned further divergence from the federal model, these five decisions demonstrate that the Iowa Supreme Court is steadily moving away from a strict, blind adherence to federal search doctrine. More specifically, this trend appears in two interrelated analytical threads throughout the five decisions: the Iowa Supreme Court (1) continually emphasizes independence from the United States Supreme Court; and (2) has in recent years chosen to provide greater search protection under article I, section 8 than the Fourth Amendment, as interpreted by the United States Supreme Court, affords.

1. Reiterating the Ability and Importance of Independent Interpretation of the Iowa Search Provision

In recent years, the Iowa Supreme Court has continually reaffirmed its ability to interpret state constitutional provisions differently from how the United States Supreme Court has construed federal provisions. Beginning in *Ochoa*, a majority of the court, “[i]n order to resolve any inconsistency in [its] prior cases,” concluded that “while United States Supreme Court cases are entitled to respectful consideration, [the Iowa Supreme Court] will engage in independent analysis of the content of [Iowa’s] search and seizure provisions.”¹⁶⁸ Similarly, in *Baldon*, the court both reiterated that “there is no presumption that the federal law is the correct approach”¹⁶⁹ and rejected the assertion that textual similarities between the Fourth Amendment and article I, section 8, necessitate adherence to the federal interpretation.¹⁷⁰ Notably, the decision also included a 31-page concurrence by Justice Appel, which emphasized that the court “jealously reserve[s]” its right to independently interpret the state constitution.¹⁷¹ In *Pals*, a majority of the court again stated that this ability to deviate is “well supported in [Iowa’s] case law.”¹⁷² The court also stated that a more stringent standard may apply to claims arising under the state provision—“[e]ven where a party has not advanced a different standard.”¹⁷³

In addition to affirming the ability to interpret state constitutional provisions differently, members of the court have also reasserted the importance of doing so. In his *Baldon* concurrence, Justice Appel rejected the various arguments commonly set forth by those individuals who are against

167. Todd Dorman, Editorial, *Law of the Land: Should the Iowa Constitution Trump the U.S. Constitution When Protections Are Stronger?*, GAZETTE (Cedar Rapids, Iowa) (Aug. 3, 2014, 8:13 AM), <http://thegazette.com/law-of-the-land-20140803>.

168. *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010).

169. *State v. Baldon*, 829 N.W.2d 785, 821 (Iowa 2013) (Appel, J., specially concurring).

170. *See id.* at 790 (majority opinion).

171. *Id.* at 803 (Appel, J., specially concurring).

172. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011).

173. *Id.* at 771–72.

independent state constitutional law.¹⁷⁴ These claims include, among others, that if a state deviates from the federal model “it tends to defeat the development of uniform standards that apply under both the Federal and State Constitutions.”¹⁷⁵ Justice Appel, in response, deemed this argument “unpersuasive,” reasoning that “[t]he decision against uniformity . . . was made by the framers of the United States Constitution and the Iowa Constitution in favor of dual sovereignty.”¹⁷⁶ Similarly, in *Short*, the majority opinion set forth ten “Established Principles of Independent State Constitutional Law.”¹⁷⁷ These principles posit that state constitutions serve “as the original protectors of individual rights,”¹⁷⁸ that historically there has long been a “[s]trong emphasis on individual rights under the Iowa Constitution,”¹⁷⁹ and that “[t]he diminution in substance of federal rights . . . triggers renewal of independent state constitutional law.”¹⁸⁰ Also in *Short*, Chief Justice Cady concurred specially “to emphasize the importance of independently interpreting our Iowa Constitution.”¹⁸¹

However, not all justices of the Iowa Supreme Court support continued departure from the federal model. Beginning most noticeably in *Pals*, Justice Waterman “protest[ed] [the court’s] divergence from . . . well-settled federal constitutional precedent” when interpreting the Iowa search provision.¹⁸² Such departures should not occur, he argued, “unless doing so is justified by differences in the text, structure, or history of the Iowa provision.”¹⁸³ In *Baldon*, both Justices Mansfield and Waterman expressed “serious concerns about an approach that treats a United States Supreme Court decision as just another dish on the menu.”¹⁸⁴ Most recently in *Short*, Justices Waterman and Mansfield once again expressed concern with the court’s current path. To dissent, Justice Waterman reasoned, was “to fire another warning shot across the bow of the ship the majority steers in the wrong direction without a navigation system.”¹⁸⁵ To him, the majority’s continued departure from the federal model “leads to unpredictability, confusion, and instability in the law.”¹⁸⁶ Justice Mansfield, joined by Justices Waterman and Zager, rebuffed each of the majority’s “Established Principles of Independent State

174. See *Baldon*, 829 N.W.2d at 823–35 (Appel, J., specially concurring).

175. *Id.* at 825.

176. *Id.* at 825–26.

177. *State v. Short*, 851 N.W.2d 474, 481–92 (Iowa 2014).

178. *Id.* at 481.

179. *Id.* at 482.

180. *Id.* at 485.

181. *Id.* at 507 (Cady, C.J., concurring specially).

182. *State v. Pals*, 805 N.W.2d 767, 784 (Iowa 2011) (Waterman, J., dissenting).

183. *Id.* at 789 (Waterman, J., dissenting).

184. *State v. Baldon*, 829 N.W.2d 785, 837 (Iowa 2013) (Mansfield, J., dissenting). Justice Waterman joined Justice Mansfield’s dissent. *Id.* at 847.

185. *Short*, 851 N.W.2d at 510 (Waterman, J., dissenting).

186. *Id.*

Constitutional Law.”¹⁸⁷ Perhaps most notably, Justice Mansfield also underscored “the clear disconnect between [the] court’s 2010–2014 approach to search and seizure and the approach it took for decades before 2010.”¹⁸⁸ Such statements confirm an undeniable change is afoot.

2. Providing Greater Search Protection Under Article I, Section 8 Than the Fourth Amendment Affords

This change is perhaps most perceptible in three of the five decisions—where a majority of the Iowa Supreme Court not only reaffirmed the court’s ability to construe article I, section 8 to provide greater search protection than the Fourth Amendment but also reinforced those sentiments with action. When compared to a decision the Iowa Supreme Court rendered less than 15 years before, the current shift becomes even more apparent. In 2001, the Iowa Supreme Court held that while a “good faith” exception to the exclusionary rule exists under federal law, no such rule exists under the Iowa Constitution.¹⁸⁹ That is, if law enforcement obtains evidence in violation of Iowa’s search provision, the evidence must be suppressed.¹⁹⁰ For searches arising under the Fourth Amendment, in contrast, evidence may remain admissible if an officer acted in good faith, even if a warrant is later deemed defective or invalid.¹⁹¹ However, as Justice Mansfield has since stated, *Cline* involved a *remedy*, not a right.¹⁹² The court “did not say the Iowa Constitution would invalidate a search that the United States Constitution permits.”¹⁹³

However, that is precisely what the Iowa Supreme Court did in *Ochoa*, *Baldon*, and *Short*—and the court’s choice to do so three times in five years demonstrates the magnitude of its current shift away from blindly following federal doctrine. First, in *Ochoa*, the court held that a warrantless search of a parolee’s motel room lacking “any particularized suspicion or limitations,” even where a parole agreement authorizes such a search, violated the Iowa Constitution.¹⁹⁴ In doing so, the Iowa court rejected the United States Supreme Court’s reasoning and holding in *Samson v. California*,¹⁹⁵ which concluded “that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.”¹⁹⁶ The Iowa Supreme

187. *Id.* at 519–27 (Mansfield, J., dissenting). Justices Waterman and Zager also joined in the dissent, in addition to each writing their own dissents. *See id.* at 507–19 (Waterman, J., dissenting); *id.* at 527 (Mansfield, J., dissenting); *id.* at 527–45 (Zager, J., dissenting).

188. *Id.* at 520 (Mansfield, J., dissenting).

189. *State v. Cline*, 617 N.W.2d 277, 292–93 (Iowa 2000), *abrogated on other grounds*, *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

190. *Id.* at 292.

191. *See United States v. Leon*, 468 U.S. 897, 917, 920–21 (1984).

192. *State v. Baldon*, 829 N.W.2d 785, 838 (Iowa 2013) (Mansfield, J., dissenting).

193. *Id.*

194. *State v. Ochoa*, 792 N.W.2d 260, 291–92 (Iowa 2010).

195. *Id.* at 289–91.

196. *Samson v. California*, 547 U.S. 843, 857 (2006).

Court reaffirmed this divergence in *Baldon*.¹⁹⁷ In *Short*, the Iowa Supreme Court broadened this protection even further to encompass suspicionless searches of probationers.¹⁹⁸ There, the majority considered “[t]he newly fashioned Fourth Amendment doctrine,” which “provides a framework for the United States Supreme Court to avoid the warrant requirement whenever a majority of the Court determines that it is ‘reasonable’ to do so.”¹⁹⁹ The Iowa Supreme Court rejected such “innovations” and “decline[d] to join the retreat under the Iowa Constitution.”²⁰⁰ By holding that both probationers and parolees cannot be subjected to suspicionless, warrantless searches in at least some contexts,²⁰¹ the Iowa court provided broader rights and protections under the Iowa Constitution. Admittedly, conditions in parole and probation agreements, which an individual must heed or else risk incarceration or other penalties,²⁰² are distinguishable from general searches. However, in both, a person likely believes he has no choice but to accede. Both types of searches also may arise under the state constitution, which “ha[s] been a crucial font of equality . . . and civil liberties.”²⁰³ Importantly, as Chief Justice Cady stated, while *Short* “is another step in the steady march towards the highest liberty and equality that is the birthright of all Iowans; it will not be the last.”²⁰⁴

B. BENEFITS OF A “KNOWING” STANDARD

Previous discussion demonstrated that, in recent years, a majority of the Iowa Supreme Court has disagreed with and departed from the United States Supreme Court’s interpretation of the Fourth Amendment when construing article I, section 8 of the Iowa Constitution. This Part argues that the Iowa Supreme Court should do so once again by expressly rejecting the “totality of the circumstances” test and adopting a “knowing” standard to evaluate the consent of all searches arising under the Iowa search provision.

197. *Baldon*, 829 N.W.2d at 803 (“[T]he search provision contained in Baldon’s parole agreement does not represent a voluntary grant of consent within our constitutional meaning. As such, the suspicionless search of Baldon’s car violated article I, section 8 of the Iowa Constitution.”).

198. *State v. Short*, 851 N.W.2d 474, 506 (Iowa 2014).

199. *Id.* at 497 (citation omitted).

200. *Id.* at 506.

201. In *Short*, the Iowa Supreme Court appeared to limit its holding: “We hold that under article I, section 8, the warrant requirement has full applicability to *home* searches of both probationers and parolees by law enforcement.” *Id.* (emphasis added). *Ochoa* similarly addressed only a search of a parolee’s motel room. *State v. Ochoa*, 792 N.W.2d 260, 262–63 (Iowa 2010). However, *Baldon* considered a search of a parolee’s vehicle. *Baldon*, 829 N.W.2d at 788. As a result, the true scope of the three holdings appears somewhat unclear.

202. See *Ochoa*, 792 N.W.2d at 263 (quoting the search warrant: “[Ochoa’s] parole agreement warned that failure to comply with the terms and conditions [of the agreement] may result in the revocation of [his] parole” (internal quotations omitted)).

203. *Baldon*, 829 N.W.2d. at 791.

204. *Short*, 851 N.W.2d at 507 (Cady, C.J., concurring specially).

In the decades following *Schneckloth*, consent searches continue to serve as a commonly utilized and “important law enforcement tool.”²⁰⁵ Despite the frequency of consent searches, *Schneckloth* remains the subject of pervasive criticism.²⁰⁶ Skeptics deem the majority’s analytical reasoning misplaced,²⁰⁷ consider the “totality of the circumstances” test unworkable in practice,²⁰⁸ or simply agree with the claims within Justice Marshall’s dissent.²⁰⁹ For decades, law enforcement data and academic scholarship have shown that many of the rationales the majority used to reject the higher “knowing” standard were not only unsupported—they were incorrect.²¹⁰ These justifications include the majority’s claim that the consent search context is not inherently coercive²¹¹ and that such searches provide evidence law enforcement would not otherwise obtain.²¹² Without these analytical foundations relied upon by the majority, *Schneckloth*’s holding appears notably unsubstantiated. Despite these fundamental weaknesses, the United States Supreme Court continues to adhere to the “totality of the circumstances” test.²¹³

205. *State v. Pals*, 805 N.W.2d 767, 789 (Iowa 2011) (Waterman, J., dissenting).

206. *Id.* at 780 (Waterman, J., dissenting) (“The academic commentary on *Schneckloth* has been generally unfavorable . . .”); see also Gallini, *supra* note 42, at 233 (“Academics generally view the Supreme Court’s current consent search doctrine with disdain.”).

207. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221 (2001) (listing three criticisms of the Court’s “voluntariness” test, of which *Schneckloth* is a vital part); Russell L. Weaver, *The Myth of “Consent”*, 39 TEX. TECH. L. REV. 1195, 1198–1202 (2007) (discussing criticisms of *Schneckloth* in particular).

208. Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) (“[T]he Court claims to be applying one test, but in reality is applying a different test—and neither . . . comports with the real-life confrontations . . .”); Strauss, *supra* note 207, at 221–35.

209. *Pals*, 805 N.W.2d at 781 (“A number of commentators simply seem to side with Justice Marshall’s dissent . . .”); see also Loewy, *supra* note 79, at 104–08 (arguing that Justice Marshall’s dissent was not only correct, but also a “great dissent” in Fourth Amendment jurisprudence).

210. Gallini, *supra* note 42, at 236 (“[S]everal states have confirmed that *Schneckloth*’s underlying premise—administering Fourth Amendment consent warnings would be ‘thoroughly impractical’—is simply wrong.”); see also *supra* notes 206–09 and accompanying text. For a list of academic scholarship critiquing *Schneckloth* and presenting evidence against its central claims, see Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. REV. 2083, 2098 n.64 (2012).

211. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (discussing “the ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance”).

212. See Maclin, *supra* note 41, at 33 (deeming Justice Stewart’s claim that consent searches are the only way to obtain vital evidence “a naked assumption without empirical support”).

213. Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 761. This Note leaves the argument that the Court should overrule *Schneckloth* to others. See Gallini, *supra* note 42, at 236 (arguing that changes in politics, a lessening of pressure surrounding the United States Supreme Court, and our knowledge of consent searches dictates that *Schneckloth* should be overruled). Instead, the faulty rationales underlying the *Schneckloth* holding are discussed here only to demonstrate that imposition of a heightened standard under the Iowa Constitution is increasingly necessary to fix the test’s inherent faults.

By implementing “knowing” for all searches arising under the Iowa search provision, the Iowa Supreme Court could remedy these faults at a state level. Additionally, a heightened “knowing” standard would provide Iowans broader, more expansive search protection in three ways: (1) by providing law enforcement, prosecutors, and courts greater guidance than the vague, difficult-to-apply “totality of the circumstances” test; (2) by limiting the ability of law enforcement to gain an advantage due to a person’s ignorance of his rights; and (3) by creating uniformity and stability, as the same standard would apply in all search contexts.

1. Additional Guidance for Law Enforcement, Prosecutors, and Courts

As scholars have long noted, *Schneckloth*’s “totality” test “is so vague that it provides little guidance to courts, litigants or police officers.”²¹⁴ The standard dictates that courts consider various subjective factors relating to both the circumstances surrounding the search and “the suspect’s mental state or character.”²¹⁵ However, the *Schneckloth* opinion did not rank these factors.²¹⁶ The Court did not state when, and in what circumstances, the factors tip towards involuntariness. Without clear guidance and parameters, courts rarely “actually analyze[] any of these factors.”²¹⁷ One scholar noted that “out of hundreds of decisions,” only a few “analyzed the suspect’s particular subjective factors.”²¹⁸ Instead, courts often deem consent “voluntary” notwithstanding the particular characteristics of a suspect.²¹⁹ This demonstrates that the “totality” test is, at best, difficult to apply, as its factors “are often ignored or minimized.”²²⁰ At worst, these statistics suggest that the standard effectively removes the burden on both law enforcement and prosecutors to establish the voluntariness of a suspect’s consent.²²¹

In contrast, a “knowing” standard provides much needed guidance. It makes clear what a member of law enforcement or a prosecutor must demonstrate in order to establish that the subject’s consent was voluntary: that he knew of his right to refuse consent. That is, rather than contemplating

214. Strauss, *supra* note 207, at 221.

215. *Id.* at 222.

216. In *Schneckloth*, the Court included various factors it had considered previously in determining the voluntariness of a confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). However, the court simply listed the factors and provided no guidance as to the weight each factor possesses or even if all must be considered in every context.

217. Strauss, *supra* note 207, at 222.

218. *Id.*

219. *Id.*; see also Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2224 (2006) (“Many factors enumerated by the Supreme Court in *Schneckloth* were not discussed at all in the majority of opinions in the sample . . .”).

220. Strauss, *supra* note 207, at 235.

221. See *supra* note 6 (noting that law enforcement is supposed to have the burden to show voluntary consent).

malleable, amorphous factors of unknown weight, a court would consider a single determinative criterion. Despite these advantages, imposition of the standard is, admittedly, an incomplete solution. Law enforcement members may unreasonably continue to seek a subject’s consent, even after an initial refusal. Individuals who know they have the right to refuse consent may still fear repercussions will follow if they choose to invoke it. Despite these potential flaws, the heightened standard remains necessary, as it makes clear what an officer or prosecutor must prove and provides a less-muddled analytical test for courts to apply.

2. Limiting Law Enforcement’s Ability to Benefit from a Citizen’s Ignorance of Rights Possessed

Second, adoption of the “knowing” test would limit the ability of law enforcement to gain an advantage based solely on a person’s ignorance of his constitutional rights. More than 50 years ago, a United States Supreme Court Justice asserted that “no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.”²²² Ten years later, Justice Marshall’s *Schneckloth* dissent raised similar concerns.²²³ And, as recently as 2007, a scholar contended, “contemporary Fourth Amendment doctrine governing consent searches accepts—even encourages—ignorance among the people about their constitutional rights.”²²⁴ Consequently, a citizen’s Fourth Amendment right to be free from a government actor’s unreasonable search enjoys less protection than other constitutional guarantees, including the Fifth Amendment right against self-incrimination.²²⁵ However, implementing a “knowing” standard, the Iowa Supreme Court can remedy this incongruity for searches arising under article I, section 8. The entire focus of a “knowing” standard is what an individual *did* know; as it is the individual’s rights at issue, this is the more appropriate starting point.

3. Uniformity and Stability in All Search Contexts

Third, by adopting a “knowing” standard for all searches arising under article I, section 8, the Iowa Supreme Court would provide greater search protections for all searches arising under the state provision, rather than a single subset, such as those of a home or vehicle. This is important for two reasons. First, the problems inherent within the “totality” test arise in all search contexts. Issues related to the voluntariness of consent are not limited to searches involving, for example, a home, but absent from a search of a

222. *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

223. *Schneckloth v. Bustamonte*, 412 U.S. 218, 288 (1973) (Marshall, J., dissenting).

224. Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH L. REV. 1143, 1143 (2007).

225. *Id.*

person. Similarly, various state supreme courts and law enforcement entities nationwide have already implemented warning requirements in a wide range of search contexts, including vehicle searches²²⁶ and the search of a home following a knock-and-talk.²²⁷ Thus, scholars, state supreme courts, and law enforcement practices demonstrate the necessity for heightened search protection in numerous settings.

Second, an all-encompassing “knowing” standard for all searches creates much needed consistency. Importantly, it would help to decrease the unfairness and arbitrariness of the current system—where Iowans possess differing levels of protection depending on where the search occurred. For example, Iowa State Patrol troopers, as opposed to county or municipal officers, must obtain a motorist’s signature on a “Consent to Search” form prior to executing a vehicle search.²²⁸ In contrast, when an Iowa police officer seeks to search an individual’s home, verbal consent, if voluntary, is sufficient.²²⁹ Under a “knowing” test, law enforcement would no longer need to produce, and courts would no longer need to consider, varying levels of proof depending on the search setting. Instead, a single standard would apply.

C. WRITTEN CONSENT FORMS PROVIDE THE MOST EFFECTIVE METHOD OF ENFORCEMENT

While adoption of a “knowing” standard to evaluate consent for searches arising under article I, section 8 would provide Iowans greater, more expansive search protection, an important issue remains: how such a standard would be enforced. This Part argues that written consent forms—which either the legislative or executive branch could choose to require following the Iowa Supreme Court’s adoption of a “knowing” standard—provide the most effective method of implementation. Such a form could, like those currently utilized in New Jersey,²³⁰ authorize law enforcement to search an individual’s person, car, home, or other premises. However, the search would not be

226. See *supra* notes 136–37 and accompanying text (discussing New Jersey law enforcement’s requirement that a consent form must be signed before a person consents to a search of his car or another area); see also *infra* note 235 and accompanying text (discussing the Iowa State Patrol’s consent form requirement).

227. See *supra* note 123 and accompanying text (addressing the decisions of both the Arkansas and Washington Supreme Courts to require knowing consent before a search conducted after a knock-and-talk procedure).

228. Lee Rood, *Register Investigation: Iowa State Patrol Nabs More Drivers from Out of State*, DES MOINES REG. (Oct. 19, 2013), <http://www.desmoinesregister.com/article/20131020/NEWS03/310200043/Register-Investigation-Iowa-State-Patrol-nabs-more-drivers-from-out-state>.

229. See *State v. Lowe*, 812 N.W.2d 554, 570 (Iowa 2012) (describing an interaction between a mobile home owner and police officer during which the individual verbally consented to a search of the mobile home).

230. See *supra* notes 136–37 and accompanying text (describing “Consent to Search” forms in New Jersey).

lawful until the individual reads the form’s provisions, which would expressly state that he or she has a right to refuse consent to search, and signs.

First, written consent forms, and the warnings they include, would not hinder law enforcement’s ability to obtain evidence and apprehend criminals. One of the most important functions of a written consent form, in this context, is that it forces law enforcement to advise a subject of his or her right to refuse consent to search. Concerns that this “warning” obligation would place an unreasonable burden on law enforcement have existed for decades. The *Schneckloth* majority, for example, voiced this apprehension when it deemed a warning requirement “thoroughly impractical.”²³¹ However, such worries are unfounded, as “even police officers persuasively contend that” a warning requirement would not create a hindrance or burden to police efficiency.²³² Reference materials targeted at police officers praise consent forms, and “they have become an integral part of law enforcement practice in most jurisdictions.”²³³ Additionally, there are successful examples of such a requirement. New Jersey has long required that officers provide a warning to motorists prior to obtaining consent to search.²³⁴ Notably, “consent forms that advise a party of his right to refuse consent are *practical* and in use in Iowa.”²³⁵

Similarly, the available empirical data demonstrates the frequency of consent does not decrease when law enforcement must inform citizens of the right to refuse.²³⁶ In New Jersey, for example, law enforcement “Monitors” review a portion of vehicle stops to ensure that they comply with statutory and constitutional regulations.²³⁷ Over the course of “the past fifteen reporting periods . . . the Monitors reviewed 487 consent search requests.”²³⁸ Of that number, 88.3% of motorists consented even after being told of their right to refuse.²³⁹ Another study showed that when warnings are *not* used, Ohio motorists, as opposed to those in New Jersey, consented to a vehicle search at a nearly identical rate—88.5%.²⁴⁰ The latter study concluded, “the rate of

231. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

232. Strauss, *supra* note 207, at 253.

233. Leong & Suyeishi, *supra* note 213, at 778.

234. *See State v. Carty*, 790 A.2d 903, 907 (N.J. 2002), *modified*, 806 A.2d 798 (modifying retroactivity); *see also* Matthew Phillips, Note, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1198 (2008) (discussing the “de facto warning requirement” New Jersey law enforcement imposes).

235. *State v. Lowe*, 812 N.W.2d 554, 592 (Iowa 2012) (Appel, J., concurring in part and dissenting in part) (emphasis added).

236. *See Phillips*, *supra* note 234, at 1201, 1204–05; *see also State v. Pals*, 805 N.W.2d 767, 781–82 (Iowa 2011) (Waterman, J., dissenting) (discussing empirical data attempting to determine the frequency of consent searches).

237. Phillips, *supra* note 234, at 1200.

238. *Id.* at 1201.

239. *Id.* Motorists were told both verbally and in writing of their right to refuse consent. *Id.*

240. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 61 & nn.63–64 (2009) (commenting on Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment*

consent actually went *up* slightly once the police began using the warning.”²⁴¹ Unfortunately, no studies or data provide insight into the effect of the Iowa State Patrol’s required consent forms on the frequency of consent searches.²⁴²

Second, in addition to not hindering law enforcement’s ability to obtain evidence, written consent forms also have the potential to simplify and to streamline the consent-to-search process. Without written consent forms, a court considering the voluntariness of consent under a “knowing” test would lack affirmative evidence demonstrating that a subject knew of his right to refuse. As a result, much like under the current “totality” standard, the only evidence of the interaction would likely be “conflicting tales”²⁴³—as generally only the suspect and the police officer witness the search encounter. That is, the voluntariness of consent becomes a “question of credibility”²⁴⁴ and necessitates “he said, she said” testimony. Consent forms would, in contrast, provide a record of how the search encounter transpired, and an Iowa court would only need to consider the presence or absence of a signed form. If the individual signed the form, thus demonstrating knowledge of a right to refuse, the court would presume consent to be voluntary. This presumption, however, is rebuttable. Even if the individual signs the form, he still may claim that the signature resulted from police coercion and misconduct.²⁴⁵ This is a necessary protection. Without this procedural opportunity, an individual would have no recourse to contest a signed consent form and the resulting finding of voluntariness—even if an officer used inappropriate or violent means to obtain assent.²⁴⁶

V. CONCLUSION

Since the United States Supreme Court’s adoption of the “totality of the circumstances” standard in *Schneckloth v. Bustamonte*, academic commentary and empirical data have demonstrated that both the decision’s holding and

Rights, 44 HOW. L.J. 349, 366–67 (2001) (assessing the effect of warning requirements on the frequency of consent searches)).

241. *Id.* at 61 n.64 (emphasis added). However, as the author notes, the study did not mention “whether this difference is statistically significant, and the difference may have been caused by an overly sensitive dependent variable.” *Id.*

242. A statistical report for the Iowa Department of Public Safety for the fiscal year 2014 counts 403 search warrants executed by the Division of Narcotics Enforcement, but does not count the number of consent searches or searches by other divisions, including the Iowa State Patrol. IOWA DEP’T OF PUB. SAFETY, FY 2014 ANNUAL REPORT 13 (2014), available at http://www.dps.state.ia.us/commis/pib/Annual_Report/2014/FY14%20ANNUAL%20REPORT%20DOCUMENT.pdf

243. Strauss, *supra* note 207, at 245.

244. *Id.*

245. *See id.*

246. This remains an imperfect solution. Even if an individual makes such a claim, “more often judges are inclined to accept the testimony of a police officer in a swearing contest with a criminal defendant.” Strauss, *supra* note 207, at 246–47. It is an even worse approach, however, to not provide an individual the opportunity to contest simply because flaws remain.

reasoning were misplaced. In its wake, state supreme courts have exhibited differing levels of adherence to its standard—including those that have rejected its central conclusion when construing analogous state search provisions. These states have the right idea. Five recent decisions of the Iowa Supreme Court noted the ability to diverge from the federal model, and, in at least three of the decisions, the court reinforced this sentiment with action. It is time to do so once again. While not a perfect solution, by adopting a “knowing” standard under article I, section 8, the Iowa Supreme Court can rectify *Schneckloth’s* inherent weaknesses and provide broadened search protection for all Iowans. Such protection is unquestionably deserved.