BEYOND BARRETT: SHIFTING A PROGRESSIVE LEGAL STRATEGY FROM FEDERAL TO STATE COURT

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INTRODUCTORY THOUGHTS

When I graduated from law school in 1972, excited to do poverty and civil rights law, my assumption was that I would be litigating constitutional claims in federal court. I was inspired by attorneys such as William Kunstler who, in the early 1960s, developed the strategy of removing state prosecutions of civil rights activists from state court to federal court.[1] My first case, argued while I worked for Legal Aid in Jacksonville, Florida, was a substantive due process challenge to a Florida law which suspended an individual's driver's license for failure to meet certain statutory requirements which his financial status precluded him from satisfying.[2] The challenge was unsuccessful. Nonetheless, my appetite for federal litigation was whetted and continued throughout my career.

Those of us who have litigated constitutional and civil/human rights cases in federal courts find ourselves in a difficult situation as judicial vacancies were filled by Trump appointees.[3] The addition of Justice Barrett to the U.S. Supreme Court heralds a conservative and less diverse majority in the Court, likely for generations. Although challenging, this is not a unique situation. As the Burger Court emerged in the 1970s, and many of the Warren Court's decisions on civil and constitutional rights were undone, Justice William Brennan developed a strategy in a series of lectures and law review articles which is particularly relevant as the courts turn increasingly right-

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1 D.B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker*, 29 U.S.F.L. Rev. 645, 651, n. 22 (1995).

2 *McKinney v. O'Malley*, 379 F. Supp. 135 (M.D. Fla. 1974).

3 At the end of four years, Trump had won confirmation of three Supreme Court justices, 54 appeals court judges and 174 district court judges. Carl Hulse, *Biden Facing Resistance on His Picks for Federal Judges After Early Winning Streak*, N.Y. Times (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/us/politics/biden-judges-senate-confirmation.html. President Biden has sent the Senate 64 judicial nominations; 28 nominees have been confirmed as of December 5, 2021. *Id.* Many of those judges "were more openly engaged in causes important to Republicans, such as opposition to gay marriage and to government funding for abortion." Rebecca Ruiz et. al, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. Times (Mar. 14, 2020) https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html (last visited Mar. 31, 2022); *see also* Charlie Savage, *G.O.P – Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. Times (Oct. 16, 2020), https://www.nytimes.com/2020/10/16/us/politics/court-packing-judges.html ?referring Source=articleShare.

ward.

In the context of the civil rights movement in the 1960s, the Supreme Court issued a series of opinions enforcing the equal protection and due process protections of the Fourteenth Amendment, and guaranteeing other provisions of the Bill of Rights against encroachment by state action.[4] As the composition of the Court changed in the 1970s and this focus diminished, Brennan found that "state courts are now beginning to emphasize the protections of their states' own bills of rights."[5] Brennan pointed to state court decisions in California, New Jersey, Hawaii, Michigan, South Dakota, and Maine.[6]

> This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. . . .
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> The essential point I am making, of course, is not that the United State Supreme Court is necessarily wrong in its interpretation of the federal Constitution. . . . It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.[7]

Justice Brennan's analysis was premised on the principle that when a decision rests on an independent state ground, it is not reviewable by the federal courts.[8] Brennan's advice: "I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions."[9] In fact, as Justice Brennan noted in 1986, in the ten years since his initial Harvard Law Review article, state courts had issued more than 250 published decisions affording greater protection to individual liberty than the constitutional minimums set by the U.S. Supreme Court.[10]

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4 Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 493-494 (1977).

5 *Id*. at 495.

6 *Id*. at 499-501.

7 *Id*. at 501-502.

8 *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

9 *Id*. at 502; *see also* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

10 *Id.* at 548.

For those of us practicing law in Oregon, it seemed Brennan was advocating a position long articulated by Hans Linde, a constitutional law scholar who taught at the University of Oregon and was then a justice on the Oregon Supreme Court from 1977 until 1990. Linde argued that state constitutions, independent of the federal constitution, safeguarded the civil liberties of its citizens and that state constitutional law was primary; in other words, one should not examine whether a state law violated a federal constitutional guarantee until state constitutional remedies had been exhausted.[11]

> My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.[12]

Other State court jurists adopted this analysis, such as Judith Kaye who became Chief Judge of the New York Court of Appeals. Justice Ruth Bader Ginsburg supported the same position in her article: *In Praise of Judith S. Kaye*:

> Taking a cue from Justice Brennan, [Kaye] . . . understood that New York's constitution and common law had important roles to play in the protection of fundamental human rights. On her watch, the state's constitution and laws were read to advance due process, freedom of expression, freedom from unreasonable searches and seizures, and genuinely equal opportunity. The U.S. Supreme Court's sometimes constricted reading of parallel provisions of the Federal Constitution did not overwhelm her judgment.[13]

Applying this analysis, various scenarios are possible: The state's guarantee may be the same as federal law; the state law may be more protective than federal law, making analysis under federal law unnecessary; or the state law may be less protective in which case "the court must go on to decide the claim under federal law, assuming it has been raised."[14]

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11 Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 Willamette L. Rev. 251, 253 (2007).

12 Hans Linde, *E Pluribus –Constitutional Theory and State Courts*, 18 Georgia L. Rev. 165, 178 (1984).

13 The Honorable Ruth Bader Ginsburg, *Tribute: In Praise of Judith S. Kaye*, 84 N.Y.U. L. Rev. 653, 653-54 (2009).

14 Linde, *supra* note 12, at 179.

There are, of course, cases which must be brought in federal court or where it is likely federal removal will be invoked,[15] for example cases involving challenges to federal officials or agencies and cases based on violations of federal law. However, in some situations, the practitioner has the option of framing the legal challenge exclusively in the context of state law where a state law or constitutional provision applies, thereby insulating the case from removal. That decision will be based in major part on whether such laws exist in a particular state and how the equivalent state constitutional provision has been interpreted. And the decision will be influenced by the political complexion of the judiciary where one is litigating. Even with the federal judiciary becoming more conservative, the state court bench may be no better. Some academic research in the past several years has attempted to measure the political ideology of state supreme court justices by constructing ideological measures from campaign finance records.[16] Professors Bonica and Woodruff's research, for example, examined the records of 340 justices and concluded that 171 could be categorized as liberal and 165 as conservative.[17] The top five most liberal courts were in New Mexico, Maine, Oregon, New Hampshire, and Washington.[18] The most conservative courts were South Dakota, North Dakota, Texas, Alabama, and Idaho.[19] It would seem appropriate and realistic to consider this analysis when litigating a civil rights claim in a more conservative court.

I expect there will be some who will be offended by these arguments, that the choice of a forum should never be based on such political considerations. Conservative jurists can at times issue unexpectedly liberal decisions, for example the opinion by Justice Gorsuch holding that gay and transgender workers are protected under Title VII of the Civil Rights Act of 1964.[20] But for those of us bringing constitutional and civil rights cases, my contention is that we have no choice but to consider the political context and realities in which we litigate.

LESSONS FROM CASELAW

Although some scholars have suggested that **federal** constitutional

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15 28 U.S.C. §§ 1441-1453.

16 Bonica and Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J. of L., Economics and Organization, Vol. 31, No. 3 (2014). A summary of the research is available at https://ballotpedia.org/Political_outlook_of_state_supreme_court_justices (last visited Apr. 11, 2022).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Bostock v. Clayton*, ___U.S.___, 140 S. Ct. 1731 (2020).

law claims should only be litigated in federal court,[21] there is disagreement on that point.

> [T]he state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles. The continuation of this role is particularly important in the many situations when the state court is part of the enforcement system, and the federal question is relevant to whether the state court should participate in or authorize enforcement.[22]

And, as noted, historically state courts have adjudicated claims based on interpretations of **state** constitutional provisions avoiding any federal analysis and eventual Supreme Court review.[23] The question is what analysis should be used in deciding to litigate constitutional claims in state court?

Reproductive Rights Litigation

In the early post-*Roe v. Wade* climate, the Massachusetts Supreme Judicial Court struck down a law limiting state medical assistance for abortion to cases of life endangerment.[24] A similar restriction had been upheld by the U.S. Supreme Court under the Federal Constitution: *Williams v. Zbaraz*, 448 U.S. 358 (1980). The Massachusetts Court's analysis was based on a guarantee of privacy rooted in the due process clause of the Massachusetts Declaration of Rights, Article 10: "In sum, we deal in this case with the application of principles to which this court is no stranger, and in an area in which our constitutional guarantee of due process has sometimes impelled us to go further than the United States Supreme Court."[25] Obviously decisions like *Moe v. Secretary of Administration* are critical as we anticipate the U.S. Supreme Court significantly limiting if not eliminating any federal right to abortion.

However, it is also clear in this divisive political climate that victories based on state laws and constitutions are tenuous. In Kansas, for example, abortion is currently protected by a 2019 decision of the Kansas Supreme Court which interpreted Section 1 of the Kansas Constitution Bill of Rights to guarantee the right to personal autonomy. "This right allows a woman to make her own decisions regarding her body, health, family

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21 Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

22 Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & Mary L. Rev. 605, 637 (1981).

23 Brennan, *supra* note 9.

24 *Moe v. Secretary of Administration*, 417 N.E. 2d 387 (Mass. 1981).

25 *Id*. at 399.

formation, and family life – decisions that can include whether to continue a pregnancy. Although not absolute, this right is fundamental."[26] As a result of this decision, and as the states circling Kansas continue to tighten abortion restrictions, Kansas has increasingly become the easiest access point in the region for abortions. Yet in 2022, a proposal to amend the state Constitution to remove abortion as a fundamental right will be voted on by Kansas voters in a statewide election.

One clear lesson for those bringing cases such as *Hodes & Nauser, MDS, P.A. v. Schmidt*, then, is that the state court legal strategy must envision and be part of a broader political strategy to defend such court victories.

Challenges to State Education Systems

In 2014, the Michigan Supreme Court rejected a claim by students in Highland Park that the failure of the public schools to provide adequate and sufficient instruction resulted in their inability to obtain basic literacy skills and reading proficiency. The lawsuit was based on the Michigan constitution and Michigan law.[27]

The students did not give up. They next filed in a Michigan federal court, arguing that they had been denied access to literacy on account of their races, in violation of their rights under the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. Despite finding that the conditions and outcomes of Plaintiffs' schools were "nothing short of devastating," the court ruled against the students finding that education is not a fundamental right under the Federal Constitution.[28]

In 2020, the Sixth Circuit Court of Appeals reversed the lower court, holding that a basic minimum education, meaning one that plausibly provides access to literacy, is a fundamental right under the Constitution, something which the U.S. Supreme Court had never explicitly held.[29] The decision, however, was vacated when the Court granted *en banc* review.[30] A settlement agreement was then reached by the parties resulting in some increased funding for the schools, and the case was dismissed on June 10, 2020.[31]

At first it would seem what happened in the Michigan litigation undercuts the thesis of this article: A plaintiff may in fact have more success

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26 H*odes & Nauser, MDS, P.A. v. Schmidt*, 440 P. 3d 461, 466 (Kan. 2019).
27 *LM v. State of Michigan*, 307 Mich. App. 685, 690-691 (2014).
28 *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018).
29 *Gary B. v. Whitmer*, 957 F. 3d 616 (6th Cir. 2020).
30 *See Gary B. v. Whitmer*, 958 F. 3d 1216 (6th Cir. 2020).
31 *Gary B. v. Whitmer*, No. 18-1855, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020)

filing a constitutional claim based on the federal rather than state constitution. I would argue, however, that the likelihood that the federal courts will recognize education as a fundamental right has diminished as the federal courts become more conservative. Going forward, state courts may be more receptive to these arguments. Every state constitution has language that mandates the creation of a public education system. "Based on their own constitutions, the states have generally been more welcoming to claims of education as a fundamental right."[32] California was one of the first states establishing this principle when its Supreme Court held in *Serrano v. Priest* that education is a fundamental right under the California Constitution.[33] Courts in numerous other states have followed suit.[34]

In *McCleary v. State*,[35] the adequacy of state funding for K-12 education in Washington was challenged under article IX, section 1 of the Washington State Constitution which stated that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders."[36] The Supreme Court affirmed the trial court's conclusion that "'paramount' means the State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations."[37] The state legislature was ordered to remedy the deficiencies found by the Court. In 2015, the Court imposed sanctions of $100,000 per day on the legislature based on the legislature's inadequate response to the 2012 judgment. On June 7, 2018, the Court determined that the state had sufficiently complied with the Court's 2012 judgment, lifted the monetary penalty, and terminated its retention of jurisdiction in the case.

Again, whether it makes sense to pursue such litigation depends upon various factors such as the political perspective of the state judiciary, or whether a state law or constitution provides the legal basis for such claims. However, electing different judges, enacting new laws, amending state constitutions are generally more feasible than making such changes on the federal level, again depending on the particular state's political complexion. **One purpose of this article is to encourage the consideration and development of such strategies**.

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32 Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU Educ & L.J. 261, 285 (2005).

33 *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (Cal. 1971).

34 Brennan-Gac, *Educational Rights in the States*, Vol. 40, No. 2, Human Rights Magazine (American Bar Assn., April 1, 2014).

35 173 Wash. 2d 477, 269 (2012).

36 *Id.*

37 *Id*. at 248-49.

Climate Litigation

In August 2015, twenty-one children and young adults filed suit in federal court in Oregon against agencies of the federal government, alleging that industrial-scale burning of fossil fuels was causing catastrophic and destabilizing impacts to the global environment, and threatening the plaintiffs' right to a healthy, habitable living environment.[38] Plaintiffs' claim was rooted in the Due Process Clause of the Federal Constitution, and based on the "public trust doctrine." A favorable district court opinion allowing the case to proceed to trial was ultimately overturned by the Ninth Circuit Court of Appeals which "reluctantly" concluded the claim was not redressable by an Article III court.[39]

The U.S. Constitution, unlike that of many other countries, does not explicitly contain a right to a healthy environment, and it is unlikely the federal courts would ultimately uphold claims similar to plaintiffs. However, the organization which supported the *Juliana* litigation, has also filed numerous climate change lawsuits in state courts.[40] Most of these cases have not succeeded, yet. For example, the plaintiffs in *Juliana* filed a separate action in state court in Oregon, not based on the Oregon Constitution which has no provision asserting the "right to a healthy environment," but rather based on a common law doctrine: the public trust. Ultimately the Oregon Supreme Court refused to extend that doctrine to plaintiffs' claims.[41] A case filed in Washington state by Our Children's Trust, in part based on the Due Process and Equal Protection clauses of the Washington Constitution, was also rejected by the Washington Court of Appeals: "The Youths deserve a stable environment and a legislative and executive branch that work hard to preserve it. However, this court is not the vehicle by which the Youths may establish and enforce their policy goals."[42]

Rooting the right to a healthful environment in state due process and equal protection clauses, or in the public trust doctrine, has been challenging. As with any political case, the chances of success increase if community organizations bring attention to these cases through publicity, demon-

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38 *Juliana v. United States of America*, 217 F. Supp. 3d 1224 (D. Or. 2016).

39 *Juliana v. United States*, 947 F. 3d 1159, 1175 (9th Cir. 2020).

40 *See* Our Children's Trust, ourchildrenstrust.org (last visited Apr. 11, 2022).

41 *Chernaik v. Brown*, 367 Or. 143 (Or. 2020). Arguably the Oregon Constitution has no due process or equal protection clauses although other clauses could be used to support such constitutional claims. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. Rev. 125 (1970); Balmer, Thomas A., *Does Oregon's Constitution Need a Due Process Clause?" Thoughts on Due Process and Other Limitations on State Action*, 91 WASH. L. Rev. 157 (2016), *available at* https://digitalcommons.law.uw.edu/wlro/vol91/iss1/8.

42 *AJI P. v. State*, 16 Wash. App. 2d 177, 211-212 (2021).

strations. However, litigation can be easier if the case is rooted in a state constitution which explicitly recognizes the right to a healthy environment. Several states constitutionally guarantee such a right: Montana, California, Hawaii, Illinois, Pennsylvania, Rhode Island, and Massachusetts.[43] Other states provide monetary support or bonds for protecting the environment or give the legislature the duty to enact laws to preserve the environment.[44] This is not to say that litigating in states with explicit constitutional guarantees to a healthy environment assures success. Courts have undercut these provisions by holding they are not self-executing, by denying standing to private citizens, or by establishing relatively easy standards for meeting the constitutional requirements.[45] But some cases have succeeded.

Montana Environmental Information Center ("MEIC") v. Department of Environmental Quality, 988 P.2d 1236 (Mont. 1999) was a challenge to a statute which exempted ground water pump tests for new mines from environmental review. Plaintiff alleged the pump tests at issue would have discharged large quantities of groundwater with high concentrations of heavy metals into the Blackfoot River. Ultimately the Court found the right to a clean and healthful environment in Articles II and IX of the Montana Constitution was a fundamental right, gave plaintiffs standing to enforce that right, and applied strict scrutiny to overturn the challenged statute.

A recent decision in the Louisiana Court of Appeals, Third Circuit, is also instructive. The Bayou Bridge Pipeline Company (BPP) owns a crude oil pipeline that runs from near Lake Charles to St. James, a historic Black community. Three landowners challenged an eminent domain lawsuit filed by BPP. The Appellate Court rejected constitutional challenges to the state's eminent domain scheme. However, the court found that BPP's decision to begin construction before obtaining a judicial determination of the public and necessary purpose for the land taking "not only trampled Defendants' due process rights [specifically recognized in La. Const. art 1, § 4], it eviscerated the constitutional protections laid out to specifically protect those property rights." [46] Each Defendant was awarded $10,000 in damages as well as attorney fees.[47]

Obviously prevailing in such lawsuits as *MEIC v. Department of Environmental Quality* and the Louisiana litigation (filed by the New

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43 J. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 Int'l. Legal Persp. 185, 185-186 (1999).

44 *Id*.

45 J. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough,* 21 Widener L. Rev. 239, 240 (2015).

46 *Bayou Bridge Pipeline, LLC v. 38.00 Acres,* 304 So.3d 529, 549 (La. App. 2020).

47 *Id*. at 552.

York-based Center for Constitutional Rights) is no easy task. If one's state constitution does not have the explicit language of the Montana document, then one will need to try to find some other basis for the legal claim: a due process clause, an equal protection clause (assuming those are in one's state constitution), establishing the public trust doctrine. And victories are also possible in federal court. In *Guertin v. State*,[48] a lawsuit arising out of what the court described as the "infamous government-created environmental disaster commonly known as the Flint Water Crisis[;]"[49] the court allowed plaintiffs' Section 1983 lawsuit to proceed based on the alleged violation of the right to bodily integrity as guaranteed by the Substantive Due Process Clause.[50] Given changing attitudes towards climate change, perhaps more effort should be made to amend state constitutions which do not have an explicit guarantee to a healthy environment.

CONCLUDING THOUGHTS

In a New York Times guest opinion written on November 16, 2020,[51] Gurbir S. Grewal, New Jersey's attorney general, and Jeremy Feigenbaum, the state solicitor, discussed how progressive states can respond to conservative courts. Four strategies were discussed:

- State elected officials must be ready to respond to, or act in advance of, Supreme Court rulings.[52]
- State officials such as attorneys general must enforce newly enacted laws and existing protections in state courts.[53]
- Progressive advocacy groups and lawyers outside government should litigate rights enshrined in state constitutions. "This will be particularly important in states where leaders hew to a conservative agenda."[54]
- We need to rethink the arguments we make and language we use in a conservative legal environment.[55]

My sense is that whether to raise constitutional or civil rights (discrimination, employment, etc.) issues in federal or state court depends on a

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48 912 F. 3d 907 (6th Cir. 2019) *cert. den*. ___U.S. ___ (01/21/2020).

49 *Id*. at 915

50 *Id.*

51 Gurbir S. Grewal & Jeremy Feigenbaum, *How Progressive States can Respond to Conservative Courts*, N.Y. Times (Nov. 16, 2020), https://www.nytimes.com/2020/11/16/opinion/progressive-conservative-courts.html.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

multitude of factors:

- The composition of the respective judiciaries in terms of political perspective or bias.
- How the constitutional provisions or laws at issue have been interpreted in the past, and whether that is likely to change given the increasingly more conservative perspective of the federal courts.
- In a case likely to be tried before a jury, the make-up of the jury panels in state and federal court.
- The rules regarding discovery in the different fora.
- The likelihood of being awarded attorney fees. A significant reason for filing lawsuits constitutionally challenging state action is the availability of an attorney fee award under statutes such as 42 U.S.C. §1983 or statutes prohibiting discrimination. In Oregon, constitutional challenges in state court had no explicit statute providing for fees to the prevailing party analogous to 1983. However, in 1975, the Oregon Supreme Court held that Oregon courts have inherent equitable power to award attorney fees to a party that prevails on a constitutional claim.[56] In states where this has not been established, proposing a 1983 analogue in the state legislature should certainly be pursued.
- Electing more responsive state court judges, proposing new state laws, even proposing amendments to state constitutions although no easy task, is certainly more of a possibility than making such changes on the federal level.

I agree with Grewal and Feigenbaum that a state court litigation strategy should, at a minimum, be evaluated and considered when challenging state actions – and even federal actions – which are arguably illegal under state laws and constitutions.[57] Many such actions have been and continue to be brought by community organizations and their advocates in state courts. For example, a recent lawsuit was filed in Oregon by the NYU Policing Project challenging the Oregon TITAN Fusion Center's actions monitoring and intimidating environmental, indigenous rights, and social justice activists who had (ultimately successfully) challenged the Jordan Cove pipeline, a $10 billion fossil fuel pipeline. Plaintiffs allege that the Center, run by the Oregon Department of Justice, regularly collected infor-

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56 *Deras v. Myers*, 272 Or. 47, 65-66 (1975).

57 *See also* Erwin Chemerinsky, *To Rein In the Police, Look to the States, Not the Court*, N.Y. Times (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/opinion/police-supreme-court-states.html. Chemerinsky suggests, and I agree, that the focus should not exclusively be on the courts, but also be on adopting state laws and local ordinances. *See id.*

mation on the activists, and then shared the files with "intelligence" partners ranging from the federal government and local law enforcement agencies to oil companies and public relations firms. The claim is premised on the allegation that the program was conducted without any legislative authorization or oversight.[58]

Further, state courts have become a primary forum for challenging gerrymandered political maps whereas, historically, such challenges have generally been brought in the federal courts. As noted by Michael Li, a redistricting expert at the Brennan Center for Justice:

> There's a renewed interest in this rich vein of state constitutional tradition that many people had ignored, because as lawyers, we've been training for 60 years that the federal court is where we're going to vindicate rights . . . And we've sort of tended to treat state courts and state constitutions almost as a stepchild. And then, we're realizing there's actually a lot there.[59]

Finally, although beyond the scope of this essay, we should also be creative in thinking about how to expand state court litigation to encompass issues which are increasingly foreclosed in federal courts. One example is the consideration of international law in support of claims brought in state court. In *Namba v. McCourt*, 185 Or. 579 (1949), the Oregon Supreme Court discussed Article 55 of the U.N. Charter to support its declaration that the Oregon Alien Land Law violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. And in a decision by Justice Linde in *Sterling v. Cupp*, 290 Or. 611 (1981), the Court examined a variety of international treaties and covenants regarding the treatment of detainees to interpret a phrase in Oregon's Constitution which prohibits the treatment of prisoners with "unnecessary rigor."

Yes, even as attorneys, there should be no limit to our creativity.

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58 *Farrell-Smith et al. v. The Oregon Department of Justice et al*., Marion County Circuit Court, Case No. 21CV47809 (filed 12/14/2021).

59 Nick Corasaniti & Reid J. Epstein, *State Courts Emerge as Firewall Against Gerrymandering by Both Parties*, N.Y. Times (Apr. 2, 2022), https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html.