

Judicial Federalism and Lawyers:
A (preliminary) Study of Arguments Made to the New York Court of Appeals

Richard Price

Presented to the Institute for the Study of the Judiciary, Politics, and the Media
Syracuse University
November 20, 2008

Please note that this is an early attempt to develop a dissertation project. Any comments and suggestions for improvement towards this end are appreciated. Please do not cite or distribute without permission.

Judicial Federalism and Lawyers

One of the most important additions Americans made to the practice of government was the division of sovereignty between two levels of government. While prevention of tyranny through divided power was the principle intent of federalism, it also allows for experimentation. While we commonly speak of “The Constitution” and “constitutional law,” this misses the diversity of constitutions in the United States. The U.S. Constitution is simply one of many American constitutions. Rather than simply adopting the structures of the federal Constitution, state constitutions have been adapted many times throughout history to question and reconceptualize those understandings. Dual rights protection, in particular, offers the potential for experimentation with constitutional jurisprudence; state constitutions can serve as the basis for different rights paradigms and doctrines than those accepted at the federal level. This potentiality, however, has not manifested and state constitutions have remained underdeveloped as a source of rights protections. While state courts since the 1970s have increasingly relied on state rights protections, their interpretation of state constitutional provisions have remained dominated by federal doctrines and paradigms. The question then is why state constitutions have remained underdeveloped. While previous studies have sought to answer this question through traditional court-centered explanations, this study is the first step in examining the question from an alternative angle by investigating the supply side of the legal system. Through an examination of arguments made to the New York Court of Appeals, I argue that this underdevelopment of state constitutional law is, in part at least, the result of the arguments presented by attorneys. Lawyers are constrained by their training and experience to view constitutional issues from a federal perspective leading

them to present arguments dominated by federal doctrines and paradigms. In this view, state courts are simply not supplied with the necessary arguments to more fully develop state constitutions.

While the U.S. Constitution is relatively stable with few changes overtime, state constitutions are much more fluid and susceptible to change. Many states have had multiple constitutions and the average state constitution is amended about ten times as often as the U.S. Constitution (Lutz 1996). Drafters of state constitutions rely primarily on the example of other state constitutions: “delegates to nineteenth-century state constitutional conventions viewed constitution making as a progressive enterprise, in which succeeding generations build upon the experience of their predecessors and readjusted past practices to present requirements” (Tarr 1998: 47). In his study of debates in state constitutional conventions, John Dinan (2006) finds that rather than uncritically adopting the accepted idea of fundamental governmental practices, for example separation of powers or individual rights, delegates regularly questioned this wisdom and sought to adapt inherited principles to the changing environment. Given this history of constitutional innovation we might expect that state courts would engage in innovative interpretation and application of state constitutions. The empirical evidence, however, suggests that in individual rights cases state courts rarely engage in independent constitutional analysis, preferring instead to rely on federal doctrines and paradigms.

Empirical studies of case outcomes have consistently found that federal doctrines dominate with state constitutional provisions used only sporadically. In her study of 1603

equal protection cases from every state supreme court¹ between 1975-84, Susan P. Fino (1987: 61) found that only 6.7% relied exclusively on state grounds. Michael Esler (1994: 28) examined all self-incrimination cases decided by every state supreme court between 1981-86 finding that only 22% of the 249 cases relied on state constitutional law. An examination of challenges to state statutes in all states from 1981-86 found that where the state court struck down a statute it did so on federal grounds 7% of the time, state grounds 27%, and 66% used both (Emmert and Traut 1992: 42). Interpreting this result is complicated by the fact that the coding of “both” is unclear and appears likely to include any case where a state provision is cited as a string cite filler. These studies suggest that state constitutional provisions are used as a supplement to primary federal arguments. Examinations of the constitutional doctrines employed rather than simply case result further demonstrates this fact.

In his influential critique of judicial federalism, James A. Gardner (1992) examined all constitutional cases decided by seven state supreme courts in 1990. State constitutional law as practiced was found to be “a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements” (Gardner 1992: 763). When state constitutional provisions were employed they “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 1992: 766). Thus Gardner (1992: 804) concluded that “[t]he overwhelming impression left by examination of state constitutional decisions is that state courts by and large have little

¹ While some courts use different names, when I refer to the generic “state supreme courts” I mean the highest appellate court of the states, and “justices” refers to members of those courts.

interest in creating the kind of state constitutional discourse necessary to build an independent body of state law.” Barry Latzer’s (1991) study of criminal justice cases found similar results. Latzer included only cases that relied solely on state constitutional law to resolve a question of criminal procedure finding that state supreme courts adopted federal doctrines far more often than they rejected them: two-thirds of the state cases adopted the federal rule (Latzer 1991: 158). Only four states regularly rejected (75% or more) Supreme Court reasoning, California, Alaska, Florida, and Massachusetts (Latzer 1991: 164). Robert F. Williams (1997) reached a similar conclusion that state supreme courts treat the federal doctrines as controlling and their state provisions as a supplementary document. Thus, the empirical evidence suggests that state constitutions are infrequently applied and when they are resorted to the state supreme court typically adopts doctrines and paradigms from the Supreme Court.

The reason for the limited development of judicial federalism, the independent development of state constitutional rights, likely involves a combination of factors including institutional setting of the court, ease of constitutional amendment, judicial selection methods, and judicial policy preferences (see Beavers and Walz 1998; Esler 1994; Fino 1987; Langer 2002; Latzer 1991). While important considerations, these explanations skip an important prior step in the legal process: the legal arguments presented to state courts. A number of commentators have pointed to deficiencies in legal arguments as a contributing factor, though this has been studied minimally. For example, Esler (1994: 31-32) asserts, without empirical support, that lawyers do not argue state claims regularly and that this is linked to 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.” Other legal commentators have pointed to the failure to raise legal claims as important (Collins, Galie, and Kincaid 1986; Galie 1991; Hancock 1993; Linde 1991; Williams 1991).

The primary reason for this concern with lawyers is that judicial norms of behavior strongly discourages raising a claim *sua sponte*: “it would be contrary to every canon of judging if the majority resolved the case on grounds not raised while at the same time refusing to decide the federal law claims presented to it” (Galie 1991: 238). A survey of the opinions of judges found that only 15% of respondents would support raising a claim *sua sponte* in a generic constitutional challenge (Collins, Galie, and Kincaid 1986: 155). While this is simply a norm of behavior without sanction, it is reinforced by the workload of state courts. For example, between 1987 and 1991, the New York Court of Appeals decided an average of 287 cases per year (Bierman 1996: 671). The seven judges wrote approximately 41 opinions for the court, assuming parity of opinion assignment. This is about double the workload of Supreme Court Justices of the time, though the difficulty of issues may not be comparable. Appellate judges rely on legal briefs to make their job easier: a recent work on appellate advocacy teaches that the “overarching objective of a brief is to make the court’s job easier” (Scalia and Garner 2008: 59). With such a high workload justices are less likely to willingly seek out additional work by raising, researching, and deciding a state claim without any assistance from the briefs.

Gardner (1992) rejects this focus on lawyers as a part of the explanation for the failure of state constitutional law to develop more cohesively. Gardner (1992: 810) asserts that “[l]awyers will make the arguments they need to make to win cases. If lawyers are not making state constitutional arguments, it is because doing so does not help them win.” Similarly, he argues that legal education cannot be to blame because lawyers do not have similar problems with common law doctrines. This ignores, however, the difference in how the subjects are taught. While students are taught that there is significant variation in common law doctrines and instructed to work within these variations, they are not similarly taught that constitutional law allows for such variations.² Rather than look to lawyers, Gardner argues that the fundamental flaw of judicial federalism is the failure of state supreme courts to provide a coherent, distinct discourse of state constitutional law. In this view, courts are the driving factor in legal change and lawyers are simply reactive; this ignores and trivializes the role that lawyers play in the legal process.

Lawyers are more than simply agents who react to court initiated changes. Lawyers take complaints of injury and translate them into legally cognizable claims that only then can be acted upon by the courts. The process of drafting claims involves choices that necessarily alter the options available to courts. Charles R. Epp’s (1998) study of rights revolutions highlights the importance of lawyers in revolutionary constitutional change. The traditional explanations for rights revolutions, the “sustained,

² At a later point in this project I will expand upon this by examining textbooks and comparing how variations are reported and explained. Unfortunately for now it has to remain an assertion. Similarly, I will likely examine the bar exam subjects as part of this issue. Also relevant are any CLEs offered on state constitutional issues or articles in state bar journals.

developmental process that produced or expanded the new civil rights and liberties (Epp 1998: 7), have focused on the existence of a bill of rights and the willingness of an independent judiciary to enforce them. In contrast, Epp examines the role of lawyers in such revolutionary changes. This proposition rests upon the logic discussed above: that in an adversarial system courts have nothing to work with without lawyers supplying cases and legal arguments. In his study of Canada, India, the United Kingdom, and the United States, Epp found that in each country a legal support structure was necessary to present the initial claims and to build upon initial victories in subsequent litigation. Similarly, Risa L. Goluboff's (2007) examination of the civil rights litigation in the 1940s and '50s found that rather than react to a clearly laid out path, civil rights lawyers had to deal with an unclear legal situation and pushed numerous different claims; their choices helped shape and constrain the options available to the Supreme Court. Lawyers are more, or can be more, than simply reactive agents.

While lawyers have been a common explanation in many judicial federalism studies, few have attempted to examine the question. In their study of challenges to statutes, Emmert and Traut (1992: 42) reported that 22% were based on state law alone, 44.3% were based on both, and 33.7 were solely federal. Unfortunately it is unclear how reliable these numbers are because they relied solely upon the court opinions rather than the briefs. Also, as noted above, the inclusion of unique state constitutional provisions likely inflates the state only category and the coding rules of "both" is unclear and appears to accept a simple citation to a state provision as enough. Donald J. Farole's (1998) study of interest groups and judicial federalism offers clearer evidence. This study examined groups litigating obscenity and takings cases in five states between 1960 and

1994, finding that groups prefer to litigate in federal rather than state courts because the potential impact of federal decisions is greater (Farole 1998: 20). When certain incentives are present, however, groups will litigate in state courts, though primarily relying on federal law even then. Two incentives are important: first, a judicial federalism incentive exists when the federal doctrines are less supportive than the group may want and state law is used as a fallback measure; second, procedural roadblocks restricting the ability to file suits in federal court provides a federal restriction incentive (Farole 1998: 21).

Through his interviews with litigators and examination of court documents, Farole (1998: 154) concluded that “a bias among group officials toward federal courts and federal law” was evident. However, he did find that when a state supreme court widened the protection of the state free speech provision, the groups were more likely to engage in state constitutional arguments, in particular after an influential decision from the Oregon Supreme Court (Farole 1998: 133). While this study suggests that interest groups fail to offer support for the development of judicial federalism, this suggestion is weakened by the choice of cases. Takings and obscenity law were of relatively minor importance in the early years of judicial federalism (Tarr 1998). Other groups that have experienced a far stronger judicial federalism incentive, for example in the areas of consensual sodomy laws, relationship recognition, and school finance, likely demonstrates a greater willingness to engage in state constitutional analysis (see, e.g., Andersen 2005; Bosworth 2001).

While Farole’s study gives useful information regarding the role of interest group litigators, it tells us nothing of the broader legal communities approach to judicial federalism. This study probes this question. The findings from this probe are that lawyers

rarely engage in state arguments and, when they do, arguments are framed in federal terms and doctrines.

Research design

This study attempts an initial probe of how lawyers have engaged with judicial federalism. I intend to flesh out expectations that can then be examined in a wider selection of cases across states. This study examines arguments made to the New York Court of Appeals. The Court of Appeals is a reasonable initial case because it falls within the norm of state supreme courts found in the empirical studies; it engages with state constitutional law only sporadically, as “primarily reactive and supplemental” (Galie 1991: 249). Additionally, New York is a large and diverse state with an experienced bar and should provide a wide range of constitutional cases. Convenience was also an issue in selecting New York because the study of legal briefs is necessarily time consuming and at this stage reasonably easy access to legal briefs was essential (see Songer and Kuersten 1995).

This study covers cases decided in the even years from 1976-1990.³ This is meant to capture a picture of state constitutional arguments decided during the early phase of judicial federalism. There is no “true” start to judicial federalism. While some arguments were made early (see Linde 1970), a fairly common date is 1977 because Justice Brennan published an article expressly inviting state courts to reject the Burger Court retrenchment in civil liberties doctrine. This article, written by the driving force behind the Warren Court’s liberalism and published in one of the most prominent law reviews,

³ While I had intended to run this particular study to 1994, the microfilm set stopped coverage at 1990. In its final form, I intend this study to run from 1970-2000, alternating years.

arguably raised the profile of state constitutional arguments. Additionally, studies of judicial federalism typically examine the mid-1970s through the mid- to late 1980s (Beavers and Emmert 2000; Elser 1994; Emmert and Traut 1992; Farole 1998; Fino 1987b; Latzer 1991). The alternating years is necessary because it allows for a better grasp of the diversity of cases; including every year would require reducing the cases sampled by half and thus raising the risk of missing useful material.

I utilize two different case samples.⁴ The first sample is a random selection of constitutional cases for each even year. Cases were identified using a Westlaw search that was broad enough to identify any mention of a constitutional issue. Only cases that involved subjects where parallel constitutional rights provisions existed were included. I excluded any constitutional case where the issue was a unique state provision or involved the grand jury provision since the federal provision has not been incorporated. I excluded two substantive categories: speedy trial cases because they are typically statutory in nature and double jeopardy (which I have subsequently decided was in error and will be corrected later).⁵ Finally, I excluded any case that was summarily disposed of in order to try and focus on more substantively important cases. After having identified the universe of cases I randomly selected a maximum of 20 cases. This sample composed a low of 40% of cases in 1978, about 50% for 1978-1982, and more than 70% for the remaining years; only 1986 (17) and 1988 (19) had fewer than 20 cases and the whole set were included. Only briefs representing the rights claimant were included; in other words any

⁴ Cases examined are cited in the Appendix by year.

⁵ I am currently debating on removing procedural due process challenges to hearings, usually employment or disciplinary. These briefs rarely engage with much legal analysis, instead focusing on the factual situation of the hearing in question. Excluding these cases would allow a better sample of substantively important cases.

amici briefs were not examined. Also, where the court's opinion consolidated multiple cases I examined only the first brief presented in the set. Finally, I did not examine briefs for state or governmental actors because they have no reason to seek greater restrictions on their own power under the state constitution. This sample should give a view of how the appellate bar views state constitutional rights provisions.

The second sample is of remand cases. These are cases where the Court of Appeals found a constitutional violation, either on federal or ambiguous grounds, in the initial appeal and the Supreme Court reversed finding that there was no violation of the U.S. Constitution. On remand, the Court of Appeals has the option of relying on the New York Constitution to reinstate its prior result. Because the federal issue is definitively closed, these should be cases where state arguments are deployed to their greatest potential, in other words a most likely case. Cases were identified by Galie (1991: 236, n.55). While Galie reports ten such reversals from 1980-1991, only five had briefs from both the initial and remand stage available.

Briefs are contained in a set of microfilm produced by the William S. Hein Company available in the Syracuse University Law Library. Some briefs were missing from the set and the case was removed and replaced with another randomly selected case. An initial issue was to code arguments as either federal or state. This is simplest when the point heading clearly identifies the argument as either federal or state based. A more difficult issue is presented when a point cites both constitutional provisions. Following Farole (1998: 33) where the state citation is simply part of a string cite without any independent rationale, I treat the state citation as "filler" and consider the argument federal. A final problem concerns cases that fail to cite any provision, instead simply

pointing to a “right to counsel” for example. In these cases, where the precedent cited is federal, I code the claim as federal. Where the primary precedent points to state cases, I examined those decisions and if the case clearly rested on an independent analysis of the state constitution, I code the brief’s argument as state based (see Esler 1994). These basic coding rules allows for examination of basic frequency of different arguments, but the content of those arguments are also important. Two theories⁶ of state constitutional law help guide investigation of arguments.

The supplemental approach places primary reliance on federal constitutional arguments first and state claims are resorted to only if the federal issue fails to resolve the claim. Typically, this approach only allows divergence from federal doctrine when certain criteria, including textual or structural differences between the two constitutions, state history, preexisting state law and tradition, are met.⁷ Thus this approach assumes that federal constitutional law is dominant and any state provision is of secondary importance only (see Williams 1997). Alternatively, the primacy approach demands that “state court[s] should always consider its state constitution before the Federal Constitution” (Linde 1980: 383). In her treatise on state constitutional law, Jennifer Friesen (2006) argues that this requires lawyers to depart from federal paradigms by imagining that the federal doctrine does not exist. While these are theories of court decision-making rather than legal arguments, they give some guidance to the examination of legal briefs. First, it points to the structure and order of presentation. If two parallel constitutional claims (say a state and federal free speech analysis) are made, the order is

⁶ I have omitted a third approach, which argues that state constitutions should never be interpreted to expand upon federal rights, because lawyers representing people claiming rights violations have no reason to argue for such an interpretation.

⁷ See *State v. Hunt*, 450 A.2d 952, 965-67 (Handler, J., concurring).

important because it shows order of importance, or at least consideration, to the lawyer. Similarly, length of the respective arguments can be an important indicator of the relative importance. Additionally it points to the content of the argument. Does the state based claim attempt to break with federal paradigms or simply take the same federal doctrines and assert that state constitutions should protect the same thing, or continue protecting something after the Supreme Court has reversed its trend? Does the brief examine the text or history of the provision?

If lawyers are constrained by their education and training I expect to observe state arguments relying primarily on federal doctrines and paradigms. Furthermore, state argument should be used only infrequently and the frequency should vary across issue areas. Reliance on state constitutions should increase over time, as the Supreme Court became less accommodating to rights claims. The remand cases, however, should be most likely to exhibit the use of creative state arguments because they have no federal claim remaining.

Findings

Table 1: Distribution of briefs

Year	Federal Only Briefs	State Briefs	Total
1976	18 (90%)	2 (10%)	20 (100%)
1978	16 (80%)	4 (20%)	20 (100%)
1980	15 (75%)	5 (25%)	20 (100%)
1982	15 (75%)	5 (25%)	20 (100%)
1984	13 (65%)	7 (35%)	20 (100%)
1986	14 (82%)	3 (18%)	17 (100%)
1988	13 (68%)	6 (32%)	19 (100%)

1990	11 (55%)	9 (45%)	20 (100%)
Total	115 (74%)	41 (26%)	156 (100%)

Note: federal briefs are those including solely federal constitutional arguments; state briefs are those including any state argument either alone or in conjunction with a federal argument.

Table 1 shows the breakdown by year of briefs that simply include state arguments and those that rely solely on federal constitutional provisions. On its face, Table 1 shows a couple of expected findings. First, with the exception of 1986,⁸ the inclusion of state arguments increased gradually, but fairly constantly over time. Additionally, federal constitutional arguments have been the dominant form of constitutional rights claims. This dominance is demonstrated even more sharply by changing the unit of analysis to individual arguments rather than simply briefs.

Table 2: Distribution of arguments

Year	Federal Arguments	State Arguments	Total
1976	26 (93%)	2 (7%)	28 (100%)
1978	27 (87%)	4 (13%)	31 (100%)
1980	26 (84%)	5 (16%)	31 (100%)
1982	31 (84%)	6 (16%)	37 (100%)
1984	29 (81%)	7 (19%)	36 (100%)
1986	23 (88%)	3 (12%)	26 (100%)
1988	27 (82%)	6 (18%)	33 (100%)
1990	27	9	36

⁸ This is likely caused by the abnormally low number of criminal process cases in 1986. While I did not have time to break the cases down by subject matter, generally state constitutional law arguments were far more likely in criminal procedure issues than in other areas.

	(75%)	(25%)	(100%)
Total	216	42	258
	(84%)	(16%)	(100%)

In dealing with complex factual situations, multiple constitutional arguments are possible as Table 2 demonstrates. Table 2 shows that while multiple federal arguments are utilized frequently, briefs almost never include multiple state arguments. While 26% of the total sample of briefs includes a state argument, only 16% of total constitutional arguments are state based. While the federal constitutional analysis dominates strongly, the inclusion of state arguments increased over time as expected. Thus the federal arguments dominate in terms of frequency but the content of state arguments must still be examined.

Table 3: Primacy and Supplemental Briefs by year

Year	Primacy	Supplemental	Total
1976	2	0	2
1978	2	2	4
1980	2	3	5
1982	3	2	5
1984	5	2	7
1986	2	1	3
1988	4	2	6
1990	5	4	9
Total	25	16	41

Note: briefs are defined simply by the order of the arguments. Where a state argument is the sole argument presented or is placed before a parallel federal claim it is coded under the primacy heading. If the federal argument precedes the state, then the state argument is considered supplemental.

The briefs sampled here employed state arguments as a supplement to federal claims about 40% of the time. In general these briefs relied on federal provisions as the primary argument, developing them more fully, then providing a cursory state argument. An example is *People v. Onofre* (1980) where the criminalization of consensual sodomy was attacked. While four federal arguments were deployed, only the privacy attack had a

companion state claim. In 29 pages, the brief elaborated an extensive federal privacy rationale and how the criminal statute offended that right. Turning to the state argument, the brief spent 7 pages alerting the Court of Appeals to the possibility of using the state constitution. Most of the point concerned citations to Supreme Court cases authorizing state courts to extend their state constitutions beyond the federal minimum and pointing to examples of judicial federalism, including in New York, that were not privacy cases themselves. After reassuring the Court of Appeals that it can interpret its own law, the brief provided only a minimal substantive privacy argument. It simply noted that while a right to privacy had never been interpreted from the New York Constitution, the state constitution had the same provisions used by the Supreme Court to find the federal penumbral right to privacy.⁹ The Court of Appeals was justified in finding a similar state right exists and could view the federal doctrine “as good advice from the nation’s highest court, regarding fundamental principles of liberty, and they could well be adapted intact as interpretations of New York’s own Constitution.”¹⁰ A similar pattern is evident in *Esler v. Walters* (1982), which challenged a restriction on the right to vote. The principle argument was that federal right to vote doctrine prohibited this property restriction even though the Supreme Court had recognized a limited exception. After running through precedents applying this doctrine, the brief closed with a short statement that the state equal protection and due process clauses can be applied more broadly because the state constitution has an explicit right to vote rather than implicit; however, the only precedent cited was a state free speech decision¹¹ as evidence that the state court can extend rights

⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰ *People v. Onofre*, 51 N.Y.2d 476 (1980), Brief for Respondent, 36.

¹¹ *Bellanca v. N.Y. State Liquor Auth.*, 54 N.Y.2d 445 (1981).

when it wishes. Both examples demonstrate a tendency to simply point to state provisions as an open invitation to incorporate federal doctrine into the state constitution.

Interestingly, one supplemental brief does provide a relatively complete state argument where the federal claim was arguably sufficient. In *People v. Hernandez* (1990) the appellant attacked the use of race-based preemptory challenges under the *Batson* doctrine.¹² In contrast to similar briefs at the same time, this brief extended beyond the federal doctrine to argue that racially motivated challenges also offended the state equal protection provision. In part this argument relied on the changes made in *Batson* because an earlier Court of Appeals case had rejected a similar state challenge on the grounds that the state equal protection clause reached only so far as the federal,¹³ thus the change in *Batson* required revisiting this holding. Rather than simply rely on this fact, the brief examined the history of racial discrimination in New York law, noting that even before the 1938 Constitution New York prohibited racial discrimination in juries. The brief even engages in analysis of the debates at the drafting convention in addition to noting certain textual differences. No other supplemental brief, or primacy brief for that matter, engaged in a similar historical analysis, which is surprising given that *Batson* was a recent expansion of rights protection by the Supreme Court. This may evidence a strategic concern by the attorney to establish the state right so that any later retrenchment by the Supreme Court would have limited effect.

Primacy cases, those that place the state argument as the sole or primary argument, represent about 60% of the total state arguments. Two influences are evident in these briefs: first, a relatively clear negative response from the Supreme Court on the

¹² *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹³ *People v. McCray*, 57 N.Y.2d 542 (1982).

rights claim; second, encouragement from the state court itself. Of course, these two influences are not necessarily distinct; a state court may resist the change from the Supreme Court by invoking its own constitution. An example of the first influence is *Board of Education v. Nyquist* (1982) where the state's education funding regime was attacked as a violation of equal protection.¹⁴ The Supreme Court had clearly rejected this claim ruling that there was no fundamental right to education thus strict scrutiny did not apply.¹⁵ Given this the *Nyquist* brief relies nearly exclusively on the state equal protection clause, making simply a perfunctory single page federal rational basis analysis. Even though the brief relies on the New York Constitution, it draws the entire constitutional paradigm from the federal tiers of scrutiny. The brief uses the standard Supreme Court cases to define the relevant tiers, pointing to the state education right as evidence that the right is fundamental in the New York. A companion to the education argument is that wealth should be treated as a suspect classification with the reasoning primarily pointing to examples of judicial federalism in New York (none of which dealt with equal protection). Another example is *Rivera v. Smith* (1984) where a Muslim claimed that prison rules allowing pat frisks by female guards violated his right to religious freedom. The brief specifically noted that lower federal courts had rejected similar challenges and that this argument, therefore, relied solely on the state provision. As support the brief pointed to an Oregon decision extending significant protection in a similar situation and closed with a moderate application of that standard to the facts of the case. No effort was

¹⁴ There was also a separate challenge based on the explicit right to education in the New York Constitution (Art. XI), but this argument is not relevant to this study because there is no parallel federal right.

¹⁵ *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

made to inquiry into textual differences¹⁶ between the federal and state provision or the history of the state provision.

A second influence manifest in the primacy briefs is “pushing” from the Court of Appeals, instances where a clearly state based decision is issued and then repeated over multiple cases. Cases involving the *Hobson*¹⁷ doctrine demonstrate this relationship clearly. This doctrine has two prongs. First, when adversarial proceedings have begun the right to counsel attaches indelibly and cannot be waived without the presence of defendant’s attorney. Second, even where adversarial proceedings have not begun, if retained counsel represents a suspect then a rights waiver is invalid unless counsel is present.¹⁸ In *People v. Donovan* (1963) the Court of Appeals clearly based this rule on the New York Constitution: “we are of the opinion that, quite apart 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, require the exclusion” of the confession after counsel had been denied access.¹⁹ This preceded *Miranda v. Arizona* (1966) and the Court of Appeals continued to build upon it until the early 1970s when it pulled back somewhat. This limited retrenchment, however, was clearly rejected in *Hobson* (1976) where the Court of Appeals reasserted that *Donovan-Arthur* was the proper rule after a

¹⁶ N.Y. Const. Art I, sec 3 provides “The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind.”

¹⁷ *People v. Hobson*, 39 N.Y.2d 479 (1976). Technically this doctrine can be, and is occasionally, referred to as *Donovan-Arthur*; I prefer using *Hobson* because *Hobson* reinvigorated the doctrine.

¹⁸ *People v. Donovan*, 13 N.Y.2d 148 (1963); *People v. Arthur*, 22 N.Y.2d 325 (1968); *People v. Hobson*, 39 N.Y.2d 479 (1976); *People v. Settles*, 46 N.Y.2d 154 (1978).

¹⁹ *Donovan*, 13 N.Y.2d at 151.

lengthy discussion of stare decisis and the logic of the various conflicting rules. The Court of Appeals clearly rooted the *Hobson* rule in the state constitution and continued to apply it throughout the time period sampled here. Of the twenty-five cases where the state argument is either primary or the sole argument, twelve involve the *Hobson* doctrine in some manner.

Interestingly, the brief in *Hobson* gave only a limited argument of two pages that *Arthur* required reversal because the defendant was represented without any mention of the state constitution or any specific provision. Given the Court of Appeal's complex examination of the basis for *Donovan-Arthur* and the conflicting subsequent cases, this is surprising. The early cases in my sample, in particular, failed to even clearly cite this rule as a requirement of the state constitution. One case referred simply to the "law in this state" a few times before closing by citing both the federal and state provisions (in that order).²⁰ This suggests some degree of confusion in the nature of the rule. While citation to the state provision was not common in this group of cases, over time they did stop citing the federal provision and more clearly noting that the *Hobson* doctrine was solely grounded in the state constitution. Then the arguments are simply applications of *Hobson* to different factual situations seeking either a direct application or an extension of the rule to new situations typically utilizing the language provided by the Court of Appeals rather than the Supreme Court. This finding suggests that where the state court itself pushes a state constitutional decision and continues to adhere to that line of decision, attorneys are willing to rely on that doctrine without reference to federal doctrines.

²⁰ *People v. Townes*, 41 N.Y.2d 97 (1976), Brief for Defendant-Appellant, 14.

Turning to the remand briefs, given the findings above, it is unsurprising that they were dominated by federal arguments on the initial appeal to the Court of Appeals. Of the five cases, four offered no state constitutional argument. The other, *People v. P.J. Video* (1985), offered an odd amalgamation of state and federal claims. Here, the police obtained a warrant to seize allegedly obscene material and the defendants challenged the warrant process as insufficiently protective of materials presumptively protected by the First Amendment. The brief argued that because the material is presumably protected speech under the First Amendment a warrant must be obtained through a more exacting process to protect the speech; however, the argument mixed federal and state claims in establishing this heightened requirement without a clear separation between the two. Other than this unclear argument, these initial appeals followed the trend of relying on federal law exclusively. As noted above, each of these arguments won at the Court of Appeals only to be reversed by the Supreme Court holding that federal law failed to support the Court of Appeals decision. Each case was reheard on remand leaving lawyers with only the state arguments. Given the unavailability of federal claims, I expected that lawyers would engage in a more detailed analysis of state provisions than observed in the above random sample. Contrary to this expectation, the arguments rarely invoked any deeper analysis of the state constitution and, instead relied on policy arguments that wider state protection was necessary to combat the Burger Court's retrenchment on civil liberties.

None of the five briefs provided a textual or historical analysis of the state provisions. Instead they tended to point to the earlier federal rule and simply invite the Court of Appeals to adhere to the more protective standard. Four of the five briefs make

the argument, typically dominant, that the Supreme Court had unjustifiably retracted individual liberties and that trend should be resisted by the Court of Appeals. In *People ex rel. Arcara v. Cloud Books* (1986), for example, the brief on remand argued that First Amendment jurisprudence supported the bookstore's argument that it could not be closed indefinitely under a public nuisance law. Here, we can see the dominance of federal law because even though state arguments were the only ones available, the brief still argued the case in terms of the First Amendment. The brief argued, "the Supreme Court's distortion of constitutional law [by refusing to strike down the state action in this case] does not represent considered judicial approach which ought to be emulated or accepted by the New York Court of Appeals."²¹ "The unceasing abridgement and erosion of the First Amendment should not be duplicated in the State Courts."²² Similarly, in *People v. P.J. Video* (1986), the brief argued that "[t]here is nothing in the evolution of theory or thought to be gained by adherence to this latest interpretation of federal constitutional law. Rather, it deflects, without sound basis, from established principles of First Amendment law and bodes ill for civil rights in general."²³ The same trend was complained about in search and seizure cases: "the Supreme Court's decision in *New York v. Belton* has not only suspended, but can be said to have revoked its commitment to protection of citizens from unlawful searches and seizures in the absence of warrants issued upon probable cause."²⁴

²¹ *People ex rel Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553 (1986), Brief for Appellant, 17-18.

²² *Cloud Books*, 68 N.Y.2d 553, Brief for Appellant, 26.

²³ *People v. P.J. Video*, 68 N.Y.2d 296 (1986), Brief for Defendants-Respondents, 22.

²⁴ *People v. Belton*, 55 N.Y.2d 49 (1982), Brief for Appellant, 10.

In addition to characterizations of the Supreme Court as a reckless court interested in eliminating individual rights, the briefs also ego-stroked the Court of Appeals by presenting the state court as the people's last hope. In *Belton*, the brief argued that “[u]nless this Court acts, pursuant to the mandate of our state constitution, to declare that such an illegal intrusion violated the defendants rights under [the New York Constitution], the protections of arrestees in New York to be free from warrantless searches and seizures . . . will be forever lost.”²⁵ To reiterate, the brief failed to develop an alternative theory, instead relying on the negative policy effects of the Supreme Court's decisions. In addition to these policy arguments, stress was also placed on how progressive the Court of Appeals could be: “[f]or over a century the New York Court of Appeals has labored tirelessly at improving all phases of our legal system by making it more humane and civilized. Its most distinguished judgments reflect an ongoing devotion to human rights. It has constantly cared for the poor, the wronged, and the disadvantaged.”²⁶

In sum, rather than presenting deeper state constitutional analysis as expected, these cases suggest that even where federal law is completely foreclosed lawyers did not provide analysis of text, history, or different legal paradigms and instead relied on attacks on the Supreme Court as dangerous to liberty. A caveat to this finding is necessary. One lawyer was common to four of these briefs. This fact could have both a positive and negative effect. It is possible that this lawyer is simply a poor appellate attorney and his briefs reflect that. This interpretation is weakened by the fact that two of these four briefs involve different groups of attorneys and he was never the sole attorney on any of the

²⁵ *Belton*, 55 N.Y.2d 49, Brief for Appellant, 10.

²⁶ *People v. Ferber*, 57 N.Y.2d 256 (1982), Brief for Appellant, 10.

four briefs, suggesting that he was not solely responsible for the content. A positive interpretation is that this lawyer is a respected and sought after appellate attorney who represents the common view of the state constitution among the experienced New York bar. Unfortunately, there is no way to choose between these alternatives at this time.

Conclusion and future plans

In sum, this initial probe into the role of lawyers in judicial federalism suggests that lawyers will not regularly present state constitutional arguments without some incentive. Two incentives appear important. First, where the Supreme Court has issued negative precedent against the rights claim at issue a state constitutional argument is more likely. Yet even where the state argument is made, logic and paradigms are drawn primarily from federal law something demonstrated clearly in the remand briefs. Second, where the state court has issued a state based rationale and continued to assert it in subsequent cases lawyers will utilize those cases with less reliance on federal doctrines. Thus, in the field of state constitutional law, lawyers appear to be primarily reactive rather than creative. However this study is limited by the focus on a single state. I will briefly outline some steps I plan to take in expanding this study in a more comprehensive manner.

First is inclusion of other state courts representative of the norm of state constitutional analysis. Nearly all state supreme courts have engaged in judicial federalism to some degree but most still rely on federal law primarily and resorting to state constitutions only intermittently to reach particular results unavailable under federal law (Tarr 1998: 179). In other words, most state courts have failed to systematically address state constitutions. New York falls within this group (Hancock 1993; Galie

1991), but so do a wide number of other states. A couple of additional requirements will be to include only states with a unitary supreme court and those with intermediate appellate courts (IACs). IACs serve as gatekeepers blocking less meritorious claims, which should ensure that only more substantively important cases reach the state supreme court. My current plan, depending on feasibility, is to select two additional representative cases from different regions, probably South and Midwest, because region has been a traditional element of multi-state judicial federalism studies following on Elazar's (1972) federalism work. The study in each state will be from 1970-2000 alternating years as done in this study. These three states should give a fairly reliable idea of the legal culture's view of state constitutional law across a broad set of issues.

Second, I plan to build upon the finding that a push from state courts increases reliance on the state constitution. A few states have adopted an interpretative theory for dealing with constitutional claims. Oregon has declared a preference for the primacy theory, that state issues should be addressed before any federal claims. In fact, one justice of the Oregon Supreme Court asserted that “[a]ny defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice.”²⁷ The Washington Supreme Court, on the other hand, has declared a preference for the supplemental method. In addition to declaring a preference for this approach, the Washington court declared that it would only consider state constitutional arguments when counsel adequately briefs the criteria, such as the text of the provision, its history,

²⁷ *State v. Lowry*, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring).

and state traditions,²⁸ a threat that the court has enforced in subsequent cases (Williams 1997). Assuming that the other representative cases bear out my finding that lawyers only sporadically engage in state arguments, these cases are important in different ways. In Washington, the court's order may not actually induce greater levels of engagement with state constitutional arguments but it should lead them to engage in more detailed and explicit state arguments where the lawyer decided to engage in such an argument in order to preserve the issue. Oregon, on the other hand, should actually lead lawyers to engage in state arguments more often because of the court's preference for dealing with the state constitution primarily, not to mention the potential malpractice threat, with less reliance on federal doctrines and paradigms. Thus these two cases should test the effect of internal state legal dynamics in overcoming the legal culture's trained preference for federal doctrines.

Finally, I plan to expand the remand cases in order to determine whether the New York briefs were an aberration or the norm. If feasible, I plan to examine every remand case from 1986-2005 across all states. This different time period is caused by the changes to what the Supreme Court considered independent and adequate state grounds for appellate review.²⁹ If my findings are born out more widely it lends support to James Gardner's (2005) recent argument that state courts should simply stop seeking "principled" constitutional arguments and openly base their decisions on resistance to potentially reckless changes from the Supreme Court, focusing on the function of federalism to resist federal tyranny. The remand briefs examined here appear to fall within this functionalist theory far better than more legalistic theories.

²⁸ *Forbes v. Seattle*, 785 P.2d 431 (Wa. 1990).

²⁹ *Michigan v. Long*, 463 U.S. 1032 (1983).

Appendix: Cases by year

All briefs used in this study were obtained from a microfilm collection produced by the William S. Hein Corporation and available in the Syracuse University Law Library. I provide the official New York citation rather than regional volume citation because the microfilm is organized by the former.

1976

American Bible Soc. V. Lewisohn, 40 N.Y.2d 204 (1976)
Beattie v. New York State Bd. of Parole, 39 N.Y.2d 445 (1976)
De Grego v. Levine, 39 N.Y.2d 180 (1976)
Figueroa v. Bronstein, 38 N.Y.2d 533 (1976)
Fred F. French investing C., Inc. v. City of Nw York, 39 N.Y.2d 587 (1976)
O'Keefe v. Murphy, 38 N.Y.2d 563 (1976)
People v. Abrahams, 40 N.Y.2d 277 (1976)
People v. Allende, 39 N.Y.2d 474 (1976)
People v. Doerbecker, 39 N.Y.2d 448 (1976)
People v. Drummond, 40 N.Y.2d 990 (1976)
People v. Eason, 40 N.Y.2d 297 (1976)
People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682 (1976)
People v. Hobson, 39 N.Y.2d 479 (1976)
People v. Jackson, 41 N.Y.2d 146 (1976)
People v. Mitchell, 39 N.Y.2d 173 (1976)
People v. Rizzo, 40 N.Y.2d 425 (1976)
People v. Roberson, 41 N.Y.2d 106 (1976)
People v. Stewart, 41 N.Y.2d 65 (1976)
People v. Townes, 41 N.Y.2d 97 (1976)
Sussman v. New York State Organize Crime Task Force, 39 N.Y.2d 227 (1976)

1978

Clove Lakes Nursing Home v. Whalen, 45 N.Y.2d 873 (1978)
Harris v. Mechanicville Central School Dist., 45 N.Y.2d 279 (1978)
Holly S. Clarendon Trust v. State Tax Commission, 43 N.Y.2d 933 (1978)
Hynes v. Moskowitz, 44 N.Y.2d 383 (1978)
People v. Aiken, 45 N.Y.2d 394 (1978)
People v. Buxton, 44 N.Y.2d 33 (1978)
People v. Ciaccio, 45 N.Y.2d 626 (1978)
People v. De Santis, 46 N.Y.2d 82 (1978)
People v. Grant, 45 N.Y.2d 366 (1978)
People v. Havelka, 45 N.Y.2d 636 (1978)
People v. Hodge, 44 N.Y.2d 553 (1978)
People v. Maerling, 46 N.Y.2d 289 (1978)
People v. McGrath, 46 N.Y.2d 12 (1978)
People v. Payton, 45 N.Y.2d 300 (1978)
People v. Settles, 46 N.Y.2d 154 (1978)
People v. Smith, 44 N.Y.2d 613 (1978)

People v. Thomas, 46 N.Y.2d 100 (1978)
Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152 (1978)
Sofair v. State University of New York Upstate Medical Center, 44 N.Y.2d 475 (1978)
Subway-Surface Sup'rs Ass'n v. New York City Transit Authority, 44 N.Y.2d 101 (1978)

1980

American Ins. Ass'n v. Lewis, 50 N.Y.2d 617 (1980)
Economico v. Village of Pelham, 50 N.Y.2d 120 (1980)
Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140 (1980)
National Elevator Industry, Inc. v. New York State Tax Com'n, 49 N.Y.2d 538 (1980).
People v. Adler, 50 N.Y.2d 730 (1980)
People v. Calhoun, 49 N.Y.2d 398 (1980)
People v. Chestnut, 51 N.Y.2d 14 (1980)
People v. Conyers, 49 N.Y.2d 174 (1980)
People v. Howard, 50 N.Y.2d 583 (1980)
People v. Lynes, 49 N.Y.2d 286 (1980)
People v. Marrero, 51 N.Y.2d 56 (1980)
People v. McRay, 51 N.Y.2d 594 (1980)
People v. Onofre, 51 N.Y.2d 476 (1980)
People v. Savage, 50 N.Y.2d 673 (1980)
People v. Shepard, 50 N.Y.2d 640 (1980)
People v. Skinner, 52 N.Y.2d 24 (1980)
People v. Washington, 51 N.Y.2d 214 (1980)
People v. Whidden, 51 N.Y.2d 457 (1980)
Silverstein v. Minkin, 49 N.Y.2d 260 (1980)
Society for Ethical Culture in the City of New York, 51 N.Y.2d 449 (1980)

1982

Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27 (1982)
Claim of Burns, 55 N.Y.2d 501 (1982)
Crosby v. State, Workers' Compensation Bd., 57 N.Y.2d 305 (1982)
Esler v. Walters, 56 N.Y.2d 306 (1982)
Matter of Vanderbilt (Rosner-Hickey), 57 N.Y.2d 66 (1982)
People v. Arnau, 58 N.Y.2d 27 (1982)
People v. Arroyo, 54 N.Y.2d 567 (1982)
People v. Beam, 57 N.Y.2d 241 (1982)
People v. Evans, 58 N.Y.2d 14 (1982)
People v. Harrison, 57 N.Y.2d 470 (1982)
People v. Knapp, 57 N.Y.2d 161 (1982)
People v. McCray, 57 N.Y.2d 542 (1982)
People v. Mealer, 57 N.Y.2d 214 (1982)
People v. Orlando, 56 N.Y.2d 441 (1982)
People v. Parker, 57 N.Y.2d 136 (1982)
People v. Sawyer, 57 N.Y.2d 12 (1982)
People v. Sullivan, 56 N.Y.2d 378 (1982)
Tolub v. Evans, 58 N.Y.2d 1 (1982)

Weissman v. Evans, 56 N.Y.2d 458 (1982)

Westinghouse Elec. Corp. v. Tully, 55 N.Y.2d 364 (1982)

1984

Burrows v. Board of Assessors for Town of Chatam, 64 N.Y.2d 103 (1984)

Matter of Von Wiegen, 63 N.Y.2d 163 (1984)

People v. Dodt, 61 N.Y.2d 408 (1984)

People v. Ellis, 62 N.Y.2d 393 (1984)

People v. Ferro, 63 N.Y.2d 316 (1984)

People v. Gonzalez, 62 N.Y.2d 386 (1984)

People v. Krom, 61 N.Y.2d 187 (1984)

People v. Leonard, 62 N.Y.2d 404 (1984)

People v. Levan, 62 N.Y.2d 139 (1984)

People v. Liberta, 64 N.Y.2d 152 (1984)

People v. Lombardo, 61 N.Y.2d 352 (1984)

People v. Lucarano, 61 N.Y.2d 138 (1984)

People v. Maerling, 64 N.Y.2d 134 (1984)

People v. Milaski, 62 N.Y.2d 147 (1984)

People v. Mitchell, 61 N.Y.2d 580 (1984)

People v. Scott, 63 N.Y.2d 518 (1984)

People v. Smith, 62 N.Y.2d 306 (1984)

Rivera v. Smith, 63 N.Y.2d 501 (1984)

Torres v. Little Flower Children's Services, 64 N.Y.2d 119 (1984)

1986

Cahill v. Public Services Com'n, 69 N.Y.2d 265 (1986)

Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510 (1986)

Colton v. Riccobono, 67 N.Y.2d 571 (1986)

d'Angelo v. Cole, 67 N.Y.2d 65 (1986)

de St. Augin v. Flacke, 68 N.Y.2d 66 (1986)

Morgenthau v. Citisource, 68 N.Y.2d 211 (1986)

People v. Bethea, 67 N.Y.2d 364 (1986)

People v. Burger, 67 N.Y.2d 338 (1986)

People v. Chin, 67 N.Y.2d 22 (1986)

People v. Hicks, 68 N.Y.2d 234 (1986)

People v. Hollman, 68 N.Y.2d 202 (1986)

People v. McGee, 68 N.Y.2d 328 (1986)

People v. Thomas, 68 N.Y.2d 194 (1986)

People v. Velasquez, 68 N.Y.2d 33 (1986)

Rivers v. Katz, 67 N.Y.2d 485 (1986)

Sheehan v. Suffolk County, 67 N.Y.2d 52 (1986)

Steinhilber v. Alphonse, 68 N.Y.2d 283 (1986)

1988

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

Lucas v. Scully, 71 N.Y.2d 399 (1988)

O'Neill v. Oakgrove Const., Inc., 71 N.Y.2d 51 (1988)
Parkview Associates v. City of New York, 71 N.Y.2d 274 (1988)
People v. Bright, 71 N.Y.2d 376 (1988)
People v. Colon, 71 N.Y.2d 410 (1988)
People v. Friminger, 71 N.Y.2d 635 (1988)
People v. Gensler, 72 N.Y.2d 239 (1988)
People v. Hamlin, 71 N.Y.2d 750 (1988)
People v. Hudy, 73 N.Y.2d 40 (1988)
People v. Kohl, 72 N.Y.2d 191 (1988)
People v. Love, 71 N.Y.2d 711 (1988)
People v. Rivera, 71 N.Y.2d 705 (1988)
People v. Robles, 72 N.Y.2d 689 (1988)
People v. Rodriguez, 71 N.Y.2d 214 (1988)
People v. Tambe, 71 N.Y.2d 492 (1988)
People v. Winkler, 71 N.Y.2d 592 (1988)
Rochester Gas and Elec. Corp. v. Public Service Com'n of the State of New York, 71 N.Y.2d 313 (1988)
Winkler v. Spinnato, 72 N.Y.2d 402 (1988)

1990

1616 Second Ave Restaurant v. New York State Liquor, 75 N.Y.2d 158 (1990)
Forti v. New York State ethics Com'n, 75 N.Y.2d 596 (1990)
Fosmire v. Nicoleau, 75 N.Y.2d 218 (1990)
Golden v. Clark, 76 N.Y.2d 618 (1990)
Laureano v. Kuhlmann, 75 N.Y.2d 141 (1990)
Motor Vehicle Mfrs. Ass'n of U.S. v. State, 75 N.Y.2d 175 (1990)
People v. Chipp, 75 N.Y.2d 327 (1990)
People v. Cintron, 75 N.Y.2d 249 (1990)
People v. Davis, 75 N.Y.2d 517 (1990)
People v. Hernandez, 75 N.Y.2d 350 (1990)
People v. Hults, 76 N.Y.2d 190 (1990)
People v. Jenkins, 75 N.Y.2d 550 (1990)
People v. Kern, 75 N.Y.2d 638 (1990)
People v. Keyes, 75 N.Y.2d 343 (1990)
People v. Natal, 75 N.Y.2d 379 (1990)
People v. Ortiz, 76 N.Y.2d 652 (1990)
People v. Scalza, 76 N.Y.2d 604 (1990)
People v. Vilaridi, 76 N.Y.2d 67 (1990)
People v. Wicks, 76 N.Y. 128 (1990)
Seelig v. Koehler, 76 N.Y.2d 87 (1990)

Remand

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. 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)

References

- Andersen, Ellen Ann. 2005. *Out of the Closets & Into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor: University of Michigan Press.
- Beavers, Staci L. and Jeffrey S. Walz. 1998. "Modeling Judicial Federalism: Predictors of State Court Protections of Defendants' Rights under State Constitutions, 1969-1989." *Publius* 28(2): 43-59.
- Bosworth, Matthew H. 2001. *Courts as Catalysts: State Supreme Courts and Public School Finance Equity*. Albany: State University of New York Press.
- Brennan, William H., Jr. 1977. "State Constitutions and the Protection of Individual Rights." *Harvard Law Review* 90: 489-504.
- Collins, Ronald K. L., Peter J. Galie, and John Kincaid. 1986. "State High Courts, State Constitutions, and Individual Rights Litigation since 1980: A Judicial Survey." *Publius* 16(3): 141-61.
- Dinan, John J. 2006. *The American State Constitutional Tradition*. Lawrence, KS: University Press of Kansas.
- Elazar, Daniel J. 1972. *American Federalism: A View from the States*. New York: Thomas J. Crowell Co.
- Emmert, Craig F. and Carol Ann Traut. 1992. "State Supreme Courts, State Constitutions, and Judicial Policymaking." *The Justice System Journal* 16(1): 37-48.
- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.
- Esler, Michael. 1994. "State Supreme Court Commitment to State Law." *Judicature* 78(1): 25-32.
- Farole, Donald J. 1998. *Interest Groups and Judicial Federalism: Organizational Litigation in State Judiciaries*. Praeger: Westport, Conn.
- Fino, Susan P. 1987. "Judicial Federalism and Equality Guarantees in State Supreme Courts." *Publius* 17(1): 51-67.
- Friesen, Jennifer. 2006. *State Constitutional Law: Litigating Individual Rights, Claims and Defenses* 2 Volumes. Newark, NJ: LexisNexis.
- Galie, Peter J. 1991. "Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role." *Emerging Issues in State Constitutional Law* 4: 225-50.
- Gardner, James A. 2005. *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System*. Chicago: University of Chicago Press.
- Gardner, James A. 1992. "The Failed Discourse of State Constitutionalism." *Michigan Law Review* 90: 761-837.
- Goluboff, Risa L. 2007. *The Lost Promise of Civil Rights*. Cambridge: Harvard University Press.
- Hancock, Stephen F. 1993. "The State Constitution, a Criminal Lawyer's First Line of Defense." *Albany Law Review* 57: 271-288.
- Langer, Laura. 2002. *Judicial Review in State Supreme Court: A Comparative Study*. Albany: State University of New York Press.
- Latzer, Barry. 1991. *State Constitutions and Criminal Justice*. Westport, CT: Greenwood Press.

- Linde, Hans A. 1991. "Does the 'New Federalism' Have a Future." *Emerging Issues in State Constitutional Law* 4: 251-61.
- Linde, Hans A. 1980. "First Things First: Rediscovering the States' Bills of Rights." *University of Baltimore Law Review* 9: 379-396.
- Linde, Hans A. 1970. "'Without Due Process': Unconstitutional Law in Oregon." *Oregon Law Review* 49 (February): 125-87.
- Lutz, Donald S. 1996. "Patterns in the Amending of American State Constitutions." In *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns*. Edited by G. Alan Tarr, 24-46. Westport, Conn.: Greenwood Press.
- Scalia, Antonin and Bryan A. Garner. 2008. *Making Your Case: The Art of Persuading Judges*. St. Paul, MN: Thomson/West.
- Songer, Donald R. and Ashlyn Kuersten. 1995. "The Success of Amici in State Supreme Courts." *Political Research Quarterly* 48(1): 31-42.
- Tarr, G. Alan. 1998. *Understanding State Constitutions*. Princeton: Princeton University Press.
- Tarr, G. Alan. 1998. "Review of Interest Groups and Judicial Federalism." *Publius* 28(4): 167-68.
- Williams, Robert F. 1997. "In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication." *Notre Dame Law Review* 72: 1015-64.
- Williams, Robert F. 1991. "State Constitutional Law: Teaching and Scholarship." *Journal of Legal Education* 41: 243-49.