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ON THE REPUTATION OF THE CALIFORNIA, MICHIGAN AND NEW JERSEY SUPREME COURTS

by

ROBERT M. YONKERS

THESIS

Submitted to the Graduate School

of Wayne State University,

Detroit, Michigan

in partial fulfillment of the requirements

for the degree of

MASTER OF ARTS

2014

MAJOR: POLITICAL SCIENCE

Approved By:

_____

Advisor Date

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Dedication

To my wife Kathy, son Andrew, and daughter Madeline, without whose patience, support and understanding I would have never been able to complete this project.

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Chapter 1

Introduction

Most discussions and analyses of federalism focus upon the relationship between different levels of government (Bowman, 2004). This may refer to the relationship between the national and state or state and local governments (Bowman, 2004). This is also known as vertical federalism (Bowman, 2004). The distinguishing feature is that one level of government has authority over another.

Horizontal federalism differs in that it refers to the relationship between governmental units that have no authority over the other or are on a par. Most relevant for the purposes of this thesis, it invariably pertains to the relationship between the various state governmental entities that have the same relationship with the national government (Bowman, 2004). This generally refers to interstate cooperation through such mechanisms as interstate compacts, multi-state legal actions, and uniform state laws (Bowman, 2004). This generally means binding agreements between states via legislatures or other governmental bodies.

By contrast, horizontal federalism in the judicial context refers to the non-binding influence of one state over another. A state court may choose to cite or follow the decisions of a sister state court or decline to do so. This thesis studies horizontal federalism through a citation analysis of the dissemination of decisions from the California, Michigan, and New Jersey supreme courts in regard to the narrow area of New Judicial Federalism (use of state constitutions to provide greater rights for the accused than those afforded under the United States Constitution in the area of defendant's criminal procedural rights) among the other state supreme courts.

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Those courts were chosen for two reasons. First, they have been deemed prestigious (and/or influential – since some scholars equate the two terms) in empirical studies of policy diffusion via the courts. Second, they have been deemed prestigious or to have lost prestige by non-quantitative legal research or by scholars who pass judgment on the courts based on the scholar's values.

This area of law was chosen for two reasons. First, every state court of last resort has a record of these decisions. Second, every state Bill of Rights has provisions governing the rights of criminal defendants. For example, every state constitution has a fourth Amendment equivalent. Moreover, many of these state constitutional provisions are substantially similar to the federal Bill of Rights. This facilitates the comparison between state courts and constitutions and with the federal courts and Constitution.

The data comes from two different forms of citation analysis. The first analysis is predicated on an analysis of case citations in state courts of last resort. As will be explained in detail later, high citation rates are empirically a proxy for prestige and influence. That is, the more frequently a high court is cited by sister courts, the more prestigious and influential it is presumed to be.

However, the terms are conflated. For reasons to be discussed later, I maintain that prestige and influence are distinct concepts and am looking to see if prestige translates into influence. I am presuming it does based upon the way the authors conceptualize and conflate the terms, but if it does not, I need to explain why.

Social science definitions tend to associate prestige with influence for individuals or collectivities that are in "structured" or "hierarchical" or "ranking" relationships or systems:

> Specifically, we suggest that prestige should be understood as a particular form of social power and advantage that is of a symbolic rather than of an economic or political

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> character, and which gives rise to structured relationships of deference, acceptance and derogation. (Goldthorpe & Hope, 1972, p 20);
>
> Prestige is an entitlement to deference (Shils [1968] 1994), and as such it has an inherently hierarchical quality… The entitlement to deference arises out of respect and admiration that are deserved in the sense that they are grounded in the values of the group in which the person is esteemed or the role is considered prestigious. (Sandefur, 2004, p. 383);
>
> Prestige is a particularly potent basis for the form of power that resides in influence, or the ability to get others to do what one wants because others already want to comply with one's wishes, even before those wishes are expressed. (Parsons 1963) (Sandefur, 2004, p. 384);
>
> Basically, prestige is the granting of higher human evaluation an individual or a collectivity or a symbol, within the ranking system of other individuals, collectivities, or symbols… Above all, it is evident that prestige plays a considerable role in the domination-submission process. The degree of conformity is greater the higher the prestige of the person or the group seeking to influence others. "(Roueck, 1957)

These definitions do not fully apply to American state high courts because they are formal equals and are not in "structured" or "hierarchical" "ranking" relationships or systems in which one state Supreme Court wants others "to comply with" its "wishes." It may be the case that some state Supreme Court justices are interested in being seen as prestigious justices, as members of prestigious courts, or would be subjectively pleased to be cited by other state supreme courts. But in a formal or objective way, this thesis abstracts conclusions about prestige and influence from the objective facts of court decisions and citations. Thus, while I assert that the concept of a prestigious state Supreme Court makes sense, the social science concept of prestige applies in a somewhat attenuated form when applied to these institutions.

The second form of citation analysis is based upon an examination of courts to assess their prestige as determined by law reviews, journals, and other scholarly sources. I am looking to see if assertions of prestige from the legal community translate into influence. I again assume it does if prestige and deference, derogation and influence are similar or equivalent.

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It should be noted that citation analysis runs the risk of tautology. For example, is a court cited frequently because it is prestigious, or is it prestigious because it frequently cited? Merryman (1978) and Kagan, Cartright, Friedman and Wheeler (1978) seem to assume the latter. Per Merryman: "Even accounting for the sheer volume of reported decisions does not, however provide a full explanation. There is the additional factor of authority…It may express the considered judgment that the judiciary in some states has a stronger tradition and does consistently superior work than is true of other states" (Merryman 1978, p.403). Similarly, according to Kagan and Cartright (1978): "…The opinions of such courts (high discretion and small caseload) might be well regarded and therefore frequently cited by other courts" (p. 991).

I avoid this problem by operationalizing prestige based upon academic and legal assessments. As will be explained in detail later, many normative academic articles and legal evaluations simply presume that certain courts such as the New Jersey Supreme Court are prestigious with no attempt to define the terms. As noted above, and will be discussed below, although the terms may be related, they are not synonymous and the empirical studies mistakenly conflate them. I will be examining whether prestige leads to or is an indicator of influence.

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Chapter 2

Legal and Constitutional Background

Before addressing the studies upon which this thesis is based, it is necessary to examine basic legal and constitutional issues of interpretation along with the work of the Warren and Burger Courts. The entire concept of the New Judicial Federalism and independent interpretation of state constitutions arises out of the dichotomous approaches of those courts toward protections for the criminally accused.

The Warren Court

While there is disagreement over Warren Court jurisprudence, there is little disagreement that it was an activist court (Kmiec, 2004). Both supporters and detractors of the court acknowledge this (Kmiec, 2004). It should be noted that the term "activist" is used as a pejorative term by court critics and a term of admiration by supporters (Kmiec, 2004). The relevance of the term activist for present purposes is that the decisions in the area of criminal procedure which broaden the rights of the accused are widely considered activist, and it is those decisions that proponents of the New Judicial Federalism seek to duplicate.

Some critics associate the Warren Court with an emphasis upon substantive results at the expense of constitutional restraints or awareness of the proper role of the court (McFeeley, 1978). Kurland (1969) in his article: "Toward a Political Supreme Court" opines that the Warren court was acting more like a legislature than a court. He also debates the pros and cons of: "…turning the Supreme Court into a third legislative chamber, or retaining it in the form of a judicial body" (p. 20). Another commentator puts it even more bluntly: "The Warren Court

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placed greater value on its own policy predilections than on legal reasoning" (Maidment, 1975, p. 315).

This is particularly true in the area of individual rights where: "The Warren Court, in most cases, seemed to come down squarely on the side of progress for individual rights even if those decisions were harmful to the principles of federalism" (McFeeley, 1978, p. 12). This approach was strongly opposed by members of the court itself, and most particularly by Justice Harlan (Mason, 1966) but the views of the Warren majority carried the day.

In order to accomplish its reforms, the court applied certain articles of the Bill of Rights to the states that had previously been understood to apply only to the federal government. This was the doctrine of incorporation. The court reasoned that many provisions of the Bill of Rights applied to the states through the Fourteenth Amendment which states, in relevant part: "…nor shall any state deprive any person of life, liberty, or property without due process of law…"

The court relied most heavily upon the Due Process Clause in its decisions regarding state criminal law (McFeeley, 1978). Through use of the clause, the court mandated: "…stringent protections against compulsory self incrimination (*Malloy v Hogan* (1964)), and illegal searches and seizures (*Mapp v Ohio* (1961)) as well as guarantees for provision of counsel (*Gideon v Wainwright* (1963))" (McFeeley, 1978, p. 12).

Such radical changes provoked praise or criticism depending upon political viewpoint, but the *Miranda v Arizona* (1966) decision provoked the most vehement criticisms, including from the dissenting opinions. For example, the dissenters and numerous commentators maintain that the court actually drew most of its rationale from the Sixth Amendment right to counsel, which does not attach until judicial proceedings have commenced (Maidment, 1975; Friendly, 1965). "Extension of the assistance of counsel clause to the point of arrest or even to the

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moment of arrival at the police station would require…radical textual surgery. The sixth amendment concerns 'criminal prosecutions' and guarantees an 'accused' the assistance of counsel 'for his defense' (Friendly, 1965, p. 946).

The decision also provoked a public outcry and a political backlash (Howard, 1980). In fact, Richard Nixon made the *Miranda* decision in particular and the Warren Court in general a cornerstone of his 1968 campaign (Howard, 1980):

> Appealing to 'law and order' sentiments, Nixon complained that the justices were weakening the country's 'peace forces' and giving too much ground to the 'criminal forces.' The first civil right of every American he declared, is to be 'free from domestic violence (Howard, 1980, p. 9).

True to his word, after the election, he appointed four justices who shared his 'conservative philosophy' (Howard, 1980 p. 9).

However, the court and its decisions also had staunch defenders. For example, writing in 1968, Kenneth Pye maintained that there was a: "…disparity between the reality of the criminal process and the ideals of civilized conduct to which we as a nation had sworn allegiance" (Pye, 1968, p. 253). He was particularly concerned with racial differences in how suspects were treated, especially in the Deep South (Pye, 1968).He asserts that: "The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights" (Pye, 1968, p. 256).

This sentiment is echoed by other contemporary commentators as well, such as William Beaney (Beaney, 1968) and Alpheus Thomas Mason (Mason, 1974) The common theme running through these commentaries is the necessity for court intervention because something had to be done and the coordinate branches of government simply could not be trusted.

Klarman takes is a step further and maintains that the Warren Court decisions were a natural outgrowth of earlier decisions by the court in the period between World War I and World

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War II when it first began to regulate criminal procedure in some southern states (Klarman, 2000). He argues that those cases mark the birth of state criminal procedure cases from the Supreme Court, although the Court's primary motive was to bring justice practices in the South more into line with minimal national standards than to work deep changes in state criminal procedure. Per Klarman, state criminal trials for minorities in the South were little more than an attempt avoid a lynching, with no procedural protections and a guaranteed guilty verdict regardless of actual innocence. There were also frequent instances of confessions elicited through torture (Klarman, 2000).

The Supreme Court examined particularly egregious examples in a series of cases and determined that criminal procedure must encompass more than a successful attempt to avoid a lynching (Klarman, 2000). Klarman maintains that far from being countermajoritarian, the decisions reflected northern (and some southern) disgust at the abuse and discrimination in the southern states (Klarman, 2000).

Ely (1980) maintains that the decisions of the Warren court were not ideological or result oriented at all, but merely necessary to make sure everyone had the opportunity for fair and proper procedure. "…the constitutional decisions of the Warren Court evidence a deep structure significantly different from the value oriented approach favored by the academy" (p74). He concludes that the criminal procedure decisions in particular were process oriented because they sought to assure a fair process, open to all, before serious consequences could be imposed (Ely, 1980).

Strauss asserts that Warren court jurisprudence in the realm of criminal procedure was a plausible outgrowth of the common law method of constitutional interpretation. He avers that most Supreme Court opinions may acknowledge or refer to a specific Constitutional Amendment

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or provision, but the bulk of the ruling is an analysis of prior precedent. Additionally, when the precedent is unclear: "…the opinion will make arguments about fairness or good social policy: why one result makes more sense than another, why a different ruling would be harmful to some important social interest" (Strauss, 2010, p. 33). He also states that judicial latitude is restrained by the prior precedent (Strauss, 2010).

In this method of interpretation, the written Constitution serves as a common ground for the American people to settle disputes over issues such as the term of the presidency or the number of senators per state without the necessity for endless debate and controversy. The American people accept the written Constitution not because not because of the authority of those who drafted it, but because it serves this common ground function (Strauss, 2010).

A corollary to this is that the written Constitution is to be interpreted according to the common ordinary meaning of words as we understand them today, as opposed to what they may have meant the time of its drafting. Thus, it was plausible and defensible for the Warren Court to apply the Bill of Rights to the states, despite the original understanding that they would apply solely to the federal government. The Bill of Rights served as a common ground for the ruling according to the meaning of the words as we understand them today and the decision was accepted because it was explicitly tied to the text of the Constitution.

It is not my intention to resolve the dispute over Warren Court methodology or results. The larger point is that those on both sides of the spectrum acknowledge that the criminal procedure decisions were a departure from prior constitutional adjudication, regardless of the court's motivation. As discussed in the next section, when the Burger court began to chip away at those decisions, those in support urged a greater use of state constitutions.

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The Burger Court

The court's criminal procedure trajectory was severely curtailed with the advent of the new (Burger) Court that emerged due to Nixon's appointments. The Burger Court cut back upon many of the Warren Court reforms. In response, many of those frustrated by this turn of events began urging the use of state courts and state constitutions to expand the rights of the accused.

The Burger Court basically cut back on the Warren Court's "nationalization" of the Bill of Rights (McFeeley, 1978). Concomitant with this new view of the scope of Constitutional protections was a drastic curtailment of access to federal courts.

In a series of decisions, the Court methodically and inexorably limited federal court jurisdiction. In *Tollert v Henderson* (1973) the court held that a guilty plea upon advice of adequate counsel prevented habeas review of ostensible constitutional defects which preceded the plea, and further ruled that habeas protection was waived when a prisoner bypassed state safeguards (McFeeley, 1979). Similarly, the court found, in *Murch v Mottram* (1972), that there was a "legitimate state interest in orderly proceedings and possibly…federal interest in limiting repetitious petitions" and barred habeas review when the petitioner "deliberately bypassed state proceedings" (McFeeley, 1979 p. 184). Finally, the Court ruled, in *Picard v Conner* (1972) that habeas was not available to: "…a petitioner who had not fairly presented his claim for consideration by the state's highest court" (McFeeley , 1979, p. 184).

However: "Perhaps the best intimation of the Burger Court's feelings toward the expanded writ came about in *Schneckloth v Bustamonte* (1973)" (McFeeley, 1979, p. 184). In a concurring opinion by Powell joined by Burger and Rehnquist, the court reconsidered the Warren Court opinion in *Kaufman v United States* (1969) and urged that additional federal procedural protections should not be available where a litigant had an opportunity to present 4th

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Amendment claims at the state level. The justices did a cost/benefit analysis and concluded that various costs such as the lack of finality of a judgment and misallocation of scarce judicial resources detracted from the process of administering justice (*Schneckloth* 1973).

The court then went on to severely limited habeas review for state prisoners in the case of *Stone v Powell* (1976) (McFeeley, 1979). Justice Powell, writing for the majority concluded that federal review was barred if a defendant had a full and fair opportunity to litigate a 4th Amendment claim in the state court (McFeeley, 1979). The court had now severely curtailed federal collateral attack upon state convictions (McFeeley, 1979).

This provoked a stinging dissent from Justice Brennan who was joined by Justice Marshall. They maintained that: "…the current court is reversing the entire due process revolution of the 1960's" (McFeeley, 1979, p. 187). The dissent further argued that the ruling was: "'…in keeping with the regrettable trend in barring the federal courthouse to individuals with meritorious claims'" (McFeeley, 1979, p. 187 quoting dissenting opinion in *Stone*).

Another important case limiting access to federal courts was *Younger v Harris* (1971), which, according to one author, is: "…almost universally understood to have worked a revolution in the availability of federal injunctions against state proceedings" (Weinberg, 1977, p. 1206). In *Harris* the defendant sought a federal injunction against state prosecution under the California Criminal Syndicalism Act. The court refused to grant the injunction reasoning that federalism concerns precluded federal court involvement (McFeeley, 1979). Justice Douglas was the lone dissenter.

The Court then continued this trend in a series of subsequent rulings. Two cases of note are *Wainright v Sykes* (1977) and *Teague v Lane* (1989). *Wainright* held that federal habeas corpus review is precluded if the defendant waives state law remedies by failing to comply with

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state requirements. In *Wainright*, the defendant sought to exclude statements made to the police. However, he failed to object to their admission at trial as required by Florida law, and the court concluded that review of any federal claims was barred. *Teague* similarly barred review of a defendant's claim that he was denied a fair trial because of the systematic exclusion of blacks from the jury, because he did not raise that claim at trial.

It was obvious to all that the Burger Court was simply not going to allow unfettered access to the federal courts anymore and in some instances was taking steps to preclude it entirely. As previously mentioned, this spurred a renewed interest in state courts and state court adjudication.

It is generally agreed that the starting point for this new focus was provided by Justice William Brennan. In 1977, Brennan, the most lively dissenter in most of the Burger Court cases, realizing that the federal courts were simply no longer available to carry on the Warren Court trajectory published a seminal article, *State Constitutions and the Protection of Individual Rights (*Brennan, 1977), which encouraged states to make independent use of their constitutions to grant greater protection for criminal suspects and state prisoners than the Supreme Court was willing to allow.

He reviewed major Warren Court decisions regarding segregation, reapportionment, and criminal procedure and maintained that the theme of these Bill of Rights rulings is that we need greater protection from "arbitrary action by governments" now more than any time in the past. He further asserted that the way to achieve these protections is to adhere to the principle that **"...** constitutional provisions for the security of person and property should be liberally construed**..."** (Brennan, 1977 p. 494 quoting *Boyd v United States* (1886) and *Olmstead v United States* (1928) (dissenting opinion)).

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He next pointed out many rulings increasing the rights of the accused. For example, sixth amendment protections were broadened or extended to encompass the rights to speedy and public trial, trial by an impartial jury, and compulsory process (Brennan, 1977). Additionally, fifth amendment double jeopardy protections were extended, and "…after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v Arizona*, requiring police to give warnings to a suspect before custodial interrogation" (Brennan, 1977, p. 494).

He then catalogued Burger Court rulings which he felt were inappropriate restrictions upon Constitutional protections from "arbitrary action by governments." Per Justice Brennan, under the fourth amendment, the Court has: "…found that the warrant requirement plainly appearing … does not require the police to obtain an arrest warrant before arrest, however easy it might have been to obtain an arrest warrant", allowed searches after traffic stops even when there is no probable cause, and permitted consent searches irrespective of whether the consent was intelligent and knowing (Brennan, 1977, p. 497). He additionally observed that the court has carved out numerous exceptions to the exclusionary rule even if the search violated the fourth amendment (Brennan, 1977).

Further: "The sixth amendment guarantee has fared no better" (Brennan, 1977, p. 497). Assistance of counsel is no longer required during pre indictment identification proceedings, and "…the Court has countenanced …significant burdens on the constitutional right to jury trial in criminal cases" (Brennan, 1977, p. 498). Finally: "…in the face of our requirement of proof beyond a reasonable doubt, the court has upheld the permissibility of less than unanimous jury verdicts of guilty" (Brennan, 1977, p. 498).

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He concluded his observations with commentary on the trend, noted above, of the Burger Court restricting access to federal courts. He maintained that the court was now requiring showings in the areas of jurisdiction, justiciability, and remedy which were"probably impossible to make" and "barred the federal courthouse door" (Brennan, 1977, p. 498). Additionally: "… the centuries old remedy of habeas corpus was so circumscribed last term as to weaken drastically its ability to safeguard individuals from invalid imprisonment" (Brennan, 1977, p. 498).

The above sets the stage for his urging state courts to interpret their constitutions to increase the rights of criminal defendants beyond the federal minimum standards. He cited several examples of state supreme courts providing greater protection for criminal suspects than that mandated by the Supreme Court. Most relevant for this dissertation, he included the Supreme Courts of California, Michigan, and New Jersey. Those individual decisions will be examined later.

Brennan's article is a clarion call to state courts to continue expanding the rights of criminal defendants via their own constitutions. However, some scholars had earlier noticed that some state supreme courts had already been doing exactly that. Donald Wilkes (1974, 1974a, 1974b,) in a series of articles on the new federalism, chronicled what he saw as an emerging pattern among select supreme courts to "evade" Burger Court rulings so as to provide greater protection to criminal defendants.

Similar to Justice Brennan, he begins his analysis by noting what he feels the Burger Court had done to the Supreme Court: "Since the completion of the first article, the Burger Court has continued the methodical demolition of the wall of constitutional protection entered and strengthened by the Warren Court" (Wilkes, 1975, p. 730). He observes that this new

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philosophy set the stage for state courts to "evade" federal court rulings providing less protection for criminal suspects (Wilkes, 1974). Next, he examines several examples of what he terms state court "evasions" of Burger Court rulings and arguments for why such evasion was inevitable, along with the preferred method to broaden the rights of criminal defendants in the face of an increasingly hostile United States Supreme Court.

The first series of cases do not actually show state court evasion, but are examples of where state court attempts to broaden criminal rights were overruled by the Burger Court. For example, In *California v Green* (1970) the Burger Court overruled a holding by the California Supreme Court that use of prior inconsistent statements to impeach violated the sixth Amendment (Wilkes, 1974). Instead, the Court found the use of such statements constitutionally permissible (Wilkes, 1974).

In another California case, *California v Byers* (1971), the Supreme Court held, again contrary to the California Supreme Court, that a criminal statute requiring drivers involved in accidents to stop and provide information did not violate the fifth amendment right against self-incrimination (Wilkes, 1974). Finally, the Burger Court reversed the Michigan Supreme Court and declined to give retroactive application to its ruling involving the double jeopardy clause in *North Carolina v Pearce* (1969) (Wilkes, 1974). The larger meaning of these cases, of course, is that the Supreme Court will provide a certain level of protection to criminal defendants, and will rebuff any state court attempts to broaden it under the United States Constitution.

According to Wilkes, the most promising method available to state courts to "evade" Supreme Court decisions is the "adequate state grounds" doctrine. The adequate state grounds doctrine is grounded upon the fact that: "The Supreme Court of the United States generally does

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not have the power to review a state court's interpretation of state law" (Bice, 1972, p.750). This fact has led to:

> "…a familiar doctrine: the Supreme Court will not review decisions of state courts which are based upon 'adequate state grounds', even though the state court may have also decided a question of federal law. Also, under this doctrine, the Supreme Court will not review a federal question which the state court has avoided, if the reason supporting the court's failure to decide the federal question is 'adequate' (Bice, 1972, p. 751).

In other words, a state court is free to expand the rights of criminal defendants, and its ruling is immune from federal review, if it is based upon an adequate state ground. This is another obvious reason to rely exclusively upon state law.

The criteria for determining the existence of an adequate state ground was enunciated by the United States Supreme Court in *Michigan v Long* (1983). Prior to *Long*, there was no consistent approach for determining the existence of an adequate state ground (*Long* 1983) and the *Long* case presented a unified approach. Under *Long*, if a state court uses both state and federal law, and it is not clear from the opinion which one controls, it will be presumed to be federal law unless the court clearly states that it is relying upon state law (*Long* 1983) Thus, as long as the state court clearly specifies that its ruling hinges upon state law, the decision is barred from federal judicial review.

As stated above, some state courts had been taking full advantage of this doctrine in reaction to Burger Court rulings, and Wilkes cites numerous examples which include, but are not limited to, California, Michigan, and New Jersey. One exemplar is the Supreme Court of Hawaii. In one case, the court held, contrary to the Burger Court, that statements obtained in violation of *Miranda*, are inadmissible for purposes of impeachment, nothing that:

> (T)his court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution. (Wilkes, 1974, p. 438 citing *State v Santiago* (1971)

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In another context, the Hawaii Court similarly declined to follow the United States Constitution as interpreted by the Burger Court, and suppressed evidence obtained from a woman arrested without a warrant and searched incident to arrest at the police station (Wilkes, 1974). The Burger Court had determined that someone arrested had "no reasonable expectation of privacy", but the Hawaii Court again chose to grant greater protection under its state constitution (Wilkes, 1974, p. 878). The court then concluded that it was free to reach such a decision under state law as long as it did not infringe upon any federal right (Wilkes, 1974).

As previously stated, and most relevant for the purposes of this thesis, Wilkes also found examples from the Supreme Courts of California, Michigan, and New Jersey. Many of those decisions were also noted by Brennan, such as the New Jersey case of *State v Johnson* (1975), the California case of *People v Brisendine* (1975), and the Michigan case of *People v Jackson* (1974), and will be discussed later.

As can be seen, state courts became more fertile ground for scholarly review because of the twin factors of some state courts wishing to expand the rights of criminal defendants beyond what the Burger Court would allow, and Justice Brennan's plea for them to do so.

New Judicial Federalism

Independent Interpretation of State Constitutions

In order to understand the New Judicial Federalism, it is important to examine the issue of independent state constitutional interpretation generally. The most relevant point is that no one questions the right of state courts to independently interpret their constitutions (Johansen, 1976). "All agree that the Federal Constitution in no way constrains state courts in interpreting their local constitutions; that the federal Supreme Court has no power to force state courts to alter

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these interpretations…" (Maltz, 1987, p. 435). The debate invariably focuses upon whether it is appropriate to do so (Johansen, 1976).

Indeed, until the incorporation of several articles of the Bill of Rights to the states, state constitutions provided the exclusive remedy against state government action (Hudnut, 1985). Many state constitutions and state constitutional rights came before the drafting of the federal constitution and the Bill of Rights was exclusively applicable to the federal government (Hudnut, 1985). It was presumed that state constitutions provided sufficient protection against local authority (Linde, 1980; Abrahamson, 1992). Additionally, those states admitted subsequent to the adoption of the Federal Bill of Rights used other state constitutions as the model for their bills of rights (Linde, 1980).

Moreover, most cases involving individual rights are the province of state courts, and: "…the vast bulk of criminal litigation in this country is handled by state courts." (Abrahamson, 1992, p. 27) Further, as a practical matter, if the state constitution protects a right or disposes of an issue, there is no need for federal involvement because there is no federal claim (Linde, 1980).

In fact, Linde (1980) argues that the return to state constitutional interpretation, far from being any kind of radical change, is merely a return to the state of jurisprudence before the incorporation of the Bill of Rights. He observes that attorneys arguing before state tribunals regularly relied upon state law until the advent of incorporation and simply fell out of the habit. The new and exclusive focus was on the application of federal constitutional rights to the states

The emphasis is now shifting back to state courts and constitutions due to decisions of the Burger court (Abrahamson, 1992). One of the main criticisms of this new emphasis is that it is

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too "result oriented" and unprincipled. However, proponents advance numerous justifications for independent state court review.

The first justification focuses upon the uniqueness of each state and its constitution. In a nutshell: "States have different histories and cultures; their citizens hold different rights important", and the people of a particular state enshrine those differences into their state constitutions (Weiss and Bennett, 1993, p. 233). Concomitantly, a court which fails to independently interpret its state constitution by taking these differences into account, fails to give a "…true, full meaning to the constitution" and ultimately fails the people (Long, 2006, p. 53).

A second justification is the so-called 'laboratories of democracy' argument (Long, 2006). This argument, which borrows heavily from the dissenting opinion of Louis Brandeis in the case of *New State Ice Company v Liebemann* (1932), asserts that independent state constitutional interpretation is a good thing because different states may examine the results from an individual state and determine of it would work for that state. In other words, individual states provide a guide to other states as to what policies will ultimately succeed and fail (Long, 2006).

A final justification relies upon judicial efficiency (Long, 2006). It is argued that state constitutional interpretations based upon an adequate and independent state ground relieve: "…that court and the parties the time and expense of further appellate litigation." because the decision is immune to Supreme Court review (Long, 2006, p. 57). Any other method of interpretation invites further review at the federal level (Long, 2006). There are responses to all of these justifications, but the point is that there are arguments for independent state constitutional interpretation that are neutral.

Thus, there are basically two competing schools of thought regarding the propriety of the New Judicial Federalism. The first school presents its justifications based upon the uniqueness

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of state constitutions, the 'laboratories of democracy" argument, considerations of judicial efficiency, and federalism. The rival school highlights the ostensible desire for particular results. (increasing the rights of criminal suspects beyond federal minimums using the state constitution)

It is the emphasis upon results that has prompted much of the scholarly as well as judicial criticism of the New Judicial Federalism. The success of state constitutional claims, barred from federal review: "…has resulted in charges that state courts are evading Supreme Court doctrine and engaging in unprincipled, result-oriented use of their state constitutions" (Johansen, 1976, p. 297). Similarly: "Recent reliance upon the California Constitution by our state supreme court has been viewed as result-oriented" (Dukmejian and Thompson, 1979, p. 989). In fact, as noted by Johansen: "The most vocal critics have been (dissenting) judges" (Johansen, 1976, p. 297).

This raises a question. Assuming arguendo that some state courts are interested in expanding constitutional protections, why is that necessarily a bad thing? As discussed earlier, state constitutional interpretations may only expand or broaden the rights of suspects and the accused. What is the harm in expanding the rights of criminal suspects at the state level? The main objection stresses the desirability of uniformity between state and federal constitutional protections (Hudnut, 1985). The possibility of different results in different cases seems acceptable in areas of common law and statutory interpretation, but: "… appear more repugnant or unfair in the constitutional area and especially in the criminal area" (Hudnut, 1985, p. 92). There is increased or double protection for the accused,"…but it is troubling that such double protection will result in different constitutional rights for citizens of different states" (Hudnut, 1985, p. 92). It may also: "…reinforce the popular perception of the legal system as being capricious, hyper-technical, or unfair" (Hudnut, 1985, p. 92).

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Additionally, in cases involving both state and federal agencies, there is the possibility for confusion as to which procedural standard applies (Hudnut 1985). Higher state standards will not apply to federal agencies (Hudnut, 1985). Thus, in a joint investigation involving the Federal Bureau of Investigation or the Drug Enforcement Administration, there is the danger of disarray for the officers involved and the those prosecutors (Hudnut, 1985)

Regardless of its authenticity, it is those courts that engage in such independent interpretation, which are, as noted below, considered by segments of the legal community to be the most prestigious. With this combination of accolades and encouragement to expand rights under state constitutions, I would expect to see sister state courts routinely citing and following decisions of the California and New Jersey Supreme Courts which increase the rights of the accused. The empirical prestige literature relies upon a raw citation count, and higher counts translate into greater prestige and influence. The normative literature associates prestige (at least in part) with the New Judicial Federalism. If one of the reasons these courts are prestigious is because of their expansion of rights of the accused, it follows that a significant percentage of those cases would be cited and followed if prestige equals influence.

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Chapter 3

Horizontal Federalism and Policy Dissemination

Empirical Studies

In political science, studies of Horizontal Federalism focus upon policy diffusion among the 50 states, and the vast bulk of studies are in the legislative arena (Savage, 1985) (Karch, 2007). Two seminal articles are by Walker (1969) and Gray (1973).

Jack Walker made a pioneering study of legislative horizontal federalism in his article: "The Diffusion of Innovations Among the American States" (Walker, 1969). In it, he examined the adoption of a new policy by a state and then traced its adoption by sister states. He looked at various factors such as wealth, party competition, and institutional components in explaining the propensity of certain states to adopt innovative policies. He then analyzed the elements involved with the dissemination of that policy and found strong evidence of regionalism and emulation as explanatory factors. There has been a plethora of articles on policy diffusion across disciplines since (See Savage, 1985).

The most extensive scholarly literature in the area of diffusion focuses on the diffusion of policies among the 50 states (Karch, 2007). As of 1985, there were 60 studies across disciplines. (mostly political science) (Savage, 1985). Scholars have examined factors affecting why policy diffusion occurs (geographical proximity, imitation, and competition) and what is being diffused (national organizations, policy entrepreneurs, and national government intervention) (Karch, 2007). Karch (2007) has a good summary of the current state of the research with an extensive references page.

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One article worth mentioning is "Innovations in the States: A Diffusion Study" by Virginia Gray in 1973 (Gray, 1973). Using various sources, she examined the innovation and adoption of policies in the three main areas of education, welfare, and civil rights. Similar to Walker, she was trying to determine how innovations diffuse among the states, why some states are more likely to innovate than others, and whether there were patterns of innovation (Gray, 1973). Using regression analysis and employing quadratic and linear models, she found that emulation of adopting states by non-adopting states was a large explanatory factor. She further concluded that first-adopting states were wealthier and more competitive than non-adopting states, and that innovation generally tended to be time and issue specific.

In comparison, there are relatively few studies of horizontal federalism involving the courts and policy diffusion, and even fewer which focus upon the prestige of the court or courts. I am attempting to fill that void.

Studies of policy diffusion among state courts will typically examine the diffusion of legal precedent as well as policy innovation and I will discuss them chronologically. Canon and Baum (1981) analyzed the diffusion of new doctrines in the law of torts among the various state supreme courts. Using regional legal reporters, they counted the first innovation and then subsequent adoptions by sister states. They initially assigned innovation scores from 1.00 to 0.00 based upon the amount of time between the first adoption and one year after the last adoption. They then compared those scores using variables such as the legislative innovativeness of the state, census region, characteristics of the state, and characteristics of the court.

They found little evidence of political ideology, political culture, judicial professionalism, or regionalism on the adoption or non-adoption of the ruling by sister states. Instead, they posited that since state courts are reactive institutions (unlike legislatures, they

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cannot initiate policy but are dependent upon litigants) a large portion of tort law innovation and diffusion was idiosyncratic, and that was likely true of other areas of the law as well (Canon and Baum, 1981).

In "The Transmission of Legal Precedent: A Study of State Supreme Courts", Caldeira (1984) examined patterns of citation among the various state supreme courts and the various reasons why a state supreme court may choose to follow a sister court even though its decisions are not binding (Caldeira, 1984). He examined the legal reporters for the various legal regions and counted the citations to sister courts He found several elements affecting that decision such as the relative prestige of the high court (to be discussed in detail later) similarity of political cultures and the social diversity of the environment (Caldeira, 1984).

By contrast, Harris (1985) looked at sister court citation of precedent from 1870 to 1970. Using a data set provided by Cartright, Friedman, Kagan and Wheeler (1978), he found that although social ecological similarity did not affect such citations, cultural regionalism (undefined) had a pronounced effect (Harris, 1985). He further found greater citation flowing from states that are more populous to less populated, and more urban to less urban, but that this was mediated by a number of factors other than cultural regionalism, such as legislative innovativeness and judicial professionalism (Harris, 1985).

Hofler (1994) examined the diffusion of "right to die" cases among the various states. Drawing upon various secondary sources, he examined the initial adoption and diffusion of doctrine involving the right to die among the state supreme courts (Hoefler, 1994). He found, contrary to other policy areas, a large amount of homogeneity and reliance upon the federal constitution and federal case law (Hoefler, 1994).

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Lutz (1997) narrowed his focus to eight of the tort innovations examined by Canon and Baum. He examined a tort innovation from the first adoption through its diffusion among the various state courts, up until the final adoption as of 1975. Using multiple regression analysis, he was attempting to determine if there were any regional leaders among the states. He concluded that there were regional leaders among the state courts that were early adopters of tort doctrines (Lutz, 1997).

While there have been many empirical articles that touch upon the question of the prestige of state supreme courts through an examination of horizontal federalism, the two that directly address the question are: *Judicial Influence* by Rodney Mott (1936), and On *the Reputation of State Supreme Courts* (1983) by Gregory Caldeira. Both studies rely upon citation analysis to reach their conclusions.

It is necessary to define "citation analysis." A citation is simply a reference by a scholar to the ideas or quotations of someone else regarding that authors own writing. (Shapiro, 1985). Those references are usually in the form of a footnote or citation (Shapiro, 1985). A "citation index" is an organized list of those references or citations which is used by others to access the information (Shapiro, 1985).

The first modern citation index was the Shepard's citation system used by lawyers in legal research (Shapiro, 1985). Shepard's tracks all citations of a given case or statute by other courts and indicates whether the case was overruled. Attorneys and scholars use this index to assist in research and to determine whether the case is still valid (Shapiro, 1985). That is the purpose of the Shepard's index. Other disciplines followed the Shepard's example and put together indexes of citations in the fields of medicine, science, social science, and the humanities (Shapiro, 1985)

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Citation analysis involves using a list of citations for reasons other than information retrieval. For example, using computers, scholars have: "…studied the history and structure of science by mapping networks of authors, calculated the 'half life' (rate of obsolescence) of scientific literature, and otherwise analyzed the nature of scholarly communication" (Shapiro, 1985, p. 1541). More importantly, scholars have also used the frequency of citation by colleagues as a proxy for the prestige, productivity or quality of scientists and their work (Shapiro 1985). As evidenced by Mott and Caldiera and will be discussed further in the methods section, it is a technique used in the area of public law as well.

Mott employed various methods such as a count of casebook citations and surveys of law professors, but, most relevant for purposes of this paper, he also looked at the amount of times a state supreme court is cited by sister courts in a given year and then ranks them from lowest to highest based upon the number of citations. As of 1920, California, New Jersey, and Michigan ranked fourth, eighth and twelfth respectively. He also then did a composite score combining all the elements and ranked California fifth, New Jersey fourth and Michigan eighth. He presumes that prestige and influence are similar or the same:

> It is axiomatic that some supreme courts are more influential than others. A dictum by one judge may carry more weight than a decision by another. Anyone who has studied the opinions of our highest courts is constantly assigning values to them, and the combination of these impressions may determine the relative standing of these tribunals for that individual. That this process of appreciation or depreciation is usually unconscious, and frequently irrational, does not make the prestige which results from it any less real or potent a factor. (Mott, 1936, p. 295)

In 1983, Calderia undertook a citation analysis and compared the year 1975 to the rankings from Mott's study (Caldeira, 1983). He went beyond a simple citation count per-se and did calculations yielding an expected citation score from each court and then compared it with the actual citation count (Calderia, 1983). As of 1975, California ranked number one, New

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Jersey number three, and Michigan number ten in terms of sister court citation. (Calderia, 1983). He then did a multiple regression analysis and found that political ideology was a large determining factor for a high citation count and specifically determined that: "…it appears that state supreme courts in progressive states garnered more indications of deference than did high benches in more conservative jurisdictions" (Calderia, 1983, p. 101). Although a more sophisticated procedure, it was still based upon a raw citation count for a single year.

He similarly operationalized prestige and influence as being similar or synonymous:

> These citations-construed as deference or derogation-yield very handy and non-reactive indicators of hierarchies of prestige between and among the highest appellate courts of the several states. (Caldiera, 1983, p. 84);

Borrowing from the social science definitions mentioned above he defines prestige as:

> a particular form of social power and advantage that is of a symbolic rather than an economic or political character and which gives rise to structured relationships of deference, acceptance, and derogation. (Caldiera, 1983, p. 85)

Additionally, judgments about prestige are: "'…subjective responses to particular social positions that are rooted in generally shared values'" (Caldiera, 1983, p 85).

Both studies rely upon a raw citation count. There is no indication in either study of the areas of law involved, whether the citation was a dissent or concurrence, or whether the case was followed or part of a string citation. Additionally, there is no indication of whether the law of that particular state applied to the legal matter, such as in an interstate custody dispute, or whether a party cited the case in support of its position and the court simply responded. This is an inherent weakness in relying upon such an approach.

In fact, Walsh (1997) questions the utility of using raw citation counts to reach any conclusions. He points to: "…consistent empirical findings that the majority of cites are of the non-substantive "'string'" variety (Walsh, 1997, p. 338). He also takes into account: "…the

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well-taken criticism of the failure of researchers to differentiate between types of citations…" by distinguishing "'strong'" and "'weak'" citations (Walsh, 1997, p. 324). He further asks: "Are citations meaningful indicators of intercourt communication and influence, little more than post hoc rationalization and attempts at legitimation, or something else?" (Walsh, 1997, p. 337).

Walsh (1997) does not operationalize prestige per-se, but notes that prior studies associate prestigious courts with the frequency of sister court citation. He then examined why a sister court may cite a court and determined that it may be influenced by that court or is attempting to legitimate its decision. He focused exclusively upon the doctrine in question (in this instance wrongful discharge cases) as opposed to any tangential issues, and applied a three element criteria for the citation including length or direct quotation (Walsh, 1997). He examined 157 decisions from the fifty states and the District of Columbia, and concluded that the majority of cites were of the "'weak'" variety (Walsh, 1997).

Similarly, Dear and Jessen (2007) note the problem of overinclusiveness. (a citation may be part of a long string, neutral, or cited for some other purpose) and attempt to address some of the concerns mentioned above. In *"*Followed Rates" and Leading State Cases, 1940-2005*",* the authors only count cases that were cited and followed by sister courts over the period of 1940-2002. They do this by tabulating the number of times that a Shepherd's citation indicates that the case was followed. According to their results, California ranks number one.

Although a step in the right direction, this approach also presents problems. First, it relies upon the accuracy of the Shepherd's categorization, which the authors themselves acknowledge is not always reliable. The authors admit that the Shepherd's citations involve subjective judgment, and they found instances of cases they would have coded differently. (Dear and Jessen, 2007) Additionally, there is no way to tell whether it is a string citation, cited by a

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party and addressed by the court, or even pertaining to the main issues involved in the case. At the end of the article, the authors sum up the cases most followed over those years in areas of law such as torts and criminal law and procedure (Dear and Jessen, 2007).

They similarly operationalize prestige as synonymous with influence. They discuss prior articles employing citation analysis and refer to: "…a few older studies that analyzed comparative influence of courts by measuring how frequently various courts are cited by others.", and conclude that high citation is equivalent to comparatively high influence. (Dear and Jessen, 2007, p. 687)

In his study of citations to the United States Supreme Court (Johnson, 1986) makes several important points regarding the use of raw citation counts or relying upon the accuracy of Shepherd's Citations. First,

> …a large number of citations were mere mentions in the majority opinions and had little or no direct relevance to the issues involved in the later decision. This large number of non-substantive treatments should give pause to researchers who indiscriminately count citations without consideration of whether they carry any meaning. (Johnson, 1986, p. 546)

Second, referring to reliance upon the accuracy of Shepherd's citations, he observes that inaccuracy is a risk taken by any researcher "…who chooses to rely on a secondary data source whether it is the *Congressional Quarterly*, the *Book of States*, or *Shepherd's Citations.*" (Johnson, 1981, p. 753 n 4). He further asserts that even if the Shepherd's citations are accurate, it is still no substitute for actually reading the cases as there may be multiple issues involved and there is no indication if the citation is for a procedural or substantive matter. (Johnson, 1981)

Glick (1991) also expressed concerns in his article: "Policymaking and State Supreme Courts." In it, he traced the subsequent citation history of numerous cases involving the right to die, including the seminal case of: *In the Matter of Karen Ann Quinlan* (1976). He indeed found

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courts that relied upon the precedent, but also discovered that a simple citation count did not necessarily show prestige and influence.

> If we were to infer leadership in terms of frequency of citation, the Massachusetts court's heavy use of the *Quinlan* decision would lead us to classify Massachusetts as following New Jersey. It did in part, but the content of Massachusetts policy also differed in important ways, suggesting that even very heavy citation may not indicate clear policy direction or the influence of one court over another. (Glick, 1991, p. 113-114)

Indeed, even Caldieira (1984) admits that there is a possible problem with not differentiating between positive and negative citations, but asserts, without evidence, that appellate judges usually refer to their colleagues in an approving manner. Based upon that assertion, he concludes that it is not necessary to differentiate. I found to the contrary.

Clearly, there are major disadvantages in relying upon a raw citation count conflating prestige and influence. A citation may be a part of a long string citation, a post-hoc rationalization, neutral, negative or cited for any number of purposes. Additionally, reliance on Shepard's citations presents its own problems. Shepard's citations involve subjective judgment and there will likely be numerous instances where the researcher will disagree with the coding. Further, there is no way to tell if the citation is substantive or procedural. Prior work can tell us how many times a court is cited, which may be an indicator of prestige, but taking into account the problems noted above, is it an indication of influence as well? Based upon the empirical studies utilizing raw citation counts, it certainly should be and I will proceed with that assumption.

Normative Evaluations and the New Judicial Federalism

One of the ways I am operationalizing prestige is esteem in segments of the legal community. The normative literature (defined as assertions of prestige without empirical evidence) discussing the prestige of the various courts does not define the term, but associates it

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with liberal activism or innovation. It similarly equates a loss of prestige with failing to continue issuing such decisions or overruling prior ones. For purposes of this thesis, I am narrowly defining that as the development of new legal doctrine under state constitutions (New Judicial Federalism).

For example, In *State Supreme Courts in State and Nation,* Tarr and Porter (1988) make the following assertions regarding the New Jersey Supreme Court: "The court currently enjoys a national reputation for progressivism, innovation, and solicitude for individual rights" (Tarr and Porter, 1988, p. 66); "Since World War II the New Jersey Supreme Court has assumed a role of leadership in the development of legal doctrine, thereby earning itself a national reputation for activism and liberal reformism" (Tarr and Porter, 1988, p. 184); "Taken together, the picture that emerges is of a court that has eagerly embraced opportunities to promulgate policy for the state and doctrine for the nation, confident of its own abilities and of the legitimacy of the activist posture it has adopted" (Tarr and Porter, 1988, p. 185); "…the New Jersey Supreme Court seems to exemplify …the activist 'lighthouse' courts that have assumed a leadership role in national legal development" (Tarr and Porter, 1988, p. 268).

In "The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism" Wefing (1997) asserts that:

> In the last fifty years, the New Jersey Supreme Court has attained a reputation as one of the leading state supreme courts in the United States. This reputation has been noted by numerous scholar and authors… (Wefing, 1997, p. 701).

As proof, he relies upon numerous quotes including the following: "The New Jersey Supreme Court has a history of being a leader in the development of state constitutional doctrine"; and "The New Jersey Supreme Court …has been compared to the Warren court due to its desire to effectuate social change" (Wefing, 1997, p. 701 n.1). He also notes:

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> Additionally, the court has enthusiastically embraced the New Federalism movement. As the United States Supreme Court has become more conservative in recent years, many state courts have chosen to use their own constitutions to grant greater rights than given under the United States Constitution. The New Jersey Supreme Court has regularly done this. The New Jersey Supreme Court has granted greater rights to defendants under the New Jersey search and seizure provision than the United States Supreme Court has given under the Fourth Amendment. (Wefing, 1997, p. 705)

Russello, in "The New Jersey Supreme Court: New Directions?" maintains that: "The New Jersey Supreme Court has built a reputation as an intellectually rigorous and forcefully progressive state supreme court" (Russello, 2002, p. 655). He further asserts that the court from 1979-1996 under the leadership of Chief Justice Robert Wilentz was a stellar example of the "new federalism" urged by Justice Brennan (Russello, 2002).

According to Oks in "Independence in the Interim: The New Jersey Judiciary's Lost Legacy": "…since 1947, the New Jersey Supreme Court has served as a model for the nation…" (Oks 2011, p. 132 quoting Etish 2010). Additionally, Oks refers to: "The Court's national reputation as a judicial leader…" (Oks, 2011, p. 132).

Referring to early innovations in right to die cases, Glick (1991) maintains: "It probably is not a coincidence that supreme courts in New Jersey and Massachusetts produced distinctive policies early in the process-especially New Jersey, which appears on every list of innovative or prestigious courts" (p. 111).

Statements regarding the Michigan Supreme Court include the following**:** It was apparently undistinguished until the 1970's when it gained a reputation for activism (Schneider, 2008). "…California, New Jersey, and Michigan have been the subject of extensive analysis. They are also regarded as the most activist and innovative state supreme courts in the nation" (Hagan, 1988, p. 97). "The Michigan Supreme Court enjoyed a reputation for activism and innovation in recent decades. The Court took an active role in the development of civil liberties

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issues and tort law innovations" (Parker, 1996, p. 345). It was during this period that the court overturned precedents in the areas of criminal law, torts, and contracts, granting greater protections for suspects, broader liability for alleged tortfeasors, and allowing the court to determine whether a contractual clause was '"reasonable'" (Schneider, 2008).

After 1998, when the court began overturning some of the above-mentioned precedents, it was accused of "judicial politics," conservative activism, and reaching "desired" or "intended" results (Delaney, 2002, p. 784 n 22; Miller, 2006). One commentator even concluded that: "…the transparent efforts of the Michigan Supreme Court to reach conservative results that limit and weaken human rights protection, lend strong credence to the argument that the court is engaging in unprecedented activism toward the end of reducing civil rights protection and increasing governmental power over individual liberty" (Serra, 2004, p. 959).

The most frequently cited law review article-*Stare Decisis v The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent* by Sarah K Delaney, maintains that the court had a conservative political agenda when it overruled numerous precedents as opposed to fidelity to a philosophy of "textualism" or "originalism" (Delaney, 2006). As noted above, Nelson Miller intimates that the majority was exercising "'raw power'" and engaging in '"judicial politics" in overturning prior decisions (Miller, 2006).

California statements include:

> Long before the controversial appointment of Bird in 1977, the court had acquired a reputation as the nation's premier state court, largely on the basis of its innovative, scholarly, and bold leadership in the fields of constitutional, criminal, and tort law. (Blum, 1991, p. 48);

"The California court, considered to be the most prestigious in the nation has a history of civil rights activism" (Porter, 1978, p. 57);

"The court's reputation for greatness dates back to 1940 …" (Blum, 1991, p. 49);

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"It was considered to be the premier state supreme court basically because of all the innovative opinions that would come from California" (Blum, 1991, p. 50).

After the ouster of Chief Justice Rose Bird came the following evaluations: "Toward a Radical Middle-Has a Great Court Become Mediocre?"(Blum, 1991) and "Modeling the Garden-How New Jersey Built the Most Progressive State Supreme Court, and What California Can Learn." (Mulcahy, 1999)The former article contains quotes such as; "…the California Court has been dislodged as the most ""prestigious" state court by the New Jersey Supreme Court, long known for its innovative record in such areas as exclusionary zoning and school finance" (Blum, 1991, p. 50-51). The latter article maintains that California had a great national reputation until it went from "progressive to stagnant" and that: "Although the California Supreme Court remains sound in stature, clearly the progressive era of judicial policymaking, activist decisions, and *national prominence* is over" (Mulchay, 2001 p. 863-864 emphasis added).

Additionally:

> Even before the appointment of Chief Justice Rose Bird in1977, 'the court had acquired the reputation as the nation's premier state court, largely on the basis of its innovative, scholarly and bold leadership in the fields of constitutional, criminal and tort law'. Now with Chief Justice Lucas at the helm since Bird was unseated in 1986, the court is entrenched in its conservative nature and its mainstream posture (Pease, 1994, p. 109-110).

Similarly:

> During his 19-year tenure on the Supreme Court, 14 years as its chief, Ron George successfully re-established the preeminence of California's highest court as one of the leading state courts in the country. The court's national reputation and prominence had taken a steep dive in the late 1970s and early 1980s, and the failure of three justices to win their retention elections in 1986 further damaged the court's prestige and credibility. In the aftermath of the 1986 election debacle, the court swung hard to the right (Kelso 2010).

As can be seen, one innovation frequently mentioned is the New Judicial Federalism or expanding the rights of the accused. Additional statements include, but are not limited to:

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> The movement that Brennan celebrated and sought to nurture was advancing in several states. By almost any measure, however, the California Supreme Court was setting the pace. Already considered one of the most activist and influential state courts in the nation due to its innovations in tort law, California's high court now sought to lead a similar revolution in state constitutional rights. (Miller, 2013, p. 2065);
>
> Throughout the 1970s and into the 1980s, the court issued a long series of landmark decisions expanding state constitutional rights. While the California Supreme Court took the lead in expanding rights beyond federal constitutional minimums, enthusiasm for the movement has varied from state to state. Over time, the supreme courts of New Jersey and Massachusetts have competed with California for leadership of the new judicial federalism… (Miller, 2013, p. 2066);
>
> In 1972, the California Supreme Court effectively launched the rights revolution in state constitutional law through its decision in People v. Anderson. In Anderson, the court declared that capital punishment violated the state constitution's prohibition on cruel or unusual punishments (Miller, 2013, p. 2070);
>
> The New Jersey Supreme Court responded to Brennan's call and, in some cases, construed the New Jersey Constitution to afford greater rights to those accused of crime than under the federal Constitution. Most notably, the New Jersey court interpreted New Jersey's own constitution to provide broader rights in search and seizure cases than the Fourth Amendment of the federal Constitution, as interpreted by the U.S. Supreme Court. (Mulchay, 2000);

"In addition to search and seizure issues, the New Jersey Court also provides greater protection against self-incrimination than certain federal decisions" (Mulcahy, 2000, p. 868);

> By relying on state, rather than federal, law, the New Jersey Supreme Court protects criminal defendants where the U.S. Supreme Court is unwilling to and, at the same time, insulates its decisions from scrutiny by the federal Court. (Mulcahy, 2000, p. 869);
>
> In the exercise of its constitutional power to establish rules of evidence applicable to judicial proceedings, the Michigan Supreme Court concluded that, barring exigent circumstances, a suspect should have the right to request and obtain counsel at identification (Abrahamson, 1985, p. 1164);
>
> Referring to the New Judicial Federalism, Latzer (1991) concludes that California and New Jersey are among the top 10 state supreme courts relying upon state constitutions to grant greater protections to criminal defendants.

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Regarding the use of state constitutions to expand protections for criminal defendants, Williams asserts: "… it's a debate that has its origins here in New Jersey, in the Wilentz court, and maybe ultimately it will be resolved here (Williams, 1997, p. 838);

"In becoming the first state court to reject Bustamonte (and applying a more rigorous consent search standard than the United States Supreme Court) under its state constitution, the New Jersey Supreme Court lead the way for other courts to follow" (Williams, 2000, p. 10).

This list is illustrative and not exhaustive.

The normative literature neither operationalizes nor defines prestige or reputation. It simply asserts that certain courts have great reputations or are prestigious based upon (at least in part) expanding the rights of the accused and that the prestige fades if they cease to do so. I presume reputation or prestige based upon the empirical studies ranking courts and the normative evaluations. My approach differs from the empirical studies because I actually read and evaluate the cases and categorize them based upon whether they are followed, part of a string cite, not followed… and based upon the area of law involved. I am looking to see if the prestige translates into influence. If it does not, I need to explain why.

There is clearly a gap in the literature. The empirical and normative literature assumes that some courts are more prestigious than others and this prestige results in being cited by sister courts. I attempt to shed more light on the question by going beyond raw citation counts to analyze the context in which the citation appears. This requires reading the cases to determine whether the citation to a sister court affects the decision in a substantive manner. When a court cites a sister court, it can be inferred (or at least is inferred by the empirical studies) that the original decision influenced the subsequent decision. However, if the citation is not followed or is merely part of a long string citation, there is no ground for inferring influence.

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Chapter 4

Hypothesis and Methods

Previous studies have found substantial evidence of policy diffusion at the level of state legislatures, executive branches and policy entrepreneurs, but there has been less effort at discerning whether policy diffusion happens by way of state courts.

When scholars do examine this issue, they typically have not cast their works as studies of horizontal federalism but rather as studies of whether some state supreme courts are more likely to influence decisions in other state supreme courts. In general, this research has found that some state supreme courts are more influential than others. Three states that consistently ranked as influential are California, Michigan, and New Jersey.

However, there are several aspects of these studies that make a conclusion about judicial policy diffusion problematic. First, they sometimes fail to distinguish between prestige and influence, treating the two terms as synonymous. For example Mott's article on judicial prestige is titled "Judicial Influence" Caldiera operationalizes prestige in terms of deference or derogation. Dear and Jessen equate a high citation count with prestige and influence.

Second they often operationalize influence as a high citation rate, without differentiating between cites that are substantive and those such as string cites that may be characterized as trivial. If a substantial portion of citations are part of long string citations, trivial, neutral, or cited for some other reason, it casts doubt on whether they influenced the sister court.

Finally, they tend to rely on Shepherd's citations which is problematic because it relies upon the subjective judgment of Shepherd's and the authors themselves admit finding instances

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of cases they would have coded differently. Additionally, there may be multiple issues involved and there is no way to tell if the citation is for a substantive or procedural matter.

In this study I seek to improve our understanding of policy diffusion in the courts. Like others, I am interested in showing whether and how some courts are more influential than others. In the following sections I describe the way I accomplish this, namely by separating prestige and influence, relying on a close reading of relevant cases rather than the accuracy of the Shepherd's citations, and refining citation analysis so as to more accurately determine whether a court's opinion can be said to influence the decision of a sister court.

Hypothesis

I begin by hypothesizing that prestige leads to influence. That is, if a court is prestigious, it is more likely to influence the decisions of sister courts. In order to avoid equating prestige with influence, each is defined by different criteria. Prestige is defined as an evaluation from the legal community that a court ranks high in reputation or esteem. Influence is defined as a demonstrated effect on the decisions of other state supreme courts. Specifically, a state Supreme Court influences the decision of a sister court when its decisions are both cited and followed (and not part of a long string citation).

Operationalization of Prestige

As noted above, Social science definitions tend to associate prestige with influence for individuals or collectivities that are in "structured" or "hierarchical" or "ranking" relationships or systems:

> Specifically, we suggest that prestige should be understood as a particular form of social power and advantage that is of a symbolic rather than of an economic or political character, and which gives rise to structured relationships of deference, acceptance and derogation. (Goldthorpe and Hope, 1972, p. 20);

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> Prestige is an entitlement to deference (Shils [1968] 1994), and as such it has an inherently hierarchical quality… The entitlement to deference arises out of respect and admiration that are deserved in the sense that they are grounded in the values of the group in which the person is esteemed or the role is considered prestigious. (Sandefur, 2004, p. 383);
>
> Prestige is a particularly potent basis for the form of power that resides in influence, or the ability to get others to do what one wants because others already want to comply with one's wishes, even before those wishes are expressed. (Parsons, 1963) (Sandefur, 2004, p. 384);
>
> Basically, prestige is the granting of higher human evaluation an individual or a collectivity or a symbol, within the ranking system of other individuals, collectivities, or symbols… Above all, it is evident that prestige plays a considerable role in the domination-submission process. The degree of conformity is greater the higher the prestige of the person or the group seeking to influence others. "(Roueck, 1957)

In the context of state supreme courts, a court can be termed as prestigious when it is held in high regard in the legal community. To determine whether a court is held in high regard in the legal community, I rely on evaluations from law reviews.

Using Hein Online, JSTOR and Google Scholar I searched the three courts for references to prestige, leadership or reputation That is I would input the name of the court and then search the terms “reputation”, “prestige” and “leadership” Many of the articles associated or equated those terms with activism or innovation, but I did not use those search terms. I did not put any kind of date limit on the search. I found 19 relevant items. Table 2 provides a short synopsis of articles with positive evaluations. Table 3 shows negative evaluations.

Prestige is defined as an evaluation from the legal community that a court ranks high in reputation or esteem. This is operationalized by means of an extensive review of law review articles addressing the issue of state Supreme Court prestige.

The articles associate prestige with a state court using its own constitution to create new law or new rights for criminal suspects over and above the federal minimum floor. If an article

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uses a term such as “liberal" or "activist", it generally refers to an innovation under the state constitution. Conversely, the articles associate a loss of prestige when a court ceases to provide judicial innovation or overrules prior decisions in that area. I am narrowing my focus to the limited area of providing greater protections under the state constitution, or the New Judicial Federalism.

I did not find any articles that contradicted that general pattern. Prestige (and influence) were associated with judicial innovation in general and granting greater rights for the criminally accused under the state constitution in particular. Loss of prestige was synonymous with failing to continue innovation, or cutting back on prior innovations.

As stated, there is also empirical confirmation of prestige. As noted in Table 4, Mott and Caldiera concluded that the California, Michigan and New Jersey Supreme Courts were in the top ten in the nation based upon citations from sister courts for the years studied. Dear and Jessen ranked the California Supreme Court number one in the nation based upon followed cases as determined by Shepherd’s citations. Up to a certain date, these courts are consistently treated as prestigious empirically.

In summary, prestige is operationalized normatively as being held in high regard by the legal community. Empirically, it is operationalized by a raw citation count. High citation counts from sister courts equate to high prestige.

Operationalization of Influence

Influence is defined as deference, derogation, the ability to get others to do what one wants, or the ability to effect the actions of others. It can be discerned but not directly measured. However, we can set some minimum requirements as to what must be observed for influence to occur.

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In this study I operationalize influence as having occurred when a state Supreme Court opinion is both cited and followed by sister courts. It does not occur if the citation is part of a long string citation, cited with other courts or authorities, or not germane to the New Judicial Federalism.

This is a more demanding criterion than what others have used. Mott and Caldeira, for instance use raw citation counts, where a citation in a string of other citations is treated as equivalent to a citation that stands alone in the text of the decision. There is also no attempt to determine if it was followed, or indeed how it was employed at all.

To address this problem, I distinguish between various types of citations. A case is not counted as influencing a court unless it is followed and not part of a long string citation or cited with other courts or authorities. That is, when a court cites decisions from other state supreme courts and then follows that decision, one may be able to infer that the original decision influenced the subsequent decision. However, when a citation is not followed or is merely part of a long string citation, there is no ground for inferring influence. As noted earlier, a simple citation to a case may be for a myriad of reasons, but influence may be inferred only if the case is actually followed.

Again, I chose these three states because they have consistently been ranked as influential by the empirical and normative literature. At later dates, some of them lost influence according to normative evaluations. I chose 1975 because that was the year empirically analyzed by Caldiera, and finding those courts in the top 10 nationally. Additionally, all had prestige according to the academic literature. I chose 1998 because that was the year in which the Michigan Supreme Court began losing prestige in the legal community and was 12 years after the removal of Rose Bird in California

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Data and Procedure for Analysis

Data

I obtained my data through Lexis Academic Universe. I took the volume numbers of the applicable state reporters for the year examined, and did a search to determine how many times each was cited by the highest courts of all the states. For example, for the year 1975, volumes 66, 67 and 68 were the applicable reporter numbers for the Supreme Court of New Jersey. Thus, "66 NJ" "67 NJ" "68 NJ" were my search terms narrowed to the highest courts of all states. Similarly, the reporter numbers for the State of California were 13 Cal 3d., 14 Cal 3d. and 15Cal 3d. Once I had a raw number, I then broke down further based upon the legal issue(s) involved and how the citation was treated by the sister courts.

In order to winnow this down to a manageable project, I chose to focus upon particular years when the respective courts had either positive or negative evaluations by the legal community.(1975 and 1978) Even narrowed to those parameters, data collection was extremely time consuming and tedious. Because of the time involved in gathering the data, there is no comparison to other state courts regarding citation history. This is a weakness in the methodology, but a necessary one.

Procedure for Analysis

Then, using an Excel Spreadsheet, I calculated percentages for each of the categories. Starting with the total number of cited cases, I determined how many were actually followed, or part of a string cite, or how they otherwise fell into the categories enumerated below. I then, as noted above, did the same calculations based upon the subject matter of the case. I next

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examined cases followed or not followed, then broke down further based upon the New Judicial Federalism.

My denominators were the total number of cases cited or total amount for a criminal law and procedure. My numerators varied depending upon the various categories. For example, if there were 500 cases cited in total, and 20 were followed, then my percentage was 4%.(20/500). I did this for the total number of cases cited and then further broke down the results for criminal law and procedure. As an exemplar, if 150 of the cases involved criminal law or procedure then my percentage was 30% (150/500). I then further broke those numbers down by category for totals and total amount of criminal law and procedure cases cited. If 10 were followed, I had two percentages-10/500 or 2% for criminal law and procedure in relation to the total cases cited, and 10/150 or roughly 7%.

Finally, instead of looking at how many times a court is cited in a year, I examine the frequency a court from a given year is cited in the ensuing years. For example, Calderia examines how many times sister courts cited other courts in the year 1975. I look at the year 1975 for California, New Jersey, and Michigan and see how many times those courts are cited from 1975 to the present, breaking down into the subcategories noted above. I am particularly looking to see if a substantial portion are actually followed by a sister court.

I again note that this method was tedious and time-consuming, but I found many situations where a court followed a decision or an aspect of a decision, but that was not reflected in the Sheppard's citations. In other words, I found many situations where I believed a case or issue was followed, but it did not show as followed according to Sheppard's. Obviously, much of this is subjective, but it shows the danger (in my opinion) of simply mechanically applying numbers as opposed to actually reading and analyzing the case

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It is necessary to define the terms and symbols as I use them in this study. "F" means followed by the citing court, and "NF" means not followed. "SC" stands for string-citation. A string citation is, as the name implies, a long list of citations strung together and often involving multiple jurisdictions. If a case is cited with other jurisdictions or authorities, but is not a string cite per-se, it is labeled "FCOCA" meaning cited with other cases or authorities.

There is sometimes overlap between the two categories. "CP" means that the case was cited by one of the parties or a lower court, and the higher court addressed it. "D" and "C" are for dissent and concurrence respectively. If a case is cited as part of dicta or for purposes not related to the main issues of the case, it is "COP" or cited for other purpose (See Table 1)

After examining the years 1975 and 1998, I then examined the subsequent citation history of specific cases expanding or contracting the rights of the accused under state constitutions. Before presenting results, it is necessary to provide some historical background for each of the courts.

As noted earlier, citation analysis involves the use of citations for reasons other than information retrieval and is a method used in the area of public law. For example, Shapiro used citation analysis to rate the most prestigious and influential law review articles. Using Shepard's citations, he compiled a list of those most frequently cited by other authorities and ranked them from highest to lowest. Those with the most citations were the most prestigious and influential. (Shapiro 1985)

Three seminal articles regarding state supreme courts are: *The Business of State Supreme Courts 1870-1970 (*Kagan, Cartwright, Friedman and Wheeler, 1977) (Kagan, et al., 1977), and *The Evolution of State Supreme Courts (*Kagan, Cartwright, Friedman and Wheeler, 1977) (Kagan and Carwright et.al) and *State Supreme Courts: A Century of Style and Citation*

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(Friedman, Kagan, Cartwright and Wheeler (1981). (Friedman, et al., 1981) All three articles employ citation analysis to reach their various conclusions.

In *The Business of State Supreme Courts 1870-1970,* the authors examined a sample of opinions issued by 16 State Supreme Courts at five-year intervals between 1970-1970. (The courts examined were Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia). The authors were attempting to ascertain whether caseloads had changed, or if there was a decline or increase in particular areas of law, and the effect of judicial structure, judicial culture, socioeconomic change and changes in substantive law upon both. (Kagan, et al., 1977)

As might be expected, they found that as state populations increased (California and Michigan specifically) so did the caseload of the respective courts, and this was accompanied by much shorter opinions as the courts attempted to deal with the larger volume of cases (Kagan, et al., 1977) Other factors affecting the business of state supreme courts were the discretion to select or reject particular types of cases, and the introduction of an intermediate appellate court. (Kagan, et al., 1977). They then determined that there was a noticeable decrease in Supreme Court workloads over the time period studied and a "…shift…toward *noncommercial* cases-from a concentration on debt collection and property cases to an emphasis on tort, criminal, public law, and family law matters" (Kagan, et al., 1977, p. 156 Emphasis in original).

In *The Evolution of State Supreme Courts*, the authors examine the same 16 courts to determine how the volume of cases affected the structure and institutional characteristics of those courts from, again, 1870-1970. They then created a typology of those courts based upon the factors of caseload and discretion:

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> Type I: Low population states (under one million) with no supreme court case-selecting discretion, no lower appellate court and relatively light caseloads… Type II: Medium sized (over one million) and large states with little or no supreme court case-selecting discretion and heavy caseloads… (and) Type III: Medium-sized or large states with substantial controls over supreme court caseloads (Kagan and Cartwright, et al., 1974, p. 984)

They then conclude generally that all the state courts studied have evolved into: "…smaller numbers of opinions and greater case-selection discretion" which may encourage activism because the courts are free to concentrate upon "'key'" cases (Kagan and Cartwright, et al., 1974, p. 1001).

The final article: *State Supreme Courts: A Century of Style and Citation* again analyzes the same 16 courts, but the focus this time is on the quality and length of the opinions themselves. They were looking for characteristics such as opinion length, dissent rates, and citation practice (including secondary authorities and law review articles). They conclude broadly that opinions are gradually growing in length, dissents are increasing, and courts are more likely to cite cases than secondary authorities, and that any citations to secondary authorities are more likely to involve changing existing law as opposed to those that "…crystallize the teachings of the past" (Friedman, et al., 1981, p. 817).

In 2000, the authors' findings were updated in: *The Business of State Supreme Courts Revisited* (Kritzer, 2000). Using date obtained by Paul Brace and Melinda Gann, Kritzer examined whether the trends noted in the prior article had continued, slowed down, or perhaps ceased altogether. He determined that some patterns continued such as a decrease in debt and real property cases and an increase in criminal (Kritzer, 2000) He further concluded that, torts and family law failed to increase, and there was an explosion of cases in the category of "other contract" (Kritzer, 2000)

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After examining the years 1975 and 1998, I then examined the subsequent citation history of specific cases expanding or contracting the rights of the accused under state constitutions. Before presenting results, it is necessary to provide some historical background for each of the courts.

California Supreme Court

In 1848, pursuant to the first California Constitution, Supreme Court justices were selected through partisan elections to serve six-year terms. (Culver & Wold, 1986) This was modified somewhat by the 1879 Constitution which provided for twelve year terms. (Culver & Wold 1988). The current system, adopted in 1934, provides for nomination by the Governor and approval by a Commission on Judicial Appointments consisting of the Attorney General, the chief justice, and presiding judge of the court of appeals. (Thompson, 1988). It is a twelve year appointment, and the judge is subject to a retention election at the end of the Governor's term. (Thompson, 1988)

1940 is generally considered to be a turning point for the court. That was the year that Governor Culbert Olson appointed Chief Justice Philip Gibson and Associate Justice Roger Traynor. (Mulcahy, 2000) "More a superb judicial administrator than a legal scholar, (Chief Justice) Gibson, over the years, transformed the California court system from one of disorganized locally controlled courts with overlapping jurisdiction into a model of state court systems" (Thompson, 1988, p. 2011). One of his innovations was the use of qualified attorneys to assist the judges as opposed to law clerks. (Thompson, 1988) This particular change would cause major public relations problems for future courts. (Thompson, 1988).

Roger Traynor became the new chief justice in 1964 upon the retirement of Gibson. (Thompson, 1988) "Traynor is recognized as one of the truly great common law judges,

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justifiably ranked with such eminent jurists as Learned Hand" (Thompson, 1988, p. 2013). The Traynor court was known for many liberal activist decisions and overturning precedent, but the Chief Justice insisted that any such rulings must be: "…restrained by intellectual discipline…" and that the judge must reason through "…each step of the justification" (Thompson, 1988, p. 2013).

Governor Ronald Reagan appointed Donald R. Wright to replace Chief Justice Traynor upon his retirement in 1970 (Thompson, 2010). Wright was popular, a more than adequate legal scholar, and "…an enthusiastic participant in the collegiality of the court" (Thompson, 1988 p. 2014). Shortly thereafter, the appointment of Justice Matthew Tobriner caused a shift away from Justice Traynor's philosophy of judging, to a view that, "…the court should be an instrument of social change" (Thompson, 1988, p. 2015). Justice Tobriner:

> "…deplored the failure of the legal system to respond to the oppression of racial minorities, women, and the poor… (and)…proposed that 'demands for social reform-and even for social revolution-be pressed in the judicial sphere and framed in the context of legal relationships'" (Thompson, 1988, p. 2015).

The subsequent appointment of Justice William P. Clark provided a countervailing voice on the court, but it never commanded a majority. (Thompson, 1988) Justice Clark was a close confidant of Ronald Reagan, and he shared the same philosophy (Thompson, 1988). Shortly after he joined the court "…he became the dissenting voice to a 'liberal' majority block led by Justice Tobriner" (Thompson, 1988, p. 2015). Chief Justice Wright invariably voted with this majority block, and "…the court accelerated the activist course it had begun in the Traynor years" (Thompson, 1988, p. 2015)

This activism continued until the appointment of Rose Bird as Chief Justice in 1977 and well beyond, but there was a major difference. Unlike prior courts, the Bird Court was widely

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criticized and condemned for many of its activist decisions (Mulcahy, 2000). There were numerous explanations for why this occurred, and the first was the actual appointment itself.

There was thus much hostility to the appointment in the legal community (Thompson, 1988). In fact, although she got the two out of three votes necessary for confirmation, Attorney General Evelle Younger: "...reluctantly voted to confirm, although he said that he would have appointed someone else were he governor" (Culver & Wold, 1986, p. 84). Presiding Justice of the court of appeals, Parker Wood, voted against the confirmation: "…presumably on the grounds that he would oppose any nominee who did not have prior judicial experience" (Culver & Wold, 1986, p. 84).

There was active opposition from some members of the general public as well. Bird incurred the wrath of agricultural interests during her term as secretary of agriculture with her pro-labor stance. (Culver & Wold, 1986) For example, Catholic Bishop Roger Mahoney, who had previously been chairman of the Agricultural Labor Relations Board, wrote a letter to the Commission to record his 'vigorous 'opposition' to her appointment (Culver & Wold, 1986, p. 84).

All these factors became very important later when there was public opposition to many of the Bird Court's activist decisions. There had been opposition to decisions of the Taylor and Wright courts as well, but: "The residue of the court's reputation for scholarship and the esteem in which Chief Justice Wright was held by establishment lawyers and commentators-liberal, conservative, and centrist, served as a buffer against these attacks" (Thompson 1988 p 2022). However, when Chief Justice Bird took office: "The buffers against the attacks which claimed that the court was exceeding its accepted role, were pierced" (Thompson, 1988, p. 2022).

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Chief Justice Bird faced her first retention election in 1978 and although she was retained, it was by a slim margin (Thompson, 1988). She had written a concurring opinion in a criminal case concluding that "rape per se" did not constitute great bodily injury (Culver & Wold, 1986, p. 85) and a dissenting opinion in a case challenging Proposition 13 asserting that: "…it was unconstitutionally discriminatory to require property owners to pay markedly varying taxes on properties of similar market value" (Culver & Wold, 1986, p. 85) which were used against her by the opposition (Culver & Wold, 1986). While neither of these votes determined the outcome of the cases, they were characterized as "…evidence that her decision making ran counter to the public interest" (Culver & Wold, 1986, p. 85)

As noted above, the Bird court continued the activist tradition of previous courts, but it was the area of criminal law and procedure that provoked the most controversy (Culver & Wold, 1986). The court: "…steadily extended application of the exclusionary rule, imposed strict standards upon the admission of confessions, and broadened its test regarding insanity pleas in a manner favorable to those entering such pleas" (Culver & Wold, 1986, p. 86). Again, the Chief Justice distinguished herself by voting in favor of defendants 75% of the time as opposed to 70% for the other liberals on the court (Culver & Wold, 1986).

There was negative public reaction to many of these decisions, but it was the issue of capital punishment which most galvanized court critics (Culver & Wold, 1988). As of 1988, the California Supreme Court had overturned 95% of the death sentences that came before it as opposed to 43% among other state courts and 60% for federal courts. (Culver & Wold, 1986) More importantly, the Chief Justice voted to reverse death sentences 100% of the time. (Thompson, 1988)

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The above combination of factors led to a highly organized and successful campaign to oust Bird and fellow liberals Cruz Reynoso and Joseph Grodin. (Wold & Culver, 1987). To put it more bluntly: "Court critics hope that Bird's defeat and the rejection of two other justices will signal an end to what they call the 'public be damned' attitude and ultra-liberal trends of the Bird Court" (Culver & Wold, 1986, p. 81). Counterarguments from Bird Court supporters that the retention election was really an assault on judicial independence failed to carry the day (Wold & Culver, 1986).

The retention election had major ramifications for future court rulings. Three liberal-activist justices were replaced with justices of a more moderate viewpoint. "The contrast between the legacy of judicial activism and the work of the current California Supreme Court under Bird's successor, Malcolm M. Lucas is palpable" (Blum, 1991, p. 49). Similarly:

> Reading a death penalty opinion of the Bird Court then a death penalty opinion of the Lucas Court, one often sees the same precedents cited and the same legal principles exalted… (however)…The approach of the Bird court in reviewing death penalty judgments reflected a norm of reversal, in which the court paid little heed to principles such as abstention, the substantial evidence rule, and the principles of harmless error. Doubts, particularly those involving choice of sentence, were resolved in favor of reversal because of the severity and finality of the judgment being reviewed (Uelman, 1989, p. 238-239)

It was at this point that academic opinion began to turn against the court

Michigan Supreme Court

Although not officially recognized as a state until 1837, Michigan ratified its first constitution in 1835, which provided for a supreme court composed of justices appointed by the governor with the advice and consent of the state senate serving seven-year terms (Wise, 1986). The legislature was tasked with determining the composition and jurisdiction of the court, and

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the initial legislation provided for three judges serving the three judicial circuits of the state (Wise, 1986)

As the years went on, the court grew and expanded, but was relatively undistinguished until the tenure of the "Big Four" (Chief Justice Thomas Cooley and Associate Justices Isaac P. Christiancy, James V Campbell, and Benjamin F. Graves) from 1868 to 1875 (Schneider, 2008). During that era, it: "… was generally rated as one of the finest appellate courts in the country-for a while perhaps 'the ablest State court that ever existed'" (Wise, 1987, p.1509 citing Browne, 1898).

Examples of praise include: "The Michigan Reports are among the best in the country at the present time. The reporter is better than average, and the judges are candid, able, and well informed" (Book Notice, 3 Am. Law Rev. 141 (1868); "We have spoken of the excellence of the Michigan Reports in former numbers of this review. It will do no harm, however, to repeat that this court sets an example of judicial gravity and decorum which one could wish were more widely followed" (Book Notice 3 Am law Rev. 757 (1869); and "The Michigan Reports rank, we think, first among those that reach us from the western states. The decisions are vigorous and searching, and the reporting is fair" (Book Notice 6 Am Law Rev. 558 (1872).

The court of the Big Four: "…helped shape our nation's understanding of separation of powers and standing to sue" (Schneider, 2008, p. 3). It should be noted that the court was not considered "activist" or "progressive" during this period: "The justices frequently articulated their intention to follow the Michigan Constitution…even in hotly controversial areas such as public funding for railroads" (Schneider, 2008, p. 3). Despite same: "…the court of the Big Four was quite well regarded, and that reputation has continued until the present day" (Schneider, 2008, p. 3).

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It was apparently undistinguished from that point until the 1970's when it gained a reputation for activism (Schneider, 2008). "…California, New Jersey, and Michigan have been the subject of extensive analysis. They are also regarded as the most activist and innovative state supreme courts in the nation" (Hagan, 1988, p. 97). "The Michigan Supreme Court enjoyed a reputation for activism and innovation in recent decades. "The Court took an active role in the development of civil liberties issues and tort law innovations" (Parker, 1996, p. 345). It was during this period that the court overturned precedents in the areas of criminal law, torts, and contracts, granting greater protections for suspects, broader liability for alleged tortfeasors, and allowing the court to determine whether a contractual clause was '"reasonable'" (Schneider, 2008, p.4).

The main reason for this shift was the 1970 nomination and election of former governors G. Mennen "Soapy" Williams and John B Swanson to the court. As noted by Schneider: "Prior to their elections, William's and Swainson's experience in state government consisted of *making* public policy rather than *interpreting* it" (Schneider, 2008, p. 4 emphasis in original). Additionally, both had appointed several members of the court who shared their judicial philosophy. (Schneider, 2008) With this dynamic in place, the court: "… began overruling and disregarding long-standing court decisions in politically sensitive or policy-oriented areas of the law…and overruling long established precedent including opinions of the "Big Four" (Schneider, 2008, p. 4)

This all changed with the election of John Engler as governor in 1990. (Schneider, 2008) Engler had a much different judicial philosophy from that of Swainson and Williams and elucidated it thus:

> I want jurists on the Michigan bench who understand that it is legislators, not judges, who make the law; who believe that the people should govern through their elected

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> representatives; who comprehend that the burden of policy making is on the legislative not the judicial branch; who render decisions based on the *text* of the Constitution or statute rather than on somebody's social agenda. In short: I'm looking for a few intelligent, hard working men and women with fidelity to the Constitution! (Engler, 2002)

From 1997 to 1999, Governor Engler appointed four strict constructionists- Clifford Taylor, Robert Young Jr., Maura Corrigan and Stephen J Markman to the court, who were returned to office in the succeeding general elections (Schneider, 2008).

It was after 1998 that the court began overturning some of the above mentioned precedents, and was subjected to harsh criticism.

New Jersey Supreme Court

The New Jersey court system was originally modeled upon medieval English tribunals (Tarr & Porter, 1988). The courts established by the 1776 New Jersey Constitution retained many of the institutional and structural characteristics of those tribunals, including separate courts for law and equity (Tarr & Porter, 1988). The constitution adopted in 1844 added additional courts to the system to cope with such issues as a burgeoning population and interstate migration, but the basic structure and features of the court system remained intact (Tarr & Porter, 1988).

This process of adding new courts was apparently ad hoc at best, and "…as of 1947 seventeen separate classes of courts were operating in the state, frustrating all attempts to impose system and uniformity and creating a jurisdictional maze for unwary litigants" (Tarr & Porter, 1988, p. 187). Although New Jersey was not alone in adding courts in a haphazard fashion, "…the shortcomings of 'Jersey Justice' were so severe that the American Judicature Society, the nation's preeminent organization supporting judicial reform, felt compelled to nominate New Jersey's as 'the nation's worst court system' (Tarr & Porter, 1988, p. 188).

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The 1947 Constitution made major changes to the court system that would forever change that perception. The perceived magnitude of the changes is best summed up by the Journal of the American Judicature Society (1948):

> Next September 15 the people of New Jersey will exchange America's worst court system for America's best…The hundred year order now on its way out had staunch supporters to the last, but there are few to deny that the accomplishments of the New Jersey bench and bar have been in spite of the court structure and not because of it. "New Jersey Goes to the Head of the Class"

Among the changes were a restructuring of the court system by "…unifying the courts of law and equity; granting the supreme court control over administration, practice, and procedure in all courts; and limiting the functions of each judge to one court" (Mulcahy, 2000, p. 900). In addition, it mandated that the Chief Justice would be the administrative head of the entire court system. (Wefing, 1997) Among other things, it allows the Chief Justice to assign and re-assign:

> … all superior court justices as he or she sees fit…In other jurisdictions, the appellate judges are either appointed or elected and cannot be changed or removed from that position by the chief justice. In New Jersey, if appellate division judges were constantly challenging the authority of the court they simply could be returned to their positions on the trial court and in whatever trial court the chief so designated (Wefing, 1997, p. 725)

This makes the position of chief justice a powerful one, which was what the drafters of the constitution intended (Mulcahy, 1997).

Arthur Vanderbilt was the first chief justice of the New Jersey Supreme Court. (Wefing, 1997). He had previously been Dean of New York Law School, president of the American Bar Association, and "...was instrumental in developing the Judicial Article of the 1947 Constitution" (Wefing, 1997, p. 725). He was considered for the position of Chief Justice of the United States Supreme Court by President Eisenhower which ultimately went to Earl Warren (Wefing, 1997). He was subsequently considered for a position of associate justice but poor health caused him to request that he be removed from consideration (Wefing, 1997). He was obviously very capable

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and well-respected in the legal community (Mulcahy, 2000). "Through his support of judicial reform and his service as Chief Justice, Arthur Vanderbilt fundamentally reshaped-one might even say created-the New Jersey Supreme Court" (Tarr & Porter, 1998, p. 186).

Appropriately, it was Vanderbilt who started the New Jersey Supreme Court on its activist path (Wefing, 1997). One of the court's first, and most controversial decisions, was *Winberry v Salisbury* (1947) which involved judicial v legislative power. The 1947 Constitution stated that the Supreme Court had rule making power 'subject to law' (Tarr & Porter, 1988, p. 192). The legislature maintained that 'subject to law' meant it had statutory power to oversee and regulate the court's rule-making power. Vanderbilt saw it differently and held that:

> The only interpretation of 'subject to law' that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice… (Tarr & Porter, 1998, p. 192 quoting *Winberry*)

In other words, as long as the court was not creating substantive law, but devoted its power to procedural matters only, it was not subject to legislative oversight (Tarr & Porter, 1988).

The opinion was criticized by members of the court itself: "Justice Case observed that it was not necessary to construe the constitutional provision in order to resolve the case" (Tarr & Porter, 1988, p.192). Further, the ruling was contrary to the constitutional history of the provision (Tarr & Porter, 1988). During the drafting process, the Committee on the Judiciary had specifically stated that it considered "subject to law" the same as subject to legislation, as had Vanderbilt himself (Tarr & Porter, 1988). "Thus, although Vanderbilt's may have secured the independence of the judiciary…it more closely resembled a usurpation than a faithful interpretation of the constitution" (Tarr & Porter, 1988, p. 193).

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Winberry had larger significance beyond its holding: "… it showed the court reaching out to address a politically explosive issue rather than deciding a case on narrow grounds" (Tarr and Porter, 1988, p. 193). It also showed that the court would not shy away from controversial issues (Tarr & Porter, 1988). Most importantly, it set the tone for future courts: "…in both opinions and extrajudicial writings, he (Vanderbilt) categorically rejected the standard canons of judicial restraint. And his influence has been decisive: what Vanderbilt preached and practiced became orthodoxy for the New Jersey Supreme Court" (Tarr & Porter, 1988, p. 193).

This view of the judicial role, coupled with the addition of several liberal justices in subsequent years led to many decisions in the area of the New Judicial Federalism applauded by the legal community (Tarr & Porter, 1988).

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Chapter 5

Findings

1975

I began my analysis with the year 1975, which is the year that Caldeira empirically examined and analyzed and when all three courts were prestigious according to evaluations by the legal community. It additionally falls squarely within the era of the New Judicial Federalism. He ranked the California, Michigan and New Jersey courts number one, ten and three respectively. For ease of presentation, I will note the results for cases followed and not followed and combine the remaining categories as "other" A complete breakdown for all the categories is attached as Appendix A.

The distribution of citations is presented in Table 5. California's decisions were followed in 15% of the subsequent cases while Michigan was followed in 25% and New Jersey in 22%

As can be seen, raw numbers do not tell the whole story. All three courts are actually cited and followed less than 30% of the time. Remember, these courts are in the top ten according to Calderia in terms of high citation counts. Additionally, a significant portion of the citations are either part of a string cite, cited with other cases or authorities, or cited by one of the parties. If the prestige translates into influence, I would expect larger percentages cited and followed. Again, there is no comparison with other courts, but in terms of sheer numbers, I would expect larger percentages.

Table 6 summarizes the results for criminal and constitutional law as a percentage of the total cases cited. California, Michigan and New Jersey were subsequently followed 8%, 12% and 5% of the time respectively.

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The raw numbers are relatively high for California and Michigan at 42% and 46% respectively, with New Jersey at a noticeably lower 28%. However the frequency with which court decisions were followed by sister courts is substantially smaller. Additionally, there are also a substantial percentage that are part of a string cite, cited with other authorities and courts, or not followed at all.

Table 7 shows the distribution of citations among the total amount of criminal and constitutional laws cited. For California the total amount followed was (19%), Michigan 24% and New Jersey 16%.

The percentage of cases followed is higher, but among those decisions I found very little evidence of the new judicial federalism being cited and followed by other state courts. There were many cases involving issues such as the proper conditions for probation, prosecutorial duty to the grand jury, the appropriate standard for civil commitment, or affixing responsibility for jury instructions, but few that expanded the rights of the accused under a state constitution. There were, however, a few notable exceptions for each court which will be discussed below when examining those courts in more detail.

For example, the New Jersey Supreme Court was frequently cited for holdings such as the fact that waivers of appeal are permissible as part of a plea-bargain agreement, or that a prosecutor may not insulate himself from review by bargaining away appeal rights, but again, it was always in conjunction with numerous other courts. In other words, I could find little, if any evidence of the New Jersey Supreme Court issuing rulings involving the new judicial federalism which were ultimately followed by multiple sister courts. Additionally, as mentioned above, New Jersey's overall percentage of cases involving criminal or constitutional issues was appreciably lower than Michigan or California

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Similarly, the Michigan Supreme Court featured cases involving "lesser included offense" jury instructions and the application of the so-called "castle doctrine" involving when a homeowner must retreat in the face of attack, but nothing expanding the rights of criminal suspects. Also, as with New Jersey, most of the cases were cited along with numerous other courts.

1998

I next analyzed the year 1998 because that was the year when the Michigan Supreme Court began to be excoriated in many quarters (Delaney, 2002; Serra, 2004; Miller, 2006). It is also twelve years after the ouster of Justice Rose Bird in California. As shown in Table 8, California was subsequently followed 23% of the time with Michigan at almost 40% and New Jersey 28%.

Table 9 shows the distribution of citations for cases involving criminal or constitutional law as a percentage of the total cases cited. For the three courts the total amount followed was California 4%, Michigan 22% and New Jersey 2%. Table 10 shows the distribution of citations among the total amount of criminal and constitutional laws cited.

For California, criminal law and constitutional procedure comprised 22% of the total, but only a few were actually followed and none involved the New Judicial Federalism. *People v. Jones* (1998) was cited for tangential issues such as the fact that counsel for the defense is entitled to a list of jurors, Georgia (F)[1], and *People v. Hill* (1998) Kansas (F)[2] held, among multiple other issues, that a prosecutor has wide latitude in closing argument, but may not

[1] Dorsey v The State (2005)
[2] State v Kleypas (2001)

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mischaracterize evidence, (it was a "see also") and additionally Wyoming (F)[3] ruled that shackling a defendant in front of a jury is particularly problematic.

Finally, *People v. Massie* (1998) Kansas (F)[4], distinguished between trial and structural errors and concluded that trial errors were invariably harmless. The only case with constitutional dimensions, also *People v. Massie* (1998), concluded that double jeopardy does not attach when a guilty plea is invalidated. Iowa (F)[5] The court referred to other sources but specifically cited and quoted the California opinion.

Criminal procedure and constitutional law made up 33% of the total citations for the Supreme Court of Michigan. Numerous cases were cited and followed, but none involved the New Judicial Federalism. *People v. Lemmon* (1998) Texas (F)[6] ruled that an appellate court does not have the discretion to rule upon the credibility of evidence, *People v. Gearns* (1998) Delaware (FCOCA)[7] held that the confrontation clause does not apply to witnesses who do not testify or provide evidence, *People v. Goecke* (1998) West Virginia (F)[8] involved proper jury instructions for malice. Finally, *People v Starr* (1998) West Virginia (F)[9] concluded that a victim's testimony as to the fear of her attacker was not hearsay.

For New Jersey, the total amount of citations in the area of criminal procedure and constitutional law was 12% with 2% followed. The first, *State v. Bunyan* (1998) California (F (2))[10] laid down the criteria for accepting exculpatory hearsay evidence, and the second, *State v.*

[3] Asch v State (2003)
[4] Kansas v Hill (2001)
[5] State v Cortez (2000)
[6] Johnson v Texas (2000)
[7] Shelton v Delaware (1999)
[8] State V Davis (2007)
[9] State v Mills (2005)
[10] People v Ayala

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Morton, (1998) Rhode Island (F)[11] concluded that a defendant has no constitutional right to be present at hearings involving issues of law.

There was one other case cited and not followed. The Iowa court declined to adopt a limited definition of victim as had New Jersey in *State v. Hill* (1998). Iowa (NF)[12] Instead, the court chose to give the term a much more expansive definition.

To summarize, for the year 1975, which was the year all three courts had great reputations according to a raw citation count, each was cited and followed less than 30% of the time and few cases involved the New Judicial Federalism. By contrast, for the year 1998, which was when the Michigan Supreme Court ostensibly lost prestige, it was cited and followed almost 40% of the time and 33% involved criminal procedure and constitutional law. Similarly, The California Supreme Court was actually cited and followed more frequently in 1998 than in 1975. In this situation, a comparison with other courts is not necessary. I would not expect larger percentages followed for Michigan and California in 1998 when they lost prestige in the legal community than 1975.

Subsequent Citation History-Criminal or Constitutional Law

In this section, I examine decisions from the various courts expanding or contracting the rights of the accused under the state constitutions.

New Jersey

S*tate v Johnson* (1975) held that a consent to search is invalid unless the suspect is specifically informed of his right to refuse to consent. This provided greater protection than the

[11] People v Brouillard (2000)
[12] State v Tesch (2005)

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United States Supreme Court case of *Schneckloth v. Bustamonte,* (1973) which held that there is no such requirement under the Fourth Amendment. The court further held:

> …that under Art I par. 7 of our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the state seeks to justify a search on the basis of consent, it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to consent (Brennan, 1977, p. 500 quoting *State v Johnson* 68 N.J. 349, 353-354 (1975))

The high courts of Alaska (CPNF)[13], Maryland (NFCOCA)[14], New Hampshire (NFCOCA)[15] (CPNF)[16], and Pennsylvania (NFCOCA)[17] declined to follow that precedent. In fact, the Pennsylvania Supreme Court noted that it could only find three states which take such a position. The only court I could find which followed the ruling was the Supreme Court of Arkansas (FCOCA)[18], and it did so over a stinging dissent. Colorado (SCF)[19] followed the broader proposition that there need not be an express statement that suspect is free to refuse to allow the search It should be noted that the *Johnson* case is also frequently cited for the more generic proposition that states may provide greater protections under their own constitutions than the United States Constitution, but it is generally part of a large string cite involving numerous other courts. Massachusetts (SCF)[20], Oklahoma (SCF)[21] South Dakota (SCF)[22]

Another example is *State v Hunt* (1982) which determined that there is a privacy interest in phone billing records, and thus police must obtain a warrant before obtaining them. Colorado

[13] Henry v State (1980)
[14] Scott v State (2001)
[15] State v Johnston (2004)
[16] State v. Osborne (1979)
[17] Commonwealth v. Cleckley (1999)
[18] State v. Brown (2004)
[19] People v. Hayhurst (1977)
[20] Plymouth District v New England Telephone and Telegraph Company (1980)
[21] Messenger v Messenger (1992)
[22] State v Opperman (1976)

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(F) (FCOCA) (D)[23] followed and quoted this decision and emphasized that it was rejecting the contrary position of the Supreme Court and other states. Texas (SCF) (C)[24] similarly opted to adopt this approach. However it cited the New Jersey case for the proposition that state courts may provide higher standards than federal. Indeed, this case was one of many to observe that states may impose higher standards than federal, and numerous courts cited it for this proposition only. Additionally, it was also frequently included in citations from other courts or other sources Delaware (FCOCA)[25], Florida (FCOCA)[26] Iowa (FCOCA)[27]. Kansas (SSNF)[28] declined to follow the ruling.

Two other exemplars are *State v Hempele* (1982) and *State v Reed*. (1993) In *Hempele*, the New Jersey Supreme Court concluded that there is a right to privacy in garbage placed at the curb for pickup, and thus, police must obtain a warrant before searching it. This analysis was followed by New Hampshire (F) (D(2))[29], Vermont (F)[30], Washington (F)[31] and Alaska (FCOCA)[32]. It was not followed by Colorado (NFCOCA)(D)[33], Connecticut (NF)3 (NFCOCA)(D)2[34], Indiana (NFCOCA)[35], Maryland (NF (2))[36], North Dakota (CPNF)[37],

[23] People v. Sporleder (1983)
[24] Davenport v. Garcia (1982)
[25] Dorsey v State (2000)
[26] Traylor v State (1992)
[27] State v Swain (1987)
[28] State v. Schultz (1993)
[29] State v. Goss (2003)
[30] State v. Morris (1996)
[31] State v. Boland (1990)
[32] Beltz v State (2009)
[33] People v. Hillman (1992)
[34] State v. DeFusco (1993)
[35] Litchfield v. State (2005)
[36] Moran v. State (1994)
[37] State v. Rydberg (1994)

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Tennessee (NF)[38], and Wyoming (NF)5[39]. In fact, Colorado and Connecticut cited it for the purpose of noting this was a minority position

State v Reed (1993) held that if police are aware that there is an attorney present who wishes to speak to the suspect, they have a duty to communicate that. This holding provided greater protection for the accused than the Supreme Court ruling in *Moran v Burbine* (1986). This was followed by Michigan (F) (D)[40] Oklahoma (SCF)[41] Massachusetts (SCF)[42] and Indiana (FCOCA)[43]. However, the Indiana and Oklahoma courts did a further analysis and concluded that in the totality of the circumstances, defendant had waived his right to counsel. It was not followed by Arkansas (NF)[44] and Tennessee (SCNF)[45] It was cited by Illinois (COP)[46] and New Hampshire (COP)[47] as an example of a state imposing higher standards than the federal minimum.

The above results could best be described as paltry. Here are glowing examples of a prestigious court exercising independent judgment that should be emulated across the country according the academics. Instead, a few courts chose to follow these rulings while a greater number refused. Additionally, some of the citations were for generic propositions that are found in numerous other cases.

[38] State v. Ross (2001)
[39] Barekman v. State (2009)
[40] People v. Bender (1996)
[41] Dennis v. State (1999)
[42] Commonwealth v. Mavredakis (2000)
[43] Malinski v. State (2003)
[44] Vance v. State (2011)
[45] State v. Stephenson (1994)
[46] Malinski v. State (2003)
[47] State v. Roache (2002)

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California

Here I examine pre-retention election California cases under the New Judicial Federalism or mentioned in the literature as examples of prestigious rulings. The first is *People v. Superior Court* (1975). There, the court ruled that all police questioning must cease even if a request for an attorney is equivocal or ambiguous. The court further concluded that there could be no valid subsequent waiver of Miranda rights after the initial equivocal request.

Three courts, the District of Columbia (FCOCA)[48] and North Carolina (FCOCA)[49] chose to follow this precedent, while Georgia (NFCOCA)[50], Kansas (NFCOCA)[51], Illinois (NFCOCA)[52](NFCOCA)(D)[53](CPNF)[54] and Pennsylvania (SCNF)[55] declined. It should be noted that the case was usually included along with citations from other states, and it does not appear to be a pioneer ruling by California.

Next is the case of *People v. Shuey* (1975). *Shuey* involved the admission of evidence after an admitted illegal entry into the premises which was seized after the police obtained a valid search warrant. The California court held that such evidence was per-se inadmissible:

> Analytically this case can be regarded simply as involving a de facto, inchoate seizure of the person and property of Paul the moment the police began the illegal occupation. Thereafter the obtaining of the warrant could no more operate to "disinfect this conduct" than if the police had actually seized the individual items sought to be suppressed prior to the acquisition of the warrant. (*Shuey* at 222)

[48] Sanders v. United States (1989)
[49] State v. Torres (1992)
[50] Hall v. State (1985)
[51] State v. Newfield (1981)
[52] People v. Evans (1988)
[53] People v Smith (1984)
[54] People v. Krueger (1980)
[55] Commonwealth v. Hubble (1986)

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Oregon (F)[56] and Washington (F)[57] followed this ruling, while Arizona (NFCOCA)[58] New York (NFCOCA) (D)[59] and Colorado (CPNF)[60] declined. Ohio (COP)[61] cited it along with other sources regarding proper appellate procedure.

People v. Brisendine (1975) held that an incarcerated person may not be subjected to a search beyond that required for weapons until the opportunity for bail has been provided or after it is posted. This ruling granted greater protection than the holding in *United States v Robinson* (1973). It also held that the contents of an opaque container cannot, by definition, be in plain view. Alaska (FCOCA)[62] (FCOCA)[63] (SCF) (COP (2)) (F) (FCOCA)[64] (FCOCA)[65] and New Mexico (F (7))[66] were the only two states to follow that precedent. Arizona (NFCOCA)[67] cited the general holding and then elected to admit the evidence. Colorado (FCOCA)[68] cited it for the limitations on a pat down search. It was also cited numerous times in dissenting opinions and a concurrence.

Brisendine also mentioned the generic proposition that states may apply higher criminal procedure standards than the United States Supreme Court. Numerous states cited it for that proposition alone: Massachusetts (FCOCA)[69](SCF)[70](FCOCA)[71](FCOCA)[72], New Hampshire

[56] State v. Hansen (1983)
[57] State v. Bean (1978)
[58] State v. Martin (1984)
[59] People v. Arnau (1982)
[60] People v. Griffin (1986)
[61] Nolan v. Nolan (1984)
[62] Reeves v. State (1979)
[63] Middleton v State (1978)
[64] Zehrung v. State (1977)
[65] Anderson v. State (1976)
[66] People v Paul T. (1999)
[67] State v. Lamb (1977)
[68] People v. Casias (1977)
[69] Commonwealth v. Ortiz (1978)
[70] State v. Fuller (1985)
[71] O'Connor v. Johnson (1979)
[72] State v. Settle (1982)

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(FCOCA)[73], New Jersey (FCOCA)[74](F)[75], New Mexico (F)[76](COP)[77] North Dakota (FCOCA)[78], Oregon (SSF(2))[79], Rhode Island (FCOCA)[80], South Dakota (SSF)[81] and Washington (FCOCA)[82]

People v Disbrow (1976) was a ruling barring statements made without *Miranda* warnings from being used to impeach a suspect who testifies in his own behalf. Aware the United States Supreme court had ruled otherwise, the court stated:

> We…declare that [the decision to the contrary of the United States Supreme Court] is not persuasive in any state prosecution in California…We pause…to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution (*Disbrow* 1976 p. 107).

It should be noted that the *Disbrow* decision was subsequently abrogated by statute. However, bearing in mind that caveat, no sister court cited *Disbrow* for any reason, either positive or negative.

People v. Lines (1975) extended the attorney-client privilege to experts hired by the defense to prepare the case. Alaska (FCOCA)[83] Colorado (SCF (2))[84] (FCOCA) (C)[85] and Maryland (FCOCA)[86] chose to follow this interpretation, while Illinois (SCNF)[87]

[73] State v. Ball (1983)
[74] Right to Choose v. Byrne (1982)
[75] State v. Schmid (1980)
[76] State ex rel. Serna v. Hodges (1976)
[77] State v. Paul T. (1999)
[78] State v. Nordquist (1981)
[79] State v. Caraher (1982)
[80] State v. Benoit (1982)
[81] State v. Opperman (1976)
[82] Federated Publ'ns v. Kurtz (1980)
[83] Houston v. State (1979)
[84] Hutchinson v. People (1987)
[85] Miller v. District Court of Denver (1987)
[86] State v. Pratt (1979)
[87] People v. Knuckles (1994)

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declined. Again, neither this nor the holding that states may impose higher standards were unique to California and were cited along with many similar rulings by sister courts.

People v Triggs (1973) held that people have a reasonable expectation of privacy in public restrooms and overturned a conviction for oral copulation, based in large part on a police officer's clandestine surveillance. No sister state followed or cited it by itself. However, there were some string citations from Montana (SCF)[88], and North Carolina (SCF)[89]. New York (SCF)[90] adopted the criteria but found no reasonable expectation in the facts before it. Three courts, Oklahoma (NFCOCA)[91], Nevada, (NFCOCA)[92] and Oregon (CPNF)[93] declined to adopt such a position.

Michigan

In this section, I examine Michigan Supreme Court cases expanding the rights of criminal suspects which were subsequently overruled. Two examples are *People v White* (1973), and *People v Cooper* (1976).

White involved a defendant who kidnapped, raped, and assaulted a woman. He was convicted of rape in one county, and of kidnapping and felonious assault in a different county. The court held, contrary to *People v Parrow* (1890) that multiple prosecutions, even for crimes with different elements, violated the Double Jeopardy clause if the crimes were part of the same transaction or occurrence, and threw out the rape and felonious assault convictions (Schneider 2008).

[88] State v. Smith (2004)
[89] State v. Tarantino (1988)
[90] People v. Mercado (1986)
[91] Swann v State (1981)
[92] Young v. State (1993)
[93] State v. Holt (1981)

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In *Cooper,* the defendant was accused of bank robbery, attempted murder, and assault with intent to rob being armed. He was acquitted of the bank robbery charge in federal court, but was convicted of all three charges in state court. The court of appeals dismissed the attempted murder charge, and the Supreme Court set aside the other convictions. In a display of the New Judicial Federalism, the court ruled that the Michigan Constitution prohibits a second prosecution arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different. This provided greater protection than the United States Supreme Court case of *Bartkas v Illinois* (1959) which held that subsequent federal or state prosecution for the same charges did not violate the Double Jeopardy clause of the Constitution.

*White*_was overruled by *People v Nutt* (2005), and *People v Davis* (2005) overturned *Cooper*. Arkansas (F)[94] and New Jersey (FCOCA)[95] were the only states to follow the holding in *White*. Otherwise, it was cited in dissent by, North Dakota[96], Pennsylvania[97] Tennessee[98], and Wyoming[99], and in concurring opinions by Massachusetts[100] and West Virginia.[101]. Iowa (CPNF)[102] , Maryland (NFCOCA)[103] and New Hampshire (CPNF) (COP)[104] declined to follow it.

[94] Cozzaglio v. State (1986)
[95] State v. Gregory (1975)
[96] State v. Jacobson (1996)
[97] Commonwealth v Caufman (1995)
[98] State v Black (1975)
[99] Duffy v State (1990)
[100] Commonwealth v. Gallarelli (1977)
[101] State ex rel. Johnson v. Hamilton (1980)
[102] State v. Sunclades (1981)
[103] Cousins v. State (1976)
[104] State v Gosselin (1977)

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The citation history for *Cooper* was intriguing. Only one state court followed it partially. New Hampshire (FCOCA)[105] agreed that the court should look to the interests of the individual as opposed to the sovereign when determining whether multiple prosecutions were barred. On the contrary, several courts specifically refused to follow it such as Arizona (NFCOCA)[106], Connecticut (CPNF)(D)[107], Florida (NFCOCA)[108], Maryland (NFCOCA)[109], Massachusetts (NF)(COP)(COP)[110] Minnesota (NF)[111] New Mexico (NF)[112], Tennessee (NFCOCA)[113] and Utah (CPNF (2)[114]. New Hampshire (NF)[115] also employed the test enunciated in *Cooper* and determined that multiple prosecutions were not barred in that case.

Some examples of cases involving the New Judicial Federalism that did not overrule prior precedent are: *People v Wilder* (1981), *People v Sherbine* (1984) and *People v Sloan* (1995). *People v Wilder* involved a defendant convicted of first degree murder in the perpetration or attempted perpetration of a robbery (first degree felony murder) and armed robbery. The court held that conviction for felony murder and the predicate felony giving rise to felony murder (armed robbery) violated the double jeopardy clause of the Michigan Constitution. Until being overturned by *People v Ream* (2009), *Wilder* was followed by two courts, New Mexico (SCF)[116] and Pennsylvania (F)[117], and not followed by two others-Kansas (CPNF)[118]

[105] State v. Hogg (1978)
[106] State v. Poland (1982)
[107] State v. Moeller (1979)
[108] Booth v. State (1983)
[109] Bailey v. State (1985)
[110] Commonwealth v. Cepulonis
[111] State v. Aune (1985)
[112] State v Rogers (1977)
[113] Lavon v. State (1979)
[114] State v Franklin (1987)
[115] State v. Heinz (1979)
[116] State v. Contreras (1995)
[117] Commonwealth v. Houtz (1981)
[118] State v. Crump (1982)

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and Utah (SCNF)[119]. Vermont (COP)[120] cited a case which quoted *Wilder* and had to do with lesser and greater offenses, and Wyoming (C) [121](D)[122] cited it in concurrence and dissent.

Sherbine and *Sloan,* although involving differing facts, reached the conclusion that in situations where a warrant is issued based upon a violation or violations of statutory affidavit requirements, the evidence must be excluded. Both cases were overruled by *People v Hawkins* (2003) *Hawkins* held that there was nothing in the statute mandating exclusion of evidence for those violations, and that such a determination was better left to the legislature. *Sherbine* was cited in one Texas (D)[123] dissenting opinion and as part of dicta by Vermont (COP)[124]. As far as I could tell, *Sloan* was not cited by any state court for any reason.

In *People v Beavers* (1975) , the court declined to follow *United States v White* (1971) and held that electronic transmission to law enforcement of a conversation between a suspect and an undercover officer, without a warrant or consent, was impermissible. In *White*, the Supreme Court found:

> …no practical difference, for Fourth Amendment purposes, between the risk that one's confidential communications may be disclosed by the person to whom they are made and the risk that the person in whom one confides may be wearing an electronic monitor (Wilkes, 1974, p. 881-882).

The Michigan Court, relying upon Justice Harlan's dissent, saw the matter differently:

> "…we are persuaded by the logic of Justice Harlan which recognizes a significant distinction between assuming the risk that communications directed to one party may subsequently be repeated to others and the simultaneous monitoring of a conversation by the uninvited ear of a third party functioning in cooperation with one of the participants yet unknown to the other (Wilkes, 1974, p. 882 quoting *Beavers*)

[119] State v. McCovey (1990)
[120] State v. Grega (1998)
[121] Cook v. State (1992)
[122] Birr v. State (1987)
[123] Eisenhauer v. State (1988)
[124] State v. Ballou (1987)

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The court went on to conclude that participant monitoring without a search warrant violated the Michigan Constitution. Until overruled by *People v Collins* (1991), Hawaii (CPNF)[125], Massachusetts (NFCOCA)[126], New Hampshire, (CPNF)[127], and Ohio (NF)[128] specifically declined to follow the ruling. Louisiana (FCOCA)[129] followed it as did Alaska (F) (D)[130], but over a strong dissent. Alaska (COP)[131] cited it for the fact that the ruling was not retroactive. California, Minnesota, Montana (COP)[132], Oregon (COP)[133], and South Dakota (COP)[134] cited it with other states for the general proposition that states may grant greater rights under state constitutions than the federal, Colorado (COP)[135] West Virginia (COP)[136] cited it along with other states as an example of a state court not following *White.* Massachusetts (COP)[137] [138] and Wisconsin (COP)[139] relied upon the portion of the opinion that testimony from a participant is not excluded,

People v Taylor (1997) involved the warrantless search of a car and its occupants based exclusively upon the smell of marijuana emanating from the car. In the course of the search, police found weapons and the defendants were convicted of multiple charges. The court held that the smell of marijuana, standing alone, was not a sufficient justification for a search, but could be one element in a "totality of the circumstances" test.

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[125] State v. Lester (1982)
[126] Commonwealth v. Thorpe (1981)
[127] State v. Kilgus (1986)
[128] State v. Geraldo (1981)
[129] State v. Reeves (1982)
[130] State v. Glass (1978)
[131] State v. Glass (1979)
[132] State v. Brackman (1978)
[133] State v. Caraher (1982)
[134] State v. Opperman (1976)
[135] People v. Velasquez (1982)
[136] Blackburn v. State (1982)
[137] Commonwealth v. Blood (1987)
[138] Commonwealth v. Jarabek (1981)
[139] State v. Smith (1976)

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No court followed that part of the ruling. Tennessee (COP)[140] cited it with numerous other courts in a long string cite for the test to follow in determining when a questioning becomes a seizure. That was it. On the other hand, *People v Kazmierczak* (2000), which overruled *Taylor* and held that the smell of marijuana, standing alone, was indeed sufficient justification for a search, was followed by Iowa (SCF)[141], Massachusetts (FCOCA)[142] and Ohio (FCOCA)[143] New York (COP)[144] cited it in an appendix to its opinion cataloging states which cite the case of *Wren v United States* with approval, and Florida (COP)[145] cited it along with numerous other states to show the split of authority regarding whether the smell of marijuana was sufficient probable cause for a search.

People v Jackson (1974), held that a defendant was entitled to counsel at all stages of the judicial process, including at pretrial lineups and photographic identifications (Wilkes, 1974) This holding was contrary to the Supreme Court cases of *Kirby v Illinois* (1972) and *United States v Ash* (1973) which held that there is no federal right to counsel during lineups and photographic identifications (Wilkes, 1974)

The independent state ground was not an interpretation of the Michigan Constitution, per se, but the Michigan Rules of Evidence. The court was concerned that the quality of such identifications may be tainted by unfair procedures, and based the authority for its decision upon the Court's right: "'…to establish rules of evidence applicable to judicial proceedings in Michigan courts'" (Wilkes, 1974, p. 887 quoting *Jackson).*

[140] State v. Daniel (2000)
[141] State v. Watts (2011)
[142] Commonwealth v. Garden (2007)
[143] State v. Moore (2000)
[144] People v. Robinson (2001)
[145] State v Betz (2001)

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Jackson also involved statutory interpretation and the discretion of a trial judge to admit or suppress evidence. The evidentiary statute stated, in relevant part:

> No person shall be disqualified as a witness in any civil or criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility (MCLA 600.2159).

The trial judge construed the language of the statute as requiring him to allow evidence of prior convictions if requested by the prosecutor. The Supreme Court reversed and held that the language: "…may be shown for the purpose of affecting his credibility" granted a judge discretion to exclude the evidence, and that the trial judge erred in failing to recognize that discretion.

The portion of the decision requiring an attorney at photographic arrays or lineups was followed by one court-California (FCOCA)[146]. It was not followed by The District of Columbia (NFCOCA)[147] Massachusetts (CPNF)[148] Rhode Island (NFCOCA) (D (2))[149] and South Dakota (NF)[150] . The holding allowing judicial discretion to exclude evidence of prior convictions was followed by Massachusetts (FCOCA)[151], New Jersey (SCF)[152] and Rhode Island (F)[153] It was not followed by Washington (NFCOCA)[154], and was cited in dissent by New York (D)[155] and Wyoming (D)[156] [157] [158]. Minnesota (COP)[159] cited it along with numerous other states as

[146] People v. Bustamante (1981)
[147] Parks v. United States (1982)
[148] Commonwealth v. Jackson (1995)
[149] State v. Delahunt (1979)
[150] State v. Miller (1976)
[151] Commonwealth v. Maguire (1984)
[152] State v. Sands (1978)
[153] State v. Bennett (1979)
[154] State v. Ruzicka (1977)
[155] People v. Hawkins (1982)
[156] Brown v. State (1991)
[157] Smallwood v. State (1989)
[158] Charpentier v. State (1987)
[159] Friedman v. Comm'r of Pub. Safety (1991)

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examples of states providing greater protection than the federal constitution, and South Dakota (COP)[160] cited it as an example of the only state in the union to require written findings of fact in a criminal bench trial.

These results were unexpected. High citation counts may indicate prestige, but they are not an indicator of influence. Similarly, positive evaluations by the legal community may indicate prestige, but there is no indication of influence at least in the narrow area of the New Judicial Federalism. I discuss possible reasons why in the next section

Explanation for Unexpected Results

Clearly, courts that are prestigious among particular (limited) constituencies were unable to influence other courts to follow them in expanding defendants' rights. There is apparently no such thing as prestige in general – only prestige among certain constituencies, which, even within a legal community, may be highly differentiated.

Institutional factors such as the methods of judicial recruitment may outweigh any prestige effects. Judges vulnerable to the electorate will likely be less willing to extend the rights of criminal suspects, as criminal suspects are not likely to be a popular group with the public. In other words, justices completely insulated from and unaccountable to the electorate have much more leeway to rule without fear of repercussions (Wefing, 1998),

By contrast, "In thirty eight states, Supreme Court justices face some type of popular election" (Mulcahy, 1999, p. 895). That is a total of 76%. Obviously, if a main ingredient of judicial independence is lack of electoral accountability, then the majority of state supreme courts are obviously unsuitable. Those courts would likely have every incentive to avoid making

[160] State v. Means (1978)

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liberal or progressive decisions, or to cite such decisions in a derisive manner. In fact, the late justice Otto Kaus, when referring to judicial elections remarked: "… it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." (Uelman, 1997, p. 1133)

This clearly applies to California. In commenting upon a decision of the California court led by Malcolm Lucas, who succeeded Bird, Blum observes: “Where once the court was unafraid to lead the law into new and untracked areas, it now seems content to leave the leading to others” (Blum 1991 p 48). Similarly: “…the court has also expressed a preference for deferring policy decisions affecting important social issues and commercial relationships to legislative decision making” (Blum, 1991, p. 50).

Additional factors unique to New Jersey which make the court even more invulnerable are the absence of initiative and referendum allowing the people to place issues on the ballot overturning court decisions (Wefing, 1998), and the rare use of constitutional amendment (Wefing, 1998) These are effective tools available to the people of California. As noted by Thompson, decisions of the California court regarding the death penalty, the exclusionary rule, busing as a remedy for segregation were overruled by the people through the initiative process. (Thompson, 1988)

A closely related concept is the phenomena of a public backlash against unpopular decisions. As vividly illustrated by the California experience, if voters are sufficiently upset and aroused by an active campaign, there exists a real possibility that they will “throw the bums out of office.” The additional weapon of initiative and referendum to overturn unpopular decisions, works in tandem with the ballot box to keep a court in check. Again, as

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noted, the people of New Jersey do not have these options. They may become angry with unpopular decisions, but are effectively precluded from doing anything about it.

It seems clear that a court wishing to expand the rights of criminal suspects must also be unaccountable to the electorate. “There is ample empirical and anecdotal evidence demonstrating that justices, ‘regardless of how safe their positions are [,]… often fear voters’” (Devins , 2009, p. 1664). There are also numerous articles and studies showing that state Supreme Court justices do indeed take electoral consequences into account when voting (Devins, 2009).

This invariably means taking a more conservative position to avoid voter retaliation. For example, a Louisiana state supreme court justice : “…stated that he does not dissent in death penalty cases against an opinion of the court to affirm a defendant's conviction and sentence, expressly because of a perceived voter sanction, in spite of his deeply felt personal preferences to the contrary” (Hall, 1987, p. 1120). Similarly: “A Georgia Supreme Court justice acknowledged that the elected justices of that court may have overlooked errors, leaving federal courts to remedy them via habeas corpus, because ‘[federal judges] have lifetime appointments. Let them make the hard decisions.’" (Bright and Keenan, 1995, p. 799)

On the other hand: “On socially divisive issues, politically insulated justices would be more apt to be legal policy entrepreneurs than justices who run substantial risks of either losing reelection or having their decisions overturned by a constitutional amendment or legislation” (Devins and Mankster, 2010, p. 471) However, as noted, only a few state supreme courts share that political insulation and the justices of those courts have good reason to avoid voting policy preferences which go against popular opinion.

However, a factor which may change the equation for the New Jersey Supreme Court is the election of Governor Chris Christie, who made a campaign promise to change it by

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appointing conservative justices (Oks, 2011). Governor Christie specifically stated:"' I'm hopeful that I'll be able to appoint justices who understand that their job is to interpret the law, not make the law, and to interpret the constitution, and not amend the constitution from the bench. That's what the Supreme Court has done over and over again"' (Haddon, 2012). True to his word, he became the first governor of New Jersey to refuse to reappoint a sitting justice since the new constitution was adopted. (Oks, 2011)

Whether Governor Christie intends to follow through on his promise is an open question at this point, as two of his most recent nominees have raised serious concerns among those advocating judicial restraint. For example, Carrie Severino of the Judicial Crisis Network, in referring to nominee Bruce Harris asserts: "There are two possible explanations, neither flattering to Governor Christie. The governor's office was either astoundingly incompetent in vetting Harris, or Christie has quite resoundingly betrayed his campaign promises" (Severino, 2012). Time will tell.

Another possible reason is that the prestige of the federal courts and especially the United States Supreme Court simply exceeds the prestige of even the most prestigious state courts. Additionally, the federal courts' authoritative determination that particular safeguards are sufficient to protect a defendant's legitimate interests will be very weighty where there are both political imperatives and ideological dispositions not to give criminal defendants any more than bare minimum rights.

Finally, it is hardly clear that the prestige of one set of sister courts vis-a-vis another figures substantially in state court decisions, even in more favorable circumstances.

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My findings show the dangers of not clearly defining terms or improperly conflating them. High citation counts and prestige among the legal community did not translate into influence. (Courts actually following the cases) It also shows the difficulties with relying upon a raw citation count. Though tedious and time-consuming, the only to know for sure what citations mean is to actually read the case employing the citation to determine how and why. Any future research should focus more upon the qualitative as opposed to quantitative aspects.

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Appendix A

Tables

Table 1

Symbols used

Action	**Symbol**
Followed	F
Not Followed	NF
String Cite Followed	SCF
String Cite Not Followed	SCNF
Cited by Party-Followed	CPF
Cited by Party-Not Followed	CPNF
Followed-Cited with Other Citations or Authorities	FCOCA
Dissent	D
Concurrence	C
Cited for Other Purpose	COP
Counsel	Counsel
Not Followed-Cited with Other Citations or Authorities	NFCOCA

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Table 2 Positive normative evaluations of the New Jersey, Michigan and California Supreme Courts finding prestige.

Study	Topic Addressed	Summary Quote
Glick 1991	Innovations in "right to die" cases	It probably is not a coincidence that supreme courts in New Jersey and Massachusetts produced distinctive policies early in the process-especially New Jersey, which appears on every list of innovative or prestigious courts" (Glick, 1991, p. 111).
Tarr and Porter 1998	Comparison of various state supreme courts	Since World War II the New Jersey Supreme Court has assumed a role of leadership in the development of legal doctrine, thereby earning itself a national reputation for activism and liberal reformism (Tarr & Porter, 1998, p. 184); …the New Jersey Supreme Court seems to exemplify …the activist 'lighthouse' courts that have assumed a leadership role in national legal development (Tarr & Porter, 1998, p. 268)
Wefing 1997	Review of New Jersey Supreme Court cases	In the last fifty years, the New Jersey Supreme Court has attained a reputation as one of the leading state supreme courts in the United States. This reputation has been noted by numerous scholar and authors… (Wefing, 1997, p.701); Additionally, the court has enthusiastically embraced the New Federalism movement. As the United States Supreme Court has become more conservative in recent years, many state courts have chosen to use their own constitutions to grant greater rights than given under the United States Constitution. The New Jersey Supreme Court has regularly done this. The New Jersey Supreme Court has granted greater rights to defendants under the New Jersey search and seizure provision than the United States Supreme Court has given under the Fourth Amendment (Wefing, 1997, p. 705)

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Russello 2002	Speculation about future trends for New Jersey Court	The New Jersey Supreme Court has built a reputation as an intellectually rigorous and forcefully progressive state supreme court (Russello, 2002, p. 655); He further asserts that the court from 1979-1996 under the leadership of Chief Justice Robert Wilentz was a stellar example of the "new federalism" urged by Justice Brennan (Russello, 2002).
Oks 2011	Discussion of future trends for New Jersey Court	"…since 1947, the New Jersey Supreme Court has served as a model for the nation…" (Oks, 2011, p.132 quoting Etish 2010); She additionally refers to: "The Court's national reputation as a judicial leader…" (Oks, 2011, p. 132).
Hagan 1988	Examination of activism on state supreme courts	California, New Jersey, and Michigan have been the subject of extensive analysis. They are also regarded as the most activist and innovative state supreme courts in the nation (Hagan, 1988, p. 97).
Parker 1996	Examination of Michigan Supreme Court jurisprudence	The Michigan Supreme Court enjoyed a reputation for activism and innovation in recent decades. The Court took an active role in the development of civil liberties issues and tort law innovations" (Parker, 1996, p. 345).
Schneider 2008	Examination of Michigan Supreme Court criminal law/procedure	It (the Michigan Supreme Court) was apparently undistinguished until the 1970's when it gained a reputation for activism (Schneider, 2008); It was during this period that the court overturned precedents in the areas of criminal law, torts, and contracts, granting greater protections for suspects, broader liability for alleged tortfeasors, and allowing the court to determine whether a contractual clause was "reasonable"

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Porter 1978	Discussion of New Judicial Federalism after the Warren Court	The California court, considered to be the most prestigious in the nation has a history of civil rights activism" (Porter, 1978, p 57).
Blum 1991	Discussion of new trends in California court opinions after the Bird Court	Long before the controversial appointment of Bird in 1977, the court had acquired a reputation as the nation's premier state court, largely on the basis of its innovative, scholarly, and bold leadership in the fields of constitutional, criminal, and tort law (Blum, 1991, p. 48); The court's reputation for greatness dates back to 1940 … (Blum, 1991, p. 49); It was considered to be the premier state supreme court basically because of all the innovative opinions that would come from California" (Blum, 1991, p. 50)

Table 3 Negative Normative Evaluations of the New Jersey, Michigan and California Supreme Courts inferring or concluding a loss of prestige.

Study	Topic Addressed	Summary Quote
Blum 1991		…the California Court has been dislodged as the most ""prestigious" state court by the New Jersey Supreme Court, long known for its innovative record in such areas as exclusionary zoning and school finance" (Blum, 1991, p. 49)
Pease 1994	Survey of California court opinions in criminal law, among other areas	Even before the appointment of Chief Justice Rose Bird in1977, 'the court had acquired the reputation as the nation's premier state court, largely on the basis of its innovative, scholarly and bold leadership in the fields of constitutional, criminal and tort law'. Now with Chief Justice Lucas at the helm since Bird was unseated in 1986, the court is entrenched in its conservative nature and its mainstream posture (Pease, 1994, p. 109-110)
Carbone 1998	Speculation about future trends for New Jersey Court	Recently…the New Jersey Supreme Court has appeared to depart from the liberalism the court once embraced (Carbone, 1999, p. 363). Further: "Given these appointments of moderate jurists, New Jersey's legacy of liberalism in the

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		sphere of privacy protection and criminal procedure appears to be coming to a close" (Cabone, 1999, p. 363)
Mulcahy 2001	Discussion of how to transform California court	Although the California Supreme Court remains sound in stature, clearly the progressive era of judicial policymaking, activist decisions, and *national prominence* is over (Mulcahy 2001, p. 109-110 emphasis added)
Russello 2002	Speculation about future trends for New Jersey Court	This rapid change in the Court's membership may have lasting effects on the Court's jurisprudence, which may in turn affect other state courts for which the New Jersey Supreme Court has been a model (Russello, 2002, p. 567)
Kelso 2010	Tribute to Judge Ron George	During his 19-year tenure on the Supreme Court, 14 years as its chief, Ron George successfully re-established the preeminence of California's highest court as one of the leading state courts in the country. The court's national reputation and prominence had taken a steep dive in the late 1970s and early 1980s, and the failure of three justices to win their retention elections in 1986 further damaged the court's prestige and credibility. In the aftermath of the 1986 election debacle, the court swung hard to the right (Kelso, 2010)
Delaney 2001	Discussion of Michigan court cases overruling prior precedent.	Author accuses the court of having a conservative political agenda when it overruled numerous precedents as opposed to a fidelity to "textualism" or "structutalism" (Delaney, 2001)
Serra 2004	Discussion of Michigan court cases overruling prior precedent.	"…the transparent efforts of the Michigan Supreme Court to reach conservative results that limit and weaken human rights protection, lend strong credence to the argument that the court is engaging in unprecedented activism toward the end of reducing civil rights protection and increasing governmental power over individual liberty" (Serra, 2004, p. 956)
Miller 2006	Discussion of Michigan Court cases overruling prior precedent.	Author suggests that Michigan Court was exercising "'raw power'" and engaging in '"judicial politics" in overturning prior decisions

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Table 4 Empirical evaluations of prestige

Article	Methodology	Conclusions CA	MI	NJ
Mott	Count of citations by sister courts 1920	4th	7th	10th
Caldiera	Count of citations by sister courts 1975	1st	10th	3rd
Dear and Jessen	Count of cases followed by sister courts per Shepard's citations	California number one in the country.		

Table 5

Summary of Cases Cited by Sister Courts, 1975

Totals

Courts	F	NF	Other	Totals
California	15%	5%	80%	
	114	37	611	764
Michigan	25%	8%	70%	
	59	20	160	239
New Jersey	22%	7%	71%	
	58	18	188	264

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Table 6

Summary of Cases Cited by Sister Courts, 1975

Criminal Law and Procedure as a percentage of total cases cited

Courts	F	NF	Other	Totals
California	8%	4%	31%	42%
	63	29	244	336
Michigan	12%	5%	31%	46%
	27	11	73	111
New Jersey	5%	3%	20%	28%
	12	9	54	75

Table 7

Summary of Cases Cited by Sister Courts, 1975

Criminal Law and Procedure broken down by category

Courts	F	NF	Other	Totals
California	19%	9%	72%	
	63	29	244	336
Michigan	24%	10%	66%	
	27	11	73	111
New Jersey	16%	12%	72%	
	12	9	54	75

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Table 8

Summary of Cases Cited by Sister Courts, 1998

Totals

Courts	F	NF	Other	Totals
California	23% 40	9% 15	68% 120	175
Michigan	39% 20	6% 3	55% 28	51
New Jersey	28% 25	9% 8	63% 33	90

Table 9

Summary of Cases Cited by Sister Courts, 1998

Criminal Law and Procedure as a percentage of total cases cited

Courts	F	NF	Other	Totals
California	4% 7	1% 2	37% 28	21% 37
Michigan	22% 11	2% 1	10% 5	33% 17
New Jersey	2% 2	2% 2	8% 7	12% 11

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Table 10

Summary of Cases Cited by Sister Courts, 1998

Criminal Law and Procedure broken down by category

Courts	F	NF	Other	Totals
California	19%	5%	76%	
	7	2	28	37
Michigan	65%	6%	29%	
	27	1	5	17
New Jersey	18%	18%	64%	
	2	2	7	11

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Appendix B

Breakdown by Individual State

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California 1975 Totals

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	CA Law		
Alabama	0	0	0	0	0	1	0	2	0	1	0	0	4	0	1%	
Alaska	15	5	3	1	0	4	28	5	2	12	0	0	75	6	10%	
Arizona	3	0	1	0	0	2	10	3	0	2	0	1	22		3%	
Arkansas	0	0	1	0	0	0	0	0	0	1	0	0	2		0%	
California	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Colorado	3	0	10	0	0	5	6	2	1	2	0	1	30		4%	
Connectic	0	2	3	0	0	1	3	1	1	0	0	0	11		1%	
Delaware	2	2	0	0	0	0	1	0	0	0	0	0	5		1%	
DC	3	2	2	1	0	1	3	0	0	5	0	0	17		2%	
Florida	6	0	1	1	0	0	1	3	0	1	0	0	13		2%	
Georgia	0	0	0	0	0	0	0	0	0	0	0	1	1		0%	
Hawaii	0	1	4	0	0	4	4	0	0	1	0	0	14		2%	
Iowa	5	2	3	0	0	1	6	1	0	1	0	0	19		2%	
Idaho	5	0	5	0	0	2	7	10	5	8	0	0	42		5%	
Illinois	3	0	2	2	0	0	5	3	1	2	0	0	18		2%	
Indiana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Kansas	2	1	0	0	0	2	3	0	0	0	0	1	9		1%	
Kentucky	0	0	1	0	0	0	0	0	0	0	0	0	1		0%	
Louisiana	2	1	0	0	0	0	2	3	1	0	0	0	9		1%	
Maryland	0	3	5	0	0	0	6	2	0	1	0	2	19		2%	
Massachu	2	1	4	0	0	2	7	3	0	2	0	0	21		3%	
Maine	0	1	1	0	0	0	5	0	0	5	0	0	12		2%	
Michigan	0	1	1	0	0	0	5	8	3	1	0	0	19		2%	
Minnesot	4	0	1	1	0	3	1	2	1	0	0	1	14		2%	
Mississipp	0	0	1	0	0	1	1	2	2	2	0	0	9		1%	
Missouri	1	1	0	0	0	0	0	4	1	2	0	0	9		1%	
Montana	6	0	1	0	0	8	6	7	0	1	0	1	30		4%	
Nebraska	1	1	1	0	0	1	4	0	3	1	0	0	12		2%	
Nevada	2	0	1	0	0	2	1	0	0	1	0	0	7		1%	
New Ham	5	1	0	0	0	0	7	3	0	1	0	0	17		2%	
New Jerse	4	2	3	1	0	1	4	2	2	5	0	2	26		3%	
New Mexi	4	0	3	0	0	2	5	1	0	4	0	0	19		2%	
New York	0	2	4	1	0	0	0	6	0	0	0	0	13		2%	
North Car	1	0	2	0	0	0	7	0	0	0	0	0	10		1%	
North Dak	2	0	4	0	0	0	4	0	2	4	0	0	16		2%	
Ohio	1	0	0	0	0	1	4	3	0	0	0	1	10		1%	
Oklahoma	0	2	0	0	0	0	1	0	0	2	0	0	5		1%	
Oregon	3	1	2	1	2	0	1	0	2	0	0	1	13		2%	
Pennsylva	3	0	0	1	0	0	3	2	0	1	0	0	10		1%	
Rhode Isl	0	0	2	0	0	2	3	0	0	1	0	2	10		1%	
South Car	0	1	2	1	0	0	1	0	0	1	1	0	7		1%	
South Dak	4	0	3	0	0	0	4	4	0	0	0	1	16		2%	
Tennesse	1	1	0	0	0	0	0	0	0	0	0	1	3		0%	
Texas	0	0	3	1	0	2	4	0	0	1	0	0	11		1%	
Utah	4	0	6	0	0	5	10	4	0	4	0	0	33		4%	
Vermont	2	0	1	0	0	0	11	0	0	2	0	0	16		2%	
Virginia	0	0	1	0	0	0	0	0	0	0	0	0	1		0%	
Washingt	4	0	0	0	0	2	5	6	0	5	0	0	22		3%	
West Virg	5	0	9	0	0	0	7	2	0	2	0	1	26		3%	
Wisconsir	3	1	2	0	0	0	3	3	0	3	0	0	15		2%	
Wyoming	3	2	2	0	0	0	2	6	2	4	0	0	21		3%	
Totals	114	37	101	12	2	55	201	103	29	92	1	17	764			
% Total	15%	5%	13%	2%	0%	7%	26%	13%	4%	12%	0%	2%				

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Michigan 1975 Totals

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	MI Law	
Alabama	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
Alaska	3	2	0	0	0	0	0	1	0	0	0	0	6		3%
Arizona	1	0	0	0	0	2	0	0	0	0	0	0	3		1%
Arkansas	0	0	1	0	0	0	0	1	0	0	0	0	2		1%
California	0	0	2	0	0	0	1	1	0	0	0	0	4		2%
Colorado	3	4	4	0	0	2	1	2	1	0	0	0	17		7%
Connectic	5	1	2	1	0	2	1	1	0	0	0	0	13		5%
Delaware	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
DC	0	0	0	1	0	0	1	0	0	0	0	0	2		1%
Florida	0	0	2	0	0	0	0	0	0	0	0	0	2		1%
Georgia	0	0	0	0	0	0	1	0	0	0	0	0	1		0%
Hawaii	5	1	1	0	0	1	1	2	0	0	0	0	11		5%
Iowa	1	0	3	0	0	0	1	5	0	0	0	1	11		5%
Idaho	0	0	1	1	0	1	0	3	0	0	0	0	6		3%
Illinois	2	0	0	0	0	0	1	2	0	0	0	1	6		3%
Indiana	0	0	2	0	0	0	0	1	0	0	0	0	3		1%
Kansas	0	2	0	0	0	0	1	0	0	0	0	0	3		1%
Kentucky	1	0	1	0	0	0	0	1	0	0	0	0	3		1%
Louisiana	1	0	1	0	0	0	0	1	0	0	0	0	3		5%
Massachu	2	2	2	0	0	4	1	0	0	0	0	0	11		2%
Maryland	2	0	3	2	0	0	1	1	0	0	0	2	11		0%
Maine	2	0	2	1	0	0	0	0	0	0	0	0	5		5%
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Minnesot	6	2	1	0	0	1	1	0	0	0	0	0	11		1%
Mississipp	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
Missouri	0	0	0	0	0	0	1	1	0	0	0	0	2		2%
Montana	0	0	1	0	0	0	0	0	0	0	0	0	1		1%
Nebraska	2	0	0	0	0	0	0	1	1	0	0	0	4		3%
Nevada	0	0	0	0	1	0	0	1	0	0	0	0	2		0%
NewHamp	2	1	0	0	0	2	1	0	0	0	0	0	6		3%
New Jerse	0	0	0	0	0	0	0	0	0	0	0	0	0		3%
New Mex	3	0	1	0	0	0	1	3	0	0	0	0	8		1%
New York	0	0	1	0	0	1	1	0	1	1	0	1	6		4%
North Car	2	0	0	0	0	0	1	0	0	0	0	0	3		2%
North Dak	3	0	1	1	1	0	0	2	1	0	0	0	9		1%
Ohio	1	2	0	0	0	0	2	0	0	0	0	0	5		1%
Oklahoma	0	0	0	0	0	0	1	1	0	0	0	0	2		1%
Oregon	0	0	1	0	0	0	1	1	0	0	0	0	3		0%
Pennsylva	0	0	2	0	0	0	1	0	0	0	0	0	3		1%
Rhode Isla	0	0	0	0	0	0	0	0	0	0	0	0	0		5%
South Car	0	0	1	0	0	0	1	0	0	0	0	0	2		2%
South Dak	4	0	4	0	0	0	1	3	0	0	0	0	12		1%
Tennesse	0	0	3	0	0	0	1	0	0	0	0	0	4		3%
Texas	0	0	1	0	0	0	0	1	0	0	0	0	2		0%
Utah	2	0	2	0	0	1	1	0	0	0	0	0	6		1%
Vermont	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
Virginia	0	0	1	0	1	0	0	0	0	0	0	0	2		4%
Washingt	1	0	0	0	0	0	0	0	0	0	0	0	1		0%
West Virg	2	1	3	0	0	0	2	1	0	0	0	0	9		4%
Wisconsin	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Wyoming	3	2	0	1	0	0	1	3	0	0	0	0	10		0%
Totals	59	20	53	8	3	17	29	40	4	1	0	5	239		
% Total	25%	8%	22%	3%	1%	7%	12%	17%	2%	0%	0%	2%			

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New Jersey 1975 Totals

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	NJ Law Applies	
Alabama	1	0	1	0	0	0	0	1	0	2	0	1	6		2%
Alaska	0	3	2	2	0	1	1	0	1	4	0	0	14		5%
Arizona	0	0	0	0	0	0	5	0	0	1	0	0	6		2%
Arkansas	3	0	0	0	0	0	0	1	0	0	0	0	4		2%
California	1	0	0	0	0	0	5	1	0	0	0	0	7		3%
Colorado	1	0	3	0	0	1	1	3	0	0	0	0	9		3%
Connectic	1	0	4	1	0	0	3	0	0	1	0	0	10		4%
Delaware	2	0	2	0	1	0	1	0	0	1	0	0	7		3%
DC	6	0	2	0	0	0	1	4	0	0	0	0	13		5%
Florida	0	0	5	0	0	0	0	0	0	0	0	0	5		2%
Georgia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Hawaii	0	0	1	0	0	1	0	0	0	0	0	0	2		1%
Iowa	3	1	2	2	0	0	1	0		0	0	0	9		3%
Idaho	0	0	1	0	0	0	2	2	0	0	0	0	5		2%
Illinois	0	0	3	0	0	1	0	3	0	0	0	0	7		3%
Indiana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Kansas	1	0	0	0	0	0	1	0	0	0	0	0	2		1%
Kentucky	1	0	0	0	0	1	0	0	1	0	0	0	3		1%
louisiana	0	1	0	0	0	0	0	0	0	1	0	0	2		1%
Massachu	0	1	0	0	0	0	0	0	0	0	0	0	1		0%
Maryland	1	4	6	1	0	1	1	0	0	2	0	0	16		6%
Maine	3	0	3	0	0	0	0	0	0	0	0	0	6		2%
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Minnesot	2	0	2	1	0	1	2	1	1	0	0	0	10		4%
Mississipp	0	0	0	0	0	0	0	1	0	0	0	0	1		0%
Missouri	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Montana	0	0	0	0	0	0	1	0	0	0	0	0	1		0%
Nebraska	0	0	0	0	0	0	0	1	0	0	0	0	1		0%
Nevada	1	0	1	0	0	0	0	0	0	0	0	0	2		1%
New Ham	2	2	2	0	2	2	0	0	0	2	0	0	12		5%
New Jerse	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
New Mexi	0	1	0	0	0	0	0	0	0	1	0	0	2		1%
New York	0	0	0	0	0	0	1	0	0	0	0	0	1		0%
North Car	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
North Dak	0	0	1	0	0	1	1	1	0	0	0	0	4		2%
Ohio	1	0	2	0	0	0	1	2	0	1	0	0	7		3%
Oklahoma	2	0	1	0	0	0	1	0	0	0	0	0	4		2%
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Pennsylva	6	1	2	0	0	0	0	1	1	1	0	1	13		5%
Rhode Isla	0	1	0	0	0	0	0	0	0	2	0	0	3		1%
South Car	1	0	0	0	0	0	0	0	0	0	0	0	1		0%
South Dak	2	1	2	0	0	0	4	1	0	0	0	0	10		4%
Tennesse	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Texas	0	0	1	1	0	0	0	0	0	0	0	0	2		1%
Utah	2	0	2	0	0	0	1	0	1	1	0	0	7		3%
Vermont	1	0	1	0	0	1	1	0	0	3	0	0	7		3%
Virginia	1	0	0	0	0	0	0	0	0	0	0	0	1		0%
Washingt	0	0	1	0	0	0	1	4	0	0	0	0	6		2%
West Virg	10	0	3	1	0	2	1	0	0	5	0	0	22		8%
Wisconsir	0	1	0	0	0	0	1	2	0	2	0	0	6		2%
Wyoming	3	1	0	0	0	0	1	0	0	1	0	0	0		0%
Totals	58	18	57	9	3	13	39	29	5	31	0	2	264		
% Total	22%	7%	22%	3%	1%	5%	15%	11%	2%	12%	0%	1%			

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California 1975 Criminal Law and Procedure

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	CA Law		
Alabama	0	0	0	0	0	1	0	2	0	1	0	0	4	0	1%	
Alaska	15	5	3	1	0	4	28	5	2	12	0	0	75	6	10%	
Arizona	3	0	1	0	0	2	10	3	0	2	0	1	22		3%	
Arkansas	0	0	1	0	0	0	0	0	0	1	0	0	2		0%	
California	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Colorado	3	0	10	0	0	5	6	2	1	2	0	1	30		4%	
Connectic	0	2	3	0	0	1	3	1	1	0	0	0	11		1%	
Delaware	2	2	0	0	0	0	1	0	0	0	0	0	5		1%	
DC	3	2	2	1	0	1	3	0	0	5	0	0	17		2%	
Florida	6	0	1	1	0	0	1	3	0	1	0	0	13		2%	
Georgia	0	0	0	0	0	0	0	0	0	0	0	1	1		0%	
Hawaii	0	1	4	0	0	4	4	0	0	1	0	0	14		2%	
Iowa	5	2	3	0	0	1	6	1	0	1	0	0	19		2%	
Idaho	5	0	5	0	0	2	7	10	5	8	0	0	42		5%	
Illinois	3	0	2	2	0	0	5	3	1	2	0	0	18		2%	
Indiana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Kansas	2	1	0	0	0	2	3	0	0	0	0	1	9		1%	
Kentucky	0	0	1	0	0	0	0	0	0	0	0	0	1		0%	
Louisiana	2	1	0	0	0	0	2	3	1	0	0	0	9		1%	
Maryland	0	3	5	0	0	0	6	2	0	1	0	2	19		2%	
Massachu	2	1	4	0	0	2	7	3	0	2	0	0	21		3%	
Maine	0	1	1	0	0	0	5	0	0	5	0	0	12		2%	
Michigan	0	1	1	0	0	0	5	8	3	1	0	0	19		2%	
Minnesot	4	0	1	1	0	3	1	2	1	0	0	1	14		2%	
Mississipp	0	0	1	0	0	1	1	2	2	2	0	0	9		1%	
Missouri	1	1	0	0	0	0	0	4	1	2	0	0	9		1%	
Montana	6	0	1	0	0	8	6	7	0	1	0	1	30		4%	
Nebraska	1	1	1	0	0	1	4	0	3	1	0	0	12		2%	
Nevada	2	0	1	0	0	2	1	0	0	1	0	0	7		1%	
New Ham	5	1	0	0	0	0	7	3	0	1	0	0	17		2%	
New Jerse	4	2	3	1	0	1	4	2	2	5	0	2	26		3%	
New Mexi	4	0	3	0	0	2	5	1	0	4	0	0	19		2%	
New York	0	2	4	1	0	0	0	6	0	0	0	0	13		2%	
North Car	1	0	2	0	0	0	7	0	0	0	0	0	10		1%	
North Dak	2	0	4	0	0	0	4	0	2	4	0	0	16		2%	
Ohio	1	0	0	0	0	1	4	3	0	0	0	1	10		1%	
Oklahoma	0	2	0	0	0	0	1	0	0	2	0	0	5		1%	
Oregon	3	1	2	1	2	0	1	0	2	0	0	1	13		2%	
Pennsylva	3	0	0	1	0	0	3	2	0	1	0	0	10		1%	
Rhode Isl	0	0	2	0	0	2	3	0	0	1	0	2	10		1%	
South Car	0	1	2	1	0	0	1	0	0	1	1	0	7		1%	
South Dak	4	0	3	0	0	0	4	4	0	0	0	1	16		2%	
Tennesse	1	1	0	0	0	0	0	0	0	0	0	1	3		0%	
Texas	0	0	3	1	0	2	4	0	0	1	0	0	11		1%	
Utah	4	0	6	0	0	5	10	4	0	4	0	0	33		4%	
Vermont	2	0	1	0	0	0	11	0	0	2	0	0	16		2%	
Virginia	0	0	1	0	0	0	0	0	0	0	0	0	1		0%	
Washingt	4	0	0	0	0	2	5	6	0	5	0	0	22		3%	
West Virg	5	0	9	0	0	0	7	2	0	2	0	1	26		3%	
Wisconsir	3	1	2	0	0	0	3	3	0	3	0	0	15		2%	
Wyoming	3	2	2	0	0	0	2	6	2	4	0	0	21		3%	
Totals	114	37	101	12	2	55	201	103	29	92	1	17	764			
	15%	5%	13%	2%	0%	7%	26%	13%	4%	12%	0%	2%				
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA				
CLP/CON	63	29	52	9	2	22	88	9	4	42	0	16	336			
% TOTAL	8%	4%	7%	1%	0%	3%	12%	8%	1%	5%	0%	2%	44%			
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA				
CLP/CON	63	29	52	9	2	22	88	9	4	42	0	16	336			
% CLP	19%	9%	15%	3%	1%	7%	26%	19%	1%	13%	0%	5%	100%			

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Michigan 1975 Criminal Law and Procedure

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	MI Law	
Alabama	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
Alaska	3	2	0	0	0	0	0	1	0	0	0	0	6		3%
Arizona	1	0	0	0	0	2	0	0	0	0	0	0	3		1%
Arkansas	0	0	1	0	0	0	0	1	0	0	0	0	2		1%
California	0	0	2	0	0	0	1	1	0	0	0	0	4		2%
Colorado	3	4	4	0	0	2	1	2	1	0	0	0	17		7%
Connectic	5	1	2	1	0	2	1	1	0	0	0	0	13		6%
Delaware	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
DC	0	0	0	1	0	0	1	0	0	0	0	0	2		1%
Florida	0	0	2	0	0	0	0	0	0	0	0	0	2		1%
Georgia	0	0	0	0	0	0	1	0	0	0	0	0	1		0%
Hawaii	5	1	1	0	0	1	1	2	0	0	0	0	11		5%
Iowa	1	0	3	0	0	0	1	5	0	0	0	1	11		5%
Idaho	0	0	1	1	0	1	0	3	0	0	0	0	6		3%
Illinois	2	0	0	0	0	0	1	2	0	0	0	1	6		3%
Indiana	0	0	2	0	0	0	0	1	0	0	0	0	3		1%
Kansas	0	2	0	0	0	0	1	0	0	0	0	0	3		1%
Kentucky	1	0	1	0	0	0	0	1	0	0	0	0	3		1%
Louisiana	1	0	1	0	0	0	0	1	0	0	0	0	3		5%
Massachu	2	2	2	0	0	4	1	0	0	0	0	0	11		2%
Maryland	2	0	3	2	0	0	1	1	0	0	0	2	11		0%
Maine	2	0	2	1	0	0	0	0	0	0	0	0	5		5%
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Minnesot	6	2	1	0	0	1	1	0	0	0	0	0	11		1%
Mississipp	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
Missouri	0	0	0	0	0	0	1	1	0	0	0	0	2		2%
Montana	0	0	1	0	0	0	0	0	0	0	0	0	1		1%
Nebraska	2	0	0	0	0	0	0	1	1	0	0	0	4		3%
Nevada	0	0	0	0	1	0	0	1	0	0	0	0	2		0%
NewHamp	2	1	0	0	0	2	1	0	0	0	0	0	6		2%
New Jerse	0	0	0	0	0	0	0	0	0	0	0	0	0		1%
New Mexi	2	0	1	0	0	0	0	1	0	0	0	0	4		1%
New York	0	0	1	0	0	0	0	0	1	0	0	0	2		4%
North Car	1	0	0	0	0	0	1	0	0	0	0	0	2		2%
North Dak	3	0	1	1	1	0	0	2	1	0	0	0	9		1%
Ohio	1	2	0	0	0	0	2	0	0	0	0	0	5		1%
Oklahoma	0	0	0	0	0	0	1	1	0	0	0	0	2		1%
Oregon	0	0	1	0	0	0	1	1	0	0	0	0	3		0%
Pennsylva	0	0	2	0	0	0	1	0	0	0	0	0	3		1%
Rhode Isl	0	0	0	0	0	0	0	0	0	0	0	0	0		5%
South Car	0	0	1	0	0	0	1	0	0	0	0	0	2		2%
South Dak	4	0	4	0	0	0	1	3	0	0	0	0	12		1%
Tennesse	0	0	3	0	0	0	1	0	0	0	0	0	4		3%
Texas	0	0	1	0	0	0	0	1	0	0	0	0	2		0%
Utah	2	0	2	0	0	1	1	0	0	0	0	0	6		1%
Vermont	0	0	1	0	0	0	0	0	0	0	0	0	1		0%
Virginia	0	0	1	0	1	0	0	0	0	0	0	0	2		4%
Washingt	1	0	0	0	0	0	0	0	0	0	0	0	1		0%
West Virg	2	1	3	0	0	0	2	1	0	0	0	0	9		4%
Wisconsir	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Wyoming	3	2	0	1	0	0	1	3	0	0	0	0	10		0%
Totals	57	20	53	8	3	16	27	38	4	0	0	4	230		
	25%	9%	23%	3%	1%	7%	12%	17%	2%	0%	0%	2%			
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP/CON	27	11	29	1	1	7	17	7	1	8	0	2	111		
% TOTAL	12%	5%	13%	0%	0%	3%	7%	3%	0%	3%	0%	1%	48%		
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP/CON	27	11	29	1	1	7	17	7	1	8	0	2	111		
% CLP	24%	10%	26%	1%	1%	6%	15%	6%	1%	7%	0%	2%	100%		

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New Jersey 1975 Criminal Law and Procedure

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	NJ Law Applies	
Alabama	1	0	1	0	0	0	0	1	0	2	0	1	6	2%	
Alaska	0	3	2	2	0	1	1	0	1	4	0	0	14	5%	
Arizona	0	0	0	0	0	0	5	0	0	1	0	0	6	2%	
Arkansas	3	0	0	0	0	0	0	1	0	0	0	0	4	2%	
California	1	0	0	0	0	0	5	1	0	0	0	0	7	3%	
Colorado	1	0	3	0	0	1	1	3	0	0	0	0	9	3%	
Connectic	1	0	4	1	0	0	3	0	0	1	0	0	10	4%	
Delaware	2	0	2	0	1	0	1	0	0	1	0	0	7	3%	
DC	6	0	2	0	0	0	1	4	0	0	0	0	13	5%	
Florida	0	0	5	0	0	0	0	0	0	0	0	0	5	2%	
Georgia	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Hawaii	0	0	1	0	0	1	0	0	0	0	0	0	2	1%	
Iowa	3	1	2	2	0	0	1	0		0	0	0	9	3%	
Idaho	0	0	1	0	0	0	2	2	0	0	0	0	5	2%	
Illinois	0	0	3	0	0	1	0	3	0	0	0	0	7	3%	
Indiana	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Kansas	1	0	0	0	0	0	1	0	0	0	0	0	2	1%	
Kentucky	1	0	0	0	0	1	0	0	1	0	0	0	3		
louisiana	0	1	0	0	0	0	0	0	0	1	0	0	2	1%	
Massachu	0	1	0	0	0	0	0	0	0	0	0	0	1	0%	
Maryland	1	4	6	1	0	1	1	0	0	2	0	0	16	6%	
Maine	3	0	3	0	0	0	0	0	0	0	0	0	6	2%	
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Minnesot	2	0	2	1	0	1	2	1	1	0	0	0	10	4%	
Mississipp	0	0	0	0	0	0	0	1	0	0	0	0	1	0%	
Missouri	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Montana	0	0	0	0	0	0	1	0	0	0	0	0	1	0%	
Nebraska	0	0	0	0	0	0	0	1	0	0	0	0	1	0%	
Nevada	1	0	1	0	0	0	0	0	0	0	0	0	2	1%	
New Ham	2	2	2	0	2	2	0	0	0	2	0	0	12	5%	
New Jerse	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
New Mexi	0	1	0	0	0	0	0	0	0	1	0	0	2	1%	
New York	0	0	0	0	0	0	1	0	0	0	0	0	1	0%	
North Car	0	0	1	0	0	0	0	0	0	0	0	0	1	0%	
North Dak	0	0	1	0	0	1	1	1	0	0	0	0	4	2%	
Ohio	1	0	2	0	0	0	1	2	0	1	0	0	7	3%	
Oklahoma	2	0	1	0	0	0	1	0	0	0	0	0	4	2%	
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Pennsylva	6	1	2	0	0	0	0	1	1	1	0	1	13	5%	
Rhode Isl	0	1	0	0	0	0	0	0	0	2	0	0	3	1%	
South Car	1	0	0	0	0	0	0	0	0	0	0	0	1	0%	
South Dak	2	1	2	0	0	0	4	1	0	0	0	0	10	4%	
Tennesse	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Texas	0	0	1	1	0	0	0	0	0	0	0	0	2	1%	
Utah	2	0	2	0	0	0	1	0	1	1	0	0	7	3%	
Vermont	1	0	1	0	0	1	1	0	0	3	0	0	7	3%	
Virginia	1	0	0	0	0	0	0	0	0	0	0	0	1	0%	
Washingt	0	0	1	0	0	0	1	4	0	0	0	0	6	2%	
West Virg	10	0	3	1	0	2	1	0	0	5	0	0	22	8%	
Wisconsir	0	1	0	0	0	0	1	2	0	2	0	0	6	2%	
Wyoming	3	1	0	0	0	0	1	0	0	1	0	0	0	0%	
Totals	58	18	57	9	3	13	39	29	5	31	0	2	264		
	22%	7%	22%	3%	1%	5%	15%	11%	2%	12%	0%	1%			
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP/CON	12	9	19	2	0	6	15	1	0	10	0	1	75		
% TOTAL	5%	7%	7%	1%	0%	2%	6%	0%	0%	4%	0%	0%	28%		
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP/CON	12	9	19	2	0	6	15	1	0	10	0	1	75		
% CLP	16%	12%	25%	3%	0%	8%	20%	1%	0%	13%	0%	1%	100%		

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California 1998 Totals

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	Ca law		
Alabama	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Alaska	1	0	0	0	0	0	0	0	0	0	0	0	1		1%	
Arizona	0	0	0	0	0	0	1	0	0	0	0	0	1		1%	
Arkansas	2	0	0	0	0	0	0	0	0	0	0	0	2		1%	
California	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Colorado	0	0	2	0	0	0	0	1	0	1	0	0	4		2%	
Connectic	2	3	2	0	0	0	1	5	0	1	0	0	14		8%	
Delaware	0	0	0	0	0	0	1	0	0	0	0	0	1		1%	
DC	0	1	0	0	0	0	2	0	0	1	0	0	4		2%	
Florida	1	0	0	0	0	0	0	1	0	1	0	0	3		2%	
Georgia	1	0	0	0	0	0	0	0	0	0	0	0	1		1%	
Hawaii	4	0	0	0	0	0	1	1	0	3	0	0	9		5%	
Iowa	2	1	0	1	0	0	0	0	0	2	0	0	6		3%	
Idaho	1	0	0	0	0	0	0	0	0	0	0	0	1		1%	
Illinois	0	0	0	0	0	0	2	0	0	0	0	0	2		1%	
Indiana	0	0	1	0	0	0	2	0	0	0	0	0	3		2%	
Kansas	4	0	3	0	1	0	2	0	0	0	0	0	10		6%	
Kentucky	0	1	0	0	0	0	2	2	0	0	0	0	5		3%	
Louisiana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Massachu	4	0	1	0	0	1	1	0	0	0	0	0	7		4%	
Maryland	0	0	3	0	0	0	0	1	0	1	0	0	5		3%	
Maine	0	0	0	0	0	0	1	0	0	1	0	0	2		1%	
Michigan	1	1	0	0	0	0	0	0	0	0	0	0	2		1%	
Minnesot	0	0	0	0	0	0	0	1	0	1	0	0	2		1%	
Mississipp	4	0	0	0	0	0	1	1	0	0	0	0	6		3%	
Missouri	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Montana	0	1	0	0	0	0	0	0	0	0	0	0	1		1%	
Nebraska	2	3	0	0	0	0	3	0	0	0	0	0	8		5%	
Nevada	1	0	1	0	0	0	2	3	0	5	0	0	12		7%	
NewHamp	0	0	0	0	0	0	0	0	0	0	1	0	1		1%	
New Jerse	2	1	0	0	0	0	0	1	0	0	0	0	4		2%	
New Mexi	0	1	0	0	0	0	0	0	0	0	0	0	1		1%	
New York	0	0	0	0	0	0	0	1	0	0	0	0	1		1%	
North Car	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
North Dak	0	0	0	0	0	0	0	5	0	1	0	0	6		3%	
Ohio	0	0	0	0	0	2	2	1	0	0	0	0	5		3%	
Oklahoma	0	0	0	0	0	0	1	1	0	0	0	0	2		1%	
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Pennsylva	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Rhode Isla	0	0	0	0	0	0	1	0	0	0	0	0	1		1%	
South Car	0	0	0	0	0	0	0	0	0	1	1	0	1		1%	
South Dak	0	0	0	0	0	1	0	0	0	1	0	0	2		1%	
Tennesse	1	0	4	0	0	0	0	1	0	0	0	0	6		3%	
Texas	0	0	0	0	0	0	0	1	1	0	0	0	2		1%	
Utah	1	0	0	0	0	0	0	1	0	1	0	0	3		2%	
Vermont	0	0	0	0	0	0	1	2	0	1	0	0	4		2%	
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%	
Washingt	1	0	1	0	0	1	0	4	0	2	0	0	9		5%	
West Virg	4	0	0	0	0	0	2	0	0	1	0	0	7		4%	
Wisconsin	0	2	0	0	0	0	0	2	0	0	0	0	4		2%	
Wyoming	1	0	0	0	0	0	2	0	0	0	0	0	3		2%	
Totals	40	15	18	1	1	5	31	36	1	25	2	0	175			
% TOTAL	23%	9%	10%	1%	1%	3%	18%	21%	1%	14%	1%	0%				

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Michigan 1998 Totals

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	Mi Law applies	
Alabama	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Alaska	0	0	0	0	0	0	0	0	0	1	0	0	1		2%
Arizona	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Arkansas	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
California	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
Colorado	0	0	0	0	0	0	1	0	0	0	0	0	1		2%
Connectic	0	1	0	0	0	0	0	0	0	0	0	0	1		2%
Delaware	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
DC	2	0	0	0	0	0	0	0	0	0	0	0	2		4%
Florida	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Georgia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Hawaii	1	0	0	0	0	0	0	0	0	1	0	0	2		4%
Iowa	0	0	0	0	0	0	1	0	0	1	0	0	2		4%
Idaho	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Illinois	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Indiana	0	1	0	0	0	0	0	0	0	0	0	0	1		2%
Kansas	0	0	0	0	0	0	0	0	0	0	0	1	1		2%
Kentucky	0	0	0	0	0	0	1	1	0	0	0	0	2		4%
Louisiana	1	0	0	0	0	0	1	0	0	0	0	0	2		0%
Massachu	0	0	0	0	0	0	2	0	0	0	0	0	2		4%
Maryland	0	1	2	0	0	0	0	1	0	0	0	0	4		8%
Maine	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Minnesot	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Mississipp	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Missouri	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Montana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Nebraska	4	0	0	0	0	0	1	0	0	1	0	0	6		12%
NewHamp	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Nevada	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
New Jerse	1	0	0	0	0	0	0	1	0	1	0	0	3		6%
New Mexi	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
New York	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
North Car	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
North Dak	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Ohio	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Oklahoma	0	0	0	0	0	0	0	0	0	1	0	0	1		2%
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Pennsylva	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Rhode Isla	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
South Car	0	0	0	1	0	0	0	0	0	0	0	0	1		2%
South Dak	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Tennesse	1	0	0	1	0	0	0	0	0	0	0	0	2		4%
Texas	2	0	3	0	0	0	0	0	1	0	0	0	6		12%
Utah	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Vermont	0	0	0	0	0	0	0	1	0	0	0	0	1		2%
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Washingt	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
West Virg	3	0	0	0	0	0	0	0	0	0	0	0	3		6%
Wisconsin	0	0	1	0	0	0	0	0	0	0	0	0	1		2%
Wyoming	0	0	0	0	0	0	0	0	0	1	0	0	1		2%
Totals	20	3	6	2	0	0	7	4	1	7	0	1	51		
%Totals	39%	6%	12%	4%	0%	0%	14%	8%	2%	14%	0%	2%			

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New Jersey 1998 Totals

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	NJ Law Applies	
Alabama	0	0	0	0	0	0	0	0	1	0	0	0	1	1%	
Alaska	1	0	0	0	0	0	0	0	0	0	0	0	1	1%	
Arizona	0	0	0	0	0	0	0	0	0	1	0	0	1	1%	
Arkansas	2	0	0	0	0	0	0	0	0	0	0	0	2	2%	
California	3	0	0	0	0	0	0	0	0	1	0	0	4	4%	
Colorado	1	0	0	0	0	0	0	0	0	0	0	0	1	1%	
Connectic	0	0	0	0	0	0	0	0	0	2	0	0	2	2%	
Delaware	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
DC	0	0	0	0	0	0	0	0	0	1	0	0	1	1%	
Florida	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Georgia	0	0	0	0	0	0	0	1	0	0	0	0	1	1%	
Hawaii	0	0	1	0	0	0	2	0	0	0	0	0	3	3%	
Iowa	0	1	0	0	0	0	0	0	2	2	0	1	6	7%	
Idaho	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Illinois	0	2	0	0	0	0	1	0	0	0	0	0	3	3%	
Indiana	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Kansas	0	2	1	0	0	0	0	0	0	0	0	0	3	3%	
Kentucky	0	0	0	0	0	0	1	1	1	0	0	0	3	3%	
Louisiana	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Massachu	0	0	0	0	0	0	0	1	1	0	0	0	2	2%	
Maryland	1	0	0	0	0	0	1	0	0	1	0	0	3	3%	
Maine	0	0	0	0	0	0	0	0	0	1	0	1	2	2%	
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Minnesot	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Mississipp	0	0	0	0	0	0	1	0	0	0	0	0	1	1%	
Missouri	0	0	0	0	0	1	0	1	0	0	0	0	2	2%	
Montana	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Nebraska	0	2	0	0	0	0	1	0	0	0	0	0	3	3%	
Nevada	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
NewHamp	1	0	0	0	0	0	0	0	0	1	0	0	2	2%	
New Jerse	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
New Mexi	0	0	0	0	0	0	1	0	0	0	0	1	2	2%	
New York	0	0	0	0	0	0	0	1	0	0	0	0	1	1%	
North Car	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
North Dak	6	0	0	0	0	0	0	0	0	0	0	0	6	7%	
Ohio	6	0	0	0	0	0	0	1	0	0	0	0	7	8%	
Oklahoma	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Pennsylva	0	0	0	0	0	0	1	1	1	0	0	0	3	3%	
Rhode Isla	1	0	0	0	0	0	0	0	0	0	0	0	1	1%	
South Car	1	0	0	0	0	1	0	0	0	1	0	0	3	3%	
South Dak	0	0	1	0	0	1	0	0	0	1	0	0	3	3%	
Tennesse	0	0	0	0	0	0	0	2	0	0	0	0	2	2%	
Texas	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Utah	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Vermont	0	0	0	0	0	0	3	0	0	0	0	0	3	3%	
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Washingt	2	0	0	0	0	0	0	0	0	0	0	0	2	2%	
West Virg	0	0	1	0	0	0	2	2	0	0	0	0	5	6%	
Wisconsir	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Wyoming	0	1	0	0	0	0	0	0	0	0	0	0	1	1%	
Totals	25	8	8	0	0	3	14	11	6	12	0	3	90		
%Total	28%	9%	9%	0%	0%	3%	16%	12%	7%	13%	0%	3%			

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California 1998 Criminal Law and Procedure

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	Ca law	
Alabama	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Alaska	1	0	0	0	0	0	0	0	0	0	0	0	1		1%
Arizona	0	0	0	0	0	0	1	0	0	0	0	0	1		1%
Arkansas	2	0	0	0	0	0	0	0	0	0	0	0	2		1%
California	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Colorado	0	0	2	0	0	0	0	1	0	1	0	0	4		2%
Connectic	2	3	2	0	0	0	1	5	0	1	0	0	14		8%
Delaware	0	0	0	0	0	0	1	0	0	0	0	0	1		1%
DC	0	1	0	0	0	0	2	0	0	1	0	0	4		2%
Florida	1	0	0	0	0	0	0	1	0	1	0	0	3		2%
Georgia	1	0	0	0	0	0	0	0	0	0	0	0	1		1%
Hawaii	4	0	0	0	0	0	1	1	0	3	0	0	9		5%
Iowa	2	1	0	1	0	0	0	0	0	2	0	0	6		3%
Idaho	1	0	0	0	0	0	0	0	0	0	0	0	1		1%
Illinois	0	0	0	0	0	0	2	0	0	0	0	0	2		1%
Indiana	0	0	1	0	0	0	2	0	0	0	0	0	3		2%
Kansas	4	0	3	0	1	0	2	0	0	0	0	0	10		6%
Kentucky	0	1	0	0	0	0	2	2	0	0	0	0	5		3%
Louisiana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Massachu	4	0	1	0	0	1	1	0	0	0	0	0	7		4%
Maryland	0	0	3	0	0	0	0	1	0	1	0	0	5		3%
Maine	0	0	0	0	0	0	1	0	0	1	0	0	2		1%
Michigan	1	1	0	0	0	0	0	0	0	0	0	0	2		1%
Minnesot	0	0	0	0	0	0	0	1	0	1	0	0	2		1%
Mississipp	4	0	0	0	0	0	1	1	0	0	0	0	6		3%
Missouri	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Montana	0	1	0	0	0	0	0	0	0	0	0	0	1		1%
Nebraska	2	3	0	0	0	0	3	0	0	0	0	0	8		5%
Nevada	1	0	1	0	0	0	2	3	0	5	0	0	12		7%
NewHamp	0	0	0	0	0	0	0	0	0	0	1	0	1		1%
New Jerse	2	1	0	0	0	0	0	1	0	0	0	0	4		2%
New Mexi	0	1	0	0	0	0	0	0	0	0	0	0	1		1%
New York	0	0	0	0	0	0	0	1	0	0	0	0	1		1%
North Car	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
North Dak	0	0	0	0	0	0	0	5	0	1	0	0	6		3%
Ohio	0	0	0	0	0	2	2	1	0	0	0	0	5		3%
Oklahoma	0	0	0	0	0	0	1	1	0	0	0	0	2		1%
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Pennsylva	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Rhode Isl	0	0	0	0	0	0	1	0	0	0	0	0	1		1%
South Car	0	0	0	0	0	0	0	0	0	1	1	0	1		1%
South Dak	0	0	0	0	0	1	0	0	0	1	0	0	2		1%
Tennesse	1	0	4	0	0	0	0	1	0	0	0	0	6		3%
Texas	0	0	0	0	0	0	0	1	1	0	0	0	2		1%
Utah	1	0	0	0	0	0	0	1	0	1	0	0	3		2%
Vermont	0	0	0	0	0	0	1	2	0	1	0	0	4		2%
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Washingt	1	0	1	0	0	1	0	4	0	2	0	0	9		5%
West Virg	4	0	0	0	0	0	2	0	0	1	0	0	7		4%
Wisconsin	0	2	0	0	0	0	0	2	0	0	0	0	4		2%
Wyoming	1	0	0	0	0	0	2	0	0	0	0	0	3		2%
Totals	40	15	18	1	1	5	31	36	1	25	2	0	175		
	23%	9%	10%	1%	1%	3%	18%	21%	1%	14%	1%	0%			
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP	7	2	11	0	0	0	10	0	1	5	0	1	37		
%TOTAL	4%	1%	6%	0%	0%	0%	6%	0%	1%	3%	0%	1%	21%		
CLP	7	2	11	0	0	0	10	1	0	5	0	1	37		
%CLP	19%	5%	30%	0%	0%	0%	27%	3%	0%	14%	0%	3%	100%		

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Michigan 1998 Criminal Law and Procedure

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	MI Law	
Alabama	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Alaska	0	0	0	0	0	0	0	0	0	1	0	0	1		2%
Arizona	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Arkansas	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
California	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
Colorado	0	0	0	0	0	0	1	0	0	0	0	0	1		2%
Connectic	0	1	0	0	0	0	0	0	0	0	0	0	1		2%
Delaware	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
DC	2	0	0	0	0	0	0	0	0	0	0	0	2		4%
Florida	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Georgia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Hawaii	1	0	0	0	0	0	0	0	0	1	0	0	2		4%
Iowa	0	0	0	0	0	0	1	0	0	1	0	0	2		4%
Idaho	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Illinois	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Indiana	0	1	0	0	0	0	0	0	0	0	0	0	1		2%
Kansas	0	0	0	0	0	0	0	0	0	0	0	1	1		2%
Kentucky	0	0	0	0	0	0	1	1	0	0	0	0	2		4%
Louisiana	1	0	0	0	0	0	1	0	0	0	0	0	2		0%
Massachu	0	0	0	0	0	0	2	0	0	0	0	0	2		4%
Maryland	0	1	2	0	0	0	0	1	0	0	0	0	4		8%
Maine	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Minnesot	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Mississipp	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Missouri	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Montana	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Nebraska	4	0	0	0	0	0	1	0	0	1	0	0	6		12%
NewHamp	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Nevada	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
New Jerse	1	0	0	0	0	0	0	1	0	1	0	0	3		6%
New Mexi	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
New York	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
North Car	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
North Dak	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Ohio	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Oklahoma	0	0	0	0	0	0	0	0	0	1	0	0	1		2%
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Pennsylva	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Rhode Isla	1	0	0	0	0	0	0	0	0	0	0	0	1		2%
South Car	0	0	0	1	0	0	0	0	0	0	0	0	1		2%
South Dak	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Tennesse	1	0	0	1	0	0	0	0	0	0	0	0	2		4%
Texas	2	0	3	0	0	0	0	0	1	0	0	0	6		12%
Utah	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Vermont	0	0	0	0	0	0	0	1	0	0	0	0	1		2%
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
Washingt	0	0	0	0	0	0	0	0	0	0	0	0	0		0%
West Virg	3	0	0	0	0	0	0	0	0	0	0	0	3		6%
Wisconsin	0	0	1	0	0	0	0	0	0	0	0	0	1		2%
Wyoming	0	0	0	0	0	0	0	0	0	1	0	0	1		2%
Totals	20	3	6	2	0	0	7	4	1	7	0	1	51		
	39%	6%	12%	4%	0%	0%	14%	8%	2%	14%	0%	2%			
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP/CON	11	1	0	1	1	0	2	0	0	1	0	0	17		
%TOTAL	22%	2%	0%	2%	2%	0%	4%	0%	0%	2%	0%	0%	33%		
CLP/CON	11	1	0	1	1	0	2	0	0	1	0	0	17		
%CLP	65%	6%	0%	6%	6%	0%	12%	0%	0%	6%	0%	0%	100%		

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New Jersey 1998 Criminal Law and Procedure

	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA	Total	NJ Law Applies	
Alabama	0	0	0	0	0	0	0	0	1	0	0	0	1	1%	
Alaska	1	0	0	0	0	0	0	0	0	0	0	0	1	1%	
Arizona	0	0	0	0	0	0	0	0	0	1	0	0	1	1%	
Arkansas	2	0	0	0	0	0	0	0	0	0	0	0	2	2%	
California	3	0	0	0	0	0	0	0	0	1	0	0	4	4%	
Colorado	1	0	0	0	0	0	0	0	0	0	0	0	1	1%	
Connectic	0	0	0	0	0	0	0	0	0	2	0	0	2	2%	
Delaware	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
DC	0	0	0	0	0	0	0	0	0	1	0	0	1	1%	
Florida	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Georgia	0	0	0	0	0	0	0	1	0	0	0	0	1	1%	
Hawaii	0	0	1	0	0	0	2	0	0	0	0	0	3	3%	
Iowa	0	1	0	0	0	0	0	0	2	2	0	1	6	7%	
Idaho	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Illinois	0	2	0	0	0	0	1	0	0	0	0	0	3	3%	
Indiana	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Kansas	0	2	1	0	0	0	0	0	0	0	0	0	3	3%	
Kentucky	0	0	0	0	0	0	1	1	1	0	0	0	3	3%	
Louisiana	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Massachu	0	0	0	0	0	0	0	1	1	0	0	0	2	2%	
Maryland	1	0	0	0	0	0	1	0	0	1	0	0	3	3%	
Maine	0	0	0	0	0	0	0	0	0	1	0	1	2	2%	
Michigan	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Minnesot	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Mississipp	0	0	0	0	0	0	1	0	0	0	0	0	1	1%	
Missouri	0	0	0	0	0	1	0	1	0	0	0	0	2	2%	
Montana	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Nebraska	0	2	0	0	0	0	1	0	0	0	0	0	3	3%	
Nevada	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
NewHamp	1	0	0	0	0	0	0	0	0	1	0	0	2	2%	
New Jerse	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
New Mexi	0	0	0	0	0	0	1	0	0	0	0	1	2	2%	
New York	0	0	0	0	0	0	0	1	0	0	0	0	1	1%	
North Car	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
North Dak	6	0	0	0	0	0	0	0	0	0	0	0	6	7%	
Ohio	6	0	0	0	0	0	0	1	0	0	0	0	7	8%	
Oklahoma	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Oregon	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Pennsylva	0	0	0	0	0	0	1	1	1	0	0	0	3	3%	
Rhode Isla	1	0	0	0	0	0	0	0	0	0	0	0	1	1%	
South Car	1	0	0	0	0	1	0	0	0	1	0	0	3	3%	
South Dak	0	0	1	0	0	1	0	0	0	1	0	0	3	3%	
Tennesse	0	0	0	0	0	0	0	2	0	0	0	0	2	2%	
Texas	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Utah	0	0	1	0	0	0	0	0	0	0	0	0	1	1%	
Vermont	0	0	0	0	0	0	3	0	0	0	0	0	3	3%	
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Washingt	2	0	0	0	0	0	0	0	0	0	0	0	2	2%	
West Virg	0	0	1	0	0	0	2	2	0	0	0	0	5	6%	
Wisconsir	0	0	0	0	0	0	0	0	0	0	0	0	0	0%	
Wyoming	0	1	0	0	0	0	0	0	0	0	0	0	1	1%	
Totals	25	8	8	0	0	3	14	11	6	12	0	3	90		
	28%	9%	9%	0%	0%	3%	16%	12%	7%	13%	0%	3%			
	F	NF	SCF	SCNF	CPF	CPNF	FCOCA	D	C	COP	Counsel	NFCOCA			
CLP/CON	2	2	3	0	0	0	4	0	0	0	0	0	11		
% Total	2%	2%	3%	0%	0%	0%	4%	0%	0%	0%	0%	0%	12%		
CLP/CON	2	2	3	0	0	0	4	0	0	0	0	0	11		
%CLP	18%	18%	27%	0%	0%	0%	36%	0%	0%	0%	0%	0%	100%		

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ABSTRACT

ON THE REPUTATION AND PRESTIGE OF THE CALIFORNIA, MICHIGAN AND NEW JERSEY SUPREME COURTS

by

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Advisor: Dr. Susan Fino

Major: Political Science

Degree: Master of Arts

This thesis examines Horizontal Federalism and Policy Dissemination in a federal system by analyzing the state supreme courts of California, Michigan and New Jersey during various terms in their history, using a unique form of citation analysis that builds upon prior efforts. I want to see what, if anything, a raw citation count says about prestige or reputation. For example, what types of cases are cited? Are they followed, not followed, or part of a dissent or concurrence? Are cases expanding the rights of the criminally accused cited frequently by sister courts? The normative literature associates prestige with expanding the rights of criminal suspects using state constitutions. (The New Judicial Federalism) Similarly, reputation and prestige are also associated with high citation counts by sister courts. My first objective is to determine what is actually being cited and why and my second purpose is to ascertain whether decisions expanding the rights of criminal suspects are more frequently cited than other types of cases. If prestige and the New Judicial Federalism are closely associated, and high citation counts denote prestige, then it follows that a large percentage of citations by sister courts would be to such decisions. I conclude that, contrary to expectations, decisions involving the New

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Judicial Federalism only constitute a small percentage of positive citations by sister courts and in many cases are negative. The most likely explanation appears to be the method of judicial selection and the level of a given state Supreme Court's accountability to the public.

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AUTOBIOGRAPHICAL STATEMENT

I have been practicing law for twenty four years and am ready to seek new challenges. I plan to obtain an advanced degree in political science and then use that base to teach in this area. My law experience fits into this plan since I have always been fascinated by the American political process, and in particular, the role of the judiciary in our constitutional system. I received an A.B. With High Distinction in political science from the University of Michigan in 1986, and my J.D. from Wayne State University in 1989.

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