LINDE'S LEGACY: THE TRIUMPH OF OREGON STATE CONSTITUTIONAL LAW, 1970-2000

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I. INTRODUCTION

This article discusses an interesting empirical puzzle. A peculiarity of American federalism leaves state supreme courts[1] as final interpreters of their state law.[2] This necessarily means that state supreme courts have more constitutional authority than federal courts over state law.[3] Beginning in the 1970s, many scholars argued that state courts should and would use this authority to give their state Constitutions an independent meaning beyond the then recent conservative turn in federal constitutional jurisprudence.[4] As I discuss below, the reality of judicial federalism over the past forty years demonstrates that this expectation was never fulfilled. Instead of building a new, independent state constitutional law, state supreme courts still rely primarily on federal doctrine with only occasional state decisions offered on an ad hoc basis.[5] The question then becomes why, if state courts exercise final interpretative authority over their state Constitutions, would they so often defer to the U.S. Supreme Court on constitutional rights issues?

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[1] While state courts of last resort occasionally use different titles, I use "state supreme court" to refer generally to all such state courts.

[2] *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. 590 (1875).

[3] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–70 (1998).

[4] *See generally* Richard S. Price, Lawyers Need Law: A Study of Constitutional Arguments Made to State Supreme Courts 1, 2, 3–4 (Aug. 2012) (unpublished Ph.D. dissertation, Maxwell School of Citizenship and Public Affairs at SURFACE) (on file with author) (explaining how state courts, using state Constitutions, could provide protections exceeding the federal minimum) [hereinafter Price, *Dissertation*].

[5] *See id.* at 20–21.

In this article, building upon a set of related research,[6] I argue that a key element of the explanation for the limited development of state constitutional law is found in a fundamental aspect of the American legal process: lawyers need law. Lawyers are trained to think in terms of case law, in how that law can be applied, parsed, and distinguished to reach a favorable result to their client.[7] This model of appellate advocacy, however, relies on a basic predicate: there must be law to apply.[8] Faced with a wealth of federal constitutional doctrine, lawyers use the familiar in the absence of another option. In other words, for state constitutional law to become something more than just a series of ad hoc disagreements with the U.S. Supreme Court, it requires state supreme courts to offer a foundation and guidance to their lawyers in developing a new state constitutional path. Lawyers will follow the lead of their courts but, in an area as established as constitutional law, will rarely present the foundation for a new path of law absent that leadership.

I explore and evaluate this idea through the experience in Oregon. Justice Hans Linde, the "intellectual godfather" of state constitutional law, developed a powerful theory of state constitutional law.[9] In both articulating the importance of giving primary attention to state constitutional rights claims[10] and offering early decisions elaborating a different constitutional framework, Linde's court broke a new doctrinal path and provided the law lawyers required to develop further arguments.[11] Through an examination of appellate arguments, I demonstrate that Linde's legacy was to fundamentally alter constitutional practice in Oregon. Across a spectrum of rights issues, state constitutional claims came to dominate with federal doctrine relegated to a secondary position. These findings suggest that courts are central to legal change in a way that law and courts' scholarship often discount: through their

[6] *See* Richard S. Price, *Arguing Gunwall: The Effect of the Criteria Test on Constitutional Rights Claims*, 1 J.L. & CTS. 331, 331 (2013) [hereinafter Price, *Arguing Gunwall*]; Richard S. Price, *Lawyers Need Law: Judicial Federalism, State Courts, and Lawyers in Search and Seizure Cases*, 78 ALB. L. REV. 1393, 1393 (2015) [hereinafter Price, *Lawyers Need Law*].

[7] *See, e.g.*, Price, *Dissertation*, *supra* note 4, at 14.

[8] *See id.* at 17–18.

[9] Jeffrey Toobin, *Better than Burger: States' Rights for Liberals*, NEW REPUBLIC, Mar. 4, 1985, at 11.

[10] Importantly, Linde's theory was not focused on rights claims exclusively—he argued that state constitutional arguments took primacy in all cases. It is my empirical frame that limits consideration to only rights claims.

[11] *See* Ronald K.L. Collins, *Human Rights Hero: The Legacy of Hans A. Linde*, 40 HUM. RTS. MAG., no. 2, 2014.

legal opinions, courts can push the legal support structure to adapt to a new legal framework, which in turn helps to strengthen the new doctrinal path. Thus, if state constitutional law is truly important, the target for change will have to be convincing courts to shoulder the initial burden of developing state law.

II. LEGAL CHANGE AND THE COURT-CENTRIC MODELS

It is fair to say that law and court scholars have long been focused on a deceptively simple question: why does law change? In other words, why does one legal idea win out at any given time? The classical approach to law aimed at "a uniform, undeviating, impartial application of supposedly neutral rules in all cases."[12] By focusing on "a high level of abstraction and generality[,]" classical legal thought "promoted neutrality, purportedly diverting the judge from being swayed by personal sympathy or aversion."[13] Building upon the legal realists of the early twentieth century, empirical scholars have undermined this vision of objective, politically neutral law.[14]

The behavioral school of political science saw individual choices as the center of political behavior.[15] Early judicial behavior scholars argued that judging was simply another form of political choice.[16] This behavioral approach eventually became the attitudinal model, which concluded: "[T]he Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."[17] Thus, judges are essentially just politicians in robes who make ideological choices and then justify those decisions with the trappings of law.[18] Another group of scholars posited that while

[12] WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 5 (1998).

[13] *Id.*

[14] *Cf.* Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1038 (1961).

[15] *See generally* Erkki Berndtson, Professor of Political Sci., Univ. of Helsinki Finland, Presentation at the XVIIth World Congress of the Int'l Political Sci. Ass'n: Behavioralism: Origins of the Concept (Aug. 21, 1997).

[16] *See* Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2019, 2020–21 (2016); *see, e.g.*, C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 (1948); DAVID W. RHODE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); GLENDON SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963 (1965).

[17] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

[18] *Cf.* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 39, 190 (1999) (demonstrating that Supreme Court Justices rarely accept a legal position from which they originally dissented).

individual political preferences were important, we have to remember that individuals, including judges, operate within a complex institutional web to achieve their goals.[19] As justices serve on multimember courts, their ability to achieve their goals is limited by the actions of fellow justices and the anticipated reactions of other branches of government, which "suggests that law, as it is generated by the Supreme Court, is the result of short-term strategic interactions among the justices and between the Court and other branches of government."[20] "Decision making is thus interdependent because justices' ability to have majority opinions reflect their policy preferences depends in part on the choices made by other justices."[21] These approaches share a common assumption that the primary motivation of judicial behavior is the individual justice's policy preferences, though they disagree on the degree to which those preferences are constrained by other forces. What these accounts tend to dismiss is the power of other institutions to influence courts and the way that being a member of an institution may shape a person's understanding of its mission and position in the political system.

More recently, some scholars suggest that law may matter to judge's processes in ways more subtle and less mechanical than classical legal thought assumed.[22] A justice is an individual with policy preferences and biases, but he or she is also a member of a legal institution for whom the law matters.[23] In other words, the Court is not simply a small legislature:

> [L]aw matters. But it matters to different justices in different ways. The legal values do not completely supplant policy preferences, but clearly the relationship between the Court and policy is much more complicated than it would be if the Court were simply a small legislature of nine unelected politicians.[24]

Through analysis of free speech, establishment, and search and seizure cases, Mark Richards and Herbert Kritzer demonstrated that "[l]aw matters in Supreme Court decision making in ways that

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[19] *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 21, 178 (1964).

[20] LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 18 (1998).

[21] FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 15 (2000).

[22] *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 65–66 (2011).

[23] *See id.*

[24] *See id.*

are specifically jurisprudential."[25] In a study of unanimous and highly consensual Supreme Court decisions, the authors concluded that unanimity was likely where law was more certain because "in these instances, the justices' attitudes are more constrained and consequently the likelihood of consensus increases."[26] Similarly, statutes written with greater detail tend to constrain ideological voting in statutory interpretation.[27]

One lesson of these court-centric explanations for legal behavior is that no single approach alone explains all, or arguably most, judicial behavior.[28] As Mark Graber argued: "Whatever areas of law scholars consider, the most fruitful investigations will explore the ways in which legal, strategic, and attitudinal factors interact when justices make decisions, and not engage in fruitless contests to determine which single factor explains the most."[29] Given this need for a multidimensional examination of influences on court decisions, scholars must give increased attention to the legal inputs and demands from litigants.

III. LITIGANTS, SUPPORT, AND SIGNALS: RE-CENTERING COURTS

Traditionally, law and courts scholars have tended to focus on court-centric explanations as described above. Courts, however, cannot do something with nothing; they do not operate in a vacuum. In one sense, legal development only has effect once the decision is implemented.[30] Other actors are similarly important prior to a

[25] Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315 (2002); *see* Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 L. & SOC'Y REV. 827, 827 (2003); Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 AM. POL. RES. 1, 49–51 (2005); Mark J. Richards et al., *Does* Chevron *Matter?*, 28 L. & POL'Y 444, 445, 448–49 (2006); *but see* Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273, 273 (2010) (questioning whether law has any influence on judging).

[26] PAMELA C. CORLEY ET AL., THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT 162 (2013).

[27] *See* KIRK A. RANDAZZO & RICHARD W. WATERMAN, CHECKING THE COURTS: LAW, IDEOLOGY, AND CONTINGENT DISCRETION 29 (2014).

[28] *See* Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 337 (2007).

[29] Mark A. Graber, *Legal, Strategic, or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 33, 60 (Ronald Kahn & Ken I. Kersch eds., 2006).

[30] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 15 (1991); MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 25 (2010); CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 3 (2009); Heather Schoenfeld,

court's decision as well. Students of interest groups have long noted the value of litigation because:

> The judiciary is inevitably a part of the political process. It is the locus of significant power, especially under our system of judicial review of the acts of co-ordinate branches of the government. Inevitably, therefore, the judiciary is one of the points at which the claims of interest groups are aimed.[31]

The following scholars point us toward an examination of the input that courts receive from litigants.

Marc Galanter provided one of the classic discussions of this problem when he demonstrated that "repeat players" in the litigation cycle naturally have an advantage over litigants with fewer resources and less experience.[32] This research suggests that explaining legal change requires, in part, exploring the nature of litigants and how they present claims. For example, studies of the Supreme Court bar found that certiorari was more likely to be granted and victory more likely when the party was represented by experienced counsel.[33] Susan Lawrence aptly summarized the importance of litigants: "The Supreme Court is a passive institution in that it depends upon litigants to provide opportunities for decision. The [J]ustices are powerless to act without a case."[34]

Charles Epp brought this research tradition into sharp focus by refining the various strands into the concept of a support structure.[35] Epp explored the development of rights revolutions in Canada, India, the United Kingdom, and the United States.[36] The traditional court-centric explanations of legal change failed to adequately account for the varying success of rights litigation because judges "cannot make rights-supportive law unless they

Mass Incarceration and the Paradox of Prison Conditions Litigation, 44 L. & SOC'Y REV. 731, 732, 757 (2010).

[31] DAVID BICKNELL TRUMAN, THE GOVERNMENTAL PROCESS: PUBLIC INTERESTS AND PUBLIC OPINION 498 (1951); *see* CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 1–2 (1959).

[32] *See* Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 122, 123 n.72, 125 fig.3 (1974).

[33] *See* KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 180 (1993); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 194 (1995); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 722 (1993).

[34] SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 4 (1990).

[35] *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 3 (1998).

[36] *See id.* at 6.

have rights cases to decide, and the process of mobilizing cases rests on far more than judicial fiat."[37] In other words, rights supportive constitutional provisions and judges willing to apply those provisions are not sufficient to trigger rights revolutions; a support structure must emerge in a society that demands rights protections and has the resources capable of sustaining litigation to support those rights claims.[38] In his comparative examination, Epp concluded that a vibrant support structure "preceded and supported the development of rights revolutions" in all four countries.[39] Where the simplistic court-centric vision of legal change focuses on activist judges desiring to re-make politics, Epp demonstrated that:

> [T]he development of a support structure for civil rights and liberties litigation propelled rights issues into the higher courts, encouraged the courts to render favorable decisions and, at least to some extent, provided the judiciary with active partners in the fight against opponents of implementation of the new rights.[40]

For Epp, the key to rights revolutions, and thus legal change more broadly, is "the political economy of appellate litigation, particularly the distribution of resources necessary for sustained constitutional litigation."[41] While critics have disputed the degree to which material support structures are key,[42] various scholars have similarly emphasized how material resources are essential to initiating and sustaining calls for legal change.[43]

While many of the classic studies of litigation focused on liberal groups,[44] some of the most interesting support structure work has

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[37] *See id*. at 15.

[38] *See id*. at 18.

[39] *See id*. at 20, 21.

[40] *See id*. at 22.

[41] *See id*. at 5.

[42] *See* Donald R. Songer et al., *Do Bills of Rights Matter?: An Examination of Court Change, Judicial Ideology, and the Support Structure for Rights in Canada*, 51 OSGOODE HALL L.J. 297, 326–27 (2013) (arguing that Epp underestimates the independent effect of constitutional provisions); Raul A. Sanchez Urribarri et al., *Explaining Changes to Rights Litigation: Testing a Multivariate Model in a Comparative Framework*, 73 J. POL. 391, 403 (2011) (arguing that a support structure is neither necessary nor sufficient for rights revolutions); *see also* Charles R. Epp, *The Support Structure as a Necessary Condition for Sustained Judicial Attention to Rights: A Response*, 73 J. POL. 406, 408 (2011) (arguing that Songer and his colleagues' research fails to disprove Epp's thesis); Raul A. Sanchez Urribarri et al., *The Support Structure and Sustained Attention to Rights: A Rejoinder*, 73 J. POL. 410, 411 (2011) (disagreeing with Epp's dismissal of Songer and his colleagues' research and conclusions).

[43] *See* Price, *Lawyers Need Law*, *supra* note 6, at 1401–02.

[44] *See, e.g.*, JONATHAN D. CASPER, LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957-1966, at 15 (1972) (examining lawyers who litigated in front of the

focused on the rise of conservative legal activism. A defining aspect of modern constitutional law has been the rightward turn in jurisprudence,[45] and scholars have explored various aspects of this conservative shift in litigation.[46] Steven Teles provided the most thorough exploration of the support structure of conservative litigation.[47] Focusing on changes in judicial composition, Teles argued, missed the key insight from Epp: "Where 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."[48]

Teles detailed the early struggles of conservative public interest law and the ways in which it developed the material resources, as well as professional expertise, to challenge the remains of the New Deal liberal regime because "in explaining why legal change occurs, we must focus on the supply side (litigants), rather than simply the demand side (courts)[.]"[49] By "creat[ing] a competing support structure of its own," the conservative movement was able to lay a

Supreme Court and impacted civil rights and civil liberties litigation); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, at x (1976) (studying the history of *Brown v. Board of Education* and its effects); LAWRENCE, *supra* note 34, at 98 (examining the effects that the Legal Services Program has had in giving the poor a voice in the development of national policy); FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 31 (1976) (explaining the effects of the ACLU, American Jewish Congress, and Americans United on the development and litigation of constitutional issues); VOSE, *supra* note 31, at 49 (exploring the effects of the NAACP on the legal system and civil liberties, particularly in the context of the restrictive covenant cases).

[45] *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 7 (2004).

[46] *See generally* Kevin R. den Dulk, *In Legal Culture, But Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 197, 197–98 (Austin Sarat & Stuart A. Scheingold eds., 2006) (discussing cause lawyers and development of a broader evangelical movement); Kevin R. den Dulk, *Purpose-Driven Lawyers: Evangelical Cause Lawyering and the Culture War*, *in* THE CULTURAL LIVES OF CAUSE LAWYERS 56, 57 (Austin Sarat & Stuart Scheingold eds., 2008) (exploring the role of evangelical cause lawyers as cultural warriors); LEE EPSTEIN, CONSERVATIVES IN COURT *passim* (1985) (studying the conservative groups' litigation in the areas of economic issues, social issues, and conservative public interest law); HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION, at xii (2005) (researching the adoption of liberal views relating to religion by some conservative Christian lawyers and the rejection of those views by others); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 1 (2008) (exploring the cultural conflicts among lawyers for conservative causes); Joshua C. Wilson & Amanda Hollis-Brusky, *Lawyers for God and Neighbor: The Emergence of "Law as a Calling" as a Mobilizing Frame for Christian Lawyers*, 39 L. & SOC'Y INQUIRY 416, 416 (2014) (exploring the emergence of a movement of Christian lawyers).

[47] *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

[48] *Id.* at 12.

[49] *Id.* at 11.

foundation for legal change that has seen increasing success over the past few decades.[50] While a crucial concept, the idea of a support structure tends to focus too much on the passivity of courts and too narrowly on the material resources of litigants.[51]

It is easy to overstate the passivity of courts. For example, one scholar argued that courts are "prisoners of the cases brought to them, trapped in the facts and the arguments of the litigants who bring the cases."[52] Such claims can be overstated and miss the fact that one of the distinguishing features of courts is the fact that they must give reasons for their actions in the form of public opinions.[53] This insight points to the reality of judicial signals: "The court need not simply wait for cases to knock at its door. As is well known, justices often send out signals; they invite cases."[54] Lawyers are trained to reason from precedents and the writings of judges, so the way in which arguments are framed by courts (or judges in separate opinions) can signal interest in particular issues or arguments and trigger subsequent cases.[55] One formulation presents this signaling as a game of supply and demand. Litigants have finite resources and "[a] judge who wishes to hear a particular case is selling the prospect of success" through her legal signals.[56]

Making legal policy is rarely a one-off process. Instead, it "is an iterative process, [and] courts need multiple cases within the same

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[50] *See id*. at 14; *see also* Brian J. Glenn, *Conservatives and American Political Development*, 125 POL. SCI. Q. 611, 634 (2011) ("[T]he standard narrative of most stories of modern conservatism—oddly enough, especially when written by liberals—ended with conservative victory; a movement once in the wilderness had become the dominant source of policy ideas in American politics, and these ideas were carried forth by an infrastructure that dwarfed the capacities of liberals.").

[51] *See generally* SUSANNE SCHORPP ET AL., WHAT RIGHTS IN THE "RIGHTS REVOLUTION"?: ANALYZING CRIMINAL AND OTHER CIVIL RIGHTS CASES SEPARATELY 24 (2008) ("The suspected interplay between ideology and agenda calls for a more systematic analysis of the role of judicial preferences in rights revolutions."); Songer et al., *supra* note 42, at 321 ("In contrast to the support structure theory . . . , increases in the number of lawyers do[es] not appear to increase the proportion of rights cases heard by the Court.").

[52] *See* SORAUF, *supra* note 44, at 3.

[53] *See* Martin Shapiro, *The Giving Reasons Requirement*, *in* ON LAW, POLITICS, AND JUDICIALIZATION 228, 230 (Martin Shapiro & Alec Stone Sweet eds., 2002).

[54] H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 212 (Harvard Univ. Press. Paperback ed. 1994).

[55] *See* Vanessa Baird & Tonja Jacobi, *Empirical Research on Decision-Making in the Federal Courts: Judicial Agenda Setting through Signaling and Strategic Litigant Responses*, 29 WASH. U. J.L. & POL'Y 215, 217–19 (2009).

[56] Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 S. CT. ECON. REV. 1, 11 (2008); *see* Baird & Jacobi, *supra* note 55, at 218–19; Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 186 (2009).

issue area to make comprehensive policy."[57] So the concern turns not just upon material support, as Epp's support structure focuses on, but also "*with litigants' changing perceptions of Supreme Court justices' policy priorities*[,]" the perception of what kinds of claims litigants believe justices wish to see.[58] The primary goal of litigants is to win and thus where signals change the legal terrain, they will respond strategically. For example, in challenges to anti-immigrant policies in California, the litigants preferred an equal protection legal frame but shifted to federalism-based arguments in response to the Supreme Court's increasing signals about the viability of such arguments.[59] In a similar vein, Barry Cushman argued that the New Deal crisis was caused by the poor ability of New Deal lawyers and legislators to pick up on early signals.[60] The Supreme Court's decision in *Bakke,*[61] completely altered the composition and legal defense of university affirmative action programs because universities were aligning themselves with the legal signals sent by the Court.[62]

Ultimately, both support structure and signaling arguments become mutually reinforcing and combining the two allows us to re-center courts in legal development. Of course, "in some instances, judges have created new rights in advance of sustained litigation on the subject by rights advocates, but even then the presence of a vibrant support structure is a necessary condition for rights advocates to capitalize on new legal opportunities offered by judges."[63] Courts rely on litigants to bring forth cases to act upon and litigants rely upon courts to provide signals as to the proper arguments and claims to bring before courts.[64] Thus the process is interdependent: "judicial doctrine is the product of those litigant claims, legal bases, and judicial sympathies that the temper of the times create and join together."[65]

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[57] VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 3 (2007).

[58] *Id.* at 4.

[59] *See id.* at 73–75, 77, 78, 81.

[60] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 39 (1998).

[61] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[62] *See id.* at 300, 311 (citations omitted); Thomas M. Keck, *From* Bakke *to* Grutter*: The Rise of Rights-Based Conservatism, in* THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 414, 414, 415 (Ronald Kahn & Ken I. Kersch eds., 2006).

[63] EPP, *supra* note 35, at 21.

[64] *See* Jacobi, *supra* note 56, at 11; Baird & Jacobi, *supra* note 55, at 222–23.

[65] LAWRENCE, *supra* note 34, at 122.

Studying the ways in which law is mobilized to trigger legal change requires attention to both signals and support. But support in the Epp school of thought is limited to resource mobilization, as having the financial and institutional resources situated to effectively develop cases and pursue appeals.[66] While certainly important, resources are only the beginning of developing an effective case because lawyers must still be able to marshal support in the law for their arguments.[67] This ideational support is important because it serves to frame the legal options available to courts.[68] After all, it is:

> [T]he opinions themselves, not who won or lost, [that] 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 who determine the [ninety-nine] per cent of conduct that never reaches the courts.[69]

Various studies have concluded that this type of ideational support is key to explaining legal development. Risa Goluboff's study of civil rights in the 1940s demonstrated how the choices lawyers made in the open field of civil rights shaped the options ultimately available to the Supreme Court in the 1950s.[70] Similarly, in their study of abortion and the death penalty, Lee Epstein and Joseph Kobylka concluded that while traditional court-centric explanations of legal change 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."[71]

Amanda Hollis-Brusky's work on the Federalist Society demonstrates the power of ideational support.[72] As with Epp, key

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[66] *See* EPP, *supra* note 35, at 3 ("[W]hat is distinctive about my analysis is its emphasis on material resources, on the difficulty with which those resources are developed, and on the key role of those resources in providing the sources and conditions for sustained rights-advocacy litigation.").

[67] *See* Price, *Arguing Gunwall*, *supra* note 6, at 334.

[68] *See id.*; Price, *Lawyers Need Law*, *supra* note 6, at 1400, 1401.

[69] MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 39 (1968).

[70] *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 13, 14 (2007).

[71] LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 8 (1992).

[72] Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENV. U. L. REV. 197, 242–43 (2011) [hereinafter Hollis-Brusky, *Helping Ideas*]; *see* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 23 (2015) [hereinafter HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES]; Amanda Hollis-Brusky, *"It's the Network": The Federalist Society as a Supplier of Intellectual Capital for the Supreme Court*, *in* 61 STUD. L., POL., & SOC'Y 137, 137–78 (Austin Sarat ed., 2013) [hereinafter Hollis-

works on the conservative support structure have focused on how resources are mobilized to support litigation.[73] Though using different terminology, Hollis-Brusky examined the ways in which organized groups offer ideational support for legal change: "ideas are most politically effective when buttressed by a strong 'support structure'—a group of individuals and institutions invested in nurturing, developing, and diffusing them."[74] After all, the goal of legal change is to move a legal idea "from the positively loony to the positively thinkable, and ultimately to something entirely consistent with 'good legal craft.'"[75] Hollis-Brusky centers this ideational shift in the actions of a political epistemic network[76] that offers crucial ideational support to judges. A judge seeking to alter the law must justify his or her decision in written opinion and:

> In order to persuade an audience of similarly educated and trained lawyers and politicians that their decisions are legitimate, these opinions must situate the given decision within a line of established precedents—that is, within an accepted constitutional framework—or, alternatively, they must provide a convincing argument for why that framework should either be ignored, altered, or reconstructed entirely[.][77]

By legitimizing and spreading new conceptions of constitutional law, these epistemic networks make legal change easier for judges to justify. Hollis-Brusky focused on the Federalist Society as a key partner in legitimizing the conservative turn in constitutional law.[78] By supporting the spread of conservative constitutional thought, the Federalist Society provided a wealth of ideational support to conservative justices bent on shifting the law to a more favorable ideological position. Justices Scalia and Thomas, in particular,

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Brusky, *"It's the Network"*].

[73] *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 11–12 (2008); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 12 (2008).

[74] Hollis-Brusky, *Helping Ideas*, *supra* note 72, at 242.

[75] Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444–45 (2001).

[76] HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES, *supra* note 72, at 13 ([A political epistemic network is] an interconnected network of professionals with expertise or knowledge in a particular domain, bound together by the following four characteristics: a shared vision of the proper arrangement of social and political life (shared principled and normative beliefs); shared beliefs, largely instrumental, about how to best realize that vision (shared causal beliefs); shared interpretations of politically contested texts (shared notions of validity); and a common policy project, broadly defined.").

[77] *Id.* at 12.

[78] *Id.* at 23.

borrowed heavily from the key works of Federalist Society scholars on a variety of topics.[79] Similarly, when the Court decided *INS v. Chadha*[80] it "did not introduce a single historical source or citation not provided by the Justice Department's brief."[81] By developing and presenting new visions of law, changing ideational support, the Federalist Society was able to support a new set of conservative justices and help them adapt the law in a direction favorable to their common ideological goals.[82]

IV. RE-CENTERING STATE COURTS: LITIGANTS AND JUDICIAL FEDERALISM

Research in support structures and signaling offers leverage to explore the puzzle of judicial federalism. The 1970s and 1980s conservative shift in the U.S. Supreme Court, coupled with Justice William Brennan's famous call or lawyers and state courts to remember state Constitutions as a method to evade this federal shift, clearly led some to expect a revolution in state constitutional law.[83] A variety of empirical studies demonstrated, however, that engagement was uneven over time and across courts, with most courts still heavily relying on federal doctrines when resolving rights disputes.[84]

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[79] *Id.* at 56, 107, 130, 131.

[80] INS v. Chadha, 462 U.S. 919 (1983).

[81] Hollis-Brusky, *"It's the Network"*, *supra* note 72, at 148; *see also* Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468, 472 (2008) (finding that about ten percent of U.S. Supreme Court opinions borrow language directly from party briefs).

[82] *See, e.g.,* HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES, *supra* note 72, at 23.

[83] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[84] *See* Price, *Lawyers Need Law*, *supra* note 6, at 1399–1400 (summarizing the conclusions of these studies); *see, e.g.*, SUSAN P. FINO, THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM 142, tbl.A.10 (Paul L. Murphy ed., 1987); BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 1 (1991); Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 28 tbl.1, 29 tbl.2 (1994); Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 44 tbl.2 (1992); Staci L. Beavers & Craig F. Emmert, *Explaining State High-Courts' Selective Use of State Constitutions*, 30 PUBLIUS J. FEDERALISM 1, 4 (2000) (noting that civil liberties cases in particular were unlikely to be decided on state law grounds); Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS J. FEDERALISM 111, 113 (1986); Sue Davis & Taunya Lovell Banks, *State Constitutions, Freedom of Expression, and Search and Seizure: Prospects for State Court Reincarnation*, 17 PUBLIUS J. FEDERALISM 13, 30 (1987) (concluding that many states were unwilling to depart from federal precedents 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*, 8 PUBLIUS J. FEDERALISM 55, 55 (1978) (discussing "the increasing tendency" of state courts

James Gardner provided one of the most prominent critiques of judicial federalism in his study of all constitutional cases decided by seven state high courts in 1990.[85] Rather than being a source of truly independent law as envisioned by some theorists, state constitutional law as practiced was "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[86] 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."[87] The potential for independent state law was limited 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."[88]

Of course, Gardner's case selection may have been weak. Justin Long found a much stronger independent engagement with state constitutional law than Gardner when he examined how four self-described independent state high courts—New Hampshire, New Jersey, Oregon, and Washington—actually decided cases.[89] Long found that none of the states were fully compliant but that all were substantially more compliant with their court's purported approach then prior examinations may have suggested: Oregon (ninety-one percent compliant), New Hampshire (eighty-nine percent), Washington (seventy-two percent), and New Jersey (sixty-eight).[90] Arguably, this variation in state constitutional application may be

to rely less on the federal Constitution due to the revival 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); James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1195–96 tbl.1 (2000); James N.G. Cauthen, *State Constitutional Policymaking in Criminal Procedure: A Longitudinal Investigation*, 10 CRIM. JUST. POL'Y REV. 521, 527, 528 (1999).

[85] *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 779 (1992) (discussing the states included in the study: California, Kansas, Louisiana, Massachusetts, New Hampshire, New York, and Virginia).

[86] *Id.* at 763.

[87] *Id.* at 766.

[88] *Id.* at 804. In more recent works, 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 14 (2005); James A. Gardner & Jim Rossi, *Dual Enforcement of Constitutional Norms*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 1, 4 (James A. Gardner & Jim Rossi eds., 2011) [hereinafter NEW FRONTIERS]; James A. Gardner, *Why Federalism and Constitutional Positivism Don't Mix*, *in* NEW FRONTIERS, *supra*.

[89] Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 42–43, 44 (2006).

[90] *See id.* at 74–75, 77–78, 82, 84–85.

explained in part by the law produced by state courts.[91] Stare decisis, though flexible to an extent, works to reproduce initial precedents and lock in particular doctrines over time.[92]

The fact that federal law tends to dominate modern rights discussions is predictable in part because of the path-dependent nature of law. The law is naturally path-dependent because "courts' early resolutions of legal issues can become locked-in and resistant to change."[93] Change may still occur "but it is bounded change—until something erodes or swamps the mechanisms of reproduction that generate continuity."[94] The Warren Court's incorporation revolution helped to create an understanding of rights jurisprudence as "synonymous with the decisions of federal courts in general and the U.S. Supreme Court in particular."[95] "Where law schools give significant attention to the state-level variation in common law subjects, they tend to neglect this possibility for constitutional law."[96] In other words, the groundbreaking shift in rights jurisprudence during the Warren Court broke a new path and law schools have reinforced the norm of federal dominance over rights issues by emphasizing constitutional law as a solely federal concept.[97] There is good reason to suspect that the practice of state courts has further reinforced this path-dependent effect.[98]

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."[99] Building an independent state constitutional jurisprudence entails taking on additional costs, which deters most courts from doing so, and

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[91] *See* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 602, 605 (2001).

[92] *See id.* at 631–32.

[93] *Id.* at 605.

[94] PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 52 (2004).

[95] Price, *Lawyers Need Law*, *supra* note 6, at 1406.

[96] *Id.*; Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166 (2009); Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL EDUC. 243, 243–44 (1991).

[97] *See* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 815–16 (2011); *see also* Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 933 (1993) [hereinafter Linde, *State Constitutions*] ("General constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation.").

[98] *See* Friedman, *supra* note 97, at 815–16.

[99] *See id.* at 789.

lawyers follow the courts' lead.[100] One scholar called for lawyers "to imagine a world in which there is no federal law" and make state constitutional claims from scratch.[101] 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.[102] Judicial federalism, however, has no epistemic community to develop and push new state constitutional precedents on courts.[103] In part, this is because the decentralized nature of fifty states makes such organizing difficult.[104] More importantly, such an epistemic community is unlikely because they tend to organize around substantive outcomes rather than the process of reaching an outcome, and state constitutional activism is about the process.[105] In other words, most groups are organized around a policy goal and "[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.[106] However, this argument misses the potential for signals from state courts. Where a state court does take the step to establish new precedent, "litigants will react to the precedent in ways that further reinforce and contribute to the path indicated by that new precedent."[107]

> Two kinds of legal signals are important to explaining 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

[100] *See id.* at 826–27.

[101] JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 1.08(4) (4th ed. 2006).

[102] Friedman, *supra* note 97, at 827.

[103] *See* Price, *Lawyers Need Law*, *supra* note 6, at 1404–05.

[104] *See generally* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2118 (2015) (demonstrating that the attorneys general of each of the fifty states have different obligations under their state Constitutions, which, for some states, lacks a mandate to defend the state Constitution when it differs from federal law).

[105] *Cf.* Price, *Lawyers Need law*, *supra* note 6, at 1405–06 (arguing that interest group litigation focuses on federal law to increase the impact of a decision).

[106] DONALD J. FAROLE, INTEREST GROUPS AND JUDICIAL FEDERALISM: ORGANIZATIONAL LITIGATION IN STATE JUDICIARIES 20 (1998).

[107] Hathaway, *supra* note 91, at 628.

> where federal law has soured on her, state constitutional provisions provide a last-ditch effort. This move to state law is limited, however, by the fact that there is usually no [independent] 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.[108]

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.[109] 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.[110]

> 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.[111]

This article is primarily concerned with the second, internal signal. Lawyers need law to guide them and thus will wait for some form of guidance before embarking on a new, unknown path.[112]

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[108] Price, *Arguing Gunwall*, *supra* note 6, at 336.

[109] *See generally* Friedman, *supra* note 97, at 819 ("The circumstances that shape the constraints on a state court's ability to undertake truly independent constitutional analysis of individual rights provisions have to do with the lack of resources that would allow the court to engage in doctrinal development in a given case. . . . [I]nconsistent independent doctrinal development flows from the constraining effects of resource limitations.").

[110] *See, e.g.*, Price, *Lawyers Need Law*, *supra* note 6, at 1429–36 (discussing claimant arguments in search and seizure cases in Ohio and New York under this external signal).

[111] Price, *Arguing Gunwall*, *supra* note 6, at 336.

[112] *See* Price, *Lawyers Need Law*, *supra* note 6, at 1408.

Prior research found that where courts lead the way in declaring an approach to state constitutional law, rights claimants generally followed the new path indicated.[113] This article explores in depth the effect of Justice Hans Linde's jurisprudence on rights claimants and governmental attorneys in Oregon. As the most prominent and influential theorist of state constitutional law, Linde was well situated to put his exacting theory into practice. This article concludes that his effect was dramatic, fundamentally altering the nature of constitutional adjudication in Oregon.

V. LINDE'S CONSTITUTIONAL THOUGHT

Justice William Brennan's 1977 article was likely the first introduction most legal elites had to state constitutional rights provisions.[114] Scholars of judicial federalism, however, have long known that the far more powerful statement of constitutional law came from then Professor Hans Linde in a 1970 article[115] that likely went unnoticed for a time after publication.[116] Where Brennan's arguments were based heavily on the use of state Constitutions to avoid a recent conservative turn in his own colleagues,[117] Linde's arguments turned exclusive on a powerful constitutional logic.[118] This section will outline the key aspects of Linde's thinking on state constitutional law both on and off the bench. Only after establishing the contours of Linde's call for the primacy of Oregon constitutional law can we then assess the effect it had on legal practice in Oregon.

Linde's writings offered both a theoretical basis for judicial federalism and, over time, built upon that theory to offer concrete

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[113] *See generally* Price, *Arguing Gunwall*, *supra* note 6, at 357–58 (discussing the changes to lawyers' responses after Washington adopted a criteria test); *see* Price, *Lawyers Need Law*, *supra* note 6, at 1452–53 (discussing the different changes to lawyers' responses after changes to search and seizure claims in New York, Ohio, Washington, and Oregon).

[114] *See, e.g.*, Brennan, *supra* note 83, at 490.

[115] *See* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 125–26 (1970).

[116] *See generally* Thomas A. Balmer, *"Does Oregon's Constitution Need a Due Process Clause?": Thoughts on Due Process and Other Limitations on State Action*, 91 WASH. L. REV. ONLINE 157, 157–58 (2016) (discussing the importance of Linde's 1970 article).

[117] *See* Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L. Q. 429, 432–33 (1988); *but see* Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L. J. 763, 767–71 (1998) (arguing that Brennan had some history of state constitutional support from his time on the New Jersey Supreme Court).

[118] *See* Linde, *supra* note 115, at 126.

guidance to state court judges and lawyers on how to approach the problem. While his 1970 article was primarily about the fact that the Oregon Supreme Court spoke often of state constitutional due process despite the fact that the Oregon Constitution lacked a due process clause, it went further to offer Linde's justification for the primacy of state constitutional law.[119] He concluded: "The logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last."[120] This logic flows from the reality of federal review of judicial decisions: federal review is premised on an argument that state law has denied some right.[121] But:

> The state Constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state Constitution, then the state is not violating the Fourteenth Amendment.[122]

Because state and federal constitutional claims "are not cumulative but alternative . . .[, 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."[123] This would lead to the short statement that "[s]tate bills of rights are first in two senses: first in time and first in logic."[124] After all, state bills of rights pre-dated and informed the federal Bill of Rights and even later states have turned to other state examples more often than the federal Bill.[125] The question in a primacy approach then becomes "not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand."[126] Achieving this primacy of state constitutional law, however, faced powerful logistical difficulties.

Though he used different language, Linde often wrote in terms of

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[119] *See id.* at 182–83.
[120] *Id.* at 182.
[121] *See id.*
[122] *Id.* at 133.
[123] *Id.* at 134, 135.
[124] Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 380 (1980) [hereinafter Linde, *First Things First*].
[125] *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 10 (1998).
[126] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

path dependence as a difficult barrier to independent state constitutional law. The Warren Court's rights revolution:

> [L]ed many state courts and the lawyers who practice before [state courts] to ignore the state's law, enforcing only those personal rights guaranteed by federal law, or to assume that the state's own guarantees must reflect whatever the United States Supreme Court finds in their federal analogues.[127]

This federal rights revolution led to a pedagogical approach to constitutional law that "create[s] the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation."[128] This educational myopia created "[a] generation of lawyers brought up on United States Supreme Court opinions [that] seems literally speechless when we ask from the bench, as we sometimes do, how we should decide a constitutional question if the Supreme Court has never addressed it."[129] This then leads to a reinforcing feedback dynamic where lawyers present federal arguments that rarely address state concerns and courts respond to the arguments they have before them:

> Once adopted in an opinion, a formula is hard to dislodge. Lawyers rarely offer modes of analysis that are not drawn from prior opinions, partly because that is how lawyers are taught, and partly because even when existing doctrine is unfavorable, they fear the risk of implying that their case depends on a change.[130]

Linde thus admitted that developing "an independent jurisprudence freed from generic boilerplate, in constitutional law as in other fields, requires cooperation from all concerned."[131]

Actually achieving independent analysis can be difficult given the path dependence of legal training and culture. Linde suggested that lawyers should work to preserve all state issues by briefing them separately from any federal issues and never simply present the state claim as an invitation to disagree with the U.S. Supreme Court.[132] To some degree, however, Linde saw courts as the key to changing this culture of neglect towards state constitutional law. State courts were advised to make clear that they "expect[] to hear

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[127] Linde, *First Things First*, *supra* note 124, at 382.
[128] Linde, *State Constitutions*, *supra* note 97, at 933.
[129] Linde, *First Things First*, *supra* note 124, at 391.
[130] Linde, *State Constitutions*, *supra* note 97, at 951.
[131] *Id.* at 934.
[132] *See id.* at 935, 936.

and will decide state constitutional claims before federal constitutional claims" and, if counsel failed to raise the issue, to state clearly that it is making no decision on state issues not argued,[133] and that a court should feel free to demand additional briefing if it feels an issue was inadequately presented.[134] Perhaps most dramatically, Linde suggested that state courts should not be bound by the norm against *sua sponte* issue creation: state courts owe their "state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time."[135] In terms of substantive constitutional arguments, Linde typically suggested that lawyers look to the standard norms of all constitutional arguments but without the baggage of federal doctrine.[136] This brief outline of Linde's academic writing demonstrates a consistent vision of state constitutional law. Linde's influence, however, came not from academic writings alone, but from his ability to translate those academic writings into court action.

Governor Robert Straub appointed Linde to the Oregon Supreme Court in 1977 to replace a retiring justice.[137] Immediately, Linde deployed his argument for the primacy of state constitutional law against the deferential stance of his new colleagues towards decisions of the U.S. Supreme Court. In three 1977 cases, Linde began to establish his argument for primacy, though initially through a subtle approach of simply citing state provisions without the broader logical primacy argument.[138] While agreeing with the court that a defendant could not be compelled to speak in a psychiatric examination under statutory provisions, Linde noted: "[T]his exception from a defendant's obligation to answer questions

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[133] *Id.* at 934.

[134] *See id.*

[135] Linde, *First Things First*, *supra* note 124, at 383.

[136] *See* Linde, *supra* note 115, at 182 ("To dispose of state constitutional questions before reaching claims under the federal Fourteenth Amendment obliges counsel and court to give independent professional attention to the text, history, and function of state constitutional provisions.").

[137] *See* Philip P. Frickey, *Honoring Hans: On Linde, Lawmaking, and Legacies*, 43 WILLAMETTE L. REV. 157, 159 (2007). Oregon utilizes nonpartisan judicial elections to elect and retain justices to six-year terms; however, in common with most other election states, many justices first arrive on the bench through interim appointments. *See* Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort through Interim Appointments*, 27 JUST. SYS. J. 1, 6 (2006). From 1964-2004, seventy-five percent of justices in Oregon were first appointed to the bench. *See id.*

[138] *See* State v. Flores, 570 P.2d 965, 970 (Or. 1977) (Linde, J., dissenting); Brown v. Multnomah Cty. Dist. Court, 570 P.2d 52, 55 (Or. 1977) (quoting OR. CONST. art. I, § 11); State *ex rel.* Johnson v. Woodrich, 566 P.2d 859, 862 (Or. 1977) (citing OR. CONST. art. I, § 12).

does not exhaust the defendant's privilege not to be compelled to testify against himself," and cited the state self-incrimination provision alone.[139] In one of his earliest opinions for the court, Linde held that a person accused of minor traffic offenses is entitled to legal representation with reference only to section 11 of the Oregon Bill of Rights.[140] In a footnote, he placed a simple statement of primacy: "If it is determined that a state's own law and Constitution do not provide the claimed safeguards, it then becomes necessary to consider the corresponding guarantees of the federal [Sixth A]mendment that bind the state by virtue of the [Fourteenth A]mendment."[141] Linde expressed greater frustration when the court's majority upheld a search after the suspect consented but without a warning informing him of his right to refuse.[142] The majority rested on Fourth Amendment jurisprudence with a glancing acknowledgment that "we are at liberty to adopt a stricter test under our own Constitution. . . . However, we see no persuasive reason to do so."[143] Adopting a recently published law review article outlining reasons for diverging from federal law, the court refused to consider a state rationale.[144] Linde abandoned subtlety in his dissent by vigorously presenting his primacy argument:

> 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 [was] meant to embody that principle from the state Constitutions that preceded the federal Bill of Rights.[145]

Instead, the question is "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."[146]

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[139] *See Woodrich*, 566 P.2d at 862 (Linde, J., specially concurring) (citing OR. CONST. art. I, § 12).

[140] *See, e.g.*, *Brown*, 570 P.2d at 55 (quoting OR. CONST. art. I, § 11) ("In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel[.]").

[141] *Brown*, 570 P.2d at 55 n.1 (citing Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968); Argersinger v. Hamlin, 407 U.S. 25, 27 (1972)).

[142] *See Flores*, 570 P.2d at 970 (Linde, J., dissenting).

[143] *Id.* at 968 (citing Oregon v. Hass, 420 U.S. 714, 719 (1975); State v. Evans, 483 P.2d 1300, 1302 (Or. 1971)).

[144] *See Flores*, 570 P.2d at 968 (citing Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 318–19 (1977); State v. Florance, 527 P.2d 1202, 1209 (Or. 1974)).

[145] *Flores*, 570 P.2d at 971 (Linde, J., dissenting).

[146] *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973); United States v.

Linde's primacy arguments, both subtle and forthright, met resistance from his new colleagues. Justice Thomas Tongue concurred with the holding that traffic offenders must be represented but objected to the state basis, stating: "In my opinion, the same result is required by [the federal Constitution] and is not foreclosed by decisions of the Supreme Court of the United States, as I read those decisions."[147] Justice Edward Howell similarly complained: "In the absence of some important policy reason for giving a broader interpretation to" the Oregon Constitution, it should be treated as identical to federal law as had been the court's practice.[148] The early years would continue to see contentious battles over the relationship of state and federal law.[149]

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.[150]

Linde strategically utilized the odd procedural history of *State v. Kennedy*[151] to further solidify his primacy argument. The case involved a claim that retrial after a mistrial for prosecutorial error was barred by double jeopardy, a claim accepted by the Oregon Court of Appeals without any specific mention of which constitutional provision was relied upon and just referencing two federal cases.[152] After the Oregon Supreme Court denied review, the U.S. Supreme Court reversed, holding that double jeopardy was not violated where the prosecutor did not intend to induce a mistrial.[153] On remand, the appellate court affirmed the conviction.[154] Ultimately, Linde wrote for the court and agreed that double jeopardy was not offended but used the opportunity to

Watson, 423 U.S. 411, 418–20 (1976)).

147 Brown v. Multnomah Cty. Dist. Court, 570 P.2d 52, 61 (Or. 1977) (Tongue, J., specially concurring).

148 *See* State *ex rel.* Johnson v. Woodrich, 566 P.2d 859, 864 n.1 (Or. 1977) (Howell, J., dissenting) (citing Tupper v. Fairview Hosp. & Training Ctr., 556 P.2d 1340, 1344 n.2 (Or. 1976)).

149 *See, e.g.*, State v. Newton, 636 P.2d 393, 410–11 (Or. 1981) (Lent, J., dissenting).

150 Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981).

151 State v. Kennedy, 619 P.2d 948 (Or. Ct. App. 1980).

152 *See id.* at 949 (citing United States v. Jorn, 400 U.S. 470, 485 (1970); United States v. Dinitz, 424 U.S. 600, 611 (1976); State v. Rathbun, 586 P.2d 1136, 1138 (1978)).

153 *See* Oregon v. Kennedy, 456 U.S. 667, 675–76 (Or. 1982).

154 *See* State v. Kennedy, 657 P.2d 717, 718 (Or. Ct. App. 1983).

demonstrate the practical superiority of primacy:

> The history of this case demonstrates the practical importance of the rule, often repeated in recent decisions, 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.[155]

Failure to follow the primacy requirements "can also waste a good deal of time and effort of several courts and counsel and needlessly spur pronouncements by the United State Supreme Court on constitutional issues of national importance in a case to whose decision these may be irrelevant."[156] "As it is," Linde stated, "[W]e reach the issue of Oregon law two and one-half years and hundreds of pages of briefs after it might have been decided in the Oregon courts" had the Court of Appeals simply followed the correct procedure.[157]

Other members of the Oregon Supreme Court became primacy advocates. 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.[158] 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."[159]

Even critics of early primacy seemed to shift their positions. Justice W. Michael Gillette was elevated from the Court of Appeals in 1986.[160] 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,[161] 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

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[155] State v. Kennedy, 666 P.2d 1316, 1318 (Or. 1983).

[156] *Id.* at 1319.

[157] *Id.* at 1320.

[158] *See* Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 642 (1983).

[159] State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., specially concurring), *overruled by* State v. Owens, 729 P.2d 524, 531 (Or. 1986).

[160] Price, *Lawyers Need Law*, *supra* note 6, at 1422.

[161] State v. Flores, 685 P.2d 999, 1005 (Or. Ct. App. 1984).

state search precedent went in limiting police action.[162] Even though Linde was in dissent on the substantive issue of the case, one commentator (and former Linde law clerk) argued that *Owens* was a Linde victory because "the opinions in the case are purely Oregon Constitutional law."[163] Gillette's concurrence suggested that 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 go forward on a new road, a road which will—like most roads under construction—involve an occasional detour.[164]

The disagreement shifted from whether the state Constitution deserved independent interpretation to how such interpretation should proceed.[165]

VI. CASE SELECTION AND CODING[166]

Coding rules and choices are discussed in my prior work on this subject and there is no reason to repeat it at length here; instead, I will briefly describe the complications of Oregon brief records.[167] No Oregon 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

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[162] *See Owens*, 729 P.2d at 525; *id.* at 531 (Gillette, J., concurring); *id.* at 535–36 (Lent, J., dissenting).

[163] David Schuman, *State Constitutionalism Comes of Age in Oregon*, 59 ALB. L. REV. 1741, 1742 (1996).

[164] *Owens*, 729 P.2d at 531–32 (Gillette, J., concurring).

[165] *See, e.g.*, *Owens*, 729 P.2d at 527 (citing State v. O'Neal, 444 P.2d 951, 953 (Or. 1968); State v. Krogness, 388 P.2d 120, 122 (Or. 1963); State v. Florance, 527 P.2d 1202, 1206 (Or. 1974); United States v. Robinson, 414 U.S. 218, 225–26 (1973); Gustafson v. Florida, 414 U.S. 260, 263–64 (1973)).

[166] As this article shares a common origin with other works, it substantially reproduces coding and selection issues discussed in my prior publications. *See* Price, *Arguing Gunwall*, *supra* note 6, at 339–42; Price, *Lawyers Need Law*, *supra* note 6, at 1408–28.

[167] *See* Price, *Arguing Gunwall*, *supra* note 6, at 339–42; Price, *Lawyers Need Law, supra* note 6, at 1408–28.

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.[168] The statement of intent[169] for the microfilm rolls 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.[170] Since the statement of intent clearly spells out that the records were complete as reproduced,[171] I assume that the Oregon Court of Appeals brief was the only one utilized before the Oregon Supreme Court, and therefore, I used that brief for my analysis.[172] 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.

VII. OREGON CONSTITUTIONAL EXPERIENCE: LINDE'S EFFECT ON RIGHTS CLAIMANTS

A. Aggregate Trends

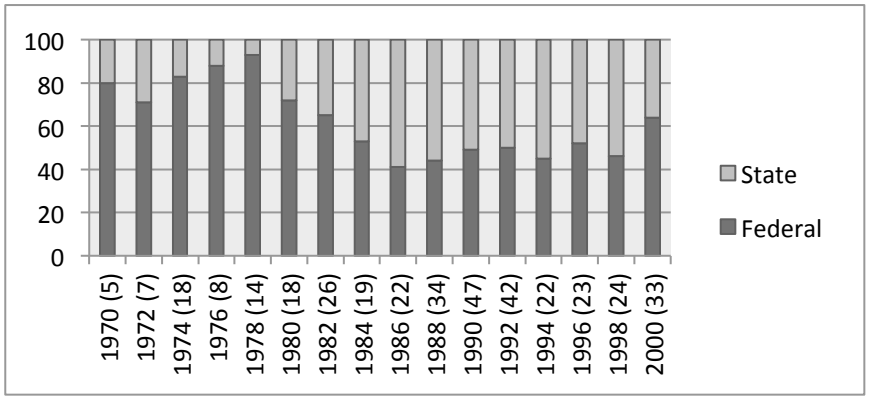

Figure 1.[173] Percentage of arguments by year, Oregon 1970-2000.

[168] Index guide on file with the author.

[169] A sample of this statement is on file with the author.

[170] A sample of this statement is on file with the author.

[171] A sample of this statement is on file with the author.

[172] This also means that citations to the relevant legal briefs will be to the Oregon Court of Appeals because of this odd appellate briefing norm. A sample of this statement is on file with the author.

[173] Data on file with author.

I analyzed a total of 362 arguments: 57% federally based and 43% state based. This aggregate distribution clearly suggests that state constitutional law enjoyed a wide presence in Oregon rights litigation but breaking the distribution down by year, shown in Figure 1, demonstrates the dramatic change over time within Oregon. With the exception of 1970 and 1972, which are skewed by the small number of arguments heard, the pre-Linde years show relatively little attention to state constitutional rights issues and a dramatic climb in the post-Linde years. After 1984, there is a surprising degree of parity with arguments hovering around an equal percentage of federal and state claims. It is unclear whether the dip in state arguments in 2000 is the start of a trend or the effect of death penalty litigation discussed below. Figure 2 shows the variations in issue areas. As with most states, criminal procedure rights see a great deal of interest but at quite high levels, especially search and seizure where the arguments are equally split, but there is significant state constitutional activity in all of the areas. There are few cases dealing with religious freedom or establishment, and takings claims were fairly rare. But both free speech and equal protection saw dramatic attention to state constitutional law—attention that has little to do with federal retrenchment and was driven by the development of separate state constitutional doctrines as discussed below.

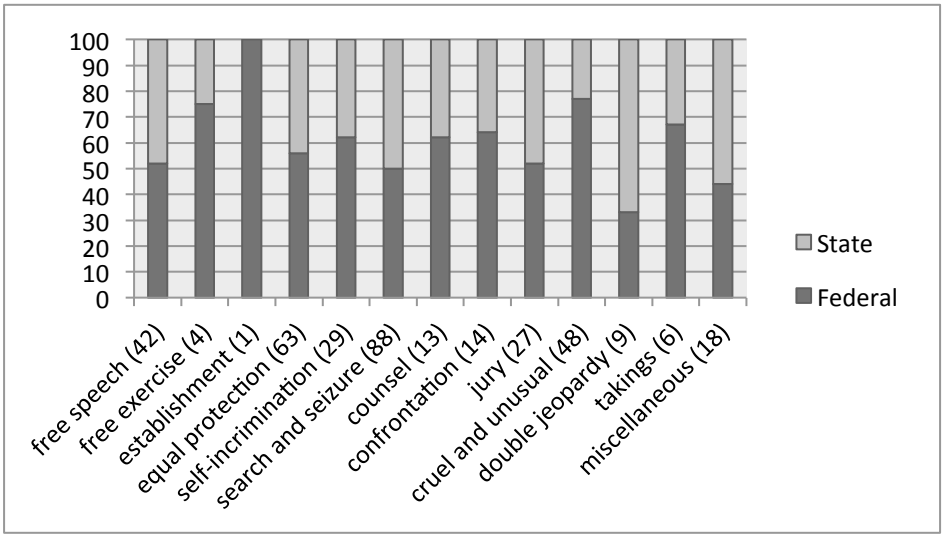

Figure 2.[174] Percentage of arguments by rights area, Oregon 1970-2000.

[174] Data on file with author.

B. The Pre-Linde Years, 1970-1978

Of the fifty-two arguments from 1970-1978, only eight (15%) were state based.[175] Two of these claims came in equal protection cases and neither were strong examples of independent law.[176] Otherwise, the remaining six arguments were all clearly state based and driven by federal retrenchment or at least substantial uncertainty in federal law.

The most thorough state argument in this period came in a school funding case. Given the U.S. Supreme Court's total rejection of school funding suits in 1973,[177] the most prominent example of state constitutional law has been in this area.[178] In *Olsen v. State*,[179] education reformers presented a state argument that did little more than invite the court to evade the recent federal retrenchment.[180] The claimants discussed the same precedents treating section 20 and the Equal Protection Clause as "[f]unctionally [e]quivalent[,]"[181] which Linde had already criticized.[182] In a single paragraph, the claimants quoted from Linde's criticism that section 20 was more specifically targeted towards special privileges, arguing that the Oregon funding scheme gives such a special advantage to children in wealthy districts.[183] The claimants made no attempt to flesh out this particular line of argument, however. Instead, the claimants turned to the California Supreme Court's recent school funding suit striking down the state's system in part based on state constitutional equal protection and urging the Oregon court to

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[175] Though Linde joined the court in 1977, I include 1978 because of the complications of Oregon briefing described above. *See supra* Figure 1; WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 74 (1997).

[176] *See* Appellant's Abstract of Record and Brief at 34, Bennett v. Oregon State Bar, 470 P.2d 945 (Or. 1970) (No. 85581); *see also* Appellant's Brief and Abstract of Record at 38, 39–40, Comm. to Retain Judge Jacob Tanzer v. Lee, 527 P.2d 247 (Or. 1974). In the latter brief, the state discussion was vague at best and coded as "state based" due to my generous rules.

[177] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55, 58–59 (1973).

[178] *See*, *e.g.*, DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001); Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 935–36 (2015); *see also* MATTHEW H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY (2001); MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM (2010).

[179] Olsen v. State, 554 P.2d 139 (Or. 1976).

[180] *See* Appellant's Brief and Abstract at 33, *Olsen*, 554 P.2d 139.

[181] *Id.*

[182] *See* Linde, *supra* note 115, at 140–43.

[183] *See* Appellant's Brief and Abstract, *supra* note 180, at 34; *see also* Linde, *supra* note 115, at 142 ("[T]he essence of a section 20 claim is that others have been granted a special advantage.").

follow suit.[184] The *Olsen* claimants argued that the court should simply continue to apply the federal tiers of scrutiny approach to equality challenges because the two provisions were equivalent, but that the application had to be different because education was a fundamental interest under the state Constitution.[185] Faced with an unambiguously negative federal precedent, and a lack of substantial state law, the claimants sought to apply the federal standard under the veneer of the state Constitution—the exact practice that Linde complained of so widely.[186]

Free speech rights on public property demonstrate a similar trend of federal retrenchment affecting state constitutional claims. In *Lenrich Associates v. Heyda*,[187] a religious group distributed magazines and chanted in a private shopping mall.[188] The trial court denied an injunction sought by the mall owners, holding that private shopping malls are quasi-public spaces and, thus, the group enjoyed the First Amendment right to express themselves.[189] While the case was on appeal, however, the U.S. Supreme Court reversed a nearly identical decision holding that the First Amendment does not require access to private shopping malls.[190] The initial section of the claimant's argument, apparently in response to the mall owner's claim, sought to convince the court that it was not bound to follow this decision, pointing to instances of judicial federalism, most of which where fairly anemic examples, and stressing Linde's push for the primacy of state rights and ending the automatic deference to the U.S. Supreme Court.[191] The bulk of the argument, though, was aimed at discussing the U.S. Supreme Court's jurisprudence prior to *Tanner*, arguing that the "*Tanner* majority ignore[d] the reasoning of [its] earlier decisions," and that *Tanner* should be ignored because it was "a retreat from a long line of cases which have expanded the scope of free speech in an effort to maintain its viability in an ever growing and increasingly

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[184] *See id.* at 36, 39.

[185] *Id.* at 38–49; *see* OR. CONST. art. VIII, § 3 ("The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of common schools.").

[186] *See* Appellant's Brief and Abstract, *supra* note 180, at 38–39, 40, 41. While the court ultimately rejected this argument, a claimant in 1978 unsuccessfully attempted to argue that *Olsen* did apply a more biting balancing test and that this should invalidate a limitation on mobile homes as wealth discrimination. *See* Appellant's Brief and Abstract of Record at 33, Clackamas Cty v. Dunham, 567 P.2d 605 (Or. Ct. App. 1977) (No. 91323).

[187] Lenrich Assoc. v. Heyda, 504 P.2d 112 (Or. 1972).

[188] *See id.* at 113.

[189] *See id.*

[190] *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 553, 555–56, 570 (1972).

[191] *See, e.g.*, *Lenrich Assoc.*, 504 P.2d at 114–15.

suburbanized society."[192] As the federal dissenters demonstrated, the U.S. Supreme Court's new direction ignored the changing social realities that make a private shopping mall akin to a modern day open town square.[193] While the court rejected this argument, it did note that it had the power to issue a more protective rule and a claimant in a libel case in 1974 used this brief assertion as a short tacked-on point that the state provision could be the basis for reversing a libel judgment as an alternative to the primary federal claim about actual malice.[194] Though the state claim was poorly developed and amounted to little more than an assertion, it is an outlier to a degree given the stable federal libel doctrine and the refusal of the Oregon court to issue a more protective state doctrine.[195]

The final significant issue unexpectedly involved double jeopardy. In *State v. Fair*,[196] the claimant noted that the federal definition of jeopardy was in flux and primarily relied upon federal law, arguing that "[w]hile it is true [that] the United States Supreme Court has as yet not adopted the 'same transaction' test to determine when jeopardy rears its head, defendant submits the trend is in that direction."[197] Though the primary argument was federal, the claimant repeatedly cited to both provisions and referenced older Oregon cases as a sloppy means of incorporating a vague state claim.[198] In essence, the claimant's brief argued for rejection of the older "same evidence" test as bad legal policy, the constitutional basis was left to the court.[199] In a related case the same year, the Oregon Supreme Court adopted this argument—despite the fact that the claimant in that case did not argue a state violation—holding that the stronger test is required under the state Constitution regardless of the ultimate resolution of the federal test.[200] A claimant in 1974 relied upon this higher bar when arguing that his plea to reckless driving forbade the state from

[192] Respondent's Brief at 23, 25, *Lenrich Assoc.*, 504 P.2d 112.

[193] *Id.* at 25, 26–27.

[194] *See Lenrich Assoc.*, 504 P.2d at 114–16; Brief and Abstract of Record of Appellant at 21–22, Post v. Oregonian Publ'g Co., 519 P.2d 1258 (Or. 1974).

[195] *See Post*, 519 P.2d at 1261 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 281–83 (1964); Rosenbloom v. Metromedia, 403 U.S. 29, 62 (1971) (White, J., concurring)).

[196] State v. Fair, 493 P.2d 182 (Or. Ct. App. 1972).

[197] Appellant's Brief and Abstract of Record at 22, *Fair*, 493 P.2d 182.

[198] *See id.* at 11–12, 19.

[199] *Id.* at 12.

[200] State v. Brown, 497 P.2d 1191, 1196 (Or. 1972); Brief for Appellant at 4, 6, State v. Brown, 488 P.2d 865 (Or. Ct. App. 1971) (No. 100559).

trying him for manslaughter arising out of the same event.[201] This early set of cases is the reason that double jeopardy claims are dominated by state arguments, as shown in Figure 2.[202]

The trend of these early cases was largely as expected. Federal arguments dominated most rights arguments. But where federal law was uncertain or negative, state claims emerged. These state claims, however, were the exact type of arguments that Linde complained of throughout his career: underdeveloped invitations to simply disregard a recent shift in federal constitutional law and apply the earlier doctrine under the trappings of the state Constitution.

C. The Transition Years, 1980-1984

As discussed in Part V above, Linde spent his first years on the court fighting for recognition of primacy as the proper approach to constitutional law. During these transition years where the court itself was struggling to define its role,[203] we would expect lawyers to gradually pick up on the increasing signals that the state Constitution should not be neglected.[204] From 1980-1984, 23 (37%) of the 63 arguments were state based, clearly a significant increase from the 1970s. However, this period still looks broadly similar to prior years with federal retrenchment driving state arguments.

A significant example of federal retrenchment came in another frequent area for judicial federalism: abortion funding.[205] A state agency promulgated a rule limiting the use of state funds for abortions and claimants attacked the rule on privacy, equal protection, and religious freedom grounds.[206] After noting Oregon decisions recognizing the role of independent constitutional law, primarily drawn from Linde-era opinions, and Brennan's call for state court activism,[207] the claimant argued that three principles

[201] Respondent's Brief at 2, 4, State v. Leverich, 511 P.2d 1265 (Or. Ct. App. 1974) (No. 29114).

[202] *See supra* Figure 2.

[203] *See* Frickey, *supra* note 137, at 163.

[204] *See* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 881, 912 n.244, 917–18 (2007).

[205] *See* Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 471–73 (2009) (discussing the various uses of state constitutional law in abortion rights cases).

[206] Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources of Oregon, 687 P.2d 785, 786–87 (Or. 1983).

[207] *See, e.g.*, Petitioner's Brief at 9–10, Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources of Oregon, 663 P.2d 1247 (Or. Ct. App. 1983) (No. A20856).

should guide independent analysis: textual differences, conflict between new federal doctrine and preexisting state law, and "independent construction is favored when special state policies or values are at stake."[208] "[T]hese principles demand departure from the decision issued by a *bare majority* of the United States Supreme Court[.]"[209] While the driving factor seems to have been the Supreme Court's decision to uphold abortion funding restrictions, the claimants did proceed to offer a relatively clear state privacy argument despite the Oregon Supreme Court's earlier expression of discomfort with the idea of a state based right to privacy.[210] In attempting to justify a new privacy doctrine under state law, the claimants explored the history of the natural rights debate in Indiana (from which the State of Oregon borrowed much of its constitutional language) as a way to incorporate privacy into some of the vague provisions of the Oregon bill of rights.[211] Claimants then discussed decisions from California and Massachusetts rejecting similar restrictions on abortion funding,[212] describing these courts as "follow[ing] the rationale of *Griswold v. Connecticut* . . . and *Roe v. Wade*" rather than the newer, narrower constructions of reproductive privacy.[213] While certainly more detailed than the pre-Linde years, the argument ultimately still settled on an invitation to avoid a recent restriction on federal rights doctrine.[214] Similarly, after the U.S. Supreme Court held that the Sixth Amendment provides a public trial right only to the accused and not the media,[215] press claimants argued that the state Constitution's strong language favoring open courts required the court to ignore the federal decision.[216] Other areas see a more mixed set of signals.

[208] *Id.* at 11.

[209] *Id.* (emphasis added); Harris v. McRae, 448 U.S. 297, 326–27 (1980).

[210] *See Planned Parenthood Ass'n Inc.*, 687 P.2d at 786–87 (citing *Harris*, 448 U.S. at 326–27); *see also* Sterling v. Cupp, 625 P.2d 123, 127–28 (Or. 1981) (avoiding the privacy argument in favor of an alternative state claim).

[211] *See* Petitioner's Brief, *supra* note 207, at 12–13, 14, 15.

[212] *See id.* at 18–21; *see also* Comm. to Def. Reprod. Rights v. Myers, 625 P.2d 779, 799 (Cal. 1981); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 405 (Mass. 1981).

[213] *See* Petitioner's Brief, *supra* note 207, at 19.

[214] *See id.* at 19–20. The claimants made secondary arguments that the abortion funding restriction violated both equal protection and free exercise rights, as well. *See id.* at 22. To a degree these arguments are similarly wrapped up in federal evasion, though the equal protection argument does seek to borrow gender equality standards from the Washington Supreme Court. *See id.* at 22–23, 25, 26–27, 28, 33.

[215] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 443, 444, 446–47 (1979).

[216] *See* Answering Brief of Plaintiffs-Relators at 12–14, State *ex rel.* Oregonian Publ'g Co. v. Deiz, 613 P.2d 23 (Or. 1980) (No. 26832). After this claim was successful, a later criminal defendant used it to supplement his public trial argument. *See* Appellant's Brief at 26, State v. Blake, 633 P.2d 831 (Or. Ct. App. 1982) (No. 17577).

As Figure 2 shows, state constitutional arguments were frequently made in free speech cases.[217] This is surprising in part as the U.S. Supreme Court did not generally retrench speech protections, though specific instances existed. One clear example of federal retrenchment is a commercial speech argument asserting that the Oregon bar's rejection of trade names was unconstitutional.[218] The U.S. Supreme Court had explicitly rejected this argument.[219] The claimant noted the absolutist language of the state speech provision[220] arguing that there is no basis for treating commercial speech to a less protective standard, as the U.S. Supreme Court did, "because the Oregon Constitution does not distinguish between commercial and non-commercial speech."[221] The claimant then turned to the policy of the federal decision, noting that trade names pose no harm to the public and in fact help build a trusted brand for public consumption; abuse may occur but "[a]ny advertisement is subject to abuse but the preferable solution is a fuller disclosure and not a banning of the statement," citing heavily to the federal dissenting opinion's logic to support this point.[222] While the court resolved the claim on statutory grounds, a more significant trend involved the relationship of speech and criminal law.

The Oregon Supreme Court began to signal a change in state doctrine where speech acts were criminalized. In *State v. Spencer*,[223] the court invalidated a disorderly conduct statute as overbroad in reaching too much protected speech.[224] Interestingly, the court openly admitted that the parties argued the case as a First Amendment issue but decided to reach a state constitutional resolution itself.[225] In *State v. Huie*,[226] the claimant utilized this precedent in arguing that the state's solicitation statute was unconstitutional because it criminalized the actual speech of

[217] *See supra* Figure 2.

[218] *See In re* Conduct of Shannon, 638 P.2d 482, 484 (Or. 1982).

[219] *See* Friedman v. Rogers, 440 U.S. 1, 15–16 (1979).

[220] *See, e.g.*, OR. CONST. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); Brief for Accused at 20, 21–22, *In re* Conduct of Shannon, 638 P.2d 482 (Or. 1982) (No. 27866).

[221] Brief for Accused, *supra* note 220, at 22.

[222] *Id.* at 23.

[223] State v. Spencer, 611 P.2d 1147 (Or. 1980).

[224] *See id.* at 1147, 1148.

[225] *See id.* at 1148 ("Although both parties to this case frame their arguments in the rhetoric of First Amendment jurisprudence, we will first consider the state constitutional claims.").

[226] State v. Huie, 638 P.2d 480 (Or. 1982).

soliciting a prostitute without any requirement of intent (an argument the court dismissed on procedural grounds).[227] In *State v. Robertson*,[228] however, the court invalidated a coercion statute as vague and overbroad because it criminalized a wide degree of pure speech without a requirement that it be connected to any actual illegal conduct.[229] Similar to *Spencer*, the court reached this decision with minimal assistance from the claimant's argument, which simply presented a single citation to an Oregon decision holding that libel damages cannot be used to punish the speaker.[230] After this effort from the court, claimants began to more clearly develop their state speech attacks on criminal statutes. For example, a claimant in 1984 attacked the state's menacing statute utilizing *Robertson*'s logic and expressed disdain at the state's argument for relying on federal decisions to defend the law rather than the state doctrine.[231] This line of cases became a significant source of state constitutional activism.

This transition period saw a marked increase in state arguments but the content of those arguments remained mixed in terms of independent state law.[232] Many arguments continued to be driven primarily by federal retrenchment, but the Oregon court's increasing attention to state constitutional law pushed some claimants to offer state claims in a wider number of areas.[233] As these state precedents developed further, litigant behavior in Oregon dramatically changed.

D. The Normalization of State Constitutional Law, 1986-2000

As Linde's arguments in favor of primacy took hold on the Oregon court, state constitutional law became a normalized element of rights litigation. Lawyers turned to state constitutional law in a wide variety of cases—from 1986-2000, 125 (51%) of 247 arguments

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[227] *See id.* at 481, 482.

[228] State v. Robertson, 649 P.2d 569 (Or. 1982).

[229] *See id.* at 589–90.

[230] *See* Respondent's Brief at 7, *Robertson*, 649 P.2d 569 (arguing punitive damages for libel violates Article 1, section 8, of the Oregon Constitution).

[231] *See* Defendants-Respondent's Brief at 2–3, State v. Garcias, 679 P.2d 1354 (Or. 1984) (Nos. 29504, 29844, 29843).

[232] *See, e.g.*, *Garcias*, 679 P.2d at 1357 (citing *Robertson*, 649 P.2d at 590) ("The district court judges who considered these cases dismissed the complaints finding the menacing statute unconstitutionally overbroad in reliance on *State v. Robertson* . . . and not susceptible to a narrowing construction that would withstand a constitutional challenge. They also found it unconstitutionally vague.").

[233] *See* Appellant's Brief at 7–9, State v. Robertson, 635 P.2d 1057 (Or. Ct. App. 1982) (No. 19337).

were based on state law—and demonstrated little discomfort with this new branch of law.[234] Claimants gave minimal attention to nearly all of the legal factors that commentators and other courts saw as the legitimate means of making state constitutional arguments.[235] This finding does not mean that Oregon lawyers offered weak arguments. On the contrary, they argued state cases in generally the same way they would argue any other case: by parsing the deepening body of state law with little attention to issues of text or history. Lawyers arguing fairly standard issues, say a Fourth Amendment probable cause claim, rarely have a need to dig into the founding era history or carry out primary historical research because they were trained to argue the issues from case law and the case law generally provides sufficient material. Oregon constitutional law became normalized in a similar manner. The court rapidly built a wide set of state constitutional doctrines and lawyers adapted to these changing signals. Federal rights arguments remained important issues, but in a wide set of cases they became supplementary to, or replaced with, alternative state arguments. The issue areas varied from areas of relatively clear federal retrenchment to areas where federal law was relatively stable or even expanding. I will discuss this development through examination of the most common doctrinal issues in my sample.

1. Search and Seizure[236]

Given the significant federal retrenchment, search and seizure issues were particularly ripe for state constitutional arguments. Practice in Oregon, however, was clearly not driven exclusively by the negative turn in federal law, as demonstrated in a comparative study of rights claimants in four states.[237] Driven by the Oregon Supreme Court's primacy push generally, and specifically the court's willingness to build a body of state search law, claimants in Oregon offered a significant number of state arguments. From 1986-2000, the percentage of state constitutional arguments ranged from a low of 60% in 2000 to a high of 100% in 1990.[238]

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[234] *See supra* Figure 1.

[235] *See* Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "*Gunwall *is Dead—Long Live* Gunwall*!,"* 37 RUTGERS L.J. 1169 (2006) (discussing the supplemental or criteria approach to state constitutional law).

[236] This section borrows from a prior article that I have published. *See* Price, *Lawyers Need Law*, *supra* note 6, at 1444–53.

[237] *See id.* at 1444.

[238] *See supra* Figure 1.

The Oregon court drove the development of state search law initially with little assistance from lawyers. One of the more prominent examples was *State v. Caraher*, where the claimant failed to make any serious state claim.[239] Instead, she challenged the search of her purse as outside the search incident rule because federal law only recognized the validity of searches of the person but not of items seized and outside her control.[240] The court argued that its history of linking state and federal search provisions to simplify the law had failed, instead stating: "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."[241] 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 it is reasonable in light of all the facts."[242] The next year, in *State v. Lowry*,[243] the court held that police are allowed to seize materials that are apparently contraband for a short time to obtain a warrant for testing, but that testing without the warrant extends beyond the search incident to arrest exception.[244] From these foundational cases, the court built an extensive set of state search precedents for lawyers to utilize.

Oregon's distinctive approach begins at the very purpose of the exclusionary rule and, thus, determines who has standing to challenge a search. The court held that "the exclusionary rule of section 9 is predicated on the personal right of a criminal defendant to be free from an 'unreasonable search, or seizure[.]'"[245] Thus, exclusion of evidence is the proper remedy regardless of whether it would deter police misconduct; the right is personal and invasion always require remedy.[246] In terms of who may challenge a search, the court held in *State v. Tanner* that "[a] criminal defendant

[239] *See generally* Appellant's Brief at 4–11, State v. Caraher, 637 P.2d 217 (Or. Ct. App. 1981) (No. A20330).

[240] *See id.* at 9–10.

[241] *Caraher*, 653 P.2d at 947.

[242] *Id.* at 952. A concurring opinion complained that this question should "wait for a case in which that question has been squarely presented, briefed[,] and argued. This is not that case." *Caraher*, 653 P.2d at 953 (Campbell, J., concurring).

[243] State v. Lowry, 667 P.2d 996 (Or. 1983). The Supreme Court of Oregon chose not to follow the *Lowry* decision in a similar case that followed the *Lowry* decision. *See* State v. Owens, 729 P.2d 524, 531 (Or. 1986).

[244] *See Lowry*, 667 P.2d at 1003.

[245] State v. Tanner, 745 P.2d 757, 758 (Or. 1987).

[246] *See id.* at 758–59.

always has standing to challenge the admission of evidence introduced by the state."[247] A number of claimants utilized these broad rules of standing and exclusion without any apparent concern with shifting federal law.[248] In a challenge to a search of an open field, a third party asserted the right to challenge the fruits of a search because his work on the area gave him privacy interests that were violated, and, 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 state search law.[249] 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 his mother's car, and a person holding a container.[250]

The search incident rule established by *Caraher* and *Lowry* was 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.[251] In one, the legal basis was vague at best, failing to cite to a constitutional provision and only referring to unspecific "Oregon law" at a few points with a heavy inter-mix of federal law.[252] The claimant in *State v. Bennett* offered a more confusing argument, apparently motivated in part by the state's formulation of the case.[253] 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.[254] The claimant accepted this understanding of *Caraher* and argued that "the formulation of the appropriate rule under the Oregon Constitution is probably a mistake" because it

[247] *See id.* at 759.

[248] *See, e.g.*, Appellant's Brief at 22–23, State v. Dixson, 740 P.2d 1224 (Or. Ct. App. 1987) (No. A34586).

[249] *See id.*

[250] *See, e.g.*, Appellant's Brief at 26, State v. Buchholz, 775 P.2d 896 (Or. Ct. App. 1990) (No. A45808); Respondent's Brief at 14–15, State v. Morton, 904 P.2d 631 (Or. Ct. App. 1995) (No. A80443); Appellant's Brief at 17, State v. Tucker, 959 P.2d 632 (Or. Ct. App. 1998) (No. A90706); *see also* Respondent's Brief at 26–33, State v. Davis, 781 P.2d 1264 (Or. Ct. App. 1989) (No. A50571) (providing an extensive federal argument from claimants in a case that occurred where fugitive was arrested in Mississippi by local police and entered without a warrant; also deploying a state argument because it was uncertain what reach Oregon's restrictions would have outside the state).

[251] *See* Appellant's Brief at 2, State v. Brown, 695 P.2d 1383 (Or. Ct. App. 1985) (No. A29759); State v. Bennett, 721 P.2d 1375, 1376 (Or. 1986).

[252] *See* Appellant's Brief, *supra* note 251, at 8–10.

[253] *See* Appellant's Brief at 16, *Bennett*, 721 P.2d 1375.

[254] *See id.*

relied upon older Oregon cases that in turn rested on Fourth Amendment law overruled in the late 1960s.[255] In essence, the claimant argued that this rule could not be allowed because the state Constitution cannot give less protection than federal law.[256]

This complicated set of arguments appears to have been caused by the fact that the Oregon 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.[257] 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*.[258]

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.[259] Both claimants presented clear state arguments without discussion of federal law.[260] They simply sought to apply the *Lowry* holding that a warrant is required for further inspection of legitimately discovered closed containers.[261] 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.[262] Thus, searches of wallets were challenged on the grounds that the police either had all the evidence necessary for arrest or that there was no possibility of a weapon in the small

[255] *Id.* at 4.

[256] *See id.* at 6.

[257] *See* State v. Brown, 721 P.2d 1357, 1359, 1360 (Or. 1986).

[258] *See* State v. Kock, 725 P.2d 1285, 1287 (Or. 1986).

[259] *See* State v. Forseth, 729 P.2d 545, 546 (Or. 1986); State v. Owens, 729 P.2d 524, 525, 526 (Or. 1986).

[260] *See* Brief for Appellant at 4–6, State v. Forseth, 705 P.2d 1161 (Or. Ct. App. 1985) (No. A33445); Brief for Respondent at 5–10, State v. Owens, 715 P.2d 1351 (Or. Ct. App. 1986) (No. A36677).

[261] *See* Brief for Appellant, *supra* note 260, at 8; *see* Brief for Respondent, *supra* note 260, at 5.

[262] *See, e.g.*, Brief for Appellant at 10, 11, State v. Hoskinson, 859 P.2d 576 (Or. Ct. App. 1993) (No. A73746).

wallet compartments.[263] Even with the limitations on the state rule in *Owens*,[264] 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.[265]

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,[266] one claimant presented dual arguments attempting to, first, distinguish the federal case law, and, second, state that *Caraher* and its progeny recognized a privacy interest in a storage locker that cannot be invaded by police action whatever its form.[267] Ten years after the court rejected that argument because the dog's presence was not investigative, another claimant presented an extensive argument distinguishing this precedent, the decade of Oregon search cases since, and the rejection of the federal position in several other states with little attention to federal law.[268] Similarly, a claimant challenging the use of a beeper placed upon his car developed a detailed argument discussing the state precedents on expectations of privacy and the reasoning of other state high courts applying warrant requirements to electronic tracking.[269]

The "open fields" doctrine presents a clear example of federal retrenchment.[270] 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.[271] In fact, one claimant criticized the trial court judge for

[263] *Id*. at 11; *see* Brief for Appellant at 20, State v. Noble, 818 P.2d 938 (Or. Ct. App. 1991) (No. A63703).

[264] *See Owens*, 729 P.2d at 535 (holding that testing of suspect substances seized during a search incident to arrest did not require a warrant).

[265] *See* Brief for Appellant, *supra* note 260, at 6–7.

[266] United States v. Place, 462 U.S. 696, 707 (1983).

[267] *See* Appellant's Brief at 5–7, State v. Slowikowski, 743 P.2d 1126 (Or. Ct. App. 1987) (No. A39836).

[268] *See* State v. Slowikowski, 761 P.2d 1315, 1320 (Or. 1988); Appellant's Brief at 17–36, State v. Smith, 969 P.2d 157 (Or. Ct. App. 1997) (No. A86622).

[269] *See* Appellant's Brief at 1, 2, 3–7, State v. Campbell, 742 P.2d 683 (Or. Ct. App. 1987) (No. A37511).

[270] *See* Oliver v. United States, 466 U.S. 170, 173 (1984) (citing Hester v. United States, 265 U.S. 57, 58–59 (1924)).

[271] *See* Appellant's Brief at 17, State v. Andreason, 743 P.2d 781 (Or. Ct. App. 1987) (No. A39306); Appellant's Brief at 14, State v. Dixson, 740 P.2d 1224 (Or. Ct. App. 1987) (No.

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, *Caraher* held that the state basis should still survive a change in federal law.[272]

While the search and seizure area is one of the strongest areas of federal retrenchment, Oregon claimants almost never invoked policy-based attacks on the U.S. Supreme Court's change.[273] 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[274] and argued that "[e]ven for a court which seems more interested in legislating tha[n] in judicial decision making, this is an extraordinary philosophy. Clearly, recent pronouncements by [the U.S. Supreme Court] are result oriented."[275] 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.[276] Given a significant and growing body of law, lawyers deployed these arguments as they would any other body of constitutional doctrine. Claimants showed little difficulty in providing relatively complete and detailed arguments that had little grounding in the more familiar federal law.[277]

2. Free Speech

The Oregon court adopted an expansive, almost absolutist, vision of free speech under section 8, and claimants responded in kind. In *State v. Henry*,[278] the court held that:

> [T]he guarantee of freedom of expression of the Oregon Constitution forecloses the enactment of any prohibitory law backed by punitive sanctions that forbids speech or writing on any subject whatever, unless it can be shown that the

A34586).

[272] *See* Appellant's Brief at 13, *Dixson*, 740 P.2d 1224.

[273] *But see* Appellant's Brief at 5–7, *Slowikowski*, 743 P.2d 1126.

[274] *See* Segura v. United States, 468 U.S. 796, 816 (1984).

[275] Respondent's Brief at 11, State v. Sargent, 860 P.2d 836 (Or. Ct. App. 1993) (No. A72824).

[276] *See id.* at 12.

[277] *See id.* at 12–14.

[278] State v. Henry, 732 P.2d 9 (Or. 1987).

> prohibition falls within an original or modern version of an historically established exception to the protection afforded freedom of expression by Article I, section 8, that this guarantee demonstrably was not intended to displace.[279]

Henry ultimately held that obscenity was protected speech under the state Constitution.[280] This distinctive vision of free speech, building in part on Linde's academic writing,[281] provided a set of precedents available to rights claimants.[282]

As federal retrenchment was limited in the free speech area, federal claims remained viable in many cases and claimants often deployed both as alternatives. In an invasion of privacy suit against a television broadcaster, the claimant noted that the U.S. Supreme Court had rejected a similar action already.[283] Even though this federal precedent offered strong support to the claimant broadcaster, the claimant went on to argue that an invasion of privacy action was not firmly established when the state Constitution was adopted as required by various state precedents.[284] In two cases regulating electoral activity, the claimants relied primarily upon the body of federal law but offered short statements of Oregon law to preserve the issue.[285] When the state required lobbyists to register and pay a fee, the claimants offered a thorough state argument that the state had failed to carry its burden in showing that this policy fell within an historical exception; the First Amendment was relegated to a secondary point.[286] Building on this same body of law, a claimant argued that the state Constitution recognized no exception for commercial speech and thus a town's restriction on door-to-door sales was invalid in addition to the

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[279] *Id.* at 11.

[280] *Id.* at 18.

[281] Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1179–80 (1970); *see* Michael West, *High Court Study: Arrested Development: An Analysis of the Oregon Supreme Court's Free Speech Jurisprudence in the Post-Linde Years*, 63 ALB. L. REV. 1237, 1239 (2000).

[282] *See Henry*, 732 P.2d at 18; Portland v. Tidyman, 759 P.2d 242, 251 (Or. 1988).

[283] Defendant-Respondent's Brief at 4, Anderson v. Fisher Broadcasting Co., Inc., 696 P.2d 1124 (Or. Ct. App. 1984) (No. A30110).

[284] *Id.* at 7–8.

[285] Appellant's Brief at 12, Libertarian Party of Or. v. Roberts, 737 P.2d 137 (Or. Ct. App. 1987) (No. A40378) (arguing that restrictions on third party ballot access were unconstitutional); Appellant's Brief at 14, Oregon Republican Party v. State, 717 P.2d 1206 (Or. Ct. App. 1986) (No. A0689) (arguing that sending voters a self-addressed stamped envelope was protected speech).

[286] Respondents' Brief at 2, Fidanque v. State *ex rel.* Or. Gov't Standards & Practices Comm'n, 920 P.2d 154 (Or. Ct. App. 1996) (No. A86332).

secondary federal claim.[287] These cases saw generally strong state arguments paired with sometimes equally viable federal claims.[288] Interestingly, they were treated as alternative, independent arguments for the most part.[289]

Perhaps the most substantively interesting state claims came in cases involving hate crimes and sexually explicit speech. Two 1992 cases raised speech challenges to the state's hate crime enhancement statute.[290] Even though the briefs were filed before the U.S. Supreme Court rejected similar challenges under the First Amendment,[291] both briefs relied primarily on state claims with a perfunctory federal argument that "under a similar analysis this court must overturn the statute on federal grounds as well."[292] The state claim invoked the historical exceptions rule in an interesting manner: given the history of clear racism in the Oregon Constitution,[293] this speech was certainly protected by section 8 when drafted.[294] Distributors of sexually explicit speech sought to deploy the growing state law to protect adult businesses from restrictive zoning laws modeled on laws passing federal review[295] arguing that the various state precedents required rejection of a time, place, and manner argument when it targeted the content of adult businesses specifically.[296] More dramatically, a claimant argued that child pornography was protected because "*Henry* makes clear that *any* statute that seeks to criminalize obscenity, however defined, must fall under Article I, section 8."[297]

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[287] Appellant's Brief at 3–4, City of Hillsboro v. Purcell, 743 P.2d 1119 (Or. Ct. App. 1987) (No. A41671).

[288] *See, e.g.*, *City of Hillsboro*, 761 P.2d at 553.

[289] *See, e.g.*, *id.* at 556.

[290] State v. Hendrix, 838 P.2d 566, 566–67 (Or. 1992); State v. Plowman, 838 P.2d 558, 559 (Or. 1992) (quoting OR. REV. STAT. § 166.165(1)(a)(A) (1981)).

[291] *See* Wisconsin v. Mitchell, 508 U.S. 476, 479 (1993).

[292] Appellant's Brief at 15–16, *Plowman*, 813 P.2d 1114.

[293] David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611, 611, 615–16 (1995).

[294] Appellant's Brief at 17, *Hendrix*, 813 P.2d 1115 ("For example, the Oregon Constitution, Article I, section 31 (repealed 1970) provided that 'White foreigners' who become residents shall enjoy the same rights to own property as native born citizens. Section 35 (repealed 1926) provided that no 'free negro or mulatto' could immigrate, own property, contract, or sue. Article II, section 6 (repealed 1926) provided: 'No Negro, Chinaman, or Mulatto shall have the right of suffrage.' . . . Racial discrimination was supported by both Constitutions in 1859. This is a tragic chapter in our national history. The point here is that the state cannot use an 'historical exception' analysis to uphold the intimidation law.").

[295] Portland v. Tidyman, 759 P.2d 242, 243 (Or. 1988) (discussing how the ordinance was modeled on a Detroit ordinance that survived a First Amendment challenge).

[296] Respondent Brief at 4, *Tidyman*, 742 P.2d 1202.

[297] Respondent's Brief at 5, State v. Stoneman, 888 P.2d 39 (Or. Ct. App. 1994) (No. A70085). This argument came at a complicated time for free speech in Oregon as the people

After its early efforts, the Oregon Supreme Court's jurisprudence established a significant alternative to federal law that, for the most part, remained stable and reasonably supportive of the claims offered. Claimants turned to both claims as alternative, independent legal claims.[298] None of the free speech claimants attacked the U.S. Supreme Court's decisions or policies, or sought to simply import federal doctrine alone into state law as evasion of some change.[299] Even *Stoneman*, the clearest example where only state law was viable, focused solely on the internal logic of the state legal doctrine rather than attacking the choices made at the federal level.[300]

3. Equal Protection

Section 20 states that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."[301] Linde criticized the long practice of treating this provision as identical to the Fourteenth Amendment's equal protection clause and moved to end it.[302] The Oregon court sought to "reject[] the basic federal methodology" of sliding tiers of scrutiny.[303] The development of this rule was slow and unclear, and at times still looked similar to the federal test.[304] David Schuman summarized the developing and uncertain law in 1988: that the discrimination against an identifiable class where it is based on prejudice or stereotype will be impermissible, classes created by a statute (such as taxpayers) are permissible so long as the class is open for other people to enter it, and actions against individuals must follow some systematic

considered and ultimately rejected amendments seeking to overrule or at least narrow *Henry* in 1994 and 1996. *See* Wendy Underhill, *Ballot Measures Database*, NAT'L CONF. ST. LEGISLATURES (Sept. 4, 2015), http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx. The National Conference of State Legislatures' Ballot Measures Database reports that Measure 19 in 1994 received 45.7% of the vote and Measure 31 in 1996 received 47.2%. *Id*.

298 *See, e.g., Stoneman*, 920 P.2d at 539; *In re* Complaint of Fadeley, 802 P.2d 31, 38 (Or. 1990).

299 *See Stoneman*, 920 P.2d at 539; *see generally* Respondents Brief, *supra* note 297, at 1 (demonstrating that the claimant's argument does not reference federal doctrines or U.S. Supreme Court decisions).

300 *See Stoneman*, 920 P.2d at 538.

301 OR. CONST. art. 2, § 20.

302 *See* Linde, *supra* note 115, at 183–84.

303 David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 225 (1988).

304 *See id.*

criteria.[305] While a few section 20 arguments were made attacking general classifications, the most common use was to attack prosecutorial decisions as lacking a systematic basis for the decision to treat one defendant differently from another defendant.[306]

A number of the attacks on class legislation were of relatively limited development, at times still referring to the tiers of scrutiny approach. For example, two cases attacked tax classifications for creating different groups of taxpayers without a rational basis for the treatment.[307] The idea of a statutorily created class arose in a challenge by town residents to the annexation of their town to another; the claimants admitted that federal law likely was not violated but argued that section 20 still forbid the creation of different classes of voters and denying one of those classes a vote on a subject that will affect them.[308] In two 1990 cases, claimants attacked limitations on civil actions, arguing that the legislature denied an important right to one class of citizens and not to others without justification.[309] While these arguments all focused on section 20, they tended to be confused on the exact application and thus still fell back to standard federal language. In *Zockert v. Fanning*,[310] the claimant offered a thorough argument using multiple theories because the "approach of Oregon courts in recent years . . . has been ill-defined."[311] The claimant discussed the various cases key to this developing doctrine and applied each of the different approaches to the question of whether indigent natural fathers are entitled to state paid legal representation.[312] Faced with an uncertain doctrine, claimants still frequently attempted to comply with primacy though struggling with the application.[313]

Arguments over the administration of laws were clearer than classification claims. The court held that section 20 "reaches forbidden inequality in the administration of laws under delegated

[305] *See id.* at 244–45.

[306] *See, e.g.*, State v. Freeland, 667 P.2d 509, 514–15 (Or. 1983).

[307] *See* Plaintiff-Appellant's Brief at 3, 17–18, Wilson v. Dep't of Revenue, 727 P.2d 614 (Or. 1986) (No. S31577); Appellant's Brief at 38–40, Pollin v. Dep't of Revenue, 952 P.2d 537 (Or. 1998) (No. S44044).

[308] *See* Appellants' Brief at 4, 24–25, Mid-County Future Alternatives Committee v. City of Portland, 770 P.2d 604 (Or. Ct. App. 1989).

[309] *See* Brief for Appellant at 12–13, Sealey v. Hicks, 768 P.2d 428 (Or. Ct. App. 1989) (No. A47084) (putting limits on minors bringing suit); Brief for Appellant at 2, Van Wormer v. Salem, 771 P.2d 653 (Or. Ct. App. 1989) (No. A47630) (putting limits on suits against governmental bodies); *see also Sealey*, 788 P.2d at 440; *Van Wormer*, 788 P.2d at 445–46.

[310] Zockert v. Fanning, 775 P.2d 346 (Or. Ct. App. 1989), *rev'd*, 800 P.2d 773 (Or. 1990).

[311] Appellant's Brief at 35, *Zockert*, 775 P.2d 346 (No. A49299).

[312] *Id.* at 35–37, 38, 39, 40.

[313] *See, e.g.*, *id.*

authority as well as in legislative enactments."[314] While discretion in the administration of law alone was not inherently suspect, the discretion must be exercised on the basis of some meaningful criteria and be able to offer a satisfactory explanation for differential treatment.[315] Death penalty defendants raised arbitrary enforcement arguments often.[316] A number specifically complained of unequal treatment in plea offers.[317] One case noted that the prosecutor offered a plea deal to some defendants but not others even though their crimes were similar without sufficient justification.[318] In a similar case, the claimant complained that he was denied a plea deal given to similarly situated defendants because the prosecutor gave the final decision to the victim's family.[319] Other death penalty claimants sought to link the arbitrary enforcement aspect of section 20 to the broader criticism of the prosecutor's power in death penalty cases. One claimant argued that allowing the prosecutor to choose between two different underlying crimes that were identical was inherently arbitrary because no meaningful criteria existed to justify one charge over another.[320] Outside of the criminal system, a lawyer utilized this doctrine to attack his bar disciplinary action arguing that his behavior was identical to a large number of other lawyers who engaged in the exact same behavior.[321]

Section 20 became a significant source of state constitutional litigation as the court developed the doctrine. While the class based arguments showed a degree of confusion over the meaning of the state doctrine, claimants found a somewhat more definite standard in the arbitrary treatment cases and deployed it often, though primarily as part of a wide set of challenges to death penalty trials.[322]

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[314] State v. Clark, 630 P.2d 810, 815 (Or. 1981).

[315] *See* State v. Freeland, 667 P.2d 509, 512, 514 (Or. 1983) (quoting State v. Edmonson, 630 P.2d 822, 823 (Or. 1981)).

[316] *See, e.g.*, State v. Farrar, 786 P.2d 161, 166, 194 (Or. 1990).

[317] *See, e.g.,* State v. Hayward, 963 P.2d 667, 671–72 (Or. 1998).

[318] *See* Appellant's Brief at 60, *Hayward*, 963 P.2d 667.

[319] *See* Appellant's Brief at 57–58, 60, State v. McDonnell, 794 P.2d 780 (Or. 1990) (No. S35117).

[320] *See* Brief for Appellant at 180, State v. Montez, 789 P.2d 1352 (Or. 1990) (No. S35291).

[321] *See* Accused's Petition for Review and Opening Brief at 27, *In re* Conduct of Schenck, 879 P.2d 863 (Or. 1994) (No. S40156).

[322] *See* discussion *supra* Part VII(D)(3); discussion *infra* Part VII(D)(4).

4. Death Penalty

Oregon saw a high degree of constitutional activity regarding the death penalty with claimants deploying a set of creative state constitutional arguments in a time where the state Constitution was itself being altered. In 1984, the Constitution was amended to insulate the death penalty from state constitutional challenge.[323] Lawyers still attempted to push the court to maintain the primacy approach and provide a separate state standard for cruel and unusual punishment well after the court clearly rejected the claim, but in an increasingly minimal fashion.[324]

Claimants generally used state constitutional challenges to attack the procedures utilized rather than the validity of the penalty itself. Claimants admitted that section 40 protected the death penalty from facial invalidity under sections 15 and 16, but maintained that these provisions still held weight as to the procedures used to reach the method.[325] In *State v. Isom*, particular weight was placed upon section 15, then requiring that "laws for punishment of crime shall be founded on principles of reformation and not vindictive justice[.]"[326] The claimant argued that coupled with the prohibition of the cruel and unusual punishment clause in section 16,[327] the state was prohibited from utilizing any procedure that was aimed at vengeance and argued that the newly enacted system was aimed at nothing more than vengeance.[328] The Oregon Supreme Court rather forcibly rejected this theory holding that section 40 was clearly intended to suspend all effects from sections 15 and 16.[329] Despite this rejection, a number of claimants continued to press this argument, admitting that the court rejected the claim but seeking to

[323] *See* WILLIAM R. LONG, A TORTURED HISTORY: THE STORY OF CAPITAL PUNISHMENT IN OREGON 64 (Jennifer Root ed., 1st ed. 2001); *see also* OR. CONST. art. I, § 40 ("Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law . . . and otherwise shall be life imprisonment with minimum sentence as provided by law.").

[324] *See* LONG, *supra* note 323, at 62, 63, 64–65.

[325] *See, e.g.,* Appellant's Brief at 83–86, State v. Isom, 761 P.2d 524 (Or. 1988) (No. S33725).

[326] *See id.* at 83–84. Section 15 was amended in 1996 and now reads: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." OR. CONST. art. I, § 15.

[327] OR. CONST. art. I, § 16.

[328] *See* Appellant's Brief, *supra* note 325, at 93, 95.

[329] *See* State v. Wagner, 752 P.2d 1136, 1152 (Or. 1988) (this denial actually became the basis for a Fourteenth Amendment challenge rejected on appeal to the U.S. Supreme Court in this case).

preserve it and asking for reconsideration,[330] but over time they began to give up on a substantive discussion and just included it in a brief kitchen sink argument.[331] Some cases continued to try and work around section 40 with more creative arguments trying to backdoor some proportionality review used in other criminal cases.[332]

More narrowly, a common challenge attacked the death qualification procedure. The U.S. Supreme Court allowed prospective jurors to be removed where they were categorically opposed to the death penalty and would not consider the sentence.[333] Unfortunately for rights claimants, the Oregon court had accepted similar death qualification procedures as early as 1951.[334] State constitutional arguments in this area appear similar to some of the pre-Linde years, focusing on the policy outcomes of death qualification to convince the court to "reach a different conclusion under the Oregon Constitution."[335] Interestingly, the claimants used social scientific data showing that death qualification lead to juries that are biased to reach a guilty verdict that the U.S. Supreme Court itself explicitly rejected in 1986.[336] The data, and Justice Thurgood Marshall's dissent interpreting it, were used to both attack the consequences of the U.S. Supreme Court's decision and to convince the court that its 1951 decision was so outdated as to deserve repudiation.[337] As with the arguments over the continued validity of sections 15 and 16, the Oregon court approved death qualification in 1988.[338] However, claimants continued to press the issue in later cases, calling on the court to bow to the continued evidence about the ill effects of the practice and change its mind, before ultimately abandoning significant

[330] *See, e.g.,* Appellant's Brief 202–03, State v. Miranda, 786 P.2d 155 (Or. 1990) (No. S34970); Appellant's Brief at 35–38, State v. Nefstad, 789 P.2d 1326 (Or. 1990) (No. S34971).

[331] *Compare* Appellant's Brief 202–03, *Miranda*, 786 P.2d 155, *and* Appellant's Brief at 35–38, *Nefstad*, 789 P.2d 1326, *with* Appellant's Brief at 192, State v. Montez, 789 P.2d 1352 (Or. 1990).

[332] *See, e.g.*, Appellant's Brief at 192, *Montez*, 789 P.2d 1352 (No. S35291).

[333] *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 517–18 (1968); Lockhart v. McCree, 476 U.S. 162, 175–76 (1986).

[334] *See* State v. Leland, 227 P.2d 785, 796, 797 (Or. 1951).

[335] Appellant's Brief at 53, State v. Isom, 761 P.2d 524 (Or. 1988) (No. S33725).

[336] *See* Lockhart v. McCree, 476 U.S. 162, 181, 183 (1986); Appellant's Brief, *supra* note 335, at 55–56.

[337] Appellant's Brief, *supra* note 335, at 55–56; *see also* Appellant's Brief at 214–17, State v. Miranda, 786 P.2d 155 (Or. 1990) (No. S34970); Appellant's Brief at 75–77, State v. Moen, 786 P.2d 111 (Or. 1990) (No. S33952); Appellant's Brief at 295–97, State v. Nefstad, 789 P.2d 1326 (Or. 1990) (No. S34971).

[338] State v. Wagner, 752 P.2d 1136, 1174 (Or. 1988) (quoting *Witherspoon*, 391 U.S. at 519).

discussion of the issue and relegating it to a short statement as part of the kitchen sink argument so many death penalty briefs conclude with.[339]

Despite a large hurdle in the form of section 40's protection for capital punishment, claimants still attempted to press significant state constitutional limitations as an alternative to the quickly evolving federal doctrines. In the face of a resistant court that refused to accept ways around these limits, the arguments gradually faded, leaving claimants to focus on other aspects of the criminal process in individual cases, such as search and seizure or self-incrimination.[340]

5. Other Issues

Interestingly, the Oregon court's commitment to primacy did not always lead to expanded rights protection. For example, after noting its duty to settle state law first, the court adopted the federal reasoning for when hearsay statements violate a defendant's right to confront his or her accusers.[341] Given this direct link between state and federal law, it is unsurprising that most claimants relied primarily upon federal law, even if they also at least noted the state basis and linkage declared by Oregon precedents.[342] One claimant did attack this linkage, attempting to convince the court to break with shifting federal reasoning after the U.S. Supreme Court held that courts are not necessarily compelled to conduct an inquiry into the reliability of hearsay statements.[343] The claimant criticized the court for its blind adoption in this one area, stating: "If this court is going to adopt current federal reasoning, it must re-evaluate the quality of that reasoning with every new federal case."[344] After a detailed analysis of the heavy criticism from law reviews and legal commentators of this recent federal change, the claimant argued that this new federal decision was "a poorly reasoned deviation from

[339] *See, e.g.*, Appellant's Brief at 295–302, State v. Langley, 16 P.3d 489 (Or. 2000) (No. S41885).

[340] Appellant's Brief at 59, 61–62, *Moen*, 786 P.2d 111.

[341] State v. Campbell, 705 P.2d 694, 703 (Or. 1985) (adopting the reasoning from *Ohio v. Roberts* (448 U.S. 56 (1980))).

[342] *See* Appellant's Brief at 26, State v. Cervantes, 848 P.2d 118 (Or. Ct. App. 1993) (No. A68493); *see also* Appellant's Brief at 20, 25–26, State v. Kirtzman, 879 P.2d 1326 (Or. Ct. App. 1994) (No. A77967); Appellant's Brief at 173–76, State v. Wilson, 918 P.2d 826 (Or. 1996) (No. S41047).

[343] *See* Bourjaily v. U.S., 483 U.S. 171 (1987) (citations omitted); *see also* Appellant's Brief at 59, State v. Cornell, 820 P.2d 11 (Or. Ct. App. 1991) (No. A49478).

[344] Appellant's Brief, *supra* note 343, at 59.

prior precedent and from scholarly opinion, and should not be followed by this court."[345] The claimant, in essence, made a policy critique of federal law the central element of the state claim, but did so based on the court's own state constitutional precedent.[346] This argument ultimately failed and later claimants simply applied the law as adopted.[347]

In self-incrimination cases, a plurality reduced state protection below the level of protection guaranteed by federal law. In *State v. Smith*,[348] the claimant presented a weak assertion that the state self-incrimination clause required *Miranda*-type warnings as a supplement to a more focused federal argument.[349] A plurality of the Oregon Supreme Court rejected this invitation and held that long-standing Oregon law required only that confessions be voluntary to be admissible, and that warnings were not required.[350] The plurality especially warned of the risk of tying state law to federal: "To adopt an Oregon *Miranda* rule identical to the federal rule and tie it to future interpretation by the federal caselaw would be foolish. We do not know what may be waiting in the alley."[351]

The plurality acknowledged the fact that federal law still had to be applied, but refused to extend state protections even to the level of the federal doctrine.[352] Only a year later, the full bench appeared to limit *Smith* to situations where a suspect was simply being questioned without any accusation against her or custodial situation.[353] *Magee* opened the door again to warnings under state law where the suspect was in custody or subject to the adversarial process in some way.[354] A number of claimants sought to exploit this division for custodial interrogations arguing alternative state and federal points, though sometimes in a poorly divided presentation, for issues about warnings and the waiver thereof.[355]

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345 *Id.* at 60.

346 *Id.*

347 *See Cornell*, 842 P.2d 394, 402 (Or. 1992).

348 State v. Smith, 725 P.2d 894 (Or. 1986).

349 *See* Appellant's Brief at 6–7, *Smith*, 691 P.2d 484.

350 *See Smith*, 725 P.2d at 906.

351 *Id.* at 906.

352 *Id.*

353 State v. Magee, 744 P.2d 250, 252 (Or. 1987) (per curiam) (citations omitted); *see Smith*, 725 P.2d at 906 (where three members of the *Smith* plurality concurred on federal law grounds but reiterated that state law should not provide a remedy in this case).

354 *See Magee*, 744 P.2d at 251 (citation omitted).

355 *See* Appellant's Brief at 34–36, State v. Buchholz, 775 P.2d 896 (Or. Ct. App. 1989) (No. A45808); Respondent's Brief at 46, State v. Davis, 781 P.2d 1264 (Or. Ct. App. 1989) (No. A50571); Appellant's Brief at 77–78, State v. Moore, 927 P.2d 1073 (Or. 1996) (No. S40506); Appellant's Brief at 21–22, State v. Toevs, 904 P.2d 658 (Or. Ct. App. 1995) (No. A85708).

In some narrow factual settings, federal retrenchment continued to play a role, but still, claimants rarely invoked the kind of policy attack arguments that existed pre-Linde in Oregon. In *State v. Miranda*[356] the claimant immediately acknowledged that federal law supported the impeachment use of illegally obtained statements[357] but relied on a 1988 Oregon precedent[358] rejecting the use of such statements without real concern for the federal decision.[359] A similar situation occurred in a case about whether statements were admissible after an attorney had attempted to intervene but the police did not inform the suspect of this fact.[360] Here, the federal law was again unsupportive, but the Oregon court seemed to suggest that state law prohibited such actions, though the constitutional basis for this decision was unclear.[361] Thus, the claimant noted this retrenchment from the U.S. Supreme Court but pointed out how that decision expressly noted "that a number of state courts had taken the opposite position" and that Oregon was such a court and that whatever changes occurred in federal law, the state protections should remain intact.[362] After this argument was successful, two later claimants sought to utilize it as the primary claim in cases involving suspects' invocation of their right to counsel.[363] Even with the early mixed signals about the reach of the state provision, and the clear examples of federal retrenchment, claimants still engaged with primarily legal arguments over the kinds of policy attacks on federal law that are common elsewhere.[364]

E. Comparative Data

Figure 1 and the discussion of the post-Linde changes demonstrate a dramatic shift in constitutional rights claims. In sum, rights claimants relied upon state constitutional arguments in

[356] State v. Miranda, 786 P.2d 155 (Or. 1990).

[357] *See* Appellant's Brief at 61–62, *Miranda*, 786 P.2d 155; Harris v. New York, 401 U.S. 222, 225–26 (1971) (citations omitted).

[358] *See* Appellant's Brief, *supra* note 357, at 61–62; *see also* State v. Isom, 761 P.2d 524, 525 (Or. 1988).

[359] *See* Appellant's Brief, *supra* note 357, at 61–64.

[360] *See* Moran v. Burbine, 475 U.S. 412, 415 (1986).

[361] *See id*. at 428–29 (citations omitted); *see also* State v. Haynes, 602 P.2d 272, 272–73 (Or. 1979); State v. Sparklin, 672 P.2d 1182, 1190 (Or. 1983).

[362] Appellant's Brief at 36, 37, State v. Simonsen, 878 P.2d 409 (Or. 1994) (No. S38966).

[363] *See* Appellant's Brief at 49–54, State v. Charboneau, 913 P.2d 308 (Or. 1996) (No. S41060); Respondent's Brief at 3–4, State v. Meade, 933 P.2d 355 (Or. Ct. App. 1997) (No. A90793).

[364] *Compare Moran*, 475 U.S. at 427, *with* State v. Jones, 578 P.2d 71, 73 (Wash. Ct. App. 1978).

a wide variety of cases and did so with relatively strong claims, though this strength varied by subject area, based upon the body of law built by the Oregon Supreme Court. To provide stronger context for how dramatic this change truly was, this section provides a brief overview of comparative data drawn from three additional state high courts: New York, Ohio, and Washington.[365] Figure 3 provides a picture summary of this comparative data.

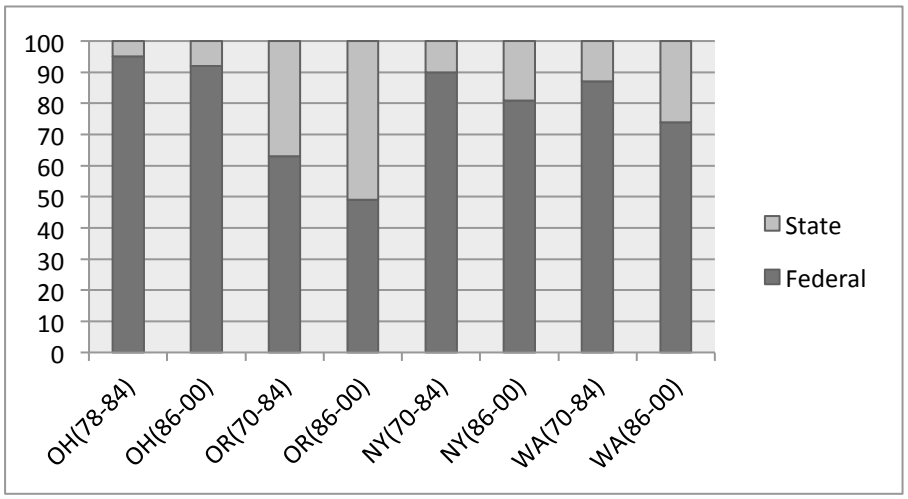

Figure 3.[366] Comparative summary, breakdown of arguments by percentage state and federal.

[365] *See supra* Part VI (describing data collection rules for Oregon Supreme Court cases that are identical to the data collection rules of the three additional state high courts); *see also* Price, *Lawyers Need Law*, *supra* note 6, at 1455–58 (describing complications with data collection for each state).

[366] Data on file with author. Data from the Ohio Supreme Court was only collected from 1978 forward.

This summary demonstrates the dramatic difference in claimant arguments between the four states. Oregon is the only state to see parity between federal and state arguments in any period covered. At 26% state arguments, Washington comes in a distant second. This largely tracks the approach that each state supreme court adopted for state constitutional claims. In short, only the Washington Supreme Court also adopted a clear theory of state constitutional law, imposing an obligation for a certain form of briefing for the claim to be preserved and heard, and thus drove at least some interest in state constitutional law even though it did not attempt to mandate that claimants raise state issues.[367] The New York Court of Appeals adopted an ad hoc approach by failing to offer significant guidance on how claimants should offer state constitutional claims or why the court accepted some claims and not others.[368] Claimants responded in kind with only infrequent state arguments, almost exclusively in cases where federal retrenchment occurred. The Ohio Supreme Court offered no real guidance on the meaning of state constitutional rights and rarely accepted any such claims when made and claimants generally ignored the state Constitution with only rare exceptions.[369]

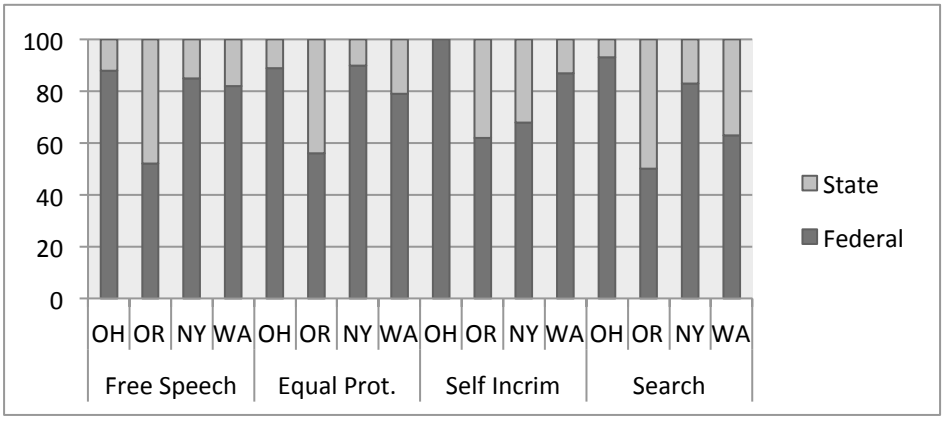

Figure 4.[370] Comparative data across common issue areas, percentage of arguments.

[367] *See, e.g.*, Price, *Arguing Gunwall*, *supra* note 6, at 337.
[368] *See* Price, *Lawyers Need Law*, *supra* note 6, at 1417–18.
[369] *See id.* at 1413, 1416.
[370] Data on file with author.

As issues vary in their salience, Figure 4 presents similar comparative data for four common rights areas. A similar pattern emerges with Oregon claimants offering state constitutional claims far more frequently than claimants in other states. Washington is typically a distant second with New York and Ohio demonstrating similar tendencies to the broad summary data in Figure 3. The one significant exception is in the self-incrimination area where the New York waiver of counsel rule was strong and independent of federal law as early as 1963—a powerful internal signal that claimants responded to.[371] Even in the search area, where arguably the greatest federal retrenchment occurred, substantial variation is observed based largely on the nature of the state courts approach to state constitutional law, a topic I discuss at more length elsewhere.[372]

This summary data is limited but useful in providing a broad picture of practice in other states. It reinforces the unusual rate of state constitutional arguments found in Oregon. Linde's push for primacy not only significantly altered claimant behavior in Oregon over time, but it appears to have dramatically shifted Oregon practice away from the norm of at least the other three states discussed here. Litigation, however, involves more than simply the claimants and I now turn to a brief examination of how the state responded to this shift in constitutional arguments.

VIII. THE STATE ADAPTS

Litigation is an iterative process between, at least, two parties.[373] The primary concern of this article is upon how rights claimants adapted to the changing signals from the Oregon Supreme Court. This section considers the effect of these signals on the state's lawyers. It seems a reasonable assumption that the state resists restrictions upon its authority.[374] The U.S. Constitution equally restrains all states but state constitutional rules are necessarily

[371] *See* People v. Hobson, 348 N.E.2d 894, 897–98 (N.Y. 1976); People v. Arthur, 239 N.E.2d 537, 538–39 (N.Y. 1968) (quoting People v. Donovan, 193 N.E.2d 628, 629 (N.Y. 1963)); *Donovan*, 193 N.E.2d at 629.

[372] *See* Price, *Lawyers Need Law*, *supra* note 6, at 1397.

[373] *See id.* at 1403.

[374] *See id.* at 1419. This is not to say that the state will always resist state constitutional activism. State Constitutions are about more than rights restrictions upon government and we can imagine many other areas where state court activism may prove useful to the state; for example, limiting home rule provisions in favor of broader state power. *See* NEW YORK STATE BAR ASS'N, REPORT AND RECOMMENDATIONS CONCERNING CONSTITUTIONAL HOME RULE ADOPTED BY THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION 15–16 (2016).

particular and impose extra restraints that other states may not face.[375] So if we assume states will resist state constitutional rights restrictions, the question becomes how does the state express that resistance? It is possible that state attorneys reject the legitimacy of judicial federalism as a number of academics and courts have done.[376] An attorney, however, has to be sensitive to the court that she presents to and attacking the legitimacy of a well-established trend of court behavior may backfire. Thus, outright criticism and resistance will likely be set aside in favor of distinguishing negative precedent in the typical process of appellate adjudication.

The sample for state briefs is not as broad as those for claimants, in part because the question is more limited. As the concern is only for how the state adapted to the new state constitutional rights doctrines, I utilized only cases where the claimants were coded as making a state constitutional argument to then evaluate the approach taken by the state. Further, I only obtained state briefs from 1980-2000, given that this is roughly in line with the Oregon Supreme Court's acceptance of Linde's primacy argument. Because of this focus, the analysis is necessarily more limited because I do not track frequency of arguments over time or across issues. Instead, this brief analysis is limited to tracking the nature of the state's broad engagement with the new primacy of Oregon constitutional law. The briefs discussed here typically came from the Oregon Attorney General's ("OAG") office, though occasionally other governmental bodies were present.

The OAG did not directly attack the legitimacy of state constitutional law. Logically, this makes sense given the broad judicial acceptance of primacy by the early 1980s. Interestingly, the state occasionally admonished rights claimants for their failure to engage with arguments in the proper primacy sequence and, in the process, subtly suggested that federal norms were still the best way to approach the dispute. For example, in a case on whether counsel must be present at a presentencing investigation interview, the OAG noted the lack of a clear state argument: the plaintiff's claim "is based principally on his interpretation of federal constitutional law. He does not attempt to analyze pertinent state law. He relies on state constitutional provisions merely as secondary authority.

[375] *See id.* at 1395.

[376] *See* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 995–96 (1985); Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism," in* 2 EMERGING ISSUES IN ST. CONST. L. 233, 233 (1989); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 194 (Oxford Univ. Press 2009).

The plaintiff has put his cart before his horse."[377] "The [state] will follow the proper analytical approach" of addressing the state issues first and found that state statutory and constitutional law did not support the claimant's argument.[378] Similarly, in a major death penalty case, the OAG argued that the claimant's reasoning was purely instrumental: "Defendant and amici contend that this court should use these provisions to adopt the federal Eighth Amendment analysis but reach a different result than the federal courts have."[379] In presenting these arguments, the state both undercut the claimants' position but also sought to send a subtle message to the court that no substantial grounds existed for expanding state protection. Arguably, the clearest example of this dynamic is the only major abortion conflict in the sample.

When the state adopted an administrative rule limiting public funding of abortion, various pro-choice groups attacked the restriction as illegal and unconstitutional under the state Constitution[380] because federal law clearly allowed such a restriction.[381] Before even engaging in the substantive constitutional claims, the state sought to narrow the application of the primacy approach. Specifically:

> Where . . . the federal constitutional issues have been recently settled by the highest federal court, an advocate of a stricter test under the state Constitution must point out persuasive reasons why Oregon courts should depart from the analysis the Supreme Court has developed in interpreting provisions analogous to state organic laws.[382]

Where Linde's primacy argument cautioned against any significant reference to federal law, the state sought to craft an extra requirement of persuasive justification for deviating from federal law, or at least recently decided federal law.[383] The claimants not only failed to achieve this high threshold but their "foundational premises are based upon federal precedents developing rights under the federal Constitution. In the absence of

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[377] Defendant's Brief at 3–4, State *ex rel.* Russell v. Jones, 647 P.2d 904 (Or. 1982) (No. 28198).

[378] *Id.* at 4.

[379] Respondent's Brief at 30, State v. Wagner, 752 P.2d 1136 (Or. 1988) (No. S32635) (identifying the provisions as Article 1, sections 15 and 16).

[380] *See, e.g.*, Planned Parenthood Ass'n v. Dep't of Human Res., 687 P.2d 785, 786–87 (Or. 1984).

[381] *See* Harris v. McRae, 448 U.S. 297, 326 (1980).

[382] Respondents' Brief at 10, *Planned Parenthood*, 687 P.2d 785.

[383] *Id.*

a principled reason for doing so, this court should not disregard otherwise applicable federal precedents."[384] In dismissing the primacy argument, the state described the claimants' argument as unsupported ad hoc avoidance; in particular, the decisions from California and Massachusetts that claimants relied on most heavily were "result oriented; the principled decisions of the United States Supreme Court should be followed here."[385] The state similarly dismissed both the equal protection and free exercise claims as nothing but frivolous invitations to evade well-considered federal law.[386] After the court showed no interest in accepting this persuasive justification requirement,[387] the OAG never again sought to so dramatically alter the primacy approach adopted by the court. However, it still attempted to create linkages with federal law to limit expansion of protections.

As discussed above, search and seizure law saw a major shift toward state constitutional arguments in Oregon. In three 1988 cases, the OAG sought to preserve recent federal decisions upholding the practices complained of: two involved warrantless searches of open fields and one involved attachment of a beeper to a car.[388] Interestingly, all three appear to have been written by the same assistant attorney general.[389] In each, the federal decisions were described as compelling. For example, the Supreme Court's

[384] *Id.* at 11.

[385] *Id.* at 26.

[386] *Id.* at 27, 51 ("However, in challenging the rule under Article I, section 20, petitioners do not present this court with a principled independent state grounds analysis to support their position . . . petitioners' commitment to independent state constitutional interpretation is highly suspect. They rely almost exclusively upon federal case law to support their argument, while ignoring the holdings of controlling federal authorities. Petitioners' advocacy of state grounds in support their contentions amount to little more than selective, ad hoc advocacy").

[387] *Planned Parenthood*, 687 P.2d at 787.

[388] *See* Respondent's Brief at 1–2, 6, State v. Andreason, 743 P.2d 781 (Or. Ct. App. 1987) (No. A39306); Respondent's Brief at 1–2, State v. Dixson, 740 P.2d 1224 (Or. Ct. App. 1987) (No. A34586); Appellant's Brief at 2–3, State v. Campbell, 742 P.2d 683 (Or. Ct. App. 1987) (No. A37511); *see also* Oliver v. United States, 466 U.S. 170 (1984) (describing the open fields exception); United States v. Karo, 468 U.S. 705 (1984) (explaining that the attachment of an electronic beeper to a car does not require a warrant).

[389] *See generally* Respondent's Brief, *Andreason*, 743 P.2d 781 (No. A39306); Respondent's Brief, *Dixson*, 740 P.2d 1224 (No. A34586); Appellant's Brief, *Campbell*, 742 P.2d 683 (No. A37511). In each of the briefs where the Attorney General was the party, the same pattern emerged. Each listed the Attorney General, Solicitor General, and then one or more assistants on the brief. It appears reasonable to assume that the assistant(s) had primary responsibility for drafting the state's brief and generally were the only signatory on the brief. In these cases, the assistant was Stephen Peifer. *See generally* Respondent's Brief, *Andreason*, 743 P.2d 781; Respondent's Brief, *Dixson*, 740 P.2d 1224; Appellant's Brief, *Campbell*, 742 P.2d 683.

decision to continue recognizing an open fields exception to the Fourth Amendment was "the most persuasive authority on this point."[390] The only Oregon precedents relied upon by the claimants "were decided solely under the Fourth Amendment . . . and thus are superseded" by the U.S. Supreme Court's subsequent decision.[391]

More importantly, the state sought to create a direct link between the foundations for the state and federal rule: "While the Oregon Supreme Court may not have done so in express terms, the state submits that several opinions indicate" adoption of the federal expectation of privacy test from *Katz*.[392] Having established a linkage, the state proposed common treatment due to the "same parentage" shared by federal and state rules: "Having the same parentage, it follows that the federal interpretation of that rule in *Katz's* progeny, including *Oliver*, is highly persuasive."[393] This "same parentage" language is repeated in the other two arguments nearly verbatim.[394] All three briefs then argued that there is no principled basis for departing from the federal decisions and that the objective, bright line approach adopted by the U.S. Supreme Court should be followed.[395] Though limited to search and seizure issues, these arguments paralleled the attempt in *Planned Parenthood* to subtly push the Oregon Supreme Court to adopt a looser primacy approach that presumed federal law as a starting point for the analysis.[396] The court rejected all three invitations to alter the primacy approach and in no subsequent argument did the state argue for any modification to the broad concept of primacy.[397] Occasionally, when the circumstances permitted, the OAG did attempt to deploy constitutional amendments to undermine state constitutional claims.

Oregon is an active initiative state[398] and its Constitution has seen a number of attempts to alter its rights provisions with some

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[390] Respondent's Brief at 6, *Andreason*, 743 P.2d 781.

[391] Respondent's Brief at 2, *Dixson*, 740 P.2d 1224.

[392] *Id.* at 7; *see also* Katz v. United States, 389 U.S. 347 (1967).

[393] Respondent's Brief at 9, *Andreason*, 743 P.2d 781.

[394] Appellant's Brief at 10, *Campbell*, 742 P.2d 683; Respondent's Brief at 8, *Dixon*, 740 P.2d 1224.

[395] Appellant's Brief at 13, *Campbell*, 742 P.2d 683; Respondent's Brief at 9, *Dixson*, 740 P.2d 1224.

[396] *See, e.g.*, Planned Parenthood Ass'n v. Dep't of Human Res., 687 P.2d 785, 787, 793 (Or. 1984).

[397] State v. Andreason, 766 P.2d 1024, 1026 (Or. 1988); State v. Dixson, 766 P.2d 1015, 1022 (Or. 1988); State v. Campbell, 759 P.2d 1040, 1049 (Or. 1988).

[398] KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 52 (Cambridge Univ. Press 2009).

significant successes. In a major death penalty case, the OAG relied heavily upon a 1984 initiative amendment protecting the death penalty from various challenges.[399] Section 40 "denies the protection of Article I, sections 15 and 16, only to the extent (if any) that these sections provide greater protection than the Eighth Amendment."[400] When the people adopted Measure 40, a victim's rights initiative, in 1996, it appeared to substantially alter state constitutional rights—an argument the OAG deployed in a case challenging the lack of a jury trial in a juvenile delinquency hearing.[401] The state noted three specific provisions relevant to the argument. First, the state noted section (1)(g): "The right, in a criminal prosecution, to a public trial without delay . . . *except that no court shall hold that a jury is required in juvenile court delinquency proceedings*."[402] Section (2) was quoted as providing "[t]he rights conferred on *victims* by this section shall be limited only to the extent required by the United States Constitution," and section (3) stating that Measure 40 "shall not reduce a criminal defendant's rights under the United States Constitution."[403] The OAG admitted that a narrow reading of these provisions would simply forbid the use of Measure 40 itself to recognize this right but "the exception is state[d] more broadly than that and could be read to mean what it says literally—i.e., no provision of the Oregon Constitution now requires a jury trial in a delinquency proceeding."[404] The OAG framed the argument mildly as a simple suggestion but, if accepted, the argument would have had a dramatic effect on multiple state constitutional doctrines, potentially limiting them to the minimum required by federal law.[405] The Oregon court, however, separately invalidated Measure 40 for violating the single subject rule of initiative amendments.[406]

Apart from these exceptions, the OAG responded to state constitutional decisions in broadly similar ways as claimants: the

[399] *See* Respondent's Brief at 1, 28–29, State v. Wagner, 752 P.2d 1136 (Or. 1988) (No. S32635); OR. CONST. art. I, § 40 ("Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law.").

[400] Respondent's Brief, *supra* note 379, at 28–29.

[401] *See* Opening Brief of Plaintiff-Realtor at 16, State *ex rel.* Upham v. McElligot, 956 P.2d 179 (Or. 1998) (No. S43551).

[402] *Id.*

[403] *Id.* at 17.

[404] *Id.* at 18.

[405] *See id.*

[406] *See* Armatta v. Kitzhaber, 969 P.2d 49, 51 (Or. 1998).

law became a normalized element of legal arguments. The OAG applied it in the same manner as it would apply other negative precedents, attempting to distinguish it to avoid the negative consequences.[407] As discussed, the Oregon court substantially expanded speech protections in the 1980s and 1990s.[408] The state was forced to defend other statutes by, for example, distinguishing a "menacing statute" from the invalidated coercion statute, arguing the menacing statute reached a more limited set of speech acts.[409] This issue was most starkly presented in 1992 by two challenges to Oregon's hate crimes law. The state sought to save the statute by focusing on the fact that the law reached only conduct and not belief: the law "neither proscribes people from holding bigoted beliefs nor from freely expressing those beliefs; it simply punishes those who cause physical injury to others based on those bigoted beliefs."[410]

The most dramatic expansion occurred in *State v. Henry*[411] when the court struck down the state's obscenity law, becoming the first court to treat obscene speech as fully protected.[412] In the midst of two constitutional initiatives seeking to reverse or limit this decision (both failed), the state was forced to defend its child pornography law.[413] The state admitted that no historical exception for child pornography specifically existed when the Oregon Constitution was drafted, but argued that this is because child pornography was a function of recent technological change.[414] "The statute, instead, represents a 'modern version' of an historic exception to the rule of free expression."[415] Importantly, the law did not target speech but the mental and physical harm to the children.[416] Finally, the state closed with an implicit warning that the court surely did not wish to become the first court to protect

[407] *See* Opening Brief of Plaintiff-Relator, *supra* note 401, at 18.

[408] *See, e.g.,* State v. Henry, 732 P.2d 9, 11 (Or. 1987) ("[T]he guarantee of freedom of expression of the Oregon Constitution forecloses the enactment of any prohibitory law backed by punitive sanctions that forbids speech or writing on any subject whatever[.]).")

[409] Appellant's Brief at 7, State v. Garcias, 679 P.2d 1345 (Or. 1984) (No. A26238).

[410] Respondent's Brief at 3, State v. Hendrix, 813 P.2d 1115 (Or. Ct App. 1991) (No. A65065); *see* Respondent's Brief at 4, State v. Plowman, 813 P.2d 1114 (Or. Ct. App. 1991) (No. A65145).

[411] *Henry*, 732 P.2d at 9.

[412] *See* Wallace Turner, *Oregon Court Broadens Free Speech Rights*, N.Y. TIMES (Apr. 15, 1987), http://www.nytimes.com/1987/04/15/us/oregon-court-broadens-free-speech-rights.html.

[413] *See, e.g.,* Appellant's Brief at 2, State v. Stoneman, 888 P.2d 39 (Or. Ct. App. 1994) (No. A70085) ("ORS 163.680 . . . does not violate Article I, section 8 of the Oregon Constitution.").

[414] *Id.* at 10.

[415] *Id.*

[416] *Id.* at 3.

child abuse: "Nothing in the text or the history of Article I, section 8[,] requires this state to be the first to conclude that is legislature may not enact child pornography laws to protect the state's children."[417] In the speech cases, as with other areas, the OAG sought to work within the precedents offered by the Oregon court while limiting their reach.

IX. CONCLUSION

Legal development is a multidimensional phenomenon. Traditional models of legal change that focus exclusively on the actions of courts too often miss the more complicated picture of change in the broader community of legal actors. Courts and lawyers work in a symbiotic relationship, each relying on the other for support and guidance. Courts rely upon lawyers to marshal the resources necessary to bring suit and develop the ideational support necessary to justify various legal conclusions. Lawyers rely upon courts to offer some basic legal framework providing direction and guidance for their development of ideational support. Only through extended iteration can the law develop and evolve along particular paths.

First as a professor, then as a justice, and then as a retired justice, Hans Linde sought to fundamentally reorient the practice of constitutional law in Oregon. Dismayed by the practice of treating federal law as dispositive, Linde articulated a clear method of state constitutional law. His method alleviated the common criticism that state constitutional arguments were only used to reach liberal results after the U.S. Supreme Court rejected the same argument. Linde's primacy approach argued that any federal issue was irrelevant until the state issue was resolved; in other words, he asked: what does the state Constitution require, rather than does the state Constitution require more (or less) than the federal Constitution? This approach necessarily required a significant degree of early heavy lifting by the Oregon Supreme Court, as few state rights doctrines had any real content. As was the general case in the post-WWII world, the Oregon court had become comfortable with applying federal doctrines as they were announced, leading to any consideration of a separate state argument becoming almost unthinkable. Linde's most lasting achievement came in convincing his colleagues that primacy was the proper approach, an approach

[417] *Id.* at 16.

that appears relatively consistent after three decades. Linde's legacy, thus, was to normalize state constitutional law, to make the Oregon Constitution a real consideration in state legal practice.

This success, however, would have been impossible for the court alone to achieve. While it is certainly easy to overstate the passivity of courts, they are dependent upon the cases and arguments brought to them by litigants. It is here that Linde's legacy was most apparent. Various empirical studies demonstrate that the actual practice of judicial federalism, generally, is ad hoc and most likely ideological in the ways that critics expressed dismay: the U.S. Supreme Court reverses itself (or rejects a new argument) and litigants turned to state Constitutions as a means of avoidance, that the federal result was wrong and can be ignored under the trappings of a state Constitution that serves as simple window dressing.

In the 1970s, Oregon claimants followed this trajectory. But as the court embraced primacy and developed the initial state constitutional doctrine to support it, claimants in Oregon adapted and engaged in state constitutional law without the ideological policy attacks on federal doctrine. In fact, as the discussion in this article demonstrates, federal law was more likely to be ignored or relegated to a secondary, alternative argument. Oregon constitutional law became the norm for rights claimants. While some trailblazing entrepreneurial lawyers may exist, most stick to their training and work from well-established case law to develop their positions. The force of this dynamic can be seen in the response of the state. It is a reasonable assumption that governments oppose the turn to state constitutionalism as it necessarily complicates governing and represents additional restrictions. Despite this likely preference for the modern conservative turn in federal constitutional law, Oregon state attorneys extensively engaged with the new constitutional world that Linde introduced, working to minimalize its reach without assaulting the legitimacy of Linde's primacy approach.

In sum, the empirical effect of the primacy turn in Oregon law was substantial. Across all issue areas, state constitutional law became the increasing norm and as the Oregon Supreme Court responded to early arguments, claimants demonstrated little of the discomfort and difficulty experienced by claimants in other states. These empirical findings require at least mention of the normative problem. If we assume state constitutional law is worthwhile, is there a best way to practice it? In terms of moving the court and

litigants away from state constitutional law as a simple means of avoiding federal policies on ideological grounds, the findings suggest that primacy is a strong means of achieving that goal. These findings, however, also demonstrate why so few courts have engaged in the effort: it is a difficult road. As discussed, there are legitimate reasons for why a court prefers the stable established path of deference to federal doctrine and blazing a new path of constitutional law is difficult and labor intensive. Linde's primacy may have built a generation of lawyers comfortable with Oregon constitutional law but it took an unusual leadership commitment from the Oregon Supreme Court as a whole. Of course, the comparative data present here is limited and additional work is necessary to establish the superiority of one method over another.