

State Constitutions: Freedom's Frontier

ARIZONA SUPREME COURT JUSTICE CLINT BOLICK delivered the annual B. Kenneth Simon Lecture at the Cato Institute's Constitution Day conference in September. The full text of his speech will be published in next year's *Cato Supreme Court Review*.

Today we celebrate, two days prematurely, the 229th anniversary of the signing of the most magnificent national freedom charter ever created. And we do so, appropriately enough, in an institution dedicated to the eternal perseverance of the Constitution and the principles upon which it is based.

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 rule of law. For in our federal system, we have not one constitution but 51. 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. And in that regard, state constitutions were intended to be primary, not secondary. Indeed, the national Constitution drew greatly from state constitutions, particularly in identifying individual rights that would be protected against the national government. It was not until the Fourteenth Amendment that individuals could look to the national Constitution to protect them against deprivations of freedom visited upon them by state or local governments. Even then, many important individual rights were protected either by state constitutions or not at all.

And yet today, state constitutions are relegated to afterthought. Constitutional law classes rarely mention them. Litigators rarely invoke them. State courts often interpret them as if they are mere appendages of the United States Constitution.

And ironically, despite their professed

commitment to federalism, conservative and libertarian litigation groups have focused almost exclusively on the national Constitution to the exclusion of state constitutions, 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 likely will produce diminishing returns for 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.

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 contained these features." Although the national Constitution has many nifty qualities from a freedom perspective, many of which have unfortunately been winnowed away by federal courts, they pale in comparison with 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 against 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 like being a kid in a candy store.

Second, many freedom provisions that are similar to provisions in the U.S. Constitution are written more broadly. And even when such provisions are identical to those in the U.S. Constitution, state courts are free to interpret them differently than the federal courts do. 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 constitution itself violates the national Constitution. That is reason enough for freedom advocates to always consider filing constitutional cases in state courts and to always assert independent state 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. Arizonans have added numerous freedom provisions to our constitution in recent years, including a prohibition against racial preferences in government employment, contracting, and education; the rights to healthcare autonomy and 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.

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 by, of all entities, the teacher's union, 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. 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 a tiny program, limited to 1 percent of the school district's students, who could use a fraction of their state education funds to attend nonsectarian private schools. We had been preparing for years for an attack on voucher programs under the First Amendment's Establishment Clause, but this didn't raise Establishment Clause issues, because religious schools were not included. So the challengers had to look not to the U.S. Constitution but to the Wisconsin Constitution for their line of attack.

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.

But over the course 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



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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 upon 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.

Soon after, a far more pressing issue emerged that required recourse to state constitutional provisions, 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 to take property from its owners and give it to others.

The Fifth Amendment, of course, forbids that practice, limiting eminent domain to “public use.” But a body of thought that sometimes dominates the U.S. Supreme Court holds 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 limitation of the Fifth Amendment had transmuted from public use to the far more forgiving public benefit. So that when my colleagues challenged the taking of Susette 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.

But at the same time that 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 to give to the owner of a hardware store who wanted to expand. 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 2, § 17 of the Arizona Constitution.

That provision states, “Private property shall not be taken for private use.” Not only that, but it goes on to say, “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 the use is public.” This language is over 100 years old! These guys knew what was coming, and they were bound and determined that it would not happen. And sure enough, although the courts previously had not vigorously applied that standard, in Randy’s case they did.

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

Other state court decisions have expanded the boundaries for freedom. In Arizona, my former colleagues and I at the Goldwater Institute 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. At the time, Arizona cities were competing for sales tax revenues by subsidizing retail shopping centers. A Chicago developer landed a nearly \$100 million 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. Dozens of other states have gift clauses in their constitutions as well, which are rarely deployed despite a plethora of government subsidies.

A recent decision by the Texas Supreme Court has special meaning because it involves a right to which I devoted much of my litigation career, but one that the federal courts have almost completely buried: freedom of enterprise. In *Patel v. Texas Department of Licensing and Regulation*, the Texas Supreme Court independently interpreted the state constitution to require greater justification for professional licensing, striking down regulations on eyebrow threading. 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 [How often do you read “rent-seeking” in a judicial opinion? Not enough!] 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

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post-dates enactment of our own constitutional provision, one more inclined to freedom.” Those stirring words are both an exposition of the boundless realm of the possible as well as a call to action.

One area in particular holds special promise: freedom of speech. All state constitutions embody free-speech protections, many are worded differently from the First Amendment, and all can be interpreted more broadly. Despite the First Amendment’s categorical prohibition against abridging freedom of speech, federal courts apply different scrutiny to regulations of different types of speech, such as commercial speech. State courts need not necessarily follow that lead in interpreting their own state provisions. For instance, should commercial speech be relegated to less-protected status under state constitutions? Should the U.S. Supreme Court overturn *Citizens United*, might state constitutions shield corporate speech in the political context?

So far I have emphasized the role of freedom advocates in bringing state constitutional actions. I will conclude my remarks 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 often means departing 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 oath 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 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, even when federal courts have determined that provisions of the U.S. Constitution have “evolved”—that is to say, they 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 a similar metamorphosis.

Each state developed its organic law to reflect its own values and aspirations. Its meaning 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. And quite often, they mean to protect freedom.

As a Justice, I draw inspiration, and take my marching orders, from Art. II, § 1 of our 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, we will despite all odds leave to our children and grandchildren a nation more free than we inherited. ■