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# Social-Network Theory and the Diffusion of the Search-and-Seizure Exclusionary Rule Among State Courts Between Weeks and Wolf

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# Social-Network Theory and the Diffusion of the Search-and-Seizure Exclusionary Rule Among State Courts Between *Weeks* and *Wolf*<sup>†</sup>

Laurence A. Benner,<sup>\*</sup> Robert Bird<sup>\*\*</sup> & Donald J. Smythe<sup>\*\*\*</sup>

## ABSTRACT

*In light of the Supreme Court's recent narrowing of the Fourth Amendment exclusionary rule in cases like *Herring v. United States*<sup>1</sup> and *Davis v. United States*,<sup>2</sup> there is renewed interest in whether state supreme courts will maintain or similarly narrow the search and seizure exclusionary rule for violations of their own state constitutions. The pattern of early adoptions of the exclusionary rule as a matter of state law before it was mandated by the federal Constitution may provide interesting insights into how the state supreme courts will respond to cases such as *Herring* and *Davis*. This article uses social-network theory to evaluate the patterns of communication and influence across state courts in the diffusion of the search and seizure exclusionary rule as a matter of state constitutional law. During the period studied, the Supreme Court made the exclusionary rule mandatory in federal criminal prosecutions for violations of the Fourth Amendment, but had not yet ruled that the Fourth Amendment applied to the states. We conceptualize the diffusion of the exclusionary rule in state courts as a matter of state law as a two-stage process. The first stage concerns whether the issue of exclusion of evidence obtained through illegal searches and seizures in violation of state constitutional law was presented to state supreme courts following adoption of the federal exclusionary rule in *Weeks v. United States*.<sup>3</sup>*

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1. *Herring v. United States*, 555 U.S. 135 (2009).

2. *Davis v. United States*, 131 S. Ct. 2419 (2011).

3. *Weeks v. United States*, 232 U.S. 383 (1914).

*The second stage concerns whether the state courts adopted the exclusionary rule as a matter of state law, before *Wolf v. Colorado*,<sup>4</sup> when the Fourth Amendment was made applicable to the states. This article uses logistic regressions to evaluate the pattern of communication and influence among state courts in the diffusion of the exclusionary rule at each stage in the process. The results are striking. They suggest that precedents by other state supreme courts in the same West legal reporting regions were more influential in determining whether the question would arise in a particular state than precedents by state supreme courts in neighboring states, or the same federal circuit regions, or the same census regions. But precedents by other state supreme courts in the same federal circuit regions appear to have been more influential in determining whether the exclusionary rule would be adopted than precedents in neighboring states, the same West reporting regions, or the same census regions. These results both corroborate and extend those of previous studies.*

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4. *Wolf v. Colorado*, 338 U.S. 25 (1949).

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## I. INTRODUCTION

Today, the exclusionary rule that bars physical evidence obtained through unreasonable search or seizure is applied, albeit with many exceptions, in both federal and state criminal prosecutions as a matter of federal constitutional law under the Fourth Amendment to the United States Constitution. In the early part of the twentieth century, however, the Fourth Amendment had not yet been incorporated as part of due process and made applicable to the states under the Due Process Clause of the Fourteenth Amendment. Thus, there was no federal constitutional protection against unreasonable searches and seizures that were conducted by state officials acting under the color of state law.<sup>5</sup>

The states did have longstanding protections against unreasonable searches and seizures in their state constitutions.<sup>6</sup> But under an equally longstanding common law rule of evidence, a criminal court did not inquire into whether physical evidence had been illegally obtained.<sup>7</sup> This was viewed as a collateral issue properly dealt with in a civil proceeding against the offending trespasser.<sup>8</sup> The Supreme Court's ruling in *Weeks v. United States*,<sup>9</sup> excluding physical evidence in federal criminal cases because it had been illegally obtained in violation of the Fourth Amendment, thus constituted a dramatic departure from the common law tradition. It was thus only after the Supreme Court adopted the federal exclusionary rule in *Weeks* that most state supreme courts subsequently addressed the issue of whether the exclusionary rule should likewise apply to searches and seizures by state officers under their state constitutions.<sup>10</sup> The new *Weeks* rule immediately engendered controversy, receiving criticism from such notable figures as John Henry Wigmore<sup>11</sup> and Judge Benjamin Cardozo.<sup>12</sup> Yet, it was gradually adopted by a number of state courts as a matter of state constitutional law. This article uses a new meth-

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5. See *infra* Part II.

6. See *infra* Part II.

7. See 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183 (4th ed. 1985).

8. *Id.*; see also *People v. Adams*, 68 N.E. 636 (N.Y. 1903).

9. *Weeks v. United States*, 232 U.S. 383 (1914).

10. See Kenneth Katkin, "Incorporation" of the Criminal Procedure Amendments: *The View From the States*, 84 NEB. L. REV. 397, 415-16 (2005).

11. 8 WIGMORE, *supra* note 7, § 2184a & n.1.

12. See *People v. Defore*, 150 N.E. 585, 587-89 (1926).

odology drawn from social-network theory to evaluate the forces that generated and facilitated the diffusion of the exclusionary rule as a matter of state constitutional law after *Weeks*, but before the Supreme Court made the Fourth Amendment applicable to the states in *Wolf v. Colorado*.<sup>13</sup>

We believe that the study of the diffusion of new legal innovations makes an important contribution to our knowledge about the law. Indeed, one of the characteristics of the law that makes it so interesting to study, and yet so difficult to understand, is that it is constantly changing and evolving. As a matter of case law, for instance, it is not enough to know the rule that courts have previously applied. Attorneys who are advising their clients often need to evaluate the possibility that the courts will overrule their precedents and apply a new rule in some future case. On a question of state law in the United States, for example, there might be a majority rule, a minority rule, and a direction or pattern to the way the law is changing—in other words, a trend in the law. If the minority rule is the trend, then at some point it might become the majority rule. The fact that adoption of a new rule by the courts of one state might also influence courts in other states that follow the old majority rule creates uncertainty. The possibility of such changes in the law—or “legal innovations”—makes the practice of law an especially challenging profession.

Ideally, therefore, an attorney should know more than simply the “law on the books”—she should also know about any trends in the law. Even a single new precedent might persuade the courts in her state to change an existing rule. That is why so much time in law school is devoted to thinking about the alternatives to the law on the books and debating the relative merits of alternative legal rules. In her role as counselor to her clients, a good attorney should be able to track the direction and pattern of any changes in the law and advise her clients about their legal risks under these trends.

A good attorney should also be able to assess whether the courts

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13. *Wolf v. Colorado*, 338 U.S. 25 (1949). The exclusionary rule was made mandatory upon the states in *Mapp v. Ohio*, 367 U.S. 643, 654 (1961). We focus on the period between *Weeks* and *Wolf* because after the Supreme Court adopted the exclusionary rule as a matter of federal constitutional law in *Weeks*, the question arose in almost all states as a matter of state constitutional law. Justice Frankfurter’s majority opinion in *Wolf* indeed surveyed the state cases that had addressed the *Weeks* doctrine, which, by then, had diffused among the states, as a matter of state law alone, as widely as it ever would.

in her jurisdiction might accept a claim based on the trend toward a change in the existing legal rule. Indeed, social and political reformers also have an interest in understanding the direction of trends in the law and any patterns in the way the law changes. If agents of change want to allocate their time and resources to promote legal reform in the most effective way possible, they would clearly benefit from having a better understanding of where they should challenge the status quo and establish a new precedent so as to have the most influence upon other courts in their own or other jurisdictions.

Given that changes in the law are so frequent and important, it is surprising that more systematic empirical research has not been devoted to understanding the underlying patterns of diffusion of legal innovations. Indeed, developments and changes in the law are rarely a matter of happenstance. They are a product of underlying social forces and dynamics that operate through legal institutions and the human actors that work within them. Of course, traditional historical studies have often been directed at understanding the causes and consequences of legal change. Unfortunately, it is often difficult to draw the kind of generalizations from such studies that will help to serve as a guide in predicting the path of future developments and changes in the law. Indeed, one of the great virtues of traditional historical scholarship is that it often has identified what was unique about a particular historical phenomenon rather than how it obeyed a similar pattern to other phenomena of the same type. For generalizations that will have predictive value, the social sciences are likely to be more availing.

Fortunately, there is a large and growing social science literature on the diffusion of innovations.<sup>14</sup> This literature has generally drawn on insights from economics, political science, and sociology to create what some scholars consider a new field—the field of diffusion studies.<sup>15</sup> The fundamental idea is to recognize that most innovations diffuse when they are voluntarily adopted by particular actors. The actors might be individuals, business firms, or state and national governments—in fact, almost any person or social institution that

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14. See generally EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* (5th ed. 2003) (providing a classic introduction to and overview of the social science literature on diffusion).

15. *Id.*; see also EVERETT M. ROGERS et al., *Complex Adaptive Systems and the Diffusion of Innovations*, 10 *INNOVATION J.*, no. 3, 2005, at 4, <http://www.innovation.cc/volumes-issues/rogers-adaptivesystem7final.pdf> (giving a brief history of diffusion studies).

makes decisions.<sup>16</sup> The innovations can be of almost any type, but most studies have focused on innovations such as the adoption of new production techniques by business firms, or new agricultural methods by farmers, or new prescription practices by physicians.<sup>17</sup> One of the basic premises of the field is that the social context—in particular, the social network—within which the actors make their decisions about whether to adopt innovations is of primary importance.<sup>18</sup> The field of diffusion studies thus overlaps heavily with the emerging field of social-network theory.

Although social-network methods are being used with increasing frequency in the social sciences, legal scholars have only recently begun to explore the possibilities.<sup>19</sup> In one early study, Donald Smythe used social-network methods to study the diffusion of the Uniform Sales Act across the states from 1906–47.<sup>20</sup> He found that “neighborhood” effects were particularly important in the enactment of the Uniform Sales Act by state legislatures.<sup>21</sup> He also found some evidence that transportation networks were influential,<sup>22</sup> and, in a subsequent study, attempted to evaluate the effects of the national transportation network on the legislatures’ decisions.<sup>23</sup> In some cases the effect seemed quite strong. To our knowledge, Robert Bird and Donald Smythe were the first to use social-network methods to examine the diffusion of new legal rules made by judicial decisions. They used social-network methods to study the diffusion of wrongful-discharge laws across the states in the 1970s and 1980s.<sup>24</sup> They subsequently used social-network methods to study the diffusion of the strict liability rule in tort for manufacturing defects in the 1960s and 1970s.<sup>25</sup> Both of these studies found a particularly interesting re-

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16. See *infra* text accompanying note 166.

17. See *infra* text accompanying note 164; see also Rogers et al., *supra* note 15, at 4.

18. Rogers et al., *supra* note 15, at 4.

19. See *infra* Part III.

20. Donald J. Smythe, *Transaction Costs, Neighborhood Effects, and the Diffusion of the Uniform Sales Act, 1906–48*, 4 REV. L. & ECON. 341 (2008).

21. *Id.* at 342.

22. *Id.*

23. Donald J. Smythe, *Why Was the Uniform Sales Act Adopted in Some States but not Others?* (Mar. 29, 2008) (unpublished manuscript) (on file with the International Society for New Institutional Economics), <http://extranet.isnie.org/uploads/isnie2008/smythe.pdf>.

24. Robert Bird & Donald J. Smythe, *The Structure of American Legal Institutions and the Diffusion of Wrongful-Discharge Laws, 1978–99*, 42 LAW & SOC’Y REV. 833 (2008).

25. Robert Bird & Donald J. Smythe, *Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963–87*, 37 LAW & SOC. INQUIRY 565 (2012).



sult: the federal circuit regions appeared to play an important role in the diffusion processes, even though both the wrongful-discharge laws and the strict liability rule were new legal rules adopted by state courts<sup>26</sup> as a matter of state law.<sup>27</sup> As Bird and Smythe have explained, these findings suggest that the administrative structure of the federal court system may play an important role in the development of state laws, even though *Erie v. Tompkins*<sup>28</sup> and succeeding Supreme Court cases have attempted to separate and clarify the lines of state and federal judicial power in order to preserve federalism in the United States.<sup>29</sup>

The Bird and Smythe studies were limited, however, in a number of ways. First, they focused on the diffusion of new private laws. There is no guarantee that the patterns evident in the diffusion of new private laws would be observed in the diffusion of new public laws. Second, the two Bird and Smythe studies focused on new judicially created rules that diffused over roughly the same period—primarily the 1960s, 1970s, and 1980s. There is no guarantee that the patterns they found would be observed over a different period. Third, as Bird and Smythe explained, the evolution of new state legal rules might depend in subtle ways upon the decisions of different actors within the legal system at different stages in the legal process.<sup>30</sup> Unfortunately, in their studies they were unable to draw any inferences about the influences on different actors at various stages in the diffusion process. Further studies using richer data would be necessary to identify more nuanced patterns in the diffusion of new judicial rules. Finally, Bird and Smythe's results could have simply been a consequence of "noise" in the data—peculiarities unique to the particular

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26. Although judges do not technically "make" laws, as a practical matter they do change the law through interpretation by adopting new legal rules that govern how disputes are adjudicated. The exclusionary rule is a classic example of such a judge-made law.

27. Bird & Smythe, *supra* note 24, at 835–36; Bird & Smythe, *supra* note 25, at 581–84.

28. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (holding that there is no federal common law; rather, in the absence of any controlling state or federal statute, a federal court exercising diversity jurisdiction is to apply the common law of the state in which it sits).

29. For a then-contemporary interpretation of *Tompkins* as playing an important clarifying role in understanding federalism, see Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 Harv. L. Rev. 579, 610 (1940) ("The Court's decision to cut through this tangle of inconsistent purposes and flatly to reverse a discredited policy [created by *Swift v. Tyson*, 41 U.S. 1 (1842)] clarifies and refines the working theory of federalism. It terminates the scandal of dual, conflicting rules of decision wherever it survived.").

30. See Bird & Smythe, *supra* note 24, at 838–41.

decisions and rules they studied over a particular period—or simply a spurious statistical correlation. One point of wide agreement among social scientists is that empirical studies should be replicated whenever possible, and the rationale for replication is just as compelling when social scientific methods are applied to the law.<sup>31</sup>

This article attempts to redress some of the limitations of the earlier studies by applying social-network methods to examine the diffusion of the search and seizure exclusionary rule as a matter of state constitutional law. The time period studied begins when the U.S. Supreme Court created the exclusionary rule for violations of the Fourth Amendment by *federal* authorities in *Weeks v. United States*<sup>32</sup> and ends the year the Court made the Fourth Amendment (but not the exclusionary rule) applicable to the states in *Wolf v. Colorado*.<sup>33</sup> The state supreme court decisions addressing the exclusionary rule during this period were rendered from 1915 to 1936.

Today there is a renewed interest in state constitutional criminal procedure.<sup>34</sup> We hope this article will add to our understanding of the manner in which state constitutional criminal procedures changed in the early twentieth century. Beyond that, however, we also hope it adds to our more general understanding of how new legal rules spread throughout the legal system. In addition, the rich data created by the exclusionary rule cases allow this article to expand upon Bird and Smythe's previous studies. This allows us to penetrate some of the layers in the diffusion process that the previous studies were unable to address. Specifically, we are able to distinguish between the factors that facilitated whether the question about the exclusionary rule "bubbled up" to the state supreme courts in the first place, and the factors that may have influenced the state supreme courts to adopt the rule in a case that reached them.

Our study provides some interesting results. First, it appears that whether the issue of exclusion due to illegal search and seizure arose at all in a particular state correlates strongly with whether an exclusionary rule case had been previously decided by another jurisdiction

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31. Except for experimental research, exact replication is generally not possible in the social sciences. Nonetheless, studies that test the same hypothesis on different data sets are often possible and they also help to verify the results.

32. *Weeks v. United States*, 232 U.S. 383 (1914).

33. *Wolf v. Colorado*, 338 U.S. 25 (1949).

34. *See, e.g.*, BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW*, at vii (1995).

in that state's West Regional Reporter.<sup>35</sup> Indeed, previous judicial decisions reported within a state's West Regional Reporter had more influence on whether the question would arise in any particular state than decisions by other state supreme courts in neighboring states, the same federal circuit regions, or the same census regions. This makes sense in the days before computerized access to decisions via Westlaw, LexisNexis, and the Internet. Knowledge about exclusionary rule decisions in other states was more readily available to attorneys in their regional West reporters.

But when cases raising the exclusionary rule reached the state supreme courts we found that decisions adopting the rule by other state supreme courts in the same federal circuit regions appeared to be more persuasive than decisions by other state supreme courts in the same West legal reporting regions, neighboring states, or the same census regions. It is not immediately apparent why the federal circuit regions might play a role in the diffusion of the exclusionary rule among state courts. A federal court, moreover, would not have habeas corpus jurisdiction to hear a claim of a state prisoner concerning illegal search and seizure under the Fourth Amendment because that amendment did not apply to the states during this time period. In any event, this result corroborates one of the main results from Bird and Smythe's earlier diffusion studies that used the same social-network methods.<sup>36</sup> The corroboration of those results lends some further credence to the conclusion that there are important patterns of communication and influence between federal and state court systems that we do not fully understand. The administrative structure of the federal courts may have left an important imprint on the pattern of communication and influence across state courts.<sup>37</sup>

In the next section of the article, we present an overview of Fourth Amendment jurisprudence and the exclusionary rule. In the third section, we present a discussion of social-network theory and its application to diffusion studies. In the fourth section, we discuss the

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35. West Publishing's National Reporter System groups states into seven regions: Atlantic, North Eastern, North Western, Pacific, South Eastern, South Western, and Southern. Decisions of state appellate courts are published in a reporter for each region. MORRIS L. COHEN & KENT C. OLSON, *LEGAL RESEARCH IN A NUTSHELL* (8th ed. 2003) (describing the West reporting regions).

36. These studies also found that the federal circuit regions played a significant role in diffusion of private laws. *See infra* Part V.

37. *See infra* Parts V–VI.

data we compiled for this study, and in the fifth section we explain our empirical methods. In the sixth and seventh sections, we present our results and conclusions.

## II. THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

### *A. Common-Law Antecedents*

Fourth Amendment protections have deep roots in the common law.<sup>38</sup> Some of the most influential cases supporting a right to be free from unreasonable searches and seizures in England arose from attempts to censor the speech of dissenters.<sup>39</sup> English kings had established the practice of granting a monopoly to royally favored printers.<sup>40</sup> Under its charter of incorporation, this guild of printers was granted the power to search, seize, and destroy all unlicensed presses to enforce its monopoly, and to confiscate seditious and heretical publications.<sup>41</sup> By 1636, the infamous Star Chamber was issuing what were referred to as “general” search warrants that authorized appointed “messengers” to search for and seize any books or printed matter suspected to be libelous of church or state.<sup>42</sup> In contrast to a search warrant to recover stolen property that required probable cause sworn to under oath,<sup>43</sup> such general warrants required no

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38. *See, e.g.,* *Semayne’s Case*, (1604) 77 Eng. Rep. 194 (K.B.) 195 (recognizing the right of a homeowner to defend his or her house against unlawful entry, and also recognizing appropriate officers’ authority to enter upon notice in order to arrest or execute the king’s process). *See generally* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT, ORIGINS AND ORIGINAL MEANING* 602–1791, at part II–VI (2009); THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 15–20 (2009).

39. *See* *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (C.P.) 812–13 (declaring a general warrant was unlawful because it authorized the king’s agents to search at their discretion and thus lacked the established common law safeguards, i.e., justification, in the form of a sworn declaration under oath that illegal contraband was in fact located in the particular place to be searched); *see also* *Wilkes v. Wood* (1763) 98 Eng. Rep. 489 (C.P.).

40. CUDDIHY, *supra* note 38, at 59.

41. *Id.*

42. *Id.* at 61.

43. Sir Matthew Hale, Chief Justice of the Kings Bench wrote:

[Warrants for stolen property] are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons of such suspicion. And therefore I do take it, that a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact.

sworn justification for the search of any particular place.<sup>44</sup> After 1640 and the overthrow of King Charles I, the power of search and seizure was exercised by the English parliament to silence dissenters using the same type of general warrant.<sup>45</sup> Englishmen challenged the issuance of such general warrants on the grounds that they conferred unbridled discretion on those authorized to conduct them, and in 1765 in *Entick v. Carrington*,<sup>46</sup> a general warrant to search for libel was declared illegal in England as being contrary to English common law.

*Entick v. Carrington* would establish an important precedent for the American colonies. During the colonial era, the English parliament enacted a number of statutes that empowered government officials to search for and seize goods that had been imported without customs duties being paid.<sup>47</sup> In England, the Act of Frauds in 1662 authorized customs officers through a writ of assistance to command officials and virtually anyone in the kingdom to assist them in searching private property for goods upon which duties had not been paid.<sup>48</sup> This provision was then applied to the American colonies by the Act of Frauds of 1696.<sup>49</sup> A writ of assistance operated like a general warrant in that no justification had to be shown or sworn to in order for the customs officer to search a particular home or shop.<sup>50</sup> This became a cause of great resentment in the colonies. For example, the Molasses Act of 1733 imposed prohibitive tariffs on sugar and molasses imported from non-British colonies in the West Indies. While enforcement was initially lax, after England and France went to war in the 1750s, customs officers used the writs of assistance to gain entry into the homes, shops and storehouses of American colo-

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2 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 150 (W.A. Stokes & E. Ingersoll, eds., R.H. Small 1847) (1736).

44. *Entick*, 95 Eng. Rep. 807.

45. CUDDIHY, *supra* note 38, at 151–52.

46. *Entick*, 95 Eng. Rep. 807.

47. The Court of Exchequer was empowered to issue a writ to a customs officer, who could, with a constable or even the aid of any other nearby subject, enter “any House, Shop, Cellar, Warehouse or Room or other Place and, in Case of Resistance, to break open [d]oors, [c]hests, [t]runks, and other packages, there to seize” any prohibited and uncustomed goods. ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT, A HISTORY OF SEARCH AND SEIZURE, 1789–1868*, at 32 (2006).

48. See William J. Stutz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 404 (1995).

49. *Id.*

50. *Id.* at 405.

nists for the purpose of seeking out illegal imports from the French and Dutch colonies.<sup>51</sup>

These writs continued in force until the sovereign under whom they had been issued died.<sup>52</sup> In 1761, James Otis sought unsuccessfully to enjoin the issuance of new writs after the death of King George II<sup>53</sup> calling them “monsters in the law” reminiscent of Star Chamber tyranny and “instruments of slavery” which placed “the liberty of every man in the hands of every petty officer.”<sup>54</sup> The abuse of the power to engage in search and seizure thus contributed to the tensions between the colonists and the English Crown and led to public demonstrations as well as legal challenges to the Crown’s exercise of authority.<sup>55</sup>

Immediately after declaring their independence, eight states<sup>56</sup> included provisions in their state constitutions guaranteeing their citizens’ rights against unreasonable searches and seizures.<sup>57</sup> State constitutional protections against unreasonable searches and seizures thus pre-date the federal constitutional protections in the Fourth Amendment. Indeed, the states’ concerns about the lack of such protections in the proposed federal constitution figured prominently in the ratification debates.<sup>58</sup> Ultimately, of course, James Madison’s

51. *Id.*

52. *Id.* at 406.

53. *Id.*

54. James Otis, Argument before the Boston Superior Court (Feb. 1761) in MASSACHUSETTS SPY, Apr. 29, 1773, and *Israel Keith’s Pleadings, Arguments, &c.*, QUINCY’S REPORTS 479 (Horace Grace, ed.), reprinted in M. H. SMITH, *Appendix J: John Adams’s “Abstract” of THE WRITS OF ASSISTANCE CASES 552–54* (1978).

55. McINNIS, *supra* note 38, at 18–19. Sentiments expressing a need for freedom from unreasonable searches and seizures also appeared in *The Rights of the Colonists and a List of Infringements and Violations of Rights in 1772*. BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 205–06* (1971); McINNIS, *supra* note 38, at 5 (“Ratification of the amendment ‘was not a pedantic exercise, but [done] to protect an almost sacred right that the colonists felt about their privacy, particularly the privacy of their homes, but also their persons, businesses, and other private premises.’” (citing PHILLIP A. HUBBART, *MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 77* (2005))).

56. The states in order of adoption include Virginia (1776), Delaware (1776), Pennsylvania (1776), Maryland (1776), North Carolina (1776), Vermont (1777), Massachusetts (1780), and New Hampshire (1784). McINNIS, *supra* note 38, at 19.

57. See also McINNIS, *supra* note 38, at 17 (“For Americans during the founding era the possible abuses of governmental power concerning search and seizure were not distant or remote fears. Americans had examples of abuses from the colonial era which they could point to in order to justify the need for strong limits on the power of the government to conduct searches and seizures.”).

58. See *id.* at 19.

proposed Bill of Rights was adopted and thereafter provided constitutional protections against all unreasonable searches and seizures by the federal government.<sup>59</sup> The protection against unreasonable search and seizure thus operated at two levels. State constitutions protected against infringement by the states, the federal constitution protected against infringement by the federal government.

*B. Early American Cases*

In spite of the federal and state constitutional protections, American courts were initially slow to regulate government searches and seizures. For one thing, they did not initially exclude evidence that was obtained through an illegal search.<sup>60</sup> The exclusionary rule would not be applied until the early twentieth century.<sup>61</sup> Moreover, criminal cases were generally a matter of state law, and the Supreme Court held in an early case that the Bill of Rights did not apply to the states.<sup>62</sup> Because the Court held the Bill of Rights inapplicable to the states, federal courts had little to say about searches and seizures early in the history of the republic.<sup>63</sup> The Supreme Court thus decided only a few Fourth Amendment cases during the entire nineteenth century.<sup>64</sup> *Boyd v. United States*,<sup>65</sup> the most important Supreme Court case that addressed Fourth Amendment rights during that period was not a typical criminal case, but rather an in rem proceeding to obtain forfeiture of goods allegedly imported without paying proper duties.

In *Boyd*, a dispute arose between the federal government and Boyd over the duty-free importation of French plate glass windows

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59. See *id.* at 19–20 (an amendment to Madison’s proposal introduced by Egbert Benson might have limited the federal protections to general warrants but it was rejected). See also 1 ANNALS OF CONG. 754 (1790).

60. See Bradford Wilson, *The Origins and Development of the Federal Rule of Exclusion*, 18 WAKE FOREST L. REV. 1073, 1074 (1982) (“Evidence obtained in the course of an illegal search and seizure always has been admitted in England and universally was admitted in American courts for more than a century after the Revolution.”); see also *People v. Adams*, 68 N.E. 636, 638 (1903).

61. *Weeks v. United States*, 232 U.S. 383 (1914).

62. See *Barron v. Baltimore*, 32 U.S. 243, 248 (1833); 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, 961 (2005).

63. See McINNIS, *supra* note 38, at 21; Urbonya, *supra* note 62, at 961.

64. McINNIS, *supra* note 38, at 21.

65. *Boyd v. United States*, 116 U.S. 616 (1886).

used in construction of a federal courthouse.<sup>66</sup> The government maintained Boyd imported far more than was needed for the project and brought a civil action seeking forfeiture of the excess crates of glass upon which no duty had been paid. The trial court ordered Boyd to turn over invoices showing the amount of plate glass that had been imported and based upon this evidence the jury returned a verdict in the government's favor.<sup>67</sup> On appeal, the Supreme Court held:

[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.<sup>68</sup>

While *Boyd's* Fourth Amendment ruling had been based on the belief that it was unreasonable to search for and seize mere papers for use as evidence (a ruling later overturned in *Warden v. Hayden*<sup>69</sup>), the exclusion of evidence was based upon the Fifth Amendment's ban on use at trial of compelled testimony. The exclusionary rule crafted by the *Boyd* decision thus had limited application. The general rule that a court would not take notice of how physical evidence was obtained still applied unless the owner of the property was compelled by a court order to turn it over or had submitted to a search warrant.<sup>70</sup> The Court did not enunciate the Fourth Amendment exclusionary rule in its current form until 1914 in *Weeks v. United States*.<sup>71</sup>

### *C. Mechanisms for Enforcing Fourth Amendment Protections*

Once a court has determined that particular government action constitutes a search or seizure, Fourth Amendment protections apply. The text of the Fourth Amendment declares that no warrant shall issue but upon probable cause and warrantless searches or seizures are

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66. *Id.* at 617.

67. *Id.* at 618.

68. *Id.* at 634–35.

69. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

70. *See Adams v. New York*, 192 U.S. 585 (1904) (distinguishing *Boyd* on the ground that the search warrant was not directed at the defendant). The Fifth Amendment basis for exclusion was later abandoned, and in *United States v. Leon*, 468 U.S. 897 (1984), the Court held that where an officer in good faith relies upon a search warrant, evidence will not be excluded even if the search warrant was invalid.

71. *Weeks v. United States*, 232 U.S. 383 (1914).



presumptively unconstitutional unless one of the many exceptions crafted by the Supreme Court applies.<sup>72</sup> Indeed, the vast majority of searches and seizures are warrantless.<sup>73</sup> The Supreme Court has, for example, carved out a substantial body of exceptions to the warrant requirement for searches and seizures based upon probable cause and conducted under exigent circumstances.<sup>74</sup> It has also carved out a large number of exceptions to the warrant requirement for searches and seizures that are reasonable even though there may not be exigent circumstances or probable cause.<sup>75</sup> In the absence of such an exception, however, a warrant and probable cause are required.

In order to protect Fourth Amendment rights against such violations, some enforcement mechanism is necessary, but the precise scope of that mechanism has always been controversial in criminal cases. Those whose Fourth Amendment rights are violated by state officials may of course seek damages under a statutory cause of action for violation of civil rights.<sup>76</sup> Those whose Fourth Amendment rights are violated by federal officials may seek damages under a judicially created common law action known as a *Bivens* action.<sup>77</sup> Nonetheless, such civil rights actions are of limited use in enforcing Fourth Amendment rights. A state governmental entity cannot be sued under the federal statute unless it is shown that the entity had a custom or

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72. See RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF FOURTH, FIFTH AND SIXTH AMENDMENTS, AND RELATED AREAS 609–828 (3d ed. 1995).

73. See *id.* at 671.

74. See *Hayden*, 387 U.S. at 298–99 (concluding that warrant not required in a case involving hot pursuit where it would permit destruction of evidence or endanger the lives of police or others); *Carroll v. United States*, 267 U.S. 132, 155–56 (1925) (establishing an exception to the warrant requirement for searches and seizures of automobiles which are readily mobile).

75. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (suspicionless stop of automobiles at sobriety check point permissible); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (suspicionless stop of automobiles at immigration check point permissible); *Terry v. Ohio*, 392 U.S. 1 (1968) (warrantless stop and frisk is permissible if police officer has reasonable suspicion of criminal activity and reasonably believes the person may be armed and dangerous).

76. 42 U.S.C. § 1983 (1976) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”).

77. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 390 (1971) (finding that despite the absence of any statutory authority, tort actions may be brought against federal officials by persons seeking damages for violations of their Fourth Amendment rights).

practice of engaging in such violations,<sup>78</sup> and attorneys' fees cannot be recovered against a governmental entity if the plaintiff is successful in bringing the action only against officials in their personal capacity.<sup>79</sup> In many cases it is also very difficult for the plaintiff to prove the type of substantial damages sufficient to give attorneys an incentive to bring such suits.<sup>80</sup> Most scholars and courts agree that if the Fourth Amendment right to be free from unreasonable searches and seizures is to be enforced, there is little effective alternative to the exclusionary rule.<sup>81</sup>

#### *D. The Weeks Exclusionary Rule*

The Supreme Court of the United States first enunciated the exclusionary rule as we know it today in a federal criminal case, *Weeks v. United States*.<sup>82</sup> Weeks was arrested at his place of employment and charged with using the mail to promote illegal gambling.<sup>83</sup> His home was subsequently searched without a warrant and incriminating letters and other documents were discovered.<sup>84</sup> Before trial, Weeks moved for the return of the illegally seized items, but the court declined the motion with respect to the letters that were used as evidence against him.<sup>85</sup> On appeal, the Supreme Court framed the issue as whether the defendant's letters and correspondence could be retained and used as evidence in a criminal prosecution where they had been "seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises."<sup>86</sup>

The Court distinguished these circumstances from warrantless searches conducted incident to a lawful arrest and held that exclusion was required.<sup>87</sup> If "private documents" could illegally be seized and

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78. *Monell v. Dep't of Soc. Serv. of N.Y.C.*, 436 U.S. 658 (1978).

79. *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) (attorneys' fees cannot be recovered from a governmental entity when government employees are sued in their personal capacities).

80. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (compensatory damages based on the jury's assessment of the importance of the constitutional rights violated are impermissible).

81. *ALLEN ET AL.*, *supra* note 72, at 902-76.

82. *Weeks v. United States*, 232 U.S. 383 (1914).

83. *Id.* at 386.

84. *See id.*

85. *Id.* at 388.

86. *Id.* at 393.

87. *Id.* at 398.

used in evidence against the defendant, the Court observed, “the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and . . . might as well be stricken from the Constitution.”<sup>88</sup> As for the officials who acted under color of law, the Court concluded that it need not inquire into any remedy against them since the Fourth Amendment was not directed against individual misconduct.<sup>89</sup>

By ruling that the trial court should have granted the defendant’s pre-trial motion to return his property taken as a direct result of the unlawful invasion of his home without a warrant, the Court spawned the exclusionary rule, which is now the Court’s primary method for deterring violations of Fourth Amendment rights. *Weeks* was, however, a federal case. Most criminal cases then, as now, were brought in state courts for violation of state criminal laws. *Weeks* did not reach them because it did not address whether the Fourth Amendment or the exclusionary rule would apply against state officials. The Supreme Court continued to clarify the scope of the exclusionary rule in federal cases during the next several decades.<sup>90</sup> It did not, however, hold that the Fourth Amendment applied to state government officials acting under color of state law until 1949,<sup>91</sup> and it did not require the states to adopt the exclusionary rule until 1961.<sup>92</sup> During this period, the states developed their own jurisprudence to address unreasonable searches and seizures under their state constitutions.

#### *E. Applying Federal Constitutional Protections to the States*

Before the Fourteenth Amendment it was clear that the Bill of Rights did not apply to the states. In *Barron v. Baltimore*,<sup>93</sup> the Supreme Court held that the Takings Clause of the Fifth Amendment did not apply to takings by state governments and, more generally,

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88. *Id.* at 392–93.

89. *Id.* at 398.

90. See *Nardone v. United States*, 308 U.S. 338, 340 (1939) (all derivative evidence originally discovered through an illegal search is inadmissible); *Agnello v. United States*, 269 U.S. 20, 32 (1925) (searches conducted without a warrant are per se unreasonable, unless court-approved exceptions apply); *Burdeau v. McDowell*, 256 U.S. 465 (1921) (the exclusionary rule only applies to actions of government officials); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (the exclusionary rule not only applies to direct evidence seized as a result of an illegal search but also evidence or knowledge found as a result of such a search).

91. See *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

92. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

93. *Baron v. Baltimore*, 32 U.S. 243 (1833).

that the Bill of Rights “contain no expression indicating an intention to apply them to the state governments.”<sup>94</sup> The Fourteenth Amendment subsequently changed the constitutional landscape by providing that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>95</sup> In *Burlington & Quincy Railroad v. Chicago*, the Supreme Court applied the Due Process Clause of the Fourteenth Amendment to a taking of the railroad’s property without expressly stating that the clause incorporated the takings clause of the Fifth Amendment against the states.<sup>96</sup> In *Gitlow v. New York*, however, the Court expressly ruled that First Amendment freedoms were incorporated within the meaning of the term “due process,” stating: “[F]reedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”<sup>97</sup>

In subsequent cases, the Supreme Court proceeded to selectively incorporate other specific protections in the Bill of Rights and make them applicable against the states.<sup>98</sup> The Court did not incorporate the right to be free from unreasonable searches and seizures, however, until 1949 in *Wolf v. Colorado*.<sup>99</sup> In *Wolf*, the Supreme Court treated the exclusionary rule as a device of judicial creation rather than a constitutionally mandated remedy.<sup>100</sup> Thus, even though the Court held that the Fourth Amendment applied to the states, the exclusionary rule was still not mandated as a constitutionally required remedy for violation of the right to be free from unreasonable searches and seizures.<sup>101</sup>

### *F. The Exclusionary Rule under State Constitutions*

#### *1. Methodological considerations*

Justice Frankfurter’s majority opinion in *Wolf* provided a survey

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94. *Id.* at 250.

95. U.S. CONST. amend. XIV, § 1.

96. *Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233–34 (1897).

97. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

98. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932); *Near v. Minnesota*, 283 U.S. 697 (1931).

99. *Wolf v. Colorado*, 338 U.S. 25 (1949).

100. See *id.* at 28–33.

101. See *id.* at 31–33.

of state court decisions that had addressed the issue of whether to adopt an exclusionary rule as a matter of state constitutional law. Before the Supreme Court's adoption of the *Weeks* exclusionary rule in federal cases in 1914, the issue had arisen in twenty-seven states.<sup>102</sup> Iowa's Supreme Court was the only state that had excluded evidence secured through an unlawful search or seizure before *Weeks*.<sup>103</sup> After *Weeks*, all of the twenty-seven states that had already ruled on the question of the search and seizure exclusionary rule revisited the issue.<sup>104</sup> As Justice Frankfurter characterized the case law, ten of these states overruled their previous decisions and adopted the exclusionary rule,<sup>105</sup> and sixteen upheld their previous decisions that had rejected the rule.<sup>106</sup> Iowa, according to Frankfurter, continued to follow its previous decision adopting the exclusionary rule. As discussed below, we think Justice Frankfurter's analysis was incorrect.

Justice Frankfurter observed that twenty other states addressed the question whether to adopt the exclusionary rule for the first time after *Weeks*.<sup>107</sup> Of these twenty states, six adopted the exclusionary rule and fourteen rejected it.<sup>108</sup> Actually, as explained below, our research shows that only sixteen states had adopted an exclusionary rule between *Weeks* and *Wolf*. Thirty states had rejected *Weeks*, Rhode Island had not addressed the issue, and Oregon had come to no definitive conclusion.

We think Justice Frankfurter mischaracterized Iowa law by indicating that it had adhered to its prior formulation of the *Weeks* doctrine. Justice Frankfurter cited *State v. Rowley*<sup>109</sup> in support of this characterization.<sup>110</sup> While the *Rowley* court initially followed its earlier precedent, it subsequently withdrew that opinion on a motion for rehearing and reversed its position by rejecting *Weeks* based on an intervening case.<sup>111</sup> In the intervening case, *State v. Tonn*,<sup>112</sup> the Iowa

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102. *Id.* at 29.

103. *See id.* at 34 tbl.B.

104. *See id.* at 29, 36–38 tbls.F, G & H.

105. *Id.* at 36–37 tbl.F.

106. *Id.* at 37–38 tbl.G.

107. *Id.* at 29.

108. *Id.*

109. *State v. Rowley*, 195 N.W. 881 (Iowa 1923).

110. *Wolf*, 338 U.S. at 38 tbl.H.

111. *See Rowley*, 195 N.W. at 979.

112. *State v. Tonn*, 191 N.W. 530, 534–41 (Iowa 1923).

Supreme Court noted disenchantment with both *Boyd v. United States*<sup>113</sup> and *Weeks* because “[t]he due enforcement of criminal law would be most seriously handicapped in many instances, if not wholly crippled, by a strict adherence” to the *Weeks* rule.<sup>114</sup> The Court held that evidence taken from defendant’s suitcase without a search warrant was properly admitted.<sup>115</sup> Iowa had therefore rejected the exclusionary rule by the time *Wolf* applied the Fourth Amendment to the states. As the Supreme Court of Iowa has more recently observed, this remained the law in Iowa until *Mapp v. Ohio*.<sup>116</sup>

We also have another point of disagreement with Justice Frankfurter, that is, in his characterization of the law in Oregon as having rejected the *Weeks* exclusionary rule.<sup>117</sup> Justice Frankfurter cited *State v. Folkes*<sup>118</sup> in support of his characterization.<sup>119</sup> But upon a careful reading of *Folkes* it is evident that the Supreme Court of Oregon does not directly address the question of whether evidence obtained as a result of an illegal search or seizure should be excluded at trial.<sup>120</sup> That case involved the admissibility of a confession obtained “without being first taken before a magistrate.”<sup>121</sup> The defendant relied upon a non-constitutional exclusionary rule fashioned by the Supreme Court in *McNabb v. United States*<sup>122</sup> for violations of a federal statute requiring that a person arrested be promptly brought before a magistrate. In the Oregon case, the Oregon Supreme Court noted that “[w]hen evidence is seized by an illegal search, the illegality is the immediate and proximate cause which produces the evidence.”<sup>123</sup> Although this may seem to imply an affirmation of the *Weeks* doctrine, the court proceeded to distinguish illegal search and seizure from the facts at hand, which involved a confession. It noted that

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113. *Boyd v. United States*, 116 U.S. 616 (1886) (citing *Weeks v. United States*, 232 U.S. 383 (1914)).

114. *Id.* at 536.

115. *See id.* at 535.

116. *See State v. Cline*, 617 N.W.2d 277, 286–87, 293 (Iowa 2000) (the court noted that after *Tonn*, Iowa rejected the exclusionary rule until the United States Supreme Court compelled states to adopt it in *Mapp v. Ohio*, 367 U.S. 643, 654 (1967)).

117. *See Wolf v. Colorado*, 338 U.S. 25, 36–37 tbl.I (1949).

118. *State v. Folkes*, 150 P.2d 17 (Or. 1944).

119. *Wolf*, 338 U.S. at 38 tbl.G.

120. *See Folkes*, 150 P.2d 17.

121. *Id.* at 24.

122. *Id.* (citing *McNabb v. United States*, 318 U.S. 332 (1943)).

123. *Id.* at 25.

“when the illegality, if any, consists merely in questioning the defendant, having failed first to take him before a magistrate, the confession, if voluntarily made, is only remotely, if at all, connected with the fact that the officer disobeyed the statute.”<sup>124</sup> The Oregon Supreme Court, therefore, did not address the admissibility of evidence obtained as a result of an illegal search or seizure in *Folkes*. In our view, it stands for neither an adoption nor a rejection of the *Weeks* exclusionary rule.<sup>125</sup> Therefore, we treat Oregon as not having definitively adopted or rejected the *Weeks* exclusionary rule before *Wolf*.

Because we are interested in determining the pattern of diffusion of the exclusionary rule after *Weeks*, we focused upon whether the adoption or rejection of the exclusionary rule by a particular state supreme court influenced other state courts. Therefore, we used the earliest state supreme court case to adopt a consistent position in a particular jurisdiction, while Justice Frankfurter’s tables cited the latest decision. For example, while Justice Frankfurter cited *Jackson v. State*,<sup>126</sup> decided in 1923, as rejecting *Weeks* in Georgia, we chose

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124. *Id.*

125. Recognizing that the status of the exclusionary rule was in a state of flux in Oregon, Justice Frankfurter followed the citation to *Folkes* with a “*but see*” *State v. Laundry*, 204 P. 958 (Or. 1922). In *Laundry*, the Oregon Supreme Court claimed that Oregon had followed the general rule that courts would not inquire into the legality of how evidence was obtained. *Id.* at 975. But the cases it cited for this proposition all involved instances in which there had been no illegal search and seizure because the evidence had been found on the defendant’s person at the time of his arrest and thus was admissible as a reasonable search incident to arrest. *See id.* The Court cited *Weeks* and stated that its rule “ought . . . to . . . be adopted and followed by the courts of this state.” *Id.* at 975. But this was clearly dicta because in *Laundry* the court ultimately found no search-and-seizure violation: “It is our conclusion that no constitutional right of the defendant was violated by the taking of any of the state’s exhibits.” *Id.* at 976.

Justice Frankfurter also mischaracterized *State v. McDaniel*, 65 P. 520 (Or. 1901) as having rejected the exclusionary rule before *Weeks*. *See Wolf v. Colorado*, 338 U.S. 25 (1949), 34 tbl.A. That case also involved evidence found on the defendant’s person at the time of arrest and thus did not involve an illegal search or seizure. The Oregon court considered *Weeks* before *Folkes* in a petition for rehearing in *State v. Ware*, 155 P. 364 (Or. 1916), a case that was not cited by Frankfurter. That case distinguishes *Weeks* stating that “the facts in that cause are decidedly different from those in the one at bar” because *Weeks* involved entry into a house after arrest elsewhere, whereas *Ware* involved papers taken from defendant’s place of business at the time of his arrest. *Id.* The Court also noted the general rule that “courts will not pause in the orderly trial of a criminal cause to inquire into the manner in which the evidence was secured” and observed that “[i]f the defendant suffered injury by the seizure of his papers, he had his remedy in some civil proceeding.” *Id.* Because the search and seizure issue was not addressed in the original decision, the brevity of this one-page opinion denying the petition for rehearing that avoids confronting *Weeks* cannot be said to confidently place Oregon in either camp regarding whether it had adopted the exclusionary rule.

126. *Wolf*, 338 U.S. at 37 tbl.G (citing *Jackson v. State*, 119 S.E. 525 (Ga. 1923)).

*Kennemer v. State*,<sup>127</sup> decided in 1922, which had earlier rejected the *Weeks* doctrine. Similarly, we chose *People v. Brocamp*<sup>128</sup> as adopting the exclusionary rule in Illinois in 1923 rather than *People v. Castree*,<sup>129</sup> decided in 1924. For the same reasons, we treat Oklahoma as having adopted the exclusionary rule in 1921 in *Hess v. State*,<sup>130</sup> rather than in 1923 in *Gore v. State*.<sup>131</sup>

In some states the treatment of the exclusionary rule raised special issues because the court did not maintain a consistent position. For instance, according to Justice Frankfurter, the first post-*Weeks* opinion in which the Idaho Supreme Court discussed the *Weeks* doctrine was *State v. Myers*<sup>132</sup> in 1922. But a majority (three of the judges on the five justice Supreme Court) actually found no search and seizure violation in that case.<sup>133</sup> *State v. Anderson*,<sup>134</sup> moreover, in 1918 had been the first Idaho case to reject the exclusionary rule after *Weeks*. In 1927, in *State v. Arregui*<sup>135</sup> federal officers obtained evidence using an invalid search warrant and then turned it over to state law enforcement officers.<sup>136</sup> The Idaho Supreme Court excluded the evidence as a matter of state constitutional law.<sup>137</sup> We, therefore, treat Idaho as having first considered the question of whether to follow the exclusionary rule after *Weeks* in 1918 and as having adopted the exclusionary rule in 1927.

## 2. Patterns in the state exclusionary-rule cases

There are some interesting patterns in the state exclusionary rule cases. The time period covered by our study encompassed much of the prohibition era (1920–1933), in which there was an effort to minimize alcohol in society.<sup>138</sup> While possession was not outlawed, alco-

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127. *Kennemer v. State*, 113 S.E. 551 (Ga. 1922).

128. *People v. Brocamp*, 138 N.E. 728 (Ill. 1923).

129. *Wolf*, 338 U.S. at 36 tbl.F (citing *People v. Castree*, 143 N.E. 112 (Ill. 1924)).

130. See *Hess v. State*, 202 P. 310 (Okla. 1921).

131. *Wolf*, 338 U.S. at 36 tbl.F (citing *Gore v. State*, 218 P. 545 (Okla. 1923)).

132. *Id.* (citing *State v. Myers*, 211 P. 440 (Idaho 1922)).

133. See *Myers*, 211 P. at 445 (Macarthey, J., concurring); see also *State v. Arregui*, 254 P. 788, 790 (Idaho 1927).

134. See *State v. Anderson*, 174 P. 124, 125–26 (Idaho 1918).

135. See *Arregui*, 254 P. 788.

136. *Id.* at 793.

137. *Id.* at 792.

138. The Eighteenth Amendment, which prohibited the sale of intoxicating liquor, became effective one year after its ratification in 1919. It was repealed by the Twenty-first



hol was treated like contraband in the effort to stamp out the large, illegal industry devoted to its manufacture, distribution, and sale.<sup>139</sup> Some of the exclusionary rule cases arose from car stops in which the authorities conducted warrantless searches and found alcohol that was being transported for sale.<sup>140</sup> The cases more commonly, however, arose from searches of private premises that were being used to sell alcohol, or private residences that were being used to manufacture alcohol.<sup>141</sup> While some cases targeted isolated whiskey stills, undoubtedly many defendants were targeted because of their involvement in the organized crime syndicates that often distributed the alcohol and engaged in violence and related crimes to protect their markets.<sup>142</sup>

Fourteen of the sixteen cases in which the exclusionary rule was adopted involved charges related to intoxication or the manufacture or transportation of the alcohol.<sup>143</sup> The two cases that did not involve alcohol arose in Wyoming (involving a prosecution for the theft of sheep)<sup>144</sup> and Illinois (involving a prosecution for burglary).<sup>145</sup> The proportion of cases involving alcohol in the states that rejected the exclusionary rule was much smaller. It appears, therefore, that the prevalence of prohibition cases may have been an important factor in determining whether the issue of exclusion was raised and reached the state supreme courts. In most jurisdictions at this time, defense

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Amendment in 1933. U.S. Const. amends. XVIII and XXI.

139. See DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION 26-27* (2d ed. 2000) (describing the "bootlegging" industry).

140. See *State v. Pluth*, 195 N.W. 789 (Minn. 1923); *State v. Simmons*, 110 S.E. 591 (N.C. 1922); *Welchek v. State*, 247 S.W. 524 (Tex. Crim. App. 1922).

141. See *State v. Johnson*, 226 P. 245 (Kan. 1924) (charging for possession of a still); *Billings v. State*, 191 N.W. 721 (Neb. 1923) (charging for possession of a still); *State v. Dillon*, 281 P. 474 (N.M. 1929) (charging for the possession of alcohol for sale).

142. As Kyvig explains, concerns about the violence and related illegal activities spawned by the bootlegging industry helped to motivate the movement to repeal prohibition. KYVIG, *supra* note 139, at 74-75.

143. See *Atz v. Andrews*, 94 So. 329 (Fla. 1922); *State v. Arregui*, 254 P. 788 (Idaho 1927); *People v. Brocamp*, 138 N.E. 728 (Ill. 1923); *Flum v. State*, 141 N.E. 353 (Ind. 1923); *Youman v. Commonwealth*, 224 S.W. 860 (Ky. 1920); *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919); *Tucker v. State*, 90 So. 845 (Miss. 1922); *State v. Owens*, 259 S.W. 100 (Mo. 1924); *State ex rel. King v. Dist. Ct.*, 224 P. 862 (Mont. 1924); *Hess v. State*, 202 P. 310, (Okla. 1921); *State v. Gooder*, 234 N.W. 610 (S.D. 1930); *Hughes v. State*, 238 S.W. 588 (Tenn. 1922); *State v. Gibbons*, 203 P. 390 (Wash. 1922); *State v. Andrews*, 114 S.E. 257 (W. Va. 1922); *Hoyer v. State*, 193 N.W. 89 (Wis. 1923); *State v. George*, 231 P. 638 (Wyo. 1924).

144. *George*, 231 P. 683.

145. *Brocamp*, 138 N.E. 728.

counsel was not provided for the indigent accused in ordinary felony cases.<sup>146</sup> Interestingly, the prohibition defendants, however, either individually or through their employers, apparently had the means to afford counsel. Whether a court's adoption of the exclusionary rule was influenced by judicial views about prohibition, which reflected local cultural values, would be an interesting topic for further research. Seven of the states that adopted the rule were from what many would consider to be the "South."<sup>147</sup> Another five of the states that adopted the rule were from what many would consider to be distinctively "Western" states.<sup>148</sup> One of the states that adopted the rule, Oklahoma, might be considered both "Southern" and "Western." Whether the prevalence of "Southern" and "Western" states in the adoption of the exclusionary rule was due to happenstance or cultural factors is beyond the scope of this study.

### III. SOCIAL-NETWORK THEORY

This study attempts to assess why the exclusionary rule was adopted by some states as a matter of state constitutional law before the Fourth Amendment being made applicable to the states. It is in essence a study of the diffusion of a new state constitutional rule. In an early study of this type, Jack Walker treated the diffusion of new laws as a sociological phenomenon and drew on insights from the sociological literature on the diffusion of innovations to frame the research question.<sup>149</sup> Many of the subsequent studies have also adopted this approach.<sup>150</sup> There is a sense in which new legislation and new

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146. This did not occur until the Supreme Court mandated the provision of counsel for all felony defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

147. These states are Florida, Kentucky, Mississippi, Missouri, Oklahoma, Tennessee, and West Virginia. See *Atz v. Andrews*, 94 So. 329 (Fla. 1922); *Youman v. Commonwealth*, 224 S.W. 860 (Ky. 1920); *Tucker v. State*, 90 So. 845 (Miss. 1922); *State v. Owens*, 259 S.W. 100 (Mo. 1924); *Hess v. State*, 202 P. 310 (Okla. 1921); *Hughes v. State*, 238 S.W. 588 (Tenn. 1922); *State v. Andrews*, 114 S.E. 257 (W. Va. 1922).

148. These included Idaho, Montana, Oklahoma, Washington, and Wyoming. See *State v. Arregui*, 254 P. 788 (Idaho 1927); *State ex rel. King v. Dist. Ct.*, 224 P. 862 (Mont. 1924); *Hess v. State*, 202 P. 310, (Okla. 1921); *State v. Gibbons*, 203 P. 390 (Wash. 1922); *State v. George*, 231 P. 638 (Wyo. 1924). In this regard, it is worth noting that Texas also adopted the exclusionary rule by statute.

149. See Jack L. Walker, *The Diffusion of Innovations Among the States*, 63 AM. POL. SCI. REV. 880 (1969). See generally EVERETT M. ROGERS, *THE DIFFUSION OF INNOVATIONS* (5th ed. 2003) (providing an overview of the literature on the diffusion of innovations).

150. See Frederick J. Boehmke & Richard Witmer, *Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion*, 57 POL. RES. Q.

legal precedents are merely innovations, and legislatures' or courts' decisions to adopt them bear an analogy to the decisions that other actors make about whether to adopt new production techniques, professional practices, or modes of behavior. Therefore, this study draws on the analogy between legal innovations and other types of innovations to examine the diffusion of the exclusionary rule across the states.

One important respect in which this study differs from most other studies of the diffusion of new laws, however, is that it frames the diffusion process using social-network theory.<sup>151</sup> The application of social-network theory in empirical legal research is still new, but promises many important new perspectives and avenues for research.<sup>152</sup> The approach and methods we use in this article were first used by Robert Bird and Donald Smythe in a study of the diffusion of wrongful-discharge laws across the states during the 1970s and 1980s.<sup>153</sup> The basic idea is to investigate how the "social" structure of legal institutions influences the decisions of the state courts. The approach attempts to draw inferences about the patterns of communication and persuasion between state court actors by examining how the decisions of courts in one state appear to affect the decisions of courts in other states.<sup>154</sup>

The social-network methods that we use are an alternative to the more traditional approach to inferring patterns of communication and persuasion among judicial actors by examining the pattern of citations in courts' opinions. Scholars have raised questions about the

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39 (2004); Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178 (1985); Bradley C. Canon & Lawrence Baum, *Patterns of Adopting of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981); Christopher Z. Mooney, *Modeling Regional Effects on State Policy Diffusion*, 54 POL. RES. Q. 103 (2001).

151. See generally LINTON C. FREEMAN, *THE DEVELOPMENT OF SOCIAL NETWORK ANALYSIS: A STUDY IN THE SOCIOLOGY OF SCIENCE* (2004) (providing a history of the subject); JOHN SCOTT, *SOCIAL NETWORK ANALYSIS: A HANDBOOK* (2nd ed. 2000) (providing an excellent introduction to social-network theory and methods).

152. Another emerging use of social-network theory in the law is in the study of citation patterns. See, e.g., Lillian V. Faulhaber & Daniel Katz, Harvard Law School, *A Social Network Analysis of American Tax Jurisprudence (1990–2008)* (June 12, 2009). See also Daniel Katz & Derek Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L.J. 457 (2010) (a recent article that uses social-network methods to trace connections between federal judges).

153. See Bird & Smythe, *supra* note 24.

154. See *id.*

reliability of citation data in drawing inferences about patterns of influence and persuasion across courts.<sup>155</sup> Court opinions often seem to “string out” case names, and it is not always apparent that the opinions cited were truly influential or whether they were merely being used to legitimize the courts’ decisions.<sup>156</sup> Indeed, there is little empirical basis for evaluating whether the citations truly reflect influences across courts or whether they merely reflect the courts’ efforts to legitimize their decisions. In one study, however, David Walsh found significant evidence that courts often use citations for legitimization purposes.<sup>157</sup> His study corroborates some of the concerns that scholars have raised about citation data. We feel that the concerns are significant enough to warrant experimentation with other methods of drawing inferences about patterns of influence and persuasion across courts, including the social-network methods that we use in this article.

Under our approach, we conceive of the American legal system as a social network, and the state supreme courts as actors within the network whose decisions depend in part upon the decisions of other courts, especially those that are closely related to them.<sup>158</sup> In general, the degree of influence between any two actors in a social network—in this case, state courts—depends upon their “closeness” or “connectedness” within the network.<sup>159</sup> Drawing on the network analogy, we assume that the decisions of a court in any one state depend, to

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155. See, e.g., Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981).

156. *Id.* at 804.

157. David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful-Discharge Precedent Cases*, 31 LAW & SOC’Y REV. 337, 357 (1997).

158. The use of social-network theory to study the decisions of institutional actors, such as large corporations or nation states, rather than individuals, is well-established and even common. E.g., Ronald S. Burt, *Models of Network Structure*, 6 ANN. REV. SOC. 79 (1980). Social-network theory has thus informed studies of institutional actors as diverse as corporations. See Gautam Ahuja, *Collaboration Networks, Structural Holes, and Innovation: A Longitudinal Study*, 45 ADMIN. SCI. Q. 425 (2000) (institutional actors as chemical manufacturers); Joseph Galaskiewicz & Stanley Wasserman, *A Dynamic Study of Change in a Regional Corporate Network*, 46 AM. SOC. REV. 475 (1981) (institutional actors as diverse as corporations); James B. Goes & Seung Ho Park, *Interorganizational Links and Innovation: The Case of Hospital Services*, 40 ACAD. MGMT. J. 673 (1997) (institutional actors as hospitals); Robert Rohrschneider & Russell J. Dalton, *A Global Network? Transnational Cooperation among Environmental Groups*, 64 J. POL. 510 (2002) (institutional actors as environmental groups).

159. Cf. Mark. E. MacDonald, Jr. & Camille R. McLeod, *Pictures Are Worth a Thousand Words: Understanding the Chapter 11 Process Through Models and Simulation*, 526 PLI/Comm 453, 486–87 (1990) (describing in context of neural networks).

some extent, on the relative influence or persuasiveness of precedents by courts in other states. The relative influence of precedents established by other courts depends on the relationship between the two courts in the social network.<sup>160</sup> The method is one that examines the decisions taken by the courts to draw inferences about the patterns of influence and persuasion between them. Whereas citation studies draw inferences about patterns of influence based on what courts have said was influential, the social-network approach that we use draws inferences about patterns of influence based on what courts actually did.

One of the difficulties in using social-network theory to study the diffusion of legal precedents is in identifying the factors that might determine the “closeness” or “connectedness” of courts within the legal network. It is helpful, therefore, to frame the issue somewhat differently. One can conceive of the actors in a social network as belonging to certain “reference groups”—that is, subgroups of actors that relate more closely to one another than they do to other actors outside the subgroup. The idea is very intuitive and examples are quite common. In a network of high school students, for example, the reference groups might include “jocks,” “brains,” “partiers,” and “nerds.”<sup>161</sup> The usual hypothesis is that decisions by other actors that belong to the same reference group will be more influential than decisions by other actors that do not belong to the same reference group. Among a network of high school students, for example, the jocks will be more influential on other jocks than on brains, partiers, or nerds.<sup>162</sup> The brains will be more influential on other brains than on jocks, partiers or nerds. In other words, actors within the same reference group are closer or more connected to one another than they are to other actors outside of the reference group, and their decisions will be more influential on one another than on other actors outside the reference group.

In this study, we conceive of the social network as being comprised of state courts. Studies of legal citations in courts’ opinions suggest that the persuasiveness of a court’s precedent on other courts may depend on criteria such as membership of the courts in the same

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160. Bird & Smythe, *supra* note 24, at 838–39.

161. See, e.g., BARBARA M. NEWMAN & PHILIP R. NEWMAN, DEVELOPMENT THROUGH LIFE: A PSYCHOLOGICAL APPROACH 339 (10th ed. 2008) (including a discussion of social-reference groups among a group of high school students).

162. *Id.*

legal reporting district, their geographical proximity, and sharing a regional culture.<sup>163</sup> Other studies suggest that the federal circuit regions are an important reference group for federal judges, and that federal judges frequently attend the meetings of the state bar associations within their circuit districts.<sup>164</sup> This suggests that the “federal circuit regions may also define an important reference group for attorneys and state judges.”<sup>165</sup> This study identified four reference groups, and tested and compared the influence of precedents by other courts within these groups in the diffusion of the exclusionary rule. The four reference groups were (1) neighboring states, (2) states within the same federal circuit region, (3) states within the same West reporting region, and (4) states within the same census region. The first objective was to determine whether precedents within any of these reference groups were at all persuasive on their own, and the second objective was to distinguish whether precedents in any one of the reference groups were generally more influential than precedents in the others.<sup>166</sup>

Of course, the American legal system is somewhat more complicated than the discussion above suggests, and so precedents operate on different actors at different stages of the legal process.<sup>167</sup> Cases must first “bubble up” to the courts before the courts can have the opportunity to rule on any new legal questions they raise.<sup>168</sup> In the context of new precedents affecting private law, for example, the parties are responsible for asserting their own private legal rights. A precedent by a court in one state that creates a new private cause of action could encourage similarly aggrieved parties in another jurisdiction to go to a lawyer to seek this same type of legal redress.<sup>169</sup> The new precedent might encourage the plaintiff’s attorney to accept the case and use the out-of state precedent as the basis for arguing for

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163. See Caldeira, *supra* note 153, at 190; Canon & Baum, *supra* note 153, at 985.

164. See Robert A. Carp, *The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC’Y REV. 405 (1972); Ronald Stidham & Robert A. Carp, *Exploring Regionalism in the Federal District Circuits*, 18 PUBLIUS 113 (1988).

165. Bird & Smythe, *supra* note 24, at 840.

166. Some studies have suggested that certain states’ courts (e.g. California and New York) may hold national influence. See Caldeira, *supra* note 153; Walker, *supra* note 149. Since precedents by courts in these states would likely affect all other states’ courts equally, these national influences would not affect the results of this study.

167. Bird & Smythe, *supra* note 24, at 839–40.

168. *Id.*

169. *Id.*

the new cause of action in the plaintiff's state.<sup>170</sup> At that point, the question of whether the new rule should be adopted in the plaintiff's state would come before a court and the court would be required to make a decision. Precedents in other states addressing the same issue could influence the court's decision at this level of the legal process.<sup>171</sup>

The social structure of the legal system could be important at all of the foregoing levels of the process. First of all, a potential plaintiff with a grievance may be more likely to feel she has grounds for a lawsuit against someone if she hears about a similar, successful case from another jurisdiction. She may be more likely to hear about such a case if it is from a neighboring state or a state within the same region of the country than if it is from some distant and dissimilar state.<sup>172</sup> Second, any attorney to whom she initially takes her grievances may be more inclined to take the case in reliance on a precedent if he feels it will be a persuasive one that will allow his client's complaint to survive summary judgment.<sup>173</sup> An attorney might feel that a precedent from a court within the same federal circuit region or the same geographical region will be more persuasive than others. Finally, the court that hears the case may actually be more persuaded by some precedents than others. Courts may be more strongly influenced by precedents within the same federal circuit region or the same geographical region of the country, or by courts in states that belong to some other reference group, whatever that might be.<sup>174</sup>

On a question of public law, such as the application of the exclusionary rule to suppress evidence in a criminal case, the process would be somewhat different even though different actors would still be important at different stages in the process. We can distinguish between at least two distinct stages: first, the stage at which the rule is invoked; and second, the stage at which it is adjudicated. Criminal charges would be made against the defendant by a public official. The defendant's attorney would then attempt to invoke the exclusionary rule to suppress the state's evidence. If there were no binding precedents on the exclusionary rule from that jurisdiction, the attorney's

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173. *Id.*

171. *Id.*

172. *Id.* With the advent of the internet, geographic proximity may undoubtedly play less of a role than patterns of online communication.

173. *Id.*

174. *Id.*

decision to invoke it would probably be influenced by persuasive authorities from other states, especially precedents from other states' supreme courts in which the rule was adopted. Precedents from other states' supreme courts in which the rule was rejected might disincline the attorney to invoke the rule. Once the rule was invoked, the court would then have to render a holding on the question of whether it should apply. If the question was a matter of first impression, the trial court's holding might well be appealed, and the appeal might reach the state supreme court. At this point, the state supreme court could issue a binding precedent on the question of whether the exclusionary rule should apply.

Social-network effects could be important at both stages in the diffusion of a new public law holding, such as the adoption of the exclusionary rule. At the first stage in the process, the defense attorney's decision to invoke the rule would probably depend heavily on her awareness of any precedents from other states in which it had been adopted and her assessment of whether those precedents would be persuasive to her own states' courts. She might be more aware of precedents from neighboring states, for instance, than from those in the same census region of the country. She might also feel that precedents from neighboring states would be more persuasive than those from other state courts in the same census region. In that case, neighboring states would constitute an important reference group in her decision to invoke the exclusionary rule and raise the question of whether to adopt it to her own states' courts. At the second stage in the process, the courts' decisions about whether to adopt the exclusionary rule would probably depend in some part on the persuasiveness of precedents adopting or rejecting the rule from other states' courts. Precedents from courts in neighboring states might be more persuasive than precedents from other courts in the same census region, or vice versa. It is primarily at this last stage in the diffusion process that patterns of influence and persuasion between state courts would be most evident.

But the entire diffusion process is important. Indeed, one of the limitations of the previous studies that used social-network methods to investigate the diffusion of new state laws is that they have focused entirely on the last stage of the diffusion process.<sup>175</sup> They have been unable to evaluate why cases of first impression may have “bubbled

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175. *Id.*; Bird & Smythe, *supra* note 25.



up” to the state supreme court in the first place or even conjecture as to the factors that influenced the likelihood of that happening. Because the data available for this study is somewhat richer than that which was available in the previous studies, we are able to draw inferences here about the patterns of influence and other underlying forces that resulted in cases raising the question as to whether the exclusionary rule should be adopted reaching the state supreme courts in the first place, and then we are able to draw inferences about the patterns of influence and other forces that caused the state supreme courts to choose to adopt the exclusionary rule in those cases that did reach them. In this respect, the present study delves deeper into the web of connections between state court systems than earlier studies.

#### IV. THE DATA

Most of the data in this study is constructed from judicial decisions. We coded every state supreme court’s decision about whether to adopt or reject the exclusionary rule as a matter of state constitutional law between 1915 and 1936.<sup>176</sup> A binary variable was used first to record whether the state supreme court had addressed the question at all by each year in the sample period. Second, an additional binary variable was used to record whether the state supreme court adopted the rule. We then constructed several variables from the data to indicate the number of prior adoptions and rejections of the rule by courts in each state’s reference groups—we refer to these as “network” variables. Network variables were constructed to isolate and compare the effects of precedents by courts in: (1) neighboring states, (2) the same federal circuit region, (3) the same West reporting region,<sup>177</sup> and (4) the same census region.<sup>178</sup> The network variables were defined as the proportion of states within the reference group that had previously adopted the exclusionary rule minus the propor-

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176. In a few states, the rule was adopted or rejected by a lower court and never addressed by the state’s supreme court. In those cases, we treated the highest court’s decision on the question as the authority for the state’s law.

177. See *supra* text accompanying note 35.

178. The census regions were chosen to determine whether regional cultural similarities may have factored in the relative influence of legal precedents. To that end, two of the states, Delaware and Maryland, were reclassified as “Middle Atlantic” states instead of “South Atlantic” states. The former grouping includes New Jersey, New York, and Pennsylvania. The latter includes primarily southern coastal states, such as Florida, Georgia, and South Carolina. We believe that Delaware and Maryland have more cultural similarities with the Mid-Atlantic states than with the southern states.

tion of states within the reference group that had previously rejected the exclusionary rule.<sup>179</sup> The idea was to quantify the net effect of the precedents—that is, the positive influence of adoptions net of the negative influence of the rejections. The variables were defined proportionally to the total number of states in the reference groups in part to adjust for the unequal sizes of the groups. It is worth emphasizing that although two of these network variables (the ones defined for the census regions and neighboring states) are primarily geographic in nature, the other two (the ones defined for the federal circuit and West reporting regions) primarily reflect the structure of American legal institutions.

The method resulted in the following network variables: neighboring state network variables, which equal the net proportion of neighboring (contiguous) states that had previously adopted the exclusionary rule; federal circuit region network variables, which equal the net proportion of states within the same federal circuit region that had previously adopted the rule; West reporting region network variables, which equal the net proportion of states within the same West reporting region that had previously adopted the rule; and census region network variables, which equal the net proportion of states within the same census region that had previously adopted the rule.<sup>180</sup> In their earlier studies, Bird and Smythe defined the network variables as the proportion of adoptions rather than the proportion of net adoptions.<sup>181</sup> We are able to define the network variables in this study as the net proportion of adoptions because we have a richer data set that includes the rejections of the exclusionary rule as well as the adoptions. This should make the empirical analysis more reliable.

Since the network variables are the primary focus of our study, some descriptive statistics about them may be helpful. We ran two sets of logistic regressions<sup>182</sup>: one to investigate the forces causing the question about whether to adopt the exclusionary rule to arise, and

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179. The network variables were defined to include only previous adoptions net of previous rejections within the reference groups to preclude endogeneity problems. They were also defined cumulatively, i.e., as the total number of previous adoptions net of the total number of previous rejections in the reference groups for each year.

180. U.S. Census Bureau, *Census Regions and Divisions of the United States*, CENSUS.GOV, [http://www.census.gov/geo/www/us\\_regdiv.pdf](http://www.census.gov/geo/www/us_regdiv.pdf) (last visited Oct. 26, 2012) (U.S. Census Bureau describes the Census Regions and Divisions of the United States).

181. Bird & Smythe, *supra* note 24, at 847.

182. A logistic regression is commonly used when the dependent variable is binary. Intuitively, it involves estimating the probability that a particular outcome will occur.

the other to investigate the forces causing the state supreme courts to adopt the rule. Because of the method, the sample was different for each of the two sets of regressions. Thus, the summary statistics of the network variables were slightly different for each of the two sets of regressions. Table 1 presents some summary statistics for the network variables in the first set of regressions. There are 477 observations in the sample. The mean of each of the network variables is negative but greater than -0.1. This means that on average, across all states and years in the sample, slightly more states in each reference group had rejected the exclusionary rule than had adopted it. The range of values for the neighborhood network variable is from -1 to 0.8. In other words, for at least one state in one year, all of the neighboring states had rejected the rule (thus the net proportion of adoptions in neighboring states was -1). In at least one other state in one year, the net proportion of adoptions in neighboring states was 0.8 (in net, 80% of the neighbors had adopted). Except for the West reporting region network variable, the ranges of values for each of the other network variables in the sample are roughly the same. The West network variable is somewhat smaller on the maximum end of the range.

Table 2 presents some summary statistics for the network variables in the second set of regressions. There are 848 observations in the sample—significantly more than in the sample used for the first set of regressions. The mean of each of the network variables is negative, indicating that on average, there were more rejections among the reference groups than adoptions. The mean of the net proportion of adoptions for each network variable is actually smaller than in the sample for the first set of regressions (a bigger negative number). The value ranges of the network variables are similar to the value ranges of the network variables in the sample for the first set of regressions. In this case, however, the West reporting region network variable is slightly less stunted at the maximum end relative to the others.

We added additional variables to our regressions as controls. State population was added to control for scale effects. It seems more likely that search and seizure questions would arise in states with large populations than in states with small populations simply because there should have been more searches and seizures in the large states. Based on our analysis of the cases, it seems quite possible that prohibition may have played a role in the diffusion of the exclusionary rule. Many of the early search and seizure cases raising questions

about whether the exclusionary rule should apply appear to have involved illegal searches for alcohol, stills, or other related contraband.<sup>183</sup> Prohibition may have increased the likelihood that questions about the exclusionary rule would arise in the courts, and it may even have influenced the courts' answers to those questions. To control for this possibility, two additional binary variables were constructed, one to indicate whether federal prohibition was in effect, and the other to indicate whether state prohibition was in effect.<sup>184</sup> Finally, state political cultures may have influenced the judicial philosophies of state judges and justices or they may have influenced the decisions of state judges and justices because of the contexts in which their opinions were delivered. We therefore constructed eight binary variables to control for any state culture effects using Daniel Elazar's typology of state political cultures.<sup>185</sup>

## V. EMPIRICAL METHOD

We used logistic regressions to evaluate which, if any, of the network variables most strongly influenced the diffusion of the exclusionary rule at each of the two stages in the diffusion process: the first stage in which the question arose, and the second stage in which the rule was (or was not) adopted.<sup>186</sup> We first ran a set of logistic regres-

183. *See supra* Part II.

184. Several states had established state-level prohibitions against alcohol before federal prohibition was established. Of course, when federal prohibitions were established they often then overlapped with the state prohibitions. This makes it difficult to separate the effects of federal prohibition from those of state prohibition in our study; but since these are not our focus, we do not consider that important. Our primary concern is to ensure that we control for any prohibition effects so that we can clearly identify the network effects. The state prohibition variable was constructed from information about state prohibitions presented in Angela K. Dills & Jeffrey A. Miron, *Alcohol Prohibition and Cirrhosis*, 6 AM. L. & ECON. REV. 285 (2004).

185. Elazar identified three dominant types of political cultures: moralist, individualist, and traditionalist. A moralist political culture views politics as the pursuit of the public interest and has little tolerance for corruption. An individualist political culture emphasizes the virtues of a free marketplace, a limited role for government, and skepticism of politicians. A traditionalist political culture values the status quo and tolerates the concentration of political power. Elazar posited that a state might have one dominant culture in conjunction with a strong strain of another. He thus identified eight types of regional political subcultures. *See generally* DANIEL J. ELAZAR, AMERICAN FEDERALISM (3rd ed. 1984).

186. A binary regression method, such as a logistic regression, is preferable to ordinary least squares when the dependent variable is binary, as in this case. *See* Bird & Smythe, *supra* note 24, at 846. In our study, the first stage dependent variable has the value of zero in any state and year for which the question about the exclusionary rule has not arisen, and one in any state and year in which it has arisen. The second stage dependent variable has the value zero in any state and year for which the exclusionary rule has not been adopted, and one in any state and

sions to investigate the forces driving whether a case raising the question of whether to adopt the exclusionary rule arose in each state supreme court by each year in the sample period.<sup>187</sup> We included the four network variables, as well as the controls. In addition, we included binary variables for each year so that any extraneous influences unique to any particular year could be accounted for in the model separately.<sup>188</sup> We ran a second set of logistic regressions to investigate the forces driving the adoption of the exclusionary rule by the state supreme courts.<sup>189</sup> We included the four network variables again, as well as all of the controls, and we included binary variables for each year to control for individual year effects.<sup>190</sup>

Our basic strategy was to try to identify robust empirical results.<sup>191</sup> Thus, all control variables were included in all of the regressions even though they probably had overlapping effects.<sup>192</sup> Binary variables for each year were also included in all of the regressions.<sup>193</sup> Our purpose was to try to control for any extraneous influences on the forces driving whether the question about the exclusionary rule arose and whether it was adopted, rather than to isolate the influence of particular control variables. Finally, in addition to the results reported here, we ran many other regressions to test the robustness of the results. We do not present all of the results in this article, but

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year in which it has been adopted.

187. The sample was modified by dropping all the observation in any state for the years after the question arose. The method is thus a form of hazard analysis and the empirical model is similar to a Cox proportional hazard model. *See id.*

188. This makes the empirical model very similar to the Cox model, in which the baseline hazard rate does not have to be estimated in order to estimate the separate effects of the independent variables. *Id.*

189. Once again, the sample was modified—this time by dropping all the observations in any state for the years after the exclusionary rule was adopted. *Id.*

190. The second set of logistic regressions was run independently of the first set. In a two-stage analysis like this it is often desirable to do a sequential logit analysis in which the two sets of regressions are related. It turned out, however, that certain complications in the case law precluded sequential logit analysis.

191. Empirical results are said to be “robust” when they are the same regardless of minor variations in the independent variables that are included or the way the empirical model is specified. Robust empirical results obviously have more credibility than those that do depend on nuances in the empirical model’s specification.

192. This was, no doubt, especially the case for the federal and state prohibition variables.

193. The binary variables to capture the individual year effects may also have overlapped with and confounded the separate effects of the control variables. Again, though, since the primary purpose of the control variables is to ensure that the estimates of the network variables are reliable, this is not a problem.

none of the results that we have omitted undermine any of the results we present here or any of the conclusions of our study.

## VI. RESULTS

Table 3 presents results from the first set of regressions in which the question of whether to adopt the exclusionary rule arose is the dependent variable. Each column presents the results from a different regression. The independent variables are listed on the left hand side of the table. The coefficients of the independent variables in each of the regressions are the un-bracketed numbers entered in the corresponding space in each column. If the number is positive, the variable had a positive effect on the likelihood of the question about the exclusionary rule arising and if the number is negative, the variable had a negative effect on the likelihood of the question arising. In certain regressions, some of the network variables were excluded. In those cases, there is no entry for its coefficient in the table. The number in brackets beneath the coefficients of the variables is a test statistic computed to determine whether the variable is statistically significant at different confidence levels.<sup>194</sup>

### *A. Stage-One Diffusion: Whether the Issue of Exclusion Was Raised*

The results in Table 3 are quite striking. A quick scan across all eight columns clearly indicates that the network variable defined for the West reporter regions dominated all of the other network variables at this first stage in the diffusion process. As column 1 indicates, when all four network variables were included in the regressions (along with all the controls and the binary variables for the years), the West reporter network variable was the only one that was both positive and close to being statistically significant at the 90% level of confidence. As columns 2–4 indicate, when the West reporter network variable was included along with each of the other network variables individually, it dominated in each case, in the sense that its coefficient was both positive and more statistically significant (at the 95% level of confidence in one case and the 90% level of confidence in another case). As columns 5–8 indicate, when each network variable was included alone, the only one whose coefficient was close to being both positive and statistically significant was the West reporter network

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194. This is the logistic regression equivalent of a t-statistic in an ordinary least squares regression.

variable, which was positive and statistically significant at the 90% level of confidence.

The dominance of the West reporter network variable at the first stage in the diffusion process is a new result, since none of the previous studies of this type have examined the forces that caused a legal question to arise in the first place. The result suggests that the West reporters may have served as an important source of information about the existence of new precedents from other states in which the exclusionary rule was adopted. Attorneys at the time may have been more likely to keep abreast of new case law that was reported in the regional reporter that included their own state than of other case law generally. Attorneys might have also felt that new precedents reported in their own state's West reporter would be more persuasive on the courts in their own state. Since the sample period was one that long pre-dated the emergence of electronic databanks of case precedents, and new precedents were probably harder to find than they are today, the dominance of the West reporters in driving the question about the exclusionary rule to the courts is intuitively compelling.

The other results in Table 3 are not our primary focus, but they are at least worth noting. Both of the prohibition variables have negative coefficients in all the regressions. This suggests that both federal and state prohibition laws diminished the likelihood that the question about the exclusionary rule would arise. That seems counterintuitive. But neither of the two prohibition variables is statistically significant in all of the regressions. Indeed, the federal prohibition variable is not statistically significant at any respectable level of confidence in any of the regressions, although the state prohibition variable is statistically significant at the 90% level of confidence in some of the regressions, and it is statistically significant at the 95% level of confidence in one of them. Since the prohibition variables are only being used as controls and the model includes binary variables for each year, the empirical model is not intended to evaluate the impact of prohibition laws on the diffusion of the exclusionary rule and these results are not particularly reliable. It is also interesting to note that neither the state population variable, nor all of the Elazar political culture variables, was statistically significant in any of the regressions.<sup>195</sup>

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195. In some cases, Table 3 does not report the estimates for certain of the Elazar variables' test statistics. The logistic regressions were computed using Stata. Stata employs an itera-

*B. Stage-Two Diffusion: Whether Exclusionary Rule Was Adopted*

Table 4 presents results from the second set of regressions in which the decision to adopt the exclusionary rule was the dependent variable. Table 2 is organized exactly like Table 1, with the results for each regression reported in a separate column, the independent variables listed on the left hand side, and the coefficients of the independent variables in each regression reported above the bracketed test statistics in the appropriate column. The results are equally striking, if not more so, because even a cursory perusal reveals that an entirely different, but equally dominant, pattern is evident in the diffusion of the courts' decisions to adopt the exclusionary rule than in the diffusion of the question about the rule being brought up in the courts.

As column 1 indicates, when all four network variables are included in the regressions, the one defined for the federal circuit regions clearly dominates. It is the only one whose coefficient is both positive and statistically significant at the 90% level of confidence. As columns 2–4 indicate, when the federal circuit network variable is included against each of the other network variables individually, the federal circuit network variable again dominates, in the sense that it is the only one whose coefficient is both positive and statistically significant at the 90% or 95% level of confidence. Finally, as columns 5–8 indicate, when each of the network variables is included in the regressions alone, the federal circuit region network variable is the only one whose coefficient is both positive and statistically significant at the 95% level of confidence. At the second stage in the diffusion process, the stage at which courts actually decide whether to adopt the exclusionary rule, the federal circuit network variable clearly dominates the other network variables in much the same manner that the West reporter network variable dominates the others at the first stage in the diffusion process.

The results in Table 4 are striking in part because they corroborate the results of Bird and Smythe's previous studies, but in a new sample showing the diffusion of a new public law rather than a new private law, and over a much earlier period in United States history. The results are also striking for the same reasons that they were in

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tive method for computing binary regression models and in some of the regressions the method was unable to estimate the standard errors of the Elazar variables. Since the Elazar variables were included in the model primarily as controls we do not consider this particularly important.



Bird and Smythe's earlier studies. These results suggest an unexpected pattern of communication and influence across the state courts' decisions. It is important to emphasize that this study is examining the diffusion of the exclusionary rule as a matter of state constitutional law before the rule was applied to the states as a matter of federal constitutional law. It is not at all obvious that the federal circuit regions, as determined by the administrative structure of the federal courts, should have defined an important reference group for the state courts on a question of state constitutional law. The fact that they appear to do so, both in this study and in Bird and Smythe's earlier studies, suggests that the administrative structure of the federal courts may have made an important imprint on the pattern of communications and influence across the state courts. Since the exclusionary rule diffused across the states much earlier than wrongful-discharge laws or the strict liability rule, the imprint may have been made much earlier than one might have guessed from the previous studies alone.

Robert Bird and Donald Smythe have already made several conjectures as to why the federal circuit regions seem to influence the diffusion of state laws. As they note, it seems reasonable to surmise that the federal circuit regions' influence derives either from some form of intra-circuit communication or information flow among state judges within the circuits or from more direct influences on the development of state law.<sup>196</sup> One possibility, of course, is that state courts may follow legal developments in other state courts within the same federal circuit region more closely than they follow legal developments in state courts outside the same circuit region.<sup>197</sup> This may be a habit that attorneys and state judges develop from having to follow federal precedents within their circuit regions on federal legal questions. The practice of looking for precedents on federal legal questions within the same federal circuit regions may inculcate the habit of looking for precedents on state legal questions from other state courts within the same federal circuit regions.<sup>198</sup>

Although we are not aware of any studies of intra-circuit communications among state judges, there is some evidence of important intra-circuit communications among federal judges. Indeed, Robert

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196. See Bird & Smythe, *supra* note 24, at 857.

197. *Id.*

198. *Id.*

Carp has found that federal judges communicate with other federal judges within the same circuit in a variety of ways, including through judicial conferences, professional contacts, personal contacts, and correspondence.<sup>199</sup> In his study, he found that federal judges communicated frequently with other federal judges in non-contiguous states within the same federal circuit but rarely, if ever, with other federal judges in contiguous states that were not within the same federal circuit.<sup>200</sup> Carp also noted the important role played by state bar association meetings and professional journals in these intra-circuit communications.<sup>201</sup> Since state judges no doubt also interact with federal judges at state bar association meetings, and probably also read many of the same professional journals, state bar association meetings and professional journals may also facilitate intra-circuit communications among state courts.

The results from the study we present in this article raise serious doubts about some of Bird and Smythe's other conjectures. For instance, they noted that the State-Federal Judicial Councils may have helped to facilitate communications among state judges as well as between state and federal judges within particular federal circuits.<sup>202</sup> But since these were established only in the early 1970s, they cannot help to explain the pattern of communication and influence that we observe here in the diffusion of the exclusionary rule between 1915 and 1936. Bird and Smythe have also conjectured that the federal circuit regions may provide an "echo" effect for some state court opinions.<sup>203</sup> Since federal courts often cite state court opinions, attorneys and judges in other states who follow the federal cases in their own circuits may be more inclined to see and read those opinions than opinions from other state courts outside the same circuit region. It seems unlikely, however, that there was any significant echo effect in the diffusion of the exclusionary rule across the states, since questions from state criminal prosecutions rarely reach the federal courts unless they raise federal constitutional issues. Further studies will, therefore, be helpful in clarifying why the federal circuit regions seem to define important channels of communication and influence in the diffusion of state laws.

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199. Carp, *supra* note 164, at 409.

200. *Id.* at 414, 416.

201. *Id.* at 412, 415.

202. Bird & Smythe, *supra* note 24, at 858.

203. Bird & Smythe, *supra* note 25, at 582–83.

It is interesting to note that the coefficient of the West reporter network variable is actually negative in all of the regressions, including the one reported in column 7 in Table 4, in which it was the only network variable included in the model. If the West reporter regions defined an important reference group in the question about the exclusionary rule arising in the first place, they certainly do not appear to have defined an important reference group in the courts' decisions to adopt the rule. It is also worth noting that neither the federal nor state prohibition binary variables are statistically significant in any of the regressions. Once again, it is well to remember that these variables are only controls and their influence may be confounded by their correlations with other control variables. Although the prohibition era may have resulted in many cases in which the exclusionary rule was invoked, it does not appear to have influenced the state courts' holdings. Finally, it is also worth noting that the state population variable was again not statistically significant in any of the regressions, nor were all of the Elazar political culture variables consistently significant across the regressions (indeed, in some cases the standard errors of the coefficients of the Elazar variables could not be computed).

## VII. CONCLUSION

The law is constantly changing and evolving. Attorneys must therefore be able to make judgments about whether the courts are likely to overrule their own precedents when they prepare cases and advise clients. Empirical studies offer one way of improving our ability to identify and track important trends in the law and make better judgments about whether and how the law may change. This article reports the results of an empirical study that has used social-network methods to draw inferences about the underlying patterns of communication and influence across state courts. One important advantage of this approach is that it draws inferences from the courts' decisions, which reflect what they actually did, rather than their citations, which reflect only what they said was important. We believe that the social-network methods we describe in this article are a useful alternative to the citation methods that have typically been used in empirical legal research.

We used social-network methods in this study to examine the diffusion of the exclusionary rule as a matter of state constitutional law before the Fourth Amendment was applied to the states. Our results

both corroborate and extend those of previous studies. Indeed, they suggest that the diffusion of the exclusionary rule was more complicated than previous studies of the diffusion of new state laws might have suggested. The previous studies by Bird and Smythe focused entirely on the adoption of new legal rules by the state courts and were unable to examine the forces that caused the questions to arise in the first place. Our results in this study suggest that at the first stage in the diffusion process, the stage in which the question of whether to adopt the exclusionary rule “bubbled up” to the state supreme courts, the West legal reporter regions defined an important network of communication and influence between the state courts.

This actually makes a good deal of sense. At this stage in the diffusion process, the question about the exclusionary rule was probably driven by criminal defendants and their attorneys who wanted to challenge convictions based on evidence seized without warrants or the requisite exigent circumstances. The criminal defense attorneys who represented the defendants no doubt looked for case precedents upon which to base their efforts to suppress the evidence. The exclusionary rule diffused as a matter of state constitutional law in the early twentieth century after the U.S. Supreme Court’s decision in *Weeks* in 1914. This was long before the advent of electronic databases. In the early twentieth century, legal research was typically done using legal reporters, and the West legal reporters may have grouped the case precedents in a way that influenced whether a challenge was made. An attorney was probably more likely to see a case adopting the exclusionary rule in another state if it was published in the same West legal reporter that published the cases from his own state. The West legal reporters did not, however, appear to define an important reference group at the second stage in the diffusion process, the stage at which state supreme courts actually decided whether to adopt the exclusionary rule. Thus, the fact that a case was from another state supreme court whose opinions were published in the same West legal reporter does not appear to have made it any more persuasive.

Indeed, it appears that the federal circuit regions defined an important reference group at the second stage in the diffusion of the exclusionary rule. In other words, a state supreme-court decision from another jurisdiction that adopted the rule appeared to be more persuasive if that state was within the same federal circuit as the state considering such adoption. Because the issue involved state law, this is a striking result that we would not have expected if other studies

had not already found that the federal circuit regions appear to define important channels of communication and influence between states courts. It is interesting, however, that Robert Bird and Donald Smythe have also found that the federal circuit regions defined important reference groups in the diffusion of new state laws in two separate studies: one on wrongful-discharge laws and the other on the strict liability rule in tort for manufacturing defects. The federal circuit regions thus appear to have left an important imprint on the pattern of communications and influence across state courts. At this point, we can only conjecture as to why decisions by other state courts within the same federal circuit regions appear to be more persuasive than decisions by courts in neighboring states, the same West reporter regions, or the same census regions, but it is a result that now has significant corroboration across three separate studies.

Further studies of the diffusion of new state laws are clearly warranted. In light of the Supreme Court's recent narrowing of the Fourth Amendment exclusionary rule, for example, state search and seizure exclusionary rules for violations of state constitutional provisions have taken on new importance. In *Herring v. United States*,<sup>204</sup> for example, the Court held that evidence obtained incident to an arrest on a recalled arrest warrant should not be excluded because the failure of the police department to remove the recalled warrant from its database was an act of "isolated negligence" and the reliance upon the warrant by a police officer from a different police agency was not the result of deliberate, reckless, or grossly negligent conduct.<sup>205</sup> This decision appears to significantly expand the so called "good faith" exception to the exclusionary rule created in *United States v. Leon*,<sup>206</sup> by requiring police culpability for an illegal search or seizure to equate to recklessness. Whether state supreme courts will follow suit and adopt this new standard for their state law exclusionary rule raises an interesting question, especially in view of the fact that some states rejected the *Leon* good faith exception altogether when redressing violations of their state constitution.<sup>207</sup>

Further studies directed at more clearly understanding the connections and influences between state and federal courts more gener-

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207. *Herring v. United States*, 555 U.S. 135 (2009).

205. *Id.* at 137, 144.

206. *United States v. Leon*, 468 U.S. 897 (1984).

207. *See, e.g., State v. Marsala*, 479 A.2d 58, 68 (Conn. 1990).

ally might be especially insightful.<sup>208</sup> Studies that attempt to corroborate the role of the West legal reporters in the first stage of the diffusion process would also be interesting, especially in view of the enhanced research capabilities that have been created by electronic databases which did not exist in the early 1900s. Ultimately, we hope that, in addition to their historical value, studies of this kind will shed enough light on the patterns of communication and influence between courts that attorneys may be able to better predict imminent changes in the law and legal reformers may be able to more effectively influence developments in the law.

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208. Whether an early decision by state supreme courts within a federal court of appeals circuit will exert influence upon other state supreme courts within that circuit region, for example, would be interesting to examine.

TABLE 1: SUMMARY STATISTICS: NETWORK VARIABLES IN THE FIRST-STAGE REGRESSIONS

VARIABLE	OBS	MEAN	STD. DEV.	MIN	MAX
Neighboring-state network variable	477	-0.07	0.29	-1.00	0.80
Federal-circuit network variable	477	-0.07	0.26	-0.75	0.75
West-reporter network variable	477	-0.09	0.19	-0.89	0.20
Census-region network variable	477	-0.07	0.26	-0.83	0.80

TABLE 2: SUMMARY STATISTICS: NETWORK VARIABLES IN THE SECOND-STAGE REGRESSIONS

VARIABLE	OBS	MEAN	STD. DEV.	MIN	MAX
Neighboring-state network variable	848	-0.20	0.40	-1.00	0.80
Federal-circuit network variable	848	-0.16	0.27	-0.75	0.75
West-reporter network variable	848	-0.13	0.28	-0.89	0.40
Census-region network variable	848	-0.16	0.31	-0.83	0.80

TABLE 3: LOGISTIC REGRESSIONS: DEPENDENT VARIABLE AS THE QUESTION WHETHER TO ADOPT THE EXCLUSIONARY RULE

Number of Observations: 477 | Equations 1–8

INDEPENDENT VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Neighbor-state network variable	-1.10 (-1.26)	-0.82 (-1.11)			-0.20 (-0.27)			
Federal-circuit network variable	1.23 (1.08)		0.37 (0.43)			0.98 (1.32)		
West-reporter network variable	2.70 (1.69)	2.99 (2.16)*	2.15 (1.47)	2.77 (1.76)**			2.44 (1.89)**	
Census-region network variable	-0.55 (-0.40)			-0.38 (-0.37)				0.68 (0.84)
Population	-0.00 (-0.41)	-0.00 (-0.53)	-0.00 (-0.84)	-0.00 (-0.77)	0.00 (0.45)	-0.00 (-0.12)	-0.00 (-0.83)	-0.00 (-0.07)
State prohibition	-1.13 (-1.90)	-1.02 (-1.77)	-1.17 (-1.99)	-1.07 (-1.86)	-0.43 (-0.84)	-0.85 (-1.57)	-1.11 (-1.95)	-0.70 (-1.32)
Federal prohibition	-2.15 (-1.37)	-2.00 (-1.31)	-1.66 (-1.09)	-1.69 (-1.14)	-1.78 (-1.19)	-1.71 (-1.10)	-1.66 (-1.10)	-1.63 (-1.08)
Moralistic culture	0.23 (0.16)	0.40 (0.28)	0.26 (0.18)	0.44 (0.31)	-0.54 (-0.42)	-0.42 (-0.32)	0.35 (0.25)	-0.42 (-0.32)
Moralistic with individualist strain	1.57 (1.03)	1.55 (1.02)	1.50 (0.98)	1.54 (1.01)	0.47 (0.34)	0.85 (0.60)	1.51 (0.99)	0.74 (0.52)
Individualist with moralistic strain	-0.33 (0.22)	-0.16 (-0.11)	-0.08 (-0.05)	0.01 (0.01)	-1.08 (-0.80)	-0.80 (-0.59)	-0.03 (-0.02)	-0.79 (-0.58)
Individualist culture	0.29 (0.18)	0.54 (0.35)	0.15 (0.09)	0.53 (0.33)	-0.90 (-0.67)	-0.94 (-0.68)	0.34 (0.22)	-0.90 (-0.66)
Individualist with traditionalist strain	0.38 (0.20)	0.16 (0.08)	-0.07 (-0.03)	-0.09 (-0.05)	-0.53 (-0.30)	-0.30 (-0.17)	-0.10 (-0.05)	-0.45 (-0.25)
Traditionalist with individualist strain	3.86 (2.14)	3.95 (2.22)	3.78 (2.12)*	3.94 (2.20)*	2.25 (1.48)	2.67 (1.72)	3.85 (2.17)	2.58 (1.66)
Traditionalist culture	3.22 (1.85)	3.33 (1.96)	3.10 (1.80)	3.32 (1.92)	1.66 (1.14)	1.96 (1.33)	3.20 (1.88)**	1.89 (1.28)
Traditionalist with moralistic strain	2.36 (1.29)	2.40 (-3.10)	2.33 (1.28)	2.43 (1.33)	1.20 (0.73)	1.57 (0.93)	2.37 (1.30)	1.46 (0.87)

Coefficients are on top; test statistics are in parentheses on bottom.

\* Statistically significant at the 95% level of confidence.

\*\* Statistically significant at the 90% level of confidence.



TABLE 4: LOGISTIC REGRESSIONS: DEPENDENT VARIABLE AS  
THE DECISION TO ADOPT THE EXCLUSIONARY RULE

Number of Observations: 848 | Equations 1–8

INDEPENDENT VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Neighboring-state network variable	0.69 (0.17)	0.58 (0.60)			1.10 (1.17)			
Federal-circuit network variable	3.19 (1.82)**	2.67 (1.82)**	3.86 (2.67)*	2.95 (1.85)**		2.89 (2.06)*		
West-reporter network variable	-4.82 (-2.17)		-4.57 (-2.17)				-2.61 (-1.62)	
Census-region network variable	0.62 (0.37)			-0.11 (-0.07)				1.19 (1.04)
Population	-0.00 (-0.34)	-0.00 (-1.34)	-0.00 (-0.20)	-0.00 (-1.19)	-0.00 (-0.89)	-0.00 (-1.27)	-0.00 (0.16)	-0.00 (-0.90)
State prohibition	0.31 (0.33)	-0.32 (-0.40)	0.42 (0.47)	-0.21 (-0.27)	0.13 (0.16)	-0.21 (-0.27)	0.95 (1.07)	0.22 (0.29)
Federal prohibition	1.06 (0.60)	-0.07 (-0.04)	0.98 (0.65)	1.09 (0.64)	-0.01 (-0.01)	-0.90 (0.54)	0.01 (0.07)	-0.01 (-0.01)
Moralistic culture	-21.51 (-16.53)	-18.90 (-11.30)	-22.00 (-13.78)	-20.38 (-12.37)	-19.80 (-15.75)	-20.16 (-15.91)	-21.86 (-13.71)	-19.91 (-13.06)
Moralistic culture with individualist strain	-20.25 (-16.24)	-17.74 (-11.62)	-20.59 (-13.72)	-19.17 (-13.14)	-19.01 (-16.29)	-18.95 (-16.05)	-20.91 (-14.17)	-19.04 (-13.43)
Individualist culture with moralistic strain	-21.89 (blank)	-19.17 (-10.56)	-22.43 (-12.87)	-20.69 (-11.86)	-20.19 (blank)	-20.46 (blank)	-22.23 (-13.46)	-20.17 (-12.30)
Individualist culture	-22.46 (-14.33)	-19.03 (-11.35)	-22.62 (-12.14)	-20.37 (-12.39)	-19.58 (-15.03)	-20.16 (-14.92)	-21.73 (-14.44)	-19.65 (-13.42)
Individualist culture with traditionalist strain	-18.11 (-9.51)	-16.15 (blank)	-18.18 (-10.60)	-17.35 (blank)	-17.96 (-10.67)	-17.13 (-9.85)	-19.09 (blank)	-17.48 (blank)
Traditionalist culture with individualist strain	-18.27 (-12.10)	-15.53 (-9.61)	-18.74 (-11.59)	-17.08 (-11.39)	-17.08 (-12.96)	-16.85 (-12.03)	-19.40 (-12.03)	-17.13 (-11.34)
Traditionalist culture	-21.65 (-14.42)	-18.46 (-11.60)	-22.00 (-11.66)	-19.89 (-12.85)	-19.77 (-15.19)	-19.69 (-15.15)	-21.93 (-12.91)	-19.91 (-12.66)
Traditionalist culture with moralistic strain	-38.39 (blank)	-34.17 (blank)	-38.99 (blank)	-36.82 (blank)	-36.20 (blank)	-36.61 (blank)	-38.72 (blank)	-35.55 (blank)

Coefficients are on top; test statistics are in parentheses on bottom.

\* Statistically significant at the 95% level of confidence.

\*\* Statistically significant at the 90% level of confidence.