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SURVEY

State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*

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Introduction

A growing number of state high courts have been construing their own constitutions in a way recognizing "greater" protection for individual rights claims than has been recognized by the United States Supreme Court in interpreting the federal Constitution. This development may be, as Associate Justice William Brennan has noted, "the most important development in constitutional jurisprudence of our times."[1]

The numerous state cases, in turn, have produced an even larger body of commentary on the topic of state constitutions. By the latest count, over three hundred such articles have been published since 1970

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1. *Quoted in* NAT'L L. J., Sept. 29, 1986 (Special Supplement). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

alone.[2] What has not been explored are the reactions of state judges to this trend. In this article we offer some information on the various perceptions and reactions of judges sitting on high courts to this relatively new development concerning the law of individual rights.

Since the early 1970's, state courts of last resort have issued a growing number of decisions in which provisions of state constitutions have served either as independent grounds or as the only grounds for ruling on questions of individual rights and liberties. A benchmark year in the revival of judicial attention to state declarations and bills of rights was 1977. In that year, Justice William Brennan of the United States Supreme Court urged state courts to look to their state constitutions as a way of affording citizens' rights protections beyond those recognized by United States Supreme Court interpretations of the United States Constitution.[3] Although Justice Brennan based his article in part on signs of a new judicial trend already evident in several states, the pace of that trend picked up after 1977.[4] Since 1977 alone, state high courts have rendered at least 217 rights-affirming decisions based upon provisions of their state constitutions—approximately a 131 percent increase in the number of such decisions over the ninety-four decisions issued during 1950-1977.[5] Some forty-six such decisions were handed down in 1985, the highest

2. Collins & Galie, *Cases & Commentary on State Constitutions*, NAT'L L.J., Sept. 29, 1986 (Special Supplement) [hereinafter cited as Collins & Galie, *Commentary*]. *See infra* note 7.

3. Brennan, *supra* note 1. The key ideas expressed in Justice Brennan's article had been set forth earlier by other commentators. *See, e.g.*, Countryman, *Why a State Bill of Rights?* 45 WASH. L. REV. 454 (1970); Force, *State 'Bills of Rights': A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Linde, *Without 'Due Process': Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

4. *See infra Table I.*

5. The 311 decisions (mostly post-1970) are identified in Collins & Galie, *Commentary, supra* note 2. The decisions are those in which state high courts announced "greater" rights protection to individuals under their state constitutions than is otherwise granted by the United States Supreme Court in interpreting the United States Constitution, or in which state high courts based their decisions affirming rights solely on state constitutional grounds. We believe that these 311 decisions accurately represent the vast majority of such decisions for the 1950-1985 period. Such decisions are not easy to locate because, among other things, they are not always clearly identified in the standard reporting sources; therefore, a possibility of an undercount exists, especially for the 1950-1969 period. However, if an undercount does in fact exist, we do not believe that an identification of any additional decisions would significantly alter the findings presented *infra* in Tables 1, 3, 4, and 5. It should also be noted that, in a relatively few instances, state high courts have denied a state constitutional rights claim while, nevertheless, announcing a level of constitutional protection greater than that recognized by the United States Supreme Court. *See, e.g.*, Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985); State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983). The number of cases cited here is also the product of changes in litigation trends as much as of changes in the methods of state court decisonmaking. Finally, data for 1986 are incomplete at this time.

recorded number for any single year.[6] As noted, law reviews around the country have published a multitude of articles on individual rights litigation under state constitutions.[7]

TABLE 1
Number of Independent State Constitutional Rights Decisions Since 1950[a]

Years	Number	Percent of Total
1950-1959	3	1
1960-1969	7	2
1970-1974	36	12
1975-1979	88	28
1980-1984	125	40
1985-1986	52	17
Total	311	100

[a] See footnote 5.

Measuring the level and geographic spread of rights litigation premised upon state constitutional law is not easy. For example, while it is possible to examine the number of state court individual rights decisions based upon state constitutional grounds, records are not ordinarily kept on the number and type of cases in which state constitutional questions were raised initially. To measure the level and distribution of state constitutional litigation in individual rights cases in a preliminary way, in early 1986 we conducted a survey of state high court justices and judges. A brief questionnaire was mailed to the fifty-two chief justices of the nation's state courts of last resort and to one randomly selected associate justice from each of those courts.[8] A follow-up questionnaire was sent to the initial non-respondents. Usable responses were received from thirty-seven chief justices and twenty-eight associate justices representing forty-one of the fifty states.[9] The regional distribution of responses closely approximates the regional distribution of the states. The total response rate was sixty-three percent. Nearly all respondents answered all questions.

6. The 1985 cases are discussed in Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS: J. OF FEDERALISM 111 (Summer 1986), *reprinted in* 55 U. CIN. L. REV. 317 (1986).

7. *See* Collins & Galie, *Commentary*, *supra* note 2. This compilation contains over three hundred and fifty articles or monographs on the topic of state constitutional law and individual rights. *See also Symposium on State Constitutional Law*, 63 TEX. L. REV. 959-1375 (1985).

8. There are fifty-two courts because Oklahoma and Texas have two high courts each, a supreme court and a court of criminal appeals. For the sake of economy, we will refer to all respondents as "justices" even though high court members in some states are called "judges."

9. No responses were received from justices in Illinois, Kansas, Michigan, Mississippi, Missouri, Nevada, South Dakota, Virginia, and Wyoming.

It is important to note that the survey results reflect the *perceptions* of justices concerning activity in the area of state constitutional law litigation in individual rights cases in their states. Several justices reported that they did not wish to respond to the questionnaire because they did not have data on such litigation. Also, in a few cases, respondents from the same court had different perceptions of the level and nature of state constitutional law litigation in individual rights cases brought before their court. In part, such differences may have been due to the fact that we provided a fairly wide range of responses for each question so that justices could find a response that would best reflect their perception of litigation activity.

I. Increases and Frequencies of State Constitutional Rights Litigation

The data displayed in Table 2 show that slightly more than three-quarters of the responding state high court justices perceive an increase in the number of individual rights cases litigated under their state constitution since 1980. Generally, the perceptions of the justices coincide with the data presented in Table 1. Of the justices who reported an increase since 1980, thirty-three percent reported a significant increase, thirty-four percent reported a moderate increase, and thirty-three percent reported a slight increase. Interestingly, associate justices in all regions except the Midwest were more likely to report significant-to-moderate increases in state constitutional law litigation than were chief justices, fifty-eight percent and forty-two percent respectively.

TABLE 2
Perceptions of Change in State Constitutional Rights Litigation Since 1980

Has there been an increase in the number of individual rights cases litigated under the state constitution since 1980?

Response	Percent	Number
Significant increase	25	16
Moderate increase	27	17
Slight increase	25	16
No increase	23	15
Decrease	0	0
Total	100	64

In the absence of survey data prior to 1980, we cannot be certain about the meaning or strength of the trend suggested by these survey results. A court that had experienced a significant increase in state constitutional rights litigation during the 1970's might report a smaller increase during the 1980's. For example, in 1977, Justice Brennan cited the Supreme Court of New Jersey for its activity in the field of rights litigation under its state constitution.[10] Survey responses from that court, however, indicated only a moderate increase in such litigation since 1980. Similarly, the Supreme Court of California reported no increase in state constitutional rights litigation since 1980. Most likely, this response is due to the fact that the California court was already active in this field before 1980. In fact, of the 311 actual rights-affirming decisions based on state constitutional law grounds rendered by state high courts, the California court, with forty-one such decisions, is the nation's leading court. Furthermore, the survey responses from California indicate that state constitutional claims are raised in an unusually high proportion, approximately fifty to seventy-four percent of all rights cases brought before the supreme court. Hence, a response of "no increase" does not always signify an absence or a paucity of state constitutional law litigation in individual rights cases.

Nonetheless, considering the increase in the number of rights-affirming cases actually decided on state constitutional law grounds since 1980, it is reasonable to suggest that the survey results also point to a marked increase, though not yet a "revolution," in litigation based upon rights protections contained in state constitutions. Justice Harry C. Martin of the Supreme Court of North Carolina captured the tone of the overall survey results in a comment he wrote on his questionnaire: "State constitutional law is being relied upon more frequently. As lawyers become more familiar with it, state constitutional law will no longer be 'The Forgotten Evil.' " Indeed, no survey respondent reported a decrease in the number of individual rights cases litigated under his or her state constitution since 1980.

In most states, however, state constitutional claims are raised less frequently than federal constitutional claims in individual rights cases. Nearly two-thirds[11] of the respondents reported that state constitutional claims are raised less frequently than federal constitutional claims in such cases. Chief justices, however, were more likely to give this response than were associate justices, fifty-nine percent and forty-two percent respectively. One-quarter of the respondents replied that both state

10. Brennan, *supra* note 1, at 499.
11. Sixty-six percent.

and federal constitutional claims are raised with the same frequency in individual rights cases. Only ten percent of the respondents reported that state claims are raised more frequently than federal claims.[12]

A survey comment from Justice Frank B. Morrison of Montana suggests one reason why state constitutional law claims are raised frequently in Montana:

> During the years I have been a Montana Supreme Court Justice, I have become more interested in developing the area of law known as "independent state grounds." The new Montana Constitution adopted in 1972 is a rather unique document and provides a basis for considerable departure from federal precedent. This has been particularly true in the civil area where we have developed a new equal protection law relying upon the implication of fundamental rights declared in our State Constitution and requiring a showing of a compelling state interest to justify legislative discrimination.[13]

We did not ask justices for the reasons why state constitutional issues are raised or not raised in cases brought before their courts, but comments from two other justices suggest why state constitutional issues are often raised less frequently than federal constitutional issues. Justice Arthur A. M'Guieriu of the Supreme Court of Iowa commented:

> Most practicing and appellate lawyers in Iowa, especially those not recently out of law school, pay little attention to the provisions of the Iowa Constitution. Their constitutional thoughts focus more on the United States Constitution. A provision of the Iowa Constitution is usually raised, if at all, in conjunction with a provision of the United States Constitution on an equal protection or due process question.

Justice Christine M. Durham of the Supreme Court of Utah expressed "dismay" at "the continuing failure of counsel to raise and brief state constitutional claims. I expect that our Court will be increasingly willing to require supplemental briefing and/or to treat such claims *sua sponte* if this practice does not change."[14] By comparison, Justice Ernest W. Gibson of the Supreme Court of Vermont sounded a cautionary note: "I view state constitutions as a safety net and would hope that the fifty states do not go charging off in all directions simply because it has become a fad to cite the local constitutions."

12. The states represented in this category were Alaska, Montana, Rhode Island, Utah, and Wisconsin.

13. *See, e.g.*, State v. Johnson, 719 P.2d 771 (Mont. 1986). *But cf.*, Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985).

14. See also, Justice Durham's majority opinion to the same effect in State v. Earl, 716 P.2d 803, 806 (Utah 1986); Durham, *Filling a Scholarly Void*, NAT'L. L. J., Sept. 29, 1986 (Special Supplement), at 6.

II. Variations in Activity

The high courts in the fifty states have not all charged down the state constitutional law path in the field of individual rights protection. Some state courts have virtually no recent record in this area, others have a substantial record, and still others turn to their state constitution on a selective basis.

A. Region

There are noticeable regional differences in the degree to which state constitutional law litigation in individual rights cases has increased in different states since 1980. The data displayed in Table 3 show a U-shape, regional distribution. Respondents from both the Northeast and the West reported greater increases in the number of individual rights cases litigated under their state constitutions since 1980 than did respondents from the Midwest and South.

TABLE 3
Perceptions of State Constitutional Rights Litigation By Region

	Percent of Respondents			
Response	Northeast	Midwest	South	West
Significant increase	73	0	5	24
Moderate increase	20	27	29	29
Slight increase	7	45	24	29
No increase	0	27	43	18
Total number	15	11	21	17
Percent of 311 actual cases decided since 1950	[26]	[7]	[16][a]	[51]

[a] West Virginia, a border state, accounts for twenty-eight percent (or fourteen) of the actual state constitutional rights-affirming decisions in the South.

Nearly all of the high courts in the Northeast[15] have experienced significant-to-moderate increases in state constitutional law litigation in

15. The Northeast consists of the New England states as well as New York, New Jersey, and Pennsylvania.

individual rights cases since 1980. In the West, the greatest increases in state constitutional law litigation since 1980 occurred in Montana, Oregon, and Washington. Moderate increases occurred in Alaska, Arizona, Colorado, and Utah.[16]

The data displayed in Table 3 conform fairly well to the regional distribution of rights-affirming cases actually decided since 1950. The percentages in the bottom row of the table are based upon the 311 cases decided since 1950 in which state high courts granted greater rights protection to individuals under their state constitution than that granted under United States Supreme Court interpretations of the United States Constitution, or in which state high courts based their decisions affirming rights solely on state constitutional grounds. Again, there is the same U-shape pattern. State courts in the Northeast and in the West account for the lion's share, seventy-seven percent, of such decisions grounded in state constitutional law.

Respondents from the West, however, were much more likely to report that state constitutional issues are raised with greater frequency than, or the same frequency as, federal constitutional issues in individual rights cases. Fully fifty-five percent of the western respondents reported such frequencies, while only twenty-nine percent of the respondents from the Northeast and eighteen percent from the Midwest reported such frequencies. No respondent from the South reported that state constitutional claims are raised more frequently than federal constitutional claims in individual rights cases, although twenty-nine percent of the southern respondents did report that state constitutional issues are raised with the same frequency as federal constitutional issues. In light of the South's historic concern for state sovereignty, one might have expected southern high courts to welcome the opportunity to base constitutional decisions upon state law. However, because of a number of possible factors, such as conventional litigation practices and the South's historic record in the field of individual rights protection, the development of

16. The only state court response that fell outside this regional pattern was that of Kentucky. A significant increase in state constitutional law litigation was reported from the Supreme Court of Kentucky. However, only one justice responded from Kentucky, and the questionnaire was incomplete. Furthermore, we have been able to identify only two noneconomic, state constitutional rights-affirming decisions issued by the Supreme Court of Kentucky. Therefore, in the absence of additional information, the Kentucky response ought to be viewed with caution, although we have included the response in all data tabulations. If Kentucky were to be deleted from Table 3, the percentages for the South would be as follows: significant increase (0), moderate increase (30), slight increase (25), and no increase (45). Similarly, if Kentucky were deleted from the traditionalistic category in Table 4, the percentages would be: significant increase (0), moderate increase (35), slight increase (20), and no increase (45).

state constitutional rights law has yet to occur on a widespread basis in the South.

B. Political Culture

The regional distributions of both survey responses and actual case decisions suggest that variations in state constitutional law litigation in individual rights cases may also be associated with political culture.[17]

Daniel J. Elazar has suggested that American political culture reflects three constituent subcultures: individualistic, moralistic, and traditionalistic.[18] Politics in the individualistic political culture tends to be viewed as a means for advancing private interests rather than public principles. The role of government is to keep the political "marketplace" in working order but not, for the most part, to initiate new programs or policies unless there is a strong demand for such action from the general public or powerful interest groups. By contrast, politics in the moralistic political culture tends to be viewed as a principled and communitarian search for the good of the "commonwealth." The role of government is to help foster social and economic welfare and to initiate action, where necessary, to promote principles associated with the public interest. Politics in the traditionalistic political culture, however, tends to be viewed as a means for maintaining hierarchial social structures and traditional ways of life rooted historically in precommercial, organic conceptions of the social order. The role of government is to perpetuate the interests of elite groups, not to promote principles of general public interest or to maintain a political marketplace reasonably open to anyone who wants to get in on the game.

In light of the orientations of these subcultures, one would expect respondents from states having a moralistic political culture to report greater increases in state constitutional law litigation in individual rights cases than those reported by respondents from states having a traditionalistic political culture. One would, in turn, expect responses from justices in individualistic states to fall between the responses of justices from moralistic and traditionalistic states. Such a pattern can be observed, for example, in state ratifications of the proposed Equal Rights Amendment to the United States Constitution. The amendment was ratified by ninety-four percent[19] of the moralistic states, eighty-two percent of the

17. *See also* Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 187-88 (March 1985).

18. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 110-42 (3d ed. 1984).

19. All but Utah.

individualistic states, and only thirty-one percent of the traditionalistic states.[20]

The data displayed in Table 4 show that respondents from moralistic states were more likely to report significant increases in state constitutional law litigation in individual rights cases since 1980 than were respondents from both traditionalistic and individualistic states. In turn, respondents from individualistic states were more likely to report moderate-to-significant increases in state constitutional law litigation since 1980 than were respondents from traditionalistic states. Like Table 3, the bottom row of Table 4 shows the percentage distribution by political culture on the 311 actual rights-affirming cases decided since 1950. The distribution of these cases conforms nicely to the survey results. High courts in the moralistic states account for half of the 311 rights-affirming cases decided on state constitutional grounds since 1950.

TABLE 4
Perceptions of State Constitutional Rights Litigation By Political Culture

	Percent of Respondents		
Response	Moralistic	Individualistic	Traditionalistic
Significant increase	42	26	5
Moderate increase	17	32	33
Slight increase	29	26	19
No increase	13	16	43
Total number	24	19	21
Percent of 311 actual cases decided since 1950	[51]	[34]	[15][a]

[a] West Virginia accounts for twenty-nine percent of the actual state constitutional rights-affirming decisions among traditionalistic states.

Similar results were obtained on the question of whether state constitutional issues are raised more or less frequently than federal constitutional issues in individual rights cases. Nearly half[21] of the respondents from moralistic states and thirty-three percent of the respondents from

20. Kincaid, *Dimensions and Effects of America's Political Cultures*, 5 J. AM. CULTURE 84, 87-88 (Fall 1982).

21. Forty-eight percent.

individualistic states reported that state constitutional issues are raised with greater frequency than, or the same frequency as, federal constitutional issues. No respondent from a traditionalistic state reported that state constitutional issues are raised with greater frequency, and only nineteen percent reported that state constitutional issues are raised with the same frequency as federal constitutional issues in individual rights cases.

The political culture findings are more theoretically appealing than the regional findings because political culture provides a conceptual bridge that links similarly active courts which are otherwise a continent apart. The bridge is the moralistic political culture, or strong elements thereof, characteristic of many states in the Northeast[22] and states in the West[23] where state high courts have experienced significant increases in state constitutional law litigation in individual rights cases since 1980. Hence, the U-shape pattern for regional variations disappears when we consider variations by political culture.

It would appear, then, that increases in such litigation since 1980 reflect more than an ideological disposition that encourages attorneys or courts to try to go beyond United States Supreme Court protections of rights,[24] and more than a simple geographic proximity that encourages a regional diffusion of constitutional ideas. State political cultural orientations toward government and politics in general seem to play a role as well. Indications of such cultural orientations can be seen in narrative comments on the survey provided by justices from Washington and Georgia. Chief Justice James M. Dolliver of the Supreme Court of Washington wrote:

> In the last ten years, the Washington Court has begun to analyze seriously the meaning of our state constitution's Declaration of Rights. Counsel are now regularly arguing our Declaration of Rights and are also beginning to provide some assistance to the Court by doing more than just pointing out the differences in language [between the state Declaration of Rights and the United States Bill of Rights and Fourteenth Amendment] of which the Court is already aware.

Justice George T. Smith of the Supreme Court of Georgia wrote:

> The Supreme Court of Georgia does not favor the use of State Constitutional law in view of the fact that in the criminal law field especially, the State Constitution gives the individual more protec-

22. *E.g.*, Vermont.

23. *E.g.*, Oregon.

24. Of course, for some attorneys, particularly criminal defense lawyers, resort to state constitutional law is primarily a litigation strategy employed in an attempt to obtain a result not available under federal law.

> tion than does the Federal. The field of free speech is the only field in which our Court follows the State Constitution, and it is more protective than the Federal. Strangely enough, lawyers in the state have not realized that you can depend upon the State Constitution rather than the Federal. If they did, we would have some interesting opinions coming from our Supreme Court in its effort to ignore the more protective State Constitution.

C. Method of Selection

One might also expect that responses could vary with the method of selection of state high court justices. Courts whose justices are linked closely to voters through direct elections to the court might be expected to exhibit less activity in the field of state constitutional rights litigation than courts whose justices are not linked closely, or linked at all, to voters. Voter perceptions of judicial leniency in the area of individual rights, especially criminal rights in the public opinion climate of the 1980's, might restrain the activity of elected justices. This is not to say that members of a court can control the nature and frequency of state constitutional rights litigation. A motivated state bar can bring state constitutional rights claims to a court whether or not the court welcomes those claims. The actions of attorneys, of course, affect the decisionmaking process. Still, justices on the courts do give cues as to how receptive they are to entertaining such claims. Members of the high courts in California, Oregon, Washington, Montana, Utah, New Hampshire, Maine, and Vermont, for example, have given clear signals to attorneys that they will give serious consideration to state constitutional rights claims.[25] Consequently, one might expect methods of selection to have an effect on such judicial cue giving. To help test this proposition, responses from states were divided into three categories: (1) states having direct, partisan and nonpartisan election of justices to the high court; (2) states having a system of appointment followed at some point by a public "retention" vote; and (3) states having systems of appointment by the governor and the legislature or both.[26]

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25. *See, e.g.*, State v. Jewett, 500 A.2d 233, 238 (Vt. 1985); State v. Ball, 471 A.2d 336, 350-51 (N.H. 1983); State v. Cadman, 476 A.2d 1148 (Me. 1984); State v. Coe, 679 P.2d 353, 359 (Wash. 1984); Hewitt v. State Accident Ins. Fund Corp., 643 P.2d 970, 975 (Or. 1982); People v. Brisedine, 531 P.2d 1099, 1113-14 (Cal. 1975); State v. Pitsch, 369 N.W.2d 711 (Wis. 1985); Pfost v. State, 713 P.2d 495, 500-01 (Mont. 1985); *see supra* note 14.

26. Data on methods of selection were obtained from COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1984-85 (1984). States in the first category may include justices who first came to the court by appointment to fill a vacancy, but they must (or must have) run against an opponent in the next judicial election. In states in the second category, justices can only reach the court by appointment. After being appointed to the court, they

The data displayed in Table 5 show expected and unexpected results. Justices from courts for which the method of selection is appointment were much more likely than other respondents to report a significant increase in the number of individual rights cases litigated under their state constitution since 1980. However, respondents from courts for which the method of selection is direct election were the next most likely to report a significant increase in such state constitutional law litigation since 1980. Another apparent anomaly is that, in this table, the percentage distribution of actual rights cases decided on state constitutional grounds since 1950 does not conform to the survey results.

TABLE 5
Perceptions of State Constitutional Rights Litigation
By Method of Selection

	Percent of Respondents		
Response	Election	Appoint/Elect	Appointment
Significant increase	19	0	56
Moderate increase	31	29	17
Slight increase	28	36	11
No increase	22	36	17
Total number	32	14	18
Percent of 311 actual cases decided since 1950	[46]	[32]	[22]

A different and unexpected pattern emerged on the question of whether state constitutional claims are raised with greater or lesser frequency than federal constitutional claims. The differences were not strong, but justices from courts whose members are elected to the court were slightly more likely than other justices to report that state constitutional claims are raised more frequently than federal constitutional claims. Justices who were appointed to their courts were slightly less likely than other respondents to report such a situation.

If one controls for political culture by examining the relationship between method of selection and survey responses within each political subculture, then the relationship between method of selection and level

must appear on the ballot for a retention vote by the public. In such a retention election, the justice "runs" on his or her judicial record and does not face an opponent for his or her seat.

of increase in state constitutional rights litigation disappears among respondents from individualistic and traditionalistic states. Among moralistic states, however, all of the appointed respondents, thirty-one percent of the elected respondents, and none of the other respondents reported a significant increase in the number of individual rights cases litigated under their state constitution since 1980.

The findings for method of selection appear to reflect the regional history of state constitutional law litigation in individual rights cases more than they do methods of selection per se. That is, such litigation began more or less independently during the 1970's in both the Northeast and the West, two regions influenced by the moralistic political culture. However, different methods of judicial selection prevail in these two regions. In the Northeast, the most common method of selection is appointment to the high court by the governor or the legislature or both. Justices in these states do not face the voters. In the West, especially in the western states having a strong record of state constitutional rights litigation, justices are more likely to be elected to the high court[27] or appointed and then required to stand before the electorate to retain their seat.[28]

Considering the actual number of independent state constitutional rights decisions rendered by courts in the two regions, state constitutional law litigation appears to have diffused earlier[29] in the West than in the Northeast. That is, contrary to expectations, justices in western moralistic states who are linked to voters either by direct election or retention elections have been among the leaders in developing state constitutional rights law. By contrast, diffusion in the Northeast appears to have increased after 1980. Since justices in the Northeast are more likely to have been appointed to the state high court, appointed respondents were more likely than other respondents to report a significant increase in state constitutional law litigation in individual rights cases since 1980. At the same time, elected respondents were slightly more likely than other respondents to report that state constitutional claims are raised with greater frequency than federal constitutional claims in individual rights cases. In Table 5, then, there is the same kind of U-shape pattern as in Table 3, except that one leg of the U in Table 5 is, in effect, much shorter than the other because the "Elect" column includes most respondents from the South where justices in most of those states are elected to the state high court.

27. *E.g.*, Oregon and Washington.
28. *E.g.*, California.
29. Before 1980.

III. Criminal and Noncriminal Rights Cases

Approximately three-quarters[30] of the respondents reported that state constitutional claims are raised most frequently in criminal justice cases. Only fourteen percent reported that such claims are raised most frequently in noncriminal rights cases, and merely eleven percent reported no difference in the frequency with which state constitutional claims are raised in criminal and noncriminal rights cases.

The data displayed in Table 6 also show that state constitutional claims are more likely to be raised in criminal justice cases than in noncriminal rights cases.[31] Slightly more than half of the respondents reported that state constitutional claims are raised in less than a quarter of the criminal justice cases brought before their courts; however, more than three-fourths of the respondents reported that state constitutional claims are raised in less than twenty-five percent of the noncriminal rights cases brought before their courts.

TABLE 6
Perceptions of Frequency of State Constitutional Rights Claims

Percent Frequency	Criminal Cases		Noncriminal Cases	
	Percent	Number	Percent	Number
100-75	10	6	2	1
74-50	21	13	10	6
49-25	18	11	13	8
24-0	52	33	76	48
Total	100	63	100	63

Apparently, though, the frequency with which such claims are made is not always a measure of the importance of the state constitutional law claims which are raised. According to a respondent from the Supreme Court of Hawaii:

> There is no doubt that since at least the early 1970's, state constitutional law has played a significant role in appellate case law in Hawaii. Although I would estimate that less than twenty-five percent of our total number of appellate cases involve state constitutional questions, many of the really significant cases do include such questions. This is particularly true in criminal cases, where this court in certain instances has interpreted a state constitutional provision more broadly than a counterpart federal provision. In civil cases too, this court and many attorneys before it are aware that

30. Seventy-five percent.

31. *Cf.* State v. Earl, 716 P.2d 803 (Utah 1986) (noting the opposite).

state constitutional provisions must not be ignored.[32]

IV. Responses to State Constitutional Claims Not Raised in Lower Courts

Justices were asked if a majority of the members of their court favors a particular course of action in cases where a litigant has failed to raise a state constitutional claim in lower court proceedings.[33] Slightly more than half of the respondents reported a "yes" response; another forty-four percent reported a "don't know" response. Interestingly, justices from the West were the least likely to report that a majority on their court favors a particular response: thirty-eight percent compared to sixty-four percent of the justices from the Midwest, sixty percent from the Northeast, and fifty-eight percent from the South. Moreover, justices from the West were the most likely to report a "don't know" response.

The justices were asked (1) whether they themselves favor a particular course of action in cases in which a litigant has failed to raise a state constitutional claim in lower court proceedings, and (2) whether a particular course of action is generally followed by their court in such cases.[34] Overall, the data displayed in Table 7 show that fifty-six percent of the justices favor the idea of declining to hear the claim. Fully seventy-seven percent of the justices reported that their court does in fact decline to hear the claim. If a claim is to be considered, the most favored and followed procedure is to ask counsel to prepare supplemental briefs. There is only minimal support for having a claim raised *sua sponte*, and virtually no support for the idea of remanding such a case to lower court for additional argument.

32. When the identity of a justice is not given for a quote, the respondent wished to remain anonymous.

33. *See, e.g.*, State v. Jewett, 500 A.2d 233 (Vt. 1985):

> The state constitutional issue has been squarely raised but neither party has presented any substantive analysis or argument on this issue. This constitutes inadequate briefing . . . . Because the briefs fall short of the mark on the state constitutional claim, we are directing the parties to file supplemental briefs addressing the issue.

Id. at 234. "To protect his or her client, it is the duty of the advocate to raise state constitutional issues, where appropriate, at the trial level and to diligently develop and plausibly maintain them on appeal." *Id.* at 238. *See also, supra* note 14.

34. The responses provided were (1) ask counsel to prepare supplemental briefs, (2) decline to hear the claim, (3) remand to a lower court for additional argument, and (4) raise the claim *sua sponte*.

TABLE 7
Opinions and Perceptions of Court Responses to State Constitutional Claims Not Raised in Lower Courts

	Favor[b]		Follow[c]		Total	
Response[a]	Chief Justice	Associate Justice	Chief Justice	Associate Justice	Favor[b]	Follow[c]
Decline to hear claim	63	47	79	77	56	78
Request supplemental briefs	24	30	11	18	27	13
Raise claim *sua sponte*	13	17	11	6	15	9
Remand to lower court for additional argument	0	7	0	0	3	0
Total number	38	30	28	17	68	45

[a] Multiple responses were given by a few respondents.
[b] Respondents who favor a particular response.
[c] Respondents who reported that their court generally follows a particular response.

There are, however, some interesting variations in responses. Consistent with several other findings from this survey, chief justices were more likely than associate justices to favor the idea of declining to hear a claim that was not raised in lower court proceedings. The chief and associate justices agreed, though, that their courts generally decline to hear such a claim. Regionally, justices from the West were more likely to favor the idea of asking counsel to prepare supplemental briefs: forty-two percent as opposed to twenty-five percent of the respondents from the Midwest, twenty percent from the South, and only thirteen percent from the Northeast. Justices from the Northeast were the most likely to favor the idea of declining to hear a claim: seventy-five percent as opposed to sixty-seven percent of the respondents from the Midwest, fifty percent from the South, and forty-two percent from the West. In terms of political culture, justices from traditionalistic states were the least likely to favor the idea of declining to hear a claim: thirty-three percent as opposed to seventy percent of the respondents from moralistic states and sixty-five percent from individualistic states. Justices from traditionalistic states were, thus, the most likely to favor the ideas of asking counsel

to prepare supplemental briefs,[35] raising the claim *sua sponte*,[36] and remanding the case to lower court for additional argument.[37]

What may underlie and link the comparatively high levels of support among respondents from the West and traditionalistic states for raising a state constitutional claim *sua sponte* and remanding a case to a lower court for additional arguments is the predominantly traditionalistic political culture of much of the so-called Sun Belt.[38] That is, eighty percent of the respondents who favor these two courses of action sit on courts in a band of Sun Belt states stretching from Florida to Arizona. Similarly, though less decisively, thirty-five percent of the respondents who favor the idea of asking counsel to prepare supplemental briefs come from Sun Belt states, while another thirty-five percent come from states in the Northwest, including Alaska. Only eighteen percent come from the Midwest, and twelve percent from the Northeast. Consequently, justices from the West and from traditionalistic states were the least likely to favor the idea of declining to hear a claim.

These results suggest that a large proportion[39] of justices who sit on courts in traditionalistic states favor the idea of raising state constitutional claims in individual rights cases even though very few such claims are raised before their courts. However, a certain caution is in order. Response rates were lower for these questions than for other questions, in part, because many courts have rules that preclude one or more courses of action. In some jurisdictions, issues not raised in lower court are waived and cannot be raised for the first time on appeal. Some courts are limited to reviewing assigned errors. Several justices reported that courses of action depend upon the particular case. A number of justices therefore refrained from expressing an opinion on a favored course of action, and some others simply checked "decline to hear the claim."

V. Teaching State Constitutional Law

In most law schools, the contents of courses on constitutional law and individual rights are limited almost entirely to federal constitutional law.[40] This is one reason, perhaps an important reason, why state consti-

35. Twenty-nine percent.

36. Twenty-four percent compared to fifteen percent for the entire sample.

37. Fourteen percent compared to three percent for the entire sample.

38. The Sun Belt encompasses the warm-weather states of the South and Southwest.

39. Sixty-seven percent. *See supra* note 38 and *infra* note 42 and accompanying text.

40. Leading constitutional case books of the day, though otherwise thorough, make little mention of state constitutional law developments. *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985) (includes a few references to articles); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW (6th ed. 1986) (does include at least one case

tutional claims are not raised with greater frequency before most state high courts. Neither the justices who serve on the courts nor the attorneys who appear before those courts are likely to have learned much about state constitutional law in law school.[41] There is no major current textbook on state constitutional rights law, nor is there a general constitutional law casebook containing any significant discussion of state constitutional law. Charles G. Douglas, a former justice of the Supreme Court of New Hampshire, made these same points quite strongly in 1978:

> The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from "federally" oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law . . . could be viewed as an attempt to "nationalize" the law and denigrate the state bench.[42]

Nevertheless, in recent years, there has been a growing awareness of rights provisions in state constitutions among judges and attorneys in many states. As Justice Clifford F. Brown of the Supreme Court of Ohio commented on the survey: "Lawyers on appellate review have recently become more conscious about raising state constitutional issues, in addition to federal constitutional issues, and about the significance and consequences of doing so." In light of this growing awareness, as well as the growing number of rights cases decided on state constitutional law grounds, how do justices of the state high courts feel about teaching state constitutional law in law schools and about testing for state constitutional law on bar examinations?

The data displayed in Table 8 show that slightly more than two-thirds of the responding justices favor the idea of testing for knowledge of

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and several citations); P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS (2d ed. 1983) (includes references to several cases and excerpts from a few articles); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW (1986) (little or no references). College texts on civil liberties give even less attention to state constitutional law. The most scholarly recent text on all aspects of American Constitutionalism is W. MURPHY, J. FLEMING & W. HARRIS, III, AMERICAN CONSTITUTION INTERPRETATION (1986) (no section on state constitutional law and makes only passing references). W. COHEN & J. KAPLAN, CONSTITUTIONAL LAW: CIVIL LIBERTIES AND INDIVIDUAL RIGHTS (2d ed. 1982), R. CUSHMAN, CASES IN CIVIL LIBERTIES (5th ed. 1985) and M.G. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION (4th ed. 1985), do not treat the subject at all. *See also* C.H. PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES (1984); L. BARKER & T. BARKER, CIVIL LIBERTIES AND THE CONSTITUTION (4th ed. 1982) (passing references and note of a few cases).

41. *See* Collins, *Looking to the States*, NAT'L L. J., Sept. 29, 1986 (Special Supplement), at 2.

42. Douglas, *State Judicial Activism—The New Role for States' Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1147 (1978) (emphasis in original).

state constitutional law on bar examinations. Interestingly, however, far fewer justices[43] favor the idea of offering state constitutional law as a required course in law school. On this question, moreover, slightly more than one-quarter of the justices expressed "no opinion." Instead, those state court justices surveyed favor the idea of including state constitutional law materials in the standard constitutional law course[44] and of offering state constitutional law as an elective course in law school.[45] Nearly three-quarters of the responding justices also prefer the idea of including state constitutional law materials in the standard constitutional law course offered to undergraduates.

TABLE 8
Opinions About Teaching State Constitutional Law

	Percent of Respondents[a]				
Response	A	B	C	D	E
Favor	69	39	81	85	75
Do not favor	15	34	7	7	5
No opinion	16	26	12	8	20
Total number	61	61	57	61	59

[a] Respondents were asked if they favored, did not favor, or had no opinion about:
A: Testing state constitutional law on the bar examination.
B: Offering state constitutional law as a required course in law school.
C: Offering state constitutional law as an elective course in law school.
D: Including state constitutional law materials in the standard constitutional law course.
E: Including state constitutional law materials in the standard constitutional law course offered to undergraduates.

As one might expect, respondents who reported a moderate-to-significant increase in the number of individual rights cases litigated under their state constitutions since 1980, and respondents who reported that state constitutional claims are raised in fifty percent or more of the criminal justice cases brought before their courts, were more likely than other respondents to favor (1) testing for knowledge of state constitutional law on bar examinations, (2) offering state constitutional law as a required course in law school, (3) including state constitutional law materials in

43. Thirty-nine percent.
44. Eighty-five percent.
45. Eighty-one percent.

the standard constitutional law course, and (4) including state constitutional law materials in the standard constitutional law course offered to undergraduates.

Associate justices were much more likely than chief justices to favor the testing of state constitutional law on bar examinations and of requiring a course on state constitutional law in law school. Indeed, most of the justices who have come to be regarded as pioneers in this field are, or have been, associate justices.[46]

In most cases, responses to the questions about the teaching and testing of state constitutional law varied with region and political culture in much the same, but weaker, manner as the findings reported earlier. The large proportion of favorable responses to four of the five items served to weaken regional and political cultural differences. Justices from the Northeast and West and justices from moralistic states were slightly more likely than other justices to favor all of the ideas concerning the teaching and testing of state constitutional law *except*, however, the idea of requiring a state constitutional law course in law school. In this case, fifty-three percent of the justices from traditionalistic states reported that they favor a state constitutional law course requirement. Only thirty-five percent of the justices from moralistic states and thirty-two percent of the justices from individualistic states favor such a requirement. The difference is not great, but it is odd, considering the comparatively low level of state constitutional law litigation in traditionalistic states. Perhaps the responses from justices in the traditionalistic states reflect a memory and a hope: a memory of the days of states' rights when state constitutions were not so overshadowed by the United States Constitution, and a hope that state constitutions will again become more important. Traditionalistic states of the old Confederacy are also among those states that have ordinarily required the teaching of the state constitution to high school and college students.[47]

Conclusion

There has been a notable increase in the number of individual rights cases litigated under state constitutions since 1980. No state high court

46. *E.g.*, Shirley S. Abrahamson of Wisconsin, Edward F. Hennessey of Massachusetts (as associate justice then chief justice), William C. Hill of Vermont, Hans A. Linde of Oregon, Stanley Mosk of California, Steward G. Pollock of New Jersey, Samuel J. Roberts of Pennsylvania (as associate justice then chief justice), and Robert F. Utter of Washington (as associate justice then chief justice).

47. One respondent, Justice Harry C. Martin of the Supreme Court of North Carolina, noted that he planned to teach a course on state constitutional law at the University of North Carolina Law School during the summer of 1986.

justice reported a decrease in such ligitation. Increases have been most evident in the Northeast and West and in states having a moralistic political culture, although among the moralistic states, justices on courts for which the method of selection is appointment were more likely than other respondents to report a significant increase in the number of individual rights cases litigated under their state constitution since 1980.

At the same time, in most states, state constitutional claims are raised less frequently than federal constitutional claims in individual rights cases. State constitutional claims are most likely to be raised in criminal justice cases. Such claims appear to be raised with the greatest frequency before high courts in the West and in states having a moralistic political culture. Where state constitutional claims are not raised in lower court proceedings, however, the majority of justices prefer to decline to hear a claim raised before the high court, and more than three-quarters of the courts do decline to hear such claims. Only in the traditionalistic states do most justices[48] favor a procedure for hearing such a claim.

Large majorities of justices favor the ideas of testing for knowledge of state constitutional law on bar examinations and of giving greater attention to state constitutional law in law schools and in undergraduate education. However, only slightly more than a third favor a required separate course in state constitutional law for law students, compared to slightly more than half of the justices from traditionalistic states.

This latter response could reflect a certain tentativeness on the part of some state high court justices. In fact, a tone of tentativeness seemed to underlie a notable number of the survey responses, suggesting that there has been a guarded judicial response to the current enthusiasm with state constitutional law. State constitutional claims are hardly ever raised in some states, and where they are raised, many justices appear to approach them with caution and, perhaps in some cases, even reluctance.

We cannot say precisely why state constitutional claims in individual rights cases are raised with greater frequency in some states than in other states. There are, however, a number of possible factors. First, litigation premised upon state constitutional claims may arise when one or more justices on a court hold an independent view of the role of the court, one that encourages the justices to look to state law as an analytically separate basis for deciding rights cases. For example, Justice Wallace P. Carson of the Supreme Court of Oregon noted: "In recent years, the bench and bar of this state have paid considerably more attention to

48. Approximately two-thirds.

state constitutional issues. This increase in interest is primarily traceable to the scholarly efforts of my colleague, Associate Justice Hans Linde." Second, given the regional patterns evident in the survey responses, there also appears to be a diffusion factor. Justices pay attention to decisions rendered by high courts in neighboring or nearby states.[49] Third, there appears to be a political culture factor, which may influence many facets of state constitutional rights litigation, from the very nature and contents of the state constitution itself to public and legal conceptions of the proper roles of the state high court. Lastly, a number of interest groups, such as the American Civil Liberties Union and the National Rifle Association, have raised state constitutional claims out of a realization that what they may not be able to secure from the United States Supreme Court under the United States Constitution may sometimes be secured from a state supreme court under its state constitution.

A new constitution, an overall revision of a constitution, or a major amendment to a constitution may also affect the nature of litigation. For example, Chief Justice J. A. Turnage of Montana reported: "Montana adopted a broad revision of its Constitution in 1972; the court has been called upon numerous times to interpret and apply its provisions. The Bench and Bar of Montana should be encouraged to develop the State Constitution on an independent basis." A justice from the Supreme Court of Pennsylvania said:

> Since the individual rights guaranteed by Article I of the Pennsylvania Constitution are generally the same as those guaranteed under the federal Constitution, state constitutional claims are often not raised specifically. The Pennsylvania Constitution does, however, contain an "equal rights" amendment which is raised in support of civil claims more frequently than federal statutes.

Massachusetts, perhaps, is in a class by itself. Chief Justice Edward F. Hennessey of the Supreme Judicial Court of Massachusetts, the state with the nation's oldest written constitution still in effect today, reported that: "The Court is guided by the knowledge that the Massachusetts Constitution of 1780 has served as a model for the United States Constitution and for those of many states."

Considering the near absence of state constitutional rights litigation during the 1950's and 1960's, the rise of such litigation since 1970 might be seen as "revolutionary." So thoroughly did federal constitutional law come to dominate the rights field during the Warren Court era that a turn to state constitutional rights litigation appeared to be remote, if not

49. *See* PORTER & TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (1982).

out of the question, by the late 1960's. However, considering the current level of state constitutional rights litigation in most states, one cannot yet speak of a "revolution." The trend clearly appears to be upward, toward an increase in state constitutional rights litigation. Furthermore, with additional changes in the composition of the United States Supreme Court, coupled with greater dissemination of information about state constitutional law, the trend may accelerate upward during the late 1980's and into the 1990's.[50] There is already a comparatively high level of state constitutional rights litigation in the moralistic states, with California and the upper West apparently having the greatest activity and the Northeast following close behind. Significant increases in such litigation in the individualistic states can probably be expected as well, especially if a more rights-restrictive United States Supreme Court precipitates renewed "interest group" conflict over rights issues.

A major question, though, is both the future and the direction of state constitutional rights litigation in the traditionalistic states and in those moralistic states where justices are either elected directly to the high court or required to stand for some type of retention election. There is comparatively little state constitutional rights litigation in the traditionalistic states, yet justices in those states certainly express an interest in hearing state constitutional rights claims and in seeing state constitutional law taught in law schools. While there is a comparatively high level of state constitutional rights litigation in the moralistic states, high court elections in some western states may be becoming more contentious, in part because of public conflict over rights issues. For example, Justice Linde of the Oregon Supreme Court, the nation's second leading court in terms of the number of actual state constitutional rights-affirming decisions rendered, recently prevailed in an unusually spirited election in which his positions on state constitutional rights questions were an issue.[51] Otto Kaus, a former justice of the Supreme Court of California, complained, upon announcing his retirement, of increasing politicization of the California court: "You cannot forget that you have a crocodile in your bathtub. You keep wondering whether you're letting yourself be influenced, and you don't know."[52] Chief Justice Rose Bird of California faces a fierce retention election contest in 1986 in which her

50. Methodological and systematic approaches to state constitutional decisionmaking could also have a significant effect on the trend. *See* Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 389-408 (1984).

51. Although challenged by a sitting trial judge and a local prosecutor, Justice Linde ultimately won re-election with sixty-two percent of the votes.

52. Quoted in Morain, *Kaus to Retire from State Supreme Court*, L.A. Times, July 2, 1985, § I, at 1, col. 2.

positions on capital punishment and other rights questions are among the leading issues.[53] The upward trend in state constitutional rights litigation and decisionmaking could also be effected by voter approval of constitutional initiatives and constitutional amendments designed to override high court decisions.[54]

In light of these and other factors, then, we cannot be certain at this time as to where, when, or if the upward trend will change, or what the outcome of future activity will mean for the protection of individual rights and the nature of judicial federalism in the United States. It does, however, appear likely that the upward trend will continue for the foreseeable future.

53. It is unclear, however, as to how much, if any, of the campaign to unseat Chief Justice Bird can be attributed to her state constitutional rights decisions. (Chief Justice Bird won her first retention election in 1977 with only fifty-two percent of the votes. She was then the target of an impeachment campaign, and current polls suggest that she may lose her 1986 election).

Justice Stanley Mosk, a leading advocate of reliance on state constitutions, was also up for election in November 1986, but faced little or no opposition. *See* Hager, *Mosk Will Seek New Court Term*, L.A. Times, Aug. 12, 1986, § 1, at 1, col. 5.

54. *See, e.g.*, Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223-59 (1984); Collins, *Attacks on Roe v. Wade Decision Hot Ballot Topic this November*, NAT'L L.J., Sept. 22, 1986, at 22; Collins, *The 'New Federalism' is Thriving Despite Setbacks & Losses in 1984*, NAT'L L. J., Apr. 29, 1985, at 32.