

5-2015

Reasonable Expectations: State Appellate Courts and the Third-Party Doctrine

Tanner M. Russo

Follow this and additional works at: <https://scholarworks.wm.edu/honorsthesis>



Part of the [American Politics Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Privacy Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Russo, Tanner M., "Reasonable Expectations: State Appellate Courts and the Third-Party Doctrine" (2015). *Undergraduate Honors Theses*. Paper 139.

<https://scholarworks.wm.edu/honorsthesis/139>

This Honors Thesis is brought to you for free and open access by the Theses, Dissertations, & Master Projects at W&M ScholarWorks. It has been accepted for inclusion in Undergraduate Honors Theses by an authorized administrator of W&M ScholarWorks. For more information, please contact scholarworks@wm.edu.

Reasonable Expectations: State Appellate Courts and the Third-Party Doctrine

A thesis submitted in partial fulfillment of the requirements for the degree of

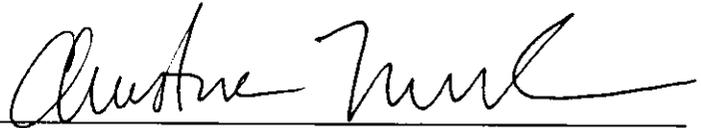
Bachelor of Arts with Honors in Government from

the College of William and Mary

by

Tanner Russo

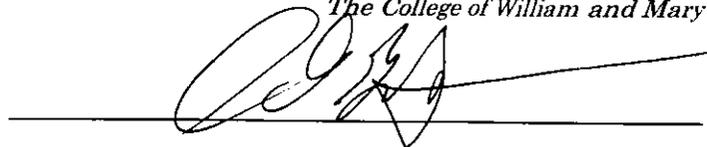
Accepted / Not Accepted for Honors



Dr. Christine Nemacheck, Project Advisor
*Associate Professor, Department of Government
The College of William and Mary*



Professor Jackson N. Sasser, Jr.
*Visiting Instructor, Department of Government
The College of William and Mary*



Professor Adam Gershowitz
*Kelly Professor of Teaching Excellence, Professor of Law
William and Mary Marshall-Wythe Law School*

Williamsburg, Virginia
5 May 2015

Table of Contents

Acknowledgements	2
Introduction	3
I. New Judicial Federalism and the Third-Party Doctrine	5
II. The Third-Party Doctrine – Landmark Cases	10
III. Literature Review	17
IV. Hypotheses and Theoretical Support	24
V. Methodology	36
VI. Results	44
Conclusion	61
References	63

Acknowledgements

Several people have helped bring this thesis to fruition but none more so than Dr. Christine Nemacheck. It is rare for a professor to oversee an honors thesis while on sabbatical, let alone from another continent. Dr. Nemacheck's willingness to do so bespeaks her immense generosity. This thesis has benefited enormously from her insight and encouragement.

Professor Jackson Sasser has been an unflagging source of support since my first days at William and Mary. He helped facilitate many of my most fulfilling academic and professional experiences. His seminars informed my views on law and history and made clear the sometimes troubling, always fascinating intersections between the two. Ultimately, I am a better writer and thinker for having known him.

My gratitude also extends to Professor Adam Gershowitz of William and Mary's Marshall-Wythe School of Law for agreeing to serve as a third reader and going well beyond the role's requirements in offering thoughtful suggestions.

This thesis was further bolstered by the good humor of friends and family. Ashley Murphy, Brooke Huffman, and Zoë Trout have offered vital camaraderie and distraction throughout the process. Andrew Jones has tolerated a dorm room stacked high with the books and papers that comprised this research. Lastly, my parents, James and Toni Russo, offered unending love and support during this endeavor.

INTRODUCTION

On January 23, 2012, the United States Supreme Court issued a unanimous decision in *United States v. Jones*, ruling that the warrantless installation of a Global-Positioning-System (GPS) tracking device on a criminal suspect's vehicle constitutes a search under the Fourth Amendment, which forbids "unreasonable searches and seizures."¹ Justice Scalia's majority opinion held that the Court need not address the defendant's privacy expectations since, at the time of its adoption, the Fourth Amendment prohibited the sort of physical trespass that occurred when law enforcement placed a GPS tracker on a Jeep registered to Jones's wife. In a powerful concurrence, Justice Sotomayor took issue with the majority's property-based inquiry, arguing that the Fourth Amendment's protections extend beyond "trespassory intrusions on property" to instances when law enforcement violates a "subjective expectation of privacy that society recognizes as reasonable." By limiting its Fourth Amendment inquiry to one based on common-law trespass, Sotomayor contended, the Court overlooked the "reasonable expectations of privacy" standard set forth in *Katz v. United States* (1967). Worse still, the Court ignored the reality that many types of government surveillance no longer require "physical intrusion" onto private property (*United States v. Jones*, 2012, 954-955).²

In perhaps the most memorable portion of her concurrence, Justice Sotomayor voiced her willingness to reconsider the third-party doctrine, a strand of the Supreme

¹ The text of the Fourth Amendment reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

² Ironically, Sotomayor ultimately endorsed a trespass-based approach, joining the property rationale of Justice Scalia's opinion along with Chief Justice Roberts and Justices Kennedy and Thomas. While concurring in the result of the majority opinion, Justices Ginsburg, Brennan, and Kagan joined a separate concurrence by Justice Alito in which Alito argued that the Court should have conducted a *Katz*-based inquiry into whether installation of the GPS tracker violated Jones's "reasonable expectations of privacy." See Stephen E. Henderson, "After *United States v. Jones*, After the Fourth Amendment Third Party Doctrine," *North Carolina Journal of Law and Technology* 14, no. 2 (Spring 2013), 448-452.

Court's Fourth Amendment jurisprudence holding that individuals enjoy no reasonable expectations of privacy, and thus no Fourth Amendment protection, over "information voluntarily disclosed to third parties" like banks, telephone companies, or Internet Service Providers (ISPs). This doctrine, Sotomayor asserted, is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks" (*United States v. Jones*, 2012, 957). While the United States Supreme Court held in cases such as *United States v. Miller* (1976) and *Smith v. Maryland* (1979) that the Fourth Amendment does not protect material shared with third parties, state appellate courts are free to offer greater levels of protection to such material under their own state constitutions. In this thesis, I aim to illuminate the legal and political factors that might lead state courts to avail themselves of state constitutions in recognizing citizens' privacy expectations over information shared with third parties.

This essay takes shape as follows: First, I delineate the concept of new judicial federalism, whereby state appellate courts are free to offer greater protections under state constitutions than the minimum levels of protection established by the United States Supreme Court. Here, I explain the legal means that empower state appellate courts to reject the federal third-party doctrine by capitalizing on state constitutional provisions, especially search-and-seizure analogs and privacy provisions. Second, I explore the Supreme Court's landmark third-party doctrine jurisprudence, tracing the Court's rulings in *Olmstead v. United States* (1928), *Katz .v United States* (1967), *United States v. Miller* (1976), *Smith v. Maryland* (1979), and *California v. Greenwood* (1988). Third, I review the literature on new judicial federalism and the third-party doctrine, demonstrating how my thesis fills gaps in existing scholarship. Fourth, I enumerate my hypotheses and underlying theoretical assumptions. Fifth, I explain my methodology for building a population of state third-party doctrine cases, collecting and coding data, and conducting statistical analyses to

test my hypotheses. Finally, I discuss the results of my analyses, which show that judicial ideology and the presence of a state constitutional privacy guarantee both shape state judges' calculus about whether to protect third-party material under state constitutions.

I. New Judicial Federalism and the Third-Party Doctrine

In 1977, Justice William Brennan, the Supreme Court's longtime liberal stalwart, introduced the concept of new judicial federalism. In a foundational *Harvard Law Review* article, Brennan urged state courts to utilize their state constitutions to provide higher levels of protection for individual liberties than those afforded by the United States Supreme Court. This rallying cry to state courts sprung from what Brennan regarded as the Supreme Court's alarming conservatism during the tenure of Chief Justice Warren Burger (1969 – 1986). The Burger Court veered from the Court's robust protection of civil liberties and criminal suspects rights under Chief Justice Earl Warren (1953 – 1969). While leaving unscathed many of the Warren Court's most lauded decisions on matters like school desegregation and legislative reapportionment,³ the Burger Court attracted criticism for "whittling down the greater civil libertarian advances of the Warren Court," especially in the realm of criminal suspects' rights (Howard 1976; Israel 1977, 1322).⁴

Maligning the Burger Court's "door-closing decisions," Brennan (1977, 495) applauded state courts for "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provision, even those identically phrased." Establishing his role as the "intellectual godfather of the new judicial federalism," Brennan presented state courts and constitutions

³ See *Brown v. Board of Education* 347 U.S. 483 (1954) and *Reynolds v. Sims* 377 U.S. 533 (1964), respectively.

⁴ Justice Brennan (1977, 496-498) lists numerous Burger Court decisions that, in his view, diluted the rights of criminal suspects. See *United States v. Robinson*, 414 U.S. 218 (1973), upholding warrantless searches of automobiles following routine traffic stops; *Gustafson v. Florida*, 414 U.S. 260 (1973), condoning full searches of lawfully detained suspects; *South Dakota v. Opperman*, 96 S. Ct. 3092 (1976), upholding full warrantless searches of impounded cars.

as a potential remedy for conservative Burger Court doctrine (Tarr 1999, 1112). Legal historians note that the robust state constitutionalism Brennan envisioned constituted a mere “rediscovery of state constitutions,” which served as the “primary vehicle for protecting individual rights” until federal courts assumed a more active role in protecting civil liberties in the 1930s (Tarr 1999, 1099-1100). Nevertheless, most legal scholars credit Brennan’s 1977 article with reviving state appellate courts’ use of state constitutions to augment federal doctrine.

In the United States’ federal judicial system, state appellate courts enjoy “unquestioned, final authority to interpret their state constitutions” (Friedman 2000, 100). This power stems from the “adequate and independent state grounds” doctrine. Established by the Supreme Court in such cases as *Murdock v. City of Memphis* (1874), *Herb v. Pitcairn* (1945), and *Michigan v. Long* (1983), the independent state grounds doctrine stipulates that federal courts have no jurisdiction to review state court decisions grounded in state provisions that stand independent from federal law.⁵ While U.S. Constitutional rights incorporated to the states through the Fourteenth Amendment establish a “minimum of protection from which the states may not subtract” (Howard, Graves, and Flowers 2006, 847), the U.S. Constitution does not require state courts to interpret state constitutions in harmony with the Bill of Rights nor prohibit state courts from offering more expansive protections than those provided by federal courts (Abrahamson 1985, 1156; Van Cleave

⁵ It is worth noting that two of the landmark third-party doctrine holdings explored in this paper affirm the ability of state appellate courts to apply their state constitutions toward more protective ends than the United States Supreme Court. Dissenting in *United States v. Miller* (1976, 1629), Justice Brennan highlights several state cases included in my analysis as examples of the “emerging trend among high state courts of relying upon state constitutional protections of individual liberties protections . . . increasingly being ignored by decisions of this Court.” Writing for the majority in *Greenwood v. California* (1988, 1630), Justice White acknowledged that “individual States may surely construe their own constitutions as imposing more stringent constraints than the does the Federal Constitution.”

1998, 206; Wilkes 1974, 426-431).⁶

While these decisions and analyses seemingly embolden state appellate courts to offer additional protections under their state constitutions, some legal scholars question the “legitimacy of independent state constitutional interpretation in cases where there are also similar or identical federal constitutional guarantees” (Williams 1999, 1055).⁷ Rebuking new judicial federalism as a euphemism for “unprincipled” evasion of federal doctrine, Barry Latzer (1991, 865) argues that by using state constitutional provisions to reject federal Fourth Amendment precedents, state appellate courts burden law enforcement with contradictory bodies of criminal law. These “mid-game rule changes” make it difficult for law enforcement officers without legal training to recall doctrinal detail when making decisions “rapidly under trying circumstances” (Latzer 1991, 866). Despite such criticisms, many judges and scholars embrace Justice Brennan’s conception of state appellate courts as “laboratories” for developing innovative approaches to “protect individual rights and promote the public interest” (Abrahamson 1985, 1192).

Justice Brennan’s article followed on the heels of *United States v. Miller* (1976), a ruling Brennan cites as yet another example of the Burger Court’s “door-closing” jurisprudence. In *Miller* (1976), the Court established the third-party doctrine, ruling, in

⁶ Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit argues that while state courts may not ignore independent federal claims, they “remain free to construe their constitutional guarantees to offer as little protection as they think appropriate,” perhaps even less than the U.S. Constitution provides (Sutton 2011, 712). Given that constitutional claimants almost always present a federal claim, however, less protective state constitutional rulings would likely have little effect on most parties and would invite unfavorable review by a higher court.

⁷ Williams (1996, 1056) argues that state appellate courts betray an awareness of this “crisis of legitimacy” when they “attempt to formulate standards or criteria by which to justify their rejection of Supreme Court decisions.” *State v. Gunwall* 106 Wash.2d 54 (1986), a Washington Supreme Court decision from my data set, demonstrates the point. The *Gunwall* Court lists six factors it considers relevant when deciding whether its state constitutional provisions offer more protection than the federal constitution: “(1) the textual language [of both constitutions]; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences [between the two constitutions]; and (6) matters of particular state or local concern” (*State v. Gunwall*, 1986, 811). Several cases in my population look to similar or identical factors in deciding whether to offer broader rights under their state constitution.

Brennan’s words, that “none of us has a legitimate expectation of privacy in the contents of our bank records, thus permitting governmental seizure of those records without our consent or knowledge” (Brennan 1977, 497). If Brennan’s vision of state courts as “font[s] of individual liberties” holds water, scholars might expect state appellate courts to engage in judicial federalism by ruling that, while the Fourth Amendment does not protect material shared with third parties, a state’s constitution *does* offer such protection.

All fifty state constitutions contain a search-and-seizure provision analogous to the Fourth Amendment, albeit with sometimes significant textual distinctions. Like the Fourth Amendment, these analog provisions protect against unreasonable searches and seizures and, to varying degrees, prohibit warrantless intrusions of citizens’ “persons, houses, papers, and effects” (Henderson 2006; Gorman 2007).⁸ Six states—Arizona, Hawai’i, Illinois, Louisiana, South Carolina, and Washington—have adopted search-and-seizure analogs with explicit references to citizens’ privacy interests.⁹ Six states—Alaska, California, Florida, Hawai’i, Illinois, and Montana—have adopted separate constitutional provisions that recognize citizens’ privacy rights.¹⁰ Armed with search-and-seizure analogs and privacy provisions, state appellate courts possess ample tools with which to counteract the third-party doctrine and make real Brennan’s vision of renewed state constitutionalism.

⁸ Georgia’s analog, for example, is essentially coterminous with the text of the Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized” (Georgia Constitution, art. 1, sec. 1).

⁹ For example, South Carolina’s analog reads: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained” (South Carolina Constitution, art. 1, sec. 10, emphasis added, “invasions of privacy” clause added in 1971).

¹⁰ For example, Hawai’i’s right-to-privacy provision reads: “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right” (Hawai’i Constitution, art. 1, sec. 6, amended in 1978).

Far from a mere theoretical exercise, a court's rejection of the federal third-party doctrine can have serious consequences for criminal defendants. In *Commonwealth v. DeJohn* 486 Pa. 32 (1979), a case in my data set, the Supreme Court of Pennsylvania reversed Jill DeJohn's third-degree murder conviction. In February 1976, Michael DeJohn, a decorated Vietnam War veteran, was found dead in his garage from a single gunshot wound to the head, his wedding band, wallet, and watch untouched. Jill DeJohn, the victim's wife and mother of their two children, had mismanaged the family's finances. As the family's debts mounted, Jill DeJohn forged her husband's signature on loan applications and tried to extort \$5,000 from a neighbor. Michael DeJohn was insured for approximately \$200,000, with his wife as his primary beneficiary. On the night of DeJohn's murder, the only items missing from the DeJohn household were \$50 in poker winnings and a .25 caliber pistol, the same weapon used to shoot Michael DeJohn and which Jill DeJohn told a neighbor she "knew how to use" (*Com. v. DeJohn*, 1979, 36).

Acknowledging that the jury had sufficient evidence to convict Jill DeJohn of her husband's murder, the Pennsylvania Supreme Court nevertheless remanded her case for a new trial. Under Article 1, Section 8 of the Pennsylvania Constitution, the court held that police violated Jill DeJohn's reasonable expectations of privacy by using an improperly issued subpoena to obtain incriminating bank records. Dismissing *United States v. Miller* (1976) as a "dangerous precedent" with "great potential for abuse," the court ruled that unlike the Fourth Amendment, Pennsylvania's search-and-seizure analog recognized citizens' legitimate expectations of privacy in bank records. Because the defendant's bank records were procured with an invalid subpoena and used to establish a motive a trial, Pennsylvania's search-and-seizure analog demanded suppression of DeJohn's bank records (*Com. v. DeJohn*, 1979, 49). Like so many cases in my sample, *DeJohn* illustrates the

tremendous power state courts' third-party doctrine decisions hold not just for academic understandings of judicial federalism but also for criminal defendants.

II. The Third-Party Doctrine – Landmark Cases

We embark now on a brief examination of how the federal third-party doctrine precedent evolved from the United States Supreme Court's twentieth century search-and-seizure jurisprudence.

Olmstead v. United States (1928): In 1928, the Supreme Court held in *Olmstead v. United States* (1928) that police officers did not violate the Fourth Amendment by wiretapping a criminal suspect's private telephone line from a public street. Writing for a five-person majority, Chief Justice Taft reasoned that because the plain text of the Fourth Amendment protects citizens only in their "persons, houses, papers, and effects," only a physical intrusion on these elements triggers Fourth Amendment protection. Since the police did not physically intrude on the *Olmstead*'s person or home, and because overheard telephone conversations are "neither papers nor effects," the Court ruled that the act of wiretapping presented no Fourth Amendment violation (*Olmstead v. United States*, 1928, 464). *Olmstead* inaugurated a new phase in the Court's approach to Fourth Amendment violations, presenting "physical penetration of a protected area" as the touchstone for determining whether state action constituted a search within the meaning of the Fourth Amendment (Kerr 2012, 81). While post-*Olmstead* decisions have understood *Olmstead* as placing the common-law "trespass test" at the center of Fourth Amendment inquiries, scholars like Orin Kerr (2012, 81) argue that the *Olmstead* Court was careful to distinguish "physical penetration from the technical doctrine of trespass." Indeed, Chief Justice Taft's majority opinion mentions "trespass" only twice.¹¹ Regardless, *Olmstead* effectively limited

¹¹ Kerr's contention that "no trespass test was used in the pre-*Katz* era" problematizes the historical rationale of Justice Scalia's *Jones* (2012) opinion. While Scalia frames *Jones* as trumpeting

the scope of search-and-seizure violations to instances in which law enforcement physically intruded on criminal defendants' "persons, houses, papers, and effects." The physical intrusion standard would dominate Fourth Amendment inquiries until 1967.

Katz v. United States (1967): In *Katz v. United States* (1967), the Supreme Court shifted the "Fourth Amendment focus from property to privacy" (Thompson 2014, 8). Tasked once more with deciding whether warrantless wiretapping violated the Fourth Amendment, the *Katz* Court settled the issue with an approach decidedly different from the one it adopted in *Olmstead*. By 1967, the Warren Court's progressivism had reached its zenith. Since becoming Chief Justice in 1953, Earl Warren had overseen major changes in the Court's jurisprudence on equal protection, voter apportionment, and criminal procedure, issuing landmark rulings in *Brown v. Board of Education* (1954), *Mapp v. Ohio* (1961), *Gideon v. Wainwright* (1963), *Reynolds v. Sims* (1964), and *Miranda v. Arizona* (1966). Two years before hearing argument in *Katz*, the Court acknowledged a clear, though somewhat amorphous, right to privacy, ruling in *Griswold v. Connecticut* (1965) that "specific guarantees in the Bill of Rights" cast "penumbras" that together form constitutionally protected "zones of privacy" (*Griswold v. Connecticut*, 1965, 1681). Though the Court as a whole has never specified the constitutional provisions that establish Americans' right to privacy, *Griswold* nevertheless affirmed the right's existence, laying a foundation for the Court's ruling in *Katz*.

Addressing a fact pattern analogous but not identical to *Olmstead's*, the *Katz* Court ruled that law enforcement officers violated the Fourth Amendment when they taped a microphone to the top of a public phone booth in order to listen in on a criminal suspect's telephone conversations. Though the placement of the microphone "involved no physical

the "return of the trespass test for what is a Fourth Amendment 'search,'" Kerr (2012, 1-3) presents persuasive arguments that "there is no trespass test to restore."

penetration of the telephone booth,” and the booth itself was not the defendant’s personal property, the Court held that the police nevertheless “violated the privacy upon which [Katz] justifiably relied while using the telephone booth.” Dismissing the “premise that property interests control the right of the Government to search and seize,” Justice Stewart wrote for the Court that the Fourth Amendment “protects people, not places.” The trespass rationale of *Olmstead* no longer controlled Fourth Amendment inquiries (*Katz v. United States*, 1967, 511-5112). In an influential concurrence, Justice Harlan articulated a standard for determining the conditions under which citizens can expect Fourth Amendment protection. In Harlan’s estimation, Fourth Amendment search-and-seizure protections apply in settings where citizens exhibit “an actual (subjective) expectation of privacy” that “society is prepared to recognize as ‘reasonable’” (*Katz v. United States*, 1967, 516). Called the “reasonable expectations of privacy” standard, Harlan’s test continues to shape the Court’s modern Fourth Amendment jurisprudence.

While I argue in that *Katz* marked a bold turn in the Supreme Court’s Fourth Amendment jurisprudence—one the Burger and Rehnquist Courts curbed by announcing the third-party doctrine—it bears noting that *Katz* and a series of Warren Court decisions before *Katz* sowed the seeds from which the third-party doctrine sprouted. In a string of “agent-informer” or “false friend” cases spanning from 1952 to 1971, the Court maintained that individuals who speak to undercover government informants about criminal activity enjoy no privacy interests in the content of their conversations. By voluntarily conversing with another person about unlawful activity, individuals assume the risk that their confidantes might relay incriminating information to police (Thompson 2014, 7-9).¹² Collectively, as Justice Stewart asserted in *Katz*, the agent-informer cases establish the

¹² See *Lee v. United States* 343 U.S. 427 (1963); *Lopez v. United States* 373 U.S. 427 (1963); *Lewis v. United States* 385 U.S. 206 (1966); *Hoffa v. United States* 385 U.S. 293 (1966); and *United States v. White* 401 U.S. 745 (1971).

principle that the Fourth Amendment does not protect “what a person knowingly exposes to the public” (*Katz v. United States*, 1967, 511). While *Katz* and the agent-informer cases paved the way for the third-party doctrine in *Miller* (1976) and *Smith* (1979), the latter decisions still signal a sharp turn from *Katz* by dismissing as wholly unreasonable any expectation of privacy in information shared with third parties. Moreover, the agent-informer cases are primarily concerned with the risk individuals assume when conversing with others, not instances, as in *Miller* (1976), *Smith* (1979), and *Greenwood* (1988), where individuals convey tangible transactional data to third party entities like banks, telephone companies, and garbage collectors (Thompson 2014, 9).¹³

***United States v. Miller* (1976):** Almost a decade after *Katz* and seven years into Warren Burger’s tenure as Chief Justice, the Supreme Court narrowed the circumstances under which criminal defendants could claim reasonable expectations of privacy when it ruled in *United States v. Miller* (1976) that a criminal suspect’s Fourth Amendment rights were not violated when law enforcement subpoenaed the suspect’s bank for his financial records. Citing the reasonable expectations test set forth in Justice Harlan’s *Katz* concurrence, Miller argued that the warrantless procurement of his bank records violated his reasonable expectations of privacy and thus offended the Fourth Amendment. Relying on agent-informer precedent like *Hoffa* (1966) and *White* (1971), the Court rejected these claims. Writing for a seven-justice majority, Justice Powell held that Miller enjoyed no “legitimate expectation of privacy” in the content of financial records “voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.” Simply put, the subpoenaed bank documents were not “respondent’s ‘private

¹³ I did not include state appellate cases concerning agent-informer or false-friend scenarios in my data set, because I view the Supreme Court’s agent-informer precedent as a precursor to the modern third-party doctrine. Since I am concerned with state court reactions to the third-party doctrine, which did not ripen until *Miller* (1976) and *Smith* (1976), I focus on how state courts have addressed *Miller*, *Smith*, and subsequent federal precedent rather than rulings like *White* (1971).

papers” but rather the “business records of the banks.” Because the subpoenaed bank records raised no constitutionally recognized privacy interests, the Fourth Amendment imposed no warrant or probable cause requirement, allowing government officials to subpoena third party records for the purpose of criminal prosecution (*United States v. Miller*, 1976, 440-442). The *Miller* Court scaled back the scenarios subject to *Katz’s* privacy-driven inquiry and heralded the arrival of the modern third-party doctrine.

Smith v. Maryland (1979): Three years after *Miller* (1976), the Court cemented the third-party doctrine in *Smith v. Maryland* (1979), ruling that police officers did not violate the Fourth Amendment when, without a warrant or court order, they installed a pen register to obtain phone numbers dialed out of a criminal suspect’s home telephone line. Lauding Justice Harlan’s reasonable expectations of privacy test as the “lodestar” of Fourth Amendment inquiries, the Court extended *Miller’s* rationale to telephone records. Justice Blackmun’s majority opinion asserted that telephone users do not maintain reasonable expectations over the telephone numbers they dial, since all users “realize that they must ‘convey’ phone numbers to the telephone company” for calls to be completed. Since *Miller* established that an individual has “no legitimate expectations of privacy in information he voluntarily turns over to third parties,” *Smith* abandoned his expectation of privacy when he “voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business” (*Smith v. Maryland*, 1979, 2580-2582). While the Court extended the third-party doctrine to different settings during the Burger, Rehnquist, and Roberts Courts, *Smith* (1979) marks the Supreme Court’s last major “pronouncement on the parameters of the third-party doctrine” (Thompson 2014, 12). The decision stands as a significant supplement to the initial announcement of the doctrine in *Miller*, since, unlike in *Miller*, *Smith* condoned governmental procurement of third-party materials obtained without subpoenas, court

orders, or any judicial oversight whatever. Thus, *Smith* establishes the principle that third-party materials enjoy no Fourth Amendment protection “no matter how egregious the police conduct which results in governmental acquisition of the information,” a breathtaking departure from the level of protection suggested by the Warren Court in *Katz* (1967) (LaFave 1987, 511).¹⁴

***California v. Greenwood* (1988):** Since cases concerning garbage collection are well represented in my data set, a brief exploration of *California v. Greenwood* (1988) is in order.¹⁵ One of the most noteworthy extensions of the third-party doctrine because of its relevance for criminal drug prosecutions, *Greenwood* (1988) upheld the warrantless search and seizure of garbage left for collection outside the curtilage of a home. Writing for the majority, Justice White applied *Smith*'s rationale, noting that while *Greenwood* may have maintained some subjective expectation of privacy in the contents of his garbage, society would not accept this expectation as reasonable since the defendant placed his refuse “at the curb for the express purpose of conveying it to a third party, the trash collector.” It is “common knowledge,” White contended, that garbage left by the street for collection is “readily accessible to animals, children, scavengers, snoops, and other members of the public” (*California v. Greenwood*, 1988, 1628-1629). Here, as in *Smith*, the Court employed the third-party doctrine to uphold a search conducted without any judicial authorization.

Since the Court's announcement of the third-party doctrine in *Miller* (1976) and *Smith* (1979), attorneys, judges, and scholars of all stripes have presented arguments supporting and decrying the doctrine. In perhaps the most coherent defense, Orin Kerr (2009) argues

¹⁴ To demonstrate the point, LaFave (1987, 511) notes that in *United States v. Payner*, 447 U.S. 727 (1980), the Court applied the third-party doctrine to a scenario in which IRS agents “arranged to have [the defendant's] bank records obtained by burglary.”

¹⁵ Cases concerning garbage left for collection account for 73 of the 218 cases in the population, the largest case type represented. Most garbage cases involve drug prosecutions in which police discover evidence of narcotics in garbage left for collection.

that the third-party doctrine serves two critical purposes. First, Kerr contends, the doctrine ensures the “technological neutrality of the Fourth Amendment,” allowing law enforcement easy access to evidence of sophisticated criminal third-party exchanges technological advances have rendered unobservable through traditional surveillance (Kerr 2009, 516; Thompson 2014, 16). Second, Kerr argues that the third-party doctrine “creates ex ante clarity by matching the Fourth Amendment rules for information with the Fourth Amendment rules for location.” By holding that materials shared with a third party receive the same protection as all other materials stored with that third party—by doctrinally “erasing the history” and place of origin of third-party materials—the third-party doctrine permits law enforcement to treat all materials stored in the same place in the same fashion. This reflects the reality that police will “normally know the status of the place they search but not the history of the items found inside it” (Kerr 2007, 581-582).

Still, other scholars denounce the third-party doctrine as poorly reasoned and out of step with modern life. Wayne LaFave (1987, 507-511) calls *Miller* “dead wrong” and *Smith* a “crabbed interpretation of the *Katz* test.” In LaFave’s view, both decisions rest on the faulty proposition that the Fourth Amendment protects only matters that are “absolutely, 100% private.” This standard belies even the Court’s pre-*Katz* jurisprudence, which often protected individuals in settings that did not provide “absolute privacy” (LaFave 1987, 508).¹⁶ Furthermore, LaFave contends, the third-party doctrine grounds Fourth Amendment determinations in “property concepts” of “ownership and possession” *Katz* held no longer dispositive of Fourth Amendment inquiries (LaFave 1987, 511-512).

Numerous scholars take issue with the third-party doctrine’s assumption that individuals “voluntarily” convey materials to third parties (Thompson 2014, 18; LaFave

¹⁶ In *United States v. Chapman* (1961), for example, the Court protected tenants from warrantless police intrusion even though a landlord’s ability to enter the premises negated tenants’ absolute privacy in rented dwellings.

1987, 515). Dissenting in *Miller*, Justice Brennan asserted that disclosure of one's financial affairs to a bank is "not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account" (*United States v. Miller*, 1976, 451). Such concerns about the doctrine's practicability echo Justice Sotomayor's *Jones* concurrence, which deems the third-party doctrine "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks" (*United States v. Jones*, 2012, 957).

The Burger and Rehnquist Courts' third-party doctrine rulings in *Miller* (1976), *Smith* (1979), and *Greenwood* (1988) constitute major breaks from the high level of privacy protection advanced by the Warren Court in *Katz* (1967). These federal precedents present ample opportunities for state appellate courts to use their search-and-seizure analogs and privacy provisions to offer more protection for third-party material than the Supreme Court provides under the Fourth Amendment. If Brennan's vision of new judicial federalism holds true, we should expect to see post-*Miller* state appellate courts wielding their state constitutions to counteract the Burger and Rehnquist Courts' third-party doctrine rulings.

III. Literature Review

My analysis of state appellate courts' treatment of the third-party doctrine fills several gaps in the literature on new judicial federalism and search-and-seizure jurisprudence in the fifty states. Most glaring, no scholar has conducted sustained empirical analysis of state appellate courts and the third-party doctrine. Henderson (2006) provides a useful descriptive catalog of how each state's judiciary had addressed the federal third-party doctrine as of 2006. However, his compendium of third-party doctrine holdings is not comprehensive, and he conducts no empirical analysis to determine the legal or political factors that might explain why some states choose to protect third-party materials and others embrace the rationale of *Miller*, *Smith*, and *Greenwood*. By examining state court

activity since 2006, my work offers a much-needed update to Henderson’s article; a handful of states have rejected the federal third-party doctrine since 2006. Gorman (2007) compiles the text of each state’s search-and-seizure analog and privacy provisions, as well as statements from each state judiciary about how courts should interpret their analogs in relation to the Fourth Amendment.¹⁷ However, Gorman (2007) presents no quantitative or qualitative analysis of how state courts have utilized their analog and privacy provisions to address the federal third-party doctrine.

At least five studies of state appellate decisions account for the influence of state constitutional provisions. Examining state search-and-seizure decisions from 1981 to 1993, Howard, Graves, and Flowers (2006) found that the presence of a state constitutional privacy guarantee had no significant effect on whether a state court grounded its search-and-seizure jurisprudence in state constitutional provisions or federal doctrine. Similarly, Flemming, Holian, and Mezey (1998) found that the presence of a privacy guarantee in a state’s constitution had no significant impact on a state’s propensity to issue pro-privacy decisions; instead, justices’ religious and partisan affiliations significantly predicted support for privacy claims. Examining the effect of state equal protection clauses on state

¹⁷ I refer to such pronouncements as “statements of interpretive approach.” While these statements constitute non-binding dicta, I hypothesize they may yet offer cues to state court judges presented with opportunities to diverge from the federal third-party doctrine. Compare statements made by appellate courts in Hawai’i, a state that has rejected the federal third-party doctrine in a number of contexts, with statements made by courts in Wisconsin, a state that has embraced federal third-party doctrine holdings on at least six occasions. In *State v. Tanaka*, 67 Haw. 658701 P.2d 1274 (1985), the Hawaii Supreme Court noted, “Art. 1, Sec. 7 of the Hawaii Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights.” In comparison, the Wisconsin Court of Appeals has stated, “Wisconsin courts interpret the search and seizure provisions of the state and federal constitutions identically” (*State v. Yakes*, N.W. 2d 108 (1999), quoting *State v. Rewolinski* (1990)).

Other state courts’ statements of interpretive approach are far more neutral in tenor. In *People v. Sporleder*, 666 P. 2d 135, 140 (1983), the Colorado Supreme Court noted, “Although Art. II, Sec. 7 of the Colorado Constitution is substantially similar to its federal counterpart, we are not bound by the United States Supreme Court’s interpretation of the Fourth Amendment when determining the scope of state constitutional protections.” Though its statement of interpretive approach would not necessarily compel greater protection, Colorado has consistently provided greater protection for third party materials under its analog.

courts' equal protection decisions, Fino (1987) found that neither the presence of an equal protection clause nor the degree of specificity of the clause had a significant effect on whether state courts based equal protection decisions on state or federal grounds.

A few scholars have found some relationship between state constitutional provisions and case outcomes. Lovell (2012) examined the role of Blaine Amendments, state constitutional provisions that prohibit state funds from reaching religious schools, in state courts' religious liberties jurisprudence. While the effect of Blaine Amendments was not statistically significant, Lovell (2012) found a relationship between a courts' reliance on its Blaine Amendment and decisions to provide higher levels of religious liberties protection. Similarly, Emmert and Traut (1992) found that while states usually relied on federal doctrine when reviewing state statutes between 1981 and 1985, states were more likely to invalidate statutes when their constitution included a relevant provision with no federal analog. While the literature as a whole provides mixed support for the significance of state constitutional provisions, Lovell (2012) and Emmert and Traut (1992) provide some basis for my hypothesis that the text of a state's analog and the presence of a state constitutional privacy provision might prove critical to state third-party holdings.

Numerous studies have probed state appellate criminal procedure jurisprudence for evidence of new judicial federalism. Overall, scholars seem to have reached a consensus that though state constitutions are an "important source of additional rights" for criminal defendants, state courts have not become the "leaders in civil liberties" Brennan envisioned (Cauthen 2000, 1202). Examining state criminal procedure decisions from 1969 to 1989, Latzer (1991) found that regardless of the state court's prestige or the criminal procedure issue in question, states were far more likely to adopt Burger and Rehnquist Court precedents than to offer more expansive protections for criminal suspects under state constitutions. Using Latzer's data set, Beavers and Walz (1998) offered little analysis of the

frequency of states engaging in judicial federalism but found that longer judicial terms and support from a liberal citizenry made it more likely for state courts to offer greater protection under their state constitutions. Exploring state supreme court decisions in takings, search-and-seizure, and self-incrimination cases from 2000 to 2010, Nelson (2014) found that elected judges were less likely to base decisions on state grounds. In addition, case outcomes requiring the suppression of evidence were more likely to rely on state constitutional provisions than federal doctrine.

A few studies widen their aperture from specific cases to state courts' criminal procedure decisions over years or decades. Cauthen (1999, 539) examined 528 state high court criminal procedure decisions between 1970 and 1994, finding that "both across states and within individual states," the rate at which state courts have extended greater protection to criminal suspects has varied significantly since the beginning of the Burger Court in 1969. While the rate at which state courts used state constitutions to offer greater protections was high in the early 1970s, "activism was limited to few states rendering relatively few state constitutional decisions" (Cauthen 1999, 539). Interestingly, Cauthen (1999) found that between 1981 and 1990, a higher percentage of state courts relied on their state constitutions in criminal procedure cases, though heightened reliance on state constitutions did not lead to heightened protection for criminal suspects. This demonstrates that reliance on state constitutional provisions does not necessarily entail divergence from federal doctrine. In a subsequent study, Cauthen (2000) examined state high court decisions from 1970 to 1994 to determine whether a state's propensity to engage in judicial federalism depends on the legal issue presented in the case. Cauthen (2000) found that states were most likely to offer greater protection than federal doctrine in cases concerning the free exercise of religion, jury trials, and governmental searches and seizures. These results support my primary hypothesis that state appellate courts might engage in judicial

federalism in cases concerning the seizure of materials stored with third parties.

An abundance of research demonstrates the potency of federal constitutional doctrine in state judicial decisionmaking. In a study of state high court cases concerning the applicability of United States Supreme Court precedent from 1994 to 2006, Kassow, Songer, and Fix (2012) found that the vitality of the federal precedent in question, measured in part by the number of justices in the majority, significantly predicted whether state courts adopted federal doctrine or relied on independent state grounds.¹⁸ Though they did not focus on search-and-seizure cases specifically, Beavers and Emmert (2000) examined more than 500 state high court reviews of state legislation, concluding that state courts were especially likely to base civil liberties decisions on federal doctrine rather than independent state grounds. Hoekstra (2005) found that federal precedent dominated state labor cases from 1900 to 1940, while Esler (1994) and Tarr and Porter (2012) found similar effects in their respective studies of state self-incrimination and gender discrimination cases.

Taken together, then, the literature indicates that state courts faced with the choice of federal doctrine or independent state constitutional grounds will likely adopt federal doctrine. Scholars and judges have attempted to determine why state constitutional law remains so underdeveloped. Esler (1994, 31-32) identifies several factors underlying state court reliance on federal doctrine, including a long “history of federal judicial dominance,” textual similarities between federal and state constitutional provisions, and ingrained preferences for prosecuting under federal rather than state law, especially in a growing number of cases where state and federal law enforcement collaborate. Tarr and Porter

¹⁸ At least two of the landmark third-party doctrine cases addressed in this paper resulted in near-unanimous rulings. *Miller* (1976) was decided a by 7-2 majority, with Justices Brennan and Marshall dissenting, while *Greenwood* (1988) was decided by a 6-2 majority, with Justice Kennedy recused and Justices Brennan and Marshall in dissent. A more narrow majority decided *Smith* (1979); the Court split 5-3, with Justice Powell recused and Justices Brennan, Marshall, and Stewart dissenting. Thus, by Kassow et. al’s standards, at least two of the three federal third-party rulings I focus on would likely be classified as enjoying a high degree of vitality.

(1982) hypothesize that federal law dominates because litigants and lawyers prefer to bring federal claims in a federal forum. In a *Harvard Law Review* article published just months after Brennan's January 1977 article, Burt Neuborne (1977, 1126) argues that civil liberties lawyers *should* prefer federal forums since the federal bench attracts gifted judges and clerks steeped in the "libertarian tradition" of Locke and Mill. Unlike state judges, Neuborne argues, federal judges possess the requisite talent to parse "complex, often conflicting lines of authority" and settle constitutional questions in "competently written, persuasive opinions" (Neuborne 1977, 1120).

Some observers fault law school curriculums for deemphasizing state law, arguing that lack of exposure to state constitutional law leads attorneys to bring only federal claims where they could bring state *and* federal constitutional claims. Arguing that litigators should prefer "two arrows in their quiver" to one, Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit posits that law schools devalue state constitutional law because of the "undue length" of state constitutions; the relative ease with which state constitutions can be amended; and the perceived negative effect of state judicial elections on the quality of state constitutional interpretation (Sutton 2011, 688-711). Interestingly, Sutton (2011, 711) argues that Justice Brennan's 1977 article may have stunted the development of state constitutional law. In Sutton's view, Brennan framed judicial federalism as a "liberal ratchet" and encouraged attorneys to adopt an opportunistic view of state constitutions at the expense of principled arguments that the "language, context, and history" of state constitutions compel greater civil liberties protections.

My analysis of state appellate courts' third-party doctrine holdings promises to build on the current literature in several ways. First, while studies have examined judicial federalism in criminal procedure cases, scholars have not focused specifically on the third-party doctrine or the role of states' search-and-seizure analogs and privacy provisions on

third-party holdings. Second, most of the extant literature on state criminal procedure cases covers state high court activity only until the mid-1990s. By covering more than 200 cases spanning from 1968 to 2014, my project adds years of valuable data.¹⁹ Third, most studies only examine state court activity starting with the beginning of the Burger Court. To determine whether Brennan's model of judicial federalism has prevailed, I examine state court activity both before and after the Burger Court. If state courts offered greater protection under state constitutions to third-party materials both before and during the Burger Court, we could safely state that the causal mechanism of judicial federalism is not state courts' reaction to Burger Court decisions, as Brennan's article supposes, but rather some other factor. Fourth, nearly all of the studies to date account only for state courts of last resort, while this paper covers both state high court decisions and intermediate state appellate court decisions not appealed to high courts. To overlook these mid-level appellate decisions would be to miss a substantial number of definitive third-party doctrine holdings.²⁰ Finally, while many studies offer insight into the factors that prompt state courts to rely on independent state grounds, fewer studies assess whether courts basing decisions on state constitutional provisions provide greater or the same levels of protection as the United States Supreme Court. As my analysis demonstrates, state courts can base decisions on their state constitutional analogs and privacy provisions but still offer the same level of protection as federal doctrine. By coding case outcomes based on both the use of state constitutional provisions and the level of protection provided, my project offers insight not simply into *whether* states make use of their constitutions but *how* they do so.

¹⁹ Though I searched for state appellate third-party rulings between 1952, the beginning of the Warren Court, and 2014, the earliest year a ruling in my data set was decided is 1968.

²⁰ My data set includes 73 cases from mid-level state appellate courts and 145 cases from state courts of last resort.

IV. Hypotheses and Theoretical Support

Three models of judicial decisionmaking provide theoretical support for my hypotheses. The legal model posits that judges are “motivated to establish an accurate, clear, and consistent interpretation of the law” in light of precedent, the text of relevant statutory and constitutional provisions, and the intent of these provisions’ authors (Segal 2011, 18). In sharp contrast, the attitudinal model asserts that judges marshal facts and legal texts to suit their own “ideological attitudes and values” (Segal and Spaeth 2002, 86). Reflecting the widespread approval the attitudinal model enjoys among political scientists, many studies on judicial decisionmaking account for judicial ideology and find judges’ ideological preferences have a significant impact on case outcomes (Segal and Cover 1989; Segal et. al 1995).²¹ Baum (2006) proposes a third paradigm of judicial decisionmaking in which judges act to earn respect from key “audiences,” such as fellow judges, attorneys, the public, or the media. Under this model, we should expect to see judges act in ways that reflect the interests or views of their audiences, either because these audiences help advance a judge’s career or because judges hope to accrue regard from “people whose esteem they care about” (Baum 2006, 21).

While most political scientists believe the legal model obscures the true basis for judges’ decisions, namely judges’ ideological preferences, some scholars balk at the strict division between legal and ideological motivations. Baum (2011, 76) rejects the dichotomy between law and politics, arguing instead that “legal and policy considerations are entwined in the processes through which judges make their choices.” Others rebuff the

²¹ Segal and Spaeth’s attitudinal model centers on United States Supreme Court justices, who are theoretically free to ignore legal constraints and pursue policy preferences because their decisions cannot be reviewed. Segal and Spaeth (2002) would likely argue that the attitudinal model does not apply in the state appellate context, since state court judges are tethered to legal constraints. However, state high court justices faced can avoid judicial review by basing third-party decisions on independent state grounds and are thus theoretically as free as United States Supreme Court justices to pursue personal policy preferences.

formal division between law and politics by asserting that “law *is* politics,” an enterprise in which indeterminate legal language and frequent interactions with governmental actors compel judges to reach political decisions (Cross 2011, 92-93). Thus, to hypothesize that legal factors shape a state judge’s decisions is not to assert that law trumps ideology but rather to acknowledge the interconnectedness of the two.

While I expect judicial ideology to exert influence in the case outcomes included in my data set, I also predict that certain legal constraints will shape state appellate judges’ decisions about whether to offer greater protection to third-party materials under state constitutions. These legal constraints include federal and state precedent, the text and structure of state constitutions, and legal history.

My first two hypotheses concern the influence of U.S. Supreme Court decisions like *Miller* (1976), *Smith* (1979), and *Greenwood* (1988) on state courts’ third-party rulings. When adjudicating federal claims, state courts may not offer less protection than the minimum protections established by federal courts’ interpretations of the U.S. Constitution. Ample statistical evidence demonstrates that state appellate courts feel the weight of federal precedent and are far more likely to adopt it than to develop state constitutional law (Kassow, Songer, and Fix 2012; Tarr and Porter 2012; Hoekstra 2005). If the legal model holds true, we could reasonably expect federal third-party decisions to act as a constraint on state court judges, who, because of a “long history of federal judicial dominance,” may feel pressure to adopt federal doctrine and offer the same level of protection established by the Supreme Court (Esler 1994, 31-32).

This expectation, however, that federal third-party doctrine precedent will render state judges *less* likely to engage in judicial federalism belies the underlying logic of Justice Brennan’s 1977 *Harvard Law Review* article. Under Brennan’s model of judicial federalism, the presence of conservative Burger and Rehnquist Court rulings like *Miller* (1976), *Smith*

(1979), and *Greenwood* (1988) should function not as a constraint on state courts but as a catalyst. Primed by the Warren Court to regard federal courts as the wellspring of progressive civil liberties jurisprudence, state courts, Brennan argues, will be alarmed by Burger and Rehnquist Court decisions that seem to renege on its most celebrated rulings. Faced with deficient federal protections, Brennan (1977, 503) predicts state courts will “step into the breach” and use state constitutions to “expand constitutional protections.” Brennan’s conception of new judicial federalism, then, suggests that the presence of conservative federal doctrine will make it *more* likely for state courts to offer greater protection for third-party materials under search-and-seizure analogs and privacy provisions. Given these conflicting expectations about how federal precedent might affect state courts’ third-party doctrine rulings, I offer the following two hypotheses:

(H1a) State court decisions decided after relevant federal third-party doctrine rulings—*Greenwood* (1988) for all garbage cases; *Miller* (1976) for all non-garbage cases—will be **less** likely to result in judicial federalism than decisions issued before relevant federal third-party doctrine rulings.²²

(H1b) State court decisions decided after relevant federal third-party doctrine rulings—*Greenwood* (1988) for all garbage cases; *Miller* (1976) for all non-garbage cases—will be **more** likely to result in judicial federalism than decisions issued before relevant federal third-party doctrine rulings.

Drawing on the same theoretical bases, I offer similar hypotheses about the extent to which the legal issue presented by a case may affect the court’s treatment of the third-party

²² For both (H1a) and (H1b), *Smith* (1979) is excluded as a temporal marker. Because *Smith* is typically viewed as a natural extension of *Miller* (1976), and *Miller* marks the earliest definitive emergence of the federal third-party doctrine, all non-garbage cases are viewed in light of their temporal relation to *Miller*. Because garbage cases account for such a large portion of the cases in my data set, and because *Greenwood* (1988) holds special sway in garbage cases, all garbage cases are coded in light of their temporal relation to *Greenwood*.

doctrine. I predict that if the issue matches one covered by federal third-party doctrine precedent—namely, financial records (*Miller*); telephone records (*Smith*); or garbage left for collection (*Greenwood*)—these issue areas will trigger either the constraint or the catalyst presented by federal precedent. While these hypotheses may seem distinct from those presented above, which focus on whether a state court ruling falls before or after *Miller* (1976) or *Greenwood* (1988), both constitute different ways of accounting for the impact of federal third-party doctrine holdings. If a state case concerns a third-party issue at play in federal precedent, the legal model suggests that states may feel pressure to adopt the federal precedent. Brennan’s model of new judicial federalism, however, suggests that when the legal issue presented corresponds with a conservative Burger or Rehnquist Court decision, the issue will trigger state courts to provide more protection under state constitutions. In light of these conflicting expectations, I offer two hypotheses:

(H2a) State court third-party doctrine rulings that concern the same issues presented in landmark federal third-party doctrine decisions—namely, financial records (*Miller*); telephone records (*Smith*); and garbage left for collection (*Greenwood*)—will result in judicial federalism **less** often than decisions that do not concern the same issues presented in landmark federal third-party doctrine decisions.

(H2b) State court third-party doctrine rulings that concern the same issues presented in landmark federal third-party doctrine decisions—namely, financial records (*Miller*); telephone records (*Smith*); and garbage left for collection (*Greenwood*)—will result in judicial federalism **more** often than decisions that do not concern the same issues presented in landmark federal third-party doctrine decisions.

The legal model posits that, like federal precedent, a state’s own precedent imposes a powerful constraint. The doctrine of *stare decisis* theoretically compels judges to show deference to prior rulings to give the law “a quality of connectedness, an appearance of

stability” (Segal and Spaeth 2002, 76). While adherents to the attitudinal model argue that judges defer to precedent only when it aligns with their policy preferences, judges like Nancy Vaidik of the Indiana Court of Appeals rebuke political scientists’ “underestimation of the role of precedent,” insisting that genuine respect for precedent plays an enormous role in judicial decisionmaking (Sullivan, Vaidik, and Barker 2011, 333). Some scholars acknowledge a middle ground between the two positions, arguing that while sincere devotion to precedent may not fully explain case outcomes, precedent nevertheless can “serve as a constraint on [judges] acting on their personal preferences” (Knight and Epstein 1996, 1021). In the context of state third-party doctrine rulings, then, we might expect that states will be influenced by prior decisions to adopt federal doctrine or protect third-party materials under their state constitutions. I hypothesize:

(H3) If at the time of a given decision, a state court has previously used its state constitution to offer greater protection to materials conveyed to third parties, the state court will be **more** likely to extend greater protection to third-party materials again.

Distinct from but in the same vein as state court precedent, statements of interpretive approach—non-binding declarations by state courts about how a state’s analog or privacy provision should be interpreted in relation to the Fourth Amendment—may also affect state courts’ third-party rulings. If the legal model is correct that state precedent constrains state courts, so, too, might statements that a search-and-seizure analog offers greater or the same levels of privacy protection as its federal counterpart. By issuing statements about the scope of a state analog’s protection in comparison to the Fourth Amendment, state courts effectively “establish the interrelation of the two guarantees,” imposing a legal constraint on judges in subsequent cases (Sutton 2011, 712). Statements suggesting more extensive protection than the Fourth Amendment should theoretically result in greater protection for third-party materials, while statements suggesting lockstep interpretation with the Fourth

Amendment should result in adoption of federal precedents like *Miller* (1976), *Smith* (1979), and *Greenwood* (1988). Thus, I predict:

(H4) If a state third-party doctrine ruling cites a prior statement that the state's search-and-seizure analog provides more protection than the Fourth Amendment, the ruling will be **more** likely to offer greater protection to materials shared with third parties than decisions that do not cite such statements.

The legal model asserts that judges base their decisions in large part on the meaning of relevant statutory or constitutional texts (Segal and Spaeth 2002, 53). While proponents of the attitudinal model argue that imprecise legal language allows judges to bend texts to suit their ideological preferences, some judges, Justice Antonin Scalia foremost among them, insist that the text of legal provisions drives, or should drive, case outcomes.²³ Furthermore, several studies cited above suggest that the text and structure of state constitutions exerts some influence on state appellate case outcomes (Lovell 2012; Emmert and Traut 1992). Thus, it is not unreasonable to expect that when deciding whether state search-and-seizure analogs or privacy provisions offer more protection to materials shared with third parties than the federal Constitution, state courts might look to the text of those provisions and the overall structure of their state constitutions.

Many states' search-and-seizure analogs contain significant textual departures from the Fourth Amendment that suggest greater protection, such as references to privacy rights or enumerated protections from specific types of searches not proscribed by the Fourth Amendment. Under the legal model, state appellate judges might interpret these textual departures as signals that the analog provides higher levels of protection to third-party materials than the U.S. Supreme Court offers under the Fourth Amendment. Similarly,

²³ See Scalia, Antonin, and Bryan A. Garner. 2012. *Reading Law: The Interpretation of Legal Texts*. St. Paul, MN: Thomson/West.

since the U.S. Constitution contains no explicit right to or mention of privacy, state constitutions equipped with provisions acknowledging citizens' privacy rights provide an important structural cue that the state constitution offers more expansive civil liberties protections than the Fourth Amendment. Thus, I hypothesize:

(H5) Decisions handed down in states whose search-and-seizure analog texts suggest higher levels of privacy protection will be **more** likely to offer greater protection to materials shared with third parties than will decisions handed down in states whose analog texts suggest the same level of protection offered by the Fourth Amendment.

(H6) Decisions handed down in states whose constitutions include separate provisions recognizing citizens' privacy interests or whose analogs contain explicit mention of privacy interests will be **more** likely to offer greater protection to materials shared with third parties than decisions issued in states without explicit privacy protections.

Though not explored in the literature in great detail, state constitutional history may also offer state appellate judges an important cue about the appropriate level of protection to offer under a state's analog or privacy provision. Under the legal model, judges hoping to reach fair interpretations of state analogs and privacy provisions may find it helpful to examine the state's historical level of protection against unlawful searches and seizures. One of the best available measures of a state's historical level of protection against illegal searches and seizures is whether the state's judiciary embraced the exclusionary rule—which requires that unlawfully obtained evidence be suppressed from criminal trials—before the Supreme Court required them to do so in *Mapp v. Ohio* (1961). Prior to *Mapp* (1961), some states required the exclusion of illegally obtained evidence while others admitted such evidence into criminal trials (Benner, Bird, and Smythe 2012). In determining whether state constitutional protections should extend to third-party materials, a state court judge may view heightened historical concern about improper

searches and seizures as an indicator that the state constitution offers greater protection for criminal suspects than the Fourth Amendment. Therefore, I hypothesize:

(H7) If a third-party doctrine decision is decided in a state that excluded or partially excluded unlawfully obtained evidence from criminal trials between *Weeks* (1914) and *Mapp* (1961) (i.e. adopted the exclusionary rule prior to incorporation), the decision will be **more** likely to result in greater protection for materials shared with third parties.

We turn now to two hypotheses derived from the attitudinal model, which proposes that judges are motivated by a desire to see their personal policy preferences become law (Segal and Spaeth 2002). Some studies find that ideologically liberal judges tend to support more expansive civil liberties protections than ideologically conservative judges. In studies of President George H. W. Bush's and President Clinton's federal judicial appointees, scholars found that the role of judicial ideology was particularly pronounced in civil liberties cases, where liberal appointees were more likely to support broad civil liberties protections (Carp et. al 1993; Stidham, Carp, and Songer 1996). Thus, both the attitudinal model and empirical research suggest that judicial ideology might explain why some state appellate courts favor more expansive protections for third-party materials and others adopt less protective federal doctrine. Accordingly, I hypothesize that in a given case:

(H8) The more ideologically liberal the author of the majority opinion, the **more** likely the decision will offer greater protection to materials shared with third parties.

Under the attitudinal model, "policy-minded" judges are likely to decide cases in ways that "reduce the likelihood that a higher court will reverse [the] decision" (Nelson 2014, 4). Judges sitting on courts whose decisions are subject to review from higher judicial bodies must address the "threat of reversal," sometimes assuming "positions that diverge from their own preferences in order to avoid reversals that would move policy even further from those preferences" (Baum 1997, 115). This means intermediate appellate court judges

subject to review by state high courts may be hesitant to find greater protection for third party materials under state constitutions, lest the state high court reverse and adopt federal third-party precedent. For state high courts whose decisions are reviewable by the United States Supreme Court, the attitudinal model suggests that state high court justices will decide cases in ways that reduce federal reversal. In the third-party doctrine context, the only way to ensure that federal reversal will not occur is to ground third-party holdings in independent state constitutional provisions. Former Justice Sandra Day O'Connor has acknowledged that "especially in the constitutional context," state appellate courts hold "substantial power to grant or withhold jurisdiction to the Supreme Court by the choice and articulation of the grounds for the state court decisions" (O'Connor 1984, 5). If we assume that judges with ideological reservations about the federal third-party doctrine are scattered on both intermediate and high courts, state high court justices should theoretically feel more emboldened to find greater protections for third-party materials under state constitutional provisions, since doing so removes their holdings from the ambit of federal review. I predict:

(H9) State high courts will **more** often hand down decisions that diverge from the federal third-party doctrine than will intermediate appellate courts.

Drawing on Baum's audience-driven model of judicial decisionmaking, I hypothesize that the ideology of a state's citizenry, the rulings of neighboring state appellate courts, and a state court's reputation will all shape judges' decisions to embrace federal doctrine or provide greater protection for third-party materials under state constitutions.

Assuming that judges have a "strong interest in retaining their positions," and given that nearly 90 percent of state judges face regular elections, state court judges likely remain abreast of citizens' political leanings (Baum 2006, 61). Baum (2006, 61-62) asserts that judges facing elections are particularly "vulnerable to attack for perceived leniency in

criminal justice.” At least one study shows that trial judges become “more punitive” when sentencing criminal defendants as elections draw near (Huber and Gordon 2004, 247).

Some of the most revealing scholarship on the sway of judicial elections examines the effect of elections on death penalty appeals. Hall (1992) finds that state high court justices vote strategically in death penalty appeals to minimize electoral opposition. Several studies conclude that elected state judges are less likely than appointed judges to overturn death sentences (Blume and Eisenberg 1999; Brace and Boyea 2007). Thus, both Baum’s audience-focused model and political science research provide support for my expectation that elected judges may feel pressure to decide third-party doctrine cases in ways that will appeal to voters and project a tough-on-crime image, namely by allowing police easy access to third-party materials. I predict:

(H10) Third-party doctrine cases decided by elected judges will be **less** likely than cases decided by appointed judges to result in greater protection under state constitutional provisions for materials conveyed to third parties.

For the same reasons we might expect elected judges to decide third-party cases in ways that appeal to voters, we might also expect judges in general, particularly elected judges, to consider the political views of a state’s citizenry. Baum’s model suggests that judges want to issue decisions that comport with the political views of the public at large, either for electoral purposes or to facilitate smooth implementation of judicial decisions. Though elected judges have an obvious incentive to consider citizens’ ideology, an appellate court with appointed judges may court public favor to ensure “better implementation of its decisions” and “reduce the chances that other branches will limit or reverse those decisions” (Baum 2006, 63). Limited empirical evidence shows that judicial decisions often reflect the ideological preferences of a state’s populace (Shepherd 2009), and some evidence suggests that judges in states with a liberal citizenry are more likely to offer civil liberties

protections that extend beyond those provided by federal doctrine (Beavers 1998; Brody 2002). With this theoretical and empirical foundation, I hypothesize:

(H11) Decisions issued in states with an ideologically liberal citizenry—as measured by close proximity to a presidential election in which a majority of the state’s citizenry voted for a Democratic candidate—will be **more** likely to result in judicial federalism than decisions issued in states with an ideologically conservative citizenry—as measured by close proximity to a presidential election in which a majority of the state’s citizenry voted for a Republican candidate.²⁴

As noted above, one of the underlying reasons we might expect judges to decline to offer greater protection for third-party materials is the desire to present themselves as “tough on crime” and criminal defendants (Baum 2006, 62). Some empirical evidence suggests that judges are less likely to decide cases in favor of defendants whose crimes are particularly violent or involve several aggravating factors (Brace and Boyea 2007). Thus, it is reasonable to hypothesize that third-party cases involving violent crimes like homicide, rape, and the like will be less likely to result in greater protection for third-party materials than cases involving non-violent crimes like financial fraud or drug use. I predict:

(H12) Third-party doctrine cases involving violent crime will be **less** likely than cases involving non-violent crime to result in greater protection under state constitutions for third-party materials.

Baum (2006, 104) asserts that other courts in the “judicial community” stand as a “highly salient audience” for many judges. Since judges prefer to be “well thought of among professional peers,” Baum (2006, 104) predicts they will decide cases in ways that “enhance

²⁴ There may be interaction effects between judicial elections (H10) and citizen ideology (H11). For instance, if an elected judge faces overwhelmingly liberal voters, we might expect the judge to be more, rather than less, supportive of criminal suspects rights. While I have not done so, future researchers may want to develop an interaction variable to account for these dynamics. Despite the potential for interaction effects, both (H10) and (H11) rest on solid theoretical ground.

their standing among other judges.” Latzer (1991, 197) discusses “horizontal federalism,” a dynamic whereby state courts look to the decisions of “sister state courts” to gauge the “latest development[s] in state law.” State courts seek company among other state courts, since joining a “solid lineup” of similar decisions on a given legal issue “bolsters a court’s feeling that its ruling is right” (Latzer 1991, 197). At least one study has found that a state court is more likely to issue a particular ruling if another court in its federal circuit or WestLaw reporting zone has already issued a similar decision (Benner, Bird, and Smythe 2012).²⁵ With this theoretical and empirical foundation, I hypothesize:

(H13) At the time of a given state decision, if a state court in the same federal circuit has previously offered greater protection under their state constitution to the type of third-party material presented in the case in question, the case will be **more** likely to result in greater protection for third-party materials.

Finally, a state court’s reputational standing among other state courts may inform third-party doctrine holdings. Caldeira (1983, 84) asserts that “hierarchies of prestige” persist “between and among” state appellate courts, some of which are “more influential than others.” Assessing state high courts’ citations of other state courts in 1975, Caldeira ranks each state court’s prestige, finding that high courts in California, New York, and New Jersey exert the most influence over other state high courts. Comparing the 1975 rankings with rankings from 1920, Caldeira (1983, 93) finds “considerable movement” among less prestigious courts but stability across the fifty-year span for the most influential courts. States with socially diverse populations, progressive or liberal state policies, and higher levels of judicial professionalism demonstrated higher levels of prestige (Caldeira 1983,

²⁵ For general literature on policy diffusion among the fifty states, see Virginia Gray, “Innovations in the States: A Diffusion Study,” *American Political Science Review* (1973) 67, 1174-1185, and Jack L. Walker, “The Diffusion of Innovations among the American States,” *American Political Science Review* (1969) 63, 880-899.

103). Since states with more prestigious courts tend to be ideologically liberal, and liberalism often correlates with support for broad civil liberties protections, there exists some theoretical basis for the idea that more prestigious state courts may be more likely to protect third-party records under state constitutions. Additionally, the audience-driven model of judicial decisionmaking suggests that courts with higher reputations among their peers may feel emboldened to break with federal doctrine and lead sister-states toward greater protections for third-party materials. I predict:

(H14) Third-party doctrine holdings issued by state courts with higher prestige will be **more** likely to engage in judicial federalism and protect third-party materials than holdings issued by state courts with less prestige.

V. Methodology

The dependent variable in my analysis is the outcome of state appellate courts' decisions to either adopt the federal third-party doctrine or provide greater protection to third-party materials under their state analogs and privacy provisions. To locate the population of state appellate third-party doctrine cases, I conducted a Westlaw search and, after cross-referencing my search results with cases listed in Henderson (2006), compiled a data set of 218 cases covering forty-six of the fifty states.²⁶ The cases in my data set cover a

²⁶ My Westlaw search terms were as follows: "(third party' third-party') & reasonabl! & expect! & privacy &co(high) &da(aft1952). In order to determine whether state courts' third-party doctrine activism occurred in response to Burger and Rehnquist Court decisions or had already started during the Warren Court (i.e. whether state court activism on the third-party doctrine can really be called "new judicial federalism"), the results were restricted to cases after 1952, the year before Earl Warren became Chief Justice. The search returned 1,670 results. After reading the syllabus of each potential case, I selected 97 cases for inclusion in the data set.

Next, I cross-referenced these 97 cases with the list of third-party doctrine cases compiled by Henderson (2006). While nearly all of the pre-2006 cases from my Westlaw search also appeared in Henderson (2006), I discovered a number of cases listed in Henderson that had not appeared in my original Westlaw search. In total, I added 82 new cases to my population from Henderson (2006). After reading and coding these 179 decisions, I investigated other cases cited in those decisions, adding 39 new cases to the population for a total of 218 state appellate third-party doctrine cases.

My criteria for selection were as follows: If a state appellate decision concerned the question whether citizens maintain reasonable expectations of privacy in materials shared with third parties

variety of third-party doctrine issue types. Over 70 percent of the cases concern the issues presented by *Miller*, *Smith* and *Greenwood*: financial records, telephone records, and garbage left for collection. See Table 1 below for a full list of the issues covered by my data:

Table 1. Third-Party Doctrine Issues Covered

Third-Party Issue Type	Number of Cases in my Sample
Garbage Left for Collection	73
Telephone Records (toll records, pen register scenarios)	46
Financial or Bank Records	40
Medical Records (Blood Alcohol, Prescription Records)	22
Identifying Info (name, address) stored with third party	8
Power Consumption or Utility Records	7
Internet Service Provider (ISP) Subscriber Information	7
Cell Service Location Information (CSLI)	5
Miscellaneous Issues or Combination of the Above Issues	10
Total Number of Cases	218

While it is possible that a few cases remain, these 218 cases essentially represent the total population of cases since the beginning of the Warren Court in which state high and intermediate appellate courts have addressed whether citizens possess reasonable expectations of privacy in information or materials shared with third parties.²⁷

After compiling my universe of state appellate third-party doctrine cases, I read each decision and coded the case's outcome, my dependent variable, as a dummy variable. Decisions were assigned a 0 if the state court did not use its state constitution to provide greater protections than the United States Supreme Court for information or materials conveyed to third parties. Decisions were assigned a 1 if the state court used its state

and seized by law enforcement for criminal investigations, the decision was automatically included. A small number of civil cases were included but only if the opinion held clear implications for criminal cases. Cases concerning third-party consent, informer-agent or false-friend scenarios, overheard prison conversations, etc. were rejected. I did not include cases in which individuals merely exposed materials to the public; only cases in which an individual knowingly conveyed materials or information to an identifiable third party were included in the data set.

²⁷ It is somewhat disconcerting that my original Westlaw search did not yield all 218 cases eventually selected for inclusion in the population. However, since my goal was not to build a representative sample of cases but rather to locate a comprehensive population of all the third-party doctrine cases decided by state appellate courts since 1952, the addition of cases beyond the Westlaw search does not pose a serious problem and, in fact, strengthens the validity of my results by bolstering the number of observations in the data set.

constitution to provide greater protections to third-party materials (i.e. if the state court engaged in new judicial federalism by rejecting the federal third-party doctrine).²⁸

After reading each case in the population, I coded several independent variables to test my hypotheses. To evaluate the effect of federal third-party precedent (**H1a**, **H1b**), I created a dummy variable, assigning a 0 if the state decision came before *Miller* (1976) for non-garbage cases or before *Greenwood* (1988) for garbage cases, and a 1 if the case came after these federal decisions. I also coded based on whether the state appellate case corresponded with a legal issue presented in *Miller*, *Smith*, or *Greenwood* (**H2a**, **H2b**), assigning a 0 if the case did not involve financial records, telephone records, or garbage left for collection and assigning a 1 if the case did concern these issues. To assess statements of interpretive approach (**H4**), I created a dummy variable, assigning a 0 if the state appellate decision cited a statement of interpretive approach (regardless of whether the statement suggested greater or the same protection as the Fourth Amendment) and assigning a 1 if

²⁸ I also coded case outcomes as an ordinal variable. Decisions were coded on a spectrum from full application of federal third-party precedent to total rejection of the third-party doctrine through the state analog or privacy provision. If a decision sidestepped a clearly presented third-party question or simply applied *Miller* (1976), *Smith* (1979), or *Greenwood* (1988) with no mention of the state constitution, the decision was coded as 0. If a decision applied federal third-party doctrine precedent through the state analog or privacy provision, it was coded as 1. If a decision provided greater protection than the Supreme Court for third-party materials but offered this protection under the Fourth Amendment instead of the state constitution, it was coded as 2. Such decisions are rare and involve third-party doctrine issues the United States Supreme Court has not explicitly addressed. Of the 218 cases, only two cases received this classification. If a decision provided greater protection for materials conveyed to third parties under the state analog or privacy provision (i.e. clearly engaged in new judicial federalism), the decision was coded as 3.

My final logit models remain stable regardless of whether I include the dummy or ordinal variable. For the ordinal variable, there is arguably little distinction between 0 (decisions that sidestep or apply federal doctrine with no mention of state analogs or privacy provisions) and 1 (decisions that apply federal doctrine through state constitutional provisions), as both result in the adoption of federal doctrine. Thus, I use the dummy variable in my final statistical analyses.

Since the United States Supreme Court held in *Miller* (1976) and *Smith* (1979) that individuals enjoy no reasonable expectations of privacy in materials shared with third parties, and that these materials can be seized without a warrant, court order, or any judicial authorization, state appellate decisions could be classified as providing “greater protection” for both variables if, first, they established that citizens have reasonable expectations of privacy in the third-party material or information in question and, second, if they required some judicial authorization, whether subpoena, court order, or warrant, before law enforcement can seize the material.

the decision did not cite a statement of interpretive approach.²⁹

I created additional dummy variables to account for whether a state high or intermediate appellate court decided a given case (**H9**) and to capture whether each case involved violent or non-violent crime (**H12**).³⁰ I used U.S. Census Bureau regional categories to code each decision for the geographic region of the state court in which the decision was issued. There is no solid theoretical basis for predicting that state courts in certain geographic regions will be more or less likely to protect third-party material under state constitutions, but coding for this variable allows me to assess qualitatively whether state court activism on the third-party doctrine is concentrated in specific regions.³¹

To test the effects of judicial ideology (**H8**), I recorded the author of the majority opinion for each decision in the population and then referred to Bonica and Woodruff's database of judicial ideology measures (Campaign Finance or "CF" scores) for state supreme court justices who either received or made political campaign donations between 1979 and 2012. Departing from the standard measure of judicial ideology—Party Adjusted

²⁹ Using Henderson (2006) and Gorman (2007) as a reference for statements not cited in the decisions in my population, I also created an ordinal variable to capture the level of protection suggested by statements of interpretive approach in a state court's precedent. If a state court's precedent contained no statement whatsoever, I assigned a 0. If a state court's precedent contained a statement that the state analog should be interpreted in harmony with the Fourth Amendment, I assigned a 1. If a state court's precedent contained a statement acknowledging that the state judiciary is free in rare circumstances to provide more protection than the United States Supreme Court, I assigned a 2. If a state court's precedent contained a statement that the state analog or constitution provides *more* protection than the Fourth Amendment, I assigned a 3.

My final logit models remain stable regardless of whether I include the dummy or ordinal variable. For the ordinal variable, there is arguably no incremental difference in the level of protection suggested by decisions in states whose precedent contains no statement (0) and in decisions in states whose precedent contains statements that suggest lockstep interpretation (1). Thus, I use the dummy variable in my final statistical analyses.

³⁰ For the dummy variable capturing the state court level, I assigned a 0 if an intermediate appellate court decided the case and a 1 if a state high court decided the case.

For the dummy variable capturing the severity of the crime involved, I assigned a 0 if the case involved non-violent crime like fraud, gambling, or drug use, and assigned a 1 if the case involved violent crime like murder, manslaughter, rape, armed robbery, etc.

³¹ The U.S. Census Bureau divides states into four geographic regions: West, Midwest, South, and Northeast. For a full list of the states in each geographic region, see http://www2.census.gov/geo/docs/maps-data/maps/reg_div.txt.

Justice Ideology (PAJID) scores, developed by Brace, Langer, and Hall (2000)—Bonica and Woodruff (2014) developed a new measure, using political campaign contributions made to or by state supreme court justices to place a justice’s political ideology on a scale of -2.5 (very liberal) to 2.5 (very conservative). As with all other measures, Bonica and Woodruff’s CF scores offer an imperfect measure of judicial ideology. Bonica and Woodruff (2014, 11) do not assign CF scores to intermediate appellate court judges and have not compiled CF scores for many justices who joined state high courts before 1990 and left before 2000.³² However, Bonica and Woodruff’s CF scores are arguably preferable to PAJID scores, which Bonica and Woodruff (2014, 17) assert are “poor predictors of judicial voting patterns and only very loosely map onto the familiar liberal-conservative dimension that has come to define American political ideology.” In contrast, CF scores unify “ideal point estimation into a single measurement framework,” facilitating comparisons of “ideal points across states, institutions, incumbency status, and time” that otherwise would be “overly complicated or infeasible” with PAJID scores and other measures (Bonica and Woodruff 2014, 32).

After coding these case-specific variables, I coded for several state-level variables. To account for the textual attributes of each state’s search-and-seizure analog (**H5**), I created a dummy variable. I assigned a 0 if the text and structure of a state’s analog did not suggest greater protection than the Fourth Amendment and a 1 if the text or structure of the analog

³² Of the 218 cases in the population, CF scores exist for 138 observations. For the vast majority of these cases, I was able to include a CF measure of the majority opinion’s author. If a score was not available for the majority opinion author, I included CF scores for the next most senior judge in the majority. For 80 cases, I was unable to locate a CF score for the opinion author or any other member of the majority.

While it is somewhat concerning that Bonica and Woodruff (2014) do not list CF scores for a sizable number of state high court justices, this would only pose a serious problem if Bonica and Woodruff failed to compile these scores for some systematic reason that might skew my statistical analysis (if, for example, they excluded all liberal justices or all appointed justices).

did suggest greater protection than the Fourth Amendment.³³ Similarly, to gauge the impact of states' explicit constitutional privacy provisions (**H6**), I coded a dummy variable. I assigned a 0 if a state constitution contained neither a separate privacy provision nor a state analog that includes clear mention of citizens' privacy interests. For states whose constitutions contain either a separate privacy provision or a state analog that includes clear mention of citizens' privacy interests, I assigned a 1.³⁴

To account for judicial selection and the effect of judicial elections (**H10**), I coded another dummy variable. I designated a 0 for decisions from states whose judges are elected and a 1 for decisions from states whose judges are appointed.³⁵ To test the role of citizen ideology on state courts' third-party doctrine decisions (**H11**), I created a dummy variable, assigning a 0 if a state court decision fell in close proximity to a presidential election in

³³ I also created an ordinal variable to account for the spectrum of privacy protection suggested by search-and-seizure analogs. I assigned a 0 if the state's analog was textually identical in structure and syntax to the Fourth Amendment, a 1 if the analog differed from the Fourth Amendment in structure or syntax but still did not suggest more robust privacy protections, and a 2 if the analog's text clearly suggested a higher level of privacy protection by explicitly mentioning "privacy" or the "right to privacy."

My final logit models remain stable regardless of whether I include the dummy or ordinal variable. For the ordinal variable, 0 and 1 are quite similar in that both involve analogs whose text and structure suggest protection coextensive with the Fourth Amendment. Thus, I use the dummy variable in my final analyses.

³⁴ I also created an ordinal variable. I designated a 0 for states whose constitutions contain neither a separate privacy provision nor a search-and-seizure analog that functions as a privacy provision, as signaled by mentions of "privacy" or the "right to privacy." I designated a 1 for states without a separate privacy provision but whose analogs include an explicit mention of privacy, and assigned a 2 for states whose constitution contains a separate state privacy provision.

My final logit models remain stable regardless of whether I include the dummy or ordinal variable. For the ordinal variable, state analogs with explicit mentions of privacy interests (1) are in many ways the functional equivalents of separate, explicit state privacy provisions (2). Because the dummy variable captures the dichotomy I am interested in—between constitutions that reference privacy interests and constitutions that do not—I use the dummy variable in my final analyses.

³⁵ I also created an ordinal variable by coding each state's formal judicial selection methods on a scale from partisan elections to merit selection plans, designating a 1 for partisan elections, a 2 for non-partisan elections, a 3 for gubernatorial or legislative appointments, and a 4 for merit selection in which state judges are chosen through a combination of commission-based recommendations, gubernatorial appointments, and retention elections.

My final logit models remain stable regardless of whether I include the dummy or ordinal variable. Because I am interested in the dichotomy between elected and appointed judges, and the dummy variable best captures this dichotomy, I use the dummy variable in my final analyses.

which a majority of the state's voters selected a Republican candidate and a 1 if a decision fell in proximity to a presidential election in which a majority of the state's voters selected a Democratic candidate.³⁶

To assess the role of a state's third-party precedent (**H3**) and nearby states' third-party holdings (**H13**), I coded two dummy variables. If a decision in my population was not preceded by precedent that afforded greater protection to third-party materials under the state constitution, I designated a 0. If a decision was preceded by precedent that afforded greater protection for third-party material under the state analog or privacy provision, I assigned a 1. To gauge the influence of other states' third-party doctrine holdings, I examined rulings within the eleven federal circuits, assigning a 0 if a decision was not preceded by a ruling in another state in its federal circuit offering greater protection to third-party materials. I assigned a 1 if a decision was preceded by a more protective ruling by another state in its federal circuit.³⁷

To take stock of a state's exclusionary rule history and thereby assess the role of historical state search-and-seizure protections (**H7**), I utilized the Appendix in *Elkins v. United States* (1961), an exclusionary rule case that preceded the U.S. Supreme Court's incorporation of the rule to the states in *Mapp v. Ohio* (1961). The *Elkins* Appendix accounts for how each state, except Hawai'i and Alaska, handled illegally obtained evidence in criminal trials prior to *Elkins*. Based on the categories included in the Appendix, I created an ordinal variable, designating a 0 for states that allowed unlawfully obtained

³⁶ I consulted the National Archives' Electoral College database for historical election results from each state. See <http://www.archives.gov/federal-register/electoral-college/votes/index.html>.

³⁷ I also made use of Westlaw reporting zones to create a second dummy variable, assigning a 0 if a decision was not preceded by a ruling in another state in its Westlaw zone offering greater protection to third-party materials and assigning a 1 if a decision was preceded by a more protective ruling by another state in its Westlaw zone. Westlaw divides the fifty states into seven reporting zones: Pacific, Northwestern, Southwestern, Northeastern, Southern, Southeastern, and Atlantic. See https://lawschool.westlaw.com/userguides/nationalreporter/west_map_reg_v5.html.

evidence to be admitted at criminal trials before incorporation; a 1 for states that made unlawfully obtained evidence partially excludable at criminal trials before *Elkins*; and a 2 for states that adopted the exclusionary rule before its incorporation, requiring the exclusion of unlawfully obtained evidence in criminal trials.

Finally, to assess the role of state courts' prestige (**H14**), I use rankings developed by Caldeira (1983) that span from 1, the court cited most frequently, to 50, the court cited least frequently. Caldeira's rankings date to 1975, near the middle of the temporal span of my data (1952-2014) and one year before the United States Supreme Court decided *United States v. Miller* (1976). While it would be ideal to include state court prestige rankings for the specific years in which each of the cases in my data set were decided, no such ranking exists. Caldeira's rankings provide the best available indicator of state courts' prestige.

To test my hypotheses and assess the effect of my independent variables on the outcomes of state appellate third-party doctrine decisions, I use bivariate and multivariate analyses. Because my dependent variable is categorical and takes only one of two possible values, it violates the assumptions required for ordinary least squares regression. Thus, a logit model offers the most appropriate multivariate statistical approach for my project. We turn now to a discussion of my results and their significance for understandings of new judicial federalism and state courts' treatment of the federal third-party doctrine.

VI. Results

My analysis provides evidence that, under certain conditions, state appellate judges engage in Justice's Brennan's model of judicial federalism. When deciding whether to extend the "independent protective force" of state constitutions to third-party materials, judges seem to consider state constitutional privacy guarantees, precedent in their own and other states, and their reputation among other state courts (Brennan 1977, 491). Ideologically liberal judges appear more likely to protect third-party material. My findings suggest that, as the legal model predicts, state judges feel the weight of constitutional provisions and precedent but, as the attitudinal and audience-based models posit, also look to their ideological preferences and the behavior of other courts.

First and foremost, this thesis provides an up-to-date look at the scope of state courts' protection of third-party materials. Since 1952, twenty-two states have offered higher protection to third-party records and information on at least one occasion. Of those twenty-two states, five have been particularly active: California, Colorado, New Jersey, Pennsylvania, and Washington. Of the 218 decisions included in my data set, 58 provide greater protection for third-party materials than the United States Supreme Court requires. While many of these decisions concern issues like bank records, telephone records, and garbage left for collection (the issues covered in *Miller*, *Smith*, and *Greenwood*), some concern third-party issues not yet considered by the United States Supreme Court but still covered by the rationale of federal third-party doctrine precedent. Such issues include medical records, credit card records, Cell Service Location Information (CSLI), and Internet Service Provider (ISP) subscriber information. See Table 2 below for a breakdown of each state's third-party rulings from 1952 to 2014:

Table 2. State-Level Protection of Third Party Materials³⁸
(1952 – 2014)

State	Total Number of Third-Party Cases	Decisions Offering Greater Protection to Third-Party Material	% of Decisions Offering Greater Protection	Third Party Materials Protected
Alabama	4	0	0%	
Alaska	5	1	20%	Garbage left for collection
Arizona	1	0	0%	
Arkansas	3	0	0%	
California	8	8	100%	Garbage left for collection Bank Records Trust Account Records* Credit Card Records Name, address, phone # w/ telephone company Telephone Call Records (2) Motel / Hotel Telephone Records
Colorado	10	8	80%	Bank Records (4)* (1 civil) Telephone Call Records (4) Tax Return Records
Connecticut	5	0	0%	
Delaware	0	0	0%	
Florida	6	3	50%	Bank Records Telephone Call Records Real-Time CSLI
Georgia	6	0	0%	
Hawaii	4	2	50%	Garbage left for collection Telephone Call Records
Idaho	6	1	16.7%	Telephone Call Records
Illinois	6	3	50%	Bank Records Telephone Call Records Medical Records*

³⁸ Entries marked with an asterisk (*) represent civil cases. Of the 58 decisions in which a state court provided greater protection to third-party materials, only five were in civil cases.

Entries marked with a double asterisk (**) represent cases decided on the basis of a state statute, not a state constitution. Of the 58 cases enumerated here, only three were decided on state statutory grounds. While cases decided on statutory grounds do not represent instances of new judicial federalism in the purest sense, Justice Brennan (1977, 503) mentions state statutes when he urges state courts to use their “common law, statutes, and constitutions” to “breathe new life into the federal due process clause.” I ran logit tests where these three cases were coded as both “0” (not engaging in new judicial federalism) and “1” (engaging in new judicial federalism). The model remains stable under both conditions. Because these cases do result in greater third-party protection, I code them as “1” in my final analysis.

Indiana	8	1	12.5%	Garbage left for collection by private trash collectors
Iowa	2	0	0%	
Kansas	4	0	0%	
Kentucky	2	0	0%	
Louisiana	4	1	25%	Prescription Records
Maine	1	0	0%	
Maryland	2	0	0%	
Massachusetts	8	2	25%	Garbage left for collection on commercial property Historical CSLI
Michigan	5	0	0%	
Minnesota	8	1	12.5%	Telephone Call Records**
Mississippi	0	0	0%	
Missouri	0	0	0%	
Montana	5	2	40%	Employee Personnel Records* Blood Alcohol Test Results
Nebraska	4	0	0%	
Nevada	2	0	0%	
New Hampshire	7	2	28.6%	Bank Records** Garbage left for collection
New Jersey	8	7	87.5%	Telephone Toll Records Hotel Telephone Records Garbage left for collection Bank Records Utility Records ISP Subscriber Information Real-Time CSLI
New Mexico	3	2	66.7%	Garbage left for collection in motel
New York	7	0	0%	
North Carolina	3	0	0%	
North Dakota	8	0	0%	
Ohio	4	0	0%	
Oklahoma	4	1	25%	Bank Records* **
Oregon	6	1	16.7%	Garbage left for collection
Pennsylvania	5	4	80%	Bank Records Telephone Call Records (2) Blood Alcohol Test Results

Rhode Island	3	0	0%	
South Carolina	1	0	0%	
South Dakota	3	0	0%	
Tennessee	2	0	0%	
Texas	9	1	11.1%	Blood Alcohol Test Results ³⁹
Utah	2	1	50%	Bank Records
Vermont	3	2	66.7%	Prescription Records Garbage left for collection
Virginia	0	0	0%	
Washington	7	4	57.1%	Telephone Toll Records Unlisted phone number, address stored w/ third party Garbage left for collection Bank Records
West Virginia	1	0	0%	
Wisconsin	8	0	0%	
Wyoming	5	0	0%	
Total	218	58		

Of the 58 decisions in my data set that exceed the protection required by federal doctrine, nearly 85 percent were decided *after* relevant federal third-party rulings (*Miller* (1976) or, for garbage cases, *Greenwood* (1988)). While I cannot claim with certainty that federal third-party precedent *caused* states to engage in judicial federalism, state courts' citations of federal third-party precedent provide compelling evidence that the bulk of judicial federalism in state third-party rulings has occurred in response to U.S. Supreme Court precedent. Of the 58 decisions in which state courts protected third-party material on

³⁹ In *State v. Comeaux* 818 S.W.2d 46 (1991), a plurality of judges on the Texas Court of Criminal Appeals held that citizens have a reasonable expectation of privacy in blood alcohol test results stored with a hospital. Texas courts have since rejected this plurality decision as non-binding and ruled that citizens enjoy no reasonable expectations of privacy in blood alcohol test results. I include the decision in the count because, regardless of subsequent reversal, the decision represents an instance of a state court offering greater protection to third-party materials. The model remains stable regardless of how I code this case.

independent state grounds, 34 include negative citations of *Miller*, *Smith*, and *Greenwood*, signaling these courts' clear intention to break from the federal third-party doctrine. Thus, even descriptive analysis suggests that many state appellate courts are intentionally engaging in a form of judicial federalism in their third-party rulings.

A few examples demonstrate the extent to which many state appellate courts consciously engage in judicial federalism using their state analogs and privacy provisions. In *State v. Thompson* 114 Idaho 746 (1988, 751), the Idaho Supreme Court adopted the “dissenting comments in *Smith*” in holding that citizens of Idaho have reasonable expectations of privacy in the telephone numbers they dial such that telephone call records obtained via warrantless installation of a pen register should be suppressed. The majority asserted that until the U.S. Supreme Court overrules *Smith* and establishes “for the nation the protection to which we believe those who use telephones in Idaho are entitled,” Article 1, Section 17 of the Idaho constitution, Idaho’s search-and-seizure analog, will “stand as a bulwark against the intrusions of pen registers” (*State v. Thompson*, 1988, 751).

An almost identical pen register case from Hawai’i demonstrates the power of a state privacy provision in third-party rulings. In *State v. Rothman* 70 Haw. 546 (1989, 556), the Supreme Court of Hawai’i ruled that even if the court were willing to adopt *Smith*’s rationale “with respect to Article I, Section 7 of our State Constitution, which parallels the Fourth Amendment to the United States Constitution, the Hawaii Constitution has, in addition, an expressed right of privacy set forth in Article I, Section 6.” Given Hawai’i’s additional constitutional layer of privacy protection, the state high court reasoned, “persons using telephones in the State of Hawaii have a reasonable expectation of privacy, with respect to the telephone numbers they call” (*State v. Rothman*, 1989, 556).

While these two rulings offer a glimpse into explicit instances of judicial federalism, subsequent decisions illustrate the fluidity of state courts’ third-party jurisprudence. Since

State v. Thompson (1988), Idaho appellate courts have declined to offer greater protection under state constitutional grounds to power consumption records, garbage left for collection, bank records, and HIV test results, citing federal third-party doctrine precedent favorably in each of these rulings.⁴⁰ Similarly, following its decision in *State v. Rothman* (1989), the Supreme Court of Hawai'i gave no deference to its constitutional privacy provision when in *State v. Klattenhoff* 71 Haw. 598 (1990, 552), it adopted the "rule set forth in *United States v. Miller* . . . finding no reasonable expectation of privacy in personal bank records." Thus, while this thesis sheds light on the volume of state court activity surrounding the federal third-party doctrine, my data also demonstrates that protection for third-party records and materials sometimes fluctuates within states.

My dependent variable indicates whether, in a third-party ruling, a state court reaches a decision that provides greater protection than required by the U.S. Supreme Court's relevant third-party precedent. Because my dependent variable is coded as either 0 (no evidence of judicial federalism) or 1 (clear presence of judicial federalism), a logit model is appropriate. To examine the factors that might account for judicial federalism in third-party rulings, I conducted a multivariate analysis, running two separate logit models. A measure for one of the key variables in my analysis, judicial ideology, is not available for all the third-party decisions included in my data set. Because Bonica (2014) offered a judicial ideology measure for only 138 of the 218 cases in my population, running the model with judicial ideology excludes 80 decisions for which no measure of judicial ideology is available. Thus, it was important to run the model both with and without judicial ideology to determine whether the exclusion of cases missing an ideology measure disrupted my

⁴⁰ See *State v. Kluss* 125 Idaho 14 (1993), applying federal doctrine to utility records; *State v. Donato* 135 Idaho 469 (2001) and *State v. McCall* 135 Idaho 885 (2001), applying federal doctrine to garbage left for collection; *State v. Patterson* 139 Idaho 858 (2003), applying federal doctrine to bank records; *State v. Mubita* 145 Idaho 925 (2008), applying federal doctrine to HIV test results.

findings. The first model does not incorporate judicial ideology; the second includes judicial ideology.⁴¹ The results of both models are reported in Table 3 below:

Table 3. State Appellate Third-Party Rulings

Variable	Coefficient (Model 1)	Standard Error (Model 1)	Coefficient (Model 2)	Standard Error (Model 2)
Court Level	1.26**	.492	.763	.942
Time of Decision in Relation to USSC Third Party Doctrine (TPD) Precedent	-.039	.740	-.117	1.10
Issue Presented in Relation to USSC TPD Precedent	.149	.475	-.162	.554
State Analog – Level of Privacy Protection Implied	-.749	.679	-1.07	.926
State Constitutional Privacy Guarantee	2.28***	.680	2.79**	.976
Statements of Interpretive Approach	.505	.60		
Previous State TPD Holdings	1.18**	.424	1.36**	.519
TPD Holdings in Same Federal Circuit	.872*	.481	1.22**	.542
Pre- <i>Mapp</i> Exclusionary Rule Adoption	-.395	.267	-.421	.323
Crime	-1.01	.643	-.981	.812
Judicial Selection Method	.530	.438	.820	.574
State Citizenry Political Ideology	-.426	.440	-.633	.562
State Court Reputation	-.057***	.014	-.042**	.017
Judicial Ideology			-.578*	.340

*=Significant at the .1 level; **=Significant at the .01 level; ***=Significant at the .001 level

Model 1 (without Judicial Ideology): n=218; Pseudo R²=0.3051

Model 2 (with Judicial Ideology): n=138; Pseudo R²=0.2975

⁴¹ Model 2 includes judicial ideology but excludes my measure for statements of interpretive approach. Once cases without a judicial ideology score were excluded in Model 2, a state court's failure to cite a statement of interpretive approach perfectly predicted adoption of federal doctrine. Without variance, Stata drops the variable from Model 2 altogether. The model remains stable.

My findings validate several theoretical assumptions of the legal, attitudinal, and audience-focused models of judicial decisionmaking. The significance of state privacy guarantees and prior third-party holdings provides support for the legal model's assertion that state judges give deference to the syntax and structure of legal texts, as well as the principle of *stare decisis*. Baum's (2006, 104) audience-based model predicts that judges will act in ways that "enhance their standing" among their judicial peers. My findings support this contention: judges were more likely to engage in judicial federalism if another state court within the same federal circuit had already done so and as their prestige among other state courts rose. Lastly, my findings support the dominant assumption in the literature on judicial decisionmaking that judicial ideology matters: as state judges became more ideologically liberal, their willingness to protect third-party material under state constitutional provisions increased. While this suggests that ideology shapes third-party rulings, the significance of legal and audience-based variables runs counter to Segal and Spaeth's (2002) argument that judges' policy preferences trump all other motivations.⁴²

As Table 3 demonstrates, most of my independent variables perform consistently across both models. Regardless of whether I include judicial ideology, several variables remain significant and in the expected directions. The presence of a state constitutional privacy guarantee, state court precedent offering greater protection to third-party material, precedent offering greater protection by a state court within the same federal circuit, and Caldeira's measure of state court prestige all play some role in state appellate judges' third-party doctrine rulings. The court level (intermediate appellate or high court) is significant in Model 1 but falls short of statistical significance once I incorporate judicial ideology in

⁴² As noted in previous sections, Segal and Spaeth (2002) would argue that the attitudinal model they envision applies only to U.S. Supreme Court justices, who are uninhibited by the possibility of judicial review by a higher court. Because the independent state grounds doctrine provides at least state high court justices with an avenue to avoid judicial review, I believe their model can be appropriately applied to state appellate judges.

Model 2. Once added in Model 2, judicial ideology becomes statistically significant.

These results lend support to several of my hypotheses. Of particular note, my analyses provide evidence that when a court examines the third-party doctrine in a state whose constitution includes some recognition of citizens' privacy interests—either in a separate constitutional provision or by explicit mention in a search-and-seizure analog—the court is more likely to protect third-party material under their state constitution (**H6**). The variable remains significant regardless of whether judicial ideology appears in the model. This finding lends credence to the legal model's assertion that the syntax and structure of legal texts shape judicial decisionmaking. Since the U.S. Constitution does not reference privacy, state judges may view an explicit state constitutional privacy reference as a reason to provide greater privacy protection than the Fourth Amendment requires. Interestingly, the level of protection suggested by the text of a state's search-and-seizure analog (**H5**) is not significant in either model. This indicates that while general textual attributes of a state's analog may be immaterial, specific mention of privacy interests or the presence of a separate constitutional privacy provision provides a conspicuous cue that a state constitution should provide more robust privacy protection.

My results' affirmation of this tenet of the legal model sits alongside support for the attitudinal model. Once added in Model 2, Bonica and Woodruff's (2014) measure of judicial ideology is significant in the expected direction: as the author of a given opinion grew more ideologically liberal, so, too, did the likelihood that the opinion would offer greater protection to third-party records than the Fourth Amendment provides (**H8**). Consider how the addition of judicial ideology in Model 2 alters the significance of the state court level. Absent a measure for ideology in Model 1, state high courts appear more likely than mid-level appellate courts to reject the federal third-party doctrine under state constitutions, presumably because state high court justices can avoid federal review by basing third-party

rulings on independent state grounds. Once judicial ideology is added in Model 2, however, the court-level variable falls just outside the level of statistical significance.

While this change probably reflects the exclusion of 80 observations in Model 2 because of missing ideology measures, it might also signal that state high courts are more likely to engage in judicial federalism because they have more freedom to enact their ideological preferences, not just because they have less fear of higher court review. Thus, the significance of the court-level variable in Model 1 offers only moderate support for my hypothesis that state high courts will be more likely to protect third-party materials (**H9**). The changes that occur once I control for judicial ideology lend support to my hypothesis that liberal judges will be more disposed to protect third-party records under state constitutions (**H8**). Though the significance of other legal and audience-based variables precludes me from concluding that ideology alone shapes third-party rulings, my results support the attitudinal model's assertion that ideological preferences inform judicial decisionmaking. Liberalism seems to be associated with a greater propensity to engage in judicial federalism in third-party rulings, though my results do not make clear why this is so. Liberal judges may be motivated to protect third-party material by a heightened desire to protect criminal suspects or, perhaps, a more general inclination to develop state constitutional law along the progressive lines delineated by Justice Brennan.

On the whole, then, both constitutional texts and ideological values appear to influence judges' third-party doctrine rulings, with modest evidence suggesting that the possibility of review may also enter judges' calculus. Three other variables exhibit statistical significance across both models. The presence of state court precedent protecting third-party materials under state constitutional provisions was significant in the expected direction: if a state court has previously protected third-party records or information, the court appears more likely to do so in subsequent cases (**H3**). Similarly, the presence of

precedent protecting third-party materials by state courts located in the same federal circuit has a statistically significant effect on the third-party rulings of other courts' in the same circuit. If a state appellate court in a given federal circuit extends state constitutional protection to third-party materials, other courts in the same federal circuit are more likely to do so (**H13**). Finally, Caldeira's (1983) measure of state court prestige remained significant across both models: the more prestigious the state appellate court, the more likely the court was to reject the federal third-party doctrine (**H14**).

These results offer support for assumptions underlying the legal and audience-centered models of judicial decisionmaking. As the legal model predicts, it appears that state judges feel at least somewhat constrained by precedent when deciding whether to protect third-party materials under state constitutions. This respect for precedent might bespeak judges' genuine commitment to *stare decisis*, or it might suggest that precedent serves as a "constraint on [judges] acting on their personal preferences" (Knight and Epstein 1996, 1021). That state courts are more likely to engage in judicial federalism if other state courts in their federal circuit have already protected the third-party material in question suggests that, as Baum (2006) and Latzer (1991, 97) predict, state judges look to "sister state courts" for cues about the "latest development[s] in state law." This result supports Baum's assertion that the "judicial community" constitutes a "highly salient audience" for state court judges (Baum 2006, 104).⁴³ Finally, the significance of state court prestige provides support for Caldeira's assertion that some state appellate courts are "more influential than others" (Caldeira 1983, 84). As a state court's standing among other state courts rises, it may feel emboldened to capitalize on its prestige and break from the federal third-party doctrine.

⁴³ The significance of other third-party holdings in the same federal circuit comports with my qualitative observation that the decisions in my data set almost always cite other state courts' third-party rulings.

Of course, it is entirely possible that some antecedent variable or variables—perhaps judicial ideology or the presence of a state constitutional privacy guarantee—explains the significance of state court prestige and precedent within both individual states and federal circuits. Though the principle of *stare decisis* suggests that prior rejections of the third-party doctrine will lead to subsequent rejections, proponents of the attitudinal model might counter this assertion with the claim that judges show deference to progressive third-party precedent only when it suits preexisting ideological preferences in favor of continuing to protect third-party material (Segal and Spaeth 2002, 76-77). This attitudinal counterclaim is somewhat supported by my qualitative observation that many state courts' third-party jurisprudence has fluctuated between 1952 and 2014; a court's deference to precedent protecting third-party material may vary as ideological factions on the court shift over time.

The attitudinal model might also posit that judicial ideology undergirds the significance of state court prestige and other courts' rulings in the same federal circuit. Motivated primarily by ideological preferences, state judges may look only to third-party rulings in their federal circuit that support desired policy outcomes. What seems like sensitivity to the "judicial audience" may, in fact, represent calculated attention to third-party rulings within the federal circuit that align with judges' ideological views of the third-party doctrine. Similarly, some third variable like judicial ideology might account for the significance of state court prestige. Caldeira (1983, 103) notes that more prestigious courts tend to be ideologically liberal. As political science research and my own findings suggest, ideological liberalism tends to be associated with support for expansive civil liberties protections. Thus, the tendency of more prestigious courts to engage in judicial federalism may provide further affirmation that liberal judges are more likely to protect third-party materials under state constitutional provisions. While it is certainly possible that all three of these variables are motivated by another variable like judicial ideology or the presence of

constitutional privacy guarantees, my findings still provide evidence that a state court's third-party precedent, third-party rulings in the same federal circuit, and state court prestige exert *some* influence over state courts' third-party jurisprudence.

I find no support for several of my hypotheses. The variable indicating whether a decision in my population occurred before or after relevant federal third-party rulings did not achieve statistical significance (**H1a**, **H1b**). Similarly, my variable capturing whether the issue presented in a case matched an issue decided in *Miller*, *Smith*, and *Greenwood* failed to reach significance (**H2a**, **H2b**). For both variables, deficient variance might explain the lack of significance. Almost 90 percent of the cases in my data set occur after relevant federal third-party holdings. Over 70 percent concern the issues decided in *Miller*, *Smith*, and *Greenwood* (financial records, telephone records, and garbage left for collection). These high percentages, coupled with the negative citations of federal precedent mentioned at the beginning of this section, provide compelling evidence that between 1952 and 2014, state courts were more likely to engage in judicial federalism when the case fell after federal third-party rulings and concerned the same issues addressed by the U.S. Supreme Court in *Miller*, *Smith*, and *Greenwood*. Ultimately, however, neither of my models supports this conclusion.

A state's treatment of the exclusionary rule prior to incorporation in *Mapp* (1961) did not significantly predict the variance in state appellate third-party rulings (**H7**). While legal constraints like precedent and state constitutional privacy guarantees seem to shape judges' third-party rulings, a state's historical level of search-and-seizure protection does not appear to exert influence. Several factors might explain why this variable falls short of statistical significance. Judges may simply be indifferent to their state's historical level of search-and-seizure protection. Alternatively, a state's pre-*Mapp* treatment of the exclusionary rule may not offer the most salient measure of historical protection of criminal

suspects. Regardless, my findings run counter to the legal model's suggestion that legal history constrains judicial decisionmaking.

Neither the method of judicial selection (**H10**) nor the ideological leanings of a state's citizenry achieved statistical significance (**H11**). Unlike many studies that find effects of judicial elections on case outcomes, my results suggest that elected judges are no more likely than appointed judges to adopt federal third-party precedent. While Baum (2006, 61) is likely correct that judges have a "strong interest in retaining their positions," elected judges may only feel electoral pressure in a subset of high-profile cases, which may not encompass third-party decisions. My finding that citizens' ideology does not significantly predict the variance in third-party rulings undercuts Baum's assertion that judges, particularly elected judges, keep abreast of the citizenry's ideological mood. My results indicate that while judges care about enacting their own ideological preferences, they may be apathetic about citizens' preferences. This comports with the above finding about judicial selection: if judges do not feel electoral pressure when deciding third-party cases, we would have less reason to expect them to respond to fluctuations in citizens' ideology.

Lastly, the variable measuring violent or non-violent crime failed to reach significance (**H12**). The theoretical assumptions underlying my hypothesis that judges would be more likely to engage in judicial federalism in cases involving non-violent crime centered on Baum's prediction that elected judges attempt to project a "tough on crime" persona to voters (Baum 2006, 62). Since judicial elections do not appear to hold sway in third-party rulings, it makes sense that judges might also be less concerned about appearing "tough on crime" in third-party cases that involve violent offenses.

The variable assessing statements of interpretive approach about how judges should interpret search-and-seizure analogs in relation to the Fourth Amendment presents a few problems. The variable is not significant in Model 1. Once I added judicial ideology in Model

2, the variable drops out of the model because it perfectly predicts the adoption of federal third-party precedent in the 138 cases for which a judicial ideology measure was available. It is possible, however, that the failure of a citation to a statement of interpretive approach to reach statistical significance is an artifact of its measurement. That is, the variable may not achieve significance because the way I operationalize it fails to capture the actual degree of protection suggested by statements of interpretive approach but accounts only for whether a court cited a statement or did not cite a statement. I operationalized the variable this way because 49 of the 218 cases in my data set issue from state courts whose precedent contains no statement about how to interpret the search-and-seizure analog in relation to the Fourth Amendment. The absence of statements in so many cases makes it impossible to craft a proper ordinal variable for all observations, as this ordinal variable would inevitably jump from “0” (no statement) to “1” (a statement that implies lockstep interpretation with the Fourth Amendment) before moving up the spectrum to statements that imply greater privacy protection. As mentioned in previous sections, movement from “0” and “1” would not necessarily entail a transition from a statement implying less protection to a statement implying more protection, since the absence of a statement gives no information about how an analog should be interpreted in relation to the Fourth Amendment (see footnote 29).

To better understand the role of statements of interpretive approach, I examined the outcomes of the 169 cases for which statements of interpretive approach exist. For this analysis, I coded statements on a three-point ordinal scale ranging from those that suggest lockstep interpretation with the Fourth Amendment to those that indicate a higher level of privacy protection under the state analog than available under the Fourth Amendment. The results of this analysis are displayed in Table 4 below:

Table 4. Subset – Cases Decided in States with Statements of Interpretive Approach

Case Outcome	Statement of Approach			Total
	Suggests Lockstep Interpretation With Fourth Am.	Analog May Go Beyond Fourth Amendment	Analog Offers Greater Protection than Fourth Am.	
Applies USSC TPD Holdings	81.58% (31 cases)	77.55% (76 cases)	36.36% (12 cases)	119 cases
Rejects USSC TPD Holdings	18.42% (7 cases)	22.45% (22 cases)	63.64% (21 cases)	50 cases
Total	38	98	33	169 cases

Pr = 0.000
Pearson chi² = 23.036

As Table 4 demonstrates, the level of protection suggested by statements of interpretive approach seems to correlate with certain types of case outcomes. Cases decided in states whose statements of approach suggest lockstep interpretation with the Fourth Amendment overwhelmingly provided the level of protection offered in the U.S. Supreme Court’s third-party precedent, with almost 82 percent embracing the federal third-party doctrine. However, a substantial majority (63 percent) of the cases decided in states whose precedent includes assertions that the state analog provides greater protection than the Fourth Amendment did provide greater protection than required by *Miller*, *Smith*, and *Greenwood*. Most of the cases (77 percent) decided in states whose precedent included declarations that state courts were free to offer higher levels of privacy protection under search-and-seizure analogs than the Fourth Amendment provides resulted in applications of federal third-party precedent, though a significant number (22 percent) resulted in rejections of the federal third-party doctrine. While this variable does not reach statistical significance when I operationalize it so as to include both states with and without statements of approach, the chi² statistic in Table 4 confirms that among those states with

a statement of interpretive approach, a statistically significant relationship exists between the level of protection suggested by a statement of approach and third-party case outcomes.

Overall, twenty-two states have protected third-party records and information under their state constitutions on at least one occasion from 1952 to 2014. Much of this state court activity has occurred after, and likely in response to, federal third-party holdings like *United States v. Miller* (1976), *Smith v. Maryland* (1979) and *California v. Greenwood* (1988). Perhaps most important, my analysis affirms tenets of the legal and attitudinal models by providing evidence that ideological liberalism and state constitutional privacy guarantees play an important role in judges' third-party rulings. These findings echo a plethora of research on the clout of judicial ideology, as well as a smaller body of scholarship that finds a significant relationship between state constitutional attributes and case outcomes (Lovell 2012; Emmert and Traut 1992). A state court's third-party precedent, third-party holdings in a state court's federal circuit, and state court prestige all help predict the variance in state appellate courts' third-party holdings. Finally, my results lend moderate support to my hypotheses that the possibility of judicial review and the level of protection suggested by statements of interpretive approach play a role in judges' treatment of the federal third-party doctrine. Taken together, these findings indicate that when judges decide to protect third-party materials under their state analogs and privacy provisions, they do so to advance their own ideological preferences and prestige but also in deference to legal constraints like *stare decisis* and state constitutional privacy guarantees.

CONCLUSION

Every year, the Aspen Ideas Festival draws visionaries from all walks to lecture on art, science, and policy—a fitting venue for speculation about the future of the United States Supreme Court’s Fourth Amendment jurisprudence. Speaking at the Festival in 2013, Justice Elena Kagan surmised the challenges digital technology poses for the Court’s reasonable expectations of privacy standard. Of cases concerning wireless governmental surveillance and police tracking techniques that involve no “trespass on property,” Justice Kagan predicted that such cases will likely provide “a growth industry” for the Court for decades to come.⁴⁴ The third-party doctrine articulated in *Miller*, *Smith*, and *Greenwood* will almost certainly play a crucial role in this burgeoning class of cases.

While it remains unclear whether the United States Supreme Court will ever turn from the third-party doctrine, we can look to state appellate courts for hints about how the doctrine might evolve in the twenty-first century. Since 2006—the endpoint for Henderson’s compendium of state appellate third-party holdings—at least 30 cases in 24 states have addressed the doctrine, with six states using their state constitutions to protect third-party records and information. Though many of these cases concern standard third-party issues like bank and telephone records, several involve emerging issues like text message records, real-time and historical Cell Service Location Information (CSLI), and Internet Service Provider (ISP) subscriber records. At least five state appellate cases issued after *United States v. Jones* (2012) cite Justice Sotomayor’s *Jones* concurrence positively.

The modern third-party doctrine emerged at the “dawn of the Information Age” (Slobogin 2011,17). When the Supreme Court decided *United States v. Miller* (1976) and *Smith v. Maryland* (1979), few Americans owned personal computers, Google did not exist,

⁴⁴ For Justice Kagan’s full remarks in an interview with Professor Jeffrey Rosen of the George Washington University Law School, see <https://www.youtube.com/watch?v=Nm2Xke9jbNY>.

and the iPhone had yet to become a fixture of everyday life. Much has changed. Since the mid-1990s, the volume of the “world’s recorded data has doubled every year,” and the computing power required to aggregate and analyze data has “increased geometrically” (Slobogin 2011, 17). These technological advances have expanded the third-party doctrine’s reach in ways the Burger and Rehnquist Courts could hardly have imagined possible. The third-party doctrine allows law enforcement to “access free and clear of Fourth Amendment constraints” an ever-expanding corpus of information voluntarily stored with third parties (Slobogin 2011, 17). We can safely conclude that the third-party doctrine will continue to pose fundamental questions about the meaning of privacy in a digital age.

This thesis makes clear that many state appellate courts have for decades acted on Justice Sotomayor’s call to “reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties” (*United States v. Jones*, 2012, 957). State appellate courts will likely continue to use their constitutions to reexamine the third-party doctrine. My findings suggest that ideological liberalism and the presence of constitutional privacy guarantees may well animate state courts’ efforts to square an increasingly thorny federal doctrine with a citizenry whose lives are more entwined than ever with third parties.

References

- Abrahamson, Shirley S. 1984 "Criminal Law and State Constitutions: The Emergence of State Constitutional Law." *Texas Law Review* 63: 1141-1194.
- Baum, Lawrence. 2011. "Law and Policy: More and Less than a Dichotomy." In *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake*, ed. Charles Geyh, 71-91. Stanford, CA: Stanford University Press.
- Baum, Lawrence. 2006. *Judges and their Audiences: A Perspective on Judicial Behavior*. Princeton: Princeton University Press.
- Beavers, Staci L. and Jeffrey S. Walz. 1998. "Modeling Judicial Federalism: Predictors of State Court Protections of Defendants' Rights under State Constitutions, 1969-1989." *Publius* 28, no. 2: 43-59.
- Beavers, Staci L. and Craig F. Emmert. 2000. "Explaining State High-Courts' Selective Use of State Constitutions." *Publius* 30, no. 3: 1-15.
- Benner, Laurence, Robert Bird, and Donald Smythe. 2012. "Social-Network Theory and the Diffusion of the Search-and-Seizure Exclusionary Rule Among State Courts Between Weeks and Wolf." *Brigham Young University Journal of Public Law*: 97-144.
- Blume, John and Theodore Eisenberg. 1998. "Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study." *South California Law Review* 72: 465-503.
- Bonica, Adam and Michael J. Woodruff. 2014. "A Common-Space Measure of State Supreme Court Judicial Ideology." *Journal of Law, Economics, and Organization*. Forthcoming: 1-55.
- Brace, Paul and Brent D. Boyea. 2007. "Judicial Selection Methods and Capital Punishment in the American States." In *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, ed. Matthew J. Streb, 186-203. New York: New York University Press.
- Brennan Jr., William J. "State Constitutions and the Protection of Individual Rights." *Harvard Law Review* 90, no. 3: 489-504.
- Brody, David C. 2002. "Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism." *The Justice System Journal* 23, no. 1: 75-93.
- Caldeira, Gregory A. 1983. "On the Reputation of State Supreme Courts." *Political Behavior* 5, no. 1: 83-108.
- California v. Greenwood* 108 486 U.S. 35 1988.
- Carp, Robert A., Donald Songer, C. K. Rowland, and Ronald Stidham. 1992. "Voting Behavior of Judges Appointed by President Bush." *Judicature* 76: 298-303.

- Cauthen, James N.G. 1999. "State Constitutional Policymaking in Criminal Procedure: A Longitudinal Investigation." *Criminal Justice Policy Review* 10, no. 4: 521-545.
- Cauthen, James N.G. 2000. "Expanding Rights Under State Constitutions: A Quantitative Appraisal." *Albany Law Review* 63: 1183-1204.
- Commonwealth v. DeJohn* 486 Pa. 32 1979.
- Cross, Frank B. 2011. "Law Is Politics." In *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake*, ed. Charles Geyh, 92-113. Stanford, CA: Stanford University Press.
- Elkins v. United States* 364 U.S. 206 1960.
- Emmert, Craig F. and Carol A. Traut. 1992. "State Supreme Courts, State Constitutions, and Judicial Policymaking." *The Justice System Journal* 16, no. 1: 37-48.
- Eslser, Michael. 1994. "State Supreme Court Commitment to State Law." *Judicature* 78, no. 1: 25-32.
- Fino, Susan P. 1987. "Judicial Federalism and Equality Guarantees in State Supreme Courts." *Publius* 17, no. 1 (Winter 1987): 51-67.
- Flemming, Gregory, David B. Holian, and Susan G. Mezey. 1998. "An Integrated Model of Privacy Decision Making in State Supreme Courts." *American Politics Research* 26, no. 1: 35-58.
- Friedman, Lawrence. 2000. "The Constitutional Value of Dialogue and the New Judicial Federalism." *Hastings Constitutional Law Quarterly* 28 (Fall 2000): 93-144.
- Gray, Virginia. 1973. "Innovations in the States: A Diffusion Study." *American Political Science Review* 67: 1174-1185.
- Griswold v. Connecticut* 381 U.S. 479 1965.
- Gorman, Michael J. "Survey: State Search and Seizure Analogs." *Mississippi Law Journal* 77 (2007): 417-464.
- Henderson, Stephen E. 2013. "After *United States v. Jones*, After the Fourth Amendment Third Party Doctrine." *North Carolina Journal of Law and Technology* 14, no. 2 (Spring 2013): 431-460.
- Henderson, Stephen E. 2006. "Learning from All Fifty States: How to Apply the Fourth Amendment and its State Analogs to Protect Third-Party Information from Unreasonable Search." *Catholic University Law Review* 55: 373-438.

- Hoekstra, Valerie. 2005. "Competing Constraints: State Court Responses to Supreme Court Decisions and Legislation on Wages and Hours." *Political Research Quarterly* 58, no. 2: 317-328.
- Howard, AE Dick. 1976. "State Courts and Constitutional Rights in the Day of the Burger Court." *Virginia Law Review* 62, no. 5: 873-944.
- Howard, Robert M., Scott E. Graves, and Julianne Flowers. 2006. "State Courts, the US Supreme Court, and the Protection of Civil Liberties." *Law & Society Review* 40, no. 4: 845-870.
- Huber, Gregory A. and Sanford C. Gordon. 2004. "Accountability and Coercion: Is Justice Blind When It Runs for Office?" *American Journal of Political Science* 48, no. 2: 247-263.
- Israel, Jerold H. 1977. "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court." *Michigan Law Review* 75, no. 7: 1319-1425.
- Kassow, Benjamin, Donald R. Songer, and Michael P. Fix. 2012. "The Influence of Precedent on State Supreme Courts." *Political Research Quarterly* 65, no. 2 (June 2012): 372-384.
- Katz v. United States* 389 U.S. 347 1967.
- Kerr, Orin S. 2012. "The Curious History of Fourth Amendment Searches." *Supreme Court Review* 2012, no. 1: 67-97.
- Knight, Jack and Lee Epstein. 1996. "The Norm of Stare Decisis." *American Journal of Political Science* 40, no. 4: 1018-1035.
- LaFave, Wayne R. 1987. *Search & Seizure: A Treatise On the Fourth Amendment*. 2nd ed. St. Paul, Minn.: West Publishing Company.
- Latzer, Barry. 1991. "The Hidden Conservatism of the State Court 'Revolution.'" *Judicature* 74, no. 4: 190-197.
- Latzer, Barry. 1991. "The New Judicial Federalism and Criminal Justice: Two Problems and a Response." *Rutgers Law Journal* 22: 863-886.
- Lovell, Ani-Rae. 2012. "Deference or Defiance: State Court Treatment of Blaine Amendments." Honors Thesis, The College of William and Mary: 1-50.
- Nelson, Michael J. 2014. "Duel(ing) Constitutions: State Constitutions and Judicial Federalism." Unpublished. Washington University in St. Louis: 1-32.
- Neuborne, Burt. 1977. "The Myth of Parity." *Harvard Law Review* 90, no. 6: 1105-1131.
- O'Connor, Sandra Day. 1984. "Our Judicial Federalism." *Case Western Law Review* 35, no. 1: 1-13.

- Olmstead v. United States* 277 U.S. 438 1928.
- Reddick, Malia and Rebecca L. Kourlis. August 2014. "Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices." *The Quality Judges Initiative*: 1-26.
- Scalia, Antonin and Bryan A. Garner. 2012. *Reading Law: The Interpretation of Legal Texts*. St. Paul, MN: Thomson/West
- Segal, Jeffrey A. and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83, no. 2: 557-565.
- Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of US Supreme Court Justices Revisited." *Journal of Politics* 57, no. 3: 812-23.
- Segal, Jeffrey A. 2011. "What's Law Got to Do with It: Thoughts from 'the Real of Political Science'." In *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake*, ed. Charles Geyh, 17-40. Stanford, CA: Stanford University Press.
- Shepherd, Joanna M. 2009. "The Influence of Retention Politics on Judges' Voting." *The Journal of Legal Studies* 38, no. 1: 169-206.
- Slobogin, Christopher. 2011. "Is the Fourth Amendment Relevant in a Technological Age?" In *Constitution 3.0: Freedom and Technological Change*, ed. Jeffrey Rosen and Benjamin Wittes, 11-31. Washington, D.C.: Brookings Institution Press.
- Smith v. Maryland* 442 U.S. 735 1979.
- Stidham, Ronald, Robert A. Carp, and Donald R. Songer. 1996. "The Voting Behavior of President Clinton's Judicial Appointees." *Judicature* 80: 16-20.
- Sullivan, Frank, Nancy Vaidik, and Sarah E. Barker. 2011. "Three Views from the Bench." In *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake*, ed. Charles Geyh, 328-342. Stanford, CA: Stanford University Press.
- Sutton, Jeffrey S. 2011. "What Does—and Does Not—Ail State Constitutional Law." *Kansas Law Review* 59: 687-714.
- Tarr, G. Alan. 1999. "New Judicial Federalism in Perspective." *Notre Dame Law Review* 72, no. 4: 1097-1118.
- Tarr, G. Alan and Mary C. Porter. 1982. "Gender Equality and Judicial Federalism: The Role of State Appellate Courts." *Hastings Constitutional Law Quarterly* 9: 919-973.

Thompson, Richard. 2014. "The Fourth Amendment Third-Party Doctrine." *Congressional Research Service*: 1-26.

United States v. Jones 132 S. Ct. 945 2012.

United States v. Miller 425 U.S. 435 1976.

Van Cleave, Rachel A. 1998. "State Constitutional Interpretation and Methodology." *New Mexico Law Review* 28: 199-225.

Walker, Jack L. 1969. "The Diffusion of Innovations among the American States." *American Political Science Review* 63: 880-899.

Wilkes Jr., Donald E. 1974. "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court" *Kentucky Law Journal* 62: 421-451.