The Short-Lived Burial of Miranda (Comments)

Ken Gormley, Duquesne University School of Law
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One of the intriguing things about state constitutional law as it has developed in modern times—roughly since the 1970s—is that it has been a seat-of-the-pants experiment.

That is true of all developing bodies of jurisprudence, of course. It was true of modern labor law in the 1940s and 1950s. It was true of administrative law in the 1960s and 1970s. But state constitutional law has provided a particularly fertile playground for judicial inventors and tinkerers. It inevitably encompasses issues that spawn the hottest of hot debates in American society—the scope and durability of individual liberties; the parameters of criminal procedural rights; the complex legal tests by which we safeguard those guarantees that flow from the very soul of our nation.

Those of us who taught courses or litigated cases in state constitutional law in the early 1980s, remember jumping into this new subject by parroting the pleasant incantation that states could grant “more” rights to their citizens under their own constitutions but never less. Yet we quickly discovered that “more” and “less” were elusive terms as slippery and hard to handle as ball-bearings rolled in oil. A state could grant “more” rights of free speech to leaflets at a private shopping center, under its own constitution, surpassing those extended by the First Amendment. But a horrible quandary presented itself. Did this not simultaneously cut back on the “rights” of the private property owners?1 Which way was up, and which way was down?

A state could invoke its own constitution to extend the wall of separation between church and state further than that mandated by the U.S. Supreme Court. But didn’t this simultaneously shrink the free exercise rights of a different group of citizens?2 “More” and “less” were difficult directorial signals to apply, we quickly found.

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Even in the criminal cases, where John Q. Citizen faced the government and the maxim seemed foolproof (the state could go beyond the “floor” of rights established by the U.S. Bill of Rights, but never sink below it), we found room for debate and confusion. Could states develop their own ways for preserving criminal defendants’ rights that were not identical to those pronounced by the U.S. Supreme Court, but arguably of equal weight (if one were comparing them on a postage scale) such that they could coexist?

It was here that experimentation, in the early years of the state constitutional law movement, reached its most colorful zenith.

To put it in blunt, over-generalized, political terms: If “liberals” could use state constitutions to enhance the rights of criminally accused, why couldn’t “conservatives” check-mate them by shrinking (or at least freezing) criminal rights? As long as a state developed a “different” way for protecting the same rights as the federal constitution, where was the foul?

My favorite case of this generation was State v. Smith, a decision of the Oregon Supreme Court in 1986, that flirted with brinkmanship in federalism, almost to the point of a major fireworks display.

In Smith, the three-judge plurality of the Oregon Supreme Court concluded that Miranda warnings—required by the federal Fifth Amendment—simply did not have a place under the Oregon Constitution. Grant Smith, arrested for drunk driving, had gone into the case arguing that the Oregon Constitution (Article 1, Section 12) guaranteed him Miranda-type warnings at a point earlier than that required by the federal Fifth Amendment. He wanted “more” rights under his state constitution, riding the crest of state constitutional zeal in Oregon during the early 1980s.

Not only did Justice J.R. Campbell and his two colleagues in the plurality disagree with Grant Smith, but they were tired of liberal Justices on their Court, led by Justice Hans Linde (a national force in the “New Judicial Federalism” movement), using their state constitution as a tool to grant “additional” rights to criminal defendants. So they decided to beat Linde and the rest of the state constitutionalists at their own game.

Justice Campbell declared that Miranda warnings were not required under the Oregon Constitution. At all.

The Miranda decision in 1966, the plurality explained in Smith, was based in large part on the U.S. Supreme Court’s determination

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725 P.2d 894 (Or. 1986).


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that coercion had become a common practice in police fieldwork. Brutality and violence had become a standard tactic for eliciting confessions and incriminating statements from suspects. But there was a flaw in the federal logic—these problems simply did not exist in Oregon.

Wrote Justice Campbell: "It is not the purpose of this opinion to argue with *Miranda v. Arizona*, but it made a mistake including Oregon within the 'part of the country' where physical brutality and violence by the police exist."4

The reasoning was bold and intriguing. It went like this: *Miranda* warnings were not really federal constitutional law; they amounted to federal procedure rules that could be tinkered with by the state. Oregon had a century-old body of case law under its own constitution that protected criminal defendants with equal vigor; it focused on whether a confession was "voluntary," to accomplish the same end.5 So why force a state to employ the rigid warnings developed at the federal level in *Miranda*, if it was doing something just as effective under its own constitution?

Professor Yale Kamisar, quoted in the *National Law Journal*, decried the Oregon decision in *Smith* as "a long step backwards" for constitutional law in the states.6 Attorney John Henry Higson, III, who had filed an amicus brief in *Smith* for the Oregon Criminal Defense Lawyers Association, attempting to push *Miranda* to more protective heights in Oregon, was stunned. "I'm the one who started this," he lamented.7 In seeking more rights for criminal defendants in Oregon, he had somehow caused the Court to abolish *Miranda* entirely.

What was the impact of the bold, controversial, revolutionary *Smith* decision over the next ten years? Nothing.

Lawyers in the State Attorney General's office (some of whom I ran into at conferences over the next few years), quietly ignored the decision. This was true even though their boss, Attorney General David Frohnmayer, had argued the case. The Oregon Court itself, except for occasional flourishes by Justice J.T. Campbell and his colleagues in the plurality, pretended it did not exist.8 Police

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4 Id. at 905.
5 Id.
7 Id.
8 For an example of later attempts to resurrect *Smith* by Justice Campbell and his colleagues in the plurality, see State v. Magee, 744 P.2d 250, 253 (Or. 1987) (Carson, J., concurring).

continued to give *Miranda* warnings routinely in Oregon. The Oregon appellate courts eventually declared that *Smith* was repudiated and laid to rest—although the precise site and date of its interment still remain a mystery.⁹

The world of federalism survived, without exploding into a fiery ball of judicial chaos. “New Judicial Federalism” kept chugging along.

Why? Because *Smith* was not really a close case. The Supremacy Clause of the United States Constitution makes clear that federal law (including constitutional provisions) trump state law (including state constitutional provisions) if they directly collide.¹⁰ Despite the creative footwork of the *Smith* plurality, *Miranda* is almost certainly—no matter how one dices it up—a mandate of the Fifth Amendment. Substituting “voluntariness” tests and other homegrown (often nebulous) standards in favor of a straightforward *Miranda* test that police in every state had to follow, would almost certainly amount to a direct violation of the Supremacy Clause, if the issue were forced to the steps of the U.S. Supreme Court.

The other Justices in Oregon knew this. The State Attorney General’s office knew this. Lawyers in Oregon knew it. Police officers figured it out. So *Miranda*’s dramatic burial was thrilling but short-lived, in the chilly Pacific Coast state.

Yet *Smith* remains a colorful reminder that ceilings and floors are not always such simple reference points, in the shifting house-of-cards known as federalism. What is more? What is less? What is the same? Creative lawyers and jurists will inevitably produce varying answers, as long as we continue to carve out a body of law that did not exist fifty or a hundred years ago.

Aberrant cases like *Smith* should not frightens us; they should invigorate us. State constitutional law began as, and remains, an experiment. As with any other experiment, the results are not as interesting or productive—for a society sharper when it is on the brink of the unexpected—unless everyone is invited to the laboratory table. Should some states succeed in diverging from federal precedent if they provide rights “equal” to those guaranteed by the U.S. Constitution, in some different form? Perhaps so. Should “liberal” and “conservative” state justices both find solace within the

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¹⁰ U.S. Const. art. VI, § 2.
crusty pages of their own state charters, if U.S. Supreme Court standards (in any given sphere) seem flat and lifeless? Why not?

Experiments in government are rarely successful unless they reflect, to some modest extent, the sum total of those components making up the governed. *Miranda* was not buried in Oregon. It does not hurt to have occasional reminders that not every jurist in America does, or should, wish to grant “more” rights every time he or she wishes to invoke the state constitution in the name of positive change.

Granting “equal” rights, in different and ingenious ways, may be the new frontier into which state constitutional jurisprudence must push: Even if there are occasional flutters of mischievous pens.


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