

State Constitutions: Freedom's Frontier

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We gather today to celebrate the 229th anniversary of the signing of the most magnificent national freedom charter ever created—appropriately enough in an institution dedicated to the eternal preservation of the Constitution and the principles on which it rests.

And yet, when we speak of *the* Constitution, no matter how much we properly revere it, we often overstate its intended importance in the American legal order. For in our federal system, we have not one but 51 constitutions. It is part of the masterpiece of federalism that each of us in the 50 states can look for the protection of our rights not to one constitution but two. Indeed, state constitutions were intended to be primary, not secondary. Early Americans looked mainly to their state constitutions to protect their rights. Only after the Fourteenth Amendment was ratified in 1868 could they look to the national constitution for protection against most state violations of their rights.

But even as the national constitution moved to the fore—particularly the rights protected in the Bill of Rights, plus equal protection and due process—many essential liberties were protected either by state constitutions or not at all. Freedom of enterprise, for instance, was left unprotected by the U.S. Supreme Court, even though many state courts applied their own constitutions to strike down excessive economic regulations.¹

Yet today, state constitutions are relegated to an afterthought. Constitutional law classes rarely mention them. Litigators rarely invoke

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¹ See, e.g., Clint Bolick, *Death Grip: Loosening the Law's Stranglehold Over Economic Liberty* (2011) (discussing the failure to protect freedom of enterprise under the national constitution starting with *The Slaughter-House Cases*, 83 U.S. 36 (1873)).

them. State courts often interpret them as if they were mere appendages of the national constitution.

Moreover, despite their professed commitment to federalism, many conservative and libertarian litigation groups focus almost exclusively on the national constitution, except when they have no other choice. That emphasis is profoundly unfortunate, for two reasons. First, it overlooks the vast untapped potential of state constitutions as bulwarks for freedom. Second, it concentrates resources in judicial terrain that may grow increasingly hostile to freedom in the years to come. So even as we pause to celebrate the remarkable resiliency of our nation's constitutional charter, so should we look anew to the state constitutions that were intended to provide the first line of defense against overreaching government.

I. The Advantages of State Constitutions

For freedom advocates, state constitutions provide significant advantages over their national counterpart. Indeed, if this talk had a subtitle, it would be "if only," as in, "if only the United States Constitution had so many of these features." Although the national constitution has many nifty qualities from a freedom perspective, many individual rights and constraints on government power in the U.S. Constitution have been winnowed by federal courts. And they pale in comparison to provisions for freedom available in state constitutions.

I call these superior features of state constitutions the Fabulous Five. Foremost among them is that all state constitutions provide protections of individual rights and constraints on government power that are completely unknown to the U.S. Constitution. I will discuss some of those provisions later on, but among those that are common to many state constitutions are explicit rights to privacy, debt limits, and prohibitions against gifts of public funds. For freedom advocates, exploring state constitutions is akin to being a kid in a candy store. And like the proverbial unseen tree falling silently, the freedom provisions of state constitutions are equally silent when they are unlitigated.

Second, many state freedom provisions that are similar to provisions in the U.S. Constitution are written more broadly. Even when such provisions are identical to those in the U.S. Constitution, state courts are free to interpret them differently than federal

courts, but only in one direction: state courts may apply state constitutional provisions as more protective of freedom than their federal counterparts, but not less. I call this the freedom ratchet: the U.S. Constitution provides the floor beneath individual rights, while state constitutions can provide greater but not lesser protection.

Third, state courts have the final word on state constitutional interpretation. In other words, if you prevail on a state constitutional issue, the other side has no recourse to the U.S. Supreme Court, unless of course the state court interpretation violates the U.S. Constitution or valid federal laws. That is reason enough for freedom advocates to always consider filing constitutional cases in state courts and to always assert independent state constitutional grounds in addition to federal constitutional grounds when doing so.

Fourth, state constitutions often provide greater access to the courts than does the national constitution, at least as interpreted by the U.S. Supreme Court. For instance, many state constitutions do not contain “case or controversy” requirements. Perhaps most important, unlike federal courts, most state courts recognize taxpayer standing to challenge unconstitutional government spending.

Finally, state constitutions often are far more easily amended than the national constitution. If you’ve ever aspired to constitutional authorship, I suggest you look at amending state constitutions rather than attempt the Sisyphean task of amending the U.S. Constitution. Arizonans have added several freedom provisions to our Constitution in recent years, including a prohibition against racial preferences in government employment, education, and contracting; provisions protecting rights to healthcare autonomy and rights of terminally ill patients to use experimental drugs; and a provision authorizing the legislature or the people to forbid the use of state funds to implement federal laws or programs they believe exceed constitutional boundaries.

State constitutions, like the national constitution, were intended to protect individual rights and restrain government power. Their potential to do so is vast and largely unrealized, yet hardly unrealizable.

II. Learning from Justice Brennan

The earliest clarion call for freedom advocates to repair to state constitutions came not from the right but the left, in a pair of penetrating law review articles by U.S. Supreme Court Justice William

H. Brennan. Justice Brennan was not only a highly effective jurist but a brilliant legal strategist. By 1977, the Warren Court with Brennan as its chief architect had experienced a very successful run, fundamentally reshaping American jurisprudence in a wide array of areas, most notably the rights of criminal defendants. But Brennan correctly sensed that change was coming. With President Richard Nixon's appointment to the Court of so-called law-and-order strict constructionists, the jurisprudential tide was turning. Writing in the *Harvard Law Review*, Brennan declared that "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."² Where federal courts retreated from judicial frontiers, Brennan urged liberal advocates to turn instead to state courts.

They did, and with gusto. Only nine years later, when Brennan wrote his second article on the subject, he could report at least 250 state court decisions that had interpreted their state constitutional rights more broadly than their national counterparts.³ Most of the decisions were in the realm of criminal procedure, but others encompassed free-speech guarantees and educational equity. In this second article, Brennan's call to arms was even more urgent, and grounded in decidedly different rhetoric addressed to liberals and conservatives alike. He applauded state courts for "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their own states even more protection than the federal provisions, even those identically phrased."⁴ Brennan declared, "Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts."⁵

Fast forward 30 years to today. I submit that we conservatives and libertarians may find ourselves in a "Brennan moment." For the past quarter-century, since the confirmation of Justice Clarence Thomas in 1991, we have enjoyed a renaissance in the jurisprudence of original meaning. I know that many will argue about whether the glass is

² William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," 90 *Harv. L. Rev.* 489, 489 (1977).

³ William J. Brennan Jr., "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," 61 *N.Y.U. L. Rev.* 535, 548 (1986).

⁴ *Id.* at 495.

⁵ *Id.* at 502.

half-empty or half-full, and all of us would quibble over doctrinal details. But none of us would trade the federal jurisprudence of today for that of 1991. We have made significant progress for liberty in areas as diverse as freedom of speech, religion, and association; federalism; private property rights; Second Amendment rights; racial classifications; school choice; and the limits of federal power under the Commerce Clause.

But prospects for future freedom gains are uncertain. Justice Antonin Scalia's intellect and his role as an ardent proponent of constitutional textualism will be sorely missed. Justice Anthony Kennedy's pivotal vote is increasingly uncertain, as evidenced by his 2016 decision to uphold racial preferences at the University of Texas, after decades of voting to strike such preferences down. Chief Justice John Roberts disappointed freedom advocates by voting to uphold Obamacare. And of course we cannot be certain of President Donald Trump's commitment to appoint justices and judges dedicated to the rule of law.⁶

So the time has come for freedom advocates to devote greater attention to state constitutions. Some of the issues on which we have experienced great success in the federal courts cannot, of course, be equally advanced in state courts. But many, such as freedom of speech and religion, private property rights, and equal protection can be. And as I noted earlier, largely unexplored state constitutional frontiers abound in other areas, including economic liberty and taxpayer protections. Brennan's epiphany about the independent vitality of state constitutions is as relevant and resonant for today's freedom advocates as it was nearly four decades ago.

III. My Own Experience and Beyond

My own epiphany about state constitutions occurred early in my career. Like most lawyers, I never took a course in state constitutional law and hadn't a clue what treasures those mysterious documents contained. But I was about to be schooled on them in what was to be the most important case of my young career.

I went to law school in large part to advance educational freedom, especially through school vouchers, and was determined to defend voucher programs against inevitable legal challenges

⁶ But the appointment of Justice Neil Gorsuch is a promising start!

by those invested in the status quo. Trouble was, there were no voucher programs to defend.

That changed in 1990 with the enactment of the Milwaukee Parental Choice Program. Initially it was tiny, limited to one percent of the school district's students who could use a fraction of their state education funds to attend nonsectarian private schools. Still, we knew a legal challenge was imminent. But what would be the grounds for attack? For years we had prepared for a challenge under the First Amendment's Establishment Clause, but the program excluded religious schools. So the challengers had to look not to the U.S. Constitution but to the Wisconsin Constitution.

There they found three causes of action: the educational-uniformity clause, the so-called public purpose doctrine, and the "private or local bill" clause, which the challengers asserted the program violated because it was passed as part of the state budget rather than as a stand-alone bill. I had never heard of any of these provisions, and I had all of a couple of weeks to fathom and argue them.

For the next two years, we battled over those provisions, winning in the trial court, losing in the court of appeals. The private or local bill clause, in particular, became the bane of my existence. Ultimately, in 1992, we prevailed in the Wisconsin Supreme Court by the resounding vote of 4-3,⁷ which marked the start of a vibrant national movement to expand precious educational opportunities for children who desperately needed them.

In the midst of that grueling struggle, an odd thing happened: I fell in love with my *bête noire*, the private or local bill clause. Once I allowed myself to get past my adversarial disdain and see it in its natural splendor, I found the stuff of which libertarian dreams are made, a constitutional provision aimed at one of the most odious yet ubiquitous legislative practices: logrolling. Properly applied, the local or private bill clause, contained in numerous state constitutions, requires narrow-interest bills to stand on their own and be voted on separately, in the light of day. No more bridges to nowhere. No more larded up appropriations bills. No more earmarks. If only the U.S. Constitution contained such a provision! Having grasped the potential of the private or local bill clause, I made a mental vow

⁷ Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).

to one day wield it to good effect in litigation—a promise my colleagues eventually kept.

But that was not for many years. A far more pressing issue emerged requiring recourse to state constitutional protections, with results that illustrate perhaps better than any other the importance and potential for state constitutional guarantees. That issue was eminent domain. Under the guise of economic development, local governments around the country were using eminent domain in reverse-Robin Hood fashion, taking property from less well-connected owners and giving it often to developers tight with local officials.

The Fifth Amendment, of course, forbids that practice, limiting eminent domain to “public use.” But a body of thought has emerged from the Supreme Court holding that the Constitution is self-amending, and that the justices’ role is to discover and announce when that happens. Sure enough, the Court discovered that the Fifth Amendment’s “public use” limitation had transmuted into the far more forgiving “public benefit.” So when my colleagues challenged the taking of Suzette Kelo’s little pink house in New London, Connecticut, under the Fifth Amendment, they faced a decidedly uphill task. And we all know the outcome: the neighborhood was bulldozed, the supposed public benefit never materialized, and we all suffered an erosion of our precious liberties.⁸

But at the same time the fight against eminent domain was being fought and lost in federal courts, my former colleagues and I were waging a similar battle in Arizona state courts on behalf of Randy Bailey, who owned Bailey’s Brake Service in Mesa. Randy inherited the business from his dad and wanted to pass it along to his son. But the city had other ideas: it wanted to take Randy’s shop and several homes so that the owner of a hardware store could expand his business. Under the *Kelo* decision, Randy surely would have come away empty-handed in federal court. But in state court, Randy had a powerful weapon: Article II, § 17 of the Arizona Constitution.

That provision states, “Private property shall not be taken for private use.” Not only that, but it states, “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that

⁸ *Kelo v. City of New London*, 545 U.S. 469 (2005).

the use is public.” Although the courts previously had not vigorously applied that standard, in Randy’s case they did.⁹ So while Suzette and her neighbors tragically lost their homes, you can still buy brakes at Bailey’s Brake Service at Country Club and Main in Mesa.

That decision, in my view, illustrates what federalism and state constitutionalism are all about. And it’s the kind of decision that can be contagious; indeed, several other state courts have applied their eminent domain provisions more broadly than the U.S. Supreme Court to protect private property rights.¹⁰

In other areas too, state court decisions have expanded the boundaries for freedom. In Arizona, my former colleagues and I dusted off the Gift Clause of the state constitution, which forbids gifts of public funds to private individuals, corporations, or associations by subsidy or otherwise.¹¹ At the time, Arizona cities were competing for sales tax revenues by subsidizing retail shopping centers. A Chicago developer landed a nearly \$100 million taxpayer subsidy to construct a Phoenix mall that was supposed to be so grandiose that we dubbed it the “Taj Mah-Mall.” In its 2010 decision in *Turken v. Gordon*, the Arizona Supreme Court ruled that payments to private companies are unconstitutional unless supported by tangible, enforceable consideration, thus bringing the costly subsidy wars to an end.¹² Dozens of other states have gift clauses in their constitutions, which are rarely deployed despite a plethora of state and local subsidies.

A recent decision by the Texas Supreme Court has special meaning for me because it involves a right to which I devoted much of my

⁹ *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003).

¹⁰ See, e.g., *Mt. Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W. Va. 2016) (holding that a natural gas pipeline did not constitute a public use because defendant was “unable to identify even a single West Virginia consumer, or a West Virginia natural gas producer who is not affiliated with [defendant], who [would] benefit”); *Kirby v. N.C. DOT*, 786 S.E.2d 919 (N.C. 2016) (holding that the state’s designation of private property as part of a highway corridor, heavily restricting owners’ right to develop, constituted a taking requiring just compensation); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (In the first state supreme court case addressing the use of eminent domain for private development after *Kelo*, the court unanimously held that economic benefit to the government and community alone was not enough to constitute public use, that eminent-domain cases require heightened scrutiny, and that the use of the term “deteriorating area” as a taking standard was void for vagueness).

¹¹ Ariz. Const. Art. IX, § 7.

¹² 224 P.3d 158 (Ariz. 2010).

litigating career, but a right that the federal courts have almost completely buried: freedom of enterprise. Even though economic liberty was meant to be a foundational freedom protected by the Fourteenth Amendment's Privileges or Immunities Clause, federal courts have largely abdicated their responsibility to protect it, no matter how sweeping, destructive, or protectionist the regulation.¹³

In *Patel v. Texas Department of Licensing and Regulation*, the Court independently interpreted the state constitution to require greater justification for professional licensing, striking down regulations on eyebrow threading.¹⁴ In a concurring opinion, Justice Don Willett articulated perfectly the necessity of state constitutionalism:

Today's case arises under the Texas Constitution, over which we have final interpretive authority, and nothing in its 60,000-plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living. Indeed, even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.¹⁵

Those stirring words are both an exposition of the boundless realm of the possible as well as a call to action.

What then are the frontiers for freedom advocacy under state constitutions? They depend, of course, on the particulars of specific state constitutions and the opportunities they afford to protect freedom. They also depend on how much erosion our rights sustain under the federal constitution, and whether state constitutions can fill the void. The possibilities run the gamut from rights protections—in such areas as free speech, religious liberty, criminal procedure, privacy, freedom of association, private property rights, economic liberty, gun ownership, due process, and equal protection—to structural limits on government power, such as separation of powers, spending limits, gift clauses, and anti-monopoly provisions.

¹³ See, e.g., Clint Bolick, *Death Grip: Loosening the Law's Stranglehold Over Economic Liberty* (2011).

¹⁴ 469 S.W.3d 69 (Tex. 2015).

¹⁵ *Id.* at 98.

IV. The Judge's Role

Thus far I have emphasized the role of freedom advocates in bringing state constitutional actions. I will conclude by briefly discussing the role of judges in that context, a subject to which I hope to return in greater depth soon.

Judges are (or ought to be) bound by the rule of law. Even in my short time on the Arizona Supreme Court, I can attest that taking the rule of law seriously means departing frequently from personal policy preferences. We are not policymakers. That role is played by the political branches, within their constitutional boundaries.

But as state court judges, we swear oaths to two constitutions, and we ought to take each seriously. When a state constitutional issue is presented to us, that oath, in my view, requires us to interpret what the words of our state constitution say and mean—not what the federal courts have interpreted national constitutional provisions to mean. Unless our state constitutional provisions derive from the national constitution, what similar provisions of the national constitution mean is largely irrelevant to our task, and federal court interpretations even more so. In particular, while federal courts have determined that provisions of the U.S. Constitution have “evolved”—that is, have amended themselves to permit greater government power or protect fewer individual rights—there is no reason to assume that state constitutional provisions have experienced similar metamorphosis.

Each state has developed its organic law to reflect its own values and aspirations. The meaning of that law often is evident from its text and its history, but rarely from reference to federal jurisprudence. That is what is meant by independent interpretation of state law. As state judges, we are oath-bound to determine what our state constitutions mean. Quite often, they mean to protect freedom.

As a justice, I draw inspiration, and take my marching orders, from Article II, Section 1 of our Arizona Constitution: “A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” If we take those words seriously, and strive to give them their intended meaning, we will, despite all odds, leave to our children and grandchildren a nation more free than the one we inherited.