

WHEN THE U.S. SUPREME COURT IS NOT THE LAST WORD:
DIALOGUE BETWEEN STATE SUPREME COURTS AND ITS ROLE IN STATE
CONSTITUTIONALISM

by

MARK W. DENNISTON

B.A., Simpson College, Indianola, Iowa (1997)

J.D., University of Iowa College of Law (2000)

M.A., University of Colorado at Boulder (2007)

A thesis submitted to the
Faculty of the Graduate School of the
University of Colorado in partial fulfillment
of the requirement for the degree of
Doctor of Philosophy
Department of Political Science
2012

This thesis entitled:

When the U.S. Supreme Court is Not the Last Word:
Dialogue Between State Supreme Courts and its Role in State Constitutionalism

written by Mark W. Denniston

has been approved by the Department of Political Science

Date: Tuesday, May 22, 2012

John P. McIver, Advisor and Committee Chair

Vanessa A. Baird

Kenneth Bickers

Frank Colucci

Scott A. Moss

The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above mentioned discipline.

IRB protocol # 11-0030

Denniston, Mark W. (Ph.D., Political Science)

When the U.S. Supreme Court is Not the Last Word: Dialogue Between State Supreme Courts
and its Role in State Constitutionalism

Thesis directed by Associate Professor John P. McIver

State supreme courts occasionally rely on the provisions of their own state constitutions to expand rights for their citizens beyond the protections that the U.S. Supreme Court has interpreted the U.S. Constitution to require. This practice is known as the New Judicial Federalism. State supreme courts have the prerogative to recognize more expansive rights under their state constitutions because the U.S. Constitution sets a floor and not a ceiling for the protection of individual rights. On the other hand, the U.S. Supreme Court has unmatched resources as well as unparalleled prestige, and most state supreme courts give considerable respect and deference to its interpretations of common or similar constitutional language.

The challenge for political scientists is to explain why some state supreme courts have chosen to expand rights and why other courts prefer to follow the example and interpretation of the U.S. Supreme Court. I hypothesize that state supreme courts are engaged in an ongoing dialogue about rights by considering the reasoning contained in sister state supreme court decisions, prior deciding court precedent, and changes in U.S. Supreme Court precedent, when deciding whether to expand rights under state constitutions. This dissertation examines the decisions of state supreme courts, as well as interviews with state supreme court justices, to examine why state supreme courts sometimes render rights expanding decisions, but more often follow the approach adopted by the U.S. Supreme Court in interpreting the U.S. Constitution.

ACKNOWLEDGMENTS

First, I want to thank my wife Christie. Without her patience, support and love this dissertation would not have been possible. Seven years is a long time to wait for a loved one to pursue their dreams and aspirations. We were told my returning to school was not the financially prudent course, and yet you had the courage to pursue it anyway. I appreciate your strength to shoulder the burden and stresses of work while I researched and read and wrote and taught. Thank you for bringing me to share your family next to the mountains of Colorado.

Next I want to thank the teachers and professors throughout all of my years of school who have helped me at every stage of my academic journey. In particular I want to thank my advisor, John McIver, who read so many drafts of conference papers and dissertation chapters and who patiently waited as the weeks stretched into months as I revised my work. I am sure what follows is only half as good as it might have been had I followed all of your suggestions. I want to also thank Vanessa Baird, without whose encouragement this would still not be written, and Ken Bickers who saw the very first versions of this work as part of a project for his class.

I also want to thank all of the state supreme court justices who were interviewed as part of this research. I asked the questions, but they provided the answers. I want to especially thank Justice Jerry L. Larson of the Iowa Supreme Court, for whom I clerked. Had you not hired me to be your clerk and helped me to learn the law this dissertation about state courts would never have happened. My academic career sprouted from the seeds you sowed.

CONTENTS

INTRODUCTION.....	1
 CHAPTER 1 THEORETICAL BACKGROUND: HISTORY OF NJF AND DIALOGUE THEORY.....	 14
I. Explanation and History of New Judicial Federalism.....	14
II. A Dialogue Theory of State Constitutionalism.....	19
A. So What Does Dialogue Look Like?.....	24
B. Who is a Party to the Dialogue?.....	24
C. Is Dialogue Happening?.....	25
D. Is the Dialogue Having Any Discernible Effect?.....	26
III. Theoretical Foundations.....	30
<u>Hypothesis 1: Horizontal Federalism</u>	30
<u>Hypothesis 2: Vertical Federalism</u>	34
IV. Alternative Explanations.....	36
A. Ideology of Sister States.....	36
B. Judicial Selection Methods.....	38
 CHAPTER 2 OHIO CASE STUDY.....	 40
I. Why Choose Ohio?.....	40
II. Ohio and the New Judicial Federalism.....	43
III. Case Selection.....	48
IV. Recent Decisions in Ohio Expanding State Constitutional Rights.....	49
V. How Well Do the Horizontal and Vertical Federalism Hypotheses Fit Recent Ohio Decisions Expanding State Constitutional Rights?.....	60
VI. Recent Decisions in Ohio Following U.S. Supreme Court Precedent.....	62
VII. Lessons and Developing ABC analysis.....	69

CHAPTER 3 METHODOLOGY, CODING AND MEASUREMENT.....	74
I. Nine State Research Design.....	76
II. Measuring the Dependent Variable.....	77
III. Measuring the Independent Variables.....	80
A. Measuring Horizontal Federalism Hypothesis: Influence of Sister State Decisions.....	80
B. Measuring Vertical Federalism Hypotheses: The Role of Precedent.....	83
1. Is the Current Supreme Court Precedent Narrower Than Prior Precedents?.....	83
2. Deciding Court Precedent Made Before the Controlling Supreme Court Precedent.....	83
CHAPTER 4 EMPIRICAL RESULTS.....	85
I. Nine State Research Results.....	85
A. Horizontal Federalism results.....	89
B. Vertical Federalism results.....	94
C. Alternative Explanations.....	96
II. Prestigious States.....	104
CHAPTER 5 SISTER STATE DIALOGUE: THE GOOD FAITH EXCEPTION... 109	
I. The First Mover Decisions.....	114
II. <i>Lincoln v State</i>	118
III. <i>State v Wilmoth</i>	119
IV. <i>State v Saiz</i>	120
V. <i>Commonwealth v Edmunds</i>	121
VI. <i>People v Krueger</i>	123
VII. <i>State v Cline</i>	125
VIII. <i>Garza v State</i>	129
IX. <i>State v Daniel</i>	130
X. Lessons	132

CHAPTER 6 INTERVIEWS WITH STATE SUPREME COURT JUSTICES..... 133

I.	Overview and Description of Process.....	133
	A. Design and How Interviews Were Conducted.....	135
	B. Interview Participants.....	139
II.	Are Sister State Decisions Influential Upon State Supreme Courts?.....	142
	A. Divergence Factors Across Courts.....	146
	B. Relative Weight of Sister State Citations to Other Factors.....	153
	C. What about Sister State Decisions is Influential?.....	167
	1. Trend and Numbers.....	168
	2. Prestige.....	170
	3. Sister State Ideology.....	173
	4. Role of Opinion Author.....	173
	D. Sister State Influence versus the Role of Ideology.....	177
III.	The Role of Precedent on Supreme Court Decision Making.....	180
	A. Role of U.S. Supreme Court Precedent.....	181
	1. U.S. Supreme Court retreat.....	181
	2. Degree of Division of U.S. Supreme Court.....	182
	B. Role of Deciding Court Precedent.....	185
IV.	Evidence for Alternative Explanations.....	187
	A. Role of Political Ideology as Alternative Explanation.....	188
	B. Role of Judicial Selection Method as Alternative Explanation.....	191
	C. The Role of Public Opinion	195
V.	Lessons From the Interviews.....	197

CHAPTER 7 CHALLENGES, FUTURE RESEARCH, CONCLUSION..... 205

I.	Challenges of Merging Legal Approach with Political Science Approach.....	205
	A. Are Variables Independent and Constant in the Judicial Politics Context?..	206
	B. The Number of Sister State Decisions versus Quality of Reasoning.....	208
	C. Measuring the Quality of Reasoning.....	211
II.	Implications.....	211
	A. State Supreme Courts as Second Line of Defense.....	212
	B. State Constitutional Law Facilitating Supreme Court Retreat.....	212

III.	Avenues for Future Research.....	214
	A. Measuring How Much of Sister State Dialogue is Communicated Through Briefs.....	214
	B. Investigating the First Mover.....	214
	C. How is Sister State Dialogue Reflected in U.S. Supreme Court Decision Making?.....	215
	1. <i>Arizona v Gant</i>	215
	2. <i>Ex Parte Bruner</i>	216
	BIBLIOGRAPHY.....	218
	APPENDIX.....	230

TABLES

Table

2-1	Rights Expansive Decisions in Ohio by ABC Groupings.....	71
3-1	Nine State Most Different Systems Research Design.....	76
4-1	Comparative Rates of Rights Expanding Decisions (REDs).....	87
4-2	Rates of Rights Expanding Decisions Depending Upon Type of Sister State Citations.....	89
4-3	Sister State Citations 3 Liberal States (IA, IL, MN).....	98
4-4	Sister State Citations 3 Moderate States (KS, OH, PA).....	98
4-5	Sister State Citations 3 Conservative States (AL, AR, SD).....	99
4-6	Sister State Citations 3 Non-Partisan Election States (AR, MN, OH).....	99
4-7	Sister State Citations 3 Partisan Elections States (AL, IL, PA).....	100
4-8	Sister State Citations 3 Merit Selection States (IA, KS, SD).....	100
4-9	Horizontal and Vertical Federalism Effects on Likelihood of Rights Expanding Decision by State Supreme Courts.....	102
4-10	Citations of Prestigious Sister States by 9 State Supreme Courts.....	107
5-1	Good Faith Exception in State Constitutional Law.....	112
5-2	Rates of Rejection of Good Faith Exception on State Constitutional Grounds Depending Upon Presence of Sister State Citations.....	114
6-1	Interviewed Justices' Home States and Number of Rights Expanding Decisions.....	140
6-2	Information on the 17 Justices Willing to Be Identified.....	142

INTRODUCTION

The term “New Judicial Federalism” is used to denote the movement by many states to give renewed attention to state constitutional provisions as independent sources of rights. United States Supreme Court Justice William J. Brennan characterized the New Judicial Federalism as “probably the most important development in constitutional jurisprudence of our times.” (Williams 2007, p. 227). Advocates of the New Judicial Federalism encourage state supreme courts to carefully examine their state’s constitutional provisions and consider interpreting state constitutional provisions in ways more expansive than similar provisions in the United States Constitution. State supreme courts¹ can and do go further in protecting individual rights than does the United States Supreme Court. (Porter and Tarr 1982). However, the Supreme Court² has unmatched resources as well as unparalleled prestige, and most state supreme courts give considerable respect and deference to its interpretations. Thus in the majority of cases where state supreme courts are considering whether to reach a different interpretation of a common (or similar) constitutional provision, state supreme courts choose to follow Supreme Court precedent when interpreting state constitutional provisions even though they are not required to do so. (Esler 1994, Latzer 1991a).

The scholarly debates in the legal literature, particularly in the law reviews and journals, struggle with the question of the precise circumstances, and the types of legal and factual arguments, under which state supreme courts should be justified in coming to a different

¹ Not every state names the court of last resort in that state the “supreme court.” For example, the court of last resort, having the ultimate and highest appellate jurisdiction, in New York state is called the Court of Appeals while the term “supreme court” is used for district level trial courts. While some authors use the term “court of last resort,” or acronyms, instead of “state supreme courts” those terms seem cumbersome. Instead, for the sake of simplicity throughout this paper I refer collectively to the courts of last resort in the states as the “state supreme courts” since this is overwhelmingly the case.

² The term “Supreme Court” with both words capitalized refers to the United States Supreme Court throughout this dissertation. Individual state supreme courts will be referred to individually by their full proper name (e.g. New Jersey Supreme Court) or collectively as state supreme courts.

conclusion than the Supreme Court about the scope of constitutional rights. (Williams 2005).

The impact of state constitutional interpretation can be considerable. For instance, one legal scholar has noted the New Jersey Supreme Court deviates from U.S. Supreme Court interpretation by providing expanded rights in the following areas of state constitutional search and seizure law:

(1) consent to search [requiring police officers to apprise property owners of their right to refuse before obtaining consent]; (2) standing to challenge seized evidence; (3) good faith exception to the warrant requirement [also known as the good faith exception to the exclusionary rule, or just the “good faith exception”]; (4) [requiring a search warrant before] search of garbage left out on the curb for pick-up; (5) what constitutes a seizure in the context of a citizen who flees from the police; (6) [requiring a warrant before] search of toll billing records; (7) the automobile exception to the warrant requirement; and (8) a warrantless automobile search. (Braithwaite 2001, p. 2).

This is despite the fact that the language of the Fourth Amendment and the analogous provision of the New Jersey Supreme Constitution are virtually identical.³

To better understand the importance of the New Judicial Federalism, it is illustrative to briefly examine an example of one area of law where state supreme courts, like the New Jersey Supreme Court, have recognized more rights under their state constitutions than the Supreme Court recognizes under the U.S. Constitution. In this area of law state supreme courts have reacted to the federal good faith exception to the exclusionary rule. Scholars have repeatedly pointed to this issue as an example of the impact of the New Judicial Federalism. (O’Brien 2005; Gardner 1999; Mosk 1988).

³ New Jersey Constitution Article I sec. 7 reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.”

The United States Constitution Amendment IV reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Conflict over the exclusionary rule is nothing new in American history, and this conflict predates the development of the New Judicial Federalism in the 1970s. (Wohl 2011). The exclusionary rule is how courts enforce the protections of the Fourth Amendment (as well as equivalent state provisions). If evidence is obtained in violation of the Fourth Amendment, the Supreme Court has held that such evidence must be excluded (not used) at trial, in order to deter future police misconduct.

The exclusionary rule is controversial because it prohibits the state from using relevant, probative evidence of a particular criminal's guilt (without this evidence criminals may escape conviction and punishment) in order to advance a more general societal goal of scrupulous police conduct in future searches which respect the privacy interests protected by the Fourth Amendment. The objection to the exclusionary rule was neatly summed up by Justice Cardozo, (who was later to serve on the Supreme Court) in *People v Defore*, 150 N.E. 585 (N.Y. 1926): "The criminal is to go free because the constable has blundered." Concerned about mandating to the states the tradeoff of requiring the exclusion of evidence (which sometimes permits guilty defendants to go free) to accomplish society's interest in deterring future police misconduct, the Supreme Court for several decades only applied the exclusionary rule against the federal government, and refused to apply the exclusionary rule to the states. (Wohl 2011). This was an extremely important distinction as the vast majority of criminal prosecutions occur in state courts pursuant to state law, and these prosecutions were not originally subject to the exclusionary rule.

When in 1961 the Supreme Court held in *Mapp v. Ohio*, 367 U.S. 643 that the exclusionary rule also applied to the states (almost 50 years after first applying the rule to the federal government) the costs to law enforcement led the Court to slowly begin restricting the application of the exclusionary rule. Perhaps the most important limitation on the exclusionary

rule is known as the good faith exception to the exclusionary rule. The Supreme Court held in *United States v. Leon*, 468 U.S. 897 (1984), that errors by judges and magistrates in issuing warrants should not be held against police officers acting in good faith reliance upon the warrant. These errors by judges are not grounds to exclude evidence from trial when a facially valid warrant is determined to be invalid only after the search warrant is executed. The Supreme Court explained that the sole justification for the exclusionary rule is deterrence of police misconduct. Therefore, when police officers act in good faith and rely upon the decision of a neutral magistrate in issuing a search warrant, even if that magistrate's decision is later found to be wrong, the evidence gathered as a result of that warrant should not be excluded from trial. When the police act in good faith, there is no police misconduct to deter, and thus no reason to apply the exclusionary rule.

This is the point at which the New Judicial Federalism becomes important. While the Supreme Court decides what is required to protect the Fourth Amendment rights contained in the U.S. Constitution, state supreme courts are free to disagree with the reasoning of the Supreme Court when interpreting the search and seizure provisions contained in their state constitutions.⁴ Despite that fact that many states have state constitutional provisions that read very similar to the Fourth Amendment (and thus presumably mean something similar) the interpretation and reasoning of the Supreme Court in *Leon* is not binding upon the states who want to read their analogous state constitutional provision more broadly. Specifically, state supreme courts may or may not agree with the reasoning of the Supreme Court that the only justification for the exclusionary rule is deterrence of police misconduct. Indeed, several state supreme courts have held, when interpreting the search and seizure provisions of their state constitutions, that there is

⁴ At least they are free to disagree if the result of the decision is to recognize greater constitutional protections under the state constitutional provision. State supreme courts cannot refuse to protect rights recognized by the Supreme Court under the U.S. Constitution.

no good faith exception to the exclusionary rule that exists under state constitutional law. *See e.g. State v. Cline*, 617 N.W.2d 277 (Iowa 2000); *State v. Canelo*, 653 A.2d 1097 (N.H. 1995); *Commonwealth v. Edmunds* (Pa. 1991); *State v. Novembrino* (N.J. 1987).⁵

States are free to disagree with the reasoning of the Supreme Court in *Leon* that exclusionary rules are valuable only to deter police misconduct, but instead argue that the exclusionary rule can promote institutional compliance generally. According to this reasoning adopted by state supreme courts, judges and legislatures (not just law enforcement officers) will be more careful in crafting warrants and legislation respectively if they know evidence will be excluded if they act unconstitutionally. Good faith on the part of police officers is not sufficient; rather the errors of judges and legislatures also justify application of the exclusionary rule. In addition, several state supreme courts argue that the good faith exception leaves defendants without effective remedies for violation of search and seizure requirements. *State v. Cline*, 617 N.W.2d 277 (Iowa 2000) (citing cases emphasizing the need for effective remedies). Therefore these state supreme courts choose to read their state constitutional provisions to require a broader version of the exclusionary rule that does not include a good faith exception. The conflict over the meaning of the Fourth Amendment and its state constitutional analogs is about striking the proper balance between the state interest in detecting crime and prosecuting criminals on the one hand, and on the other hand protecting citizens in the privacy of their persons, houses, papers and effects against unreasonable searches and seizures. The end result is that the search and seizure provisions of the state constitutions in some states protect more privacy by excluding more evidence (although at the cost of law enforcement) than is required by the U.S. Supreme Court's interpretation of the Fourth Amendment to the U.S. Constitution.

⁵ The role of state supreme courts in the larger constitutional dialogue about the good faith exception to the exclusionary rule is discussed in more detail in chapter 5.

Application of the New Judicial Federalism may prove even more important, if as several scholars have predicted, the Supreme Court is considering scaling back or doing away with the exclusionary rule entirely. David Moran reports, based on the U.S. Supreme Court's decision in *Hudson v. Michigan*, 547 U.S. 586 (2006) that the Court seems to be signaling that it is willing to further narrow the scope of the exclusionary rule.⁶ The decision in *Hudson*, according to Moran, "calls into question the entire rationale of the exclusionary rule." (2006, p. 284). Moran proved prescient, as three years later in *Herring v. United States*, 555 U.S. 135 (2009) that Supreme Court held that the good faith exception to the exclusionary rule covered not only errors made by magistrates, but also police conduct when the police error was attenuated from the arrest. In *Herring* an error in a sheriff's database lead deputies to arrest and search a man even though his arrest warrant had actually been withdrawn five months before the arrest. The Supreme Court found that the deputies at the scene of the arrest were entitled to rely in good faith on the erroneous database entry in a different jurisdiction. Goldstein (2009) notes that "prior to *Herring* the Supreme Court had applied the good faith exception only to non-police conduct." Wohl (2011) warns the 1961 *Mapp v. Ohio* precedent applying the exclusionary rule to the states may be overruled explicitly, or it may experience the "death by a thousand cuts" through continuous expansion of exceptions that chip away at its underlying reasoning.

Adam Liptak (2009) suggests that Justice Kennedy seems to hold the pivotal vote to decide whether the Court will eliminate the exclusionary rule altogether. However, even if the Supreme Court eliminates the exclusionary rule under the U.S. Constitution, a broader exclusionary rule will still exist in those states whose supreme courts have already rejected the good faith exception to the exclusionary rule on the basis of state constitutional law. Even if the

⁶ In *Hudson*, the Court refused to exclude evidence that was obtained in violation of the knock-and-announce rule when executing a search warrant, because the Court reasoned the evidence would have been found anyway had officers complied with the knock-and-announce requirement.

U.S. Supreme Court merely continues to narrow the federal exclusionary rule by expanding the good faith exception or other exceptions it will be necessary to canvass the decisions of the state supreme courts concerning exclusionary rules under state constitutions in order to determine whether citizens of a particular state continue to enjoy the protection of an exclusionary rule, and the scope of that exclusionary rule.⁷

The New Judicial Federalism has important consequences in areas of the law beyond merely those rights contained in the Bill of Rights and analogous state constitutional provisions. State supreme courts have also left their mark in other legal areas such as interpreting state analogs to the 14th Amendment's Equal Protection Clause with consequences for rights for homosexuals (e.g. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)) and abortion rights (see e.g. Moss and Raines 2008). State supreme courts also interpret state constitutional provisions without analog in the U.S. Constitution. For example, state supreme courts have interpreted state constitutional provisions to require equitable and sufficient funding for primary and secondary education, overturning funding formulas and allocations made by state legislatures. (O'Brien 2005 pp. 212-219; Mosk 1988; see also Shaman 2008; Wong 2008).

While these examples illustrate there are numerous important areas of state constitutional law, the focus of this dissertation will be on state constitutional decisions based on state constitutional analogs to the provisions in the U.S. Bill of Rights. This is because the state constitutional analogs to the U.S. Bill of Rights provisions tend to be textually similar, and are often virtually identical.⁸ In comparison, there are relatively more substantial textual differences

⁷ See generally chapter 5 and specifically Table 5-1. This reveals that at the heart of the New Judicial Federalism, like in federalism more generally, there is a tradeoff between uniformity across the 50 states and the autonomy of states to choose to protect more rights.

⁸ See for example footnote 3 above, comparing U.S. and New Jersey constitutional provisions regarding searches and seizures. Gorman (2008) examines the state constitutional provisions analogous to the Fourth Amendment in each state's constitution. Although Gorman does not attempt to characterize the degree to which each state provision equates to the Fourth Amendment, approximately 18 states (including New Jersey) have provisions that

between state constitutions and the U.S. Constitution in other legal areas, a fact that is pivotal to other studies such as Moss and Raines (2008), who explicitly argue for different outcomes in state constitutional decisions based on textual differences in state constitutions. For instance, some states have explicit privacy provisions in their state constitutions, and several states have more explicit equal protection language and explicit educational provisions. In order to minimize the impact of textual differences between the U.S. Constitution and state constitutions as an explanation for state supreme court decision making, this research only focuses upon state constitutional analogs to the protections in the U.S. Bill of Rights. By focusing on provisions that are textually similar or identical, variation that might occur based on textual differences is reduced through research design.

Chapter 1 focuses on the history and application of the New Judicial Federalism before considering the theoretical support for the hypothesized factors expected to influence state supreme court decision making. The hypothesized influences consist of both horizontal federalism (influences by sister state supreme court decisions) and vertical federalism (influences by changes in U.S. Supreme Court precedent as well as previous decisions of the deciding court interpreting the U.S. Constitution). Key to chapter 1 is the introduction and explanation of a dialogue theory of state constitutionalism. In this context, state supreme courts are asked to resolve legal questions about whether the state constitutional provisions mean the same thing as the analogous U.S. Constitutional provisions, and they seek information in order to answer these

are virtually identical to Fourth Amendment's search and seizure and warrant requirements. Approximately 14 states have substantially different language (although this does not mean the state supreme courts necessarily interpret this language differently). This leaves approximately 18 states with textually similar, but not virtually identical, language. Many of the differences in these 18 states include language explicitly requiring the affidavit or other information provided in support of an application for a search warrant to be in writing. The textual differences, however are modest, and certainly do not provide explicit grounds for different interpretations of the exclusionary rule. Thus, adding the 18 states with similar language to the 18 states that have virtually identical language, there are approximately 32 states with substantially similar textual search and seizure requirements.

legal questions.⁹ By research design, the cases examined are ones of first impression, where the state supreme court is confronting for the first time the legal issue on state constitution grounds (although they may have resolved similar questions previously on federal constitutional grounds). In the context of state constitutionalism the dialogue does not occur when all actors who contribute to overall constitutional understanding are simultaneously sitting in the same room considering an issue. Indeed the influential legal actors focused upon in this research, namely other courts, are necessarily physically absent, but it is a form of dialogue nonetheless as state supreme courts are influenced by the reasoning and arguments contained in previous court decisions.¹⁰ This reasoning and influence may come from the decisions of sister state courts, the decisions the deciding court has made previously, as well as changes in United States Supreme Court precedent. However, the idea of dialogue is emphasized, as opposed to focusing on the diffusion of legal policy, because very often the reasoning, particularly of other sister state supreme courts, does not support the acceptance of rights expansive legal policy, but rather reaffirms the reasoning of United States Supreme Court precedent.

Chapter 2 explores in rich contextual detail through a case study the evidence for the hypothesized relationships introduced in Chapter 1. Chapter 2 analyzes 16 state constitutional decisions made by the Ohio Supreme Court from 1993 to 2009, and provides analysis of each of those decisions made on state constitutional provisions analogous to the U.S. Bill of Rights. These cases were selected because they are all cases where the Ohio Supreme Court was asked to

⁹ Indeed one can think of oral argument before a state supreme court as an opportunity for the justices to seek information from the attorneys in order to be better informed about how to resolve a legal question. The attorneys are having a debate (and certainly the justices might take sides in the debate through their questions) but the court generally is seeking to inform itself by asking questions of both sides, which might be as close to pure intellectual curiosity as yet remains in the political system. Even as the court turns to writing a definitive legal decision, often conflicting precedent and legal reasoning is acknowledged and considered. While the particular dispute must be resolved, and clear rules for future cases established, courts often opine how different facts and circumstances could lead to different results.

¹⁰ The attorneys who are present (either physically in-person during oral argument or through written briefs) make frequent use of these physically absent legal authorities as the basis for their arguments.

reach a more rights expansive interpretation of provisions in the Ohio Constitution than the analogous provisions in the U.S. Constitution. Of these 16 decisions, the Ohio Supreme Court expanded rights on the basis of the Ohio Constitution in 7 cases, and the Ohio Supreme Court followed U.S. Supreme Court precedent in interpreting the provisions of the Ohio Constitution in 9 cases. Chapter 2 also examines the judicial ideology and voting patterns of the Ohio Supreme Court justices across these 16 cases, contrasted with the justices' voting patterns in other legal areas. This analysis suggests decision making is influenced by both sister state decisions as well as prior Ohio precedent, and cannot be explained merely on the basis of judicial ideology.

Chapter 2 is unique in considering the political and judicial ideology of particular justices on the Ohio Supreme Court, whereas the most different systems empirical design tested in the later chapters considers only statewide political ideology when testing the alternative explanation of the influence of political ideology upon state supreme court decision making. Chapter 2 also reveals the critical necessity of measuring the direction of influence of sister state supreme court decisions. Whereas previous scholarship focused on the presence or absence of sister state citations, the decisions of the Ohio Supreme Court reveal it is critical to focus on whether those sister state decisions followed U.S. Supreme Court or provide reasoning to expand state constitutional rights beyond what is required by the U.S. Supreme Court's interpretation of provisions in the U.S. Constitution.

Chapter 3 explains the methodology, coding and measurement of a nine-state, most-different-systems research design. The expectation is that judicial reasoning in previous decisions (including sister state decisions, changes in U.S. Supreme Court precedent, and previous decisions by the deciding court) will influence state supreme court decision making regardless of differences in state ideology and judicial selection methods. In particular it is

expected that liberal, moderate and conservative states will all be more likely to expand rights when citing sister states decisions that have expanded rights. It is also expected that states with Missouri Plan merit selection systems (with retention elections), states with non-partisan election systems, and states with partisan election systems also will all be more likely to expand rights when citing sister states decisions that have expanded rights. Likewise the expected influence of changes in U.S. Supreme Court precedent and previous precedent by the deciding court should be observed regardless of differences in state ideology and judicial selection systems.

Chapter 4 then considers the empirical evidence supporting the expectations established in Chapter 3. Chapter 4 shows the quantitative results of 87 cases from 9 states (Alabama, Arkansas, Illinois, Iowa, Kansas, Minnesota, Ohio, Pennsylvania, and South Dakota) to determine whether citations of sister states, as well as prior state precedent and changes in federal precedent, have an impact on the likelihood of courts make rights expanding decisions. The explanatory variables are the number of rights expanding sister state decisions cited, the number of federal precedent following sister state decisions cited, whether the deciding court cites prior rights-expansive precedents of its own interpreting federal constitutional provisions, and whether the deciding court cites notes the Supreme Court has narrowed its previous precedents. Control variables include whether the deciding court notes it generally decides state constitutional decisions consistently with federal precedent, the political ideology of the states (conservative, moderate, liberal), and dummy variables for the judicial selection methods. Chapter 4 finds a correlation between directional citations to sister state supreme courts (i.e. whether rights-expanding or federal-precedent following sister state cases are cited) and the likelihood of state supreme courts rendering a rights expansive decision, while controlling for

state ideology and judicial selection method. Chapter 4 also explores, in a separate analysis, whether the sister state citations from prestigious states have a disproportionate influence.

Chapter 4 does have several weaknesses, which are addressed in subsequent chapters. First, the 87 decisions analyzed in Chapter 4 cover numerous issues of constitutional law, and there is no indication of consistent trends across states and over time within particular areas of state constitutional law. Chapter 5 therefore focuses upon one issue area of state constitutional law across all of the states that have addressed the issue. In particular, Chapter 5 returns to the specific issue of the good faith exception to the exclusionary rule to track how sister state supreme courts have considered this issue on state constitutional grounds. Chapter 5 notes that numerous states have rejected the good faith exception on state constitutional grounds, and have done so while relying upon the reasoning of sister state supreme courts. Chapter 5 then examines several examples of state supreme court decisions relying upon sister state cases to help inform the decision making process.

Chapter 4 also has the weaknesses of potential spuriousness and improper specification of the main independent variables concerning sister state citations. The problem of potential spuriousness is particularly acute. In analyzing sister state citations it is impossible to know from the citations themselves whether the sister state citations are actually influencing deciding court behavior, or whether the deciding court has reached its decision for other reasons and then merely cites sister state authority to justify its decisions. Chapter 6 attempts to address the problem of spuriousness by reporting upon the results of interviews with state supreme court justices. The justices were asked directly whether they are influenced by sister state citations, or merely include citations for justification purposes (i.e. window dressing). The interviewed justices support the basic horizontal and vertical federalism hypotheses, confirming that sister

state citations do in fact, influence decision making, as do prior decisions by the deciding court (prior state precedent) and changes in Supreme Court precedent.

Chapter 7 continues exploring the results of the judicial interviews. The interviewed justices emphasize that the effect of sister state decisions is not uniform, but rather is contingent upon the quality of the reasoning contained in the sister-state decisions cited. In other words, the independent variables used in Chapter 4, which count the number of rights-expanding and federal-precedent-following sister state decisions, misspecify the actual impact of sister state decisions. These measures overlook the fact that the influence of precedent depends heavily upon the quality of the reasoning contained in the precedent, a point upon which the interviewed justices were clearly in agreement. This leads to a discussion in Chapter 7 about the need to rethink how the influence of citations to other courts is measured empirically. It is likely that objective measures of the quality of the reasoning in sister state decisions must be developed and employed in future research in order to have confidence in studies finding support for influence by sister state citations upon deciding court behavior. Similarly the misspecification of the independent variables may cause some hypothesized relationships to be obscured by the lack of measures accurately accounting for differences in the quality of reasoning across cited decisions.

CHAPTER 1: THEORETICAL BACKGROUND—A HISTORY OF NJF AND DIALOGUE THEORY

I. Explanation and History of New Judicial Federalism.

II. A Dialogue Theory of State Constitutionalism.

- A. So What Does Dialogue Look Like?
- B. Who is a Party to the Dialogue?
- C. Is Dialogue Happening?
- D. Is the Dialogue Having Any Discernible Effect?

III. Theoretical Foundations.

Hypothesis 1: Horizontal Federalism: State supreme courts will be more likely to recognize additional rights if sister state courts, particularly prestigious sister state courts, have already done so.

Hypothesis 2: Vertical Federalism: State supreme courts will be more likely to recognize additional rights if (a) the current precedent of the Supreme Court is narrower than earlier Supreme Court decisions, and (b) the deciding court rendered expansive interpretations when Supreme Court precedent was unclear.

IV. Alternative Explanations.

- A. Ideology of Sister States
- B. Judicial Selection Methods

I. Explanation and History of New Judicial Federalism.

State supreme courts are critical players in constitutional interpretation as they help interpret and apply *both* federal and state constitutional provisions. The focus of this dissertation, however, is the prerogative of state supreme courts to interpret state constitutional provisions as expanding rights beyond what the United States Supreme Court has interpreted federal constitutional provisions to require. This aspect of state constitutionalism, often referred to as the New Judicial Federalism, allows state supreme courts to give independent meaning to state constitutional provisions and protect additional rights when they deem it appropriate. Indeed U.S. Supreme Court Justice William J. Brennan suggested, in an influential 1977 *Harvard Law Review* article, that this is a critical function for state supreme courts.

Each state has its own constitution. As interpreted by that state's supreme court, each state's constitution stands at the pinnacle of state law (Pollock 1983). While the U.S. Constitution and federal statutes supersede state constitutional provisions where federal and state law conflict, where there is no conflict the state supreme court's interpretation of the state constitution is controlling and final.¹¹ Furthermore, the United States Supreme Court has held that where federal constitutional provisions apply to the states they merely set a floor and not a ceiling on the protection of rights (Gardner 1999).¹² Therefore, state supreme courts have the prerogative to establish *state* constitutional protections more expansive than the rights derived from the Bill of Rights of the United States Constitution as interpreted by the Supreme Court and applied to the states through the Due Process Clause of the 14th Amendment. (Abrahamson 1985). While state constitutional rights can be made expansive explicitly in state constitutions (either originally or by amendment), in practice this is often done by a decision of the state supreme court changing the interpretation of what existing state constitutional provisions require.

Advocates of the New Judicial Federalism encourage state supreme courts to carefully examine their state's constitutional provisions and consider interpreting state constitutional provisions in ways more expansive than similar provisions in the United States Constitution. So long as state supreme courts are only expanding and not contracting constitutional protections,

¹¹ At least the state supreme court's interpretation is final barring constitutional amendment, such as occurred in response to the California Supreme Court's recognition of homosexual marriage in 2008. Voters in California amended the California Constitution in the fall of 2008 to overturn the decision of the California Supreme Court in *In re Marriage Cases*, 183 P.3d 384 (2008). See generally Dinan (2009) discussing state constitutional amendments adopted specifically in response to and designed to overrule state court decisions.

¹² Latzer (1998 and 1992) argues that the federal constitution does not technically set a floor. His argument is interesting, but mostly addresses legal justifications and opinion writing. From an outcome-based perspective, states may not *protect* fewer rights than those emanating from the federal constitution. While Latzer is correct that states may make it clear when adjudicating rights that certain rights are *provided* only by federal, and not state law (so that in the event the U.S. Supreme Court reinterprets the federal constitution to include less rights no similar right would be construed to exist under state constitutions), for practical purposes it is useful to think in terms of a federal floor under which no state can go. In other words, Latzer's distinction between *providing* and *protecting* rights only makes a practical difference in instances where the U.S. Supreme Court narrows, or is likely to narrow, federal interpretations of rights. See also Williams (2009, p.114).

and make it clear they are resolving the case on state constitutional grounds and not federal precedent, such decisions are not reviewable by the United States Supreme Court. *See Michigan v. Long*, 465 U.S. 1032 (1983). As state supreme courts are the final word on the meaning of their state constitutions, they determine the ultimate scope of state constitutional rights in a particular state barring a change in the constitutional text through constitutional amendment.¹³

Justice Brennan played a large role in galvanizing movement toward state constitutionalism and the New Judicial Federalism with a 1977 article in the *Harvard Law Review*.¹⁴ He implored state supreme courts to take advantage of their independence to definitively set state constitutional protections beyond federal protections (Brennan 1977).

Gardner (2005) credits Brennan's law review article for initiating a wave of state supreme court decisions expanding individual rights beyond federal precedent¹⁵ based on state constitutional

¹³ Having the final word on state constitutional interpretation has led some observers to note state supreme courts speak "last" on these issues, but speaking "last" can be misleading depending on how long a view one takes. In the long run, it is more accurate to understand the establishment of constitutional rights as involving an ongoing dialogue between the U.S. Supreme Court, state supreme courts, the elected branches of government (federal and state), and voters (as well as scholars and media). In this sense, "last" means only the latest to speak, and it could mean a decision of either the U.S. Supreme Court or a state supreme court, or even state constitutional amendment ratified by the voting public. The idea of a dialogue over constitutional meaning is discussed in more depth in Part II of this chapter. Yet on a shorter view, considering any given federal constitutional right, federal law is often relatively stable over several years, sometimes decades, due to the doctrine of *stare decisis* (i.e. adherence to precedent). While it is true that the U.S. Supreme Court can and does overturn or distinguish previous decisions despite *stare decisis*, and in that sense the U.S. Supreme Court can always speak again, state supreme courts can be thought of as having the "last" word because they can always decide to "go a step further" and recognize more rights under their state constitutions than the U.S. Supreme Court has interpreted the U.S. Constitution to require. On this shorter view, once the U.S. Supreme Court has decided a case, even one departing from their own previous precedent and recognizing more rights, attorneys can always ask state supreme courts to render a decision recognizing rights even more expansive under state constitutions. But since the end of the Warren Court the U.S. Supreme Court has often overturned its precedents in order to *narrow* federal rights, so state supreme courts are then faced with the question of following the new narrower federal precedent on federal constitutional grounds, or following the broader outcomes of the old federal precedent on new independent state constitutional grounds. In any event, state supreme courts are *the* final word on the meaning of their state constitutions. *See Michigan v. Long*, 463 U.S. 1032 (1983).

¹⁴ Justice Brennan's article "is among the most frequently cited law review articles of modern times." (Williams 2007).

¹⁵ I use the term "federal precedent" interchangeably with the more precise term "U.S. Supreme Court precedent." While federal precedent could mean any decision by a federal district court or one of the U.S. Circuit Court of Appeals, since my focus is on U.S. Supreme Court precedents I use the term "federal precedent" to mean "U.S. Supreme Court precedent" (a bulkier term) unless it is clear from the context that I am also discussing federal court of appeals or federal district court decisions.

provisions. Although such cases were beginning to appear before Brennan's law review article, the pace accelerated rapidly following it (Gardner 2005). Brennan characterized the New Judicial Federalism as "probably the most important development in constitutional jurisprudence of our times." (Williams 2007, p. 227).

In addition, state supreme court justices such as Shirley Abrahamson (Wisconsin),¹⁶ Stewart Pollock (New Jersey),¹⁷ Hans Linde (Oregon),¹⁸ and Stanley Mosk (California)¹⁹ also gave speeches and contributed articles to various legal journals advancing the cause of expanding upon the protections found in federal precedents through reliance on state constitutional provisions (Collins, Gaile and Kincaid, 1986). These justices decried "lock-step" analysis where state supreme courts automatically interpret state constitutional provisions consistent with similar federal constitutional provisions. Instead they encouraged states to recognize rights beyond those in the federal constitution when appropriate (Williams 2005).

While the New Judicial Federalism is a relatively new phenomenon,²⁰ having gained momentum in the late 1970s, it is sufficiently far along to see that there are counter forces

¹⁶ Abrahamson, Shirley S. (1985). Criminal Law and State Constitutions: The Emergence of State Constitutional Law. *Texas Law Review*, 63, 1141-1193.

¹⁷ Pollock, Stewart. (1983). State Constitutions as Separate Sources of Fundamental Rights. *Rutgers Law Review*, 35, 707-722.

¹⁸ See e.g. Linde, Hans A. (1980). First Things First: Rediscovering the States' Bill of Rights. *University of Baltimore Law Review*, 9, 379.

¹⁹ See e.g. Mosk, Stanley. (1988). The Emerging Agenda in State Constitutional Rights Law. *Annals of the American Academy of Political and Social Science*, 496, 54-64.

²⁰ While the New Judicial Federalism as an identified movement or legal approach began in the 1970's, in actuality states have been an independent source of rights since the dawn of the republic. The Iowa Supreme Court in *Varnum v Brien*, 763 N.W.2d 862 (Iowa 2009) pointed with pride to the instances where it had previously reached decisions protecting civil rights decades before the Supreme Court:

In the first reported case of the Supreme Court of the Territory of Iowa, *In re Ralph*, 1 Morris 1 (Iowa Terr. 1839), we refused to treat a human being as property to enforce a contract for slavery and held our laws must extend equal protection to persons of all races and conditions. 1 Morris at 9. This decision was seventeen years before the United States Supreme Court infamously decided *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1856), which upheld the rights of a slave owner to treat a person as property. Similarly, in *Clark v. Board of Directors*, 24 Iowa 266 (1868), and *Coger v. North West Union Packet Co.*, 37 Iowa 145 (1873), we struck blows to the concept of segregation long before the United States Supreme Court's decision in *Brown v. Board*

operating to constrain it. Indeed a popular backlash against certain state supreme courts reaching rights expanding decisions under the New Judicial Federalism occurred in the mid 1980s. Voters in Florida and California were concerned that state supreme courts had become too activist,²¹ as the recognition of more rights under state constitutions led to the striking down of statutes, and more ominously, many criminal convictions by state supreme courts (McCoy 1996). Thus voters in these states approved ballot initiatives amending the Florida and California constitutions. These constitutional amendments limited the grounds upon which the supreme courts in these states could disagree with the interpretations of the United States Supreme Court, thus forcing two of the most active state supreme courts to reduce their activism (McCoy 1996; Esler 1994).

The New Judicial Federalism doctrine establishes that state supreme courts can and do go further in protecting individual rights under state constitutions than does the United States Supreme Court in interpreting the federal constitution (Porter and Tarr 1982). Often, however, state supreme courts, when presented with the opportunity to go further than what the Supreme Court has determined the federal constitutional demands, choose to follow federal precedent. The Supreme Court has unmatched resources as well as unparalleled prestige, and most state supreme courts give considerable respect and deference to its interpretations. Indeed in a

of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Iowa was also the first state in the nation to admit a woman to the practice of law, doing so in 1869. Admission of Women to the Bar, 1 Chicago Law Times 76, 76 (1887). Her admission occurred three years before the United States Supreme Court affirmed the State of Illinois' decision to deny women admission to the practice of law, see *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139, 21 L.Ed. 442, 445 (1873), and twenty-five years before the United States Supreme Court affirmed the refusal of the Commonwealth of Virginia to admit women into the practice of law, see *Ex parte Lockwood*, 154 U.S. 116, 118, 14 S.Ct. 1082, 1083, 38 L.Ed. 929, 930 (1894).

Prior to the incorporation of the Bill of Rights into the 14th Amendment's Due Process Clause and application of those federal rights to the states during the 20th Century, it was state constitutions, and the interpretation of them by state supreme courts, that provided the sole source of rights protecting citizens from state government action. (Blocher 2011, p. 335-37). This is notable because state government action is more likely to be encountered by citizens than federal government action, particularly given the primary role of state governments in criminal law. The application of state criminal law not only implicates criminal procedure rights, for example the rights against unreasonable searches and seizures and against self-incrimination, but rights of free speech as well since many free speech claims stem from criminal prosecutions.

²¹ I use "activist" in the precise sense of overturning the actions of the popularly elected branches.

sizeable majority of cases state supreme courts prefer to follow the lead of the United States Supreme Court by interpreting the provisions of state constitutions consistently with interpretation of similar terms in the U.S. Constitution. (Esler 1994; Latzer 1991).

From a legal perspective the New Judicial Federalism, the idea of reaching a more expansive interpretation of the state constitution than similar or identical federal constitutional provisions, is justified because “while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law. . .” (Brennan, 1977, p 500, quoting *State v. Kaluna*, 520 P.2d 51 (Hawaii 1974)). From a political science perspective, however, the challenge is to explain why one court chooses to interpret their state constitutional provisions in a manner consistent with the precedents of the Supreme Court regarding the U.S. Constitution, and why other state supreme courts reach a contrasting, rights expansive interpretation of their own similar state constitutional provision. To begin to answer that question it is helpful to briefly examine what legal scholars have said about the roles and relationship between the Supreme Court and state supreme courts in the state constitutional law context.

II. A Dialogue Theory of the New Judicial Federalism.

The idea of a constitutional dialogue pervades recent law review articles discussing state constitutional law decisions. Robert F. Williams (2003) suggests the New Judicial Federalism should include “a true dialogue among state and federal judges” pursuing a joint enterprise of providing interpretative answers to shared federal and state constitutional issues (p. 223).

According to Williams this developing era of state and federal constitutional dialogue constitutes

a fourth stage of the New Judicial Federalism.²² Williams argues that this dialogue between judges is part of a larger “ongoing national discourse about ‘ideas of liberty, equality and due process.’” (Williams 2003, p. 223; Kahn 1993, p. 1147-48). Dialogue between federal and state courts is workable because “the federal Constitution—both in its explicit terms and in the constitutional culture it creates—is deeply intertwined with state constitutions and state constitutionalism.... [and] state constitutions are deeply intertwined with the federal Constitution—they inspired it and are modeled after it....” (Blocher, 2011, p. 354). In particular, most state constitutions include provisions protecting rights that are often identical to those protections contained in the U.S. Bill of Rights. In fact, “[e]very state has a bill of rights, and almost all of them reproduce in some form or another the full list of rights protected by the federal Bill of Rights.” (Blocher, 2011, p. 333).

Lawrence Friedman agrees that constitutional dialogue between state and federal courts is desirable, arguing that “dialogue promotes federalist principles by validating the initiative of state supreme courts to speak to the U.S. Supreme Court about interpretations of shared constitutional text—that is, to engage the U.S. Supreme Court in discourse about the meaning of parallel provisions [in] state and federal constitutions and, thereby, to balance the Court’s perceived interpretational supremacy.” (2000, p. 143). In short, Friedman argues “state courts can contribute to state and federal constitutional discourse by providing an interpretive counterpoint to the U.S. Supreme Court.” (2000, p. 129). Instead of the U.S. Supreme Court being seen as *the* authoritative source for a single, fixed constitutional meaning, the U.S. Supreme Court is only one voice in a larger forum of courts (as well as other political actors) all

²² According to Williams (2003) the first stage was the “thrill of discovery,” starting in the 1970’s and extending through the early 1980’s, the second stage was a “backlash” including constitutional amendments responding to overly expansive state supreme court decisions during the 1980’s, and a third stage that he termed “the long hard task” continued into the new millennium as state supreme courts struggled to establish independent bodies of state constitutional law.

engaged in constantly reexamining and expounding a nationwide constitutional understanding based on the federal constitution as well as the various state constitutions.

Louis D. Bilonis may have captured the essential basis for constitutional dialogue best when he wrote: “Federal and state constitutions... are interdependent features of a greater *American* constitutional structure.” (1992, p. 1805, (emphasis in original)). This American constitutional structure is not only erected by the U.S. Supreme Court with the assistance of federal and state court decisions applying its interpretations of federal constitutional law. Instead, this American constitutional structure is also jointly erected with the cooperation of the several state supreme courts interpreting their analogous state constitutional provisions. According to Bilonis a two-tiered constitutional structure, in which state supreme courts engage the Supreme Court in dialogue and voters may in turn respond to state supreme court decisions, has certain advantages. This is because an “erroneous overstatement of a state constitutional right is not nearly so troublesome as a similar mistake under the Federal Constitutional might be because the [state mistake] is bound to be less costly and more easily rectified than the [federal mistake].” (Bilonis 2007, p. 1822). As Bilinois suggests, even the elected branches and voting public may become involved in this dialogue by initiating state constitutional amendments reacting to state constitutional law decisions.²³ Several books and articles have focused on the reactions to state supreme court decisions by the voting public. For example, Dinan (2007) comprehensively examines a variety of state constitutional amendments over several decades designed to overturn state supreme court decisions that went beyond what the public would tolerate. Dinan identifies state constitutional amendments responding to state supreme court

²³ The idea of dialogue has also been picked up by state supreme courts. The Iowa Supreme Court acknowledges that its decision recognizing a right to same-sex marriage under the Iowa Constitution is part of a larger “national dialogue” in which the voters in twenty-seven states have passed constitutional amendments prohibiting same-sex marriage. *Varnum v. Brien*, 763 N.W.2d 862, 878 & n.5 (Iowa 2009).

decisions interpreting state constitutional provisions concerning religion, the death penalty, search and seizure, the right to bear arms, and same sex marriages. Kramer (2004) goes further and says the claims of judicial supremacy by the U.S. Supreme Court should be resisted as “for most of our history American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.”²⁴ Therefore some legal scholars have argued that state supreme courts, which are either more responsive to the voting public through elections, or subject to being overturned by the public through ballot initiatives and referenda, are a superior venue for constitutional dialogue compared to the Supreme Court, which is almost wholly insulated from public pressure.

Regardless of the arguments for or against the normative desirability of more dialogue, and the relative weight to place on state constitutional decisions, it is undisputed that state supreme courts must be persuaded, rather than commanded, when they are considering whether to expand state constitutional rights above the federal floor of required federal constitutional rights. This is because, in contrast to situations where state courts are interpreting federal constitutional provisions, state supreme courts are immune from U.S. Supreme Court review when considering whether to expand rights based clearly on state constitutional provisions. *Michigan v. Long*, 463 U.S. 1032 (1983). Thus a collaborative, instead of a hierarchical, view of the construction of constitutional meaning is more appropriate in the context of the New Judicial Federalism. If state supreme courts cannot be commanded by the Supreme Court on issues of

²⁴ Kramer seems to endorse attempts to reestablish popular control over both federal and state constitutional interpretation, noting Theodore Roosevelt supported measures, such as implemented for a time in Colorado, that allowed for popular recall of state supreme court decisions. (2004, p. 216). From 1912 to 1921 Colorado allowed recall of judicial decisions by the electorate until the Colorado Supreme Court declared this procedure unconstitutional. (Dinan 2007, p. 985-986, n. 10). This endorsement of popular control over constitutional interpretation is not limited merely to academics. Friedman (2000) notes that Chief Justice Burger reminded citizens that “when state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law...” *Florida v. Casel*, 462 U.S. 637, 639 (1983) (Burger, C.J. concurring).

state constitutional law, then only means of persuasive influence remain. How might states be persuaded? A collaborative understanding suggests that dialogue will occur between the collaborators—in this case potentially with all of the other courts with arguments persuasive to the deciding court. While no court is required to listen to other courts in this collaborative model, the fact that courts share a common constitutional tradition suggests the possibility, and even the likelihood, that persuasion exists across courts. Blocher (2011) argues that both the Supreme Court and state supreme courts have long looked to the decisions of other courts:

Comparativism has long been a part of the Supreme Court's interpretive toolkit, perhaps increasingly so in recent years. For example, the Court has often relied on international and foreign law in Eighth Amendment cases.... International comparativism has also become a part of the Court's due process jurisprudence. In *Lawrence v. Texas*, for example, the majority noted that the European Court of Human Rights had recently struck down the United Kingdom's sodomy ban in *Dudgeon v. United Kingdom*....

Comparativism is also prevalent among the states themselves. State courts often cite one another's decisions and borrow one another's doctrine, even in constitutional cases. They do so despite the fact that they are no more bound by one another's precedents when interpreting their own law than the Supreme Court is when interpreting federal law. ...If international law can be a valid comparator, then why not also the law of those sovereign states whose constitutional tradition is historically, culturally, and formally enmeshed with the nation's?

...[T]he differences between the relevant state constitutions and the federal Constitution are much smaller than the differences involved in the transnational comparisons that are a staple of comparative constitutional law. ...Indeed, the development of individual rights under state Bills of Rights has been a cooperative, common law-like effort by federal and state courts. (Blocher 2011, p. 351-52) (internal citations omitted).

Legal scholars, such as those discussed in the previous pages, then add normative arguments elaborating on why dialogue should be pursued and why state supreme courts should consider the arguments of sister state courts as well as the Supreme Court.

Regardless of whether dialogue is viewed through an objective lens and is considered a predictable consequence of a collaborative model of state constitutional interpretation in a context of shared culture, tradition, and text, or through a normative lens also considering

arguments for why dialogue is desirable in such situations, certain predictable effects may be expected. For instance, it may be expected that one state supreme court speaks with a relatively quiet voice in this dialogue between state supreme courts and the Supreme Court about the meaning of shared constitutional text and tradition, but several state supreme courts speaking in unison speak with more authority, and with greater legitimacy. (Blocher 2011).²⁵

A. What Does Dialogue Look Like? Law review articles have addressed the phenomenon of dialogue between the Supreme Court and state supreme courts, as well as between state supreme courts and sister state supreme court, from a normative perspective. Legal scholars argue dialogue is desirable as it leads to favorable consequences, such as robust and redundant rights protection for citizens, diverse analytical approaches, possibility of correcting Supreme Court error, etc., and therefore should be endorsed and encouraged. From a political science perspective the question is what should we objectively expect to observe if dialogue theory is correct?²⁶ A political scientist, in evaluating whether this normative advice from legal scholars is being acted upon and to what effect, is faced with at least three questions: 1) Who is a party to the dialogue? 2) Is dialogue happening? (how would we know/ how should we measure it); and 3) Is the dialogue having any discernible effect? These questions have not always been clearly articulated in studies, and thus need to be fleshed out here before proceeding to develop hypotheses.

B. Who is a Party to the Dialogue? The answer to the first question is that there could be multiple dialogues occurring at once. I have condensed the plethora of possible constitutional dialogues into two major types. In the first type the Supreme Court and one or more states are

²⁵ “[S]tate constitutional law is undoubtedly more useful when the states have spoken with a relatively unified voice—when their laboratories have come up with similar results.” (Blocher 2011, p. 363).

²⁶ To be specific, this question is not evaluating dialogue theory from a normative perspective, but rather what objective manifestations should be expected to be observed if dialogue is occurring (as opposed to a situation where advocacy of dialogue is more wishful thinking or merely an argument how things ought to change).

engaged in a dialogue. Such dialogue is an example of vertical federalism. This type of vertical federalism dialogue is mostly top down communication—the Supreme Court is making decisions that the state supreme courts read and consider following when interpreting state constitutional provisions.²⁷ Such top-down communication is the focus of Hypothesis 2, discussed later in Part III of this chapter. Occasionally, however, the dialogue of vertical federalism is bottom up, when the decisions of state supreme courts are considered by the Supreme Court.

A second type of dialogue is the dialogue occurring between state supreme courts.²⁸ This type of dialogue is an example of horizontal federalism, as is suggested by the title of Cauthen's 2003 article, "*Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations.*" The role of horizontal dialogue between sister state supreme courts is the key element in Hypothesis 1, discussed below in Part III of this chapter.

C. Is Dialogue Happening? The second question facing political scientists in evaluating the dialogue theory of legal scholars is whether dialogue is happening—how would we know and how should we measure the dialogue? In my view a dialogue theory of state constitutionalism contains two central tenets. First, for dialogue to occur, state supreme courts must be aware of

²⁷ When using Supreme Court precedents for the purpose of interpreting state constitutional provisions technically the Supreme Court precedent is only persuasive, not controlling, precedent for the state supreme court. The real question is how persuasive state supreme courts consider Supreme Court precedent to be. Supreme Court precedent becomes functionally controlling in states that adopt what is known as "lockstep" analysis of their state constitutions. In other states the persuasiveness of Supreme Court precedent varies from one issue area to another based on state supreme court precedent (state supreme courts use a variety of characterizations to express how persuasiveness they views Supreme Court precedent to be in a given legal area). However, this dissertation will not be focusing on the normative arguments of how persuasive Supreme Court decisions are or should be in this context. The desirability of lockstepping and other interpretative methods that encourage states to either give deference to or be wary of Supreme Court decisions are issues well covered in the legal literature.

Technically it is not dialogue unless the Supreme Court is considering the reactions of state supreme courts to its decisions. Thus while this form of communication may be important and influential on state supreme court decision making behavior, this one-way communication is not a true dialogue and the rest of this part of the chapter is analyzed in a context where true dialogue is more likely to be occurring.

²⁸ This dialogue between state supreme courts is, at least for the purposes of this dissertation, occurring in light of a decision by the Supreme Court. The Supreme Court need not take notice of this horizontal state dialogue for it to be important or effective. While legal scholars such as Blocher (2011) argue the Supreme Court *should* take notice of this state dialogue, the horizontal dialogue between states can occur and be influential without the necessity of the Supreme Court taking notice.

what their sister state supreme courts are saying. Second, a true dialogue requires more than merely listening, but requires a response that demonstrates the deciding court has taken seriously the arguments made by sister state courts. Dialogue for these purposes need not be conceived of as a repeated exchange between two parties, but rather akin to a dialogue in a deliberative body where successive speakers consider a common question in light of the comments and arguments of previous speakers. Finding frequent citations to sister state supreme court decisions is direct evidence that deciding courts are cognizant of and consider the opinions of sister state courts.

D. Is the Dialogue Having Any Discernible Effect? This is by far the most difficult question. Answering it requires focusing on my second tenet of dialogue theory: dialogue requires more than merely listening, but requires a response that demonstrates the deciding court has taken seriously the arguments made by sister state courts. Case outcomes consistent with cited sister state supreme court decisions is preliminary evidence that state supreme courts are influenced by sister state supreme courts.²⁹ It is important to note here that a discernible effect is more than merely citing sister state cases to justify “liberal” results—a criticism that often seems to be the objection of the normative opponents to New Judicial Federalism. Thus a reasonable prerequisite to determine that dialogue is having a discernible effect is that citations to decisions of sister state courts are used both in state constitutional decisions following Supreme Court precedent as well in rights expanding decisions based on state constitutional provisions. The most difficult task is determining whether deciding courts are actually being influenced in particular cases by the decisions of sister state supreme courts, or whether deciding courts are merely using the decisions to justify decisions (both decisions following Supreme Court

²⁹ Of course, contrary case outcomes could also be consistent with dialogue theory *if* the majority opinion demonstrates that the deciding court has taken seriously the arguments of sister state courts by discussing the rationale of earlier sister state decisions (and preferably by giving thorough and compelling rebuttal to the arguments made in these earlier sister state decisions).

precedent or expanding rights) made on other grounds. Case outcomes consistent with cited sister state supreme court decisions is preliminary evidence, but not conclusive evidence, that state supreme courts are influenced by sister state supreme courts. It is necessary to check for alternative explanations that might constitute the true causal factor(s) for decisions made consistently with cited sister state decisions. It is necessary to guard against the possibility that sister state citations are used merely as justifications which obscure the actual reasons for the decision. In particular, it is possible that case outcomes consistent with sister state citations is merely a spurious relationship (i.e correlation is not causation). This leads to a discussion of other alternative explanations for state supreme court decision making behavior.

Some scholars have argued for a partisan ideology explanation to state supreme court behavior. Instead of state supreme courts being influenced by the decisions of sister state supreme courts, these scholars argue that state supreme court decision making is driven primarily by the ideological predispositions of the individual justices. In this view, citations to sister state supreme cases are merely “window dressing” to justify decisions already made primarily on the basis of ideology. Indeed, scholars have perceived an inherent liberal ideological bias in the New Judicial Federalism (Latzer, 1998). This is not surprising as Justice Brennan, a renowned liberal, perceived the United States Supreme Court was no longer actively expanding rights (at least to the extent Brennan preferred) beginning in the 1970’s under Chief Justice Burger, and penned his *Harvard Law Review* article urging states to instead expand rights based on their independent state constitutional provisions.

It is also true that the New Judicial Federalism mostly prevents conservatives from achieving their ideological preferences at the state level. This is because rights can only be expanded, not restricted, by state constitutional law. Conservatives on state supreme courts

cannot use the New Judicial Federalism to contract rights protected by the U.S. Constitution. Only the U.S. Supreme Court can authoritatively narrow the meaning of the U.S. Constitution by reinterpreting it.³⁰ Conservatives, however, have been able to expand rights under state constitutions in those issue areas where conservatives favor more expansive rights interpretations (e.g. property and gun rights). For instance in *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) the Ohio Supreme Court interpreted Section 4, Article I of the Ohio Constitution,³¹ the analog to the 2nd Amendment³² in the U.S. Constitution, to provide an individual right to bear arms, instead of a collective right (i.e. one held by the state militia, but not individual citizens). Thus in 1993 the Ohio Supreme Court interpreted its state constitution to provide a right that the U.S. Supreme Court did not recognize as applying to the states until 2010 in the case of *McDonald v City of Chicago*, 561 U.S. ____; 130 S. Ct. 3020; 177 L. Ed. 2d 894.³³

Furthermore, other legal scholars have argued that support for a robust system of state constitutional interpretation has not been confined to liberals. (Blocher 2011). The New Judicial Federalism is a form of federalism after all, which is generally a value supported by conservatives, and conservatives like Chief Justice Burger occasionally made reference in Supreme Court decisions to an expanded role for state courts. (Blocher 2011, p. 338). Louis D.

³⁰ Although as Latzer (1998 and 1992) points out, conservatives on state supreme courts could conceivably anticipate U.S. Supreme Court decisions narrowing the interpretation of the U.S. Constitution and make clear that state constitutions do not provide rights in the absence of federal requirements. However, such decisions by state supreme courts are extremely rare, if they exist at all. See also footnote 2 discussing the possibility of state supreme courts anticipating a narrowing of federal rights by the Supreme Court and preemptively narrowing the extent of rights *provided* under state constitutional provisions, even though the broader federal rights must be *protected* until such time as the Supreme Court actually narrows the meaning of the U.S. Constitution.

³¹ Section 4, Article of the Ohio Constitution reads: “The people have the right to bear arms for their defense and security, but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” In *Arnold* case the language difference with the 2nd Amendment served as a basis for the difference in outcome in *Arnold* compared with federal precedent.

³² The 2nd Amendment reads “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

³³ In other words the U.S. Supreme Court did not recognize a right to bear arms that constrained state actors until 2010. Thus from 1993 until the U.S. Supreme Court declared in *McDonald* in 2010 that an individual right to bear arms was incorporated into the 14th Amendment (and thus made applicable to the states), the *Arnold* case was the only refuge for Ohio citizens to contest the constitutionality of Ohio firearm laws.

Bilionis suggests another reason why conservatives might support the New Judicial Federalism, even if individual state supreme court decisions trend generally liberal. “Overstatement of a federal constitutional right constrains the national political majority and the political majorities of every state, and to the extent that it threatens to disrupt social practices, it does so nationwide. Any harm done by the overstatement of a state constitutional right, by contrast, is confined for the most part to the state in question.” (Bilionis 2007, p. 1822 n. 65).

If a healthy constitutional dialogue exists amongst the states, the Supreme Court might feel comfortable deciding cases in narrower fashion (perhaps consistent with originalist principles and deferential to elected political branches) knowing that state supreme courts who objected to the narrower constitutional interpretations would always have their state constitutions to rely upon for reaching more expansive decisions.³⁴ An example of such an argument (albeit in a case not generally considered to have a conservative outcome) was made by Justice Stevens in *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).³⁵ This would be wholly consistent

³⁴ Indeed state constitutionalism, and dialogue between states supreme courts, offers a middle ground between the extreme rigidity of the Article V amending process required to make changes under a strict originalist interpretative method and the fuzziness of using public polling to discern constitutional values under an extreme version of the living constitution method. (Blocher 2011, p. 347). Blocher is concerned with the debate between constitutional interpretative methods, from originalism on one side which ignores the role of contemporary norms and values in constitutional interpretation, and a living constitution approach on the other that can become detached from the constitutional text and thus from the underlying legitimacy of having been ratified collectively by the people through state legislatures. The Supreme Court is usually considered the institution to strike the balance between interpretive approaches (which is merely part of a larger debate between the role of civil and political rights versus the rule of the majority). However, the Supreme Court suffers from the counter-majoritarian problem of being almost impossible to overturn if it makes a mistake (*see supra* footnote 10 and accompanying text) and the nationwide costs of such a mistake. (Bilionis 2007). State supreme courts do not suffer from the counter-majoritarian problem to the same extent as the Supreme Court, nor do they have the same geographical coverage for their decisions. Thus state courts, whose “institutional position can be thought of as intermediate between that of federal judges and that of elected representatives” may be poised to fill a middle ground or compromise position between the nearly absolute counter-majoritarian decisions of the Supreme Court, and the unrestrained majoritarianism of deferring completely to the elected branches. (Bilionis 2007, p. 359 quoting Kahn 1993, p. 1155-56)

³⁵ Justice Stevens stated at the end of the *Kelo* majority opinion: “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law....” Effectively the *Kelo* decision deferred to the decision making of elected bodies, but explicitly reminded state supreme courts they were free to reach a more expansive decision that would be more protective of individual property rights under their state constitutions.

with the idea of states as laboratories of democracy, experimenting with the consequences of more expansive rights interpretations. Indeed a savvy conservative Supreme Court majority, believing its current precedents are generally too liberal but also concerned about political backlash if it moves too quickly or too far in chipping away at those precedents, might use state constitutional decisions (as well state legislation) as a barometer to help measure if it has gone too far. In this context Supreme Court decisions that chip away at old expansive precedents but draw just a few somewhat random state constitutional decisions in reaction might be considered mainstream and presumptively correct. In contrast if Supreme Court decisions that quickly draw many state supreme court decisions which are relatively uniform in opposition on state constitutional grounds might be evidence of overreach or even error by the Supreme Court.

III. Theoretical Foundations

What are the predictable discernible effects that would be expected to be observed if dialogue was occurring? If state supreme courts are engaging in a national constitutional dialogue based on shared constitutional text, culture and tradition, they should be influenced both by sister state supreme courts (horizontal federalism) as well as the U.S. Supreme Court (vertical federalism). I define “sister state supreme courts” as courts of last resort in the other 49 states relative to the deciding court in question.

Hypothesis 1: Horizontal Federalism: State supreme courts will be more likely to recognize additional rights if sister state courts, particularly prestigious sister state courts, have already done so.

Barry Latzer points out that decisions of other state supreme courts can be very persuasive authority (Latzer 1991). He terms the influence of state supreme courts on other state supreme courts as “horizontal federalism.” Latzer argues that “[p]raise from the academy in the law reviews, and a solid lineup of court decisions coming to a similar conclusion surely bolster a

court's feeling that its ruling is right." (1991, p. 197). An alert bar, and litigating interest groups, will track decisions by state supreme courts across the country, and use these decisions as persuasive authority when making arguments in other states. Indeed, state supreme courts like California and New York, which he terms "leadership" courts, have "undoubtedly encouraged state law 'movement' throughout the nation." (Latzer 1991, p. 197).

The fact that sister state supreme courts have decided to depart from the reasoning of the U.S. Supreme Court should provide some level of "encouragement" for the deciding court to also depart from the reasoning of the U.S. Supreme Court on analogous state constitutional provisions. This influence could be simply informational. By citing sister state cases the deciding court demonstrates it is aware that other interpretative options exist, and not merely academic/scholarly interpretations, but interpretations that have been adopted by other collegial courts. My hypothesis rests on the idea that state supreme courts view themselves as part of a larger legal community. Some are willing to innovate, particularly on close legal questions, but consistently look to other legal actors for guidance as to what is mainstream within the bounds of acceptable legal jurisprudence. When lawyers speak of a "body of law" they recognize that judicial decisions are made in the context of larger overarching principles, and are not (merely) the result of individual judicial preferences.³⁶

Or the influence could be something more. State supreme courts are more "on the hook," or in other words more politically exposed to criticism, for decisions rendered with a basis solely in the state constitution. This is because state constitutional decisions rely entirely on the authority of state supreme courts as the final interpreter of state constitutional provisions, and are

³⁶ Louis Bilonis (1992) makes this point, arguing that explaining state supreme court behavior based on political ideology "leaves untold far too much of the judicial story." (p. 1804). "Constitutional texts comprise a part of the state's corpus juris [body of law], and the court's constitutional responsibility is to consider them and give them their due effect." (p. 1804).

not subject to review by the U.S. Supreme Court. State supreme courts are more politically exposed to negative reactions from other political actors as well as popular opinion when they are the actor ultimately responsible for the decision.

If state supreme courts make the decision to expand rights on the basis of state constitutional provisions, they are no longer “shielded” by U.S. Supreme Court precedent. In other words, the state supreme court can no longer blame the U.S. Supreme Court, and say that the state supreme court has no choice in the matter because it must follow controlling federal precedent. Rather, the full responsibility of a decision and the attendant political costs are attributable to the state supreme court itself when it chooses to recognize additional rights under state constitutions (Beavers and Emmert, 2000). While often such negative reaction might be limited to other political actors like the governor or legislature, or perhaps elite public opinion, there is always the potential for negative reactions by the general public on particularly salient issues. The Iowa Supreme Court recently discovered this when the 3 members of the 7 member Court up for election were removed in retention elections in the 2010 elections. Their removal was clearly related to the Iowa Supreme Court’s 2009 decision in *Varnum v. Brien*, 763 N.W.2d 862, which recognized a right to same sex marriage under the Iowa Constitution.

However, if sister state courts have blazed a trail³⁷ by expanding rights under similar state constitutional provisions they are potential sources of political support for the deciding court. The deciding court can point to sister state cases to bolster the reasonableness and

³⁷ Dialogue between states (horizontal federalism) becomes observable when states have the advantage of looking to the decisions of sister states who have already considered a common constitutional question. Yet horizontal federalism does little to explain the decision making process of the first mover—the first state to explicitly consider whether to follow U.S. Supreme Court precedent or adopt a different standard based upon state constitutional provisions. By definition, a first mover cannot rely upon sister state decisions, and even states in the first handful of movers would have few sister state decisions to consider. As a subject for future research, I hypothesize that several factors drive the first mover(s) including: 1) whether the U.S. Supreme Court has retreated from earlier broader precedents, 2) degree of division within the U.S. Supreme Court (number of dissents in controlling precedent), 3) deciding court precedent, 4) citations to law review articles and other scholarly opinion, 5) amicus briefs filed by interest groups, and 6) political ideology.

plausibility of their own decision—sister state courts have reached a similar conclusion, so therefore such a decision presumably has some legal basis and legitimacy. The deciding court may deflect allegations of political motivation by claiming their decision has a basis in the wider legal community, and is not (merely) politically motivated. Furthermore, since law is partially a consensus building exercise, a showing of consensus (i.e. a “majority rule”) across states may be particularly persuasive both to elites and the general public who might potentially be the source of a backlash against a state supreme court’s decision. Sister state consensus may be one standard by which to judge the reasonableness of the legal reasoning within a particular decision. In short, the deciding court looks less extreme as more courts render similar decisions.

There is both anecdotal and statistical support for the horizontal federalism hypothesis that state supreme courts will be more likely to expand rights if sister state courts have already done so. On an anecdotal level, courts have signaled that sister state decisions are an important consideration. For example the Iowa Supreme Court has consistently surveyed the decisions of sister state courts in similar state constitutional cases. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (authored by now Chief Justice Cady); *State v. Allen*, 690 N.W.2d 684 (Iowa 2005) (authored by former Justice Streit); *City of West Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002) (authored by former Justice Carter); *State v. Cline*, 617 N.W.2d 277 (Iowa 2000) (authored by former Chief Justice Ternus). The Pennsylvania Supreme Court has gone one step further and explicitly incorporated the decisions of sister state courts into its four-factor test of deciding when to follow federal precedent on state constitutional grounds. See *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).³⁸ Thus in Pennsylvania attorneys are counseled to include such citations in their brief, and the Pennsylvania Supreme Court regularly (but not

³⁸ The four-factor test normally employed by the Pennsylvania Supreme Court includes examining (1) the constitutional text, (2) the history of the constitutional provision, (3) related case law from other states, and (4) policy considerations.

always) cites and considers decisions from other sister state courts when deciding state constitutional cases.

There is also empirical data indicating that sister state cases influence state supreme court decision making. James Cauthen (2003) examines citations to sister state court cases. He finds that state supreme courts cite sister state cases in just over one-third of their state constitutional decisions (34.8%). He also finds that state supreme courts expand rights in 41.4% of their decisions citing sister state cases, compared to expanding rights in 31.5% of their decisions that do not cite sister state cases (Cauthen 2003). Thus Cauthen suggests that citing sister state supreme court decisions will generally make it more likely that a state supreme court will choose to expand rights.

Hypothesis 2: Vertical Federalism: State supreme courts will be more likely to recognize additional rights if (a) the current precedent of the Supreme Court is narrower than earlier Supreme Court decisions or (b) the deciding court rendered expansive interpretations when Supreme Court precedent was unclear.

Cauthen argues that at least some state supreme courts may be reacting to decisions of the U.S. Supreme Court that have narrowed earlier precedent. Cauthen finds evidence that in many areas states do seem to react to retrenchment by the Supreme Court, although he is quick to qualify that not all areas in which state supreme courts expand rights are areas in which the Supreme Court has curtailed rights. (2000).

Cauthen (2000) discusses the example of the Supreme Court's decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith* the Supreme Court departed from its strict scrutiny test in *Sherbert*, that the state regulation must be narrowly tailored to advance a compelling state interest, and be the least restrictive means necessary to advance that interest, in order to uphold legislation that impinges on the free exercise of religion. Rather *Smith* developed a looser test upholding legislation of general applicability with a

religiously neutral purpose. The holding in *Smith* is less constraining of government regulation, and in turn less protective of religious freedom. Several state supreme courts have subsequently decided that their state constitutions continue to require the strict scrutiny test with a compelling state interest in order to justify government legislation impinging on religion, similar to the old *Sherbert* test (Cauthen 2000). For example in *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) the Ohio Supreme Court unanimously ruled that Article I, section 7 of the Ohio Constitution requires a strict scrutiny standard of analysis when deciding free exercise cases, contrary to the U.S. Supreme Court's decision in *Smith*.

In addition, sometimes a state supreme court has resolved an issue, often applying federal constitutional law, before the Supreme Court addresses the specific issue. If the state supreme court has reached a relatively expansive interpretation of rights by applying the federal constitution prior to a definitive resolution of the Supreme Court, and the U.S. Supreme Court subsequently decides that the U.S. Constitution actually does not require such a broad reading,³⁹ then the state supreme court is faced with a dilemma. It may choose to continue to follow the reasoning of its own precedent, but this time explicitly on state constitutional grounds, or follow the more recent U.S. Supreme Court precedent. Therefore, a prior precedent by a state supreme court that interpreted federal constitutional provisions more broadly than the U.S. Supreme Court

³⁹ Effectively the U.S. Supreme Court is saying that the state supreme court earlier overestimated the height of the federal floor compared to what the U.S. Constitution actually requires. A state supreme court decision that has overestimated the height of the federal floor will be overturned if appealed, unless the state supreme court decision includes a *Michigan v. Long* "plain statement" explicitly asserting that the decision is based on adequate and independent state law grounds. State supreme courts will occasionally recognize they are pushing the boundaries of federal constitutional jurisprudence and will thus consciously insulate their decision from U.S. Supreme Court review by explicitly stating they are deciding the case upon federal as well as upon adequate and independent state constitutional grounds (a practice sometimes referred to as "double-barreling" in reference to firing both barrels of a shotgun). See e.g. *Ohio AFL-CIO v Ohio Bureau of Workers' Compensation*, 780 N.E.2d 981 (Ohio 2002).

subsequently does, should make it more likely that a state supreme court will reach a rights expanding decision under the state constitution when it is faced with making a decision solely on state constitutional grounds.

IV. Alternative Explanations.

A. Ideology of Sister States. A state supreme court may be citing decisions favorable to an outcome the majority wants to reach for other reasons. In other words it may be that citations to sister state decisions are merely pre-textual. A central problem in explaining judicial decision making is establishing that the decisions of sister states are influential on the deciding court and not merely the result of the majority justifying with convenient legal authority decisions made for ideological reasons (Cauthen 2003). Stated more concisely, citations to sister state decisions could be only justifications, not explanations, for case outcomes. It should be noted, however, that even if the alternative explanation is true that citations to sister state supreme court decisions are mostly justifications, not explanations, then sister state citations would still be interesting. It would be interesting that courts take the time and energy to often include citations to sister state supreme courts if these sister state cases were not influencing the deciding court itself, but perhaps influencing observers (other political actors, elite and perhaps occasionally public opinion) of the deciding court.

On a literal level *citations* to sister state decisions are certainly *not* the cause of an individual case outcome because the decision is almost always made before the opinion is written. Of course, citations are only written notations and the issue is really whether the cited sister state cases influenced the decision-making process of the deciding court. Stated differently, the real question is whether a written opinion is an accurate representation of the decision making process, and of the considerations and factors (particularly the cited sister state

cases) that actually influenced the decision. Otherwise the findings reported below would merely report a spurious relationship—sister state citations and case outcomes are correlated, but both are caused by something else, which is the true causal factor.

Political scientists have established that political ideology influences the decision-making process of courts to some degree, yet judges are loathe to admit the influence of ideology, especially in their opinions, which are the written explanations for their decisions. So it is at least plausible that political ideology is the true cause of both the case outcomes and the choice to include citations—and that courts are not completely forthright about their decision-making process. According to this view, state supreme court justices are instead merely including citations to sister state decisions as “window dressing” to “sell” a decision already made on ideological grounds, and not because these citations actually influenced the decision or were a substantial causal factor in the decision making process. It is impossible to know for certain the nature of the decision making process since decision making conferences are held behind closed doors.⁴⁰ Similarly, it is possible that state supreme courts only cite sister state cases favorable to the outcome desired and ignore “inconvenient” sister state cases. Of course it is not reasonable to expect that state supreme courts will always follow the majority rule of sister state cases, since on many of these issues there is also a persuasive minority view. This paper relies upon dissenters to point out duplicity or lack of forthrightness by the majority by citing only favorable sister state decisions and ignoring the majority rule or unfavorable decisions if, and when, it

⁴⁰ However, even if judicial conferences were open to the public, this does not necessarily mean that justices would be completely forthright about their motives for making a particular decision. Chapter 6 reports the results of interviews with state supreme court justices. The interviews were designed to elicit responses addressing the weight and value of sister state decisions, and specifically whether sister state decisions were used merely as “window-dressing” justifications. Of course, even in an interview, justices might not be completely forthright, or may be unwilling to acknowledge (perhaps even to themselves) that their ideological predispositions influence their decision making. However, the interview design rests upon the assumption that the opportunity to candidly reveal their thought process to a researcher, without being exposed in the press, will reveal whether there is a concerted “window dressing” approach employed by state courts.

occurs. One would expect that if the majority was purposefully overlooking or ignoring precedents from other sister states, particularly if there was a clear majority rule, the dissenters would call the majority out on their willful slanting of the available precedents.

B. Judicial Selection Methods. Admittedly, “the link between judicial selection procedures and actual case outcomes remains murky.” (Beavers and Emmert, 2000, p. 5). Conventional wisdom seems to suggest that elected justices should be hesitant to use judicial review to expand rights under state constitutional provisions (Beavers and Emmert, 2000, p. 5). This might be especially true in the area of criminal law where “extant research... views the public as sensitive to cases favoring unpopular criminal defendants.” (Beavers and Walz, 1998, p. 57). Consistent with this conventional wisdom, David Brody (2002) “anticipated that judges who had to stand for election would be less likely to make decisions that would be favorable to criminal defendants and unpopular with the general public.” (p. 84). However, Brody was surprised to find that states with elected justices provided rights in more issue areas than did appointed justices (2002, p. 84).

There certainly are reasons to believe elected justices will be more likely to expand rights. Beavers and Emmert (2000) hypothesized that courts with popular-vote based selection methods would be most likely to strike down challenged legislation because electoral based judicial selection methods attract “risk-taking” judicial candidates willing to risk the consequences of judicial activism. If elected justices prove in fact to be most likely to expand rights I suggest it will be because elected justices feel a greater sense of legitimacy in acting as counter-majoritarian agents. As elected (partisan and non-partisan) justices draw authority and legitimacy directly from voters, there is less reason for these justices to defer to other elected

branches.⁴¹ While it certainly is not clear what impact judicial selection methods should be expected to have on state constitutional rights, scholars continue to believe the way justices are selected influences their behavior, and therefore it is important to consider judicial selection methods as an alternative explanation for the hypothesized behavior.

⁴¹ Similarly, Blocher (2011) has argued “[i]t is possible that the political accountability of state judges (and the amendability of state constitutions) might encourage them to read some state constitutions more expansively, knowing that their rulings can always be ‘corrected’ by a democratic majority.” (p. 358).

CHAPTER 2 OHIO CASE STUDY

- I. Why Choose Ohio?
- II. Ohio and the New Judicial Federalism.
- III. Case Selection.
- IV. Recent Decisions in Ohio Expanding State Constitutional Rights.
- V. How Well Do the Horizontal and Vertical Federalism Hypotheses Fit Recent Ohio Decisions Expanding State Constitutional Rights?
- VI. Recent Decisions in Ohio Following U.S. Supreme Court Precedent.
- VII. Lessons and Developing ABC analysis

Prior to developing a research design, and sorting through hundreds of cases and then coding scores of cases, it was important to investigate my hypotheses discussed in the previous chapter. The goal was to see if there was any preliminary evidence to support the hypotheses in order to justify proceeding with data collection in a larger research design. This chapter is a case study that examines the evidence supporting the horizontal and vertical federalism by analyzing state constitutional decisions by the Ohio Supreme Court over the years 1993 to 2009. It not only provided preliminary support for the hypotheses discussed in Chapter 1, but revealed the need to measure the direction of the sister state decision cited (i.e. whether the sister state citations are rights-expanding or federal precedent following decisions) in order to test the validity of the horizontal federalism hypothesis concerning the influence of sister state decisions.

I. Why Choose Ohio?

Ohio was selected for two main reasons. First, in order to isolate the impact of political ideology, it is helpful to have both conservative and liberal state supreme court decisions. Ohio meets this criterion. In particular, the Ohio Supreme Court decided in 2006, in contrast to the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), that mere economic or financial benefit to the community did not satisfy the “public use” requirement of the Ohio Constitution to justify eminent domain condemnation of private property. *City of*

Norwood v Horney, 853 N.E.2d 1115 (Ohio 2006). In other words, private property could not be taken and transferred to private developers, who planned to make better economic use of the property, simply because the property was in a “deteriorating area.” Thus the Ohio Supreme Court construed the Ohio Constitution to be more protective of property rights than the interpretation given to the U.S. Constitution by the U.S. Supreme Court. A right under the Takings Clause⁴² to prevent governments from taking private property for the purpose of transferring it to other private property owners is generally considered a right supported by conservatives.⁴³

Finding states recognizing conservative state constitutional rights was relatively difficult. Ohio was selected in part because it had reached at least two such decisions. In addition to the conservative eminent domain (i.e. “takings” clause) decision in *Norwood*, the Ohio Supreme Court also recognized a personal right to possess firearms under the Ohio Constitution in *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993). It also reached what might be considered a conservative decision in a free exercise case⁴⁴ under the Ohio Constitution, *see Humphrey v Lane*, 728 N.E.2d 1039 (Ohio 2000). In *Humphrey* the Ohio Court held that strict scrutiny applies to free exercise claims under the Ohio Constitution so that a Native American corrections officer has the right not to cut his hair pursuant to his spiritual beliefs, so long as he pins his hair

⁴² The term “Takings Clause” denotes the portion of the 5th Amendment to the U.S. Constitution stating, “nor shall private property be *taken* for public use, without just compensation” (emphasis added), as well as the various state analogs to the 5th Amendment contained in the several state bill of rights. The analogous section of the Ohio Constitution is Section 4, Article I of the Ohio Constitution, which reads in pertinent part: “Private property shall ever be held inviolate, but subservient to the public welfare. ...[W]here private property shall be taken for public use, a compensation therefore shall first be made in money...” There is no indication from the *Norwood* decision that the language difference compared to the Fifth Amendment served as any basis for the difference in case outcomes between *Norwood* and *Kelo*.

⁴³ *Kelo* was authored by Stevens and his opinion was joined by the liberal members of the Court, Breyer, Ginsburg and Souter, as well as Kennedy, the swing vote on the Court. The more conservative members of the Court, O’Connor, Rehnquist, Scalia and Thomas, all dissented.

⁴⁴ The term “free exercise cases” refer to the Free Exercise Clause contained in the First Amendment of the U.S. Constitution, “Congress shall make no law . . . prohibiting the free exercise [of religion],” and the various state analogs to that provision contained in the several state bill of rights.

up under his cap while on duty.⁴⁵ In contrast, Ohio and many other state supreme courts have rendered “liberal” state constitutional decisions. Liberal decisions include cases excluding evidence from trial for violating search and seizure or self-incrimination protections in state constitutions more expansive than what the U.S. Supreme Court has held the U.S. Constitution requires. *Arnold* and *Norwood* effectively serve as “bookends”, demonstrating that the Ohio Supreme Court is expanding rights favored by conservatives, as well as other rights favored by liberals, throughout the time period of this case study.

The second reason Ohio was selected was that, while there were a handful of other states that also reached conservative decisions similar to the Ohio Supreme Court in its *Norwood* decision, Ohio has been a swing state in recent presidential elections. Ohio is located in an area of the country that is not seen as clearly favoring Democrats or Republicans.

It is worth noting here a few points about the Ohio judicial system that might affect the decision making process in Ohio. Ohio employs contested elections to select justices for the Ohio Supreme Court, as well as for lower courts in Ohio. Technically the general elections are non-partisan (although there can be partisan primaries), but scholars and commentators clearly differentiate the party affiliation of the individual justices despite the technical non-partisan nature of the election (Solimine, 2002). It is also worth noting that the justices draw lots to determine who will write the majority opinion (Hallet, 2007).

⁴⁵ It is possible to characterize free exercise cases that apply strict scrutiny as conservative as this standard tends to encourage religious practice, which is a generally conservative value. However, it is perhaps overly simplistic to do so given that the U.S. Supreme Court decision replacing the strict scrutiny standard with a standard designed to uphold more government regulations, *Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), was written by Justice Scalia and joined by the more conservative to moderate members of the Court, including Rehnquist, Kennedy, White and Stevens, with dissents by the more liberal members, Blackmun, Brennan, and Marshall.

II. Ohio and the New Judicial Federalism.

The Ohio Supreme Court is a relative late comer to the New Judicial Federalism movement, only “expressly join[ing]” the movement in 1993 (Bettman, 2004, p. 491).⁴⁶ In the years prior to 1993, the Ohio Supreme Court was criticized by scholars advocating adherence to New Judicial Federalism principles, particularly for failing to analyze and apply state constitutional provisions in deciding cases. (Saphire 2004, p. 444-445; Porter and Tarr 1984). The Ohio Supreme Court had, up until that point, largely ignored the Ohio Constitution in its constitutional jurisprudence, relying instead mostly upon federal case analysis, and declining to interpret Ohio constitutional provisions independently.

The Ohio Supreme Court began to embrace the New Judicial Federalism with its decision in *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993). In *Arnold*, the Ohio Supreme Court interpreted Section 4, Article I of the Ohio Constitution, the analog to the 2nd Amendment in the U.S. Constitution, to provide an individual right to bear arms, instead of a collective right (i.e. one held by the state militia, but not individual citizens).⁴⁷ Thus in 1993 the Ohio Supreme

⁴⁶ Williams (2004) also adopts 1993 as a pivotal date, stating “Ohio did not embrace the [New Judicial Federalism] until . . . the 1993 case of *Arnold v. City of Cleveland*.” While Bettman acknowledges “the Ohio Supreme Court had used its own constitution as the basis of decisions many times before that” (2004, p. 491), she does not provide examples of such earlier decisions, choosing instead to focus on the *Arnold* decision as a seminal case. A handful of earlier cases explicitly discussing and relying upon Ohio Constitutional provisions prior to the *Arnold* case have come to my attention in researching this case study. See *City of Columbus v. Cooper*, 550 N.E.2d 937 (Ohio 1990) (citing only sister state decisions and treatises, but no federal decisions, to hold that under the “Compulsory Process Clause of Section 10, Article I of the Ohio Constitution, a trial court may not exclude a person who has previously asserted his right against self-incrimination from appearing as a witness on behalf of a criminal defendant.”); *State v. Brown*, 588 N.E.2d 113 (Ohio 1992) (holding that a warrantless search of a vehicle violated the Ohio Constitution, but was later overturned by *State v. Murrell*, 764 N.E.2d 986 (Ohio 2002), which is discussed further below); *State v. Storch*, 612 N.E.2d 305 (Ohio 1993) (holding, without citation to sister state decisions, that the Ohio Constitution is more protective of the right to confrontation of witnesses than the 6th Amendment based partially on differences between the language of the two constitutions). It appears that the 1993 *Arnold* decision is a high profile case, and may simply have been the first Ohio Supreme Court case to explicitly use the term “New Judicial Federalism” or discuss its implications. While it may be somewhat arbitrary to begin with 1993, nevertheless I use the 1993 *Arnold* decision as a starting point because this is apparently when the Ohio Supreme Court begins to self-consciously engage in the dialogue of New Judicial Federalism. *Arnold* also represents an important conservative rights decision by the Ohio Supreme Court by recognizing an individual right to bear arms.

⁴⁷ U.S. Supreme Court precedent was not entirely clear on the question of whether the 2nd Amendment provided a collective or an individual right at the time of the *Arnold* decision. Still, the *Arnold* court said “[t]he question as to

Court interpreted its state constitution to provide a right that the U.S. Supreme Court did not recognize as applying to the states until 2010 in the case of *McDonald v City of Chicago*, 561 U.S. ____; 130 S. Ct. 3020; 177 L. Ed. 2d 894.⁴⁸

The question that will be repeatedly confronted in this case study is whether the Ohio Supreme Court was motivated by partisan and ideological reasons or whether it was responding to influences consistent with the horizontal and vertical federalism hypotheses outlined above. In the *Arnold* case, the Ohio Supreme Court rendered a 5-2 decision with one Republican justice (Justice Paul Pfeifer) and one justice sitting by designation from the Ohio Court of Appeals, concurring and dissenting in part. At the time a bare majority of the Court (4 out of 7) were Republicans.⁴⁹ Importantly, the two Democratic justices who heard the case (the third Democratic justice recused himself and was replaced in this case by an Ohio Court of Appeals justice) voted with the majority, and the opinion was authored by Justice Douglas, one of the liberal Republican members of the Court.⁵⁰ However, the *Arnold* case is an imperfect test of whether the Ohio Supreme Court tends to decide state constitutional decisions along ideological lines because while it recognized a personal right to bear arms under the Ohio Constitution, the Ohio Supreme Court actually upheld the state assault weapons ban in question as a “reasonable regulation.” 616 N.E.2d at 172. Therefore, even if one presumes Democratic or liberal justices

whether individuals have a fundamental right to bear arms has, seemingly, been decided in the negative under the Second Amendment to the United States Constitution.” 616 N.E.2d at 166. This is also consistent with what many constitutional scholars believed over the 60 years preceding the *Heller* case in 2008.

⁴⁸ In other words the U.S. Supreme Court did not recognize a right to bear arms that constrained state actors until 2010. Thus from 1993 until the U.S. Supreme Court declared in *McDonald* in 2010 that an individual right to bear arms was incorporated into the 14th Amendment (and thus made applicable to the states), the *Arnold* case was the only refuge for Ohio citizens to contest the constitutionality of Ohio firearm laws.

⁴⁹ Wikipedia lists the terms and partisanship of Ohio justices since Ohio’s admission as a state in 1803, but does not list the source(s) from which this information is compiled.

http://en.wikipedia.org/wiki/List_of_Justices_of_the_Ohio_Supreme_Court last visited on May 29, 2009. This information seems reliable and this author has not discovered any inconsistencies with information provided by other sources. See e.g. Liptak and Roberts (2006); Hallett (2007).

⁵⁰ The measure of ideology of the justices on the Ohio Supreme Court is taken primarily from Adler and Adler (2008) and Owisiany (2004). All of these authors are attorneys, writing white papers for the Federalist Society.

are generally opposed to an individual right to bear arms (based merely on ideological assumptions), the outcome of this case did not strike down any firearms regulations, so there was no immediate negative impact. Without an immediate negative outcome, Democratic justices might simply have decided a dissent was not necessary, or could have concluded that the reasonable regulation standard was sufficiently malleable that only future cases would determine the actual scope of the right in question.

Yet the dissent in the *Arnold* case casts doubt on an ideological explanation for the votes in the case. The doubtfulness of an ideological explanation becomes clear when one focuses on the standard adopted by Ohio Supreme Court to apply the right to bear arms under the Ohio Constitution, the political leanings of the dissenters, and the legal standard favored by the dissenters. The partial dissent was drafted by the justice sitting by designation, but was joined by Justice Pfeifer. Despite being a Republican, Justice Pfeifer has been labeled by one article as the “the most ‘liberal’ member of the court.” (Adler & Adler 2008, p. 4).⁵¹ However, the partial dissent (joined by Justice Pfeifer) in *Arnold* argued that the decision did not go far enough in protecting an individual right to bear arms, and the claim should have been considered under the more protective strict scrutiny standard, requiring that the law be necessary to promote a compelling government interest instead of the reasonable regulation standard adopted by the majority. *Arnold*, 616 N.E.2d at 176 (Hoffman, J dissenting). If Justice Pfeifer is actually a liberal (despite being a Republican), but takes a more conservative position in *Arnold* than the rest of his colleagues, it suggests that ideology may not be the most important explanation of behavior in this case.

Unfortunately the horizontal and vertical federalism hypotheses are also not particularly consistent with the *Arnold* decision. The Ohio Supreme Court does cite sister state supreme

⁵¹ Justices Douglas and Pfeifer have also been labeled as “maverick Republicans.” (Hallett, 2007).

court decisions in *Arnold*, but not for the proposition that the Ohio Constitution provides an individual right. Instead sister state decisions are cited to support the reasonable regulation standard critical to upholding the regulation. *Arnold*, 616 N.E.2d at 172. Furthermore, it may simply be that Justice Pfeifer has idiosyncratic, heterodox personal preferences. It might be the case that Justice Pfeifer, more than being a conservative or a liberal, is a libertarian, seeking to shield individuals from government regulation and interference, and expanding rights at the expense of government authority. Justice Pfeifer also appears to be a judicial activist, in the sense of preferring constitutional interpretations that enhance the power of the Supreme Court of Ohio to overturn the decisions of the legislature. In the following state constitutional cases, Justice Pfeifer seemed to regularly, although not always, vote to find laws unconstitutional, and apply standards that would empower the Ohio Supreme Court to closely scrutinize legislative actions. This may reveal one drawback with the selection of Ohio as the subject of a case study due to its direct election of justices. Since Ohio justices are directly elected they (or particular individual justices) may perceive that they draw legitimacy directly from the voters, and therefore need not be particularly deferential to the legislature since in Ohio the judiciary is also an elected branch.⁵²

While it may not be possible to precisely measure the personal preferences of individual justices in this case study, the lack of ideology driving the *Arnold* case is also revealed by an examination of the political divisions wracking the Ohio Supreme Court in other areas of the law. Two areas of constitutional law bedeviled the Ohio Court through this time period, tort reform and school financing. Hallet (2007) traces a series of four school funding decisions from 1997 to 2002 ruling that the formula Ohio used to fund primary and secondary education was

⁵² It should be noted, however, that Justice Pfeifer directly refuted this hypothesis in my interview with him. He denied that he felt a sense of enhanced legitimacy or mandate to strike down statutes because he had an electoral mandate directly from the people.

unconstitutional under the Ohio Constitution.⁵³ In three of the four decisions the Ohio Supreme Court divided along ideological lines with the “Gang of 4” (Democratic justices Alice Resnick and Francis Sweeney along with liberal Republican justices Andrew Douglas and Paul Pfeifer) agreeing to strike down the funding formula. The Republican Chief Justice Thomas Moyer and Republican justices Evelyn Lundberg Stratton and Deborah Cook dissented. Hallet (2007) interviewed Chief Justice Moyer and Justices Stratton, Douglas and Pfeifer for a ten-year anniversary retrospective on these cases, and discloses that Moyer and Stratton were the potential swing votes during deliberations on the cases, initially leaning toward the majority in the first case, and later joining the majority in one of the subsequent reiterations of the case.

The multi-year struggle between the Ohio Supreme Court, the Ohio General Assembly, and two Republican Governors over education funding formulas was very contentious, but not the only area where the Ohio Supreme Court was closely divided along ideological lines. Owisany (2004) recaps this ideological split in school funding decisions, as well as examining where the same four member majority battled the legislature over the constitutionality of laws in several other areas, including tort reform, workers’ compensation reform, insurance coverage, and punitive damages.⁵⁴ Entin (2002) focuses on the school funding and tort reform cases and their impact on the 2000 re-election effort of Democratic Justice Resnick, who authored controversial 4-3 decisions in the school funding and tort reform areas.⁵⁵ The ideological divide

⁵³ Hallett (2007) is writing for the popular press, and focuses on the politics behind the decision making and the impact for citizens for citizens of Ohio. For a more scholarly treatment see Entin (2002).

⁵⁴ Many of these reforms were struck down on separation of powers grounds for impinging upon the judicial prerogative to set remedies for damages and thereby impeding access to the courts. (Entin 2002).

⁵⁵ I do not want to overstate the case here. Entin (2002) cautions that of the 17 cases regarding tort reform that he discusses, only three cases “reflected the four to three split that has characterized the Ohio Supreme Court in recent years.” (2002, p. 530). However, Entin then goes to discuss an additional 4-3 decision (not included in the above ratio) regarding tort reform that seemed particularly divisive and controversial, where the 4 member majority reached out to strike down a comprehensive tort reform bill the Ohio General Assembly enacted in response to the earlier decisions. My point is that there were several ideological 4-3 decisions in other areas of state constitutional law, but only two 4-3 decisions, *Ohio AFL-CIO v Ohio Bureau of Workers’ Compensation*, 780 N.E.2d 981 (Ohio

on these issues stands in stark contrast to the general lack of ideological divide on the cases examined below. This suggests that political ideology was not a particularly important explanation of judicial behavior for the types of constitutional issues explored in this case study.⁵⁶

III. Case Selection.

An additional 15 Ohio Supreme Court cases from 1993 to 2008 are analyzed in the following pages. Each will be examined for evidence consistent with the horizontal and vertical federalism hypotheses presented above and/or evidence consistent with the alternative explanation of political ideology. These 15 cases were identified as the leading Ohio state constitutional cases in the legal literature, as well as cases found through the Lexis-Nexis electronic search engine. Cases based on state constitutional claims of due process, equal protection, school funding, right to privacy, and separation of powers were excluded because of concerns that such claims might arise from state constitutional provisions that were substantively different from U.S. Constitutional provisions. On the other hand, most of the state analogs to the U.S. Bill of Rights are generally in line with the language of the federal provisions.

2002) and *State v Gardner*, 889 N.E.2d 995 (Ohio 2008) in the free speech, free exercise, property, gun and criminal rights cases discussed below in this case study.

⁵⁶ Justice Stratton later during the judicial interviews partially confirmed this supposition that political ideology (or she might prefer the idea of preexisting preferences instead—she took issue with the whole idea of political ideology as classically understood, instead arguing that the judicial activism/judicial restraint divide was much more accurate in explaining Ohio Supreme Court behavior) does not necessarily impact every decision equally. She argued there were certain cases where justices might go into the case with preformed notions of how the case might be resolved, but there were certainly many cases where that was not the case, and justices had not occasion or reason to consider those issues before and were truly looking for guidance and insight, and in those cases justices were particularly open to approaches taken by other courts.

IV. Recent Decisions in Ohio Expanding State Constitutional Rights.

After 1993 the Ohio Supreme Court decided several cases interpreting its state constitution that expanded criminal rights⁵⁷, property rights, gun rights, free speech rights or free exercise rights beyond those required by the U.S. Constitution, as interpreted by the U.S. Supreme Court.

Vail decision. One of the first decisions following *Arnold* where the Ohio Supreme Court decided in expand rights under the Ohio Constitution is the case of *Vail v. Plain Dealer Publishing Company*, 649 N.E.2d 182 (Ohio 1995). In that case the Ohio Supreme Court held that under Article I, section 11 of the Ohio Constitution opinions printed in a newspaper are protected by the freedom of the press from libel suits. This is in contrast to U.S. Supreme Court decisions holding that factual statements within an opinion piece may still be the subject of a libel lawsuit. Ohio applies a different test, a totality of the circumstances test, than provides greater protections to opinions than the U.S. Supreme Court.⁵⁸ The decision was 7-0, although Justice Pfeifer, the liberal Republican, concurred on the ground that Ohio should not have applied the old broader standard under state constitutional law, but instead should have reached the same outcome under the new U.S. Supreme Court standard. This is an important point, because this is a route the conservative Republicans on the Ohio Court could also have chosen to take, keeping the Ohio Constitution in line with the U.S. Constitution.⁵⁹ Still the two Democrats,

⁵⁷ Criminal rights in the context of this case study include whether traditional criminal rights, such as search and seizure protections, or right to counsel, apply to civil situations similar to criminal charges, such as workplace injuries, sex offender registries or implied consent statutes requiring alcohol breath tests.

⁵⁸ While factual statements within an opinion piece can still be libelous even under the Ohio Constitution, what is considered “opinion” is much broader under the Ohio standard.

⁵⁹ Yet it is not clear here which way ideology pushes a justice to decide this case—endorsing greater free speech rights might be considered generally liberal (except in the context of campaign finance regulations), but on the other hand recognizing more extensive constitutional protections under the Ohio Constitution could be considered conservative in this context because it makes libel suits more difficult, and thus could be seen as reducing avenues for trial lawyers, typically seen as a liberal constituency, to bring lawsuits.

and 4 of the 5 Republicans, voted together on the reasoning in this decision, and all seven justices agreed on the outcome.

While there was no ideological divide in the decision, there were also no citations to sister state decisions. However, the *Vail* decision was consistent with the vertical federalism hypothesis.⁶⁰ Central to the discussion in the *Vail* decision, there was explicit reliance upon an earlier Ohio Supreme Court precedent. The Ohio Supreme Court decided to continue to follow the standard adopted by the Ohio Supreme Court in *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986) rather than adopt the standard established later (1990) by the majority of the justices of the United States Supreme Court in *Milkovich*. Reliance on previous state precedent is connected to the idea of vertical federalism. When state supreme courts are faced with conflicting precedent (earlier precedents of their own court state versus subsequent U.S. Supreme Court precedent) state supreme courts might be expected to prefer the greater rights protected by earlier state precedent.⁶¹

⁶⁰ Ironically the *Vail* decision (written by the Republican, albeit moderate, Chief Justice Moyer) cites (liberal) Justice Brennan's dissent in the 7-2 case of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (Brennan and Marshall dissenting) was also consistent with an earlier hypothesis of mine, that I elected not to pursue. My idea was that state supreme courts would look to dissents in U.S. Supreme Court decisions when deciding whether to recognize more extensive rights under state constitutions. This idea was consistent with the notion that a dialogue between the U.S. Supreme Court and the state supreme courts is occurring. Instead of conceiving of U.S. Supreme Court opinions as merely establishing a constitutional standard and enforcing it upon the states, the dissents written by U.S. Supreme Court justices provide the basis for an alternative constitutional jurisprudence that state supreme courts may choose to adopt in interpreting the provisions of their state constitutions.

⁶¹ Deciding court precedent made before the controlling U.S. Supreme Court precedent can be conceived of as part of a dialogue with the U.S. Supreme Court. Sometimes a state supreme court has resolved an issue, perhaps applying federal constitutional law, before the Supreme Court addresses the specific issue. If the state supreme court resolves the issue with an expansive interpretation, and the U.S. Supreme Court decides later that in fact the U.S. Constitution does not require such a broad reading, then the state supreme court is faced with a dilemma. It may choose to continue to follow the reasoning of its own precedent, but this time on state constitutional grounds, or follow the more recent U.S. Supreme Court precedent that says the state earlier overestimated the height of the federal floor by misinterpreting what the U.S. Constitution actually required. A prior precedent by the deciding court, even interpreting federal constitutional requirements, should make it more likely it will reach a decision expanding rights under the state constitution when faced with conflicting precedents.

A state supreme court may rationally prefer to adopt the reasoning or standards of one of its earlier decisions that originally purported to interpret the U.S. Constitution for the present purposes of interpreting its state constitutional provisions. Despite subsequent clarification by the U.S. Supreme Court, the state supreme court chooses to continue the reasoning or standards of the old state precedent, but to do so under the authority of the state, rather than the federal constitution. A state supreme court by that time may have information about application of that standard in the form of lower court rulings. Also from the perspective of local law enforcement, prosecutors, or in this case plaintiffs in libel suits, such a decision does not mark a change, but rather a continuation of the status quo. Thus a decision to follow earlier deciding court precedent may be relatively unremarkable, helping to counteract whatever concern a state supreme court may have in now resting the outcome on its own authority to interpret the state constitution, as opposed to applying what it believes is required by the U.S. Constitution and the U.S. Supreme Court.

The *Vail* decision and its progeny are actually a better example of dialogue between courts in the search for constitutional meaning than appears within the *Vail* decision alone. While the *Vail* decision does not cite sister state decisions, a subsequent Ohio Supreme Court case applying the *Vail* decision, *Wampler v Higgins*, 93 Ohio St.3d 111 (2001), both extensively considers sister state decisions, and explains in detail the dialogue between not only the Ohio Supreme Court and the U.S. Supreme Court, but the several federal Courts of Appeal as well. In *Wampler* the Ohio Supreme Court was asked two questions. First, it was asked to reconsider its decision in *Vail*, and second whether to expand the reach of the *Vail* decision to cover private-citizen defendants as well as media defendants.⁶² In reaffirming *Vail* and expanding its coverage

⁶² I have not separately considered the *Wampler* case because it reaffirms the seminal state constitutional decisions in this legal issue area.

to private-citizen defendants writing letters to the editor, the Ohio Supreme Court in *Wampler* considered several sister state decisions.

The *Wampler* plurality tracks the progression of the dialogue between several courts. The U.S. Supreme Court first announced a decision that led several federal court of appeals to develop a standard that was later adopted by the Ohio Supreme Court as well as other state supreme courts. The U.S. Supreme Court then changed track. The Ohio Supreme Court refused to go along with the new standard adopted by the U.S. Supreme Court, instead preferring to follow the old standard under its state constitution, a standard more protective of opinion in editorials and letters to the editor. This progression highlights that constitutional meaning is not always simply announced. Rather, it is often developed over the course of several decisions, and the important decisions are not only those of the U.S. Supreme Court. The state of constitutional law in Ohio on this issue is a combination of earlier (and now overturned) U.S. Supreme Court precedent, federal Court of Appeals precedent (also overturned) as well as Ohio Supreme Court precedent, which is informed by sister state decisions.

Humphrey decision. The Ohio Supreme Court next expanded rights under the Ohio Constitution in the case of *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000). The decision in *Humphrey* was unanimous that Article I, section 7 of the Ohio Constitution requires a strict scrutiny standard of analysis when deciding free exercise cases (contrary to the U.S. Supreme Court's holding in *Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) measuring whether laws are religiously neutral and of general applicability).⁶³ Justice Pfeifer authored the

⁶³ Although *Smith* was decided 6-3 on the judgment, it was decided 5-4 on the issue of whether to retain the strict scrutiny standard. O'Connor concurred in the judgment with the majority, (she would have reached the same outcome under the strict scrutiny standard) while Blackmun, Brennan and Marshall dissented. Perhaps more importantly, not only is the *Smith* case closely divided, but it is example of the U.S. Supreme Court clearly pulling back from a previously more expansive interpretation of rights. It is in such cases that the vertical federalism hypothesis predicts that state supreme courts are most likely to expand (or more accurately maintain) rights under state constitutional provisions.

opinion holding that the Ohio Constitution protected a prison guard who wished to grow his hair long consistent with the demands of his Native American Spirituality, but contrary to prison policy, so long as he could and did pin his hair up under his cap while on duty.

Since this was a unanimous decision there was no political or ideological split on the Ohio Supreme Court. On the other hand, the Ohio Court did not cite to any sister state decisions. However, the Ohio Court did again look to Ohio precedent to establish the strict scrutiny standard under the Ohio Constitution.⁶⁴ The Ohio Supreme Court had followed the strict scrutiny standard when it had previously been applied by the U.S. Supreme Court in *Wisconsin v Yoder*, 406 U.S. 205 (1972). Later in the *Smith* case the U.S. Supreme Court changed the strict scrutiny standard on the federal level to whether laws are religiously neutral, and of general applicability. The *Smith* test is a more permissive standard, allowing more state regulations that have the effect of prohibiting acts of religious exercise (such as laws prohibiting Native Americans from smoking peyote as in the *Smith* case). However, the Ohio Supreme Court refused to change the older strict scrutiny standard under the Ohio Constitution. The Ohio Supreme Court in *Humphrey* cited an earlier Ohio case, *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976) that applied a heightened level of judicial scrutiny to laws that were claimed to impinge upon the right to free exercise of religion. The unanimous opinion in *Humphrey* stated: “We adhere to the standard long held in Ohio regarding free exercise claims—that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest.” *Humphrey*, 728 N.E.2d at 1045. This appears then to be another case of the Ohio Supreme Court preferring earlier Ohio precedent, more protective of rights, to a latter decision by the U.S. Supreme Court.

⁶⁴ See the *Vail* decision above for discussion of the impact of state precedent generally.

Ohio AFL-CIO decision. The next decision expanding rights under the Ohio Constitution is the decision of *Ohio AFL-CIO v Ohio Bureau of Workers' Compensation*, 780 N.E.2d 981 (Ohio 2002). This opinion, authored by Justice Pfeifer, was a closely divided 4-3 decision split along ideological lines. The Ohio Supreme Court decided under Article I, section 14 of the Ohio Constitution (virtually identical to the Fourth Amendment) that automatic drug testing following workplace accidents causing injury violated the search and seizure rights of workers. The Ohio Supreme Court held that there must be some evidence to suggest drug use beyond merely the occurrence of a workplace injury in order to justify a drug test. It appears the majority anticipated appeal of this case and wanted to make the decision “immune” to review by the U.S. Supreme Court by resting the decision on the Ohio Constitution as well.⁶⁵

While Republicans controlled a majority on the Ohio Supreme Court at this time, and the decision of the Ohio Supreme Court is not split literally on party lines (if the Republicans had voted as a block, instead of 3-2, they would have had the votes to prevent expanding Ohio constitutional interpretation in the case), the Ohio Supreme Court was arguably divided along ideological lines. The two Democrats (Resnick and Sweeney), along with the two most liberal Republicans (Pfeifer⁶⁶ and Douglas) voted to strike down the drug tests under the Ohio Constitution (as well as the U.S. Constitution), while the moderate Chief Justice Moyer,⁶⁷ joined

⁶⁵ To “immunize” the case from review by the U.S. Supreme Court, the state supreme court must satisfy the “independent and adequate state grounds” requirement of *Michigan v. Long*, 463 U.S. 1032 (1983). At first glance the *Ohio AFL-CIO* case appears to violate this requirement because the Ohio Supreme Court decides the case under both the Ohio and U.S. Constitutions. However, upon further analysis the *Ohio AFL-CIO* case does meet the *Michigan v. Long* test because the Ohio Supreme Court very clearly states: “The Ohio Constitution is a document of independent force. ... We find that the Ohio Constitution, which prohibits unreasonable searches and seizures and also contains special considerations for Ohio’s workers, provides additional and independent protection against the searches allowed by [the Ohio law challenged here].” *Ohio AFL-CIO*, 780 N.E.2d at 991-92. See also Friesan (2006) at § 1.07 (pages 1-52 to 1-57) discussing the requirements of the *Michigan v. Long* independent state grounds test.

⁶⁶ Pfeifer wrote the decision in *Ohio AFL-CIO*.

⁶⁷ Adler and Adler (2008) discuss the relative ideological predispositions of the respective justices involved in this opinion. My characterizations of the ideological leanings of the justices are based largely on their assessments.

his more conservative Republican colleagues in voting to uphold the law. So this case does fit the alternative hypothesis that political ideology influenced the outcome in this case.⁶⁸

Brown decision. In the decision of *State v. Brown*, 792 N.E.2d 175 (Ohio 2003), the Ohio Supreme Court was not divided along party lines, but the 5-2 decision was perhaps divided along ideological lines. It is also consistent with both the horizontal and vertical federalism hypotheses. In *Brown* the Ohio Supreme Court held that Article I, section 14 of the Ohio Constitution provides greater protection than the 4th Amendment of the U.S. Constitution against warrantless arrests for minor misdemeanors. Officers arrested Brown for jaywalking, conducted a custodial search, and discovered crack cocaine in Brown's possession. The Ohio Supreme Court held that evidence obtained as a result of a search that violates the statutory prohibition against misdemeanor searches must be excluded from trial on constitutional principles.

The decision was authored by Justice Resnick, one of the Court's two Democrats, and joined by her Democratic colleague, Justice Sweeney; a liberal Republican, Justice Pfeifer; a centrist Republican, Chief Justice Moyer; and a court of appeals judge sitting by appointment. Two of the more conservative Republicans dissented. While arguably consistent with the political ideology alternative hypothesis, this case is also consistent with the horizontal and vertical federalism hypotheses. First, Justice Resnick cited a decision of a sister state supreme court, *State v. Bauer*, 36 P.3d 892 (Mont. 2001) that read Montana state constitutional protections more broadly than the 4th Amendment under similar circumstances.⁶⁹ This is

⁶⁸ Indeed, this decision in this case may have been particularly susceptible to political pressures within the Court, as is partially revealed by the case name, due to the direct involvement and implications for unions, which are large political supporters and campaign contributors, particularly of the Democratic justices. (Liptak & Roberts 2006). It is worth noting here that the dissent only cites state statutes in other states, not state court decisions, and a lone law review article from Alaska, which suggests this was a relatively obscure and undeveloped area of the law at the time that did not yet have clear demarcations.

⁶⁹ However, Montana does not meet the standard of a prestigious sister state court as discussed in Chapter 3.

consistent with the horizontal federalism hypothesis that citations to sister state supreme court decisions make a decision expanding rights under state constitutions more likely.⁷⁰

Second, and perhaps more central to Justice Resnick's decision, the Ohio Supreme Court had previously held in *State v. Jones*, 727 N.E.2d 886 (Ohio 2000) that a similar arrest violated an Ohio statute, and triggered the constitutional exclusionary rule. This earlier Ohio case was decided prior to the U.S. Supreme Court decision in *Atwater v. Lago Vista*, 532 U.S. 318 (2001) which held that the 4th Amendment does not require exclusion of evidence found in a search as a result of an arrest that violated a state statute restricting misdemeanor arrests.⁷¹ In other words, the arrest of Brown for jaywalking violated state statute, but the resulting evidence need not be excluded under the federal constitution. While the U.S. Supreme Court's interpretation of the 4th Amendment may not require application of the federal exclusionary rule, the Ohio Supreme Court in *Brown* relied upon its earlier decision in *Jones* to establish the exclusionary rule under the Ohio constitutional analog to the 4th Amendment did apply, and required the exclusion of the crack cocaine from evidence at trial. This is now three cases in Ohio that have relied in part upon earlier Ohio precedents to disagree with subsequent U.S. Supreme Court precedents.

Farris decision. The Ohio Supreme Court's decision in *State v. Farris*, 849 N.E.2d 985 (Ohio 2006) is perhaps the strongest evidence for my hypotheses, and against the alternative hypothesis of political ideology as explanations of state supreme court behavior. In *Farris* the Ohio Court held that Article I, section 10 of the Ohio Constitution, contrary to the holding of the U.S. Supreme Court in *United States v. Patane*, 542 U.S. 630 (2004) interpreting the 5th

⁷⁰ Interestingly, both the Montana case, and the Ohio Supreme Court's decision in *Brown* were cited with approval by the Minnesota Supreme Court in *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004).

⁷¹ It is also worth noting that the U.S. Supreme Court precedent in *Atwater* was based on a 5-4 vote. While there is no citation in *Brown* to the dissenting opinion in *Atwater*, the fact of a closely divided outcome in *Atwater* may potentially have influenced the Ohio Supreme Court in *Brown*.

Amendment, requires that physical evidence found as a result of statements solicited in violation of the *Miranda* rule (which protects against self-incrimination) is subject to the exclusionary rule and therefore must be excluded from evidence at trial.⁷² The decision was 4-3, but this split was upon neither political or ideological lines. Justice Pfeifer, a liberal Republican, authored the majority decision and was joined by Chief Justice Moyer, a centrist Republican, and two more conservative Republicans, Justices O'Connor and Lanzinger. However, the Ohio Court's then lone Democrat, Justice Resnick, authored what was mostly a dissent, concurring on only a few points, and she was joined in that opinion by Justices Stratton and O'Donnell, two conservative Republican justices. Resnick and the other dissenters objected to the majority's holding that the Ohio Constitution requires the exclusion of physical evidence found as a result of statements solicited in violation of *Miranda* protection.⁷³

The decision of the Ohio Supreme Court in *Farris* is consistent with the horizontal federalism hypothesis. Justice Pfeifer wrote: "We thus join the other states that have already determined after *Patane* that their state constitutions' protections against self-incrimination extend to physical evidence seized as a result of pre-Miranda statements." He then proceeded to cite the sister supreme court decisions of *State v. Knapp*, 700 N.W.2d 899 (Wis. 2005) and *Commonwealth v Martin*, 827 N.E.2d 198 (Mass. 2005). Both of these sister supreme courts,

⁷² According to the *Patane* decision, the 5th Amendment only requires exclusion from evidence of *statements* solicited in violation of *Miranda* rights, *not physical evidence* found as a result of unwarned statements. *Patane* was technically a 3-2-4 decision, with Justice Thomas, Chief Justice Rehnquist and Justice Scalia clearly advocating for admission of the evidence, Justices Kennedy and O'Connor agreeing while saying they would not have reached the question, and Justices Breyer, Souter, Stevens and Ginsburg dissenting. For the purposes of this case study, however, the U.S. Supreme Court was divided 5-4 on the basic constitutional question of the application of the exclusionary rule.

⁷³ According to the dissenters the evidence should have been admissible under the automobile exception to the search warrant requirement as the smelling of an odor of marijuana by the officer gave probable cause to search the trunk of the car. *Farris*, 849 N.E.2d at 997-98. The majority disagreed with the dissenters upon this point, holding that the odor of marijuana only gave probable cause as to the passenger compartment. Thus the officer needed separate justification to search the trunk. The majority then proceeded to address whether the defendant's solicited statements (solicited in violation of the *Miranda* warnings) gave that justification, and reached its decision under the Ohio Constitution.

Wisconsin and Massachusetts, meet the standard of prestigious sister state courts.⁷⁴

Interestingly, these cases, as well as the Ohio Supreme Court's decision in *Farris*,⁷⁵ were all subsequently cited and followed by the Vermont Supreme Court in *State v. Peterson*, 923 A.2d 585 (2007).

Norwood decision. The Ohio Supreme Court's decision in *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), is the decision that drew my attention to Ohio in the first place. This is the decision where the Ohio Supreme Court decided that property rights under the Ohio Constitution are more extensive than those protected under the U.S. Constitution, at least in the context of the taking of private property for public use. In *Norwood* the Ohio Court held that "an economic or financial benefit [to the city] alone is insufficient to satisfy the public-use requirement of Section 19, Article I [of the Ohio Constitution]." It was not enough for the City of Norwood to show that the property in question was in a "deteriorating area", which was an insufficiently precise standard, in order to justify using eminent domain to take the property. The Ohio statute in question, using the term "deteriorating area," violated the Ohio Constitution's public use requirement. This was contrary to the decision reached by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005) in interpreting the Takings Clause of the 5th Amendment where it held that governments may take property using eminent

⁷⁴ My measure of prestigious state supreme courts is defined and operationalized in Chapter 3. Massachusetts is ranked 5th and Wisconsin is ranked 6th in the 1975 Caldeira top 15 ranking of prestigious state courts. Massachusetts is ranked 7th and Wisconsin ranked 8th in the more recent Dear and Jensen (2007) rankings of prestige (state high courts with the most decisions followed at least once by a sister state appellate court from 1940 to 2005). Massachusetts is also ranked 8th by Cauthen (2003) in his measure of state supreme courts cited the most by other states in state constitutional decisions.

⁷⁵ The *Farris* decision also provided support for my supposition that state supreme courts are more likely to expand rights if the Supreme Court is closely divided or if the deciding court cites language/reasoning from the dissenting Supreme Court opinions, suppositions I have not developed in subsequent chapters when insufficient evidence appeared to support them. While Justice Pfeifer does not make reference to the dissenting opinions in the United State Supreme Court decision in *Patane*, the *Patane* decision was closely divided with four justices dissenting.

domain, consistently with the public use requirement, even if that property will be transferred to other private property owners for the purpose of economic development.

The decision in *Norwood* was unanimous, although Justice Resnick, the lone Democrat on the Ohio Court at the time, did not participate in the decision. The decision, authored by the conservative Republican, Justice O'Connor, cited repeatedly and discussed extensively sister state decisions on the meaning of the public use requirement, as well as citing the dissenting opinions from the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). Citations by the Ohio Supreme Court to sister state decisions included *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Illinois 2002) and *County of Wayne v Hathcock*, 684 N.W.2d 765 (Mich. 2004).⁷⁶ Both Illinois and Michigan meet the standard of prestigious sister state courts.⁷⁷ The discussion of sister state supreme court decisions went beyond merely a string citation and were integral to the Ohio Court's decision. Discussion of these sister state decisions were interwoven throughout the reasoning. Discussions of O'Connor's and Thomas's dissenting opinions in *Kelo* are also interspersed through the Ohio Court's decision. See *Norwood*, 853 N.E.2d at 1137, 1138, 1140.

⁷⁶ While both of these sister state decisions (from Illinois and Michigan) predated the *Kelo* decision, they are within a few years of that decision. The Ohio Supreme Court also cited to several other earlier sister state decisions that were decided before the turn of the 21st century, including: *Merrill v. Manchester*, 499 A.2d 216 (N.H. 1985) (holding land could not be taken for an industrial park because industrial park did not provide direct public benefit); *In re Petition of Seattle*, 638 P.2d 549 (Wash. 1981) (finding that planned redevelopment was primarily to promote retail stores, and thus was a predominately a private, not a public use); *Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979); *Baycol v Fort Lauderdale Downtown Dev. Auth.*, 315 So.2d 451 (Fla 1975). See *Norwood*, 853 N.E.2d at 1139.

⁷⁷ Illinois is 7th and Michigan is 10th on Caldeira's top 15 list of prestigious courts. Neither make the more recent top 10 of Dear and Jessen (2007), but they are both listed in the top 10 by Cauthen (2003) in his measure of state supreme courts cited most frequently by other states in state constitutional decisions.

V. How Well Do the Horizontal and Vertical Federalism Hypotheses Fit Recent Ohio Decisions Expanding State Constitutional Rights?

Of the seven decisions (including *Arnold*) expanding rights under the Ohio Constitution detailed above, the most recent three (*Brown*, *Farris*, and *Norwood*) rely upon the decision of sister state decisions in their reasoning, and three (*Brown*, *Humphrey* and *Vail*) rely upon previous precedents by the Ohio Supreme Court that predated the applicable U.S. Supreme Court precedent.⁷⁸ Thus five of seven of the rights expanding decisions examined from Ohio are consistent with one or more of the hypotheses described in Chapter 1.

Furthermore, only the *Ohio AFL-CIO* decision is clearly consistent with the alternative explanation that partisan identification or political ideology is driving the decision making process. The *Brown* decision is perhaps partially explainable on ideological grounds (and possibly also *Norwood* because the only Democrat on the Court did not participate), but the other decisions examined seem not to be clearly explainable on the basis of partisanship or ideology. This is despite the fact that commentators argued that the Ohio Supreme Court was being driven by partisanship and ideology in other areas.

However, it is not sufficient to examine only cases ultimately expanding rights, but the results must be compared to decisions that follow U.S. Supreme Court precedent. Thus I also examined nine Ohio Supreme Court decisions that considered, but ultimately rejected recognizing rights under the Ohio Constitution broader than those recognized by the U.S. Supreme Court interpreting the U.S. Constitution. Those decisions to some degree limit the impact of my findings above. Of the nine Ohio Supreme Court decisions following U.S. Supreme Court precedent (which are outlined below) seven cite sister state decisions, and two

⁷⁸ Two of the seven rights expanding cases make specific reference to dissenting opinions by U.S. Supreme Court justices (*Vail* and *Norwood*). Four cases (*Humphrey*, *Brown*, *Farris*, and *Norwood*) reject closely divided (5-4 votes) U.S. Supreme Court decisions, although they do not directly cite the dissenting opinions.

overturn or refuse to follow earlier Ohio Supreme Court precedent. These cases suggest that citing sister state decisions and expansive deciding court precedents,⁷⁹ while making it more likely for the Ohio Supreme Court to reach decisions expanding rights, are by no means determinative.

There is a higher proportion of Ohio cases following federal precedent which cite sister state decisions (7 of 9)⁸⁰ than the proportion of Ohio cases expanding rights which cite sister state decisions (3 of 7). In addition, almost as many Ohio cases refuse to follow prior Ohio precedent (2 of 9) as follow prior Ohio precedent (3 of 7). However, I think these comparisons are misleading for three reasons. First, the statistic that 7 out of 9 cases citing sister state decisions refuse to expand rights is misleading, most notably because all of these seven cases cite sister state decisions consistent with the outcome of the case, and in at least three of the cases below (*Eastwood Mall*, *Gustafson*, and *Murrell*) the Ohio Supreme Court is following the majority rule across sister states when it follows U.S. Supreme Court precedent.⁸¹ Second, previous studies suggest that state supreme courts are more likely to follow federal precedent when deciding questions of state constitutional law than to approve expansions of rights, so

⁷⁹ To be clear, I am not looking at whether there are any precedents from the deciding court that are cited by the deciding court. Rather I am only considering situations where the deciding court either acknowledges a prior deciding court precedent (decided either on federal or state constitutional grounds) in conflict with a more recent U.S. Supreme Court precedent, or where a deciding court explicitly considers overturning a previous deciding court precedent decided on state constitutional grounds.

⁸⁰ The seven Ohio decisions following federal precedent that cite sister state decisions are *Eastwood Mall*, *Gustafson*, *Cook*, *Orr*, *Murrell*, *Jordan* and *Gardner*.

⁸¹ Actually the finding that 3 out of 9 cases follow the majority rule across sister states is probably low. An educated estimate is that it is also certainly true of *Dobbins* (no right to counsel for alcohol breath test), *Robinette* (no need for clear state statement that defendant is free to go), *Cook* (changes to sex offender registry do not violate *Ex Post Facto* clause), and *Gardner* (jury unanimity not required for different means of committing burglary). Only for the *Orr* case, dealing with driver's license checkpoints, are there likely to be significant numbers of sister state decisions not following federal precedent. The *Jordan* case is so fact specific that it would probably be difficult to gauge a majority rule across sister states. Thus a more accurate figure of how frequently the Ohio Supreme Court follows the majority rule is probably closer to 7 out of the 9 cases where the Ohio Court declines to expand rights.

finding many cases following federal precedent is not surprising.⁸² Third, these cases still find little evidence of partisanship or ideology, but do find evidence of dialogue occurring between courts, which is really the underlying premise of my dissertation.

VI. Recent Decisions in Ohio Following U.S. Supreme Court Precedent.

Eastwood Mall decision. In the early days of the Ohio Supreme Court's acknowledgement of the New Judicial Federalism it ruled in a 5-1 decision⁸³ authored by Justice Sweeney, a Democrat, not to recognize free speech rights in privately owned shopping malls because restrictions on speech in those instances was private, not state action. *Eastwood Mall v. Slanco*, 626 N.E.2d 59 (Ohio 1994). The majority cites several sister state decision in favor of following U.S. Supreme Court precedent.⁸⁴ The dissent in turn cites sister state decisions supportive of a more expansive state constitutional right.⁸⁵ However, the majority also states that its conclusion "is consistent with the majority of states whose courts of review have considered this question." *Eastwood Mall*, 626 N.E.2d at 61.⁸⁶

Dobbins decision. In *Dobbins v Ohio Bureau of Motor Vehicles*, 664 N.E.2d 908 (Ohio 1996) the Ohio Supreme Court held that, despite officers denying Dobbins her statutory right to

⁸² In other words it is not necessarily a question of whether cases citing sister state decisions are more than 50% likely to expand rights, rather the question is whether citations to sister state courts increases the likelihood of expanding rights from a baseline of all cases. Yet even under this standard the evidence from Ohio does not support my original horizontal federalism hypothesis. However, as discussed following the summaries of cases following federal precedent, if sister state citations are distinguished between citations to sister state decisions expanding rights and citations to sister state decisions that follow U.S. Supreme Court precedent, then the evidence is consistent with the idea that state supreme courts look to the decisions of other state supreme courts.

⁸³ The one dissenter, Justice Wright, was a Republican, suggesting this decision was not decided along partisan or ideological lines. Justice Douglas did not participate in the decision.

⁸⁴ The majority used a string citation (just a list of citations without discussion or explanation) in a footnote to cite 9 decisions from supreme courts of sister states. These decisions came from Connecticut, Georgia, Michigan, New York, North Carolina, Pennsylvania, South Carolina, Washington and Wisconsin, of which five, Michigan, New York, Pennsylvania, Washington and Wisconsin are prestigious state courts.

⁸⁵ The dissent also used a string citation in a footnote and cited 4 sister state decisions, all of which came from prestigious state supreme courts: California, Massachusetts, New Jersey and Colorado.

⁸⁶ The issue of the majority rule concerning speech in shopping malls is a closer one when looking only at prestigious sister state courts, but here too the Ohio Court is following the narrow 5-4 majority among prestigious sister state supreme courts.

attorney consultation prior to refusing to take an alcohol breath test, section 16, Article I of the Ohio Constitution did not provide a constitutional due process right to legal counsel for Dobbins. The implied consent statute was civil and administrative in nature, not criminal, and thus neither the Fifth or Sixth Amendments to the U.S. Constitution, nor the Ohio Constitution applied to create a constitutional right to counsel.⁸⁷ Dobbins lost her driver's license for failing to submit to alcohol breath test even though officers violated the right to counsel portion of the Ohio implied consent statute. The right to counsel in the implied consent statute was only *statutory*, not *constitutional*, and thus the only remedy available to Dobbins was the *statutory* remedy of fining or imprisoning the police officer responsible for the violation of Dobbins's right to counsel. This was a 6-1 decision authored by Democratic Justice Alice Resnick, with liberal Republican Justice Paul Pfeifer dissenting without opinion. The discussion of the Ohio constitutional provision was very brief (a paragraph), without citing sister state decisions.

Gustafson decision. The Ohio Supreme Court found in *State v. Gustafson*, 668 N.E.2d 435 (Ohio 1996) that Ohio's implied consent statute governing administrative license suspensions for refusal to submit alcohol breath tests when suspected of drunk driving did not violate the double jeopardy provision of the Ohio Constitution. *Gustafson* was a 5-2 decision with a majority opinion authored by Chief Justice Moyer, a centrist Republican, and joined by 2 Democrats, a liberal Republican, and a court of appeals judge, with a conservative Republican and another court of appeals judge concurring and dissenting in part.⁸⁸ The majority opinion cited several sister state decisions supportive of its position, but cited no sister state decisions on

⁸⁷ The controlling U.S. Supreme Court precedent, *United States v. Wade*, 388 U.S. 218 (1967), is a very fractured decision, but the issue of blood testing (analogous to alcohol breath tests in *Dobbins*) was only one paragraph in a decision devoted predominately to police line-ups. There appeared to be general agreement on the U.S. Supreme Court that defendants were not entitled to counsel during blood tests.

⁸⁸ It is not clear there is one particular U.S. Supreme Court decision that serves as precedent for *Gustafson*, but rather a trio that establish the outlines of the test for a double jeopardy violation. See *Gustafson*, 668 N.E.2d at 441-42. Therefore it is difficult to establish the degree of division, if any, on the constitutional issue in the U.S. Supreme Court.

the opposite side in favor of expanding rights. On one prong of the analysis the sister state decisions cited were from Hawaii, Maryland, and Arizona, none of which are prestigious state courts. On another prong of the analysis the sister state decisions cited were from Massachusetts, Maine, Maryland, and Idaho, of which Massachusetts is a prestigious state court.⁸⁹ The Ohio majority also goes further on the second prong of the analysis and states: “Our prior law is thus consistent with that in the overwhelming majority of the states.” *Gustafson*, 668 N.E.2d at 446. Thus again the majority rule of sister state decisions seems to be an important consideration.

Robinette decision. In a fractured decision, but not fractured along ideological lines, the Ohio Supreme Court, found that “the Ohio Constitution does not require a police officer to inform an individual, stopped for a traffic violation, that he or she is free to go before the officer may attempt to engage in a consensual interrogation.” *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997). The majority opinion (joined by 4 of the 7 justices) was authored by Justice Stratton, a Republican. The *Robinette* decision was not particularly ideological as the majority opinion was joined by Resnick, Moyer and Pfeifer, some of the more liberal justices on the Ohio Court. These justices agreed on the constitutional issue and they also agreed that consent to search was not voluntary in this case based on a totality of the circumstances. The dissenters, Justice Douglas (liberal Republican) and Justice Sweeney (Democrat), argued the search was voluntary, but agreed on the constitutional issue. There was also a concurrence by a more conservative Republican, Justice Cook, who like the majority, would have excluded the evidence, but for different reasons, and did not reach the state constitutional issue.

⁸⁹ The Ohio majority suggests there are more sister state decisions on this prong, by citing to the Massachusetts decision, *Luk v. Commonwealth*, 658 N.E.2d 664 (Mass. 1995), which, according to the Ohio Court, contains “a lengthy compilation of recent [administrative license suspension] double jeopardy cases” from sister state courts. *Gustafson*, 668 N.E.2d at 446.

The case has an interesting procedural history because the Ohio Supreme Court had earlier decided this same case under federal constitutional law, holding that such a warning was constitutionally required, and was then overturned by the U.S. Supreme Court.⁹⁰ On remand, the Ohio Supreme Court refused to follow its earlier precedent on state constitutional grounds. Thus this is an example where deciding court precedent did not lead to an expansion of rights under state constitutional law. No sister state decisions were cited.

Cook decision. The Ohio Supreme Court, in a unanimous decision in *State v. Cook*, 700 N.E.2d 570 (Ohio 1998), held that changes in the sex offender registry statute that imposed greater disclosure requirements upon already convicted sex offenders did not violate either the *Ex Post Facto* Clause of the U.S. Constitution or the Ohio Constitution.⁹¹ The Ohio Court cited a decision by the New Jersey Supreme Court in favor of its decision against finding a constitutional violation. New Jersey is a prestigious state court.

Orr decision. In *State v. Orr*, 745 N.E.2d 1036 (Ohio 2001), the Ohio Supreme Court, in an 6-1 decision authored by Justice Sweeney, a Democrat, upheld driver's license checkpoints as

⁹⁰ In other words, the Ohio Supreme Court decided the case, the U.S. Supreme Court reviewed the case because the Ohio Supreme Court had not relied upon independent state law grounds to the satisfaction of the U.S. Supreme Court, and in this case the Ohio Supreme Court was again considering the issue on remand, but this time only as a matter of state constitutional law. The U.S. Supreme Court decision in *Ohio v. Robinette*, 519 U.S. 33 (1996), resolved the federal constitutional issue by an 8-1 decision, although even the dissenting justice, Stevens, agreed that "The Federal Constitution does not require that a lawfully seized person be advised that he is 'free to go' before his consent to search will be recognized as voluntary." Thus, effectively the U.S. Supreme Court overruled the Ohio Court by 9-0 decision on this specific point. While the Ohio Supreme Court was certainly free to recognize this right under state constitutional law on remand, as Justice Ginsburg specifically pointed out, it is consistent with the vertical federalism hypothesis that the Ohio Court was unlikely to do so given the unanimity on this point by the U.S. Supreme Court. Compare this case to the *Vail* decision, where the intervening U.S. Supreme Court in *Milkovich* was divided 5-2, with a vigorous dissent by Justice Brennan providing an alternative constitutional analysis for the *Vail* majority to follow. See *supra* pp. 26-30.

⁹¹ It is difficult to identify a single U.S. Supreme Court decision as the federal precedent for the *Cook* decision. First, the applicable language of the Ohio Constitution is very different from the U.S. Constitution and unlike many cases, the Ohio Court did not look at federal precedent to inform its interpretation of the Ohio constitutional provision. It first analyzed the case under the more expansive Ohio provision, and then conducted a completely separate analysis of the federal constitutional provision. The federal *Ex Post Facto* clause generally only applies to criminal statutes, with a few exceptions. While it seems clear that those exceptions do not apply here, there is no one case close enough on point to permit a direct comparison.

constitutional under the Ohio Constitution.⁹² The Ohio Court cited three sister state decisions from Georgia, Maine and North Carolina following federal precedent (although none of these decisions are prestigious sister state supreme courts). No sister state decisions were cited or acknowledged in favor of expanding rights.⁹³

Murrell decision. The Ohio Supreme Court in *State v. Murrell*, 764 N.E.2d 986 (Ohio 2002) overturned one of its own state constitutional law precedents in upholding a search of a cloth bag as a search incident to arrest. Previously the Ohio Court had required probable cause to search containers within a vehicle stopped for a traffic violation, but synchronized its state constitutional jurisprudence with that of the U.S. Supreme Court in the *Murrell* case by holding containers within a vehicle could be searched incident to arrest, regardless of the grounds of the arrest. The 5-2 decision was authored by Justice Resnick, a Democrat, and joined by another Democrat, a liberal Republican, and two more conservative Republicans. Chief Justice Moyer, a centrist Republican, and Justice Pfeifer, a liberal Republican, dissented. The majority opinion cited two sister state decisions, one from Idaho and another from Wisconsin (which is a prestigious state court). *Murrell*, 764 N.E.2d at 991. Although the majority opinion acknowledged a split among the states (without citing contradictory precedent), the majority opinion noted that “most states” have followed the federal precedent.⁹⁴ This is important, because a majority rule among state supreme courts should be persuasive.

⁹² In *Orr* a Republican justice concurred in the judgment, but not the majority opinion, without issuing a concurring opinion.

⁹³ The closest U.S. Supreme Court precedent is *Michigan Dept of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding sobriety checkpoints), a 6-3 decision with Brennan, Marshall and Stevens dissenting.

⁹⁴ While the Ohio Supreme Court did not provide citations to back up the assertion it was following what “most states” have chosen to do, a subsequent decision by the New Jersey Supreme Court did investigate sister state decisions on both sides. The string citation in *State v. Eckel*, 888 A.2d 1266 (N.J. 2006) suggests that at the time of the Ohio decision in *Murrell* the majority rule among state supreme courts on this issue was 6-4 (although it becomes a tie at 6-6 if state intermediate appeals court decisions are included) on the side of the *Murrell* and *Belton* decisions. The states were also closely divided, if one only looks at prestigious state supreme courts. At the time of the *Murrell* decision two prestigious states, Iowa and Wisconsin, followed the *Belton* standard, while at least two

The *Murrell* decision overturns previous state constitutional precedent of Ohio (not just precedent applying the federal constitution, but precedent partially based on Ohio constitutional provisions) while citing sister state decisions. The Supreme Court precedent *Murrell* follows is *New York v. Belton*, 453 U.S. 454 (1981). Yet, interestingly, the dissent in *Murrell* is prescient, objecting to returning to the *Belton* standard because the justification for the search incident to arrest based on officer safety was not present in the *Murrell* case. By the time the cloth bag in the vehicle was searched (revealing cocaine) the defendant, stopped for speeding and arrested on a warrant for failure to pay child support, was securely handcuffed and sitting in the back of the police car. In fact the reasoning adopted by the dissent in *Murrell* anticipates and tracks almost exactly the reasoning of the subsequent Supreme Court decision of *Arizona v. Gant*, 556 U.S. 332 (2009) which sharply limited *Belton*.

The *Gant* case holds that searches incident to arrest are not permitted once the defendant has been removed from the vehicle and secured. The *Gant* case is important because it cites several state supreme court decisions as rejecting the broad *Belton* standard under their state constitutions.⁹⁵ *Gant*, 556 U.S. at 347 fn8. While the dissent in *Murrell* is not cited by the U.S. Supreme Court, it is part of the larger constitutional dialogue that the U.S. Supreme Court acknowledges, not only in citing to state constitutional decisions, but in stating “The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision’s clarity and its fidelity to Fourth Amendment principles.” *Gant*, 556

prestigious states, New York and Pennsylvania, rejected the *Belton* standard under state constitutional law (it is unclear whether Massachusetts, a third prestigious state, rejected *Belton* under constitutional or statutory law).

⁹⁵ Of the six state supreme court decisions cited by the U.S. Supreme Court in *Gant*, three (New Jersey, New York, and Pennsylvania) were from prestigious state courts. (The Court also cited two lower state appellate decisions). The U.S. Supreme Court does not address how many state supreme court decisions supported the contrary position. Only four of the state supreme court decisions cited by the U.S. Supreme Court (and only two of the prestigious state decisions) were decided prior to the Ohio Supreme Court’s decision in *Murrell*.

U.S. at 338 (emphasis added).⁹⁶ While the majority opinion in *Murrell* was not decided consistent with my hypotheses, the dissent in *Murrell* was a small voice in a larger constitutional dialogue that apparently had an impact on the U.S. Supreme Court's decision making.

Jordan decision. The Ohio Supreme Court in *State v. Jordan*, 817 N.E.2d 864 (Ohio 2004) held that under both the U.S. and Ohio constitutions that police had reasonable suspicion to stop and pat down a man (leading to the discovery of a crack pipe) as a result of an anonymous tip of drug use in high drug activity area and the fact that as officers approached the defendant he yelled something to his companion, and the companion immediately fled from the police.⁹⁷ The 5-2 decision was authored by Justice O'Donnell, a Republican, and joined by a Democrat, a centrist Republican and two conservative Republicans. Another Democrat concurred in the judgment, but not the opinion (and without a separate concurring opinion). Only Justice Pfeifer, the liberal Republican dissented.

The majority opinion in *Jordan* cited one sister state decision from New Mexico (not a prestigious court) that was relied upon by the defendant as favoring an expansion of rights on state constitutional grounds. However the *Jordan* majority discussed the New Mexico case only with the purpose of distinguishing that case from the case at hand.⁹⁸

Gardner decision. The Ohio Supreme Court in *State v. Gardner*, 889 N.E.2d 995 (Ohio 2008)⁹⁹ upheld a burglary conviction despite the lack of jury instructions requiring the jury to

⁹⁶ This is consistent with Jennifer Friesen's (2006) point that, "[S]tate-federal influence is a two way street: State courts have the opportunity to experiment with constitutional rights and lay potential guidelines for future constitutional decisions of not only state courts but the Supreme Court as well." (§1.03[3] fn 51, p. 1-12).

⁹⁷ The U.S precedent for the *Jordan* case is *Illinois v. Wardlow*, 528 U.S. 119 (2000) (holding that unprovoked flight from officers helped provide reasonable suspicion), a 5-4 decision, but one heavily dependent upon the facts of the case.

⁹⁸ The New Mexico case, *State v. Jason L.*, 2 P.3d 856 (2000), imputed a companion's suspicious behavior to the defendant, whereas the Ohio Supreme Court found that the defendant in *Jordan* was personally suspicious when he shouted something to his companion, prompting the companion to immediately flee.

⁹⁹ The plurality in *Gardner* cited at least 6 prestigious sister state supreme courts (see chapter 3): California, Connecticut, Hawaii, Kansas, Wisconsin and Washington. California, Kansas, Wisconsin and Washington.

agree on the nature of the crime the defendant intended to commit when entering the residence (an element of the crime of burglary).¹⁰⁰ The *Gardner* case is problematic because there is no majority opinion (i.e. an opinion that received votes from a majority of the Ohio Supreme Court). Rather the *Gardner* decision is best described as a 3-1-3 decision. By the time of this decision all the members of the Ohio Supreme Court were Republican, but Justice Pfeifer (a liberal Republican), Chief Justice Moyer (a centrist Republican), and Justice Lanzinger dissented, believing that the Ohio Constitution requires jury unanimity on the underlying offense the defendant intended to commit when entering the residence. Three arguably more conservative justices, O'Connor, Stratton and Cupp, citing several sister state court decisions, opined that the federal and Ohio constitutions only require that each juror agree that the defendant intended to commit an offense when entering, but need not agree on what that offense was. The swing justice, O'Donnell, did not take a position on the constitutional issue. Thus it is difficult to categorize a holding for the *Gardner* case, but there is some evidence this case was decided along ideological lines.

VII. Lessons and Developing ABC analysis

On its face it appears that citations to sister state decisions do not make the Ohio Supreme Court more likely to expand rights.¹⁰¹ Merely citing sister state decisions, as Cauthen (2003) suggested, did not make it more likely for the Ohio Supreme Court to reach rights expanding decisions. Ohio had more decision citing sister state decisions which follow federal precedent (7 of 9) than cases that expand rights under the Ohio Constitution (3 of 7). A deeper analysis, however, revealed a useful lesson to be applied in my research design.

¹⁰⁰ The closest U.S. precedent is *Schad v. Arizona*, 501 U.S. 624 (1991), a 5-4 decision with White, Blackmun, Marshall and Stevens dissenting.

¹⁰¹ On the other hand, ideology does not appear to be an especially good explanation either. Only one case (*Gardner*) in the group following federal precedent is divided along ideological lines. The rest of the cases, while many include dissents, appear to cut across the partisan and ideological divides.

First and foremost the Ohio results suggested that merely looking for the presence of sister state decisions is insufficient, rather it is important to distinguish whether the sister state decisions cited expanded rights or followed federal precedent. Sister state decisions are influential, but they are influential in the direction of the sister state decisions cited. In other words, contrary to Cauthen (2003), who only looks at two groups of cases, 1) state supreme court decision that do not cite sister state decisions, and 2) state supreme court decisions that do cite sister state decisions (where the second group are more likely to result in decisions that expand rights), there are instead three groups of cases: A) state supreme court decisions that cite sister state decisions cases following federal precedent; B) state supreme court decision that do not cite sister state decisions; and C) state supreme court decisions that cite sister state decisions cases which have expanded rights.¹⁰²

One would expect that each group is different from the others in terms of the probability of following federal precedent. For instance, cases in Group A should be expected to be most likely to follow federal precedent—and the Ohio cases supported this. Cases in Group C should be the least likely to follow federal precedent (most likely to expand rights). Most importantly, it is incorrect to lump groups A and C together, as Cauthen (2003) did, when theoretically they lead to opposite outcomes. Indeed, it may be that lumping group A cases together with group C cases diminished the impact of Cauthen’s findings in his 2003 article investigating state constitutional law citations. It is not sufficient merely to count the presence of sister state citations, but rather it is necessary to consider the direction of each citation.

¹⁰² There are cases that fit in both groups A and C, but it makes sense to classify such cases as being of the group that is consistent with the majority rule across sister states, given the apparent power of the majority rule established in these cases from Ohio. So, for instance, if a case cites sister state decisions on both sides, as in *Eastwood Mall*, where the Ohio Court majority cited sister state decisions following federal precedent while the dissent cited rights expanding decisions, then that case should be coded as in Group A (citing sister state decisions following federal precedent) direction with the most citations to sister state supreme courts should determine the grouping.

TABLE 2-1 Rights Expansive Decisions in Ohio by ABC Groupings

	Group A sister state citations following federal precedent	Group B no sister state citations	Group C sister state citations that expand rights
<i>Cases Following Federal Precedent</i>	7 (100%) <i>Eastwood Mall, Gustafson, Cook, Orr, Murrell, Jordan, Gardner</i>	2 (33%) <i>Dobbins, Robinette</i>	0
<i>Cases Expanding Rights</i>	0	4 (67%) <i>Arnold, Vail, Humphrey, Ohio AFL-CIO</i>	3 (100%) <i>Brown, Farris, Norwood</i>

N=16 (%) = percentage of decisions in each Group/column

Table 2-1 shows a strong pattern even based upon this small sample. Overall, considering all 16 Ohio decisions summarized, seven cases fall in Group A, six cases fall in Group B and three cases fall in Group C. One hundred percent of Group A cases follow federal precedent, 33% of Group B follow federal precedent, and 0% of Group C cases follow federal precedent. Of the 16 decisions considered here, 10 cite sister decisions¹⁰³ and 3 explicitly purport to follow the majority rule across sister states.¹⁰⁴ Of the 7 decisions that cite sister state decisions but do not reference the majority rule, 4 had dissenting opinions. The dissenting

¹⁰³ The ten cases citing sister state decisions are *Brown, Farris, Norwood, Eastwood Mall, Gustafson, Cook, Orr, Murrell, Jordan and Gardner*.

¹⁰⁴ The three cases explicitly claiming to follow the majority rule are *Eastwood Mall, Gustafson, and Murrell*. In footnote 41 I estimated that 7 of the 9 federal-precedent following decisions probably followed the majority rule across sister states. The majority rule for federal precedent following cases such as *Jordan* and *Norwood* is difficult to determine because *Jordan* is so fact specific and with *Norwood* there is the additional complication of whether to consider legislative enactments since there has been a strong movement in state legislatures to overturn or limit *Kelo* with state legislation. That leaves *Brown, Farris* and *Orr* as the three cases citing sister state decisions which are the most questionable as to whether they are following the majority rule. *Brown* and *Farris*, but not *Orr*, had dissenting opinions with an incentive to raise this issue if warranted.

opinions are important in the absence of a clearly articulated majority rule as one would expect that if the majority was purposefully overlooking or ignoring precedents from other sister states to the detriment of the dissenting position, the dissenters would call the majority out on their willful slanting of the available precedents.

While the Ohio Supreme Court was divided along ideological lines in other issues, there was little evidence the Ohio Court has been divided along ideological lines in the areas of state constitutional criminal rights, property rights, gun rights, free speech rights and rights to free exercise of religion. Only a handful of the cases considered appear to have been decided along ideological lines.¹⁰⁵ Instead, the Ohio Court often cites sister state decisions and then renders decisions in accordance with those decisions (10 out of 16 cases overall).

While the individual decisions rendered by the Ohio Supreme Court were interesting in many respects, the collective lesson from the Ohio case study revealed that merely citing sister state decisions did *not uniformly* make it more likely that a state supreme court will decide to expand rights. Instead it is important to distinguish whether the sister state supreme court cases cited expanded rights or followed federal precedent. Sister state supreme court cases are influential, but they are influential in the direction the sister state case cited was decided. In other words, state constitutional decisions fall into three groups: (Group A) state supreme court decisions that cite sister state cases which have followed federal precedent; (Group B) state supreme court decisions that do not cite any sister state cases; and (Group C) state supreme court decisions that cite sister state cases which have expanded rights.

¹⁰⁵ At most four cases (*Ohio AFL-CIO*, *Brown*, *Norwood* and *Gardner*) and more likely only two cases (*Ohio AFL-CIO* and *Gardner*) were divided along ideological lines.

Each group should be different from the others in terms of the probability of a rights expanding decision by the deciding court:

Group A. Citations to sister state cases following federal precedent should be expected to decrease the probability of a rights expanding decision from the baseline.

Group B. Decisions without citations to sister state cases are the baseline.

Group C. Citations to sister state cases expanding rights increase the probability of a rights expanding decision from the baseline.

Most importantly, it is incorrect to lump Group A and Group C decisions together to estimate their likely effect, despite the fact that in both groups of decisions the deciding court is citing sister state cases, as the sister state cases lead to opposite outcomes. This lesson I incorporate into my nine state most different systems research design as described in the next chapter.

CHAPTER 3 METHODOLOGY, CODING AND MEASUREMENT

- I. Nine State Research Design
- II. Measuring the Dependent Variable
- III. Measuring the Independent Variables
 - A. Measuring Horizontal Federalism Hypothesis: Influence of Sister State Decisions
 - B. Measuring Vertical Federalism Hypothesis: The Role of Precedent
 - 1. Is the Current Supreme Court Precedent Narrower Than Prior Precedents?
 - 2. Deciding Court Precedent Made Before the Controlling Supreme Court Precedent.

The research design examines individual decisions of state supreme courts in nine states to investigate why the supreme courts in these states sometimes render rights expanding decisions, but more often follow the approach adopted by the U.S. Supreme Court in interpreting the U.S. Constitution. As discussed in chapter 1, I hypothesize that state supreme courts are engaged in an ongoing dialogue about rights with other courts, and look to sister state supreme court decisions, prior deciding court precedent, as well as changes in U.S. Supreme Court precedent when considering whether to expand rights under state constitutions. The research design seeks to isolate the influence of sister state decisions and changes in federal precedent upon state supreme court decision making from the influences of political and judicial ideology. It acknowledges the role of political ideology and judicial selection methods as partial explanations for state supreme court behavior, yet also finds evidence for horizontal and vertical federalism influences on state supreme court decision making.

The Ohio Case Study in the previous chapter focused upon only 16 decisions made by one state supreme court. While it found evidence in support of the horizontal and vertical federalism hypotheses, it was unable to control for alternative hypotheses by measuring variation in political ideology across states, or variation in judicial selection methods. Therefore this chapter explains the basis for a nine-state, most-different-systems research design which

addresses those shortcomings of the Ohio Case Study. As a most different systems design the nine state supreme courts selected (Alabama, Arkansas, Illinois, Iowa, Kansas, Minnesota, Ohio, Pennsylvania, and South Dakota) were selected for variation across the measures for the alternative hypotheses of state political ideology and judicial selection method, in order to show the hypothesized horizontal and vertical federalism relationships hold across states varying on the dimensions of state political ideology and judicial selection method. This is based on the logic of Przeworski and Teune (1970) which note that most different systems research designs seek to discredit systemic factors as explanatory variables.

The dependent variable for the research design is whether, when requested to make a rights expansive decision on the basis of state constitutional law, a state supreme court decides to follow Supreme Court precedent or to establish greater rights protections based on state constitutional provisions. Only state supreme court cases interpreting a state constitutional provision analogous to the provisions in the U.S. Bill of Rights are examined. Cases were also included only if there was clear U.S. Supreme Court precedent on point.

The independent variables are the number of rights expanding sister state decisions cited, the number of federal precedent following sister state decisions cited, whether the deciding court cites prior rights-expansive precedents of its own interpreting federal constitutional provisions, and whether the deciding court cites notes the Supreme Court has narrowed its previous precedents. Control variables include the political ideology of the states (conservative, moderate, liberal), and dummy variables for the judicial selection methods.

I. Nine State Research Design

TABLE 3-1 Nine State Most Different Systems Research Design

	<i>Non-Partisan Elections</i>	<i>Partisan Elections</i>	<i>Missouri Plan (retention elections)</i>
<i>Liberal</i>	Minnesota	Illinois	Iowa
<i>Moderate</i>	Ohio	Pennsylvania	Kansas
<i>Conservative</i>	Arkansas	Alabama	South Dakota

These nine states were selected by considering states within each of the judicial section methods that would result in variation across the range of political ideology in the states. The variation in state political ideology is based on Erikson, Wright and McIver (1993) and their measure of state political ideology. Brace, Langer and Hall (2000) suggest that in states where justices are selected through partisan or nonpartisan elections, the preferences of justices should be aligned with citizens' preferences. (p. 394). Again the idea is that if the hypothesized relationships endure across states selected as most different in terms of state political ideology and judicial selection methods, then these alternative explanations are not the most important explanatory variables. The expectation is that judicial reasoning in previous decisions, including sister state decisions, changes in U.S. Supreme Court precedent, and previous decisions by the deciding court, will influence state supreme court decision making regardless of differences in state ideology and judicial selection methods. In particular it is expected that liberal, moderate

and conservative states will all be more likely to expand rights when citing sister states decisions that have expanded rights. It is also expected that states with Missouri Plan merit selection systems (with retention elections), states with non-partisan election systems, and states with partisan election systems also will all be more likely to expand rights when citing sister states decisions that have expanded rights. Likewise the expected vertical federalism hypotheses of changes in U.S. Supreme Court precedent and previous precedent by the deciding court should be observed regardless of differences in state ideology and judicial selection systems.

II. Measuring the Dependent Variable

The dependent variable is whether, when requested to make a rights expansive decision on the basis of state constitutional law, a state supreme court decides to follow Supreme Court precedent or to establish greater rights protections based on state constitutional provisions. This is a dichotomous dependent variable. Following upon the leading research in the field, including Barry Latzer (1991a), Beavers and Walz (1998), and Caughen (2003), my unit of analysis is individual state supreme court decisions. There are, certainly, alternative units of analysis used in this subfield. For instance, Brody used areas of constitutional law as the unit of measure for his dependent variable. (2002). Unlike Brody, I am not interested in measuring how active courts are generally in the area of state constitutional law, but rather what influences state supreme courts to extend rights on a case by case basis. Brody looked at whether state supreme courts had rendered rights-extending decisions in several areas of criminal law, and these doctrinal areas became his dependent variable. (2002). However, since I hypothesize that both sister state supreme court decisions (horizontal federalism) and U.S. Supreme Court decisions (vertical federalism) influence the decision making of state supreme court when interpreting state constitutional provisions, using Brody's approach would make it impossible to measure the

impact of issue-specific precedents by other courts. This is because Brody aggregates several specific issues into issue areas. Studying individual state supreme court decisions is necessary in order to measure the influence of persuasive authority by other courts on a particular legal issue. In addition, courts make decisions on a case by case basis, so employing a dependent variable that varies on a case by case basis is most true to how courts actually make decisions.

Also consistent with the standard initiated by Latzer, Beavers and Walz, as well as Cauthen, only those state supreme court decisions which considered expanding rights on state constitution grounds beyond those recognized by the United States Supreme Court are included in the data set. In other words, state supreme court decisions that arguably interpret the federal constitution, and do not clearly rely upon state constitutional language for their decision, were excluded. Therefore, a plain statement of adequate and independent state law grounds consistent with *Michigan v. Long*, 463 U.S. 1032 (1983) is required, unless the decision is to follow federal precedent, in which case language that the deciding court considered resolving the case on state constitutional grounds is sufficient. While there is an asymmetry here in terms of case selection it is necessary because state supreme courts do not have the incentive to use a *Michigan v. Long* plain statement when deciding to follow federal precedent. To exclude such cases from the data set would bias the results by excluding decisions where state constitutional claims were earnestly considered, but ultimately rejected. Of course this creates some coding difficulties as there is no completely objective standard as to how much a state supreme court must say for a case to be included in the data set. Basically the coding rule for inclusion of state constitutional cases following Supreme Court precedent, developed after looking over scores of cases, was whether the state case contained anything more than a mere citation to the state constitutional provision analogous to the federal constitutional provision.

In addition, only state supreme court decisions that consider constitutional questions where there is a clear U.S. Supreme Court precedent are included. The entire idea of “expanding rights” is in relation to a baseline of established U.S. Supreme Court precedent. The most that can be said about a state supreme court’s state constitutional law interpretation when there is no clear U.S. Supreme Court precedent is that the state decision is more (or less) expansive than the consensus view of the U.S. Constitution (which might be highly nebulous considering it could be measured in several different ways—majority of U.S. Courts of Appeal, overall citations within federal and state courts, scholarly opinion, etc). Another related point is that when there is no fixed meaning to the U.S. Constitution, state supreme courts often interpret both the federal constitution and state constitutions in tandem (“double-barreling”), often without clearly providing adequate and independent state law grounds.

A core part of this project was gathering state supreme court decisions via the Lexis/Nexis Academic electronic legal database, and then sorting through the cases to check for all of the requirements described above. The first step was to search for any state supreme court decisions from the nine states in the research design which cited state constitutional analogs to the provisions in the Bill of Rights in the U.S. Constitution. State supreme court decisions from 1995 to 2009 from the nine states in the research design were collected via the Lexis/Nexis Academic electronic legal database.¹⁰⁶ This produced lists of cases which cited each the selected analogous state constitutional provisions. Next, each of these state supreme court decisions listed was initially examined to see if the decision met the requirements for resolving a state constitutional law claim on independent state law grounds, as well as whether there was clear U.S. Supreme Court precedent on the issue (as discussed above). Ultimately 87 cases were

¹⁰⁶ Although if a state had very few citations, state supreme court decisions for their state back to 1990 were also included.

identified as meeting the criteria established in the previous paragraphs. As a third step the decisions that meet these preliminary requirements were coded for the explanatory and control variables discussed in the next part.

III. Measuring the Independent Variables

A. Measuring Horizontal Federalism Hypothesis: Influence of Sister State Decisions.

In order to test the first (horizontal federalism) hypothesis, I expand upon the work of Latzer; Beavers and Walz; and Cauthen in several ways. Cauthen in particular performed a citational analysis similar in many ways to my approach here. However, as discussed in the previous chapter, Cauthen only tested the impact of whether a state supreme court cited sister state court decisions. I add to Cauthen's theory by recognizing that not all sister state citations are created equal. The Ohio Case Study discussed in Chapter 2 revealed that not all citations to sister state decisions are likely to have the same impact. While Cauthen suggests that citations to sister state decisions will uniformly increase the probability of a rights expanding decision, as noted in the previous chapter, I devised an ABC division that is more consistent with the findings from Ohio:

- A. Citations to sister state decisions following U.S. Supreme Court precedent decrease the probability of a rights expanding decision from the baseline.
- B. Decisions without citations to sister state decisions should be the baseline.
- C. Citations to sister state decisions expanding rights increase the probability of a rights expanding decision from the baseline.

Courts that have citations to both types of sister state decisions should be coded consistent with majority rule across the sister state citations cited.¹⁰⁷

¹⁰⁷ As it turned out as I began to collect data actually about 40% of the time when state supreme courts cite sister state decisions, the deciding court opinion meets the requirements of belonging to both Groups A and C (i.e. they cite sister state cases that decided the issue in both directions). In those instances it makes sense to classify such

Recall that my first hypothesis is that state supreme courts will be more likely to recognize additional rights if sister state courts, *particularly prestigious sister state courts*, have already done so. The idea, building upon previous scholars of the New Judicial Federalism, is that some state supreme courts have higher levels of prestige than other courts, and thus their decisions are likely to be more persuasive to a deciding court, than the average sister state citation.¹⁰⁸ (Latzner 1991). If prestige of the sister state cited enhances the effect of citations to sister states, the first problem is how to measure prestige.

Differences in levels of prestige have been established in the political science and legal literature for some time. (Caldeira 1983; see also Dear and Jessen 2007). The leading studies in this area proceed by assuming that a court is more prestigious the more often it is cited by other state supreme courts.¹⁰⁹ Encouragingly, at first glance, the Dear and Jessen measure of state court prestige, based on citations from 1940 to 2005, is quite close to the ranking assembled by Caldeira (1983) based on 1975 data, suggesting that prestige is a relatively stable characteristic of courts. All of the top 10 state supreme courts identified by Dear and Jessen (2007) (based on the number of that state supreme court's decisions which were followed at least once by a sister state court between 1940 and 2005) are in the top 15 of Caldeira's ranking, also based on citations from sister state supreme courts. These measures of prestige are general, encompassing decisions across the entire spectrum of legal issues, not just state constitutional law claims. Of

decisions as being of the group that is consistent with the majority of sister state supreme court cases cited by the deciding court. In collecting and coding the data the identity and direction of each citation to a sister state court was recorded. More discussion about the results is contained in Chapter 4.

¹⁰⁸ I expect that the prestige of sister state courts may be particularly important in two contexts: 1) early second mover states (where few sister state decisions have yet been published) and 2) when states follow the minority rule. However, I have not measured how many state supreme court decisions exist in each of these categories, so I am unable to test these expectations.

¹⁰⁹ Of course this is an imperfect measure of prestige as there may be other reasons besides prestige for a court to be frequently cited, including similar political culture, more cases on point given a state's population size, court resources to hear more cases or focus on cases of first impression, and unique policy challenges for certain state supreme courts due to geographical location, industries, etc.

initial concern was the fact that the Dear and Jessen measure is not as good a fit when compared to Cauthen's 2003 research which identified 10 top state courts measured by how frequently they were cited by other state supreme courts making state constitutional decisions.¹¹⁰ The top 10 states identified by Dear and Jessen only include 5 of Cauthen's top 10 state constitutional prestige states. However, if one uses the top 15 states in Caldeira's 1975 ranking, these 15 states include all the top 10 states in the 2007 Dear and Jessen ranking, as well as 9 of the top 10 of Cauthen's most cited state constitutional courts.¹¹¹ That is a good argument for using Caldeira's top 15 list to measure prestige, despite the fact that is not as recent a ranking as the Dear and Jessen list.¹¹²

Using Caldeira's top 15 list, I coded each instance where the deciding court in my nine state research designed cited a case or cases by these 15 "prestigious" sister state supreme courts, and also whether each of these cases cited expanded rights or chose to follow U.S. Supreme Court precedent. The goal was to determine whether Latzer (1991a) is correct that California and New York are truly "leadership" courts, or whether all of these "prestigious" courts identified by previous authors could claim such a title.

¹¹⁰ Of course, the citations Cauthen measured came only from the group of 12 state supreme courts in his sample.

¹¹¹ Of the top 15 most prestigious states (for being cited most often by sister states) as identified by Caldeira (1975) only Florida does not make either the Dear and Jessen's top 10 or Cauthen's top 10. Florida is Caldeira's 14th most prestigious state supreme court in 1975, and Dear and Jessen's 21st most prestigious state. An argument might be made to drop Florida, and just go with the 14 from Caldeira that also make Dear and Jessen's or Cauthen's top 10. However Florida is a heavily populated state, the only "Southern" state in Caldeira's top 15, and was one of Latzer's four highest "rejectionist" states of U.S. Supreme Court criminal law precedent, at least prior to its 1983 constitutional referendum, which helped turn it into a high "adoptionist" state. (1991a). Despite this constitutional amendment pertaining to criminal law, Florida may be influential in non-criminal state constitutional law decisions. Also worth mentioning is that Louisiana is seventh on Cauthen's list, and the only one of his top 10 not to make Caldeira's top 15.

¹¹² These rankings change only modestly over time. For instance Caldeira examines a 1920 ranking, and 11 of Caldeira's top 15 in 1975 were already in the top 15 in 1920. Missouri, Indiana, Kentucky and Texas were replaced by Washington, Oregon, Colorado, and Florida in the top 15 between 1920 and 1975.

B. Measuring Vertical Federalism Hypothesis: The Role of Precedent.

1. Is the Current Supreme Court Precedent Narrower Than Prior Precedents?

Measuring Hypothesis 2(a), which predicts that state supreme courts will be more likely to recognize additional rights if the current precedent of the Supreme Court is narrower than earlier Supreme Court decisions) calls for a dichotomous variable. This measure was coded one (1) if the deciding court claims the Supreme Court has narrowed its interpretation of federal constitutional rights over time and current precedent is narrower in scope than past Supreme Court precedents, and coded zero (0) if no mention of Supreme Court retreat by the deciding court. See the State Constitutional Code Book in the Appendix for how all variables were coded.

2. Deciding Court Precedent Made Before the Controlling Supreme Court Precedent.

Sometimes a state supreme court has resolved an issue, perhaps applying federal constitutional law, before the Supreme Court addresses the specific issue. If the state supreme court resolves the issue by protecting more rights, and the U.S. Supreme Court decides that in fact the U.S. Constitution does not require such a broad reading, then the state supreme court is faced with a dilemma. It may choose to continue to follow the reasoning of its own precedent, but this time on state constitutional grounds, or follow the newer U.S. Supreme Court precedent that says the state earlier overestimated the height of the federal floor (or in other overestimated what the U.S. Constitution actually required). *See State v. Allen*, 690 N.W.2d 684 (Iowa 2005) (refusing to decide that the Iowa Constitution requires prior misdemeanor plea bargains have had the assistance of counsel before being used to enhance sentences, even though the Iowa Supreme Court had once erroneously read the U.S. Constitution to require such assistance of counsel).

A prior precedent by state supreme court, even interpreting federal constitutional requirements, should make it more likely it will reach a decision expanding rights under the state constitution. The Ohio Case Study discussed in Chapter 2 provided additional support for the theory underlying this variable. To measure this hypothesis requires another dichotomous variable. The measure is coded one (1) whenever the deciding court cites an earlier decision made by itself that turned out to be more expansive than what the U.S. Supreme subsequently said the U.S. Constitution requires in an intervening opinion, while the lack of any such reference will be coded zero (0).

Chapter 4 Empirical Results

- I. Nine State Research Results
 - A. Horizontal Federalism results
 - B. Vertical Federalism results
 - C. Alternative Explanations

II. Prestigious States

This chapter examines the evidence in support of the hypotheses in Chapter 1 across the entire 9 state research design as described in Chapter 3. This chapter also examines whether prestigious sister states are cited more frequently than other sister state decisions, and whether there is evidence of disproportionate impact by prestigious sister states.

I. Nine State Research Results

The first step toward supporting my dialogue theory of state constitutionalism and my horizontal federalism hypothesis is finding evidence that state supreme courts frequently cite and discuss sister state cases. Recall that Hypothesis 1 (Horizontal Federalism) predicts that “State supreme courts will be more likely to recognize additional rights if sister state courts, particularly prestigious sister state courts, have already done so.”¹¹³ To determine whether state supreme courts frequently cite sister state cases, state constitutional decisions were identified and coded from the 9 states in the research design (Alabama, Arkansas, Illinois, Iowa, Kansas, Minnesota, Ohio, Pennsylvania, and South Dakota). Eighty-seven state constitutional cases were identified from these states that concerned state constitutional analogs to the provisions in the U.S. Bill of Rights, and for which there was identifiable U.S. Supreme Court precedent that controlled the resolution of the issue under the U.S. Constitution.

Chapter 1 explains that my dialogue theory of constitutional interpretation rests on two central tenets. First, for a dialogue to occur, state supreme courts must be aware of what other

¹¹³ See Chapter 1 for explanation of this hypothesis.

courts are saying. Second, a true dialogue requires more than being aware of cases from other supreme courts, but instead requires a response that demonstrates the deciding court has taken seriously the arguments made in these other cases and acts accordingly. In other words it is necessary to demonstrate that state supreme courts are both aware of sister state decisions, and that state supreme courts actually seriously consider the arguments of sister state courts. Thus finding two types of evidence is also necessary—first, finding evidence that courts frequently cite and discuss sister state cases. Proving the second step requires that state supreme courts make decisions consistent with the sister state cases cited (or consider it necessary to give reasons for deciding the issue differently).

Analysis of the 87 state constitutional decisions identified from the nine states in the research design provides support for the dialogue theory and the horizontal federalism hypothesis. Over half of these 87 decisions cited sister state cases.¹¹⁴ The results of this nine state survey show 52% percent of state constitutional decisions¹¹⁵ cited sister state cases, which is higher than Cauthen's findings in 2003 showing that 35% of state constitutional decisions cite sister state cases.¹¹⁶ The fact that sister state cases are being cited frequently suggests that state supreme courts are generally concerned with how their sister states are resolving similar cases, consistent with the necessary first step of demonstrating support for my dialogue theory. Deciding courts are taking the time and expending the energy to show they have looked to their sister state supreme courts for guidance. Thus there are at least frequent opportunities for sister state influence upon deciding courts.

¹¹⁴ 45 of 87 (52%) decisions examined cited sister state decisions.

¹¹⁵ Remembering that these 87 cases were drawn only from 9 states, and reflect only decisions based on state constitutional provisions analogous to the federal Bill of Rights, where the U.S. Supreme Court has already rendered a decision interpreting the analogous federal provision.

¹¹⁶ Possible reasons for the disparity include the fact that Cauthen had a larger sample of 333 cases from a different group of states.

In just under a quarter of the 87 decisions I examined, the state supreme court chose not to follow federal precedent and instead expanded rights based on state constitutional provisions.¹¹⁷ These cases I refer to as “rights expanding” decisions. My percentage of “rights expanding” decisions is lower than the percentages found by Cauthen (2003), both when the deciding court cited sister state decisions, and when the deciding court did not cite sister state decisions.

TABLE 4-1: Comparative Rates of Rights Expanding Decisions (REDs)

Cauthen’s findings		My findings	
% of REDs when citing sister states	41.4%	% of REDs when citing sister states	35.6% (16/45)
% of REDs when no sister state citations	31.5%	% of REDs when no sister state citations	11.9% (5/42)

While I find a higher rate of cases citing sister state decisions than Cauthen, I find lower rates of rights expanding decisions both in that group of cases where deciding courts cite sister state cases and in that group of cases where deciding courts do not cite sister state cases.¹¹⁸ I do continue to find, however, that when state supreme courts cite sister state cases the deciding courts on average have a higher rate of rights expanding decisions, than when deciding courts do not cite sister state cases. In short, the presence of sister state citations is correlated with a greater likelihood of rights expanding decisions.

¹¹⁷ 21 of 87 decisions (24%) were rights expanding decisions

¹¹⁸ Possible reasons for the disparity include the fact that Cauthen had a larger sample of 333 cases from a different group of states. If Cauthen’s group of states included states more likely to be first movers (courts that render rights expanding decisions in situations where sister state supreme courts had not yet considered that issue or issued rights expanding decisions) then he would see a higher rate of rights expanding decisions in both groups. Cauthen is also drawing cases from a different time period. Finally, Cauthen also considers only whether sister states were cited or not, and does not distinguish between citations to sister state cases that followed federal precedent versus citations to sister state rights expanding decisions. I report here the same equivalent statistics for purposes of comparison.

This simple correlation, however, does not prove causation. It may simply be that rights expanding decisions would tend to be longer, or that rights expanding decisions tend to be more thoroughly researched and disproportionately stuffed with citations, including citations to sister state decisions.¹¹⁹ Furthermore, the percentages shown in Table 4-1 above do not show whether deciding courts made decisions consistent with the sister state supreme courts cited. Thus it is necessary to take the second step to demonstrate my theory that true dialogue exists between state supreme courts. That second step requires finding evidence that state supreme courts make decisions consistent with the sister state cases cited.¹²⁰ I divide the cases into three groups to determine whether state supreme courts make decisions consistent with the outcomes of sister state cases cited:

Group A. Citations to sister state decisions following U.S. Supreme Court precedent decrease the probability of a rights expanding decision from the baseline.

Group B. Decisions without citations to sister state decisions is the baseline.

Group C. Citations to sister state decisions expanding rights increase the probability of a rights expanding decision.

Courts that have citations to both types of sister state decisions should be coded with the citations they cite with approval.

¹¹⁹ This is a potential problem that would require measuring both the length of the decisions in the data set and the total number of all citations in each decision.

¹²⁰ As suggested above, even if there is little evidence that state supreme courts make decisions consistent with the sister state cases cited, there might still be evidence supporting my dialogue theory if the deciding court takes the time to give reasons why the deciding court is deciding the issue differently from the sister state cases cited. Yet investigating for such reasons is unnecessary if deciding courts are making decisions consistent with the sister state citations they cite.

**TABLE 4-2: Rates of Rights Expanding Decisions
Depending Upon Type of Sister State Citations**

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Decisions Following Federal Precedent</i>	21 (95%)	37 (88%)	8 (35%)
<i>Rights Expanding Decisions</i>	1 (5%)	5 (12%)	15 (65%)

N=87 (%) = percentage of decisions in each Group/column

$X^2 = 29.24$ df = 2 p = .001

A. Horizontal Federalism results. Table 4-2 reports percentages within the column (i.e. within each Group). The Group C results are most revealing. In support of Hypothesis 1, the Horizontal Federalism hypothesis, state supreme courts are much more likely to recognize additional rights when citing sister state decisions that have already done so. So when citing sister state decisions that have expanded rights (Group C cases), state supreme courts decide to expand rights in 65% of those Group C cases. It is also important to note that 68% of all of the rights expanding decisions (15 out of 21 total rights expanding decisions) are in the lower right cell of Table 4-2. This is a key finding—the vast majority of all rights expanding decisions are cases in which the deciding court has cited sister state cases expanding rights.

Yet it is not only the Group C results that are illuminating. While the Group C results show that the vast majority of the rights expanding decisions cite sister state cases that also expand rights, the Group A results reveal that when sister state cases are cited that follow federal precedent then the deciding court also follows federal precedent at very high rates, possibly at

even higher rates than if no sister state cases are cited. While this is not yet conclusive proof that the sister state citations are helping to influence the deciding court to decide that way, clearly the sister state citations are corresponding with the deciding court outcomes. It is strong evidence that a dialogue between state supreme courts is occurring—deciding courts are investigating the cases of sister state supreme courts and finding it worthwhile to include these citations in their own decisions. More importantly, the deciding courts are deciding cases consistently with the decisions of sister state supreme courts cited.

In short the empirical evidence shows that state supreme courts are much more likely to expand rights when citing sister state decisions expanding rights, and the vast bulk of all of the rights expanding decisions are cases in which the deciding court has cited sister state cases expanding rights. In addition, there is no evidence to suggest that opinion authors selectively cite cases and ignore contrary sister state decisions, at least not to the degree to draw comment from dissenting justices. Thirty-seven of the total 87 cases examined contained dissenting opinions, but none of these 37 dissents accused the majority of not following the majority rule across sister states or of manipulating or mischaracterizing the state of the law across sister states.

At this point it might be objected that the ABC analysis obscures the fact that some Group A cases also have citations to rights-expanding sister state cases, and likewise some Group C cases include citations to sister state cases that follow federal precedents. As discussed in the previous chapters, the idea of majority rule is incorporated into the ABC analysis. Some Group C cases are actually cases where the deciding court cited more rights-expanding sister state cases than federal-precedent-following sister state cases (“Mixed C” cases). And some Group A cases are actually cases where the deciding court cited more federal-precedent-

following sister state cases than rights-expanding sister state cases (“Mixed A” cases). To be specific, just under 40% of the Group C cases (9/23) were “Mixed C” cases (where a majority of the sister state citations were to rights-expanding sister state cases, but also included some federal-precedent-following sister state citations).¹²¹ Yet in six out of the eight instances where the Group C deciding court followed federal precedent there were no citations to sister state cases following federal precedent. In other words “Pure C” cases (with no citations to federal-precedent-following sister state cases) accounted for more of the Group C cases that followed federal precedent, even though one might expect “Mixed C” cases to be more likely to lead to a federal precedent following result. Likewise just under 40% of the Group A cases (8/22) were “Mixed A” cases (where a majority of citations were to federal-precedent-following sister state citations, but also included some rights-expanding sister state cases). Yet the only Group A case where the deciding court reached a rights expanding decision was a “Pure A” case. Therefore, finding no reason to further distinguish between “Pure C” and “Mixed C”, “Pure A” and “Mixed A” cases, I will refer hereafter only to Group A, Group B, and Group C cases.

The single most populated cell in Table 4-2 is the group of decisions that cite no sister state cases and which follow federal precedent (i.e. Group B decisions that follow federal precedent). Thus, in over 42% (37 of 87) of all cases examined state supreme courts simply follow federal precedent without citing sister states cases. Adding to this the 5 cases that expand rights without citing sister state cases we are reminded that in just under half of the cases (48%)

¹²¹ Of these 9 “Mixed C” cases there were 2 exceptional cases that were coded into Group C based on tiebreaker rules, since there was an equal number of rights-expanding sister state cases and federal-precedent-following sister state cases cited in those decision. In both cases the tiebreaker consisted of the fact that the rights-expanding sister state cases as a group were more prestigious. These were the only 2 decisions with equal numbers of sister state cases cited on both sides of the issue, and in both of these decisions the deciding court rendered a rights expanding decision.

there is no dialogue occurring between the sister states.¹²² Viewed from a different angle, however, the numbers for Groups A and C suggest that when state supreme courts do engage in dialogue, and cite sister state decisions, the deciding courts generally (80% of the time) make decisions consistent with the majority rule across those sister state citations.

The obvious outliers in Table 4-2 (from the perspective of dialogue theory) are in the upper right, lower middle, and lower left cells. I will in turn say a few words about the cases in each of these cells.¹²³ First, a discussion of what might have occurred in the cases in the upper right hand cell of Table 4-2—the Group C cases which cite sister state decisions expanding rights but the deciding court follows federal precedent. While state supreme courts expand rights in 65% of Group C cases, this means that in 35% of Group C the deciding court continues to follow federal precedent—and these are the cases found in the upper right hand cell of Table 4-2. Remember that Hypothesis 1 (Horizontal Federalism) predicts: “State supreme courts will be *more likely to* recognize additional rights if sister state courts, particularly prestigious sister state courts, have already done so.” (emphasis added). It does not suggest that every state supreme court decision will follow the majority rule across sister states. Of the eight cases in this upper right hand cell, half are cases from South Dakota (a conservative state) and Kansas (a moderate state) (both of whom are merit selection states), the only two states of the 9 states that did not have any cases that expand rights during the time period studied. While the citations to sister state cases expanding rights did not lead the South Dakota and Kansas Supreme Courts to expand rights in these four cases, it did appear to encourage vigorous dissents. Three of these four cases each had two dissenting justices arguing for expanded rights based on state constitutional provisions. The other four cases in the upper right hand cell were spread out across

¹²² Caution finds that dialogue exists in only 34.8% of cases (cases with citations to sister state decisions), meaning that in the sizable majority of cases in his data there is no dialogue between sister states.

¹²³ My discussion proceeds in order of the number of cases in each of these “outlier” cells.

four separate states (Illinois, Iowa, Minnesota, and Pennsylvania). And three of these four cases from other states also drew dissents. In other words, while these 8 cases technically are “outliers,” in many respects these cases are consistent with the prediction of Hypothesis 1. Six of the eight cases in this cell had dissents arguing for a rights expanding decision. While these dissents were unsuccessful in obtaining their desired outcome it is worth remembering that dissents are generally rare on state supreme courts, and even in these 87 state constitutional cases less than half of the cases drew dissents. Thus arguably the citation to sister state cases was making it more likely these decisions would be rights expanding decisions, and several justices were persuaded, it simply was not enough to alter the decision outcomes.

The cases in the lower middle cell (Group B cases citing no sister state decisions but the deciding court expands rights) also are not predicted by Hypothesis 1—but many are consistent with Hypothesis 2, the vertical federalism hypothesis.¹²⁴ Of the five cases in the lower middle cell, three cases come from Ohio, and in two of these three cases the Ohio Supreme Court justified its decision on textual difference between the Ohio Constitution and the U.S. Constitution.¹²⁵ In one of the two Ohio cases relying on textual differences, the Ohio Supreme Court also noted the U.S. Supreme Court had retreated from earlier more expansive federal precedent (consistent with Hypothesis 2a). In the third Ohio case the Ohio Supreme Court noted that the U.S. Supreme Court had retreated from earlier more expansive federal precedent as well as contradicting earlier Ohio precedent (consistent with both Hypothesis 2a and 2b). Of the other

¹²⁴ Remember Hypothesis 2 (Vertical Federalism) states: “State supreme courts will be more likely to recognize additional rights if (a) the current precedent of the Supreme Court is narrower than earlier Supreme Court decisions, or (b) the deciding court rendered expansive interpretations when Supreme Court precedent was unclear.”

¹²⁵ However, my research design did not preclude textual differences between the U.S. Constitution and the analogous state constitutional provision, it just attempted to minimize the number of such differences by focusing on provisions in the Bill of Rights were state constitutional provisions and often identical or nearly identical. Indeed the fact that there were only 5 attempts by justices to justify a different, more rights expansive outcome based on text/language differences between the state and federal constitutional provisions, and only these two were successful suggests the research design accomplished this goal. Please also see following footnote and accompanying text.

two cases in the lower middle cell, there was one each in Arkansas and Pennsylvania. The Arkansas decision also was consistent with Hypothesis 2b, relying upon earlier Arkansas precedent rendered when U.S. Supreme Court precedent was unclear. Only the Pennsylvania decision expanded rights without any of the predictors contained in Hypothesis 1 or 2.

To place these numbers from the lower middle cell in some context, the Ohio decisions justifying their decisions on the basis of textual differences were the only two decisions of the 87 cases that expanded rights based in part on differences in constitutional text and language (and two of only five cases to even make textual arguments—the other three cases containing textual arguments were instances where the dissenters made a textual argument but the majority decided to follow federal precedent anyway). It is not surprising that textual arguments were rare in these cases—that was by design. The decision to focus on cases with analogs to the Bill of Rights (as opposed to state constitutional claims based on equal protection, privacy, right to education, etc) was done purposefully to help exclude cases with textual differences between the U.S. Constitution and state constitutions.¹²⁶

B. Vertical Federalism results. Hypothesis 2, the Vertical Federalism hypothesis, seems to be supported by the cases in the data set, although there were fewer cases implicating Hypothesis 2 than Hypothesis 1. Only ten of the 87 cases noted that the U.S. Supreme Court had retreated from earlier more expansive federal precedent (consistent with Hypothesis 2a). Of these ten cases noting U.S. Supreme Court retreat, seven were rights expanding decisions. This is strong percentage support for Hypothesis 2a (70%), but based on relatively few cases.

Furthermore, five of these seven rights expanding decisions noting U.S. Supreme Court retreat

¹²⁶ Most state constitutions have provisions analogous to the 4th Amendment analogs in their state constitutions which are quite similar to the 4th Amendment itself (47 of the 87 cases involved 4th Amendment analog claims). While there are many states with 1st Amendment analogs with somewhat different language than the 1st Amendment, there were fewer cases (9 of 87) in the data set based on 1st Amendment analogs. Furthermore, most states still find the textual differences in free speech clauses not to be significant.

were also Group C cases where the deciding court cited sister state supreme courts expanding rights. Therefore much of the explanatory power may actually be with Hypothesis 1, not Hypothesis 2a (noting U.S. Supreme Court retreat), suggesting that U.S. Supreme Court retreat is a less substantial causal factor than sister state dialogue. This surmise is also supported by the fact that of the three cases where U.S. Supreme Court retreat was noted by the state supreme court but the state supreme court decided to follow federal precedent anyway, two of those three cases were Group A cases where the deciding court was also following the result suggested by the citations to sister state decisions following federal precedent.

As to Hypothesis 2b, that state supreme courts will be more likely to recognize additional rights if the deciding court rendered expansive interpretations when Supreme Court precedent was unclear, 21 of the 87 cases noted deciding court precedent that was more expansive than the subsequent (and controlling) U.S. Supreme Court precedent. In 52% (11 of 21) of these Hypothesis 2b cases (expansive deciding court precedent), the deciding court issued rights expanding decisions. However, eight of the eleven Hypothesis 2b cases with rights expanding decisions were also Group C cases with citations to sister state cases expanding rights, suggesting again, as with the Hypothesis 2a cases, that perhaps sister state dialogue is the more influential causal factor. On the other hand, the one case in the lower left hand cell was a case where the Pennsylvania Supreme Court expanded rights, even after citing sister state decisions following federal precedent, in part because of previous expansive Pennsylvania precedent.

Hypothesis 2b cases also present an additional analysis problem. The prior expansive precedent of the deciding court may be in part based upon the political ideology of the deciding court at the time of deciding the prior precedent. But if the deciding court was more “liberal” at time 1 when deciding the expansive precedent, and then follows that precedent at time 3 after the

intervening more restrictive Supreme Court decision at time 2, political ideology may be a significant causal factor directly influencing the decision at time 1, and then indirectly through precedential weight at time 3. The effect of political ideology may be obscured due to the multiple steps and because the cases examined in the data set are all at time 3. This idea cannot be conclusively disproven here, but some evidence suggests it is not an overwhelming influence. Each of the nine states had at least one decision citing a prior expansive precedent of their own court and no state had more than four such decisions. Even the two states with four expansive precedents (Ohio and Pennsylvania) did not always follow these expansive precedents. Note also that these two states with the most expansive precedents were in the “moderate” state ideology category. The Ohio Supreme Court followed its expansive precedents 50% of the time and the Pennsylvania Supreme Court followed three out of four of its expansive precedents. However, in the fourth case the Pennsylvania Supreme Court followed Group A sister state citations following federal precedent instead of its own previous precedent, vividly illustrating that dialogue across sister states does not always have a “liberal” impact.

C. Alternative Explanations. That leads to a discussion of the alternative explanations for state supreme court behavior. Again the research design was intended to help reveal whether horizontal and vertical federalism had an impact despite these alternative explanations. The evidence suggests that sister state dialogue influenced state supreme court decision making across all types of political ideology and across all types of selection method. All of the states followed the general trend contained in Table 3 and the increasing percentages of rights expanding decisions moving from left to right from column (Group) A, to column (Group) B to column (Group) C except for Kansas and South Dakota, which as noted above did not have any rights expanding decisions. This is consistent (except for Kansas and South Dakota) with what

was predicted for the ABC analysis: Group A should have a lower percentage of rights expanding decisions than Group B, and Group B had a lower percentage of rights expanding decisions than Group C.

It is true that three states (Alabama, Arkansas and Kansas) had no Group A cases to compare to Groups B and C. However, when compiling across political ideology categories and across selection method categories the predicted relationship held. (See Tables 4-4 through 4-8 on following pages.)

TABLE 4-3: Sister State Citations 3 Liberal States (IA, IL, MN)

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Following Federal Precedent</i>	6 (100%)	18 (100%)	3 (33%)
<i>Rights Expanding</i>	0 (0%)	0 (0%)	6 (67%)

N=33 (%) = percentage of decisions in each Group (column)

18% of cases are rights expanding

TABLE 4-4: Sister State Citations 3 Moderate States (KS, OH, PA)

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Following Federal Precedent</i>	14 (93%)	8 (67%)	2 (25%)
<i>Rights Expanding</i>	1 (7%)	4 (33%)	6 (75%)

N=36 (%) = percentage of decisions in each Group (column)

33% of cases are rights expanding

TABLE 4-5: Sister State Citations 3 Conservative States (AL, AR, SD)

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Following Federal Precedent</i>	1 (100%)	11 (88%)	3 (50%)
<i>Rights Expanding</i>	0 (0%)	1 (12%)	3 (50%)

N=19 (%) = percentage of decisions in each Group (column)

21% of cases are rights expanding

TABLE 4-6: Sister State Citations 3 Non-Partisan Election States (AR, MN, OH)

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Following Federal Precedent</i>	8 (100%)	13 (76%)	1 (13%)
<i>Rights Expanding</i>	0 (0%)	4 (24%)	7 (87%)

N=34 (%) = percentage of decisions in each Group (column)

35% of cases are rights expanding

TABLE 4-7: Sister State Citations 3 Partisan Election States (AL, IL, PA)

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Following Federal Precedent</i>	9 (90%)	13 (92%)	2 (25%)
<i>Rights Expanding</i>	1 (10%)	1 (7%)	6 (75%)

N=32 (%) = percentage of decisions in each Group (column)

25% of cases are rights expanding

TABLE 4-8: Sister State Citations 3 Merit Selection States (IA, KS, SD)

	Group A citations to sister state cases following federal precedent	Group B no sister state citations	Group C citations to sister state cases that expand rights
<i>Following Federal Precedent</i>	4 (100%)	11 (100%)	5 (71%)
<i>Rights Expanding</i>	0 (0%)	0 (0%)	2 (29%)

N=22 (%) = percentage of decisions in each Group (column)

9% of cases are rights expanding

When compiling into 3 state sets, Group A had an equal or lower percentage¹²⁷ of rights expanding decisions than Group B, and Group B had a lower percentage of rights expanding decisions than Group C across all of the various three state sets. There was only one very small exception to this uniform finding across the three state sets contained in Tables 4-4 through 4-8. In the three partisan-election states (Alabama, Illinois, Pennsylvania) Group B actually had a slightly smaller rights expanding percentage than Group A (7% rights expanding decisions for Group B versus 10% rights expanding decisions for Group A) while the theory suggests Group B should always be the baseline and have a higher rights expanding decision percentage than Group A. The fact that this is the only exception in all of the three state sets (and only by 3 percentage points) and Group C (citations to sister state decisions expanding rights) always had a higher rights expanding decision percentage suggests that the evidence supporting the theory is quite robust.

Finally, to help confirm the analysis above I performed a logit analysis, testing whether my explanatory variables (citations to sister state decisions, citations to previous deciding court precedent, and acknowledgement by deciding court that Supreme Court had restricted its previous more expansive decisions) had the hypothesized effects on the dependent variable, (whether the deciding court rendering a rights expanding decision) while controlling for the alternative hypotheses of state ideology and judicial selection methods. The results are listed in Table 4-9 below.

¹²⁷ In several sets Group A and Group B had equal 0% rights expanding decisions.

Table 4-9: Horizontal and Vertical Federalism Effects on Likelihood of Rights Expanding Decision by State Supreme Courts

Logit Estimates

Sister State Citations Following Federal Precedent	-.42* (.21)
Sister State Citations with Rights Expanding Decisions	.65* (.24)
Prior Expansive Precedent on Issue by Deciding Court	1.68* (.46)
Supreme Court Retreat from Previous Precedent	1.40 (.87)
State Ideology	-.026 (.45)
Missouri Plan/retention elections	-3.67 (2.34)
Partisan Elections	-1.05 (.54)
Constant	-5.64 (1.61)
Log likelihood	-47.8
<i>N</i>	86

Standard errors are in parentheses. The dependent variable is dichotomous (0 = follows federal precedent, 1 = rights expanding decision). Coefficients with an asterisk are significant at the .95 confidence level. Both “Sister State Citations” variables are count variables. “Prior Expansive Precedent” and “Supreme Court Retreat” are dichotomous variables. “State Ideology” is an ordered categorical variable (1 = conservative, 2 = moderate, 3 = liberal). “Missouri Plan” and “Partisan Election” are dummy variables measuring judicial selection methods, with the category of non-partisan elections omitted. Spatial autocorrelation is controlled for with a variable not shown here identifying each state and using the cluster command in Stata to adjust standard errors for 9 state clusters.

The results in Table 4-9 are consistent with the horizontal federalism hypothesis. The explanatory variables for the horizontal federalism hypothesis (“Sister State Citations Following Federal Precedent” and “Sister State Citations with Rights Expanding Decision”) are both significant at the 95% confidence level, with signs in the predicted directions. In other words as the number of citations to sister state decisions that expand rights increases, the more likely it is the deciding court will also decide to expand rights. Also, as the number of citations to sister state decisions that followed federal precedent increases, the deciding court is less likely to decide to expand rights. The predicted likelihood of a rights expanding decision when there are no rights expanding sister state citations is 5.7%. This likelihood increases to 10.4% when one rights expanding decision is cited, and on to 18% when 2 rights expanding decisions are cited, 30% when 3 rights expanding decisions are cited, and on to 45% when 4 rights expanding decisions are cited.

Likewise the explanatory variable for the second vertical federalism hypothesis, (Hypothesis 2(b) predicting deciding courts are more likely to expand rights when citing their own earlier precedent that rendered an expansive rights interpretation during the time when Supreme Court precedent was unclear) is also significant. However, the explanatory variable for Hypothesis 2(a), predicating a the deciding court will be more likely to expand rights when noting that the Supreme Court has retreated from previous expansive federal precedent, is not statistically significant. The measures for the alternative explanations also do not reach statistical significance. State ideology is not significant, and neither are the judicial selection dummy variables, at the 95% confidence level. It should be noted, however, that the partisan election dummy variable is significant at the 90% confidence level, and the Missouri plan dummy just misses significance at that level. Each has a negative sign, suggesting that the

absent dummy category, state supreme courts with non-partisan methods of judicial selection, represent the state supreme courts most likely to expand rights. However, again these findings are not statistically significant at the .95 level, and as discussed in Chapter 1, the theoretical reasons for an impact of judicial selection methods upon state constitutional decision making are conflicting. Clearly any claims about the effect of judicial selection methods would require more robust findings and better theorized explanations before such claims could be confidently accepted.

II. Prestigious States

My first hypothesis suggested that sister state supreme courts would be more likely to expand rights when sister state courts, *particularly prestigious sister state supreme courts*, had already done so. There does seem to be some support for this proposition, although it is a modest effect. In addition to some supportive statements by state supreme court justices (see next chapter), prestigious sister state courts were cited disproportionately often.

I originally identified 15 prestigious sister state courts based on Caldiera's 1983 article. Chapter 3 discusses several studies ranking courts and finds Caldiera's list to accurately include the same states as other more recent, but shorter lists. These fifteen states, ranked from most to least prestigious, are: California, New York, New Jersey, Pennsylvania, Massachusetts, Wisconsin, Illinois, Washington, Iowa, Michigan, Minnesota, Colorado, Kansas, Florida and Oregon. Decisions rendered by these 15 prestigious state courts were cited by the 9 states in this survey disproportionately often compared to the number of citations that should have been made to these 15 states if the citations had been distributed evenly across the state supreme courts in all 50 states.¹²⁸ There were a total of 246 citations to sister state decisions contained in the 45

¹²⁸ There is certainly the possibility of a productivity fallacy here (i.e. confusing productivity with persuasiveness/prestige). It is certainly possible that prestigious state courts have decided more state constitutional

opinions in the data set which cited sister state decisions.¹²⁹ If the 246 citations had been distributed evenly, with each state cited at the same rate, then each state supreme court would have been expected to be cited 4.9 times ($246 \div 50$).¹³⁰ Stated differently, if the citations were evenly distributed the 15 prestigious state supreme courts should have collectively accounted for 30% of the sister state citations and thus would have been collectively cited about 74 times. Instead, the 15 prestigious states accounted for 122 of the 246 citations, 49.6% of all the citations—approximately 48 more citations than if the citations were evenly distributed. The 15 prestigious states collectively were also relied upon (the deciding court reached a decision consistent with the outcome of the cited case) at slightly higher rates than other states. The 15 prestigious states were relied upon 56% of the time when cited for rights expanding decisions (compared to 51% for other states) and were relied upon 87% of the time when cited for cases following Supreme Court precedent (compared to 84% for other states). Overall the 15 prestigious states had an almost identical reliance rate as other states (72% to 73% respectively), but this was because the other states were cited proportionally more often for following the U.S. Supreme Court.¹³¹ The non-prestigious states were cited 66% of the time (83 of 124 citations) following the U.S. Supreme Court versus prestigious states being cited 51% (63 of 122 citations)

cases than the average state, and thus there are more state constitutional decisions from prestigious states to be cited by deciding courts compared to the number of state constitutional decisions from non-prestigious state courts. However, a productivity bias does not explain why prestigious states would have a slightly higher reliance rate compared to citations from non-prestigious states.

¹²⁹ Only 45 of the total 87 cases examined cited sister state decisions. The mean number of sister state citations per deciding court opinion (considering only decisions that cited at least one sister state opinion) was 5.5 citations per opinion. The median number of citations per opinion was 5. While the minimum and modal value was 1 citation (again because only the 45 cases that cited a sister state opinion are considered here), the maximum number was 17 sister state decisions cited in one opinion.

¹³⁰ I am ignoring here the fact that a couple states have bifurcated their courts of last resort.

¹³¹ This suggests that there might also be an ideological bias as well as a productivity bias. In other words, prestigious states might have proportionally more rights expansive precedents to be cited (suggesting prestigious states are more liberal and thus more likely to reach rights expansive precedents) in addition to having more total state constitutional decisions (which could be a function of population, court resources to focus on constitutional issues including the presence of intermediate appellate courts, as well as ideology—states might decide more state constitutional issues because litigants/attorneys respond to signals in previous decisions by liberal courts suggesting these courts are open to such claims thus more claims are litigated and presented for subsequent decision).

of the time following the Supreme Court, and sister state citations following Supreme Court precedent had considerably higher rates of reliance than sister state citations expanding rights.

While I identified 15 prestigious states at the outset, the data suggested not all of the 15 prestigious states were equally likely to influence their sister state supreme courts. The five most prestigious states (California, New York, New Jersey, Pennsylvania, and Massachusetts) from the original list of 15 prestigious states all shared three characteristics in this data: 1) they were cited at least 8 times; 2) they were cited by deciding courts for expanding rights at least 5 times; 3) they were relied upon by deciding courts at least two-thirds of the times cited (i.e. reliance rates $\geq 67\%$). Only one other state in the original 15 prestigious states met all of those criteria, and that state was Washington. (See Table 4-10 below). In fact, Washington (originally ranked 8th most prestigious) was the second most cited state supreme court after New Jersey, with 15 citations to Washington Supreme Court decisions compared to 16 citations (no other state was cited more than 9 times). Furthermore, Washington actually had a better reliance rate (80%) compared to any of the first five most prestigious states. So a case could be made that there were actually 6 particularly prestigious states or “super prestigious states.” These findings support Latzer’s (1991a) idea that courts of last resort in California and New York are leadership courts-- along with, according to this data, the state supreme courts in New Jersey, Pennsylvania, Massachusetts and Washington.

Table 4-10 Citations of Prestigious Sister States by 9 State Supreme Courts

	CA	NY	NJ	PA	MA	WI	IL	WA	IA	MI	MN	CO	KS	FL	OR
cited expanding	5	6	11	5	6	1	2	7	0	3	3	4	0	3	3
cited following	4	3	5	3	3	7	4	8	4	5	5	3	3	4	2
total citations	9	9	16	8	9	8	6	15	4	8	8	7	3	7	5
relied upon expanding	3	3	6	3	3	1	2	5	0	2	1	1	0	2	1
relied upon following	4	3	5	3	3	5	3	7	2	5	4	3	3	3	2
relied upon total	7	6	11	6	6	6	5	12	2	7	5	4	3	5	3
% relied upon	78	67	69	75	67	75	83	80	50	88	63	57	100	71	60

N=122 citations

A couple of the other original 15 prestigious states, Wisconsin and Michigan, came close to satisfying the three-part “super prestigious” standard suggested by the data, by satisfying two of the three categories above. Both Wisconsin and Michigan were cited 8 times and both had reliance rates greater than 67%, but Michigan was cited by deciding courts for expanding rights only 3 times and Wisconsin cited for expanding rights only once. Every other state originally identified as prestigious failed to satisfy at least two of the above “super prestigious” criteria.

On the other hand 13 of the 15 prestigious states were cited at least five times (what would have been predicted had citations been evenly distributed) by deciding courts and had reliance rates 55% or greater. Only Iowa and Kansas of the original 15 prestigious states failed to meet these lower threshold criteria (Iowa with 4 citations and 50% reliance, Kansas with only 3 citations but with 100% reliance rate). To compare no other state satisfied the three-part “super prestigious” criteria, but 6 of the original non-prestigious states (Connecticut, Georgia, Maryland, New Hampshire, North Carolina, and Vermont) also satisfied the lower threshold criteria of 5 citations and reliance rate $\geq 55\%$ based on the data collected. Four of these states, Connecticut, New Hampshire, North Carolina, and Vermont clearly appear to be prestigious in the field of state constitutional law according to the data—each of these four were cited at least 7

times, relied upon at least twice for expanding rights and relied upon at least three times for following the U.S. Supreme Court, and each had a reliance rate of at least 71%. Two other states, Georgia and Maryland were each cited five times, but only for following the U.S. Supreme Court.¹³² Hawaii was cited eight times, but had a dismal reliance rate of 38% as no court relied upon any of its five rights expanding decisions that were cited—demonstrating that merely being cited for expanding rights is not the same thing as being persuasive.

There are a couple of other points about the interaction of the prestigious and non-prestigious states. In only 5 of the 45 cases citing sister states were the non-prestigious states working alone or against the prestigious states collectively. In four of these five cases there were no prestigious states cited, and the only sister state decisions cited came from non-prestigious states. These four cases with only non-prestigious sister state citations happened to be 2 pure group A cases (only sister state citations following Supreme Court precedent) and 2 pure group C cases (only sister state citations expanding rights), and the deciding court followed the sister state cases cited in each of those four cases. In only one of the 45 cases citing sister state citations did the non-prestigious states come to a different conclusion than the prestigious states collectively. In that case, *Commonwealth v Russo* (Pa 2007) seven non-prestigious states were cited following the U.S. Supreme Court against two prestigious sister states (New York and Oregon) and two non-prestigious sister states. The Pennsylvania Supreme Court decided to follow the U.S. Supreme Court precedent.¹³³

¹³² Georgia was relied upon all 5 times it was cited (i.e. the deciding court reached the same result), but Maryland was only relied upon 3 of the 5 times cited.

¹³³ In *Russo* there were 3 U.S. Supreme Court dissenters, and the Pennsylvania dissent cited the U.S. Supreme Court dissent. The Pennsylvania dissent also made an argument based on the different text of the Pennsylvania Constitution. The Pennsylvania Supreme Court in *Russo* followed the U.S. Supreme Court on a 4-3 vote holding that landowners do not have an expectation of privacy in open fields, and thus the government does not need a search warrant under the Pennsylvania Constitution to search bait piles to illegally attract deer located in open fields on the defendant's property.

CHAPTER 5: SISTER STATE DIALOGUE: THE GOOD FAITH EXCEPTION

- I. The First Mover Decisions
- II. *Lincoln v State*
- III. *State v Wilmoth*
- IV. *State v Saiz*
- V. *Commonwealth v Edmunds*
- VI. *People v Krueger*
- VII. *State v Cline*
- VIII. *Garza v State*
- IX. *State v Daniel*
- X. Lessons

This chapter focuses on the influence of sister state decisions in a specific legal issue area: the good faith exception to the exclusionary rule. It addresses one of the weaknesses of Chapter 4 which is that each of the 87 decisions analyzed in Chapter 4 are analyzed in isolation. However, the reality is that these 87 cases cover numerous issues of constitutional law, and Chapter 4 ignores any trends across states and over time within particular areas of state constitutional law. In contrast, this chapter focuses upon one issue area of state constitutional law, tracking how state supreme courts have considered the specific issue of the good faith exception to the exclusionary rule. This chapter begins by showing that numerous states have rejected the good faith exception to the exclusionary rule on state constitutional grounds, and many (but not all) have done so while relying upon the reasoning of previous sister state supreme court decisions in this area of law. This chapter then examines the opinions in several of these cases to illustrate, based upon a textual analysis of the written opinion, how much attention was given in the deciding court's written opinion to sister state decisions. A large degree of attention to the reasoning of sister state decisions by the deciding court suggests that the sister state decisions helped inform the deciding court's decision making process.

The good faith exception to the exclusionary rule is one particularly important and active area in state constitutional jurisprudence. Recall from the Introduction, that the exclusionary rule is controversial because it prohibits the use of relevant, probative evidence of a particular criminal's guilt (without this evidence criminals may escape conviction and punishment) in order to advance a more general societal goal of scrupulous police conduct in future searches which respect the privacy interests protected by the Fourth Amendment. To help reduce the amount of excluded evidence, and thus limit the controversy, the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984), held that errors by judges and magistrates in issuing warrants should not be held against police officers acting in good faith reliance upon the warrant. These errors by judges are not grounds to exclude evidence from trial when a facially valid warrant is determined to be invalid only after the search warrant is executed. The Supreme Court explained that under the U.S. Constitution the sole justification for the exclusionary rule is deterrence of police misconduct. Therefore, when police officers act in good faith and rely upon the decision of a neutral magistrate in issuing a search warrant, even if that magistrate's decision is later found to be wrong, the evidence gathered as a result of that warrant should not be excluded from trial. When the police act in good faith, there is no police misconduct to deter, and thus no reason to apply the exclusionary rule—thus the good faith exception to the exclusionary rule was born.

State supreme courts have struggled to decide whether to follow the *Leon* precedent, which narrowed expansive federal precedent that had previously applied to all types of official conduct that led to unconstitutional searches. Application of the New Judicial Federalism to this area has already proven important in the state supreme court cases discussed later in this chapter, and if as several scholars have predicted, the Supreme Court is considering scaling back or doing away with the exclusionary rule entirely, it will likely prove even more important in the

aftermath of such a ruling. As David Moran reports, based on the U.S. Supreme Court's decision in *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court seems to be signaling that it is willing to further narrow the scope of the exclusionary rule.¹³⁴ The decision in *Hudson*, "calls into question the entire rationale of the exclusionary rule." (Moran 2006, p. 284). Adam Liptak (2009) suggests that Justice Kennedy seems to hold the pivotal vote to decide whether the Court will eliminate the exclusionary rule altogether. Wohl (2011) warns the 1961 *Mapp v Ohio* precedent applying the exclusionary rule to the states may be overruled explicitly, or it may experience the "death by a thousand cuts" through continuous expansion of exceptions that chip away at its underlying reasoning.

Even if the U.S. Supreme Court merely continues to narrow the federal exclusionary rule by expanding the good faith exception, it is necessary to canvass the decisions of the state supreme courts concerning exclusionary rules under state constitutions in order to determine whether citizens of a particular state continue to enjoy the protection of an exclusionary rule, and the scope of that exclusionary rule. This chapter traces the chronology of state supreme court consideration of the good faith exception under state constitutions since the time of the *Leon* decision, and then explores how the reasoning of the early state supreme court decisions in this area was discussed in subsequent decisions by state supreme courts.

Table 5-1 below tracks the consideration of the good faith exception to the exclusionary rule on state constitutional grounds.

¹³⁴ In *Hudson*, the Court refused to exclude evidence that was obtained in violation of the knock-and-announce rule when executing a search warrant, because the Court reasoned the evidence would have been found anyway had officers complied with the knock-and-announce requirement.

Table 5-1 Good Faith Exception in State Constitutional Law

Case name (citation includes state and year)	Expand rights or follow federal precedent?	Citation to Sister States?
<i>State v White</i> (Wash. 1982)	<i>Expand</i>	No
<i>Lincoln v State</i> (Ark. 1985)	Follow	No
<i>People v Bigelow</i> (N.Y. 1985)	<i>Expand</i>	No
<i>State v Wilmoth</i> (Ohio 1986)	Follow	No
<i>State v Brown</i> (Mo. 1986)	Follow	Yes
<i>State v Novembrino</i> (N.J. 1987)	<i>Expand</i>	Yes
<i>State v Carter</i> (N.C. 1988)	<i>Expand</i>	Yes
<i>State v Saiz</i> (S.D. 1988)	Follow	Yes
<i>State v Marsala</i> (Conn. 1990)	<i>Expand</i>	Yes
<i>Cmnwlth v Edmunds</i> (Pa. 1991)	<i>Expand</i>	Yes
<i>State v Oakes</i> (Vt 1991)	<i>Expand</i>	Yes
<i>Crayton v Cmnwlth</i> (Ky. 1992)	Follow	No
<i>State v Guzman</i> (Id 1992)	<i>Expand</i>	Yes
<i>State v Gutierrez</i> (N.M. 1993)	<i>Expand</i>	Yes
<i>State v Canelo</i> (N.H. 1995)	<i>Expand</i>	Yes
<i>State v Lopez</i> (Haw. 1995)	<i>Expand</i>	Yes
<i>People v Krueger</i> (Ill. 1996)*	<i>Expand</i>	Yes
<i>State v Ward</i> (Wis. 2000)	Follow	Yes
<i>State v Cline</i> (Iowa 2000)	<i>Expand</i>	Yes
<i>Dorsey v State</i> (De. 2000)	<i>Expand</i>	Yes
<i>Garza v State</i> (Minn. 2001)	<i>Expand</i>	No
<i>State v Lacasella</i> (Mont. 2002)	<i>Expand</i>	No
<i>People v White</i> (Miss. 2003)	Follow	No
<i>People v Goldston</i> (Mich. 2004)	Follow	Yes
<i>State v Daniel</i> (Kan. 2010)	Follow	No

**People v Krueger* follows good faith exception in *Leon*, but not the later expansion of the good faith exception in *Illinois v Krull*, 480 U.S. 340 (1987)

As Table 5-1 shows, the dialogue between state reacting to the *Leon* decision has varied over the last few decades. The decade of the 1980s saw a mixed verdict, with four state supreme courts rejecting the good faith exception recognized in *Leon* under their state constitutions, and four states explicitly following *Leon* on state constitutional grounds (although other state supreme courts would have been following the *Leon* decision on federal constitutional grounds). In the 1990s momentum shifted to those states that chose to expand rights under their state

constitutions. During this decade eight states recognized expanded rights under their state constitutions, and only one state explicitly followed the federal rule in interpreting their state constitution. Interestingly, each state supreme court that expanded rights during the 90s cited sister state decisions. The only state to follow federal precedent during this decade did not look to what sister states were doing. That trend in favor of expanding rights continued into the first years of the 21st century (although sister state decisions were not always cited). However, beginning in 2003 a group of three states in succession chose to interpret their state constitutional provisions consistently with the precedent of the U.S. Supreme Court in *Leon*. One of these three states, Michigan, did so even while citing sister state decisions.

The concern of this chapter is not merely to show the course of state constitutional decisions over time, but to investigate to what extent state supreme courts seem to be influenced by the decisions of their sibling jurisdictions. Of the 25 states that have so far explicitly considered whether to reject the good faith exception to the exclusionary rule under their state constitutions, 16 states (or 64%) have rejected the good faith exception and 9 have chosen to follow federal precedent on state constitutional grounds.¹³⁵ Importantly of the 16 states that cited sister state decisions,¹³⁶ only 4 states (25%) followed the *Leon* precedent. Of the 9 states that did not cite sister state decisions,¹³⁷ 5 states (55%) followed the *Leon* precedent. The relationship between sister state citations and decision outcome is depicted in Table 5-2 below:

¹³⁵ Of course it is important to remember that the other 25 states are presumably following the *Leon* precedent on federal constitutional grounds (unless they have state legislation or state court rules to the contrary, although such rules are rare). Therefore if these 25 states who have not yet considered the issue specifically on state constitutional grounds are added to the 9 that explicitly follow the *Leon* precedent on state constitutional grounds, it is probably more accurate to say the *Leon* precedent is still followed by approximately 68% of the states.

¹³⁶ Not to be confused with the different group of 16 states that expanded rights.

¹³⁷ Not to be confused with the different group of 9 states that followed federal precedent.

TABLE 5-2: Rates of Rejection of Good Faith Exception on State Constitutional Grounds Depending Upon Presence of Sister State Citations

	Decisions with citations to sister state cases	Decisions without citations to sister state cases
<i>Decisions Expanding Rights by Rejecting Good Faith Exception</i>	12 (75%)	4 (45%)
<i>Decisions Following Federal Precedent</i>	4 (25%)	5 (55%)

N=25 (%) = percentage of decisions in each column

While this comparison of rates of rejecting the good faith exception depending upon whether sister state decision are cited suggests that sister state decisions may be influencing subsequent state supreme court decisions, the next step is to examine the decisions themselves for evidence in the text of the opinions that the reasoning of prior sister decisions influenced the decision making.

I. The First Mover Decisions.

The first decision listed in Table 5-1 above, *State v White*, 640 P.2d 1061 (Wash. 1982), actually predates the *Leon* decision by two years, but anticipates several of the arguments that will be made against *Leon* by later state supreme courts. In particular, the five member majority in *White* was concerned that the legislature had attempted an end run around constitutional principles, and felt legislative, as well as law enforcement, misconduct needed to be deterred by the exclusionary rule:

We believe the stop-and-identify statute in question to be an unwarranted extension of the *Terry* stop. It makes criminal exactly what *Terry* is intended to protect -- the right to refuse to answer. Statutes such as RCW 9A.76.020 purport to create a substantive offense, but have the effect of negating the probable cause requirement basic to the Fourth Amendment. If we were to permit the use of

evidence obtained incident to an arrest under this statute, we would allow the Legislature to make an "end run" around the Fourth Amendment. *See generally Constitutional Law: Search and Seizure -- The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine -- Michigan v. DeFillippo*, 443 U.S. 31 (1979), 55 Wash. L. Rev. 849, 861-67 (1980). This we cannot permit. Neither can we allow the officer's claim of good faith to supplant independent judicial scrutiny of police conduct.

The good faith arrest exception is unworkable and is contrary to well established Fourth Amendment principles. As pointed out by Judge Browning: "The public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct, *but the public interest is served by deterring legislators from enacting such statutes.*" (Italics ours.) *Powell v. Stone*, 507 F.2d 93, 98 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976).

The potential abuses envisioned by Judge Browning are evident in this case. In 1971, Mountlake Terrace Ordinance 405 was invalidated for being unconstitutionally vague. *Mountlake Terrace v. Stone*, 6 Wn. App. 161, 492 P.2d 226 (1971). The language of that ordinance was identical to RCW 9.69.060, which had been in existence since 1909. The Legislature responded in 1975 by repealing RCW 9.69.060 and enacting an almost identical provision, RCW 9A.76.020. RCW 9.69.060 was eventually invalidated in 1978 in *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978), but by that time the new provision accomplished the same purpose. The need for deterrence of such legislative conduct in the future is as essential as deterring unlawful police action. Firmly applying the exclusionary rule to prevent the use of evidence obtained pursuant to such statutes works to that end. [640 P.2d at 1069-70 (footnote omitted)].

As seen in the proceeding quote, the Washington Supreme Court uses both law review articles and reasoning adopted from other courts (although not sister state courts) to support its decision. The Washington Supreme Court goes on to make clear that the Washington Constitution has different text protecting home privacy than does the 4th Amendment by noting that Washington Constitution Art. I sec. 7 provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington Supreme Court argues this section differs from the Fourth Amendment in that it "clearly recognizes an individual's right

to privacy with no express limitations.” 640 P.2d at 1070. In addition, the majority argues: “Historical evidence reveals that the framers of the Washington Constitution intended Const. art. 1, § 7 to have a meaning different from the federal provision. The Constitutional Convention of 1889 was presented with a proposed state provision with language identical to the Fourth Amendment. This proposal was rejected in favor of our current version of Const. art. 1, § 7.” 640 P.2d at 1071. Thus, while the Washington Supreme Court is making arguments based on reasoning similar to that employed subsequently by other state supreme courts, particularly the Iowa Supreme Court (see discussion of *State v Cline* below in this chapter), it also appears to have strong textual and historical arguments to distinguish its state constitutional provisions from the federal constitutional provisions.

By contrast, in 1985 after *Leon* was decided, the Court of Appeals of New York in *People v Bigelow*, 488 N.E.2d 451, unanimously rejected the good faith exception in one paragraph, citing only one legal treatise (albeit authored by Wayne LaFave).¹³⁸ This despite being assisted by the filing of several amicus curiae briefs, with at least one such brief directly addressing the good faith exception issue:

Whether or not the police acted in good faith here, however, the *Leon* rule does not help the People's position. That is so because if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future (*see*, 3 LaFave, *op. cit.* § 11.4, at 645, 1985 Pocket Part, at 319-320). We therefore decline, on State constitutional grounds, to apply the good faith exception the Supreme Court stated in *United States v Leon*. [488 N.E.2d at 458].

The introductory material in the Lexis-Nexis version of the opinion notes that the amicus brief for the New York State District Attorneys Association had specifically argued “This court should adopt the good-faith exception to the exclusionary rule announced in *United States v Leon*.”

¹³⁸ See below discussion of deference given to Wayne LaFave in discussion about *State v Cline* case below.

However, the New York Court of Appeals rejected this argument, as well as the People's apparently similar argument, without much explanation. It is unclear why the New York Court of Appeals dealt so briefly with this issue.

It was not until the New Jersey Supreme Court in 1987 decided *State v Novembrino*, 519 A.2d 820, that there was a thoroughly reasoned opinion that rejected the *Leon* holding on state constitutional grounds. The various majority, concurring and dissenting opinions in *Novembrino* covered over 50 pages in the Atlantic Reporter. The majority reviewed the arguments made by both sides in the 6-3 *Leon* decision, including considerable time reviewing the arguments of the dissenting opinions. The New Jersey majority then reviewed the historical development of the exclusionary rule in New Jersey. Next, like the New York Court of Appeals, the New Jersey Supreme Court turned to Professor LaFave, although it quotes rather than merely citing his legal treatise, before noting it finds his criticism of the good-faith exception "to be persuasive." 519 A.2d at 853-54. The New Jersey Supreme Court also observes "that *Leon* has generated significant debate in other jurisdictions" and includes a large string citation to cases in other states (most of which followed the *Leon* precedent on federal constitutional grounds) but also includes a cite with parenthetical quote to the *Bigelow* case as well as a couple of state intermediate appellate courts rejecting the good faith exception. 519 A.2d at 855. It appears that the New Jersey Supreme Court benefitted from several amicus curiae briefs in reaching its decision. It is worth noting that the *Novembrino* decision will consistently be one of the decisions cited by state supreme courts who choose to cite sister state decisions, presumably because of its thoroughly reasoned opinion.¹³⁹

¹³⁹ The *Novembrino* decision serves as an illustration of why the New Jersey Supreme Court was the second most frequently cited state supreme court by the states in this data set.—see discussion of prestigious state courts in the previous chapter.

Interestingly, of the nine states in the research design, eight of the states (all but Alabama) have directly addressed the issue of the good faith exception to the exclusionary rule. Instead of discussing each of the decisions listed in Table 5-1, the decisions of these eight states will serve as illustrations of the progression of the dialogue (or lack thereof) across the states. Of these eight states 4 chose to expand rights, while 4 chose to follow federal precedent. Like the first mover decisions discussed above, the decisions from these eight states will be explored below for evidence that sister state citations influenced the decision making process.

II. *Lincoln v State*. The Arkansas Supreme Court in *Lincoln v State*, 685 S.W.2d 166 (Ark. 1985) was the first of the state supreme courts from the nine states in the research design to have considered the good faith exception issue, albeit very briefly, on state constitutional grounds. The Arkansas Supreme Court was also the first state to consider the issue on state constitutional grounds following the *Leon* decision (as *Lincoln* was decided prior to the *Bigelow* and *Novembrino* decisions discussed above). The Arkansas Supreme Court in *Lincoln* followed federal precedent without citing any decisions to sister state cases, or any legal treatises on the issue. The majority disposed of the issue in two short paragraphs noting only that the *Leon* case had been decided by the Supreme Court and that the Arkansas Supreme Court would follow that decision:

The Court of Appeals certified the case to us as presenting a significant and important issue concerning the effect upon our law of recent Supreme Court decisions modifying the exclusionary rule in search-and-seizure cases. [*United States v. Leon*, 468 U.S. 897 (1984)]. By now we have expressed our intention of following the modified rule, a position to which we shall adhere. *McFarland and Soest v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985).

Counsel for the appellant, in challenging the sufficiency of the affidavit for the search warrant, relies upon the law that was applicable before the *Leon* and *Sheppard* cases, although they were decided three months before the appellant's brief was filed. The earlier law is no longer applicable. There is no vested right

in a rule of evidence. *Reid v. Hart*, 45 Ark. 41 (1885). Indeed, the Supreme Court applied its new rule retroactively in *Leon*, reversing a federal Court of Appeals decision which had invalidated a search-warrant affidavit in reliance on the pre-existing law.

There was no discussion of the reasoning in *Leon*, no quotations from that case or any other case on the issue, and no citations to legal treatises. Specifically the Arkansas Supreme Court did not cite the earlier *State v White* case from Washington in 1982, which predated the *Leon* decision in 1984.

One lone dissenter spent one paragraph questioning the appropriateness of the good faith exception to the exclusionary rule on the basis of the Arkansas Constitution. Justice John I. Purtle's argument was consistent with both prongs of my vertical federalism hypothesis. He bemoaned what he saw as a "repudiation of more than 100 years of precedent and the destruction of parts of the Arkansas and United States Constitutions." 685 S.W.2d at 110. He seemed motivated by the arguments that U.S. Supreme Court was retreating from its earlier expansive precedent, and the Arkansas Supreme Court was likewise abandoning state precedent made while the federal precedent was more expansive. Justice Purtle went on to make a basic argument stemming from the idea of New Judicial Federalism: "I have never felt that this court is bound by the opinions of the United States Supreme Court in matters where our Constitution and laws are more protective of individual rights than are those of the United States." 685 S.W.2d at 110. It was a short objection, however, as the entire decision, including both majority and minority opinions, took only 4 pages in the South Western Reporter.¹⁴⁰

III. State v Wilmoth. The following year (after *Bigelow*, but prior to *Novembrino*) the Ohio Supreme Court in *State v Wilmoth*, 490 N.E.2d 1236 (Ohio 1986) followed federal

¹⁴⁰ I count pages based on the published paper copies of the West Reporter system to keep a consistent standard that is easily accessible to all scholars regardless of the electronic system used to retrieve the cases since each system reports the West Reporter pagination.

precedent without citing any decisions to sister state cases. Yet the Ohio Supreme Court spent considerably more attention on the legal issue of the appropriateness of the good faith exception to the exclusionary rule than did the Arkansas Supreme Court, and two Ohio justices dissented on state constitutional grounds. The majority and dissents spanned 15 pages in the *Northeastern Reporter*. While neither majority nor dissenting opinion cited sister state decisions, both cited numerous federal and Ohio cases analyzing the purpose behind the exclusion rule. The majority focused upon the costs to law enforcement posed by the exclusionary rule, and Ohio cases holding that only constitutional violations, not violations of statutes or court rules, justify application of the exclusionary rule in Ohio. The Ohio dissent, in addition to focusing on lower federal court cases and Ohio cases to support its position, also cites Justice Brennan's dissenting opinion in *Leon*, and a law review article about the origin and purposes of the exclusionary rule. At this point only two sister states (*White* and *Bigelow*) had reached rights expanding decisions on this issue (although no sister state decisions were cited by either the majority or the dissent).

IV. *State v Saiz*. In *State v Saiz*, 427 N.W.2d 825 (S.D. 1988), the South Dakota Supreme Court spends 7 pages of the North Western Reporter (between majority, concurring and dissenting opinions) discussing the “only meritorious issue” presented in the case, that of the good faith exception to the exclusionary rule. The majority acknowledges, by citing two law review articles, that “[t]he *Leon* decision has been extensively critiqued.” 427 N.W.2d at 828. Yet the majority goes on to say that “we find the *Leon* case persuasive and adopt its reasoning under the South Dakota Constitution Art. VI, § 11.” 427 N.W.2d at 828. The concurrence, while not directly citing sister state cases, instead cites an article in the *Wall Street Journal* (which is quite unusual in my experience—but what I have counted as a sister state citation in Table 5-1) that describes actions by the New Jersey Supreme Court protective of rights

(presumably referencing the *Novembrino* decision). The concurrence acknowledges this supports the dissents viewpoint:

Specifically, the State of New Jersey is portrayed as having a Supreme Court which protects, very jealously, individual liberties under the New Jersey State Constitution. And even more specifically, the New Jersey Supreme Court, per the article, veered away from the "good faith" ruling of the United States Supreme Court when Fourth Amendment scrutiny pertains to probable cause and search warrants. ...All in all, the article in the Wall Street Journal wins credence to [the dissent's] viewpoints of protecting citizens' rights under our state constitution to a greater extent than that which is now being done by the United States Supreme Court under the federal constitution. [427 N.W.2d at 830-31]

Yet the concurrence, while showing some sympathy to the idea of greater rights protection under the South Dakota Constitution, goes on to vote with the majority by accepting the basic reasoning of the *Leon* decision: "Surely, the exclusionary rule was designed to prevent and deter police misconduct rather than to punish any error of a judge or magistrate." 427 N.W.2d at 831. The dissent discusses specific legal rules involving the search warrant at issue, but clearly would reach a different conclusion under the South Dakota Constitution. By this time in 1988, two more states had reached rights expansive decisions on the basis of their state constitutions (including the New Jersey Supreme Court in *Novembrino*) and one more state supreme court had explicitly rejected such arguments.

V. *Commonwealth v Edmunds*. The Pennsylvania Supreme Court in *Commonwealth v Edmunds*, 586 A.2d 887 (Pa. 1991) rejected the good faith exception under the Pennsylvania Constitution after considerable attention to the reasoning employed by sister state courts in a variety of cases. As will be discussed in the next chapter, the majority in *Edmunds* established a rule in Pennsylvania that attorneys should generally brief how other state supreme courts have addressed similar issues under their state constitutions. The case was the second longest case considered here (after *Novembrino*), covering 22 pages in the Atlantic Reporter between the

majority, concurring and dissenting opinions. The Pennsylvania Supreme Court, consistent with its new rule directing attorneys and lower courts to consider sister state decisions, devoted an entire section of their opinion to analyzing the decisions from other states. The majority of the Pennsylvania Supreme Court observed in this section that:

A mere scorecard of those states which have accepted and rejected *Leon* is certainly not dispositive of the issue in Pennsylvania. However, the logic of certain of those opinions bears upon our analysis under the Pennsylvania Constitution, particularly given the unique history of Article 1, Section 8.

In this respect, we draw support from other states which have declined to adopt a "good faith" exception, particularly New Jersey, Connecticut and North Carolina.

...

Similarly, the Connecticut Supreme Court -- which most recently rejected the good faith exception on August 7, 1990 -- concluded that the purpose of the exclusionary rule under Article I, Section 7 of the Connecticut Constitution, was to "preserve the integrity of the warrant issuing process as a whole."

More directly on point, the North Carolina Supreme Court ... rejected the "good faith" exception to the exclusionary rule, noting the importance of the *privacy rights* flowing from the search and seizure provision in the North Carolina Constitution. The court in *Carter* emphasized the need to preserve the integrity of the judiciary in North Carolina....

We similarly conclude that, given the strong right of privacy which inheres in [Pennsylvania Constitution] Article 1, Section 8, as well as the clear prohibition against the issuance of warrants without probable cause, or based upon defective warrants, the good faith exception to the exclusionary rule would directly clash with those rights of citizens as developed in our Commonwealth over the past 200 years. To allow the judicial branch to participate, directly or indirectly, in the use of the fruits of illegal searches would only serve to undermine the integrity of the judiciary in this Commonwealth. [586 A.2d at 900-01 (citations omitted)].

The dissent in the case¹⁴¹ however, rejected the expansion of rights under the Pennsylvania Constitution:

I would choose to accept the rationale of the Supreme Court and recognize the "good faith exception" of *Leon* to the exclusionary rule as have eighteen of our sister states.^[142] My opinion is not merely grounded in the absurdity of excluding this evidence, nor only upon the persuasiveness of *Leon*, but also because it is firmly grounded in Pennsylvania jurisprudence. To now reject the holding of *Leon* for Pennsylvania is mere fiat, an exercise of personal illumination about a need for protection not only from the police but from the judiciary.

...The Supreme Court of the United States is a world landmark for the protection of constitutional rights. What they require we enforce; what they allow we ought not deter except upon clear evidence of positive need.
[586 A.2d at 909].

It seems evident from opinions that passions were running high on this case in the Pennsylvania Supreme Court, perhaps suggesting an ideological dimension to the case. Yet again, the most important take home from this case is the Pennsylvania Supreme Court signaling that it would consider sister state decisions not only in this case, but regularly in future cases as well, and instructing attorneys to include in their briefs decisions of sister state courts.

VI. *People v Krueger*. In *People v Krueger*, 675 N.E.2d 604 (Ill. 1996) the Illinois Supreme Court made a rights expanding decision under the Illinois Constitution, rejecting the U.S. Supreme Court's expansion of the *Leon* precedent in *Illinois v. Krull*, 480 U.S. 340, 94 L. Ed. 2d 364, 107 S. Ct. 1160 (1987) (extending the good faith exception to cover evidence collected pursuant to state statutes later declared unconstitutional). The majority opinion and dissents cover 7 pages in the North Eastern Reporter. The majority notes the *Krull* case broadened the *Leon* precedent by a bare majority vote. The majority continues by identifying a

¹⁴¹ One justice wrote the dissent, and would have been joined by another justice who concurred in the result, except that the concurrence found the Pennsylvania Rules of Court prevented the need to reach the constitutional question, but still felt it necessary to express his "outrage in the result of cases such as this" deciding the case on the basis of the Pennsylvania Constitution. 586 A.2d at 906.

¹⁴² Presumably including both cases decided explicitly on state constitutional grounds, and decisions merely applying the good faith exception on Fourth Amendment grounds.

major underlying reason for the *Krull* expansion as the assumption that “that legislators are not inclined to act in contravention of fourth amendment values; as a result, the majority found no evidence that the exclusionary rule is necessary to deter legislators from enacting unconstitutional statutes.” 675 N.E.2d at 610. This is an overly narrow assumption on the part of the U.S. Supreme Court according to the majority. The majority then spends several paragraphs considering the arguments made by the dissenters on the Supreme Court in *Krull*.

The majority then observes, consistent with my vertical federalism hypothesis (prior expansive state precedent will make the deciding court more likely to expand rights) that “our state exclusionary rule has applied in Illinois for more than 70 years to suppress evidence gathered in violation of the Illinois Constitution's prohibition against unreasonable searches and seizures ... [and] [t]his exclusionary rule has always been understood to bar evidence gathered under the authority of an unconstitutional statute.” 675 N.E.2d at 611-12. The majority also cites several sister state decisions,¹⁴³ as well as legal treatises criticizing *Krull*. Yet the majority also continues to focus on the idea that the exclusionary rule should apply when the legislature errs constitutionally, but not when judges and magistrates do (and is perhaps unique amongst state supreme courts on this point):

Not surprisingly, several fourth amendment scholars have severely criticized *Krull*. *E.g.*, 1 W. LaFare, *Search & Seizure* § 1.3(h), at 96-99 (3d ed. 1996). Our own appellate court has determined that the *Krull* good-faith exception violates the Illinois Constitution. *People v. McGee*, 268 Ill. App. 3d 32, 205 Ill. Dec. 883, 644 N.E.2d 439 (1994). In addition, several state courts of last resort presumably will reject *Krull*'s extension of the good-faith exception based on their determination that the *Leon* good-faith exception violates their respective state constitutions. See *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *State v. Oakes*, 157 Vt. 171, 598 A.2d 119 (1991); *State v. Marsala*, 216 Conn. 150, 579 A.2d 58 (1990); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988); *State v.*

¹⁴³ Including the *Edmunds* case from Pennsylvania and the *Novembrino* decisions from New Jersey.

Novembrino, 105 N.J. 95, 519 A.2d 820 (1987). This result is self-evident because one cannot reject *Leon*'s good-faith exception and accept *Krull*'s extension of that exception.

Before concluding, we note that our decision today does not impact the *Leon* good-faith exception. See *People v. Turnage*, 162 Ill. 2d 299, 306, 205 Ill. Dec. 118, 642 N.E.2d 1235 (1994). Although the converse is not true, one can fully accept the rationale and result in *Leon* while rejecting the rationale and result in *Krull*. This is precisely what Justice O'Connor did in her dissent in *Krull*. [675 N.E.2d at 612].

The lone dissenter in the case, however, rejects the expansion of rights under the Illinois Constitution in *Krueger*:

I do not agree with the majority's conclusion that the Illinois Constitution forbids in this case what the United States Constitution clearly allows. I would therefore apply the good-faith exception recognized by the Supreme Court in *Illinois v. Krull*, 480 U.S. 340, 94 L. Ed. 2d 364, 107 S. Ct. 1160 (1987). [675 N.E.2d at 613].

The dissent goes on to reason that the majority “does not point to anything in either the text or history of our state constitution that would warrant this court in reaching a result different from the one reached by the United States Supreme Court in *Krull*.” 675 N.E.2d at 613. While this is the perspective of only the dissent in this case, the dissent’s reasoning here would effectively become the reasoning, and the standard, the Illinois Supreme Court would use when it explicitly adopted a partial lockstep approach in subsequent cases and rejected looking to sister state decisions for guidance.

VII. *State v Cline*. The Iowa Supreme Court in *State v. Cline*, 617 N.W.2d 277 (Iowa 2000) unanimously expanded rights under the Iowa Constitution in a decision stretching over 16 pages of the North Western Reporter. The decision by former Chief Justice Marsha K. Ternus relied heavily upon the reasoning of sister state opinions which was woven into several parts of the decision. The Iowa Supreme Court considered the reasoning of most all of the sister state courts that had preceded it in expanding rights, canvassing the different reasons previous courts

had offered to reject the *Leon* precedent in interpreting their state constitutions. The Iowa Supreme Court cited 12 sister state cases expanding rights under their state constitutions, but also acknowledged 4 sister state cases that had explicitly followed the *Leon* precedent under their state constitutions. The Iowa decision also noted previous expansive Iowa precedent as well as the Supreme Court's retreat from previous precedent:

Although more recent Supreme Court decisions, as represented by *Leon*, have narrowed the focus of the exclusionary rule to the deterrence of constitutional violations by law enforcement, the rule was originally justified for the additional reasons that it provided a remedy for the constitutional violation and protected judicial integrity. [*Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961)]. Regardless of whether one believes that the post-*Mapp* cases have revised the history of the exclusionary rule or merely refined the rule, we think the rule serves a purpose greater than simply deterring police misconduct. Clearly our early cases viewed the exclusionary rule as a remedy for the constitutional violation and relevant to the integrity of the courts. [617 N.W.2d at 289]

The Iowa Supreme Court's opinion systematically considered and rejected the reasoning in *Leon* by using arguments from sister state decisions. In particular the idea that the exclusionary rule was designed only to deter police misconduct was challenged:

Even in the face of United States Supreme Court decisions stating that the purpose of the rule was simply to deter unlawful police action, our court stated that the exclusion of tainted evidence also "protects the integrity of the judiciary." *State v. Hamilton*, 335 N.W.2d 154, 158 (Iowa 1983).

Our conclusion that the exclusionary rule provides a remedy for the constitutional violation finds support in decisions from other states. *E.g.*, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660, 671 (Idaho 1992) (holding rule is a remedy for illegal searches and seizures); *State v. Canelo*, 139 N.H. 376, 653 A.2d 1097, 1105 (N.H. 1995) ("The exclusionary rule serves to redress the injury to the privacy of the search victim . . ."); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820, 856 (N.J. 1987) ("The rule also serves as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches."); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553, 557 (N.C. 1988) ("the rule of exclusion is the only available remedy to protect society from the excesses which led to the constitutional right" (quoting *Eleuteri v. Richman*, 26 N.J. 506, 141 A.2d 46, 49 (N.J. 1958))). It is true, as the Supreme Court has noted, that suppression of the evidence does not "cure" the constitutional invasion, *see Leon*,

468 U.S. at 906, 104 S. Ct. at 3412, 82 L. Ed. 2d at 687, but it is clearly the best remedy available. As with many civil remedies, the exclusionary rule merely places the parties in the positions they would have been in had the unconstitutional search not occurred, and the State is deprived only of that to which it was not entitled in the first place. *See Canelo*, 653 A.2d at 1105; *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052, 1067 (N.M. 1993).

As this court has stated, the exclusionary rule also protects the integrity of the courts. *See Hamilton*, 335 N.W.2d at 158; *accord Guzman*, 842 P.2d at 671; *Canelo*, 653 A.2d at 1105; *Gutierrez*, 863 P.2d at 1068 (citing *Sheridan*, 121 Iowa at 166-67, 96 N.W. at 731). The reasoning that leads to this conclusion is obvious. By admitting evidence obtained illegally, courts would in essence condone the illegality by stating it does not matter how the evidence was secured. But it ought to matter, as the Kansas federal district court observed many years ago: "Shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done defendants by the ruthless invasion of their constitutional rights, and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen." *United States v. Mounday*, 208 F. 186, 189 (D. Kan. 1913). We agree. Judges would become accomplices to the unconstitutional conduct of the executive branch if they allowed law enforcement to enjoy the benefits of the illegality. [617 N.W.2d at 289-90]

The Iowa Supreme cited numerous sister state supreme court decisions challenging several underlying premises of the *Leon* decision, noting that recognizing the good faith exception would deprive citizens of their only effective constitutional remedy to illegal actions. Rejecting the exception, on the other hand, would help preserve the legitimacy and integrity of both the judicial and legislative branches. The Iowa Supreme Court continued by making the following point, again based largely on sister state arguments (including some first referenced in the previous quote), that judicial and legislative officers and institutions benefited from an integrity standpoint in rejecting the good faith exception:

Even if we were to accept the Court's proposition that the exclusionary rule is aimed solely at deterrence, we cannot accept the Court's limitation on the deterrence function to law enforcement. Common sense tells us that the exclusionary rule prompts more care and attention at all stages of the warrant-issuing process, including by the judicial officers issuing the warrant. *See State v. Marsala*, 216 Conn. 150, 579 A.2d 58, 67 (Conn. 1990) ("we cannot agree that

the rule as it stood before *Leon* was not a significant factor inducing judges to take seriously their obligation to ensure that the probable cause requirement . . . had been met before issuing search warrants"); *Guzman*, 842 P.2d at 672 (stating that rule influences judicial behavior and "encourages thoroughness in the warrant issuing process"); *State v. Oakes*, 157 Vt. 171, 598 A.2d 119, 125 (Vt. 1991) (noting the exclusionary rule promotes "institutional compliance" with the Fourth Amendment). The same can be said for legislative action. The knowledge that an unconstitutional statute will be of no assistance to law enforcement will certainly tend to encourage lawmakers to take care to ensure that any law they enact passes constitutional muster. See *State v. White*, 97 Wn.2d 92, 640 P.2d 1061, 1070 (Wash. 1982) ("The need for deterrence of such legislative conduct in the future is as essential as deterring unlawful police action."). Thus, the exclusionary rule serves a deterrent function even when the police officers act in good faith. Consequently, to adopt a good faith exception would only encourage lax practices by government officials in all three branches of government. See *Marsala*, 579 A.2d at 67; *Guzman*, 842 P.2d at 676; *People v. Sundling*, 153 Mich. App. 277, 395 N.W.2d 308, 314 (Mich. Ct. App. 1986); *Novembrino*, 519 A.2d at 854; *People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630 (N.Y. 1985); *Oakes*, 598 A.2d at 125. [617 N.W.2d at 290].

The Iowa Supreme Court also used legal treatises and law review articles to rebut, argument by argument, the reasoning in *Leon*:

As a final matter, we must express our disagreement with the cost-benefit analysis employed by the [Supreme] Court. As noted earlier, the Court considered the costs of exclusion to be substantial. This conclusion is simply not supported, however, by studies that have attempted to quantify the number of prosecutions adversely affected by the suppression of illegally obtained evidence. According to one authority in this area, "the most careful and balanced assessment conducted to date of all available empirical data shows 'that the general level of the rule's effects on criminal prosecutions is marginal at most.'" 1 Wayne R. LaFare, *Search and Seizure* § 1.3(c), at 58 (3d ed. 1996) (quoting Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 Am. B. Found. Res. J. 611, 622). Even the Court in *Leon* cited a study discussed in the Davies article that concluded the exclusion of evidence "results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies." *Leon*, 468 U.S. at 907 n.6, 104 S. Ct. at 3412 n.6, 82 L. Ed. 2d at 688 n.6.

Even more important is the fact that the costs, regardless of their magnitude, are improperly attributed to the exclusionary rule. We agree with the following statements made by former Justice Stewart:

Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.

. . . The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrants shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. . . . That is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, home and property against unrestrained governmental power.

Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1392-93 (1983). [617 N.W.2d at 292].

My own experience clerking for Justice Larson suggests that the legal treatise on search and seizure law by Wayne R. LaFave, cited in the quote above as well as in several of the proceeding state supreme court decisions, was an authority given particular deference. I observed that the justices seemed to treat LaFave's treatise, although technically only persuasive legal precedent, to be persuasive precedent almost on par with binding precedent from previous Iowa Supreme Court decisions. Thus I am not surprised citations to LaFave's treatise abound in the cases discussed in this chapter.

VIII. Garza v State. In contrast to the expansive treatment to the issues surrounding the good faith exception by the Iowa Supreme Court, the decision by the Minnesota Supreme Court the following year in *Garza v State*, 632 N.W.2d 633 (Minn. 2001) consists of only a paragraph. The Minnesota Supreme Court does cite the Minnesota Constitution, but without citation to a specific section (explaining why this case did not appear in my data set). In fact it would probably be more accurate to say the Minnesota Supreme Court has not yet squarely faced the

issue of the good faith exception, instead holding (under the specific facts of this case) that there must be some particularized facts to uphold the warrant before the good faith exception would even be considered, and there were no such facts here. On the other hand, I characterized the Minnesota decision as expanding rights in Table 5-1 because it apparently added requirements to the application of the good faith exception beyond what the Supreme Court requires:

...[E]ven if we were to adopt *Leon* the good faith of the police cannot cure the absence of particularized circumstances in the warrant application justifying an unannounced entry. *See State v. Zanter*, 535 N.W.2d 624, 634 (Minn. 1995) (holding good faith of police cannot cure clear insufficiency of application for warrant). We interpret the requirement in the Minnesota Constitution that persons not be subject to unreasonable searches and seizures to require sufficiently particularized circumstances justifying an unannounced entry before such entry may be authorized. As we stated in [our previous precedent], the showing is "not high," but the officer must point to a particular fact about the residence at issue that would justify an unannounced entry.

Thus it appears Minnesota does not fully embrace the *Leon* good faith exception, and has instead used the Minnesota Constitution to place a caveat on its use.

IX. State v Daniel. In the latest case decided by one of the nine states in the research design, the Kansas Supreme Court in *State v Daniel*, 242 P.3d 1186 (Kan. 2010) followed federal precedent without citing any decisions to sister state cases. The *Daniel* case followed the Supreme Court's decision in *Arizona v Gant* restricting warrantless automobile searches:

A unique issue arises because K.S.A. 22-2501(c) was declared unconstitutional while Daniel was appealing her conviction based on the warrantless search of her vehicle. *See State v. Henning*, 289 Kan. 136, 148-49, 209 P.3d 711 (2009), which applied *Arizona v. Gant*, 556 U.S. ___, 173 L. Ed. 2d 485, 129 S. Ct. 1710 (2009) (vehicle search without warrant prohibited unless arrestee is within reaching distance of passenger compartment at time of search or there is reasonable belief the vehicle contains evidence of the crime of the arrest). [242 P.3d at 1188].

The question for the Kansas Supreme Court was whether the evidence collected in the case should be excluded, even though officers acted in good faith reliance upon the Kansas statute in performing the search which produced the evidence, which was later struck down as

unconstitutional. The majority noted that neither the Fourth Amendment, nor the analogous provision in the Kansas Constitution, explicitly requires the exclusionary rule. Rather the exclusionary rule is a judicially crafted remedy designed to protect Fourth Amendment and Kansas Constitution rights through deterrence of police misconduct, and is not the defendant's personal right. The majority held that Kansas would follow the *Leon* rule: "We interpret § 15 of the Kansas Constitution Bill of Rights to provide the same protection from unlawful government searches and seizures as the Fourth Amendment to the federal Constitution." 242 P.3d at 1191. The majority decided to follow the federal precedent even though it acknowledged that the Supreme Court has been expanding the use of the good faith exception by focusing on the narrow remedial purposes of the exception:

After *Leon*, the United States Supreme Court extended the good-faith exception to the exclusionary rule in other circumstances. See *Herring*, 555 U.S. at ____, 172 L. Ed. 2d at 507-09 (negligently maintained police records); *Arizona v. Evans*, 514 U.S. 1, 14-16, 131 L. Ed. 2d 34, 115 S. Ct. 1185 (1994) (inaccurate court records); *Krull*, 480 U.S. at 349-50 (statute). In each extension, the Supreme Court has continued to focus on whether the remedial purpose of the exclusionary rule [of deterring police misconduct] would be fulfilled if the illegally obtained evidence was suppressed. [242 P.3d at 1191]

The dissent in *Daniel* sought to draw a distinction between the Supreme Court's decision in *Leon*, and its subsequent decision in *Krull* expanding the good faith exception to cover evidence gathered pursuant to a state statute later struck down as unconstitutional, much like the distinction the Illinois Supreme Court accepted above. However, neither the majority nor the dissent in *Daniel* cited any sister state decisions despite the fact that by then almost half the states had considered the issue of the good faith exception on state constitutional grounds, and at least Illinois had specifically considered and rejected the *Krull* expansion of the exception.

X. Lessons.

Both the table of state supreme court decisions concerning the good faith exception and the analysis of the decisions themselves, suggest that when sister states decisions are cited the deciding court is more likely to expand rights on the basis of their state constitutions. Even the decisions to follow federal precedent seem to increasingly acknowledge that the underlying reasoning of the *Leon* precedent has been called deeply into question by law review articles and by state supreme court decisions. Yet not every state supreme court looks to sister state citations, and when the deciding court does not look to sister state decision they are comparatively less likely to expand rights.

Unfortunately, the analysis in this chapter, while showing that sister state dialogue is important and often incorporated into state supreme court decisions in great detail over many pages, does not in isolation show that state supreme courts are actually persuaded by the sister state decisions. There are powerful suggestions in these cases showing the development, refinement, and growing influence over time of the alternative legal reasoning which questions the assumptions and legal reasoning underlying the *Leon* precedent. This alternative legal reasoning has given courts pause in following *Leon*, regardless of the forum where the argument is being made (newspaper article, law review article, legal treatise, or state supreme court decisions). It still remains possible that deciding courts simply go looking for support and precedent to help bolster its justifications, particularly when the deciding court is already prepared to reject the Supreme Court precedent in *Leon* and subsequent cases like *Krull*. Thus in the next chapter state supreme court justices are themselves interviewed to determine whether the reasoning of sister state precedents is persuasive, or whether the citations are included merely as justification of decisions already made on other grounds.

CHAPTER 6 INTERVIEWS WITH STATE SUPREME COURT JUSTICES

- I. Overview and Description of Process
 - A. Design and How Interviews Were Conducted
 - B. Interview Participants
- II. Are Sister State Decisions Influential Upon State Supreme Courts?
 - A. Divergence Factors Across Courts
 - B. Relative Weight of Sister State Citations to Other Factors
 - C. What about Sister State Decisions is Influential?
 - 1. Trend and Numbers
 - 2. Prestige
 - 3. Sister State Ideology
 - 4. Role of Opinion Author
 - D. Sister State Influence versus the Role of Ideology
- III. The Role of Precedent on Supreme Court Decision Making
 - A. Role of U.S. Supreme Court Precedent
 - 1. U.S. Supreme Court retreat
 - 2. Degree of Division of U.S. Supreme Court
 - B. Role of Deciding Court Precedent
- IV. Evidence for Alternative Explanations
 - A. Role of Political Ideology as Alternative Explanation
 - B. Role of Judicial Selection Method as Alternative Explanation
 - C. The Role of Public Opinion
- V. Lessons From the Interviews

I. Overview and Description of Process

As convincing as the findings discussed in the preceding chapters seem, it is reasonable to question the correlation between sister state decisions and deciding court behavior. Is this correlation evidence of a causal relationship or is the correlation spurious? Are citations to sister state opinions merely *post hoc* justifications for decisions already made? One way to confront that issue is to ask state supreme court justices about their decision process. Do the justices recognize that sister state decisions actually and explicitly influence their thinking in reaching a

result in their consideration of state constitutional cases? In this chapter I report on my interviews with the justices.

The decision making process of each individual justice, and a state supreme court collectively, is by design a “black box”. The process is institutionally insulated from scrutiny. Deliberations are held behind closed doors and justices generally reveal their reasoning only in written opinions and do not often answer questions for the mass media as to the reasons for their decisions. Thus we cannot know for certain what factors influence an individual justice or a court collectively. Indeed, it is possible that sister state court decisions may serve as convenient pretexts for decisions made on other grounds, such as judicial or political ideology, or even idiosyncratic/heterodox personal preferences. Therefore interviewing justices directly about their perceptions of what factors influenced their colleagues in the conference room is critical. The goal is to reveal whether citations to sister state decisions are influential, or merely serve as justifications for a decision reached on other grounds.

This approach is not without some criticism, since it has been argued that judges are so immersed in the legal culture that they are unable to even recognize the role of personal preferences in the decision making process, much less openly acknowledge the role preferences and ideology play. Gillman (2001) writes that Segal and Spaeth “have suggested in the past that any post hoc interpretation of law’s influence amounts to mere ‘normative rationalization’ that ‘masks the reality of choice base on the individual justices’ personal policy preferences.’” (p. 491). On the other hand, legal concerns, and not just pre-formed personal preferences, do occasionally seem to matter since as Justice Ginsburg reported recently (in a September 15, 2009 talk at Northwestern University broadcast on C-SPAN) that in the 2008 Supreme Court term there were four decisions where the justice initially assigned to write the dissent in conference

ended up writing the majority, and one case where Justice Ginsburg herself was assigned to write a 2-person dissent and ended up writing a 6-3 majority. Of course, she did not reveal which cases these were, but her observation suggests that justices' initial ideological preferences do not always decide cases, and the votes of justices are subject to change by persuasive legal argument.

With these considerations in mind, I began the process of interviewing state supreme court justices with informal discussions with the state supreme court justice that I clerked for, Justice Jerry L. Larson of the Iowa Supreme Court. He gave a mixed answer to the basic question faced in this chapter, whether state supreme court justices believe sister state decisions influence their thinking in reaching a result in their consideration of state constitutional cases or whether sister state citations are merely *post hoc* justifications for decisions already made. As it turned out, the answers I received from the justices overall were mixed, and not all justices perceived the role of sister state opinions the same way. With the exception of one justice, however, the justices admitted that citations to sister state decisions were important and influential, at least some of the time, to the decision making process. Justices varied on the conditions under which they would be influenced, but almost all of them believed that the reasoning in sister state decisions was consulted in state constitutional cases, and this reasoning of sister state decisions (more than the outcome) could influence the thought process of the deciding court.

A. Design and How Interviews Were Conducted.

I sought interviews with the current and former members of the nine state supreme courts (Alabama, Arkansas, Illinois, Iowa, Kansas, Minnesota, Ohio, Pennsylvania, and South Dakota) selected in my research design. Participation of the justices was solicited in a variety (and often in a combination) of ways, including e-mail, regular letters, and telephone calls. In total I

contacted 101 current and former justices, including 95 current and former justices from these nine states.¹⁴⁴ Each of the 101 separate individual justices were contacted by either regular mail or email, including a letter and informed consent form requesting an interview. Over 20% of these individuals were contacted more than once in follow up emails or telephone calls. To help explain why this number of justices was contacted, there are 63 current justices on the nine state supreme courts in my research design. I contacted 45 of these current justices, as the other 18 current members had started serving only after cases collected for this project from their courts had been decided. There are also approximately 70 former justices who sat on cases included in this data set, and who had served more than a few years on one of these nine state supreme courts between 1995-2009. However, at least 13 of these former justices had either passed away or had health issues that prevented them from participating.¹⁴⁵ Thus there were approximately 57 former justices from the 9 states to contact, but I was only able to contact 50 of these justices. To summarize, I contacted 45 current justices from the nine states in my research design, 50 former justices from those same nine states, and 6 justices from Colorado, North Dakota and Utah, for a total of 101 justices contacted.

I began collecting contact information, contacting, and then interviewing former justices in April of 2011, and then expanded my contacts and interviews to current justices in June of 2011. Contacting current justices was relatively straightforward as their addresses, or at least addresses for the entire court, were publically available. Obtaining addresses for former justices was more difficult. Although some states have publically accessible directories through their state bar associations for attorneys in their states, other states do not. While I received helpful

¹⁴⁴ I also contacted 6 justices from Colorado, North Dakota and Utah, receiving interviews from former Colorado Supreme Court Justice Jean E. Dubofsky and former North Dakota Supreme Court justice Herbert L. Meschke.

¹⁴⁵ This information was collected through a combination of on-line research (including newspaper articles, official state court websites, and online sites such as Judgepedia), discussions with court information officers or clerks of court, and family members.

assistance in several states from court information officers, clerks of court and secretaries for the individual justices, there were also roadblocks in some states like Illinois, where obtaining addresses for former justices provided difficult.¹⁴⁶

Interviews continued during the summer and fall of 2011, and I ended the year 2011 with 15 interviews. I found the overall response rate to be relatively low—less than 20% of justices contacted were willing to grant interviews. I received regrets letters from 14 justices declining to be interviewed.¹⁴⁷ I was unable to obtain interviews from justices that had served on the Illinois, Kansas or South Dakota Supreme Courts. In an effort to reach my goal of interviewing 20 justices, I expanded my search in January of 2012 to include mostly former justices of the state supreme courts from the states of Colorado, North Dakota and Utah, even though obviously none of the cases in my data set were collected from these three states. The two former justices from North Dakota who had served during the time period of my study were contacted, even though North Dakota has a different judicial selection method than South Dakota, as it has similar cultural background and ideology. Colorado and Utah were included because my ties to Iowa resulted in a higher interview response rate, and was I hoping connections to Colorado and proximity to Utah would likewise help increase the odds of gaining an interview.

In total I conducted 18 interviews which provided usable answers.¹⁴⁸ The interviews themselves generally followed a common script, but the interview script was designed to be flexible and follow up on unexpected comments with additional questions. In some instances the

¹⁴⁶ I never obtained contact information for four former Illinois justices that I had identified as serving during the period from 1995-2009, the time from which I collected cases. I was also unable to obtain addresses for several other justices in other states.

¹⁴⁷ I did not hear anything back from 68 justices that I contacted. (101 contacts led to 18 usable interviews, 1 unusable interview, and 14 justices specifically declined to be interviewed).

¹⁴⁸ Of these 18 interviews, 14 interviews were telephone conversations (12 of which were recorded and transcribed), and 4 interviews consisted of written responses to my questions (after a variety of email, telephone, and in-person contacts). There was an additional 19th interview that was not usable as that justice had served only a short time and had no experience with state constitutional decisions. As will be discussed below, several more justices refused to answer all or some of the multiple choice questions that I later coded for quantitative comparison.

script was largely abandoned to pursue issues that arose during the interview. A copy of the interview script is contained in the Appendix.

In particular, the first part of the interview was designed to be quite scripted, with several questions with proffered multiple choice answers. However, I was prepared to and did follow up on answers even to the scripted multiple choice questions that sought to differentiate the weight individual justices would give to different factors hypothesized to impact the decision making process. Also, as it turned out, several justices were resistant to answering with one of the proffered answers to the multiple choice questions. The second part of the interview consisted of asking justices about state constitutional cases that their supreme court had decided while they were sitting with the court. This allowed me to move from the abstract and general impact of various factors to concrete examples in order to probe the importance of various factors in actual cases. In fact, several justices were resistant to the general questions, some preferring not to rank factors, and also often saying it depends upon the case, making clear that the hypothesized factors do not have a uniform or consistent impact.¹⁴⁹

By the time the interviews were conducted I was already aware of many of the results contained in the previous chapters, and therefore was conducting the interviews with these findings in mind and with the express purpose of trying to ascertain whether the findings were genuine or merely spurious. The main idea was to have state supreme court justices speak to how influential sister state opinions were to the decision making process relative to other

¹⁴⁹ See generally part IV of this chapter. In particular, I asked Justice Paul H. Anderson of Minnesota: “If you had to put a weight on the role of sister state supreme court decisions and their rational and reasoning in percentage terms, one out of 100% of everything that goes into the decision-making process, what percentage of your court’s decision-making process would sister state opinions account for?” Justice Anderson answered that he “[c]annot answer that question because it’s different with each case. ...It depends how well developed the body of law is that we have in Minnesota. If we have [a] fairly well-developed [body of law] what sister states have done may be persuasive [in] some way, but we are mostly focused on at what we have done in Minnesota; but, if we have little or no case law in Minnesota on the issue, we will look more closely at what other states have done. Under the latter scenario what a sister state has done is considerably more persuasive...”

influences on the decision making process. I also sought to ascertain which aspects of sister state opinions were most influential (trends, numbers, reasoning, the ideological nature or prestige of other courts, etc).

As will become apparent at several points in the discussion below, I pledged to protect the identity and confidentiality of several justices. While several justices were willing to be identified and quoted, others chose not to be identified, in order to protect their colleagues still on the court from controversy.

B. Interview Participants.

I interviewed and received usable responses from 18 justices.¹⁵⁰ Sixteen of these justices were from states in the original nine state sample, and the numbers of these justices from each state are arranged in the following table according the states each justice is from, and the number of rights expanding decision versus total state constitutional decisions from that state.

¹⁵⁰ To recap, I interviewed 18 justices who provided usable answers. One justice requested to not be identified. Information about this justice is included in the collective totals reported in Table 6-1, but not in Table 6-2 below which identifies justices by name. So to be clear the N of 16 reported in Table 6-1 is because Table 6-1 only references the 16 interviews (including the two from unidentified justices) which came from justices in the 9 states that are the focus of my project. Two additional justices, one from CO and one from ND, were interviewed to supplement my interviews by providing insights into thinking in other states and help verify if these insights were widespread across states and are identified in Table 6-2.

TABLE 6-1: Interviewed Justices' Home States and Number of Rights Expanding Decisions

JUDICIAL SELECTION METHOD			
	<i>Non-Partisan Elections</i>	<i>Partisan Elections</i>	<i>Missouri Plan (retention elections)</i>
<i>Liberal</i>	Minnesota	Illinois	Iowa¹⁵¹
	3 justices	0 justices	5 justices
	2 REDs	2 REDs	2 REDs
<i>Moderate</i>	Ohio	Pennsylvania	Kansas
	3 justices	1 justice	0 justices
	6 REDs	5 REDs	0 REDs
<i>Conservative</i>	Arkansas	Alabama	South Dakota¹⁵²
	1 justices	3 justices	0 justices
	3 REDs	1 RED	0 REDs
<i>“RED” stands for “Rights Expanding Decision” N=16 (only justices from original 9 states)</i>			

Table 6-1 above gives an overview of where the 16 interviewed justices came from (excluding the 2 interviewed justices from Colorado and North Dakota), compared to how the 21 rights expanding decisions in the data set were distributed. Note that no justices agreed to be interviewed from Illinois, Kansas or South Dakota, but there were no rights expanding decisions from Kansas or South Dakota. Illinois is now by explicit judicial holding a limited lock-step state (requiring exceptional reasons for a rights expanding decision departing from U.S. Supreme Court precedent) and has only 2 rights expanding decisions in the data set. Thus the lack of

¹⁵¹ Justice Jean Dubofsky was also interviewed from Colorado (see Table 6-2 below). Colorado, like Iowa, is both a Missouri Plan state and relatively liberal, indeed even more liberal than Iowa in terms of state ideology (based on citizen ideology). Erikson, Wright and McIver (1993).

¹⁵² Justice Herbert L. Meschke was also interviewed from North Dakota (see Table 6-2 below). North Dakota is similarly conservative to South Dakota, and shares the same political culture according to Daniel Elazar, but uses a different judicial selection method (non-partisan elections) than South Dakota (Missouri plan). Thus in terms of ideology and selection method North Dakota would be grouped with Alabama, not South Dakota.

interviews from these states is not particularly troubling for evaluating my hypotheses about what drives courts to make rights expanding decisions in specific cases when they are generally open to making such decisions. Obviously, however, interviews from these states would have been useful in exploring why some states generally choose not to make rights expanding decisions at all, and adopt forms of lockstep analysis.¹⁵³

A very strong caveat about Table 6-1 is required. While the number of justices from each state are reported together with the total number of rights expanding decisions from that state in the data set, this does not necessarily mean that the justices interviewed heard all, or even any, of the rights expanding decisions from their states in the data set. For instance Minnesota Supreme Court Justice Esther Tomljanovich retired in 1998 prior to either of the 2 rights expanding decision from Minnesota in the data set, and indeed before 9 out of 10 total Minnesota decisions in the data set. Similarly Justice Andrew Douglas of the Ohio Supreme Court was on the court for the first 3 out of 6 rights expanding decisions from Ohio, but retired in 2002 before the other 3 rights expanding decisions from Ohio. Justice Daryl L. Hecht began his service with the Iowa Supreme Court in 2006 and thus participated in only 3 of 13 Iowa decisions (but 1 out of 2 rights expanding decisions from Iowa) in the data set.

Several of the justices, however, served during the entire period of data collection. In fact the eighteen interviewed justices collectively share over 250 years of experience as state supreme court justices. Furthermore, at least one interviewed justice was sitting on their respective court during 19 of the 21 rights expanding decisions in the data set. Table 6-2 below includes the information of how long each individual justice who agreed to be identified served on their

¹⁵³ There appears to be a threshold effect upon deciding courts based on judicial attitudes concerning the appropriateness of lockstep analysis (the desirability of following U.S. Supreme Court precedent in general without regard to the specific issues or facts of a particular case, or setting the burden on parties to show especially compelling reasons to depart from U.S. Supreme Court precedent), as will be discussed at the end of the chapter.

respective court, and also how many of the rights expanding decisions from their state supreme court they participated in. To be clear this last column is not an indication that these justices agreed with the outcome of those cases, merely that they were on the court at that time of the decision and participated in those cases and were therefore in a position to consider those cases in answering the interview questions. Recall the cases in the data set cover the years 1995 to 2009.¹⁵⁴

TABLE 6-2: Information on the 17 Justices Willing to Be Identified

<u>Justice name</u>	<u>State</u>	<u>Years of Service</u>	<u>REDs participation</u>
Janie L. Shores	Alabama	1974-1999	1 of 1
Harold F. See	Alabama	1997-2009	0 of 1
Robert L. Brown	Arkansas	1991-present	3 of 3
Mark S. Cady	Iowa	1998-present	2 of 2
Daryl L. Hecht	Iowa	2006-present	1 of 2
Jerry L. Larson	Iowa	1978-2008	1 of 2
Linda K. Neuman	Iowa	1986-2003	1 of 2
Marsha K. Ternus	Iowa	1993-2010	2 of 2
Paul H. Anderson	Minnesota	1994-present	2 of 2
James Gilbert	Minnesota	1997-2004	1 of 2
Esther Tomljanovich	Minnesota	1990-1998	0 of 2
Andrew Douglas	Ohio	1985-2002	3 of 6
Paul E. Pfeifer	Ohio	1993-present	6 of 6
Evelyn Lundberg Stratton	Ohio	1996-present	4 of 6
Ronald D. Castille	Pennsylvania	1994-present	5 of 5
*Jean E. Dubofsky	Colorado	1979-1987	NA
*Herbert L. Meschke	North Dakota	1985-1998	NA

* not a member of one of the nine supreme courts included in the Chapter 4 data set

II. Are Sister State Decisions Influential Upon State Supreme Courts?

State supreme courts have a variety of criteria they consider when deciding whether to depart from federal precedent in making state constitutional decisions. As one justice I interviewed discussed in his own article written on this subject, after answering the question of

¹⁵⁴ However, for the states of Alabama, Kansas, and Ohio cases back to 1990 were also included, amounting to five additional cases, although only one of these five cases (a case from Ohio) was a rights expanding decision.

why state supreme courts should interpret the constitution of its state differently from the United States Constitution, the second question is how, and under what appropriate circumstances, this should be accomplished.¹⁵⁵ (Brown 2002, p. 503).

Justice Robert L. Brown of Arkansas suggests a couple of possible answers to how and under what circumstances state supreme courts should interpret state constitutional provisions differently from the analogous provision in the U.S. Constitution. The first answer he explores is a result orientated answer—to protect rights the deciding court believes should be protected, and reject federal precedent with which the court disagrees. Justice Brown acknowledges that this approach is essentially one to overtly accomplish a liberal judicial agenda and he characterizes this approach as the one implicitly present in Justice Brennan’s seminal 1977 law review article and associated advocacy. Justice Brown goes on to note that this approach has been both praised and criticized, presumably depending on whether it accomplishes results with which the commentator agrees. However, Justice Brown asserts and defends a second answer to the question of how and under what appropriate circumstances state supreme courts should render rights expanding decisions on the basis of their own state constitutions. This answer is a process-based approach—where courts examine traditional jurisprudential factors such as differences in text and constitutional history between the parallel federal and state constitutional provisions.

Although ideological leanings could certainly influence even Justice Brown’s process-based approach, this approach not necessarily ideological. Indeed there is a strong abhorrence by state supreme courts to be labeled as a “results-orientated court.” Several justices made clear

¹⁵⁵ I think these questions of why and how are closely linked. So closely linked in fact that one might consider the answer of how and under what circumstances rights are to be expanded under state constitutions as providing the concrete details, while the “why” question can be thought of as the esoteric and theoretical version of the same question. The why question was emphasized above in Chapter 1, while the focus here is upon the second question.

that their court did not engage in outcome-based judging to achieve a certain preferred outcome. For instance Justice Brown assured me, completely unbidden, that the Arkansas Supreme Court was not a “results-orientated court.” Likewise former Justice Ester M. Tomljanovich of Minnesota stated:

Your decision is the last thing you make after you consider all these things. I don't think you ever say this is the way this case is going to come out now let's find some way to do it. You don't do that.

Former Chief Justice of the Iowa Supreme Court, Marsha K. Ternus, when asked “What kinds of things are you looking for or would be characteristic of an opinion you felt was legally sound?” answered in part that “...it's really a matter of just going back to the beginning and working your way up and seeing what makes the most sense and not be disingenuous about it to reach a certain result that reflects as you would a political approach or philosophy or view.”

Justice Evelyn Lundberg Stratton of Ohio elaborated at length on this point of courts not giving in to personal preferences to achieve certain results:

This bench truly tries to put aside personal opinions, personal philosophies. A lot of times we will say, “Hey, if we were a legislature, we would never do this or we would change this or change that,” and try to really stay within our constitutional role and not step on the toes of the legislature for making public policy. We take that very seriously, and you'll see a lot in our opinions, you know, you're in the wrong forum to seek your resolution, you need to go to the legislature, you're in the wrong forum to get this changed, you need to go to the legislature. You'll see that a lot in our opinions or you'll see, “The law gives me no choice but to.” That's a signal we don't like [the result], but that we have to go with the law as it says, and as we sometimes say in our opinions, “the legislature has the right to make bad law, not unconstitutional law, but bad law, and we aren't here to fix bad law.” ...[Y]ou know sometimes [a justice] will want to do something and three or four of us will say you're being activist, you're trying to make the law what you want it to be. We just had that happen a couple days ago. I can't go there because that is rewriting the law. I like that outcome, I agree with the outcome, but I can't go there because you're turning into a legislator when you do that. We'll have those conversations, and we'll challenge each other. I have a phrase I

frequently use when I give speeches: “I have the power if I can get four votes, but do I have the right?” I can remember with the old group, that used to do a lot of “making the law” as I frequently called it, one of the justices saying: “how can you possibly go there. How can you possibly do that?” And the other justice looked at her and said, “because I have four votes.” Now, I think that’s wrong, but I wasn’t one of the four votes. The bench now would never do that. We are very conscious about our role and very conscious and we challenge each other if we think someone is starting to stray or what is our appropriate role as a justice.

So to return to Justice Brown’s point, while even with a process-based approach ideology might sneak in, justices generally are on guard against that happening. However, even if ideology is held in check, a dilemma still exists in the process-based approach from a judicial perspective. Brown quotes Justice Souter (while Souter was still a New Hampshire Supreme Court justice): “If we place too much reliance on federal precedent we will render the State rule a mere row of shadows; if we place too little, we will render State practice incoherent.” (Brown 2002, p. 505). Striking the proper balance, therefore, is key—but how to strike the proper balance?

One of the basic lessons learned during this research, both from collecting cases and from interviewing state supreme court justices, is the diversity of approaches taken by state supreme courts. There is considerable disagreement on the appropriate “divergence factors” a state supreme court should examine when deciding how to strike the proper balance between following U.S. Supreme Court reasoning and precedent, or instead reaching more expansive interpretations of analogous state constitutional provisions. Brown identifies at least three different sets of divergence factors that should be considered when deciding whether to reach a more rights expansive interpretation based on state constitutional law¹⁵⁶ (Brown 2002, p. 506-

¹⁵⁶ Brown cites three state supreme courts with different lists of divergence factors. According to Brown the Washington Supreme Court considers: “(1) the textual language of the state constitution; (2) differences in the texts of parallel provisions in the state and federal constitutions; (3) constitutional history; (4) pre-existing state law (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local

07). Indeed numerous books chapter and law review articles have been addressed to this issue.¹⁵⁷

A. Divergence Factors Across Courts.

Like other states, the nine states in the research design employ diverse divergence factors. These diverse set of factors range from an explicit list of factors that a state supreme regularly follows and exhorts attorneys to brief, to very ad hoc discussions that seem to vary from case to case, and everything in between. Part of the reluctance courts have in establishing consistent divergence factors stems from the fact that most state supreme courts consider proportionally few state constitutional cases (perhaps 1 to 2 such cases per year) and may see little use in explicitly identifying factors that might or might not be relevant in each case. Instead a flexible approach might be preferable for such courts, particularly for state supreme courts who consider the fewest state constitutional cases.

Even state supreme courts that have explicit lists of divergence factors do not always analyze the stated factors, a point that justices sometimes lament.¹⁵⁸ For states that do have

concern.” Brown goes on to say that the Washington Supreme Court explained it uses these factors in ensure the decision “will be made for 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.” (quoting *State v Gunwall*, 720 P.2d 808, 812 (Wash. 1986). Similarly the New Jersey Supreme Court uses the following factors: “(1) the textual language of the state constitution; (2) legislative history of the language of the state constitution; (3) preexisting state law; (4) structural differences between the state and federal constitutions; (5) matters of particular state interest or local concern; (6) state traditions; and (7) the distinctive public attitudes of the state’s citizens.” In contrast, the New Mexico Supreme Court deemphasizes the importance of historical or textual difference between the New Mexico and U.S. Constitutions and considers just three factors: (1) a flawed federal analysis; (2) structural differences between state and federal government; and (3) distinctive state characteristics.” Brown, a justice on the Arkansas Supreme Court, then examines three Arkansas state constitutional cases, concluding that Arkansas follows a process-based approach, and specifically has considered the “textual and structural” differences between the US and Arkansas Constitutions. Brown notes that it remains to be seen whether Arkansas will expressly adopt any of the other factors used by other courts.

¹⁵⁷ See e.g. Williams (2009, 2007, 2005); Braithwaite (2001). In fact some scholars have questioned the very use of divergence factors. Williams criticizes the use of divergence factor (or what he terms “criteria approaches”) “as representing, in an important sense, a challenge to the legitimacy of independent state constitutionalism itself.” (2009, p. 150). Williams strongly encourages state supreme courts to look to and independently interpret their own constitutional provisions first, and then secondarily to look to state constitutional decisions in other jurisdictions. (p. 173). According to Williams, state courts should consider only the persuasiveness of the reasoning in Supreme Court decisions, but not give deference to the Supreme Court “merely because of [its] institutional position as the highest court in the land for resolution of federal constitutional claims.” (p. 176).

explicit divergence factors, generally these lists of explicit factors seem on their face to work against Hypothesis 1 (the horizontal federalism thesis that the deciding court is influenced by the previous decisions from sister state courts) since most supreme courts do not articulate that sister state decisions should be considered as an explicit divergence factor. While based on the work of Gorman (2007) approximately 10 states have specifically endorsed looking to sister state jurisdictions for guidance on state constitutional issues,¹⁵⁹ only one of the nine state supreme courts in the research design (Pennsylvania) explicitly lists sister state decisions as a divergence factor to be briefed and considered. The Pennsylvania Supreme Court in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) requires certain information from attorneys asking the Pennsylvania Supreme Court to decide a case on state law grounds:

[A]s a general rule it is important that litigants brief and analyze at least the following four factors: 1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) *related case-law from other states*; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. (emphasis added).

¹⁵⁸ For instance in my interview with Chief Justice Castille of the Pennsylvania Supreme Court I asked:

Well, there was something that [as] I read through the [*Commonwealth v. White*, 669 A.2d 896 (1995)] case [that caught my attention]. The discussion of sister state opinions is in the concurrence, not in the majority opinion. Are you in a position to speak [to] how that got in the concurrence as opposed to being considered in the *Edmunds* factors in the majority? I know the concurrence spoke to that and you tack it on at the end of your dissent that the majority did not go through the whole list of *Edmunds* factors. Why was that?

I think it's just pick and choose whenever they want to apply it. I'd always needle my fellow justices when we'd have argument because someone would have [said], "Well, you know the Pennsylvania Constitution says, you know gives greater rights." So, I would always ask the question, "Well, where's your *Edmunds* analysis?" And, some of the other justices would sort of sheepishly like look around because they tell us that's what you had to do, but we didn't follow it as precedent in every case, and that was one of them there. And then Justice Montemuro sort of went into it [in his concurring opinion] and said, "Yeah, the *Edmunds* analysis is required."

¹⁵⁹ Gorman (2007), in canvassing state constitutional analogs to the 4th Amendment, also notes sets of divergence factors such as the *Edmunds* factors used by the Pennsylvania Supreme Court, and he frequently quotes from state supreme court decisions explaining their interpretive approaches such as looking favorably upon citations to reasoning from sibling jurisdictions.

States like Iowa have no explicit set of factors, although they seem to regularly examine and cite sister state opinions.¹⁶⁰ The Illinois Supreme Court, on the other hand, prefers to maintain a “limited lockstep” approach of generally following U.S. Supreme Court precedent. The Illinois Supreme Court in *People v. Caballes*, 851 N.E.2d 26 (2006) explicitly rejected the use of sister states decisions in interpreting the Illinois Constitution:

We reaffirm our commitment to limited lockstep analysis not only because we feel constrained to do so by the doctrine of state decisis, but because the limited lockstep approach continues to reflect our understanding of the intent of framers of the Illinois Constitution of 1970. This court’s interpretation of state constitutional law *cannot be predicated on trends in legal scholarship, the actions of our sister states*, a desire to bring about a change in the law, or a sense of deference to the nation’s highest court. (emphasis added).¹⁶¹

Ironically, the Illinois Supreme Court in earlier cases had expanded rights, and had done so while citing sister state decisions. See e.g. *People v. Washington*, 665 N.E.2d 1330 (1996) (citing cases from California and Texas in holding that an inmate was permitted to raise his innocence claim in a post-conviction relief action under the Illinois, but not the U.S., Constitution) and in *People v. Krueger*, 675 N.E.2d 604 (1996) (citing cases from sister states while rejecting in part the use of the good faith exception to the exclusionary rule).

The explicit divergence factors articulated by some state supreme courts provide better support for Hypothesis 2, the vertical federalism hypothesis predicting that state supreme courts will be more likely to recognize additional rights if (a) the current precedent of the Supreme Court is narrower than earlier Supreme Court decisions, and/or (b) the deciding court rendered expansive interpretations when Supreme Court precedent was unclear. Hypothesis 2, as explained in chapter 1, emphasizes that state supreme courts do not make decisions in a vacuum,

¹⁶⁰ See e.g. *State v. Allen*, 690 N.W.2d 684 (Iowa 2005); *City of West Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002).

¹⁶¹ *People v. Caballes*, 851 N.E.2d 26 (2006).

and rarely make decisions that are completely detached from prior precedent.¹⁶² In particular, a state supreme court is often making state constitutional decisions in areas where it and the Supreme Court have made previous decisions interpreting the U.S. Constitution. Indeed, the research design here excludes state constitutional cases where there is no clear U.S. Supreme Court precedent. While the research design excludes cases where there is no clear Supreme Court precedent on the U.S. Constitution, Hypothesis 2 aims at something related but slightly different. It suggests there is an important influence on state supreme court decision making if the Supreme Court has *narrowed* its precedent (reducing rights)¹⁶³ or if the state supreme court has previously rendered expansive decisions interpreting the U.S. Constitution prior to the Supreme Court making a narrower definitive interpretation of the U.S. Constitution.¹⁶⁴ The explicit divergence factors adopted by the Pennsylvania Supreme Court in the *Edmunds* case again provide support, particularly for Hypothesis 2(a), in requiring attorneys to present

¹⁶² This is also consistent with the interview answers. For instance, Justice Robert L. Brown of Arkansas noted the most important influence on how the Arkansas Supreme Court will decide a case “is obviously precedent—we look to precedent and what our case law has shown in the past, and we are guided by that to a large extent.” Indeed, he would come back to this theme unbidden when asked what aspects of sister state constitution decisions were most influential: “if a sister state has a case that’s right on point, that’s going to be helpful to me, but it doesn’t necessarily decide the issue if it competes with one of our own cases. As far as a trend [across sister states], yes, we’re influenced by a trend, but not necessarily. In other words, if we are in the minority of jurisdictions and we think that’s right, our jurisprudence is right on that particular issue, we’re going to stick to it, so we don’t necessarily go with the flow. So, we look at the fairness, we look at our own jurisprudence. So, trends, we take note of trends, we follow the trend or we don’t. The facts of a particular sister state’s case is important to me, but again, if it conflicts with one of our own cases, we’re going to be hard-pressed to follow it.”

¹⁶³ In other words, for Hypothesis 2(a) it is the *movement* of Supreme Court precedent that is key, or to be even more precise, the fact that in narrowing precedent the Supreme Court has endorsed conflicting reasoning—the reasoning underlying the previous federal precedent and the reasoning underlying the current federal precedent. Since the state supreme court is not bound to follow the new more restrictive Supreme Court precedent in interpreting state constitutional provisions, what is to say the reasoning underlying the new Supreme Court precedent is more persuasive than the reasoning underlying the old Supreme Court precedent? While following the new reasoning has the additional advantage of maintaining a harmonious and consistent reading of state constitutional law with federal constitutional law, if the old reasoning is more persuasive then the state supreme courts may choose to follow the old, more expansive reasoning under their state constitutions. See chapter 1.

¹⁶⁴ Hypothesis 2(b) is not concerned with the movement of the Supreme Court, but instead focuses on the chronology and scope of successive decisions. If the state supreme court decided the issue first in a rights expansive way (perhaps on the basis of the U.S. Constitution), and only later the Supreme Court decides the precise issue in a narrower way, the state supreme court then faced with deciding the issue specifically on state law grounds must decide whether to follow the reasoning of its earlier expansive decision or the reasoning of the later narrow Supreme Court decision.

information and arguments in the briefs concerning the “history of the provision, *including Pennsylvania case-law*” (emphasis added).

Minnesota Supreme Court Justice Paul H. Anderson gives a colorful and insightful explanation for the why the deciding court might decide cases consistently with Hypothesis 2. While he is not specifically responding to the language of Hypothesis 2, and rather in the context of the interview is discussing different divergence approaches, note how he explains both the previous actions of both the Supreme Court, and the Minnesota Supreme Court are important:

Actually, I co-wrote an article about this topic, and in the article we explain my view on this issue. [Anderson and Oseid 2007]. We discuss the differing approaches that state supreme courts take when looking at their own constitution and the U.S. Constitution. Some states take a lockstep approach and follow exactly what the U. S. Supreme Court does. Other states take an opposite approach and some essentially say that their state constitution predates the U.S. Constitution. These states may note that their state constitution was used as a reference point by the founders during the drafting of the U.S. Constitution, so they are entitled to look at their constitution first. There are states in the middle ground, Minnesota is one of these states. We really do want to look to the U.S. Constitution first, and unless there is some strong reason to do otherwise that exists in our case law or because of some unique aspect of Minnesota history, we will follow the Supreme Court’s lead. What we do is to generally look first to the U.S. Constitution, then we look at our Constitution and how our law has developed, and then often we will take a look back at the U.S. Constitution and see where we are. We follow this approach because we have said we do not want to depart from Supreme Court jurisprudence unless we see a compelling reason to do so. In essence, we generally want to stay consistent with the U.S. Supreme Court. But, if we have seen the Supreme Court take a radical or a significant departure from its previous case law in an area of the law where we have developed our case law along the lines of the Supreme Court’s previous case law, we will frequently decide there is no good reason for us to depart from what we have been doing for any number of years.

My co-author and I started our article on state constitutions with a story that I think describes what we do. It is a Minnesota-type story. Elmer and Ethel are a retired farm couple living in west central Minnesota and they have recently turned the operation of their farm over to their children. It is late on a Saturday afternoon. They are driving their pickup truck into town where they’re going to go

to church, get some groceries and stop at a local café to get some dessert. Elmer's behind the wheel, and Ethel is sitting over on the passenger side. They see a red convertible with the top down coming from the opposite direction. The man and the woman in the other car are seated so close to one another you could not fit a blade of grass between them. Ethel looks at the young couple and says to Elmer in a nostalgic tone, "You know Elmer we used to be like that." Elmer responds, "Well, Ethel I haven't moved, I'm still sitting where I used to sit." This is what we do, we take a look at where we have been, where we are "sitting" now and then decide if we should stay where we are. What I am talking about in this context is that we view the U.S. Constitution as the baseline for rights below which we cannot go and we will generally follow the Supreme Court when the federal and state constitutions use identical or nearly identical language. But this rule does not apply where there is different language in the two constitutions. Moreover, we do understand very clearly that the Minnesota Constitution can grant more rights than the U.S. Constitution does. Further, if we have been in a particular position for a while and we see the Supreme Court changing its jurisprudence, we will be more likely to look at our own constitution when determining whether to stay where we have been "sitting" in previous years.

While Justice Anderson's story most clearly illuminates the importance of the *movement* of the U.S. Supreme Court for Minnesota decision making, consistent with Hypothesis 2(a), his explanation suggests it is not necessary for the U.S. Supreme Court to *move* positions, as the *timing* of the U.S. Supreme Court is also important. Justice Anderson notes the Minnesota Supreme Court takes "a look at where we have been and where we are sitting now." Thus, arguably even if the U.S. Supreme Court is a relative latecomer on a particular legal issue—and to expand upon the metaphor, slides into the front passenger seat after being picked up in town—the Minnesota Supreme Court is still in the driver's seat. If the Minnesota Supreme Court has considered the issue previously, even if only under the U.S. Constitution at a time when federal precedent on the specific issue was still vague, they may have little reason to move when the Supreme Court later determines where it sits on the issue once it gets around to deciding it. If the Minnesota Supreme Court has previously staked out a position on the issue, that might be almost as important in the ultimate decision making on state law grounds as where the U.S.

Supreme Court finally stakes out a position. Justice Brown's law review article also gives support to the ideas behind Hypothesis 2(b). Two of the states Justice Brown discusses, Washington and New Jersey, specifically establish divergence factors that, like Pennsylvania discussed above, examine "pre-existing state law" and the third state discussed by Justice Brown, New Mexico, considers whether there has been "a flawed federal analysis." (Brown 2002, p. 506-07).

It is important to note, however, that the desire to avoid outcome-based judging or result-orientated judging has not wholly removed the concern of ideology from state constitutional decision making just because courts have developed process-based approaches by articulating divergence factors and criteria. Justice Anderson sounded a cautionary note in his interview, that the use of the New Judicial Federalism is influenced by judicial philosophy: "the more conservative members of our court appear to be less willing to go the state constitution, whereas the moderate members of our court appear to be more willing to look to the state constitution."¹⁶⁵

¹⁶⁵ Justice Anderson, however, urged caution and being as precise as possible when discussing the idea of ideology in the context of judicial decision making. Judicial ideology and the terms "conservative" and "liberal" in this context are terms too easily thrown around without precision. He elaborated:

...[T]he problem with the definition of who's a conservative or liberal is that people view these terms very differently. When looking at the current and recent U.S. Supreme Court, I think one could justifiably classify Justices Sandra Day O'Connor and Anthony Kennedy as classic conservatives. Chief Justice Roberts and Justices Scalia, Thomas, and Alito are more difficult to define. Several commentators have said that Justice Thomas is a Libertarian in a many ways. Many classify Justice Scalia as a "neoconservative", even though several of his decisions may undermine such a characterization. When categorizing what constitutes a liberal or a conservative view, several broad concepts are often considered. These concepts include individual rights, government regulations, the proper role of federal and state government, whether small government is an ultimate good, when big government is okay, and the many facets of separation of powers. These concepts tend to get blurred because they are often in conflict, merge with each other, or are subject to misunderstanding or differing interpretations. These factors make it very hard to nail down must what the judicial philosophy or point of view one is talking about when classifying a judge as being a liberal or a conservative. [Regarding] the current Supreme Court, commentators often talk about the four liberal justices on that court, but in a historical context nobody on the current court is a liberal when compared to someone like Justice William A. Brennan or Justice Thurgood Marshall. At least three of the current "liberal" members of the Court would probably be considered moderate if they were sitting on a court with Marshall, Brennan and Justice William O. Douglas. I hope you can easily see the difficulty with defining

This observation would suggest that even despite concerns with state supreme courts about avoiding outcome based judging, and laying judicial ideology aside in decision making, judicial ideology is still an influence on the decision to recognize more rights under state constitutions.

B. Relative Weight of Sister State Citations to Other Factors.

I asked the state supreme court justices “how important is it to you personally the way that sister state supreme courts in the other 49 states have resolved similar cases under their state constitutions?” and provided them with four responses: a. very important; b. somewhat important; c. mostly unimportant, or d. not at all important.¹⁶⁶ Their answers were then coded d = 1, c = 2, b = 3 and a = 4.¹⁶⁷ The modal answer was 3 (“somewhat important” with 7 responses out of 10 scored responses¹⁶⁸) and the mean score was 3. The mean answer to this question was significantly higher than the role of public opinion (mean 1.2). While I report the mean values of answers to this question, and later other influences on state supreme court decision making, it is important to keep in mind only 10 justices gave responses corresponding to

terms when describing the philosophy of the justices? Defining them in a contemporary context is often at odds with what defines them in a historical context.

¹⁶⁶ This question was inspired by a more general question I had asked former Iowa Supreme Court Justice Jerry L. Larson when I was in the research design stage of the dissertation:

Generally speaking, across all types of cases, not just constitutional cases, that the Iowa Supreme Court would consider, how important is it for you personally the way that sister states have decided a case?

Very important, very important. We are persuaded in many cases by cases in other states--it just makes sense to have some authority and if there is a real significant case out there on point it makes sense that we would follow it.

It should be noted, however, that Justice Larson of Iowa was the only justice to characterize state citations as “very important” in response to this overall, general question. Other justices said sister state decisions could be very important in a particular context.

¹⁶⁷ It is important to note here that several justices did not want to rank the various causal factors according to the scale I offered (and thus their answers were impossible to code), and sometimes had troubling fitting their way of thinking about the issue to my proffered answers. For instance, former Chief Justice of the Iowa Supreme Court, Marsha K. Ternus, initially responded, “not at all important” about the role of sister state decisions, but then went on to explain that the *numbers* of sister state citations was not at all important, but the *reasoning* included in those sister state decisions was important.

¹⁶⁸ Of the remaining 3 scored responses, 2 responses were greater than 3. The final response was provided by a justice who ranked every answer as “not at all important.” This justice was generally opposed to state constitutional rights being interpreted differently than what the U.S. Supreme Court had provided.

my proffered ranked answers to this question. Generally speaking there were not statistically significant differences between the mean scores. However, it is also important to note, that of justices that refused to give answers corresponding to my proffered ranking in response to my question about the influence of sister state citations several did answer with statements like “we look at that,” “it is helpful,” “it depends” and it is “sometimes” important. For instance, former Justice Neuman of Iowa answered: “Helpful, but I wouldn’t say important. Important isn’t really the right word. Helpful or useful would be better.”

After responding with one of the proffered answers many justices then elaborated on their answers. Justice Andrew Douglas of Ohio added:

I always sought out other state precedent to see what colleagues on those courts were doing and oftentimes that was persuasive, and I suppose it is because I agreed with what they said, as opposed to disagreeing. But, if I ever had a question that I really was up in the air about, other states’ precedence is persuasive.

Later in the interview I followed up on that answer, asking: “I think you said earlier that [sister state opinions] were persuasive in a close case at least. What percentage of all the things that go into the decision-making process, how much weight in percentage terms would sister state opinions have?” To this follow-up question Justice Douglas responded:

If I agreed with what they said, 100%. If I disagreed with it, none. But, the fact is that you use [sister state opinions] to be sure that you have considered all of the surrounding issues in the issue you are dealing with, so I suspect that from the point of education that leads a justice [to conclude] those decisions were very important. Not necessarily their ultimate conclusion, but certainly how they got to where they went and the other issues that you might impact or that you might not think about in your decision.

Both Chief Justice Mark S. Cady of Iowa and Justice Paul H. Anderson of Minnesota, echoed this idea that the importance of sister state decisions comes from the reasoning contained in those opinions, as opposed to the outcome of those cases. When asked how important it is

how sister state supreme courts have resolved similar cases under their state constitutions Chief Justice Cady said sister state decisions “can be important, but it really requires us read through that decision, not to just look at the holding of the case, but to see how they got there.”¹⁶⁹

Justice Hecht of Iowa expanded upon this point:

I would say [sister state decisions are] somewhat important.... I would say it could be very important in some instances depending upon how thoroughly the [sister state] court has reasoned its decision. We look at decisions of other sister supreme courts and sometimes they’re just very short and don’t offer much in the way of rationale, and we find them sort of unimpressive and unpersuasive, but if it’s a well-reasoned and explained decision that thoroughly reviews the legal landscape, I would say then it’s very important what other states have done.

Justice Anderson of Minnesota answered the question similarly:

Somewhat important. Not necessarily very important because state constitutions are different. And the development of case law in each state is different. But I look to the other states, not so much for the result they reached, but the rationale and reasoning followed to reach the result, and if the rationale and the reasoning is persuasive in the other states, then the importance of that state’s opinion increases in its value to me. It is not the result of the decision by a sister state that matters, it is how that decision was reached that is important. The reasoning and the rationale behind it. That becomes quite important to us.

Justice Anderson then provided an interesting example of how reasoning can influence decisions and even be adopted and transmitted on to other courts both horizontally and vertically:

I will give you an example that involves a case dealing with medical expense recovery, [*Martin ex rel. Hoff. v City of Rochester*, 642 N.W.2d 1 (Minn. 2002)]. In *Martin* we were interpreting federal regulations, state regulations, and looking at several cases from other state supreme courts that had decided that issue. Among the states that had dealt with the key issue were New York, Utah, and

¹⁶⁹ At another point Chief Justice Cady, when asked what is necessary to reach a more rights expansive decision and what the Iowa Supreme Court looks for in those types of cases, said:

In those types of cases where everything else is identical, I think we have to look to whether there’s any distinguishable background or history that is associated with the federal approach versus the state approach to see if that alters our thinking at all. And, then, I think we just have to look at the rationale itself, and if we are reviewing under our own state constitutional provision, we should not [follow] a rationale that we might find flawed in the Federal Constitution. And, so, you know, the U.S. Supreme Court is not infallible, and their history shows that there’s been flawed decision making, and states shouldn’t just fall in line by accepting flawed decision making.

Washington. The other states decided the issue the opposite way I thought it should be decided, but there was a dissent in the Washington case [*Wilson v State*, 10 P.3d 1061 (Wash. 2000)] by Justice Gerry Alexander who ultimately became that court's Chief Justice. I knew Gerry, and I read his dissent with particular interest. I knew Gerry to be a thoughtful justice and I found his reasoning in the dissent compelling, so I used his dissent as a springboard for a draft of a dissent in our case. My draft dissent ultimately became the majority opinion. Our case was then appealed to the U.S. Supreme Court. The Court sent the petition for cert to the Justice Department to ascertain if the Justice Department wanted to weigh in. The Justice Department responded in essence that it did not think Minnesota got it right, but the case was not worth taking." A similar case subsequently came up [from] Arkansas to the 8th Circuit. The 8th Circuit cited our decision quite extensively [in *Ahlborn v Arkansas Dept. of Human Services*, 397 F.3d 620 (2005)] and held the same way we did. Now, this subsequent case was taken by the Supreme Court because there is now a circuit court deciding the issue differently from several state courts. In its unanimous opinion [by the U.S. Supreme Court and they] held the same way we did in Minnesota [*Arkansas Dept. of Human Services v. Ahlborn*, 547 U.S. 268 (2006)]. Tracking the evolution of the law on this issue, we have a dissenting opinion by a justice on a [state] supreme court that is the springboard for another state's majority opinion, which leads to other decisions that ultimately result in the original dissent being affirmed 9-0 by the U.S. Supreme Court. This I believe, is an excellent example of how the law can develop.

Justice Anderson, when asked specifically about the role of sister state decisions in the case of *State v Askerooth*, 681 N.W.2d 353 (Minn. 2004) (holding that defendants stopped in a minor traffic stop cannot be placed in the squad car or otherwise seized under Minnesota Constitution without reasonable suspicion) went on to say:

There were some of us on our court who were not pleased with the Supreme Court's holding in *Atwater v City of Lago Vista*, 532 U.S. 318 (2001), and we were looking for an opportunity (case) where we could distinguish *Atwater* [which held a defendant could be subject to warrantless arrest during traffic stop] because we did not think that *Atwater* was consistent with our jurisprudence in Minnesota. I did not start drafting *Askerooth* with the idea that it would be the case where we took on *Atwater*, but it developed that way. Then when we found that there were other state supreme courts that had also disagreed with *Atwater*, it was helpful for us. At least for me, it made me more convinced that what we were doing in *Askerooth* was right.

Justice Brown of Arkansas suggested sister state supreme court decisions would at least be considered:

Well, as I say [regarding] the *Brown* case [*State v Brown*, 156 S.W.3d 722 (Ark. 2004)], we look to other states, so if there is a precedent out there right on all fours with what we're dealing with, we'll look at that and we'll decide it, which we did in the *Brown* case, and I daresay [while] I haven't reread *Jegley v. Picado*, [80 S.W.3d 332 (Ark. 2002)] which was the sodomy case, to determine whether we did cite other cases, but I bet we did [and he was correct].

The importance of sister state decisions should be kept in perspective, however. I asked justices another question in an effort to ascertain the relative weight of sister state decisions compared to all other influences on state supreme court decision making: "if you had to put a weight on the role of sister state supreme court opinions in percentage terms, 1 out of 100% considering everything in the decision-making process, what percentage of your court's decision-making process would sister-state opinions account for?" The answers varied.¹⁷⁰ Potentially the impact of sister state decisions could be quite high for particular justices. Former Justice Jean E. Dubofsky of the Colorado Supreme Court reported that *if* the sister state decision was well done it could have "a major role," constituting maybe even as much as 80-90% of the overall weight (thinking in terms of a pie chart) of everything that went into the case. However, Justice Dubofsky went on to say that sister state opinions that were not terribly thorough in their analysis and reasoning were not particularly persuasive, and might constitute only 25% of the weight of everything that went into the decision making process. While these estimates of influence are high compared to other justices I interviewed, the idea of a persuasive case reflects what several of the justices said in their quotes above. Indeed, Justice Hecht of Iowa said almost exactly the same thing as Justice Dubofsky, minus the percentage weights: some sister state decisions are

¹⁷⁰ Indeed, several justices preferred not to answer this question. Even for the justices that would answer this question, almost all struggled to answer. It was clear that they really didn't think of influence in this way, and several balked saying things like "it doesn't really work that way." Justice Meshke of North Dakota might have been most blunt saying: "I think it is nonsense to try to quantify complex reasoning and analysis in arithmetic terms."

short and offer little rationale and are thus “unimpressive and unpersuasive,” but a well-reasoned decision that thoroughly reviews the legal landscape, can be “very important.”

It is accurately quantifying the overall role of sister states decisions that is difficult, and for most justices the overall role of sister state decisions was comparatively modest. For instance, former Justice Neuman of Iowa was probably more representative of the justices as a whole in reporting that for her 80% of the decision making process was based on Iowa Supreme Court precedent, while public policy and public opinion together amounted to around 10% of the decision making process, with another 5% for professional background of the justices, leaving 5% of the influence to sister state opinions. Still, Justice Neuman reported that sister states decisions played a significant role in her own thought process as she authored the case of *Santi v Santi*, 633 N.W.2d 312 (2001) (holding the Iowa grandparent visitation statute unconstitutionally impinged upon parental rights).

[*Santi* was] 10 years ago, so I don't remember that particularly, but in reviewing, taking a look at it this morning, it seems to me that I would think that I felt pretty good about the, I think it was Maine and Maryland, [who] had decided that similarly and some other states had not. ...I thought some states kind of went with the sentimentality argument, you know, “oh great for grandparents having interaction with their kids” so we're going to overlook there's a constitutional problem there. Whereas, I thought it was more persuasive to look at [the Maine and Maryland] courts. ...[E]verybody that I know, of course, love their grandkids but I understand [the constitutional need to find parental] unfitness before you move to the best interests [of the child] analysis.

...I think the reasoning in these cases was probably, well the reasoning in the cases where I found the discussion to be a good critical analysis in the discussion was influential, and I think the way other courts had sorted this out, both the United States Supreme Court and the other state courts, was at least 50% [of the overall decision making process]. You know the fact of the matter is we may not have thought as hard about whether this statute was unconstitutional unless someone else had thought about it as well. This is a case, when I look back at the statute, it just seems so breathtakingly broad, not as breathtakingly broad as the situation and legislation was in [*Traxel v. Granville*, 530 U.S. 57 (2000)], but I think there was quite a lot of influence here in terms of how other states had already looked at the question, and it created a comfort level. It created a comfort

level for our court to move in that direction. Or affirmed our sort of gut sense to how that case ought to come out.

However, this sister state influence was probably most felt in the writing stage—not at the conference or the initial vote—as Justice Neuman goes on to say later in the interview:

I sort of have this recollection of discussing this case and how important it was because whenever we were considering just saying on its face this statute is not constitutional that was always a serious moment for the court. ...I can picture myself sort of leading the discussion and listening to everybody, but I don't think at that point the other state court decisions were as important as a sense among some members of the court, and some stronger than others, that parents ought to get the first shot at this you know, and there ought to be that parental autonomy. I think there was some strong, a couple [of members of the court] in particular [who] felt very strongly about the parental autonomy.

My discussion with Chief Justice Castille of Pennsylvania revealed that while the Pennsylvania Supreme Court has explicitly included sister state decisions in its four factor divergence test for deciding when to expand rights on state constitutional grounds, this did not guarantee that sister state decisions were particularly influential for Pennsylvania justices. Sister state decisions were instead something that the Pennsylvania Supreme Court would consider, but sister state decision did not generally appear sufficiently important to determine the outcomes of decisions. His answers suggested there are subtle distinctions between informing, influencing, and determining the outcome of decisions in how state supreme court justices view the role of sister state decisions. While Chief Justice Castille did not use those terms, other justices did struggle to find the correct word to describe the relationship, and in the extended exchange below a careful read of the Chief Justice's comments seems to suggest the role of sister state cases, at least for him, fell somewhere between informing and influencing decision making, but not determining the outcome of decisions. Justice Castille responded to my questions as follows:

In considering just these state constitutional cases, how important is it to you personally the way that sister state supreme courts resolve similar cases under their state constitution?

I think it's important. Not all the states have the same constitution, although they're generally the same, they're all kind of written a little differently, so the question comes up I think it is important to look to see how other states have decided the same issue.

Now, in looking at sister states specifically, case in case out [and thus] generally speaking across cases, if you had to put a weight on the role of sister state opinions perhaps in percentage terms, 1 out of 100% of everything that's going into the decision-making process, what percentage of your court's decision-making process would sister state opinions account for?

Probably really zero. I mean we look to it. We always put that proviso of when we go into sister states we always say like, "While not binding on us we look to the sister state who felt was a similar situation." We will look to that. How the other states have dealt with it. I tell you it's important, but not extremely important.

To me this suggests that, at least for Chief Justice Castille, sister state decisions play an admittedly important role in informing a court's decision—certainly something informative to be considered—but not necessarily particularly influential in determining the outcome of the case.¹⁷¹ Support of the idea of sister state supreme court opinions "informing" the decision making process was reinforced by the following exchange with Chief Justice Castille:

When citations to sister state decisions are included in an opinion of your court in a state constitutional case, would you say that this means that the sister state opinions influenced your court's decision-making process or do these citations to sister state opinions merely help to justify a decision that was already made on other grounds?

[I]t is generally an issue that we have not addressed before when we look to other states, so if it's a constitutional law case, we'll look to see how we've done the constitution, but new situations, factual situations always come up, and we might just look to the other states to see how they address a similar factual situation, so that is part of the body of law [in] the United States and the they are all law

¹⁷¹ This idea of "informing" is the term that best captures what I think justices mean when they say that sister state decisions are "helpful" (see quotes from Justice Neuman and Justice Douglas above, and descriptions by other justices, on pages 154-55 of this chapter). Chief Justice Ternus used the term "illuminate": "I think the citation to sister states indicates that those opinions illuminated the issue for us. They were helpful in – well illumination I think is the best. And, to that extent, influenced I suppose, sure—if we thought that they were persuasive."

trained justices in the other states, and you can get some pretty good stuff from the other states also—a pretty good body of law.

I then attempted to move this discussion with Chief Justice Castille from the abstract, to the practical impact of sister state decisions in a concrete case decided by the Pennsylvania Supreme Court. Again the impact of sister decisions seemed to be informative, although not particularly influential (at least in the specific cases I asked him about), and certainly not determinative of the outcome of the Pennsylvania decisions. The following is a portion of our exchange concerning the influences upon the Pennsylvania Supreme Court in the case of *Commonwealth v White*, 669 A.2d. 896 (Pa. 1995), which held the Pennsylvania Constitution was violated where officers conducted a search of materials inside a car after the defendant was removed and secured, rejecting the search incident to arrest exception for automobiles established in *New York v Belton*, 453 U.S. 454 (1981).¹⁷² Chief Justice Castille dissented in the *White* case, and I was interested in his perspective of what motivated both the majority and his dissent, and particularly the role of sister state court decisions:

So specifically in the context of Commonwealth v. White, what was the single most explanation for the outcome of that case in your mind?

To me, I was a prosecutor for twenty years. I think [the officer] was just doing her job, and you know you can't expect them to be lawyers, and they're generally trying to do the best that they can, although you know you have rogue cops. Here's the police, they face a situation, they have to make a decision, and it might, it was ruled technically wrong, but I guess it comes from my experience in the past and my sort of antipathy towards the suppression of evidence. [Thus], I'm not as strong on our constitution, our constitutional rights as the U.S. constitutional decisions.¹⁷³

¹⁷² Interestingly *Belton* was subsequently partially overruled by the U.S. Supreme Court in *Arizona v. Gant*, 556 U.S. 332 (2009).

¹⁷³ At another point in the interview he reiterated this point regarding *Theodore v Delaware Valley School District* 836 A.2d 76 (Pa. 2003): “in that particular case [*Delaware Valley*] I thought our constitution gave greater rights, but search and seizures I've always tried to be congruent with the U.S. Supreme Court.”

Would it be fair to say--I know the concurrence by [Justice] Montemuro [in White] spent quite a bit of time looking at sister state decisions. Would it be fair to say that really didn't matter all that much in the outcome of the case?

Not to the other justices. I mean I agreed with the 50-state search that he did. It was pretty comprehensive. I would, in that particular search, I would find very relevant to how the case should be decided. If you have looked at the jurisprudence of all 50 states and they kind of support your position, you say like, "Wow, why should we be different?"

It was really close, as I recall, the states. I mean it was pretty well divided. I think it might have slightly gone to follow U.S. precedent, but it was pretty close, but you're saying it didn't really impact the decision all that much.

No.

Unfortunately these exchanges with Chief Justice Castille about the specific case of *Commonwealth v White* are not particularly helpful to my sister state hypothesis, yet I included this series of exchanges for several reasons. First, I include them so as to characterize as accurately as possible the impact of sister state opinions upon deciding courts from justices with different perspectives. Second, I have included this particular exchange because it highlights one of the few examples I found of courts disregarding sister state opinions when those sister state opinions were basically not helpful to the outcome reached. Instead, the majority in *White* relied upon earlier Pennsylvania Supreme Court precedent¹⁷⁴ (predating *Belton*) which rejected a search-incident-to-arrest exception for the search warrant requirement in the Fourth Amendment in cases where the defendant is secured in a police vehicle before the search of the defendant's vehicle begins. *Belton*, and the federal cases following *Belton*, reached a different conclusion and permitted warrantless vehicle searches incident to arrest.

In *White* the majority relied upon earlier Pennsylvania precedent interpreting the Fourth Amendment to inform and support rejecting the *Belton* exception under the Pennsylvania

¹⁷⁴ *Commonwealth v. Timko*, 417 A.2d 620 (Pa. 1980).

Constitution, but the majority completely ignored the considerable jurisprudence on this question from sister states, much of which followed federal precedent. The concurrence by Justice Montemuro in *White* called the majority out for “fail[ing] to employ the *Edmunds* analysis.” Justice Montemuro reminded the majority that the *Edmunds* precedent instructed litigants and the court to examine “related case-law from other states” as part of a four factor analysis. *White*, 669 A.2d at 903. Justice Montemuro carefully applied and analyzed each of the *Edmunds* factors, and particularly the factor concerning case law from other states, before reaching the same conclusion as the majority. He also looked to legal treatises and law review articles, spending several pages examining how sister state courts and legal authorities had wrestled with the *Belton* exception. He rejected the *Belton* rule on its own reasoning, saying it is unreasonable to allow warrantless searches incident to arrest in order to protect officer safety in situations where the defendant has been safely secured.

Instead of sister state opinions, Chief Justice Castille suggested the professional background coupled with judicial ideology was more influential in *Commonwealth v. White*.

Well, I know you’ve already said that your professional background influenced your take on the case. Do you feel that was also true of your colleagues’ approach to the case?

Yeah, I think so, because they were mostly like liberal judges [and then Chief Justice Castille discusses individual backgrounds of several justices potentially leading them to that ideological persuasion].

I then discussed with Chief Justice Castille another specific case, *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003), in which the Pennsylvania Supreme Court held that the Pennsylvania Constitution protects greater student privacy interests in the context of student drug tests than the U.S. Constitution. Again sister state opinions were not the most important influence according to the Pennsylvania Chief Justice:

Well, let me turn to the decision you authored. I want to get your impression of the Theodore v. Delaware Valley School District case. In your mind, what was the biggest impact, the single largest important explanation for the outcome of that case?

It's a huge issue—drug testing in schools and safety in schools. We had a couple of cases where we said, “Yeah, you can search every kid coming into the school for safety reasons,” and we had another case where you can search lockers without probable cause because the school basically owns the locker, but then this drug testing stuff is a problem everywhere in adults and especially in schools. In schools, I think I even went through the whole litany of the horrors that we're talking about—drugs running rampant in the schools and things like that, but the overarching thing is that kids have rights also. We don't just trample them. The school district is probably well meaning, but as far as I was concerned, they targeted the wrong kids.

Now, how important in your view were the sister state decisions that you cited in the outcome of the case?

They weren't that important. I just cite them as support for various things I said. I don't think they played a huge role. We're like writing on a blank slate to some extent. There's such a new issue, and we have guidance from the U.S. Supreme Court in [*Vernonia Sch Dist. 47J v. Acton*, 515 U.S. 646 (1995)].

Now, I know you spent about a page, at least a page of this printout, speaking, kind of distinguishing, but looking at the reasoning, of the New Jersey Supreme Court in that decision and generally when I see something more than just a string citation, I tend to assume that it was relatively important, but as far as the overall, everything that went into the decision-making process it really wasn't that important?

Basically not. It's not that important. It's sort of like you're dealing a deck of cards, it's just another card that supports your view.

Again this above exchange with Chief Justice Castille seems to suggest that sister state decisions are important, but seem to be important mostly to the extent of informing the deciding court more fully about the issues involved and the reasoning. Sister state decisions may also be influential to a degree, although certainly not determinative of the outcome. Chief Justice Cady of Iowa echoed this point when specifically asked about the case of *State v Cline*, 617 N.W.2d

277 (Iowa 2000) (rejecting the good faith exception to the exclusionary rule under the Iowa Constitution):

Specifically, how important in your view were the sister state decisions in the outcome of the State v. Cline case?

Well, in that particular case, I don't know if they are important to the outcome. They may have – I think some of them were cited to support where we were going... I mean I think that the sister court jurisdictions played a role, but only to the extent that it was simply support for what we were doing. You know, we're taking a contrary position from the United States Supreme Court, and I think when you do that, you feel a little better about it when you're able to say, "Well, this isn't an oddball decision. There [are] other things out there; there's other jurisdictions out there that [agree with us], the landscape is varied." So, I don't think—I don't remember the cases as the decision standing or falling because of the way the sister court cases were lined up. It was more helpful to us.

There are instead other more important factors than just the outcomes of sister state decisions. These other factors include normative reasoning and general common sense ideas of justice. Indeed in the context of *State v Cline*, Chief Justice Cady answered that what was more important to the outcome of the case than the role of sister state opinions was "the deeper purposes of the good-faith exception." Yet when asked in the abstract whether the citation of sister state decisions in Iowa Supreme Court opinions means that these sister state opinions influenced the Iowa Supreme Court's decision-making process, or do these citations to sister state opinions merely help justify a decision that already made on other grounds he answered: "Well, I would hope that they would be more to influence than to justify." Thus, at least for Chief Justice Cady, the role of sister state court decisions is a modest and subtle one, but their inclusion in the final written opinion for the court is generally an intellectually-honest exercise, as their influence is more than merely ideologically motivated.

The important role of normative reasoning and general common sense ideas of justice, as informed by the arguments in sister state opinions, can be at odds with what one might expect

based solely on a particular justice's ideology and background. For instance, in the *Delaware Valley School District* case Chief Justice Castille of Pennsylvania admitted to coming to a conclusion that might not be predicted based solely on this background and ideology:

Now, how important in your view was the political ideology of your colleagues in the outcome of [Theodore v. Delaware Valley School District]?

Well, at that time, I would be the one who was the most likely to uphold the lower court as opposed to reversing them because of my prosecutorial background. People say I'm a prosecutor, but the one thing I always want is for people to have a fair trial. So that's why I would reverse death penalties, even from my own office because they didn't get a fair trial.... If I decided it this way, which would sort of be the liberal way, then almost all of my colleagues would go along with that because they'd see me as the most conservative justice at that time.

Chief Justice Castille went on to address the tension justices must constantly resolve within themselves as they make decisions, and that is the tension between having personal feelings about issues, but keeping an open mind to fully consider the constraints of the law.

My own personal philosophy is that, I think I mentioned it a little while back in our discussion, is that I generally know how I'm going to decide these cases or how I'm going to vote on a case, but it's important that you have an open mind and you not be locked into any certain position. I think oral argument generally is not going to sway anybody ...but every once in a while they'll say something that causes you to rethink your position. It's important to have an open mind. It's important to try to not have your personal past influence your decisions.

This last answer was interesting as Chief Justice Castille had admitted that political and judicial ideology had influenced the outcome in *Commonwealth v White*, 669 A.2d. 896 (Pa. 1995), but then says it is important to have an open mind, and not allow your personal past to influence your decisions. One response to this conflict would be to conclude that these are simply irreconcilable statements. That strikes me as too narrow of a view. Perhaps a better approach is to acknowledge that background and ideology are always present in state supreme court decision

making, but are merely factors in the process. More importantly they are factors that need to be controlled and limited to achieve good judicial decision making. To deny their existence or role is incorrect and disingenuous, but they also should not control decision making. Instead justices seek to place background and ideology aside and decide cases on legal factors. Note that Chief Justice Castille acknowledged that his vote in the *Delaware Valley School District* case went against his normal predispositions based on background and ideology. To what degree background and ideology should yield to other factors, and what those other factors should be and in what combinations, seems to vary from justice to justice and case to case based on the strength of countervailing considerations.

As we have seen in this discussion, the issue of how important sister state decisions are to state supreme court decision making is complicated by the fact that not all sister state decisions are equally influential. The potential influence of a particular sister state decision is contingent upon its content and quality, as well as the context in which it was decided and being used. In other words the importance of sister state decisions is variable based on the internal components of the sister states decisions cited and the external context in which they are being considered. Certainly one internal component impacting the importance of sister state decisions is the quality of the reasoning contained in those decisions, and that is a very difficult issue we will return to. First it is worth investigating more objectively measurable components and contexts which impact the persuasive power of sister state decisions.

C. What about Sister State Decisions is Influential?

I asked the justices the following question:

what tends to be most important about these sister-state opinions . . . a) the recent trend across sister states deciding similar cases, b) the prominence or prestige of the sister state supreme courts being cited, c) whether the sister states are liberal or conservative, [or] d) the number of sister state opinions on both sides

While opinions varied, Justice Ester M. Tomljanovich, who served on the Minnesota Supreme Court from 1990 to 1998, answered “all of the above.” She followed up by saying it was all of these factors working together as “you really can’t isolate one factor and say this is what we rely on ... because you think about all of them.”¹⁷⁵ She also agreed that it was probably the case that sister state decisions are more important when there is a clear majority rule across states on one side of the legal issue.

However, other justices preferred to single out one, or a couple of factors. Justice Brown of Arkansas seemed to focus on the trend across states and the number of sister state opinions on both sides (as well as the relation with existing Arkansas precedent):

[F]rom my vantage point, I’d say if a sister state has a case that’s right on point, that’s going to be helpful to me, but it doesn’t necessarily decide the issue if it competes with one of our own cases. As far as a trend, yes, we’re influenced by a trend, but not necessarily. In other words, if we are in the minority of jurisdictions and we think that’s right, our jurisprudence is right on that particular issue, we’re going to stick to it, so we don’t necessarily go with the flow. So, we look at the fairness, we look at our own jurisprudence. So, trends, we take note of trends, we follow the trend or we don’t. The facts of a particular sister state’s case is important to me, but again, if it conflicts with one of our own cases, we’re going to be hard-pressed to follow it.

1. Trend and Numbers. The recent trend across sister states (category a) and the number of sister state decisions on both sides (category d—hereafter referred to as the majority rule) were the most important aspects of sister state supreme court decisions, according to the justices interviewed. These two categories certainly got the most responses. All but one of 12 justices who answered this question identified the recent trend across sister states as important, and that one justice not identifying the trend as important answered that the majority rule across states

¹⁷⁵ Former Justice Neuman of Iowa said almost the same thing: “It seems like it’s kind of a blend. You just sort of weigh all of those factors...” Justice Andrew Douglas of Ohio also agreed all of the factors matter: “Your question is well thought out. ...I chose a, b, c, and d because all of those things are important to me.”

was most important. Majority rule was also identified as important by 7 of the 12 justices, again usually in conjunction with identifying the trend across sister states as one of the most important factors. In other words, trends across sister states and majority rule are closely linked factors.

Yet Chief Justice Cady of Iowa was quick to point out that all of this consideration of trends and majority rules leads immediately back to the quality of the reasoning contained in the sister state decisions:

Are sister state supreme courts more important when there's a clear majority rule across states on one side of the issue?

Yes.

How much did that play, I know you said it's rationale and quality of the reasoning that's more important, but how important is having a disproportionate number of outcomes on one side of the issue?

Well, it is important, but I don't think, it's not what wins the day. I think what's important is to look at each one of those decisions and primarily the decisions that started the path and to see the rationale of those decisions and to see if the courts have followed just followed because that was the path that was taken by other courts and because I think you need to guard against instances where there might be a clear majority, but the majority was just falling in line instead of individually testing the validity of those early courts, the holdings of those early courts.

So, you're actually looking to see if there's an evolution of reasoning and whether each subsequent sister state held with the reasoning.

Exactly.

Justice Hecht of Iowa elaborated on this point:

[I]t's not unusual in the course of a case conference to say, "There are 15 jurisdictions that have decided it this way, there are 10 that have decided it the other way, and let's break that down." Among the 15 jurisdictions that have decided it one way, there are really only two of them that have taken a critical look at the issue and expressed in a thorough way why they came out that way. The rest of them were just conclusory and cited the first two, and so we don't really give too much weight in our conversation to the ones that are just followers and conclusory case counters. ...[I]t's not uncommon for us to then take a look at the well-reasoned, thorough discussion of the two states and give that careful

thought—and then we do the same on the other side, the other 10 jurisdictions. Where did they come out and have they made a persuasive argument as to why they chose to go the other way? It's a common occurrence in our conference.

2. *Prestige*. Several justices spoke to the issue of prestige of sister state supreme courts as factor in how influential citations to their decisions would be. Justice Paul Anderson of Minnesota addressed the issue in depth:

Several years ago I had an interesting conversation with Margaret Marshall, the former Chief Justice of Massachusetts. At the time she was an Associate Justice on that court. Chief Justice Marshall was in Minnesota for an Eighth Circuit Judicial conference. The two of us were visiting about judicial decision making when she mentioned to me that, when she had a case where there was no clear precedent in Massachusetts, Minnesota is one of four or five states that she would ask her clerks to check out to see what if anything Minnesota had done on the issue.

Often which other state supreme courts we look to depends upon the reputation of the state and the reputation for the quality of that state's jurisprudence and how that state approaches its decision making process on particular issues. In the recent past an important state for us to look at was our sister state, Wisconsin, but I do not know how much we will look to Wisconsin in the future, given that state's recent problems with the selection of justices and the apparent dissension on that court. As you can probably tell, I not only pay attention to the fact that another state has made a decision, I also pay attention to which state it is. If you were to ask me to tell you which states I generally look at, it's a little bit hard to say because that list changes over time. I can say that I frequently look to New York and Massachusetts to see what they have done. California is also on the list, as well as several of our neighboring states. During my tenure as a justice I have seen some southern states find their way onto my list. Unfortunately, there are some states that I do not look to with any frequency, but it is best not to name those states.

Certainly prior to the interviews I had hypothesized that California would have an outsized impact based on previous scholars noting such an effect (see chapters 3 and 4). Yet I had also found modest evidence suggesting that courts would cite California precedent for the purpose of suggesting it was too radical, and as noted above, Justice Stratton of Ohio seemed to confirm this: "If you cite us California it carries very little precedent [value]. Their [cases are] so far out there it's kind of a joke. Don't send us to California law."

Not every justice looked to the most prestigious states nationwide, preferring to look to more like minded states in their region. I asked former Justice Neuman of Iowa: “Is there a subset of states you would give a little more credence to than the average state?”

Well, to be honest, the states in the heartland, the Midwestern states. I just feel like those courts are by and large taking a look at cases much like the Iowa Supreme Court would, less ideologically polarized: Minnesota, Wisconsin, Nebraska, Kansas.

Yet just a minute or so later in the interview, however, Justice Neuman added this:

[P]eople talk about there was a time when certain state courts were kind of in their ascendancy. You know, I think of New Jersey, California early on and the New Jersey. I think of Washington and their state constitutional analysis, you might really pay attention to that. It’s kind of who the head of those court systems is and where the leadership is, and that varies over the years. I would say that that seems less important, that prestige, that prominence that prestige, that seems less important in the later years that I was on the court than it did early on.

Chief Justice Cady of Iowa tied the prestige of sister states to the judicial selection method those sister states employ:

I tend to consider first of all the nature of the issue and to see if it’s the type of issue influenced by elected judges or merit-appointed judges, and I think if a decision comes from a state that has the election of judges, I can tend to give that lesser weight.

I also tried to investigate the role of prestige in specific cases. I asked Justice Brown of Arkansas specifically in the context of *State v. Brown*, 588 N.E.2d 113 (Ohio 1992) “[D]oes it matter that it was New Jersey or Washington on one side or Iowa and North Carolina or Maryland on the other?” His answer was similar to Justine Neuman’s noting that sister state prestige is not a stable and consistent factor:

No, it really doesn't [matter] because I think the complexion of those state courts changes. So, I mean, the idea that New Jersey may have been at one particular time a great supreme court doesn't necessarily apply today, so we really, I'm harking back to the statement ... that we really look at the analysis and the proximity to our fact situation.

Other justices, however, downplayed the connection between influence and the prestige of sister state courts altogether. Justice Paul E. Pfeifer of Ohio, for instance, turned the question around on me:

You may know which are the highly regarded state supreme courts, but I've got to be honest with you; I don't.

...[A]nd one of the reasons may be that the Chief Justices have kept their little organization to themselves.... I noticed when I first got there the Chiefs meet regularly and have an exchange with each other, but the rest of us who make up the majority of these courts don't have ... an organization where we meet regularly. ...[W]e don't know each other, so when you don't know people, there isn't much reason to respect or disrespect them....

Justice Hecht of Iowa was even more blunt in rejecting the role of sister state prestige:

Let me start by completely ruling out [the prominence or prestige of the sister state supreme court being cited]. I've never heard any colleague express the opinion that one supreme court or another should be accorded more prominence or weight because of its prestige or something like that, so that never is a factor.

It was my impression that the role of prestige of sister state supreme courts was the single issue upon which there was the least amount of consensus amongst the various justices I interviewed. Justices ranged the entire spectrum from believing that certain sister state courts did have more influence based on perceived prestige and reputation, to thinking the amount of influence varied as the membership of sister state courts changed, to rejecting altogether disproportionate influence based on prestige. Thus the prestige component illustrates the fact that there is no established manual that tells justices how to decide cases. While there is a substantial amount of consensus between justices on many issues concerning the decision making process, each justice

approaches decision making in his or her own style. Each justice seems to have his or her own internal list of factors that are most important to him or her. Some of these components do become institutionalized in explicit sets of decision making factors (like the explicit divergence factors adopted by some state supreme courts as discussed earlier in this chapter). Yet even when sets of decision making factors are agreed upon and institutionalized by certain courts, there is often disagreement amongst justices about the appropriate relative weights each of the component factors is due.

3. Sister State Ideology. While four justices answered that all four of the proffered aspects of sister state decisions (trends, prestige, sister state ideology and majority rule) were influential to them (Justices Meschke of North Dakota, Neuman of Iowa, Tomljanovich of Minnesota, and Douglas of Ohio) these were the only four justices to identify sister state ideology as important, and then only in the context of everything matters. None of the nine justices answering this question who identified three or less factors as important, identified sister state ideology as one of those factors. To be fair, however, there was some anecdotal evidence concerning sister state ideology, including comments from Justice Stratton of Ohio concerning the reputation and prestige of the California Supreme Court. Yet Justice Stratton also specifically said that whether sister states are liberal or conservative is “not important at all.” So while there is disagreement on the role and importance of sister state ideology, on the whole it seems plausible, even probable, that there is an interaction between the ideology of sister state supreme courts and the prestige, persuasiveness, and credibility given to them by other courts.

4. Role of Opinion Author. While I did not emphasize, or offer as a possibility the role of the opinion author for the deciding court, former Justice Neuman of Iowa suggested this might

be an important conditioning factor on the influence and importance of sister state decisions upon the deciding court.

Let me say that everyone who has read the briefs will be aware of how other states have decided the case and then kind of presume from the briefs that the descriptions are accurate. [However] [t]he author at conference may say, “Well, I’ve read these cases, but they aren’t very sound.” Or their reasoning just parroted what other courts have said and you think this could pile up on one side, but I’m not paying very much attention to that, and then you’d listen to that that description of those cases and kind of rethink them. And, maybe, ultimately, go back and take a look at them for yourself. But there was a lot of, I would say a fair amount of reliance on the opinion author, the person who’s leading the discussion as to the significance of other state court decisions.

The role of the opinion author was further underlined by Justice Neuman during the rest of the interview as we discussed specific cases. The role of sister states decisions seemed most important during the opinion writing stage. The reasoning of sister states impacted Justice Neuman’s writing of *Santi v Santi*, 633 N.W.2d 312 (Iowa 2001), but was not particularly important during the conference discussion of *Santi*. Justice Neuman also suggested that any influence of sister state decisions also appeared to be limited to the opinion writing stage in *State v Cline*, 617 N.W.2d 277 (Iowa 2000).¹⁷⁶ Justice Stratton of Ohio echoed the importance of the opinion author as to whether sister state opinions were included in her discussion of the *City of Norwood*, 853 N.E.2d 1115 (Ohio 2006) decision:

[I]n this opinion there were several ... sister state decisions cited at one point or another in the opinion and most of them are in agreement with the outcome, although there’s a handful that are not. How important, in your view, were the opinions of the sister states decisions?

I think that has a lot more to do with the author. [Chief] Justice O’Connor tends to write very law journal, well-researched, historical background, go-into-great-

¹⁷⁶ As Justice Neuman described the role of sister state supreme court decisions in *Cline*: “I don’t remember paying that much attention to the other state court decisions [in *Cline*], and of course, I wasn’t the author then so, as I suggested before, I probably didn’t dig into them as much as Justice Ternus [who wrote the unanimous opinion in *Cline*] would have.”

depths cases, and I think that was a writing style. I don't recall talking about any of that stuff in conference itself. I think it's more writing style. If another justice had written it, it might have been ten pages long with very few citations, so I think that has more to do with her writing style and her recognition this was a very important case and a desire to have it very well written and researched because there would be a lot of people looking at it.

Justice Pfeifer of Ohio pointed out that individual preferences and self-imposed rules for opinion writing could have an important influence on whether sister state decisions are cited. In particular, he discussed how several of his own personal rules about writing opinions could have an influence both on whether sister state citations made it into a final decision, and also the importance those sister state decisions might have:

I [have] three writing rules... No footnotes, no string citations, and then keep it short.... You know, in most cases, I just won't let my law clerks cite much from anywhere else unless it's really, really helpful.... So, I tend in most cases not to look very much at what other states are doing.

Justice Pfeifer then placed a caveat on his reluctance to use sister state decisions, saying that in the area of state constitutional law sister state decisions have more than the typical impact "because you're talking about important constitutional issues." He went on to say: "I mean when we're deciding lots of other things, [sister state decisions are] not so important, but when we're maybe differentiating from where the U.S. Supreme Court has gone [sister state cases are somewhat important]."

Justice Dubofsky of Colorado also commented about the role of the opinion writer, specifically in the context of paying particular attention to the prestige or reputation of sister state supreme courts. While she personally did not give much attention to the level of prestige of sister state courts (as the makeup of state supreme courts is continually changing and she did not keep abreast of those changes), she found it noteworthy that her predecessor on the Colorado Supreme Court, Chief Justice Edward E. Pringle, did maintain personal connections with justices

on sister state courts and would give particular deference to decisions by other justices he knew. Thus, given the inordinate influence of the opinion writer on the decision making process, the influence of such idiosyncratic factors as sister state prestige is conditioned upon the opinion writer's predilections.

So what have we learned from asking justices about what particular aspects of sister state decisions are most influential upon the decision making process? First, whether a particular sister state decision is cited in an opinion is partially a function of the thoroughness and individual writing style of the author of that opinion. Thus the given value of a sister state decision is highly contextual and variable—it is not a constant! Indeed, the interaction of all these different factors contributing to what sister state decisions important suggests an observer should be very cautious in attributing a fixed value to sister state decisions. Different justices weigh the value of sister state decisions differently, depending most importantly on the quality and thoroughness of reasoning in those sister state decisions cited, and then to some extent upon the recent trend and majority rule across sister states, and most idiosyncratically the prestige and reputation of particular sister state supreme courts (and perhaps even the reputation of individual justices writing opinions for those sister state supreme courts). Each justice on the deciding court makes this calculation somewhat differently. The weight given to sister state decisions is also contextual given the countervailing weight of other considerations like Supreme Court and deciding court precedent, the likely impact of the decision upon public policy, and the ideology and background of the justices—thus it is impossible to ascribe a fixed weight to the role of sister state decisions.

D. Sister State Influence versus the Role of Ideology.

One major justification for conducting the judicial interviews was to attempt to compare the relative weights of the effect of political ideology versus the influence of sister decisions cited. One concern with the empirical findings was whether these findings were merely correlational or causal. Specifically, while there was evidence in chapter 5 that courts did cite sister state supreme courts, particularly when deciding to expand rights, there is concern that justices were only citing sister state decisions that agreed with decisions they had already made for other reasons. In other words the correlation found might be merely spurious if justices were merely citing sister state opinions in order to justify their decisions, and were not being influenced by the sister state opinions themselves. Indeed there is some significant evidence suggesting the possibility of a spurious relationship in the answers of the justices. As cited above, Justice Anderson of Minnesota warned generally about the role of ideology in state constitutional decision making: “the more conservative members of our court appear to be less willing to go the state constitution whereas the moderate members of our court appear to be more willing to look to the state constitution.” However, other justices maintained that citations to sister state decisions were included because the sister state decisions being cited were actually persuasive, not merely as after the fact justifications.

To help tease out the connection between ideology and citations to sister state courts, I asked the justices the following question:

When citations of sister states are included in an opinion of your court in a state constitutional case, would you say that this means the sister state opinions actually influenced your court’s decision-making process or do these citations to sister state opinions merely help justify the decision that was already made on other grounds?

Former Minnesota Supreme Court Justice Tomljanovich answered that sister states help influence decisions, which are made only after considering many factors. Moreover she rejected,

the idea that state supreme courts were using sister state citations simply to justify certain outcomes: “I don’t think you ever say this is the way this case is going to come out now let’s find some way to do it—you don’t do that.” Justice Brown of Arkansas, while acknowledging citations to sister state courts could be used in some cases to bolster decisions said: “[F]or the most part, I would cite another state’s decision because that was influential, or it’s something that is close to the facts of our particular case, and we want to distinguish it for some reason.” Justice Brown went on to say, in response to my follow up question asking “to what extent do your colleagues only cite sister state decisions that comport with their own personal preferences and backgrounds or are the opinion writers generally even handed and cite relevant sister precedent regardless of whether it agrees or disagrees with their preferred position?”:

[I]f they’re cited, it’s objectively based. It’s not because, you know, I have a certain ideological proclivity for this particular position; it’s because it’s objectively based, and it’s helpful to the particular situation or case at hand, it’s important to the court, helpful to the court. So, yeah, I don’t think a particular individual ideology gets involved in it.

Former Chief Justice of Iowa, Marsha K. Ternus, added:

You look [first] at the constitutional provision. [Then] you go back to cases that have interpreted that provision in our state or similar provisions in other states or similar federal constitutional provision and you begin to understand what is the nature of the right being protected here, and you look at how courts have interpreted that – broadly or narrowly and whether that seems consistent and makes sense if over time an interpretation has been shown to stand the test of time ... so it’s really a matter of just going back to the beginning and working your way up and seeing what makes the most sense and not be disingenuous about it to reach a certain result that reflects as you would a political approach or philosophy or view.¹⁷⁷

¹⁷⁷ I went on to engage Chief Justice Ternus in the following colloquy:

Now when citations of sister states are included in an opinion of your court in a state constitutional case, would you say that this means the sister state opinions actually influenced your court’s decision-making process or is the citation to the sister state opinions merely help justify the decision that was already made on other grounds?

Well, I think the citation to sister states indicates that those opinions illuminated the issue for us. They were helpful in – well illumination I think is the best. And, to that extent, influenced I suppose, sure—if we thought that they were persuasive.

There were some justices, however, that acknowledged citations to sister state decisions were included to justify decisions already made. Justice Pfeifer of Ohio answered the citation of sister state decisions was more about justification than influence upon the decision making process. Other justices felt sister state decisions were cited both because they influenced the decision making process and also because they justified the result. Former Iowa Supreme Court Justice Jerry L. Larson said “I think it’s some of both. I think we analyze those cases [as] to result and we also use them to substantiate what we’re doing. I don’t know that I would say that primarily one or the other.” This was echoed by Justice Neuman of the same court: “I’d like to say [sister state citations] influence, but I think there is also an element of justification. Kind of like, ‘Ah hah: We are looking at it this way and these other states did too.’” Indeed, in hindsight there is something of a false dichotomy in this question.¹⁷⁸ It was not until late in the

I guess what I’m really trying to get at, just to be upfront, lawyers and political scientists think about these things very differently, unfortunately, sometimes, and the real concern is are the sister states’ decisions and the rationale in them causal in the sense that they are actually literally influencing the decision or having an impact on the decision that’s going to be made, or are they thrown in at the end of the process and being used to simply justify an outcome?

I know what you’re asking, and I’m saying, at least in my years on the court, they were part of the research that bore on the court’s decision-making process. Now, I can’t say that, when we wrote the decision and we found out that Missouri had reached the same decision three months ago and it wasn’t in the clerk’s memo or the briefs that we didn’t put it in. ...[B]ut this idea you know how you want to come out because you’re strong on crime and you go looking for a way to justify it – did it happen on our court? I can’t say, maybe it did, but that approach was certainly not reflected in the conference room, and it was certainly not the approach that I saw or that I took.

Would you say that your colleagues only cite sister state, this is similar to what you said, do you find that your colleagues only cited sister state decisions or other authority that would comport with their own personal preferences and backgrounds or were the opinion writers generally even-handed and cited relevant sister state precedent, regardless of whether they agreed or disagreed with their preferred position?

...We have some people on the court who if they had written [the opinion] would have reached the same result in much fewer pages [than I did]... but then when they went to write it, they would have written it to support the path the court took and would not have gotten into, this is why we reject or don’t go with the U.S. Supreme Court or minority view or whatever the case might have been out there. And so the failure to cite contrary authority, I think, oftentimes is not to pretend it’s not there, but just the opinion writer’s style is not to go into that depth.... I just always thought that particularly in case where you are departing from the U.S. Supreme Court that maybe you are a little more sensitive to explaining why you are doing that—to make it clear that there [are] intellectually sound bases for your rejection of case authority from a court with that prestige or authority.

¹⁷⁸ Justice Meschke of North Dakota revealed this perhaps most bluntly in answering this question with another question: “which came first, the chicken or the egg?”

interviewing process that I conceived of sister state decisions helping to validate a decision initially made on gut feelings, as discussed in the final section of this chapter. There I attempt to distinguish between justification and validation in the decision making process. The validation of gut feelings seemed to be much more in tune with how many state supreme court justices thought about the nature of the influence, as opposed to some independent factor that had a consistent, predictable weight. This is explained more fully in the final section of this chapter discussing the subtle difference between justification and validation.

III. The Role of Precedent on Supreme Court Decision Making.

As discussed above in the discussion about explicit divergence factors (section II part A of this chapter), there is support both in state supreme court opinions as well as commentary by justices for a role for changes in U.S. Supreme Court precedent and a role for deciding court precedent in influencing state supreme court decision making. The explicit divergence factors articulated by some state supreme courts provide support for Hypothesis 2: state supreme courts will be more likely to recognize additional rights if (a) the current precedent of the Supreme Court is narrower than earlier Supreme Court decisions, and/or (b) the deciding court rendered expansive interpretations when Supreme Court precedent was unclear. Hypothesis 2 suggests there is an important influence on state supreme court decision making if the Supreme Court has *narrowed* its precedent (reducing rights)¹⁷⁹ or if the state supreme court has previously rendered

¹⁷⁹ In other words, for Hypothesis 2(a) it is the *movement* of Supreme Court precedent that is key, or to be even more precise, the fact that in narrowing precedent the Supreme Court has endorsed conflicting reasoning—the reasoning underlying the previous federal precedent and the reasoning underlying the current federal precedent. Since the state supreme court is not bound to follow the new more restrictive Supreme Court precedent in interpreting state constitutional provisions, what is to say the reasoning underlying the new Supreme Court precedent is more persuasive than the reasoning underlying the old Supreme Court precedent? While following the new reasoning has the additional advantage of maintaining a harmonious and consistent reading of state constitutional law with federal constitutional law, if the old reasoning is more persuasive then the state supreme courts may choose to follow the old, more expansive reasoning under their state constitutions. See Chapter 1.

expansive decisions interpreting the U.S. Constitution prior to the Supreme Court making a narrower definitive interpretation of the U.S. Constitution.¹⁸⁰

A. Role of U.S. Supreme Court Precedent

1. *U.S. Supreme Court retreat.* I asked the state supreme court justices “considering just these state constitutional cases, how important is it to you personally that the U.S. Supreme Court may have adjusted, distinguished, or overruled its own previous precedent” and provided them with four responses: a. very important; b. somewhat important; c. mostly unimportant, or d. not at all important. Their answers were then scored d = 1, c = 2, b = 3 and a = 4.¹⁸¹ The modal answer, like the answer for the importance of sister state decisions discussed above, was 3 (“somewhat important” with 7 responses out of 15 codeable responses to this question) and the mean score was 2.8. The mean answer to this question was significantly higher than the role of public opinion (mean 1.2) upon the deciding court.

For some justices the presence of U.S. Supreme Court retreat from its own prior precedent was important. As discussed at the beginning of this chapter, the Minnesota Supreme Court seems particularly sensitive to this factor. Justice Anderson of Minnesota wrote a law review article emphasizing this factor, and stated to me: “If we have seen the U.S. Supreme Court take a radical or a significant departure from its previous case law where we have developed our case based on the previous case law, we will often decide there is no good reason for us to depart from what we have been doing for any number of years.” Not surprisingly, Minnesota Supreme Court Justice James Gilbert echoed that same language, that while the

¹⁸⁰ Hypothesis 2(b) is not concerned with the movement of the Supreme Court, but instead focuses on the chronology and scope of successive decisions. If the state supreme court decided the issue first in a rights expansive way, and only later the Supreme Court decides the precise issue in a narrower way, the state supreme court now faced with deciding the issue specifically on state law grounds must decide whether to follow the reasoning of its earlier expansive decision or the reasoning of the later narrow Supreme Court decision.

¹⁸¹ It is again important to note here that several justices did not want to rank the various causal factors, and there is a very small sample size for this question, N=15

Minnesota Supreme Court reached rights expanding decisions very guardedly and very respectfully, it looks to see if there has been a “radical departure” in previous precedent by the U.S. Supreme Court, or “a sharp turn in the road.” Indeed the only factor Justice Gilbert identified as “very important” was whether the U.S. Supreme Court had “adjusted, distinguished, or overruled its own previous precedent.”

For other justices Supreme Court retreat and conflicting deciding court precedent was not important. Justice Stratton of Ohio said that the Ohio Supreme Court is likely to go along with the changes in federal precedent by the U.S. Supreme Court, and reflect those changes in state constitutional law in Ohio:

A lot of times we'll have a case we've decided, then the U.S. Supreme Court changes it, and then we end up changing ours to match what the U.S. Supreme Court said. That's a lot more frequent than us going differently. And, a lot of times we get a challenge from parties to go differently, and we don't. We still match.... We stay concurrent with or similar to what the U.S. Supreme Court has done.

2. *Degree of Division of U.S. Supreme Court.* Degree of division seemed particularly important to Justice Herbert L. Meschke of the North Dakota Supreme Court. In fact he volunteered this information when asked what would be necessary to reach a rights expanding decision: “I think it would be possible anytime the U.S. Supreme Court was divided, particularly a 5/4 split.” While he volunteered this information early, later in the interview I asked other justices: “considering just these state constitutional cases where [your supreme court] was asked to not follow decisions of the U.S. Supreme Court and instead apply state constitutional provisions, how important is it to you personally that the U.S. Supreme Court was closely divided when reaching its decision that serves as federal precedent?” I then provided them with four responses: a. very important; b. somewhat important; c. mostly unimportant, or d. not at all

important. Again some justices simply chose one of the proffered answers, and others chose to elaborate. Justice Stratton of Ohio elaborated:

I think it's very important. I have seen how tiny little shades of stuff can flip a vote here or there, and the fact that [the Supreme Court is] pretty closely divided carries a lot of weight to me. You can have someone up there with a little bit more different philosophy, and they can have interpreted that phrase a different way, so it matters to me.

Chief Justice Cady of Iowa thought close division on the U.S. Supreme Court was somewhat important:

I think it's somewhat important, if not very important because, like I said, when we apply our own constitution, we're looking for the persuasiveness of the two positions, and if it's a very close decision for the United States Supreme Court, I think it certainly causes us to weigh that decision just as carefully as the division of the U.S. Supreme Court reflects.

Justice Larson, former Iowa Supreme Court Justice, concurred: "If it's a five-four split, to me [such a decision of the U.S. Supreme Court] is not all that persuasive." Chief Justice Castille of Pennsylvania also felt the degree of consensus on the Supreme Court impacted the persuasive weight of a Supreme Court decision:

You know a 9-0 decision is a firmer statement of the law than a 5-4. About all it takes is one vote to flip one way or a new justice to come on and the 5-4 can become 4-5 basically. So the stronger the vote toward the majority, I think that's more weight for the case as a pretty good statement of the law.

There was not a uniform position, however, as to the importance of division within the U.S. Supreme Court influencing state supreme court decision making. Justice Gilbert of Minnesota said a "majority is a majority" and this factor is "mostly unimportant." Justice Brown of Arkansas felt that division on the U.S. Supreme Court is largely irrelevant: "[S]ometimes we will look to dissents, but by and large we don't look to the dissents. We look at the holding of

the U.S. Supreme Court, and I think that's what guides me..." Chief Justice Ternes emphasized the theme that reasoning, not outcomes or votes, was what was important:

[T]he fact that the Supreme Court is divided or undivided says nothing about the soundness of or basis for its decision. The fact that a majority of sister states view it one way and a minority view it another way says nothing about the soundness of the rationale used by these two lines of authority"

According to Chief Justice Ternes, only the persuasiveness of the reasoning used by other courts influences the decision making process—not the ideology or the degree of division on other courts cited.

Justice Pfeifer of Ohio had an interesting take about divisions upon the U.S. Supreme Court. For him it was not necessarily the numbers of votes on one side or the other of the U.S. Supreme Court holding that was important, but the clarity of the reasoning, and more importantly how well it could be implemented by prosecutors and law enforcement officers. Indeed, according to him, in recent U.S. Supreme Court decisions it was difficult to determine exactly what the holding was, and how many justices supported that holding.¹⁸² He was especially critical of U.S. Supreme Court Justice Anthony Kennedy, who he said "is like nailing Jell-O to the wall right now. You just never know where he's going to end up from one case to the next." To the extent that U.S. Supreme Court outcomes are unpredictable and their holdings are unclear this not only makes applying the law difficult for state supreme court justices, it confuses prosecutors and law enforcement officials. Justice Pfeifer then elaborated:

...I used to joke that the Fourth Amendment is almost dead, and I don't think it should be. So, actually if following the U.S. Supreme Court means there's almost no protection where one would ordinarily think there should be, then I'm very comfortable saying the Ohio Constitution affords more protection than that.

¹⁸² Although it hadn't been decided yet, Justice Pfeifer seemed to have something like the recent decision in *U.S. v. Jones*, 132 S. Ct. 945; 181 L. Ed. 2d 911 (2012) (regarding the necessity of warrants for GPS tracking devices) in mind, both as to the difficulty of identifying or articulating clear statement of the holding due to the deeply conflicted and divided reasoning contained in the various opinions accompanying the decision (as well the majority's failure to take a strong stand in defense of privacy in that case).

It's not even hard for me. The U.S. Supreme Court has always been populated by very smart, very well educated [justices].... [but in] many of their opinions what the true holding is almost unintelligible because everyone is writing, and they're off in different directions, and you have to plow through this stuff. Law professors and everybody else can argue about what does this really mean? Where is the true majority on the court? That's not helpful. Law enforcement people are trying to abide by the Constitution and protect us where we live from the criminal element, but there are boundaries in the U.S. Constitution that were followed, and when states adopted their constitutions, and so [to] the extent the U.S. Supreme Court has blurred lines in places where it doesn't seem appropriate to me on the facts of the case, then I'm very comfortable saying the Ohio Constitution here means more than the U.S. Constitution does today under the present guidelines of the U.S. Supreme Court, so we'll find that our constitution independently stands for more than the U.S. Constitution does.

...[W]hen [prosecutors and law enforcement officials] go to their training seminars, it's useful to have clear, concise examples of what you can and can't do and what you should and shouldn't do, and I think our court does a much better job of that than the U.S. Supreme Court does any day of the week. I will match us up against their opinions and ... I would guess our brethren around the country are like us. They're a lot clearer and a lot more concise in how they see the rules of the road than the U.S. Supreme Court at this point.

B. Role of Deciding Court Precedent.

As already discussed at length, a closely connected issue to whether the U.S. Supreme Court has changed its previous precedent, is what the deciding court has done previously in trying to apply the U.S. Constitution before the U.S. Supreme Court may have explicitly considered a particular issue. State supreme courts are routinely making decisions applying broad constitutional principles enunciated by the U.S. Supreme Court before that Court addresses a specific issue. It is very common for a state supreme court to reach a specific issue in advance of the U.S. Supreme Court. And it is common for the state supreme court to resolve that issue differently under broad constitutional principles, than how the U.S. Supreme Court resolves the specific issue when it finally reaches it. For instance, this is what occurred in Pennsylvania as described in the case of *Commonwealth v White*, 669 A.2d. 896 (Pa. 1995), which is discussed

above regarding searches of vehicles incident to the arrest of the driver after the driver has been secured in a police car. It seems evident that the majority in that case was influenced more by prior Pennsylvania precedent, while Justice Montemuro in his concurrence spent considerable time analyzing sister state decisions and legal treatises. In such cases as *White*, and *State v Murrell*, 764 N.E.2d 986 (Ohio 2002) (same issue as in *White* regarding vehicle searches incident to arrest, but following federal precedent) discussed at the end of this section, there is a conflict in precedent, and more importantly in reasoning, between the state supreme court and the U.S. Supreme Court. Attorneys may ask the state supreme court to then resolve the matter on state constitutional grounds in favor of earlier more expansive state precedent over more recent narrower federal precedent.

I asked the justices the following question regarding the role of their own court's earlier precedents on the issue: "Again, considering just these types of state constitutional cases, how important is to you personally that your Court had already decided that issue differently than how the U.S. Supreme Court later decides the case, and you are being asked to either follow your Court's earlier precedent or the more recent U.S. Supreme Court precedent. In other words, your state precedent and the federal precedent do not agree. In that situation, how important to you personally is your state's prior precedent?" I then provided them with four responses: "a. very important; b. somewhat important; c. mostly unimportant, or d. not at all important." Their answers where then scored d = 1, c = 2, b = 3 and a = 4.¹⁸³ Although we cannot draw any statistically significant conclusions comparing the mean answer to this question, and the mean answers to the questions considered above concerning the role of sister state courts and retreat by

¹⁸³ It is again important to note here that several justices did not want to rank the various causal factors, and there is a very small sample size for this question, N=13

the Supreme Court, this was the only question with a modal answer of 4 (“very important”).¹⁸⁴

The mean answer for this question was 3.4, which is significantly higher than the role of public opinion (mean 1.2) upon the deciding court.

Justice Stratton of Ohio answered the question of the importance of conflicting state and federal precedent with an answer that is sometimes known as the limited lockstep approach:

I think it all depends on the case. Sometimes we will match the U.S. Supreme Court even though we had gone differently previously. Most of the time I would say we would match it unless we have some good cause in our constitution – if it’s identical language in their constitution and ours and they changed their interpretation, we generally match it. I can think of very few cases where we said nah we’re staying this way no matter what they say.

Ironically, for another justice on the Ohio Supreme Court, previous precedent by the Ohio Supreme Court was generally “very important.” Indeed Justice Pfeifer dissented in the specific case of *State v Murrell*, 764 N.E.2d 986 (Ohio 2002), and explained the quality of the reasoning in the previous Ohio precedent was better:

I only wrote a paragraph, and you can see what I say, I like to keep it short. I just didn’t think much of the U.S. Supreme Court decision and thought our precedent was better. End of story as far as I was concerned. Not so much stare decisis motivated as I just thought we had a better answer originally, and we should stick with it. A better answer than this case.¹⁸⁵

IV. Evidence of Alternative Explanations.

I also asked state supreme court justices questions designed to help reveal evidence for or against the alternative explanations for state supreme court decision making behavior that I

¹⁸⁴ Eight justices (out of 13 justices providing codeable answers on this issue) answered this question with “a. very important.”

¹⁸⁵ Ironically the Ohio majority in *Murrell* followed the federal rule outlined in *New York v Belton* and allowed a search incident to arrest after the defendant had been secured. However the U.S. Supreme Court partially overruled that decision in *Arizona v. Gant*, and Justice Pfeifer’s position in *Murrell* was then vindicated. It should be noted that while the dissent Justice Pfeifer’s authored in *Murrell* was short, he also joined a much longer dissent that elaborated on these issues, and argued the prior Ohio precedent was superior because the officer safety justification for a search incident to arrest is no longer present after the defendant is safely secured).

recognized and discussed in chapter 1, namely political and judicial ideology, as well as judicial selection method.

A. Role of Political Ideology as Alternative Explanation. Political ideology certainly influences state supreme court decision making. Several justices admitted they could often, in approximately 70%-80% of cases predict the outcomes of decisions on the basis of the political ideology and personal backgrounds of their colleagues even before reading the briefs. This included similar statements made by Justice Brown of Arkansas, former Justice Larson of Iowa, Chief Justice Cady of Iowa, former Justice Tomljanovich of Minnesota, and former Justice Douglas of Ohio. Justice Andrew Douglas of Ohio elaborated by saying before reading the briefs in the case he could confidently predict outcomes 60% of the time just based on reading a statement of the issue, and 80% of the time after reading the briefs. He was also quite specific in saying that approximately 70% of his ability to predict outcomes was based on the political ideology of his colleagues (how conservative or liberal they were) and 30% based on their legal background, prior offices, and experiences before joining the Ohio Supreme Court. Thus professional background and political ideology, at least for several justices, has a great deal of predictive power of the outcome of the case.

While several justices said that text and the law itself matter, at least one justice acknowledged that interpreting text is a task infused with ideology. Chief Justice Cady noted that “the text by itself doesn’t get you very far. It requires interpretation based upon the issue that you’re presented with. I think there’s considerable weight that’s afforded the ideology of the judge doing that analysis.” Justice Tomljanovich, former Minnesota justice, also admitted that she was influenced by the political ideology of Supreme Court dissenters when discussing the

role of U.S. Supreme Court division on the deciding court. She was likely to give less weight to arguments from U.S. Supreme Court justices with whom she disagreed ideologically.

On the other hand, Chief Justice Ternus, the former Chief Justice of Iowa, claimed to not even be aware of the political ideologies of other justices on that justice's state supreme court. This justice could confidently predict outcomes only when the court had previously considered a similar issue and thus was aware how colleagues had voted on similar issues. On issues of first impression that justice could confidently predict outcomes only about 10% of the time. Justice Meschke of North Dakota answered that he could predict outcomes zero percent of the time before reading the briefs, and little better after reading the briefs: "After reading the briefs, sometimes I could tentatively guess the likely outcome using the factors you suggest, but rarely with any certainty." Similarly, former Justice Neuman of the Iowa Supreme Court, who served on that court from 1986 to 2003, said she could "almost never" predict case outcomes:

[O]ne of the things that really impressed me when I first came on the [Iowa Supreme Court] was that there were no, sort of, alliances or presumptions that you could depend on among the members of the court, particularly early on, I would say in my career on the court. They really struck me as individuals who were looking at every single case, and there was no ideological sort of decision making. It was purely based on the law, the facts, the constitution and so forth, and a really kind of moderate court. Just not at all ideologically polarized, so as a result, I really could not predict from case to case. That might have changed slightly toward the end of my tenure where there had been some changes in personnel on the court, but certainly that was my introductory view of the court.

Another justice echoed the idea that their ability to predict outcomes based on political or judicial philosophy changed over time. Justice Stratton of Ohio stated:

When I was here for my first eight years, we had a bench that was clearly activist, but only in the areas involving the plaintiff lawyers, med-mal insurance cases, and it was not [a Republican-Democrat divide] because there were two Rs in that mix and two Ds in that mix, and I could say 95% of the time I knew what the outcome would be. The current bench, which has only one of that remaining batch, I cannot predict at all anymore. When cases come up, our mix is all over the place. There's no clear 4-3 split like there used to be all the time before, and it really

looks at the merits, and you can't really pin people down anymore. So, I think the bench is now the way a supreme court should be. It should be on the law and not on certain political philosophies.

To the extent that you can predict, how much of your ability to predict case outcomes is based on your colleagues' political ideology? How conservative or liberal they are, and how much on their legal background, their prior offices and experiences before joining the court?

I really can't separate those out. We have such a mix. We have two former legislators, one tends to be more activist and one tends to defer to the legislature. We have a former prosecutor; probate magistrate/lieutenant governor; we have a woman who was at all four levels of the courts, you know, municipal, common pleas, courts of appeals, now here; we have a former domestic judge that went into running a nonprofit; my background was a trial lawyer and a trial judge. There's quite a mix of backgrounds and philosophies, and it's very, very difficult to really predict based on their [ideology], where anybody's going other than we tend to be as a group, even anyone who is from the Democratic party, because we like to figure ourselves up here as very nonpartisan. Outsiders like to label us. We think of ourselves as very nonpartisan...

This evidence from these interviews suggests that political and judicial ideology does often matter—and at certain times and for certain courts, at least in a large percentage of cases, it can be determinative of case outcomes. Yet it seems too simplistic, again based on the evidence from these interviews, to conclude that political and judicial ideology is always important, or even important all of the time and to all justices. In fact the opposite seems to be true—at least some justices believe that individually, and the courts they serve upon more generally, are relatively immune from political and judicial ideology. Perhaps more importantly, almost all of the justices argue that legal factors, particularly text, precedent (deciding court and Supreme Court precedent), and legal reasoning, as well as sister state supreme court decisions (and the legal reasoning contained in such decisions) are influential, even being very important in some cases.

The biggest problem for this research is not that the alternative explanations threaten to obviate the causal influence of the hypothesized factors. There seems to be plenty of evidence

that the hypothesized variables can and do matter. Rather, where this investigation falls short is by barely scratching the surface of attempting to accurately ascertain the scope of the relationships between (and even within) the hypothesized factors, as well as with the alternative explanations. The relationships are so complex, intertwined and context sensitive that it is difficult to make reliable, generalizable statements about the relationships for the sake of predicting future outcomes.

B. Role of Judicial Selection Method as Alternative Explanation.

I asked former Minnesota Justice Tomljanovich about whether the way Minnesota elects justices impacts the decision-making process. She answered:

Well, so far the election has not made a difference. We worry a lot, or I worry a lot, after the [U.S.] Supreme Court case in *Republican Party [of Minnesota] v. White* where they said that judges could get political endorsements and express their views on contested issues. I worry a lot about political influence in elections and political influence if you were endorsed by the Republican Party or Democratic Party. I worry about the effect that that might have on rulings.

At least one justice from a partisan election state, Justice Janie L. Shores of Alabama, did admit that the prospect of elections inevitably had judges with one eye on the next election. While justices attempted to decide cases by ignoring the prospect of elections, it was impossible to completely purge the prospect of elections from the decision making process. In particular, justices were concerned to be perceived as making decisions favorable to “notorious” defendants.

There was some evidence to support the tentative findings of other studies that elected justices might actually be more emboldened to reach rights expanding decisions, and that might be related to the type of people necessary to run for election.¹⁸⁶ While Justice Dubofsky of

¹⁸⁶ See chapter 1.

Colorado (a merit selection state) argues that justices are by nature conservative,¹⁸⁷ Justice Douglas of Ohio argued that:

You don't get to that position to be elected statewide by an electorate by being a shrinking violet. You have to be, I think, pretty aggressive and [have] firmly held thoughts—not necessarily that that's how you decide cases if the law and the facts are different, but at least people know or if they take the time to find out what you believe when they elect you. Just like you can't put lions and tigers in the same cage, it's difficult to put seven justices all from different backgrounds and experiences in a room and expect that you're going to have always peace and light. There often was heated discussion and controversy, and frankly, that never bothered me. Five minutes after I left the room it was over for me because I always thought that brought out the best in all of us, but you have to recognize... that these things do occur between multijudge courts. We'd be casting a blind eye in just taking the academic approach, "Oh everything is just built on the facts and the law and judicial philosophy." Sometimes there's more than that. Sometimes it's maybe some personal animosities, not me, personal animosities and a lack of respect, and so I think that that probably ought to have some place in your presentation....

Perhaps there is a certain "edge" to justices from states that elect their justices in terms of willingness to accept politics as part of the process, or at least to be more slightly more confrontational, and perhaps a greater willingness to take on other branches.

Certainly there was a perspective among merit-selection justices that their brethren in the elected states were different. This perspective that judicial elections had the potential to influence judicial decision making was reinforced by a justice from a merit selection state, Justice Hecht of Iowa, reporting on what justices from states who had elected their justices had said:

For example, in one of our courses at the University of Virginia graduate program for appellate judges, I had many colleagues, classmates, from states where judges are directly elected politically. We were discussing one day in class the *Lawrence v. Texas* case, and the professor just said, "How many of you could have decided this case this way? The reaction from the directly elected members of the class was just kind of a guffaw.

¹⁸⁷ See quote and discussion on page 68 of this chapter.

It was like, “You gotta be kidding. We couldn’t decide the case that way and expect to hold our offices.” That struck me as really foreign to what my experience in Iowa has been because we really decide cases (and I’m speaking now primarily to the time prior to *Varnum v. Brien*) without regard to what the political consequences are going to be. Time will tell whether the court will continue to do that, but I hope it will.

Of course, legal issues concerning homosexuality are uncommonly salient in the electoral sphere, and the role of judicial selection may be less pronounced in less salient legal issues, but it is still a revealing comment. It illustrates what Justice Hecht would go on to say: “My principal awareness was the comparison of the judges from directly elected states and my own approach to the law, and it was starkly different” suggested judicial selection systems can have an impact. On the other hand, two Southern states, Arkansas and Georgia, with non-partisan elections did exactly what the elected justices Justice Hecht refers to suggested was impossible without losing their seats—rejecting the old *Bowers v. Hardwick* precedent and recognizing a state constitutional right prohibiting criminalization of homosexual conduct prior to the Lawrence decision. See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Georgia 1998).

Another justice,¹⁸⁸ however, suggests that judicial elections may work more subtly to impact outcomes, even when the justices themselves believe they decide cases completely even-handedly, in an objective and neutral fashion. The main point this justices makes is that with the role of money in judicial elections, interest groups with money to spend can help create a selection effect that winnows certain justices out of the selection process. The key here, however, is that the actual effect upon judicial decision making may not depend so much upon the type of selection method (as the alternative explanation hypothesis concerning judicial selection method suggests), but rather is conditioned by capacity of groups to mobilize and the types of issues these groups mobilize about:

¹⁸⁸ This justice did not want to be identified with these comments.

I don't want to offend my colleagues. They enjoy living under the blissful delusion that they won their races all by themselves when ... [in] every one of the races [moneyed interests] spent sometimes two or three times more money than they spent out of their campaign committees.

...*Citizens United* just made that worse because the only thing holding back the corporate money was some CEOs would be sparring with legalists, you know, are we okay legally on doing this and *Citizens United* said, "Absolutely." So, now there aren't even any legal questions about what started unfolding about 15 years ago. ...I don't care how wealthy you are, when you get into your own checkbook there are limits, but when all you [need] to do is call the corporate treasurer and say, "Cut a check for \$50,000 out of corporate funds." There's just not much restraint on that, and so, that's why I'm as negative as I am about [*Citizens United*], it's changed the look of supreme courts all over the country, and it's not that the people elected are going up and checking with the [moneyed interests]. [Instead, the moneyed interests,] working with political parties, are identifying the folks that would just naturally be the most sympathetic to their views, and they see to it that those people are the ones selected to be the candidates, so it starts with candidate selection and stays arms-length so the folks who were elected really do personally believe, and I've served with them since this happened, I think they all feel they are very independent in their thinking. [They] don't have a full appreciation of how it is they moved to the front of the bus in the selection process. But, that's the reality in which we live. [However], I don't think it slops over very much into the area that you're interested in.

The fact that selection process itself (partisan elections, non-partisan elections, merit selection) may not be as important as the types of interest groups, and their ability to mobilize suggests that more work needs to be done focusing on alternative explanations. This expanded work on the selection process broadly defined may be quite difficult as it involves complex counterfactuals about the nature of justices who are not selected. The note of optimism sounded at the end of the quote that this type of moneyed interest group mobilization has yet to reach the state constitutional issues with which I am concerned is only partially reassuring. The influence of such groups upon the judicial selection process may not have impacted my results, but as interest groups mobilize on less economic issues and expand their influence into areas of social issues, as occurred in Iowa in the campaign to oust justices regarding the *Varnum* decision, this subtle (or

not so subtle) influence by interest groups upon the selection processes may be an issue that requires additional scrutiny by scholars.

Another interesting perspective on judicial selection method came from Justice Brown of Arkansas. While it might not impact decision making much, he felt the idea was dangerous both because judges might not develop any barometer of the limits of public support (although he strongly downplayed the role of public opinion) but also because such merit selection judges are less able to defend themselves in retention elections:

Don't get me started on the Missouri plan and the retention system. I think it's a very, very dangerous system ... because they are so susceptible to single issues, and you saw that in Iowa. ...[M]y understanding was that the justices in Iowa just did not get out and campaign. They just assumed they were going to be retained because that had always happened, and they didn't see it coming, which I mean I will say this, you have to have a little bit of a barometer in any kind of public service, but they did not see it coming. Maybe they thought the bar association would carry them through, which they should have done by the way, but you know I think they're more dangerous than the general election system because you're not running against an idea so much in a general election situation. You have an opponent, and if the opponent is mounting this particular claim, then you can attack him or her and say, "Where's this coming from," and if it's the 527 group, it's the same type of thing. You can go against that, but you're not just a bull's-eye or a target with a bull's-eye on your chest. That's what happened to those four [actually it was three] justices, I think.

C. The Role of Public Opinion. A couple justices from judicial election states acknowledged that the consequences of public opinion could not be entirely purged from the decision making process, but the attempt to ignore public opinion was still made. Justice Stratton of Ohio, a non-partisan election state, admitted that it was a matter of joking amongst the judges on her Court if one judge drew a particularly controversial opinion, but that was just part of the job that had to be dealt with and essentially ignored:

Oh, we talk about [public reaction and public opinion] and fret about it and then we say that's what we're elected for and we go vote the way we do anyway. It's

really part of your job. You get the negative reactions. I mean we just threw out a state law on changing the status of sex offenders under the Adam Walsh Act. ... You know that's a popular issue with the public, but someone said to me once, "Judges are... elected to make the decisions no one wants to make...."

So, you consciously try to push it aside and, you know, I guess you're aware of it, but –

We're aware of it and sometimes talk about or if you draw the case and you know it's going to be an unpopular one and everybody's like "oh lucky you, you got that case," but it does not affect our vote. I've never seen it affect our vote. We've never shied away from making the tough call, and whatever heat comes down it comes down. That's why we're against the media coverage because they don't necessarily understand the issue or they get it all wrong or they try to call us an all-Republican bench... so we rail against those sorts of things, but now you've got to bite the bullet and do what ya gotta do. It's what you're elected to do.

Justice Brown Arkansas, another non-partisan election state, agreed the consensus view amongst his colleagues in the face of such a predicament was "damn the torpedoes—full speed ahead".

Perhaps the most succinct answer to this nuanced problem was provided by Justice Douglas of Ohio:

I strongly believe that our opinions ought to be looked at before we ever issue them on how it will play in the marketplace, but that's not the deciding factor because the judicial code of ethics precludes, says you cannot be subject to clamor or public outrage in making your decision.

Yet the impact of public opinion, as well as media coverage, cannot be wholly ignored by state supreme court justices. Justice Douglas from Ohio went on to say that in cases where justices expected a backlash in the media that "I would like to respond to you by saying it has absolutely no consideration in decision making. It is unfortunate that I cannot say that." Instead Justice Douglas answered that an expected media backlash had a "moderate, but not overriding [impact]." At another point in the interview, while discussing a case bearing directly upon press freedoms, Justice Douglas acknowledged that newspapers in his state have "tremendous

influence on elections [and] justices of the [Ohio] Supreme Court are elected.” He added that while it may not be announced during the judicial conference, the power of newspapers in Ohio “is omnipresent” and a “consideration” in such cases.

V. Lessons From the Interviews.

According to the justices interviewed, precedent played the single largest role in the decision making process, with U.S. Supreme Court precedent generally but not always trumping deciding court precedent for most justices. For instance, U.S. precedent perhaps played a larger role in Ohio, while deciding court precedent seemed particularly important in Minnesota. The justices interviewed also generally considered sister state opinions (which some refer to as persuasive precedent as opposed to binding precedent) to be important, primarily the persuasiveness of the reasoning in the previous decisions. Most justices identified sister state decisions as helpful or useful to their decision making. The helpfulness or usefulness seems to be of a nature of informing or illuminating the deciding court as to the arguments and reasoning that should be considered when deciding the case.

Generally sister state decisions were not reported by the interviewed justices as being the controlling factor in the outcome, instead sister state decisions tended to be reaffirming of the deciding court’s approach. However, many justices were quick to point out this did *not* mean sister state decisions were merely used to justify an outcome reached for other reasons. The justices seemed nearly unanimous that courts did not start the decision making process seeking to justify certain ideologically predisposed outcomes. Rather, the reasoning and analysis contained in the sister state decisions could be informative, and even persuasive, in the context of a good faith approach to ascertain what the law required. Certainly the background and ideology of justices played a (considerable) role in decisions, but all of the justices were striving to constrain

and limit the role of background and ideology—all of the justices aspired to a largely non-ideological approach.

The most difficult part of the interview process was attempting to articulate exactly what about sister state decisions was most influential. As many of the quotes in the previous sections above attest, the reasoning contained in the sister state decisions, not the outcome of those cases, was the aspect justices almost uniformly identified as most important. The problem for the objective observer is the difficulty of distinguishing between persuasive and unpersuasive reasoning so as to evaluate whether reasoning is actually influencing the justices. It is easy for one to question whether persuasive reasoning is simply reasoning that comports with a justice's ideology, and if so then ideology is again the deeper causal factor. Yet again many justices were adamant that they did not approach a decision with a particular outcome in mind—that this was bad practice and something to be avoided.

My discussion with former Colorado Supreme Court Justice Jean E. Dubofsky was particularly enlightening in terms of identifying what was necessary for state supreme courts to reach rights expanding decisions. Justice Dubofsky identified three global considerations as rough prerequisites for rights expanding decisions: 1) Whether a majority on the court was willing to consider deciding cases more expansively under the state constitution consistent with the New Judicial Federalism; 2) the necessity of some type of technological or social change driving uncertainty in a particular area of law; and 3) if persuasive sister state precedent existed. Justice Dubofsky's first point was that, without a majority on the court considering it to be an appropriate judicial role for state supreme courts to render decisions differently than the U.S. Supreme Court, such decisions were unlikely to happen. In effect, acceptance of making such decisions as consistent with the appropriate judicial role in the context of the New Judicial

Federalism was a type of threshold effect. Without a majority generally approving of this judicial role, rights expanding decisions were not going to happen. Justice Dubofsky did not see this acceptance or rejection of the New Judicial Federalism as part of the judicial role as particularly tied to political ideology. Instead acceptance or rejection of the NJF is tied to a deeper, more basic feeling and conception of the appropriate judicial role, perhaps similar to the varying levels of deference to precedent by different justices, or the varying levels of deference to the other elected branches.¹⁸⁹ There seems to be some support for this idea in the data, as Illinois, one of the states with the most liberal political ideology as a state, was a state where the supreme court was on the record as believing it was generally inappropriate for the state supreme court to render rights expanding decisions, preferring a limited lockstep approach to state constitutional interpretation.

Justice Dubofsky's second point is that typically these rights expanding decisions are happening in areas where the law is unsettled. Generally there needs to be an emerging technological or social change driving the uncertainty in the law. This change could be technological change, such as the expanding use of pen registers which was at the heart of the case of *People v Sporleder*, 666 P.2d 135 (Colo. 1983) (holding government must get a warrant to search information in a pen register under Colorado Constitution). It could also be in the form of social change, such as changing societal attitudes to homosexuality behind state constitutional cases concerning homosexual marriage, or increasing levels of professionalism in police forces behind the expanding good faith exception to the exclusionary rule at the federal level.¹⁹⁰

¹⁸⁹ This is a very tricky part of studying judicial decision making. It is difficult "because few scholars have studied the relationship between judicial roles and voting in a systemic way... and it is virtually impossible to separate roles from attitudes." (Epstein and Walker, 2011).

¹⁹⁰ In the last example, the U.S. Supreme Court is perhaps more responsive to the social change in police departments whereas state supreme courts are acting to preserve the reasoning supporting the older legal precedent previous to the recognition of the good faith exception.

Finally, and perhaps most useful to this chapter, is Dubofsky's third factor: whether there is existent sister state precedent to support a rights expanding decision. The persuasiveness of that sister state precedent is key. As noted above, in Justice Dubofsky's opinion, sister state opinions *if* well done can play a major role, perhaps even constituting as much as 80-90% of the decision making process. Yet a sister state decision that is not terribly thorough is not particularly persuasive. So what exactly constitutes a thorough, well done, and thus persuasive sister state decision? According to Justice Dubofsky persuasiveness is tied to length and thoroughness. This includes a) an in-depth restatement of the facts of the specific case, b) a tracing of the historical development of the law, c) discussion and analytical comparison of other sister state cases (in other words a good canvassing of the opposing arguments and legal developments), and d) a persuasive statement of reasons to decide the case as it was decided by the sister state court.

This explanation is not wholly satisfactory, because it includes persuasiveness both in the term which needs to be explained, and as one of the factors explaining it. There is a certain sense of "knowing it when you see it" to persuasiveness. Certainly judges have a finely tuned sense of what is and what is not persuasive through experience and legal training. Yet that is exactly the point—persuasiveness is devilishly difficult to define (and perhaps impossible to code). Certainly my initial hypothesis falls short, because it focuses on sister state case outcomes, as opposed to the quality of reasoning without an attempt to measure persuasiveness. Clearly the interviews suggest persuasiveness is far deeper than case outcome—it is tied to quality of reasoning. This quality and thoroughness of reasoning, includes facts, historical development, analytical comparison, and finally at heart an intangible "eye of the beholder" quality that realistically is also tied to subjective ideological predispositions and pre-existing

values, but also is somewhat objective in the sense that judges have a general notion of what is persuasive. This seems to befuddle the entire project—yet on the other hand it is just another form of measurement error, the inability to clearly quantify what is persuasive and separate it from predisposition/ideology.

So what does this all mean? The key finding supported by the interviews is the idea that legal reasoning, particularly that contained in sister state supreme court decisions, as well as Supreme Court and deciding court precedent, is important. While it would be appealing to be able to make the stronger argument, that sister state decisions determine the outcomes of cases in other courts, the reality appears to be less absolute. Rather sister state decisions, and particularly the reasoning contained in those decisions, does seem to occasionally influence and more often inform the decision making process by other state supreme courts.

Courts are normative institutions--they are not merely an institutional body of preference aggregation. They are capable of being persuaded, and according to the justices interviewed are sometimes in fact persuaded by reasoned legal argument. The problem is always the degree to which, and in what contexts, legal reasoning is persuasive to courts. Observers of judicial decision making behavior are often broken into two camps--with a corresponding tendency to create a false dichotomy. The first camp believes that legal reasoning can actually be persuasive, leading justices to change their minds on an issue. The second camp believes that legal reasoning is largely justification: reasons and arguments used to support a reason reached on grounds of preexisting ideological preferences or personal background.

The interviews suggest, however, that neither of these perspectives is complete. Instead there is a more subtle blended perspective and approach. This middle road suggested by the interviews views the use of legal reasoning as part of a validation or confirmation process.

Instead of justices approaching a case with an answer in mind, and a policy outcome to achieve, the judicial norm is to approach a case with a (at least somewhat) open mind. There is a certain tension inside each justice, as justices do have gut feelings tied to that justice's backgrounds and ideology. Justices may not even be fully aware of the influence of their professional backgrounds and ideological preferences on their "common-sense" gut feelings with which they begin the decision making process. Here I am reminded of Chief Justice Castille's statement:

My own personal philosophy is ... that I generally know how I'm going to decide these cases or how I'm going to vote on a case, but it's important that you have an open mind and you not be locked into any certain position. I think oral argument generally is not going to sway anybody ...but every once in a while they'll say something that causes you to rethink your position. It's important to have an open mind. It's important to try to not have your personal past influence your decisions.

In the *validation perspective*, legal reasoning by other courts may not frequently persuade a justice to change their minds, but legal reasoning by other courts regularly informs justices about an issue that perhaps comes rarely before the court. When sister state decisions are found with persuasive legal reasoning consistent with the gut feeling this *helps confirm* for the deciding justices that their gut feelings are correct. To quote Justice Neuman of Iowa "how other states had already looked at the question...created a comfort level for our court to move in that direction--or affirmed our sort of gut sense to how that case ought to come out."

Yet importantly justices are not simply looking to justify a pre-determined outcome. Rather, in a subtle but important distinction, confirming sister state decisions allow a court to decide cases not merely on the basis of a gut feeling, *but consistent with outside validation*. Justice Dubofsky emphasized the aspect of constraint in such a perspective. Often there is a gut feeling that justices initially have about a case, reports Justice Dubofsky, but a state supreme court "is not likely to go that way without support." In other words, gut feelings rarely are acted

upon without legal precedent, preferably from sister state supreme courts, but occasionally from legal treatises or law review articles. In short, as Justice Dubofsky said, “Judges are basically conservative people, they like to be in the middle—it is part of their judicial temperament.”

Thus the take home message is that often sister state decisions with compelling normative reasoning helps confirm an underlying gut feeling amongst the justices on the deciding court.

Inconsistent reasoning from cases whose outcomes disagree with the justices’ gut feelings might give the deciding justices pause if they are truly open minded—particularly if it is the U.S.

Supreme Court precedent that is inconsistent. Inconsistent sister state decisions are probably not sufficient to outright change minds, but the justices do report sister state decisions can be helpful and informative. Presumably this means inconsistent sister state decisions might encourage deeper reflection and consideration, additional justification and reasoning in the deciding courts opinion, and further searching for legal authority consistent with the gut feeling. However, sister state opinions are unlikely to overcome strong ideological predispositions as they generally have modest weight in the overall decision process. For instance, Chief Justice Cady of Iowa reports ideology is a factor with more weight than sister state opinions. First, he identified the text of the state constitution as having the most weight by far of all the other factors influencing the decision making process. When asked then to compare what percentage of the overall decision making process would political ideology and professional background account for, he answered:

that is a part of the interpretation of the text perhaps, and so I think that the text by itself doesn’t get you very far. It requires interpretation based upon the issue that you’re presented with. I think there’s considerable weight that’s afforded the ideology of the judge doing that analysis.

When asked to compare the factors of text and ideology with that the role of sister state decisions Chief Justice Cady reported that sister state decisions “would have much less weight... it depends on the quality of them and their numbers too. So I think it can vary from case to case because of

that, but to think of a pie chart, I would think that [the role of sister state decisions] might be 10%.” Thus the role of ideology and background is considerable, but judges aspire to hold their backgrounds and ideology in check, constrained by the norms of legal culture and the imperative to reserve judgment while other arguments are considered.

The real question then becomes not whether ideology and background matter to judicial decision making, as they surely do (with perhaps 75% of case outcomes predictable on these factors alone), but instead how powerful is the norm of reserving judgment and considering competing arguments. If the norm of reserving judgment is weak amongst the justices on a particular court, then that particular court’s decision-making process might be quite consistent with the predictions of the attitudinal model. If the norm of reserving judgment is quite strong in a particular state, however, then the role of the confirmation process arguably becomes stronger and the role of factors such as sister state decisions increases. While this study did not attempt to measure the strength of this norms across courts, the interviews suggested that sister state cases inform the decision making process and can influence decisions particularly when consistent with the gut feelings of justices. Citing these sister state decisions also shows the deciding court “reserved judgment” until it considered all the arguments. Indeed the confirmation process drives the need for dialogue (considering arguments and citing cases from sister states) in the deciding court’s opinion itself, to show compliance with the legal norm of reserved judgment.

CHAPTER 7 CHALLENGES, FUTURE RESEARCH, CONCLUSION

- I. Challenges of Merging Legal Approach with Political Science Approach
 - A. Are Variables Independent and Constant in the Judicial Politics Context?
 - B. The Number of Sister State Decisions versus Quality of Reasoning
 - C. Measuring the Quality of Reasoning
- II. Implications
 - A. State Supreme Courts as Second Line of Defense
 - B. State Constitutional Law Facilitating Supreme Court Retreat
- III. Avenues for Future Research
 - A. Measuring How Much of Sister State Dialogue is Communicated Through Briefs
 - B. Investigating the First Mover
 - C. How is Sister State Dialogue Reflected in U.S. Supreme Court Decision Making?
 - 1. *Arizona v Gant*
 - 2. *Ex Parte Bruner*

I. Challenges of Merging Legal Approach with Political Science Approach

Courts stand at the cross-roads of political science and normative political theory. Judicial scholars must straddle the divide between analyzing judicial decision making behavior by political preferences and by normative argument. While judicial scholars have helped establish that courts are political actors and are influenced by political ideologies, state supreme court justices seem to be more at home analyzing reasoned argument than anticipating and responding to the preferences of other political actors.

Scholars have analyzed court action by assuming judges have single peaked political preferences, just as they do with other political actors like legislators. On the other hand, judges deal with normative arguments on a daily basis. They see themselves as engaging in a process of legal reasoning, evaluating a whole host of arguments from analysis of textual meaning, to legal precedent, to the impact upon public policy, and then making a decision and explaining that decision with reasons. While legal reasoning is different from the logical reasoning of philosophers and political theorists, judges probably have more in common with philosophers

and political theorists in the tools they use and the way in which they approach problems and decision making than they do with elected political actors. Therefore trying to view the behavior of state supreme court justices from only one analytical point of view overlooks the fact they identify more with the methods of normative argument.

A. Are Variables Independent and Constant in the Judicial Politics Context?

One reoccurring issue with my hypotheses, which several justices addressed, was the basic premise underlying my dissertation that the independent effect of my hypothesized explanatory variables could be isolated from other explanatory variables. The interviews revealed two related problems in trying to isolate the independent effect of the explanatory variables. First the justices questioned whether my hypothesized variables were independent of one another. Instead, the various causal factors are intrinsically bound together—and that is how the justices perceived them. Former Minnesota Supreme Court Justice Esther Tomljanovich cleverly described the dilemma using this metaphor:

It's like baking a cake: you can't say that in this case I decided that cocoa was important and that in this case I decided flour was and in this case it was the eggs. I mean you need them all, and that's the way the opinions are. You need all of that background and sometimes probably one [factor] is more important than another, but you can't decide only one thing's important.

You can't decide a case based on just [one factor] without deciding precedence and all these other things—there is not one thing that influences you. I mean, you can't say now today I'm going to decide this case based on my background or today this case I'm going to decide based on public policy or today I'm going to do this one because I'm a Democrat. ...[B]ecause all those things go into your [thought process]. I mean my own personal ideology is influenced by my background, and my view of what public policy should be is influenced by my background. ...[D]ecision-making at the supreme court is not, you just simply can't divide it up like that. You can't divide up parts of your thought process.

This cake ingredient metaphor used by Justice Tomljanovich was echoed by Justice Neuman of Iowa, when she compared the decision making process to soup: “It’s so hard to separate those things from the mix of the decision making. Because you read it all, and it all kind of goes into the soup, to decide what seems like the right thing to do given all these factors.”

A secondary and related problem noted by Justice Tomljanovich, is that is that the factors influencing the decision-making process are not necessarily of uniform weight from case to case. This was revealed in my discussion of two specific cases which Justice Tomljanovich had participated in deciding. In explaining one case, *Friedman v Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991) she ascribed particular importance to the political ideology of the justices making the decision, and this ideology worked against a modest trend of sister state decisions. In a second case, *State v Davidson*, 481 N.W.2d 51 (Minn.1992) political ideology of the justices was far less important. In *Davidson* the state constitutional issue, according to Justice Tomljanovich, was a slam dunk because of the facts—it was clearly obvious that the material in question was pornography and therefore constitutionally-unprotected speech. The clear facts in *Davidson*, and to a lesser extent the approach of sister states courts who were almost uniformly in agreement against recognizing additional free speech protections for pornography under state constitutional provisions, led to a result “very much contrary” to the general political ideology of the opinion writer.¹⁹¹

¹⁹¹ The relevant portion of the interview with Justice Tomljanovich, who was the opinion writer in *State v Davidson*, 484 N.W.2d 51 (Minn. 1992) was as follows:

I noticed you did cite sister state supreme court decisions [in State v Davidson] specifically in footnote one.... “[M]ost other state supreme courts facing the same issue have found obscenity unprotected,” and then you have a string of citations [supporting that conclusion] and then the sole exception you found is State v. Henry [732 P.2d 9] from Oregon.

Oh, I think you would have to say the fact that other states went the same way was important, was persuasive I should say, rather than important.

B. The Number of Sister State Decisions Versus Quality of Reasoning.

The directional measure of citations discussed above in chapters 2 and 3 may be the best way to approximate the impact of sister state decisions. It is a crude measure that is valuable because there is presently no good way to code and compare the normative reasons contained in the decisions. Another reoccurring issue with the basic premises of my approach was my counting sister state decisions and concluding that the number of sister state decisions on each side of the issue was persuasive. While some justices acknowledged the number of sister state decisions did influence the decision making process, other justices very clearly disagreed and argued that counting the number of decisions on each side of the issue (the majority rule) was just a type of intellectual shortcut. Former Chief Justice of Iowa, Marsha K. Ternus, stated:

The fact that sister states have decided to expand rights beyond those recognized under the federal constitution is probably an indicator that other states will do so. ... A growing number of states that adopt the reasoning for expanding rights simply reflects, in my view, the strength of the reasoning. ... Counting the number of states expanding rights versus the number of courts that refused to do so was never a persuasive analysis used by [our] supreme court for determining how to decide an issue. In fact, when that fact came up in discussion, I can recall many times that we reminded each other that the process of deciding a case was not polling the number of other state courts deciding an issue one way or the other.

And, in this case, the Davidson case, how important was the role of political ideology of your colleagues?

Not very because my political ideology would say that the First Amendment [protects everything]. So, this [decision] probably went contrary. It went very much contrary to that, as a matter of fact.

So, was your opinion here simply more reflective of where the majority of the court was?

No, it was reflective of where that material was. I mean [when] you looked at it simply no one could ever come up with any kind of [way to say] that there was anything but just pornography. ...[T]here was simply nothing [of literary, artistic, political or scientific value] in it. So, yeah, it was the quality of pornography I think in that case. The sheer fact overweighed my political ideology in that one.

Chief Justice Ternus agreed after the interview to look over previous drafts of my arguments and findings in the preceding chapters and raised several objections to my approach. The most basic objection is that while political scientists want to condense a state supreme court decision into a simple outcome, a vote for or against defendants, or for or against following U.S. Supreme Court precedent, or for or against expanding rights, the term “decision” is actually misleading. Chief Justice Ternus explained it is the reasoning contained in the opinion that is more important than the outcome in sister state decisions:

[Sister state decisions] were only important in so far as they illuminated the issue, and they were persuasive. At least the ones we followed we found persuasive. It wouldn't have mattered how many there were or how they broke down on one side or the other. It was just the fact that they were illustrative of the analysis.

While Chief Justice Ternus was most adamant on this point, it was echoed in the language of other justices as well. A similar point was made by former Justice Tomljanovich of Minnesota: “[R]easoning is very important. I don't think we said, ‘well, this is what Oregon said and we know Oregon is really important and so we better go with that.’ I don't think that. We looked at it and said Oregon said something really good here, so let's follow it.” I asked former Justice Neuman of Iowa whether a clear majority rule across sister states, or the reasoning and analysis of the sister state decisions was more important and she replied: “I think reasoning and analysis is more important. You'd like to think that, if most of the courts are piled up on one side, it's because they're on the right side of the subject, but that isn't necessarily so.”

Reasoning, and how the issue and arguments comported with a particular justice's sense of “justice,” is what is persuasive. Having sister state decisions on one side or the other of an issue is important, not necessarily because of the numbers of cases (and sometimes despite that fact) but because of the quality and persuasiveness of the reasoning contained in those decisions. The citations to sister state opinions are often merely shorthand for the underlying reasoning

contained in the cited decisions—and that reasoning might be repeated or summarized to varying degrees in the deciding court opinion.

I asked Chief Justice Ternus whether the Iowa Supreme Court would have reached the same decision in a case absent previous sister state decisions disagreeing with U.S. Supreme Court precedent. The answer was yes, *if* all of the arguments had been worked out in the briefs. That answer supports the idea that the presence of citations to sister state cases is, as Latzer (1991a) suggested, important because the sister state cases themselves are convenient and efficient expositions of legal reasoning. Several justices noted that they were not persuaded by the citations themselves, but would closely examine the arguments made in the sister state cases cited in legal briefs, and then cite the sister state cases themselves if they assisted in clarifying the thought process of the deciding court. In short, several justices took issue with my counting of sister state cases on one side or another of a specific constitutional issue. It is not the number of cases on one side or another, but the reasoning that matters. Yet there may still be some merit to my approach as a crude measure of the quality of reasoning, because one might assume the reasons that are compelling to one court may very well be compelling to another court.

Chief Justice Ternus also took issue with my idea that sister state citations can provide political “cover” for a state supreme court with other political actors in the state and the public. “[S]tates will [expand rights], not because they have the “cover” of states that have already done so, but because the reasons for doing so are persuasive.” If reasoning, not the number of cases on either side of the issue is what is truly important, there is then another related problem for the political scientist attempting to address these questions. That problem is the difficulty of measuring the quality of reasoning apart from the ideological component of the arguments.

C. Measuring the Quality of Reasoning. The validation perspective described at the end of chapter 6 has the benefit of accepting the insights of conflicting perspectives. Justices are influenced by many factors, and at base are about resolving tension and competing arguments. In the validation perspective legal reasoning, as well as preexisting political and judicial ideology, influences the decision making process. This is not surprising. It is simply another way of saying both the quality of reasoning, and the predisposition to accept a particular type of reasons, matter in deciding what reasoning is persuasive and which reasoning is less persuasive. The basic problem for scholars, however, is that it is far easier to measure the predisposition to accept a particular idea (ideology), than it is to measure the quality of the idea itself,¹⁹² or the quality of presentation in sister state decisions. We can exhume vast quantities of past decisions in order to deduce the predispositions of justices to make future decisions consistent with those outcomes. What it is much more difficult (perhaps impossible) is objectively measuring the quality of the ideas themselves as presented in sister state decisions and other legal sources. Without a means to measure the objective quality of ideas, we are predisposed to finding that predispositions to certain ideas is the more important explanation.

II. Implications

What is the ultimate take home value of this research? There is evidence for the dialogue model—that states are in dialogue with each other through their decisions. The justices interviewed suggested the reasoning contained in these sister state decisions is important. While it would be appealing to be able to make the stronger argument that the reasoning of sister state

¹⁹² Ideas do not have fixed objective values. Their values may vary in subtle ways depending on the presence and strength of other countervailing ideas. A related problem is whether ideas can be effectively arrayed along a one-dimensional ideological scale.

decisions changes case outcomes, the reality appears to be more subtle. Sister state decisions, and more precisely the reasoning contained in those sister state decisions, does seem to influence the decision making process.

A. State Supreme Courts as Second Line of Defense. State supreme courts collectively are poised to serve as a second line of defense for constitutional rights. This is consistent with Justice Brennan's appeal to state supreme courts to take advantage of their independence to definitively set state constitutional protections beyond federal protections (Brennan 1977). What is important is that each state supreme court need not play this role as second line of defense in isolation, rather state constitutionalism can be viewed as a joint enterprise, albeit loosely organized and imperfectly coordinated. In short, to return to the theme at the end of Chapter 1, states need not act as isolated individual institutions—they are instead part of a common American constitutional structure. The evidence suggests state supreme courts frequently respond collectively to the Supreme Court to the extent that states make their state constitutional decisions in dialogue with each other. Of course each state supreme court is making an individual decision on the legal issues in the specific factual context in which the issue arose in their state, but state supreme courts frequently make their decisions in light of what their sister states have done on similar issues concerning almost identical language. The legal reasoning in particular may be transferable across states given the common American constitutional structure, and frequently the common constitutional text and tradition.

B. State Constitutional Law Facilitating Supreme Court Retreat. There is an implication for having a second line of defense for constitutional rights defended by state supreme courts. The implication is the Supreme Court need not be pressured to expand rights in all instances where controversy may occur by fashioning a national rule. The Supreme Court suffers from

the counter-majoritarian problem of being almost impossible to overturn if it makes a mistake and the nationwide costs of such a mistake. (Bilionis 2007). State supreme courts do not suffer from the counter-majoritarian problem to the same extent as the Supreme Court, nor do they have the same geographical coverage for their decisions. Thus state courts, whose “institutional position can be thought of as intermediate between that of federal judges and that of elected representatives” may be poised to fill a middle ground or compromise position between the nearly absolute counter-majoritarian decisions of the Supreme Court, and the unrestrained majoritarianism of deferring completely to the elected branches. (Bilionis 2007, p. 359 quoting Kahn 1993, p. 1155-56).

As state supreme courts fill an intermediate position (in terms of selection methods) between the majoritarian elected branches and the life-tenure protected federal courts, they are tasked to police the shadowy intermediate areas between constitutional rights and “non-rights” (i.e. the unprotected areas of conduct). State supreme courts have the prerogative to fill this area with state constitutional law, more malleable, adaptable and responsive than federal constitutional law, but still insulated from the majoritarian whims of elected officials. State supreme courts can do this in light of local needs, conditions and experiences. This is the quintessential federalism argument, but to be workable, state supreme courts first need to be aware of and prepared to exercise this role. While state legislatures also play an intermediate role, reliance upon state legislatures may be unrealistic for criminal defendants and minorities who need counter-majoritarian protections analogous to those in the Bill of Rights. If state supreme courts are to play this role, it would be best to accept this responsibility, if not in explicit coordination with other states supreme courts, at least with cognizance of how their fellow states are exercising their responsibilities in this field.

III. Avenues for Future Research

A. Measuring How Much of Sister State Dialogue is Communicated Through Briefs. One promising avenue of future research is to see if justices are just cut and pasting citations from the attorneys' briefs without much discussion (and thus likely little persuasion) or whether justices and their law clerks are discovering and citing sister state cases on their own. The entire process of the transfer of ideas and reasoning from the briefs to final published opinion is one that promises fertile grounds for future research. Such future research might include examining the briefs themselves and comparing them to the final opinions regarding the citations to sister state decisions, and more importantly whether legal reasoning has been directly lifted from the briefs. Similar investigations might be conducted with legal treatises and law review articles cited in the legal briefs and final opinions.

B. Investigating the First Mover. Dialogue between states (horizontal federalism) becomes observable when states have the advantage of looking to the decisions of sister states who have already considered a common constitutional question. Yet horizontal federalism does little to explain the decision making process of the first mover—the first state to explicitly consider whether to follow U.S. Supreme Court precedent or adopt a different standard based upon state constitutional provisions. By definition, a first mover cannot rely upon sister state decisions. Even states in the first handful of early movers would have few sister state decisions to consider, as the discussion in Chapter 5 demonstrated concerning the first movers in the area of the good faith exception to the exclusionary rule. As a subject for future research, I hypothesize that several factors drive first mover(s) including: 1) whether the U.S. Supreme Court has retreated from earlier broader precedents, 2) degree of division within the U.S. Supreme Court (number of dissents in controlling precedent), 3) deciding court precedent, 4)

citations to law review articles and other scholarly opinion, 5) amicus briefs filed by interest groups, and 6) political ideology. While the discussion in Chapter 5 considered these factors (particular factors 3-5) in the discussion of the first movers, a more comprehensive collection of first movers across multiple legal issues is certainly required to test whether this list of influencing factors is accurate. This investigation would also benefit with being coupled with a focus on the briefs filed by the attorneys as discussed above.

C. How is Sister State Dialogue Reflected in U.S. Supreme Court Decision Making?

Dialogue is not simply of interest to state constitutional law. Rather state constitutional decision making is also considered by the U.S. Supreme Court when interpreting the U.S. Constitution. Although the previous chapters have shown that dialogue influences state supreme courts concerning issues of state constitutional interpretation, if lockstepping interpretive approaches continue to predominate, then the impact of state constitutional dialogue upon the larger American constitutional structure is likely to remain relatively modest. In a few issue areas states will innovate, but the Supreme Court will still be viewed as the predominant voice on American constitutional interpretation. On the other hand, if the Supreme Court takes notice of what states are doing, and considers their alternative reasoning and at least occasionally decides to adjust its decisions in light of state constitutional decisions, then state constitutional dialogue has the potential to be truly revolutionary. Exploring the impact of state supreme court decisions upon the Supreme Court is thus an interesting avenue for future research. What follows are few examples of state supreme court decisions being cited by the Supreme Court.

1. Arizona v Gant. Whether to follow the holding of *New York v Belton*, 453 U.S. 454 (1981) under state constitutional law was an issue for state supreme courts almost 30 years before the Supreme Court partially overturned *Belton* in 2009. In *Arizona v. Gant*, 556 U.S. 332

(2009) the Supreme Court held that concerns for officer safety did not justify warrantless searches of automobiles (searches ostensibly for weapons but which often discovered contraband like drugs) once a defendant had been safely removed from the vehicle and secured in a law enforcement vehicle. Prior to *Gant* lower courts, including state supreme courts, had interpreted *Belton* to permit warrantless searches of the car for a considerable period even after defendants were removed from their cars. While certainly it cannot be claimed that state supreme court decisions caused the Supreme Court decision in *Arizona v Gant*, the Supreme Court did reference those state constitutional decisions as informing its decision.¹⁹³

2. *Ex Parte Bruner*. The U.S. Supreme Court took state constitutional decisions into account in the seminal case of *Batson v Kentucky*, 476 U.S. 79 (1986), which made it made it far easier to demonstrate racial discrimination in exercising peremptory strikes during jury selection. As noted by Justice Cook of the Alabama Supreme Court in the case of *Ex Parte Bruner* (Ala. 1996) the *Batson* case

was decided only after a number of *state* courts had already taken the initiative in ameliorating the harsh rule of *Swain v. Alabama*, 380 U.S. 202 (1965). More specifically, *Batson* explained that two United States Circuit Courts of Appeals had recently “*follow[ed] the lead of a number of state courts* construing their State’s Constitution” to challenge as discriminatory peremptory strikes based on evidence supplied in the “particular case” rather than requiring, as did the federal standard, proof of “systemic exclusion of blacks.” (emphasis added by Justice Cook quoting *Batson*, 476 U.S. 79, 82 n.1)

Thus Justice Cook draws attention to the fact that the U.S. Supreme Court can and does take notice of state constitutional decisions. While Justice Cook goes on to argue that since the Alabama Supreme Court had cited the same sister state decisions in earlier decisions as the U.S. Supreme Court relied upon, that its earlier decisions were actually based in state constitutional

¹⁹³ See the discussion in Chapter 2 regarding the *State v. Murrell* case from the Ohio Case Study, and accompanying footnotes.

law and existed independently of the federal line of authority, the more basic point is that state constitutional law can predate and serve as support for federal constitutional decision making.

Thus constitutional dialogue has come full circle. We started by discussing state supreme court decision making serving as a dissenting voice or counterpoint to federal interpretation. The modern examples of *Batson* and *Gant* demonstrate the potential for constitutional decision making by the Supreme Court to have intellectual foundations, at least in part, in the state constitutional reasoning and decision making of state supreme courts. This illustrates that there is actually one American constitutional structure, as opposed to separate and distinct federal and state constitutional jurisprudence. In this common American constitutional structure the state and federal constitutional interpretations by both state and federal courts, and the reasoning utilized by those courts, can flow in both directions and reinforce each other.

BIBLIOGRAPHY

- Abrahamson, Shirley S. (1985). Criminal Law and State Constitutions: The Emergence of State Constitutional Law. *Texas Law Review*, 63, 1141-1193.
- Adler, Jonathan H. and Christina M. Adler. (2008). "A More Modest Court: The Ohio Supreme Court's Newfound Judicial Restraint. Retrieved May 29, 2009 from http://www.fed-soc.org/publications/pubid.1157/pub_detail.asp
- Anderson, Paul H. and Julie A. Oseid. (2007). A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions. *Albany Law Review*, 70, 865-925.
- Beavers, Staci L. and Craig F. Emmert. (2000). Explaining State High Courts' Selective Use of State Constitutions. *Publius*, 30(3), 1-15.
- Beavers, Staci L. and Jeffrey S. Walz. (1998). Modeling Judicial Federalism: Predictors of State Court Protections of Defendants' Rights Under State Constitutions. *Publius*, 28(2), 43-59.
- Bettman, Marianna B. (2004). Ohio Joins the New Judicial Federalism Movement: A Little Toning and Fro-ing. *Cleveland State Law Review*, 51, 491-503.
- Bilionis, Louis D. (1992). On the Significance of Constitutional Spirit. *North Carolina Law Review*, 70, 1803-1822.
- Blocher, Joseph. (2011). Reverse Incorporation. *Southern California Law Review*, 84, 323-386.
- Braithwaite, Dennis J. (2001) An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution. *Rutgers Law Journal*, 33, 1-48.
- Brace, Paul, Laura Langer and Melinda Gann Hall (2000). Measuring the Preferences of State Supreme Court Judges. *Journal of Politics*, 62(2), 387-413.
- Brennan, William J. (1977). State Constitutions and the Protection of Individual Rights. *Harvard Law Review*, 90, 489-504.
- Brody, David C. (2002). Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism. *Justice System Journal*, 23(1), 75-95.
- Brown, Robert L. (2002). Expanded Rights Through State Law: The United States Supreme Court Shows States the Way. *The Journal of Appellate Practice and Process*, 4(2), 499-519.

- Caldeira, Gregory A. (1983). On the Reputation of State Supreme Courts. *Political Behavior*, 5, 83-108.
- Caldeira, Gregory A. (1985). The Transmission of Legal Precedent: A Study of State Supreme Courts. *American Political Science Review*, 79, 178-194.
- Cauthen, James N. G. (1999). State Constitutional Policymaking in Criminal Procedure: A Longitudinal Investigation. *Criminal Justice Policy Review*, 10, 521-545.
- Cauthen, James N. G. (2000). Expanding Rights Under State Constitutions: A Quantitative Appraisal. *Albany Law Review*, 63, 1183-1203.
- Cauthen, James N. G. (2003). Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations. *Albany Law Review*, 66, 783-795.
- Canon, Bradley C. and Lawrence Baum. (1981). Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Decisions. *The American Political Science Review*, 75, 975-987.
- Choper, Jesse H. (2009). Should Proposition 8 Be Held to Be Retroactive? *California Journal of Politics and Policy*, 1.
- Collins, Ronald K. L., Peter J. Gailie and John Kinkaid. (1986). State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey. *Publius*, 16, 141-161.
- Dear, Jake and Edward W. Jessen. (2007). "Followed Rates" and Leading State Cases, 1940-2005. *University of California Davis Law Review*, 41, 683-711.
- Dellinger, Walter. (2009, June 29). "Souter: A Last Lecture on Gay Marriage?" *Slate*. Retrieved on June 28, 2011 from: <http://www.slate.com/id/2220927/entry/2221719/>
- Derthick, Martha. (2001). *Keeping the Compound Republic: Essays on American Federalism*. Washington: Brookings Institution Press.
- Dinan, John. (2007). Court-Constraining Amendments and the State Constitutional Tradition. *Rutgers Law Journal*, 38, 983-1039.
- Entin, Jonathan L. (2002). Judicial Selection and Political Culture. *Capital University Law Review*, 30, 523-557.
- Epstein, Lee and Thomas G. Walker. (2011). *Constitutional Law for a Changing America: Institutional Powers and Constraints*. Washington: CQ Press.

- Erikson, Robert S., Gerald D. Wright and John P. McIver. (1993). *Statehouse Democracy: Public Opinion and Policy in the American States*. New York: Cambridge University Press.
- Esler, Michael. (1994). State Supreme Court Commitment to State Law. *Judicature*, 78, 25-32.
- Flemming, Gregory N., David B. Holian and Susan Gluck Mezey. (1998). An Integrated Model of Privacy Decision Making In State Supreme Courts. *American Politics Quarterly*, 26(1), 35-58.
- Friedman, Lawrence. (2000). The Constitutional Value of Dialogue and the New Judicial Federalism. *Hastings Constitutional Law Quarterly*, 28, 93-144.
- Friesan, Jennifer. (2006). *State Constitutional Law: Litigating Rights, Claims and Defenses*. (4th ed.) (Vol. 1) Newark, N.J.: Lexis Nexis
- Gardner, James A. (1999). *State Expansion of Federal Constitutional Liberties: Individual Rights in a Dual Constitutional System*. (Vol. 1). New York: Garland Publishing.
- Gardner, James A. (2005). Dual Enforcement of Constitutional Norms: Whose Constitution is It? Whey Federalism and Constitutional Positivism Don't Mix. *William and Mary Law Review*, 46, 1245-1271.
- Gillman, H. (2001). What's Law Got to Do With It? Judicial Behaviorists Test the 'Legal Model' of Judicial Decision Making. *Law and Social Inquiry*, 26, 465-504.
- Ginsburg, Ruth Bader (2009, Sept. 15). Speech at Northwestern University School of Law. Video of program available at <http://www.c-spanvideo.org/program/288900-1>
- Goldstein, Tom. (2009, January 14). The Surpassing Significance of Herring. Retrieved July 13, 2012, from <http://www.scotusblog.com/2009/01/the-surpassing-significance-of-herring/>
- Gorman, Michael J. (2008). Survey: State Search and Seizure Analogs. *Mississippi Law Journal*, 70, 417-467.
- Gormley, Ken. (2003). Federal Jurisprudence, State Autonomy: The Silver Anniversary of New Judicial Federalism. *Albany Law Review*, 66, 797-808.
- Gryski, Gerard S., Eleanor C. Main and William J. Dixon. (1986). Models of State High Court Decision Making in Sex Discrimination Cases. *Journal of Politics*, 48, 143-155.
- Hallett, Joe. (2007, March 18). "What went on in the Supreme Court." *The Columbus Dispatch*. Retrieved on July 14, 2009 from: http://www.dispatch.com/live/content/local_news/stories/2007/03/18/SUPREMES.ART_ART_03-18-07_A1_OK638N7.html

- Howard, Robert M., Scott E. Graves, and Julianne Flowers. (2006). State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties. *Law & Society Review*, 40(4), 845-870.
- Heofler, James M. (1994). Diffusion and Diversity: Federalism and the Right to Die in the Fifty States. *Publius*, 24, 153-170.
- Kahn, Paul. W. (1993). Interpretation and Authority in State Constitutionalism. *Harvard Law Review*, 106, 1147-1168.
- Kerr, Orin S. (2011). Good Faith, New Law, and the Scope of the Exclusionary Rule. *Georgetown Law Journal*, 99, 1077-1118.
- Kincaid, John. (1988a). State Constitutions in the Federal System. *Annals of the American Academy of Political and Social Science*, 496, 12-22.
- Kincaid, John. (1988b). State Court Protections of Individual Rights Under State Constitutions. *Journal of State Government*, 61(5), 163-169.
- Kramer, Larry D. (2004). *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press.
- Latzer, Barry. (1991a). The Hidden Conservatism of the State Court “Revolution”. *Judicature*, 74, 190-197.
- Latzer, Barry. (1991b). *State Constitutions and Criminal Justice*. Westport, CT: Greenwood Press.
- Latzer, Barry. (1992). Four Half-Truths About State Constitutional Law. *Temple Law Review*, 65, 1123-1152.
- Latzer, Barry. (1998). Whose Federalism? Or, Why “Conservative” States Should Develop Their State Constitutional Law. *Albany Law Review*, 61, 1399-1415.
- Liptak, Adam. (2009, January 31). Justices Step Closer to Repeal of Evidence Ruling. *The New York Times*. Retrieved July 13, 2012 from:
<http://www.nytimes.com/2009/01/31/washington/31scotus.html?pagewanted=all>
- Liptak, Adam and Janet Roberts. (2006, Oct. 1). “Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court’s Rulings.” *The New York Times*. Retrieved July 14, 2009 from:
<http://query.nytimes.com/gst/fullpage.html?res=9A06E7D81730F932A35753C1A9609C8B63>

- Mazzone, Jason. (2007). The Bill of Rights in the Early State Courts. *Minnesota Law Review*, 92, 1-82.
- Mc Coy, Candice (1996). Crime as a Boogeyman: Why Californians Changed Their Constitution to Include a "Victims Bill of Rights" (and What it Really Did). In G. Alan Tarr (Ed.), *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns*. (pp. 128-146). Westport, CT: Greenwood Press.
- Miller, Marc L. and Ronald F. Wright. (2008). Leaky Floors: State Law Below Federal Constitutional Limits. *Arizona Law Review*, 50, 227-259.
- Moran, David A. (2006). The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment. *Cato Supreme Court Review* 2005-2006, 283-309. Retrieved March 16, 2009, from <http://www.cato.org/pubs/scr/2006/index.html>
- Mosk, Stanley. (1985). State Constitutionalism: Both Liberal and Conservative. *Texas Law Review*, 63, 1081-1093.
- Mosk, Stanley. (1988). The Emerging Agenda in State Constitutional Rights Law. *Annals of the American Academy of Political and Social Science*, 496, 54-64.
- Moss, Scott A. and Douglas M. Raines. (2008). The Intriguing Federalist Future of Reproductive Rights. *Boston University Law Review*, 88, 175-225.
- O'Brien, David M. (2005). *Constitutional Law and Politics: Civil Rights and Civil Liberties*. (6th ed.). New York: Norton.
- Owsiany, David J. (2004) "The Ohio Supreme Court: A Court at the Crossroads." Retrieved on July 13, 2012 from: http://www.fed-soc.org/doclib/20070325_ohio.pdf
- Pollock, Stewart. (1983). State Constitutions as Separate Sources of Fundamental Rights. *Rutgers Law Review*, 35, 707-722.
- Porter, Mary C. and G. Alan Tarr, eds. (1982). *State Supreme Courts: Policymakers in the Federal System*. Westport: Greenwood Press.
- Porter, Mary C. and G. Alan Tarr. (1984). "The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure." *Ohio State Law Journal*, 45, 143.
- Przeworski, Adam and Henry Teune. (1970). *The Logic of Comparative Social Inquiry*. New York: Wiley-Interscience
- Saphire, Richard B. (2004). "Ohio Constitutional Interpretation." *Cleveland State Law Review*, 51, 437-489.

- Schapiro, Robert A. (2009). *Polyphonic Federalism: Toward the Protection of Fundamental Rights*. Chicago: University of Chicago Press
- Shaman, Jeffrey M. (2008). *Equality and Liberty in the Golden Age of State Constitutional Law*. New York: Oxford University Press.
- Sisk, Gregory C. (2007). Uprooting the *Pruneyard*. *Rutgers Law Journal*, 38, 1145-1213.
- Solimne, Michael E. (2002). "The False Promise of Judicial Elections in Ohio. *Capital University Law Review*, 30, 559-581.
- Segal, Jeffrey A. and Harold J. Spaeth. (2002). *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Sunstein, Cass R. (2008). Second Amendment Minimalism: *Heller* as *Griswold*. *Harvard Law Review*, 122, 246-274.
- Tarr, Alan G. (1994). The Past and Future of New Judicial Federalism. *Publius*, 24, 63-79.
- Tomlin, Christopher (2006). Criminal Procedure—Jury Trial—Colorado Constitution Guarantees Right to a Twelve-Person Jury in Felony, but not Misdemeanor Criminal Cases. *Rutgers Law Journal*, 37, 1497-1512.
- Williams, Robert F. (2003). The Third Stage of the New Judicial Federalism. *NYU Annual Survey of American Law*, 59, 211-230.
- Williams, Robert F. (2004). "The New Judicial Federalism in Ohio: The First Decade." *Cleveland State Law Review*, 51, 415-436.
- Williams, Robert F. (2005). State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping? *William and Mary Law Review*, 46, 1499-1531.
- Williams, Robert F. (2007). State Constitutional Methodology in Search and Seizure Cases. *Mississippi Law Journal*, 77, 225-263.
- Williams, Robert F. (2009). *The Law of American State Constitutions*. New York: Oxford University Press.
- Wohl, Alexander. (2011). *Mapp v Ohio* Turns 50: If a Moderate Texan Could Love the Exclusionary Rule, Why Can't Judicial Conservatives? *Slate* June 7, 2011. Retrieved June 11, 2011, from <http://www.slate.com/id/2296453/>
- Wong, Kenneth K. (2008). The Politics of Education. In Virginia Gray and Russell L. Hanson (eds.), *Politics in the American States: A Comparative Analysis* (9th ed.) (pp. 350-377). Washington: CQ Press.

Cases Cited

U.S. Supreme Court cases:

Arizona v. Gant, 556 U.S. 332 (2009)

Arkansas Dept. of Human Services v. Ahlborn, 547 U.S. 268 (2006)

Atwater v City of Lago Vista, 532 U.S. 318 (2001)

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

Brown v. Board of Education, 347 U.S. 483 (1954)

D.C. v Heller, 554 U.S. 570 (2008)

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)

Ex parte Lockwood, 154 U.S. 116 (1894)

Florida v. Casel, 462 U.S. 637 (1983)

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

Hudson v. Michigan, 547 U.S. 586 (2006)

Illinois v Krull, 480 U.S. 340 (1987)

Kelo v. City of New London, 545 U.S. 469 (2005)

Mapp v. Ohio, 367 U.S. 643 (1961)

McDonald v City of Chicago, 561 U.S. ____; 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010)

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

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)

New York v Belton, 453 U.S. 454 (1981)

Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990)

Republican Party of Minnesota v. White, 536 U.S. 765 (2002)

Sherbert v. Verner, 374 U.S. 398 (1963)

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

Traxel v. Granville, 530 U.S. 57 (2000)

U.S. v Jones, ___ U.S. ___; 132 S. Ct. 945; 181 L. Ed. 2d 911 (2012)

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

United States v. Patane, 542 U.S. 630 (2004)

United States v. Wade, 388 U.S. 218 (1967)

Vernonia Sch Dist. 47J v. Acton, 515 U.S. 646 (1995)

Wisconsin v Yoder, 406 U.S. 205 (1972)

Federal Circuit Court cases:

Ahlborn v Arkansas Dept. of Human Services, 397 F.3d 620 (2005)

State Supreme Court cases:

Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993)

Baycol v Fort Lauderdale Downtown Dev. Auth., 315 So.2d 451 (Fla 1975)

Board of County Commissioners v Lowery, 136 P.3d 639 (Okla. 2006)

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)

City of Columbus v. Cooper, 550 N.E.2d 937 (Ohio 1990)

City of Norwood v Horney, 853 N.E.2d 1115 (Ohio 2006)

City of Painesville Bldg Dept. v. Dworken & Bernstein, L.P.A., 733 N.E.2d 1152 (Ohio 2000)

City of West Des Moines v. Engler, 641 N.W.2d 803 (Iowa 2002)

Clark v. Board of Directors, 24 Iowa 266 (1868)

Coger v. North West Union Packet Co., 37 Iowa 145 (1873)

Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)

Commonwealth v. Martin, 827 N.E.2d 198 (Mass. 2005)

Commonwealth v. Timko, 417 A.2d 620 (Pa. 1980)

Commonwealth v White, 669 A.2d. 896 (Pa. 1995)

County of Wayne v Hathcock, 684 N.W.2d 765 (Mich. 2004)

Dobbins v Ohio Bureau of Motor Vehicles, 664 N.E.2d 908 (Ohio 1996)

Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994)

Ex Parte Bruner (Ala. 1996)

Friedman v Commissioner of Public Safety, 473 N.W.2d 828 (Minn. 1991)

Gallathin Realty Development v. Borough of Paulsboro, 924 A.2d 447 (N.J. 2007)

Garza v State, 632 N.W.2d 633 (Minn. 2001)

Humphrey v Lane, 728 N.E.2d 1039 (Ohio 2000)

In re Marriage Cases, 183 P.3d 384 (Cal. 2008)

In re Petition of Seattle, 638 P.2d 549 (Wash. 1981)

In re Ralph, 1 Morris 1 (Iowa Terr. 1839)

Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002)

Lincoln v State, 685 S.W.2d 166 (Ark. 1985)

Luk v. Commonwealth, 658 N.E.2d 664 (Mass. 1995)

Martin ex rel. Hoff. v City of Rochester, 642 N.W.2d 1 (Minn. 2002)

Merrill v. Manchester, 499 A.2d 216 (N.H. 1985)

Ohio AFL-CIO v Ohio Bureau of Workers' Compensation, 780 N.E.2d 981 (Ohio 2002)

Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979)

People v Bigelow, 488 N.E.2d 451 (N.Y. 1985)

People v. Caballes, 851 N.E.2d 26 (Ill. 2006)

People v. Corr, 682 P.2d 20 (Colo. 1984)

People v Defore, 242 N.Y. 13, 150 N.E. 585 (N.Y. 1926)

People v. Haley, 41 P.3d 666 (Colo. 2001)

People v. Krueger, 675 N.E.2d 604 (Ill.1996)

People v. Rodriguez, 112 P.3d 693 (Colo. 2005)

People v. Sporleader, 666 P.2d 135 (Colo. 1983)

People v. Washington, 665 N.E.2d 1330 (1996)

Powell v State, 510 S.E.2d 18 (Georgia 1998)

Santi v Santi, 633 N.W.2d 312 (Iowa 2001)

Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986)

Southwestern Illinois Development Authority v. National City Environmental, 768 N.E.2d 1 (Illinois 2002)

State ex rel. Beacon Journal Publishing v. Bond, 781 N.E.2d 180 (Ohio 2002)

State v. Allen, 690 N.W.2d 684 (Iowa 2005)

State v. Askerooth, 681 N.W.2d 353 (Minn. 2004)

State v. Bauer, 36 P.3d 892 (Mont. 2001)

State v. Brown, 792 N.E.2d 175 (Ohio 2003)

State v Brown, 588 N.E.2d 113 (Ohio 1992)

State v. Canelo, 653 A.2d 1097 (N.H. 1995)

State v. Cline, 617 N.W.2d 277 (Iowa 2000)

State v. Cook, 700 N.E.2d 570 (Ohio 1998)

State v Daniel, 242 P.3d 1186 (Kan. 2010)

State v Davidson, 481 N.W.2d 51 (Minn.1992)

State v. Eckel, 888 A.2d 1266 (N.J. 2006)

State v. Farris, 849 N.E.2d 985 (Ohio 2006)

State v.Fisher, 789 N.E.2d 22 (Ohio 2003)

State v Gardner, 889 N.E.2d 995 (Ohio 2008)

State v. Gustafson, 668 N.E.2d 435 (Ohio 1996)

State v. Henry, 732 P.2d 9 (Ore. 1987)

State v. Jason L., 2 P.3d 856 (N.M. 2000)

State v. Jones, 727 N.E.2d 886 (Ohio 2000)

State v. Jordan, 817 N.E.2d 864 (Ohio 2004)

State v. Kaluna, 520 P.2d 51 (Hawaii 1974)

State v. Knapp, 700 N.W.2d 899 (Wis. 2005)

State v. Murrell, 764 N.E.2d 986 (Ohio 2002)

State v Novembrino, 519 A.2d 820 (N.J. 1987)

State v. Orr, 745 N.E.2d 1036 (Ohio 2001)

State v. Peterson, 923 A.2d 585 (Vt. 2007)

State v. Robinette, 653 N.E.2d 695 (Ohio 1995)

State v. Robinette, 685 N.E.2d 762 (Ohio 1997)

State v Saiz, 427 N.W.2d 825 (S.D. 1988)

State v Storch, 612 N.E.2d 305 (Ohio 1993)

State v. Whisner, 351 N.E.2d 750 (Ohio 1976)

State v White, 640 P.2d 1061 (Wash. 1982)

State v Wilmoth, 490 N.E.2d 1236 (Ohio 1986)

Theodore v Delaware Valley School District 836 A.2d 76 (Pa. 2003)

Vail v. Plain Dealer Publishing Company, 649 N.E.2d 182 (Ohio 1995)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Wampler v Higgins, 93 Ohio St.3d 111 (2001)

Wilson v State, 10 P.3d 1061 (Wash. 2000)

APPENDIX

State Constitutional Code Book

W	case name	name of case
X	citation	West Publishing citation
Y	state	1-50 value corresponding to state chart
Z	full date	numeric value—full date decision filed
ZZ	ct of appeals outcome	1 = affirm 0 = reverse
ZD	district ct outcome	1 = affirm 0 = reverse
A	issue area	1-20 issue areas corresponding to issue area chart
B	follows SCOTUS	1 = yes 0 = no
BB	on remand from SCOTUS	1 = yes 0 = no
C	SCOTUS precedent name	name of controlling SCOTUS precedent (limit one named precedent— if multiple SCOTUS precedents code “no single precedent”)
D	majority vote	number of justices on deciding court supporting decision on state const. grounds
DD	majority author	name of the justice writing the majority/plurality opinion
E	dissenting vote	number of justices opposing decision on state constitutional grounds
EE	names of dissenters	names of dissenting justices on deciding court
F	no stand	number of justices that take no stand on state constitutional grounds
G	no part	number of justices not participating (do <i>not</i> court if temporarily substituted for)
H	sister state citations	1 = yes 0 = no by majority OR dissent of deciding court (can be ct of appeals cases)
I	majority rule	1 = yes 0 = no deciding court claims to follow majority rule of sister state decisions (either of all courts or sister state courts)
J	dissent claims that majority rule ignored	1 = yes 0 = no 97 = no dissent/NA dissent claims majority decided case contrary to majority rule of sister state decisions
K	Group A	1 = yes 0 = no Group A if cited sister state <u>supreme</u> cts follow SCOTUS precedent
L	Group B	1 = yes 0 = no Group B if NO sister state <u>supreme</u> court citations
M	Group C	1 = yes 0 = no Group C if cited sister states <u>supreme</u> cts expand rights
N	ABC resolution	1 = A 2 = B 3 = C can be <u>both</u> A and C, so <i>1st tie breaker</i> is majority rule across sister states decisions (counting <u>only</u> sister state <u>supreme</u> courts) cited by deciding court, <i>2nd tiebreaker</i> is majority of <i>prestigious</i> sister supreme courts cited by deciding court, <i>3rd tiebreaker</i> is by ranking prestigious courts 1-15, side w/ lowest average wins.
O	CA – OR	15 prestigious states 0 = no citation 1 = follow SCOTUS 3 = rights expanding
O _A	other states (A)	numeric code for all other state supreme courts cited following SCOTUS
O _C	other states (C)	numeric code for all other state supreme courts cited expanding rights
P	# SCOTUS dissents	numeric value range 1-4 (97 if no single precedent coded)
PP	SCOTUS dissenters	names of dissenting justices in SCOTUS precedent
Q	cites SCOTUS dissent	1 = yes 0 = no (by majority OR dissent of deciding court)
R	SCOTUS retreat	1 = yes 0 = no mention deciding court (majority or dissent) notes SCOTUS has narrowed rights interpretation by overturning/limiting earlier SCOTUS precedent
S	prior state precedent	1 = yes 0 = no cites rights expansive deciding ct precedent from time when SCOTUS precedent unclear (but <u>not</u> if deciding ct precedents before time SCOTUS if consistent with current SCOTUS precedent)
T	identical language	1 = identical or nearly identical (change in commas/capitalization ok) 2 = very similar (modest word substitutions) 3 = quite different (different phrases)
U	justified on lang diff	1 = yes 0 = no (also 0 if identical above, i.e. T = 1)
V	state right coextensive	1 = yes 0 = no state court states it always/consistently reads state const provision as coextensive with fed const provision (including “lockstep” or “coextensive” <u>but</u> “generally” or “usually” <u>not</u> sufficient)

97 = NA (not applicable)

98 = missing

Interview Questions for State Supreme Court Justices

1. I am speaking via telephone with _(state)_ Supreme Court Justice ____ (name) _____. Today is _____, 2011

Before we begin Judge, did you have any questions about the process after reviewing the informed consent mailer? You understand you may choose not to answer any question and you also understand you may answer a question either literally or figuratively off the record. *(If they failed to initial each page, ask them if they had chance to read ICM).*

2. Judge, which years have/did you serve on active duty with the _____ Supreme Court (before retiring or taking senior status) ?

3. Generally, what are the most important influences on how the _____ Supreme Court will decide a case? (open ended)

4. What percentage of the time could you confidently predict the outcome of a case based on your colleagues personal backgrounds or political ideology just on a statement of the issue without reading the briefs? (try to get an actual percentage number)

5. Would you be more or less confident in predicting an outcome prior to reading the briefs when deciding constitutional law cases specifically? (What percentage?)

6. How much of your ability to predict case outcomes is based on your colleagues political ideology, how conservative or liberal they are; and how much on their legal background, their prior offices and experiences before joining the Court?

Today my focus is going to be on state constitutional law decisions, and in particular those state constitutional law cases where your Court was asked to not follow decisions of the U.S. Supreme Court and instead apply state constitutional provisions more broadly than the provisions in the U.S. Constitution. For all of these questions assume the text of the U.S. Constitution and the applicable state constitutional provision is identical----For example, the U.S. Supreme Court has held there is no expectation of privacy in trash cans left on the street curb so there is no need for a search warrant under the 4th Amend to examine their contents, but the state supreme court is asked to find that a search warrant is required under state constitutional provision analogous to 4th Amend).

7. Do you think it is ever appropriate for your Court to not follow a decision of the U.S. Supreme Court on state constitutional grounds, and interpret an identical state constitutional provision more broadly than the U.S. Constitutional provision?

8. What would be necessary for you to reach such a decision? (open ended)

9. Again, considering just these state constitutional cases, where your Court was asked to not follow decisions of the U.S. Supreme Court and instead apply state constitutional provisions, how important is to you personally that the U.S. Supreme Court was closely divided when reaching its decision that serves as federal precedent? Your choices are:

- a. Very important
- b. Somewhat important
- c. Mostly unimportant
- d. Not at all important

10. Again, considering just these state constitutional cases, how important is it to you personally that the U.S. Supreme Court may have adjusted, distinguished, or overruled its own previous precedents? (if asked for example—good faith exception to the exclusionary rule)

- a. Very important
- b. Somewhat important
- c. Mostly unimportant
- d. Not at all important

11. Again, considering just these types of state constitutional cases, how important is to you personally that your Court had already decided that issue differently than how the U.S. Supreme Court later decides the case, and you are being asked to either follow your Court's earlier precedent or the more recent U.S. Supreme Court precedent. In other words, your state precedent and the federal precedent do not agree. In that situation, how important to you personally is your state's prior precedent:

- a. Very important
- b. Somewhat important
- c. Mostly unimportant
- d. Not at all important

12. Again, considering just these state constitutional cases, how important is to you personally the way that sister state supreme courts have resolved similar cases under their state constitutions?

- a. Very important
- b. Somewhat important
- c. Mostly unimportant
- d. Not at all important

13. Again, considering just these state constitutional cases, how important is to you personally that public reaction and public opinion might be negative in response to your decision?

- a. Very important
- b. Somewhat important
- c. Mostly unimportant
- d. Not at all important

14. Again, considering just these state constitutional cases, how important is it to you personally the impact the decision will likely have upon public policy, including the impact the decision will have on the administration of justice, upon lower courts, upon defendants and prosecutors, or upon other political actors in the state?

- a. Very important
- b. Somewhat important
- c. Mostly unimportant
- d. Not at all important

15. Are there any factors that I have not mentioned so far, that would be important to you personally in deciding such a state constitutional case? (open ended).

16. Considering everything that would go into your Court's decision in a state constitutional case, including the political ideology and backgrounds of your colleagues, divisions on the U.S. Supreme Court, precedent of your state supreme court, decisions of sister state supreme courts, whether the U.S. Supreme Court may have adjusted or overruled its own precedent, and the impact of your decision upon public policy and upon public opinion (and things Justice might have mentioned in response to #15) – what is the largest single factor you think influences your Court's decision making in such cases?

17. If you had to put the impact and weight of (this factor) upon your Court's decision making in percentage terms, 1 out of 100%; considering everything in the decision making process, what percentage of your Court's decision making process would (this factor) account for?

18. If you had to put a weight on the role of political ideology and professional background of your colleagues in percentage terms, 1 out of 100%; considering everything in the decision making process, what percentage of your Court's decision making process would political ideology and professional background account for?

19. If you had to put a weight on the role of sister state supreme court opinions in percentage terms, 1 out of 100%; considering everything in the decision making process, what percentage of your Court's decision making process would sister state opinions account for?

20. How often, in these type of state constitutional cases, do sister state opinions come up when deciding cases in conference?

21. Can you give me an example of sister state cases ever playing an important role in conference in state constitutional cases?

22. To the extent opinions of sister states are important and discussed in conference, what tends to be most important about these sister state opinions, and I have several choices here: a) the recent trend across sister states deciding similar cases b) the prominence or prestige of the sister state supreme courts being cited c) whether the sister states are liberal or conservative d) the number of sister state opinions on both sides e) other—(something else about the sister decision). (*If "e" please elaborate*)

23. Are sister state supreme court opinions more important when there is a clear majority rule across states on one side? (For Iowa Judges only, if not important to 23: The Iowa Supreme Court in State v. Allen (2005) stated “Nor do we detect a trend in our sister state courts to abandon the federal analysis. A strong majority of the states that have [considered this question] have declined to forge new and different ground.” Is this statement then just a throw-away sentence in the opinion?) *How much more important?*

24. When citations to sister state decisions are included in an opinion of your Court in a state constitutional case, would you say that this means these sister state opinions influenced your Court’s decision making process, or do these citations to sister state opinions merely help justify a decision that was already made on other grounds?

24a. (new) To what extent do your colleagues only cite sister state decisions that comport with their own personal preferences and backgrounds, or are the opinion writers generally even-handed and cite relevant sister state precedent regardless of whether it agrees or disagrees with their preferred position?

25. Do you have anything to add about the role of sister state opinions and how they might influence your Court’s decision making process?

(Cut questions 26 through 33 if less than 30 minutes remaining)

26. In deciding state constitutional cases, what weight, if any, would you personally give the dissenting opinions of the U.S. Supreme Court when deciding whether to vote to follow that federal precedent?

27. Does it matter to you personally who wrote the U.S. Supreme Court majority in the federal precedent?

28. Would you be more likely to join an opinion on state constitutional grounds if you disagreed ideologically with the author of the U.S. Supreme Court decision?

29. Does it matter to you personally who wrote the dissent in the U.S. Supreme Court decision?

30. Does it matter to you personally how many justices joined the U.S. Supreme Court majority?

31. Does your state have clear “divergence factors” that are to be briefed, considered and weighed to help decide when it would be appropriate to depart from a U.S. Supreme Court decision in a state constitutional case? (If no, some states like Pennsylvania do have a list of divergence factors—is that something you wished your state had, or do you believe such factors are too confining for the decision making process?)

32. (If yes) What are those factors?

33. Do you agree with those factors? Would you like to change them?

*Focus on two decisions from their Court with sister state opinions
(preferably where Justice wrote a majority and a dissent, otherwise where they joined a majority
and a dissent)*

34. Specifically in the context of _____ v. _____ [summarize if Justice does not remember—I will forewarn in confirmation email] what was the single most important explanation for the outcome in this case?
35. In _____ v. _____ the majority (or dissenting) opinion found support in opinions of sister state supreme courts. How important, in your view, were these sister state decisions in the outcome of this case in comparison to the _____ (single most important explanation) _____?
36. In _____ v. _____ how important, in your view was the political ideology of your colleagues in the outcome of the case? More or less important than the sister state opinions?
37. In _____ v. _____ how important, in your view was the professional background of your colleagues in the outcome of the case? How would it compare in importance to the other factors we have discussed in the outcome of the case?
38. Do you recall whether the sister state opinions cited in the final opinion of your Court were discussed in the conference when _____ v. _____ was under consideration, or merely cited later in the opinion writing process?
39. What do you remember about the discussion in conference about this case?
40. Do you recall if these sister state opinions were an integral part of the briefs and arguments of the parties in the case?
41. Suppose you were going through the opinion in _____ v. _____ and marking each paragraph as to how important that paragraph was to the outcome of the case—a) very important, b) average importance, c) below average importance, d) why is this here? How would you mark the paragraph containing the sister state decisions in _____ v. _____?
42. *specific question from coding about this case?(other contributing factors—deciding court precedent, U.S. Supreme Court retreat, U.S. Supreme Court dissents cited, lockstepping, etc)*
43. Is there anything else I should know about this case?

Repeat questions 34-43 for a second case

Move to with 5 minutes left

44. Is there anything that you have thought of as I have asked these questions that I should know about your Court's decision making process, but have failed to ask about?

Finally, I am going to ask you the confidentiality questions that I listed in the informed consent form that you signed and returned to me.

45. Do you feel comfortable allowing me to identify you by name in writing about my research?

----If no, say: Okay then, I will refer to your answers in my writing only anonymously as "one justice revealed" or "another justice confirmed".

46. ----If yes: Do you feel comfortable allowing me to reference the specific cases we discussed during the interview?

47. Are there are there any topics or areas that we have discussed today that you would prefer that I not quote you about?

48. *Follow up on tape retention if they neglected to mark on informed consent sheet*

49. Do you have any questions for me?

50. *If they seemed cooperative throughout interview, ask if they would be willing to serve as a reference for other justices on their court if those justices have questions.*

That is all of the questions that I have—THANK YOU very much for answering my questions today. I really appreciate your time!