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ARTICLES

THE FOURTH AMENDMENT IN TECHNICOLOR

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The Supreme Court's Fourth Amendment doctrine largely ignores how race shapes police encounters. Yet over the past few decades, several state courts have rejected this approach when expounding their own constitutions, adopting more protective standards that better account for how policing actually operates.

Working backward from these departures, the Article examines the logics that persuaded state courts to diverge from federal law. It shows that unique constitutional text mattered less than institutional self-conception, local policing conditions, and advocates' framing. In some cases, state courts engaged race directly. In others, they constrained police practices that disproportionately burden people of color through race-neutral rulings.

These state-level innovations show how state courts engage in constitutional construction. In a period when the Supreme Court has shown little appetite for confronting the racial harms produced by its criminal procedure jurisprudence, some state courts have taken the pen themselves, reshaping search-and-seizure doctrine to better reflect the realities of policing. By clarifying when and how those state courts have done so, the Article offers guidance for advocates, judges, and scholars working to advance racial justice and vindicate civil rights through state constitutional law.

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INTRODUCTION

For decades, critical race and criminal procedure scholars have critiqued the Supreme Court's Fourth Amendment jurisprudence on racial justice grounds.[1] As many have explained, modern Fourth Amendment doctrine has ignored the lived experiences of Black people and other communities of color who are policed most aggressively in the United States.[2] But also, by not grappling with race, Fourth Amendment case law has helped produce the racialized policing practices that have fueled the country's current mass incarceration crisis.[3] These scholars have shown how the Court's doctrinal choices have not merely tolerated racialized policing but also built the legal architecture that sustains it.[4]

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1. See, e.g., Paul Butler, The White Fourth Amendment, 43 Tex. Tech L. Rev. 245, 246–47 (2010) [hereinafter Butler, The White Fourth Amendment] (calling attention to decades of scholarship examining race-based policing and racial profiling emerging from racialized Fourth Amendment doctrine); I. Bennett Capers, Criminal Procedure and the Good Citizen, 118 Colum. L. Rev. 653, 654–55 (2018) [hereinafter Capers, The Good Citizen] (highlighting how Supreme Court criminal procedure jurisprudence perpetuates racialized distinctions between "good" and "second-class" citizens (internal quotation marks omitted)); Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 969 (2002) [hereinafter Carbado, (E)racing the Fourth Amendment] (examining how the Fourth Amendment racially allocates burdens and benefits); Frank Rudy Cooper, Post-Racialism and Searches Incident to Arrest, 44 Ariz. St. L.J. 113, 149 (2012) (arguing that Fourth Amendment doctrine leaves room for ambiguity that implicit racial bias often fills); Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L. Rev. 13, 27, 33 (1998) (highlighting the dangers of judicially sanctioned police discretion incorporating subjective bias into legal standards governing stops and arrests); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Valparaiso U. L. Rev. 243, 248 (1991) (arguing that the Court's reliance on a "reasonable person" standard ignores realities of encounters between Black men and police officers); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 340 (1998) (critiquing Fourth Amendment decisions for failing to acknowledge race as a factor in police discretion); L. Song Richardson, Police Efficiency and the Fourth Amendment, 87 Ind. L.J. 1143, 1145 (2012) (arguing that the reasonable suspicion standard fails to account for implicit biases that lead officers to view ambiguous behavior by people of color as suspicious); Ekow N. Yankah, Pretext and Justification: Republicanism, Policing, and Race, 40 Cardozo L. Rev. 1543, 1551 (2019) (challenging the rights-based assumptions that hide patterns of racial domination in policing on which the Supreme Court's Fourth Amendment jurisprudence relies). I am grateful that these scholars have blazed a path for me to follow.

2. See Daniel S. Harawa, Whitewashing the Fourth Amendment, 111 Geo. L.J. 923, 926 (2023) [hereinafter Harawa, Whitewashing the Fourth Amendment] (summarizing the racial critiques of the Supreme Court's Fourth Amendment jurisprudence).

3. Rachel Elise Barkow, Justice Abandoned: How the Supreme Court Ignored the Constitution and Enabled Mass Incarceration 169 (2025) (explaining how the Court had ample information to be "fully aware of the racial consequences of authorizing stop-and-frisk practices").

4. See, e.g., Butler, The White Fourth Amendment, supra note 1, at 246–47 (contending that the Court, by "rarely mention[ing] race," is invested in "a project . . . to expand the power of the police against people of color, especially blacks and Latinos"); Brandon Hasbrouck, The Unconstitutional Police, 56 Harv. C.R.-C.L. L. Rev. 239, 251

Yet while the Supreme Court has essentially treated race as irrelevant to Fourth Amendment search-and-seizure analysis—except when endorsing racially targeted systems of policing[5]—some state courts have taken a different approach. Across the country, state courts have rejected the Supreme Court's cramped vision of the Fourth Amendment, formulating doctrines that impose greater restrictions on searches and seizures. These states are expounding their constitutions in ways that both implicitly and explicitly acknowledge the role that race plays in policing. In so doing, these states are working to "color in" the Fourth Amendment.[6]

The traditional account of federalism's effect on civil rights reform emphasizes that the United States' diffuse constitutional structure once made it difficult, if not impossible, to secure equal rights nationwide.[7] Federalism frustrated the pursuit of racial justice.[8] And constitutional

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(2021) (arguing that the Court's Fourth Amendment jurisprudence "excuses" police racism and then "enshrines it within the limits of constitutional protections").

5. See, e.g., Noem v. Vasquez Perdomo, 146 S. Ct. 1, 3 (2025) (Kavanaugh, J., concurring) ("To be clear, apparent ethnicity alone cannot furnish reasonable suspicion; under this Court's case law regarding immigration stops, however, it can be a 'relevant factor' when considered along with other salient factors." (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975))); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) ("Thus, even if it be assumed that such [inspection] referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." (footnote omitted)); *Brignoni-Ponce*, 422 U.S. at 886–87 ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."). For discussions of how these cases condoned racialized policing, see Daniel Harawa & Kate Weisburd, Opinion, The 4th Amendment Will No Longer Protect You, L.A. Times (Sep. 29, 2025), https://www.latimes.com/opinion/story/2025-09-29/fourth-amendment-racial-profiling-noem-vasquez-perdomo [https://perma.cc/Z4G6-5DA8] (describing that, after *Vasquez Perdomo*, police "no longer need race-neutral person-specific suspicion" to seize someone); Jennifer Chacón, Whose Common Sense? Some Reflections on *Noem v. Vasquez Perdomo*, SLS Blogs (Sep. 24, 2025), https://law.stanford.edu/2025/09/24/whose-common-sense-some-reflections-on-noem-v-vazquez-perdomo/ [https://perma.cc/4UZ9-2TLD] ("By staying a lower court's restraining order, the Court allowed agents once again to stop and arrest people based on how they look, the language they speak, where they live, and the kind of work they do."); Sherrilyn Ifill, SCOTUS, ICE Raids & the Matter of Facts, Sherrilyn's Newsletter (Sep. 8, 2025), https://sherrilyn.substack.com/p/scotus-ice-raids-and-the-matter-of [https://perma.cc/CT45-K36A] (scrutinizing Justice Kavanaugh's concurrence in *Vasquez Perdomo* as ignoring the reality of abusive profiling practices).

6. Daniel S. Harawa, Coloring in the Fourth Amendment, 137 Harv. L. Rev. 1533, 1575–76 (2024) [hereinafter Harawa, Coloring in the Fourth Amendment].

7. See Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 48 (2010) (arguing that "[f]ederalism has often been a code-word for letting racists be racists" and that federalism "has played a tragic role in shielding a powerful regional dissenter—Southern racists—in its efforts to oppress blacks").

8. See Lindsay F. Wiley, Elizabeth Y. McCuskey, Matthew B. Lawrence & Erin C. Fuse Brown, Health Reform Reconstruction, 55 U.C. Davis L. Rev. 657, 719 (2021) ("'People of color have long been disproportionately disadvantaged by federalism,' and the 'core problems of racial inequality' still find their 'core . . . in questions of federalism.'" (alteration in original) (footnote omitted) (first quoting Jamila Michener, Race, Politics, and the Affordable Care Act, 45 J. Health Pol. Pol'y & L. 547, 550 (2020); then quoting

criminal procedure was one of the clearest examples of this: The Warren Court's criminal procedure revolution was an explicit response to Southern states' refusal to afford Black people basic constitutional protections throughout the criminal process.[9]

But for the last half a century or so, as the Supreme Court has become less protective of procedural rights,[10] federalism has been functioning differently, especially when it comes to criminal procedure and the Fourth Amendment.[11] Rather than simply following federal law, state courts have crafted more protective standards.[12] And more recently, this innovation

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Robert C. Lieberman & John S. Lapinski, American Federalism, Race, and the Administration of Welfare, 31 Brit. J. Pol. Sci. 303, 303–04 (2001))).

9. See Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2002 (1998) ("Although the Supreme Court's initial forays into criminal procedure surely had been motivated in large part by concern with the racial unfairness of southern criminal justice, the Court developed a series of formally race-neutral rules for constraining police, prosecutors, and the courts."); Burt Neuborne, The Gravitational Pull of Race on the Warren Court, 2010 Sup. Ct. Rev. 59, 60, 85–86 ("Perhaps the clearest evidence of the gravitational pull of race on Warren Court constitutional doctrine was in the areas of criminal law and procedure."); David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271, 316 ("[M]uch of the Court's criminal procedure jurisprudence . . . was a form of race jurisprudence, prompted largely by the treatment of black suspects and black defendants in the South. The Court's concern with race relations served as the unspoken subtext of many of its significant criminal procedure decisions . . . ." (footnote omitted)).

10. See Thomas Y. Davies, The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine, 100 J. Crim. L. & Criminology 933, 994 (2010) (explaining that the Burger Court represented a "plunge to the right in criminal procedure" and that this iteration of the Supreme Court "produce[d] a dependable pro-government majority"); Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2468 (1996) ("[T]he Supreme Court has profoundly changed its approach to constitutional criminal procedure since the 1960s at least in the following fairly limited (but obviously important) sense: the Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order." (emphasis omitted)).

11. See Donald E. Wilkes, Jr., The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L.J. 421, 425 (1974) (describing how state courts have evaded the Burger Court's criminal procedure retrenchment). An important counterpoint to this thesis is how the Roberts Court has interpreted the Fourth Amendment in the digital space. See, e.g., Matthew Tokson, The *Carpenter* Test as a Transformation of Fourth Amendment Law, 2023 U. Ill. L. Rev. 507, 509–10 (describing scholarly reaction to the Court's decision in Carpenter v. United States, 585 U.S. 296 (2018)). For instance, Professor Orin Kerr called the Supreme Court's recent decision Chatrie v. United States, 146 S. Ct. 2193 (2026), a case about location history records, "an expansive pro-privacy opinion" that "reads more like a decision from the Warren Court heyday of 1966 than the Roberts Court of 2026." Orin S. Kerr, The Fourth Amendment After *Chatrie*, 102 Notre Dame L. Rev. (forthcoming 2027) (manuscript at 3), https://ssrn.com/abstract_id=7238178 [https://perma.cc/K65L-V6N2].

12. See Wilkes, supra note 11, at 425 ("The Court's shift in attitude has made conditions ripe for an astonishing development in criminal procedure—evasion of the Supreme Court by state courts willing to protect rights of criminal defendants that are no longer guaranteed under the Federal Constitution as interpreted by the Burger Court.").

has taken the form of state courts interpreting their Fourth Amendment analogs to better account for how communities of color experience policing—the Fourth Amendment in technicolor.[13]

Of course, turning to the states for a more capacious vision of rights is not new, and this is not to say that state constitutionalism is necessarily reactionary, with states only moving in a dialogic response to the Supreme Court.[14] But as the Burger Court reached its zenith, Justice William Brennan called on advocates and state courts to look to state constitutions as independent sources of rights, given the Supreme Court's conservative shift.[15] And today, the Supreme Court is far more conservative than the Court on which Brennan sat, making his call even more urgent.[16]

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13. See infra Part III. With different states taking different paths to bolstering search and seizure rights, it conjures up a "coat of many colours." See Andrew Lloyd Webber & Tim Rice, Joseph's Coat, *on* Joseph and the Amazing Technicolor Dreamcoat (Vinyl Record, Decca Recs. Jan. 1969).

14. See Jessica Bulman-Pozen & Miriam Seifter, State Constitutional Rights and Democratic Proportionality, 123 Colum. L. Rev. 1855, 1857 (2023) [hereinafter Bulman-Pozen & Seifter, State Constitutional Rights] ("All eyes are on the states. As the U.S. Supreme Court retrenches, state courts are taking up many issues that matter most to Americans. From abortion to voting, state constitutions are defining the content and scope of rights across the nation." (footnote omitted)); Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859, 861 (2021) [hereinafter Bulman-Pozen & Seifter, Democracy Principle] ("In one sense, a call to consider state constitutions is nothing new. For decades, prominent jurists and scholars have advocated turning to state constitutions to protect individual rights.").

15. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977) [hereinafter Brennan, State Constitutions and the Protection of Individual Rights]; William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 548 (1986). Brennan's call for state courts to interpret their state constitutions to be more rights-enhancing is still commonly referred to as "new judicial federalism" or "new federalism" (despite no longer being new). See Ronald K.L. Collins, Foreword: The Once "New Judicial Federalism" & Its Critics, 64 Wash. L. Rev. 5, 5 (1989); Lawrence Friedman, The Constitutional Value of Dialogue and the New Judicial Federalism, 28 Hastings Const. L.Q. 93, 94 n.5 (2000) (collecting sources); John Kincaid, Foreword: The New Federalism Context of the New Judicial Federalism, 26 Rutgers L.J. 913, 913 n.1 (1995) (defining "the new judicial federalism" as state high court decisionmaking based on state constitutional provisions serving as independent bases for rulings on individual rights and liberties (internal quotation marks omitted)); G. Alan Tarr, The New Judicial Federalism in Perspective, 72 Notre Dame L. Rev. 1097, 1097 (1997) (defining "new judicial federalism" as "the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution" and noting that the phenomenon emerged in the early 1970s). This Article uses "new federalism" and "new judicial federalism" interchangeably.

16. See Richard M. Re, The Supreme Court, 2024 Term—Foreword: To a Conservative Warren Court, 139 Harv. L. Rev. 1, 3–4 (2025) ("The present Court . . . possesses the defining traits that the Warren Court did, but in political opposite. . . . [I]t wields its power in pursuit of its ideological goals. Instead of being the most liberal Court in living memory, however, it is the most conservative."). The call is also timely given that "[l]ockstepping's critics have increasingly found their voice in the [state] courts." Developments in the Law, Introduction, 139 Harv. L. Rev. 1371, 1371 (2026). Of late, state

But Brennan's concerns, rooted mainly in a broad rights-and-liberty frame, now take on a distinctly racial dimension. In one breath, the current Court has announced a full-throated embrace of constitutional colorblindness,[17] going so far as to call the charter document "our colorblind Constitution,"[18] while in the next it has endorsed a system of racialized policing.[19] In this climate, state innovation has become increasingly critical for acknowledging, confronting, and remedying the racial injustices that the Supreme Court refuses to see, or sees but refuses to correct.[20]

While many today recognize that state courts are key battlegrounds for civil rights, the literature often operates at a higher level of generality,[21] focusing on interpretive method,[22] the scope of state constitutional rights,[23] or the uniqueness of state constitutional structure.[24]

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courts have been more willing to forcefully criticize the Supreme Court's decisionmaking. See Mark Joseph Stern, One Judge Has the Guts to Put the Horror of This Supreme Court Term in Context, Slate (July 17, 2026), https://slate.com/news-and-politics/2026/07/one-judge-supreme-court-horror-show.html (on file with the *Columbia Law Review*) (discussing Granillo v. State, 593 P.3d 1 (Haw. 2026)).

17. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2161 (2023) ("Eliminating racial discrimination means eliminating all of it."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

18. Allen v. Milligan, 146 S. Ct. 1377, 1380 (2026).

19. See Noem v. Vasquez Perdomo, 146 S. Ct. 1, 3 (2025) (Kavanaugh, J., concurring) (explaining, in the context of immigration raids, that "[u]nder this Court's precedents, not to mention common sense," race or ethnicity can be taken into account when determining whether there is reasonable suspicion for a seizure).

20. See Erwin Chemerinsky, Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights 288–95 (2021) (arguing that "[s]tate constitutions . . . provide a way for our society to limit police conduct in instances where the Supreme Court has failed to do so through the Constitution").

21. See Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1857–58 ("For all that rides on state constitutional law, there has been little attention to some of its most basic questions. . . . There is limited discussion of other state constitutional clauses, the distinctiveness of state constitutions collectively, or what those differences might mean for adjudication.").

22. See id. at 1857 n.5 (collecting sources engaged in the debate).

23. See, e.g., Helen Hershkoff, "Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 Stan. L. Rev. 1521, 1523–24 (2010) ("[E]very state constitution in the United States—like many constitutions abroad—contains some explicit commitment to positive rights." (footnote omitted)); Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1135 (1999) ("Unlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government."). For a comprehensive account of rights protected by state constitutional law, see generally Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses (4th ed. 2006).

24. See, e.g., Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 2–3 (2018) (pointing to the dynamic relationship between state courts and state constitutional law, and their federal counterparts, as critical in

Rather than theorizing in the abstract, this Article works backward from state-court decisions that have departed from federal search-and-seizure standards to identify the arguments, institutional considerations, and doctrinal moves that have proven effective in persuading state courts to rise above the federal floor. It pays special attention to when state courts have been willing to recognize the racial dynamics of police–citizen encounters in their search-and-seizure doctrine. By providing these examples of success, this Article illustrates how other jurisdictions can "color in" their Fourth Amendment equivalents. At the same time, this Article looks beyond the arguments made in these cases to identify additional considerations that may resonate with state courts exercising their state constitutional authority today. In this way, this Article offers a bottom-up account of how state constitutional law can serve as a vehicle for advancing racial justice in policing, even as federal Fourth Amendment doctrine remains resistant to such concerns.

The Fourth Amendment provides an especially fertile case study for this inquiry.[25] State courts started developing the practice of departing from federal search-and-seizure doctrine long before the Roberts Court's ascension, producing a mature body of state constitutional law from which to learn.[26] The Fourth Amendment's centrality to everyday criminal law enforcement also means that constitutional questions arise—and are litigated—far more often in state courts than in their federal counterparts.[27] Today, Fourth Amendment–specific doctrinal roadblocks such as the good-faith exception to the exclusionary rule and the Supreme Court's own ambivalence about whether to retain the exclusionary rule have drastically reduced the number of Fourth Amendment cases the Court agrees to review.[28] As a result, state courts have had even more opportunity to engage their constitutions vis-à-vis the federal Constitution in the criminal

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articulating new legal norms that advance individual liberties); Goodwin Liu, State Courts and Constitutional Structure, 128 Yale L.J. 1304, 1310–12 (2019) (reviewing Sutton, supra).

25. See Robert F. Williams & Lawrence Friedman, The Law of American State Constitutions 151 (2d ed. 2023) (explaining that "criminal procedure generally has, in many ways, provided the driving force behind [new judicial federalism]. It is in this area that state courts first realized they could reach results different from those reached by the U.S. Supreme Court, or at least consider doing so").

26. See infra section I.C.

27. Williams & Friedman, supra note 25, at 152 (explaining that "[l]awyers are already in court defending criminal charges, so *state* constitutional criminal procedure arguments are easier to make" and "criminal law is of special *state* concern" (emphasis added)); see also Shirley S. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1148–49 (1985) ("The sheer number of state criminal cases and the relation between the protection offered by state and federal constitutions means that the state courts have many opportunities to rule on both federal and state constitutional issues." (footnote omitted)).

28. See Jack Goldsmith, Orin Kerr & Jen Patja, Lawfare Daily: Orin Kerr on the Digital Fourth Amendment, Lawfare (Jan. 9, 2025), https://www.lawfaremedia.org/article/lawfare-daily-orin-kerr-on-the-digital-fourth-amendment [https://perma.cc/Q6AT-JFNZ] (explaining why there hasn't been a recent rush of Fourth Amendment cases).

prosecution context.[29] This is not to say that state courts always depart from federal Fourth Amendment doctrine or even usually depart from federal doctrine.[30] But still, there has been enough departure from states across the country such that the Fourth Amendment provides a useful example of state constitutional innovation. And while scholars have discussed how states have departed from the Supreme Court's Fourth Amendment jurisprudence more generally,[31] the literature has not adequately focused on when and why state courts depart specially to consider issues of race. This Article brings a racial justice lens to the conversation.

Here's a preview of what's to come. The Article details in-depth departures in ten cases from state courts across the country that have charted a different course. Exploring what prompted these state-court departures in the Fourth Amendment context confirms some intuitions about new federalism.[32] State courts exercised their authority to depart from the Supreme Court by focusing on the textual differences between their state search-and-seizure provisions and the Fourth Amendment, as some state constitutions contain broader language.[33] Relatedly, state courts felt freer to depart when prior state-court precedents had enshrined broad search-and-seizure protections, allowing those courts to invoke stare decisis.[34] Also helpful was if *other* states had moved beyond the Supreme Court, as a state court could cite those decisions and follow their lead.[35] And when departing, state courts were often attentive to the lived realities within

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29. This is also not to say that states have not departed in other areas of criminal procedure. For example, states have rejected the daunting ineffective assistance of counsel standard imposed by Strickland v. Washington, 466 U.S. 668, 687–88 (1984). See Alexis Hoag-Fordjour, Back to the Future: (Re)Constructing Ineffective Assistance of Counsel, 58 U.C. Davis L. Rev. 111, 175–76 (2024) [hereinafter Hoag-Fordjour, Back to the Future] (noting how several states, including Hawai'i, New York, Alaska, and Oregon, have dispensed with *Strickland*'s prohibitive prejudice requirement).

30. See 1 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr & Andrew D. Leipold, Criminal Procedure § 2.12(a) (4th ed.), Westlaw (database updated Nov. 2025) (noting that many states have interpreted their Fourth Amendment equivalents in lockstep with Supreme Court Fourth Amendment doctrine); LaKeith Faulkner & Christopher R. Green, State-Constitutional Departures From the Supreme Court: The Fourth Amendment, 89 Miss. L.J. 197, 198 (2020) (considering a database of 342 Fourth Amendment cases and finding that "[o]f [those] cases, 125 cases have triggered a total of 306 such state-level departures, from thirty-seven states"); James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761, 781 (1992) [hereinafter Gardner, Failed Discourse] (noting a "general unwillingness among state supreme courts to engage in any kind of analysis of the state constitution at all").

31. See, e.g., Sutton, supra note 24, at 42–83 (including a chapter on how state courts have followed or departed from Supreme Court Fourth Amendment doctrine); Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1864 (noting that much of the commentary on state constitutionalism has focused on rights recognized by the U.S. Constitution, including "freedom from unreasonable search and seizure").

32. See infra section IV.A.

33. See infra section IV.A.1.

34. See infra section IV.A.2.

35. See infra section IV.A.2.

their state's bounds, adopting arguments that emphasized how the Supreme Court's Fourth Amendment doctrine inadequately protected their state's residents.[36]

The exploration of state courts interpreting their state constitutional search-and-seizure provisions independent of the Fourth Amendment also reveals new insights.[37] First, a more recent trend is for state courts to explain that issues of race require different search-and-seizure standards.[38] But importantly, state courts are more likely to focus on race *when the parties* foreground it.[39] In other words, when the parties invite the courts to think of search-and-seizure issues in racialized terms, some state courts have accepted the invitation. Of course, whether and how to focus on race remains contingent on the institutional posture of the particular court and the political realities on the ground. Second, and of self-interest to scholars, state courts often discussed whether Supreme Court rulings had been the subject of sustained scholarly criticism when deciding whether to follow them.[40] Thus, a robust body of scholarship explaining why a particular Supreme Court decision is wrong or wrongheaded can help legitimate a state court's decision to chart its own course.

Finally, there are two lines of argument that do not feature prominently in the decisions or the briefing that may be ripe for this constitutional moment.[41] The first is highlighting the different democratic relationships state courts have with their citizens as compared to the Supreme Court. The Supreme Court is antimajoritarian by design, while many state courts are democratically accountable.[42] Therefore, to the extent the Supreme Court's sentiments are out of step with what a majority of the state's citizens regard as just, then that can support state constitutional rulings that provide greater protections. The second is greater emphasis on how the Supreme Court's precedents harm people of color. For all the talk of colorblindness, most Americans understand that race plays a role in policing and the criminal legal process more broadly.[43] That

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36. See infra section IV.A.3.

37. See infra section IV.B.

38. See infra section IV.B.

39. See infra section IV.B.2.

40. See infra section IV.B.3.

41. See infra section IV.C.

42. Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1882 (noting that, as opposed to federal courts, "[s]tate courts are generally majoritarian, elected institutions, and their decisions are readily countermanded" and that their decisions "are entries in an ongoing popular conversation, not the final word on constitutional questions").

43. Drew DeSilver, Michael Lipka & Dalia Fahmy, 10 Things We Know About Race and Policing in the U.S., Pew Rsch. Ctr. (June 3, 2020), https://www.pewresearch.org/short-reads/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ [https://perma.cc/D5KG-R6JR] (finding that "[m]ajorities of both black and white Americans say black people are treated less fairly than whites in dealing with the police and by the criminal justice system as a whole").

shared understanding can and should be leveraged in state court constitutional adjudication to reinforce the legitimacy of departures that acknowledge racialized policing.[44]

Before proceeding, a couple of caveats. Although not the focus of this Article, *legislation* is also a means by which some states have addressed the racial injustices rife within police investigative practices.[45] To be sure, this form of state innovation is worthy of examination. This Article nevertheless focuses on courts and state constitutionalism for several reasons. First, unlike affirmative civil rights litigation or episodic legislative reform, criminal cases arise continuously, ensuring that constitutional questions—particularly those involving search and seizure—are litigated with regularity in state courts.[46] Second, legislative reforms remain subject to judicial interpretation and enforcement, and courts retain significant power to narrow their reach or blunt their remedial force.[47] In other words, even a focus on legislative action requires paying attention to the courts. Third, statutory reforms are contingent: They may be amended, repealed, or underenforced as political winds shift.[48] State constitutional rulings, by contrast, tend to be more durable and harder to unwind. For these reasons, state constitutional adjudication offers a relatively stable[49] and

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44. For an in-depth discussion explaining why it is important to recognize race, see Harawa, Whitewashing the Fourth Amendment, supra note 2, at 971–81.

45. See, e.g., California Racial Justice Act, Cal. Penal Code § 745 (West 2026) (allowing criminal defendants to challenge convictions and sentences based on race and ethnicity); Kentucky Racial Justice Act, Ky. Rev. Stat. Ann. § 532.300 (West 2026) (allowing capital defendants to present evidence about how race influenced their case); North Carolina Racial Justice Act, N.C. Gen. Stat. § 15A-2010 (2009) (repealed 2013) (allowing death-sentenced defendants to challenge sentences based on racial bias). State ballot initiatives are also a source of criminal justice reform. See, e.g., Meg Anderson, Three Takeaways From Crime Ballot Measures Around the Country, NPR (Oct. 31, 2024), https://www.npr.org/2024/10/30/nx-s1-5155201/criminal-justice-ballot-measures [https://perma.cc/5VPG-E4VW]; Marshall Project Staff, We're Tracking 7 Ballot Measures that Could Change Criminal Justice, Marshall Project (Oct. 28, 2020), https://www.themarshallproject.org/2020/10/28/7-states-where-voters-could-change-the-future-of-criminal-justice [https://perma.cc/X8AT-TZXM] (last updated Nov. 5, 2020).

46. See Jennifer Friesen, Recovering Damages for State Bills of Rights Claims, 63 Tex. L. Rev. 1269, 1270 (1985) (explaining that there are a large number of criminal procedure cases applying new judicial federalism "in large part because attorneys are paid to file and brief them").

47. For example, the New York Court of Appeals recently made the felony of making terroristic threats bail-eligible despite it not being specifically included in the Bail Reform Act as one of the few offenses for which cash bail can be imposed. See People ex rel. Ellis v. Imperati, 277 N.E.3d 213, 214 (N.Y. 2025) ("We therefore hold that making a terroristic threat is a bail-eligible offense.").

48. For example, the North Carolina legislature repealed the state's Racial Justice Act just four years after it was passed and attempted to make the repeal retroactive. See State v. Robinson, 846 S.E.2d 711, 715–18 (N.C. 2020) (holding that this repeal was not constitutional).

49. There is no fifty-state survey of how often state supreme courts overrule prior decisions, and it seems that the pace of overruling may vary widely by state. Tyler J. Buller & Kelli A. Huser, Stare Decisis in Iowa, 67 Drake L. Rev. 317, 327–30 (2019) (collecting studies

recurring vehicle for confronting racial injustice in criminal law's enforcement, and hopefully, legislative efforts continue alongside it. Finally, a focus on the courts, and particularly on state constitutional interpretation, allows for closer attention to the meaning of the Fourth Amendment itself, especially the disconnect between everyday policing practices and the constitutional protections that govern them.

To be clear, this Article does not seek to romanticize state constitutionalism or federalism more broadly.[50] State criminal legal systems subjugate Black and Brown people in myriad ways, and this Article does not minimize those harms.[51] But in *this* constitutional moment—one defined by backlash, retrenchment, and revisionism—state autonomy can be leveraged to advance racial justice.[52] How states have innovated in the Fourth Amendment space provides proof of concept for how other states can engage and deploy their constitutions to do meaningful racial justice work when the Supreme Court will not.

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of various state supreme courts). It's worth noting, however, that "state constitutional decisions are generally easier to override by constitutional amendment than federal constitutional rulings." Liu, supra note 24, at 1339 (citing Sutton, supra note 24, at 18, 213). Or, as Professor Helen Hershkoff colorfully put it, as compared to the federal Constitution, state constitutions are "said to draw more from Mary Poppins than from James Madison: pie crust promises, more fragile even than parchment promises—easily made, easily broken, hardly the stuff of immutable constitutional principle." Helen Hershkoff, Introductory Remarks: The Promise and Limits of State Constitutions, 99 N.Y.U. L. Rev. 1895, 1902 (2024) [hereinafter Hershkoff, Introductory Remarks] (footnote omitted).

50. See, e.g., Elizabeth Bentley, State Court Adherence to Decisions Incorporating Federal Constitutional Law, 110 Iowa L. Rev. 1013, 1019 (2025) (explaining that state courts "did not always wield their interpretive power equitably"); Erwin Chemerinsky, Two Cheers for State Constitutional Law, 62 Stan. L. Rev. 1695, 1702 (2010) ("State constitutions are generally more majoritarian than the United States Constitution because they are easier for the majority to change . . . . Advancing individual liberties and furthering equality is thus inherently more problematic under state constitutions because it puts the rights of the minority more in the hands of the majority.").

51. See Aaron Gottlieb, Making *Gideon* Count? Public Defender Resources and Felony Case Outcomes for Black, White, and Latinx Individuals, 13 Race & Just. 506, 507 (2023) (documenting the effects of the underfunding of public defense on case outcomes for minorities); Hershkoff, Introductory Remarks, supra note 49, at 1904 ("[W]e should not ignore or erase the role of state constitutions and state courts in entrenching racial subordination and the Supreme Court's acquiescence—even partnership—in that enterprise."). Today, for example, misdemeanor courts are a site of racial injustice. See Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal 9 (2018) ("Misdemeanors [] fuel some of America's most infamous inequalities, especially the gap between the rich and the poor and the disparate treatment of people of color."). So too are grossly underfunded public defense systems. See Eve Brensike Primus, The Problematic Structure of Indigent Defense Delivery, 122 Mich. L. Rev. 207, 209 (2023) (noting that the criminal justice system "target[s] racial minorities for differential treatment").

52. See Gerken, supra note 7, at 46–47 ("[W]e should be open to the possibility that at this stage in our history, minority rule—and not just minority rights—represents a tool for combating discrimination and promoting democracy.").

With those caveats cleared away, this Article makes its case over the course of four parts. Part I explains the traditional account that "those interested in racial justice have long been skeptical of federalism,"[53] as diffuse authority and the "preservation of states' rights" often interfered with "the federal government's [historical] goal of promoting racial equality."[54] As this Part explains, it was federalism concerns that fueled the Warren Court's criminal procedure revolution, as the Court attempted to constitutionalize foundational criminal procedure rights in the face of Southern states routinely denying those rights to Black people accused of crime. But the new federalism movement has flipped the traditional account of federalism on its head—hence the label "new." Now, with the Supreme Court adhering to the position that the Constitution must be colorblind while also claiming that the Constitution allows for racially targeted policing, states have taken on renewed importance in the struggle for racial justice.[55] And while this is true beyond policing, it is especially true in constitutional criminal procedure, where states have taken meaningful steps to better protect their residents—especially those of color—against unreasonable searches and seizures.

Part II explores the federal doctrine from which states have departed, focusing on three Fourth Amendment cases involving defendants of color that have drawn the harshest criticism for their racial obliviousness. It focuses on this cluster of cases because, as a corpus, they have given law enforcement sweeping power to aggressively police communities of color, while at the same time minimizing the experiences of those same people most aggressively policed.[56] It examines *Whren v. United States*, where the

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53. Id. at 49.

54. Medha D. Makhlouf, Laboratories of Exclusion: Medicaid, Federalism & Immigrants, 95 N.Y.U. L. Rev. 1680, 1752 (2020).

55. See John Ettorre, Civil Rights Cases Are Part of MLK's Legacy, but Many Are Moving to State Courts, Best Laws. (Jan. 20, 2022), https://www.bestlawyers.com/article/civil-rights-cases-are-moving-to-state-courts/4347 [https://perma.cc/F43R-GH4X] ("[M]ore and more of these [civil rights] cases are being brought in state courts . . . ." (internal quotation marks omitted) (quoting Sanford Rosen, civil rights attorney, Rosen Bien Galvan & Grunfeld LLP)); Matthew R. Segal, Civil Rights and State Courts in the Trump Era, 12 Harv. L. & Pol'y Rev. 49, 50 (2018) ("[S]trategic state litigation can also substantially advance the individual rights placed at risk by the Trump administration . . . ." (emphasis omitted)). In a leading example of this, the ACLU recently launched a "State Supreme Court Initiative," explaining:

> The U.S. Supreme Court is increasingly unlikely to protect, let alone expand, individual rights. Empowered by President Trump's three nominees, the Court's conservative supermajority has moved radically against liberty and equal justice in numerous recent cases. State supreme courts, however, offer promise for civil liberties and civil rights. That's why we are making new investments to support litigation in state courts.

State Supreme Court Initiative, ACLU, https://www.aclu.org/campaigns-initiatives/state-supreme-court-initiative [https://perma.cc/75ST-UMK4] (last updated Oct. 9, 2026).

56. To be clear, this Article does not catalog every Supreme Court case that has erased race. Rather, it focuses on some of the most prominent cases that have received sustained

Court greenlit racial profiling by holding that an officer's subjective motives are irrelevant under the Fourth Amendment;[57] *Schneckloth v. Bustamonte*, where the Court held that the government does not have to prove consent was made with knowledge of the right to refuse, ignoring the precarity and coercion that people of color experience in police encounters;[58] and *Illinois v. Wardlow*—a case in which the Court held that "unprovoked flight" from police in a "high crime area" gives rise to reasonable suspicion, ignoring the innocent reasons people of color may wish to avoid police contact.[59] Together, these decisions constitutionalize a vision of policing that grants wide latitude to officers while failing to conduct any meaningful inquiry into how race shapes police–citizen encounters.

Part III describes state courts' resistance to federal doctrine. It identifies how state courts have pushed back against the Supreme Court's refusal to recognize race in its Fourth Amendment case law. For example, Washington has prohibited pretextual seizures—rejecting *Whren*.[60] New Jersey requires consent to be informed—bucking *Bustamonte*.[61] And Massachusetts has refuted the suspiciousness of a Black person's flight from police—contra *Wardlow*.[62] To better understand what prompted these departures, this Part examines not only the decisions themselves, but, when available, the briefing and oral arguments underlying them.[63] Doing so illuminates how litigants framed race, policing realities, state constitutional text, and institutional competence—and how those arguments resonated with state courts deciding whether to chart an independent constitutional course.

Finally, Part IV distills lessons from the state Fourth Amendment departures. This Part identifies recurring patterns in how state courts have been persuaded to deviate from federal search-and-seizure doctrine, which essentially erases race, to more fully embrace a vision of the law

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critique. It therefore does not discuss state court departures from cases not discussed. See, e.g., State v. Ingram, 914 N.W.2d 794, 797–98 (Iowa 2018) (adopting tighter legal standards than the U.S. Supreme Court when it comes to warrantless inventory searches and seizures of automobiles).

57. 517 U.S. 806, 813 (1996).

58. 412 U.S. 218, 227 (1973).

59. 528 U.S. 119, 124–25 (2000) (internal quotation marks omitted) (quoting Adams v. Williams, 407 U.S. 143, 144, 147 (1972)).

60. See State v. Ladson, 979 P.2d 833, 842 (Wash. 1999) (forbidding pretextual stops).

61. See State v. Johnson, 346 A.2d 66, 67–68 (N.J. 1975) (holding consent must be informed).

62. See Commonwealth v. Warren, 58 N.E.3d 333, 341 (Mass. 2016) (citing Commonwealth v. Mercado, 663 N.E.2d 243, 246 (Mass. 1996); Commonwealth v. Thibeau, 429 N.E.2d 1009, 1010 (Mass. 1981)) (refusing to give much weight to flight where suspect is a Black male).

63. See generally Harawa, Whitewashing the Fourth Amendment, supra note 2, at 927 (examining how Fourth Amendment cases were litigated to better understand what conclusions can be drawn from them).

attuned to a racialized reality. It synthesizes the doctrinal moves, institutional justifications, and framing strategies that have accompanied these departures, shedding light on how state courts have exercised their authority to move beyond the federal floor in concrete cases. Although this Article focuses on searches and seizures, the identified patterns provide insights that extend beyond the Fourth Amendment context, illuminating how state constitutional law can operate as a distinct site of racial justice across doctrinal domains.

I. FEDERALISM, RACIAL JUSTICE, AND THE FOURTH AMENDMENT

Federalism has long occupied an uneasy place in accounts of racial justice. For much of U.S. history, diffuse authority and state autonomy helped entrench racial hierarchy. This was especially true in the administration of criminal law. State and local officials exercised near-total control over policing, prosecution, and punishment, while federal constitutional protections remained largely unincorporated and thus unenforceable. As a result, state criminal legal systems—especially in the Jim Crow South—systematically denied Black people basic procedural protections. It was against this backdrop that the Warren Court launched its criminal procedure revolution, constitutionalizing rights and imposing national standards precisely because states could not be trusted to vindicate them.

But that familiar story is not the end. Developments over the last half-century have complicated, if not inverted, the traditional account. While the Supreme Court has grown more conservative, retreating from its earlier commitment to robust criminal procedure protections and embracing a formalistic colorblind constitutionalism, state courts have at times moved in the opposite direction. This "new federalism," trendy now in the face of an ultraconservative Court, caught fire early in constitutional criminal procedure. This Part traces this evolution.

A. *The Traditional Account*

For much of the twentieth century, federalism was understood by both advocates and scholars as a barrier to racial justice rather than a vehicle for it.[64] Across social life—from education and housing to voting and public accommodations—appeals to states' rights and local control were repeatedly invoked to resist federal efforts to dismantle the American racial hierarchy.[65] Diffuse authority meant that any notion of equality

64. See, e.g., William H. Riker, Federalism: Origin, Operation, Significance 155 (1964) (writing that if "one disapproves of racism, one should disapprove of federalism").

65. See Bentley J. Anderson, Book Review, Fed. Law., Jan./Feb. 2015, at 84, 84 (reviewing Sotirios A. Barber, The Fallacies of States' Rights (2013)) (summarizing Barber's argument that federalism "institutionalized racial segregation in housing, education, voting, and even eating and drinking" and served as the "theoretical framework on which the 19th-century theory of nullifying federal legislation and the secession movements were based"); see also Lisa L. Miller, The Invisible Black Victim: How American Federalism Perpetuates

could be thwarted by local institutions deeply invested in maintaining the current order. As such, federalism, as venerated by the post-Reconstruction Supreme Court, came to be associated with widespread subordination.[66]

This was especially true in the operation of state criminal legal systems. In the decades that followed Reconstruction, Southern states in particular used criminal law as a tool of racial control. Through Black Codes and violent policing, states funneled Black people into systems of forced labor and incarceration.[67] And both before and after arrest, Black defendants were routinely denied basic procedural protections as they moved through the criminal process.[68] Federalism worked to insulate these practices because criminal law lies at the "core" of state power,[69] upon which

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Racial Inequality in Criminal Justice, 44 Law & Soc'y Rev. 805, 806 (2010) ("American federalism limits the authority and political incentives of the central government to address a wide range of social problems that give rise to crime and diffuses political power across multiple venues . . . ."). Justice Goodwin Liu complicates this account by providing examples of states protecting Black schoolchildren's rights before the Supreme Court decided *Brown v. Board of Education*. See Liu, supra note 24, at 1345–54 (explaining a comprehensive survey of state court cases challenging segregated schools finding "that among forty-eight decisions by state high courts between 1834 and 1903, black plaintiffs obtained relief in twenty-eight cases").

66. See, e.g., Cheryl I. Harris, In the Shadow of *Plessy*, 7 U. Pa. J. Const. L. 867, 870 (2005) (arguing that the Court's most anticanonical case, *Plessy v. Ferguson*, was "built within the edifice of federalism to insulate state discrimination from national intervention" and that "the Court played a critical role in consolidating state sovereignty over race and validating federalism as a constraint on national intervention to rectify inequality"). See generally Hoag-Fordjour, Back to the Future, supra note 29, at 152 ("Despite the broad sweeping language of the Reconstruction amendments, it had little impact on formerly enslaved people's rights when facing criminal charges.").

67. See Timbs v. Indiana, 586 U.S. 146, 153 (2019) ("Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy."); see also Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. L. Rev. 1, 12 n.62 (1995) ("The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws and restrictive travel laws . . . denying African Americans civil rights and due process of law."); Daniel S. Harawa, How Much Is Too Much? A Test to Protect Against Excessive Fines, 81 Ohio St. L.J. 65, 104 (2020) ("To be sure, financial punishment was a critical tool that white Southerners used to subordinate Black people."); Darren Lenard Hutchinson, "With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection, 110 Calif. L. Rev. 371, 392 (2022) (describing how "southern police turned Blacks over to mobs, participated in the violence, or ignored it").

68. See Hoag-Fordjour, Back to the Future, supra note 29, at 153 ("In response to Black people's change in legal status, many former slaveholding states turned to the criminal legal system to facilitate Black people's virtual re-enslavement."); Herbert L. Packer, The Courts, the Police, and the Rest of Us, 57 J. Crim. L., Criminology & Police Sci. 238, 240 (1966) ("What we have seen in the South is the perversion of the criminal process into an instrument of official oppression.").

69. See Shinn v. Ramirez, 142 S. Ct. 1718, 1730–31 (2022) ("The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" (quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))).

the post-Reconstruction Supreme Court repeatedly proclaimed federal courts could barely intrude.[70]

It was under these conditions that the Warren Court undertook its mid-twentieth century criminal procedure revolution.[71] Throughout the 1960s, the Warren Court dramatically expanded the reach of federal constitutional protections in state criminal cases. Through the doctrine of incorporation, the Court held that most provisions of the Bill of Rights (along with relevant remedies and prophylaxes) that provide criminal defendants with procedural protections apply to the states through the Fourteenth Amendment.[72] Thus, the federal Constitution (at least on paper) began to have real teeth in the run-of-the-mill state criminal prosecution.

Many view the Warren Court's criminal procedure revolution as a racial justice project even though many of the cases did not involve defendants of color, originate from the Deep South, or even discuss race.[73]

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70. See, e.g., Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the Fifth Amendment's grand jury requirement does not apply to the states and rejecting the claim that due process incorporates specific procedural guarantees); Twining v. New Jersey, 211 U.S. 78, 99–100 (1908) (holding that the Fifth Amendment privilege against self-incrimination is not enforceable against the states and articulating a narrow conception of "fundamental" rights under due process); Snyder v. Massachusetts, 291 U.S. 97, 105–06 (1934) (declining to require state courts to allow a defendant to be present during a jury view of the crime scene under due process, emphasizing deference to state criminal procedure); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (holding that the Double Jeopardy Clause does not apply to the states and limiting incorporation to rights implicit in the very idea of "ordered liberty"); Betts v. Brady, 316 U.S. 455, 471–72 (1942) (holding that the Sixth Amendment right to appointed counsel is not generally applicable to state felony prosecutions).

71. It's worth noting that civil rights litigants beyond the criminal legal system also looked to federal courts to protect civil rights because state courts were beholden to Jim Crow injustice. See, e.g., Robert D. McFadden, Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80, N.Y. Times (July 24, 1999), https://www.nytimes.com/1999/07/24/us/frank-m-johnson-jr-judge-whose-rulings-helped-desegregate-the-south-dies-at-80.html (on file with the *Columbia Law Review*) (describing a federal judge whose major rulings advanced racial justice in Alabama, "insist[ing] that he had intervened only when state and local officials had failed to perform their constitutional duties").

72. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968) (incorporating the Sixth Amendment right to a jury trial against the states); Katz v. United States, 389 U.S. 347, 353 (1967) (reconceptualizing the Fourth Amendment to protect reasonable expectations of privacy); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring warnings and safeguards during custodial interrogation to protect the Fifth Amendment privilege against self-incrimination); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (recognizing the right to counsel during custodial police interrogation); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (holding that the Sixth Amendment right to appointed counsel is fundamental and applies to state felony prosecutions); Mapp v. Ohio, 367 U.S. 643, 655–57 (1961) (incorporating the Fourth Amendment exclusionary rule against the states and emphasizing the need to deter unconstitutional policing).

73. See Carol S. Steiker & Jordan M. Steiker, The American Death Penalty and the (In)Visibility of Race, 82 U. Chi. L. Rev. 243, 251–52 (2015) (stating that the Warren Court's criminal procedure revolution had an "unstated racial subtext"); George C. Thomas III,

"According to the conventional understanding, much of the reason for the criminal procedure revolution of the 1960s was the need to rein in a discriminatory criminal justice system, to keep police and prosecutors from victimizing, not just criminal defendants in general, but black defendants in particular."[74] In other words, the Court's imbuing defendants with federal constitutional protections was an "unstated" effort at ensuring racial equality that was frustrated by the federalist structure: "By insinuating courts deeply into the process of [state] criminal-law enforcement, the federal constitutionalization of state police procedures was intended to correct this imbalance."[75]

The legacy of this period profoundly shaped how federalism was understood in racial justice discourse. Appeals to states' rights were widely associated with resistance to racial equality. Even outside the South, local control often meant unchecked discretion exercised by officials whose practices disproportionately harmed communities of color, with criminal procedure providing a paradigmatic example. The very need to federalize criminal procedure underscored the depth of states' failure to provide their residents, particularly those of color, adequate procedural safeguards.

Yet the traditional account also carried implicit assumptions that would later prove unstable. It presumed federal courts would remain reliable guardians of rights, and that national constitutional doctrine would continue to evolve in ways attentive to the abuses of policing and punishment. It also assumed that state courts would remain resistant to robust enforcement of rights absent federal compulsion. For a time, those assumptions seemed well-founded.

Today, not so much.

Racial Justice: The Failure of the Warren Court's Criminal Procedure, 25 U. Pa. J. Const. L. 710, 711 (2023) ("One aspect of the Warren Court criminal procedure 'revolution' in the 1960s was to advance what we might call, for lack of a better term, racial justice." (footnote omitted)); Justin Driver, Recognizing Race, 112 Colum. L. Rev. 404, 453–54 (2012) (pointing out that there will be important Fourth Amendment cases that do not involve defendants of color). It's worth noting, however, that in some of the cases involving defendants of color, the Court made sure to mention their race. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 952 n.234 (noting that race was mentioned in *Duncan* and *Miranda*).

74. William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 50 (1997).

75. Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Crisis of Criminal Procedure, 86 Geo. L.J. 1153, 1158 (1998). There are those who disagree with this account. See, e.g., Corinna Barrett Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. Pa. L. Rev. 1361, 1363–65 (2004); Eric J. Miller, The Warren Court's Regulatory Revolution in Criminal Procedure, 43 Conn. L. Rev. 1, 4–5 (2010) [hereinafter Miller, Regulatory Revolution].

B. *Flipping the Script*

Toward the tail end of the 1960s, the Warren Court decided *Terry v. Ohio*.[76] In many ways, *Terry* marked the Court's "shift[] from its rights-expanding to a rights-constricting phase," with *Terry* serving as the progenitor of modern racialized policing.[77]

In *Terry*, a seasoned Cleveland police officer, Detective Martin McFadden (who was white), reportedly observed two men—John Terry and Richard Chilton (both Black)—pacing back and forth in front of a store, peering into the window, and conferring with one another—behavior he interpreted as "casing" it for a robbery.[78] The two men had not committed any crime, but Detective McFadden was "thoroughly suspicious," so he stopped them anyway.[79] Detective McFadden began questioning the men, and when they only "mumbled" in response, McFadden grabbed Mr. Terry, "spun him around," and "patted down the outside of his clothing," finding a gun in Mr. Terry's coat pocket.[80]

All of the Justices agreed that Mr. Terry had been "seized" and "search[ed]" "within the meaning of the Fourth Amendment."[81] And under the law at the time, for a search and seizure to be constitutional, an officer had to have probable cause "to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed."[82] The Justices also agreed that Detective McFadden lacked probable cause.[83] Under existing law, then, the evidence McFadden found during his search should have been suppressed.

And yet the Supreme Court concluded Detective McFadden's stop-and-frisk of Mr. Terry was constitutional, holding police are permitted to conduct "limited" seizures based on "reasonable [suspicion]" that a person may have committed a crime, and can conduct "limited" searches if they have reason to suspect that person "may be armed and presently

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76. 392 U.S. 1 (1968).

77. Miller, Regulatory Revolution, supra note 75, at 3; see also Yankah, supra note 1, at 1573 (calling *Terry*'s "sublimation of race in policing . . . the beginning of [the Court's] modern policing case law").

78. 392 U.S. at 6 (internal quotation marks omitted) (quoting Martin McFadden, Detective, Cleveland Police Dep't). The *Terry* opinion elides the race of the key players. Barkow, supra note 3, at 177. This would not be the last time the Court would erase race in Fourth Amendment cases. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 927 ("[T]he erasure of race in the Fourth Amendment context often happens long before the Supreme Court hands down its opinions. The parties—through their lawyers—sidestep issues of race too." (emphasis omitted)).

79. *Terry*, 392 U.S. at 6.

80. Id. at 7.

81. Id. at 35 (Douglas, J., dissenting) (internal quotation marks omitted).

82. Id.

83. Id.

dangerous."[84] In lowering the quantum of suspicion necessary to stop and search someone, *Terry* "unleashed a scale of policing never seen before in America . . . . After *Terry*, police departments felt emboldened to expand the use of stop-and-frisk and employ it as a programmatic tactic."[85] The "result was predictable—expanded police powers and diminished individual freedom."[86] *Terry* "authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide."[87]

To be sure, the *Terry* Court was on notice that any decision lowering the probable cause standard would have disastrous consequences for communities of color. The NAACP Legal Defense and Educational Fund (LDF) filed an amicus brief "cit[ing] statistics showing that blacks were more prone to being stopped and frisked than whites"[88]—indeed, at the time of *Terry*, the targets of stop-and-frisks "were overwhelmingly poor people and people of color."[89] And LDF argued that any decision relaxing the probable cause standard would be detrimental to communities of color's relationship with policing.[90] Yet, as one scholar observed, while *Terry* paid lip service to the fact that "police used stops and frisks as a means of racial harassment," the *Terry* Court nonetheless concluded that this reality "provided no reason to establish strict standards for the exercise of the stop and frisk power."[91]

Terry complicates the story of the criminal procedure revolution. Some scholars contend that *Terry* turned not "on legal principle or

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84. Id. at 30 (majority opinion); see also Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 963 n.19 (1999) (describing the "reasonable suspicion" standard for conducting stops and frisks). Describing a frisk as a "limited" intrusion is certainly a misnomer. For an in-depth description of what exactly a frisk can entail, see Seth W. Stoughton, *Terry v. Ohio* and the (Un)Forgettable Frisk, 15 Ohio St. J. Crim. L. 19, 28–30 (2017). Given the intrusiveness of frisks, Professor Paul Butler has described them as "sexual touchings." Paul Butler, Chokehold: Policing Black Men 97 (2017) [hereinafter Butler, Chokehold].

85. Barkow, supra note 3, at 164–65.

86. Tracey Maclin, *Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John's L. Rev. 1271, 1278 (1998).

87. Id. at 1277; see also I. Bennett Capers, Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle, 46 Harv. C.R.-C.L. L. Rev. 1, 14 (2011) (contending that *Terry* "enabled racial profiling to flourish").

88. Thompson, supra note 84, at 965.

89. Barkow, supra note 3, at 176.

90. See id. at 177 (describing LDF's assertion that a reasonable suspicion standard would allow greater leeway for police to act on misinformed views of communities of color and reinforce their hostility toward police); Thompson, supra note 84, at 965 (explaining LDF's argument that a weakened probable cause standard would exacerbate unequal policing patterns).

91. Adina Schwartz, "Just Take Away Their Guns": The Hidden Racism of *Terry v. Ohio*, 23 Fordham Urb. L.J. 317, 322 (1996); see also Terry v. Ohio, 392 U.S. 1, 14–15 (1968) (expressing disapproval for discriminatory police practice while disavowing the judiciary's ability to curtail those practices).

political ideology," but instead was motivated by "political *necessity*."[92] By the time of *Terry*, support for civil rights was "waning."[93] "[P]eople no longer saw blacks as peaceful, praying protesters being savagely beaten by white policemen, but as lawless looters shouting '[b]urn, baby, burn' while exiting broken storefront windows with all they could carry."[94] And this was against the backdrop of a larger desire for "law and order" amid a wash of protests, riots, and political assassinations.[95] In any event, regardless of what prompted the shift, *Terry* was undoubtedly a "dramatic demonstration of the Warren Court's change in tone and attitude."[96]

Terry was a harbinger of things to come. Chief Justice Warren would leave the bench the next year.[97] And in the years that followed, the Court increasingly retreated from the expansive vision of constitutional rights that had characterized the early phase of the criminal procedure revolution.[98] And while, so the story goes, the early Warren Court's criminal procedure decisions were performing racial justice work without announcing their intentions, the Courts that followed (Burger, Rehnquist, and Roberts) became increasingly hostile to claims framed in racial justice terms.[99]

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92. William J. Stuntz, *Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law, *in* Criminal Procedure Stories 351, 362 (Carol S. Steiker ed., 2006); see also Francis A. Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. Ill. L.F. 518, 538–39 ("That period [the 1960s] was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were politically exploited."). Others believe the Warren Court's criminal procedure jurisprudence was "bipolar," focusing on two sets of sometimes competing values: "crime control" and "due process." Miller, Regulatory Revolution, supra note 75, at 13.

93. Lain, supra note 75, at 1447.

94. Id. (alteration in original) (quoting Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics 49–50 (1991)).

95. Id. (internal quotation marks omitted).

96. Yale Kamisar, The Warren Court and Criminal Justice: A Quarter-Century Retrospective, 31 Tulsa L.J. 1, 5 (1995).

97. Earl Warren, Oyez, https://www.oyez.org/justices/earl_warren [https://perma.cc/2QE7-VJ9G] (last visited Aug. 11, 2026).

98. See Terry Skolnik, Criminal Justice and the Erosion of Constitutional Rights, 66 B.C. L. Rev. 1679, 1685 (2025) ("Some argue that the Warren Court's expansive protection of civil liberties triggered a counter-revolution that restricted defendants' constitutional rights."); see also id. at 1685 n.24 (collecting examples of scholars who have adopted this account).

99. See Shelby Cnty. v. Holder, 570 U.S. 529, 551–53 (2013) (invalidating the Voting Rights Act's coverage formula and rejecting Congress's reliance on evidence of racial discrimination in voting); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (striking down voluntary school integration plans and equating race-conscious efforts to remedy segregation with invidious discrimination); McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (refusing to credit statistical evidence of systemic racial bias in capital sentencing and warning that recognizing such claims would call the entire criminal justice system into question); Washington v. Davis, 426 U.S. 229, 242, 245–46 (1976) (rejecting disparate-impact liability under the Equal Protection Clause absent proof of

Seeing the writing on the wall, less than a decade into Chief Justice Burger's tenure, Justice Brennan urged state courts to assume a more active role in the quest for equality, calling on them to treat their constitutions as independent sources of rights rather than mere echoes of federal doctrine.[100] As the Supreme Court narrowed the avenues for addressing racialized harms, state constitutional law emerged as a space in which courts could confront the realities of race that federal doctrine had rendered invisible.

C. *New Federalism and the Fourth Amendment*

The new federalism movement caught fire early in the Fourth Amendment context, even before the Supreme Court's retrenchment. The reasons for this are structural. Searches and seizures are fact-bound, contingent on local policy and practice, and a regular part of everyday policing.[101] Those features make search-and-seizure protections especially amenable to variation across states. State courts are closer to local law enforcement and more aware of community conditions, and thus, better positioned than the United States Supreme Court—which adopts rules that apply nationwide—to assess how abstract constitutional rules operate on the ground.[102]

In some ways, states have *always* been innovating in search-and-seizure protections. As Judge Jeffrey Sutton explains, protections against unreasonable searches and seizures were not a federal mandate later imposed on the states but rather a state innovation adopted by the federal

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discriminatory intent and sharply limiting constitutional remedies for structural racial inequality in public employment).

100. While Justice Brennan gets a lot of credit for the new judicial federalism movement, its "intellectual godfather" was Oregon Supreme Court Justice Hans Linde. See Collins, supra note 15, at 5 (noting Hans Linde as "the person credited with being [new judicial federalism's] 'intellectual godfather'" (quoting Jeffrey Toobin, Better Than Burger: States' Rights for Liberals, New Republic, Mar. 4, 1985, at 10, 11)); see also Hershkoff, Introductory Remarks, supra note 49, at 1898–99 (explaining that crediting the turn to state constitutionalism solely to Justice Brennan "would be shortsighted and misleading; in particular, it overlooks the important work of scholars and jurists who had pressed state constitutional claims before his critical intervention"); Hans A. Linde, Without "Due Process": Unconstitutional Law in Oregon, 49 Or. L. Rev. 125, 135 (1970) ("Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action . . . under the fourteenth amendment."); Adam Liptak, Hans A. Linde, Iconoclastic Legal Scholar, Dies at 96, N.Y. Times (Sep. 2, 2020), https://www.nytimes.com/2020/09/02/us/hans-a-linde-dead-96.html?smid=url-share (on file with the *Columbia Law Review*) ("That approach became known as the 'new judicial federalism,' and Justice Linde is widely recognized as its most important theorist. . . . Justice William J. Brennan Jr. . . . was a notable champion of the movement . . . .").

101. See Andrew Manuel Crespo, Systemic Facts: Toward Institutional Awareness in Criminal Courts, 129 Harv. L. Rev. 2049, 2068–74 (2016) (discussing criminal courts as institutions and all of the information they collect).

102. See Liu, supra note 24, at 1322 (discussing how complex, fact-bound problems are often not amenable to national solutions).

framers.[103] By the Founding, most states had already constitutionalized search-and-seizure protections, and the Fourth Amendment itself borrowed directly from some of those state provisions.[104]

But states are not a monolith (neither are jurisdictions within a state). Thus, the racial harms distributed by local criminal legal systems were not the same nationwide.[105] Moreover, just because states had long protected against unreasonable searches and seizures does not mean that states had enacted robust protections against search-and-seizure practices that had distinct racialized effects. Thus, part of the impetus behind the Warren Court's federalization of criminal procedure was to provide protections in the jurisdictions where defendants, particularly Black defendants, needed them most.[106]

But the Warren Court's "most aggressive [criminal procedure] decisions drew criticism from coast-to-coast, [fared] poorly in major public opinion polls, triggered contrary legislation, and even inspired a backlash 'law and order' campaign that helped send Richard Nixon to the White House in 1968."[107] Thus, while the Court in *Terry* began its retreat from its rights-enhancing jurisprudence toward the end of Chief Justice Warren's tenure, the retrenchment only accelerated after his departure.[108]

This change in posture from the Court catalyzed renewed attention to state constitutions,[109] which had often (though certainly not always) been treated as coextensive with the federal criminal procedure amendments.[110] Once the Supreme Court started its rightward shift, state courts were reminded—sometimes explicitly by Justices in dissent—that they remained free to interpret their own constitutions more expansively.[111]

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103. Sutton, supra note 24, at 52.

104. Id.; see also Joseph Blocher, Reverse Incorporation of State Constitutional Law, 84 S. Cal. L. Rev. 323, 335 (2011) (explaining that "throughout much of American history, state constitutional interpretation was the most important game in town").

105. See Benjamin Levin, After the Criminal Justice System, 98 Wash. L. Rev. 899, 911 (2023) ("Criminal law and the models of its enforcement and administration vary state to state, city to city, and county to county. At best, then, we have criminal justice *systems*, not a singular criminal justice system." (footnote omitted)).

106. See supra note 73.

107. Lain, supra note 75, at 1364.

108. This is what Professor Eric Miller calls the thesis of the "two Warren Courts," though he disagrees with this framing. See Miller, Regulatory Revolution, supra note 75, at 4; see also supra notes 99–100 and accompanying text.

109. See Brennan, State Constitutions and the Protection of Individual Rights, supra note 15, at 491 ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

110. See LaFave et al., supra note 30, § 2.21(a).

111. See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 338–39 (1976) (Brennan, J., concurring in part and dissenting in part) ("If this Court's insensitivity to the Fifth Amendment violation present in this case portends still more erosion of the privilege, state courts and legislatures will remember that they remain free to afford protections of our basic liberties as a matter of state law."); Michigan v. Mosley, 423 U.S. 96, 121 (1975)

The Fourth Amendment quickly became a visible arena in which that reminder took hold.[112] Indeed, comprehensive studies mapping state departures from Supreme Court precedent show that, while such departures are rare overall, they occur with relative frequency in Fourth Amendment cases.[113]

At the same time, most states continue to interpret their search-and-seizure provisions in lockstep with federal doctrine.[114] As one account put it, roughly two-thirds of state court rulings "either affirmatively or by indecision" continue to mirror the Supreme Court's Fourth Amendment rulings.[115] That said, at least one account has also found that "a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree."[116] This means that across the states, there is no uniformity in when states defer to the Supreme Court's Fourth Amendment rulings, and even within states

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(Brennan, J., dissenting) ("Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court."); Texas v. White, 423 U.S. 67, 72 (1975) (Marshall, J., dissenting) ("In any event, it should be clear to the court below that nothing this Court does today precludes it from reaching the result it did under applicable state law."); Oregon v. Hass, 420 U.S. 714, 727–28 (1975) (Marshall, J., dissenting) ("The Constitution of Oregon contains an independent prohibition against compulsory self-incrimination . . . .").

112. See State v. Short, 851 N.W.2d 474, 486 (Iowa 2014) ("As a result of the United States Supreme Court's retreat in the search and seizure area, there has been a sizeable growth in independent state constitutional law."); Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1864 (noting the focus on state departures from the Supreme Court on doctrines related to searches and seizures).

113. LaFave et al., supra note 30, § 2.12(a) ("[H]undreds of state appellate court decisions . . . held state constitutions to be more protective of individual rights than the federal constitution as interpreted by the Burger and Rehnquist Courts . . . . [O]ver two hundred such state court rulings had been issued over the 1970s and 1980s . . . ."). For examples of these studies, see Faulkner & Green, supra note 30, at 211–13; Stephen E. Henderson, Learning From All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information From Unreasonable Search, 55 Cath. U. L. Rev. 373, 376, 394–95 (2006) (categorizing constitutional doctrine in each of the fifty states).

114. Faulkner & Green, supra note 30, at 198–200 (noting that departure "is thus very rare: less than one departing state per case at the Supreme Court"). Professor Kathryn Urbonya has explored a related but different issue: the Supreme Court's using of state law to define the scope of the Fourth Amendment. Kathryn R. Urbonya, Fourth Amendment Federalism? The Court's Vacillating Mistrust and Trust of State Search and Seizure Laws, 35 Seton Hall L. Rev. 911, 911 (2005).

115. LaFave et al., supra note 30, § 2.12(a) (internal quotation marks omitted) (quoting Barry Latzer, State Constitutions and Criminal Justice 165 (1991)). Professor James Gardner has argued that there has not been a systematic pattern of state departures in part because of the "poverty of state constitutional discourse," meaning there has not been the same sustained attention to state constitutions as there has been to the federal Constitution. Gardner, Failed Discourse, supra note 30, at 766.

116. *Short*, 851 N.W.2d at 486. As former Wisconsin Supreme Court Justice Shirley Abrahamson explained, "Extensive court experimentation with state constitutional interpretation has taken place in [criminal] law." Abrahamson, supra note 27, at 1144.

sometimes courts will defer to the Supreme Court on certain Fourth Amendment questions, but depart under their state constitutions when deciding others. In practice, then, new federalism has produced pockets of difference in the Fourth Amendment arena rather than a wholesale alternative constitutional order.

* * *

There is an established though uneven practice of state courts departing from federal Fourth Amendment doctrine when interpreting their state constitutional analogs. And as will be explained later, more recently, those departures have focused on the relevance of race to a search or seizure.

II. THE FOURTH AMENDMENT'S RACIAL OBLIVIOUSNESS

If the Warren Court is famous for its criminal procedure revolution that was silently doing racial justice work, the Courts since are better known for constructing a Fourth Amendment doctrine oblivious to the racial realities of policing. Over the last half-century, the Burger, Rehnquist, and Roberts Courts have handed down a series of search-and-seizure cases that ignore how race shapes suspicion, compliance, and fear in police encounters.

This Part does not attempt to catalog every instance in which the Court has erased race from its Fourth Amendment analysis. Instead, it focuses on three doctrinal clusters that together illustrate the racial obliviousness of modern search-and-seizure law: pretextual seizures, consent and voluntariness, and flight-based suspicion. This Part focuses on these doctrinal clusters not only because they have been the subject of sustained scholarly critique,[117] but also because, when viewed together, they create a permission structure for some of the most pernicious racialized policing that occurs today. By permitting pretextual policing, the jurisprudence allows police to engage in racial profiling. By divorcing the jurisprudential conception of consent from any lived notion of the term, the jurisprudence removes many police encounters from the bounds of the Constitution despite the coercion that most people, especially people of color, would likely feel. And by treating flight as a building block for suspicion, the jurisprudence penalizes the entirely rational response a person of color socialized in the United States might have to police. In other words, while these decisions are not the only decisions that have contributed to the problem of racialized policing, they are critical to the architecture that renders it constitutional. By examining these decisions, this Part clarifies the federal constitutional baseline against which state courts have begun to chart a different course.

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117. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 926–28 (noting that "scholars routinely lay the blame at the feet of the Supreme Court").

A. *Pretextual Seizures*

Under current constitutional doctrine, police can not only seize someone based on the amorphous standard of reasonable suspicion but also legitimate that seizure through pretextual justifications. In *Whren v. United States*, "plainclothes vice-squad officers" in an unmarked car were patrolling a "high drug area" of Washington, D.C.[118] The officers observed a Nissan Pathfinder with two "youthful" Black men inside linger at a stop sign "for what seemed an unusually long time," turn right "without signaling," and then pull away at what the officers described as an "'unreasonable' speed."[119] The officers decided to stop the truck for the traffic infractions, and when they approached the driver's window, they saw plastic bags of crack cocaine in Mr. Whren's hands.[120]

The defendants in *Whren* argued that the Court should consider whether the stop was pretextual and that the officers' *actual* motivations should matter, especially in the traffic-stop context, in which an officer can always find a reason to pull a person over.[121] Indeed, one of the officers testified that they were patrolling the neighborhood "almost strictly to do drug investigations"—traffic infractions were not part of their beat.[122] Put more bluntly, the *Whren* defendants argued that the officers did not care about the traffic offenses; they stopped them because they were young Black men in an alleged high-crime area.[123]

A unanimous Court refused to consider whether the stop was pretextual, holding that an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[124] The Court understood the stakes of the case, as it acknowledged that "Petitioners, who are both black, . . . contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants."[125] Yet the Court said that such a concern is beyond the scope of the Fourth Amendment.[126]

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118. 517 U.S. 806, 808 (1996) (internal quotation marks omitted).

119. Id. at 808, 810.

120. Id. at 809.

121. Id. at 809–10.

122. Brief for the Petitioners at 7, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758 (internal quotation marks omitted) (quoting Efrain Soto, Jr., Officer, D.C. Metro. Police Dep't); see also id. (noting that the officer also testified that he did "[n]ot very often" pull people over for traffic violations (internal quotation marks omitted) (quoting Efrain Soto, Jr., Officer, D.C. Metro. Police Dep't)).

123. See id. at 23–27 (discussing the racial profiling of Black and Hispanic people).

124. *Whren*, 517 U.S. at 813.

125. Id. at 810.

126. Id. at 813. The Court said that Black people who are subject to racial profiling can seek redress under the Equal Protection Clause, see id., but selective enforcement claims are notoriously difficult to bring. See Barry Friedman, Unwarranted: Policing Without Permission 188–89 (2017) (calling for a more robust application of equal protection doctrine to discriminatory policing).

Scholars were immediately critical.[127] As Professor Devon Carbado summarizes: "*Whren* is problematic not only because it creates an incentive for police officers to continue to perform pretextual stops, but also because it legalizes those stops, which helps make them an institutional practice."[128] In other words, *Whren* "effectively constitutionalized racial profiling."[129]

Pretextual policing, and thus racial profiling, is remarkably easy given that federal, state, and local criminal codes are incredibly bloated.[130] As such, police can find probable cause to stop *anyone* if they think hard enough, and the *Whren* Court said the Fourth Amendment does not care if the justification for that stop was pretextual. By so holding, the Court gave short shrift to the "fear, anxiety, humiliation, anger, resentment, and cynicism" that people of color feel "when they are unjustifiably treated as criminal suspects."[131] And with that, *Whren* joined a body of Fourth Amendment case law that shows a "systematic disregard for the distinctive concerns of racial minorities."[132]

B. *"Consent"*

Schneckloth v. Bustamonte is the Supreme Court's foundational consent case.[133] That case arose from a late-night traffic stop in California, when police pulled over a car for a "burned out" headlight and license-plate

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127. See, e.g., Albert W. Alschuler, Racial Profiling and the Constitution, 2002 U. Chi. Legal F. 163, 192–96; Carbado, (E)racing the Fourth Amendment, supra note 1, at 1032–34; David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 582 (1997) [hereinafter Harris, "Driving While Black" and All Other Traffic Offenses]; Kevin R. Johnson, How Racial Profiling in America Became the Law of the Land: *United States v. Brignoni-Ponce* and *Whren v. United States* and the Need for Truly Rebellious Lawyering, 98 Geo. L.J. 1005, 1065–75 (2010); Andrew D. Leipold, Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law, 73 Chi.-Kent L. Rev. 559, 566–68 (1998); Wesley MacNeil Oliver, With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling, 74 Tul. L. Rev. 1409, 1413–14 (2000).

128. Devon W. Carbado, Unreasonable: Black Lives, Police Power, and the Fourth Amendment 83 (2022) [hereinafter Carbado, Unreasonable].

129. Devon W. Carbado & Jonathan Feingold, Rewriting *Whren v. United States*, 68 UCLA L. Rev. 1678, 1688 (2022).

130. See Carbado, Unreasonable, supra note 128, at 82 ("It is only slightly hyperbolic to say that to drive a car is to violate some provision of a vehicle code."); Lauryn P. Gouldin, Redefining Reasonable Seizures, 93 Denv. L. Rev. 53, 98 (2015) ("In other words, an assumption that probable cause works as a reasonable proxy for the government's need for a particular seizure does not hold up as criminal codes become bloated.").

131. End Racial Profiling Act of 2001, S. 989, 107th Cong. § 2(a)(8) (2001) (detailing findings of Congress when proposing legislation to curb racial profiling).

132. Sklansky, supra note 9, at 274.

133. 412 U.S. 218 (1973); see also Tracey Maclin, The Good and Bad News About Consent Searches in the Supreme Court, 39 McGeorge L. Rev. 27, 29 (2008) (calling *Bustamonte* a "seminal" consent case).

light.[134] Six men were in the car.[135] Among them were Joe Gonzales, the driver, and Robert Bustamonte and Joe Alcala—who were in the front seat.[136] The officers asked the men for identification, and only Mr. Alcala could produce his driver's license.[137] All six men were then ordered out of the car, and reinforcements were called.[138] The officers asked for consent to search the vehicle, to which Mr. Alcala purportedly replied, "Sure, go ahead."[139] The men were never told they were free to refuse permission. Under the backseat, the police found three stolen checks.[140]

On appeal, the Ninth Circuit had held that the evidence uncovered during the search had to be suppressed because, for a consent search to be valid, the government must prove "not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withheld."[141] The Supreme Court reversed. The Court concluded that the fact that police did not inform the individuals that they were free to withhold consent was not dispositive.[142] As the Court saw it, while a person's "knowledge of a right to refuse" might be one "factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."[143]

Scholars have explained that *Bustamonte* and the Court's consent case law more broadly ignores the fact that "[m]ost, if not all, black people—especially black men—are apprehensive about police encounters."[144] This apprehension is born from the fact that many Black people in America "grow up with racial stories of police abuse—witnessing them as public spectacles in the media, observing them firsthand in their communities, and experiencing them as daily realities."[145] This is even more true today

134. *Bustamonte*, 412 U.S. at 220.

135. Id.

136. Id. Although the opinion does not discuss the race or ethnicity of the six passengers, at least one scholar has asserted that "Bustamonte and his companions appear to have been hispanic." Sklansky, supra note 9, at 322 n.238.

137. *Bustamonte*, 412 U.S. at 220.

138. Id.

139. Id. (internal quotation marks omitted).

140. Id.

141. Id. at 221–22.

142. Id. at 227–28.

143. Id. at 249.

144. Carbado, (E)racing the Fourth Amendment, supra note 1, at 985; see also Alafair S. Burke, Consent Searches and Fourth Amendment Reasonableness, 67 Fla. L. Rev. 509, 516–25 (2015) (tracing the Supreme Court's modern consent cases); Kate Weisburd, Criminal Procedure Without Consent, 113 Calif. L. Rev. 697, 703 (2025) (describing the robust scholarly criticisms of the Supreme Court's consent doctrine).

145. Carbado, (E)racing the Fourth Amendment, supra note 1, at 985.

in the age of the cellphone and social media, where videos of police violence are omnipresent.[146]

Yet the Court has never grappled with the fact that Black people and other people of color may "consent" to police requests out of fear of what might happen if they say no.[147] And the Court has never stopped to ponder that informing someone of their right to refuse might help alleviate the coerciveness of the encounter, bringing it closer to what any reasonable person would consider consensual.[148] The result is a body of law that treats submission as choice, which in the process flattens the profound racial asymmetries that shape police–citizen encounters.

C. *Flight*

A final paradigmatic example of the Court's racial obliviousness in its Fourth Amendment case law is its association of flight from police with criminality in *Illinois v. Wardlow*.[149] Around lunchtime one September day in 1995, a four-car police caravan descended on a "high crime" neighborhood on the West Side of Chicago to "investigate drug transactions."[150] Sam Wardlow, who was Black,[151] was standing outside a building holding a

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146. See Miles v. United States, 181 A.3d 633, 641 (D.C. 2018) (referring to the defendant's argument that "the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests" illustrates that a Black person's fear of police cannot be characterized as "exaggerated" (internal quotation marks omitted) (first quoting Brief for Appellant at 33, *Miles*, 181 A.3d 633 (No. 13-CF-1523); then quoting In re D.J., 532 A.2d 138, 142 n.4 (D.C. 1987))); Lia Epperson, Are We Still Not Saved? Race, Democracy, and Educational Inequality, 100 Or. L. Rev. 89, 99 (2021) ("With the advent of smartphone cameras and social media campaigns, horrific examples of this violence landed in the news feeds of individuals of all races, creeds, colors, and economic backgrounds across the United States and around the world.").

147. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 950 ("Black people are taught to be especially 'deferential' to police in an attempt to offset the criminality associated with Blackness." (quoting Capers, The Good Citizen, supra note 1, at 696)); see also Capers, The Good Citizen, supra note 1, at 696 (stating that "[p]artially as a result of the Court's jurisprudence," Black people must be "extra deferential" to police); Kristin Henning, The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment, 67 Am. U. L. Rev. 1513, 1553 (2018) (arguing the Court has overlooked the "current strain in police-black relations"); Eric J. Miller, Encountering Resistance: Contesting Policing and Procedural Justice, 2016 U. Chi. Legal F. 295, 315 (asserting that the Court failed to grapple with the fact that Black people "might feel particularly incapable of resisting the police officer's polite 'May I?'"); Roseanna Sommers & Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L.J. 1962, 1975 (2019) (contending the Court "ignore[d] racial differences in how people respond to police").

148. See Carbado, Unreasonable, supra note 128, at 50–51 (discussing *Bustamonte*'s holding that officers do not need to inform individuals of their "right to refuse consent").

149. See 528 U.S. 119, 124–25 (2000).

150. Id. at 121, 123.

151. Neither the Supreme Court's opinion nor the Illinois appellate courts' opinions mention Mr. Wardlow's race. See Butler, The White Fourth Amendment, supra note 1, at 250.

bag when he saw the caravan and took off running.[152] Two officers turned their car around, watched him run down an alley, and "cornered him."[153] One of the officers "immediately" searched Mr. Wardlow for weapons because, in the officer's experience, "it was common for there to be weapons in the near vicinity of narcotics transactions."[154] The officer then searched the bag Mr. Wardlow was holding and discovered a gun.[155] Mr. Wardlow argued that the officers violated his Fourth Amendment rights because they lacked reasonable suspicion to stop and search him.[156] The Illinois Supreme Court agreed, holding that "neither a person's mere presence in an area where drugs are sold nor sudden flight alone will justify a *Terry* stop."[157]

The Supreme Court reversed. The Court reasoned that although "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime[,] . . . it was not merely [Mr. Wardlow's] presence . . . that aroused the officers' suspicion, but [also] his unprovoked flight upon noticing the police."[158] The Court concluded that these two facts together—"unprovoked flight" in a "high crime area"—"justified" the officers "investigating further."[159] The Court acknowledged "that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity."[160] Even so, the *Wardlow* Court emphasized that "*Terry* accepts the risk that officers may stop innocent people."[161]

Wardlow is subject to two common race-based critiques: "the use of 'high crime areas' in the reasonable suspicion calculus" and the Court's "failure to acknowledge that people of color, particularly Black people, may have any number of innocent reasons to run at the sight of police given America's history of racialized policing."[162] Focusing on flight, scholars have criticized *Wardlow* for being "ostentatiously indifferent"[163] to the fact that "there are too many innocent reasons for black [people] to be nervous and flee from police to infer criminal intent from those

152. *Wardlow*, 528 U.S. at 121–22.

153. Id. at 122.

154. Id.

155. Id.

156. People v. Wardlow, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997), aff'd, 701 N.E.2d 484 (Ill. 1998), rev'd, 528 U.S. 119 (2000).

157. *Wardlow*, 701 N.E.2d at 487 (citations omitted) (internal quotation marks omitted) (quoting *Wardlow*, 678 N.E.2d at 67).

158. *Wardlow*, 528 U.S. at 124 (citing Brown v. Texas, 443 U.S. 47 (1979)).

159. Id. at 124–25 (internal quotation marks omitted) (quoting Adams v. Williams, 407 U.S. 143, 144 (1972)).

160. Id. at 125.

161. Id. at 126.

162. Harawa, Whitewashing the Fourth Amendment, supra note 2, at 943.

163. Andrew E. Taslitz, Stories of Fourth Amendment Disrespect: From Elian to the Internment, 70 Fordham L. Rev. 2257, 2299 (2002).

behaviors."[164] Beyond being racially obtuse, *Wardlow*'s *flight + high-crime neighborhood = reasonable suspicion* formulation has far-reaching consequences for people of color's ability to exist in the world.[165] Communities of color are disproportionately designated as "high crime," meaning that *Wardlow*'s rule uniquely constrains their ability to avoid police encounters in the very neighborhoods where they live.[166] As such, not only did the Court render unimportant the fact that people of color may have myriad innocent reasons to avoid the police, but *Wardlow* also effectively limited their ability to avoid police contact in their own communities.

* * *

The Supreme Court has not merely failed to grapple with the racial dynamics of policing but also built a body of Fourth Amendment law that renders those dynamics constitutionally irrelevant. In case after case, the Court has abstracted away from the realities of race and policing, with the Court not showing any concern for how Black people in particular experience policing.[167] The result is a doctrine that looks past, if not outright legitimizes, the racialized policing commonplace in the United States today.

III. STATE COURTS COLORING IN THEIR FOURTH AMENDMENT ANALOGS

State courts across the country—from east to west, red and blue—have not moved in lockstep with the Supreme Court's race-oblivious case law. And these state courts have refused to move in lockstep for different reasons. Some emphasized their more expansive constitutional provisions. Others expressed concern with realities on the ground. Still others invoked institutional competence, insisting that state courts are better positioned to protect their citizens from unreasonable police practices.

Although the state court decisions examined below weigh these considerations differently, virtually all emerge from the same terrain, drug enforcement and gang policing—forms of policing that have long been concentrated in communities of color. In some opinions, race is named directly and treated as constitutionally salient. In others it remains implicit, surfacing through discussions of discretion, coercion, and fear. But even

164. Henning, supra note 147, at 1541.

165. See Elise C. Boddie, Racially Territorial Policing in Black Neighborhoods, 89 U. Chi. L. Rev. 477, 495 (2022) (explaining that *Wardlow* instills in Black communities a "heightened sense that danger at the hands of the police is always around the corner").

166. Id. at 493–97; see also Trevor George Gardner, Police Violence and the African American Procedural Habitus, 100 B.U. L. Rev. 849, 869 (2020) (suggesting that law-abiding African American residents in "high-crime areas" would feel the walls closing in after *Wardlow* (internal quotation marks omitted)).

167. For a comprehensive account of how Fourth Amendment jurisprudence has legalized racial profiling, see generally Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125 (2017) [hereinafter Carbado, From Stopping Black People to Killing Black People].

where courts do not explicitly discuss race, the cases still reflect a sensitivity to how policing plays out on the ground in ways the Supreme Court's case law does not.

Organized around the three Supreme Court cases discussed in Part II, this Part shows how state courts have interpreted their Fourth Amendment analogs to better address the racial realities of policing. In so doing, it looks beyond the opinions themselves to the arguments that produced them, examining how litigants persuaded state courts to depart from federal doctrine. What follows likely represents the full universe of departures from the specific Supreme Court cases discussed above. That said, in reading this Part, it is important not to get bogged down in the number of cases in which state courts have charted a different path from the Supreme Court, because the point is *not* to show that they are deviating from the Supreme Court en masse. Rather, it is to show that some have and to examine how they got there. The value of these cases lies not in their quantity, but in what they teach about the conditions under which state courts are willing to interpret their constitutions independently of the Supreme Court's race-blind Fourth Amendment jurisprudence.

A. *Against Pretext*

Since *Whren* blessed pretextual stops under the Fourth Amendment, several state courts have rejected the notion that their state constitutions permit pretextual policing. And race played a role, to varying degrees, in their decisions to depart from the Supreme Court. Although these courts took different paths, their decisions share common concerns about unfettered police discretion, the realities of overly broad traffic codes, and the risk that pretextual law enforcement facilitates discriminatory policing.[168]

1. *Washington.* — In *State v. Ladson*, two officers were on "proactive gang patrol"—a detail that did not involve routine traffic enforcement.[169] Based on a "street rumor," the police followed a car driven by two Black men and stopped it for license tabs being five days out of date.[170] The minor traffic infraction was indisputably pretextual.[171] The officers then ordered Mr. Ladson out of the car, searched him, and during the search, discovered contraband.[172]

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168. There have been other instances where lower state courts have refused to follow *Whren* when applying state constitutional standards, only to be reversed by the state high court. See, e.g., State v. Heath, 929 A.2d 390, 402 (Del. Super. Ct. 2006), abrogated by Juliano v. State, 254 A.3d 369, 386 (Del. 2020) (en banc); People v. Dickson, 690 N.Y.S.2d 390, 397 (Sup. Ct. 1998), rev'd sub nom. People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001). By contrast, the Supreme Judicial Court of Massachusetts attempted to curb pretextual racial stops by making equal protection claims easier to prove under its state constitution. See Commonwealth v. Long, 152 N.E.3d 725, 733 (Mass. 2020).

169. 979 P.2d 833, 836 (Wash. 1999).

170. Id.

171. Id.

172. Id.

The Washington Supreme Court held that the pretextual stop was unconstitutional under the state's search-and-seizure constitutional provision.[173] The court grounded its decision to depart from *Whren* based on the state's unique constitutional text, which protects against intrusions on one's "private affairs."[174] As the court explained, this language is "explicitly broader than that of the Fourth Amendment" and "places greater emphasis on privacy" than the federal Constitution.[175] And the court focused on conditions specific to Washington, emphasizing how the breadth of state traffic laws and local traffic ordinances makes it easy for officers to stop almost any vehicle.[176] This caused the court to declare that "the citizens of Washington have held, and are entitled to hold, a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement."[177]

The racial implications of pretextual policing were not surfaced in the court's opinion, although at oral argument, one justice raised the concern that if the court were to allow pretextual stops, "what would . . . stop the police from [targeting] Hispanics or Blacks?"[178] Mr. Ladson's briefing was more explicit, noting that the "*Whren* decision has generated intense scholarly criticism" and that "pretextual traffic stops have also generated founded allegations of racial discrimination in several states."[179] He therefore implored the court not to "condone pretextual traffic stops," as they give police officers license "to harass members of groups identified by facts that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin."[180]

2. *Arkansas*. — The Arkansas Supreme Court likewise rejected *Whren* in *State v. Sullivan*, in which a narcotics officer stopped Kenneth Sullivan

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173. Id. at 842. Washington's analog to the Fourth Amendment provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7.

174. See *Ladson*, 979 P.2d at 837–38 (internal quotation marks omitted) (quoting Wash. Const. art. I, § 7).

175. Id. at 837 (citing State v. Young, 867 P.2d 593, 596 (Wash. 1994)).

176. See id. at 839 nn.4–5 (citing state and local ordinances); id. at 842 n.10 (explaining how "virtually the entire driving population is in violation of some regulation as soon as they get in their cars" (internal quotation marks omitted) (quoting Peter Shakow, Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of *Whren v. United States*, 24 Am. J. Crim. L. 627, 633 (1997))).

177. Id. at 842.

178. See Oral Argument at 25:22–25:49, *Ladson*, 979 P.2d 833 (No. 65801-3), https://tvw.org/video/supreme-court-oral-arguments-174/?eventID=1998051032 (on file with the *Columbia Law Review*).

179. Amended Supplemental Brief of Petitioner at 3, *Ladson*, 979 P.2d 833 (No. 65801-3), 1998 WL 34360178.

180. Id. at 20 (internal quotation marks omitted) (quoting United States v. Scopo, 19 F.3d 777, 785–86 (2d Cir. 1994) (Newman, J., concurring)). The Washington Supreme Court later held that mixed motive stops are permissible under the state constitution. See State v. Arreola, 290 P.3d 983, 991 (Wash. 2012).

for going five miles above the speed limit[181] and used Mr. Sullivan's inability to produce his registration and proof of insurance as a pretext to search for drugs based on "intelligence" he had.[182]

In holding the state constitution prohibited this type of pretextual search, the Arkansas Supreme Court accepted that the search would be constitutional under the Fourth Amendment as interpreted by *Whren*.[183] And the court even noted that, at times, it had "viewed the protections of [the state constitutional search-and-seizure provision] to be parallel to those provided by the Fourth Amendment."[184] That said, the court explained that it had not always been in lockstep with federal constitutional interpretation, and here was another place where Arkansas would depart, with the Arkansas Supreme Court declaring: "Unlike the United States Supreme Court, this court has considered pretextual arrests to be unreasonable . . . ."[185] Despite the text of the Arkansas Constitution and the federal Constitution being materially indistinguishable, the court relied on its own independent judgment of what it deemed "unreasonable" to hold that pretextual stops are unconstitutional under the state constitution.[186]

3. *New Mexico*. — New Mexico addressed pretextual stops in *State v. Ochoa*.[187] There, police officers used an alleged seatbelt violation as pretext

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181. (*Sullivan I*), 11 S.W.3d 526, 526–27 (Ark. 2000), rev'd per curiam, 532 U.S. 769 (2001).

182. Id. at 527–28.

183. See State v. Sullivan (*Sullivan III*), 74 S.W.3d 215, 221 (Ark. 2002), overruled by Gamble v. State, 729 S.W.3d 661 (Ark. 2026).

184. Id. at 217. Arkansas's Fourth Amendment analog states:

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

Ark. Const. art. 2, § 15.

185. *Sullivan III*, 74 S.W.3d at 218. The Arkansas Supreme Court would later limit *Sullivan* to only pretextual arrests, not pretextual stops. See State v. Harmon, 113 S.W.3d 75, 79–80 (Ark. 2003). Arkansas's departure is even more remarkable because it at first held that the pretextual stop was unconstitutional under the Fourth Amendment by asserting its power to "interpret[] the U.S. Constitution more broadly than the United States Supreme Court." State v. Sullivan (*Sullivan II*), 16 S.W.3d 551, 552 (Ark. 2000). The Supreme Court summarily reversed, categorically rejecting the Arkansas Supreme Court's assertion "that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide." *Sullivan*, 532 U.S. at 772. So, on remand, the Arkansas Supreme Court turned to the state constitution to afford greater protections, a shining moment for new federalism. See *Sullivan III*, 74 S.W.3d at 217.

186. *Sullivan III*, 74 S.W.3d at 218. While *Sullivan* is certainly a triumph for new federalism, as will be discussed in Part IV, the Arkansas Supreme Court recently overruled the decision and decided to move in lockstep with the U.S. Supreme Court. See *Gamble*, 729 S.W.3d at 667–68.

187. State v. Ochoa (*Ochoa III*), 206 P.3d 143 (N.M. Ct. App. 2008).

to facilitate a narcotics investigation.[188] The New Mexico Supreme Court held that the stop was reasonable under the Fourth Amendment but then remanded to the New Mexico Court of Appeals to determine "whether the stop was pretextual and, if so, whether [New Mexico's constitutional search-and-seizure provision]"—which is also materially indistinguishable from the Fourth Amendment—"prohibits pretextual stops."[189]

The New Mexico Court of Appeals held that pretextual stops violate the state constitution, offering a sustained critique of *Whren*.[190] The court described the "widespread criticism" that *Whren* had suffered and emphasized the breadth of traffic regulations and the frequency with which ordinary driving conduct can supply a basis for a stop—something that *Whren* "fail[ed] to acknowledge."[191] The court also confronted *Whren*'s suggestion that concerns about discriminatory enforcement should be addressed through equal protection doctrine rather than search-and-seizure law by noting the practical difficulty of litigating selective enforcement claims, and the limited protection they offer in routine criminal cases, given that suppression is not the remedy for an equal protection violation.[192] The court therefore concluded that the New Mexico Constitution does not allow for pretextual stops because any ruling otherwise "would be an abdication of [the court's] judicial responsibility to meaningfully review police action, ferret out police perjury, weigh the evidence, and guard our citizens' privacy rights."[193]

In arguing that New Mexico should reject *Whren*, Mr. Ochoa's briefing focused squarely on issues of race. Citing a raft of legal scholarship, Mr. Ochoa argued that "[t]he primary concern with pretext stops is that they facilitate racial profiling, the process of singling out drivers based on their race."[194] His reply brief further made clear that the public was also "leery

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188. Id. at 147, 157.

189. State v. Ochoa (*Ochoa II*), 182 P.3d 130, 136 (N.M. 2008). New Mexico's Fourth Amendment analog states:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

N.M. Const. art. II, § 10.

190. See *Ochoa III*, 206 P.3d at 148–51, 155–57 ("[W]e are not persuaded as the *Whren* court was, that probable cause and reasonable suspicion standards are sufficient to limit police discretion to enforcement of traffic offenses.").

191. See id. at 148–50.

192. See id. at 150–51.

193. Id. at 155.

194. Appellant's Reply Brief at 2, State v. Ochoa (*Ochoa I*), 144 P.3d 132 (N.M. Ct. App. 2006) (No. 24,720), 2005 WL 6113459 (internal quotation marks omitted) (quoting Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp. L. Rev. 597, 597 (1999)). Interestingly, Mr. Ochoa's opening brief did not dwell on issues of race in the same way. See Appellant's Brief-in-Chief at 16, *Ochoa I*, 144 P.3d 132 (No. 24,720), 2005 WL 6122972.

if not outraged by [the] use [of racial profiling]."[195] And to reiterate the point, the briefing argued that the "most compelling" reason to depart from *Whren* is the fact that pretextual stops "will be made disproportionately against an identifiable group, such as a racial minority."[196] As the brief concluded, "Not only does racial profiling harm the individual, it also undermines the integrity of the state by making it a tool for discriminatory behavior against a group."[197]

B. *Reconceiving Consent*

State courts have also balked at *Bustamonte*'s account of uninformed consent as an exercise of free choice.[198] Whereas *Bustamonte* treats knowledge of the right to refuse as merely one factor in a totality-of-the-circumstances inquiry, several state courts have required the state to prove that consent was knowingly given.[199] These courts adopted different standards out of an understanding of the coercive realities of policing. And while these courts do not explicitly invoke race in their analyses, each case arose in the highly racialized context of drug policing.[200]

1. *New Jersey.* — The New Jersey Supreme Court was one of the first state courts to break from *Bustamonte*.[201] In *State v. Johnson*, Newark narcotics officers arrived at Mr. Johnson's fiancée's apartment late one night "seeking access to conduct a search."[202] She claimed she did not give the officers permission to enter her apartment, while one of the officers testified that she invited them in.[203] The officers searched her bedroom, including a dresser where Mr. Johnson stored his things; in it, they found

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195. Appellant's Reply Brief, supra note 194, at 2.

196. Id. at 9.

197. Id. (internal quotation marks omitted) (quoting Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp. L. Rev. 597, 618 (1999)). The New Mexico Supreme Court has not deviated from *Ochoa*. See State v. Gonzales, 257 P.3d 894, 897–99 (N.M. 2011).

198. Kate Weisburd has provided an exhaustive account of the various ways that states and cities have addressed consent searches. See Weisburd, supra note 144, at 739–44.

199. The Iowa Supreme Court roundly criticized *Bustamonte*, including the fact that the "use of minor traffic infractions as a springboard to consent searches has generated charges of abuse and racial profiling." State v. Pals, 805 N.W.2d 767, 772 (Iowa 2011). Still, the Iowa Supreme Court left "for another day" the question of "whether a knowing or intelligent waiver of search and seizure rights . . . is required to establish consent under [the state constitution]." Id. at 782. Unfortunately, when that day came, the court decided to follow *Bustamonte*, with the justice who wrote the majority opinion in *Pals* dissenting. See State v. Hauge, 973 N.W.2d 453, 461–63 (Iowa 2022); id. at 470–72 (Appel, J., dissenting); see also *Pals*, 805 N.W.2d at 767 (Appel, J.).

200. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 947 (explaining how the "War on Drugs" was racialized).

201. See State v. Johnson, 346 A.2d 66, 67–68 (N.J. 1975). In fact, Justice Brennan would praise this decision in his seminal article on state constitutional rights. See Brennan, State Constitutions and the Protection of Individual Rights, supra note 15, at 499–500.

202. *Johnson*, 346 A.2d at 70 (Pashman, J., dissenting).

203. Id.

drugs.[204] The trial court suppressed the evidence, concluding that the state had failed to show that any "consent was knowingly, intelligently, voluntarily[,] and unequivocally given."[205]

The New Jersey Supreme Court acknowledged that, as a matter of federal law, *Bustamonte* did not require proof of knowing consent.[206] But the court nevertheless chose to assert its "power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution," holding that under the state constitution, consent searches "must be measured in terms of waiver; I.e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent."[207] The court based its ruling on the realities of police encounters, reasoning:

> Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful.[208]

At bottom, *Johnson* put the burden on the state to show that the person who consented knew they "had a choice in the matter."[209] And because of *Johnson*, the New Jersey State Police developed a "'Consent to Search' form" that affirmatively informed a person that they have a right to refuse or withdraw consent.[210]

Interestingly, Mr. Johnson did not raise the state constitutional claim on his own. Instead, the New Jersey Supreme Court identified the issue

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204. Id.

205. Id. at 67 (majority opinion).

206. See id.

207. Id. at 67–68. New Jersey's Fourth Amendment analog states:

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

N.J. Const. art. I, para 7.

208. *Johnson*, 346 A.2d at 68. While all the justices of the New Jersey Supreme Court agreed that *Bustamonte* should be rejected as a matter of state law, the lone dissenting justice would have gone further, requiring police to inform individuals of their right to refuse consent. See id. at 75 (Pashman, J., dissenting). In the dissent's view, consent searches are so inherently coercive that meaningful consent cannot exist absent an explicit warning that refusal is permitted and will be respected, and that anything short, according to the dissent, "merely pay[s] lip service to the subject's awareness of his rights in an effort to accommodate the convenience of law enforcement at the expense of important personal freedoms." Id. at 76.

The court would later extend *Johnson* to the traffic-stop context. See State v. Carty, 790 A.2d 903, 910 (N.J.), modified, 806 A.2d 798 (N.J. 2002) (mem.).

209. See *Johnson*, 346 A.2d at 68.

210. *Carty*, 790 A.2d at 907.

and requested supplemental briefing after oral argument.[211] In his supplemental brief, Mr. Johnson argued that despite the state search-and-seizure provision being identical to the Fourth Amendment, "more than one reasonable construction of the same words is rational and, in this situation, . . . desirable."[212] As Mr. Johnson pointed out, the U.S. Supreme Court and the New Jersey Supreme Court have "different [perspectives]."[213] Thus, the court accepted Mr. Johnson's argument imploring the court to interpret the New Jersey Constitution to "grant[] rights in a positive form directly to people" and to adopt a "broad, positive, affirmative and realistic construction of the New Jersey Constitution."[214]

2. *Mississippi.* — Mississippi similarly went further than *Bustamonte* in *Penick v. State*.[215] In *Penick*, federal and state drug enforcement agents were in the airport "on an investigation unrelated to [Mr.] Penick," although one of the agents was familiar with Mr. Penick because he had previously been an informant.[216] The agent testified that when Mr. Penick, who had just landed, saw him, Mr. Penick became "very nervous."[217] Outside of the terminal, agents stopped Mr. Penick and escorted him back inside to a police office for questioning.[218] Although not formally arrested, Mr. Penick was questioned by agents, directed to empty his pockets, and told to undress.[219] Mr. Penick testified that he believed he had "to do as he was told" and that no officer advised him that he had a right to refuse.[220] The agents subsequently retrieved Mr. Penick's luggage and, without waiting for Mr. Penick's consent, opened it up and found marijuana.[221]

The Mississippi Supreme Court held that the evidence had to be suppressed.[222] Rejecting *Bustamonte*'s account of consent, and instead drawing on longstanding state precedent, the court held that, under the Mississippi Constitution, the state must prove "there was a knowledgeable waiver . . . of [the] state constitutional right not to be searched."[223] The court

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211. *Johnson*, 346 A.2d at 67–68.

212. Answering Letter Memorandum at 2, *Johnson*, 346 A.2d 66 (No. A-2549-73).

213. Id.

214. Id. at 3; *Johnson*, 346 A.2d at 68.

215. 440 So. 2d 547 (Miss. 1983).

216. Id. at 547.

217. Id. at 548 (internal quotation marks omitted) (quoting Ernest S. Jacobsen, Special Agent, Drug Enf't Admin.).

218. Id.

219. Id.

220. Id. at 550.

221. Id. at 548.

222. Id. at 558.

223. Id. at 551. Mississippi's Fourth Amendment analog states:

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

acknowledged that *Bustamonte* treats knowledge of the right to refuse as but one factor in the Fourth Amendment totality-of-the-circumstances test.[224] But the court refused to adopt that approach in Mississippi, explaining that "neither consistency nor wisdom would be served by our overruling or diluting our own interpretation" of the Mississippi Constitution.[225] While expressing "utmost respect" for the U.S. Supreme Court, the Mississippi Supreme Court insisted on its "sole and absolute right to make the final interpretation of [its] state Constitution," warning that state constitutions are not "balloons to be blown up or deflated every time" the Supreme Court interprets the federal Constitution.[226]

3. *Hawai'i.* — Likewise, in *State v. Trainor*, the Hawai'i Supreme Court expounded the state constitution to create much more stringent legal requirements for consensual searches.[227] There, an officer approached Mr. Trainor while he was hailing a cab outside the airport because he was, among other things, wearing baggy clothing, walking quickly, and traveling alone.[228] At the beginning of the encounter, the officer made clear that she was investigating narcotics trafficking yet told Mr. Trainor that he was free to leave.[229] The questioning became increasingly accusatory and "placed Trainor in the position of having to prove his innocence" to end the encounter.[230] The interrogation escalated to the point that the officer searched Mr. Trainor's bag and began to pat him down, which prompted him to run away; while running, Mr. Trainor pulled a bag of drugs from his waist area and threw it into the foliage.[231]

The Hawai'i Supreme Court determined that suppression was required.[232] The court held that, under the state constitution, not only are police required to inform individuals of both the purpose of their questioning *and* that they are free to go at any time during "walk and talk investigations," but that even with such disclosures, the encounter could still be nonconsensual if coercive in nature.[233] The court grounded its decision in both Hawai'i state precedent and the unique language of the

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Miss. Const. art. 3, § 23.

224. See *Penick*, 440 So. 2d at 550.

225. Id. at 551.

226. Id. at 551–52. Interestingly, the Mississippi Supreme Court also held that suppression was also warranted under the Fourth Amendment because Mr. Penick had been unlawfully seized. Id. at 558.

227. 925 P.2d 818, 828–29 (Haw. 1996) (holding that a seizure may be considered involuntary even when police issue requisite warnings to a person regarding the person's ability to leave).

228. Id. at 820–21.

229. Id. at 821.

230. Id. at 825.

231. Id. at 821–22.

232. See id. at 819.

233. See id. at 828–29.

state's search-and-seizure constitutional provision.[234] Throughout the ruling, the court repeatedly pointed to the coercive nature of police interactions as a reason for its ruling, namely that a reasonable person would be afraid to arouse an officer's suspicion by refusing to answer increasingly invasive questions.[235] The court did not, however, discuss how race affects coerciveness.

In adopting a knowing consent standard, the Hawai'i high court did not openly repudiate *Bustamonte*. Instead, it focused largely on its own previous rulings. But the cases upon which *Trainor* relied *did* directly challenge the Supreme Court's Fourth Amendment case law, adopting an approach "unrestricted in interpreting the constitution of this state to afford greater protection."[236]

4. *Washington.* — In *State v. Ferrier*, the Washington Supreme Court mandated that police must give certain prescribed warnings before they can constitutionally conduct a consent search.[237] That case involved a "knock and talk"—an investigative strategy designed to secure consent to search a home without a warrant.[238] Police had received a tip from Ms. Ferrier's teenage son that his mom was operating a marijuana grow.[239] Unable to verify the tip to get a warrant, police decided to descend on Ms. Ferrier's home to seek her consent to a search.[240] Officers knocked on Ms.

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234. See id. at 824 (citing State v. Kearns, 867 P.2d 903, 907–08 (Haw. 1994); State v. Quino, 840 P.2d 358, 364–65 (Haw. 1992)). Article I, section 7 of the Hawai'i state constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and 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 and the persons or things to be seized or the communications sought to be intercepted.

Haw. Const. art. I, § 7.

235. See *Trainor*, 925 P.2d at 825–30.

236. *Quino*, 840 P.2d at 362 (internal quotation marks omitted) (quoting State v. Texeira, 433 P.2d 593, 597 n.2 (Haw. 1967)); see also *Kearns*, 867 P.2d at 907 (clarifying and applying the analysis of previous rulings). Indeed, one of the Hawai'i justices lamented the fact that the Fourth Amendment, as interpreted by the Court, has "atrophied to the condition of a vestigial organ." *Quino*, 840 P.2d at 365 (Levinson, J., concurring).

237. 960 P.2d 927, 932–33 (Wash. 1998).

238. Id. at 932. A knock-and-talk is when "police go to people's residences . . . and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the 'knock and talk.'" Craig M. Bradley, "Knock and Talk" and the Fourth Amendment, 84 Ind. L.J. 1099, 1099 (2009). As one court explained, this "investigation technique is subject to abuse by law enforcement, as an officer's zeal to gain information can prey on citizens' belief in the honesty of the police." United States v. Boyd, 910 F. Supp. 2d 995, 1003 (W.D. Mich. 2011); see also United States v. Mills, 372 F. Supp. 3d 517, 530 n.5 (E.D. Mich. 2019) (collecting criticisms of knock-and-talks to grant a motion to suppress physical evidence collected during a pat-down and apartment search).

239. *Ferrier*, 960 P.2d at 928.

240. Id.

Ferrier's front door, claimed Ms. Ferrier let them in, and secured her signature on a consent-to-search form.[241] Neither the form nor the officers informed Ms. Ferrier of her right to refuse.[242] The officers then searched the home and found drugs.[243]

Contravening *Bustamonte*, the Washington Supreme Court held that the Washington Constitution requires explicit warnings before consent is deemed valid during a "knock and talk."[244] The court, similarly to *Ladson*, emphasized the fact that the state constitution explicitly protects individuals from disturbance in their "private affairs."[245] But beyond that, the court reasoned that a "knock and talk" is "inherently coercive," creating pressure that makes it likely that "virtually everyone" would accede to a search under those circumstances.[246] Because of those dynamics, the court concluded that meaningful consent cannot exist unless police first inform an individual of three things: the right to refuse consent, the right to revoke consent, and the right to limit the scope of consent.[247] Absent those warnings, the court held, any subsequent consent is vitiated under state constitutional law.[248]

Notably, like the other state courts before it, *Ferrier* did not discuss race.[249] And this race-neutral framing flowed from the briefing in the case in focusing on both the coerciveness of knock-and-talks in general and the particular one Ms. Ferrier was subject to, without discussing how race might amplify the coercive dynamics of this police tactic.[250]

5. *Arkansas*. — The Arkansas Supreme Court also required knowing consent in a case involving a knock-and-talk. In *State v. Brown*, drug task force agents used a knock-and-talk to obtain consent to search a trailer home after receiving uncorroborated tips about drug activity.[251] Three agents approached the trailer and told Ms. Brown that they were investigating the possibility that someone was growing marijuana and that they wanted to investigate.[252] Like the police in *Ferrier*, the agents asked Ms. Brown for consent to search her home without informing her of her right

241. Id. at 929.

242. Id.

243. Id.

244. Id. at 930, 932–33.

245. Id. at 930 (internal quotation marks omitted) (quoting Wash. Const. art. I, § 7).

246. Id. at 933.

247. See id. at 934.

248. See id.

249. Race also did not come up at oral argument. See Oral Argument, *Ferrier*, 960 P.2d 927 (No. 64930-8), https://tvw.org/video/supreme-court-oral-arguments-98/?eventID=1997091068 (on file with the *Columbia Law Review*).

250. See Brief of Appellant, *Ferrier*, 960 P.2d 927 (No. 64930-8), 1995 WL 17217740; Reply Brief of Appellant, *Ferrier*, 960 P.2d 927 (No. 64930-8), 1995 WL 17217742; Supplemental Brief of Respondent, *Ferrier*, 960 P.2d 927 (No. 64930-8), 1997 WL 33824856.

251. 156 S.W.3d 722, 724–25 (Ark. 2004).

252. Id. at 724.

to refuse consent, and they presented her with a consent-to-search form to sign that did not advise her of any right to refuse either, which Ms. Brown signed.[253] The officers then conducted their search and, in the process, found evidence of drugs.[254] Ms. Brown testified at the suppression hearing that she signed the form because she believed she had no choice and did not know she could say "no."[255]

The Arkansas Supreme Court found *Bustamonte*'s treatment of knowledge as one factor in a voluntariness inquiry to be insufficient, holding that the state constitution requires that valid consent to search a home include apprising the resident of the right to refuse.[256] Although the court acknowledged that the Fourth Amendment (as interpreted by *Bustamonte*) does not impose such a requirement, it emphasized that Arkansas is not bound to follow the Supreme Court when interpreting its own constitution.[257] As the court colorfully put it: "Without question, a slavish following of federal precedent would render this court's opinions merely a mirror image of federal jurisprudence, which would carry with it a certain abrogation of our duty to interpret our own state constitution and follow our own state law."[258]

Like the other courts before it, the Arkansas Supreme Court did not discuss how already "inherently coercive" police encounters may be even more coercive for Arkansans of color.[259] Ms. Brown's brief did not invoke race either. It did, however, situate consent searches within the racialized terrain of the "War on Drugs," which, in her words, had produced "more aggressive investigation by police" and "more intrusive methods of getting into people's home," with police "run[ning] roughshod over the rights of individuals against unreasonable search and seizure."[260] The brief was also framed in hyperlocal terms, explaining that Arkansans are not taught and therefore do not "know that they have the right to refuse consent, or if they do know it, they are too intimidated to exercise that right."[261] The brief finally appealed to the fact that the U.S. Supreme Court and the Arkansas Supreme Court have different roles given that the U.S. Supreme Court must make "broad Constitutional rules for a nation of 300 million,"

253. Id.

254. Id.

255. Id. at 725 (internal quotation marks omitted) (quoting testimony of Jaye Brown).

256. See id. at 732.

257. See id. at 729. Arkansas courts have since "reaffirm[ed] the bright-line rule that law enforcement must inform citizens of their right to refuse a warrantless search of their homes *before* an officer may enter, *not after* the warrantless entry has already occurred." Virgil v. State, 603 S.W.3d 603, 604 (Ark. Ct. App. 2020).

258. *Brown*, 156 S.W.3d at 729.

259. Id. at 730.

260. Brief and Argument for Appellee, Jaye M. Brown at 10, *Brown*, 156 S.W.3d 722 (No. CR 03-914), 2003 WL 23696004.

261. Id. at 12–13.

while the Arkansas Supreme Court must "respond[] to the chang[ing] social needs of [its] citizens."[262]

C. *Rejecting Flight*

Before the Supreme Court in *Wardlow* held that "unprovoked flight" in a "high crime area" gives rise to reasonable suspicion,[263] several states had minimized the relevance of flight to the reasonable suspicion calculus.[264] And since *Wardlow*, at least two more states have limited the relevance of flight when applying their state constitutional seizure standards.[265]

1. *Tennessee.* — In *State v. Nicholson*, the Tennessee Supreme Court confronted whether an individual's flight—after being told by police to "hold up"—supplied reasonable suspicion sufficient to justify an investigatory stop.[266] There, detectives were "conducting gang investigations" in a Nashville housing project.[267] The detectives saw people engaging in "various hand-to-hand" transactions, so they decided to speak with several of them "to gather gang intelligence."[268] After unsuccessfully chasing one person, a detective noticed Mr. Nicholson walking nearby and ordered him to "hold up."[269] When Mr. Nicholson instead ran, detectives pursued and apprehended him, discovering cocaine on his person.[270]

The state argued that there was reasonable suspicion to seize Mr. Nicholson because of his flight from police à la *Wardlow*.[271] The Tennessee Supreme Court acknowledged *Wardlow*'s conclusion that "[h]eadlong flight" may be "suggestive" of wrongdoing.[272] But the court declined to adopt *Wardlow*'s inference wholesale. While agreeing that location characteristics and evasive behavior may be relevant, the court rejected the notion that flight from a police command to stop is "certainly suggestive"

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262. Id. at 11–12.

263. Illinois v. Wardlow, 528 U.S. 119, 123–25 (2000).

264. See, e.g., State v. Tucker, 642 A.2d 401, 407 (N.J. 1994); People v. Holmes, 619 N.E.2d 396, 398 (N.Y. 1993).

265. Courts have also resisted the most maximalist reading of *Wardlow* when applying Fourth Amendment standards by still contemplating the innocent reasons for why a person of color might run from police. See, e.g., United States v. Brown, 925 F.3d 1150, 1156–57 (9th Cir. 2019); Miles v. United States, 181 A.3d 633, 641–42 (D.C. 2018); People v. Horton, 142 N.E.3d 854, 858 (Ill. App. Ct. 2019).

266. 188 S.W.3d 649, 652 (Tenn. 2006) (internal quotation marks omitted).

267. Id. at 653 (internal quotation marks omitted) (quoting testimony of Ryan Lockwood, Detective, Metro. Nash. Police Dep't).

268. Id. (internal quotation marks omitted) (quoting testimony of Ryan Lockwood, Detective, Metro. Nash. Police Dep't).

269. Id. (internal quotation marks omitted) (quoting testimony of Ryan Lockwood, Detective, Metro. Nash. Police Dep't).

270. Id. at 654.

271. Id. at 660–61.

272. Id. at 661 (alteration in original) (internal quotation marks omitted) (quoting Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000)).

of criminal activity.[273] Instead, the court emphasized that "innocent reasons for flight abound," including: "fear of retribution for speaking to officers, unwillingness to appear as witnesses, and fear of being wrongfully apprehended as a guilty party."[274] In other words, the Tennessee Supreme Court treated flight as a weak and context-dependent factor that cannot substitute for specific, articulable evidence of criminal conduct.[275]

In discussing the fact that there are "innocent reasons" for flight from police, especially in areas "being investigated for gang activity," the court did not mention race.[276] In fact, its whole discussion on this point was cribbed from the Tennessee Court of Criminal Appeals' opinion below.[277] And while the Court of Criminal Appeals cited Justice John Paul Stevens's *Wardlow* dissent for examples of why innocent people might run from police,[278] it left out Justice Stevens's point that the innocent reasons for running from police are often particularly acute for people of color. As Justice Stevens explained, people of color may reasonably believe "that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."[279] In other words, the Tennessee courts, in cabining *Wardlow*'s reach, did so based on the same concerns that Justice Stevens raised in his *Wardlow* dissent, without

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273. Id. (internal quotation marks omitted) (quoting *Wardlow*, 528 U.S. at 124).

274. Id. (internal quotation marks omitted) (quoting State v. Nicholson, No. M2004-00111-CCA-R3CD, 2005 WL 434646, at *6 (Tenn. Crim. App. Jan. 25, 2005)).

275. Id. at 661–62. In its opinion, the Tennessee Supreme Court also reaffirmed its rejection of California v. Hodari D., 499 U.S. 621 (1991)—a heavily criticized case concerning whether a person is seized if the person does not acquiesce—holding that, as a matter of state constitutional law, a seizure occurs when police pursue a person after a show of authority, regardless of whether the individual submits. *Nicholson*, 188 S.W.3d at 658–59. For criticisms of *Hodari D.*, see Thomas K. Clancy, The Future of Fourth Amendment Seizure Analysis After *Hodari D.* and *Bostick*, 28 Am. Crim. L. Rev. 799, 841–42 (1991); Patrick T. Costello, Case Note, *California v. Hodari D.*: The Demise of the Reasonable Person Test in Fourth Amendment Analysis, 12 N. Ill. U. L. Rev. 463, 495 (1992). Tennessee's Fourth Amendment analog states:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted.

Tenn. Const. art. I, § 7.

276. See *Nicholson*, 188 S.W.3d at 661 (internal quotation marks omitted) (quoting *Nicholson*, 2005 WL 434646, at *6).

277. See id.

278. *Nicholson*, 2005 WL 434646, at *6 (citing Illinois v. Wardlow, 528 U.S. 119, 139 (2000) (Stevens, J., concurring in part and dissenting in part)). While Mr. Nicholson's brief also mentioned the potential for abuse, it, too, elided race. See Brief and Argument on Behalf of Appellee, James D. Nicholson at 14, 19, *Nicholson*, 188 S.W.3d 649 (No. M2004-00111-SC-R11-CD), 2005 WL 3015821.

279. *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part).

mentioning the fact that those concerns were particularly animated by race.

2. *Massachusetts*. — The Massachusetts Supreme Judicial Court rejected the logic of *Wardlow* without ever mentioning the decision by name. In *Commonwealth v. Warren*, Boston police officers were investigating a reported breaking and entering in the Roxbury area.[280] An officer saw two Black men walking approximately a mile from the crime scene, twenty-five minutes after the crime occurred.[281] An officer rode by the two men, "rolled down the passenger's side window and 'yelled out,' 'Hey guys, wait a minute.'"[282] The two men jogged away into a park.[283] A second officer then approached them from the opposite side of the park, and when he said, "[h]ey fellas," Mr. Warren turned and ran back into the park.[284] Officers gave chase and apprehended him, finding a gun near where they seized him.[285] The Commonwealth argued that Mr. Warren's flight, combined with proximity to criminal activity, supplied reasonable suspicion for the stop.[286]

The Massachusetts Supreme Judicial Court disagreed. The court recognized that "evasive conduct" is a factor in the reasonable-suspicion analysis. Still, the court concluded that "flight to avoid [police] contact should be given little, if any, weight as a factor probative of reasonable suspicion."[287] To rule otherwise, explained the court, risks allowing police to "turn a hunch into a reasonable suspicion by inducing the [flight] justifying the suspicion."[288] More striking was the court's candid discussion of how race influences why one may flee from police.[289] Relying on a Boston Police Department study documenting that Black men in "Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations," the court explained that a Black man's running from the Boston police "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[290]

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280. 58 N.E.3d 333, 336 (Mass. 2016).

281. Id. at 336, 338.

282. Id. at 337.

283. Id.

284. Id. (internal quotation marks omitted).

285. Id.

286. Id. at 338–39.

287. Id. at 341.

288. Id. (alteration in original) (internal quotation marks omitted) (quoting Commonwealth v. Stoute, 665 N.E.2d 93, 97–98 (Mass. 1996)).

289. See id. at 342.

290. Id. While the court did not say so explicitly, by not discussing any federal precedents, "it appears that the decision was interpreting Article 14 of the Massachusetts Declaration of Rights, not the Fourth Amendment." Walker v. Femino, 311 F. Supp. 3d 441, 451 n.10 (D. Mass. 2018). Massachusetts's Fourth Amendment analog states:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his

In issuing its sweeping decision, the Massachusetts high court went far further than Mr. Warren even had asked. His briefing did not request any grand pronouncement about the relevance of race to flight from police.[291] To the contrary, his brief only obliquely referenced the racial dynamics of the case by "point[ing] out more than once that [he] was a young Black man, and insinuat[ing] [that his] race and clothing (a hoodie and baggy pants) were the real reason police tried to stop him before he ran away."[292] Still, this was enough for the Massachusetts Supreme Judicial Court to consider the effect of race when it comes to flight and reasonable suspicion.

* * *

In all, these cases reveal a common mode of resistance to the Supreme Court's race-oblivious Fourth Amendment doctrine. In rejecting *Whren*, state courts refused to constitutionalize pretextual policing practices, insisting that reasonableness under their state constitutions requires scrutiny of how police authority is exercised, not merely whether it can be abstractly justified.[293] In departing from *Bustamonte*, state courts grounded their consent doctrine in the structural coercion of police encounters—coercion that is often rendered invisible in federal doctrine, yet experienced most acutely along racial lines.[294] And in discounting the relevance of flight to reasonable suspicion, these state courts incorporated into their analyses a consideration unimportant to *Wardlow*'s account: that the impulse to avoid police may reflect fear and a desire for self-preservation, rather than guilt, particularly in overpoliced communities of color where police presence itself can be a source of danger.[295]

To be sure, the departures cataloged here are the exception rather than the rule.[296] At least eleven state supreme courts have expressly

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> possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Mass. Const. pt. 1, art. 14.

291. See Brief and Record Appendix for the Defendant on Appeal from the Boston Municipal Court at 4–5, 8, Commonwealth v. Warren, 31 N.E.3d 1171 (Mass. App. Ct. 2015) (No. 2013-P-0820), 2013 WL 6211276.

292. Harawa, Whitewashing the Fourth Amendment, supra note 2, at 975.

293. See supra section III.A.

294. See supra section III.B.

295. See supra section III.C.

296. In following the Supreme Court, some states do so under state law (case law or legislation) that mandates that state constitutional rights must be interpreted as coextensive with the federal law. See, e.g., Commonwealth v. Mobley, 160 S.W.3d 783, 784 (Ky. 2005); State v. Lee, 498 S.W.3d 442, 448 (Mo. Ct. App. 2016).

followed *Whren* or have allowed pretextual stops under the state constitution.[297] At least twelve state supreme courts have expressly followed *Bustamonte* or have refused to require informed consent.[298] And at least nine state supreme courts have expressly followed *Wardlow* or held that flight in a high-crime neighborhood gives rise to reasonable suspicion under the state constitution.[299]

But that observation does little work against this Article's thesis. The aim is not to show that state courts routinely reject *Whren*, *Bustamonte*, or *Wardlow*. It is to show that some have and to examine how they got there. The value of these cases lies not in their quantity, but in what they teach about the conditions under which state courts are willing to interpret their constitutions independently of the Supreme Court's race-blind Fourth Amendment jurisprudence.

IV. THE COLORING GUIDE

Taking a step back, when one examines state-court departures from federal Fourth Amendment doctrine, several lessons emerge. First, the familiar logics of new judicial federalism have proven effective in persuading state courts to deviate from Supreme Court precedent. Arguments that emphasize differences in constitutional text, build on existing state precedent, and foreground local conditions of policing align with state courts'

297. See Juliano v. State, 254 A.3d 369, 372 (Del. 2020); Holland v. State, 696 So. 2d 757, 759 (Fla. 1997); Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001); State v. Brown, 930 N.W.2d 840, 854 (Iowa 2019); Gama v. State, 920 P.2d 1010, 1013 (Nev. 1996) (per curiam); People v. Robinson, 767 N.E.2d 638, 640 (N.Y. 2001); City of Dayton v. Erickson, 665 N.E.2d 1091, 1097 (Ohio 1996); State v. Vineyard, 958 S.W.2d 730, 736 (Tenn. 1997); Crittenden v. State, 899 S.W.2d 668, 673 (Tex. Crim. App. 1995) (en banc); Fertig v. State, 146 P.3d 492, 501 (Wyo. 2006); see also Gamble v. State, 729 S.W.3d 661, 668 (Ark. 2026) (discussed infra section IV.C.3). This list does not include courts that have cited *Whren* approvingly without deciding whether a different standard should apply under the state constitution.

298. See Frink v. State, 597 P.2d 154, 169 (Alaska 1979); State v. Jenkins, 3 A.3d 806, 852 (Conn. 2010); State v. Christofferson, 610 P.2d 515, 517 (Idaho 1980); Scott v. State, 782 A.2d 862, 874–75 (Md. 2001); State v. Stemple, 646 P.2d 539, 541 (Mont. 1982); State v. Johnston, 839 A.2d 830, 836–37 (N.H. 2004); State v. Robinette, 685 N.E.2d 762, 769 (Ohio 1997); State v. Flores, 570 P.2d 965, 970 (Or. 1977); Commonwealth v. Cleckley, 738 A.2d 427, 433 (Pa. 1999); State v. Forrester, 541 S.E.2d 837, 841–44 (S.C. 2001); State v. Cox, 171 S.W.3d 174, 184 (Tenn. 2005); State v. One Hundred Seventy-Five Thousand Eight Hundred Dollars, U.S. Currency, 942 P.2d 343, 348 (Utah 1997). This list does not include courts that have cited *Bustamonte* approvingly without deciding whether a different standard should apply under the state constitution.

299. See Woody v. State, 765 A.2d 1257, 1265–66 (Del. 2001) (en banc); C.E.L. v. State, 24 So. 3d 1181, 1184 (Fla. 2009) (per curiam); Padilla v. State, 389 P.3d 169, 172 (Idaho 2016); People v. Thomas, 759 N.E.2d 899, 905–06 (Ill. 2001); Hardister v. State, 849 N.E.2d 563, 569–71 (Ind. 2006); State v. Morgan, 59 So. 3d 403, 405–09 (La. 2011); Washington v. State, 287 A.3d 301, 336 (Md. 2022); State v. Jackson, 772 S.E.2d 847, 849–51 (N.C. 2015); Commonwealth v. Shivers, 360 A.3d 713, 721–22 (Pa. 2026).

institutional self-conception as independent constitutional interpreters responsible for safeguarding the rights of their own citizens.[300]

Second, these cases reveal that state courts have begun—albeit unevenly—to acknowledge why race matters to a search-and-seizure analysis. When courts have engaged race, they have done so by grounding constitutional meaning in lived experience, focusing on the realities of how policing often operates in communities of color. And even when the courts did not explicitly acknowledge race, the facts they confronted were suffused with racial meaning. Significantly, however, courts rarely departed or raised race on their own initiative. Rather, race entered the analysis only after litigants raised it,[301] and even then, courts often relied on social-science research and legal scholarship to justify treating race as constitutionally relevant,[302] revealing the vital role scholarship can play in the new federalism movement.

Finally, the cases illuminate paths not yet fully taken. Although courts often relied on text, precedent, and local conditions to justify their departure, they were more hesitant to lean explicitly on the different democratic relationship many state courts have with their citizens as compared to the Supreme Court. Likewise, few of the state courts squarely confronted the contemporary racial harms of federal Fourth Amendment doctrine as a standalone reason for departure.[303] These underdeveloped arguments suggest additional avenues for state constitutional innovation, especially in a constitutional moment in which the Supreme Court has made clear that racial justice claims will find little purchase at the federal level.

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300. It's important to recognize that some state courts have proposed frameworks for when to depart from federal constitutional law. See, e.g., Kahn v. Griffin, 701 N.W.2d 815, 829 (Minn. 2005) (suggesting seven factors that may "implicate a separate independent analysis under the" state constitution); State v. Hunt, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring) (noting that seven factors should be considered when "invok[ing] [the New Jersey State Constitution] as an independent source for protecting individual rights"); State v. Gunwall, 720 P.2d 808, 812–13 (Wash. 1986) (listing six criteria to consider when determining whether Washington's constitution extends greater rights to its citizens than the U.S. Constitution). There are debates over what mode of analysis state courts should apply when deciding whether to adopt an independent interpretation of the state constitution. See People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986) ("Courts and commentators have identified many considerations and concerns upon which a State court may rely when determining that its Constitution accords greater protection to individual liberties and rights than the protection guaranteed by the Federal Constitution." (citations omitted)). This debate is beyond the scope of the Article. For now, it's enough to say that where states have existing frameworks, the arguments laid out in this Part would need to be made within them.

301. See, e.g., supra section III.C.2.

302. See, e.g., supra section III.A.3.

303. See supra Part III.

A. *Logics of New Federalism*

Reviewing the above state-court departures confirms that arguments amplifying the logics underlying new judicial federalism have been successful in getting state courts to depart from federal Fourth Amendment doctrine. "Proponents of the New Judicial Federalism" have long called for state courts to exercise their independence "by looking to the state constitution's text, history and structure and the underlying values of the state polity that the constitution reflects."[304] The examples highlighted above show that each of these new federalism considerations was important, though none dispositive, in getting state courts to chart an independent course.[305]

1. *Constitutional Text.* — Of the state courts that bucked the Supreme Court's Fourth Amendment case law, only a couple did so by relying on distinctions in state constitutional text. In rejecting pretextual policing and holding any consent must be informed under the state constitution, the Washington Supreme Court grounded its rulings in the state constitutional protection against intrusions on "private affairs"[306]—language that is absent in the Fourth Amendment. As that court explained, this unique constitutional language, "[u]nlike the Fourth Amendment, . . . 'clearly recognizes an individual's right to privacy with *no* express limitations,'" and the fact that the state constitution expressly protects privacy means that, by its text, the protections it provides are greater than those provided by the Fourth Amendment.[307] The Hawai'i Supreme Court made a similar move when providing more stringent protections against "consent" searches, grounding its decision in the unique text of the state's search-and-seizure provision, as Hawai'i's constitution likewise protects against "invasions of privacy."[308]

But textual differences were hardly a prerequisite to departure. In fact, of the examples explored above, all the state constitutional search-and-seizure provisions other than Washington's and Hawai'i's are identical or near-identical to the Fourth Amendment.[309] Yet, these courts still did

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304. James A. Gardner, The Positivist Revolution that Wasn't: Constitutional Universalism in the States, 4 Roger Williams U. L. Rev. 109, 128 (1998); see also Sutton, supra note 24, at 177 (urging state courts to ask "whether state constitutional demand[s] a different answer from federal constitutional law based on local language, context, and history").

305. Professors Anthony Amsterdam and Randy Hertz provide a short but helpful guide in their renowned trial manual for trial lawyers wishing to make independent state constitutional arguments. See Anthony G. Amsterdam & Randy Hertz, Trial Manual 11 for the Defense of Criminal Cases § 17.11 (2026).

306. State v. Ladson, 979 P.2d 833, 837–38 (Wash. 1999) (internal quotation marks omitted) (quoting Wash. Const. art. I, § 7); see also supra sections III.A.1, III.B.4.

307. State v. Ferrier, 960 P.2d 927, 930 (Wash. 1998) (emphasis added by id.) (quoting State v. Young, 867 P.2d 593, 596 (Wash. 1994)).

308. State v. Trainor, 925 P.2d 818, 823–29 & n.6 (Haw. 1996) (internal quotation marks omitted) (quoting Haw. Const. art. I, § 7).

309. See supra Part III.

not believe themselves constrained by the Supreme Court's decisions. Quite the contrary, they understood that the same constitutional language can reasonably bear different meanings, and that, given their distinct institutional roles, it is entirely appropriate for state courts and the Supreme Court to have different perspectives. Thus, the vast majority of the state court departures confirm that the "sine qua non of independence in state constitutional interpretation is not reliance on state-specific [text]; it is *analytical independence*, as opposed to a posture of deference, in evaluating whatever materials are brought to bear on a particular issue."[310]

2. *History.* — Also important to some of the departures was a body of state court precedent providing robust search-and-seizure protections. The Mississippi Supreme Court's refusal to follow *Bustamonte* is evidence of this, as there, the court relied on its longstanding waiver doctrine to hold that consent must be informed, thus refusing to "dilut[e] the strength" of its precedent.[311] The Arkansas Supreme Court's refusal to follow *Whren* reflects a similar dynamic. There, the court emphasized that "[u]nlike the United States Supreme Court, this court has considered pretextual arrests to be unreasonable for over twenty years."[312] This mode of decisionmaking allows state courts to frame their departures less as outright disagreement with the Supreme Court than as a refusal to disturb settled state constitutional understandings.[313]

Beyond state courts relying on their own precedents to depart from federal Fourth Amendment doctrine, states also look to see whether *other* states had strayed from the Supreme Court's precedents. For instance, the New Mexico Court of Appeals pointed to other state court decisions when deciding not to follow *Whren*.[314] Likewise, the Arkansas Supreme Court was "cognizant of" other states' refusal to strictly follow *Bustamonte*.[315] Thus, a history of other states not following the Supreme Court when interpreting their state constitutions creates a permission structure for other courts to do the same, forming a "jurisprudential echo chamber" in which state courts can cite one another.[316]

One final word about history. Although not a focus of the state court opinions discussed above, the Supreme Court's turn to originalism and the text and history of the federal Constitution should also be read as an invi-

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310. Liu, supra note 24, at 1331.

311. Penick v. State, 440 So. 2d 547, 551 (Miss. 1983).

312. *Sullivan III*, 74 S.W.3d 215, 218 (Ark. 2002).

313. There is much to plumb from history that may be helpful in understanding a state court's decision to depart, including any sociopolitical dynamics and other legal developments that were happening at the time of the decision.

314. See *Ochoa III*, 206 P.3d 143, 153 (N.M. Ct. App. 2008) (citing State v. Ladson, 979 P.2d 833, 837–42 (Wash. 1999); State v. Heath, 929 A.2d 390, 402 (Del. Super. Ct. 2006)).

315. State v. Brown, 156 S.W.3d 722, 729 (Ark. 2004).

316. Liu, supra note 24, at 1344. Professor Alan Tarr has described states looking to other states as "horizontal federalism." G. Alan Tarr, Understanding State Constitutions 50–52, 98–99 (1998).

tation to state courts to think independently. It should make state courts question whether they wish to adopt originalism as a methodology to begin with,[317] and if so, how the unique history of the state constitution affects the legal question before them.[318]

3. *Local Conditions.* — Departing state courts also point to local conditions when justifying a different standard from that adopted by the Supreme Court. The Massachusetts Supreme Judicial Court's decision refusing to impute criminality to a Black person's flight from police is the perfect example of this.[319] There, the court held that much weight cannot be attributed to a Black man running from police in part by citing studies showing the racialized policing practices of the Boston Police Department.[320] Similarly, in outlawing pretextual stops, the Washington Supreme Court acknowledged the expansiveness of the state traffic code and also pointed to various municipal codes to explain that allowing for pretextual stops would, in essence, provide police carte blanche to stop whomever they wish.[321] And when the Tennessee Supreme Court minimized the relevance of flight from police to the reasonable suspicion calculus, it was concerned with the realities of gang policing in urban housing projects.[322] That these state courts were concerned with how the standards would operate on the ground is proof of the "practical complexity" of policing, which is highly contingent on local conditions, making it well suited for state-level standards as opposed to the national "one-size-fits-all" approach necessarily embodied by the Supreme Court's decisionmaking.[323]

The takeaway is this: The Fourth Amendment departures cataloged in this Article reveal that the various logics and intuitions that underlie new judicial federalism can act as justificatory tools that state courts can

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317. See generally Chihiro Isozaki & Maryjane Johnson, State Justices Continue to Challenge Originalism, State Ct. Rep. (Aug. 12, 2025), https://statecourtreport.org/our-work/analysis-opinion/state-justices-continue-challenge-originalism [https://perma.cc/LEC7-E9HU] (discussing recent critiques of originalism among state supreme court justices).

318. See Recent Book, 132 Harv. L. Rev. 811, 818 (2018) (reviewing Sutton, supra note 24) (noting that "textual originalism requires state-by-state, individualized analysis").

319. See Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) ("[T]he finding that black males in Boston are disproportionately and repeatedly targeted . . . suggests a reason for flight totally unrelated to consciousness of guilt.").

320. See id. (citing Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, Final Report: An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports 2 (2015), https://raceandpolicing.issuelab-dev.org/resources/25203/25203.pdf [https://perma.cc/58ZA-WBQ8]).

321. See State v. Ladson, 979 P.2d 833, 842 n.10 (Wash. 1999) (quoting Peter Shakow, Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of *Whren v. United States*, 24 Am. J. Crim. L. 627, 633 (1997)).

322. See State v. Nicholson, 188 S.W.3d 649, 661 (Tenn. 2006).

323. Liu, supra note 24, at 1322, 1339; see also Sutton, supra note 24, at 208 ("While national interest groups will invariably favor winner-take-all approaches, complexity often stands in the way. The more difficult it is to find a single answer to a problem, the more likely state-by-state variation is an appropriate way to handle the issue . . . .").

draw on in different combinations. Perhaps most revealing in this context, however, is the relative unimportance of differences in state constitutional texts. What seemed to matter more to these courts in departing from the Supreme Court was their own constitutional precedents and a sense of institutional responsibility—a responsibility heightened by the fact that any standard that the state court sets will shape the countless police–citizen encounters that occur every day within the state.

B. *Making Race Legible*

The state-court Fourth Amendment departures also illuminate the uneven development of when and how race becomes legible within state constitutional search-and-seizure analyses. While by no means universal, some state courts in recent years have begun to acknowledge how race shapes policing when announcing state constitutional search-and-seizure standards in the same scenarios the Supreme Court did not. And from the above departures—both when race is discussed and when it is not—there are important lessons to learn.

Before proceeding, however, one point bears emphasis. Every departure arose in a deeply racialized policing context, regardless of whether the state courts acknowledged these racial realities. Each case involved either gang or drug policing, two domains of law enforcement that have long targeted communities of color.[324] As a result, even when the state courts framed their departures in race-neutral terms, by tightening suspicion standards or limiting the scope of consent searches, they were regulating practices that operate most heavily in racially marginalized communities. Therefore, *any* action to enhance search-and-seizure protections in these contexts can operate to disparately *protect* people of color from racialized police practices.

1. *Political Realities.* — One reason race may appear unevenly in state search-and-seizure doctrine is that state courts operate in different sociopolitical environments. Unlike the Supreme Court, which claims to be

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324. See andré douglas pond cummings & Steven A. Ramirez, Roadmap for Anti-Racism: First Unwind the War on Drugs Now, 96 Tul. L. Rev. 469, 469–70 (2022) ("The War on Drugs (WOD) transmogrified into a war on communities of color early in its history . . . . People of color disproportionately suffer incarceration in the WOD even though people of color use illegal narcotics at substantially lower rates than white Americans." (citing Butler, Chokehold, supra note 84, at 121–22; Patrisse Khan-Cullors & Asha Bandele, When They Call You a Terrorist: A Black Lives Matter Memoir 133–34, 144 (2018); Ibram X. Kendi, Stamped From the Beginning: The Definitive History of Racist Ideas in America 433–36 (paperback ed. 2017); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 1–11 (rev. paperback ed. 2012))); Kim Strosnider, Anti-Gang Ordinances After *City of Chicago v. Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law, 39 Am. Crim. L. Rev. 101, 125 (2002) ("[W]ith gangs, there may be no getting around these racial disparities in enforcement. Authorities consistently assert that many more minorities than whites are members of street gangs. Race thus is bound up in gang crime in a way that it is not necessarily implicated by other crimes . . . ." (footnote omitted)).

removed from political dynamics,[325] state courts are often embedded in state electoral systems, partisan appointment structures, and regional political cultures that likely shape how openly courts feel they are able to engage with contested social questions, with race perhaps being the most contested topic of all.[326] That positioning may sometimes enable courts to respond to local concerns regarding race and policing, but it may also inspire caution in explicitly naming race.

A comparison of how Massachusetts and Tennessee addressed race and flight helps bear this out. Massachusetts's decision in *Commonwealth v. Warren* reflects how local political and institutional context can create space for more direct engagement with race. There, the court relied on a Boston Police Department study documenting racial disparities in police encounters to explain why a Black man's flight from police could not reasonably be treated as strongly indicative of criminal activity.[327] The court's willingness to treat race as relevant to reasonable suspicion was grounded in empirical evidence specific to the community it serves from a city infamous for its fraught racial politics.[328] Beyond that, the Massachusetts Supreme Judicial Court has historically been at the forefront of recognizing race.[329] *Warren*, therefore, not only fell well within that state court's established institutional profile, but the justices on that court also had no reason to fear reprisal, as the Massachusetts judges have life tenure (subject to a mandatory retirement age of seventy).[330]

The Tennessee Supreme Court, however, appeared to face different constraints. When weighing the value of flight in a reasonable suspicion analysis, the Tennessee Supreme Court emphasized the many innocent reasons for avoiding police.[331] The court even underscored that the innocent reasons for flight are more obviously true in heavily policed neigh-

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325. See, e.g., Adam Liptak, Politics Has No Place at the Supreme Court, Chief Justice Roberts Says, N.Y. Times (Sep. 25, 2019), https://www.nytimes.com/2019/09/25/us/politics/chief-justice-john-roberts-interview.html (on file with the *Columbia Law Review*) (last updated June 30, 2020); Melissa Quinn, Amy Coney Barrett Says Supreme Court Justices Aren't "Partisan Hacks", CBS News (Sep. 13, 2021), https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justices-partisan-hacks/ [https://perma.cc/39M2-2WE2].

326. See Daniel S. Harawa, Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence, 110 Calif. L. Rev. 681, 735 (2022) ("On a good day, outside the charged atmosphere of the courtroom, race is a third rail discussion topic.").

327. See Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016).

328. For background on Boston's troubled racial history, see generally Ronald P. Formisano, Boston Against Busing: Race, Class, and Ethnicity in the 1960s and 1970s (2004) (exploring the racist and violent reaction to an order to desegregate Boston schools).

329. See, e.g., Commonwealth v. Lora, 886 N.E.2d 688, 696–99 (Mass. 2008) (attempting to be more protective than the Supreme Court to limit race-based pretextual stops).

330. See Mass. Const. pt. II, ch. III, art. I.

331. See State v. Nicholson, 188 S.W.3d 649, 660–61 (Tenn. 2006) ("In fact, innocent reasons for flight abound in high crime areas . . . ." (internal quotation marks omitted) (quoting State v. Nicholson, No. M2004-00111-CCA-R3CD, 2005 WL 434646, at *6 (Tenn. Crim. App. Jan. 25, 2005))).

borhoods.[332] But what the court was unwilling to do was ground those reasons in the racialized fears and asymmetries that Justice Stevens expressed in his *Wardlow* dissent—even though the court's opinion was largely built on his dissent.[333] This decision to forgo any discussion of race may reflect an institutional preference for judging in purely race-neutral terms. It may reflect a discomfort in having constitutional discussions in the register of race. Or it may reflect the political pressures in Tennessee, where judicial selection and retention are subject to the will of the voters.[334] In such an environment, explicit racial reasoning may carry higher institutional and political costs, even when courts are ready to limit police authority for race-based reasons.

Of course, Tennessee is not alone. Many of the state courts above did not explicitly address race despite the clear racial context of the cases. In that way, these race-silent decisions echo an earlier federal pattern. Remember, much of the Warren Court's criminal procedure revolution addressed racially disparate policing without naming race, with the idea being that the Court would craft neutral rules that would constrain abusive policing practices that disproportionately burden Black Americans.[335] Perhaps, then, the state courts that do not discuss race can be seen as doing something similar. Perhaps, by tightening standards for pretext, consent, and suspicion without mentioning race, these decisions reflect the fact that state courts can address the effects of racialized policing without having to adopt a race-explicit framework. And perhaps, in some parts of the country, this approach is wise, as it can help insulate the court from any political blowback that would come with explicitly acknowledging the role that race plays in policing.

At the same time, this indirect approach has limits. Race-neutral framing keeps courts from addressing racial harm directly. In so doing, the approach risks inculcating the belief that race is, or should be, irrelevant, not just to policing, but to constitutional meaning more broadly.[336] It erases the experiences of a large swath of people from the constitutional discourse, even though there is epistemic value in having institutions recognize racial realities, including that laws and systems that appear neutral

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332. See id. at 661 ("We are particularly mindful of the potential for 'retribution for speaking to officers' in an area being investigated for gang activity.").

333. See supra section III.C.1.

334. In Tennessee, the governor appoints a justice, subject to confirmation by the Tennessee General Assembly. Tenn. Const. art. VI, § 3. Once appointed and confirmed, a justice serves an eight-year term. Id. At the end of that term, the justice faces a retention election. Id.; see also Michael S. Kang & Joanna M. Shepherd, The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions, 86 N.Y.U. L. Rev. 69, 73–74 (2011) (exploring the influence of campaign contributions in partisan judicial elections on judicial behavior).

335. See supra section I.A.

336. See, e.g., Ian F. Haney López, Is the "Post" in Post-Racial the "Blind" in Colorblind?, 32 Cardozo L. Rev. 807, 831 (2011) (arguing that "post-racialism tells us that racialized mass incarceration is not, in fact, a rank injustice").

on their face are rarely neutral in practice.[337] And, as the post–Warren Court retrenchment proves, race-neutrality also obscures the racial stakes of future decisions that reduce or limit constitutional protections. So, while indirect engagement may have upside in the short term, it necessarily limits the efficacy of any state court's attempt to advance racial justice in the long run.

2. *Explicit Advocacy.* — A second factor shaping when race becomes legible in state constitutional search-and-seizure doctrine is the role of advocacy. For courts that infused race into their search-and-seizure analyses, they rarely did so on their own. Instead, race entered the constitutional equation when advocates took the time to explain the racial stakes, supplying the courts with the ammunition necessary to inject race into their constitutional rulings.[338]

New Mexico's rejection of *Whren* provides a clear example of this. There, the briefing paid significant attention to the racial harms invited by pretextual policing, calling racial profiling the "primary public concern" with that problematic practice, and asserting that the concern of racial profiling was the "most compelling" reason for New Mexico to depart from *Whren*.[339] In turn, these concerns featured in the New Mexico Court of Appeals' decision, with that court explaining that to allow pretextual policing would be to enable unchecked racial discrimination.[340] Thus, per the advocate's urging, race was not simply background context; it was critical to the court's understanding of the constitutional question presented.

Explicit advocacy may not always do the trick, however. The way Washington departed from *Whren* is proof. While not the focus, the defendant in *State v. Ladson* did note in his briefing that pretextual stops had led to "founded allegations of racial discrimination."[341] But perhaps because race only appeared on the periphery of the briefing, it faded from sight in the opinion, as the Washington Supreme Court did not engage with racial profiling directly or situate its departure in racial terms.[342] To be sure, *Ladson* is a significant constraint on a discriminatory police prac-

337. See Harawa, Coloring in the Fourth Amendment, supra note 6, at 1575 ("In fact, if the law is truly to 'operate equally upon all,' the law may well demand the opposite, requiring that everyone have an equal chance to tell their story and have it recognized under law." (footnote omitted) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2159 (2023))); see also S. Lisa Washington, Survived & Coerced: Epistemic Injustice in the Family Regulation System, 122 Colum. L. Rev. 1097, 1138–39 (2022) ("By advantaging powerful groups and erasing marginalized groups from collective understanding building, hermeneutical injustice obscures and damages collective knowledge production and spreading.").

338. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 965–66 (arguing that lawyers for people accused of crime need to foreground race if they want the court to take it seriously).

339. Appellant's Reply Brief, supra note 194, at 9.

340. See *Ochoa III*, 206 P.3d at 150–51.

341. Amended Supplemental Brief of Petitioner, supra note 179, at 3.

342. See *Ladson*, 979 P.2d at 837–40.

tice. But the decision elided why the constraint was mainly necessary in the first place: to prevent police from targeting Washingtonians of color.

That said, even a party's modest invocation of race can lead to a sweeping decision. In *Commonwealth v. Warren*, the Massachusetts case minimizing the relevance of flight from police to the reasonable-suspicion calculus, the defendant did not advance a broad theory of racialized policing or seek a race-based doctrinal rule. Instead, race entered the case primarily through Mr. Warren's presentation of his own plight, with him explaining how his race influenced the police's decision to engage him.[343] This was enough of an opening, though, for the Massachusetts Supreme Judicial Court to meditate on how race affects police encounters.[344] In that sense, *Warren* suggests that even relatively surface-level attention to race can prompt so-inclined courts to acknowledge racial dynamics when conducting constitutional analysis.

The above underscores that advocacy can operate as a gatekeeping mechanism for racial legibility, even if not a deterministic one.[345] When advocates press racial dynamics, courts may explicitly engage race, as in *Ochoa*.[346] When advocates do not dwell on race, courts may not either, as in *Ladson*.[347] And when race enters the litigation modestly but concretely, courts may nevertheless seize on that opening to engage race more fully, as in *Warren*.[348]

At the same time, explicit advocacy does not guarantee that courts will adopt an explicit racial framing. Even in *Ochoa*, racial profiling concerns were still primarily mediated through race-neutral reasoning.[349] But if these examples are any indication of broader practice, courts will rarely introduce racial considerations without the parties' prompting. Put another way, while it may be hard to predict whether a court will address race if the parties do, the examples show that it is far more likely that the courts will ignore race if the parties do too.[350] The cases, therefore, suggest that party presentation can play a central role in shaping whether, and

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343. See Brief and Record Appendix for the Defendant, supra note 291, at 4–5, 8.

344. See Commonwealth v. Warren, 58 N.E.3d 333, 341–42 (Mass. 2016) ("[T]he analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston." (citing Commonwealth v. Warren, 31 N.E.3d 1171, 1186 n.18 (Mass. App. Ct. 2015) (Agnes, J., dissenting))).

345. See supra section IV.B.1.

346. See supra notes 190–197 and accompanying text.

347. See supra notes 173–180 and accompanying text.

348. See supra notes 287–292 and accompanying text.

349. See supra notes 190–197 and accompanying text.

350. This might flow directly from the "principle of party presentation," in which "[t]he parties 'frame the issues for decision,' while the court serves as 'neutral arbiter of matters the parties present.'" Clark v. Sweeney, 146 S. Ct. 410, 412 (2025) (per curiam) (citation modified) (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)).

how, race becomes visible within state constitutional search-and-seizure doctrine.

3. *Scholarly Study and Critique.* — Finally, scholarship played an important role both in persuading state courts to depart from federal Fourth Amendment doctrine *and* in shaping how courts engaged with race when doing so.[351]

State courts relied on scholarship to bolster their decisions to depart from federal doctrine. For example, when the Washington Supreme Court departed from *Whren*, it cited a new federalism article to underscore its prerogative to adopt more protective standards than those announced by the Supreme Court.[352] The Arkansas Supreme Court did the same when it required informed consent, going further than *Bustamonte*.[353] And again, in Washington, when the court announced its own informed-consent ruling, it relied on legal scholarship to allay concerns that the rule would unduly hamper law enforcement, citing an article that explained that most suspects waive their *Miranda* rights.[354] These examples underscore the importance of legal scholarship that explores the distinct constitutional role of state courts and develops frameworks to help them exercise their independence.

New Mexico's rejection of pretextual stops similarly illustrates how scholarship can also help state courts engage race more directly in their state constitutional analyses. In *Ochoa*, the court included an entire section on the "widespread criticism" of *Whren*'s "legal reasoning."[355] In that section, much of the literature it cited focused on the racialized harms of pretextual policing, which allowed the court to perceive those racial harms as part of the constitutional problem it was addressing.[356] The engagement

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351. See Harawa, Coloring in the Fourth Amendment, supra note 6, at 1582 (explaining the importance of legal scholarship for courts that "attempt to take progressive swings or break from a seeming trend" in Supreme Court case law).

352. See State v. Ladson, 979 P.2d 833, 843 (Wash. 1999) (quoting Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459, 508 (1986)).

353. See State v. Brown, 156 S.W.3d 722, 729 (Ark. 2004) (citing Robert L. Brown, Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way, 4 J. App. Prac. & Process 499, 505 (2002)).

354. See State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998) (citing Paul G. Cassell & Bret S. Hayman, Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*, 43 UCLA L. Rev. 839, 859 (1996)). In his dissent arguing that the New Jersey Supreme Court should have gone even further when it rejected *Bustamonte*, Justice Morris Pashman relied on legal scholarship to point out *Bustamonte*'s "substantial shortcomings." State v. Johnson, 346 A.2d 66, 74 & n.5 (N.J. 1975) (Pashman, J., dissenting) (citing John B. Wefing & John G. Miles, Jr., Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems, 5 Seton Hall L. Rev. 211, 212 (1974)).

355. *Ochoa III*, 206 P.3d 143, 148–51 (N.M. Ct. App. 2008).

356. See id. at 150 (citing David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 298 (1999); Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth

with scholarship thus helped race hold a more prominent place in the court's articulation of why the federal rule in *Whren* was inadequate as a matter of state law. This example highlights that critical scholarship can helpfully expose the frailties in Supreme Court doctrine, providing courts with greater reason not to follow it.

Empirical evidence can also help a court engage with the racial dynamics of policing. In *Commonwealth v. Warren*, for example, the Massachusetts Supreme Judicial Court relied on a Boston Police Department study documenting racial disparities in stops, frisks, searches, and interrogations.[357] That localized data provided a concrete basis for the court to conclude that flight may reflect a desire to avoid the indignity of being targeted due to the color of one's skin rather than a consciousness of guilt, making race relevant to how courts should perceive flight and factor it into the reasonable suspicion analysis.[358] *Warren* therefore shows that a context-specific empirical record can help make race legible,[359] pointing to the value of localized study of how policing practices operate in particular jurisdictions.

In short, legal scholarship and empirical work can help influence both the willingness of state courts to depart from federal doctrine and the manner in which racial concerns enter constitutional analysis. Critique provides courts with tools to question federal doctrine, while data (the more localized the better) helps anchor those concerns in the conditions on the ground.

C. *Untapped Paths*

While this Part has so far focused on the arguments that successfully persuaded state courts to depart from federal Fourth Amendment doctrine, it's also worth briefly considering which arguments were left on the table. Two arguments immediately stand out. First, both advocates and state courts rarely invoked the different democratic relationship state courts have with their citizens, compared to the Supreme Court. And given that most state courts are to some degree democratically accountable, there is a plausible argument that state court judges should be more sensitive to public sentiment, including public sentiment around policing. Second, even when race was discussed by either the state court or the

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Amendment, 102 Mich. L. Rev. 1843, 1854 (2004); Harris, "Driving While Black" and All Other Traffic Offenses, supra note 127, at 550–53).

357. See 58 N.E.3d 333, 342 (Mass. 2016) (citing Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, Final Report: An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports 2 (2015), https://raceandpolicing.issuelab-dev.org/resources/25203/25203.pdf [https://perma.cc/58ZA-WBQ8]).

358. See id.

359. See Harawa, Coloring in the Fourth Amendment, supra note 6, at 1547 (explaining that courts that consider race in Fourth Amendment analyses often do so based on the "specific racial dynamics of the area in question").

advocate, the discussions seldom focused on the racial harms produced by the Supreme Court's Fourth Amendment doctrine. Put another way, the adjudication rarely mentions that not only are the Supreme Court's opinions oblivious to race, but they also *coproduce* and *reproduce* the racial harms of modern policing.[360] This alone should be a reason for state courts to chart a different course.

1. *Appeals to Public Sentiment.* — One underdeveloped line of argument from the new federalism playbook concerns institutional position, democratic accountability, and democratic signal. Unlike the Supreme Court, which by design is supposed to be insulated from electoral and political pressure,[361] the majority of state courts (for better or worse) operate within systems of popular election, retention voting, or politically accountable appointment.[362] As Professors Jessica Bulman-Pozen and Miriam Seifter accordingly explain, "[S]tate courts do not resemble their federal counterparts: They are majoritarian, not countermajoritarian; their judges are elected and recallable rather than insulated; and their decisions are readily countermanded rather than 'infallible [because they] are final.'"[363]

This means that state courts are situated differently with respect to the political communities they serve, and state court judging should be adjusted as such. When the public signals concern about the state of local policing, state courts should pay attention.[364] That concern could be expressed in a variety of ways—through legislation, ballot initiatives, calls for department-level reform, consistent polling, or widespread protest.[365] Each of these signals reflects public judgment about how state power is

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360. See Devon W. Carbado, Police Power Abolition, 72 UCLA L. Rev. Discourse 658, 726 (2025), https://www.uclalawreview.org/police-power-abolition/ [https://perma.cc/V4J6-KMJR] (explaining that Professor Carbado wrote the book *Unreasonable*, supra note 128, to highlight the racially constitutive power of legal doctrine).

361. This is not to say that the Court's race-oblivious Fourth Amendment doctrine is consistent with its antimajoritarian institutional structure.

362. See Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1890 ("Today, most state judges run in popular elections to obtain or retain their positions . . . ."); Judicial Selection: Significant Figures, Brennan Ctr. Just. (May 8, 2015), https://www.brennancenter.org/our-work/analysis-opinion/judicial-selection-significant-figures [https://perma.cc/D9XN-XMG4] (noting that "39 states use some form of election at some level of court").

363. Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1889 (second alteration in original) (quoting Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment)).

364. See David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 Colum. L. Rev. 2047, 2050 (2010) (arguing that elected state judiciaries provide a "systematic and pervasive mechanism for popular constitutionalism").

365. Each of these methods has been used as a means of trying to curb racialized policing. See Nat'l Acads. of Scis., Eng'g & Med., Reducing Racial Inequality in Crime and Justice: Science, Practice, and Policy 265–309 (Bruce Western, Khalil Gibran Muhammad, Yamrot Negussie & Emily Backes eds., 2023) (discussing various efforts at criminal justice reform).

being exercised. Attending to those judgments can make state constitutional adjudication distinct in a moment when federal doctrine has largely calcified.[366] And state courts have every reason to pay attention: That state judges are often democratically accountable "give[s] citizens a powerful tool with which to check the judges' interpretive outputs, as well as a recurring focal point with which to stimulate and structure constitutional deliberation."[367]

State courts should be especially attentive when those signals reflect concerns about racially disparate policing.[368] Constitutional doctrine plays a critical role in ordering the routine encounters between police and the citizenry.[369] Therefore, when the citizenry cries out about racialized patterns of law enforcement, state courts should calibrate local constitutional doctrine to address those concerns. Popularly expressed concerns about racialized policing supply state courts with important information about how constitutional standards are operating in practice, including whether existing rules are perceived as legitimating arbitrary or unequal exercises of state power. Given that many state courts are in direct democratic dialogue with the public, they should take those concerns seriously.[370] Acknowledging the different democratic roles that state courts play compared to federal courts does not undermine the legitimacy of state-court decisionmaking. Rather, it reflects an understanding of state courts' "position as democratically embedded actors with the authority to craft policy and the duty to justify their decisions."[371]

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366. See Bulman-Pozen & Seifter, Democracy Principle, supra note 14, at 863 ("Yet while courts and scholars have long recognized the federal Constitution's promise of tempering state majoritarianism, they have not similarly appreciated the ways in which state constitutions may respond to national democratic shortcomings—at least if state constitutions are properly understood.").

367. Pozen, supra note 364, at 2050.

368. See Jed Handelsman Shugerman, The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law, 98 Geo. L.J. 1349, 1354 (2010) (canvassing historical evidence to find that "judicial elections generally may have produced judges more sympathetic to public opinion and more responsive to salient and dramatic events"); see also Pozen, supra note 364, at 2084 ("Whereas appointive systems with life tenure reflect a societal aspiration for judges who will follow the law . . . elective systems might legitimize a different conception of the judicial role: They might 'send a signal to judges that sensitivity to public opinion is part of the job description.'" (quoting David E. Pozen, The Irony of Judicial Elections, 108 Colum. L. Rev. 265, 277 (2008))).

369. See Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 Geo. Wash. L. Rev. 453, 534 (2004) ("The legal standards that the courts in civil and criminal cases employ, however, almost entirely define police norms about the use of force. This is evidenced by police departments' written policies governing uses of force, which virtually track word-for-word the judicial rules that govern legal liability."); David B. Goode, Law Enforcement Policies and the Reasonable Use of Force, 54 Willamette L. Rev. 371, 413 (2018) ("Many departments currently do not adopt use-of-force standards beyond the constitutional minimum.").

370. See Armacost, supra note 369, at 534; Goode, supra note 369, at 413.

371. Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1861. Thus, this argument sounds in "popular constitutionalism," affording the public a role in "the

2. *Exposing Racial Harms.* — A second underutilized argument treats the Supreme Court's role in producing racial harm as a standalone justification for states diverging from federal doctrine. Critical race scholars who have long critiqued the Court's Fourth Amendment jurisprudence have done so not only because the doctrine is oblivious to race, though it is certainly that.[372] They have also emphasized that racial obliviousness is itself a mechanism of harm that facilitates and legitimates practices that disproportionately burden communities of color.[373] In this sense, federal Fourth Amendment doctrine does not merely fail to correct racialized policing; it helps reproduce it.[374]

At times, in either the advocates' briefing or state courts' opinions, there was acknowledgment of the racialized context of policing.[375] And in some cases, advocates or courts suggested that strengthening search-and-seizure protections beyond those announced by the Supreme Court was necessary to guard against racially targeted policing.[376]

What the advocates and state courts have thus far failed to do is explain how the Supreme Court's decisions themselves perpetuate racial harms. *Whren* did not merely fail to appreciate the racial risks inherent in pretextual policing; it legitimized racial profiling.[377] *Bustamonte* did not just fail to provide robust protections against "consent" searches; it obscured the coerciveness of police contact in a world in which people of color are taught from a young age to be especially deferential to law enforcement as a matter of personal safety.[378] And *Wardlow* did more than overlook the innocent reasons people of color might flee from police; it effectively criminalized a person of color's ability to avoid police contact in the very communities in which many people of color live.[379] In other

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interpretation and enforcement of constitutional law." Larry D. Kramer, Popular Constitutionalism, Circa 2004, 92 Calif. L. Rev. 959, 959 (2004).

372. For a collection of some of these critiques, see supra note 1.

373. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 926 (explaining this critique).

374. See Carbado, Unreasonable, supra note 128, at 29 (claiming that "the Supreme Court has effectively legalized racially targeted policing by interpreting the Fourth Amendment to protect police officers at the expense of Black Americans"); Butler, The White Fourth Amendment, supra note 1, at 246 ("The Fourth Amendment . . . is . . . a project by the Burger, Rehnquist, and Roberts Courts to expand the power of the police against people of color . . . .").

375. For example, in New Mexico. See supra section III.A.3.

376. For example, in Massachusetts. See supra section III.C.2.

377. Carbado, From Stopping Black People to Killing Black People, supra note 167, at 156 ("[*Whren*] legalizes [pretextual] stops, which helps make them an institutional practice.").

378. Capers, The Good Citizen, supra note 1, at 694–98 (claiming that the *Bustamonte* Court likely had an interest in encouraging consent for search from the people of color, who also are demanded to be more deferential to law enforcement for personal safety); see also Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (describing "the talk").

379. Boddie, supra note 165, at 495–96.

words, the Court's Fourth Amendment decisions are not only analytically flawed; they have "effectively legalized racially targeted policing by interpreting the Fourth Amendment to protect police officers at the expense of Black Americans."[380]

While perhaps the cumulative effects of the Supreme Court's decisions were difficult to discern when those rulings were first announced, we are now far enough removed, with substantial evidence about how race shapes policing, to reckon with the way those doctrines have structured and normalized racialized patterns of law enforcement.[381] There is room to more directly engage the connection between federal Fourth Amendment doctrine and the current state of policing qua race when advocates urge, or courts explain, why divergence from federal doctrine is necessary. Indeed, naming racial harm clarifies what is at stake in these departures.[382] In a constitutional moment in which the Supreme Court has increasingly washed its hands of racial justice claims, state courts should lean on the racial harms caused by the colorblind Court as a basis for charting a different constitutional course.

3. *Cold (but Not Too Cold) Water.* — To be clear, none of the foregoing strategies guarantees that a state court will depart from federal doctrine—or that, if it does depart, it will meaningfully engage race in doing so. For that reason, this Article is decidedly *not* focused on empirics, laboring over how often arguments are successful. Because even if an argument has only worked once, that one time reveals that there is still space for the argument to be made. Indeed, for every success story, the Article could point to a counterexample, including in states one might have expected to be more receptive to incorporating the role that race plays in policing into state constitutional analysis.[383]

Consider the New York Court of Appeals' decision in *People v. Robinson*.[384] There, the defendants argued that pretextual stops should be ruled unconstitutional under the New York Constitution, in contravention of *Whren*.[385] One of the defendants' briefs focused heavily on the concern

380. Carbado, Unreasonable, supra note 128, at 29.

381. For sources detailing racial disparities in policing, see Harawa, Whitewashing the Fourth Amendment, supra note 2, at 925 n.2 (collecting sources).

382. See id. at 981 ("Lawyers' *not* telling the racialized truth allows for the perpetuation of colorblind doctrine without a full understanding of the violence that the law works on communities of color. . . . [It] feed[s] into the fiction that race is irrelevant and that the world is postracial and . . . law should be too.").

383. As Whitney Houston said, "For every win, someone must fail." Whitney Houston, Exhale (Shoop Shoop), *on* Waiting to Exhale: Original Soundtrack Album (CD, Arista Recs. Nov. 14, 1995).

384. 767 N.E.2d 638 (N.Y. 2001).

385. See Brief and Appendix for Defendant-Appellant at 18–35, *Robinson*, 767 N.E.2d 638 (Nos. 141, 142, 143), 2001 WL 34151599 (arguing that the *Whren* Fourth Amendment standard is "over-permissive" and is "inconsistent with the protections of . . . the New York State Constitution").

that pretextual policing enables racial profiling.[386] It cited examples from New York, invoked legal scholarship critical of *Whren*, and relied on federalism principles in urging the court to move beyond the federal floor set by the Supreme Court.[387] The Court of Appeals acknowledged that it was "not unmindful" of evidence showing that pretextual stops result in racial targeting, yet nonetheless adopted the "standard approved by *Whren*," reasoning that a rule prohibiting pretextual policing would "put unacceptable restraints on law enforcement."[388]

Or take a consent-search case from Pennsylvania, *Commonwealth v. Cleckley*.[389] There, Mr. Cleckley argued that the Pennsylvania Constitution should provide greater protections against consent searches than those afforded by *Bustamonte*.[390] He pointed to differences in the text and history of Pennsylvania's search-and-seizure provision, which "embod[ies] a strong notion of privacy" that must be "safeguarded," in contrast to the United States Supreme Court's tendency to "downplay the significance of a Fourth Amendment right to privacy as it [is] related to the law of search and seizure."[391] He cited prior Pennsylvania precedent that had departed from Supreme Court jurisprudence.[392] He also emphasized that *Bustamonte* "has never been universally approved in the United States" and "has been criticized and repudiated by many eminent jurists and legal commentators, in Pennsylvania and elsewhere."[393] None of this persuaded the court, which concluded that it could "find no policy issues unique to Pennsylvania . . . that would cause [it] to depart from the federal standard."[394]

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386. See id. at 18 (arguing that "[u]nder established principles of federalism, a State is free to provide greater rights for its citizens than those included in the federal Constitution"); id. at 27 ("'Driving while black' has begun to threaten the integrity of the entire process not only in the eyes of African-Americans, but of everyone." (internal quotation marks omitted) (quoting David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 269 (1999))).

387. See id. at 16–23, 27–28.

388. *Robinson*, 767 N.E.2d at 642–45. At least one intermediate New York appellate court held that "*Robinson* . . . does not preclude a challenge to a traffic stop predicated on racial profiling, at least under our State Constitution." People v. Jones, 177 N.Y.S.3d 174, 178 (App. Div. 2022). The New York Court of Appeals may revisit *Robinson* when it considers People v. Hooks, 240 N.Y.S.3d 381 (App. Div. 2025), leave to appeal granted, 275 N.E.3d 648 (N.Y. 2026) (unpublished table decision).

389. 738 A.2d 427 (Pa. 1999).

390. See Brief for Appellant at 10, 15, *Cleckley*, 738 A.2d 427 (No. 53 W.D. Appeal Docket 1998), 1998 WL 34114316 (arguing that *Bustamonte* is merely persuasive authority and that "under the Pennsylvania Constitution, valid consent to search requires waiver of a known right").

391. Id. at 18 (internal quotation marks omitted) (quoting Commonwealth v. Edmunds, 586 A.2d 887, 897 (Pa. 1991)).

392. See id. at 18–19 (citing, e.g., Commonwealth v. Matos, 672 A.2d 769 (Pa. 1996); Commonwealth v. White, 669 A.2d 896 (Pa. 1995)).

393. Id. at 24–25.

394. *Cleckley*, 738 A.2d at 433.

A final example concerning the relevance of flight from police comes from Maryland in *Washington v. State*.[395] There, Mr. Washington argued that inferring guilt from flight is inconsistent with the innocent reasons people, particularly young African American men, may seek to avoid police contact.[396] He further argued that the "constant exposure to images of racialized police violence—usually, graphic videos—amplifies fear of the police."[397] And he grounded these claims in local context, citing Baltimore's "history of police discrimination," recent indictments of Baltimore police officers, and the high-profile killing of Freddie Gray.[398] The Maryland court stated that it had "reviewed and considered [Mr.] Washington's arguments with care" and did not "take lightly his contentions."[399] Yet it ultimately followed *Wardlow*, finding "no necessary reason to engraft onto [its] State Constitution a deviation from the Supreme Court's Fourth Amendment precedent."[400]

Then there is the reality that even when a state does adopt a more protective approach, stare decisis does not prevent backsliding. Recall that earlier, Part III highlighted the Arkansas Supreme Court's refusal to follow *Whren* and outlawing pretextual stops in *State v. Sullivan*.[401] Well, recently,[402] the Arkansas Supreme Court sua sponte asked the parties in *Gamble v. State* whether it should overrule *Sullivan*.[403] Of course the state said yes, and a majority of the court acceded, reasoning that the history of the Arkansas Constitution does not "show [that] the people of Arkansas viewed pretextual arrests as uniquely unreasonable," and deciding to align the state with *Whren*.[404] In response, a dissenting justice charged the majority with engaging in "judicial activism," lamenting that "[a]ll [the court's] precedents are now at the mercy of the whims of a majority of [the] court without regard to the arguments presented by the parties."[405] In other words, even progressive decisions are contingent on a court

395. 287 A.3d 301 (Md. 2022).

396. Id. at 323.

397. Id. at 323–24.

398. Id. at 324 (internal quotation marks omitted).

399. Id.; see also Note, The Paradox of "Progressive Prosecution", 132 Harv. L. Rev. 748, 748–50 (2018) (discussing Freddie Gray's case).

400. *Washington*, 287 A.3d at 337. Interestingly, in affirming *Wardlow*, the Maryland Supreme Court limited its reach by refusing to "establish a per se rule that unprovoked flight in a high-crime area will always equal reasonable suspicion." Id. at 325 (emphasis omitted). Other state courts have similarly refused to adopt a per se rule regarding flight. See, e.g., People v. Archuleta, 980 P.2d 509, 515 (Colo. 1999); State v. Morgan, 59 So. 3d 403, 408–09 (La. 2011); State v. Arellano, No. A-04-060, 2004 WL 1151984, at *4 (Neb. Ct. App. May 25, 2004); People v. Holmes, 619 N.E.2d 396, 398 (N.Y. 1993); State v. Mendez, 970 P.2d 722, 728 (Wash. 1999).

401. See supra section III.A.2.

402. This case was handed down during the drafting of this Article.

403. 729 S.W.3d 661, 666 (Ark. 2026).

404. Id. at 668.

405. Id. at 672 (Hudson, J., dissenting).

respecting them—a sobering reality of any state-court-focused racial justice strategy.

Ending this Part with a douse of cold water should not be read as a sign of futility, however, as there are still lessons to learn.

Let's start with Arkansas's backsliding. No doubt this decision was a blow to racial justice as it permits the pretextual policing that *Whren* allows. But in reversing itself, the court revealed a truism about court-based decisionmaking: It is subject to change.[406] This is a reminder that even in jurisdictions where certain arguments seem foreclosed, parties should make them and urge the courts to revisit their precedents. As the Arkansas court explained, "[S]tare decisis has no value in cases where a prior decision is 'subordinate to legal reason and justice.'"[407] This is a reminder that advocates have an obligation to remind courts why their precedents are not consonant with reason or justice, especially when their decisions are at odds with *racial* justice. Thus, even state courts that have moved in lockstep with the Supreme Court should not necessarily be seen as impervious to change.

But to bring about the change, there is a need to build state courts' muscle memory for exercising constitutional independence. As other scholars have noted, state constitutionalism has received too little attention.[408] Although calls for state courts to expound their constitutions to provide greater protections than the federal Constitution are not new, those calls have often been couched in broad, largely normative terms, with less of a focus on how state constitutional adjudication should work in practice.[409] As a result, state courts inclined to exercise independence have little decisional infrastructure to draw upon.[410] While this gap in the literature is beginning to narrow, sustained scholarly engagement can further disrupt state courts' reflexive tendency to default to federal standards by supplying concrete analytical frameworks and, ideally, jurisdiction-

406. This is why Professor Quinn Yeargain advocates for constitutionalizing state criminal procedure holdings. See Quinn Yeargain, State Constitutional Development and the Criminal Procedure Revolution, 59 Ga. L. Rev. 1377, 1383–85 (2025) ("The omission of core criminal procedure protections in state constitutions could leave the criminal legal system's basic operating principles in jeopardy.").

407. *Gamble*, 729 S.W.3d at 668 (quoting State v. Good Day Farm Ark., LLC, 725 S.W.3d 1, 14 (Ark. 2025)).

408. See, e.g., Bulman-Pozen & Seifter, State Constitutional Rights, supra note 14, at 1857–58.

409. See id. ("There is limited discussion of other state constitutional clauses, the distinctiveness of state constitutions collectively, or what those differences might mean for adjudication.").

410. See Gardner, Failed Discourse, supra note 30, at 764 (arguing that the new judicial federalism has largely failed to sustain "a coherent discourse of state constitutional law—that is, a language in which it is possible for participants in the legal system to make intelligible claims about the meaning of state constitutions").

specific analysis that gives each state constitution and state court system individualized attention.[411]

Developing the literature in this way can influence litigation strategy.[412] Much can be learned from reviewing the briefings of state court cases that have considered whether or not to extend protections beyond those afforded in *Whren*, *Bustamonte*, and *Wardlow* and opted not to do so. As the briefing shows,[413] defense attorneys concerned most with defending against the criminal conviction at issue expended most energy arguing within the confines of the federal status quo.[414] Oftentimes, it was only at the very end that litigants argued in the alternative and suggested that even if they lose under the Fourth Amendment, they should win under the state's distinct constitutional provision.[415] But by making state constitutional arguments appear to be an afterthought, state courts may feel at liberty to dismiss the argument wholesale.[416]

To be sure, this strategy is understandable. Defense attorneys may feel themselves to be stuck between a rock and a hard place: In a world of scarce resources and caseload constraints,[417] do they concern themselves

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411. For example, Berkeley Law has the California Constitution Center, "a nonpartisan academic research center devoted to studying California's constitution and high court." California Constitution Center, UC Berkeley L., https://www.law.berkeley.edu/research/california-constitution-center/ [https://perma.cc/42FH-NR64] (last visited Aug. 12, 2026). Former Chief Judge of the New York Court of Appeals Judith Kaye once remarked that "state courts and state lawmaking . . . are serious subjects too often overlooked in many of our nation's law schools." Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U. L. Rev. 1, 35 (1995).

412. See Hershkoff, Introductory Remarks, supra note 49, at 1909–10 ("Professional and scholarly resources thus also are essential to encouraging the development of a robust state constitutionalism . . . .").

413. I specifically considered the briefings in State v. Espy, No. 1 CA-CR 17-0530, 2018 LX 44640 (Ariz. Ct. App. Oct. 11, 2018); State v. Jenkins, 3 A.3d 806 (Conn. 2010); State v. Cyrus, 997 N.W.2d 671 (Iowa 2023); Washington v. State, 287 A.3d 301 (Md. 2022), as all opinions came close to affording additional state constitutional protections but ultimately declined to do so.

414. See John Christopher Anderson, The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois, 44 Loy. U. Chi. L.J. 965, 988 (2013) (noting numerous instances where the Illinois Supreme Court refused to consider independent state constitutional claims because they were not adequately raised by the parties).

415. See Abrahamson, supra note 27, at 1163 ("Despite state courts' growing receptivity to state constitutional law issues, lawyers may view state constitutional arguments as a throw-in because they do not know how to frame a good argument on this relatively new issue.").

416. See Clint Bolick, Principles of State Constitutional Interpretation, 53 Ariz. St. L.J. 771, 772 (2021) ("State court judges typically, and often correctly, blame practitioners for failing to raise and develop state constitutional arguments adequately."); see also *Jenkins*, 3 A.3d at 853 n.2 (Katz, J., dissenting) ("The defendant has offered no analysis directly addressing [why the court should adopt a new 'free to leave' standard under the state constitution] or any case law that would tend to support [that standard]. I therefore decline to address [it].").

417. See Alexis Hoag-Fordjour, Universal Public Defense, 60 Harv. C.R.-C.L. L. Rev. 661, 686 (2025) (discussing how defender offices are often underresourced).

solely with the developed federal constitutional claims, or do they expend capital on novel state constitutional arguments? Although it is not necessarily a zero-sum game, those who attempt to tackle both often sacrifice the latter by only presenting a truncated version of the arguments against federal Fourth Amendment law, which implicitly encourages the state court to also give the argument short shrift. Perhaps an alternative measure would be to lead with state constitutional arguments, signaling the significance of the matter to the court in which they are appearing. Otherwise, framing these arguments as a last-ditch effort (even if unintentionally) may pronounce them dead on arrival. And while of course defense lawyers must always do what is best for their clients, experimentation in this manner carries comparatively little downside where the status quo is coextensive with the federal floor, where there is obvious need for radical change, and when the dignity of the client is on the line.

Another lesson from failure concerns the value of pressing arguments even when they do not succeed. Not naming the racial stakes of a case allows courts to continue to act as if race does not matter. It sanitizes a person's experience with a criminal legal system that is rife with racial differentiation. Therefore, arguing explicitly about how race should matter both honors the individual defendant's racialized experiences, which have for so long been absent from the criminal courtroom, and makes it harder for the court to look away.[418] When advocates ask courts to exercise their independent constitutional authority to confront racialized policing, courts are much more likely to respond.[419] If advocates do not press independent state constitutional arguments, however, they leave it to the courts to decide whether to address the state constitution.[420] And when judges decide cases based on claims not raised by the parties, that exposes courts to claims of partiality.[421] Therefore, *raising* the state constitutional claims is a necessary prerequisite to any widespread state constitutional independence and is an important first step to truth telling in the courtroom.

When claims are raised and state courts follow federal precedent anyway to conclude racial harms lie beyond state constitutional reach, that acknowledgment matters for at least two reasons. First, the awareness may influence *how* states follow federal law. When advocates confront state courts with the racial stakes, the courts may be more inclined to read the Supreme Court precedent in question narrowly to avoid amplifying the most harmful features of the federal rule.[422]

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418. For further discussion on this point, see Harawa, Whitewashing the Fourth Amendment, supra note 2, at 979–81.

419. Of course, silence in the face of an explicit argument is a response in itself.

420. Only deciding issues raised by the parties reflects the party presentation principle. Jeffrey M. Anderson, The Principle of Party Presentation, 70 Buff. L. Rev. 1029, 1033 (2022).

421. See Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 279 (2002).

422. This is true of the Maryland example. In *Washington*, the Maryland Supreme Court claimed to be applying *Wardlow*, but also noted that its analysis would satisfy Justice Stevens's

Second, when advocates press state courts to acknowledge how race affects search-and-seizure questions, and the courts refuse to do so, then at least that choice is visible to the public. In jurisdictions where judges are democratically accountable, such candor allows citizens to respond through democratic channels—for instance, by pursuing constitutional or statutory reform or mobilizing electoral pressure.[423] This does not ignore the fact that state judicial elections are often low-salience and thus the democratic feedback loop needs strengthening to ensure true accountability.[424] But hopefully, as scholars and advocates increasingly turn to state courts to advance rights, those efforts will also include a campaign to educate the public about the importance of judicial elections.[425] And even in jurisdictions where courts are more insulated from public pressure, a clear judicial ruling enables a more informed debate about how to best reform policing, including whether it should be constrained by other nonjudicial mechanisms.[426] In this way, even unsuccessful litigation can activate the feedback mechanisms that distinguish state constitutional law from its federal counterpart, an important reminder that any enduring racial progress will require buy-in beyond the courts.[427]

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It is important to be clear about what this Part is not. It is not a surefire guide to persuading state courts to depart from federal Fourth Amendment doctrine. Nor does it guarantee a set of arguments that will persuade a state court to recognize race. Instead, this Part identifies a set of arguments that have succeeded (though not always) in prompting state courts to adopt more protective search-and-seizure standards than those adopted by

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dissent and that it was not strictly applying *Wardlow*'s headlong *flight + high-crime area = reasonable suspicion* formula but instead was considering those factors within a totality-of-the-circumstances analysis. See Washington v. State, 287 A.3d 301, 322, 335 (Md. 2022); see also supra text accompanying note 165.

423. See Pozen, supra note 364, at 2070 (describing how judicial elections give "citizens a means and a forum with which to register dissent").

424. Id. at 2051 (noting the low salience of state judicial elections).

425. In a similar vein, Professor William Snowden runs the Juror Project, which is designed to educate the public about the importance of jury service and the need for civic participation. About Us, Juror Project, https://www.thejurorproject.org/new-page [https://perma.cc/ME6Z-9B7C] (last visited Aug. 11, 2026).

426. See Harawa, Whitewashing the Fourth Amendment, supra note 2, at 980 ("[A]n accurate picture matters because that affects what happens next. Clarity about racism and the roots of subordination can influence actions and policies going forward.").

427. See Amna A. Akbar & Ryan D. Doerfler, Imperfect Guardians, 113 Calif. L. Rev. 2225, 2226–27 (2026) (arguing not "to forgo the courts" but explaining that it is still "hard to imagine courts paving roads to popular emancipation or mitigating harm at scale" because "[t]hat is not and cannot be the place of courts, given their social composition and their function"); Hershkoff, Introductory Remarks, supra note 49, at 1897 ("[A]s advocates, we also knew that state court litigation, like all litigation, could not hope to be transformational unless allied with communities that were organized and mobilized to do political struggle.").

the Supreme Court. It also surfaces additional lines of argument (not intended to be exhaustive) that may help state courts exercise their own constitutional independence going forward. Because state constitutional ecosystems vary widely, different courts may be receptive to different arguments. State courts may have divergent views on whether, when, and how to engage race in resolving search-and-seizure questions. Being sensitive to that, this Part should be understood as a buffet rather than a prix fixe, providing a menu of options to deploy in light of the conditions on the ground.

CONCLUSION

Over the course of these pages, this Article has aimed to do three things. First, and most descriptively, it provides an account of state constitutional rulings that have rejected some of the Supreme Court's most race-oblivious Fourth Amendment decisions. Second, it grounds debates about new judicial federalism in the actual practice of law, examining the arguments and rationales state courts have found persuasive when deciding whether to depart from federal search-and-seizure standards. Third, by distilling those successful arguments, the Article offers a roadmap for the increasing number of advocates, judges, and scholars who turn to state courts to advance civil rights and racial justice, both within and beyond the Fourth Amendment context.[428]

The Supreme Court has been unable—or unwilling—to confront the racial dynamics of policing that its own doctrine has enabled. Some states are charting a different course, developing doctrines that provide greater protection against racialized policing and that, at times, explicitly treat

428. For example, this Article may find purchase in the push for state courts to recognize abortion rights. See Jonathan L. Marshfield, State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections, 76 SMU L. Rev. 519, 528 (2023) ("[P]ro-choice advocates have pursued both formal amendments to state constitutions as well as constitutional litigation in state courts . . . ."). Or voting rights. See Jessica Bulman-Pozen & Miriam Seifter, Countering the New Election Subversion: The Democracy Principle and the Role of State Courts, 2022 Wis. L. Rev. 1337, 1344 ("Although the democracy principle is a longstanding commitment of state constitutions, it has been urgently invoked in recent years as challenges to partisan gerrymandering and other electoral mischief have been pushed out of federal [courts] to state courts."). Or religious freedom. See Vincent Martin Bonventre, Tori Logan Deyo & Matthew T. Skinner, Supreme State Courts: Protecting Rights & Liberties Despite the Supreme Court, 85 Alb. L. Rev. 739, 741 (2022) (noting the influence of state high courts on the Supreme Court in the context of the Supreme Court's granting religious exemptions for a Jehovah's Witness); see also Note, Federalism Rebalancing and the Roberts Court: A Departure From Historical Patterns, 138 Harv. L. Rev. 1385, 1403 & n.161 (2025) (observing that "there are many examples where state constitutions are more protective of rights than the Federal Constitution is," including with respect to religious free exercise). The Article may also be helpful in other criminal justice issues—for example, in how state courts interpret their state constitutional cruel and unusual punishments clauses. See, e.g., Commonwealth v. Lee, 357 A.3d 356, 357 (Pa. 2026) (holding mandatory life without parole sentences for all felony murder convictions unconstitutional under the Pennsylvania Constitution).

race as legally relevant to a search-and-seizure analysis. As it is with state-based remedies, the results are uneven. But here, states can offer something the Supreme Court (likely[429]) does not: a viable forum for naming and addressing the racial harms of modern policing.

At a moment when the Supreme Court has weakened the federal Constitution's capacity to address racial harm, state courts remain well positioned to take the pen themselves and craft constitutional doctrine attuned to the pluralistic realities of American life.[430] This Article aims to show when that has occurred, how it has been done, and what it may require going forward.

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429. To be clear, "the Court has never explicitly held that race cannot be considered when resolving Fourth Amendment questions." Harawa, Coloring in the Fourth Amendment, supra note 6, at 1536 (emphasis omitted). And in fact, over a dissent by Justice Alito joined by Justice Thomas, the Supreme Court recently denied the federal government's certiorari petition in a case raising the question of whether race can be considered as part of the Fourth Amendment reasonable person analysis. See United States v. Carter, 146 S. Ct. 1871, 1871 (2026). Thus, as I have argued in previous work, all courts should exploit the gap and hold that considering race in the Fourth Amendment context is consistent with the Court's articulation of colorblind constitutionalism. See generally Harawa, Coloring in the Fourth Amendment, supra note 6.

430. See Beyoncé, Bigger, *on* The Lion King: The Gift (Spotify, Parkwood Ent. July 19, 2019) ("Life is your birthright, they hid that in the fine print . . . Take the pen and rewrite it.").