

Resisting Rights Claims: State Attorneys General and Judicial Federalism

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This paper explores the legal arguments deployed by the state attorneys general (SAGs) of Washington and Oregon resisting the expansion of state constitutional rights. I find that direct attacks on the legitimacy of judicial federalism were minimal. Instead, SAGs tended to accept state constitutional doctrine as a given but limit the spread through distinguishing case facts.

Introduction

Judicial federalism—the interpretation of state constitutional texts independently of federal case law—has been a source of commentary and action since the 1970s (see Tarr 1998, 173-209; Williams 2009, 113-33). The issue continues to see continued relevance as demonstrated aptly by the conflict between Governor Chris Christie, the New Jersey Legislature, and the New Jersey Supreme Court where aspects of judicial federalism are central to Christie’s attempt to remake the New Jersey Supreme Court (Mortorano 2012; Corriher and Brown 2014). The vigorous calls for judicial federalism suggested a revolution in state constitutional law and yet studies found that most states failed to join the revolution (see, e.g., Fino 1987; Esler 1994; Emmert and Traut 1992; Collins and Galie 1986; Cauthen 2000; Latzer 1991; Gardner 1992).

While naturally explanations for this limited development tend to focus on attitudinal or strategic factors, I examine the interactions between courts and lawyers in developing state constitutional arguments (see Price 2013). However, this research has been limited to date by focusing only upon the claims made by rights claimants and, thus, ignored the significant element of how state attorneys fought those rights claims. Here, I explore how state attorneys in two states where the courts were highly engaged with judicial federalism, Oregon and

Washington, responded to that active engagement. In brief, state attorneys unsurprisingly worked to limit the development of judicial federalism. However, they did not attack the legitimacy of expanding constitutional rights provisions under state constitutions. Instead they worked within the developing state constitutional doctrines by admitting that expanded protections may be legitimate but were inappropriate in the given case. While admittedly rough, this initial study suggests the value of expanding consideration of constitutional arguments to include the responses from states opposing rights arguments.

State Attorneys and Judicial Federalism

Explanations for the limited development of state constitutional law have tended to focus on core judicial behavior arguments such as judicial ideology, the institutional structure of state courts, and the political environment in which state courts operate (see Beavers and Emmert 2000; Beavers and Walz 1998; Brace, Hall, and Langer 1999; Emmert and Traut 1992; Esler 1994; Fino 1987b; Latzer 1991; Swenson 2000; Tarr and Porter 1988). Drawing on support structure and signaling arguments (Price 2013), I argue that a fuller picture requires attention to the interaction over time between state courts and lawyers in developing the necessary legal claims for later court action.

The work of Charles Epp (1998) in particular points to the value of understanding how lawyers act in the litigation process. Examining rights revolutions in Canada, India, the United Kingdom, and the United States, Epp shifted away from focusing on the actions of courts and instead looked at the role that lawyers played in stimulate such revolutions and supporting them once started. Epp demonstrated that “rights revolutions depend on widespread and sustained litigation in support of civil rights and liberties” (1998, 18). In the two broadest rights

revolutions, Canada and the U.S., a broad support structure for rights claims preceded the work of activist courts. Even in the U.K. a limited rights revolution developed despite the lack of a formal constitutional bill of rights. Further, an activist court is not always enough because in India the high court was receptive to such claims but the limited support structure meant few reached the court for action. Epp focused on a conceptual frame of support as resource mobilization and other scholars adopted a similar conceptualization. For example, Steven Teles's examination of conservative rights groups detailed the necessity of legal mobilization in being able to capitalize on shifts in other institutions: "Where the composition of the judiciary is reshuffled without a corresponding shift in the support structure, legal change may fail to occur or, at the least, be substantially limited and poorly coordinated or implemented" (2008, 12). Similarly, Susan Lawrence (1990) found that expansion of legal support services for the poor led to significant alteration in legal rules affecting the poor by ensuring a sufficient degree of support in bringing the issues to court.

While resource mobilization is certainly a necessary component, lawyers must still marshal support in the law. This is a form of ideational support (Price 2013) that builds upon the simple need to mobilize resources to support litigation. Courts are required to provide legal justifications for their decisions and "opinions themselves, not who won or lost, are the crucial form of political behavior by the appellate courts, since it is the opinions which provide the constraining directions to the public and private decision makers " (Shapiro 1968, 39). Legal arguments frame the options available to courts even if the final decision "is the product of those litigant claims, legal bases, and judicial sympathies that the temper of the times create and join together" (Lawrence 1990, 122). In her study of the development of civil rights litigation in the 1940s, Risa Goluboff (2007) demonstrated that lawyers were faced with an open field of legal

possibilities and that their choices and interactions with courts throughout the decade shaped the options ultimately available to the Supreme Court in the 1950s. In their study of death penalty and abortion litigation before the Supreme Court, Lee Epstein and Joseph Kobylka (1992, 8, emphasis in original) concluded that while traditional explanations of judicial ideology, political environment, and interest group pressure were all important to the Supreme Court's doctrinal shifts, "it is *the law and legal arguments as framed by legal actors*, that most clearly influence the content and direction of legal change." A study comparing the texts of legal briefs and Supreme Court opinions found that 10% of the language in Supreme Court opinions was drawn directly from the briefs (Corley 2008). From these studies we see suggestions of the importance of ideational support in addition to material support. In turn, then, we look to the primary source of law for constitutional litigations: the actions of courts.

Court signaling theory shifts away from the focus on lawyers to examine the ability of courts to trigger cases and arguments they are interested in hearing (Baird 2007; Baird and Jacobi 2009a, 2009b). Vanessa Baird (2007, 4) argued "that the incentive to support litigation in particular policy areas varies over time in accordance with litigants' changing perceptions of Supreme Court justices' policy priorities." Justices send signals through their opinions about the viability of certain kinds of claims and "policy-minded litigants base their strategies of selecting cases, issues, and legal arguments on information from the Supreme Court" (Baird 2007, 31). For example, in an immigrant rights case the litigants preferred to rely on an equal protection argument but negative signals from the Supreme Court suggested such arguments would fail. Instead the litigants shifted to a federalism argument after an increasing trend of signals about the revival of federalism (Baird 2007, 73-82; see also Baird and Jacobi 2009a). In a related vein, the Supreme Court's earliest decision on university affirmative action pushed universities and

litigants on both sides of the issue to reframe their approaches and challenges to the policy in the Court's terms (Keck 2006).¹ Perhaps the single most successful example of signaling occurred in death penalty debates. In 1963, Justice Arthur Goldberg issued a dissent from denial of certiorari and expressed a set of constitutional concerns about capital punishment, concerns that movement litigators picked up and built upon (Mandery 2013). Through the favoring of some claims over another, courts provide guidance on particular legal claims that in turn shapes how litigants develop subsequent arguments.

Understanding the limited development of judicial federalism requires understanding the interactions between lawyers and courts. Unfortunately, failure to raise state constitutional claims has rarely been examined, though often discussed in passing (see Collins, Galie, and Kincaid 1986; Esler 1994; Williams 1991). There is reason to believe that support for state constitutional law is weak given the legal training that presents constitutional law as a unitary concept derived from decisions of the U.S. Supreme Court (Sutton 2009; Williams 1991). Research into rights claimants found that constitutional claims altered in response to court signals. Where the U.S. Supreme Court retrenched rights protections, litigants fell back to state constitutional law requesting that state courts utilize state constitutions to evade restrictive federal decisions. Of greater importance was state court guidance and encouragement to pursue state constitutional rights claims (Price 2013). However, this research looked only at one side of the litigation process, that of the rights claimant. A more complete picture of the litigation process requires attention to how governments respond.

While there has been much written about the U.S. Attorney General's office (See, e.g., Baker 1992; Clayton 1992), there has been less attention to the role that State Attorneys General

¹ Signaling may come from other actors as well. Justin Wedeking (2010) has argued that litigants strategically frame their legal arguments in response to frames adopted by other parties and

(SAGs) play). Recently attention has focused upon the role that SAGs play in regulatory politics through multistate litigation (Clayton 1994; Meyer 2007). Paul Nolette (2012, 375) examined SAG litigation in the Gilded Age concluding that "SAGs' initiatives ... illustrate how law was creatively used to promote governmental intervention in the economy." Few scholars have examined the role SAGs play in state constitutional law. Thomas Morris (1987) discussed the use of SAG advisory opinions and state constitutional meaning but did not offer an extended empirical analysis of SAG impact. Unfortunately no systematic study has been conducted of SAG behavior in state constitutional law cases, though clearly there was some interest in advice on how to handle such cases (Amestoy and Brill 1988; Collins 1988).

This paper seeks to explore the government's substantive arguments in cases where state constitutional claims were made. While there are some exceptions (Amestoy and Brill 1988), generally it is a reasonable assumption that the state resists restrictions upon their authority.² This is likely to be particularly important in state constitutional law. All states are restrained by federal constitutional rules equally, but state constitutional restrictions go beyond this federal minimum and impose special restraints. The question here is how state attorneys resist claims. We might expect state attorneys to reject the very legitimacy of judicial federalism as a number of academics and courts have done (Maltz 1985, 1989; Williams 2009, 193-209). However, an attorney has to be sensitive to the court she presents to and attacking the legitimacy of a well-established trend of court behavior may backfire. If criticizing the legitimacy of the court's decisions is unacceptable, then attorneys will be more likely to try and stem the tide of judicial federalism by distinguishing precedent from the case before the court.

² State constitutions are, of course, about much more than rights issues and we can imagine many other areas of state constitutional law where the state would support activism in state courts. One example could be home rule provisions as a limitation upon state power versus local autonomy.

Research Design

The sample of state briefs utilized in this study relied upon my prior examination of rights claimants before both courts (Price 2013). In brief, I utilized briefs in a selection of cases for even years from 1970-2000 identified through Westlaw searches. For this study I selected only cases where my previous study found the rights claimant presented a state constitutional argument. I then examined the parties in each of these cases to identify when a state attorney was present; state attorneys included those identified as members of the state attorney general office as well as city or county lawyers. I then obtained copies, whenever present, of the table of contents, arguments presented section, and all constitutional arguments sections of the state briefs in all cases identified. I examined the constitutional arguments and discourses of the state briefs to identify how the state briefs approached judicial federalism. The dates for the samples were dependent upon the nature of state court engagement with state constitutional law. For Washington, my date range runs from 1988-2000 as the Washington Supreme Court adopted the criteria test in *State v. Gunwall* in 1986³ where the Washington Court specified a criteria based approach to state constitutional litigation and refused to consider constitutional arguments that did not come in this form (Price 2013; Spitzer 1998). These criteria focused on “(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”⁴ These criteria were specifically aimed at guiding counsel in arguing state constitutional issues as well as ensuring that any expansive state constitutional holding is based on “well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the

³ 106 Wash.2d 54.

⁴ *Gunwall*, 106 Wash.2d at 58.

United States Supreme Court.”⁵ For Oregon, the date range runs from 1980-1996.⁶ Under the influence of Justice Hans Linde, who as a law professor had vigorously pushed for a primacy approach to state constitutional law (Linde 1970, 1980), the Oregon Supreme Court embraced a strong primary approach in the early 1980s that required courts and lawyers to address state constitutional issues before considering any parallel federal claims (McIntosh and Cates 1997, Ch.4).⁷

Discussion

*Washington*⁸

In a number of briefs, the state attorneys did not actually address a state constitutional claim. Two likely explanations exist for this. First, the coding rules for identifying state claims err on the side of coding ambiguous claims as state based and it is possible that these were so ambiguous that the state felt no reason to respond (Price 2013, 340-41). Second, where the state is appellant it may be that the respondent made a state claim only in response to the state’s initial brief. While technically violating rules of briefing and preservation of issues, it is not uncommon for state constitutional claims to be first articulated on appeal.

Interestingly, no instances of outright attack on the legitimacy of judicial federalism were present. While it is possible that such an attack was made in a brief outside my sample, it is also reasonable to assume that state attorneys wish to avoid outright attacks upon the court hearing

⁵ *Gunwall*, 106 Wash.2d at 60.

⁶ I have collected briefs through 2000 but only had time to analyze through 1996.

⁷ *Sterling v. Cupp*, 290 Or. 611 (1981).

⁸ Washington briefs were often filed by prosecuting, county, and city attorneys in addition to the state attorney general. I refer to them collectively as simply state attorneys in this section.

their cases.⁹ Instead of legitimacy attacks, the state briefs tended to fall into one of two categories. First, what could be called application arguments simply attempted to apply and distinguish state constitutional decisions to the case at hand. The second category encompassed cases where claimants pushed state constitutional arguments significantly further than the Washington Court had accepted. In these cases, the state offered, on average, offered more detail rebuttals as an attempt to stem the expansion of state constitutional rights decisions.

As the most frequently litigated area of state constitutional rights, search and seizure issues were commonly briefed in narrow, specific ways to distinguish the present case from established law. Thus, the state repeatedly acknowledged that broader protection under Section 7¹⁰ was “settled law” but that “the issue is whether it provides greater protection on the particular facts involved.”¹¹ Or to limit the contexts of this greater protection by arguing that the Court has “almost always read [Section 7] to provide greater protection than the Fourth Amendment only when warrantless searches are involved.”¹² In terms of *Gunwall*'s substantive holding that attachment of pen registers requires a warrant, state briefs repeatedly distinguished cases by arguing that one-party consent was present or that nothing was attached to a person's phone line.¹³ Other areas of the law with similarly well-settled applications saw relatively brief factual briefs. For example, after the Court expanded free exercise protections in 1992,¹⁴ the state twice

⁹ Of course, it is possible that attacks came outside of litigation such as through public statements and opinions from the office of the attorney general. At this time, I have not explored either possibility.

¹⁰ Wash. Const. Art. I, Sec.7: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

¹¹ *State v. Goucher*, 124 Wash.2d 778 (1994), Respondent's Brief at 12.

¹² *City of Seattle v. McCreedy*, 123 Wash.2d 260 (1994), Respondent's Brief at 37.

¹³ *Kandorian v. Bellingham Police Dept.*, 119 Wash.2d 178 (1992), Respondent's Brief; *State v. Salinas*, 119 Wash.2d 192 (1992), Respondent's Brief; *State v. Faford*, 128 Wash.2d 476 (1996), Respondent's Brief.

¹⁴ *First Covenant Church of Seattle v. Seattle*, 120 Wash.2d 203 (1992).

argued simply that zoning and historic preservation measures did not substantially burden the exercise of religion.¹⁵ Or that the absolutist test that forbid any gender differences in the law regardless of state justification¹⁶ did not affect a gender-neutral statute that may potentially have a disparate impact on women.¹⁷ In defending an obscenity prosecution, that state argued that recent speech precedents did “not prohibit persons from being held responsible for abuses” of their free speech.¹⁸

While the above examples dealt with relatively well-settled state search law, claimants frequently pushed novel arguments for expansion well beyond those areas. State responses to these novel arguments were more detailed rebuttals and, at times, close to criticism of the legitimacy of expansion. In justifying sobriety checkpoints the state emphasized a recent appellate court decision upholding a similar checkpoint consistent with a growing body of federal law and that prior expansions of Section 7 were limited to warrantless searches and searches incident to arrest. For persuasive precedent, the state noted that an identical search provision in Arizona had “not been interpreted to bar sobriety checkpoints.”¹⁹ At times the emphasis was the stronger policy logic of federal decisions. For example, in responding to an argument that heightened standards of probable cause must be applied to search warrants in obscenity cases, an argument that the New York Court of Appeals had accepted,²⁰ the state argued that there was no strong reason under the *Gunwall* criteria to expand protection and that

¹⁵ *First United Methodist Church of Seattle v. Hearing Examiner*, 129 Wash.2d 238 (1996), Appellants’ Brief; *Open Door Baptist Church v. Clark County*, 140 Wash.2d 143 (2000), Appellants’ Brief.

¹⁶ *Darrin v. Gould*, 85 Wash.2d 859 (1975) (forbidding gender discrimination even if it satisfied strict scrutiny).

¹⁷ *Arnold v. Dept. of Retirement Systems*, 128 Wash.2d 765 (1996), Respondent’s Brief.

¹⁸ *State v. Reece*, 110 Wash.2d 766 (1988), Respondent’s Brief at 33).

¹⁹ *City of Seattle v. Messiani*, 110 Wash.2d 454 (1988), Appellant’s Brief at 50.

²⁰ *People v. P.J. Video*, 68 N.Y.2d 296 (1986).

“the New York court’s decision imposes an inappropriate and unnecessary requirement on a magistrate” as demonstrated by the long line of cases adopting the federal approach.²¹ In 1990, the state surveyed a wide range of state and federal cases concluding that “[v]irtually all of the cases ... have held that a warrant is not required” to search garbage put out for collection.²² The state again noted Arizona’s rejection of such a privacy interest in garbage and that Washington search precedents provided “no reason why garbage should be treated more deferentially in Washington, then elsewhere in the country.”²³ Perhaps more interestingly, the state suggested that if the Washington Court wished to deviate from accepted federal law, it should also question the existence of the exclusionary rule: “Washington has not always had an exclusionary rule. ... Why should it automatically cling to such a rule when police complied with existing law ... when the privacy interest involved is abandoned garbage ... when other adequate remedies are available ... and when the windfall gained by the defendant so outweighs the alleged privacy violation as to defy justice.”²⁴

The state came closest to a direct attack on the Court’s search doctrine in two cases dealing with automatic standing. While admitting that there are substantial differences between the federal and state provisions, though noting the lack of historical evidence to explain why these differences exist, the state placed the burden on the Court for explaining why automatic standing is a requirement of Section 7: “It would seem, however, that there has to be a reasonable basis for doing so. Respondent is waiting for this court to articulate, by the application of logic and reason, a justification for granting a privacy interest to this defendant in

²¹ *State v. J-R Distributors, Inc.*, 111 Wash.2d 764 (1988), Appellant’s Brief at 29).

²² *State v. Boland*, 115 Wash.2d 571 (1990), Appellant’s Brief at 4.

²³ *Boland*, Appellant’s Brief at 7.

²⁴ *Boland*, Appellant’s Brief at 16.

the stolen goods that he possesses.”²⁵ In 1980 a four justice plurality justified retaining automatic standing but their decision epitomizes the approach condemned in *Gunwall*, “[e]ssentially, the court disagreed with the analysis of [SCOTUS] ... concluding that it ‘does not provide sufficient protection against the self-incrimination dilemma.’”²⁶ Further, history undermines the concept of automatic standing because it “was created by [the U.S. Supreme Court] in 1960. It has no common law basis and did not exist when the state constitution was adopted.”²⁷ Finally, the state criticized the doctrine on policy grounds: “It is *harmful* because it prevents the conviction of criminals, no matter how clear the evidence of their guilt, when the rights of those criminals were *not violated*.”²⁸

Though infrequent, the state did occasionally criticize the structure of claimants’ arguments. In rejecting an equal protection claim, the state argued that “[b]ecause they have not properly briefed the issue, however, this Court should refuse to consider their attempted state constitutional argument.”²⁹ The state was particularly eloquent in dismissing a due process assertion: “Appellant cites Article I, Section 3, of the State Constitution in an effort to bootstrap his due process argument into an otherwise faded painting. But, neither the case cited by appellant ... nor the other case discussing historical concepts of due process of law ... can transform appellant’s pallid arguments into a living, breathing thing.”³⁰

Not only did the state criticize the failure to offer the correct structural briefing, the state also utilized the *Gunwall* criteria carefully to undermine what it saw as poor claimant attention to the criteria. In rejecting an argument that confrontation rights extended to sentencing

²⁵ *State v. Zakel*, 119 Wash.2d 563 (1992), Respondent’s Brief at 27-28.

²⁶ *State v. Williams*, 142 Wash.2d 17 (2000), Appellant’s Brief at 18.

²⁷ *Williams*, Appellant’s Brief at 20.

²⁸ *Williams*, Appellant’s Brief at 30 (emphasis in original).

²⁹ *Omega National Ins. v. Marquardt*, 115 Wash.2d 416 (1990), Respondent’s Brief at 44, n.25.

³⁰ *In re Boot*, 130 Wash.2d 553 (1996), Respondent’s Brief at 12.

proceedings, the state was forced to admit a textual difference³¹ but argued it was minor and irrelevant because the issue was whether sentencing was part of a criminal prosecution and that language is identical in both constitutions; further because “there was no debate concerning” this section at the convention, the “inference to be drawn is that the adoption of language identical to that found in the federal constitution supports a reading of [the state provision] as being indistinguishable from federal law.”³² In another confrontation case, involving protection of child victims, that the minor textual difference of including “face to face” was irrelevant because the U.S. Supreme Court had long described the Sixth Amendment as requiring the same type of confrontation and that Washington courts had long treated the two as identical.³³ In an equal protection challenge to the state’s Lemon Law, the state noted that as recently as July 1989 the Washington Supreme Court had treated the provisions as identical but was forced to admit that in recent dicta the Court had suggested the Oregon analysis could be a better approach (and the claimant picked up on this signal).³⁴ After addressing the other criteria the state turned to the final one, describing attention to local concerns as “the most important *Gunwall* issue” and that “manufacturers should have an interest in uniformity in court interpretations of lemon laws through the country.”³⁵ At times claimants were criticized for asserting a broader state protection but failing to “explain[] how such a stricter construction would benefit” them.³⁶

State attorneys in Washington certainly sought to limit the expansion of judicial federalism (sometimes successfully, sometimes not). But their approach tended towards adoption

³¹ “In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face.” (Wash. Const. Art. I, Sec. 22).

³² *State v. Strauss*, 119 Wash.2d 401 (1992), Respondent’s Brief at 25.

³³ *State v. Foster*, 135 Wash.2d 441 (1998), Respondent’s Brief.

³⁴ *Ford Motor Comp. v. Barrett*, 115 Wash.2d 556 (1990), Intervenor/Respondent’s Brief at 45, 46.

³⁵ *Ford Motor Comp.*, 115 Wash.2d 556 (1990), Intervenor/Respondent’s Brief at 47, 48.

³⁶ *Foster*, 135 Wash.2d 441 (1998), Respondent’s Brief at 30.

of the Washington Supreme Court's new approach to state constitutional law and arguments for application that rejected further expansions.

Oregon

As in Washington, some Oregon briefs failed to present state claims (though fewer in number) and this is likely for the same reason. Additionally, and as with Washington, the state failed to engage in direct attacks on the legitimacy of judicial federalism. Instead the briefs tended to apply Oregon precedents to avoid losses, though in a smaller number of cases the arguments were broader and may be justly described as implicit criticism of rights expansion.

In the early days of judicial federalism in Oregon, the state at times scolded claimants for their weak briefing with the implicit message that only particularly compelling evidence should justify the expansion of rights protection under the state constitution. In a case disputing whether counsel had to have access to a presentencing hearing, the state was particularly dismissive of the claimant's argument as pretending to be a state argument but "based principally on his interpretation of federal constitutional law. He does not attempt to analyze pertinent state law."³⁷ Moreover, the defendant failed to follow the correct methodology of constitutional reasoning required by the Oregon Supreme Court³⁸ and placed the state on proper footing by "follow[ing] the proper analytical approach" of addressing the state issues before any federal constitutional claims.³⁹ In a major death penalty case, the state complained that the claimant's reasoning was purely instrumental: "Defendant and *amici* contend that this court should use these provisions to adopt the federal Eighth Amendment analysis but reach a different result than the federal courts

³⁷ *State ex rel. Russell v. Jones*, 293 Or. 312 (1982), Defendant's Brief at 3-4.

³⁸ *Sterling v. Cupp*, 290 Or. 611 (1981).

³⁹ *Jones*, 293 Or. 312, Defendant's Brief at 4.

have.”⁴⁰ In presenting these arguments the state both undercut the claimants’ position but also sought to send a subtle message to the Court that no substantial grounds existed for expanding state protection. Arguably the clearest example of this dynamic is the only major abortion conflict in the sample.

The dispute centered on a state administrative decision limiting public funding for abortion and the arguments represented some of the most developed state constitutional arguments, perhaps unsurprising given the issue. Before even engaging in the substantive constitutional claims, the state sought to narrow the application of the primacy approach. “Where ... the federal constitutional issues have been recently settled by the highest federal court, an advocate of a stricter test under the state constitution must point out persuasive reasons why Oregon courts should depart from the analysis the Supreme Court has developed in interpreting provisions analogous to state organic laws.”⁴¹ Where Linde’s primacy argument cautioned against any significant reference to federal law (Linde 1970, 1980), the state sought to craft an extra requirement of persuasive justification for deviating from federal law, or at least recently decided federal law. The claimants not only failed to achieve this high threshold but their “foundational premises are based upon federal precedents developing rights under the federal constitution. In the absence of a principled reason for doing so, this court should not disregard otherwise applicable federal precedents.”⁴² In dismissing the privacy argument, the state stressed the lack of a due process clause in the state constitution—a fact Linde (1970) had long noted as critical—and described the claimants’ argument as ad hoc avoidance without support; in

⁴⁰ *State v. Wagner*, 305 Or. 115 (1988), Respondent’s Brief at 30. The sections referred to are Art. I, Sections 15 and 16.

⁴¹ *Planned Parenthood Ass’n, Inc. v. Department of Human Resources*, 297 Or. 562 (1984), Respondents’ Brief at 10.

⁴² *Planned Parenthood*, 297 Or. 562, Respondents’ Brief at 11.

particular, the California and Massachusetts decisions claimants relied on most heavily were “result oriented; the principled decisions of [the U.S. Supreme Court] should be followed here.”⁴³ The state similarly dismissed both the equal protection and free exercise claims as nothing but frivolous invitations to evade well-considered federal law. The Oregon Attorney General never again sought to so dramatically alter the primacy approach adopted by the Court. However, it still attempted, at times, to create linkages with federal law to limit expansion of protections.

Search and seizure law presents the clearest example of this attempted linkage. In three 1988 cases the attorney general’s office sought to preserve recent federal decisions upholding the practices complained of; two involved warrantless searches of open fields and one involved attachment of a beeper to a car.⁴⁴ Interestingly, all three appear to have been written by the same assistant attorney general.⁴⁵ In each, the federal decisions were described as compelling. For example, the Supreme Court’s decision to continue recognizing an open fields exception to the Fourth Amendment was “the most persuasive authority on this point.”⁴⁶ The only Oregon precedents relied upon by the claimants “were decided solely under the Fourth Amendment ... and thus are superseded” by the U.S. Supreme Court’s subsequent decision.⁴⁷ More importantly, the state sought to create a direct link between the foundations for the state and federal rule:

“While the Oregon Supreme Court may not have done so in express terms, the state submits that

⁴³ *Planned Parenthood*, 297 Or. 562, Respondents’ Brief at 26.

⁴⁴ *Oliver v. U.S.*, 466 U.S. 170 (1984) (open fields exception); *U.S. v. Karo*, 468 U.S. 705 (1984) (attachment of an electronic beeper to a car does not require a warrant).

⁴⁵ In all Oregon briefs where the attorney general was the party, the same pattern emerged. Each listed the Attorney General, Solicitor General and then one or more assistants on the brief. It appears reasonable to assume that the assistant had primary authority for drafting the state’s brief. In these cases the assistant was Stephen Peifer.

⁴⁶ *State v. Andreason*, 307 Or. 190 (1988), Respondent’s Brief at 6.

⁴⁷ *State v. Dixon*, 307 Or. 195 (1988), Respondent’s Brief at 2.

several opinions indicate” adoption of the federal expectation of privacy test from *Katz*.⁴⁸ Having established a linkage, the state proposes common treatment due to the “same parentage”:

“Having the same parentage, it follows that the federal interpretation of that rule in *Katz*’s progeny, including *Oliver*, is highly persuasive.”⁴⁹ This “same parentage” language is repeated in the other two arguments nearly verbatim.⁵⁰ All three briefs then argued that there is no principled basis for departing from the federal decisions and that the objective, bright line approach adopted by the U.S. Supreme Court. Though limited to search and seizure issues, these arguments paralleled the attempt in *Planned Parenthood* to subtly push the Oregon Supreme Court to adopt a looser primacy approach that presumed federal law as a starting point for the analysis. Ultimately the Court rejected all three invitations to alter the primacy approach and in no subsequent argument did the state argue for any modification to the broad concept of primacy. Instead, the state turned to simply accepting the growing body of state constitutional rights law and applying it to new situations.

After this failed attempt to create conceptual linkages between the state and federal search doctrines, the state largely deferred to the growing body of state law and sought to distinguish cases on factual grounds. After the foundational decisions in *State v. Caraher* (1982)⁵¹ and *State v. Lowry* (1983),⁵² the state was forced to acknowledge that “[r]ecent cases by this court preclude reliance upon the” federal search rules⁵³ but argued that a search incident can

⁴⁸ *Dixson*, 307 Or. 195, Respondent’s Brief at 7; *Katz v. United States*, 389 U.S. 347 (1967).

⁴⁹ *Andreason*, 307 Or. 190, Respondent’s Brief at 9.

⁵⁰ *State v. Campbell*, 306 Or. 157 (1988), Appellant’s Brief at 10; *Dixson*, 307 Or. 195, Respondent’s Brief at 8.

⁵¹ 293 Or. 741 (holding that search incident to an arrest must be “reasonable in light of all the facts”).

⁵² 295 Or. 337 (police may seize apparent contraband during a search incident only for a short time to seek a separate warrant authorizing testing of the substance).

⁵³ *State v. Bennett*, 301 Or. 299 (1986), Appellant’s Brief at 14.

extend to a trunk where it is reasonable. A regular assertion was that a defendant lacked a privacy interest in various circumstances including abandoned property, inadvertent dog sniffs, and a stolen car.⁵⁴ The other frequent set of arguments sought to broaden items eligible for search or seizure incident to an arrest and the state was ultimately able to convince the Court to reverse itself and allow warrantless testing of apparent contraband seized incident to arrest.⁵⁵ Both arguments turned not on attacking the legitimacy of expansive state rights protections but instead convincing the Court that its weighing of competing values was misplaced.

In the early 1980s, the Court began to expand speech protection initially by striking down statutes, such as disorderly conduct statutes and coercion statutes, for criminalizing too much speech.⁵⁶ The state was forced to defend other statutes by, for example, distinguishing a menacing statute from the invalidated coercion statute arguing the former's language reached a more limited set of speech acts.⁵⁷ This issue was most starkly presented in 1992 by two challenges to Oregon's hate crimes law. The state sought to save the statute by focusing on the fact that the law reached only conduct and not belief: the law "neither proscribes people from holding bigoted beliefs nor from freely expressing those beliefs; it simply punishes those who cause physical injury to others based on those bigoted beliefs."⁵⁸ The most dramatic expansion occurred in *State v. Henry* (1987)⁵⁹ when the Court struck down the state's obscenity law

⁵⁴ *State v. Belcher*, 306 Or. 343 (1988), Respondent's Brief (abandoned property); *State v. Pidcock*, 306 Or. 335 (1988), Respondent's Brief (abandoned property); *State v. Slowikowski*, 307 Or. 19 (1988), Respondent's Brief (dog sniff); *State v. Buchholz*, 309 Or. 442 (1990), Respondent's Brief (stolen car).

⁵⁵ *State v. Owens*, 302 Or. 196 (1986), Appellant's Brief; *State v. Westlund*, 302 Or. 225 (1986), Respondent's Brief.

⁵⁶ *State v. Spencer*, 289 Or. 225 (1980); *State v. Robertson* 293 Or. 402 (1982).

⁵⁷ *State v. Garcias*, 296 Or. 688 (1984), Appellants' Brief.

⁵⁸ *State v. Hendrix*, 314 Or. 170 (1992), Respondent's Brief at 3; *State v. Plowman*, 314 Or. 157 (1992), Respondent's Brief.

⁵⁹ 302 Or. 510.

becoming the first court to treat obscene speech as fully protected. In the midst of two constitutional initiatives seeking to reverse or limit this decision (both failed),⁶⁰ the state was forced to defend its child pornography law. The state admitted that no historical exception for child pornography specifically existed when the Oregon Constitution was drafted, but argued that this is because child pornography was a function of recent technological change.

Importantly, the law did not target speech but the mental and physical harm to the children.

Finally the state closed with an implicit warning that the Court surely did not wish to become the first court to protect child abuse: “Nothing in the text or the history of Article I, section 8 requires this state to be the first to conclude that is legislature may not enact child pornography laws to protect the state’s children.”⁶¹

A similar trend is observed in other contexts where expansion had been established and state sought to limit any more movement.⁶² The Oregon Attorney General’s office may not have directly attacked the legitimacy of judicial federalism, but it did show creative arguments appearing to accept expanded state constitutional rights while linking those rights to federal doctrine. As these attempts failed in the late 1980s, the state resorted to simply accepting the state doctrines and attempting to limit expansion by distinguishing cases from that precedent.

Conclusion

Understanding the ideational support provided to courts necessarily requires attention not only to the demands and arguments of rights claimants, but also to the methods of resistance

⁶⁰ The National Conference of State Legislatures Ballot Measures Database (<http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx>) reports that Measure 20 in 1994 received 45.7% of the vote and Measure 31 in 1996 received 47.2%.

⁶¹ *State v. Stoneman*, 323 Or. 536 (1996), Appellant’s Brief at 16.

⁶² *State v. Wedge*, 293 Or. 598 (1982), Respondent’s Brief (jury); *State v. Martin*, 288 Or. 643 (1980), Appellant’s Brief (double jeopardy).

offered by the state. While we might expect SAGs to issue a broad set of attacks on the very legitimacy of judicial federalism, it is less surprising that this was not evident in either state. Instead, some more limited attempts were made, especially in Oregon, to blunt the reach of judicial federalism. After this failed, the state tended to accept the reality of expanded protection and focused on distinguishing the immediate case from the growing body of state constitutional rights law.

As always, this study is limited. First, it is simply a first pass through the briefs obtained and those were for a limit set of years to match already collected claimants data. Second, it focuses on only two states. While it is reasonable to look at states such as Washington and Oregon where the engagement with judicial federalism was particularly dramatic, it is also worth examining states with middling records where legitimacy concerns may flow more widely from SAG offices. Third, the focus here is exclusively on legal arguments as a challenge to judicial federalism. Naturally, however, there are alternative methods of challenging state courts. One is through the advisory opinion function of the SAG where it is possible that SAGs advised on means for state agencies to avoid state constitutional decisions. Additionally, judicial elections present another avenue for attack and in Oregon at least one such challenge to Justice Linde, from a young county prosecutor and a trial judge, was motivated in part by the Oregon Court's judicial federalism decisions (Collins 1991).

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All briefs are on file with the author.