LAWYERS NEED LAW: JUDICIAL FEDERALISM, STATE COURTS, AND LAWYERS IN SEARCH AND SEIZURE CASES

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ABSTRACT

The progress of judicial federalism, the independent interpretation of state constitutions, has generally been limited. This article explores how lawyers have contributed to the development of state constitutional rights law in the search and seizure context. Through a comparative study of lawyers in New York, Ohio, Oregon, and Washington, I argue that the ideational support provided by lawyers in the form of constitutional arguments has varied widely across the states in response to the legal signals sent by their high courts and the United States Supreme Court. In essence, the argument is that lawyers need law and in the area of judicial federalism have largely waited for their state courts to provide some measure of leadership.

I. INTRODUCTION

Judicial federalism—the interpretation of state constitutional texts independently of federal doctrine—has been a source of commentary and action since the 1970s. Then Professor Hans Linde argued that judicial federalism was a requirement of standard rules of adjudication and legal argumentation. Linde argued that “[t]he logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last.”¹ As federal jurisdiction depends upon the state depriving a person of some interest, and given that courts are a constitutive element of the state, a state court decision that some action violated state law

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eliminates the need for federal review: “By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it.”

State and federal constitutional claims, therefore, “are not cumulative but alternative,” and “[c]laims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.”

This primacy approach “obliges counsel and court to give independent professional attention to the text, history, and function of state constitutional provisions,” rather than simply borrow concepts and doctrines wholesale from federal doctrine.

While Linde’s call came in 1970, it took further federal developments to put judicial federalism forward as a serious jurisprudential approach because judicial federalism is inextricably linked to developments in federal constitutional politics. Political struggles to influence the U.S. Supreme Court led to the push for increased state constitutional activism.

The Warren Court represented a dramatic expansion of judicial power in the service of liberal policy goals actively supported by Presidents Kennedy and Johnson. The Warren Court expanded protections in a diverse set of areas such as criminal procedure, free speech, and religious freedom through the application of nearly the entire Bill of Rights to the states. This liberal activism in turn elicited a conservative backlash; Richard Nixon’s 1968 campaign focused heavily on a criticism of the Warren Court as being too friendly to criminals in particular and promising to appoint more conservative justices to correct this tendency.

While a common view of Nixon’s Court was one of a failed counterrevolution, this ignores the limited goals that Nixon expressed. On the issues that Nixon cared the most

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2 Id. at 133.
3 Id. at 134.
4 Id. at 135 (emphasis omitted).
5 Id. at 182.
9 JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 3–4, 8 (1973).
about, criminal rights and desegregation, the Court delivered much of what he hoped for, successes that were built upon by Reagan’s more expansive attack on the liberal legacy. The Court never completely delivered on the goal of conservative activists to reverse the Warren Court’s legacy, but the sustained opposition led to a Court that maintained some liberal rights while severely constraining others and then turned the Court’s activist power to the protection of conservative rights claims. This rights retrenchment, however, was open to contestation from below because the rules of American federalism allow for divergent constitutional rights doctrines through state constitutions. Long standing federal doctrine recognized that the U.S. Supreme Court lacked constitutional authority to review determinations of independent state law.

The increasingly conservative trend of federal rights jurisprudence in the 1970s and 1980s led more advocates to push for a turn to state law as a way to sidestep or evade federal rights retrenchment. Justice William Brennan made the highest profile call for judicial federalism by instructing liberal lawyers dismayed over the increasing conservatism of his own Court to remember federalism: “Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty”; instead, “one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.” He admonished both lawyers and state courts that federal law is not dispositive on the meaning of state constitutional provisions and should be followed “only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees.” While Brennan’s argument disclaimed any preference for particular results, this was a transparent denial when read against his jurisprudence, which did not show great

11 See generally KEVIN J. MCMAHON, NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES (2011).
13 Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (noting that to achieve this protection state decisions must include a plain statement that they rest solely on state law); Murdock v. City of Memphis, 87 U.S. 590, 638 (1874).
14 One survey found that Brennan’s article was the nineteenth most cited law review article overall and the eighth most cited article published since 1979. Fred R. Shapiro, The Most-Cited Law Review Articles, 73 CALIF. L. REV. 1540, 1550 n.45 (1985).
16 Id. at 502.
support for federalism; his message was that “state courts should vindicate personal liberties along the lines undertaken by the Warren Court by reading their state constitutions expansively and should justify their actions by referring to the ’neutral’ principle of federalism.” Brennan’s theory then amounts to an instrumental one: state courts should utilize their constitutions to evade federal retrenchment.

All this attention to judicial federalism seemed to augur a revolution in state constitutional law, with courts embracing their state constitutional rights provisions as sources of true, independent constitutional law. Studies of case outcomes and legal reasoning, however, demonstrate that federal law generally remained dominant in rights disputes. A study of six state high courts in 1975 found that approximately 19% of all constitutional issues, not simply limited to rights issues, were resolved on state law grounds. A broader study of all equal protection cases from all state supreme courts between 1975 and 1984 found that equal protection was particularly dominated by federal law, with only 6.7% relying on state law alone to reach the court’s decision. A study of self-incrimination cases from all state high courts from 1981 to 1986 found that 22% rested solely on state law but there was significant variation between states, with fourteen states never relying on state law and eight states relying on state law in at least half of the cases. Emmert and Traut examined all instances of facial challenges to state statutes between 1981 and 1985, finding that state-only grounds were relatively rare for invalidations. More impressionistic studies of small-issue areas or only a few courts have similarly found that while judicial federalism may have increased in frequency in the 1980s, the “area continue[d] to be

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21 Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 44 & tbl.2 (1992); see also Staci L. Beavers & Craig F. Emmert, *Explaining State High-Courts’ Selective Use of State Constitutions*, 30 PUBLIUS 1, 1 (2000) (noting that civil liberties cases in particular were unlikely to be decided on state-law grounds).
largely reactive." Another study of criminal procedure and First Amendment rights-parallels found that in a third of cases the state court adopted a broader rule; two of the three most common areas of expansion were in search and seizure and free exercise claims, both responding to federal retrenchment, but jury trial claims were similarly frequent and cannot be explained solely with reference to federal law. The picture of case outcomes demonstrates that judicial federalism is the exception rather than the rule, but that judicial federalism varies by issue area and, in some studies at least, the state court studied. Examination of the rationale of opinions similarly demonstrates a tendency to converge federal and state law. Barry Latzer examined all instances of state constitutional interpretation in criminal procedure cases from the late-1960s to 1989 to gauge the degree of rejection or adoption of federal rights doctrines. Contrary to the view by some that judicial federalism “is of a wholly liberal legal movement” regularly expanding criminal procedural rights, two-thirds of the cases adopted the reasoning of the U.S. Supreme Court. There was considerable variation in the one-third of cases that rejected the federal rule, with the most common area being search and seizure because that is the area of strongest federal retrenchment; where the Burger Court’s “Fourth Amendment jurisprudence had clearly been given a pro-police cast.” Only four state high courts (Alaska, California, Florida, and Massachusetts) regularly expanded state constitutional protections. Cauthen utilized Latzer’s case samples for twenty-

22 Ronald K. L. Collins & Peter J. Galie, Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions, 16 PUBLIUS 111, 113 (1986); see also Sue Davis & Taunya Lovell Banks, State Constitutions, Freedom of Expression, and Search and Seizure: Prospects for State Court Reincarnation, 17 PUBLIUS 13, 30 (1987) (concluding that many states were unwilling to depart from federal precedent through further reliance on their own state constitutions); Mary Cornelia Porter, State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 3, 3–4 (Mary Cornelia Porter & G. Alan Tarr eds., 1982) (discussing “the increasing tendency” of state courts to rely less on the Federal Constitution due to the revial of the principle that the U.S. Supreme Court will not review state high court decisions that are made on an independent and adequate state grounds).


25 Id. at 7, 157.

26 Id. at 160–61 & tbl.1.

27 See id. at 32, 160–61 & tbl.1.

28 See id. at 164. However, California and Florida courts were both restricted in the early 1980s from issuing expansive state rights decisions by forced linkage provisions and all cases after those amendments were excluded in Latzer’s sample. See CAL. CONST. art. I, § 24; Fla.
five state high courts and extended the data through 1994, finding that while the aggregate degree of expansion was consistent with Latzer’s original finding, there was substantial variation over time. In the 1970s, the degree of expansionism was actually quite high but was concentrated in a handful of prominent decisions from only a few early adopters of active judicial federalism. In the 1980s, as state constitutional issues spread to more states, the rate of expansive decisions dropped off. But in the 1990s, an increasing trend of expansion emerged.

In a prominent critique of judicial federalism, Gardner examined all constitutional cases decided by seven state high courts in 1990. By looking at all constitutional disputes, Gardner’s analysis avoided a narrow focus on areas where judicial federalism was more likely than not and illuminated the constitutional discourse used by state supreme courts. Rather than being a source of truly independent law as pictured by some theorists, state constitutional law as practiced “is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.” State constitutional discourse “often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of lingua franca of constitutional argument generally.” The hopes for independent state law were low because “state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law.”

30 Id. at 529–30 tbl. 1 & 2.
31 Id. at 529–32 & tbl. 1 & 2.
32 Id. at 529–30, 533–34 & tbl. 1 & 2.
33 James A. Gardner, The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761, 779 (1992). The states included in the study were California, Kansas, Louisiana, Massachusetts, New Hampshire, New York, and Virginia. Id. at 779. Gardner further confined his review to only those cases in which the court issued a full opinion and therefore did not review any memorandum or summary decisions. Id.
34 Id. at 763.
35 Id. at 766.
36 Id. at 804. In more recent work Gardner has argued that this reliance on federal law is normatively defensible and that state courts are justified in instrumentally using state constitutions to resist federal retrenchment. See generally JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005) [hereinafter INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM]; James A. Gardner & Jim Rossi, Dual Enforcement of Constitutional Norms, in NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 2 (James A. Gardner & Jim Rossi eds., 2011); James A. Gardner, Why Federalism and Constitutional Positivism Don’t Mix, in
More recently Justin Long explored how four states that purport to be strong supporters of judicial federalism—New Hampshire, New Jersey, Oregon, and Washington—actually practice in a single year (summer 2005 to summer 2006) of decisions.\textsuperscript{37} As with Gardner, Long examined all constitutional issues and not only rights claims.\textsuperscript{38} Long found substantial variation in how well state courts complied with their purported state constitutional doctrine.\textsuperscript{39} In Oregon, four cases of the forty-four state constitutional decisions failed to be consistent with the methodological approach, in Washington nine of thirty-two cases similarly failed, in New Jersey seven of twenty-two failed, and in New Hampshire four of thirty-four decisions failed.\textsuperscript{40} How we should interpret these results, however, is not obvious. As the title of his article suggests, Long sees this as evidence of “intermittent state constitutionalism,”\textsuperscript{41} and that is true in the sense that none of the courts were 100% consistent. When we compare it to the empirical studies discussed above, however, a compliance rate of between 68%, on the low end in New Jersey, to 91%, in Oregon, seems to be an impressive deviation from all other studies of judicial federalism where state courts were found to engage with state law at a much lower level.\textsuperscript{42} As my purpose is the study of rights arguments, it is worth noting that it appears all of Long’s examples of failure came in rights areas.\textsuperscript{43} Unfortunately, Long does not provide the breakdown of state constitutional decisions by issue area and thus it is unclear how to interpret this fact. At the least it suggests that on structural or non-rights issues these four states regularly interpret their state constitutions consistent with established state precedent but have more trouble in rights areas, though the amount of active state

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\textsuperscript{38} Id. at 72.

\textsuperscript{39} Id. at 86, 96. Unfortunately, Long fails to provide clear coding rules used to decide when a decision is compliant to the state’s doctrine.

\textsuperscript{40} Id. at 74–75, 77–78, 82, 84. I would disagree on the coding of three of the Washington cases because they relied upon a 1995 double jeopardy precedent that had provided the correct state analysis when adopting the federal rule. Id. at 79. Long’s coding as failure seems to come from his judgment that the Washington Supreme Court should have done the analysis again ten years later because federal law may have changed, but this is not a requirement of the court’s approach. See id.

\textsuperscript{41} Id. at 96.

\textsuperscript{42} Compare id. at 74–75, 77–78, 82, 84, with LATZER, supra note 24, at 164, and Cauthen, supra note 29, at 527, 528, and Gardner, supra note 33, at 804.

\textsuperscript{43} See Long, supra note 37, at 75, 79, 82–83.
individual rights decisions seems to still be significant.\footnote{But even this is uncertain because Long does not examine the number of federal rights decisions made. If a substantial number of decisions rested on federal law only that would suggest, potentially, that courts were simply ignoring state constitutional law in a number of cases and this would strengthen his point that state constitutionalism is intermittent. However, given the number of cases he examined I suspect this potential avoidance argument is unlikely.}

At the very least these studies leave us with an empirical puzzle: Why did judicial federalism fail to develop more fully? The next section briefly presents some of the primary, court-centric factors emphasized by many researchers. I then turn to my primary concern: the role that lawyers have played. While many scholars have suggested that the arguments of lawyers play a major role in explaining the development of judicial federalism, few have attempted to explore this empirically.

II. SUPPORT AND SIGNALING

The empirical study of legal development has tended to focus on court-centric aspects of ideology,\footnote{See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).} strategic interactions,\footnote{Lee Epstein & Jack Knight, The Choices Justices Make 12–17 (1998).} or the influence of political elites in shaping the courts.\footnote{See generally Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (2007); Howard Gillman, How Political Parties Can Use the Courts to Advance Their Agenda: Federal Courts in the United States, 1875–1891, 96 Am. Pol. Sci. Rev. 511 (2002); Gillman, supra note 7, at 138; Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 Am. Pol. Sci. Rev. 583 (2005).} Scholars have largely followed this court-centric focus in offering explanations for the limited development of state constitutional law as a function of judicial ideology, the institutional structure of state courts, and the political environments in which state courts operate.\footnote{See Fino, supra note 18, at 8–9; Latzer, supra note 24, at 166–71; G. Alan Tarr & Mary Cornelia Aldis Porter, State Supreme Courts in State and Nation 2 (1988); Beavers & Emmert, supra note 21, at 5–8; Staci L. Beavers & Jeffrey S. Walz, Modeling Judicial Federalism: Predictors of State Court Protections of Defendants’ Rights Under State Constitutions, 1969–1989, 28 Publius 43–51 (1999); Paul Brace et al., Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts, 62 Alb. L. Rev. 1265, 1295 (1999); Emmert & Traut, supra note 21, at 47; Esler, supra note 20, at 32; Karen Swenson, School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrainted?, 63 Alb. L. Rev. 1147, 1152 (2000).} While certainly important to answering the question of why judicial federalism has not been practiced more widely, these explanations tend to ignore the role that lawyers play in legal development.

This focus on lawyers draws upon support structure explanations...
of legal development. Charles Epp examined rights revolutions in Canada, India, Great Britain, and the United States by looking not at the behavior of courts in those revolutions but at the preceding actions taken by lawyers in laying the foundation for constitutional activism. Epp demonstrated that “rights revolutions depend on widespread and sustained litigation in support of civil rights and liberties.” While so much attention may be focused upon images of trailblazing courts, vibrant support structures “preceded and supported the development of rights revolutions.” Even where judges may occasionally take the initiative in creating new legal rules, the rules have little force without lawyers willing and able to take up the task and build upon the decisions. Epp’s study found that in the two most significant rights revolutions, Canada and the United States, support structures were well developed prior to the revolutions and supported both the initial development as well as pushing for future applications. Even in Great Britain, where no formal constitutional bill of rights exists, a limited rights revolution was found to exist in areas where support structures developed. In India, despite the presence of a committed activist court, the rights revolution was minimal because the support structure failed to develop. Epp’s findings demonstrate the importance of considering the activity of lawyers as a necessary, though not sufficient, component for legal change. Epp’s vision of support is a relatively specific one in that it focuses on material support, funds, and other resources necessary to bring cases to court. Other scholars have similarly noted the role that material support plays in legal development. Steven Teles examined the

50 Id. at 18.
51 Id. at 20 (emphasis omitted).
52 Id. at 21.
53 Id. at 23–24.
54 Id. at 24.
55 See id. at 23–24.
57 Epp, supra note 49, at 18–19.
conservative legal movement, arguing that a change in the support structure was a necessary component of building a new constitutional regime: “[F]or a new political coalition to fully translate its electoral power into legal change, it must either substantially weaken the support structure of its older rivals or create a competing support structure of its own.”

The rising Republican regime was quite adept at appointing judges broadly in line with their agenda, but “[w]here the composition of the judiciary is reshuffled without a corresponding shift in the support structure, legal change may fail to occur or, at the least, be substantially limited and poorly coordinated or implemented.”

Susan Lawrence found that the expansion of federal aid to legal services programs led to significant change in legal rules affecting the poor by providing the necessary material support to bring cases to court and build upon victories.

Support, however, should not be seen as limited to resource mobilization because lawyers must still marshal support in the law through their arguments and legal claims. This is a form of ideational support. Courts are required to provide legal justifications for their decisions and “opinions themselves, not who won or lost, are the crucial form of political behavior by the appellate courts, since it is the opinions which provide the constraining directions to the public and private decision makers.”

Legal arguments provided by lawyers frame the options available to courts even if the final decision “is the product of those litigant claims, legal bases, and judicial sympathies that the temper of the times create and join together.” In her study of civil rights in the 1940s, Risa Goluboff demonstrated that lawyers were faced with an open field of legal possibilities and their choices and interactions with courts throughout the decade shaped the options ultimately available to the U.S. Supreme Court in the 1950s. In their study

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59 See Keck, supra note 12, at 113.
60 TELES, supra note 58, at 12.
63 Martin Shapiro, The Supreme Court and Administrative agencies 39 (1968).
64 lawrence, supra note 61, at 122.
of death penalty and abortion litigation, Lee Epstein and Joseph
Kobylka make the case that ideational support was crucial: while
court-centric explanations of ideology and political environment
were important, “it is the law and legal arguments as framed by
legal actors that most clearly influence the content and direction of
legal change.”66 Similarly, Michael Paris found that how education
reformers translated their ideological goals into legally-cognizable
language affected how education reform occurred in Kentucky and
New Jersey.67 Finally, a study using plagiarism software to
compare legal briefs and U.S. Supreme Court opinions found that
10.1% and 9.4% of language in opinions was drawn directly from the
appellants’ and respondents’ briefs, respectively.68 Drawing upon
these studies, we can see suggestions of the importance of ideational
support in explaining legal development. The legal system,
however, is not a one-shot process.

Where support structure arguments focus attention on how
lawyers develop cases and legal arguments for courts to act upon,
we must also give attention to how courts react to those arguments
because their decisions become the basis for further legal actions.
In other words, legal development is an iterative process. Court
signaling theory highlights the ability of courts to trigger
arguments that they are interested in hearing.69 Vanessa Baird
argued “that the incentive to support litigation in particular policy
areas varies over time in accordance with litigants’ changing
perceptions of Supreme Court justices’ policy priorities.”70 Through
their opinions and other actions, justices send signals that they are
interested in particular kinds of claims and legal arguments and
“policy-minded litigants base their strategies of selecting cases,
issues, and legal arguments on information from the Supreme
Court.”71 For example, in an immigrant rights case the litigants
shifted to a federalism argument after an increased trend of signals

69 Signaling may come from other actors as well. Justin Wedeking has argued that
appellant litigants strategically frame their legal arguments in response to frames adopted by
other parties and lower courts. Justin Wedeking, Supreme Court Litigants and Strategic
70 Vanessa A. Baird, Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda 4 (2007) (emphasis omitted).
71 Id. at 31.
about the revival of federalism and shifted away from the preferred equal protection claim due to negative signals in that area. In a related vein, the Supreme Court’s affirmative action decisions pushed universities and litigants on both sides of the issue to reframe their approaches and challenges to the policy in the Court’s terms. Evan Mandery examined the campaign against the death penalty and specifically demonstrated how the reformers’ litigation was triggered by Justice Arthur Goldberg’s dissent from denial of certiorari, suggesting constitutional problems with capital punishment.

Another intriguing example of signaling was the constitutional conflicts of the 1930s. Barry Cushman argued persuasively that the crucial doctrinal change occurred in 1934 and it simply took a few years for New Deal lawyers to catch up. Through the favoring of some claims over others courts provide guidance on particular legal claims, which in turn shapes how litigants develop subsequent arguments: “[W]hen a new precedent emerges, litigants will react to the precedent in ways that further reinforce and contribute to the path indicated by that new precedent . . . .”

III. SUPPORT AND SIGNALING IN JUDICIAL FEDERALISM

These arguments provide a potentially strong explanation not

Donald Farole provides one of the few exceptions. In his study of obscenity and takings cases, Farole examined interest-group litigation in state and federal courts and found that “[a]ll else being
equal, interest groups typically prefer to locate policy conflicts in national rather than state courts because federal decisions have a broader impact, but where there were incentives, such as favorable state law, they would offer those arguments. But this study of interest groups is limited because such groups are necessarily policy activists with a national focus, whereas most lawyers serve individual clients and practice law in a single state and thus may have different interests. In particular, duty to their client is of foremost importance and the failure to raise state claims may have disastrous consequences for these clients. A former judge of the New York Court of Appeals noted that in a series of recent cases his court had adopted broader state protection but warned: “Obviously, if defense counsel had not argued state constitutional law . . . their clients, instead of being exonerated, would have gone to jail.” Connecticut Supreme Court Justice Robert Berdon discussed a case where a mentally ill man lost his federal claim and opines that a state claim, if made, would most likely have resulted in his removal to a mental institution rather than prison.

There is good reason to believe that the support structure for state constitutional law is generally weak. After the Warren Court’s incorporation revolution, rights jurisprudence became synonymous with the work of federal courts in general and the U.S. Supreme Court in particular. Where law schools give significant attention to state-level variations in common law subjects, they tend to neglect this possibility for constitutional law. The law is a fundamentally path-dependent institution where “courts’ early resolutions of legal issues can become locked-in and resistant to change.” Path-dependent processes do not foreclose change “but it is bounded change—until something erodes or swamps the mechanisms of reproduction that generate continuity.” The doctrine of stare decisis works to reproduce initial precedents and

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81 DONALD J. FAROLE, JR., INTEREST GROUPS AND JUDICIAL FEDERALISM: ORGANIZATIONAL LITIGATION IN STATE JUDICIARIES 14, 20–21 (1998); G. Alan Tarr, Book Review, 28 PUBLIUS 167, 167 (1998) (noting that these issues are of limited utility for studying judicial federalism because neither saw regular attention in the time period Farole studied).

82 Hancock, Jr., supra note 80, at 276–77.

83 Berdon, supra note 80, at 197.

84 Jeffrey S. Sutton, Why Teach—and Why Study—State Constitutional Law, 34 OKLA. CITY U. L. REV. 165, 166–67 (2009); Williams, supra note 78, at 245 (noting that recent attention to state constitutional law has been limited to the protection of individual liberties).

85 Hathaway, supra note 77, at 604–05.

lock in particular doctrines over time. Law schools factor into this path dependence by emphasizing federal constitutional law as a unitary concept. Even if law school is understood as implanting a particular worldview along with certain research tools, the lack of any background training surely limits the imagination of lawyers approaching cases that could potentially include state constitutional issues. The practice of state courts discussed above likely further reinforces this path dependence.

Lawrence Friedman argued that the limited development of judicial federalism “is simply the consequence of strong path dependence—that is, of a demonstrable and perhaps inevitable reliance upon federal constitutional doctrinal paths.” In essence, building an independent state constitutional jurisprudence entails taking on additional costs, which deters most courts from doing so. Similar to support structure claims, Friedman posited that overcoming the path-dependent reliance on federal constitutional law would require lawyers to present compelling state claims that are more efficient or offer some other benefit to the state courts. But as noted above, this ignores the potential for signals from state courts. Where a state court does take the step to establish new precedents, “litigants will react to the precedent in ways that further reinforce and contribute to the path indicated by that new precedent.”

Two kinds of legal signals are important in exploring why lawyers develop state constitutional claims in some areas but not others. I refer to these as the external and internal signals. “The external refers to instances where the U.S. Supreme Court has retrenched away from previous rights protection or refused to recognize rights claimed from precedent.” A lawyer seeks primarily to win her case and where federal law has soured on her, state constitutional

87 Hathaway, supra note 77, at 631–32.
89 See generally Elizabeth Mertz, The Language of Law School: Learning to “Think Like a Lawyer” (2007) (discussing the efforts of law professors to move students away from thinking about conflict in emotional and moral terms towards thinking about conflict through the lens of legal authority).
90 Friedman, supra note 88, at 789.
91 See id. at 827.
92 Hathaway, supra note 77, at 628.
93 Price, supra note 62, 336.
94 Id.
provisions provide a last ditch effort. This move to state law is limited, however, by the fact that there is usually no state constitutional law to rely upon. In such a situation, lawyers are likely to provide arguments that are still primarily concerned with the now discarded federal doctrine because that is all the law they have to work with. This is the problem of path dependence discussed above; lawyers turn to the law that is available to them because the costs of designing arguments from scratch is too high. Thus, under the external signal, state arguments are most likely to be invitations for evasion of federal retrenchment by applying the prior federal rule under the window dressing of state law.

State courts, however, may take a stronger interest in state constitutional activism and seek to provide guidance to their bars. This is the internal signal where courts seek to provide instruction and guidance by providing standards and independent law to lawyers. State courts may pursue this doctrinally in terms of particular kinds of rights claims or more broadly through instructions on how constitutional claims are to be litigated generally. With the state court encouraging the development of, and providing the seeds for, distinct state constitutional doctrines, the content of litigants’ state claims should shift. The arguments should become increasingly divorced from simple invitations for evasion of a retrenching federal court because litigants are provided with a more coherent set of law or guidelines and in turn provide the state courts with more opportunities to build that law.

In essence, my argument rests upon a claim that lawyers need law. They respond to the guidance provided by courts and develop arguments based upon the legal signals provided. As legal signals from either federal or state courts change, we should see similar alterations in how lawyers present constitutional claims.

IV. Why Focus on Search and Seizure?

This article explores issues of signaling, support, and legal arguments in search cases in four states. Search cases provide an excellent area because federal retrenchment here was extensive, especially in the 1980s. While it is unfair to say that the Burger and Rehnquist Courts completely nullified the Warren Court revolution in search and seizure law, and the Warren Court

95 See Berdon, supra note 80, at 196. In this article, Justice Berdon offers a framework for attorneys to raise state constitutional claims in Connecticut state courts. See id. at 202–15.

96 See LATZER, supra note 24, at 32–33.
experience was not exclusively expansive in protections, by the end of the 1980s “Fourth Amendment jurisprudence had clearly been given a pro-police cast.”97 As criminal cases are common in state court, they provide a significant number of opportunities for claims to be made, and search and seizure law in some ways has been one of the more active areas of judicial federalism.98 Focusing on search and seizure claims allows for tracking how changes in external and internal signals affects the behavior of litigators before state supreme courts. A single doctrinal area, even a complicated one like search and seizure, allows for examination of these effects over time. Furthermore, the four states all saw a strong presence of search arguments that are examined here in comparison to the broader set of issues discussed below: New York (18.9% of all arguments were search arguments), Ohio (11.5%), Oregon (24.3%), and Washington (15.7%).

V. RESEARCH DESIGN

This article utilizes legal briefs presented to state supreme courts involving search and seizure arguments only. However, those briefs were drawn from a broader project examining all constitutional arguments and thus some discussion of how briefs were identified is necessary. While other aspects of the litigation process, such as oral arguments, provide important information to courts, it is the legal briefs presented by parties and other actors that provide most of the information courts receive.99 I utilize the briefs presented by litigants claiming a rights violation—because the terms vary, I refer to these litigants as rights claimants.100 As my interest is in how the legal bar supports constitutional rights arguments against governmental behavior, I do not consider the opposing briefs. I also do not examine amicus curiae briefs. While amici are important means of interest-group involvement,101 my focus is on how the

97 Id. at 32.
99 See generally TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004) (discussing the influence that oral arguments, as opposed to written briefs, have on the U.S. Supreme Court).
100 Where a case involves multiple consolidated cases, I utilize the first rights claimant’s brief available in the relevant collection.
broader legal bar approaches issues of constitutional rights and not on how organized interest groups act. Thus I utilize only the rights claimant’s (who may be an interest group or represented by one) initial brief. While it is always possible that additional arguments will be made in subsequent briefs, litigants are still expected to offer their primary legal arguments in the initial brief. Further, it is not feasible to collect the entire record for each case.

My data is drawn from briefs presented to four state high courts. I utilized cases from 1970 to 2000, with the exception of Ohio where the range is 1978 to 2000. This date range is aimed at capturing how constitutional rights claims shifted over time from an era before significant interest in judicial federalism existed through the early years and into the later stages of judicial federalism where state courts were faced with the difficulty of consistently applying their state constitutions. Further, this date range ensures a wide variation in federal retrenchment. I only utilized cases from the even years of this range, however, because a long date range required trade-offs. Using alternating years allows for a larger sample of cases per year and thus reduces the likelihood of missing important developments. Alternating years provides the best compromise between completeness and an extended time period. Cases were identified through Westlaw searches of state high court opinions by state and year for any variation of “constitution.” While ideally it would be possible to search the legal briefs directly, as discussed below this is not possible because legal briefs are generally unavailable electronically. Thus, I rely upon the final opinions for indications that constitutional arguments were made. This may miss some claims, but even where a court does not decide a constitutional issue it frequently notes that one was made and explains why it is avoiding the claim.

I then read the syllabus and head notes of the opinions to identify constitutional rights claims. I included nearly all rights claims where state and federal provisions were present. I generally included all claims involving the rights guaranteed by the Bill of Rights—except for the unincorporated provisions guaranteeing grand juries and civil jury trials—and the equal protection and due process clauses of the Fourteenth Amendment. By including a broad set of rights issues I avoid problems of self-selecting only


102 This range was caused by resource limitations only.

103 Williams, supra note 79, at 220.

104 See infra Appendix.
areas where state arguments were likely. Including a wide variety of issue areas ensures a significant variation of federal retrenchment across issue areas and also allows for surprising and unexpected findings. The Appendix provides more information about specific state selection and problems unique to each state. Given this broad set of rights claims, for this article I simply pulled out all the search and seizure arguments for analysis. Some arguments or cases from odd years may be discussed but they are not included in the figures because they were not included in the process of the broader sampling procedure for each state detailed in the Appendix. In short, each state was chosen to represent different internal signals. The Ohio Supreme Court showed a basic degree of apathy for judicial federalism and rarely pushed state constitutional rights issues. The New York Court of Appeals engaged with state constitutional law quite actively in one area, the right to counsel, but generally adopted an ad hoc approach towards other state constitutional rights with little clear guidance about what the court wanted to see in state claims or why some were accepted. The Washington Supreme Court adopted a strong preference for the criteria approach, going so far as to declare that it would reach state issues only when briefing was complete as to those criteria. The Oregon Supreme Court declared a preference for the primacy approach and treated state constitutional issues as their prime responsibility, only reaching federal issues if the case remained unresolved by state issues.

A. Coding Rules

Scholars have adopted a variety of approaches for how to utilize legal briefs. A number of scholars utilize only parts of the briefs. McGuire and Palmer argued that the best method is to use the “questions presented” section, as litigants are expected to clearly summarize the points they present. Spriggs and Wahlbeck suggested that the best method is to examine the point headings in

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105 See infra Appendix.
106 See infra Part V.B.1.
107 See infra Part V.B.2.
108 See infra Part V.B.3.
109 See infra Part V.B.4.
the “argument” section.\textsuperscript{111} Legal briefs are organized through separate point headings intended to summarize the following argument and, thus, the headings provide an indication of the claims offered.\textsuperscript{112} Comparato adopted a hybrid of these approaches by examining the table of contents (that usually includes the point headings), the summary of arguments, and the table of authorities.\textsuperscript{113} Epstein et al., however, countered that the whole brief is the proper basis for analysis because the entire body is part of the legal record.\textsuperscript{114} Given my focus not only on the presence of specific constitutional arguments but also on the way those arguments are made, as well as the constitutional discourses used, I utilize a form of this last approach. However, copying briefs is a costly procedure, especially for nearly 1200 briefs included in the complete study, and thus I utilized only portions. I copied, wherever present, the table of contents, questions presented or argument summary section, and elements of the argument section. I include the complete point for any argument that clearly involved, or appeared to involve, a constitutional rights issue and discarded any nonconstitutional issue or nonrights issue.

Coding constitutional arguments as either state or federal can be complicated at times and I followed three rules.\textsuperscript{115} First, where the point heading or point clearly identifies the argument as either federal or state based alone it is coded accordingly. This holds true even in arguments that are presented as solely state constitutional issues but rely heavily on federal cases and doctrines. Second, where the point cites both federal and state constitutional provisions I follow Farole’s standard, with the state citation treated as filler where it is simply presented as part of a string cite without any independent development or rationale.\textsuperscript{116} However, where the reference to a state provision is supported by some kind of supporting argument, even if vague, it is coded as a separate state argument even if it is not included in a separate point. Third, at times an argument fails to specify a constitutional basis. Instead, a point may simply refer generally to a “right to counsel,” for example,

\begin{footnotes}
\item[112] Id. at 370.
\item[113] COMPARATO, supra note 101, at 14–15.
\item[115] See Price, supra note 62, at 340–41. In this article I set forth identical coding rules because it involves a similar project.
\item[116] FAROLE, supra note 81, at 33.
\end{footnotes}
and I examined the precedents offered to determine the coding. Where the precedent is dominated by federal cases, I code the argument as federal. I follow Esler’s method of examining those decisions where the precedent points primarily to state cases, and if the precedents appear to rely on independent analysis of the state constitution, I code the argument as state based.\textsuperscript{117} Given the assumption that federal law will tend to dominate constitutional claims, my rules are intended to err in favor of state coding where arguments are vaguely presented.

\textit{B. State Selection}

Four states were chosen to represent a reasonable diversity in internal signals from low to high engagement with state constitutional law. Here, I summarize the four states chosen and explain their approaches to state constitutional rights issues. The Appendix has information about the location of briefs and difficulties experienced in each state.\textsuperscript{118}

1. Ohio

It is safe to say that all state high courts have issued some rights-protective decisions beyond the level set by the U.S. Supreme Court since the 1970s,\textsuperscript{119} but many state high courts are less than enthusiastic about judicial federalism.\textsuperscript{120} The Ohio Supreme Court represents such courts. While it has issued broader state protections in a few cases, the tendency of the court has been a policy of “unreflective adoptionism” of, or lockstep with, U.S. Supreme Court precedent; the immediate application of federal law and doctrines without any discussion of even the possibility that state law may require some different rule of law.\textsuperscript{121} The Ohio Supreme Court has followed this path consistently, despite some protestations to the contrary.

Historically, the Ohio Supreme Court was controlled by “conservative, ‘old stock’ Republicans who fashioned the law to

\textsuperscript{117} See Esler, supra note 20, at 28.
\textsuperscript{118} See infra Appendix.
\textsuperscript{119} See e.g., People v. Weaver, 909 N.E.2d 1195, 1202 (N.Y. 2009); State v. Flores, 570 P.2d 965, 968 (Or. 1977); State v. Coe, 679 P.2d 353, 360 (Wash. 1984).
conform to the values and interests they shared with small town and rural Ohioans, with business and industry.”122 Expressing this conservatism in the area of individual rights, the court in the 1960s was highly critical of the Warren Court revolution in criminal law and resisted it to some degree.123 In 1978, however, a Democratic majority—initially a 4 to 3 majority but quickly expanding to 6 to 1124—came to power and reoriented the court so that “[v]irtually overnight the court became ‘pro-labor and highly urban’ in orientation.”125 The court exercised this orientation by dramatically altering the law in areas of torts, tenant rights, and workers’ rights.126 But this “quiet revolution” did not reach constitutional law.127 While this new democratic majority dramatically changed the court’s approach to various areas of common and statutory law, it showed no real interest in state constitutional rights.128 The traditional Republican dominance reemerged in 1986 and continued this apathetic view of state constitutional rights, though a few justices expressed some support.129

Porter and Tarr discussed a number of cases in the late 1970s and early 1980s that were prime candidates for judicial federalism but the court rejected that possibility in all of them, usually without any serious consideration.130 Even in the single instance where the court declared that state law required a protective rule, it stressed that this protective rule was necessary to meet federal levels of protection.131 When faced with a school-funding challenge that was successful in both the trial and appellate courts, the court, with only a single dissent, rejected the challenge by adopting the deferential federal test.132 While other state high courts at this time may have striven to establish themselves as constitutional innovators, the Ohio Supreme Court maintained its image as “neither an innovator nor an enthusiastic emulator, deferential toward other branches of

122 TARR & PORTER, supra note 48, at 127.
123 Id. at 156.
124 Id. at 128. While Ohio general elections for judges are nominally nonpartisan, all candidates are nominated through partisan primary elections. Id. at 126.
125 Id. at 129.
126 See id.
127 See id. at 128–32 & n.8 (collecting cases and discussing the Ohio Supreme Court’s reversal of long lines of precedent in areas such as torts, tenants’ rights, and workers’ rights, but not constitutional rights).
128 See id.
129 Id. at 124, 154, 155; see infra text accompanying note 151–52 and accompanying text.
state government, and anxious to avoid” controversy. However, there was some halting movement away from this image in the 1990s.

In Arnold v. Cleveland, the court issued an unusually detailed exploration of judicial federalism and interpreted its right to bear arms provision more broadly than the Second Amendment, though it ultimately upheld the challenged ban on assault weapons. The court discussed the lengthy set of federal precedents recognizing the legitimacy of judicial federalism and briefly noted the experience in other states and scholarly commentary on the movement towards greater state constitutional activism. The court approvingly quoted a Texas declaration that “[w]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.” In engaging with the state right to bear arms, the court expressed an apparently enthusiastic endorsement of judicial federalism:

In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

While this may have been a ringing endorsement for judicial federalism, the actual practice of the court differed only minimally. The approach to criminal rights issues was generally still to adopt the federal rule. The one prime exception was

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133 Porter & Tarr, supra note 130, at 154.
134 Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993).
135 Id. at 168–69.
136 See id. at 171.
137 Id. at 175.
138 Id. at 168.
139 Id. at 169 (quoting Davenport v. Garcia, 834 S.W.2d 4, 12 (Tex. 1992)).
140 Arnold, 616 N.E.2d at 169.
142 Id.
hardly a paradigm of independent state analysis. The court focused solely on the federal decisions for search of vehicles before simply asserting a state basis just in case: “If [the U.S. Supreme Court’s decision in] Belton does stand for the proposition that a police officer may conduct a detailed search of an automobile solely because he has arrested one of its occupants, on any charge, we decline to adopt its rule.”\(^{143}\) No discussion of the basis for this rejection occurred beyond a footnote noting that state courts can provide greater rights protection.\(^{144}\) In 2002, the court reversed this decision, concluding that there were insufficient “persuasive reasons to depart from the principle that [the state and federal provisions] should be harmonized whenever possible.”\(^{145}\) In other cases, the court rather quickly retreated from the hint of an independent state constitutional basis for rights protective decisions. For example, in two cases where the Ohio Supreme Court found a rights violation that the U.S. Supreme Court subsequently reversed, the Ohio Supreme Court simply deferred to the federal decision.\(^{146}\) One case involved a search and the other struck down the state’s hate crime enhancement as violating free speech rights.\(^{147}\) On remand in the speech case, the court summarily reversed its prior decision and upheld the law under both constitutions without discussion.\(^{148}\) In the search case, the court noted the lengthy history of state cases adopting a principle of “harmonizing” the meaning of federal and state search provisions.\(^{149}\) Justice Craig Wright dissented from the speech decision on remand, complaining forcefully that the court should not simply conform its state decisions.\(^{150}\) Justice Wright, joined occasionally by Justice Paul Pfeiffer, would continue to advocate for at least some attention to the state constitution, though they were generally unsuccessful apart from a few decisions.\(^{151}\)

The 1990s did see a small number of cases expanding rights

\(^{144}\) Id. at 115 n.3.
\(^{145}\) Murrell, 764 N.E.2d at 993.
\(^{148}\) Wyant, 624 N.E.2d at 724.
\(^{149}\) Robinette, 685 N.E.2d at 766.
\(^{150}\) Wyant, 624 N.E.2d at 724–25 (Wright, J., dissenting).
\(^{151}\) Bettman, supra note 141, at 495–97.
protection. In 1997 a narrowly-divided court reversed its earlier
decision and invalidated the school funding system.\textsuperscript{152} In 2000 the
court rejected the limited federal protections for religious
freedom.\textsuperscript{153} Finally, in 1995 the court held that it would continue to
adhere to its earlier defamation cases after federal retrenchment on
the proper standard for determining whether a statement is one of
fact or constitutionally protected opinion.\textsuperscript{154} While these examples
suggest a slightly increased willingness to consider state issues,
the dominant trend was still to defer to federal law on rights issues
through a continued lockstep approach, even if it was minimally
more robust.\textsuperscript{155}

2. New York

The New York Court of Appeals hinted that it might adopt a form
of the criteria test in \textit{People v. P.J. Video, Inc.},\textsuperscript{156} a case on remand
from the U.S. Supreme Court.\textsuperscript{157} The court admitted it was bound
by the reversal on federal grounds, but noted that state law is solely
in its discretion.\textsuperscript{158} The court discussed the criteria test in the
language of academics of the time period, as between interpretative
and noninterpretive factors.\textsuperscript{159} Interpretative approaches point to
the importance of text, history, and structure of the state
constitution, whereas noninterpretive approaches look to state
traditions, matters of particular local concern, or any distinctive
attitudes of the citizenry.\textsuperscript{160} However, the court failed to seriously
commit to this approach or any other. A few years later, the court
openly admitted that it lacked consistency towards judicial
federalism: “[T]his Court has not wedded itself to any single
methodology, recognizing that the proper approach may vary with
the circumstances.”\textsuperscript{161} Commentators and at least one former judge
described the Court of Appeals’ approach as a “primarily reactive
and supplemental” approach to state law where “the dominant

\begin{thebibliography}{9}
\bibitem{DeRolph}
\bibitem{Humphrey}
Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000).
\bibitem{Vail}
Vail v. Plain Dealer Publ’g Co., 649 N.E.2d 182, 185 (Ohio 1995).
\bibitem{Williams}
Robert F. Williams, \textit{The New Judicial Federalism in Ohio: The First Decade}, 51 CLEV.
\bibitem{People}
\bibitem{Id}
\textit{Id.} at 557.
\bibitem{Id2}
\textit{Id.} at 559–60.
\bibitem{Id3}
\textit{Id.} at 560; see also \textit{John Hart Ely, Democracy and Trust: A Theory of Judicial
Review} 1 (1980) (discussing “interpretivism” and “noninterpretivism”).
\bibitem{PJVideo}
P. J. Video, Inc., 501 N.E.2d at 560.
\bibitem{Immuno}
\end{thebibliography}
tendency has been for the court to wait until federal law is settled before deciding to provide adequate and independent state grounds for a rights sustaining decision.\textsuperscript{162}

Thus, New York fits within the norm for most state courts where the court engages with state constitutional provisions in piecemeal fashion without giving a great deal of guidance to its bar. With one major exception,\textsuperscript{163} the Court of Appeals typically pushed independent analysis in areas only after the Supreme Court retracted protections. This is dramatically illustrated by three 1986 cases where the Supreme Court reversed decisions by the Court of Appeals that had accepted a rights claimant’s federal argument.\textsuperscript{164} In an unusual demonstration of resistance, the Court of Appeals reinstated all three cases under state constitutional law,\textsuperscript{165} echoing a previous statement that the court “perceive[d] no reason to depart from [its prior] conclusion” simply because the Supreme Court rejected that conclusion.\textsuperscript{166} While not as dramatic, most of the examples of state constitutional activism followed a similar path of state expansion after federal retrenchment: for example, the state action doctrine was expanded after the Supreme Court limited the doctrine;\textsuperscript{167} the Court of Appeals refused to follow the newly weakened federal test for anonymous informants in search cases;\textsuperscript{168} and after an unusually vigorous and public dispute about the legitimacy of rejecting federal precedent, the Court of Appeals rejected both the open fields exception as well as the Supreme Court’s broad deference to administrative searches.\textsuperscript{169}

\textsuperscript{162} Peter J. Galie, \textit{Modes of Constitutional Interpretation: The New York Court of Appeals’ Search for a Role}, 4 EMERGING ISSUES ST. CONST. L. 235, 236, 249 (1991); \textit{see also} Hancock, Jr., \textit{supra} note 80, at 285–86 (discussing various analytical frameworks employed by the New York Court of Appeals when dealing with cases involving judicial federalism); Stewart F. Hancock, Jr., \textit{New York State Constitutional Law—Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence}, 77 ALB. L. REV. 1331 (2013/2014) (discussing several cases that employed judicial federalism).


3. Oregon

The experience of state constitutional law in Oregon is wrapped up heavily in the leadership of Justice Hans Linde. Linde has been described as the “godfather” of state constitutional law. One prominent legal scholar stated, “along with Benjamin Nathan Cardozo and Roger Traynor, [Linde] is easily one of the three most important state court judges in this century.” While most academics and judges became interested in state constitutional law primarily as a reaction to the retrenchment of federal protections, Linde’s interest predated that shift and rested on a sincere appreciation of state constitutions as documents of independent force deserving of attention without regard for federal law. Over time, his early academic theories came to dominate his court and in turn drew lawyers into the debate.

As discussed above, Linde argued that the state constitution should be treated as the primary issue in any constitutional dispute because state and federal constitutional claims “are not cumulative but alternative” and “[c]laims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.” Primacy “obliges counsel and court to give independent professional attention to the text, history, and function of state constitutional provisions” rather than simply borrow concepts and doctrines wholesale from federal doctrine. Linde continued to advocate this position while on the bench.

Linde brought his primacy approach to the bench when he was appointed to the Supreme Court of Oregon in 1977. In State v. Flores, Linde had his first opportunity to attempt a change in the court’s approach. The case concerned consent to search and

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172 Brennan, Jr., supra note 15, at 495. For a criticism of Brennan’s commitment as a function of retrenchment rather than a sincere commitment to state constitutional law, see generally Maltz, supra note 17.
173 Linde, supra note 1, at 133–35.
174 See infra notes 189–212 and accompanying text.
175 Linde, supra note 1, at 134–35 (emphasis omitted).
176 Id. at 182.
177 See generally Hans A. Linde, Does the “New Federalism” Have a Future?, 4 EMERGING ISSUES ST. CONST. L. 251 (1991); E Pluribus: Constitutional Theory and State Courts, supra note 80; First Things First: Rediscovering the States’ Bills of Rights, supra note 80.
178 State v. Flores, 570 P.2d 965 (Or. 1977).
whether police are required to give notification of the right to refuse consent. The majority relied upon Fourth Amendment law to reject the claim and noted that while it was “at liberty to adopt a stricter test under [its] own constitution . . . [it saw] no persuasive reason to do so.” The court noted a history of treating the search provisions as identical and that there was no reason to alter this relationship. In his dissent, Linde commended the majority on its willingness to even mention, however briefly, the state provision, but criticized it for asking the wrong question:

The question is not whether article I, section 9 was meant to embody the same principle as the federal fourth amendment . . . . Of course it was. It may equally be pointed out that the fourth amendment meant to embody that principle from the state constitutions that preceded the federal Bill of Rights.

. . . .

The question is, rather, what safeguards this principle . . . extends to the people of Oregon. That question . . . cannot be answered by the Supreme Court of the United States but only by this court.

Even where he achieved some measure of victory in this debate, Linde faced strong criticism from a court divided over the legitimacy of judicial federalism. In another 1977 case, Linde wrote for the court holding that a person accused of minor traffic offenses is entitled to legal representation. Linde focused on the state provisions with only scant attention to federal law, eliciting a concurring opinion complaining of his reliance on the state constitution because in the opinion of the concurring judge “the same result is required by [the federal Constitution] and is not foreclosed by decisions of the Supreme Court of the United States.” In another 1977 case, a dissent criticized Linde’s emphasis on state law by relying on stare decisis, pointing out that as recently as 1976 the court had treated parallel state and federal provisions as identical “[i]n the absence of some important policy reason for giving a broader interpretation” to the Oregon

179 Id. at 967.
180 Id. at 968 (citations omitted).
181 Id. at 969.
182 Id. at 970, 971 (Linde, J., dissenting) (citations omitted).
184 Id. at 61.
185 Id. at 61 (Tongue, J., concurring).
Constitution.\textsuperscript{186} Slowly, however, Linde’s views took control of his court. This change was helped by the retirement of some critics, such as Justice Howell in 1980,\textsuperscript{187} as well as his success at convincing colleagues as to the propriety of his views.\textsuperscript{188} In 1981, Linde succeeded in writing primacy into Oregon Law:

The proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.\textsuperscript{189}

Linde solidified the primacy approach in \textit{State v. Kennedy}.\textsuperscript{190} He used “Kennedy’s meandering procedural history” to finally convince his court of the propriety of his approach.\textsuperscript{191} The meandering history began when the Oregon Court of Appeals issued a cryptic opinion that failed to clearly express the legal basis and, after the Oregon Supreme Court denied review, the U.S. Supreme Court reversed.\textsuperscript{192} After the court of appeals reversed its earlier decision, the Oregon Supreme Court agreed to hear the case.\textsuperscript{193} Linde argued that the “history of this case demonstrates the practical importance of the rule . . . that all questions of state law be considered and disposed of before reaching a claim that this state’s law falls short of a standard imposed by the federal constitution on all states.”\textsuperscript{194} By simply forgoing consideration of decisive Oregon state law, the court of appeals caused a waste of time and “needlessly spur[red] pronouncements by the United States Supreme Court on constitutional issues of national importance in a case to whose decision these may be irrelevant.”\textsuperscript{195} Had the court of appeals

\textsuperscript{188} See Wayne V. McIntosh & Cynthia L. Cates, Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas 70, 72 (1997).
\textsuperscript{189} Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981).
\textsuperscript{190} \textit{State v. Kennedy}, 666 P.2d 1316, 1318 (Or. 1983).
\textsuperscript{191} McIntosh & Cates, supra note 188, at 72.
\textsuperscript{193} Kennedy, 666 P.2d at 1318–19.
\textsuperscript{194} Id. at 1318.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 1319.
followed the correct approach of treating state law first, the criminal defendant’s claim would have been easily dismissed and saved the time and expense of an irrelevant judgment from the U.S. Supreme Court. In *Kennedy*, Linde spoke for a unanimous majority apparently convinced of the logical and practical value of primacy in constitutional rights disputes.

Other members of the Oregon Supreme Court became enthusiastic advocates of primacy. Justice Wallace Carson wrote an article, based on a speech to the Oregon Criminal Defense Lawyers Association, extolling the virtues of primacy and instructing lawyers in how they should approach the subject of constitutional rights arguments. Justice Robert Jones echoed a similar view with a more strict warning to lawyers: “Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice.”

Even early critics of primacy seemed to shift their positions. In 1986, Justice W. Michael Gillette was elevated from the court of appeals. While on the court of appeals, Gillette had issued biting criticism of the primacy movement and especially how it left the lower courts to build precedent completely anew, but as a justice he adopted the primacy view of the Oregon Constitution even though he disputed the substantive meaning at times. For example, in *State v. Owens* the court was deeply fractured over how far a state search precedent went in limiting police action. Even though Linde was in dissent on the substantive issue of the case, one commentator argued that *Owens* was a Linde victory because “the opinions in the case are purely Oregon Constitutional law.” Justice Gillette’s concurrence suggests he agreed with this assessment: “I should like to think that the Oregon Constitutional Revolution has been accomplished. The primacy of our state’s constitution, so long neglected, is now accepted by all. It remains to

197 See id. at 1319–20.
198 McIntosh & Cates, supra note 188, at 72.
199 Carson, Jr., supra note 80, at 641, 643.
205 Id. at 1742.
go forward on a new road, a road which will—like most roads under construction—involve an occasional detour. The disagreement shifted from whether the state constitution deserved independent interpretation to how such interpretation should proceed.

Unlike the Washington Supreme Court discussed below, the Oregon Supreme Court showed relatively little concern for the form of arguments. It did not issue broad guidance beyond statements to look at the state’s text, history, and precedent. The court continued an earlier policy of accepting claims of unconstitutional invasion of rights when first made on appeal. In *Sterling v. Cupp* the court noted that it still discouraged generalized constitutional attacks with only string cites to constitutional provisions, but adopted a deferential standard: “[P]laintiffs did at least cite relevant sections of the Oregon Constitution to the trial court, although they developed their argument under [the state provision] only in response to this court’s inquiry, perhaps because counsel commonly tend to search for sources in case law.” Thus, poor briefing is more indicative of the weak jurisprudence the court has given so far and less a criticism of the lawyers. In her memoir, Justice Betty Roberts admitted that Linde “convinced [her] that [they] should rely on Article I Section 20 of the Oregon Constitution” in a major gender rights case rather than on the claimant’s brief. These early foundational primacy cases saw little input or help from the legal briefs; instead it seems that Linde, who tended to take these cases himself, took it upon himself to develop the jurisprudence for lawyers to rely upon.

4. Washington

The Washington Supreme Court responded to the judicial federalism movement by expressing a clear state constitutional theory to guide how lawyers were expected to argue such claims.

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206 *Owens*, 729 P.2d at 531–32 (Gillette, J., concurring).
209 BETTY ROBERTS, WITH GRIT AND BY GRACE: BREAKING TRAILS IN POLITICS AND LAW, A MEMOIR 241 (2008).
211 This subpart overlaps with my prior writing on Gunwall. See Price, supra note 62.
Similar to the Oregon experience under the leadership of Hans Linde, the primary push came from Justice Robert Utter, who published widely on state constitutional theory and its application in Washington. The court adopted a strong preference for hearing state constitutional claims but only when they were properly presented. While initially flirting with a quasi-primacy approach, the court ultimately settled on the supplemental criteria test.

The first attempt at clarity came in State v. Coe, where Justice Utter wrote for the court declaring that the constitutional challenge to a judicial order forbidding broadcasting of trial evidence should first be examined under the state constitution. Utter defended this approach as necessary to be faithful to the two operative constitutions controlling state government. The very nature of the federal system and differences between the constitutions along with the histories of both “clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty.” Moreover, regular engagement with the state constitution allows the court to “develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied.” This body

213 A 1980 survey of Washington law professors rated Utter as the most influential member of the court. See CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 327 (1988). Perhaps not surprisingly given the correlation of ideology and support for judicial federalism, a 1980 survey of former law clerks and appellate attorneys found Utter to be the most liberal justice as well as the one most willing to actively use the court’s power. See id. at 320–21. This liberal reputation led to an unsuccessful challenge in the 1980 election after two prior uncontested elections. Id. at 182.


216 Id. at 359.

217 Id.

218 Id.
of law will be more legitimate because it “will not appear to have been constructed to meet the whim of the moment.”\textsuperscript{219} Finally, it is simply illogical to apply federal law where narrower state law, whether common, statutory, or constitutional, would have been sufficient.\textsuperscript{220} Though state law is the preferred method for constitutional resolution, the court maintained it should also resolve the federal issues despite the fact that the state issue was dispositive.\textsuperscript{221} Utter justified this approach as maintaining participation in the national debate.\textsuperscript{222}

Two years later, in \textit{State v. Gunwall},\textsuperscript{223} the court revised its position by specifying a clear preference for the criteria approach to state constitutional law in a case about whether a warrant is required to obtain phone records or to attach a pen register to a phone line.\textsuperscript{224} The court expressed concern with the legitimacy of judicial federalism noting that

\begin{quote}
any of the courts now resorting to state constitutions rather than to analogous provisions of the United States Constitution simply announce that their decision is based on the state constitution but do not further explain it. The difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.\textsuperscript{225}
\end{quote}

\textit{Gunwall} established six “nonexclusive neutral criteria” that are necessary for demonstrating whether “the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”\textsuperscript{226} These criteria were specifically aimed at guiding counsel in arguing state constitutional issues as well as ensuring that any expansive state constitutional holding is based on “well founded legal reasons and not by merely substituting

\begin{footnotes}
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 361–62.
\textsuperscript{223} State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986).
\textsuperscript{224} Id. at 809.
\textsuperscript{225} Id. at 811–12.
\textsuperscript{226} Id. at 811.
\end{footnotes}
our notion of justice for that of duly elected legislative bodies or the United States Supreme Court.”

After Gunwall’s guidance proved less than effective the court strengthened the test. In State v. Wethered, the court declared that the Gunwall factors were not optional and that

[b]y failing to discuss at a minimum the six criteria mentioned in Gunwall, [claimant] requests us to develop without benefit of argument or citation of authority the “adequate and independent state grounds” to support his assertions. We decline to do so consistent with our policy not to consider matters neither timely nor sufficiently argued by the parties.

While other courts may have decided to expand Miranda-type protections, the court declared that “[it would] not consider that question until the issue [was] adequately presented and argued to [it].” Subsequent cases consistently reiterated this rule, requiring full Gunwall briefings before the court would consider the issue. Hugh Spitzer examined the 108 instances where the court discussed Gunwall through 1997, finding that in nearly 60% of cases it refused to consider the issue solely because of inadequate briefing.

Later cases also encouraged early complete briefing, refusing to consider issues where a Gunwall analysis was made only in late reply or supplemental briefs. As the cases accumulated and developed a strong and clear body of law the court became less strict holding that “[n]o Gunwall analysis is necessary in [certain] case[s] because we apply established principles of state constitutional jurisprudence,” but warning that “[a] Gunwall analysis is nevertheless required in cases where the legal principles are not firmly established.”

A later analysis by Spitzer found that while Gunwall was primarily used to block claims in its early years, through consistent reiteration it became less about whether to interpret the state constitution and more about how to interpret

227 Id. at 813.
228 Price, supra note 62, at 338.
230 Id. at 800–01 (quoting Michigan v. Long, 463 U.S. 1032, 1035 (1983)) (citation omitted).
231 Wethered, 755 P.2d at 801.
233 See State v. Hudson, 874 P.2d 160, 167 (Wash. 1994) (“To allow Hudson to engage in a full Gunwall analysis so late in the appeal would encourage parties to save their state constitutional claims for the reply brief and would lead to unbalanced and incomplete development of the issues for review.”).
those provisions.235

VI. EXPECTATIONS

The basic argument of this article centers on a claim that lawyers respond to the law (signals) they are given—that lawyers need law. If this claim has merit, then we should see differences over time and between states. With the external signal, we should see state constitutional arguments emerge as the U.S. Supreme Court retrenches rights protections. But the substance of these retrenchment-influenced arguments is likely to be focused on policy critiques of the change in federal law, probably with significant reliance on federal dissenters. As a state court offers greater internal encouragement, however, we are likely to see a divergence in form and substance from retrenchment based arguments. The arguments should become more independent and less clearly reactive to federal changes, tracking instead to the signals and growing body of state law.

VII. SEARCH EXPERIENCE

A. Aggregate Experience

Turning to basic aggregate data, Figure 1 presents the percentage of federal and state arguments for all years. Variation is rather high, with a low of only 7% state arguments in Ohio to 50% in Oregon. Given the fact that federal retrenchment was consistent and equally applicable to all four states, this wide degree of variation must be due to another influence. As presented above, the most dramatic difference in these four states is in how the state high courts approached judicial federalism. As we might expect, the Ohio Supreme Court showed little interest in judicial federalism and thus Ohio claimants rarely presented such claims. While the New York Court of Appeals demonstrated some interest in expanding state search protections, it gave little guidance as to why it expanded protection in some cases and not others, and New York claimants primarily offered arguments only in cases of fairly clear federal retrenchment. In Oregon and Washington, however, where state constitutional methodology was relatively explicit, claimants responded with a high degree of state search arguments.

Figure 2 demonstrates this even more clearly. It shows the same breakdown of arguments by percentage but separates the data into two time periods, 1970 to 1984 and 1986 to 2000, for two reasons. First, 1984 is a good cutoff point because the U.S. Supreme Court issued two of its most important retrenchment decisions in 1983 and 1984. Second, as detailed above, the internal signals in Washington and Oregon became distinct and relatively concrete in the early- to mid-1980s. The data show the expected evidence of change in search claims; after 1984 there was a significant increase in state constitutional activity in all states except Ohio. Again, however, the variation between states is dramatic, with an impressive 72% of search arguments being state based in Oregon after 1984. The variation in internal signals seems to be the only reasonable explanation assuming that lawyer quality does not vary between states in a significant manner and that all states

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237 See supra Part V.B.1–2.
238 I do not assume state constitutional arguments are evidence of lawyer quality.
saw reasonably similar search issues. I now turn to an examination of the states individually to explore how the claimants presented state claims over the time covered.

**Figure 2: Percentage of Federal and State Arguments by Time Periods**

![Graph showing percentage of federal and state arguments by time periods]

**B. Ohio**

As already discussed, the Ohio Supreme Court showed little interest in judicial federalism and was especially resistant to expansion of criminal procedural rights. The one exception to this resistance occurred in *State v. Brown* and hardly represented a paradigm of independent state analysis. *Brown* involved a vehicle search incident to an arrest and the court relied on federal law in nullifying the search but included a state basis just in case: “If [the U.S. Supreme Court’s decision in] *Belton* does stand for the proposition that a police officer may conduct a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule.”

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239 As described in the Appendix, the Ohio sample begins in 1978. See infra Appendix.
240 See supra Part V.B.1.
basis for this rejection occurred beyond a footnote noting that state courts can provide greater rights protections.\textsuperscript{242} Subsequent cases did not follow up on this minimal invocation of judicial federalism. For example, on remand from a U.S. Supreme Court reversal of a prior search decision that at least cited to the state provision along with the Fourth Amendment, the court noted the lengthy history of state cases adopting a principle of “harmoniz[ing]” the meaning of federal and state search provisions.\textsuperscript{243} In 2002, the court reversed even the anemic statement in \textit{Brown}, concluding that there were insufficient “persuasive reasons to depart from the principle that [the state and federal provisions] should be harmonized whenever possible.”\textsuperscript{244} The internal signals then were minimal and anemic, and the law provided to Ohio lawyers continued to focus on federal doctrine alone.

While a limited degree of state constitutional search claims were expected, the low number—there were only four state search claims in the sample—is surprising given the strong degree of federal retrenchment. In many cases the issues revolved around fairly standard and stable Fourth Amendment claims such as the \textit{Terry} stop-and-frisk rule. But other cases involved issues where state claims may have been likely. For example, one claimant complained of a jail’s policy of strip-searching newly arrested individuals and argued the issue as a matter of federal law only, with no mention or citation to the state provision\textsuperscript{245} despite the fact that the U.S. Supreme Court had upheld a similar policy.\textsuperscript{246} Of the four state search claims offered, none were well developed and much of that confusion resulted from the court’s own jurisprudence. Perhaps the clearest state argument, though brief, attacked the good faith exception. In \textit{State v. Wilmoth},\textsuperscript{247} claimant relied primarily on distinguishing federal case law but provided a brief state claim that “[t]he Court should reject the cost-benefit analysis utilized by the United States Supreme Court and adopt” the prior protective federal doctrine.\textsuperscript{248} The claimant also relied upon a rather confusing precedent, \textit{State v. Burkholder},\textsuperscript{249} where the

\begin{itemize}
\item \textsuperscript{242} \textit{Id.} at 115 n.3.
\item \textsuperscript{243} \textit{State v. Robinette}, 685 N.E.2d 762, 767 (Ohio 1997).
\item \textsuperscript{244} \textit{Murrell}, 764 N.E.2d at 963.
\item \textsuperscript{245} Brief of Appellee at i–ii, 6–10, \textit{Fricker v. Stokes}, 490 N.E.2d 577 (Ohio 1986) (No. 85-1177).
\item \textsuperscript{246} \textit{Bell v. Wolfish}, 441 U.S. 520, 558 (1979).
\item \textsuperscript{247} \textit{State v. Wilmoth}, 490 N.E.2d 1236 (Ohio 1986).
\item \textsuperscript{248} \textit{See Brief of Appellant at 9, Wilmoth}, 490 N.E.2d 1236 (Nos 850072).
\item \textsuperscript{249} \textit{State v. Burkholder}, 466 N.E.2d 176 (Ohio 1984), overruled by \textit{State ex rel. Wright v.}
syllabus stated that the decision rested solely on the state provision, but the text of the opinion cited both the state and federal provision and primarily relied upon the latter. In fact, in 1995, a claimant with a nearly identical case repeatedly disclaimed any intent to seek a broader degree of rights protection, arguing that federal law provided all the necessary protection. The other search claims were minimalist in nature. One claimant attacked a statute allowing warrantless inspection of pharmaceutical records, primarily focusing on a lengthy federal argument distinguishing a negative federal precedent, but closing with an assertion, unsupported by any significant argument, that the precedent should be evaded under state provision if the federal claim failed:

[T]he provision of the Ohio Constitution against unreasonable searches and seizures operates independently of any provision of the United States Constitution. To this end, the Court of Appeals was required to review the issues under the Ohio Constitution. In this regard, this Court need not be limited by the United States Supreme Court decisions. It is free to expand the protection afforded an individual beyond those granted by the United States Constitution.

Domestic violence advocates challenged telephone company policies allowing easier identification of customers relying primarily on federal precedent and, because it was fairly negative, the claimants attempted to shoehorn in a stronger state rule by noting some earlier discussion of federal and state law together as implying a stronger rule. The court’s anemic statement of a state rule in Brown was used to support a similarly undeveloped assertion in a car stop case but with no discussion of the reasoning for a broader state rule—though this may be unsurprising given that the court

Ohio Adult Parole Auth., 661 N.E.2d 728 (Ohio 1996); Brief of Appellant, supra note 248, at 8.  
250 Burkholder, 466 N.E.2d at 176–77, 178.  
251 See Appellee’s Merit Brief at 3–5, State ex rel. Wright, 661 N.E.2d 728 (No. 94-1222). It appears that the State’s brief was strongly critical of the Ohio Supreme Court’s original, messy decision. Appellant’s Merit Brief at 22–24, State ex rel. Wright, 661 N.E.2d 728 (No. 94-1222).  
254 See Reply Brief of Appellant at 16–17, Ohio Domestic Violence Network v. Pub. Utils. Comm’n, 638 N.E.2d 1012 (Ohio 1994) (No. 93-1453) (discussing how the commission should not be permitted to offer an automatic callback service because it violates constitutional rights to privacy and is subject to both state and federal constraints).  
in *Brown* also did not provide any reasoning for its brief assertion.

One particularly brazen claimant laid the blame for the weak development of state search arguments at the foot of the Ohio Supreme Court.\(^{256}\) While *Arnold* may have declared “the Ohio Constitution is a document of independent force,” the Ohio Supreme Court had recently disclaimed any broader protection under the state search provision, holding that it “should be harmonized and exist co-extensively with the protections of the Fourth Amendment.”\(^ {257}\) The court’s consistent refusal to treat the state search provision independently gave lawyers no guidance on how to make such arguments or any indication that the court wanted to hear such issues. Thus, lawyers provided the legal arguments they had been trained to provide and utilized the law their state courts gave them to work with—that is, federal constitutional law.

**C. New York**

As Figure 2 demonstrates, there was an increase in the proportion of state constitutional search claims after 1984. Unlike the Ohio Supreme Court, the New York Court of Appeals demonstrated a willingness to expand state search protection at times, but it refused to provide any clear guidance on why some claims were accepted while others were not.\(^ {258}\) This left litigants in New York with some state constitutional law to draw upon but little guidance on when or why to deploy that law. Litigant behavior demonstrates that state constitutional law was deployed almost exclusively to combat particular instances of federal retrenchment while drawing on the few state precedents to support policy arguments against following federal retrenchment.

For example, in *People v. Griminger* the claimant urged the Court of Appeals to reject the totality of the circumstances test for judging probable cause determinations in search warrants.\(^ {259}\) The court had previously rejected the test for warrantless arrests\(^ {260}\) but had refused to reach the question of application of the test to search warrants.\(^ {261}\) The claimant thus had some favorable law to draw


\(^{257}\) Id. at 4–5.

\(^{258}\) See supra Part V.B.2.


\(^{260}\) People v. Johnson, 488 N.E.2d 439, 441 (N.Y. 1985); *Griminger*, 524 N.E.2d at 411.

\(^{261}\) See People v. Bigelow, 488 N.E.2d 451, 455 (N.Y. 1985) (holding that the search would
upon, but the primary motivation centered on federal retrenchment and the claimant noted a speech by Justice Brennan encouraging evasion of federal retrenchment, specifically noting Fourth Amendment law.\footnote{Brief of Respondent-Appellant, supra note 259, at 22–23.} The claimant was forthright in his demand that the Court of Appeals simply adopt the prior federal logic through the state provision.\footnote{Id. at 24.}

A similar dynamic is evident with the open fields exception where the U.S. Supreme Court held that governmental officials do not need warrants to search land outside of the curtilage of the home regardless of whether the land was fenced or otherwise marked.\footnote{Oliver v. United States, 466 U.S. 170, 180–81 (1984).} In a 1988 case the Court of Appeals rejected a state constitutional challenge regarding unmarked land but reserved the question of whether marking or fencing may be protected.\footnote{People v. Reynolds, 523 N.E.2d 291, 293 (N.Y. 1988).} In \textit{People v. Scott} this issue was squarely presented to the court. The claimant’s primary support was the “very strong and instructive dissent by Justices Marshall and Brennan” attacking the open fields exception.\footnote{See Appellant’s Brief at 5, People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (No. 474).} Reaching beyond the arguments of federal dissenters, the claimant did note the fact that in New York the incursion into property clearly marked is criminal trespass and thus the State has a history of respecting expectations of privacy in such remote land as a valid reason to adopt a separate policy result.\footnote{Id. at 12.} In a case decided jointly with \textit{Scott}, \textit{People v. Keta},\footnote{California v. Hodari D., 499 U.S. 621, 629 (1991).} the claimant again attacked the policy rationale of the U.S. Supreme Court in broadening the administrative search doctrine for “choosing to obliterate the distinction between administrative schemes and purposes and the enforcement of penal laws by police officers exercising the authority bestowed upon them by the subject statute.”\footnote{Oliver v. United States, 466 U.S. 170, 196 (1984) (Marshall, J., dissenting).}

The Supreme Court’s decision to weaken this test was presented as a reckless change in constitutional doctrine that should be resisted.\footnote{California v. Hodari D., 499 U.S. 621, 629 (1991).} Two claimants attacked the \textit{Hodari D.} standard that a person who flees from police is not seized under the Fourth Amendment.\footnote{California v. Hodari D., 499 U.S. 621, 629 (1991).}
One claimant framed the question with a call for bald evasion:

This case presents a unique opportunity for this court to preserve the right of privacy and the protections afforded that right through state constitutional, statutory and judicially created law despite inroads that have been made on this right at the federal level as well as recent attempts to diminish the right at the state level.\textsuperscript{272}

After the court skirted the issue, two years later a claimant brought a similar attack on \textit{Hodari D.}, noting that it had been rejected by other state high courts as well as commentators who argued the prior rule was more appropriate.\textsuperscript{273} At least once, however, the state argument may have been the result of some internal encouragement, though it may have been partly a result of anticipatory retrenchment. In \textit{People v. Hollman},\textsuperscript{274} the claimant argued that police questioning a man on a departing bus amounted to a seizure by deploying various prior state expansions of search protections in a brief filed a month before the U.S. Supreme Court rejected a similar argument.\textsuperscript{275}

An examination of drug testing cases suggests how weak internal signals offered little clear guidance to lawyers. The subject of random drug testing was unsettled during the 1980s and it was an open question whether individualized suspicion was a necessary element under the Fourth Amendment. Until the Supreme Court upheld random drug testing in some contexts in 1989,\textsuperscript{276} federal law was unclear. In \textit{Patchogue-Medford},\textsuperscript{277} the New York Court of Appeals held that random drug testing of probationary teachers was an unconstitutional search under both constitutions.\textsuperscript{278} Interestingly the teachers did not present a state constitutional claim, as a vigorous concurring opinion stressed.\textsuperscript{279} While the court justified its decision by noting that the petition for review pled a

\textsuperscript{278} \textit{Id.} at 326, 328, 331.
\textsuperscript{279} \textit{Id.} at 332 (Simons, J., concurring).
general violation of the right against unreasonable search and seizure without a specific constitutional reference,\textsuperscript{280} this ignored the fact that the claimants’ brief relied solely on federal law; the claimants failed to even cite the state provision, instead repeatedly asserting a violation of only the Fourth Amendment.\textsuperscript{281} Additionally, the court noted that an amicus brief did raise the state issue, but as the concurrence argued, accepting this claim was highly unusual because “amicus cannot define the issues presented to the court.”\textsuperscript{282} By reaching such a state claim essentially sua sponte, the court was “function[ing] as an advocate for the prevailing side rather than as a court.”\textsuperscript{283} The court’s decision to reach the state issue demonstrated an interest in the subject, but the opinion was hardly a clear statement of state constitutional law. Instead, it essentially declared that because this search violated the Fourth Amendment, it certainly violated the state provision also.\textsuperscript{284} The analysis did not follow Long’s clear statement rule and instead presented only vague signals about what the independent provision may actually mean.\textsuperscript{285}

A year later the court was asked to review another drug testing program, this time involving police officers in a specialized drug unit.\textsuperscript{286} The claimant relied heavily on Patchogue–Medford, but despite, or perhaps because of, the court’s tepid statement of a state search basis, the claimant framed the argument in terms of federal constitutional law.\textsuperscript{287} Neither the majority, which upheld the search because of the special circumstances involved in drug enforcement, nor the dissent sought to clarify the constitutional logic of the rule or whether the state constitution provided any greater protection than federal law.\textsuperscript{288} Despite the lack of any clarifying guidance from the court, the claimant’s brief in Seelig v. Koehler\textsuperscript{289} contained a clear state constitutional analysis with only secondary reliance on the Fourth Amendment. The claimant was candid about the reason for this style of argument: “Even if, as [the state] argue, the recent

\textsuperscript{280} Id. at 328 (majority opinion).
\textsuperscript{281} Id. at 332 (Simons, J., concurring); see Respondent Brief passim, Patchogue-Medford Cong. of Teachers, 510 N.E.2d 325 (No. 85-8759).
\textsuperscript{282} Id. at 328 (majority opinion).
\textsuperscript{283} See id. at 851.
\textsuperscript{286} See id. at 855; id. at 856 (Kaye, J., dissenting).
United States Supreme Court decisions uphold suspicionless random drug testing rendering the Fourth Amendment a hollow precept, [the state provision] affords a more protective standard with regard to privacy rights found to be highly intrusive.”

Thus, it was the recent decision of the Supreme Court to uphold similar drug searches rather than the Court of Appeals’ weak signal that drove the decision to present the claim. The argument stressed previous examples of judicial federalism in New York, the fact that high courts in both New Jersey and Massachusetts had recently refused to follow the Supreme Court’s lead, and the logic of *Patchogue-Medford*.

On this last point the brief was particularly strong in desiring a clear statement that the rule was one of state constitutional law so as to eliminate the ambiguous nature of the earlier decisions.

In addition to rejecting the claim, the court again failed to clarify the rule in the final drug test argument in my sample and instead presented the case in federal terms without any mention beyond a string cite of the state provision. With only a weak signal from the Court of Appeals, litigants did not significantly focus on state constitutional arguments until after the Supreme Court acted, and the refusal to strengthen its prior signals led litigants to ultimately abandon the claim.

While the New York data demonstrate a clear increase in state constitutional search claims, the substance of the claims tended to reflect policy attacks upon the U.S. Supreme Court. The Court of Appeals evidenced a willingness to hear state search claims but failed to provide any clear guidance as to the kinds of claims it wanted to hear. Claimants responded accordingly by primarily relying on federal law and only occasionally requesting evasion of recent federal retrenchment.

**D. Washington**

Unlike the high courts of both Ohio and New York, the

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290 Brief for Petitioners-Appellants at 13, *Seelig*, 556 N.E.2d 125 (No. 87). Similarly the brief notes that two other state courts “consider[ed] the ‘dismantling’ of the Fourth Amendment to be so invidious that they have based their decisions regarding random drug testing solely on their states’ constitutions.” *Id.* at 15.

291 *Id.* at 19.


293 In many cases, the Washington Supreme Court relies upon briefs submitted to the Washington Court of Appeals. Thus, where this subpart cites to a court of appeal’s brief, that brief was the primary submission to the supreme court. For a further explanation, see *infra* Appendix.
Washington Supreme Court not only provided direct and strict guidance on the methodology of state constitutional argumentation, it also engaged with state constitutional arguments regularly (when made properly). I have elsewhere detailed the effects of the criteria test adopted in *Gunwall*\(^{295}\) and will not rehash it here. Here, my focus is specifically on the effect the criteria test had on search and seizure cases in Washington. As Figure 3 demonstrates, a substantial minority of search arguments were based in state constitutional law after 1984. Laying aside 1986, where three of the four arguments occurred in *Gunwall* alone, state arguments ranged from a low of 30% to a high of 80% of search claims and, as detailed in Figure 2, hovered around 50% on average. In addition to the increase in frequency of state claims, the substantive nature of the arguments shifted as well from a mostly policy-oriented critique, similar to the experience in New York, towards a substantive focus upon the legal criteria spelled out in *Gunwall*.

**Figure 3: Percentage of Federal and State arguments by Year, Washington Supreme Court (Total Number of Search Arguments)**\(^{296}\)

The arguments in *Gunwall* show the reliance upon policy objections to federal retrenchment. The two primary arguments\(^ {297}\)

\(^{295}\) See generally Price, supra note 62.
\(^{296}\) For a discussion of the limitations on this sample, see infra Appendix.
\(^{297}\) There was also a third state search argument to the effect that even if the primary arguments failed, the subsequent warrant obtained was constitutionally invalid under *State v. Jackson*, Brief of Appellant at 1, State v. Gunwall, 720 P.2d 808 (Wash. 1986) (No. 50979-4), where the court rejected the totality of the circumstances test for judging informant
revolved around warrantless access to telephone records and attachment of a pen register to record the numbers called from a home.\textsuperscript{298} The U.S. Supreme Court had upheld the warrantless use of pen registers and the logic left little room for protecting telephone records.\textsuperscript{299} In \textit{Gunwall}, the claimant noted that the text of the state provision was dramatically different:\textsuperscript{300} “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”\textsuperscript{301}

The claimant also cited to recent examples of judicial federalism in Washington search law.\textsuperscript{302} But the strongest aspect of the argument rested on a claim that “[t]here are strong policy reasons” for disagreeing with the federal rule and that those reasons had been set out by multiple state high courts.\textsuperscript{303} In rejecting the federal rule, “each of the courts which has dealt with the question of the reasonableness of the expectation of privacy in a person’s financial or telephone records has noted the tremendous potential for abuse” under federal law.\textsuperscript{304} Quoting to the dominant treatise on search and seizure law, the decision is “a mockery of the Fourth Amendment” that opens intimate private details to indiscriminate police rummaging.\textsuperscript{305} The claimant closed with an invitation for evasion: “This Court should reject the narrow and outmoded interpretation of a reasonable expectation in phone records” and follow the other state courts “which place the judiciary in its proper [role] as the guardian of privacy interests against unwarranted invasions by the police.”\textsuperscript{306} In another 1986 case challenging the claimant’s arrest there was simply a tacked on assertion of a state basis that, at the least, the state provision should provide similar protection to recent Fourth Amendment cases and that one recent Washington search precedent made “it extremely likely that the State constitution provides even more protection.”\textsuperscript{307} But no further development was offered to support this bare assertion.

While \textit{Gunwall} failed to immediately affect litigant behavior, the

\begin{footnotes}
\item[298] Brief of Appellant, supra note 297, at 1.
\item[300] See Brief of Appellant, supra note 297, at 10–11.
\item[301] WASH. CONST. art. I, § 7.
\item[302] Brief of Appellant, supra note 297, at 10–11.
\item[303] Id. at 15–21.
\item[304] Id. at 12.
\item[305] Id. at 11–12 (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.7(b) (1987)).
\item[306] Brief of Appellant, supra note 297, at 13.
\item[307] Brief of Appellant at 21, State v. Terrovona, 716 P.2d 294 (Wash. 1986) (No. 50637-0).
\end{footnotes}
court’s engagement with state constitutional search law seems to have pushed some claimants to develop state claims that were “either dominant or at least on par with federal claims” despite the fact that federal law was still uncertain on both issues.\(^{308}\) In a random drug testing case the claimant began with a state challenge that cited to recent expansive search cases as well as the textual differences between the constitutions but rested most of the state argument on Washington cases applying federal law; the claimant argued, in essence, that these strong declarations requiring individualized suspicion under Fourth Amendment law should be carried over.\(^{309}\) The brief then proceeded to argue a Fourth Amendment claim specifically as a secondary issue: “The Fourth Amendment, which provides less protection of privacy than” the state provision still prohibits random, suspicionless drug testing.\(^{310}\) In fact, the claimant framed the federal challenge as useful primarily in establishing the minimum protection provided by the state provision:

[T]he federal cases analyzing drug testing programs under the Fourth Amendment do not establish the limits of the protection of privacy provided by Article I, Section 7. Nonetheless, as Article I, Section 7 has never been interpreted to be less protective of individuals’ privacy, these cases do indicate the minimum protection below which an allowable drug testing program may not fall.\(^{311}\)

It is interesting to note that in New York such state arguments were not made until after the U.S. Supreme Court clearly rejected drug testing challenges, even though the state high court had expressed some support for a state claim.\(^{312}\) A similar dynamic is illustrated in Seattle v. Mesiani,\(^{313}\) only more dramatically. The claimant attacked the constitutionality of sobriety checkpoints and did so nearly exclusively based on state grounds despite the fact that the U.S. Supreme Court had already struck down some uses of checkpoints and only conclusively upheld sobriety checks in 1990.\(^{314}\)

\(^{308}\) Price, supra note 62, at 347.
\(^{310}\) Id. at 11.
\(^{311}\) Id. at 12.
\(^{312}\) See supra notes 276–85 and accompanying text.
\(^{314}\) Brief of Respondents at 15–27, Seattle v. Mesiani, 46 Wash.App. 1008 (Wash. Ct. App. 1986) (No. 15638-1-I); see also Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that the stopping of vehicles to check the driver’s license and registration is unconstitutional); Mich.
The claimant noted textual differences, state constitutional history, and recent state search precedent, in particular a case expressing discomfort with the federal automobile exception, but primarily relied on cases from other states rejecting sobriety checkpoints. The claimant admitted that most were based on federal law but used the logic of those decisions to support the state argument. Interestingly the federal claim is relegated to a bare assertion, reversing the trend observed in many other state constitutional arguments. The claimant simply cited to one supportive federal precedent and concluded: sobriety checkpoints “are clearly in violation of [the state provision] and many states find these roadblocks violate the Fourth Amendment as well.” While neither claimant complied fully with Gunwall despite clearly being aware of it, the fact that they rested primarily on state claims in areas where federal law was potentially supportive suggests that the repeated interest in the state search provision at least was having an effect on the Washington bar.

Not all claimants in 1988 were so focused on state claims, and one laid the blame on the court itself. While the court had pushed for strong consideration of state constitutional claims, “it has not consistently done so,” and while the claimant would like to rely upon state law over federal, such a move is difficult “primarily because there is a reasonably well-developed body of federal constitutional law . . . that seems quite clearly dispositive, [and] there is no existing body of state case law considering the validity of seizures of publications independently under the state constitution.” This statement is odd for two reasons. First, the court had developed a reasonable set of search precedents and had fewer speech-related precedents, though none of the search opinions dealt directly with seizing speech materials. Second, federal search law was not particularly supportive and, in fact, the U.S. Supreme Court specifically rejected a higher probable cause

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315 Brief of Respondents, supra note 314, at 19.
316 Id. at 33–39.
317 Id. at 35.
318 Id. at 39.
319 Id. at 35, 39.
standard for material presumptively protected by the First Amendment.\textsuperscript{322} Instead of presenting a state search claim, the claimant instead tried to distinguish this negative federal precedent in light of the circumstances of this case before turning to a brief state search claim.\textsuperscript{323} It seems that the claimant understood a state claim was likely necessary but blamed the court for not providing sufficient law to make his job easier.

\textit{Gunwall} did not lead to a dominance of state claims in any area of the law, including search law, as we see above in Figure 3. State search claims became more common, but they still largely fell in areas where we would expect, given federal retrenchment or internal encouragement from the Washington Supreme Court through particular doctrinal expansions of state search law. This is unsurprising given the fact that the court never required litigants to present state arguments in any constitutional rights cases; it simply required a particular form of briefing and argument for a state constitutional argument to be considered. While the criteria may not have been perfectly adhered to all the time and were not always of the greatest substantive import when presented, they did have one fairly clear effect: claimants ceased to base their state constitutional search arguments predominately on policy attacks on U.S. Supreme Court precedent.

A series of claimants pushed state search arguments in areas with a strong connection to the substantive holding of \textit{Gunwall}, typically involving the use of surveillance or new technologies. For example, a claimant challenging the warrantless acquisition of public utility records drew heavily from \textit{Gunwall} in arguing that the state constitution protects far more than simply the “reasonable expectation of privacy” and extends to all private affairs; as with phone records, utility records are essential to modern life and provide intimate, private details about a person’s life.\textsuperscript{324} Similarly, another claimant attacked the use of infrared surveillance as exposing more details about the intimate details of a person’s life than the phone records obtained unconstitutionally in \textit{Gunwall}, though after a thorough Fourth Amendment claim as well.\textsuperscript{325} Two


\textsuperscript{323} Brief of Respondent, \textit{supra} note 320, at 25–32, 56–57.


\textsuperscript{325} Appellant’s Opening Brief at 3–9, 13–14, State v. Young, 867 P.2d 593 (Wash. 1994) (No. 58399-4).
separate claimants argued that *Gunwall*'s requirement of judicial authorization before attachment of a pen register should apply to wiring police informants.\textsuperscript{326} Claimants made similar *Gunwall* inspired arguments seeking suppression of evidence where police simply picked up a receiver rather than tapped a phone,\textsuperscript{327} answered a ringing phone while executing a search warrant,\textsuperscript{328} obtained a warrant to record any transaction in a particular area,\textsuperscript{329} and where a private citizen utilized a scanner to capture conversations on a cordless telephone for several months.\textsuperscript{330} All of these arguments drew heavily from *Gunwall* and later similar cases because they paralleled the specific fact pattern dealing with technological surveillance. Most of the remaining state constitutional search arguments occurred in areas where federal law had seen significant retrenchment, though I do not rule out the internal development of search law as part of these cases as well.

Perhaps the clearest example of federal retrenchment occurred in *State v. Boland*,\textsuperscript{331} where the claimant sought to have evidence seized from his garbage suppressed after the U.S. Supreme Court held that there was no reasonable expectation of privacy in garbage put out for collection.\textsuperscript{332} The claimant noted how the “Washington Supreme Court ha[d] consistently interpreted” the search provision to be more protective, as seen in a number of search cases,\textsuperscript{333} and deployed an extensive *Gunwall* analysis to provide “ample support and reasoning to make a determination on independent state grounds.”\textsuperscript{334} Of particular importance was the fact that Washington cities regulated the manner of trash collection, including mandating lids, and some even made it a crime for anyone to interfere with

\textsuperscript{327} Brief of Appellant at 1, 12, State v. Corliss, 838 P.2d 1149 (Wash. Ct. App. 1992) (No. 28675-7-I).
\textsuperscript{328} Brief of Appellant at 8, 14, State v. Goucher, No. 16795-6-II (Wash. Ct. App. May 27, 1993).
\textsuperscript{331} State v. Boland, 800 P.2d 1112 (Wash. 1990).
\textsuperscript{332} Id. at 573–74; see also California v. Greenwood, 486 U.S. 35, 43–44 (1988) (holding that individuals do not have a reasonable expectation of privacy in garbage that is left on a public street for collection).
\textsuperscript{334} Id. at 12–22.
trash other than licensed collectors. Additionally, the claimant noted recent public outrage when the Seattle Mayor’s trash was stolen and examined publicly. This all justified and required an expansive interpretation of the state provision and, interestingly, the claimant failed to discuss at any length the federal opinion, the dissenters’ arguments, or the scholarly criticism of the decision. A similar dynamic was seen in State v. Werner, where the claimant sought to avoid application of a good faith standard to the state exclusionary rule. A Massachusetts claimant attacked this piece of retrenchment by describing the standard as “eviscerating the Fourth Amendment’s protection, culminating in last term’s two rulings leaving only tattered remains of the federal exclusionary rule.” Unlike this example, where policy was nearly the only consideration in the argument for state expansion, the claimant in Werner relied upon the Gunwall criteria and various state precedents recognizing that the state exclusionary rule should be aimed at protecting the integrity of the judicial system.

Policy arguments, of course, did not disappear completely in Washington. For example, in a case seeking retention of the automatic standing doctrine, the claimant argued that the “legitimate expectation of privacy” standard fosters result-oriented jurisprudence,” and after discussing federal examples concluded that the “standard has resulted in absurd contradictory results.” Another claimant argued that simple omission of material facts from a warrant affidavit should negate the warrant because “[a]n exclusionary rule which requires suppression where the magistrate could have denied the request if given the whole truth is the best way to assure that officers seeking warrants will not shave the truth.” In a challenge to administrative searches, the claimant

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335 Id. at 17–18.
336 Id. at 21–22.
337 See id. at 27.
339 See id. at 919; see also United States v. Leon, 468 U.S. 897, 926 (1984) (holding that the costs of exclusion outweigh the benefits of suppressing evidence when the warrant, though later invalidated, was based on an honest, reasonable belief that there was probable cause); State v. Canady, 809 P.2d 203, 205 (Wash. 1991) (refusing to consider arguments against the good faith standard because it was not preserved for appeal).
341 Brief of Respondent at 10–15, Werner, 918 P.2d 916 (No. 17388-3-II).
attempts to avoid the weaker federal standard by arguing that the weaker Fourth Amendment standard was truly only dicta and that “[n]ot only the dissent in [the federal decisions] but scholarly comment has criticized the dicta as setting up a ‘rubber stamp’ procedure” and being a “‘new fangled’ rule. What makes these policy arguments different from those in New York and Ohio, however, is that they play a minor part to a broader argument drawing on state constitutional precedent and the Gunwall criteria, though not all of them all the time. Other claimants, for example, sought to expand search rules regarding standing, the requirement that consent would be valid only with warning that refusal was up to the owner, that the automobile exception should not apply to a separate sleeper compartment, and that the Hodari D. standard should not apply so that shining a spotlight on a person qualified as a seizure.

Thus, the experience of the criteria test in Washington shows not only an increase in state arguments but also a deepening of those arguments. After Gunwall, claimants abandoned the primarily policy-based arguments and tended to offer arguments based upon (at least some of) the criteria and established Washington search precedents. Gunwall had the effect then of strengthening the ideational support for judicial federalism in Washington.

E. Oregon

As discussed earlier, the Oregon Supreme Court became the most fervent advocate for the primacy theory: treating state law first before reaching any ancillary question of federal law. Linde’s ideas ultimately came to dominate his court and persisted well after his

Briefs from the Oregon Court of Appeals cited in this subpart were, in fact, the primary briefs relied upon by the Oregon Supreme Court. For more information, see infra Appendix.
retirement in 1990 as evidenced by the finding that approximately 92% of state constitutional issues during the 2005–2006 term followed the primacy approach.\textsuperscript{351} As Figure 4 demonstrates, the effect of this primacy engagement was dramatic. After 1984, federal search arguments were relegated to the minority, extremely so in comparison to the other three states already discussed.\textsuperscript{352} The lowest percentage of state-based arguments during that period was 60%, though it regularly exceeded 70%. In 1990, state constitutional law accounted for all search arguments. As described below, Oregon lawyers adapted to the state law demands of the Oregon court in part because that court was happy to provide the early foundations with minimal support from claimant briefing.

\textbf{Figure 4: Percentage of Federal and State Search Arguments, Oregon 1970–2000 (Total Arguments)}

The Oregon court drove the development of state search law initially with little assistance from lawyers. One of the more prominent examples was \textit{State v. Caraher},\textsuperscript{353} where the claimant failed to make any serious state claim. Instead, she challenged the search of her purse as outside the search incident rule because

\textsuperscript{351} Long, supra note 37, at 74–75.
\textsuperscript{352} Compare infra Figure 4, with supra Figure 2.
\textsuperscript{353} State v. Caraher, 653 P.2d 942 (Or. 1982).
federal law only recognized the validity of searches of the person but not of items seized and outside the person’s control.\textsuperscript{354} The court argued that its history of linking state and federal search provisions to simplify the law had failed; instead, the “goal of simplification is, in our view, better served by relying on article I, section 9 . . . to formulate an independent rule consistent with our past decisions than by hypothesizing how the U.S. Supreme Court would consider this case.”\textsuperscript{355} The court held that searches incident to an arrest were allowed for officer safety and to prevent destruction of evidence relevant to the crime “so long as [they are] reasonable in light of all the facts.”\textsuperscript{356} An opinion concurring with the result argued that this question should “wait for a case in which that question has been squarely presented, briefed and argued.”\textsuperscript{357} The opinion concluded that this was “not that case.”\textsuperscript{358} The next year, in \textit{State v. Lowry}, the court expanded upon this test, holding that police are allowed to seize materials that are apparently contraband for a short time to obtain a warrant for testing, but testing without the warrant extends beyond the search incident to arrest exception.\textsuperscript{359} From these foundational cases, the court built an extensive set of state search precedents for lawyers to utilize even though the court had to do the heavy lifting of building the initial set of opinions.

Oregon’s distinctive approach begins with the very purpose of the exclusionary rule and who has standing to challenge a search. In \textit{State v. Tanner}\textsuperscript{360} the court noted “[u]nlike the Fourth Amendment exclusionary rule, which has been predicated in recent years on deterrence of police misconduct . . . the exclusionary rule of section 9 [of the Oregon Constitution] is predicated on the personal right of a criminal defendant to be free from an ‘unreasonable search, or seizure.’”\textsuperscript{361} Thus, exclusion of evidence is the proper remedy regardless of whether it would deter police misconduct; the right is personal and invasions always require a remedy. In terms of whom may challenge a search, the court held that “[a] criminal


\textsuperscript{355} \textit{Caraher}, 653 P.2d at 946–47.

\textsuperscript{356} \textit{Id.} at 952.

\textsuperscript{357} \textit{Id.} at 953 (Campbell, J., concurring).

\textsuperscript{358} \textit{Id.}

\textsuperscript{359} State v. Lowry, 667 P.2d 996, 1102–03 (Or. 1983).

\textsuperscript{360} State v. Tanner, 745 P.2d 757 (Or. 1987).

\textsuperscript{361} \textit{Id.} at 758.
defendant always has standing to challenge the admission of evidence introduced by the state" and what matters is his rights in an item, regardless of where it is located. The court applied these rules to exclude evidence found during an admittedly illegal search of a third-party pawnshop, even though the items seized were stolen. A person still had a right against the illegal seizure of effects that he used as collateral even if he had no legal right to those effects. A number of claimants utilized these broad rules of standing and exclusion without any apparent concern with shifting federal law. In a challenge to a search of an open field, a third party non-owner asserted the right to challenge the fruits of a search because his work on the area gave him privacy interests that were violated. While the claimant made some reference to federal law, he was careful to clarify it was used solely for persuasive effect and that the only issue was application of Turner and other state search law. Generally, standing issues after 1990 did not refer to federal law to any significant degree and simply sought to apply Tanner and its progeny to various facts, such as a passenger in a car, a driver of a mother’s car, and a person holding a container. In one case there was a lengthy federal argument in addition to the state claim but this was caused by a complicated fact pattern. In State v. Davis the claimant was arrested in Mississippi by local police on a fugitive warrant for crimes in Oregon; the local police entered his mother’s home without a search warrant; and claimant claimed, in both state and federal arguments, that this entry was illegitimate and thus evidence seized must be excluded. The state argument is a fairly simply application of Tanner; as a houseguest the claimant has a privacy interest against invasion by police.

362 Id. at 759.
363 See id. at 763.
364 Id. at 757–58, 763.
365 Id. at 763.
367 Id. at 23.
372 Id. at 1009–10.
The federal argument is longer in large part because, as the claimant noted, federal law is less protective and thus more effort had to be exerted to distinguish this negative federal law. The claimant’s argument closed with a policy critique that deferring to the police, as the U.S. Supreme Court so frequently did, only encouraged more misbehavior. This argument was clearly offered because of the complicated situation of an out-of-state arrest by non-Oregon law enforcement; in fact, the claimant’s argument began with a lengthy argument that Oregon law should apply. But if that claim failed, then the federal issue was the only remaining issue so the claimant had little choice but to detail the weaker federal analysis.

The search incident rules established by Caraher and Lowry were the source of continued contestation in 1986. One pair of cases dealt with searches of automobiles incident to arrest, specifically with searches of items in the trunk. In one the legal basis was vague at best, failing to cite to either constitutional provision and only referring to unspecific “Oregon law” at a few points, with a heavy inter-mix of federal law. The claimant in State v. Bennett offered a more confusing argument, apparently motivated in part by the State’s formulation of the case. It appears that the State relied upon Caraher’s statement that a search incident is allowed as long as reasonable in all respects to mean that such a search could go beyond the immediate area of the arrestee, to extend to closed items within a car trunk. The claimant accepted this formulation of Caraher and argued that “the formulation of the appropriate rule under the Oregon Constitution is probably a mistake” because it relied upon older Oregon cases that in turn rested on Fourth Amendment law overruled in the late 1960s. In essence, the claimant argued that this rule could not be allowed because the

374 Id. at 26–31.
375 Id. at 31.
376 Id. at 10. I usually exclude this kind of case because of the complications of applying state law to out-of-state actors. I included this argument only because the state claim was made.
379 Respondent’s Brief at 7, State v. Bennett, 697 P.2d 213 (Or. Ct. App. 1985) (A31588). Unfortunately, this is one of those cases where the State’s brief would be of great assistance but I rely upon the implicit presentation in respondent’s brief.
380 Id.
381 Id. at 4, 7.
state constitution cannot give less protection than federal law. This complicated set of arguments appears to have been caused by the fact that the Oregon Supreme Court had resisted a general automobile exception to the state rule so the state was forced to fall back to a broad interpretation of the search incident rule; ultimately, the court settled this dispute by recognizing a form of the automobile exception that a vehicle stopped in transit was subject to a complete warrantless search where the police had probable cause to believe evidence was within that vehicle. In a related case, however, a claimant successfully asserted a clear state constitutional argument that a search of a stationary automobile without even probable cause, even if allowed under federal law, still violated Caraher.

In another pair of 1986 cases, the reach of Lowry was disputed. The cases involved the seizure of vials of powder suspected of being cocaine. One claimant was arrested on a theft charge and the vials were discovered in her purse, and the other was the subject of a search warrant for marijuana and the police found the vials while executing the warrant. Both claimants presented clear state arguments without discussion of federal law. They simply sought to apply the Lowry holding that a warrant is required for further inspection of legitimately discovered closed containers. Even after the court reversed itself on this issue, though still maintaining a distinct state rule, claimants continued to apply the state search incident rule that searches incident to an arrest can only be justified for ensuring officer safety or to prevent destruction of relevant evidence. Thus, searches of wallets were challenged on the grounds that the police either had all the evidence necessary for arrest or there was no possibility of a weapon in the small wallet

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382 Brown, 721 P.2d at 1360.
384 State v. Forseth, 729 P.2d 545, 546 (Or. 1986); State v. Owens, 729 P.2d 524, 526 (Or. 1986).
386 Forseth, 729 P.2d at 546.
compartments.\textsuperscript{390} Even with the limitations on the state rule in Owens,\textsuperscript{391} claimants maintained solely state claims and simply sought to distinguish Owens on the grounds that their cases were not about simply testing materials to confirm the substance but whether the initial seizure itself was limited.\textsuperscript{392}

In a number of other search areas where federal retrenchment was clear, claimants still maintained arguments that were focused on the development of the internal logic of the state search precedents and not the attacks on the U.S. Supreme Court seen in other states. For example, despite the federal rule that police dog sniffs do not amount to a search,\textsuperscript{393} one claimant presented dual arguments attempting to, first, distinguish the federal case law, and, second, arguing that Caraher and its progeny recognized a privacy interest in a storage locker that cannot be invaded by police action whatever its form.\textsuperscript{394} Ten years after the court accepted that search because the dog was not taken to the area with the intention to discover evidence,\textsuperscript{395} another claimant raised a state challenge to an intentional, investigative dog sniff.\textsuperscript{396} The claimant made an extensive argument on the limited facts of the first decision, the decade of search cases since developing search doctrine specifically as it relates to enhancement of senses, and the rejection of the federal position in five other states with only a perfunctory attempt to discuss federal law.\textsuperscript{397} Similarly, a claimant challenging the use of a beeper placed upon his car without a warrant developed a detailed argument discussing the requirement of primacy, state precedent on expectations of privacy, and the reasoning of other state high courts applying warrant requirements to electronic tracking.\textsuperscript{398} The claimant did make a brief federal claim attempting

\textsuperscript{390} Hoshkinson Appellant's Brief, supra note 389, at 8–9; Noble Appellant's Brief, supra note 389, at 16, 20.

\textsuperscript{391} State v. Owens, 729 P.2d 524, 531 (Or. 1986) (holding that testing of suspect substances seized during a search incident to arrest did not require a warrant).

\textsuperscript{392} Hoshkinson Appellant's Brief, supra note 389, at 8–9; Noble Appellant's Brief, supra note 389, at 16, 20.

\textsuperscript{393} United States v. Place, 462 U.S. 696, 707 (1983); see also Lindsay Zanello, Note, To Sniff or Not to Sniff: Making Sense of Past and Recent State and Federal Decisions in Connection with Drug-Detection Dogs—Where Do We Go From Here?, 78 Alb. L. Rev. 1569, 123 (2014/2015) (discussing the Place Doctrine).


\textsuperscript{395} State v. Slowikowski, 761 P.2d 1315, 1320 (Or. 1988) (en banc).


\textsuperscript{397} Id. at 17–36.

to distinguish two contrary cases but without much development and with no attention to the policy implications of that doctrine.\textsuperscript{399}

The open fields doctrine presents another example. As discussed above, in 1984 the U.S. Supreme Court held that a search in an open field outside of the curtilage of the home did not require a warrant.\textsuperscript{400} In two 1988 cases, claimants argued that state law protected personal property regardless of the proximity to a person’s home, and again, without any serious discussion of federal law.\textsuperscript{401} In fact, one claimant criticized the trial court judge for failing to follow the primacy instructions and instead simply upholding the search on the basis of federal law; the claimant argued that an older Oregon precedent rejected a similar open fields search and argued that even if it was based on a mixture of federal and state law, \textit{Caraher} held that the state basis should still survive a change in federal law.\textsuperscript{402}

While the search and seizure area is one of the strongest areas of federal retrenchment, we see little evidence of the kind of policy attacks on federal doctrine exhibited in other states. Perhaps the clearest example of a policy attack involved a case where police executed an arrest warrant and remained on the premises for hours detaining people; the claimant noted that the U.S. Supreme Court had upheld a similar action\textsuperscript{403} and argued that “[e]ven for a court which seems more interested in legislating that[n] in judicial decision making, this is an extraordinary philosophy.”\textsuperscript{404} The claimant further concluded: “Clearly, recent pronouncements by \{the U.S. Supreme Court\} are result oriented.”\textsuperscript{405} But even this claimant followed the trend discussed above in developing an alternative state claim through a detailed analysis of the large body of state search law built by the Oregon Supreme Court.\textsuperscript{406} Given a significant and growing body of law, and commanding its use, lawyers deployed these arguments as they would any other body of constitutional doctrine. Unlike the experience in some other states,

\textsuperscript{399} Id. at 14–15 (citing United States v. Karo, 468 U.S. 705, 711 (1984); United States v. Knotts, 460 U.S. 276, 278 (1983)).


\textsuperscript{402} Appellant’s Brief, \textit{supra} note 366, at 11–12.


\textsuperscript{404} Respondent’s Brief, \textit{supra} note 403, at 11.

\textsuperscript{405} Id.

\textsuperscript{406} See \textit{id.} at 6–15.
they showed little difficulty in providing relatively complete and detailed arguments that had little grounding in the more familiar federal law. Of course, this is because the court gave lawyers the law they needed and continued to provide more law as lawyers developed the necessary ideational support.

VIII. CONCLUSION

I began this article by arguing that we must consider not only the output of courts in evaluating the development of judicial federalism but also arguments that are provided to those courts or, in other words, the input. Scholars of judicial federalism have long suggested, with frustratingly little data, that part of the problem is lawyers failing to argue state constitutional claims.407 As discussed, legal arguments are relevant because they both frame and limit the options available to courts deciding concrete cases. I offer empirical evidence through comparative examination of lawyer behavior on the changing nature of ideational support in response to state court signaling. Though only a single issue area is studied here, the empirical findings are strengthened by the comparative study of lawyer behavior across a diverse selection of states and over a long time window.

The empirical findings suggest that consideration of legal arguments is a valuable avenue for research and largely meets the expectations of signaling and the effect on ideational support structures. Lawyers are naturally attuned to the messages sent by the courts they argue before and their arguments are shaped and influenced by those signals. In courts with minimal guidance and engagement, Ohio, for example, state constitutional arguments in search and seizure cases were rarely made. Lawyers instead tended to fall back on the accepted federal law working to distinguish case facts from recent retrenchment rather than turn to state constitutional arguments where they had no guidance or reason to suspect the Ohio Supreme Court was interested in hearing such claims. In New York, the pattern was slightly different because the New York Court of Appeals at least demonstrated interest in state search claims in expanding protection in a number of cases. However, the New York Court of Appeals left lawyers with little guidance on how to present such claims and lawyers thus were left to focus on the logic and policy concerns drawn from the federal

407 See supra note 78 and accompanying text.
decisions. In essence, arguments in New York tended to be
dominated by calls for bald evasion of federal rights retrenchment.

The experience in Washington and Oregon, however, tells a much
different story. For reasons internal to each state and publicly
justified as a means of improving the logic of constitutional
arguments, both courts embraced a robust vision of state
constitutional law. In both states we see dramatic changes in both
the frequency of state constitutional arguments and the substance
of such arguments. In both states the policy critique, evasion
arguments that were the norm in New York, almost completely
evaporated. Instead the content of the rights arguments became
more coherent and focus around the approaches demanded by the
state supreme courts. Lawyers in Oregon and Washington offered
arguments that were more coherent and offered stronger ideational
support for state courts slowly building state law independent of
federal constitutional doctrine.

This empirical finding reinforces a basic lesson of legal
development: lawyers need law. While there may be a small
number of entrepreneurial lawyers blazing new trails in the law,
most lawyers stick to their training and draw their arguments from
legal precedents. They go where the law is. Faced with a lack of
precedent or guidance on the meaning of state constitutions, most
lawyers revert to the familiar territory of federal constitutional
doctrine introduced by their legal training as the constitutional law
of the United States. When presented with alternatives, such as an
emerging understanding of state constitutional law, lawyers will
adapt and push the new approaches because they have reason to
believe the court will be receptive and the courts have already
drawn something of a roadmap in how to approach this previously
unknown body of law.

These empirical findings raise some interesting normative issues
about state constitutional law. At a basic level there is the question
of who is to blame for the limited development of state
constitutional rights jurisprudence. This research could be read as
laying blame at the feet of state courts, as we have seen active
engagement from state courts can trigger state constitutional
arguments. But there are also reasonable arguments that state
courts should not have to shoulder the burden of creating an entire
body of new law. Path-dependence arguments suggest there are
institutional incentives in following the accepted path and costs in
deviating from it,\textsuperscript{408} and others have defended an explicit instrumental approach to state constitutions only when federal law abandons “correct” interpretations (however we determine “correct”).\textsuperscript{409} Of course it may be just as reasonable to say that any lawyer should be creative enough to make state constitutional arguments without a court leading the way.

This article is not intended to suggest a normative judgment on blame (or even assume that blame should exist). Instead it proposes a reorientation away from studying courts as the sole movers of legal development. We need to consider the litigation process in total to gain a fuller sense of the complicated movement of any legal doctrine. This may still leave us with the image of courts as a primary instigator of legal development, as this article demonstrates in the area of search and seizure, but it is a more complicated vision of court influence than often presented. Courts influence legal development through their signals but rely upon lawyers to pick up those signals and develop further arguments to develop a legal issue. Thus, the two work together in an interdependent manner to achieve change, and studying one in isolation can miss important influences. In the case of judicial federalism, it appears likely that a significant degree of the explanation for the uneven development of independent state law rests with the uneven nature of legal argumentation presented to state courts. Of course, further work will be necessary to see how robust these findings are across different issue areas or state courts.

\textsuperscript{408} Friedman, \textit{supra} note 88, at 789–90; Hathaway, \textit{supra} note 77, at 603–06.

\textsuperscript{409} \textit{INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM}, \textit{supra} note 36, 18–20; \textit{Why Federalism and Constitutional Positivism Don’t Mix}, \textit{supra} note 36, at 39.
APPENDIX

In this Appendix I detail the procedures for obtaining briefs more completely and explain the limitations of various samples.

A. Ohio

Briefs from 1978 to 1990 were obtained from the Ohio Supreme Court Law Library in Columbus, Ohio. The library utilized two forms for records: microfilm and paper. The brief collections were less than complete. According to the library staff, the clerk’s office only sent cases that were orally argued to the library for archiving and thus it was likely that any other cases identified were decided in some form of summary motion; I was unable to locate an alternative source for these missing cases. I obtained copies of all briefs available in the library’s collections. For a small number of cases only jurisdictional memoranda were available and I utilized these as a second best source of constitutional rights arguments so long as they included at least some explanation of the rights claims being relied upon. There was one type of case that was systematically missing: death penalty cases before 1988 were not in the library’s collection. While 1988 and 1990 did have paper copies of death penalty briefs, limitations of time and resources forced me to skip these briefs and focus on rounding out the other issue areas. From 1992 to 2000, I obtained only the briefs available from Westlaw’s online archive. According to the staff at the Ohio Supreme Court Law Library, Westlaw scanned all of the library’s briefs and thus the online source should be coextensive with the libraries collection with the same problems.

B. New York

Briefs were located in microfilm and microfiche sets produced by William S. Hein & Co., Inc., and contained in the collections of the Syracuse University College of Law Library (1970–1990) and the Onondaga County Supreme Court Law Library (1992–2000). I randomly selected 60% of the identified universe for each year with a minimum of twenty cases or the whole set if less than twenty were

410 My sample begins with 1978 because of limitations on my resources that did not allow for a return trip to fill out the rest of my sample.

411 Death penalty briefs can be anywhere from five to ten times the length of a brief in a standard case and thus it takes considerably longer to scan or copy them.
identified. Where a brief was missing, I replaced it with another randomly selected case where possible. Additionally, a small number of briefs were available from the 1990s on Westlaw and I obtained those whenever possible.

New York has an unusually liberal appeals law that requires mandatory appeals where the appellate division is divided.412 The Court of Appeals issues memorandum opinions in many of these cases that frequently do nothing more than issue a final order on the basis of a lower opinion.413 I excluded memorandum opinions assuming that the cases of those summary decisions represent issues the Court of Appeals perceives as easy and unworthy of its time.

C. Washington

I obtained the Washington briefs from collections at the Gallagher Law Library at the University of Washington and the Seattle University School of Law Library. From 1988 to 2000, the briefs were collected primarily in microfiches produced by William S. Hein & Co., Inc., located in the Gallagher Law Library, and the collections were relatively complete. A small number of briefs from 1992 to 2000 were also available on Westlaw and I obtained those when possible. However, from 1970 to 1986 the collections in both libraries were less than perfect. The Gallagher Library only had briefs in paper copies for that time period and a significant number were missing. From 1970 to 1982, the Seattle University Law Library had some briefs in microfiche published in house. I obtained copies of all the identified briefs available for all years from both libraries. The resulting sample had wide variation between 1970 to 1986, ranging from 40% to 70%. Especially problematic was 1984 where only 14% of the identified briefs were available. Thus, the data from these years should be read with these limitations in mind.

The Washington appeals process causes an oddity. While there is a normal appellate process through a petition of review from an appeals court, only a minority of cases reach the supreme court through this process.414 Most cases get to the court through direct

412 Before 1986, any dissent triggered a mandatory appeal. BERNArd S. MEYER ET AL., THE HISTORY OF THE New York COURT OF APPEALS, 1932–2003, at 63 (2006). However, after 1986 an appeal was only mandatory if there were two dissenters. Id.
413 See id. at 127.
review either from direct appeal from the trial court or, commonly, by transfer from one of the courts of appeals. Appellate courts are allowed to transfer cases to the high court, which it can refuse to accept, and the supreme court can also transfer a case on its own motion to reduce appellate caseloads. The briefs collected are occasionally from the Washington Court of Appeals filing, about a third of my sample for most years. While some cases showed later briefing solely to the supreme court, these were usually styled as supplemental and like supplemental briefs generally were aimed at expanding or clarifying the first brief; many cases had only these court of appeals briefs. In fact, the 1990s briefs available on Westlaw that were originally presented to a court of appeals were listed as presented to the Washington Supreme Court in the Westlaw text form of the briefs. I treated these briefs as the initial brief like any other case and similar to Oregon there is no obvious differences in quality of the arguments.

D. Oregon

No briefs were available electronically. All briefs were obtained from the John E. Jaqua Law Library at the University of Oregon. From 1970 to 1976 these briefs were available in paper form and all briefs contained in the library collection were copied. From 1978 to 2000, the briefs were contained in microfilm produced by the Washington County (Oregon) Law Library. The briefs, however, turned out to be complicated. The rolls of film for the Oregon Supreme Court briefs only included briefs that were filed on direct appeal from a trial court, usually death penalty cases or original actions. For all other cases, the microfilm roll started with an index that cross-referenced the microfilms for the Oregon Court of Appeals for the briefs on all cases that passed through it. According to the Washington County Law Library, the Oregon Supreme Court relies upon briefs presented to the court of appeals. The statement of intent for the microfilms stated that they contained the complete record of the case and that the originals were destroyed after confirming that the entire record was intact on the microfilm rolls. Since the statement of intent clearly spells out that

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415 Id.
416 Id. at 11.
417 Index guide on file with the author.
418 A sample of this statement is on file with the author.
the records were complete as reproduced, I assume that the Oregon Court of Appeals brief was the only one utilized before the Oregon Supreme Court and used that brief for my analysis. I obtained all of the identified briefs that were available in the microfilm sets with the single exception of briefs from 1990 where a high percentage of cases identified were death penalty briefs. I included only five of these briefs, all randomly selected.