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Lawyers Need Law: A Study of Constitutional Arguments Made to State Supreme Courts

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Abstract

Dismayed over the increasing conservatism of the U.S. Supreme Court, state judges, lawyers, and scholars in the 1970s argued for a new judicial federalism. State courts, using state constitutions, may provide protections exceeding the federal minimum. In addition to allowing states to experiment with solutions to rights disputes, and recognizing unique state traditions, judicial federalism had instrumental value in ensuring state level protections that were protected from review at the federal level. While supporters saw judicial federalism as a means of realizing the principle of dual constitutional rights protection through principled development of a body of state law, the reality proved to fall short of these hopes. Rights issues in state courts still focus heavily upon federal law with limited development of state constitutional law. Explanations for the limited development of judicial federalism have tended to focus on the court centric explanations of judicial ideology, separation of powers, and state political environment.

This dissertation examines the limited development from another angle by examining the support structure for state constitutional activism. Courts rely upon lawyers to develop claims for courts to act upon, and the strength of this structure helps explain how state courts have dealt with state constitutional activism. Courts, however, are not powerless to influence the content of the arguments presented by lawyers. Through their opinions, courts send signals and give guidance about the kinds of claims it wishes to hear. Given that lawyers are conditioned to think of rights issues in federal terms only, the support structure should generally be fairly anemic with lawyers focusing on federal law primarily. However, two kinds of signals can alter this behavior. First, the federal retrenchment signal occurs when the U.S. Supreme Court overrules or narrows a rights doctrine, and where it refuses to recognize new rights claims. Second, the internal

encouragement signal occurs when a state high court embraces state law either in the form of a particular doctrine or a broader theory of state constitutional law. Under either of these signals, lawyers should turn to state law providing state courts with a stronger support structure for state constitutional law.

This dissertation explores these questions through an examination of legal arguments presented to four state high courts (New York, Ohio, Oregon, Washington) and a set of remand arguments in 14 states from the 1970s to 2000. Three principle findings are identified. First, the support structure is normally quite weak. Absent signals from either state or federal courts, litigants rely upon the federal law they have been taught when dealing with rights issues with virtually no attention to state law. Second, federal retrenchment does lead to more state constitutional arguments but in a limited manner. Lawyers tend to give limited attention to the traditional legal arguments in favor of attacking the policy choices involved in the U.S. Supreme Court's retrenchment in an attempt to convince the state court to simply evade this change by applying the previous federal rule under the dressing of state law. Third, state court encouragement also leads to greater attention to state constitutional arguments but without the same focus on policy concerns. Instead, lawyers tend to abandon concern for shifts in federal law in favor of the legal factors and arguments taken from the guidance of the state high court. In addition to adding to our knowledge of the reasons for the limited development of judicial federalism, this research adds to our understanding of the interactions between lawyers and courts in the development of legal doctrine.

LAWYERS NEED LAW:
A STUDY OF CONSTITUTIONAL ARGUMENTS MADE TO
STATE SUPREME COURTS

By

Richard S. Price

DISSERTATION

Submitted in Partial Fulfillment of the requirements for the degree of

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As with all dissertations, this one is subject to the classic cliché: it is the product of influence from many people who contributed in various ways. I first became aware of the idea of state constitutional law through my first constitutional law textbook: James C. Foster and Susan M. Leeson's *Constitutional Law: Cases in Context*. Foster and Leeson were unusual in that they included a short section on this unfortunately neglected subject—perhaps unsurprisingly, after reading Chapter 7 of this dissertation, the authors were Oregon residents as well as political scientists, with Leeson eventually serving a term on the Oregon Supreme Court. This text sparked an interest that led me to take a seminar on state constitutional law during law school where an informal post-seminar chat with Barbara Hurst, then Chief Appellate Attorney at the Rhode Island Office of the Public Defender, lead me to the beginning of the road that resulted in this dissertation. Barbara mentioned off-handedly that part of the problem seemed to be that few lawyers raised state constitutional issues to the Rhode Island courts and this observation stuck with me as I started graduate school, leading to six years of research exploring the dynamics of legal arguments suggested by her comment.

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Chapter 1

Judicial Federalism and Lawyers

Judicial federalism

In 1973, the U.S. Supreme Court, under the influence of four Nixon appointees, put a clear stop to the Warren Court's trend towards applying equal protection doctrine to economic inequalities. Education reformers built upon these liberal precedents to attack state school funding schemes tying funding to local taxes. These systems were criticized as providing dramatically different educational opportunities depending on where students live, that this discriminated against the poor and denied a fundamental right to education. While a number of lower courts accepted these claims,¹ in *San Antonio Independent School District v. Rodriguez* (1973)² the Supreme Court rejected both claims by a narrow 5-4 vote. The Court put a clear end to the economic equality arguments, declaring not only that the poor are not a suspect class but that education is not a fundamental right. The Court demonstrated an unwillingness to take on the massive task of constitutional oversight across fifty states and decided to defer to local judgment to remedy the problem. The Court clearly ended all federal options to remedy this problem but reformers did not abandon the judicial remedy; they simply reoriented to another venue: state courts. Nearly every state constitution requires the state to provide a free system of public schools to their children and reformers deployed these documents to convince state courts to reach a different result than *Rodriguez*. State courts across the country took up this challenge,

¹ See *Serrano v. Priest*, 487 P.2d 1241 (Cal., 1971).

² 411 U.S. 1.

striking down their systems and, in some states, dramatically altering the state's education and tax systems. School finance became the most dramatic symbol of state court power and judicial federalism (Bosworth 2001; Paris 2010). To date twenty-five state high courts have ruled in favor of education reformers and eighteen in favor of the states.³

School finance is the principal example of judicial federalism, the use of state constitutions to protect rights beyond the level set by the U.S. Supreme Court. A common legal trope provides that federal constitutional rights precedents set only the floor for rights protection and state law can provide a higher ceiling.⁴ Since the 1970s, judicial federalism has been prominent in a variety of areas from abortion regulations, criminal procedure, and LGBT rights (Andersen 2005; Latzer 1991a; Wharton 2009). Supporters described judicial federalism as an expression of the dual protection of rights our federal system was meant to achieve. Critics asserted, however, that judicial federalism was just a backdoor method of protecting earlier liberal victories in the face of conservative Supreme Court retrenchment. While supporters sought to make state constitutional law a consistent, independent alternative to federal law, the practice of judicial federalism was uneven over time, across issue areas, and between states.

Traditionally explanations for the limited development of judicial federalism focus on the court-centric factors of judicial ideology, institutional structures, and state political environments. While these explanations are important, I argue they skip an important step in the legal process: the interactions between lawyers and state high courts in the development of state constitutional arguments. Courts rely upon lawyers to develop and present legal claims for them to act upon. Yet there is good reason to believe that lawyers present few state constitutional

³ The National Education Access Network provides the most comprehensive source for school funding suits, <http://schoolfunding.info/> (accessed April 9, 2012).

⁴ It is also true, though more rare, that state constitutional protections can be less protective than federal law (Latzer 1998b); of course, federal law is still supreme.

arguments due to the limitations imposed by legal education. I explore the degree to which the support structure for state constitutional law is present and, more importantly, the degree to which state courts can guide lawyers and induce the development of such a support structure. Through a comparative examination of lawyers and courts in four states, I find that the support structure is typically anemic, offering little support for the development of a truly independent body of state constitutional law. Where state courts encourage and guide lawyers, however, lawyers respond with greater attention to state constitutional law providing courts with more to work with in developing state constitutional law more completely.

Judicial Federalism in Theory and Practice

The rise of judicial federalism is inextricably linked to developments in federal constitutional politics. Political struggles to influence the U.S. Supreme Court led to the push for increased state constitutional activism. The Warren Court represented a dramatic expansion of judicial power in the service of liberal policy goals actively supported by Presidents Kennedy and Johnson (Gillman 2006). The Warren Court expanded protections in a diverse set of areas such as criminal procedure, free speech, and religious freedom protections through the application of nearly the entire Bill of Rights to the states (Powe 2000). This liberal activism in turn elicited a conservative backlash; Richard Nixon's 1968 campaign focused heavily on a criticism of the Warren Court as being too friendly to criminals in particular and promising to appoint more conservative justices to correct this tendency (Simon 1973). While a common view of Nixon's court was one of a failed counter-revolution (Blasi 1983), this ignores the limited goals that Nixon expressed. On the issues that Nixon cared the most about, criminal rights and desegregation, the Court delivered much of what he hoped for, successes that were built upon by

Reagan's more expansive attack on the liberal legacy (McMahon 2011). The Court never completely delivered on the goal of conservative activists to reverse the Warren Court's legacy but the sustained opposition led to a Court that maintained some liberal rights while severely constraining others, and then turned the Court's activist power to the protection of conservative rights claims (Keck 2004). Through the 1970s and '80s the Court failed to overrule significant criminal procedure precedents but conservatives succeeded at dramatically limiting a number of these precedents and also limiting Warren Court privacy and economic equality arguments. This rights retrenchment, however, was open to contestation from below because the rules of American federalism allow for divergent constitutional rights doctrines through state constitutions.

Shortly after the Fourteenth Amendment extended some federal constitutional restrictions to the states the Supreme Court held that it lacked jurisdiction to review the meaning of state law; it could declare state laws unconstitutional but it was bound by the interpretations given by the state courts.⁵ This became the basis for the independent and adequate state grounds doctrine. For the first century of its existence, this doctrine held that "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."⁶ Under this formulation a state decision based on a mixed or unclear legal basis was presumed to be state based and thus unreviewable. The early stage of judicial federalism complicated this rule however. As discussed below, the frequency of state constitutional decisions increased in the late 1970s and early 80s but the legal doctrine

⁵ *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

⁶ *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

supporting these decisions were usually murky and confusing at best. Responding to this experience, in *Michigan v. Long* (1983), the Court adopted the “plain statement” rule:

Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.⁷

Long altered the presumption of federal jurisdiction. Now mixed or unclear decisions were presumed to be based on federal law unless the state court included a plain statement that it relied only upon the state constitution and any reference to federal law was for persuasive reasoning only. While this rule may have made it more difficult to avoid federal review, it established a clear and simple rule for state constitutional activism: state courts could provide expanded state protections with a simple statement that it was doing so based solely on state and not federal law, ensuring that its decision was insulated from review by the U.S. Supreme Court.

This justification for evasion of federal retrenchment received dramatic support from Justice William Brennan in a high profile article.⁸ Brennan (1977) instructs liberal lawyers dismayed over the increasing conservatism of his own Court to remember federalism: "Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty," instead "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens" (Brennan 1977: 503). He reminds state lawyers and courts that federal law is not dispositive on the meaning of state constitutional provisions and should be followed "only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees" (Brennan

⁷ 463 U.S. 1032, 1040-41.

⁸ A study of law review citations found that Brennan's article was the eighth most cited law review since 1979 (Shapiro 1985).

1977: 502). While Brennan's argument disclaims any preference for particular results, this was a transparent denial when read against his jurisprudence, which did not show great support for federalism, his message was that "state courts should vindicate personal liberties along the lines undertaken by the Warren Court by reading their state constitutions expansively and should justify their actions by referring to the 'neutral' principle of federalism" (Maltz 1988: 432).

Brennan's theory then amounts to an instrumental one: state courts should utilize their constitutions to evade federal retrenchment. While James Gardner (2005) defends instrumentalism as a principled element of federalism in resisting federal tyranny in the denial of legitimate rights protection, other judicial federalism proponents view this as illegitimate and offer a variety of state constitutional theories to support state constitutional activism in a legally principled manner.

Judicial federalism gave rise to a new legitimacy issue: where all courts grapple with the idea of judicial review in general, state courts were also faced with a legitimacy question over whether they should disagree with the U.S. Supreme Court (Tarr 1998b: 174-77). State constitutional theory can be reduced to three broad approaches for answering this legitimacy concern. First, lockstep proponents essentially argue that independent state interpretation is never justified (Maltz 1988; Williams 2009: Ch.7). Lockstep is appropriate as due deference to the Supreme Court's role as constitutional arbiter and it ensures a simple set of rules for the whole nation to follow. Critics of lockstep argue that this approach ignores the independent force of state law where it is used in an unreflective manner, simply assuming that state law always follows federal changes; the security of the dual protection of rights "would be lost if states abdicated their responsibility to interpret their declarations of rights" (Tarr 1998b: 181). But state

constitutional law must still be guided by some principles beyond a desire to simply evade federal law as called for by instrumentalists.

Second, the supplemental or criteria approach views federal and state constitutional law as inherently mixed and interdependent. The criteria approach received its earliest development in a concurring opinion from Justice Alan Handler of the New Jersey Supreme Court. While it may be true that state constitutions are separate legal documents, “our national judicial history and traditions closely wed federal and state constitutional doctrine” and “a considerable measure of cooperation must exist in a truly effective federalist system. Both federal and state courts share the goal of working for the good of the people to ensure order and freedom under what is publicly perceived as a single system of law.”⁹ Only where federal law fails to resolve the issue should state law be considered and, further, an independent state constitutional rule must be justified by some neutral set of criteria such as text, state constitutional history, state law precedent, structural differences, matters of particular local concern, state traditions, or public attitudes.¹⁰ This approach sought to ensure that something more than just disagreement with federal law justified a state court’s decision but critics complain that it provides federal law a “presumption of correctness” (Williams 1997, 2009: 185)¹¹ and that it may actually make the legitimacy problem worse because it only provides a state interpretation where federal law is unsupportive of the rights argument (Tarr 1998b: 183).

Finally, primacy theorists answered this problem by requiring state constitutional issues to be argued first with federal law being resorted to only where state law fails to end the claim. This sequence is required by the fact that federal jurisdiction is premised on the state denying

⁹ *State v. Hunt*, 91 N.J. 338, 362-63 (1982) (Handler, J., concurring).

¹⁰ *Hunt*, 91 N.J. at 364-67.

¹¹ See also *Hunt*, 91 N.J. at 350 (Pashman, J., concurring).

some right and if state law remedies this denial there is no further legal dispute (Linde 1970b, 1980, 1984). This approach answers the instrumental problem by making the consideration of state issues mandatory rather than discretionary (Tarr 1998b: 184). Under primacy, the meaning of state law is to be determined according to the same rules of construction applied to any other law with federal precedent bearing no greater weight than any other persuasive legal precedent. Primacy theorists advise lawyers and judges “to imagine a world in which there is no federal law” (Friesen 2006: 1-64) but this “seems to demand heroic efforts on the part” of state courts because it denies state courts the accumulated legal doctrines built over decades by federal courts (Tarr 1998b: 185). For this reason it is probably unsurprising that few courts have attempted to follow the primacy approach.

While these various legal theories were developed to encourage principled state constitutional interpretation, studies of both case outcomes and legal reasoning demonstrates that federal law generally remained dominant in rights disputes. A study of six state high courts in 1975 found that 17% of all constitutional issues were resolved on state law grounds (Fino 1987b). In a broader study of all equal protection cases from all state supreme courts, 1975-84, found that equal protection was particularly dominated by federal law with only 6.7% relying on state law alone to reach the court’s decision (Fino 1987a). A study of self-incrimination cases from all state high courts, 1981-86, found that 22% rested solely on state law but there was significant variation between states with fourteen states never relying on state law and eight states relied on state law in more than half the cases (Esler 1994). Emmert and Traut (1992) examined all instances of facial challenges to state statutes, 1981-86, finding that state only grounds were relatively rare for invalidations. Of the 21% of statutes struck down on equal protection grounds, 5.6% utilized state law only; of the 9.7% struck down on due process

grounds, 1.2% rested on state law; 7.9% of statutes challenged on criminal rights grounds were struck down with a relatively high 3.8% based on state law; finally, 27.3% of statutes challenged on other bill of rights grounds were struck down with only 6.8% relying on state law (Emmert and Traut 1992: 44; see also Beavers and Emmert 2000).¹² More impressionistic studies of small issue areas or only a few courts have similarly found that while judicial federalism may have increased in frequency in the 1980s, the “area continue[d] to be largely reactive” (Collins and Galie 1986: 113; see also Davis and Banks 1987; Porter 1982). Another study of criminal procedure and First Amendment rights parallels found that in a third of cases the state court adopted a broader rule; two of the three most common areas of expansion were in search and seizure and free exercise claims both responding to federal retrenchment, but jury claims were similarly frequent and cannot be explained solely with reference to federal law (Cauthen 2000). The picture of case outcomes demonstrates that judicial federalism is the exception rather than the rule but that judicial federalism varies by issue area. Examination of the rationale of opinions similar demonstrates a tendency to converge federal and state law.

Barry Latzer (1991) examines all instances of state constitutional interpretation in criminal procedure cases from the late 1960s to 1989 to gauge the degree of rejection or adoption of federal rights doctrines. Contrary to the view by some that judicial federalism “is of a wholly liberal legal movement” regularly expanding criminal procedural rights (Latzer 1991: 157), two-thirds of the cases adopted the reasoning of the U.S. Supreme Court. There was considerable variation in the one-third of cases that rejected the federal rule with the most common area being search and seizure because that is the area of strongest federal retrenchment where the Burger

¹² Unfortunately, Emmert and Traut’s coding rules are unclear. They include a category for invalidations on “both” constitutions that appears to accept any citation to a state provision as a separate basis. Because of this I only report their findings for state only invalidations.

Court's "Fourth Amendment jurisprudence had clearly been given a pro-police cast" (Latzer 1991: 32). Only four state high courts (Alaska, California, Florida, and Massachusetts) regularly expanded state constitutional protections (Latzer 1991: 164).¹³ Cauthen (1999) utilized Latzer's case samples for 25 state high courts and extended the data through 1994, finding that while the aggregate degree of expansion was consistent with Latzer's original finding, there was substantial variation over time. In the 1970s, the degree of expansionism was actually quite high but was concentrated in a handful of prominent decisions from only a few early adopters of active judicial federalism and in the 1980s as state constitutional issues spread to more states the rate of expansive decisions dropped off. But in the 1990s, an increasing trend of expansion emerged (Cauthen 1999: 529).

In a prominent critique of judicial federalism, Gardner (1992) examined all constitutional cases decided by seven¹⁴ state supreme courts in 1990. By looking at all constitutional disputes, Gardner's analysis avoids a narrow focus on areas where judicial federalism was more likely than not and illuminated the constitutional discourse used by state supreme courts. Rather than being a source of truly independent law as pictured by some theorists, state constitutional law as practiced "is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements" (Gardner 1992: 763). What state constitutional discourse that exists is "often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of lingua franca of constitutional argument generally" (Gardner

¹³ However, California and Florida were both restricted in the early 1980s from issuing expansive state rights decisions by forced linkage provisions and all cases after these amendments were excluded in Latzer's sample.

¹⁴ Gardner's seven states: California, Kansas, Louisiana, Massachusetts, New Hampshire, New York, and Virginia.

1992: 766). The hopes for independent state law were low because “state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state law” (Gardner 1992: 804).

Thus the picture of state constitutional law from studies of case outcomes and legal reasoning present an image of judicial federalism that is both uneven over time and across issue areas. Even though state constitutions provide state courts with a significant degree of latitude in judicial policymaking without fear of vertical review, state courts only engage with state law infrequently in rights disputes. This finding opens up the question of why state law remains so relatively underdeveloped.

Explanations

Attitudes and institutions

Explanations of court behavior frequently center on two models of judicial decision-making: the attitudinal and strategic models. The attitudinal model views law as simply window dressing for ideological preferences: “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices” (Segal and Spaeth 2002: 86). The strategic model accepts the underlying importance of ideology but argues that ideology alone is not enough because “law, as it is generated by the Supreme Court, is the result of short-term strategic interactions among the justices and between the Court and other branches of government” (Epstein and Knight 1998: 18). Courts are composed of multiple members who have to agree to reach a decision and thus they engage in negotiation and bargaining to reach a majority result (Matlzman, Spriggs, and Wahlbeck 2000). Outside of the internal interactions

between justices, courts sit within a system of separation of powers that has to be navigated to achieve a desired result (Bailey and Maltzman 2011; Clark 2011). These models have been aimed at explaining state court behavior, both in general use of judicial review as well as some limited attempts to explain judicial federalism specifically.

A number of studies have explored the interaction of state courts with their broader political environment finding that shifting institutional rules influence the behavior of state high courts. Brace and Hall (1990) argue that variations in judicial selection method, internal rules about opinion assignment, and the existence of intermediate appellate courts had dramatic effects on the rate of dissenters from court opinions. In studies of death penalty decisions by justices in eight states, they conclude that attitudes (as measured by party identification) were mitigated by the institutional rules of their courts and state political factors, in particular finding that judicial tenure was important: "Democrats with long terms are least likely to support the death penalty ... Republicans with long terms are most likely to support the death penalty" (Brace and Hall 1995: 24, 1997; see also Traut and Emmert 1998). Similarly, a study of challenges to abortion restrictions suggests that reception to such challenges varied greatly by institutional situation with elected courts being less likely to invalidate restrictions with life tenure or divided state government making it more likely for courts to invalidate restrictions (Brace, Hall, Langer 1999). Utilizing a more sophisticated measure of state judicial ideology than simple party identification (Brace, Langer, and Hall 2000), Langer (2002) conducted a comparative study of judicial review in four issue areas finding that judicial attitudes were constrained by institutional rules and political divisions with the other branches. Justices were more likely to vote their sincere preferences if the issue was of low political salience to other political elites and/or the justices

were protected by generous selection and tenure rules. Similarly, Savchak and Barghothi (2007) find that variations in the rules of judicial retentions affect judicial decision-making, with state judges responding to the constituency that controls their retention in office. These studies confirm the importance of a mixture of attitudinal and strategic factors in judicial decision-making in the states. Less clear work has been done in the specific area of judicial federalism, though it tends to track with these studies.

Scholars have long asserted that "while in theory state court activism need not have a political bias, in design and practice the so-called 'new federalism' is often a device for advancing the liberal political agenda" (Maltz 1989: 233). In a study of early examples of judicial federalism, the most common reason was "ideological disagreements" with the U.S. Supreme Court (Galie 1982: 779). Studies find that while ideology clearly plays a significant role in decisions to expand state rights protections, the institutional structure and political environment of their home state also play a substantial part. In his study finding a relatively low degree of expansionism, Latzer (1991a: 166-71) concludes that intrastate political pressure to conform to federal precedent was a substantial cause of this limited development. Utilizing Latzer's case sample, a statistical analysis argues that longer terms and the support of a liberal state citizenry¹⁵ were strong influences on decisions to expand rights protection (Beavers and Walz 1998). Tarr and Porter's (1988) comparative study of Alabama, Ohio, and New Jersey's high courts, though not focused on judicial federalism, finds that the development of a state's institutional and political cultures influenced their degree of state constitutional activism. Elections also posed a threat to judges

¹⁵ Oddly, Beavers and Walz did not find judicial ideology to be a significant effect but they admit that this may be because they used party identification and that may not capture ideology as well and they note that citizen ideology may be a better measure.

willing to embrace broader state constitutional protections. For example, the defeat of three California justices in 1986 was directed at their liberal voting record on the death penalty (Wold and Culver 1987). Constitutional amendments also posed a threat to judicial activism with a number of states amending their constitutions to reverse rights protective decisions involving the death penalty and search and seizure (Williams 2003). These studies all point to legitimate explanations of ideology and institutional relationships that play a role in the limited development of judicial federalism. However, these court-centric explanations skip an important step in the litigation process: the legal arguments offered by lawyers to state high courts.

Lawyers and courts, support and signaling

The traditional court-centric models focus on the internal and external influences on how courts decide a case. These models, however, skip an important step in the legal process: the actions of lawyers. Lawyers develop and present arguments that shape and influence the options available for the courts to act upon. This section briefly outlines two interrelated theories of the role of legal support structure and court signaling in the development of rights law and the next section explores what these approaches suggest about judicial federalism.

A number of studies detail the importance of lawyers and legal mobilization on the outcome of court decisions. Marc Galanter's (1974) classic article shows how the rules of American courts give preference to those with greater resources, the "haves," who can pursue and support litigation. For example, expansion of federal funds for legal support services for the poor lead to significant alteration in legal rules affecting the poor by ensuring a sufficient degree of support in bringing the litigation necessary to force change (Lawrence 1990). In his examination of conservative rights groups, Steven Teles (2008: 12; see also Southworth 2008)

details how legal mobilization is necessary to capitalize on shifts in other institutions, such as new judges: "Where the composition of the judiciary is reshuffled without a corresponding shift in the support structure, legal change may fail to occur or, at the least, be substantially limited and poorly coordinated or implemented." This support structure of lawyers is a necessary, though not sufficient, cause for rights revolutions, as most fully discussed in Charles Epp's (1998) comparative study.

Epp examines rights revolutions, the "sustained, developmental process that produced or expanded the new civil rights and liberties" (Epp 1998: 7), in Canada, India, the United Kingdom, and the United States. Traditionally studies of rights revolutions emphasize the importance of formal bills of rights with activist judges willing to enforce these rights and Epp acknowledges the importance of these two factors as necessary to rights revolutions but not sufficient alone. He demonstrates that "rights revolutions depend on widespread and sustained litigation in support of civil rights and liberties" (Epp 1998: 18). While judges do occasionally take the initiative in crafting legal changes without the push from lawyers, the support structure is still necessary to build upon and enforce such changes (Epp 1998: 21). His comparative study finds that in the two broadest rights revolutions, Canada and the U.S., a broad support structure for the rights claims preceded and supported the work of courts. Even in the U.K., where no formal bill of rights existed,¹⁶ a limited rights revolution developed through the concerted effort of reform litigators. Finally, India never saw a sustained rights revolution despite the support of the high court because of the limited ability of rights litigators to mobilize and support this judicial interest. The findings of Epp and others demonstrate the importance in understanding

¹⁶ Similarly, Galligan and Morton (2006) present evidence that a limited rights revolution occurred in Australia without a bill of rights under the influence of a few activist judges.

how lawyers are participating in a movement for legal change.¹⁷ However, signaling theory notes that courts are still important in the development of this structure.

Ultimately the litigation process is iterative and the support structure approach highlights one half of this process by demonstrating the importance of lawyers in presenting courts with cases to act upon. Court signaling theory, on the other hand, stresses the power of courts to influence the claims presented by lawyers through an expression of interest in particular policy areas or legal claims (Baird 2007; Baird and Jacobi 2009a, 2009b). Baird (2007: 4) argues, “that the incentive to support litigation in particular policy areas varies over time in accordance with litigants' changing perceptions of Supreme Court justices' policy priorities.” Through their opinions and other actions, justices send signals that they are interested in particular kinds of claims and legal arguments and “policy-minded litigants base their strategies of selecting cases, issues, and legal arguments on information from the Supreme Court” (Baird 2007: 31). For example, in an immigrants rights case out of California the litigants preferred to rely on arguments about equal protection or due process but negative trends in those areas from the Supreme Court made the claims unlikely to be successful. Instead the litigants shifted to federalism arguments after an increasing trend of signals about the revival of federalism from the 1990s Supreme Court (Baird 2007: Ch.3; see also Baird and Jacobi 2009a). In a related vein, the Supreme Court’s earliest decision on university affirmative action pushed both universities and litigants on both sides of the issue to reframe their approaches and challenges to the policy in the Court’s terms to push for further action (Keck 2006).

¹⁷ Urribarri, et al. (2011a, 2011b) offer a recent critique of Epp’s support structure concluding that support structures are neither necessary nor sufficient. However, their conclusions at times miss the point of his argument (Epp 2011).

The interrelated approaches of support structure and court signaling suggest an alternative method of approaching judicial federalism by pointing to the question of how, if at all, lawyers approached state constitutional law. The next section details this approach with discussion of the special restrictions lawyers face in arguing state constitutional claims and the signals state courts are likely to offer.

Support, signaling, and judicial federalism

While Epp focuses on resource mobilization as the primary means of supporting court action, support in the form of legal arguments is also an important element of the support structure. Courts are required to provide legal justifications for their decisions and it is these “opinions themselves, not who won or lost, [that] are the crucial form of political behavior by the appellate courts, since it is the opinions which provide the constraining directions to the public and private decision makers ” (Shapiro 1968: 39). Legal arguments frame the options available to courts even if the final decision “is the product of those litigant claims, legal bases, and judicial sympathies that the temper of the times create and join together” (Lawrence 1990: 122). In her study of the early development of civil rights litigation in the 1940s, Risa Goluboff (2007) demonstrates that lawyers were faced with an open field of legal possibilities and how their choices and interactions with courts throughout the decade shaped the options ultimately available to the Supreme Court in the 1950s. In their study of death penalty and abortion litigation before the Supreme Court, Lee Epstein and Joseph Kobylk (1992: 8, emphasis in original) find that while traditional explanations of judicial ideology, political environment, and interest group pressure were all important to the Supreme Court’s doctrinal shifts, “it is *the law and legal arguments as framed by legal actors*, that most clearly influence the content and

direction of legal change.” A study comparing the texts of legal briefs and Supreme Court opinions finds that 10% of the language in Supreme Court opinions was drawn directly from the briefs (Corley 2008).

The norms of judicial behavior require courts to rule only on the issues and arguments presented by the litigants. While this norm against *sua sponte* issue creation are solely in the judgment of courts, crowded dockets make it unlikely that courts will regularly violate this rule—though exceptions certainly exist, as my findings in Oregon most clearly demonstrate. Courts dealing with crowded dockets have little time to independently research the legal issues in each individual case and thus they rely on the arguments as briefed and submitted to them. One appellate advocacy guide argues that the “overarching objective of a brief is to make the court’s job easier” for exactly this reason (Scalia and Garner 2008: 59). As the West Virginia Supreme Court of Appeals poetically declares, “[w]e have said many times that a skeletal argument, really nothing more than an assertion, does not preserve a claim ... Judges are not like pigs, hunting for truffles buried in briefs.”¹⁸ One study of issue creation at the Supreme Court concludes that 11% of cases were decided on issues not presented by one of the parties (McGuire and Palmer 1995, 1996), but a follow-up study of the same data demonstrates that nearly all of these instances were the result of faulty data gathering rather than genuine instances of issue creation (Epstein, Segal, and Johnson 1996).

A weakness in the legal support structure is likely an important element to the limited development of judicial federalism. Unfortunately failure to raise state constitutional claims has rarely been examined, though it has frequently been asserted (see Collins, Galie, and Kincaid 1986; Esler 1994; Williams 1991). Donald Farole (1998) provides one of the few exceptions. In

¹⁸ *State v. Ladd*, 557 S.E.2d 820, 831 n.1 (W. Va., 2001) (citations omitted).

his study of obscenity and takings cases, Farole examines interest group litigation in state and federal courts finding that “[a]ll else being equal, interest groups typically prefer to locate policy conflicts in national rather than state courts” because of the broader impact of federal decisions (Farole 1998: 20). But where legal incentives are present, they will go to state courts and, less often in his cases, to state law. Where federal procedural or substantive law had weakened support for their legal claims, groups did turn to state courts. But this study of interest groups is limited because such groups are necessarily policy activists with a national focus whereas most lawyers serve individual clients and practice law in single states and thus may have different interests. In particular, duty to their client is of foremost importance and the failure to raise state claims may have disastrous consequences. A former judge of the New York Court of Appeals notes a series of recent cases where his former court adopted broader state protection but warned, “[o]bviously, if defense counsel had not argued state constitutional law their clients, instead of being exonerated, would have gone to jail” (Hancock 1993: 276-77). Justice Robert Berdon of the Connecticut Supreme Court (1994: 197) describes a case where a mentally ill man lost his federal claim and opines that a state claim, if made, would most likely have resulted in his removal to a mental institution rather than prison. Further, Farole’s choice of cases was good for the issue of choice of venue but weaker in terms of judicial federalism because neither obscenity nor takings were areas of state constitutional activism for most of the scope of his study (Tarr 1998a).

Unfortunately, lawyers litigating in state courts are constrained by a significant limitation that Epp and others do not consider: legal education. Constitutional law, a required course in all law schools, is taught as a solely federal subject. State constitutional law is rarely taught and only

as an elective. In 1997 only 22 law schools, of the 177 ABA-accredited law schools, had courses in state constitutional law (Esler 1994: 32, n.58). This is little changed today; for the 2007-08 school year, only 24 of the nearly 200 accredited law schools offered state constitutional law courses (Sutton 2009: 166).¹⁹ Esler (1994: 31-32) describes this situation as creating a “self-perpetuating cycle” in that the “typical law school curriculum produces lawyers who are not versed in raising claims under state constitutional law, which means that state grounds often are not presented in court. The result is that judges usually refuse to base their decisions on state law, which in turn discourages law schools from taking state law seriously.” Lawyers are not trained or prepared to offer state constitutional arguments and their poor performance was the source of annoyance for many state supreme courts.²⁰ Two potential objections may counter this argument about the limitations of legal training.

First, Gardner (1992: 810) asserts that “[i]f lawyers are not making state constitutional arguments, it is because doing so does not help them win.” Gardner rejects education and training as a limitation because lawyers do not have a similar problem offering other state legal arguments such as in torts or other common law issues. This argument ignores, however, the fact that common law subjects are specifically taught as state based with attention to variations between states (Sutton 2009). Further, his assertion about lawyers not using state constitutional arguments because they do not win is unconvincing in light of the findings in the following chapters because there is no evidence of early attempts to use state constitutional arguments that failed leading to an abandonment of state arguments, at least not by the time of his study. A second

¹⁹ Sutton also found that 11 schools offered state specific constitutional law courses but it is likely that these courses are offered by some of the same institutions that offered general state courses.

²⁰ See e.g. *State v. Jewett*, 500 A.2d 233 (Vt. 1985) (admonishing poor legal briefing of state constitutional law and ordering supplemental briefing on the issue).

objection is that law school is aimed more at imparting a frame of mind to law students rather than instructing them in specific legal points (Mertz 2007). From this perspective, lawyers are trained to take claims and research them anew with each new client and thus should in the course of their ethical duty to their clients offer state arguments where available. While plausible, this claim ignores the importance of background knowledge in shaping the options lawyers investigate. If lawyers are taught that suspension from school for hate speech implicates the First Amendment, and only that, they are unlikely to uncover alternative state provisions. Even if Mertz is correct that law school is more about imparting a view of the world with specific knowledge being minimal and aimed at teaching research tools, this still does not undermine my argument. After all, the research tools in constitutional cases are centered on court opinions and thus the dominance of federal constitutional law weighs against the potential of state constitutional claims. And in fact this may weigh in favor of my signaling argument discussed below.

Given these limitations, I argue that the support structure for state constitutional arguments is likely to be quite weak. Lawyers are conditioned to think of rights in federal terms and have little experience with non-federal frames of reference. Court signaling theory, however, provides a means of explaining how lawyers overcome this limitation and probing the extent to which a support structure can be enticed into existence by state courts. We can conceive of a number of potential signals, as Baird (2007) acknowledges. For example, many sitting and former state high court justices wrote law review or bar journal pieces extolling the virtues of state constitutional law and offering lessons on how it should be approached (Berdon 1994; Carson 1983; Clarke 1987; Durham 1989; Hancock 1993; Linde 1980, 1984; Satter 1982; Utter 1984; Utter and Pitler 1987). We might also expect some influence from speeches from justices

and a number of the articles written by justices began as speeches to local or national bar organizations. But the greatest influence courts and individual justices have on lawyers comes from their judicial opinions. Lawyers litigating constitutional issues are trained to research these opinions and frame their arguments to respond to the legal theories presented by opinions. Here I outline two signals that should have strong effects on how lawyers litigate constitutional rights claims. Both should increase the likelihood of state constitutional arguments, though in different ways.

The first signal is external to the states, federal retrenchment. Retrenchment occurs where the U.S. Supreme Court reverses or limits a prior rights doctrine or refuses to recognize a new rights claim. A lawyer is primarily driven by a desire to win her case and where federal law has soured on her claim, state constitutional provisions provide a means of avoiding a new, unfavorable federal direction. Retrenchment points lawyers to the instrumental benefit of state constitutions through the independent and adequate state grounds doctrine and fits well with the arguments of Brennan (1977) and Gardner (2005). State constitutions become a means of resisting retrenchment.

The second signal is internal to each particular state and comes in the form of state court encouragement to pursue state constitutional claims. Some courts became frustrated with arguments simply seeking to evade federal retrenchment, fearing that such evasion lacks sufficient legitimacy for a separate constitutional doctrine. State court encouragement is aimed at overcoming the limitations of legal training and practice by guiding their lawyers in when or how to present competing state constitutional rights claims. A state court may pursue this encouragement in a limited manner by focusing on the development of a particular state constitutional doctrine. Some courts go further, however, and adopt one of the particular theories

of state constitutional law and instruct their lawyers to follow this path. This kind of continued guidance provides lawyers trained to think in terms of federal law a path to follow in making independent state constitutional arguments.

Ultimately signals from courts should influence the degree of support arguments receive from the legal bar and with greater support, state courts receive a stronger foundation to build independent state law. As Tarr and Porter (1988: 246) argue, “although courts can encourage litigation in particular areas, they are, as one commentator has wryly observed, like unreliable clocks, which must be shaken to be started. Whether such shaking occurs depends on whether the attorneys in a state heed and act on the signals they receive. Thus a complex pattern of reciprocal influence operates.” This dissertation explores the degree to which lawyers heed these signals from federal and state courts across issue areas and over time.

Expectations

Given the limitations imposed by training and legal education, I expect to find little evidence of a support structure in areas where federal law is relatively stable in its protections and where state courts have remained silent on the issue. In this case lawyers should focus on the protective federal doctrine with no significant attention to any potential state issue. However, as federal law turns negative, lawyers will turn to state arguments. Where federal law is still uncertain but trending negative, it is likely that lawyers will still utilize federal claims while providing a state claim as a backup. But as the negative federal precedent builds to a more clear answer, lawyers will abandon federal claims for a solely state argument. However, state arguments under federal retrenchment are likely to take a particular form because they are influenced by a primarily instrumental motivation. Lawyers will likely deploy state arguments as

invitations to evade federal retrenchment with little attention to traditional legal factors. Instead, claimants will focus on policy criticisms of federal law, attempting to convince the state court that federal law is misguided and should be ignored. These arguments are the kind so many critics of judicial federalism targeted and one reason why some courts adopted particular theories or approaches to state constitutional law.

Under the internal encouragement signal, state courts adopt a particular doctrine of state constitutional law or a broader approach towards state law. As the state court's guidance sinks into the legal community, the arguments should become more clearly independent focusing on the traditional legal factors and less on attacks upon the policy of federal law. The method of encouragement should lead to different changes in how lawyers argue state claims. Under the criteria approach, arguments should primarily be focused in areas where federal retrenchment is relatively clear but the substance of the arguments should track more closely to the criteria required by the court. The primacy approach, on the other hand, likely will result in greater independent attention to state constitutional issues across issue areas with less regard for federal retrenchment or concern with the policy effects of federal rules.

The goal of this project is not to necessarily demonstrate that state arguments are causing greater attention to judicial federalism. The legal arguments offered by lawyers frame the options available to courts but ideological, strategic, and legal factors influence the resolution of a case. Instead, my goal is to explore the degree of support for judicial federalism in the norm and, further, how the signals sent by courts impact this support structure. Specifically, my aim is to establish the degree to which state courts may be able to induce a significant degree of support from its lawyers in developing an independent body of state rights law.

Plan of the dissertation

Chapter 2 establishes the research design by laying out the rules for case selection, coding and analysis rules, and the logic behind the choice of states chosen for the case studies. Chapter 3 discusses the direct effect of federal retrenchment through the examination of remand briefs finding a dramatic shift in arguments after a Supreme Court reversal. Chapter 4 examines judicial federalism in Ohio where the Ohio Supreme Court has largely ignored state constitutional law. The lawyers in Ohio responded with minimal engagement with state law. Chapter 5 examines New York where the Court of Appeals has resisted any clear theory preferring to engage in an ad hoc approach to state law with the exception of one particular doctrine. New York lawyers offered a number of policy based attacks on federal retrenchment but engaged in a more consistent legal interpretation in the doctrinal area. Chapter 6 looks at the Washington Supreme Court's adoption of the criteria approach finding a dramatic shift in the way that state arguments were made, not necessarily in the frequency of state arguments but clearly in their content. Chapter 7 explores the effect on lawyers from the adoption of primacy from the Oregon Supreme Court where the dramatic preference for state law normalized state constitutional law to the point where federal and state issues were essentially in equal proportion for much of the period. Chapter 8 offers some comparative examination in evaluating the effects of various court signals on the support structure for judicial federalism. Additionally, I offer comments on the importance of these findings and some directions for future research.

Chapter 2

Research Design

Legal briefs

While other aspects of the litigation process, such as oral arguments (Johnson 2004), provide important information to courts, it is the legal briefs presented by parties and other actors that provide most of the information courts receive. I utilize the briefs presented by litigants claiming a rights violation—because the terms vary widely, I refer to these litigants as rights claimants.¹ As my interest is in how the legal bar supports constitutional rights arguments against governmental behavior, I do not consider the opposing briefs.² I also do not examine *amicus curiae* briefs. While *amici* are important means of interest group involvement (see, e.g., Collins 2008; Comparato 2003; Farole 1998; Songer and Kuersten 1995), my focus is on how the broader legal bar approaches issues of constitutional rights and not on how organized interest groups act. Thus I utilize only the rights claimant's (who may be an interest group or represented by one) initial brief. While it is always possible that additional arguments will be made in subsequent briefs, litigants are still expected to offer their primary legal arguments in the initial brief. Further, it is infeasible to collect the entire record for each case.

My primary source of data is drawn from briefs presented to four state high courts—I discuss the remand sample below. I utilized cases from 1970-2000.³ This date range is aimed at capturing how constitutional rights claims shifted over time from an era before significant

¹ Where a case involves multiple consolidated cases, I utilize the first rights claimant's brief available in the relevant collection.

² However, in two Washington cases discussed in Chapters 3 and 6, the state's brief is utilized because it was the side seeking broader restrictions due to unusual state specific facts.

³ Except for Ohio, as explained below, which runs from 1978-2000.

interest in judicial federalism existed through the early years into the later stages of judicial federalism where state courts were faced with the difficulty of consistently applying their state constitution (Williams 2003). Further, this date range ensures a wide variation in federal retrenchment. I only utilized cases from the even years of this range, however, because a long date range required trade-offs. Using alternating years allows for a larger sample of cases per year and thus reduces the likelihood of missing important developments. Alternating years provides the best compromise over completeness and an extended time period. Cases were identified through Westlaw searches of state high court opinions by state and year for any variation of “constitution.” While ideally it would be possible to search the legal briefs directly, as discussed below this is not possible because legal briefs are generally unavailable electronically. Thus I rely upon the final opinions for indications that constitutional arguments were made. This may miss some claims but even where a court does not decide a constitutional issue it frequently notes that one was made and explains why it is avoiding the claim.

I then read the syllabus and head notes of the opinions to identify constitutional rights claims. I included nearly all rights claims where state and federal provisions were present—the discussion of each state below mentions where issues were excluded for lack of a state provision. Three substantive issue areas were excluded from consideration: speedy trial issues, challenges to public employment hearings, and police powers cases. The first two are excluded because they tend to involve interrelated issues of constitutional and statutory provisions with little clear distinction between the two. Further, the second and third are likely to be only vaguely presented as constitutional claims with the argument primarily aimed at the facts underlying the hearing or regulation. Other than these issues I included all claims involving the rights guaranteed by the Bill of Rights—except for the unincorporated provisions guaranteeing grand juries and civil jury

trials⁴—and the equal protection and due process clauses of the Fourteenth Amendment. By including a broad set of rights issues I avoid problems of self-selecting only areas where state arguments were likely. Including a wide variety of issue areas ensures a significant variation of federal retrenchment across issue areas and also allows for surprising and unexpected findings.

Case study selections

My analysis draws upon a study of remand arguments and case studies of arguments made to four state high courts. This section explains why each was chosen for inclusion in this study—though the state specific chapters give greater details on each state’s practice—and the state specific exclusions of particular kinds of arguments, as well as the complications and limitations on each state sample. Tables 2.1 and 2.2 at the end of this chapter detail the number of briefs and arguments utilized for this study and Appendices A-F provides citations to all cases used by state and year.

Remand

Remand cases are used to explore the way that direct federal retrenchment affects the legal arguments. I examine cases where the U.S. Supreme Court reversed a state high court opinion on rights grounds. Two types of remand cases were used. First, reversal cases are where the U.S. Supreme Court decided the issue by full opinion reversing the state court. Second, consideration cases are where the Supreme Court vacated the state decision and remanded summarily with instructions to consider some recent decision. While not as directly negative as

⁴ I did include right to bear arms issues. While it was unincorporated during my time frame, the issue was included out of curiosity of how the increasingly public movement for gun rights affected rights arguments. Regardless, only a handful of cases involved this issue.

reversal cases, consideration remands are most likely utilized where a significant number of the Supreme Court justices believe the state court decision is unlikely to withstand scrutiny under the new changes to federal constitutional doctrine.

I identified remand cases by searching the U.S. Supreme Court's decisions, 1980-2006, for instances where the certiorari order was issued to a state high court. I then examined the syllabus of the decision to confirm that a rights claim was involved and that the state high court had supported that claim. I identified about 100 cases but it is not always clear from the Westlaw records whether briefing was heard on remand and in a number of cases there is no remand history at all. I focused primarily on cases where the state court issued a full decision on remand as those most likely to have briefing on the effect of the U.S. Supreme Court's decision. I estimate that about 60 cases should have briefs available from both stages and have collected briefs from 33 cases for both initial and remand stages, 24 reversal and 9 consideration cases. Briefs were obtained through correspondence with law libraries that had the case records and were willing to copy them; a small number of briefs were available on Westlaw.⁵ My current sample includes briefs from 14 states. Unfortunately, because of the cost associated with obtaining remand briefs, I had to focus on the states with a relatively high number of remand cases rather than a random sample of states or cases. Only the issue directly reviewed by the U.S. Supreme Court was included in my remand analysis.

Ohio

The Ohio Supreme Court was chosen to represent states that are resistant to state constitutional claims. While it is likely that all state high courts have had some occasion to

⁵ For cases from New York and Washington I obtained the briefs myself from law libraries at Syracuse University and the University of Washington.

expand rights protection, few were as consistently resistant as Ohio and I chose it for this reason. Briefs from 1978-1990⁶ were obtained from the Ohio Supreme Court Law Library in Columbus, Ohio. The library utilized two forms for records: microfilm and paper. While Table 2.1 shows a relatively strong percentage of the identified universe, the brief collections were less than complete. According to the library staff, the clerk's office only sent cases that were orally argued to the library for archiving and thus it was likely that any other cases identified were decided in some form of summary motion; I was unable to locate an alternative source for these missing cases. I obtained copies of all briefs available in the library's collections. For a small number of cases only jurisdictional memoranda were available and I utilized these as a second best source of constitutional rights arguments. There was one type of case that was systematically missing: death penalty cases before 1988 were not in the library's collection. While 1988 and 1990 did have paper copies of death penalty briefs, limitations of time and resources forced me to skip these briefs and focus on rounding out the other issue areas.⁷ From 1992-2000, I obtained only the briefs I could obtain from Westlaw's online archive. According to the staff at the Ohio Supreme Court Law Library, Westlaw scanned all of the library's briefs and thus the online source should be coextensive with the libraries collection with the same problems, though the death penalty briefs were generally present.

While Ohio does not have express due process or equal protection clauses, the Ohio Supreme Court has long treated various provisions of the Ohio Constitution as embracing these

⁶ My sample begins with 1978 because of limitations on my resources that did not allow for a return trip to fill out the rest of my sample.

⁷ Death penalty briefs can be anywhere from five to ten times the length of a brief in a standard case and thus it takes considerably longer to scan or copy them.

principles.⁸ Thus, I include those claims as parallel areas. Otherwise the Ohio Constitution has parallel provisions for all the rights provisions of the federal Bill of Rights.

New York

I chose the New York Court of Appeals as a representative of state high courts that approach state constitutional law in an ad hoc fashion without clear guidance through adoption of a particular approach. While it may have avoided a clear theory, New York has the added benefit of a single strong state constitutional doctrine allowing for examination of the influence of a limited internal encouragement. Briefs were located in microfilm and microfiche sets produced by the William S. Hein Company and contained in the collections of the Syracuse University College of Law Library (1970-1990) and the Onondaga County Supreme Court Law Library (1992-2000). I randomly selected 60% of the identified universe for each year with a minimum of 20 cases or the whole set if less than 20 were identified. Records are sometimes incomplete or withheld because of privacy issues (typically involving minors). Where a brief was missing, I replaced it with another randomly selected case where possible. Additionally, a small number of briefs were available from the 1990s on Westlaw and I obtained those whenever possible.

New York does not have a constitutional right to a public trial so those issues were excluded. Additionally, while the state does have a Blaine Amendment forbidding public funding of sectarian education, New York does not have an establishment clause. I thus exclude all establishment issues rather than assume that connections to this limited provision might be possible. Finally, New York has an unusually liberal appeals law that requires mandatory appeals

⁸ See, e.g., *Akron v. Chapman*, 160 Ohio St. 382 (1953); *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540 (1941); *State ex rel. Heller v. Miller*, 61 Ohio.St.2d 6 (1980).

where the Appellate Division was divided.⁹ The Court of Appeals issues memorandum opinions in many of these cases that frequently do nothing more than issue a final order on the basis of a lower opinion (Meyer, Agata, and Agata 2006: 127). I excluded memorandum opinions assuming that the cases are those representing issues the Court of Appeals perceives as easy and unworthy of its time. Any error this exclusion may introduce is most likely to be in favor of under representing the dominance of federal claims because it is unlikely that the Court will regularly summarily decide cases posing novel state constitutional arguments.

Washington

I chose the Washington Supreme Court because it endorsed the criteria approach and reiterated it over time. While six or so state high courts endorsed some version of this approach (Williams 1997, 2009: 146-77), the Washington Court went further than most and stressed it as a mandatory element in briefing and thus presented a stronger degree of encouragement. I obtained the Washington briefs from collections at the Gallagher Law Library at the University of Washington and the Seattle University School of Law Library. From 1988-2000 the briefs were collected primarily in microfiches produced by the William S. Hein Company located in the Gallagher Law Library and the collections were relatively complete. A small number of briefs from 1992-2000 were also available on Westlaw and I obtained those when possible. However, from 1970-1986 the collections in both libraries were less than perfect. The Gallagher Library only had briefs in paper copies for that time period and a significant number were missing; from 1970-1982 the Seattle University Law Library had some briefs in microfiche published in house. I obtained copies of all the identified briefs available for all years from both libraries. As Table

⁹ Before 1986, any dissent triggered mandatory appeal, after it required two dissents.

2.1 shows, this lead to a sample with some wide variations between 1970-1986, ranging from 40-70% with a single exception. Especially problematic was 1984 where only 14% of the identified briefs were available. Thus, the data from these years should be read with these limitations in mind.

No substantive issue areas were excluded for Washington. But the Washington appeals process causes an oddity. While there is a normal appellate process through a petition of review from an appeals court, only a minority of cases reach the Supreme Court through this process. Most cases get to the court through direct review either from direct appeal from the trial court or, commonly, by transfer from one of the courts of appeals. Appellate courts are allowed to transfer the case to the high court, which it can refuse to accept, and the Supreme Court can also transfer a case on its own motion to reduce appellate caseloads (Wiggins 1986). The briefs collected are occasionally from the Court of Appeals filing, about a third of my sample for most years. While some cases showed later briefing solely to the Supreme Court, these were usually styled as supplemental and like supplemental briefs generally were aimed at expanding or clarifying the first brief; many cases had only these Court of Appeals briefs. In fact, the 1990s briefs available on Westlaw that were originally presented to a Court of Appeals were listed as presented to the Washington Supreme Court in the Westlaw text form of the briefs. I treated these briefs as the initial brief like any other case and similar to Oregon there is no obvious differences in quality of the arguments. Given the longer appellate window at times, I was careful to give attention to the dates of briefs for purposes of judging the effect of precedent.

Oregon

I chose the Oregon Supreme Court because it firmly adopted the primacy approach, an approach that only two other states (Maine and New Hampshire) adopted.¹⁰ Oregon is the only court of these three with an intermediate appellate court, which helps filter out more routine appeals. Further, Oregon was chosen from among these because of the powerful influence for Justice Hans Linde, as discussed further in Chapter 7. No briefs were available electronically. All briefs were obtained from the John E. Jaqua Law Library at the University of Oregon. From 1970-76 these briefs were available in paper form and all briefs contained in their collection were copied. From 1978-2000, the briefs were contained in microfilm produced by the Washington County, Oregon, Law Library. The briefs, however, turned out to be complicated. The rolls of film for Supreme Court briefs only included briefs that were filed on direct appeal from the trial court, usually death penalty cases or original actions. For all other cases, the microfilm roll started with an index that cross-referenced the microfilms for the Oregon Court of Appeals for the briefs on all cases that passed through them. The statement of intent¹¹ for the microfilms stated that they contained the complete record of the case and that the originals were destroyed after confirming that the entire record was intact on the microfilm rolls. At this point, it is unclear exactly why only briefs from the Court of Appeals were available but likely is driven by the state's appellate rules. The current rules require appellants to file a short Petition for Review with the Supreme Court limited to 5000 words¹² but further briefing is optional with the Appellant allowed to rely upon briefs presented to the lower court.¹³ It is unclear at this time whether this rule was always optional or whether appellants were once required to rely solely on

¹⁰ *State v. Ball*, 471 A.2d 347 (N.H., 1983); *State v. Cadman*, 476 A.2d 1148 (Me., 1984). Occasionally Washington is listed as a primacy state but as discussed in Chapter 6 this ignores the clear preference for the supplemental approach.

¹¹ A sample of this statement is available from the author.

¹² Or. R. App. P. 9.05(3)(a).

¹³ Or. R. App. P. 9.05(3)(a)(v).

the Court of Appeals briefs. Since the statement of intent clearly spells out that the records were complete as reproduced, I assume that the Court of Appeals brief was the only one utilized before the Supreme Court and used those briefs for my analysis. As with the Washington briefs, there is no reason to believe these briefs are substantively different than those presented to high courts in other states and after reviewing the briefs no major differences were apparent. The one complication that I had to be aware of though was the extended time line for evaluations of legal precedents as Court of Appeals briefs may have been filed a couple of years before the Supreme Court issued a final decision. I obtained all of the identified briefs that were available in the microfilm sets with the single exception of 1990 where a high percentage of cases identified were death penalty briefs and, as discussed below, I included only five of these briefs, all randomly selected.

Oregon has an active initiative system that affects the Court's docket. Between 1998 and 2000 nearly one-fifth of the Court's opinions dealt with questions of ballot titles and initiative wording and a staff attorney estimated that in March and April of 2000 alone the Court spent all of its time on ballot issues (Ellis 2002: 149). These cases are not considered for my study because the Court does not engage in substantive challenges to ballot initiatives before enactment (Ellis 2002: Ch. 6; Miller 2009: Ch. 4). I did a check of the Court's docket for 1997 and 1999 to see if general elections and the ballot initiatives therein crowded out other constitutional issues and I found no substantial difference because ballot issues were common in all years. The major substantive area excluded in Oregon was due process. Oregon has only a provision providing that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."¹⁴ Unlike in Ohio, the Oregon Supreme Court has

¹⁴ Or. Const. Art. I, Sec. 10.

repeatedly held that this due course provision is not equivalent to the federal due process clause¹⁵ and thus I exclude the subject area. While the state constitution does not have a clear equal protection clause, the Court had a long history of treating the Equal Privileges and Immunities Clause as equivalent to the federal provision (Schuman 1988).

Coding rules

Scholars have adopted a variety of approaches for how to utilize legal briefs. A number of scholars utilize only parts of the briefs. McGuire and Palmer (1995, 1996) argue that the best method is to use the “Questions Presented” section as litigants are expected to clearly summarize the points they present. Spriggs and Wahlbeck (1997) argue that the best method is to examine the point headings in the “Argument” section. Legal briefs are organized through separate point headings intended to summarize the following argument and thus the headings provide an indication of the claims offered. Comparato (2003) adopts a hybrid of these approaches by examining the table of contents (that usually includes the point headings), the summary of arguments section or questions presented, and the list of sources. Epstein, Segal, and Johnson (1996), however, argue that the whole brief is the proper basis for analysis because the entire body is part of the legal record. Given my focus on not only the presence of specific constitutional arguments but also on the way those arguments are made, I utilize a form of this approach. However, copying briefs is a costly procedure, especially for nearly 1200 briefs, and thus I utilized only portions. I copied, wherever present, the table of contents, questions presented/argument summary section, and elements of the argument section. I include the

¹⁵ *State v. Burrow*, 293 Or. 691, 695 n.5 (1982).

complete point for any argument that clearly involved, or appeared to involve, a constitutional rights issue.

Death penalty cases require special treatment, however. These cases are obviously important sources of rights litigation but they also pose a dramatic problem for my resources. Death penalty briefs can regularly run into the hundreds of pages, frequently ten times the length of briefs in regular cases. The problem is also complicated by a “kitchen sink” approach taken by many death penalty briefs where the claimants try and include every possible type of rights claim to preserve the issue for further appeals, as well as dressing up non-constitutional issues in constitutional language. Given these complications, I adopted special rules for death penalty cases. First, I limited the total number of death penalty cases to five per year, randomly selected. Second, I copied only arguments that were at least two pages or longer. Only Ohio and Oregon had significant numbers of death penalty cases.

Coding constitutional arguments as either state or federal can be a complicated at times and I follow three basic rules. First, where the point heading or point clearly identifies the argument as either federal or state based alone then it is coded accordingly. This holds true even in arguments that are presented as solely state constitutional issues but rely heavily on federal cases and doctrines. Second, where the point cites both federal and state constitutional provisions I follow Farole’s (1998: 33) standard with the state citation treated as filler where it is simply presented as part of a string cite without any independent development or rationale. However, where the reference to a state provision is supported by some kind of supporting argument, even if vague, it is coded as a separate state argument even if it is not included in a separate point. Third, at times an argument fails to specify a constitutional basis for an argument. Instead, a point may simply refer generally to a “right to counsel,” for example, and I examine the

precedents offered to determine the coding. Where the precedent is dominated by federal cases, I code the argument as federal. Where the precedent points to state cases primarily, I follow Esler's (1994) method of examining those decisions and if the precedents appeared to rely on independent analysis of the state constitution, I code the argument as state based. Given the assumption that federal law will tend to dominate constitutional claims, my rules are intended to err in favor of state coding where arguments are vaguely presented.

I primarily rely upon a study of the legal discourse of these arguments to track how constitutional arguments shift across issue areas and over time in response to signals from state and federal courts. As part of this analysis, I provide a set of content measures to track the kinds of legal issues that claimants use to support state constitutional arguments. Using theories of state constitutional law as guidance, I code the presence or absence of nine arguments. *Textual difference* arguments are coded as present where the claimant notes some difference in state language versus the federal provision; I do not consider a simple citation to this language to be a difference argument but I code it as present if the brief discusses in some way the point that while the texts may be identical, that does not preclude a different finding. *State constitutional history* refers to mentions of the drafting process of the state constitution, preceding state constitutional experience, or history of changes since adoption. *Prior state law* is a broad category that includes use of prior state constitutional decisions on point as well as common or statutory law that relates to the argument. *Home state judicial federalism* refers to citations to example of the state court expanding constitutional protections in some other issue area. Other state law is coded similarly with *other state on point* being issues directly relating to the case being argued and *other state judicial federalism* to instances of expansion in other states on separate issues. *Structural* differences are arguments noting some differences in the institutional

power of the state or the general principle that states exercise plenary power except where limited by some clear constitutional restriction, while the federal government is one of delegated powers only and thus greater restrictions on state power are justified by the greater degree of that power. Matters of *state or local concern* are any claim about the facts in a state justifying a rule that the U.S. Supreme Court is unable or unwilling to apply nationally. Finally, *public attitudes* refers to indicia that the state's citizens desire a different rule or result than federal law. All of these are coded as either present or absent, no attempt to weigh them is made. Totaling the number of factors referenced in an argument is used as a rough idea of the complexity of the legal claim. However, I make no claim that a certain number of these factors makes a "good" argument or that all are strictly "legal" but only as a measure of the non-policy attacks used by lawyers in state constitutional arguments.

Total briefs and arguments

Year	New York	Ohio	Oregon	Washington	Total
1970	20 (67%)	---	4 (80%)	14 (70%)	38
1972	20 (63%)	---	6 (86%)	13 (50%)	39
1974	22 (63%)	---	13 (76%)	18 (56%)	53
1976	29 (64%)	---	8 (62%)	21 (53%)	58
1978	22 (67%)	14 (41%)	11 (85%)	27 (60%)	74
1980	20 (67%)	27 (61%)	15 (83%)	22 (47%)	84
1982	23 (62%)	15 (88%)	17 (85%)	19 (48%)	74
1984	20 (100%)	19 (70%)	15 (100%)	6 (14%)	60
1986	18 (100%)	23 (70%)	16 (94%)	17 (40%)	74
1988	20 (95%)	23 (52%)	17 (71%)	28 (80%)	88
1990	20 (65%)	23 (61%)	15 (68%)	24 (92%)	82
1992	19 (95%)	28 (62%)	21 (72%)	23 (77%)	91
1994	15 (68%)	22 (55%)	12 (92%)	31 (94%)	80
1996	22 (76%)	26 (63%)	12 (100%)	36 (92%)	96
1998	8 (67%)	24 (67%)	13 (93%)	25 (86%)	70
2000	12 (80%)	23 (62%)	12 (100%)	15 (83%)	62
Total	310	267	207	339	1123

Table 2.1. Total briefs (percentage of identified universe) by year and state.

Year	New York	Ohio	Oregon	Washington	Total
1970	35	---	5	16	56
1972	29	---	7	13	49
1974	39	---	18	31	88
1976	39	---	8	36	83
1978	35	29	14	42	120
1980	33	36	18	38	125
1982	41	23	26	32	122
1984	39	23	19	19	100
1986	31	32	22	36	121
1988	32	30	34	53	149
1990	29	33	47	47	156
1992	29	59	42	41	171
1994	20	28	22	61	131
1996	30	64	23	77	194
1998	10	67	24	44	145
2000	20	62	33	27	142
Total	491	486	362	613	1952

Table 2.2. Number of arguments by year and state.

Chapter 3

On Remand

This chapter explores federal retrenchment in the clearest set of examples: instances where the U.S. Supreme Court directly reversed a rights protective decision on the ground that federal law offered no protection. While federal retrenchment in other cases may be open to question about how far exactly the Court has withdrawn protection, remand cases are clear and direct: federal law offers little protection in the exact case at hand, involving the same facts and usually the same lawyers—only three cases failed to have a lawyer common to both briefs. Thus, a clear picture of the effect of federal retrenchment can be achieved by examining the constitutional arguments at both stages of litigation. The effect of federal retrenchment is stark. Even though parallel arguments were presumably as valid prior to the U.S. Supreme Court’s action, it is only after retrenchment that substantial attention is paid to state constitutional claims. Moreover, these arguments on remand are rarely more than an attack upon the Supreme Court’s retrenchment, arguing that the Court is misguided, inept, and unworthy of further deference. State constitutions become little more than a means of protecting older federal doctrine under the window dressing of state constitutional law. The story of George Upton demonstrates the gradual discovery of state constitutional law.

The Story of George Upton

On September 11, 1980, the Yarmouth, Massachusetts, Police Department received a call from an unidentified woman stating, “a motor home full of stolen stuff [is] parked behind ... the

home of [George Upton] and his mother.”¹ She described the general nature of these stolen goods, that she had seen them personally at some unspecified point, and location and that Upton was planning to move the motor home because he had purchased it from another man who’s home had just been raided by the police. The officer traveled to Upton’s home and observed that a motor home was located on the premises behind a fence. He sought and received a search warrant on the basis of this call and his observation. A variety of stolen items were discovered in the motor home and Upton was charged with burglary and related crimes. The trial court denied his motion to suppress the evidence. Upton was convicted and appealed directly to the Massachusetts Supreme Judicial Court (SJC).

Before the SJC, Upton’s lawyers initially argued a fairly standard Fourth Amendment claim: that the officer lacked probable cause. Under *Aguilar-Spinelli*, anonymous informants must demonstrate both the basis for the knowledge and the veracity of the information.² The brief argued that the informant failed to demonstrate a basis of knowledge because she failed to state when and where she saw these items. Further, there were no indicia of veracity in the statement when she refused to clearly identify herself (and thus no history of truthful assistance to the police) and provided no other evidence that her claims were accurate. The simple presence of a motor home on Upton’s property was innocent and thus could not provide any corroboration for a reasonable determination of probable cause.

Shortly after this brief was filed, the United States Supreme Court decided *Illinois v. Gates* (1983).³ The rigid *Aguilar-Spinelli* test was jettisoned in favor of a more amorphous “totality of the circumstances” test where determinations of probable cause were subjected to a

¹ *Com. v. Upton*, 458 N.E.2d 717, 718 (Mass., 1983). I draw the following basic case facts from this decision.

² *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. U.S.*, 393 U.S. 410 (1969).

³ 462 U.S. 213.

lighter deferential standard of review. The SJC ordered supplemental briefing on the effect of *Gates*. The defendant's lawyers were forced to acknowledge that their original argument was now weakened but that the search affidavit still failed the new test because it lacked any substantial evidence to show that the anonymous information was valid. However, the supplemental brief pushed a previously unargued theory based on the state constitution. Despite the fact that the state constitution had only previously been mentioned in a string cite with no discussion, the claimant argued "[i]t is obviously the province and indeed, the obligation, of [the SJC] to interpret this state's constitution."⁴ While the claimant noted textual differences between the state and federal provision and the pre-Revolutionary history of the Massachusetts Constitution, the primary argument amounted to an attack upon *Gates*. It cited both Justice Brennan's dissent and White's concurrence to show how the Fourth Amendment was being "eviscerated": "To allow informants to become the oracle of law enforcement agencies is to decimate the Fourth Amendment."⁵ With such decimation becoming a reality at the federal level, the SJC must enforce the prior protective rule under the state provision.

In a bizarre decision, the SJC held that *Gates* only minimally modified the *Aquilar-Spinelli* test and that the warrant lacked probable cause under this test and thus violated the Fourth Amendment. The Supreme Court reversed in a short opinion based on the new *Gates* test, demonstrating annoyance at the SJC's distortion of that decision.⁶ On remand to the SJC, the claimant fell back to the state argument. The brief immediately framed the issue as whether the SJC should "accept or reject two watershed Fourth Amendment decisions of the United States

⁴ *Com. v. Upton*, 458 N.E.2d 717, Defendant's Supplemental Brief at 25.

⁵ *Upton*, Defendant's Supplemental Brief at 32, 34-35.

⁶ *Massachusetts v. Upton*, 466 U.S. 727 (1984).

Supreme Court . . . as the model for interpreting” the state search provision.⁷ The claimant discussed some of the same textual and historical differences as the supplemental brief, and in greater detail, but again the primary concern was with attacking the policy of *Gates*. Primary support for this attack came from Justice Brennan’s *Gates* dissent and law reviews attacking the new Fourth Amendment trend. In particular, the remand brief attacked the cost-benefit logic of *Gates* as both faulty and a poor basis for a constitutional rule.

Aggregate trends

	Federal Arguments	State Arguments	Total
Initial Brief	32 (84%)	6 (16%)	38
Remand Brief	10 (25%)	30 (75%)	40
Total	42	36	78

Table 3.1. Remand arguments at each stage. Only the arguments related to the issue heard by the U.S. Supreme Court are included.

As Table 3.1 demonstrates, there is a clear separation between the two stages of appeal. The initial set of arguments is dominated by federal constitutional claims in the manner expected. Only six of the thirty-eight arguments presented at the initial stage were state based and of these only two state claims were presented as the primary issue with the other four being relatively short and secondary in nature. On remand, however, lawyers discovered a large number of state claims, arguments that were presumably as valid on initial appeal and yet were never pressed until after the U.S. Supreme Court retrenched protection. While a fairly diverse set of issues is present, two areas are dominant: speech (29%) and search and seizure (23%).

Initial stage

⁷ *Com. v. Upton*, 476 N.E.2d 548 (Mass., 1985), Defendant’s brief on remand at 1. The second decision was *United States v. Leon*, 468 U.S. 897 (1984), establishing the good faith exception to the exclusionary rule.

As Table 3.1 shows, federal claims were the norm at the initial stage. Given the inclination of lawyers to view rights issues in federal terms, this is unsurprising. Further, in most of the issues present, there was relatively limited federal retrenchment at the time of the initial appeal. Interestingly, of the thirty-two federal arguments presented on initial appeal, seventeen did cite the state constitution in some manner but the citation nearly always occurred in a string cite without any discussion or development. However, six state arguments were made on initial appeal.

Three of these initial state claims were enticed by uncertainty in recent federal law. The clearest negative signals were present in *Pap's A.M. v. City of Erie* (1998)⁸ involving a city ordinance regulating nude dancing. While the U.S. Supreme Court had upheld a similar law prior to this decision, it did so through a highly fractured set of opinions without a clear majority rationale.⁹ The claimant relied heavily upon the fractured nature of this precedent in arguing that the Erie ordinance was distinguishable from the prior law and fit within the more narrow rationale adopted by some of the federal justices. As a fallback argument, the claimant presented a claim that state courts are not bound by federal decisions and that this one was particularly subject to disapproval given the failure to reach a majority vote and stresses that it was Justice White's dissenting opinion that actually garnered the largest number of votes. The claimant also stressed the fact that three other state supreme courts had rejected the muddled federal test. Two other state claims were in areas with unclear though somewhat negative federal precedent. In *State v. Hershberger* (1989)¹⁰ the claimant asserted that the application of a vehicle signs requirement infringed on the free exercise rights of the Amish. While the U.S. Supreme Court

⁸ 719 A.2d 273.

⁹ *Barnes v. Glen Theater*, 501 U.S. 560 (1991).

¹⁰ 444 N.W.2d 282.

had not yet resolved the case that would dramatically limit federal protection,¹¹ the claimant noted that it had recently affirmed a similar Amish religious exemption issue only by an equally divided vote, signaling a deep division on the issue.¹² Similarly, in *People v. Conyers* (1980)¹³ the claimant argued a supplementary state claim that impeachment use of silence was unconstitutional and while the U.S. Supreme Court had not ruled on these circumstances, it had shown approval for impeachment use of illegally obtained statements.

Both federal retrenchment and state encouragement played a role in *State v. Recuenco* (2005).¹⁴ The case centered on whether violations of the right to have a jury determine all aspects of the charged crime can be harmless error. The U.S. Supreme court had shown a history of embracing harmless error analysis for various criminal procedure rights noting that “most constitutional errors can be harmless.”¹⁵ Further, the Washington Supreme Court had signaled broad interest in state constitutional law in general and had specific precedent detailing how the state jury provision grants broader protections in some areas.¹⁶ Influenced by these signals from the Washington Court, the claimant provided a well-developed independent state argument that stressed the textual differences between the state and federal provisions, the expansive Washington precedent, and structural differences to justify an independent state rule. Apparently the claimant was so confident that this original state argument was well developed and sufficient that on remand the claim was simply reasserted via reference to the initial appeal.

¹¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

¹² *Jensen v. Quaring*, 472 U.S. 478 (1985) affirming sub nom *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984).

¹³ 49 N.Y.2d 174.

¹⁴ 154 Wash.2d 156.

¹⁵ *Neder v. United States*, 527 U.S. 1, 8 (1999).

¹⁶ Chapter 6 details these state signals.

Interestingly, two initial state arguments were solely state based and ultimately only ended up in federal court through the weaknesses of the state court's decision. In *Witers v. State, Commission for the Blind* (1984),¹⁷ the state denied funding for a course of bible study. Instead of relying on the federal *Lemon* test,¹⁸ the state¹⁹ justified the decision based solely upon the state constitutional Blaine Amendment.²⁰ The state relied heavily upon a number of Washington Supreme Court decisions imposing a strict prohibition of state aid to religious education under this provision even if such assistance was allowed under the First Amendment.²¹ Despite this fact, the Washington Supreme Court proceeded to base its decision on *Lemon* and upheld the denial under federal law. Similarly, in *People v. Caballes* (2003),²² the claimant carefully presented only a state claim that a dog sniff during a traffic stop was unconstitutional because the U.S. Supreme Court had rejected similar dog sniffs claims previously.²³ Unlike *Witters*, however, the claimant did rely heavily on federal cases for the logic of the argument even though it was careful to avoid reliance on the Fourth Amendment. The Illinois Supreme Court failed to make any clear statement as to the constitutional basis for its decision and thus the U.S. Supreme

¹⁷ 102 Wash.2d 624.

¹⁸ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The brief did make an oblique reference that sounded in this theme but primarily just as a rebuttal to the free exercise assault on the denial. There was no real discussion of *Lemon* or its progeny.

¹⁹ *Witters* is an unusual case in that the issue revolved around competing constitutional limitations with the blind claimant asserting a free exercise argument and the state used the establishment clause to combat the issue. Because the U.S. Supreme Court only dealt with the later claim, I used the state's establishment claim for this study as the state was arguing for a broader constitutional rule.

²⁰ Washington Constitution, Art. I, Sec. 11 reads in part: "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

²¹ *State Higher Educ. Assistance Auth. v. Graham*, 84 Wash.2d 813 (1974); *Weiss v. Bruno*, 82 Wash.2d 199 (1973).

²² 802 N.E.2d 202 (Illinois).

²³ *United States v. Place*, 462 U.S. 696 (1983).

Court assumed jurisdiction. The experiences in these two cases highlights the fact that legal framing alone cannot control how state courts deal with the issue, even if it can influence those courts.

The few state arguments presented at the initial stage demonstrate influences from either federal retrenchment or state court encouragement, or both. Apart from these limited arguments, the initial briefs show little attention for state claims until after the U.S. Supreme Court review the issue and rejected their federal argument.

On Remand

As Table 3.1 shows, federal arguments were still made on remand but at a much lower rate. Nearly all of these federal arguments came in consideration cases, which is expected given the order for remand to consider the effect of some recent change in federal constitutional law. These federal claims tend to be briefer than the state claims and simply aim to distinguish their specific case from that of the new precedent, oftentimes halfheartedly. Three claimants made no state argument on remand. One was a consideration case arguing that the new precedent had no effect on the previously decided issue.²⁴ The other two were reversal cases with one relying on an argument based on the state code of evidence²⁵ and the other abandoned the speech claim in favor of previously undecided federal issues despite the fact that the Virginia Supreme Court did not foreclose a state constitutional speech claim until two months after the brief was filed.²⁶ Every other case offered a state constitutional claim on remand.

²⁴ *Desimone v. State*, 996 P.2d 405 (Nev. 2000).

²⁵ *Fensterer v. State*, 509 A.2d 1106 (Del. 1986).

²⁶ *Commonwealth v. Hicks*, 596 S.E.2d 74 (Va. 2004); *Elliot v. Commonwealth*, 593 S.E.2d 263 (Va. 2004) (declaring that the state constitution provided no greater protection for speech).

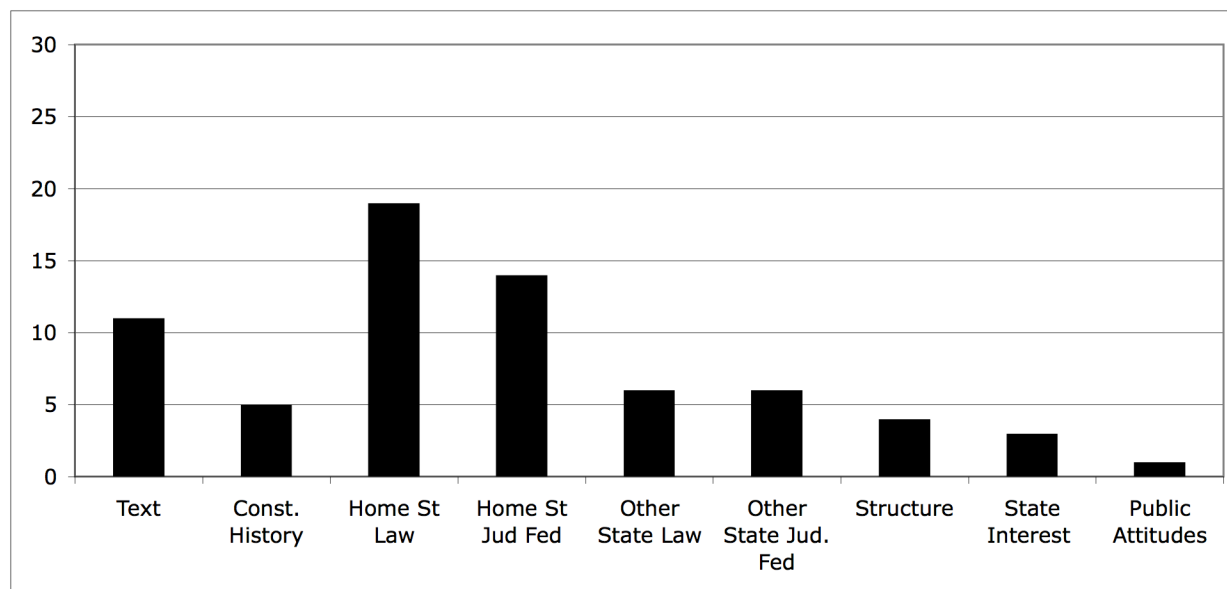


Figure 3.1. Number of remand state arguments noting each legal factor. N=30.

Figure 3.1 shows the number of state arguments on remand noting each of the legal factors coded in my analysis. As with most state arguments, attention to many of these factors was limited. One claimant did note the attitudes of the state's citizens who rejected a constitutional amendment to conform the state provision to federal law.²⁷ Three claimants noted some subject of particular state interest and four pointed to some structural difference. While only five had some discussion of the state's constitutional history, a relatively large number of claimants did discuss textual differences between the state and federal provisions. Interestingly, other state law received little attention with only six claimants pointing to either similar case law or examples of judicial federalism.

The primary factors involved home state law. Interestingly, nearly half of the claimants discussed some examples of judicial federalism from the state court in some other context. By noting the state high court's history of rejecting federal law, the claimants seek to reassure the justices that they will not be doing anything wrong this time. This is particularly true in states

²⁷ *Witters v. State, Commission for the Blind*, 112 Wash.2d 363 (1989), Respondent's brief on remand.

where the courts had a history of resistance to judicial federalism. For example, all three Ohio remand briefs, where judicial federalism was rare (Tarr and Porter 1988: Ch.4; Williams 2009: 197), noted a decision interpreting the state right to bear arms provision as an individual right.²⁸ In nearly two-thirds of the state arguments, claimants discussed some state law on point with the issue under review. In some cases this took the form of examples of judicial federalism in the legal area under dispute. For example, in *Immuno AG v. Moor-Jankowski* (1991)²⁹ the issue involved constitutional limitations on libel law and the remand brief noted two specific examples where the New York Court of Appeals expanded state speech doctrine, one of which specifically related to libel law. Other claimants noted statutory or common law rules as means to demonstrate a state law commitment to the more protective rule. More often, the claimant attempts to concoct a controlling interpretation of the state constitutional provision by noting some prior state court decision that string cited the state provision in the middle of a decision based on federal law. One of the clearest examples of this is in *Van Arsdall v. State* (1987)³⁰ on the issue of harmless error analysis from the violation of a defendant's confrontation rights. The argument rested heavily on a precedent that rejected harmless error in a similar case on federal law grounds but that also string cited the state constitutional provision. The claimant presented this string cite as creating a controlling state precedent that harmless error was inappropriate regardless of any changes in federal law.

²⁸ *Arnold v. City of Cleveland*, 67 Ohio St.3d 35 (1993).

²⁹ 77 N.Y.2d 235.

³⁰ 524 A.2d 3 (Del. 1987).

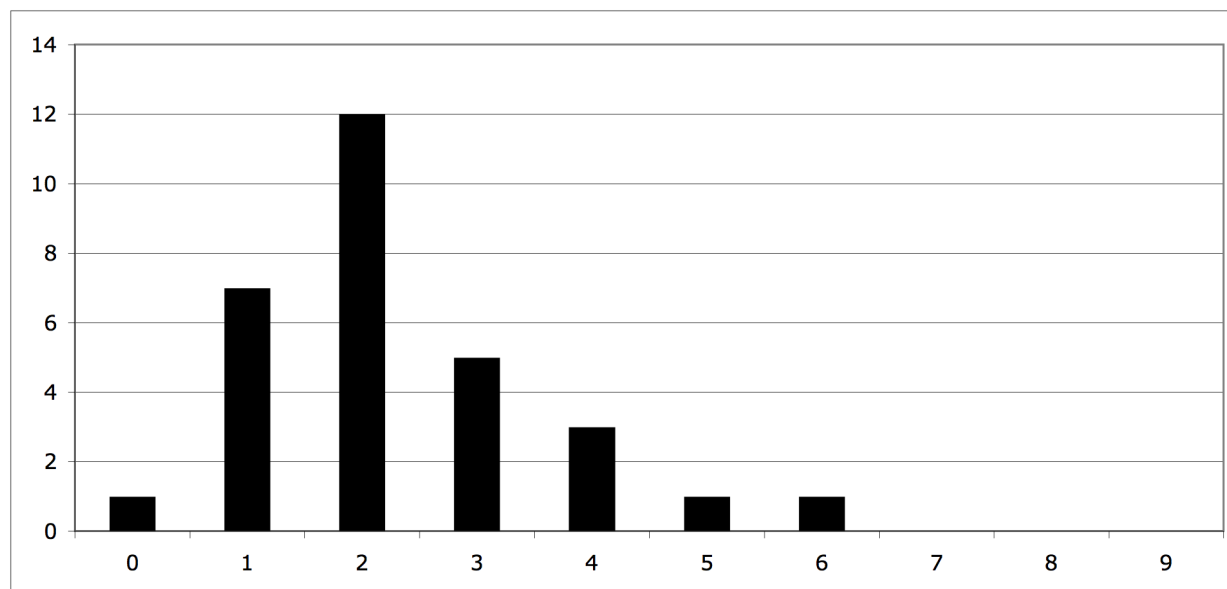


Figure 3.2. Number of remand state arguments by total legal factors. N=30.

Figure 3.2 shows the rough complexity of the state constitutional arguments by simply totaling the number of legal factors used by each rights claimant. Two-thirds of the briefs noted two or fewer factors in their state constitutional arguments with the most common combinations looking to textual differences and state law claims along the lines noted above. Interestingly, of the five briefs to note four or more of the factors, three³¹ were cases with a state argument on initial appeal suggesting that those lawyers may have been better prepared to expand upon those arguments than lawyers who had to create a whole new argument from scratch. This data demonstrates that legal factors are certainly present in state constitutional arguments on remand, but most are utilized as a desperate attempt to shore up the state court's initial decision. The clearest evidence for this claim is the fact that virtually all of this same legal evidence was available on initial appeal and yet twenty-four of the thirty arguments pressing state claims on remand were not mentioned on the initial appeal. Remand briefs are responding not to changes in

³¹ *People v. Caballes*, 851 N.E.2d 26 (Ill. 2006); *State v. Recuenco*, 163 Wash.2d 428 (2008); *Witters v. State, Commission for the Blind*, 112 Wash.2d 363 (1989). Part of the reason for more complex arguments may also be the fact that two of these cases were influenced by the Washington Supreme Court's adherence to the criteria test discussed in Chapter 6.

state legal factors, but to changes in federal law and it is the policy underlying these changes that becomes the bulk of state constitutional analysis.

While remand arguments may point to some of the legal factors discussed above, the bulk of the arguments were centered on either attacking the Supreme Court itself or the policy underlying the changes in federal law. Nine remand claimants (30%) attacked the Supreme Court as being reckless in its actions. Some are relatively gentle and complain of how the Supreme Court's decision was a "radically changed approach" or that the Court's decisions are "curiously inconsistent."³² Other claimants are more dramatic in their attacks. In a search and seizure case, the claimant argued that recent federal decisions were "eviscerating the Fourth Amendment's protection, culminating in last term's two rulings leaving only tattered remains of the federal exclusionary rule."³³ A claimant in another search and seizure case stressed the progressive diminution of rights at the federal level and wondered, given the major federal retrenchment, "what liberty interest and privacy rights have survived under the Fourth Amendment. It is thus left to [the Ohio Supreme Court] to determine whether any meaningful protections for Ohio citizens shall remain."³⁴ The single strongest attack on the Supreme Court came in a speech case from New York:

Over the past decades the Supreme Court of the United States has slowly retreated from the expanded frontiers of liberty so painstakingly established by the "Warren" Court. The Supreme Court has radically revised traditional notions about the meaning and purpose of our Bill of Rights. Widespread inhibition of human rights resulting from a systematic repression of individual liberty has been seen by many of our high state courts as alarming and intolerable. Consequently, today state courts across the country are construing their own constitutions as providing broader individual protections than once afforded by their federal counterparts.³⁵

³² *State v. Carter*, 596 N.W.2d 654 (Minn. 1999), Appellant's brief on remand at 6; *People v. Belton*, 55 N.Y.2d 49 (1982), Appellants brief on remand at 5.

³³ *Commonwealth v. Sheppard*, 476 N.E.2d 541 (Mass. 1985), Appellant's brief on remand at 16.

³⁴ *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997), Appellee's brief on remand at 19.

³⁵ *People v. Ferber*, 57 N.Y.2d 256 (1982), Appellant's brief on remand at 6.

Such claims add little to the weight of a legal argument and seem intended to undermine the natural deference towards the Supreme Court in matters of constitutional law. If the Supreme Court is acting in a reckless and dismissive manner, deference is undeserved and may actually be dangerous to the state's citizens. State courts have a duty to aggressively defend their citizens against these irrational actions through their state constitutions. While these kinds of overt attacks on the Supreme Court's legitimacy are less common, nearly every remand argument attacked the policy behind the changes in federal law. These policy attacks form the clearest and strongest argument in remand cases.

Policy arguments drew heavily from the logic of the U.S. Supreme Court dissenters but also relied on criticism from law reviews and other state courts. The most extreme example of this policy dominance came in *Commonwealth v. Sheppard* (1985)³⁶ involving the good faith exception to the exclusionary rule. This argument was the only one that failed to refer to any of the legal factors discussed above. Instead the claimant stressed the deterrence rationale at the center of the exclusionary rule since *Mapp v. Ohio* (1961)³⁷ and, relying heavily on Justice Brennan's dissent, that deterrence is required for any abuse of constitutional rights regardless of whether the error was done by the courts or the police. Brennan's dissenting opinions crop up in a number of other cases such as *People ex rel. Arcara v. Cloud Books* (1986)³⁸ where the claimant quoted his dissenting opinion extensively to demonstrate how the Burger Court doctrine was a "progressive denuding of First Amendment Rights" and how "sexually explicit but non-obscene [speech] has lost all but the surface veneer of its First Amendment Protection."³⁹ Other

³⁶ 476 N.E.2d 541 (Mass.).

³⁷ 367 U.S. 643.

³⁸ 68 N.Y.2d 296.

³⁹ 68 N.Y.2d 553 (1986), Appellant's brief on remand at 23, 24.

dissenting justices received similar attention. On remand in *Pap's A.M. v. City of Erie* (2002) the claimant stressed an earlier dissent from Justice White and that “Justice Stevens’ dissent [above] is also extremely well reasoned and appropriately critical of the Supreme Court’s plurality opinion” to demonstrate how the Supreme Court’s fractured rulings on regulation of nude dancing establishments were flawed and unpersuasive.⁴⁰ A claimant in a counsel case from Texas similarly utilized Justice Breyer’s dissenting opinion from the reversal to show how the Supreme Court’s new decision, which the brief describes as a “[r]ejection of national consensus of court authority” on the Sixth Amendment, “would emasculate the protections of the guarantee of a ‘right to counsel.’”⁴¹

Two search cases complained of trends in federal search law, but in opposite directions. In one case, the claimant complained that the Supreme Court’s decisions were based on “legal fictions” as opposed to the actual facts of the case “so as to better enable it to draw ‘bright lines.’”⁴² Another claimant, however, complained that the Supreme Court’s flexible totality of the circumstances test simply reinforced abusive practices and that the state court should adopt bright line tests to correct the disparity of power between police and citizens, and that such a bright line rule is easier for the police to comply with anyway.⁴³ In a case on standing to challenge searches, another claimant noted that the Supreme Court had developed a standing doctrine that undermined the ability of defendant’s to challenge unconstitutional searches by

⁴⁰ *Pap’s A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), Appellant’s brief on remand at 16.

⁴¹ *Cobb v. State*, 85 S.W.2d 258 (Tex. Crim. App. 2002), Appellant’s brief on remand at 10, 11.

⁴² *People v. Long*, 359 N.W.2d 194 (Mich. 1984), Defendant’s brief on remand at 23.

⁴³ *State v. Robinette*, 685 N.W.2d 762 (Ohio 1997), Appellee’s brief on remand at 14-29.

harkening back to *Katz v. United States* (1968)⁴⁴ and a treatise on federal search law to show that the state court's original decision was the proper result.⁴⁵

Additionally, claimants utilized specific predictions of the consequences of the Supreme Court's new direction for their home state. For example, the claimant in *Haliburton v. State* (1987)⁴⁶ discussed the structural difference in Florida that gave broad latitude to prosecutors and how the federal rule on when counsel attached would permit prosecutors to time the filing of charges to avoid the presence of counsel during the criminal investigation. After the Supreme Court held that statements made to a probation officer were not subject to *Miranda* warnings, the claimant stressed the danger of this rule noting that "defense attorneys in Minnesota will understandably tell their probationer clients that whenever they even remotely suspect that information requested by their probation officers may be incriminating they should no longer discuss such information with the probation officer and demand to see their attorney at once."⁴⁷ This unfortunate outcome of the Supreme Court's decision would undermine the purpose of probation and complicate the duties of probation officers more than necessary, something the state court can easily correct. These policy consequences were presented as the consequence of the Supreme Court's inability to understand local conditions.

Conclusion

Remand cases were utilized to explore how federal retrenchment alters the behavior of lawyers in how they argue state constitutional cases. While the case studies offered in subsequent chapters aim at this same signal, it is always possible that any variation in how arguments are

⁴⁴ 389 U.S. 347,

⁴⁵ *State v. Carter*, 596 N.W.2d 654 (Minn. 1999), Appellant's brief on remand.

⁴⁶ 514 So.2d 1088 (Fla.).

⁴⁷ *State v. Murphy*, 380 N.W.2d 766 (Minn. 1986), Appellant's brief on remand at 30-31.

made is caused by different underlying facts between cases or simply better lawyers. But in remand cases the facts and lawyers remain stable and the effect of federal retrenchment can be seen starkly. As expected, at the initial stage arguments are dominated by federal claims with only a small number addressing parallel state claims and usually because of earlier negative federal precedents. After remand, the arguments shift dramatically as lawyers are forced to look for an alternative method of maintaining their initial victory. On remand they turn to state arguments not out of any particular sense that an independent state doctrine is legally required but more as a means of preserving an older set of federal doctrines recently limited or abandoned by the U.S. Supreme Court. This is why the strongest emphasis on remand is not on legal factors such as text, history, or precedent, but instead is on policy attacks on the new federal rationale and the policy consequences that follow. State constitutional provisions are deployed as little more than a mechanism to apply this older federal law. While remand arguments demonstrate the instrumental use of state constitutional law advocated by some (Brennan 1977; Gardner 2005), they hardly present a significant set of arguments to support the development of a truly independent body of state law. The next chapter examines federal retrenchment in a state where the high court resisted judicial federalism and generally refused to deviate from a lockstep approach.

Chapter 4

Ohio: Lockstep in Action

The Ohio Supreme Court generally resisted state constitutional arguments, preferring to adopt a lockstep approach of adopting federal law as the limit for state constitutional rights. Lawyers under this system received virtually zero encouragement to engage in state constitutional arguments and they responded with a relatively weak set of arguments. Left with no internal guidance, the lawyers focused on instances of federal retrenchment and on policy critiques of these limited rights. State constitutional rights arguments in Ohio primarily stressed an invitation to evade federal retrenchment.

Judicial federalism in Ohio

It is safe to say that all state high courts have issued some rights protective decision beyond the level set by the U.S. Supreme Court since the 1970s, but many state high courts are less than enthusiastic about judicial federalism. The Ohio Supreme Court represents such courts. While it has issued broader state protections in a few cases, the tendency of the Court has been a policy of “unreflective adoptionism” of or lockstep with U.S. Supreme Court precedent, the immediate application of federal law and doctrines without any discussion of even the possibility that state law may require some different rule of law (Latzer 1991b: 864; Williams 2009: 196-197). The Ohio Court has followed this path consistently, despite some protestations to the contrary, and lawyers have replied with minimal attempts to push for state constitutional adjudication.

Historically the Ohio Court was controlled by “conservative, ‘old stock’ Republicans who fashioned the law to conform to the values and interests they shared with small town and rural Ohioans, with business and industry” (Tarr and Porter 1988: 127). Expressing this conservatism, in the area of individual rights, the Court in the 1960s was highly critical of the Warren Court revolution in criminal law and resisted it too some degree (Porter and Tarr 1984: 152-54). In 1978, however, a Democratic majority¹—initially a 4-3 majority but quickly expanding to 6-1—came to power and reoriented the Court so that “[v]irtually overnight the court became ‘pro-labor and highly urban’ in orientation” (Tarr and Porter 1988: 129). The Court exercised this orientation by dramatically altering the law in areas of torts, tenant rights, and workers rights. But this “quiet revolution” (Tarr and Porter 1988: 130) did not reach constitutional law. While this new Democratic majority dramatically changed the Court’s approach to various areas of common and statutory law, it showed no real interest in state constitutional rights. The traditional Republican dominance reemerged in 1986 and continued this apathetic view of state constitutional rights though a few justices expressed some support.

Porter and Tarr (1984) discuss a number of cases in the late 1970s and early 1980s that were prime candidates for judicial federalism but in all the Court rejected the possibility, usually without any serious consideration. Even in the single instance where the Court declared that state law required a protective rule, it stressed that this protective rule was necessary to meet federal levels of protection.² When faced with a school funding challenge that was successful in both the trial and appellate courts, the Court, with only a single dissent, rejected the challenge adopting

¹ While Ohio general elections for judges are nominally non-partisan, all candidates are nominated through partisan primary elections. This arrangement is unique among U.S. states.

² *State v. Gallagher*, 46 Ohio St.2d 225 (1976)

the deferential federal test.³ While other state high courts at this time may have been striving to establish themselves as constitutional innovators, the Ohio Court maintained its image as “neither an innovator nor an enthusiastic emulator, deferential toward other branches of state government, and anxious to avoid controversy” (Porter and Tarr 1984: 154). However, there was some halting movement away from this image in the 1990s.

In *Arnold v. Cleveland* (1993),⁴ the Court issued an unusually detailed exploration of judicial federalism and interpreted its right to bear arms provision more broadly than the Second Amendment, though it ultimately upheld the challenged ban on assault weapons. The Court discussed the lengthy set of federal precedents recognizing the legitimacy of judicial federalism and briefly noted the experience in other states and scholarly commentary on the movement towards greater state constitutional activism. The Court approvingly quoted a Texas declaration that “[w]hen a state court interprets the constitution of the state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.”⁵ In engaging with the state right to bear arms, the Court expressed an apparently enthusiastic endorsement of judicial federalism:

In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.⁶

³ *Board of Ed. of City School Dist of City of Cincinnati v. Walter*, 58 Ohio St.2d 368 (1979).

⁴ 67 Ohio St.3d 35.

⁵ *Davenport v. Garcia*, 834 S.W.2d 4, 12 (Tex., 1992).

⁶ *Arnold*, 67 Ohio St.3d at 42.

While this may have been a ringing endorsement for judicial federalism, the actual practice of the Court differed only minimally (Bettman 2004). The approach to criminal rights issues was generally still to adopt the federal rule. The one prime exception was hardly a paradigm of independent state analysis. The Court focused solely on the federal decisions for search of vehicles before simply asserting a state basis just in case: “If [the U.S. Supreme Court’s decision in] *Belton* does stand for the proposition that a police officer may conduct a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule.”⁷ No discussion of the basis for this rejection occurred beyond a footnote noting that state courts can provide greater rights protection. In 2002, the Court reversed this decision concluding that there were insufficient “persuasive reasons to depart from the principle that [the state and federal provisions] should be harmonized whenever possible.”⁸ In other cases, the Court rather quickly retreated from the hint of an independent state constitutional basis for rights protective decisions. For example, in two remand cases, included in the analysis in Chapter 3, the Ohio Court issued protective decisions that simply asserted violations of both constitutions. One case involved a search and the other struck down the state’s hate crimes enhancement as violating free speech rights.⁹ On remand in the speech case, the Court simply summarily reversed its prior decision and upheld the law under both constitutions with no discussion.¹⁰ In the search case, the Court noted the lengthy history of state cases adopting a principle of “harmonizing” the meaning of federal and state search provisions.¹¹ Justice Craig Wright dissented from the speech decision on remand complaining forcefully that the Court

⁷ *State v. Brown*, 63 Ohio St.3d 349, 352 (1992) (emphasis in original).

⁸ *State v. Murrell*, 94 Ohio St.3d 489, 496 (2002).

⁹ *State v. Robinette*, 73 Ohio St.3d 650 (1995) (search); *State v. Wyant*, 64 Ohio St.3d 566 (1992) (speech).

¹⁰ *State v. Wyant*, 68 Ohio St.3d 162 (1994).

¹¹ *State v. Robinette*, 80 Ohio St.3d 234 (1997);

should not simply conform its state decisions and Wright, joined occasionally by Justice Paul Pfieffer, would continue to advocate for at least some attention to the state constitution, though they were generally unsuccessful apart from a few decisions (Bettman 2004).

The 1990s did see a small number of cases expanding rights protection. In 1997, a narrowly divided Court reversed its earlier decision and invalidated the school funding system.¹² In 2000, the Court rejected the limited federal protections for religious freedom.¹³ Finally, in 1995, the Court held that it would continue to adhere to its earlier defamation cases after federal retrenchment on the proper standard for determining whether a statement is one of fact or constitutionally protected opinion.¹⁴ While these examples suggest a slightly increased willingness to consider state issues, the dominant trend was still to defer to federal law on rights issues through a continued lockstep approach, even if it was minimally more robust (Williams 2004). As demonstrated in this chapter, the legal arguments in turn have focused on federal analysis with only minimal attention to state law.

Aggregate trends

¹² *DeRolph v. State*, 78 Ohio St.3d 193 (1997).

¹³ *Humphrey v. Lane*, 89 Ohio St.3d 62 (2000).

¹⁴ *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995).

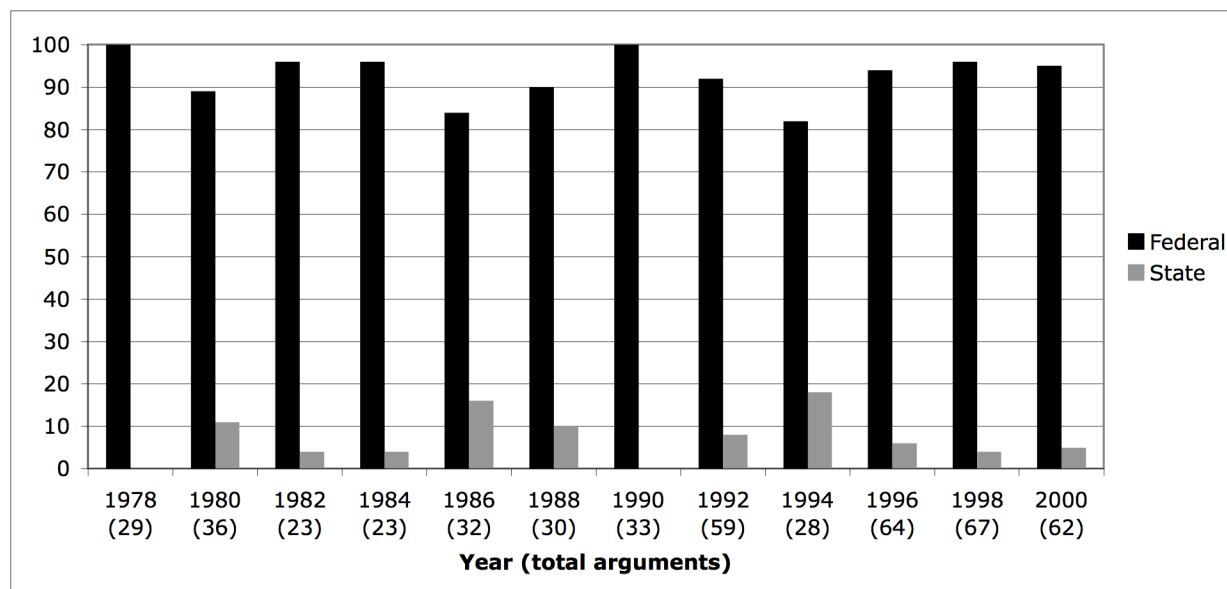


Figure 4.1. Percentage of arguments by year, Ohio 1978-2000. N=486.

The aggregate image of rights arguments in Ohio demonstrates a clear dominance of federal law. Of 486 arguments examined, only 34 (7%) were state based. There is no real trend or change over time. Apart from spikes in 1986 and 1994 no year saw much more than 10% of the arguments as state based. The number of arguments dramatically increased after 1990 largely because of the death penalty cases, which were not present for the earlier years as discussed in Chapter 2. Figure 4.2 shows the breakdown of arguments by issue area and again the picture is one of minimal attention to state rights arguments. Of the four high volume areas, more than 50 arguments, (equal protection, due process, search and seizure, and cruel and unusual punishment) none saw significant state constitutional arguments. Surprisingly, criminal rights issues generally saw a quite low degree of state constitutional litigation, but in terms of absolute number of arguments both criminal and civil issues saw roughly equally low levels of state constitutional arguments.

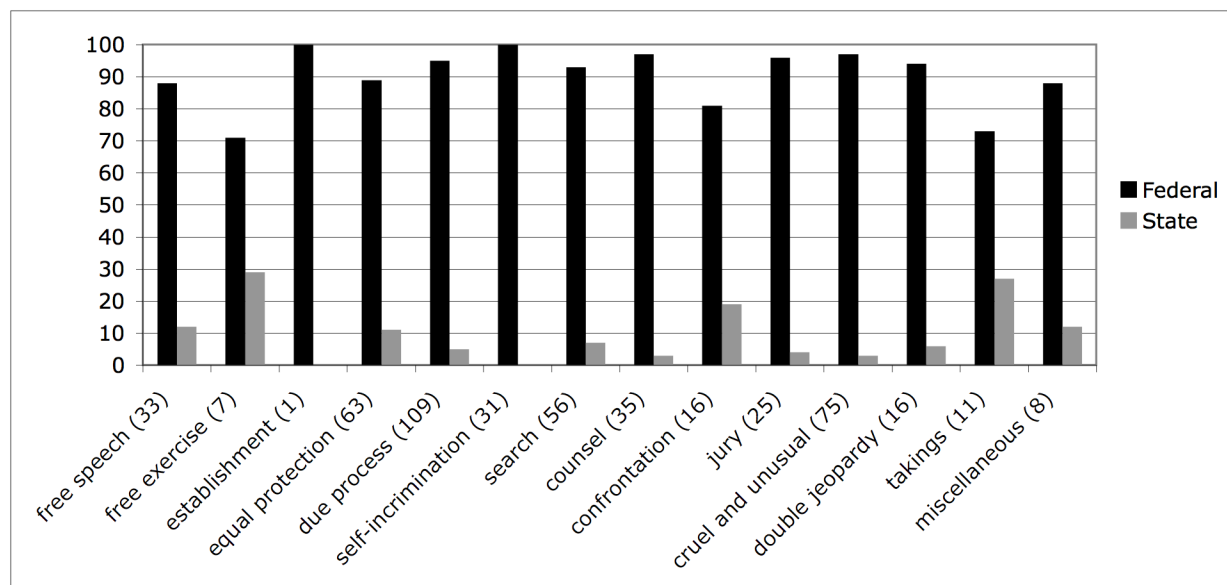


Figure 4.2. Percentage of arguments by rights area, Ohio 1978-2000. N=486.

Figures 4.3 and 4.4 provide details on the content of state constitutional arguments when offered. As with the other case studies, home state law was used relatively frequently; in Ohio this took the form most commonly of noting a precedent that applied solely federal law but string cited the state provision. Claimants attempted to utilize this as a backdoor, arguing that the federal rule was de facto adopted as an interpretation of the state provision. Interestingly, Ohio claimants discussed other state law relatively frequently; nearly a third of claimants pointed to examples of other state courts adopting a broader rule on the same issue. Totaling the factors discussed in each brief shows that the overwhelming majority (86%) cited two or fewer of these legal factors. As this chapter demonstrates, state arguments were generally weak and undeveloped, seeking little more than evasion of a particular instance of federal retrenchment.

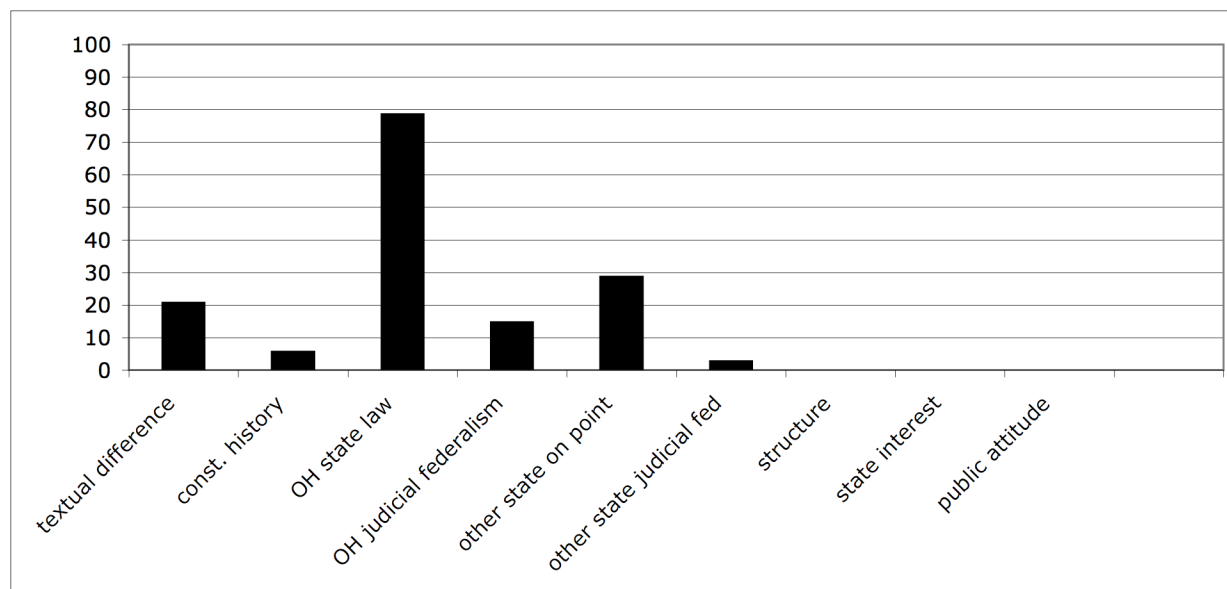


Figure 4.3. Percentage of state arguments citing each legal factor. Ohio 1978-2000. N=34.

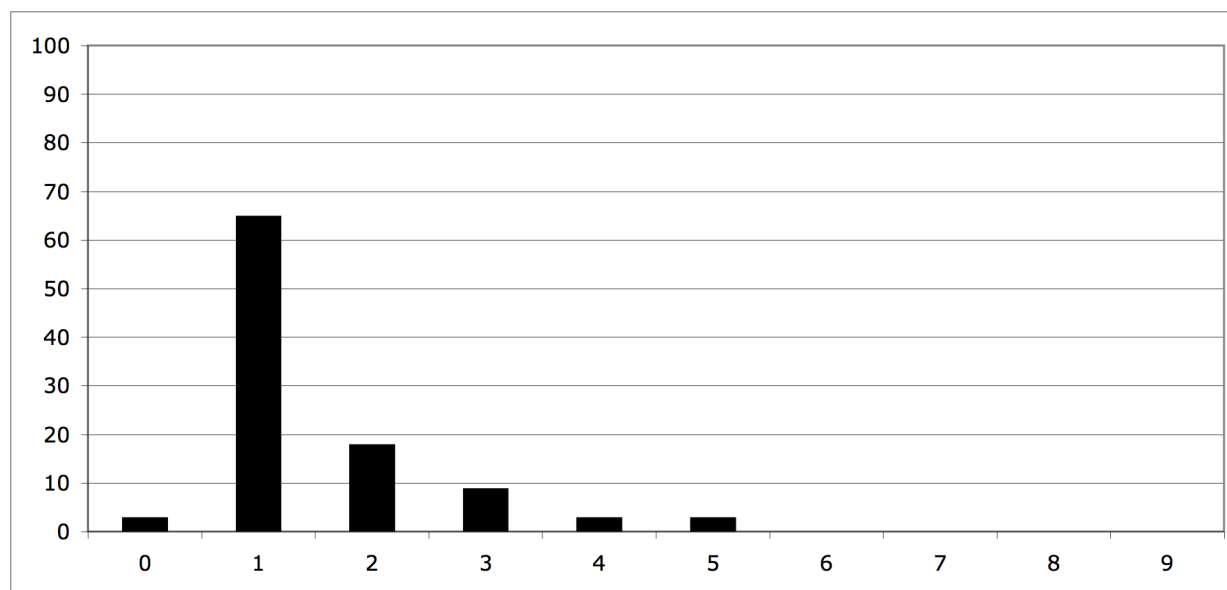


Figure 4.4. Percentage of state arguments by total factors cited, Ohio 1978-2000. N=34.

Lawyers under lockstep

Examination of this small number of state constitutional claims demonstrates a clear tendency of federal retrenchment driving the arguments. Given the lack of internal

encouragement from the Ohio Supreme Court, this is as expected. With virtual zero guidance from the state high court, lawyers utilized state provisions to avoid negative trends in federal law and as we saw in the discussion of remand cases, the state arguments tend to attack the policy in federal law. A small number of arguments, however, are harder to classify but may be an artifact of my coding rules that err in favor of state coding where the arguments are unclear.

The four speech claims represent this trend well. In *Eastwood Mall v. Slanco* (1994),¹⁵ the Court considered whether individuals have a right to use privately owned shopping centers or malls to communicate their message. This was a common argument presented to state courts because the U.S. Supreme Court had clearly rejected such a right of access decades earlier but had later recognized that state courts are free to expand protection under their state constitution.¹⁶ The claimant presented the most thorough state constitutional argument present in my Ohio sample. The claimant discussed the set of federal cases recognizing the legitimacy of judicial federalism and law reviews exploring the early development of state constitutional law arguing that while state courts must deal with federal law, where it falls short on individual rights protections state courts should look “to the state constitution as a potential supplement to the federal protections.”¹⁷ The claimant stressed the common argument of judicial federalists, that “if state courts construe their constitutions as merely redundant of the federal constitution, they allow their state charters to become lifeless and powerless.”¹⁸ After this long attempt to convince the Court that it can reach a different result from federal law, the claimant presented a thorough legal analysis that dissected the text and history of the speech provision. Having both a negative

¹⁵ 68 Ohio St.3d 221.

¹⁶ *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551 (1972); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

¹⁷ *Eastwood Mall*, 68 Ohio St.3d 221, Appellant’s brief at 7.

¹⁸ *Eastwood Mall*, 68 Ohio St.3d 221, Appellant’s brief at 10.

and positive component to the text gave a firmer ground for the application of speech rights to private malls. The claimant went back to the state's earliest history in the Northwest Ordinance and how the Virginia transplants into Ohio drafted the original constitution in the spirit of Thomas Jefferson stressing that "individual liberty permeated the 1802 document" and that "Ohio judges should be mindful of the libertarian spirit that animated its drafters."¹⁹ While the claimant attempted to provide some Ohio precedent on point (just a few intermediate appellate decisions), it had little to work with and instead stressed the logic of other state high courts that rejected the federal rule. Finally, the claimant uses these state precedents to attack the U.S. Supreme Court's decision because public malls operate as a quasi-public forum in modern, suburban America.

In a case concerning the closure of an adult bookstore as a public nuisance, the claimant attacked a controlling federal precedent and expressly requested that the Court continue to apply earlier federal precedent.²⁰ The claimant noted that the U.S. Supreme Court's decision was immediately rejected by the New York Court of Appeals²¹ on remand and described that rejection as "constru[ing] its state constitutional right of free speech as extending *O'Brien*²² protection to the bookstore."²³ The claimant continues this theme of asserting that the state provision should be utilized to correctly protect federal rights:

In conclusion, the Appellants can perceive no inherent reason why state constitutional provisions should remain inferior to the present U.S. Supreme Court's delineation of First Amendment rights. Despite the Supreme Court's rationale, it is submitted that most legal scholars would indeed recognize an impact upon First Amendment rights through closure

¹⁹ *Eastwood Mall*, 68 Ohio St.3d 221, Appellant's brief at 22.

²⁰ *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 63 Ohio St.3d 354 (1992).

²¹ *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553 (1986) on remand from *Arcara v. Cloud Books*, 478 U.S. 697 (1986).

²² *U.S. v. O'Brien*, 391 U.S. 367 (1968).

²³ *Rear Door*, 63 Ohio St.3d 354, Appellant's brief at 29.

and the State should be required to exhaust more moderate alternatives to control the problems of which it complains.²⁴

The final two speech cases are less clearly driven by a desire to evade federal retrenchment but the legal arguments are still only minimally developed. One claimant complained that her public employer violated her speech right to run for office when she was fired for that campaign.²⁵ The claimant immediately disclaimed any reliance on federal law admitting that it did not support her, though there was no precedent directly from the U.S. Supreme Court. In terms of legal support, the claimant simply noted the declaration in *Arnold* that the state constitution should have independent force and then argued that the text obviously represented an absolute protection, “[i]n light of the broad crisp language of [the state provision] it would be impossible for any reasonable person” to find that running for elective office is not protected speech.²⁶ Stressing similar arguments for open access to governmental activities, another claimant argued that the state speech provision guaranteed press and public access to legislative sessions.²⁷ Again the claimant expressly conceded that federal law was unsupportive as Congress had a long history of secret sessions,²⁸ but argued that free speech principles, as drawn from federal precedents, have a purpose “to protect free discussion about governmental affairs and the performances of public officials.”²⁹ Drawing on a federal precedent recognizing the right of public and press to access criminal trials, the claimant argued that a core element of free speech was the “[p]rotection of the ability to gather and receive information, particularly about the

²⁴ *Rear Door*, 63 Ohio St.3d 354, Appellant’s brief at 30.

²⁵ *Painter v. Graley*, 70 Ohio St.3d 377 (1994).

²⁶ *Painter*, 70 Ohio St.3d 377, Plaintiff-Appellant’s brief at 9.

²⁷ *State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St.3d 165 (1988).

²⁸ See *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987).

²⁹ *Plain Dealer*, 38 Ohio St.3d 165, Appellant’s brief at 34.

operation of government.”³⁰ In each of these free speech cases, Ohio claimants admitted a lack of federal support and sought to avoid these limitations, though with varying degrees of legal and policy arguments.

Two cases in 2000 sought expanded protection for the free exercise of religion after the U.S. Supreme Court dramatically limited the First Amendment protections for free exercise of religion in *Smith*.³¹ In *Henley v. Youngstown* (2000) the claimants sought a building permit for church owned property.³² The claimant in *Humphrey v. Lane* (2000) was a Native American corrections officer complaining about disciplinary action for his hair length.³³ The *Henley* claimants primarily relied on a federal claim seeking to utilize the limited protections still provided by federal law relying on a theory circulating in some federal courts, but closed with a state attack. The *Humphrey* claimant relied solely on a state claim, as his facts were virtually indistinguishable from *Smith*. The claimants in each case noted Ohio precedent applying the older federal law and string citing the state provision, arguing that these decisions should be maintained under the state provision, but the Ohio Court had never issued a clear independent ruling on the meaning of the state provision, though it did reserve the right to do so.³⁴ The dominant trend in both arguments, and most fully developed in *Humphrey*, was an attack upon the logic and result of *Smith* noting the opposition from members of the U.S. Supreme Court, lower federal judges, the rejection by five state high courts, and the nearly unanimous decision by Congress to repudiate *Smith*. The claimants stressed the negative outcomes in various cases since *Smith* and how it would require reversal in classic free exercise cases concluding that

³⁰ *Plain Dealer*, 38 Ohio St.3d 165, Appellant’s brief at 34.

³¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

³² 90 Ohio St.3d 142.

³³ 89 Ohio St.3d 62.

³⁴ See *Simmons-Harris v. Goff*, 86 Ohio St.3d 1 (1999) (refusing at that point to go beyond federal establishment clause jurisprudence).

“*Smith* takes one of the most cherished constitutional values woven into the fabric of American society and reduces it to nothing more than a permissible political option, to be given or taken away based upon the contemporary wisdom or fears of legislative bodies.”³⁵ This general and powerful spate of criticism meant “that this Court should not adopt it as the standard for religious freedom cases arising under the Ohio Constitution.”³⁶ Left with no real guidance from the Ohio Court, claimants turned to the copious amount of materials attacking *Smith* as a means to convince the Court that the federal decision was poorly conceived and should be rejected.

At times the claimant was faced with the situation where a similar case was under review before the U.S. Supreme Court and decided to hedge their case with parallel arguments. In one case the claimant challenged the use of witness testimony from a preliminary hearing at his criminal trial arguing that this violated his right to confront witnesses.³⁷ The Ohio Supreme Court had recently accepted a similar confrontation claim but the case was under review before the U.S. Supreme Court.³⁸ The claimant stressed the logic of the original Ohio precedent and the fact that cross-examination is limited for preliminary hearings and a ruling allowing such testimony would just encourage lawyers to abuse the hearings just in case a witness fails to appear at trial. With the issue “pending for review by the United States Supreme Court, defendant urges this court to interpret the Constitution of Ohio so that the fundamental rights of the people of this State will be applied in a manner that is consistent with the realities of [the] Ohio criminal justice system.”³⁹ It would be best to ground this result on state constitutional

³⁵ *Humphrey*, 89 Ohio St.3d 62, Appellant’s brief at 22.

³⁶ *Henley*, 90 Ohio St.3d 142, Appellants St. Brendan Church and Beatitude House brief at 27.

³⁷ *State v. Madison*, 64 Ohio St.2d 322 (1980).

³⁸ *Ohio v. Roberts*, 448 U.S. 56 (1980) ultimately reversed the lower decision. This decision was issued two days before the date the brief was filed and there is no evidence that the claimant was aware of the decision.

³⁹ *Madison*, 64 Ohio St.2d 322, Appellant’s brief at 25

grounds to ensure the best rule for the system regardless of what the U.S. Supreme Court ultimately decided. Similarly, another claimant raised a confrontation challenge to the use of closed circuit television testimony of a child victim outside the defendant's presence.⁴⁰ The U.S. Supreme Court was in the process of reviewing a similar protection for child victims⁴¹ and the claimant noted this fact in making his state argument. The claimant stressed the textual difference requiring a "face to face"⁴² confrontation specifically and a general discussion in the 1850 state convention that stressed the role of the judiciary in protecting individual liberties. The claimant presented this theory as a per se constitutional violation before turning to a balancing test approach it assumed would be required by the resolution of the U.S. Supreme Court's case. Faced with uncertainty, and perhaps some intuition of the ultimate federal resolution, claimants used parallel arguments to try and head off the potential negative result.

The paucity of state search and seizure claims is certainly surprising given the strong degree of federal retrenchment. In many cases the issues revolved around fairly standard and stable Fourth Amendment claims such as the *Terry* stop-and-frisk rule. But others cases involved issues where state claims may have been likely. For example, one claimant complained of a jail's policy of strip searching newly arrested individuals and argued the issue as a matter of federal law only with no mention or citation even to the state provision⁴³ despite the fact that the U.S. Supreme Court had upheld a similar policy.⁴⁴ Only four state search claims were offered and none were particularly well-developed. In a brief supplemental point, one claimant clearly attacked the good faith exception to the Fourth Amendment arguing that the "Court should reject

⁴⁰ *State v. Eastham*, 39 Ohio St.3d 307 (1988).

⁴¹ *Coy v. Iowa*, 487 U.S. 1012 (1988).

⁴² Ohio Const. Art. I, Sec. 10: "the party accused shall be allowed ... to meet the witnesses face to face."

⁴³ *Fricker v. Stokes*, 22 Ohio St.3d 202 (1986), Appellee's brief.

⁴⁴ *Bell v. Wolfish*, 441 U.S. 520 (1979).

the cost-benefit analysis utilized by the United States Supreme Court and adopt” the prior protective federal doctrine.⁴⁵ Similarly, another claimant attacked a statute allowing warrantless inspection of pharmaceutical records primarily focusing on a lengthy federal argument distinguishing a negative federal precedent⁴⁶ but closing with an assertion, unsupported by any significant argument, that the precedent should be evaded under state provision if the federal claim failed.⁴⁷ The Court’s anemic statement of a state rule in *Brown* was used to support a similarly undeveloped assertion in a car stop case but with no discussion of the reasoning for a broader state rule⁴⁸—though this may be unsurprising given that the Court in *Brown* did not provide any reasoning for its brief assertion either. Perhaps most bizarre is an argument that explicitly disclaimed any state basis. The claimant relied upon a 1984 Ohio precedent that was clearly based on federal law in the text but the syllabus described the holding as solely required by the state provision.⁴⁹ In a nearly identical case, the claimant repeatedly disclaimed any intent to seek a broader degree of rights protection, arguing that federal law provided all the protection necessary.⁵⁰ One claimant ultimately blamed the Court itself for the poor development of state search arguments complaining that while *Arnold* may have declared “the Ohio Constitution is a document of independent force,” it had recently disclaimed any broader protection under the state search provision holding that it “should be harmonized and exist co-extensively with the protections of the Fourth Amendment.”⁵¹ The Court’s consistent refusal to treat the state search

⁴⁵ *State v. Wilmoth*, 22 Ohio St.3d 251, Appellant’s brief at 9.

⁴⁶ *Whalen v. Roe*, 429 U.S. 589 (1977).

⁴⁷ *Stone v. Stow*, 64 Ohio St.3d 156 (1992), Plaintiffs-Appellants’ brief at 10.

⁴⁸ *State v. Droste*, 83 Ohio St.3d 36 (1998), Appellee’s brief at 10.

⁴⁹ *State v. Burkholder*, 12 Ohio St.3d 205 (1984). No state argument was made in this case.

⁵⁰ *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St.3d 82 (1996), Appellee’s brief. It appears that the state’s brief was strongly critical of the Ohio Supreme Court’s original, messy decision.

⁵¹ *State v. Moore*, 90 Ohio St.3d 47, Appellant’s brief at 4-5.

provision independently gave lawyers no guidance in how to make such arguments or any indication that the Court wanted to hear such issues.

While equal protection arguments were numerically the highest number of state arguments at seven, few of them were clear or distinct. Four cases involved fairly generalized arguments that were coded as state based primarily because of my generous rules for vague arguments, it is unlikely that any were intended as state based.⁵² Two other cases involved an interaction between equal protection and a provision requiring uniform taxation laws and rather old precedents interpreting this provision.⁵³ The clearest and most extensive state equal protection argument challenged a state constitutional amendment that forbids the election of judges over 70.⁵⁴ The claimant had to acknowledge a lengthy set of lower federal court decisions rejecting similar challenges to age limits for judicial elections under federal law but noted the extensive legal commentary on judicial federalism to show that state law need not be interpreted so narrowly.⁵⁵ Other state courts had refused to follow federal retrenchment and the Ohio Court should follow suit.

As the most active death penalty jurisdiction in this study, it is interesting to note the frequency of cruel and unusual punishment arguments. These claims were the second most common issue area in the Ohio sample. While federal law was in dramatic flux throughout the

⁵² *Hack v. Gillespie*, 74 Ohio St.3d 362 (1996), Appellant's brief; *State ex rel. Hammond v. Industrial Commission of Ohio*, 64 Ohio St.2d 237 (1980), Appellants' brief; *State ex rel. Smiddy v. Industrial Commission*, 63 Ohio St.3d 473 (1992), Relator's brief; *Vorisek v. Village of North Randall*, 64 Ohio St.2d 62 (1980), Appellant's brief.

⁵³ *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 70 Ohio St.3d 73 (1994), Appellant's amended brief; *Dublin School Dist. Bd. of Edn. v. Limbach*, 69 Ohio St.3d 604 (1994), Appellant Dublin School District's brief.

⁵⁴ I usually exclude constitutional challenges to state constitutional provisions because an amendment is typically immune from prior state rights provisions. However, I include this case because the state argument was actually made.

⁵⁵ *State ex rel. Keefe v. Eyrich*, 22 Ohio St.3d 164 (1986), Relator's brief on the merits.

1980s and early 1990s, only two state claims were offered.⁵⁶ Overwhelmingly the claimants presented standard federal death penalty claims with frequent string citations to state constitutional provisions but virtually no independent discussion with only two exceptions. In *State v. Rojas* (1992)⁵⁷ the claimant argued that the state cruel and unusual punishment clause forbids the execution of the “mentally retarded.”⁵⁸ The U.S. Supreme Court had rejected such an argument three years earlier.⁵⁹ Rather than present any coherent legal argument, the claimant attacked the moral implications of such executions. While “a majority of the justices of the Supreme Court of the United States might choose to dilute the precious protections afforded to all persons by the Bill of Rights and to facilitate the establishment of a more authoritarian system,” it cannot forbid a state court from protecting those rights.⁶⁰ The U.S. Supreme Court is described as approving “the extermination of those retarded persons who have taken the life of another” and points to Justice Brennan’s dissenting opinion arguing that the Ohio Court “should recognize ... that there are limits beneath which a civilized society should not sink in the administration of the most severe punishment.”⁶¹ Without any supporting argument about the meaning of the state provision, the claimant asserted, “the Ohio Constitution absolutely forbids execution of the retarded.”⁶² In only one other case, in 2000, did a claimant attack the death penalty as inherently unconstitutional under the state constitution. The claimant argued that key Ohio death penalty precedents had “paid but lip service” to the idea of state constitutional

⁵⁶ As discussed in Chapter 2, the sample of death penalty briefs is incomplete. Virtually no briefs pre-1990 were available. It is possible that earlier briefs presented state claims but given the general trend in Ohio and the decisions of the Court this seems unlikely.

⁵⁷ 64 Ohio St.3d 131.

⁵⁸ I use this term because it is the language adopted by the brief and the Court’s opinion.

⁵⁹ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

⁶⁰ *Rojas*, 64 Ohio St.3d 131, Defendant-Appellant’s brief at 5.

⁶¹ *Rojas*, 64 Ohio St.3d 131, Defendant-Appellant’s brief at 6, 7.

⁶² *Rojas*, 64 Ohio St.3d 131, Defendant-Appellant’s brief at 8.

protections in death penalty cases.⁶³ The short argument simply notes the textual differences in many of the criminal rights provisions but only refers to earlier federal arguments to show the substantive failures of the state's death penalty system.

Conclusion

The support structure for state constitutional activism in Ohio is quite weak. Few cases saw significant attention to state constitutional arguments and when they were made the arguments were driven by federal retrenchment. Arguments were focused on attacking the policy results of federal doctrine as a means of evading a trend of limiting federal protections. Interestingly, state arguments were not even particularly common in search and seizure cases, the area of greatest federal retrenchment. This may be the result of the nearly complete unwillingness of the Ohio Supreme Court to engage with state arguments across all issue areas. This lockstep approach gave no guidance or indication that the Court was interested in hearing state claims and lawyers responded with similarly anemic arguments. The next chapter looks at a state where the high court demonstrated a greater willingness to accept state constitutional claims but consistently refused to provide any clear guidance on how to argue state claims, instead engaging in an ad hoc application of the state constitution, with a single exception.

⁶³ *State v. Carter*, 89 Ohio St.3d 593, Appellant's brief at 182.

Chapter 5

New York: Ad Hoc Engagement

Unlike the Ohio Supreme Court, the New York Court of Appeals demonstrated some willingness to consider state constitutional claims but failed to offer any particular guidance on why some claims were accepted and others were not. This ad hoc approach gave little clear guidance to lawyers in how or when state constitutional arguments should be presented. However, the Court broke this pattern in one particular doctrine and offered a clear and consistent trend of decisions. Lawyers responded to the ad hoc approach with policy attacks on federal retrenchment similar to the Ohio experience, though state arguments were more common in New York. In the one area of consistent state constitutional doctrine, however, lawyers in New York gradually abandoned all concern for federal law for a focus on the internal logic of the state rule.

Judicial Federalism in New York

The New York Court of Appeals hinted that it might adopt a form of the criteria test in *People v. P.J. Video* (1986),¹ a case on remand from the U.S. Supreme Court (included in Chapter 3). The Court admitted it was bound by the reversal on federal grounds but noted that state law is solely in its discretion. The Court discussed the criteria test in the language of academics of the time period (see Ely 1980), as between interpretative and noninterpretative factors. Interpretative approaches pointed to the importance of text, history, and structure of the

¹ 68 N.Y.2d 296 (1986).

state constitution where noninterpretive looks to state traditions, matters of particular local concern, or any distinctive attitudes of the citizenry.² However the Court failed to seriously commit to this approach or any other. A few years later the Court openly admitted that it lacked consistency towards judicial federalism: “this Court has not wedded itself to any single methodology, recognizing that the proper approach may vary with the circumstances.”³ Commentators and at least one former judge described the Court of Appeals’s approach as “primarily reactive and supplemental” approach to state law where “the dominant tendency has been for the court to wait until federal law is settled before deciding to provide adequate and independent state grounds for a rights sustaining decision” (Galie 1991: 236, 249; Hancock 1993).

Thus, New York fits within the norm for most state courts where the court engages with state constitutional provisions in piecemeal fashion without giving a great deal of guidance to its bar. With one major exception, the Court of Appeals typically pushed independent analysis in areas only after the Supreme Court retrenched protections. This is dramatically illustrated by three 1986 cases where the Supreme Court reversed decisions⁷ by the Court of Appeals accepting a rights claimant’s federal argument.⁴ In an unusual demonstration of resistance, the Court of Appeals reinstated all three cases under state constitutional law echoing a previous statement that the Court “perceive[d] no reason to depart from our [prior] conclusion” simply because the Supreme Court rejected that conclusion.⁵ While not as dramatic, most of the examples of state constitutional activism followed a similar path of state expansion after federal

² *P.J. Video*, 68 N.Y.2d at 302-303.

³ *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 251 (1991).

⁴ *People ex rel Arcara v. Cloud Books*, 68 N.Y.2d 553 (1986); *People v. Class*, 67 N.Y.2d 431 (1986); *People v. P.J. Video*, 68 N.Y.2d 296 (1986). These cases are part of the data discussed in Chapter 3.

⁵ *Bellanca v. New York State Liquor Auth.*, 54 N.Y.2d 228, 234 (1981).

retrenchment: the state action doctrine was expanded after the Supreme Court limited the doctrine⁶; it refused to follow the newly weakened federal test for anonymous informants in search cases⁷; and after an unusually vigorous and public dispute about the legitimacy of rejecting federal precedent, the Court of Appeals rejected both the open fields exception as well as the Supreme Court's broad deference to administrative searches.⁸

The major exception to this record is the New York counsel rule. Essentially this rule declares that where counsel represents a suspect, the suspect may not waive her rights against self-incrimination and give a statement unless her attorney is present. Only New York follows such a strict interpretation of self-incrimination (Latzer 1998a). In *People v. Donovan* (1963), three years before the Supreme Court decided *Miranda*, a time when the exact reach of federal constitutional protections in state criminal trials was in flux, the Court of Appeals declared, "we find it unnecessary to consider whether or not the Supreme Court of the United States would regard [use of defendant's statement to be] a violation of defendant's rights under the Federal Constitution" because "quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel, not to mention our own guarantee of due process" requires suppression of statements when the defendant's attorney was denied access.⁹ In *People v. Arthur* (1968) the Court strengthened this rule holding that "once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches" and cannot be waived without the presence of an attorney, even if not formally

⁶ *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152 (1978).

⁷ *People v. Griminger*, 71 N.Y.2d 635 (1988).

⁸ *People v. Scott and Keta*, 79 N.Y.2d 474 (1992).

⁹ *People v. Donovan*, 13 N.Y.2d 148, 151 (1963).

retained.¹⁰ The counsel rule fell into question in the early 1970s,¹¹ but was forcefully reestablished in *People v. Hobson* (1976).¹² In an elaborate investigation into the nature of *stare decisis*, the Court held that the rule was constitutionally required and that cases suggesting otherwise were not persuasive precedent—because of this I describe this as the *Hobson* rule. In *People v. Cunningham* (1980),¹³ the Court extended *Hobson* and declared that when a suspect invokes her right to counsel when she is unrepresented, the right attaches and cannot be subsequently waived unless in the presence of counsel. Again the Court stressed that any federal analysis was irrelevant because “the issue presented here may be resolved by application of principles that are firmly rooted in our State's constitutional and statutory guarantees of due process of law, the privilege against self incrimination and the right to the assistance of counsel.”¹⁴ As discussed below, the *Hobson* rule was a major source of litigation during the 1980s but was largely settled by 1990 when the Court overruled the derivative counsel version of the rule but maintained the core holding of *Hobson*.¹⁵ The *Hobson* rule represents the best example of true independent constitutional development in New York; a clear internal signal sent by the Court of Appeals to its lawyers. The rule was established in a period where federal law was unclear and in rapid flux; the state constitution provided a more steady foundation for the rule and it was followed even after *Miranda* dramatically extended federal involvement in state

¹⁰ *People v. Arthur*, 22 N.Y.2d 325, 329 (1968).

¹¹ *People v. Robles*, 27 N.Y.2d 155, 158 (1970) (the *Donovan* rule is “merely a theoretical statement of the rule. This dogmatic claim is not the New York law” and a voluntary waiver of rights is legitimate).

¹² 39 N.Y.2d 479.

¹³ 49 N.Y.2d 203.

¹⁴ *People v. Cunningham*, 49 N.Y.2d at 207.

¹⁵ In *People v. Bartolomeo*, 53 N.Y.2d 225 (1981) the Court established the derivative counsel rule holding that where the police had reason to believe a suspect was represented on another unrelated charge, her right to counsel still attached and could not be waived without the attorney’s presence. This was overruled in *People v. Bing*, 76 N.Y.2d 331 (1990).

criminal trials. It is true that *Hobson* was decided at a time where the Supreme Court's view of *Miranda* was becoming less supportive of suspect's rights, but it was only in 1981 that the Supreme Court made clear that the federal rule was less supportive.¹⁶

By the mid-1990s the state constitutional activism of the Court of Appeals crested and slowed dramatically. In 1995, Governor George Pataki led a backlash against the Court, publicly criticizing it as enforcing constitutional rules that are wildly out of step with the opinion of other state courts; "The target of the sharpest criticisms against the court was . . . [its history of] independent state constitutional decision making" (Bonventre 2003: 75). A study of sixteen areas where the Court had rejected federal rules found that while it was mostly in the norm of other states, in nearly a third it was part of a significant minority—especially the *Hobson* rule where only New York followed such a strict rule (Latzer 1998a). Vincent Bonventre (2003: Ch. 3) presents a strong case that Pataki's criticism pushed Chief Judge Judith Kaye—one of the strongest voices for liberal use of judicial federalism in the 1980s—to be less supportive of state constitutional claims in general, and criminal procedure rights in particular. This coupled with a number of more conservative Pataki appointments resulted in a bench less willing to entertain innovative rights claims by 2000.

Aggregate Trends

¹⁶ *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that after invocation of her rights a defendant may initiate contact with police and give a statement).

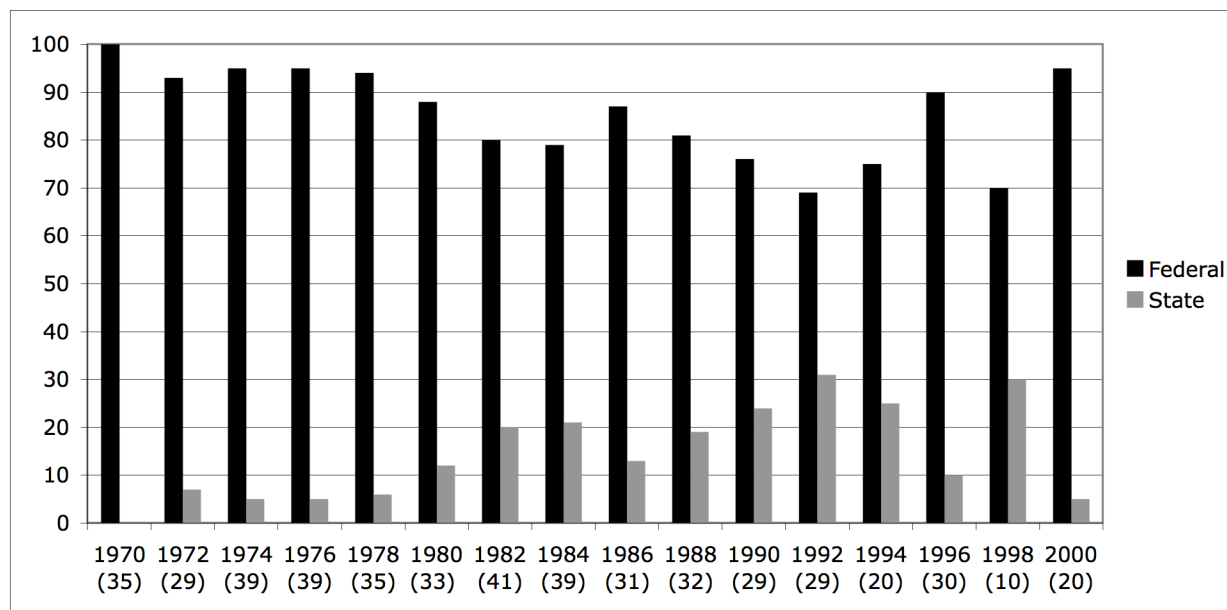


Figure 5.1. Percentage of arguments by year, New York 1970-2000. N=491 arguments.

I examined 491 arguments and state arguments accounted for 13% (66) of all rights arguments. Figure 5.1 shows the breakdown of federal and state arguments by year. State claims were relatively uncommon in the 1970s but increased during the 1980s. As discussed below, this increase tracks with federal retrenchment and the engagement with the *Hobson* rule. The trend in state arguments drops off in the 1990s as the Court of Appeals stopped hearing *Hobson* cases and the Pataki attack pushed the Court in a more modest direction. Figure 5.2 shows that state claims were more frequently presented in criminal process cases. Slightly more than a quarter of the state arguments occurred in self-incrimination cases, almost all of which are accounted for by the *Hobson* rule. Similarly, search and seizure claims represent about a quarter of state arguments and this is unsurprising given the fact that federal retrenchment was strongest in search cases. The next largest total came from due process cases, about half of which involved privacy claims. Few or no state arguments appeared in cases involving free exercise of religion, effective assistance of counsel, confrontation, cruel and unusual punishment, double jeopardy, or takings. No free exercise claims appear in my sample after 1990, when the Supreme Court significantly

limited meaningful federal protection. While the death penalty was a major source of cruel and unusual punishment arguments in other states (though not necessarily based in state law), New York lacked the death penalty for much of this period and thus it was rarely invoked.¹⁷ The remaining rarely invoked rights claims are areas where federal law remained relatively stable or actually expanded protection, such as takings, and thus lawyers had little incentive to push separate state arguments.

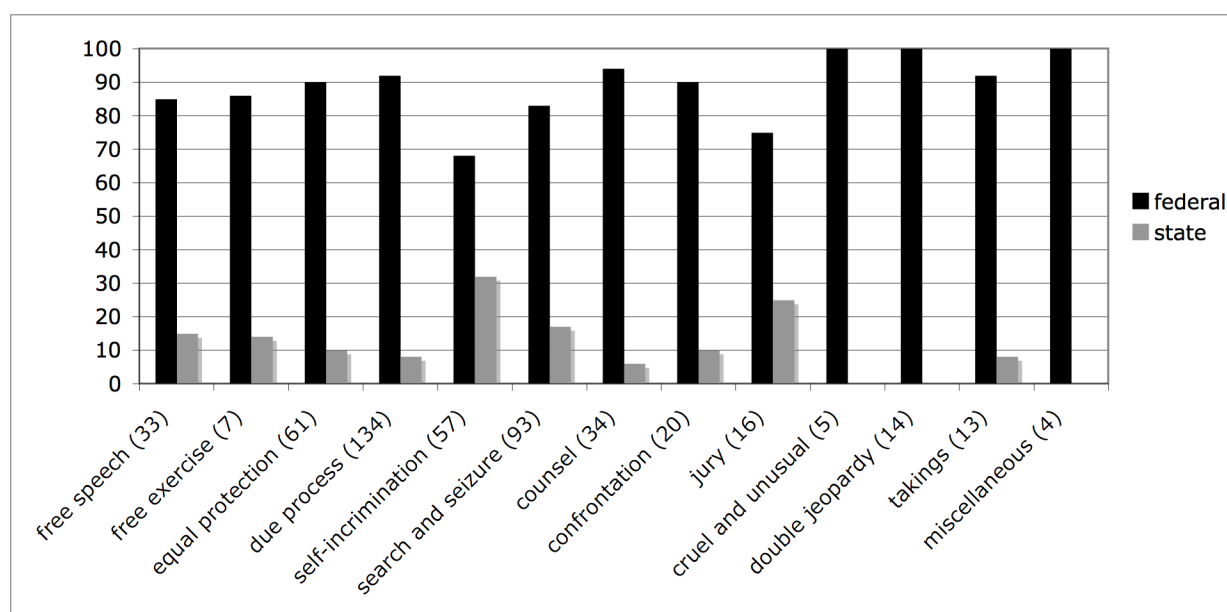


Figure 5.2. Percentage of arguments by rights area, New York 1970-2000. N=491 arguments.

Figures 5.3 and 5.4 show the content measure results. Of the 66 state constitutional arguments, 91% cited two or fewer of these factors. Turning to Figure 5.4, clearly New York state law represented the dominant factor discussed. Nearly 75% of the state arguments cited either prior state constitutional rules, in particular *Hobson* and related cases, or state common

¹⁷ After the Supreme Court temporarily stalled capital punishment in the mid-1970s, New York Governors Carey and Cuomo repeatedly vetoed attempts to reestablish capital punishment. It was reestablished finally in 1995 with Governor Pataki's signature but was struck down in 2004. The Court of Appeals held that the provision regarding jury deadlock instructions violated the state constitution. *People v. LaVelle*, 3 N.Y.3d 88 (2004). The law remains unenforceable because legislative attempts to amend the provision have failed.

and statutory law. About a quarter of state arguments also discussed prior examples of judicial federalism in New York as an example of the Court ignoring federal decisions in other areas and urging it to do so again. Few arguments cited the remaining factors. While infrequent, textual difference arguments may be misleading because the text of most of the New York constitutional criminal procedure provisions is substantially similar to the federal provisions. The nearly complete failure to offer state constitutional history arguments likely relates to the fact that case law rarely discusses it and primary source research is time consuming and difficult. Arguments rarely utilized issues of state or local interests or public attitudes to justify expanded state protection and none used structural arguments. As will be shown below, arguments made primarily in response to federal retrenchment typically rely on undermining the logic of the Supreme Court's new direction rather than on these kinds of legal factors and those made in response to prior state court engagement typically cite to that prior history alone with the remaining factors being unnecessary.

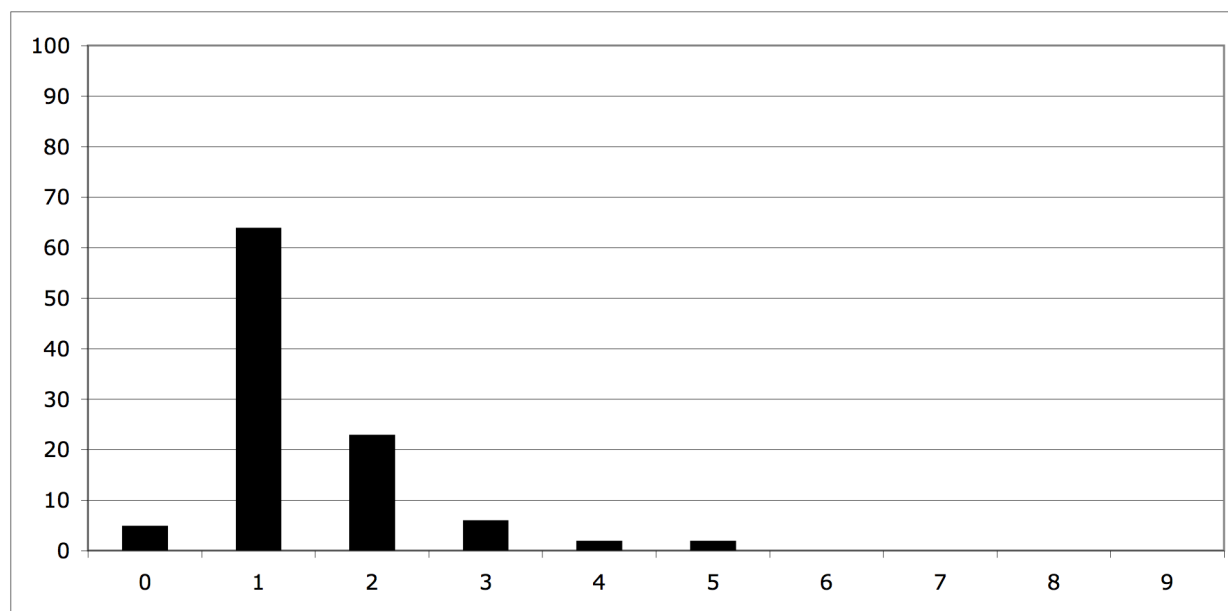


Figure 5.3. Percentage of state arguments by total factors cited, New York 1970-2000. N=66.

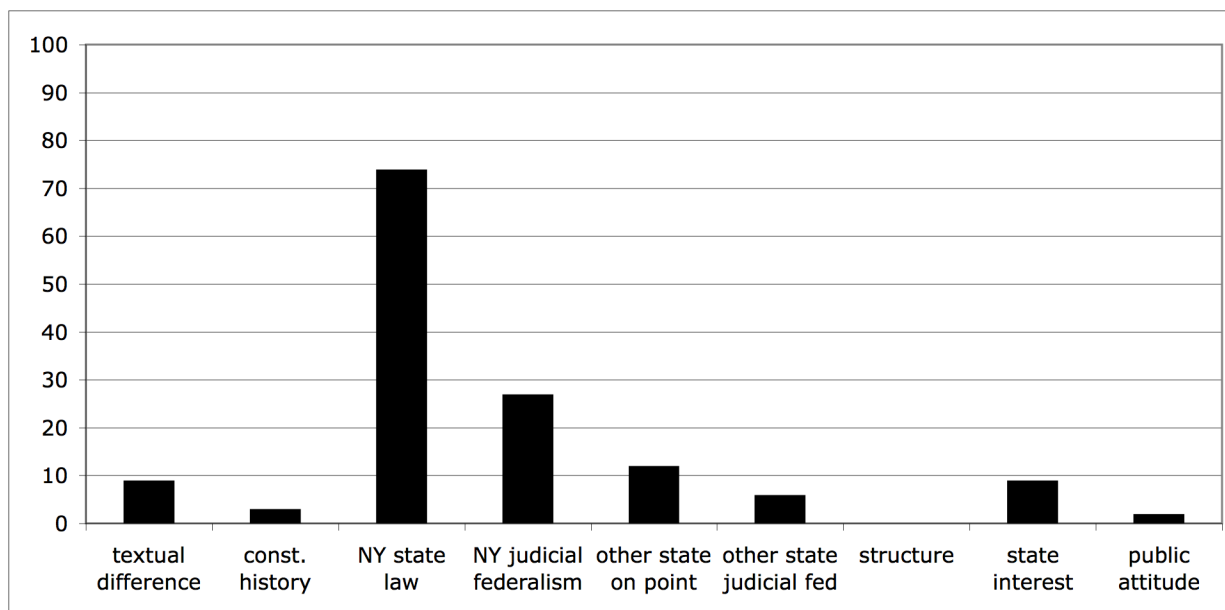


Figure 5.4. Percentage of state arguments citing each factor. N=66.

Federal retrenchment

While both signals are present in the patterns of state constitutional arguments in New York, federal retrenchment was the most frequent influence leading to state rights arguments. A particularly clear example of this dynamic is *Sharrock v. Dell Buick-Cadillac* (1978).¹⁸ The case involved a garageman's lien statute that allowed sale of vehicles when the bill for service was not paid without providing any opportunity for the owner to seek a hearing or review. The legal dispute centered on whether state action was present as the failure to allow any review was a fairly clear due process violation. While the Warren Court had widened the federal definition of state action to apply to various types of private action, the Burger Court was moving in a more restrictive direction. In the claimant's initial brief, the state argument was clearly secondary in nature amounting to a short five-page analysis preceded by twenty-two pages of federal analysis.

¹⁸ 45 N.Y.2d 152.

The state argument noted that many state courts had rejected federal law (though not on the state action issue), that the Court of Appeals could follow a similar path, and that the state due process clause lacked any clear state action language.¹⁹ Shortly after the submission of this brief, however, the Supreme Court upheld a related New York law ruling that state action was not present.²⁰ This left virtually no federal support for the claimant's position in *Sharrock* and the Court of Appeals specifically instructed supplemental briefing on the effect of this decision. The supplemental brief reversed the prior attention to federal and state arguments: after a perfunctory five-page attempt to distinguish the Supreme Court's recent decision, it provided a twenty-two page state argument. Some of the material was repeated from the initial brief, such as the textual difference, but now it emphasized the importance of state constitutions in general as primary protections of rights and sources for local variations on national themes. Of course, this primary place of state constitutions was not mentioned initially and the close of the supplemental brief places the emphasis not on the logics of federalism but on the irresponsibility of the Supreme Court's change in the law, which it noted was by a narrow 5-3 vote. The Supreme Court's decision was "neither legally nor logically sound" and resulted "in a total denial of any Fourteenth Amendment protection" by sanctioning summary creditor actions.²¹ After discussing the weaknesses of the Supreme Court opinion, the argument closed by pointing to Justice Stevens's dissent as more persuasive: the "strength of Justice Stevens' dissenting opinion, particularly when contrasted with the unsoundness of the majority opinion, should lead this

¹⁹ "No person shall be deprived of life, liberty, or property without due process of law." N.Y. Const. Art. I, Sec. 6. This lacks the Fourteenth Amendment's "nor shall any State deprive" language.

²⁰ *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

²¹ *Sharrock*, 45 N.Y.2d 152, plaintiff's supplemental brief at 27, 25.

Court to reject the [Supreme Court’s decision] in construing its own constitution.”²² Thus, as the uncertain federal terrain became clearly hostile, the claimant’s brief emphasized the central importance of state constitutions in protecting rights but still framed around the logic of the federal rule.

Examples in education, abortion funding, and search and seizure demonstrate similar dynamics. In 1973, the Supreme Court rejected federal constitutional challenges to fiscal inequalities in school funding holding that education is not a fundamental right and that wealth classifications are not suspect.²³ This decision initiated the single most important area of state constitutional activism where litigants turned to state constitutions and often won major policy changes. While these suits emphasized state constitutional education clauses primarily—and because these are unique provisions with no federal parallel they are not discussed here—litigants also offered equal protection arguments. In *Board of Education v. Nyquist* (1982),²⁴ the claimants argued extensively that New York’s funding scheme that resulted in wide disparities between districts violated the state equal protection clause, but they did so utilizing the federal tiers-of-scrutiny test. While the equal protection clauses are identical in language, the brief stressed that the education clause supported treating education as fundamental under the state provision and that wealth should be treated as a suspect classification. Again, the constitutional logic was primarily drawn from federal cases with the thrust of the brief being that the Supreme Court was wrong to discount the importance of education. Similarly, in *Hope v. Perales* (1994), claimants stressed that the Supreme Court’s decision to allow states to prohibit funding for low-

²² Ibid. at 28.

²³ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁴ 57 N.Y.2d 27.

income women to receive abortions was reckless and irresponsible.²⁵ The brief described federal reproductive privacy as “now-eroded federal principles” and stated that “the federal right of reproductive choice is both insufficient to afford relief in this case and increasingly unsure in general.”²⁶ Unlike *Nyquist*, here claimants had some New York precedent to draw upon because the Court of Appeals had issued decisions striking down criminalization of sodomy (though on federal grounds as the brief admits) and recognizing a due process liberty interest in controlling personal medical treatments.²⁷ The strongest reliance was placed on the six state courts that had struck down similar statutes by refusing to follow the weakened federal test, instead applying the older strict scrutiny of abortion restrictions.

Search and seizure law provides a number of examples of state arguments deployed only when federal law has abandoned any reasonable support. For example, in a case involving warrantless inventory searches of the possessions of arrestees, the claimant stressed, “we strongly believe that the Supreme Court has given undue attention to ‘consideration[s] of orderly police administration’ at the expense of an arrestee’s legitimate privacy interest.”²⁸ The claimant went on to note both prior examples of judicial federalism from New York as well as a number of other state supreme courts rejecting the expansion of inventory searches utilizing the logic of Supreme Court dissenters. In *People v. Griminger* (1988),²⁹ the Court was asked to reject the Supreme Court’s “totality of the circumstances” standard for judging the sufficiency of hearsay

²⁵ *Harris v. McRae*, 448 U.S. 297 (1980).

²⁶ *Hope*, 83 N.Y.2d 563, Plaintiffs-Respondents brief at 23, 33.

²⁷ *People v. Onofre*, 51 N.Y.2d 476 (1980) (criminal consensual sodomy law violates federal constitution); *Rivers v. Katz*, 67 N.Y.2d 485 (1986) (holding that state law regarding forced medication of medication failed to meet standards of due process under state constitution). See also, *Cooper v. Morin*, 49 N.Y.2d 69 (1979) (holding that pretrial detainees were entitled to reasonable visitation under state but not federal constitution).

²⁸ *People v. Gonzalez*, 62 N.Y.2d 386 (1984), Appellant’s brief at 13 (internal citations omitted). The complained of decision was *Illinois v. Lafayette*, 462 U.S. 640 (1983).

²⁹ 71 N.Y.2d 635.

evidence for warrant applications in favor of the now discarded *Aguilar-Spinelli* rule.³⁰ The claimant's argument stressed at length another speech from Justice Brennan calling for state action where his own court was busy cutting back protections, specifically citing the Fourth Amendment. The claimant stroked the state justices' egos by noting the prior examples of their engagement with judicial federalism as demonstrating that "this Court has been in the vanguard of singularly emphasizing the primacy of the New York State Constitution in the protection of individual rights."³¹ The claimant was forthright in his demand that the Court of Appeals simply adopt the prior federal logic through the state provision. A similar dynamic is evident with the open fields exception where the Supreme Court held that in land outside of the curtilage of the house governmental officials do not need warrants regardless of whether the land was fenced or otherwise marked.³² In a 1988 case the Court of Appeals rejected a state constitutional challenge regarding unmarked land but reserved the question of whether marking or fencing may be protected.³³ In *People v. Scott* (1992)³⁴ this issue was squarely presented to the Court. The claimant's argument stressed the dissenting opinions of Brennan and Marshall attacking the open fields exception. Further reliance was placed on the fact that in New York the incursion into property clearly marked is criminal trespass and thus the state has a history of respecting expectations of privacy in such remote land. In a case decided jointly with *Scott*, *People v. Keta* (1992), the claimant noted that an administrative search law had been invalidated by the Court of Appeals in 1986 but was reversed by the Supreme Court and the case was dismissed as moot before it had a chance to be heard on remand. The claimant stressed that the Court of Appeal's

³⁰ *Illinois v. Gates*, 462 U.S. 213 (1983) overruled the more protective standard from *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

³¹ *Griminger*, 71 N.Y.2d 635, Respondent-Appellant's brief at 23.

³² *Oliver v. U.S.*, 466 U.S. 170 (1984).

³³ *People v. Reynolds*, 71 N.Y.2d 552 (1988).

³⁴ 79 N.Y.2d 474.

original logic was still sound and criticized the Supreme Court for breaking with its long line of precedents limiting the nature of administrative searches.

These examples from state action, abortion, education financing, and search and seizure demonstrate a fairly clear convergence on state constitutional law only after the Supreme Court demonstrated a strong degree of retrenchment. Claimants turned to state provisions as a final effort to preserve the federal protections now abandoned by the U.S. Supreme Court. The state arguments were used as an alternative path through which claimants could push the continued reliance on now discarded federal precedents.

The Supreme Court's signals, of course, are not always as clear as the above cases. In some areas the legal trends are in flux and uncertain. In such a situation state constitutional arguments may appear to be viable supplemental arguments, treated essentially as a fallback position for a primarily federal claim. Two privacy cases from 1980 illustrate this dynamic of underdeveloped state arguments as supplements to primary federal claims. While the Supreme Court had found an implied right to privacy during the 1960s that culminated in *Roe v. Wade* (1973), by the late 1970s the Court's signals about the reach and meaning of privacy and substantive due process was less clear.³⁵ Each case pushed novel claims centered primarily on the Warren Court era due process decisions. In *People v. Shepard* (1980),³⁶ the claimant argued that criminalization of marijuana use was unconstitutional. *People v. Onofre* (1980)³⁷ attacked the criminalization of consensual sodomy. In each case claimants prepared multiple federal

³⁵ In *Maier v. Roe*, 432 U.S. 464 (1977), the Supreme Court upheld state funding that provided Medicaid benefits for poor women who gave birth but not for abortions. In *Harris v. McRae* (1980) a congressional ban on any federal money to elective abortions was upheld. In *Moore v. East Cleveland*, 431 U.S. 494 (1977) the Court was heavily divided, 4-4-1, over whether substantive due process encompassed the decision for closely related people to live together.

³⁶ 50 N.Y.2d 640.

³⁷ 51 N.Y.2d 476.

claims attacking the laws but presented only parallel state privacy claims. In *Shepard*, the federal privacy claim was detailed and extensively analyzed the ways in which marijuana criminalization implicated personal autonomy, particularly stressing personal use in the home and the state argument, in contrast, consisted primarily of a lengthy laundry list of examples where the Court of Appeals applied a stricter standard than federal courts (none of which had significant bearing on privacy or substantive due process) and a general statement that the Court of Appeals is free to apply a stronger standard. Interestingly, the brief did not raise the single most powerful case—a decision from Alaska recognizing that possession of small amounts of marijuana at home is protected by the state constitution³⁸—in favor of its state argument but presented it in the federal analysis section implying a different basis for the decision than it clearly declared.³⁹

In *Onofre*, the federal claim began by noting some negative implications from a few federal courts but stressed that it was unsettled and engaged in an extensive analysis of the ways in which criminalization of consensual sexual relations implicated privacy, autonomy, and the ability to seek self-fulfillment in personal relations. This level of detail and analysis was absent in the state claim. While admitting that the Court of Appeals had never found an implied state constitutional right to privacy, the claimant asserted that it could do so because the same constitutional provisions that were the basis for the federal penumbral right to privacy are present at the state level. In terms of the substantive content of such a right, the claimant simply pointed to the federal substantive due process cases leading up to *Roe*: such decisions should be viewed “as good advice from the nation’s highest court, regarding fundamental principles of liberty, and

³⁸ *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

³⁹ The brief describes *Ravin* as a “unanimous decision finding that criminalization of the possession of marijuana in the privacy of the home violates *the* constitutional right to privacy.” *People v. Shepard*, 50 N.Y.2d 640 (1980), Appellant’s brief at 23 (emphasis added).

they could well be adapted intact as interpretations of New York's own Constitution.”⁴⁰ This is an unusually explicit statement of what is typically left implicit: a call for the Court of Appeals to read recently abandoned (or weakened) federal law into the state constitution.

Claimants followed a standard path in federal retrenchment cases. With the initial weakening of federal protections, claimants turn to state arguments as an underdeveloped supplementary claim. Claimants rely heavily on federal law attempting to distinguish the negative cases with the state argument presented as an emergency out should the Court of Appeals not be persuaded on federal grounds, used as a way to note a work around should the Court of Appeals be unhappy with the federal result. As federal law moved to a more complete retrenchment, claimants presented solely state claims but still relied upon the now discarded federal decisions. The state arguments are essentially invitations for evasions, reminding the Court of Appeals that it need not following unpalatable changes in federal law.

Internal encouragement

The *Hobson* rule demonstrates the most powerful example of internal signaling in New York. Where the Court was willing to give guidance and leadership to its bar, the legal arguments shifted in response. Through repeated statement and clarification from the Court, by the mid-1980s the contours of the rule were reasonably clear to lawyers and utilized frequently with little attempt to resort to federal logics because lawyers had been given greater guidance. *Hobson* cases represent a quarter (17) of the state arguments in my New York sample.

Early briefs demonstrated a great deal of confusion over the basis for the earlier *Donovan* and *Arthur* cases discussed above. In *People v. Robles* (1970), the claimant presented these cases

⁴⁰ *People v. Onofre*, 51 N.Y.2d 476 (1980), Respondent's brief at 36.

as solely federal, describing them as involving the violation of the “Fifth and Sixth Amendments”⁴¹ despite the clear statement in *Donovan* that it was not reaching this question. No mention was made of the state basis for the rule and the state constitution was not even cited. When the Court of Appeals strongly reasserted the rule in *Hobson* in 1976, it did so with no assistance from the legal arguments presented. The claimant’s argument amounted to a few citations to the state cases with no citation to, or indication of, the constitutional basis for the rule; this provided virtually no support for the Court’s eventual detailed analysis of *stare decisis* and reinvigoration of the rule. Another argument from 1976 described only vaguely the “law in this state” and how the police actions violated both constitutions’ counsel provisions.⁴² While the briefs provided little in terms of substance, the Court decided on its own to develop and clarify the basis for such a strong counsel rule, unique among American jurisdictions.

This guidance from the Court did not immediately eliminate the incorrect statements of the rule. In *People v. Settles* (1978), the claimant noted the clarification of the rule in *Hobson* but dramatically misstated its legal basis: *Hobson* “stands for the proposition that an in custody interrogation, after indictment, and without waiver of counsel in the presence of counsel is a violation of the defendant’s rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.”⁴³ The state constitution is never cited and the incorrect attribution as a federal rule is restated at a number of points. Again the Court took the opportunity to clarify and express the rule as one of solely state law.⁴⁴ While some briefs cited

⁴¹ *People v. Robles*, 27 N.Y.2d 155 (1970), Appellant’s brief at 39, 49.

⁴² *People v. Townes*, 41 N.Y.2d 97 (1976), Defendant-Appellant’s brief at 14, 13.

⁴³ *People v. Settles*, 46 N.Y.2d 154 (1978), Appellant’s brief at 15.

⁴⁴ *People v. Settles*, 46 N.Y.2d at 162-163 (after a lengthy restatement of the state constitutional rule, “we take this opportunity to make explicit that which was implicit in *Hobson*: a criminal defendant under indictment and in custody may not waive his right to counsel unless he does so in the presence of an attorney”).

both constitutional provisions after *Settles*, none again misstated the rule in such a manner. Instead the string citation of federal provisions appears to parallel the practice common in federal arguments of including a state citation in a string of others without any development; it is included as little more than an afterthought. After 1982, none of the arguments still included citations to the federal provisions. Instead, claimants relied extensively upon the precedent the Court of Appeals had developed and reiterated, though occasionally with federal cases utilized to supplement this primary argument. By the mid-1980s the core of the *Hobson* rule appears relatively stable with the arguments focused on applying it to unusual situations. Examples include the use of statements made in federal court in subsequent state prosecutions,⁴⁵ an instance where the authorities intentionally delayed arresting suspects until pending charges were completed and the legal representation ended so as to avoid the derivative counsel rule,⁴⁶ and whether representation on an unrelated charge in another state invoked the state rule.⁴⁷ After 1990, *Hobson* cases disappear from my sample completely and it seems that the Court had sufficiently specified the contours of the rule and had less need to regularly police the work of lower courts. Here, the internal signals were strong and reiterated frequently so that the bar eventually grasped the state logic and discarded any reliance on federal law.

Of course, internal signals are not always clear. Drug testing challenges demonstrate how weak internal signals offered little clear guidance to lawyers. The subject of random drug testing was unsettled during the 1980s and it was an open question whether individualized suspicion was a necessary element under the Fourth Amendment. Until the Supreme Court upheld random drug

⁴⁵ *People v. Velasquez*, 68 N.Y.2d 533 (1986).

⁴⁶ *People v. Robles*, 72 N.Y.2d 689 (1988).

⁴⁷ *People v. Bing*, 76 N.Y.2d 331 (1990).

testing in some contexts in 1989,⁴⁸ federal law was unclear. In *Patchogue-Medford* (1987)⁴⁹ the Court of Appeals held that random drug testing of probationary teachers was an unconstitutional search under both constitutions. Interestingly the teachers did not present a state constitutional claim, as a vigorous concurring opinion stressed. While the Court justified its decision by noting that the petition for review plead a general violation of the right against unreasonable search and seizure without a specific constitutional reference, this ignored the fact that the claimant's brief relied solely on federal law; the claimants failed to even cite the state provision, instead repeatedly asserting a violation of only the Fourth Amendment. Additionally the Court noted that an *amicus* brief did raise the state issue but as the concurrence argued, accepting this claim was highly unusual because "*amicus* cannot define the issues presented to the court." By reaching such a state claim essentially *sua sponte* the Court was "function[ing] as an advocate for the prevailing side rather than as a court."⁵⁰ The Court's decision to reach the state issue demonstrated a clear interest in the subject, but the opinion was hardly a clear statement of state constitutional law. Instead, it essentially declared that because this search violated the Fourth Amendment, it certainly violated the state provision also. The analysis did not follow *Long*'s clear statement rule and instead presented only vague signals about what the independent provision may actually mean.

⁴⁸ *Skinner v. Railway Labor Executives Assoc.*, 489 U.S. 602 (1989) (suspicionless drug testing of railroad employees involved in accidents was reasonable); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding suspicionless testing where customs employees sought to work in drug interdiction areas).

⁴⁹ *Patchogue-Medford Congress of Teachers v. Bd. of Educ. of Patchogue-Medford*, 70 N.Y.2d 57 (1987).

⁵⁰ *Patchogue-Medford*, 70 N.Y.2d at 71 (Simons, J., concurring).

A year later the Court was asked to review another drug testing program, this time involving police officers in a specialized drug unit.⁵¹ The claimant relied heavily on *Patchogue-Medford* but despite, or perhaps because of, the Court's tepid statement of a state search basis framed the argument solely in terms of federal constitutional law. Neither the majority, which upheld the search because of the special circumstances involved in drug enforcement, nor the dissent sought to clarify the constitutional logic of the rule or whether the state constitution provided any greater protection than federal law. Despite the lack of any clarifying guidance from the Court, the claimant's brief in *Seelig v. Koehler* (1990)⁵² contained a clear state constitutional analysis with only secondary reliance on the Fourth Amendment. The claimant was candid about the reason for this style of argument: "Even if, as [the state] argue, the recent United States Supreme Court decisions upholding suspicionless random drug testing rendering the Fourth Amendment a hollow precept, [the state provision] affords a more protective standard with regard to privacy rights found to be highly intrusive."⁵³ Thus, it was the recent decision of the Supreme Court to uphold similar drug searches rather than the Court of Appeals weak signal that drove the decision to present the claim. The argument stressed previous examples of judicial federalism in New York, the fact that high courts in both New Jersey and Massachusetts had recently refused to follow the Supreme Court's lead, and the logic of *Patchogue-Medford*. On this last point the brief was particularly strong in desiring a clear statement that the rule was one of state constitutional law so as to eliminate the ambiguous nature of the earlier decisions.⁵⁴ In

⁵¹ *Caruso v. Ward*, 72 N.Y.2d 432 (1988).

⁵² 76 N.Y.2d 87.

⁵³ *Seelig*, 76 N.Y.2d 87, Petitioners-Appellants brief at 13. Similarly the brief notes, at 15, that two other state courts "consider[ed] the 'dismantling' of the Fourth Amendment to be so invidious that they have based their decisions regarding random drug testing solely on their states' constitutions."

⁵⁴ *Seelig*, 76 N.Y.2d 87, Petitioners-Appellants brief at 19.

addition to rejecting the claim, the Court again failed to clarify the rule and the final drug test argument in my sample presented the case in federal terms without any mention beyond a string cite of the state provision.⁵⁵ With only a weak signal from the Court of Appeals, litigants did not significantly focus on state constitutional arguments until after the Supreme Court acted and the refusal to strengthen its prior signals led litigants to ultimately abandon the claim.

Where the Court of Appeals clearly, explicitly, and repeatedly emphasized a state constitutional rule, as it did in *Hobson* cases, the claimant's arguments eventually shifted and followed the state rule. Through clear instructions in this one doctrinal area, the Court of Appeals altered the way that these claims were argued so that they focused less and less on federal legal changes and more on the internal logic of the state rule itself. In contrast, the decision in *Patchogue-Medford* presented a muddled signal, at best. The Court made little more than a bare assertion without any discussion of the basis for any independent state rule and lawyers only turned to this state argument after the Supreme Court demonstrated a deferential standard of review for drug testing. Without a clear commitment to the state rule, lawyers simply did not evidence great interest in the alternative argument.

An anomaly

While the above discussion demonstrates that signals help induce a greater frequency of state arguments, anomalies do exist. This is expected in part simply because at times the degree of support for a legal claim may be a matter of judgment and a rights restricting decision may be unclear as to how far it reaches in other situations. Yet in one case a state argument was made in clear contradiction of my argument. In fact, signals from both the Supreme Court and the Court

⁵⁵ *Delaraba v. Nassau County Police Dept.*, 83 N.Y.2d 367 (1994).

of Appeals weighed against any state constitutional claim. The issue involved prosecutorial use of peremptory challenges to exclude racial minorities. In 1965, the Supreme Court largely insulated the practice from constitutional review by requiring a nearly impossible standard of proof from defendants.⁵⁶ While a lower New York court had found that racially motivated use of peremptory challenges violated the state constitution,⁵⁷ the Court of Appeals rejected the argument in *People v. McCray* (1982) holding that the state constitution's protection was coequal to the federal level.⁵⁸ In *Batson v. Kentucky* (1986),⁵⁹ the Supreme Court overruled its former decision by significantly lowering the defendant's burden of proof to call peremptory challenges into question and thus expanded the degree of federal protection. Thus, neither internal nor external signals were favorable to state constitutional arguments. In *People v. Hernandez* (1990),⁶⁰ however, the claimant did stress a well-developed state constitutional argument after a *Batson* claim; in fact this argument cited the largest number of factors, five, of my New York sample. The argument began with strategic use of the linkage between the state and federal provisions in *McCray*, stressing that if they are coequal then the state provision must now offer protection at the same level as the newer federal test. In further support of a state rule, the history of New York's statutory prohibition of discrimination in jury selection and the constitutional history of the adoption of the state equal protection provision in 1938 were each addressed, in addition to the other examples of judicial federalism from the Court of Appeals. While ultimately

⁵⁶ *Swain v. Alabama*, 380 U.S. 202 (1965).

⁵⁷ *People v. Thompson*, 435 N.Y.S.2d 739 (App. Div. 1981).

⁵⁸ 57 N.Y.2d 542. Oddly, the brief failed to make a state constitutional argument in this case. It referred obliquely to the state constitution only once and failed to note the basis for *Thomson*; instead relying primarily on various aspects of modern federal equal protection analysis to attack the process. Of course, it may be the case that a clear state argument was presented in subsequent briefs.

⁵⁹ 476 U.S. 79.

⁶⁰ 75 N.Y.2d 350.

unsuccessful,⁶¹ the most reasonable explanation for this unusual argument is the attorney's strategic and long term strategy of establishing a state rule should the Supreme Court abandon *Batson* in the near future.

Conclusion

In the aggregate, the experience in New York is broadly similar to Ohio. Lawyers primarily rely on federal arguments and turn to state claims where federal retrenchment undermines their case. These arguments stress policy attacks on federal doctrine, seeking to evade retrenchment by inviting the Court to apply newly weakened or discarded federal precedents under the window dressing of state constitutional provisions. However, in the *Hobson* cases, lawyers developed a more coherent, independent analysis focused on the internal logic of the state doctrine. Lawyers in these cases abandoned nearly all consideration of federal law in favor of focusing on the case law provided by the Court of Appeals. This is suggestive of the power of internal encouragement. As the Court of Appeals reiterated the *Hobson* rule as a requirement of the state constitution alone, lawyers adapted to this new precedent and altered their arguments. The next two chapters explore how broader signals, state high court declarations of the criteria and primacy approaches, alter litigant behavior on a broader level than found in the narrower doctrinal encouragement from New York.

⁶¹ *Hernandez*, 75 N.Y.2d at 358: “Our analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right, as no justification for breaking new ground as to this clause by differentiating between this dually protected constitutional right is sufficiently advanced.”

Chapter 6

Washington: Arguing *Gunwall*

Where the New York Court of Appeals resisted any clear guidance on how to approach state constitutional law, and the Ohio Supreme Court resisted the very concept of independent analysis, the Washington Supreme Court not only actively engaged with its constitution but issued broad and clear requirements as to how state arguments were to be offered. Not only did the Court adopt the criteria test requiring lawyers to brief and discuss six different legal criteria to justify an independent interpretation, but also it consistently refused to recognize any state claim that failed to abide by these rules. This strict adherence to the criteria test led to significant shifts in how lawyers made constitutional arguments. While the arguments continued to focus in areas of retrenchment, they rarely focused on the kinds of policy criticisms seen in Ohio and New York. Lawyers may not have consistently complied with the criteria approach, but the substantive arguments shifted dramatically by offering these legal criteria arguments to support an independent state constitutional doctrine.

Adopting the criteria test

As with most state high courts, state constitutional issues became increasingly important to the Washington Supreme Court in the late 1970s and '80s. Unlike most other courts, however, it responded by expressing a clear state constitutional theory to guide how lawyers were expected

to argue such claims. Under the influence of Justice Robert Utter,¹ who published widely on state constitutional theory and its application in Washington (Utter 1984, 1985, 1988, 1992; Utter and Larson 1988; Utter and Pitler 1987; Utter and Spitzer 2002), the Court adopted a strong preference for hearing state constitutional claims but only when they were properly presented. While initially flirting with a quasi-primacy approach, the Court ultimately settled on the supplementary, criteria test.

The first attempt at clarity came in *State v. Coe* (1984)² where Justice Utter wrote for the Court declaring that the constitutional challenge to a judicial order forbidding broadcasting of trial evidence should first be examined under the state constitution. The Court offered a number of reasons for this approach. The very nature of the federal system and differences between the constitutions along with the histories of both “clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty.” Moreover, regular engagement with the state constitution allows the Court to “develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied.” This body of law will be more legitimate because it “will not appear to have been constructed to meet the whim of the moment.” Finally, it is simply illogical to apply federal law where narrower state law, whether common, statutory, or

¹ A 1980 survey of Washington law professors rated Utter as the most influential member of the Court. Perhaps not surprisingly given the correlation of ideology and support for judicial federalism, a 1980 survey of former law clerks and appellate attorneys found Utter to be the most liberal justice as well as the one most willing to actively use the Court’s power. This liberal reputation led to an unsuccessful challenge in the 1980 election after two prior uncontested elections (Sheldon 1988: 327, 321, 182).

² 101 Wash.2d 364.

constitutional, would have been sufficient.³ Despite this preference for state constitutional resolution, the Court maintained it should also resolve the federal issues even after it found the prior restraint to violate the absolute state right to publish and broadcast legally obtained information. Utter (1985) justified this approach as maintaining participation in the national debate.

Two years later, in *State v. Gunwall* (1986),⁴ the Court revisited this issue by specifying a clear preference for the criteria approach to state constitutional law in a case about whether a warrant is required to obtain phone records or to attach a pen register to a phone line. The Court expressed concern with the legitimacy of judicial federalism noting that

[m]any of the courts now resorting to state constitutions rather than to analogous provisions of the United States Constitution simply announce that their decision is based on the state constitution but do not further explain it. The difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.⁵

Gunwall established six “nonexclusive neutral criteria” that are necessary for demonstrating whether “the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”⁶ These criteria were specifically aimed at guiding counsel in arguing state constitutional issues as well as ensuring that any expansive state constitutional holding is based on “well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court.”⁷

³ *Coe*, 101 Wash.2d at 373-74.

⁴ 106 Wash.2d 54.

⁵ *Gunwall*, 106 Wash.2d at 60.

⁶ *Gunwall*, 106 Wash.2d at 58.

⁷ *Gunwall*, 106 Wash.2d at 62-63.

After *Gunwall*'s guidance proved less than effective, as discussed below, the Court strengthened the test. In *State v. Wethered* (1988),⁸ the Court declared that the *Gunwall* factors were not optional and that "[b]y failing to discuss at a minimum the six criteria mentioned in *Gunwall*, [claimant] requests us to develop without benefit of argument or citation of authority the 'adequate and independent state grounds' to support his assertions. We decline to do so consistent with our policy not to consider matters neither timely nor sufficiently argued by the parties." While other courts may have decided to expand *Miranda*-type protections, "we will not consider that question until the issue is adequately presented and argued to us."⁹ Subsequent cases consistently reiterated this rule requiring full *Gunwall* briefings before the Court will consider the issue. Hugh Spitzer (1998:1197) examined the 108 instances where the Court discussed *Gunwall* through 1997 finding that in nearly 60% of cases it refused to consider the issue solely because of inadequate briefing. Later cases also encouraged early complete briefing, refusing to consider issues where *Gunwall* analysis was made only in late reply or supplemental briefs.¹⁰ As the cases accumulated and developed a strong and clear body of law, the Court became less strict holding that "[n]o *Gunwall* analysis is necessary in this case because we apply established principles of state constitutional jurisprudence" but warning that "*Gunwall* analysis is nevertheless required in cases where the legal principles are not firmly established."¹¹ As discussed below, only cases involving search and seizure likely fit into this exception. A later analysis by Spitzer (2006) found that while *Gunwall* was primarily used to block claims in its

⁸ 110 Wash.2d 466.

⁹ *Wethered*, 110 Wash.2d at 472, 473 (internal citations omitted).

¹⁰ See *State v. Hudson*, 124 Wash.2d 107, 120 (1994) ("To allow Hudson to engage in a full *Gunwall* analysis so late in the appeal would encourage parties to save their state constitutional claims for the reply brief and would lead to unbalanced and incomplete development of the issues for review").

¹¹ *State v. White*, 135 Wash.2d 761, 769 n.7 (1998).

early years, through consistent reiteration it became less about whether to interpret the state constitution and more about how to interpret those provisions.

Aggregate trends

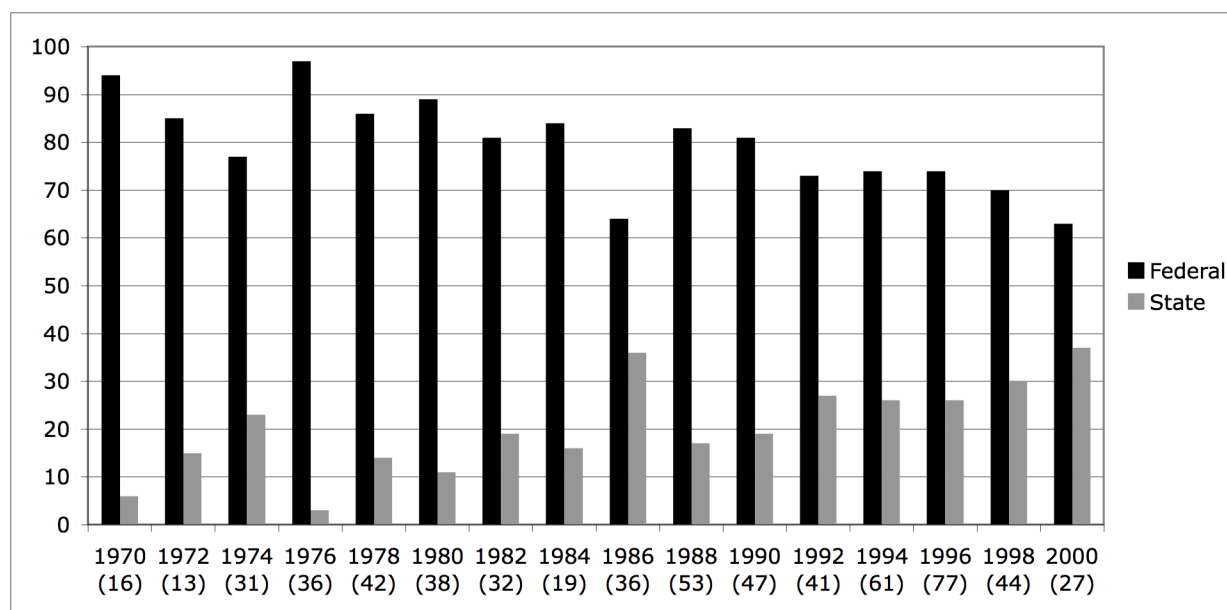


Figure 6.1. Percentage of arguments by year, Washington. N=613

I examined 613 constitutional rights arguments in Washington, finding that 79% (482) were federally based and 21% (131) were based on state constitutional law. Figure 7.1 tracks the percentages of each argument over time. With the exception of 1986, which is skewed by the fact that *Gunwall* itself represents three of the thirteenth state arguments, the trends show a generally increasing degree of state constitutional arguments and, unlike New York, there is no indication of a drop off in attention in the 1990s. This trend is at least suggestive that lawyers became increasingly attentive to the Court's guidance and its continued reliance on and reiteration of state constitutional law.

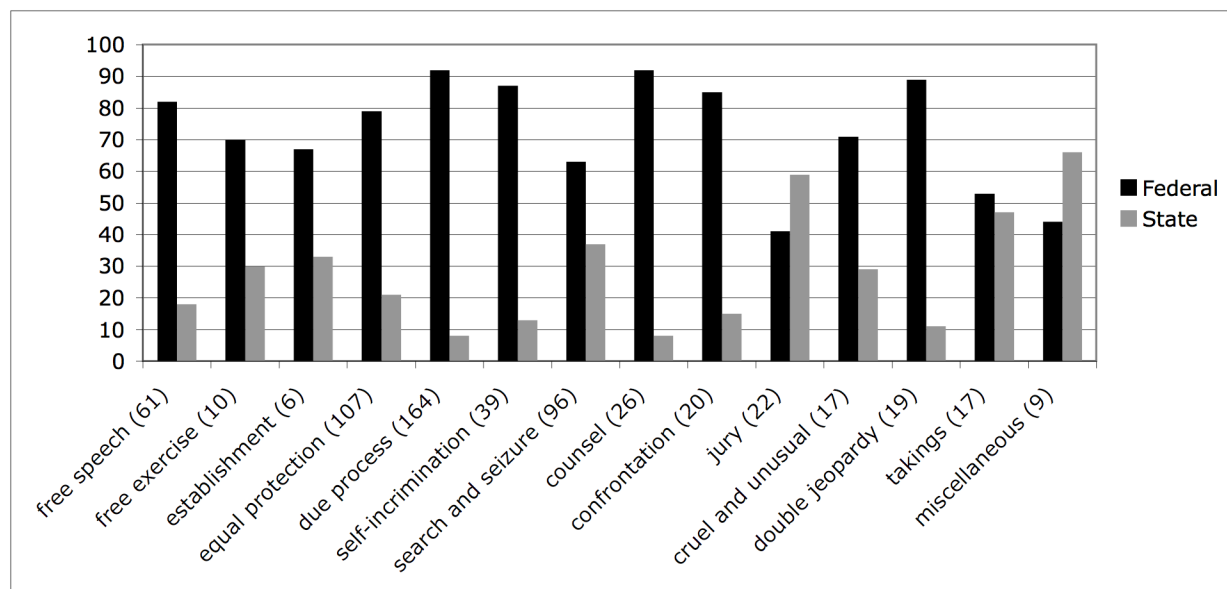


Figure 6.2. Percentage of arguments by year, Washington 1970-2000. N=613.

Figure 7.2 illustrates the percentage of rights arguments by various issue areas. Search and seizure cases represent the single largest number of state arguments, an unsurprising fact given the U.S. Supreme Court's retrenchment and that *Gunwall* was a search case. The finding that 21% of equal protection claims were state based is unexpected given the generally limited attention that equal protection receives in other states (Williams 2009: 209; see Fino 1987a), but is partly explained by the state's equal rights amendment and potentially by *Gunwall* as discussed below. Only jury issues showed a greater proportion of state than federal arguments and is due in part to major changes to the state's trial procedure but also reflects a trend in many states where jury rights saw some independent interpretation despite limited federal retrenchment (Cauthen 2000). The nearly equal split in takings issues is more surprising giving the fact that the U.S. Supreme Court was expanding the reach of federal law during much of this time.

Before *Gunwall*

Prior to the clear constitutional theory adopted in *Gunwall* and reinforced in *Wethered*, state arguments largely appeared in reaction to federal retrenchment and expressed the limited reasoning criticized so heavily by the Washington Court in later years. However, there was also some degree of internal doctrinal encouragement prior to *Gunwall*.

An interesting example of federal retrenchment came in the common area of school funding. Following the Supreme Court's rejection of school funding suits in 1973, claimants in *Northside School District No. 417 v. Kinnear* (1974)¹² attacked the state's policy under the state constitution on both education clause and equality grounds, though I only consider the equality issue due to the lack of a parallel federal education guarantee. Interestingly, the claimants did not argue for a different state test, instead stressing prior Washington precedents holding that the federal and state provisions were identical in application. Instead of rejecting the U.S. Supreme Court's decision, the claimants sought to apply that test, stressing that because of the state's education clause, "[t]here can be no doubt, therefore, under the principles of *Rodriguez*, that education *is* a fundamental interest under the Washington Constitution."¹³ As a fundamental interest, strict scrutiny applies to the state's system and even the U.S. Supreme Court's decision admitted that state funding schemes could not survive strict scrutiny.¹⁴

One of the clearest examples of response to retrenchment is *Gunwall* itself. The primary arguments revolved around warrantless access to telephone records and attachment of a pen

¹² 84 Wash.2d 685.

¹³ *Northside School*, 84 Wash.2d 685, Plaintiff-Petitioners brief at 31 (emphasis in original).

¹⁴ The Washington Supreme Court rejected both the education and equality arguments but reversed itself a few years later in *Seattle School Dist. No. 1 v. State*, 90 Wash.2d 476 (1978) but this case is not included in my study because the claimants pressed only an education clause argument and dropped the equality issue.

register to record the numbers called from a home.¹⁵ The U.S. Supreme Court had upheld the warrantless use of pen registers and the logic left little room for protecting telephone records.¹⁶ In *Gunwall*, the claimant noted that the text of the state provision was dramatically different: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”¹⁷ It also went on to note some recent examples where the Court rejected recent federal search law changes. But the strongest reliance was placed on attacking the policy underlying the U.S. Supreme Court’s decision. Specifically the claimant noted that three state high courts had recently rejected this specific decision, stressing that “each of the courts which has dealt with the question of the reasonableness of the expectation of privacy in a person’s financial or telephone records has noted the tremendous potential for abuse” under federal law. Quoting to the dominant treatise on search and seizure law, the decision is “a mockery of the Fourth Amendment” that opens intimate private details to indiscriminate police rummaging.¹⁸ The claimant closed with an invitation for evasion: “This Court should reject the narrow and outmoded interpretation of a reasonable expectation in phone records ... [and follow the other state courts] which place the judiciary in its proper [role] as the guardian of privacy interests against unwarranted invasions by the police.”¹⁹

In a number of other instances attempts were made to distinguish negative federal law with state arguments used as a last ditch effort. In *Federated Publications* (1980),²⁰ the claimants

¹⁵ There was also a third state search argument to the effect that even if those things were permissible, the subsequent warrant obtained was constitutionally invalid under *State v. Jackson*, 102 Wash.2d 432 (1984) where the Court rejected the totality of the circumstances test for judging informant reliability and credibility.

¹⁶ *Smith v. Maryland*, 442 U.S. 735 (1979).

¹⁷ Wash. Const. Art. I, Sec. 7.

¹⁸ *Gunwall*, 106 Wash.2d 54, Appellant’s brief at 12 (quoting LaFave 1984 edition).

¹⁹ *Gunwall*, 106 Wash.2d 54, Appellant’s brief at 13.

²⁰ *Federated Publications, Inc v. Kurtz*, 94 Wash.2d 51.

were newspapers attacking an order barring the public from a pretrial hearing. While the U.S. Supreme Court had recently rejected a nearly identical argument, the claimant stressed that the deciding vote only rejected the claim under the Sixth Amendment but reserved any First Amendment consideration and that this was still an open question. The state argument stressed that the state constitution also provided for a right to public trial but also a separate provision specifically guaranteed, “Justice in all cases shall be administered openly”²¹ and that some state courts had relied on similar provisions to limit courtroom closures. In *State v. Hehman* (1978) claimant argued that an arrest for a minor traffic offense was unconstitutional in the face of two recent U.S. Supreme Court decisions to the contrary by noting some factual distinctions.²² The argument then turned to a state issue noting that two state courts had invalidated arrests in similar situations but placed great reliance on a lengthy quote from a critical law review showing that the federal decisions “are not well received in all quarters.”²³ A similar dynamic is shown in *State v. Basson* (1986) involving successive confessions where unwarned incriminating statements were repeated after *Miranda* warnings were provided. The bulk of the argument sought to demonstrate that this case still fit into the weaker federal protections,²⁴ but it closed with an invitation for bald evasion of this federal restriction: “Under the state constitution, prior [federal] caselaw may be used as a guidance to determine that there is a bright line presumption” that subsequent warnings do not cure the initial constitutional defect.²⁵ Similarly, the claimant in *State v. Barkland* (1976) attempted to distinguish a recent negative federal precedent and deployed a limited state claim

²¹ Wash. Const. Art. I, Sec. 10.

²² *U.S. v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

²³ *Hehman*, 90 Wash.2d 45, Respondent’s brief at 9.

²⁴ The Supreme Court upheld the use of post-warning incriminating statements so long as the initial statement was voluntary, even where it did not comply with *Miranda*. *Oregon v. Elstad*, 470 U.S. 298 (1985).

²⁵ *Basson*, 105 Wash.2d 314, Respondent’s brief at 45.

that an earlier Washington precedent should control despite the fact that “the language of the opinion is not clear” as to whether it was based on the state provision.²⁶ These examples show a common trend of treating state provisions as a means to maintain a weakening federal standard.

As noted above, criminal jury issues had a large number of state arguments. Most of these dealt with petty offenses where even prior to incorporation of the federal jury provision against the states, the U.S. Supreme Court held that a jury was not required for petty offenses carrying less than six months of potential jail time.²⁷ Prior to 1980 this decision had no real effect in Washington because petty offenses tried in courts of limited jurisdiction where a jury trial was not permitted had an absolute right of appeal to the Superior Court where a jury trial could be held *de novo*; this arrangement was upheld in 1950.²⁸ In 1980, the legislature altered these rules to significantly limit the ability to seek a trial *de novo* and this faced immediate court challenges; in fact, four of the twelve state jury arguments, and three in 1982 alone,²⁹ involved this statute. The claimants stressed the state language providing that the “right of trial by jury shall remain inviolate.”³⁰ These words were clear and unambiguous “and provide for no restriction or limitation.”³¹ Two of the three 1982 claimants focused a great deal of attention on the constitutional history of juries as well as case law stressing the paramount role they play in Washington. Perhaps of more interest than what the claimants argued in these cases is what they did not argue: none cited the federal provision or any federal case law. The U.S. Supreme Court refused this claim early in the rights revolution and, thus, there was no history of favorable

²⁶ *State v. Barkland*, 87 Wash.2d 814, Appellant’s brief at 7.

²⁷ *Cheff v. Schanackenberg*, 384 U.S. 373 (1966).

²⁸ *Bellingham v. Hite*, 37 Wash.2d 652 (1950). However, the Washington Supreme Court later noted that this decision was likely incorrect, *Pasco v. Mace*, 98 Wash.2d 87, 89 (1982).

²⁹ *Pasco v. Mace*, 98 Wash.2d 87 (1982); *Seattle v. Crumine*, 98 Wash.2d 62 (1982); *Seattle v. Filson*, 98 Wash.2d 66 (1982).

³⁰ Wash. Const. Art. I, Sec. 21.

³¹ *Mace*, 98 Wash.2d 87, Petitioner’s brief at 10.

federal law to rely upon and the claimants were forced to develop their arguments without this reference.

Turning to internal signals, the expression of interest in state constitutional law in *Coe* had some influence; a small number of claimants' briefs included vague statements that the state constitutions may be a basis for decision. For example, an argument about due process restrictions on parole decisions stated, "it has been suggested that state courts should consider state constitutional protections before turning to the federal constitution to avoid ruling on constitutional issues when a case can be resolved on lesser grounds."³² Another brief asserted that at a minimum the state search provision should provide the same protection as a recent federal case and that one recent state search case "make it extremely likely that the State constitution provides even more protection."³³ Neither claimant made any clear argument beyond simply noting the existence of the state option. In a speech challenge to restrictions on abortion protests, the claimant's state claim became somewhat more distinct. After a lengthy federal argument, the claimant noted both *Coe* and a case about speech on private property³⁴ to show that speech rights under the Washington Constitution should prevail in any balancing test against other rights.³⁵ In *Kitsap County v. Kev, Inc.* (1986)³⁶ the state speech argument became increasingly distinct in large part because the case fit into the result of *Coe* more clearly. The claimant challenged a permanent injunction declaring an "erotic dance studio" to be a public nuisance and stressed the text of the state provision and the logic of *Coe* as creating a per se rule

³² *Petition of Ayers*, 105 Wash.2d 161 (1986), Petitioner's brief at 15. I did not code this or the following assertion as a state argument given the lack of any development beyond simply noting the state provision exists.

³³ *State v. Terrovona*, 105 Wash.2d 632 (1986), Appellant's brief at 21 (a state argument was explicitly made on another issue in this case).

³⁴ *Alderwood Associates v. Washington Environmental Council*, 96 Wash.2d 230 (1981).

³⁵ *Bering v. SHARE*, 106 Wash.2d 212 (1986), Appellants brief at 19.

³⁶ 106 Wash.2d 135.

against prior restraints arguing that the county could only punish the studio for abuses after they occurred. Federal law was not particularly hostile in either of these cases, but they at least began to suggest state arguments to supplement the primary federal claims. However, the arguments were hardly well developed and likely contributed to the frustration expressed in *Gunwall*.

Gender equality provides a strong example of a clear state based doctrine. In 1972, Washington voters approved an Equal Rights Amendment to the state constitution and the Court applied this provision strictly.³⁷ In *Darrin v. Gould* (1975), the Court interpreted the ERA to forbid gender discrimination even if it might have satisfied the strict scrutiny test.³⁸ Six gender discrimination arguments are present in my sample for all years—this helps explain the relatively large number of state equal protection arguments—and two prior to *Gunwall*, both in 1978. In *Marchioro v. Chaney* (1978)³⁹ the claimant attacked a statute requiring gender diversity in representatives to party conventions as violating this absolute bar against gender classifications. In *Seattle v. Buchanan* (1978),⁴⁰ the claimant challenged a city ordinance defining exposure of female breasts alone as lewd conduct. The claimant argued that such a law “develops from a tradition that seems to indicate that there is something wrong, abnormal or incorrect about having been born as a woman” but that under the ERA, “our courts and legislatures may no longer consider femaleness to be an aberration of maleness, subject to unique restrictions,

³⁷ Wash. Const. Art. XXXI: “Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”

³⁸ 85 Wash.2d 859 (“Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination, except possibly to make the validity of a classification based on sex come within the suspect class under Const. art. 1, s 12 ... Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment.”).

³⁹ 90 Wash.2d 298.

⁴⁰ 90 Wash.2d 584.

disabilities or preferences.”⁴¹ Neither brief bothered with a discussion of federal law, despite the increasing protection under federal law, instead relying solely on the state equality argument as expressed in *Darrin*.

This image of state constitutional arguments largely tracks with broader experience. Lawyers offer state constitutional arguments primarily where federal law either lacks support for their claim or is increasingly unsure. These arguments were the kind complained of in *Gunwall*: they presented fairly vague assertions and tended to simply invite evasion of recent federal changes in favor of older federal law. In a smaller set of cases, we do see some limited influence of *Coe* but even in those arguments the state claim was weakly developed and primarily served as an addendum to a federal argument. *Gunwall* was clearly intended to correct this problem by providing guidance about how state arguments should be briefed. I now turn to how successful this guidance has been.

After *Gunwall*

There was no immediate response to *Gunwall*. Of the nine state arguments offered in 1988, none complied by briefing the six criteria. The greatest number of the *Gunwall* criteria cited was three by two claimants. Three of these arguments involved search and seizure issues, two of which cited specifically to *Gunwall* but none of them complied with or even showed interest in the criteria established there; instead, *Gunwall* was noted only for the substantive expansion of state search law. The most egregious example was in *Wethered* where the claimant simply cites to a single state constitutional precedent and then asserts that the claimant was

⁴¹ *Buchanan*, 90 Wash.2d 584, Appellants brief at 14, 15.

coerced into consenting into a search under the state constitution. It is understandable that the Washington Supreme Court utilized this case to clarify that the *Gunwall* criteria were mandatory.

Despite the failure to comply with *Gunwall*, the other two 1988 search cases may suggest that *Gunwall* and other search cases were having some effect because in both federal law was still uncertain and yet state arguments were either dominant or at least on par with the federal claims. In a random drug testing case, the claimant began with a state challenge that cited to recent expansive search cases as well as the textual differences between the constitutions but rested most of the state argument on Washington cases applying federal law; arguing in essence that these strong declarations requiring individualized suspicion under Fourth Amendment law should be carried over. The brief then proceeded to argue a Fourth Amendment claim specifically as a secondary issue: “The Fourth Amendment, which provides less protection of privacy than” the state provision still prohibits random, suspicionless drug testing.⁴² It is interesting to note that in New York, such state arguments were not made until after the U.S. Supreme Court clearly rejected drug testing challenges even though the state high court had expressed some support for a state claim.⁴³ A similar dynamic is illustrated in *Seattle v. Messiani* (1988), only more dramatically. The claimant attacked the constitutionality of sobriety checkpoints and did so nearly exclusively based on state grounds despite the fact that the U.S. Supreme Court had already struck down some uses of checkpoints and only conclusively upheld sobriety checks in 1990.⁴⁴ The claimant noted textual differences, state constitutional history, and recent state search precedent, in particular a case expressing discomfort with the federal

⁴² *Alverado v. Washington Public Power Supply System*, 111 Wash.2d 424 (1988), Appellants’ brief at 11.

⁴³ Discussed in Chapter 5.

⁴⁴ *Deleware v. Prouse*, 440 U.S. 648 (1979) (stopping vehicles to check license and registration unconstitutional); *Michigan Dept. of Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints constitutional).

automobile exception,⁴⁵ but primarily stressed cases from other states rejecting sobriety checkpoints. The brief admitted that most were based on federal law but used the logic of those decisions to support the state argument. Interestingly the federal claim is relegated to a bare assertion, reversing the trend observed in many other state constitutional arguments. The claimant simply cited to one supportive federal precedent and concludes, sobriety checkpoints “are clearly in violation of [the state provision] and many states find these roadblocks violate the Fourth Amendment as well.”⁴⁶ While neither claimant complied fully with *Gunwall* despite clearly being aware of it, the fact that they rested primarily on state claims in areas where federal law was potentially supportive suggests that the repeated interest in the state search provision at least was having an effect on the Washington bar.

A significant conflict over obscenity occurred in two related 1988 cases, argued by the same lawyer, that demonstrate confusion over the relation between *Gunwall* and *Coe* even though a fairly complicated state argument resulted. The cases involved a company selling bondage films. One attacked the search in large part aimed at recovering all of the products seized that were not used as direct evidence at trial. After an extensive analysis of the Fourth Amendment and its application to the seizure of protected materials, especially trying to distinguish recent negative precedent, the brief turned to a state speech argument and not a state seizure argument. The claimant blamed the Washington Supreme Court for causing this problem because while *Coe* instructed consideration of state constitutional provisions first, “it has not consistently done so” and thus reliance is on federal search law “primarily because there is a reasonably well-developed body of federal constitutional law ... that seems quite clearly dispositive, while there is no existing body of state case law considering the validity of seizures

⁴⁵ *State v. Ringer*, 100 Wash.2d 686 (1983).

⁴⁶ *Messiani*, 110 Wash.2d 454, Respondents’ brief at 39.

of publications” under the state constitution.⁴⁷ Despite the fact that there was some strong negative federal precedent and that at least one state high court had rejected that precedent,⁴⁸ and a small but significant number of state search cases, the claimant presented only a brief argument using *Coe*’s prohibition on prior restraints. This minor argument was the dominant claim made in *State v. Reece* (1988)⁴⁹ where the claimant attacked the federal obscenity test, arguing that there should be no exception for obscenity under the state speech provision. While the federal obscenity test was settled in 1973⁵⁰ and remained fairly stable after that, a few state courts began to show discomfort with that test in the late 1980s (Farole 1998: 133, 143). The claimant stressed both *Coe* and the abortion protest case discussed above for the history of the state provision as well as the absolutist language providing, “[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”⁵¹ The claimant argued that this language does not express an exception for obscenity; all speech is protected subject only to abuse after the fact. The claimant noted a few dissenting justices from Maine and Massachusetts who wished to adopt this rule, as well as an Oregon appellate decision invalidating Oregon’s obscenity statute; in fact, the Oregon Supreme Court would eventually be the only state high court to accept this argument and find obscenity to be fully protected speech, but after the brief in *Reece* was filed.⁵² After this extensive speech analysis, the claimant used a state based vagueness challenge to assault the Supreme Court’s test itself, relying heavily on Justice

⁴⁷ *State v. J.R. Distributors, Inc.*, 111 Wash.2d 764 (1988), Respondent’s brief at 55, 56.

⁴⁸ *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986) held that no greater probable cause standard is required for presumptively protected speech materials. On remand the New York Court of Appeals specifically rejected this holding and adhered to its prior decision under the state constitution, *People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986). This decision was issued more than a year before the brief in *J.R. Distributors* was filed.

⁴⁹ 110 Wash.2d 766.

⁵⁰ *Miller v. California*, 413 U.S. 15 (1973).

⁵¹ Wash. Const. Art. I, Sec. 5.

⁵² *State v. Henry*, 302 Or. 510 (1987).

Brennan's dissent, as so inherently subjective that consistent application was impossible. Thus we see some evidence that *Coe* had influence within the speech context, but still no *Gunwall* compliance.

Given these arguments immediately following *Gunwall*, it is unsurprising that the Court reiterated and strengthened the criteria test in *Weathered* by requiring criteria briefing before the Court would consider the issue. Of the 79 state constitutional arguments offered from 1990 to 2000, 28 (35%) complied completely with *Gunwall*. Given Spitzer's (1998) findings that the Washington Supreme Court regularly dismissed state claims for *Gunwall* failures, this is not surprising. Figure 7.3 shows the percentages of *Gunwall* compliant state arguments. While none of the years have a majority of briefs complying, there is an increasing, if uneven trend. An initial question is whether *Gunwall* may have induced a significant number of state constitutional arguments that we might not have expected otherwise.

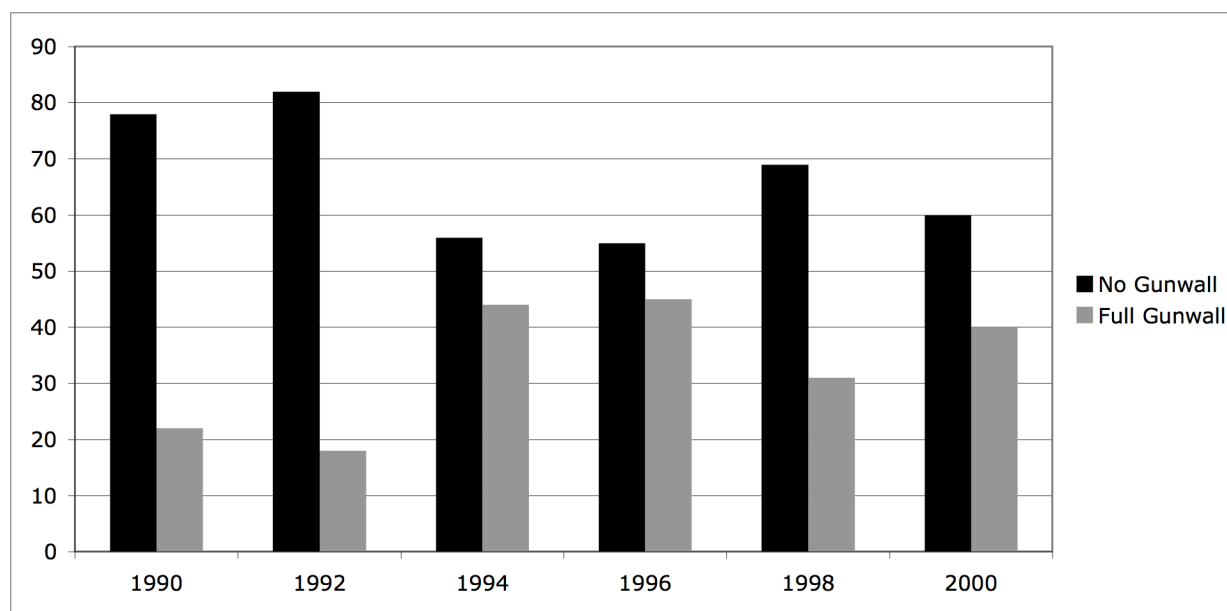


Figure 6.3. Percentage of *Gunwall* compliance, Washington 1990-2000. Briefs were considered compliant if they discussed all the factors, or gave a reason for why one was not discussed (such as no textual difference), or if it noted that full briefing was not necessary because the Court had already settled the issue. N=79.

More than a third (28) of the 79 state constitutional arguments offered, 1990-2000, involved search and seizure issues. Eleven of these arguments presented complete *Gunwall* briefing. A large proportion of these arguments sought to build upon the earlier state precedents such as the Court's rejection of the totality of the circumstances test for informant reliability. Many other cases sought to extend the result in *Gunwall* to different areas of electronic or high tech privacy. A number of these examples attacked wiretapping or the disclosure of personal records much in the same vein as the factual setting in *Gunwall*. A few pressed the boundaries further. For example, *State v. Young* (1994)⁵³ argued that warrantless use of thermal imaging devices violated the private affairs of the suspects well before the U.S. Supreme Court accepted the same argument.⁵⁴ Others had a more mixed influence as the U.S. Supreme Court retrenched in specific issue areas. For example, in *State v. Boland* (1990) the claimant argued that Washingtonians have a legitimate expectation of privacy in their garbage after the U.S. Supreme Court rejected the same argument.⁵⁵ Similarly, another claimant attacked the *Hodari D.* standard that a person who flees from a show of police authority is not seized under the Fourth Amendment.⁵⁶ In this area, given both federal retrenchment as well as the Washington Court's history of engagement with the state provision in recent years, it is not surprising to see dominance of state search issues.

Speech cases demonstrate a similar dynamic, offering state arguments largely centered on *Coe*; none of the five speech arguments offered complete *Gunwall* briefing. One of these did come in an area where we might not otherwise expect: commercial speech. Commercial speech saw a general expansion of federal protection since the 1970s and while the primary reliance was

⁵³ 123 Wash.2d 173.

⁵⁴ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁵⁵ *State v. Boland*, 115 Wash.2d 571 (1990). *California v. Greenwood*, 486 U.S. 35 (1988).

⁵⁶ *State v. Young*, 135 Wash.2d 498; *California v. Hodari D.*, 499 U.S. 621 (1991).

on this law, one claimant did assert a state claim. However, it was little more than an afterthought without more development than to simply note that *Coe* and other cases have recognized greater speech protections.⁵⁷ The expansion of federal protection had an interesting effect in *Soundgarden v. Eikenberry* (1994).⁵⁸ The case involved a statute limiting the availability of sexually explicit music to minors. The claimant began with a federal argument centered on the recent expansion of federal speech law in *R.A.V.* where the U.S. Supreme Court held that while some speech is commonly described as unprotected, the state cannot discriminate within that class of speech based on content.⁵⁹ When the claimant turned to the state argument, it sought to use *R.A.V.* to correct an aspect of *Coe* where the Court suggested that the ban on prior restraints did not apply to unprotected speech such as obscenity.⁶⁰ The claimant stressed the underlying federal legal rule assumed in *Coe*: “*Coe*’s statement rested on the premise that the First Amendment affords no protection to obscenity and, therefore, neither does Article I, Section 5. This premise is invalid in light of *R.A.V.*” and should be discarded so that the strict prior restraint rule should apply.⁶¹ Even though federal law had expanded somewhat, the claimants still offered state arguments seeking to utilize the strict rule from *Coe* though ignoring the *Gunwall* criteria.

While my entire sample includes only ten free exercise claims, it is interesting to note that pre-*Gunwall* all seven arguments were federal and all three post-*Gunwall* cases included state claims. This was in response to the U.S. Supreme Court’s significant retrenchment in

⁵⁷ *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wash.2d 101 (1992).

⁵⁸ 123 Wash.2d 750.

⁵⁹ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

⁶⁰ *Coe*, 101 Wash.2d at 375 (“However, we have expressly rejected an absolute bar against prior restraints on speech which is *not* constitutionally protected”) (emphasis in original).

⁶¹ *Soundgarden*, 123 Wash.2d 750, Respondents/Cross-Appellants brief at 25-26, n.15.

1990.⁶² In *Barnett v. Hicks* (1990),⁶³ argued before the federal case was resolved, the claimant stressed the absolute nature of the state provision as well as a recent law review stressing the strong history of religious protection in Washington.⁶⁴ The Washington Supreme Court would later accept this argument and reject the newly weakened federal test.⁶⁵ In the two subsequent cases⁶⁶ claimants relied upon this rejection to argue a state claim and none of the three presented full *Gunwall* briefing. The federal legal change led to an increase in state constitutional activity. A similar dynamic is also present in the two confrontation arguments where full *Gunwall* arguments were made in cases where federal law was fairly negative. One argued that full confrontation rights applied to sentencing hearings in the face of law at least implying that federal confrontation rights do not apply and the other objecting to closed circuit testimony by a child victim after the U.S. Supreme Court upheld similar alternatives.⁶⁷ While the above areas do not show any clear evidence that embracing the criteria approach led to state arguments than might not have been made otherwise, in two areas the post-*Gunwall* arguments show unexpected state constitutional activism: equal protection and takings.

State courts commonly lockstep with federal equal protection doctrine, despite at times quite different language and history (Williams 2009: 209; see Fino 1987a). While the text of the

⁶² *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶³ 114 Wash.2d 879.

⁶⁴ Wash. Const. Art. I, Sec. 11 (“Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion”).

⁶⁵ *First Covenant Church of Seattle v. Seattle*, 120 Wash.2d 203 (1992). This case is included in the analysis in Chapter 3.

⁶⁶ *First United Methodist Church of Seattle v. Hearing Examiner for Seattle*, 129 Wash.2d 238 (1996); *Open Door Baptist Church v. Clark County*, 140 U.S. 143 (2000).

⁶⁷ *State v. Foster*, 135 Wash.2d 441 (1998); *State v. Strauss*, 119 Wash.2d 401 (1992).

Washington provision is quite distinct from the Fourteenth Amendment,⁶⁸ the Washington Supreme Court generally followed this path of treating the provision as substantially identical to federal law, though at times it did state in dicta that a separate analysis may be possible (Bindas et al 2011).⁶⁹ Thirteen state equal protection arguments were offered post-*Gunwall*. Three of these were ERA cases relying on the law discussed above and a few others were vague assertions but some presented well-developed state arguments with full *Gunwall* briefing, though admittedly in areas where federal law offered little hope of victory. In *Ford Motor Co. v. Barrett* (1990)⁷⁰ the claimant attacked the state's lemon law statute that placed conditions on the right of auto dealers to appeal but not on the rights of the owner. The claimant stressed Justice Utter's (1984) guidance on the importance of state constitutional law as well as the prior examples of judicial federalism in Washington. Turning to the state's history, the claimant discussed how the Washington convention failed to even consider the federal language in favor of Oregon's provision and the earliest state case law did not consider the federal doctrine but that through "force of inertia" the two became conflated despite the fact that the Court "has never articulated a basis for adopting such a position" of uniform treatment.⁷¹ The claimant proceeded to invoke the historical connection to Oregon and its test (Schuman 1988), arguing that the lemon law could not survive this test even if it passed the federal rational basis review. While the Court did not give this claim serious attention, the next year Justice Utter adopted substantially identical

⁶⁸ Wash. Const. Art. 1, Sec. 12: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

⁶⁹ *American Network, Inc. v. Washington Utilities and Transp. Com'n*, 113 Wash.2d 59, 77 (1989) (the state and federal provisions "are substantially identical and have been considered by this court as one issue"); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 640-642 (1989).

⁷⁰ 115 Wash.2d 556.

⁷¹ *Barrett*, 115 Wash.2d 556, Petitioner/Appellant's brief at 31.

arguments through his own *Gunwall* analysis in a concurring opinion.⁷² A claimant attacking the punishment of first time drug offenders more harshly than other first time offenders relied heavily on Utter's opinion. Both the federal tiers of scrutiny and Oregon tests were proposed as valid tests.⁷³ In a challenge to the state's inheritance laws for blocking the ability of illegitimate children to reopen a settled estate, the claimant stressed again Utter's rationale in favor of a stronger state rule over any federal protections.⁷⁴ In these equal protection arguments it seems *Gunwall* may have triggered some interest in an area where state arguments are uncommon and this interest was buoyed by Utter's strong support even though it received little attention from the rest of the Court.

Takings law, similarly, saw relatively little support from judicial federalism as well, largely because federal law was slowly expanding protection (Tarr 1998a). Despite this fact, five of the post-*Gunwall* state arguments involved takings of property, though only one presented a full *Gunwall* analysis. Two of these arguments were public use cases where the U.S. Supreme Court gave broad deference to legislative determination of public use.⁷⁵ Both arguments⁷⁶ stressed the explicit state language, shared by only three other states, making the determination of a public use a judicial question with no weight to any legislative determination.⁷⁷ While the remaining three arguments all stressed state regulatory takings issues, only one offered complete *Gunwall* briefing noting the Washington Court's refusal to consider the same issue because of

⁷² *State v. Smith*, 117 Wash.2d 263, 282 (1991) (Utter, J. concurring).

⁷³ *State v. Clark*, 129 Wash.2d 211 (1996), Appellant Clark's brief.

⁷⁴ *Pitzer v. Union Bank of California*, 141 Wash.2d 539, Appellants brief.

⁷⁵ *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

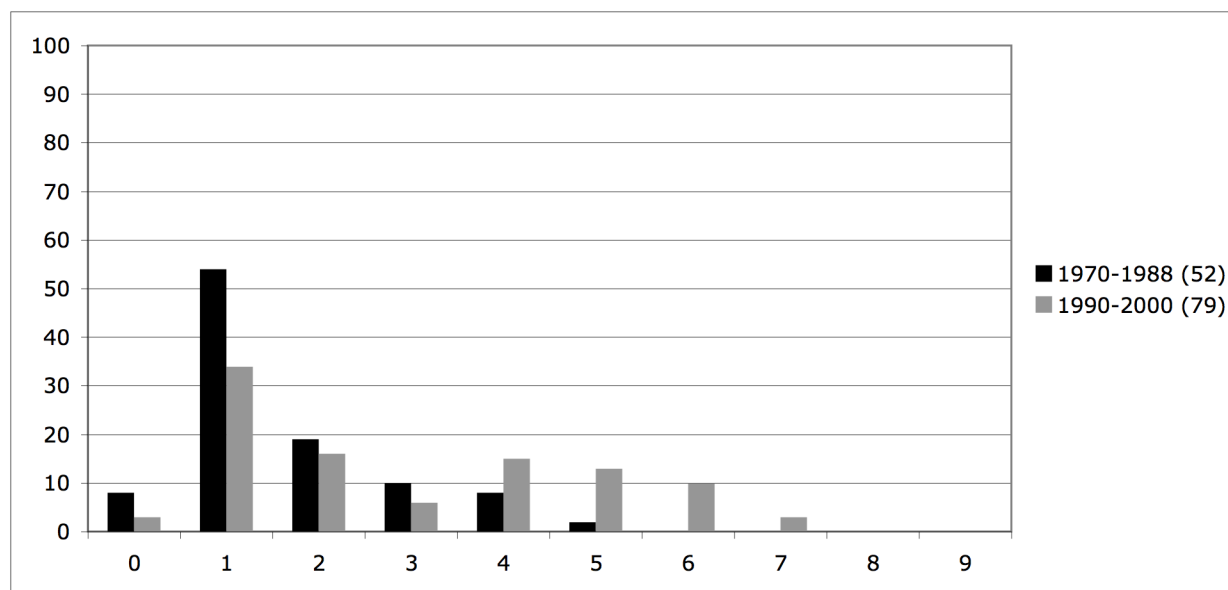
⁷⁶ *Robinson v. Seattle*, 119 Wash.2d 34 (1992); *State ex rel. Washington State Coonvention and Trade Center v. Evans*, 136 Wash.2d 811 (1998).

⁷⁷ Wash. Const. Art. 1, Sec. 16: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

Gunwall failure.⁷⁸ In *Manufactured Housing* (2000)⁷⁹ the claimant placed strong reliance on the state provision's language specifically prohibiting property from being "taken or damaged"⁸⁰ to attack a statute limiting the ability to sell property. This was in addition to a federal argument stressing the increasing protection offered in recent decisions.

While equal protection and takings cases may demonstrate that the Court's increased interest in state law induced some claims we might not have expected otherwise, generally state arguments were still primarily offered in areas where federal law was weakening or in specific doctrinal areas where the Washington Court had already increased protection. This finding is understandable because the Washington Court never issued a requirement that lawyers brief state issues in all cases. The only requirement of *Gunwall* and its progeny was that for the Court to consider an issue, the briefing must follow the requirements of the criteria test.

Did the *Gunwall* test provide anything useful?



⁷⁸ *Gulmont v. Clarke*, 121 Wash.2d 586, 604 (1993).

⁷⁹ *Manufactured Housing Communities v. State*, 142 Wash.2d 347 (2000).

⁸⁰ Wash. Const. Art. 1, Sec. 16.

Figure 6.4. Percentage of total factors, pre- and post-*Gunwall*. N=131.

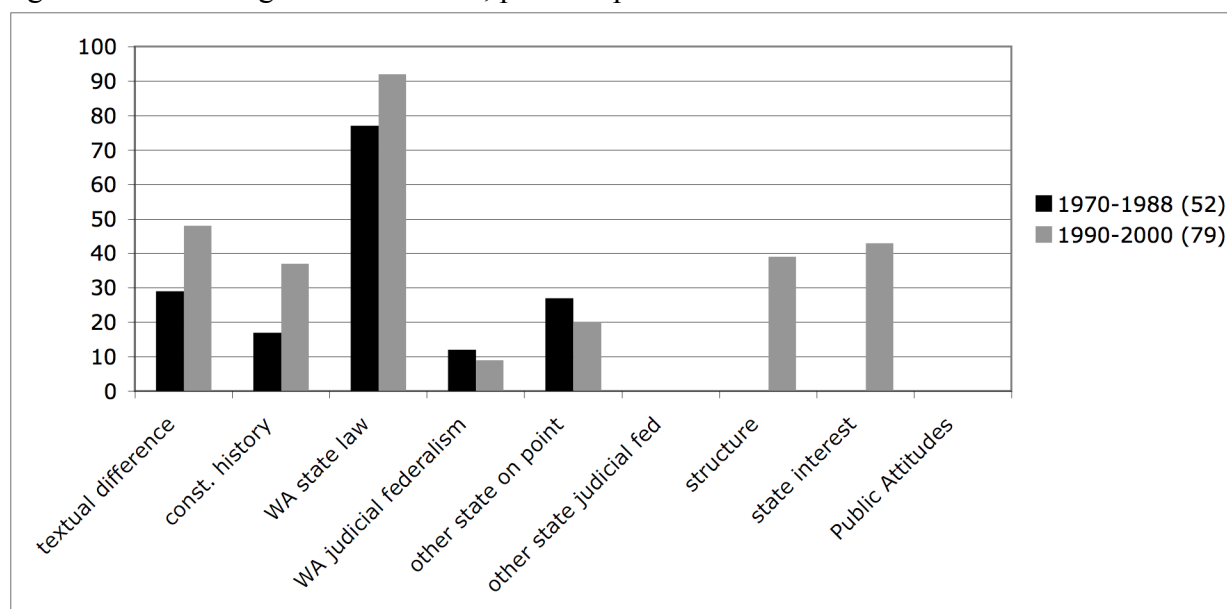


Figure 6.5. Percentage of state arguments citing each legal factor, pre- and post-*Gunwall*. N=131.

Figures 7.4 and 7.5 illustrate the effect of *Gunwall* upon the content of state constitutional arguments. Each shows significant changes in these content issues. For all five of the *Gunwall* criteria (text, constitutional history, WA state law, structure, and state interests)⁸¹ there is a sizable increase in the percentage of arguments discussing each factor. Figure 7.4 shows how the rough complexity, measured by totaling the number of factors discussed in each brief, increased after *Gunwall*. Prior to *Gunwall*, 81% of state arguments noted two or fewer of these factors; after *Gunwall*, this dropped to 53%. There was a sizable move towards more complex arguments with 41% noting four or more factors. This finding suggests that *Gunwall* had at least part of its intended effect even though full compliance was not achieved. As discussed below, these criteria were not always substantively compelling, but the strong preference for the criteria test nearly

⁸¹ While *Gunwall* includes the language of the state provision as a separate criterion, lawyers and justices tended to conflate this with textual difference. I did not code the simple citation to state language without any greater discussion as a separate legal factor.

eliminated state arguments that were nothing more than attacks on the U.S. Supreme Court's decisions.

While present in about 40% of the post-*Gunwall* arguments, neither structural nor state and local interest arguments amount to much beyond a bare quotation or paraphrasing from the *Gunwall* opinion itself. This is most clear in the context of structural arguments where nearly every argument to employ it used the direct language from *Gunwall*. There the Court discussed the plenary versus delegated power distinction; the federal government is restricted both by the doctrine of delegated powers and specific rights restrictions, but state governments possess plenary power to legislate on all issues unless their power is limited by some explicit constitutional provision.⁸² The Court itself eventually acknowledged that the structural factor “favors an independent state interpretation in every *Gunwall* analysis”⁸³ simply because the structural difference is constant and thus a broader restriction can be justified because of the greater degree of state power. Given this it is unsurprising that claimants did not stress more than a simple assertion. Similarly, the most common argument in the state or local interest category tended to simply note that whatever aspect of law is a matter of state law and thus should be judged by local and not national standards. A few of these arguments did note that the U.S. Supreme Court specifically relies upon the difficulty of fashioning rules for a large diverse country as reason for limiting constitutional protections: “Federal courts must remain responsive to concerns of federalism and local autonomy and, ultimately, the need to formulate standards of conduct that may be enforced nationwide” and that the state high court is in a better position to consider local needs.⁸⁴ An interesting example of local interest is a garbage search case where

⁸² *Gunwall*, 106 Wash.2d at 66-67.

⁸³ *State v. Russell*, 125 Wash.2d 24, 61 (1994).

⁸⁴ *State v. Williams*, 142 Wash.2d 17 (2000), Respondent's brief at 21.

the claimant discussed the recent public outcry concerning individuals who illegally stole the garbage of Seattle's mayor.⁸⁵ While these two factors received little development, the remaining factors did show some greater degree of development and substance.

Textual difference arguments were relatively common. Many of these involved search claims that understandably relied upon the extensive set of search precedents for discussion of the textual differences. A number of others noted significant differences in regards to the equal protection, bail, and self-incrimination provisions. In a challenge to the use of closed circuit television for child witnesses the claimant stressed how the state provision explicitly guarantees the right "to meet the witnesses against him face to face"⁸⁶ but went further to note the significant differences in many of the other criminal procedure rights. The absence of textual differences, however, did not stop some claimants. While admitting that there were no relevant textual differences, three claimants expressly cited *Utter* (1984) for the argument that textual differences are not a requirement for a different state constitutional rule; one going so far as to argue that "[e]ven identically-worded provisions should be interpreted independently unless a very good historical justification for assuming that the framers intended an identical meaning can be found."⁸⁷

Constitutional history was the least frequently argued, but only marginally so. This is perhaps understandable given the difficulty in primary source research where case law is sparse. As with most factors, search cases saw a large amount of history discussion because *Gunwall* and its progeny laid a foundation that was easy to draw upon. A few claimants did a thorough job

⁸⁵ *State v. Boland*, 115 Wash.2d 571 (1990), Respondent's brief at 21.

⁸⁶ Wash. Const. Art. I, Sec. 22. *State v. Foster*, 135 Wash.2d 441 (1998), Appellant's brief.

⁸⁷ *State v. Hanna*, 123 Wash.2d 704 (1994), Appellant's brief at 31; *State v. Strauss*, 119 Wash.2d 401 (1992), Appellant's brief; *State v. Copeland*, 130 Wash.2d 244 (1996), Appellant's brief.

of digging up obscure history even going so far as to note the territorial laws that existed in regards to bail that colored the Washington convention's debates.⁸⁸ Similarly in the equal protection context, even before Justice Utter's concurring opinion discussed above, one claimant stressed the intentional adoption of the Oregon language out of an "egalitarian concern" not met by the application of the federal provision.⁸⁹ Another claimant linked the history and text issues arguing that it "must be presumed that the makers of the state constitution knew the language of the United States Constitution and with that knowledge deliberately made the state constitutional provision more detailed" and protective of individual rights.⁹⁰ In a few cases, the claimant explicitly admitted that the state convention had failed to debate the issue as a means of at least showing an attempt to comply with the *Gunwall* briefing requirement.⁹¹ While a third of arguments briefing this issue may seem small, it is significantly higher than other states. For example, in New York only about 3% of arguments discussed any state constitutional history.

The high percentage of arguments citing some form of Washington law on point is unsurprising. Judicial precedent is the natural source for constitutional claims and as the Washington Supreme Court engaged with state constitutional law it built a set of state based precedents for lawyers to utilize. Search and speech related issues naturally had a fair amount of state precedent to work with. Other cases stressed common and statutory law related to the issue as a means of showing a basis for a different constitutional standard. Still others sought to take a prior Washington decision based on federal law and maintain its result and logic under the state

⁸⁸ *Westerman v. Cary*, 125 Wash.2d 277 (1994), Appellant's brief at 17.

⁸⁹ *Ford Motor Co.*, 115 Wash.2d 556 (1990), Petition/Appellant's brief at 33.

⁹⁰ *Manufactured Housing Communities of Washington v. State*, 142 Wash.2d 347 (2000), Appellant's brief at 17.

⁹¹ *Strauss*, 119 Wash.2d 401 (1992), Appellant's brief; *Hanna*, 123 Wash.2d 704 (1994), Appellant's brief; *State v. Copeland*, 130 Wash.2d 244 (1996), Appellant's brief.

provision. For example two claimants⁹² sought to maintain a 1983 decision holding that negligent destruction of evidence was a due process violate after the U.S. Supreme Court held that only bad faith destruction of evidence is a constitutional violation,⁹³ arguing that the prior logic was fundamentally correct and should be maintained. At least one claimant sought to place responsibility for the lack of precedent on the Court itself: “the court may wish to consider whether, in light of the actual history of state constitutional adjudication, these two factors tend to preclude any finding that the state constitution provides greater protection to individual liberties” because it wasn’t until 1983⁹⁴ that lawyers became generally aware of state constitutions and “[c]onsequently, the case law demanded by *Gunwall* ... just does not exist, in most cases, for reasons that have nothing to do with the merits of the state constitutional claim.”⁹⁵ Aside from this, most claimants had little difficulty composing some kind of state law argument.

Perhaps a greater measure of *Gunwall*’s effect is the reduction in the number of policy attacks on the U.S. Supreme Court. As discussed in other chapters, a common element of state constitutional arguments has been for the claimant to “merely argue that the Supreme Court majority ‘got it wrong,’ the dissent ‘got it right,’ and therefore, [state] courts should follow the

⁹² *Hanna*, 123 Wash.2d 704 (1994), Appellant’s brief; *State v. Copeland*, 130 Wash.2d 244 (1996), Appellant’s brief.

⁹³ *State v. Vaster*, 99 Wash.2d 44 (1983); *Arizona v. Youngblood*, 488 U.S. 51 (1988). In *State v. Ortiz*, 119 Wash.2d 294 (1992) the Court split evenly over whether to reject *Youngblood* with the deciding vote refusing to decide and ultimately the claim was rejected in *State v. Wittenbarger*, 124 Wash.2d 467 (1994).

⁹⁴ This refers to *Michigan v. Long*, 463 U.S. 1032 (1983) where the U.S. Supreme Court held that only state decisions that included a plain statement that it was based solely on state law would be protected from federal review under the independent and adequate state grounds doctrine.

⁹⁵ *State v. Manussier*, 129 Wash.2d 652 (1996), Appellant’s brief at 22-23, n.4.

dissent rather than the Supreme Court majority on this constitutional issue.”⁹⁶ Few of these attacks on the U.S. Supreme Court were present in post-*Gunwall* arguments. And even where they are used, they typically come after the discussion of legal factors. For example, in one of the evidence destruction cases, the claimant develops a full *Gunwall* analysis before closing by noting that the federal rule would be impossible for a defendant to win under and this would necessarily remove any incentive for the state to adequately preserve evidence.⁹⁷ A search case offered a minimal *Gunwall* brief but stressed a dissenting opinion from the U.S. Supreme Court as the primary aspect of the argument.⁹⁸

This evidence suggests that the Washington Supreme Court’s effort in *Gunwall* was successful to a degree. Even though most state constitutional arguments did not comply with *Gunwall*, claimants moved away from simply attacking the U.S. Supreme Court’s decisions and, instead, they demonstrated a greater degree of interest in the legal criteria. While it may not have greatly increased the number of state constitutional arguments offered, *Gunwall* did help to correct the weak briefing the Court sought to eliminate.

Conclusion

Unlike the Ohio Supreme Court, the Washington Supreme Court was open to the possibility of judicial federalism. And unlike the New York Court of Appeals, it took the extra step in providing broad guidance in how it expected constitutional rights cases to be presented and argued. The strong criteria rule, reiterated over time, ensured a greater complexity of legal arguments and, even where compliance was imperfect, ended the practice of state arguments as

⁹⁶ *Cobb v. State*, 85 S.W.3d 258, 267 (Tex. Crim. App., 2002).

⁹⁷ *Hanna*, 123 Wash.2d 704 (1994), Appellant’s brief at 34.

⁹⁸ *Kandorian by Peach v. Bellingham Police Dept.*, 119 Wash.2d 178 (1992), Appellant’s brief.

nothing more than bald evasion of the U.S. Supreme Court. Claimants abandoned the kinds of policy attacks on federal legal doctrine in favor of more independent attention to the legal factors. This greater attention to legal arguments to support their state claims may be one reason why Spitzer (2006) found that the Washington Court eventually stopped using *Gunwall* as a gate keeping mechanism and, in the early 2000s, began to more consistently use it to build an independent set of state law. The criteria approach, however, is still a supplemental approach. It treats federal law as the norm with state law only applying where federal law fails to resolve the issue (Williams 1997). In contrast, the primacy approach asserts that state constitutional arguments should be the primary claims in all rights disputes and the next chapter examines the primacy experience in Oregon.

Chapter 7

Oregon: The Normalization of State Constitutional Law

In Oregon we see the effect of a strong endorsement of primacy from a Court lead by the leading state constitutional law theorist. Unlike the Washington Supreme Court, the Oregon Supreme Court had no particular qualm against building the initial state precedent without significant input from its lawyers. The Court built an early set of state constitutional precedents while instructing the bar that state claims should be the primary means of protecting individual rights. This led to a normalization of state constitutional law with the subject treated as essentially identical to any other legal claim. As the body of state law accumulated, lawyers demonstrated little discomfort with the subject and deployed state claims in a variety of areas, some where federal retrenchment was significant and others where it was not, and did so with little attention to or concern with federal developments. While it may be true that primacy was not perfectly realized in all areas, it is clear that state constitutional law received the most consistent and thorough examination in Oregon of any of the states included in this study.

The adoption of primacy

The experience of state constitutional law in Oregon is wrapped up heavily in the leadership of Justice Hans Linde. Linde has been described as the “godfather of state constitutional law” (Toobin 1985: 11). One prominent legal scholar stated, “along with Benjamin Nathan Cardozo and Roger Traynor, [Linde] is easily one of the three most important state court

judges in this century" (Levinson 1992: 746). While most academics and judges became interested in state constitutional law primarily as a reaction to the retrenchment of federal protections (Brennan 1977; Maltz 1988), Linde's interest pre-dated that shift and rested on a sincere appreciation of state constitutions as documents of truly independent force deserving of attention without regard for federal law. Over time his early academic theories came to dominate his court and in turn drew lawyers into the debate.

In 1970, Linde, then a professor at the University of Oregon School of Law, published an early call for the primacy of state constitutions. Bothered by the Oregon Supreme Court's trend of treating state law in lockstep with federal jurisprudence, Linde argues that the Court's approach was backwards because the "logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last" (Linde 1970b: 182). This is required because federal jurisdiction depends upon the state depriving a person of some interest and, given that courts are a constitutive element of the state, a state court decision that some action violated state law eliminates the need for federal review: "By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it" (Linde 1970b: 133). Thus, state and federal constitutional claims "are not cumulative but alternative" and "[c]laims raised under the state constitution should always be dealt with and disposed of before reaching a Fourteenth Amendment claim of deprivation of due process or equal protection" (Linde 1970b: 134, 135). Primacy "obliges counsel and court to give independent professional attention to the text, history, and function of state constitutional provisions" rather than simply borrow concepts and doctrines wholesale from federal doctrine

(Linde 1970b: 182). Linde continued to advocate this position while on the bench (Linde 1980, 1984, 1991).

Linde brought his primacy approach to the bench when he was appointed in 1977. In *State v. Flores* (1977), Linde had his first opportunity to attempt a change in the Court's approach. The case concerned consent to search and whether police are required give notification of the right to refuse consent. The majority relied upon Fourth Amendment law to reject the claim and noted that while "we are at liberty to adopt a stricter test under our own constitution ... we see no persuasive reason to do so."¹ The Court noted a history of treating the search provisions as identical and that there was no reason to alter this relationship. In dissent, Linde commended the majority on its willingness to even mention, however briefly, the state provision, but criticized it for asking the wrong question: "The question is not whether article I, section 9 was meant to embody the same principle as the federal fourth amendment ... Of course it was. It may equally be pointed out that the fourth amendment meant to embody that principle from the state constitutions that preceded the federal Bill of Rights." Instead the question is "what safeguards this principle ... extends to the people of Oregon. That question ... cannot be answered by the Supreme Court of the United States but only by this court."²

Even where he achieved some measure of victory in this debate, Linde faced strong criticism from a court divided over the legitimacy of judicial federalism. In another 1977 case, Linde wrote for the Court holding that a person accused of minor traffic offenses is entitled to

¹ *State v. Flores*, 280 Or. 273, 279 (1977).

² *Flores*, 280 Or. at 284, 285 (Linde, J., dissenting).

legal representation.³ Linde focused on the state provisions with only scant attention to federal law, eliciting a concurring opinion complaining of reliance on the state constitution because “[i]n my opinion the same result is required by [the federal Constitution] and is not foreclosed by decisions of the Supreme court of the United States, as I read those decisions.”⁴ In another 1977 case, a dissent criticized Linde’s emphasis on state law by relying on *stare decisis*, pointing out that as recently as 1976 the Court had treated parallel state and federal provisions as identical “[i]n the absence of some important policy reason for giving a broader interpretation” to the Oregon Constitution.⁵

Slowly, however, Linde’s views took control of his court. This change was helped by the retirement of some critics, such as Justice Howell in 1980, as well as his success at convincing colleagues as to the propriety of his views (McIntosh and Cates 1997: Ch. 4). In 1981, Linde succeeded in writing primacy into Oregon Law: “The proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. This is required not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.”⁶ Linde solidified the primacy approach in *State v. Kennedy* (1983). He used “*Kennedy*’s meandering procedural history” to finally convince his Court of the propriety of his approach (McIntosh and Cates 1997: 72). The meandering history began when the Oregon Court of Appeals issued a cryptic opinion that failed to clearly express the legal basis and, after the

³ *Brown v. Multnomah County Dist. Court*, 280 Or. 95 (1977).

⁴ *Brown*, 280 Or. at 111 (Tongue, J., specially concurring).

⁵ *State ex rel. Johnson v. Woodrich*, 279 Or. 31, 42 n.1 (Howell, J., dissenting).

⁶ *Sterling v. Cupp*, 290 Or. 611, 614 (1981).

Oregon Supreme Court denied review, the U.S. Supreme Court reversed. After the Court of Appeals reversed its earlier decision, the Oregon Supreme Court agreed to hear the case. Linde argued that the “history of this case demonstrates the practical importance of the rule ... that all questions of state law be considered and disposed of before reaching a claim that this state’s law falls short of a standard imposed by the federal constitution on all states.”⁷ By simply forgoing consideration of decisive Oregon state law, the Court of Appeals caused a waste of time and “needlessly spur[ed] pronouncements by the United States Supreme Court on constitutional issues of national importance in a case to whose decision these may be irrelevant.”⁸ Had the Court of Appeals followed the correct approach of treating state law first, the criminal defendant’s claim would have been easily dismissed and saved the time and expense of an irrelevant judgment from the U.S. Supreme Court. In *Kennedy*, Linde spoke for a unanimous majority apparently convinced of the logical and practical value of primacy in constitutional rights disputes.

Other members of the Oregon Supreme Court became enthusiastic advocates of primacy. Justice Wallace Carson (1983) wrote an article, based on a speech to the Oregon Criminal Defense Lawyers Association, extolling the virtues of primacy and instructing lawyers in how they should approach the subject of constitutional rights arguments. Justice Robert Jones echoed a similar view with a more strict warning to lawyers: “Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal

⁷ *State v. Kennedy*, 295 Or. 260, 262 (1983).

⁸ *Kennedy*, 295 Or. at 264-265.

constitution, except to exert federal limitations, should be guilty of malpractice.”⁹ Even critics of early primacy seemed to shift their positions. In 1986, Justice W. Michael Gillette was elevated from the Court of Appeals. While on the Court of Appeals, Gillette had issued biting criticism of the primacy movement and especially how it left the lower courts to build precedent completely anew,¹⁰ but as a justice he adopted the primacy view of the Oregon Constitution even though he disputed the substantive meaning at times. For example, in *State v. Owens* (1986) the Court was deeply fractured over how far a state search precedent went in limiting police action. Even though Linde was in dissent on the substantive issue of the case, one commentator (and former Linde law clerk) argues that *Owens* was a Linde victory because “the opinions in the case are purely Oregon Constitutional law” (Schuman 1996: 1742). Justice Gillette’s concurrence suggests he agreed with this assessment: “I should like to think that the Oregon Constitutional Revolution has been accomplished. The primacy of our state’s constitution, so long neglected, is now accepted by all. It remains to go forward on a new road, a road which will—like most roads under construction—involve an occasional detour.”¹¹ The disagreement shifted from whether the state constitution deserved independent interpretation to how such interpretation should proceed.

Unlike the Washington Supreme Court, the Oregon Court showed relatively little concern for the form of arguments. It did not issue broad guidance beyond statements to look at the state’s text, history, and precedent. The Court continued an earlier policy of accepting claims of unconstitutional invasion of rights when first made on appeal.¹² In *Sterling v. Cupp* (1981), the Court noted that it still discouraged generalized constitutional attacks with only string cites to

⁹ *State v. Lowry*, 295 Or. 337, 365 (1983) (Jones, J., specially concurring).

¹⁰ *State v. Flores*, 68 Or. App. 617, 626 (1984).

¹¹ *State v. Owens*, 302 Or. 196, 208 (1986) (Gillette, J., concurring).

¹² See *State v. O’Neill*, 274 Or. 59 (1976).

constitutional provisions, but adopted a deferential standard: “plaintiffs did at least cite relevant sections of the Oregon Constitution to the trial court, although they developed their argument under [the state provision] only in response to this court’s inquiry, perhaps because counsel commonly tend to search for sources in case law.”¹³ Thus poor briefing is more indicative of the weak jurisprudence the Court has given so far and less a criticism of the lawyers. In her memoir, Justice Betty Roberts admitted that Linde “convinced me that we should rely on Article I Section 20 of the Oregon Constitution” in a major gender rights case rather than the claimant’s brief (Roberts 2008: 241). As discussed further below, these early foundational primacy cases saw little input or help from the legal briefs, instead it seems that Linde, who tended to take these major primacy cases himself, took it upon himself to develop the jurisprudence for lawyers to rely upon.

This revolution in Oregon constitutional law was not hidden away solely in the courtroom either. Instead, the public became increasingly aware of these constitutional debates and active participants in them. Oregon was a pioneering state for direct democracy, especially the initiative constitutional amendment, and since 1970 has seen the second highest number of initiatives only behind California (Miller 2009: 52; see also Ellis 2002). When the Court unanimously invalidated the state’s death penalty statute on jury rights grounds,¹⁴ the people amended the Constitution to exempt the death penalty from certain state constitutional provisions.¹⁵ Similarly, after the Court declared obscenity to be constitutionally protected speech

¹³ *Sterling*, 290 Or. at 614, n.1. In *State v. Spencer*, 289 Or. 225 (1980), the Court actually *sua sponte* altered the terms of the case from First Amendment to Section 8 free speech rights and openly admitted doing so.

¹⁴ *State v. Quinn*, 290 Or. 383 (1981).

¹⁵ Oregon Const. Art. I, Sec. 40: “Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings

in Oregon, two attempts were made to override this decision, though both failed.¹⁶ Most dramatic for my purposes, however, was Measure 40, which passed by 58.9% of the vote in 1996.

Measure 40, sold as a victim rights bill, aimed to significantly alter the criminal justice system and struck directly at the independent criminal rights that Linde established by creating a forced-linkage to the U.S. Constitution, providing that the state provisions on search and seizure, double jeopardy, and self-incrimination “shall not be construed more broadly than the United States Constitution.”¹⁷ After the Oregon Supreme Court struck this amendment down on the grounds that it violated the constitutional requirement that constitutional amendments be voted on separately, the legislative backers broke Measure 40 into seven different amendments and sent them to the voters, three of which were rejected (Ellis 2002: 146). Interestingly, the forced linkage provision was dropped and replaced with a simple declaration that “[n]othing in this section reduces a criminal defendant’s rights under the Constitution of the United States.”¹⁸

Additionally, Linde’s advocacy led to a strong challenge in his 1984 reelection campaign after he ran unopposed in 1978. A young, conservative prosecutor attacked Linde for his views about judicial federalism, complaining that “[t]he keystone of his judicial career has been his tinkering with the Oregon Constitution by inventing previously unknown rights for criminal defendants. Searches that are absolutely legal under our federal bill of rights now run afoul of mysterious new rules created by Linde” (Collins 1991: 760). Linde ultimately prevailed—though this may be one reason why he choose to retire in 1990 rather than seek another tough reelection—but the

as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law.”

¹⁶ *State v. Henry*, 302 Or. 510 (1987). The National Conference of State Legislatures Ballot Measures Database (<http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx>) reports that Measure 20 in 1994 received 45.7% of the vote and Measure 31 in 1996 received 47.2%.

¹⁷ As quoted in *Armatta v. Kitzhaber*, 327 Or. 250, 293 (1998).

¹⁸ Oregon Const., Art. I, Sec. 42(2).

challenge demonstrated the degree to which the Oregon Court's experience with state constitutional law was known and discussed. Both legal elites and the broader public were aware of, and debated the merits of the Oregon primacy revolution.

Linde established the primacy model and lead his Court in adopting it more fully than any other. However, as I discuss below, the Court achieved this change with little initial assistance from its lawyers. Linde and his closest allies were willing to carry the workload in some cases to help break with the established federally dominated model of constitutional law. As this law became established, state constitutional law became normalized to a significant degree. The arguments from claimants over time came to rely upon state constitutional decisions without any evidence of discomfort with this new area of law. They treated state constitutional law as simply another standard set of legal arguments to a greater extent than any of the other states included in this study

Aggregate trends

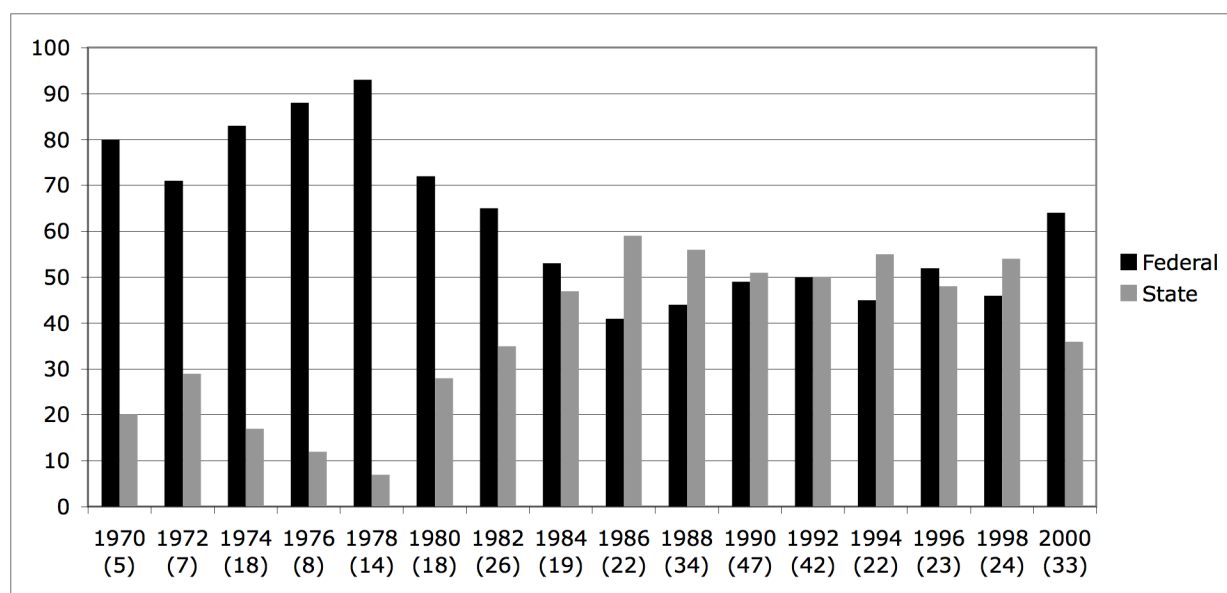


Figure 7.1. Percentage of arguments by year, Oregon 1970-2000. N=362.

I analyzed a total of 362 arguments with 57% being federally based and 43% state based. Figure 7.1 shows the trends over time. With the exception of 1970 and '72, which are skewed by the small number of arguments heard, the pre-Linde years look similar to the experience in other states. Constitutional rights arguments tended to focus on federal law. However, with Linde's battle to change the Court's orientation towards state constitutional law, the arguments begin to shift towards greater reliance on state arguments. After 1984, there is a surprising degree of parity with arguments hovering around an equal percentage of federal and state claims. This early, consistent trend clearly defies the experience seen in Ohio, New York, and Washington. It is unclear whether the dip in state arguments in 2000 is the start of a trend or the effect of death penalty litigation discussed below. Figure 7.2 shows the variations in issue areas. As with most states, criminal procedure rights see a great deal of interest but at quite high levels, especially search and seizure where the arguments are equally split, but there is significant state attention to each of the areas. As with most states there are few cases dealing with religious freedom or establishment, and takings claims were fairly rare. But both free speech and equal protection saw dramatic attention to state constitutional law, attention that has little to do with federal retrenchment and was driven by the development of separate state constitutional doctrines.

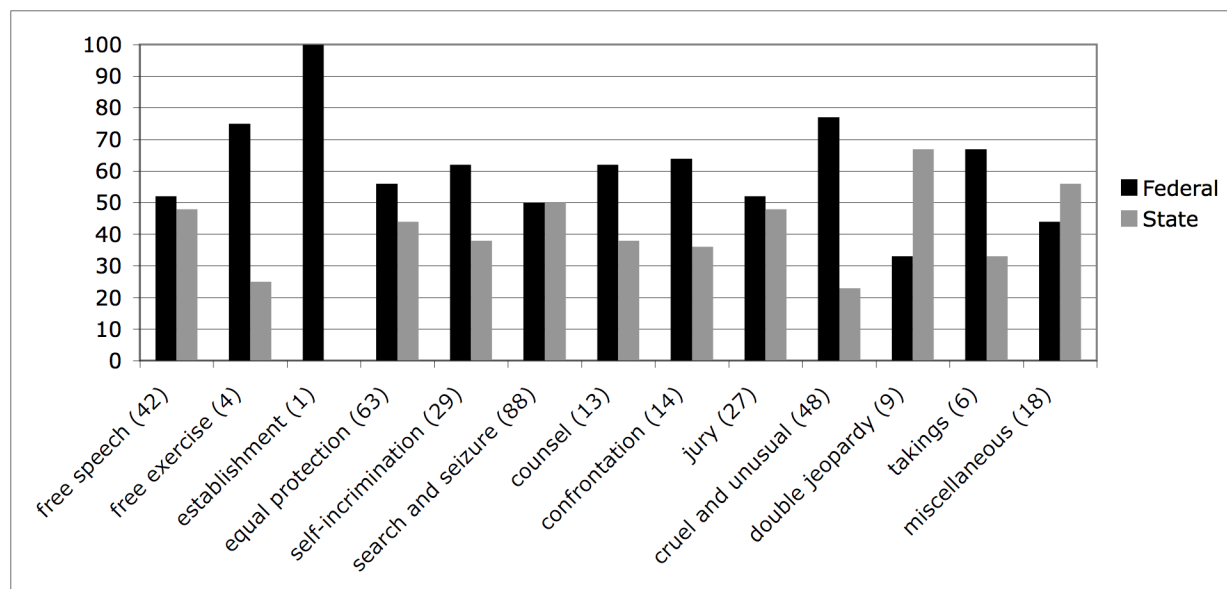


Figure 7.2. Percentage of arguments by rights area, Oregon 1970-2000. N=362.

The pre-Linde years

Of the 52 arguments from 1970-78,¹⁹ only 8 (15%) were state based. Apart from two equal protection cases coded as state based because of my generous coding rules rather than a clear expression, these early arguments appear relatively similar to the experience in other states. The state arguments come in areas of either clear federal retrenchment or at least uncertain federal law, with perhaps one exception.

As with most states, school funding provides a particularly clear example of federal retrenchment. In *Olsen v. State* (1976)²⁰ education reformers presented a state constitutional challenge broadly similar in structure to the Washington reformers discussed in chapter 6. The claimants stressed the federal test as laid out in *Rodriguez* and noted that the Oregon Supreme Court had long held the state privileges and immunities clause to be “functionally equivalent” to

¹⁹ While Linde joined the Court in 1977, I include 1978 as a prior year because of the complications of Oregon briefing described in Chapter 2.

²⁰ 276 Or. 9.

federal equal protection; however, the claimants did note Linde's (1970b) criticism of this practice and argument that the state provision more clearly singled out special advantages with the claimants noting that skewed funding amounts to just such a special advantage for privileged students.²¹ The claimants also noted California's similar experience of applying parallel constructions of the state and federal provisions but ultimately rejecting *Rodriquez*. The claimants in *Olsen* argued for a similar path: continue to apply the federal tiers of scrutiny test under state law, but reject the specific holding of *Rodriquez* because the state constitution explicitly provides a right to education. As with the claimants in Washington, here they quoted the U.S. Supreme Court's declaration in *Rodriquez* that even the state conceded the education funding system could not survive if strict scrutiny was applied. While the Court ultimately rejected this argument, a claimant in 1978 unsuccessfully attempted to argue that *Olsen* did apply a more biting balancing test and that this should invalidate a limitation on mobile homes as wealth discrimination.²²

Free speech rights on public property demonstrate a similar trend of federal retrenchment affecting state constitutional claims. In *Lenrich Associates v. Heyda* (1972),²³ the claimants were members of a religious group who distributed magazines and chanted in a private shopping mall. The trial court denied an injunction sought by the mall owners, holding that private shopping malls are quasi-public spaces and the religious group has the First Amendment right to express themselves. While the case was on appeal, however, the U.S. Supreme Court reversed a nearly identical decision from Oregon holding that the First Amendment does not require access to

²¹ *Olsen*, 276 Or. 9, Appellants' brief at 33.

²² *Clackamas County v. Dunham*, 282 Or. 419 (1978).

²³ 264 Or. 122.

private shopping malls.²⁴ The initial section of the claimants argument, apparently in response to the mall owner's claim, sought to convince the Court that it was not bound to follow this decision pointing to instances of judicial federalism, most of which where fairly anemic examples, and stressing Linde's (1970b) push for the primacy of state rights and ending the automatic deference to the U.S. Supreme Court. The bulk of the argument though was aimed at discussing the U.S. Supreme Court's jurisprudence prior to *Tanner*, arguing that the "*Tanner* majority ignores the reasoning of its earlier decisions" that should be ignored because *Tanner* was "a retreat from a long line of cases which have expanded the scope of free speech in an effort to maintain its viability in an ever growing and increasingly suburbanized society."²⁵ As the federal dissenters demonstrated, the U.S. Supreme Court's new direction ignored the changing social realities that make a private shopping mall akin to a modern day open town square. While the Court rejected this argument, it did note that it had the power to issue a more protective rule and a claimant in a libel case in 1974 used this brief assertion as a short tacked on point that the state provision could be the basis for reversing a libel judgment as well.²⁶ While the state claim was poorly developed and amounted to little more than an assertion, it is an outlier to a degree given the relatively stable federal libel protections and the refusal of the Oregon Court to issue a more protective state doctrine.

The final significant issue unexpectedly involved double jeopardy. In *State v. Fair* (1972) the claimant noted that the federal definition of jeopardy was in flux and primarily relied upon federal law, arguing that "[w]hile it is true that the United States Supreme Court has as yet not adopted the 'same transaction' test to determine when jeopardy rears its head, defendant submits

²⁴ *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

²⁵ *Lenrich Associates*, 264 Or. 122, Respondents brief at 23, 25.

²⁶ *Post v. Oregonian Publishing Company*, 268 Or. 214 (1974).

the trend is in that direction.”²⁷ But the claimant added that if this trend is not sufficient, the Oregon Court should reject the older “same proof” test under the state constitution as bad legal policy, noting a few other states that recently made this change. In a related case the same year, the Oregon Supreme Court adopted this argument—despite the fact that the claimant in that case did not argue a state violation—holding that the stronger test is required under the state constitution regardless of the ultimate resolution of the federal test.²⁸ A claimant in 1974 relied upon this higher bar when arguing that his plea to reckless driving forbade the state from trying him for manslaughter arising out of the same event.²⁹ This early set of cases is the reason that double jeopardy claims are dominated by state arguments, as shown in Figure 7.2.

The pre-Linde years show a now common theme. Federal arguments dominate rights issues. Where the federal law is uncertain or unproductive, state claims start to pop up but are relatively underdeveloped. These state arguments tended to focus on importing federal doctrines and criticizing the policy rationale underlying changes thereto.

The transition years, 1980-84

As discussed above, Linde spent his first years on the Court trying to convince his colleagues to change their mindset regarding the relationship of federal and state constitutional law. As Linde gradually succeeded in selling his ideas to his Court (McIntosh and Cates 1997), lawyers should have started to respond by offering an increasing number of state constitutional arguments both in response to continued federal retrenchment but also to the increased development of Oregon constitutional law. From 1980-84, 23 (37%) of the 63 arguments were

²⁷ *State v. Fair*, 263 Or. 383 (1972), Appellant’s brief at 22.

²⁸ *State v. Brown*, 262 Or. 442 (1972).

²⁹ *State v. Leverich*, 269 Or. 45.

state based, clearly a significant increase from the 1970s. However, this period still looks broadly similar to prior years with federal retrenchment driving state arguments.

A significant example of federal retrenchment came in another somewhat frequent area for judicial federalism: abortion funding. A state agency promulgated a rule limiting the use of state funds for abortions and claimants attacked the rule on privacy,³⁰ equal protection, and religious freedom grounds.³¹ Despite the Oregon Supreme Court's earlier expression of discomfort with the idea of a state based right to privacy,³² the claimants dug up some interesting history of the natural rights debate in Indiana (the state Oregon borrowed much of its constitutional language from) as a way to incorporate privacy into some of the more vague provisions of the Oregon bill of rights. Then, claimants turned to lengthy discussion of decisions from California and Massachusetts rejecting similar restrictions on abortion funding, describing these courts as "follow[ing] the rational of *Griswold v. Connecticut* and *Roe v. Wade*" rather than the newer, narrower constructions of reproductive privacy.³³ A similar argument was made regarding equal protection, noting that both state courts had looked at this restriction harshly as both an act of gender and wealth discrimination. Similarly, after the U.S. Supreme Court held that the Sixth Amendment provides a public trial right only to the accused and not the media,³⁴

³⁰ Admittedly, this argument runs on the edge of my rule limiting consideration to issues with parallel state and federal provisions because, as discussed in Chapter 2, Oregon does not have a due process clause. I decided to still include this privacy argument because of the attempt to justify a penumbral right to privacy similar to the early federal expression.

³¹ *Planned Parenthood Ass'n, Inc. v. Dept. of Human Resources of the State of Oregon*, 297 Or. 562 (1984).

³² *Sterling v. Cupp*, 290 Or. 611 (1981).

³³ *Planned Parenthood*, 297 Or. 562, Petitioners' brief at 19.

³⁴ *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

press claimants argued that the state constitution's strong language favoring open courts required the Court to ignore the federal restrictions.³⁵ Other areas see a more mixed set of signals.

Free speech law is an interesting example of high state constitutional activity in Oregon, as seen in Figure 7.2, and that trend began in this transition period. One rather clear example of federal retrenchment is a commercial speech argument asserting that the Oregon Bar's rejection of trade names was unconstitutional.³⁶ While it is true that the U.S. Supreme Court had recently begun expanding protections for commercial speech, it had explicitly rejected this exact argument.³⁷ The claimant noted the absolutist language of the state speech provision³⁸ arguing that there is no basis for treating commercial speech to a less protective standard, as the U.S. Supreme Court did, "because the Oregon Constitution does not distinguish between commercial and non-commercial speech."³⁹ The claimant then turned to the policy of the federal decision, noting that trade names pose no harm to the public and in fact help build a trusted brand for public consumption; abuse may occur but "[a]ny advertising is subject to abuse but the preferable solution is a fuller disclosure and not a banning of the statement," citing heavily to the federal dissenting opinion's logic to support this point.⁴⁰ While the Court avoided this issue by resolving the claim on statutory grounds, a more significant trend involved the relationship of speech and criminal law.

³⁵ *State ex rel. Oregonian Pub. Co. v. Deiz*, 289 Or. 277 (1980). After this claim was successful, a later criminal defendant used it to supplement his public trial argument, *State v. Blake*, 292 Or. 486.

³⁶ *In re Conduct of Shannon*, 292 Or. 339 (1982).

³⁷ *Friedman v. Rogers*, 440 U.S. 1 (1979).

³⁸ Oregon Const. Art. I, Sec. 8: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

³⁹ *Shannon*, 292 Or. 339, Accused's brief at 22.

⁴⁰ *Shannon*, 292 Or. 339, Accused's brief at 23.

Where speech acts were criminalized, there is some influence from doctrinal shifts from the Oregon Court. In *State v. Spencer* (1980), the Court invalidated a disorderly conduct statute for criminalizing too much speech. Interestingly, the Court openly admitted that the parties argued the case as a First Amendment issue, but *sua sponte* decided to reach a state constitutional resolution itself.⁴¹ In *State v. Huie* (1982), the claimant utilized this precedent in arguing that the state's solicitation statute was unconstitutional because it criminalized the actual speech of soliciting a prostitute without any requirement of intent (an argument the Court easily dismissed). In *State v. Robertson* (1982),⁴² however, the Court again reiterated this rule when it invalidated a coercion statute as vague and overbroad because it criminalized a wide degree of pure speech without a requirement that it be connected to any actually illegal conduct. Similar to *Spencer*, the Court reached this decision with minimal assistance from the claimant's argument, which simply presented a single citation to an Oregon decision holding that libel damages cannot be used to punish the speaker.⁴³ After this effort from the Court, claimants began to more clearly develop their state speech attacks on criminal statutes. For example, a 1984 claimant attacked the state's menacing statute utilizing *Robertson's* logic and expressed disdain at the state's argument for relying on federal decisions to defend the law rather than the state doctrine.⁴⁴ This line of cases became a significant source of state constitutional activism.

The normalization of state constitutional law, 1986-2000

⁴¹ *State v. Spencer*, 289 Or. 225, 228 (1980). Unfortunately, no records from this case were available.

⁴² 293 Or. 402.

⁴³ *Wheller v. Green*, 286 Or. 99 (1979) (compensatory damages for libel are constitutional, but punitive are not).

⁴⁴ *State v. Garcias*, 296 Or. 688 (1984), Defendants-Respondents brief.

With the establishment of primacy, state constitutional law in Oregon became normalized to a significant extent. Lawyers turned to state constitutional law in a wide variety of cases—from 1986-2000, 125 (51%) of 247 total arguments were based on state law—and demonstrated little discomfort with this new branch of law. As Figure 7.3 shows, there was minimal attention to nearly all of the legal factors that many commentators and other courts saw as the legitimate means of making state constitutional arguments. But this finding does not mean that Oregon lawyers offered weak arguments. On the contrary, they argued state cases in generally the same way they would argue any other case: by parsing the deepening body of state law with less attention to issues of text or history. Lawyers arguing fairly standard issues, say a Fourth Amendment probable cause claim, rarely have a need to dig into the founding era history or carry out primary historical research because they were trained to argue the issues from case law and the case law is generally sufficient. Ultimately, that is what occurred in Oregon. The Court rapidly built a wide set of state constitutional doctrines and lawyers adapted rather quickly. Federal rights arguments remained important issues, but in a wide set of cases they became supplementary to, or replaced with, alternative state arguments. The issue areas varied from areas of relatively clear federal retrenchment to areas where federal law was relatively stable or even expanding.

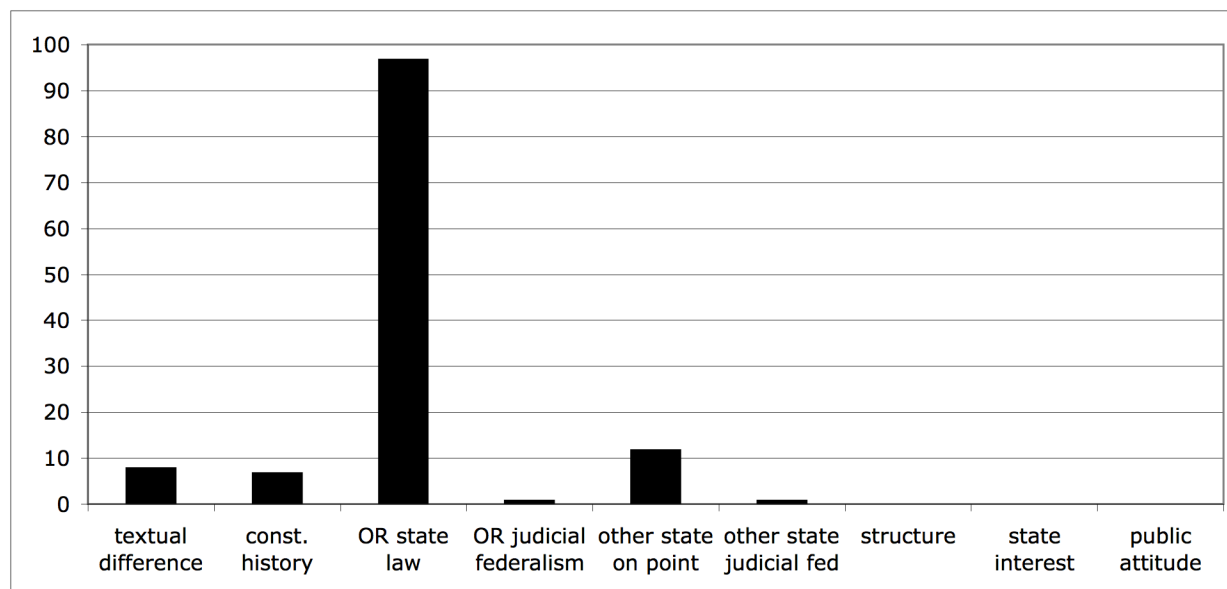


Figure 7.3. Percentage of state arguments citing each factor, Oregon 1970-2000. N=156.

Search and seizure

As Figure 7.2 demonstrates, search and seizure issues were the single most common area of constitutional rights disputes in Oregon. From 1986-2000, 43 (72%) of 60 search and seizure claims were state based. While some claimants continued to push federal issues, and a small number only presented federal issues, state search claims dominated. As the Court built an extended set of search precedents, lawyers argued the issues as they would any “normal” Fourth Amendment claim, with extensive reference to that developing state doctrine. Claimants gave little serious attention to any changes in federal law.

As with other prominent state doctrines, the Oregon Court drove the development of state search law initially with little assistance from lawyers. While the claimant did not press a clear state argument in *State v. Caraher* (1982),⁴⁵ some notice of the Linde push for primacy was made. The Court argued that its history of linking state and federal search provisions to simplify the law had failed; instead, the “goal of simplification is, in our view, better served by relying on

⁴⁵ 293 Or. 741.

article I, section 9 ... to formulate an independent rule consistent with our past decisions than by hypothesizing how the U.S. Supreme Court would consider this case.”⁴⁶ The Court held that searches incident to an arrest were allowed for office safety and to seize evidence relevant to the crime “so long as it is reasonable in light of all the facts.”⁴⁷ In *State v. Lowry* (1983) the Court expanded upon this test holding that police are allowed to seize materials that are apparently contraband for a short time to obtain a warrant for testing but that testing without the warrant extends beyond the search incident to arrest exception.⁴⁸ From these foundational cases, the Court built an extensive set of state search precedents for lawyers to utilize.

This distinctive approach begins at the very purpose of the exclusionary rule and who has standing to challenge a search. The Court held that “[u]nlike the Fourth Amendment exclusionary rule, which has been predicated in recent years on deterrence of police misconduct ... the exclusionary rule of Section 9 is predicated on the personal right of a criminal defendant to be free from an ‘unreasonable search, or seizure.’”⁴⁹ Thus, exclusion of evidence is the proper remedy regardless of whether it would deter police misconduct, the right is personal and invasions always require remedy. In terms of whom may challenge a search, the Court held that a “criminal defendant always has standing to challenge the admission of evidence introduced by the state” and what matters is his rights in an item regardless of where it is located.⁵⁰ In *State v. Turner*, the Court applied these rules to exclude evidence found during an admittedly illegal search of a third-party pawnshop even though the items seized were stolen. A person still had a right against the illegal seizure of effects that he used as collateral even if he had no legal right to

⁴⁶ *Caraher*, 293 Or. at 750.

⁴⁷ *Caraher*, 293 Or. at 759.

⁴⁸ *State v. Lowry*, 295 Or. 337 (1983). This decision was overruled by *State v. Owens*, 302 Or. 196 (1986) discussed above.

⁴⁹ *State v. Turner*, 304 Or. 312, 315 (1987).

⁵⁰ *Tanner*, 304 Or. at 316.

those effects. A number of claimants utilized these broad rules of standing and exclusion without any apparent concern with shifting federal law. In a case on a search of an open field, a third party non-owner asserted the right to challenge the fruits of a search because his work on the area gave him privacy interests that were violated and while the claimant made some reference to federal law, he was careful to clarify it was used solely for persuasive effect and that the only issue was application of *Turner* and other state search law.⁵¹ Generally standing issues after 1990 did not refer to federal law to any significant degree and simply sought to apply *Turner* and its progeny to various facts such as a passenger in a car, a driver of mother's car, and a person holding a container.⁵² In one case there was a lengthy federal argument in addition to the state claim but this was caused by a complicated fact pattern. In *State v. Davis* (1992),⁵³ the claimant was arrested in Mississippi by local police on a fugitive warrant for crimes in Oregon; the local police entered his mother's home without a search warrant and claimant claimed in both state and federal arguments that this entry was illegitimate and thus evidence seized must be excluded. The state argument is a fairly simply application of *Turner* that as a house guest he has a privacy interest against invasion by police. The federal argument is longer in large part because, as the claimant noted, federal law is less protective and thus more effort had to be exerted to distinguish this negative federal law, and it closed with a policy critique that deferring to the police, as the U.S. Supreme Court so frequently did, only encouraged more misbehavior.⁵⁴ This argument was clearly offered because of the complicated situation of an out-of-state arrest by non-Oregon law enforcement; in fact the claimant's argument was begun with a long argument that Oregon law

⁵¹ *State v. Dixon*, 307 Or. 195, Appellants' brief

⁵² *State v. Buchholz*, 309 Or. 442 (1990), Appellant's brief; *State v. Morton*, 326 Or. 466 (1998), Respondents' brief; *State v. Tucker*, 330 Or. 85 (2000), Appellant's brief.

⁵³ 313 Or. 246.

⁵⁴ *Davis*, 313 Or. 246, Respondent's brief at 26-33.

should apply.⁵⁵ But if that claim failed, then the federal issue was the only remaining issue so the claimant had little choice but to detail the weaker federal analysis.

The search incident rules established by *Caraheer* and *Lowry* were the source of continued contestation in 1986. One pair of cases dealt with searches of automobiles incident to arrest, specifically with searches of items in the trunk. In one the legal basis was vague at best, failing to cite to either constitutional provision and only referring to unspecific “Oregon law” at a few points with a heavy inter-mix of federal law.⁵⁶ The claimant in *State v. Bennett* (1986) offered a more confusing argument, apparently motivated in part by the state’s formulation of the case.⁵⁷ It appears that the state relied upon *Caraheer*’s statement that a search incident is allowed as long as reasonable in all respects to mean that such a search could go beyond the immediate area of the arrestee, to extend to closed items within a car trunk. The claimant accepted this formulation of *Caraheer* and argued that “the formulation of the appropriate rule under the Oregon Constitution is probably a mistake” because it relied upon older Oregon cases that in turn rested on Fourth Amendment law overruled in the late 1960s.⁵⁸ In essence, the claimant argued that this rule could not be allowed because the state constitution cannot give less protection than federal law. This complicated set of arguments appears to have been caused by the fact that the Oregon Court had resisted a general automobile exception to the state rule so the state was forced to fall back to a broad interpretation of the search incident rule; ultimately, the Court settled this dispute by recognizing a form of the automobile exception that a vehicle stopped in transit was subject to a complete, warrantless search where the police had probable cause to believe evidence was

⁵⁵ In fact, I usually exclude this kind of case because of the complications of applying state law to out-of-state actors. I included this argument only because the state claim was made.

⁵⁶ *State v. Brown*, 301 Or. 268 (1986), Appellant’s brief.

⁵⁷ 301 Or. 299. Unfortunately, this is one of those cases where the state’s brief would be of great assistance but I rely upon the implicit presentation in Respondent’s brief.

⁵⁸ *Bennett*, 301 Or. 299, Respondent’s brief at 4.

within.⁵⁹ In a related case, however, a claimant successfully asserted a clear state constitutional argument that a search of a stationary automobile without even probable cause, even if allowed under federal law, still violated *Caraheer*.⁶⁰

In another pair of 1986 cases, the reach of *Lowry* was disputed. The cases involved the seizure of vials of powder suspected of being cocaine, one claimant was arrested on a theft charge and the vials were discovered in her purse and the other was the subject of a search warrant for marijuana and the police found the vials while executing the warrant.⁶¹ Both claimants presented clear state arguments without discussion of federal law. They simply sought to apply the *Lowry* holding that a warrant is required for further inspection of legitimately discovered closed containers. Even after the Court reversed itself on this issue, but still maintaining a distinct state rule as discussed above, claimants still continued to apply the state search incident rule that searches incident to an arrest can only be justified for ensuring no danger to the arresting officer or to find evidence relating to the crime. Thus, searches of wallets were challenged on the grounds that the police either had all the evidence necessary for arrest or that there was no possibility of a weapon in the small wallet compartments.⁶² Even with the limitations on the state rule in *Owens*, claimants maintained solely state claims and simply sought to distinguish *Owens* on the grounds that their cases were not about simply testing materials to confirm the substance but whether the initial seizure itself was limited.

In a number of other search areas where federal retrenchment was clear and at times dramatic, claimants still maintained arguments that were focused on the development of the

⁵⁹ *Brown*, 301 Or. 268.

⁶⁰ *State v. Kock*, 302 Or. 29 (1986).

⁶¹ *State v. Forseth*, 302 Or. 233 (1986); *State v. Owens*, 302 Or. 196 (1986).

⁶² *State v. Hoshkinson*, 320 Or. 83 (1994), Appellant's brief; *State v. Noble*, 314 Or. 624 (1992), Appellant's brief.

internal logic of the state search precedents and not the attacks on the U.S. Supreme Court seen in other states. For example, despite the federal rule that police dog sniffs do not amount to a search,⁶³ one claimant presented dual arguments attempting to, first, distinguish the federal case law, and, second, that *Caraher* and its progeny recognized a privacy interest in a storage locker that cannot be invaded by police action whatever its form.⁶⁴ Ten years after the Court accepted that search because the dog was not taken to the area with the intention to discover evidence, another claimant raised a state challenge to a dog sniff but this time a purposeful one. The claimant made an extensive argument on the limited facts of the first decision, the decade of search cases since developing search doctrine specifically as it relates to enhancement of senses, and the rejection of the federal position in five other states with only a perfunctory attempt to discuss federal law.⁶⁵ Similarly, a claimant attacked the use of a beeper placed upon his car without a warrant developed a detailed argument discussing the requirement of primacy, state precedent on expectations of privacy, and the reasoning of other state high courts applying warrant requirements to electronic tracking.⁶⁶ The claimant did make a brief federal claim attempting to distinguish a contrary case⁶⁷ but without much development and with no attention to the policy implications of that doctrine.

The open fields doctrine presents another example. In 1984, the U.S. Supreme Court held that a search in an open field outside of the curtilage of the home—the property immediately adjacent to the home or other building—did not require a warrant.⁶⁸ In two 1988 cases, claimants argued that state law protected personal property regardless of the proximity to a person's home

⁶³ *U.S. v. Place*, 462 U.S. 696 (1983).

⁶⁴ *State v. Slowikowski*, 307 Or. 19 (1988), Appellant's brief.

⁶⁵ *State v. Smith*, 327 Or. 366 (1998), Appellant's brief 17-36.

⁶⁶ *State v. Campbell*, 306 Or. 157 (1988), Appellant's brief.

⁶⁷ *U.S. v. Karo*, 468 U.S. 705 (1984).

⁶⁸ *Oliver v. U.S.*, 466 U.S. 170 (1984).

and again without any serious discussion of federal law.⁶⁹ In fact, one claimant criticized the trial court judge for failing to following the primacy instructions and instead simply upholding the search on the basis of federal law; the claimant argued that an older Oregon precedent rejected a similar open fields search and argued that even if it was based on a mixture of federal and state law, *Caraheer* held that the state basis should still survive a change in federal law.⁷⁰

While the search and seizure area is one of the strongest areas of federal retrenchment, we see little evidence of the kind of policy attacks on federal doctrine exhibited in other states. Perhaps the clearest example of a policy attack involved a case where police executed an arrest warrant and remained on the premises for hours detaining people; the claimant noted that the U.S. Supreme Court had upheld a similar action⁷¹ and argued that “[e]ven for a court which seems more interested in legislating tha[n] in judicial decision making, this is an extraordinary philosophy. Clearly, recent pronouncements by [the U.S. Supreme Court] are result oriented.”⁷² But even this claimant followed the trend discussed above in developing an alternative state claim through a detailed analysis of the large body of state search law built by the Oregon Supreme Court.

Free speech

Free speech law saw a significant degree of state constitutional activity in Oregon in part influenced by the adoption of some of Linde’s academic writings pushing for a more absolutist position on free speech (Linde 1970a; West 2000). Building on *Robertson*, the Court held that

⁶⁹ *State v. Andreason*, 307 Or. 190 (1988), Appellants’ brief; *State v. Dixon*, 307 Or. 195 (1988), Appellants’ brief.

⁷⁰ *Dixon*, 307 Or. 195, Appellant’s brief.

⁷¹ *Segura v. U.S.*, 468 U.S. 796 (1984).

⁷² *State v. Sargent*, 323 Or. 455 (1996), Respondent’s brief at 11.

Section 8 protects all speech unless the state can demonstrate that the restriction comes within some historical exception that existed in 1857 (when the Oregon Constitution was drafted) and that Section 8 was not intended to supplement. In practice, the Court demonstrated a degree of hostility to these justifications. Most dramatically, in *State v. Henry* (1987)⁷³ it held that obscenity is fully protected speech because the territorial laws only prohibited obscenity in regards to certain groups and thus it did not amount to a restriction on obscenity between adults. The Court did make clear that while the speech itself is absolutely protected, the effects of that speech are still open to punishment as Section 8 specifically allows liability for abuse of the right.

Many of the state speech arguments occurred in areas where reasonable federal and state claims existed and lawyers deployed both issues as equally viable alternatives. In a case about whether a news agency can be sued for airing a report of a traffic accident by one of the participants claiming invasion of privacy and airing of private facts, the claimant argued that the U.S. Supreme Court had rejected a similar kind of private action suit more than a decade before because of the chilling effect that it would have on news coverage and, regardless, these legal actions were not firmly established when Section 8 was drafted and thus the speech is protected.⁷⁴ Similarly, another set of cases attacked limitations upon political campaigning and lobbying utilizing generally parallel state and federal claims, attacking a restriction on parties from encouraging absentee voting, a state rule requiring 5% of the prior vote for automatic party access to the ballot, and a registration fee for those who lobbied the state legislature.⁷⁵ Similarly,

⁷³ 302 Or. 510.

⁷⁴ *Anderson v. Fisher Broadcasting Companies, Inc.*, 300 Or. 452 (1986).

⁷⁵ *Oregon Republican Party v. State*, 301 Or. 437 (1986); *Libertarian Party of Oregon v. Roberts*, 305 Or. 238; *Fidanque v. State ex rel. Oregon Government Standards and Practices Com'n*, 328 Or. 1 (1998).

another claimant sought to expand protections to commercial speech arguing that under *Robertson* and *Henry*, commercial speech did not qualify as an historical exception and thus deserves the absolute protections given to all other speech while still presenting a limited analysis of the more moderate federal test.⁷⁶ Another claimant mobilized parallel claims to attack a court order enjoining a publication of trade secrets as a prior restraint under federal law and a content restriction unjustified by historical exception under state law.⁷⁷ Two judges argued that restrictions on their ability to fundraise and comment on cases also amounted to violations of the more protective state rule as well as the less absolute federal test.⁷⁸ These cases saw generally strong state arguments paired with sometimes equally viable federal claims. Interestingly, they are treated for the most part as completely alternative, independent arguments.

Two other areas, hate crimes and sexually explicit speech, saw a greater shift away from federal law even where it was still an open question. In two 1992 cases the Court was asked to strike down Oregon's hate crimes enhancement statute for punishing the beliefs and speech of criminal defendants.⁷⁹ The claimants presented an interesting analysis that not only was racist speech not an historical exception to Section 8, but that the Oregon Constitution as originally drafted was full of overtly racist pronouncements (see Schuman 1995) and thus the speech was clearly protected. Further, the law was not aimed at any effects of speech, as it only required evidence of racist speech to justify the enhancement. Interestingly, even though the U.S.

⁷⁶ *City of Hillsboro v. Purcell*, 306 Or. 547 (1988).

⁷⁷ *State ex rel. Sports Management News v. Nachtigal*, 324 Or. 80 (1996).

⁷⁸ *In re Fadeley*, 310 Or. 548 (1990) (personal solicitation of election funds); *In re Conduct of Schenck*, 318 Or. 402 (comment on cases).

⁷⁹ *State v. Hendrix*, 314 Or. 170 (1992); *State v. Plowman*, 314 Or. 157 (1992).

Supreme Court did not reject this argument until the following year,⁸⁰ the claimants made only a brief, perfunctory federal argument. Sexually explicit speech is the one area where the federal arguments are totally displaced. In *City of Portland v. Tidyman* (1988)⁸¹ the claimant attacked ordinances that sought to restrict space and location of adult businesses solely on the authority of *Robertson* and its progeny, arguing that the city was clearly aimed only at suppressing the content of its speech. While this was at least arguably still an open question under federal law, the last case is the only speech argument in my sample where no federal argument was viable.⁸² The claimant in *State v. Stoneman* (1996)⁸³ was convicted of purchasing child pornography and argued that *Henry* clearly established that all obscenity, regardless of the actions depicted, were protected speech.

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

⁸⁰ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). But it is possible that these arguments might have shifted if they were made after the U.S. Supreme Court expanded protection for hate speech in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

⁸¹ 306 Or. 174.

⁸² *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography, even if not technically obscene, may still be proscribed by the state).

⁸³ 323 Or. 536.

Equal protection

Section 20 states that “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”⁸⁴ Linde (1970b) criticized the long practice of treating this provision as identical to the Fourteenth Amendment’s equal protection clause and moved to end it as a justice. The Court sought to “reject[] the basic federal methodology” of sliding tiers of scrutiny (Schuman 1988: 225). The development of this rule was slow and unclear, and at times still looked similar to the federal test. Schuman (1988: 245) summarizes the developing law, that the discrimination against an identifiable class where it is based on prejudice or stereotype will be impermissible, classes created by a statute (such as taxpayers) are permissible so long as the class is open for other people to enter it, and actions against individuals must follow some systematic criteria. While a few Section 20 arguments were made attacking general classifications in my sample, the most common use was to attack prosecutorial decisions as lacking a systematic basis for the decision to treat one defendant differently from another defendant.

A number of the attacks on class legislation were of relatively limited development, at times still referring to the tiers of scrutiny approach. For example, two cases attacked tax classifications for creating different groups of taxpayers without a rational basis for the treatment.⁸⁵ The idea of a statutorily created class arose in a challenge by town residents to the annexation of their town to another; the claimants admitted that federal law likely was not violated but argued that Section 20 still forbid the creation of different classes of voters and

⁸⁴ Oregon Const. Art. I, Sec. 20.

⁸⁵ *Wilson v. Dept. of Revenue*, 302 Or. 128 (1986); *Pollin v. Dept. of Revenue*, 326 Or. 427 (1998).

denying one of those classes a vote on a subject that will affect them.⁸⁶ In two 1990 cases, claimants attacked limitations on civil actions, one involving minors and the other suits against a governmental body, arguing that the legislature denied an important right to one class of citizens and not to others without justification.⁸⁷ While these arguments all focused on Section 20, they tended to be confused on the exact application and thus still fell back to standard federal language. The claimant in *Zockert v. Fanning* (1990)⁸⁸ noted that the “approach of Oregon courts in recent years ... has been ill-defined.”⁸⁹ The claimant then discussed the various cases key to this developing doctrine and applied each of the different approaches to the question of whether indigent natural fathers are entitled to state paid legal representation.

Arguments over the administration of laws have been clearer, however. The Court held that Section 20 “reaches forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments.”⁹⁰ While discretion in the administration of law alone was not inherently suspect, the discretion must be exercised on the basis of some meaningful criteria and be able to offer a satisfactory explanation for differential treatment.⁹¹ Arbitrary enforcement arguments were quite common in death penalty cases in particular. A number specifically complained of unequal treatment in plea offers. One case noted that the prosecutor offered a plea deal to some defendants but not others even though their crimes were similar without sufficient justification.⁹² In a similar case, the claimant complained that he was denied a plea deal given to similarly situated defendants because the prosecutor gave the final

⁸⁶ *Mid-County Future Alternatives Committee v. City of Portland*, 310 Or. 152 (1990).

⁸⁷ *Sealey By and Through Sealey v. Hicks*, 309 Or. 387 (1990); *Van Wormer v. City of Salem*, 309 Or. 404 (1990).

⁸⁸ 310 Or. 514.

⁸⁹ *Zockert*, 310 Or. 514, Appellant’s brief at 35.

⁹⁰ *State v. Clark*, 291 Or. 231, 239 (1981).

⁹¹ *State v. Freeland*, 295 Or. 367 (1983).

⁹² *State v. Hayward*, 327 Or. 397 (1998).

decision to the victim's family.⁹³ Other death penalty claimants sought to link the arbitrary enforcement aspect of Section 20 to the broader criticism of the prosecutor's power in death penalty cases. One claimant argued that allowing the prosecutor to choose between two different underlying crimes that were identical is inherently arbitrary because there is no meaningful criteria to choose between the two charges.⁹⁴ Claimants also targeted treatment from the trial court in addition to the prosecutor. One noted that two dozen other capital defendants received a jury instruction that he was denied and another attacked a court's decision to allow only some capital defendants to go back to the penalty phase after legislative changes were made to capital sentencing regime.⁹⁵ Outside of the criminal system, a lawyer utilized this doctrine to attack his bar disciplinary action arguing that his behavior was identical to a large number of other lawyers who engaged in the exact same behavior.⁹⁶

Section 20 became a significant source of state constitutional litigation as the Court developed the doctrine. While the class based arguments showed a degree of confusion over the meaning of the state doctrine, the arbitrary enforcement principle was clearer and claimants more easily applied it to a variety of governmental actions against discrete individuals.

Death penalty

As with Ohio, Oregon saw a high degree of constitutional activity regarding the death penalty. In Oregon, however, lawyers deployed state constitutional attacks upon the death

⁹³ *State v. McDonnell*, 310 Or. 98 (1990).

⁹⁴ *State v. Montez*, 309 Or. 564 (1990).

⁹⁵ *State v. Langley*, 331 Or. 430 (2000); *State v. Rogers*, 330 Or. 282 (2000).

⁹⁶ *In re Conduct of Schenck*, 320 Or. 94 (1994).

penalty process and sentencing.⁹⁷ This is true despite the fact that the voters added Article I, Section 40 that specifically reinstated capital punishment notwithstanding Sections 15 and 16. Lawyers still attempted to push the Court to maintain the primacy approach and continue to provide a separate state standard for cruel and unusual punishment. Showing the typical tenaciousness of death penalty litigators, they continued to push these arguments well after the Court clearly rejected the claim, but in an increasingly minimal fashion.

State constitutional challenges were made generally to attack the procedures utilized in the Oregon death penalty and not the validity directly. Claimants admitted that Section 40 was clearly intended to protect the death penalty from facial invalidity, but maintained that these provisions still held weight as to the procedures used to reach the method. In *State v. Isom* (1988)⁹⁸ particular weight was placed upon Section 15, then requiring that “[l]aws for the punishment of crime shall be founded on the principles of reformation, and not vindictive justice.”⁹⁹ Claimant argued that coupled with the prohibition of cruel and unusual punishment clause in Section 16, the state was prohibited from utilizing any procedure that was aimed at vengeance and argued that the newly enacted system was aimed at nothing more than vengeance. The Oregon Supreme Court rather forcibly rejected this theory in 1988 holding that Section 40 was clearly intended to suspend all effects from Sections 15 and 16.¹⁰⁰ Despite this rejection a number of claimants continued to press this argument, admitting that the Court rejected the claim

⁹⁷ Another significant difference is that Ohio has executed 46 people since 1976 where Oregon has only executed 2, apparently both specifically ended their appeals and asked for the execution. <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (accessed 3/15/12).

⁹⁸ 306 Or. 587, Appellant’s brief at 83.

⁹⁹ As quoted in *State v. Wagner*, 305 Or. 115, 135 (1988). Section 15 was amended in 1996 and now reads, “Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one’s actions and reformation.”

¹⁰⁰ *Wagner*, 305 Or. at 138-39. This denial actually became the basis for a Fourteenth Amendment challenge rejected on appeal to the U.S. Supreme Court in this case.

but seeking to preserve it and asking for reconsideration¹⁰¹ but over time they began to give up on a substantive discussion and just included it in a brief kitchen sink argument. Some cases continued to try and work around Section 40 with more creative arguments trying to backdoor some proportionality review used in other criminal cases.¹⁰² The most creative claimant argued that Section 13's prohibition of treating prisoners "with unnecessary rigor" as interpreted by a classic primacy case¹⁰³ requires invalidation of the death sentence because the state failed to prove death was a necessary sentence.¹⁰⁴

More narrowly, a common challenge attacked the death qualification procedure. The U.S. Supreme Court allowed prospective jurors to be removed where they were categorically opposed to the death penalty and would not consider the sentence.¹⁰⁵ Unfortunately for the claimants, the Oregon Court had accepted similar death qualification procedures as early as 1951.¹⁰⁶ State constitutional arguments in this area appear similar to some of the pre-Linde years, focusing on the policy outcomes of death qualification to convince the Court to "reach a different conclusion under the Oregon Constitution."¹⁰⁷ Interestingly, the claimants use social scientific data showing that death qualification leads to juries that are biased to reach a guilty verdict that the U.S. Supreme Court itself explicitly rejected in 1986. The data, and Justice Thurgood Marshall's dissent interpreting it, were used to both attack the consequences of the U.S. Supreme Court's decision and to convince the Oregon Court that its 1951 decision is so outdated as to deserve

¹⁰¹ *State v. Miranda*, 309 Or. 121 (1990); *State v. Nefstad*, 309 Or. 523 (1990).

¹⁰² See *State v. Montez*, 309 Or. 564 (1990), Appellant's brief at 192.

¹⁰³ *Sterling v. Cupp*, 290 Or. 611 (1981).

¹⁰⁴ *Montez*, 309 Or. 564, Appellant's brief.

¹⁰⁵ *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Lockhart v. McCree*, 476 U.S. 162 (1986).

¹⁰⁶ *State v. Leland*, 190 Or. 598 (1951).

¹⁰⁷ *State v. Isom*, 306 Or. 587 (1988), Appellant's brief at 53.

repudiation.¹⁰⁸ As with the arguments over the continued validity of Sections 15 and 16, the Oregon Court approved death qualification in 1988¹⁰⁹ but claimants continued to press the issue in later cases, calling on the Court to bow to the continued evidence about the ill-effects of the practice and change its mind, before ultimately abandoning significant discussion of the issue and relegating it to a short statement as part of the kitchen sink argument so many death penalty briefs conclude with.

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

Other areas

Interestingly, the Oregon Supreme Court's commitment to primacy did not always lead to expanded rights protection. In *State v. Campbell* (1985) the Court, after discussing its duty to settle state law first, adopted the federal reasoning for when hearsay statements violate a defendant's right to confront her accusers.¹¹⁰ Despite this direct linkage a number of claimants still noted the state aspect even if they focused more heavily on federal analysis as adopted by *Campbell*.¹¹¹ One claimant did attack this linkage, attempting to convince the Court to break with

¹⁰⁸ Some form of this argument is made by Appellants in *Isom*, 306 Or. 587; *State v. Miranda*, 309 Or. 121 (1990); *State v. Moen*, 309 Or. 45 (1990); *State v. Nefstad*, 309 Or. 523 (1990); *State v. Langley*, 331 Or. 430 (2000).

¹⁰⁹ *Wagner*, 305 Or. 115.

¹¹⁰ 299 Or. 633. The Court adopted the reasoning from *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹¹¹ *State v. Cervantes*, 319 Or. 121 (1994); *State v. Kirtzman*, 323 Or. 598 (1996); *State v. Wilson*, 323 Or. 498 (1996)

federal shifting federal reasoning after the U.S. Supreme Court held that courts are not necessarily compelled to conduct an inquiry into the reliability of hearsay statements.¹¹² The claimant criticized the Court for its adoptionism in this one area stating, “[i]f this court is going to adopt current federal reasoning, it must reevaluate the quality of that reasoning with every new federal test.”¹¹³ After a detailed analysis of the heavy criticism from law reviews and legal commentators of this recent federal change, the claimant argued that this new federal decision “is a poorly reasoned deviation from prior precedent and from scholarly opinion, and should not be followed by this court.”¹¹⁴ The claimant stressed that the original federal reasoning adopted by the Oregon Court was reasonable and simply should be maintained, that the Court should not feel required to shift its home law every time federal reasoning underwent a change. This attempt, however, failed and the later claimants simply applied the law as adopted.

In self-incrimination cases, we see an attempt to actually reduce state protections below the level of protection guaranteed by federal law. In *State v. Smith* (1986) the claimant presented a relatively weak assertion that the state self-incrimination clause required *Miranda*-type warnings as a supplement to a more focused federal argument. A plurality of the Oregon Supreme Court rejected this invitation and held that long-standing Oregon law required only that confessions be voluntary to be admissible, that warnings were not required. The plurality especially warned of the risk of tying state law to federal: “To adopt an Oregon *Miranda* rule identical to the federal rule and tie it to future interpretation by the federal caselaw would be foolish. We do not know what may be waiting in the alley.”¹¹⁵ The plurality acknowledge the fact that federal law still had to be applied, but refused to extend state protections even to the

¹¹² *Bourjaily v. U.S.*, 483 U.S. 171 (1987).

¹¹³ *State v. Cornell*, 314 Or. 673 (1992), Appellant’s brief at 59.

¹¹⁴ *Cornell*, 314 Or. 673, Appellant’s brief at 60.

¹¹⁵ *State v. Smith*, 301 Or. 681, 701 (1986).

level of the federal doctrine. However, in *State v. Magee* (1987),¹¹⁶ a full bench appeared to limit *Smith* to cases where a person was simply being questioned without any accusation against them or custodial situation. *Magee* opened the door again to warnings under state law where the suspect was in custody or subject to the adversarial process in some way. A number of claimants sought to exploit this division for custodial interrogations arguing alternative state and federal points for issues about warnings and the waiver thereof.¹¹⁷ In some narrow factual settings we see federal retrenchment play a continued role, but still claimants rarely invoked the kind of policy attack arguments that existed pre-Linde in Oregon and in other states because the Oregon Court continued to provide a clear state basis for such arguments. For example, in *State v. Miranda* (1990)¹¹⁸ the claimant immediately acknowledged that federal law supported the impeachment use of illegally obtained statements¹¹⁹ but relied on a 1988 Oregon precedent¹²⁰ rejecting the use of such statements. A similar situation was present in a case about whether statements were admissible after an attorney had attempted to intervene but the police did not inform the suspect of this fact. Here the federal law was again unsupportive, but the Oregon Court seemed to suggest that state law prohibited such actions.¹²¹ Thus the claimant noted this retrenchment from the U.S. Supreme Court but pointed out how that decision expressly noted “that a number of state courts had taken the opposite position” and that Oregon was such a court

¹¹⁶ 304 Or. 261. The three members of the *Smith* plurality concurred on federal law grounds but reiterated that state law should not provide a remedy in this case.

¹¹⁷ *State v. Buchholz*, 309 Or. 442 (1990), Appellant’s brief; *State v. Davis*, 313 Or. 246 (1992), Respondent’s brief at 46; *State v. Moore*, 324 Or. 396 (1996), Appellant’s brief at 77; *State v. Toevs*, 327 Or. 525 (1998), Appellant’s brief at 21.

¹¹⁸ 309 Or. 121.

¹¹⁹ *Harris v. New York*, 401 U.S. 222 (1971).

¹²⁰ *State v. Isom*, 306 Or. 587 (1988).

¹²¹ *Moran v. Burbine*, 475 U.S. 412 (1986); *State v. Haynes*, 288 Or. 59 (1979); *State v. Sparklin*, 296 Or. 85 (1983). The Oregon Court is unclear on the extent to which it is relying on state law in these cases.

and that whatever changes occurred in federal law, the state protections should remain intact.¹²²

After this argument was successful, two later claimants sought to utilize it as the primary claim in cases involving suspects' invocation of their right to counsel.¹²³ Even with the early mixed signals about the reach of the state provision, and the clear examples of federal retrenchment, claimants still engaged with primarily legal arguments over the kinds of policy attacks on federal law that are common elsewhere.

Conclusion

The Oregon Supreme Court embraced Linde's primacy theory, championing the view that state law should be primary. Interestingly, the early engagement with state constitutional law was driven by the Court, or most likely by Linde and his closest allies, *sua sponte*. While this is contrary to rules of judicial behavior discussed in Chapter 1, it demonstrates a powerful commitment to state constitutional law through the leadership of the Court. By not only ordering consideration of state issues but also going further to issue early decisions in multiple areas with little assistance from the bar, the Court provided a high degree of guidance by giving lawyers the source material to work with. And more than any other state in my study, lawyers responded to this guidance. State constitutional law became normalized by the Oregon Court. After the early establishment of primacy, lawyers demonstrated attention to state law in much the same way they would approach any other legal issue. They applied an increasingly thorough body of state precedent to new and different situations. Claimants gave little attention to the wide range of factors coded in my analysis because they had no need to reach outside of this precedent. Similar

¹²² *State v. Simonsen*, 319 Or. 510 (1994), Appellant's brief at 36, 37.

¹²³ *State v. Charboneau*, 323 Or. 38, Appellant's brief; *State v. Meade*, 327 Or. 335 (1998), Respondent's brief.

to the Washington experience, policy critiques of federal law nearly completely disappeared because lawyers no longer had to work solely with federal principles and logic. Perhaps most interesting is that Oregon claimants utilized state arguments in a broad set of areas, some where federal law was still supportive and others where state law was only given a limited development. While it may be true that some areas saw less thorough state constitutional arguments than others, it is also clear that in the aggregate lawyers presented both the highest frequency of and most thorough examination of state constitutional claims than any other state in this study.

Chapter 8

Conclusion

The previous chapters presented a series of case studies aimed at providing insight into the dynamic interaction between lawyers and state high courts. In this chapter, I outline some comparative analysis of both the aggregate trends and the substantive content of state arguments across the various states chosen for study. I close with some suggestion of the importance of my findings and potential future research trajectories.

Comparative thoughts: the aggregate trends

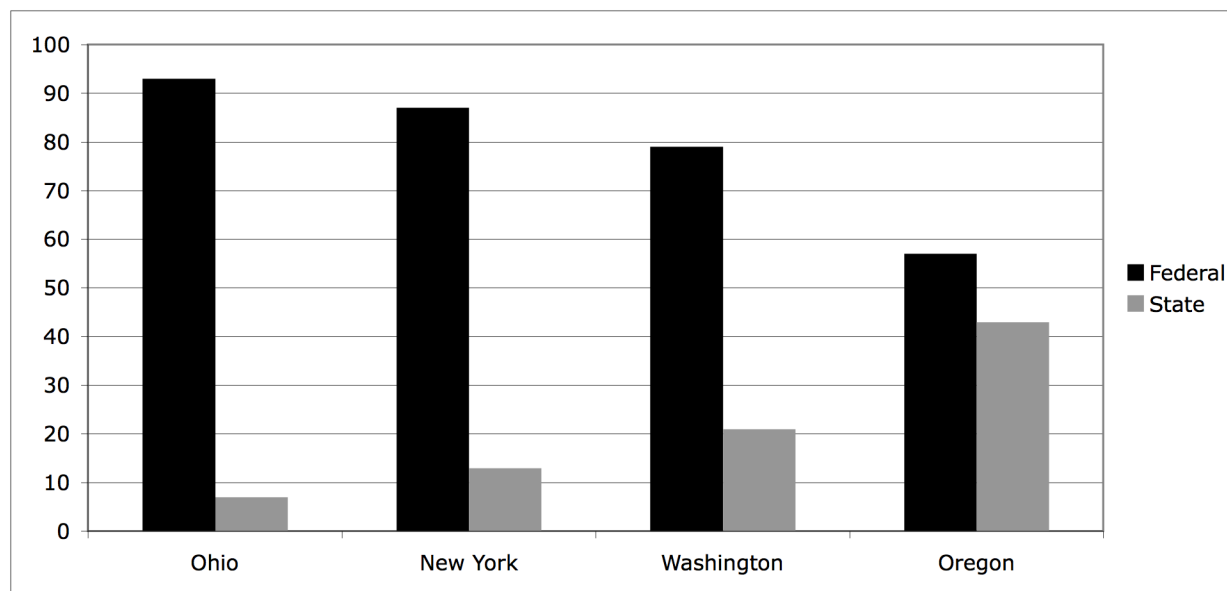


Figure 8.1. Aggregate percentage of federal and state arguments, all years.

Looking at the aggregate ratio between state and federal arguments, there is clearly substantial variation between states, as illustrated in Figure 8.1. The states show a trend that appears to track the degree of internal encouragement fairly well. The Ohio Supreme Court was

resistant to judicial federalism and gave no significant signal of interest in an independent body of state rights law and the legal bar reflected this disinterest, offering few state claims. In New York, where the Court of Appeals engaged in an ad hoc process willing to accept some state arguments with little guidance outside of the *Hobson* cases, lawyers responded with a higher number of state arguments but primarily driven by the *Hobson* cases. The consistent adoption of state constitutional theories leads to a significantly higher number of state constitutional arguments. In Washington, the criteria test may not have made state constitutional claims the norm, but they certainly became more frequent. The adoption of primacy in Oregon, on the other hand, has clearly lead to significantly greater attention towards state constitutional rights issues from the legal bar. Of course, the attention to state constitutional arguments varied significantly by year as well as between states.

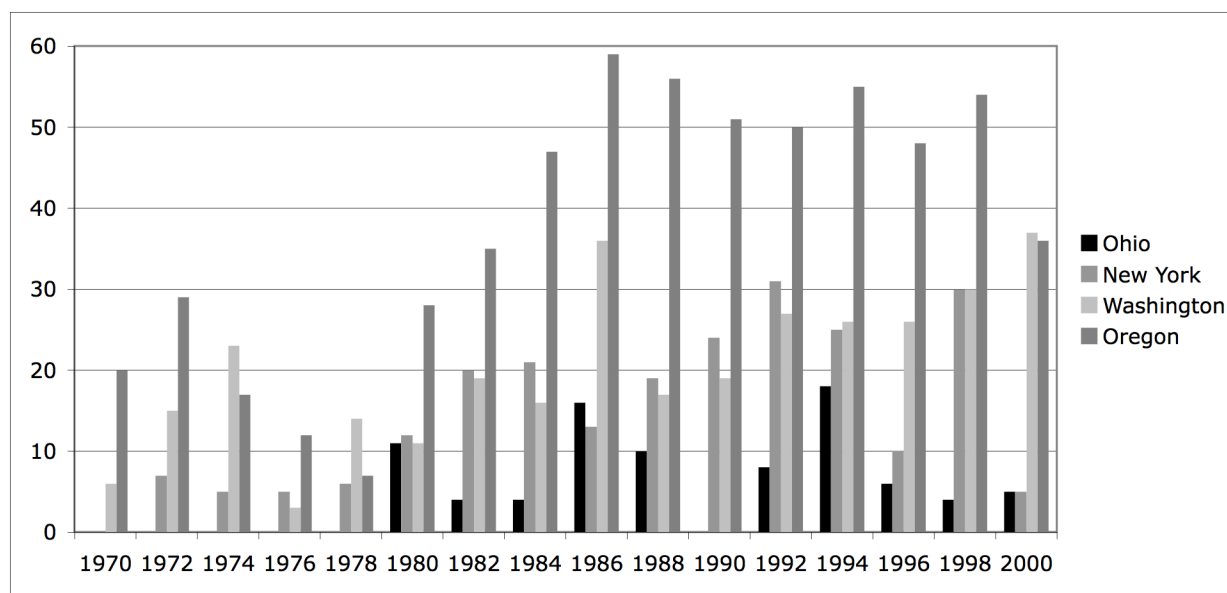


Figure 8.2. Percentage of state arguments by year, all states. For Ohio the date range is 1978-2000.

Variation in the frequency of state arguments over time is clearly common. There is little regular attention to state constitutional claims in the 1970s; the few relatively high spikes are the

function of an abnormally low number of cases (Oregon in 1970 and '72) or possibly incomplete sample issues (Washington in 1974). Generally we see an increasing trend in the 1980s in response to the signals of federal retrenchment and internal encouragement. This is most dramatically illustrated in Oregon. The spike in the early '80s is greater than in any other state and after 1984¹ the proportion is essentially evenly split between state and federal rights claims. With the adoption of primacy and the Linde led effort to establish an early set of state based rights precedent without concern for developments in federal law, lawyers were not only told to argue state issues but were given a set of precedents to apply to subsequent cases. Interestingly, New York and Washington had similar percentages of state arguments through the early 1990s. While the Washington Supreme Court may have adopted a constitutional theory, the criteria approach still tended to emphasize federal retrenchment and this was a prime driving force in New York. But the two states diverged greatly after 1994² due to one primary difference: the New York Court of Appeals settled the *Hobson* doctrine and delegated the one clear state constitutional doctrine to lower courts as part of its growing resistance to rights claims in general and without the one consistent independent doctrine lawyers reverted to the more ad hoc approach of presenting state arguments. Contrary to this experience, the Washington Supreme Court never abandoned the criteria approach, instead it consistently reiterated this theory and accepted and decided state claims where properly made; in other words, the encouragement from the court never declined. In contrast to these three states, we see no trend in Ohio towards state

¹ While 2000 shows a significant drop in the proportion of state rights arguments, this may simply be caused by an unusually high percentage of death penalty cases that had abandoned most state claims as discussed in Chapter 7. Although, it could also be the start of a declining trend.

² While New York in 1998 does show a high percentage (30%) of state arguments, this is caused by an unusually low number of cases (12) and a high number of missing briefs (4). Only 3 state arguments were made in New York, the same number as in Ohio, where Oregon and Washington each had 13.

claims. Apart from spikes in 1986 and 1994, no year saw state arguments comprising much more than 10% of the rights arguments. Faced with a state high court that largely rejecting the potential for independent state rights doctrine, lawyers responded with similarly little attention. Turning to issue areas, the aggregate trends similarly show variations across subject matter and between states.

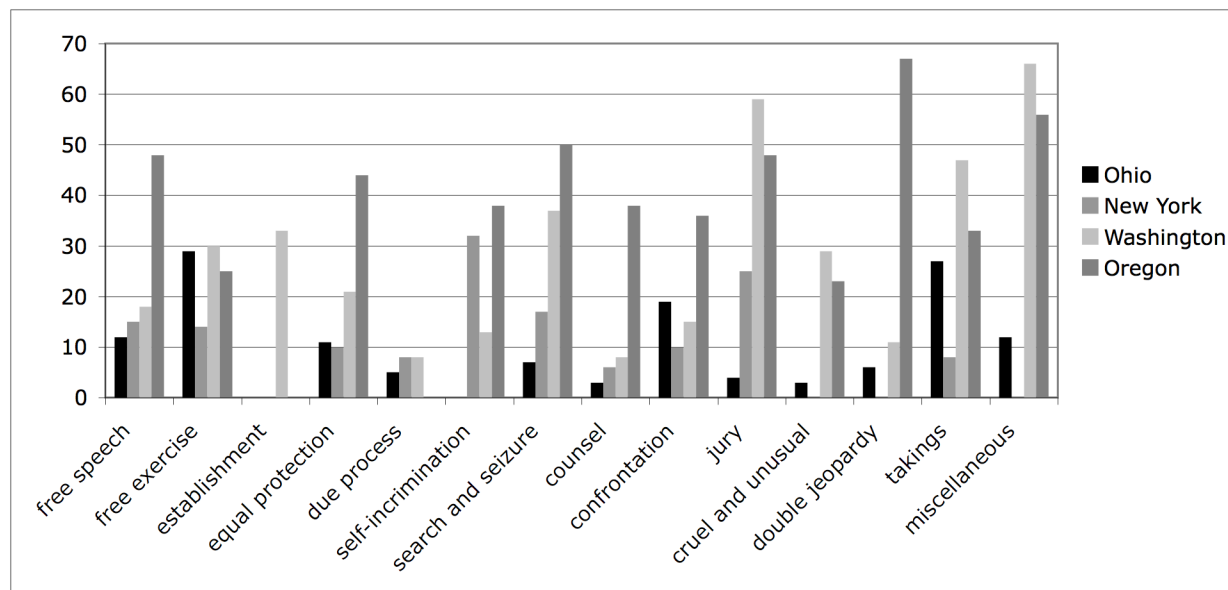


Figure 8.3. Percentage of state arguments by rights area, all states. New York has no establishment clause and Oregon does not have a due process clause.

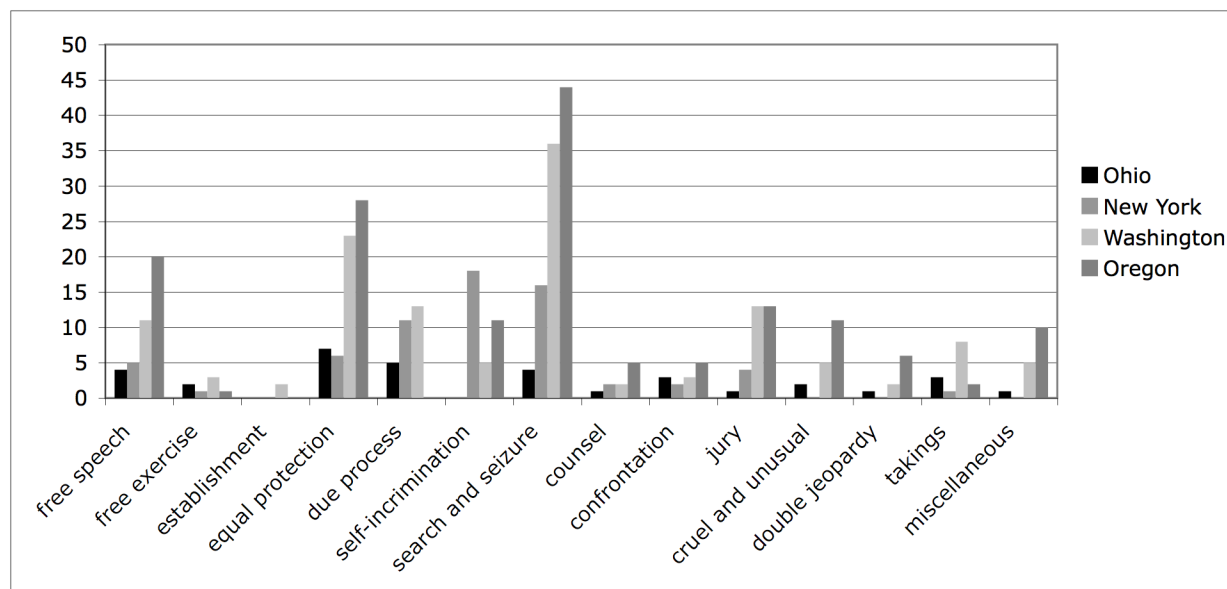


Figure 8.4. Total number of state arguments by rights area, all states.

Breaking down state arguments by issue area shows the wide variation between states and across issues. Figures 8.3 and 8.4 present this data by percentage of arguments and total state claims, respectively, to allow for easier interpretation of the percentages. Given the high degree of federal retrenchment in search and seizure law, it is unsurprising that the frequency of state search arguments were the highest for Washington and Oregon, and in New York it was nearly equal to the self-incrimination (*Hobson*) cases. However, only in the previous two was the proportion of search arguments state based in a significant way, with half of the Oregon arguments and more than a third in Washington. In other areas of criminal procedure we see a less prominent emphasis on state claims, outside of Oregon at least. Self-incrimination saw a relatively high proportion of state arguments in both New York and Oregon, influenced by the particular internal dynamics of each state. Across the other areas of criminal procedure rights, state constitutional activism is generally limited for most states, especially in Ohio and New York where no significant internal encouragement occurred in these areas and lawyers deployed state arguments instrumentally to address particular instances of federal retrenchment. In both

Oregon and Washington, significant attention was provided to jury claims due to internal doctrinal developments, and unexpectedly Oregon developed an early doctrine on double jeopardy that influenced lawyers to rely on state claims in an overwhelming proportion.

Turning to non-criminal rights areas, and leaving aside religion cases that saw minimal attention under either federal or state law, there is a greater degree of separation between states. Washington saw double the frequency of state speech (though it was not dramatically different in the proportion of claims) and in equal protection arguments than either Ohio or New York. In both areas federal law remained relatively stable and protective, apart from a few particular issues, and the increased attention was driving by the free speech decisions emanating from *Coe* and ERA and post-*Gunwall* developments in equal protection. Due process issues, however, saw little attention to state constitutional arguments—Oregon lacks a due process clause so that area was excluded. Outside of the more contentious areas of substantive privacy arguments, due process focused primarily on procedural issues where federal law remained stable. Interestingly, Oregon’s strong primacy commitment is evident in the high proportion of state constitutional arguments across all issue areas. Excluding religion cases, state arguments accounted for more than a third of all arguments in every issue area except for cruel and unusual punishment claims, where lawyers were faced with significant impediments to state claims.

The experience in Ohio is somewhat harder to detail. As discussed in Chapter 4, Ohio saw little attention to state claims apart from a relatively small number of cases driven by instances of federal retrenchment. However, the area of strongest federal retrenchment, search and seizure, saw minimal state constitutional attention. This is surprising and suggests that the support structure may require some minimal degree of support to develop even in areas of fairly strong retrenchment. Apart from a single weak statement, the Ohio Supreme Court refused to

develop state search law and thus lawyers had no body of state law to even begin with or reason to believe the Court might be receptive to the claims. While the New York Court of Appeals may not have consistently articulated a theory of state search law, it did demonstrate a willingness to evade some instances of federal retrenchment and thus lawyers were given some minimal encouragement to believe that state search claims may be useful and appropriate. It could be possible to read this evidence as supporting Gardner's (1992) assertion that lawyers rarely utilize state claims because they do not work, but to be convincing there would need to be some evidence of an early attempt to convince the Ohio Court that failed and in Ohio there is no such evidence. Lawyers simply seemed to have ignored the potential area throughout the scope of my study.

The content of state constitutional argument

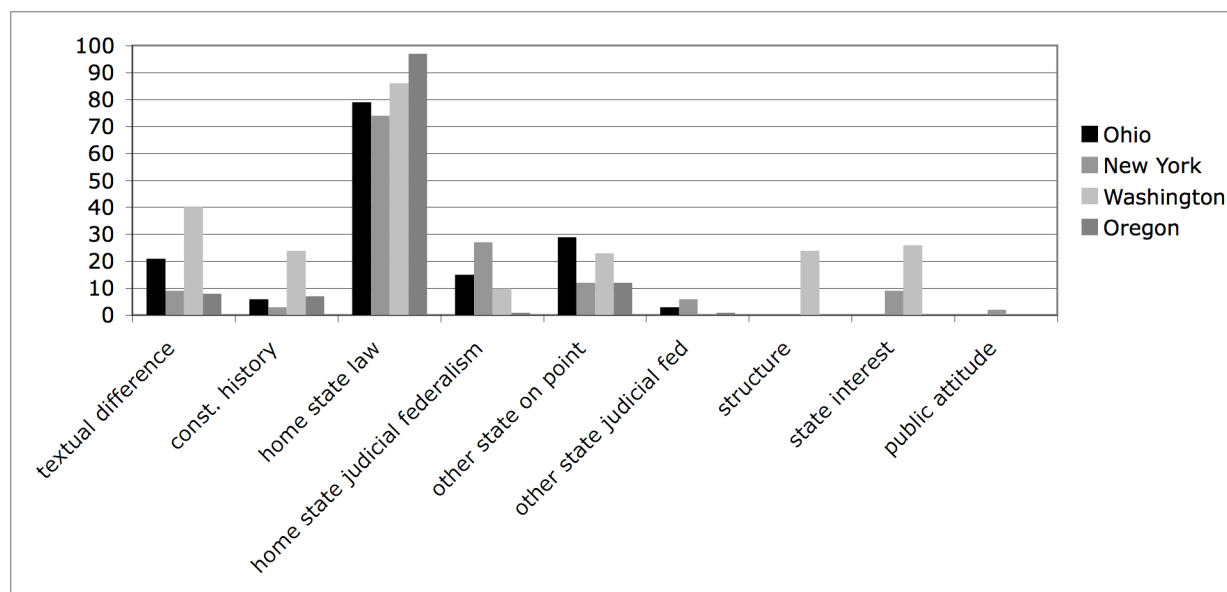


Figure 8.5. Percentage of state arguments citing each legal factor, all states.

Turning to the content of state constitutional arguments beyond their simple frequency, there are broad similarities with a few interesting outliers. Figure 8.5 presents the percentage of

state arguments that cited each particular legal factor. The only legal claim that saw a high degree of use was home state law where all states saw relatively common use. In part this is because of the loose coding rules that includes any mention of statute or common law, as well as prior state decisions based on federal law where the claimant seeks to reframe it as state based, in addition to legitimate instances of independent state constitutional doctrine. With the exception of Washington, the other areas saw little general attention. Washington shows a significantly greater degree of attention to issues of textual difference, constitutional history, structure, and state interest driven by the *Gunwall* endorsement of the criteria approach—and it should be noted that Figure 8.5 shows the percentages for all years, as Figure 6.5 shows the percentages for all of these factors were significantly higher post-*Gunwall*. While lawyers in all states generally ignored structure and state interest issues, and even in Washington the substantive arguments in these areas were minimal at best, the arguments in the other areas were significant and substantive generally in Washington but saw minimal attention in other states. This is most clearly true in the area of state constitutional history where Washington litigants utilized some state history claim in about a quarter of all state constitutional arguments (and more than a third after *Gunwall*), none of the other states saw significant attention to history. Primary source research is time consuming and difficult at times and thus lawyers generally avoid it; Washington litigants generally had a shortcut because many Washington Supreme Court precedents discussed some history providing lawyers with an easy source of research. Interestingly, Ohio litigants showed greater attention to textual differences than litigants in New York or Oregon, though still much less than Washington. This is best explained by the lack of any internal guidance on the meaning of state law, leaving lawyers with little to work with in making state constitutional claims. Textual differences are relatively easy arguments to make and

lawyers turned to them with some frequency. Interestingly, Ohio litigants were also most likely to look to other state cases on the legal point in question, again filling the hole left by the Ohio Supreme Court's refusal to engage with state law. The Oregon experience, in contrast, demonstrates a similar point: lawyers rely on the guidance from home courts in making state constitutional arguments. Where lawyers receive little guidance from the state high court, as in Ohio, they have to more frequently dig into less familiar kinds of legal arguments (or policy disputes as discussed below) and where they receive a high degree of guidance through the production of state constitutional doctrine, as in Oregon, there is little need to reach beyond this precedent. Oregon claimants show a heavy reliance on home state law, and a much greater degree is based on internal state constitutional development in this category than any other state, with minimal attention to all of the other legal claims. This does not equate to poor legal arguments, it just demonstrates a different form of argument. Provide with a sufficient foundation of precedents to work with, lawyers in Oregon had no reason to reach further to find additional support; in fact, their arguments generally looked like constitutional arguments in any "normal" federal constitutional claim where lawyers rarely delve into historical research or textual analysis.

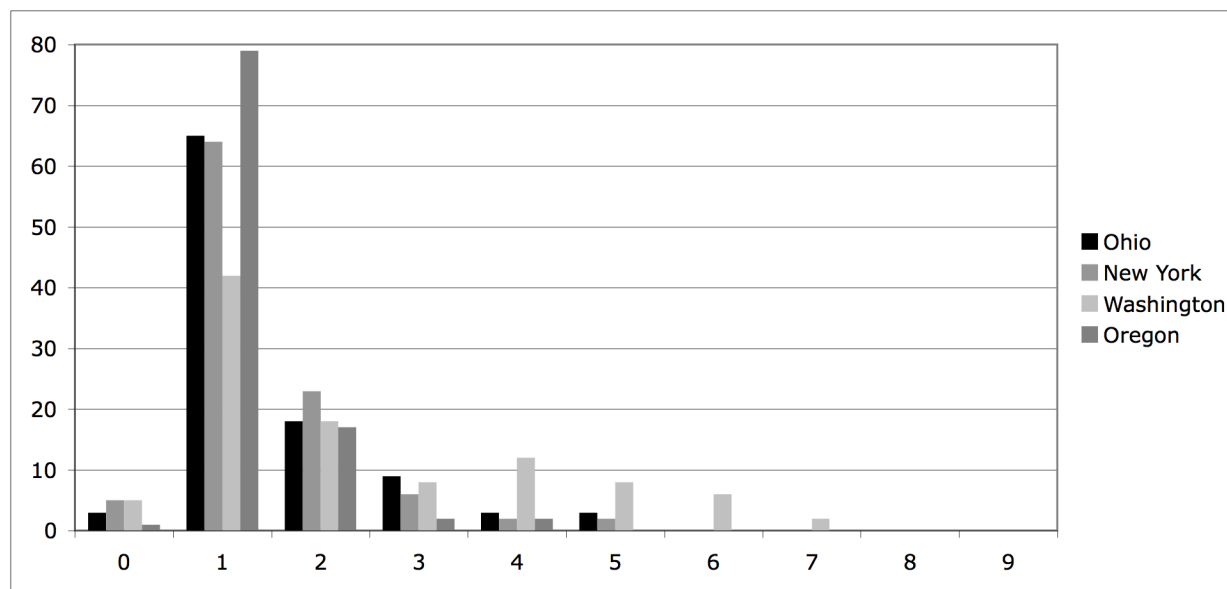


Figure 8.6. Percentage of state arguments by total factors cited, all states.

Figure 8.6 shows the rough complexity of state constitutional arguments by totaling the number of factors presented. Ohio and New York show broadly similar trends with 89% and 92%, respectively, of arguments presenting 2 or fewer of the legal factors. In Oregon that percentage jumps to 97%, again expressing the depth of state precedent that became the primary source of state constitutional arguments in Oregon. In Washington, however, we see the effect of the criteria approach in achieving some significant degree of increased complexity in the legal factors offered to justify an independent state constitutional analysis with 65% of the arguments citing 2 or fewer factors—53% if we limit the scope to only post-*Gunwall* cases. While compliance with the criteria test was far from perfect, lawyers responded to the Washington Supreme Court’s guidance with greater attention to these various legal factors.

Revisiting expectations

Examination of the four specific states and the remand sample largely bears out my expectations set out in Chapter 1 that the support structure for judicial federalism would be

generally quite weak absent court signals. Without these signals lawyers tended to rely solely on federal claims for rights arguments. As courts send signals about legal changes, however, lawyers did respond with state rights claims, but in different ways as expected.

Where federal retrenchment occurred, constitutional rights claims turned increasingly to state arguments. As federal rights doctrines start to sour on rights claimants, they begin to discover the state alternative. Initially, offering state arguments as a supplement to federal arguments seeking to distinguish these negative precedents. As federal law becomes more clearly negative, claimants abandon federal claims altogether. The state arguments in areas of federal retrenchment, however, rarely utilize the traditional legal factors generally expected from lawyers. Instead, the arguments primarily rely upon policy attacks upon the changing direction of federal law. Rather than explore the text or history of state provisions that state courts had largely ignored, claimants attacked the Supreme Court's new direction as poorly thought out, inconsistent with prior federal doctrine, and ultimately dangerous to American liberties. Claimants seek to convince the state high court to simply evade retrenchment and apply the prior federal doctrine under the window dressing of the state constitutional provision. The remand sample demonstrates this effect most dramatically in illustrating the dramatic change caused by Supreme Court reversal without any significant other change, but the experience in Ohio, New York, and the early years in Washington and Oregon also show similar trends of state arguments primarily in response to federal retrenchment. The experience observed in Ohio, however, suggests that some minimal level of state court interest may be required as even the strong degree of federal retrenchment in search and seizure law had a minimal effect on how lawyers argued rights claims.

State court encouragement, similarly, has the expected effects of not only leading to more state arguments, but also arguments that are less clearly focused solely on policy critiques of the U.S. Supreme Court. Guidance from state high courts provides lawyers with a path to follow in arguing an unfamiliar form of rights claims. The *Hobson* cases in New York led to state constitutional rights claims that were vastly different in form and tone than rights claims in other areas in the same state. They became less dependent on or concerned with federal developments and, instead, focused on the internal logic of the state rule. The *Hobson* cases, however, were constrained to this particular doctrine and had no discernible impact upon arguments in other issue areas. The adoption of broader theories in Washington and Oregon had a naturally broader impact. In Washington, lawyers still focused primarily on areas of federal retrenchment but the content of the arguments shifted dramatically to the required criteria and less on the policy implications of federal law. In Oregon, in contrast, the adoption of primacy coupled with the Court's willingness to create early state precedents *sua sponte* led to fairly dramatic shifts in how arguments were presented. In most issue areas, state constitutional rights arguments became normalized with lawyers treating state issues as they would any other legal issues. They had no reason to explore in depth the history or text of constitutional provisions, but also rarely invoked policy arguments or invited the Court to simply evade federal law; instead, the arguments were centered on parsing, distinguishing, and applying the growing body of state law. And only in Oregon is there evidence of consistent state constitutional arguments in areas where federal law is relatively stable and protective.

Importance and future research

This study is important in both a narrow and broad sense. Narrowly, it adds to the picture of judicial federalism over the first three decades of the phenomenon's development. In one sense it confirms a long asserted statement about the limitations of legal arguments by demonstrating that in actuality state constitutional arguments are generally quite weak and limited, but this gap filling alone only goes so far. I also demonstrate the ability of state high courts to overcome this limitation through active encouragement by adopting broad approaches to state constitutional law and requiring lawyers to follow those approaches. This suggests a way for state high courts to strengthen their record of independent state constitutional law, though it is a difficult path requiring a strong internal commitment that seems lacking in most state high courts. Given the state of American federalism, state courts will continue to play an important role in rights protection and my study sheds light on how lawyers and courts may interact to achieve that enforcement.

More broadly, this study adds to our knowledge about the interactive dynamics of legal development. Courts and lawyers are not completely separate entities because they rely upon the arguments and signals from each other to develop legal doctrine. I demonstrate how lawyers and courts interact to develop and support novel approaches to state constitutional law, an area of law that is generally neglected in rights litigation. This research suggests that a committed court can alter litigant behavior substantially given motivation and time.

Of course this research is limited in scope and significant additional avenues of research present themselves. An important question left unexplored here is the degree to which legal arguments affect the actual decisions of state courts. One way to explore this would be through multivariate statistical analysis including attitudinal, institutional, environmental variables along with a variable for the presence or absence of a state constitutional argument. We should observe

a significant effect on the willingness of state courts to adopt an independent state constitutional rule and, potentially, a significant decrease in attitudinal and institutional variables if legal arguments are a significant force in judicial decision-making. Another avenue is to examine the internal dynamics of state courts. My study unfortunately is forced to treat state high courts as black boxes, accepting legal inputs and producing results with no real understanding of how the courts reached that result. We can infer this internal process from findings of internal decision-making dynamics found at the federal level, but we simply have little knowledge of those dynamics at the state level. Studying the internal memorandum, draft opinions, or correspondence—assuming any exist—of a state court would allow scholars to better understand the support of judicial federalism as well as many other areas of state law. In particular, it would be interesting and important to explore the early Linde era on the Oregon Supreme Court to better understand the resistance to primacy and why the Court was ultimately so willing to decide the issues *sua sponte* where most other courts refused to do so. Additionally, given my concern about arguments seeking expanded rights protection, I neglected to explore the response from other actors, in particular government lawyers. Understanding the broader success and failure of judicial federalism will likely involve the counter-mobilization from governmental actors. This may be particularly interesting in Oregon where there is some evidence that the Attorney General's office strongly resisted the primacy approach.

Further, my research has some comparative implications. For example, when Canada adopted its Charter of Rights and Freedoms in 1982, lawyers were given an unprecedented means of attacking government actions but had zero guidance on the meaning of any of the provisions. Studying how Canadian lawyers developed these early constitutional arguments, where they drew support from, and how they adapted to the Supreme Court of Canada's initial

decisions may provide some interesting insight into the early development of Canadian constitutional rights law. Similarly, my research may have some value in European constitutional development where the rise of supranational institutions has lead to a multi-layered set of constitutional rights in some countries with the potential for similar tensions seen in the U.S.

Appendix A

Remand Sample

Delaware (2)

Fensterer v. State, 509 A.2d 1106 (Del., 1986) on remand from *Delaware v. Fensterer*, 474 U.S. 15 (1985) reversing *Fensterer v. State* 493 A.2d 959 (Del., 1985).

Van Arsdall v. State, 524 A.2d 3 (Del., 1987) on remand from *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) reversing *Van Arsdall v. State*, 486 A.2d 1 (Del., 1984).

Florida (1)

Haliburton v. State, 514 So.2d 1088 (Fla., 1987) on remand from *Florida v. Haliburton*, 475 U.S. 1078 (1986) vacating and remanding *Haliburton v. State*, 476 So.2d 192 (Fla., 1985).

Illinois (1)

People v. Caballes, 851 N.E.2d 26 (Ill., 2006) on remand from *Illinois v. Caballes*, 543 U.S. 405 (2005) reversing *People v. Caballes*, 802 N.E.2d 202 (Ill., 2003).

Massachusetts (3)

Com. v. Oakes, 551 N.E.2d 910 (Mass., 1990) on remand from *Massachusetts v. Oakes*, 491 U.S. 576 (1989) reversing *Com. v. Oakes*, 518 N.E.2d 836 (Mass. 1988).

Com. v. Sheppard, 476 N.E.2d 541 (Mass., 1985) on remand from *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) reversing *Com. v. Sheppard*, 441 N.E.2d 725 (Mass., 1982).

Com. v. Upton, 476 N.E.2d 548 (Mass., 1985) on remand from *Massachusetts v. Upton*, 466 U.S. 727 (1984) reversing *Com. v. Upton*, 458 N.E.2d 717 (Mass., 1983).

Michigan (1)

People v. Long, 359 N.W.2d 194 (Mich., 1984) on remand from *Michigan v. Long*, 463 U.S. 1032 (1983) reversing *People v. Long*, 320 N.W.2d 866 (Mich., 1982).

Minnesota (4)

International Society for Krishna Consciousness, Inc. v. Heffron, 311 N.W.2d 843 (Minn., 1981) on remand from *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) reversing *International Society for Krishna Consciousness, Inc. v. Heffron*, 299 N.W.2d 79 (Minn., 1980).

State v. Carter, 596 N.W.2d 654 (Minn., 1999) on remand from *Minnesota v. Carter*, 525 U.S. 83 (1998) reversing *State v. Carter*, 569 N.W.2d 169 (Minn., 1997).

State v. Hershberger, 462 N.W.2d 393 (Minn., 1990) on remand from *Minnesota v. Hershberger*, 495 U.S. 901 (1990) vacating and remanding *State v. Hershberger*, 444 N.W.2d 282 (Minn., 1989).

State v. Murphy, 380 N.W.2d 766 (Minn., 1986) on remand from *Minnesota v. Murphy*, 465 U.S. 420 (1984) reversing *State v. Murphy*, 324 N.W.2d 340 (Minn., 1982).

Nevada (1)

Desimone v. State, 996 P.2d 405 (Nev., 2000) on remand from *Nevada v. Desimone*, 518 U.S. 1030 (1996) vacating and remanding *Desimone v. State*, 904 P.2d 1 (Nev., 1995).

New York (7)

Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235 (1991) on remand from *Immuno v. Moor-Jankowski*, 497 U.S. 1021 (1990) vacating and remanding *Immuno AG v. J. Moor-Jankowski*, 74 N.Y.2d 548 (1989).

People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553 (1986) on remand from *Arcara v. Cloud Books*, 478 U.S. 697 (1986) reversing *People ex rel. Arcara v. Cloud Books*, 65 N.Y.2d 324 (1985).

People v. Belton, 55 N.Y.2d 49 (1982) on remand from *New York v. Belton*, 453 U.S. 454 (1981) reversing *People v. Belton*, 50 N.Y.2d 447 (1980).

People v. Class, 67 N.Y.2d 431 (1986) on remand from *New York v. Class*, 475 U.S. 106 (1986) reversing *People v. Class*, 63 N.Y.2d 491 (1984).

People v. Conyers, 52 N.Y.2d 454 (1981) on remand from *New York v. Conyers*, 449 U.S. 809 (1980) vacating and remanding *People v. Conyers*, 49 N.Y.2d 174 (1980).

People v. Ferber, 57 N.Y.2d 256 (1982) on remand from *New York v. Ferber*, 458 U.S. 747 (1982) reversing *People v. Ferber*, 52 N.Y.2d 674 (1981).

People v. P.J. Video, 68 N.Y.2d 296 (1986) on remand from *New York v. P.J. Video*, 475 U.S. 868 (1986) reversing *People v. P.J. Video*, 65 N.Y.2d 566 (1985).

Ohio (3)

American Association of University Professors, Central State University Chapter v. Central State University, 717 N.E.2d 286 (Ohio, 1999) on remand from *Central State University v. American Association of University Professors, Central State University Chapter*, 526 U.S. 124 (1999) reversing *American Association of University Professors, Central State University Chapter v. Central State University*, 699 N.E.2d 463 (Ohio, 1998).

State v. Robinette, 685 N.E.2d 762 (Ohio, 1997) on remand from *Ohio v. Robinette*, 519 U.S. 33 (1996) reversing *State v. Robinette*, 653 N.E.2d 695 (Ohio, 1995).

State v. Wyant, 624 N.E.2d 722 (Ohio, 1994) on remand from *Ohio v. Wyant*, 508 U.S. 969 (1993) vacating and remanding *State v. Wyant*, 597 N.E.2d 450 (Ohio, 1992).

Pennsylvania (1)

Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa., 2002) on remand from *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) reversing *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa., 1998).

Texas (1)

Cobb v. State, 85 S.W.3d 258 (Tex. Crim. App., 2002) on remand from *Texas v. Cobb*, 532 U.S. 162 (2001) reversing *Cobb v. State*, 93 S.W.3d 1 (Tex. Crim. App., 2000).

Virginia (2)

Com. v. Hicks, 563 S.E.2d 674 (Va., 2003) on remand from *Virginia v. Hicks*, 539 U.S. 113 (2003) reversing *Com. v. Hicks*, 563 S.E.2d 674 (Va., 2002).

Elliot v. Com., 593 S.E.2d 263 (Va., 2004) on remand from *Virginia v. Black*, 538 U.S. 343 (2003) reversing *Black v. Commonwealth*, 553 S.E.2d 738 (Va., 2001).

Washington (4)

First Covenant Church v. City of Seattle, 120 Wash.2d 203 (1992) on remand from *City of Seattle v. First Covenant Church of Seattle, Wash.*, 499 U.S. 901 (1991) vacating and remanding *First Covenant Church v. City of Seattle*, 114 Wash.2d 392 (1990).

State v. Bartholomew, 101 Wash.2d 631 (1984) on remand from *Washington v. Bartholomew*, 463 U.S. 1203 (1983) reversing *State v. Bartholomew*, 98 Wash.2d 173 (1982).

State v. Recuenco, 163 Wash.2d 428 (2008) on remand from *Washington v. Recuenco*, 548 U.S. 212 (2006) reversing *State v. Recuenco*, 154 Wash.2d 156 (2005).

Witters v. State, Com'n for the Blind, 112 Wash.2d 363 (1989) on remand from *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986) reversing *Witters v. State, Com'n for the Blind*, 102 Wash.2d 624 (1984).

Wisconsin (2)

State v. Knapp, 700 N.W.2d 899 (Wis., 2005) on remand from *Wisconsin v. Knapp*, 542 U.S. 952 (2004) vacating and remanding *State v. Knapp*, 666 N.W.2d 881 (Wis., 2003).

State v. Mitchell, 504 N.W.2d 610 (Wis., 1993) on remand from *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) reversing *State v. Mitchell*, 485 N.W.2d 807 (Wis., 1992);

Appendix B

Ohio Sample

1978

State v. Barker, 53 Ohio St.2d 135
State v. Black, 54 Ohio St.2d 304
State v. Burgun, 56 Ohio St.2d 354
State v. Chase, 55 Ohio St.2d 237
State v. Curtis, 54 Ohio St.2d 128
State v. Darrington, 54 Ohio St.2d 321
State v. Davis, 56 Ohio St.2d 51
State v. Faulkner, 56 Ohio St.2d 42
State v. Kaiser, 56 Ohio St.2d 29
State v. Kessler, 53 Ohio St.2d 204
State v. Roberts, 55 Ohio St.2d 191
State v. Smith, 56 Ohio St.2d 405
State v. Williams, 55 Ohio St.2d 82
Warren Molded Plastics, Inc. v. Williams, 56 Ohio St.2d 352

1980

Akron-Canton Regional Airport Auth. v. Swinehart, 62 Ohio St.2d 403
Blue Cross of Northwest Ohio v. Jump, Supt. Of Ins., 61 Ohio St.2d 246
Blue Cross of Northeast Ohio v. Ratchford, 64 Ohio St.2d 256
Costanzo v. Gaul, 62 Ohio St.2d 106
Dupler v. Mansfield Journal Company, Inc., 64 Ohio St.2d 116
Garcia v. Siffrin Residential Assn., 63 Ohio St.2d 259
Holladay Corp. v. Public Utilities Commission, 61 Ohio St.2d 335
Holloway v. Brown, 62 Ohio St.2d 65
Holmes v. Union Gospel Press, 64 Ohio St.2d 187
McCruiter v. Board of Review, 64 Ohio St.2d 277
Meeks v. Papadopoulos, 62 Ohio St.2d 187
Ohio Suburban Water Comp. v. Public Utilities Commission, 62 Ohio St.2d 17
State ex rel. Hammond v. Industrial Commission of Ohio, 64 Ohio St.2d 237
State ex rel. Nagle v. Olin, 64 Ohio St.2d 341
State v. Daniels, 61 Ohio St.2d 220
State v. Deener, 64 Ohio St.2d 335
State v. Flynt, 63 Ohio St.2d 132
State v. Freeman, 64 Ohio St.2d 291
State v. Madison, 64 Ohio St.2d 322
State v. Moritz, 63 Ohio St.2d 150
State v. Pierce, 64 Ohio St.2d 281
State v. Stricklen, 63 Ohio St.2d 47
State v. Thomas, 61 Ohio St.2d 254
State v. Wilkins, 64 Ohio St.2d 382

State v. Wilkinson, 64 Ohio St.2d 308
State v. Young, 62 Ohio St.2d 370
Vorisek v. Village of North Randall, 64 Ohio St.2d 62

1982

Bonkowsky v. Bonkowsky, 69 Ohio St.2d 152
City of Columbus v. New, 1 Ohio St.3d 221
Hendrix v. Eight and Walnut Corp., 1 Ohio St.3d 205
Negin v. Board of Bldg. and Zoning Appeals of City of Mentor, 69 Ohio St.2d 492
Norton Outdoor Advertising, Inc., v. Village of Arlington Heights, 69 Ohio St.2d 539
Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361
State ex rel. Buckeye International, Inc. v. Industrial Commission, 70 Ohio St.2d 200
State v. Fanning, 1 Ohio St.3d 19
State v. Liberatore, 69 Ohio St.2d 583
State v. Lilliock, 70 Ohio St.2d 23
State v. Moss, 69 Ohio St.2d 515
State v. Puente, 69 Ohio St.2d 136
State v. Roberts, 1 Ohio St.3d 36
Union Bank Co. v. Brumbaugh, 69 Ohio St.2d 202
Village of Covington v. Lyle, 69 Ohio St.2d 659

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