



Vindicating Freedom in State Courts

By Clint Bolick

Over the past several decades, a significant pro-freedom public interest law movement has emerged, encompassing such organizations as the Pacific Legal Foundation and the Institute for Justice as well as dozens of other regional or issue-focused entities. Most of their litigation has been waged in federal courts. Together, the litigation groups have scored some impressive victories in such areas as racial preferences, private property rights, freedom of speech, mandatory unionism, economic liberty, federalism, freedom of commerce, religious liberty, and school choice.

The freedom movement's emphasis on federal litigation is understandable. Federal court decisions, particularly in the U.S. Supreme Court, have far greater precedential effects than those of state constitutional decisions. Given finite resources, federal court litigation

offers the prospect of achieving much greater "bang for the buck." That is especially true when the federal courts are populated by judges who are receptive to arguments grounded in original constitutional intent.

But the ardor of the federal judicial counterrevolution seems to have cooled. Toward the end of the Rehnquist era, the U.S. Supreme Court began to retrench, delivering disappointing decisions in many of the areas in which it previously had produced important gains for freedom, including private property rights, racial preferences, and school choice. Whether the Roberts Court will resume its predecessor's earlier direction remains to be seen.

Moreover, it is a bit ironic that a movement that professes fealty to federalism has focused so intensively on federal court litigation, largely ignoring state constitutions. The



U.S. Constitution's framers intended that state constitutions, rather than the federal Constitution, would provide the first line of defense for individual liberties. Indeed, the Bill of Rights was patterned after preexisting rights in state constitutions, and the federal protections were not even held applicable to the states until after the 14th Amendment was ratified in the late 19th century. As *The Federalist* No. 51 explains, a "compound republic" consisting of a federal government and state governments, each with their own protections of individual

tutions more broadly than the national Constitution. Although his articles were a clarion call to pro-government activists, his message ought to resonate just as strongly—if not more so—among pro-freedom organizations. As Brennan proclaimed:

[T]he point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties,

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liberties, provides a "double security" for the "rights of the people."

Although principles of federalism have been greatly eroded over the years, one rule remains sacrosanct: State courts are *not* bound to interpret their own constitutions in lockstep with the U.S. Supreme Court, even if the language of the provisions is identical. The sweetest fruit of the federalist system is that the U.S. Constitution provides only the *floor* beneath which the protection of liberty may not descend. But state courts are free to go beyond federal constitutional protections (or, more to the point, beyond protections recognized by federal courts) in construing their own state constitutions.

As is so often the case, the trails of expansive state constitutional interpretation were blazed by groups I will loosely refer to as pro-government. The patron saint of that movement was U.S. Supreme Court Justice William Brennan, who perceived during the 1970s that the activist revolution of the Warren era was beginning to wane. In a pair of seminal law review articles, Brennan extolled the virtue of state courts reading guarantees of state consti-

their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The 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.

Brennan noted that Madison had cautioned that state governments, not the federal government, could pose the greatest threat to liberty and, in fact, had proposed explicit constraints on state power within the Bill of Rights. But his suggestion was defeated because, as Brennan recounted, "it was believed that personal freedom could be secured more accurately by decentralization than by express command In other words, the states were perceived as protectors of, rather than threats to, the civil and political rights of individuals." Though Madison's views ultimately prevailed through the adoption of the 14th Amendment, state courts retain the power to interpret state constitutional rights more broadly than federal constitutional rights.

“As is well known,” Brennan explained, “federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law.” In light of the perceived retrenchment in the interpretation of federal constitutional rights in the 1970s, Brennan called upon state courts to be the primary defenders of individual rights, and they did exactly that. Indeed, by 1984, Brennan counted “over 250 published opinions holding that constitutional minimums set by the United States Supreme Court were insuf-

of federalism, and I am a devout believer, must salute this development in our state courts.” He argued that “those who regard judicial review as inconsistent with our democratic system—a view I do not share—should find constitutional interpretation by the state judiciary less objectionable than activist intervention by their federal counterparts.” In addition to the framers’ intention that the state constitutions protect liberties, Brennan noted that many state judges themselves are subject to democratic processes through popular election

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ficient to satisfy the more stringent requirements of state constitutional law.”

Justice Brennan’s call to state court activism was taken up by pro-government groups across the nation with enormous success in such areas as tort liability, family law, criminal law, and education. The paradigm example is the case of educational equity. In 1973, the U.S. Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that the federal Constitution does not provide a right to education, and it rebuffed efforts to hold school funding inequities unconstitutional. Whereupon, liberal activists convinced a number of state courts, beginning in California and New Jersey, to interpret their own constitutions to confer a fundamental right to education and to strike down funding systems that were found to produce educational inequity. Three decades later, funding-equity lawsuits in numerous states have wrested billions of additional tax dollars for public schools.

The trend of a more vigorous interpretation of state constitutions is one that the freedom movement should welcome. As Justice Brennan remarked, “Every believer in our concept

and that state constitutions typically are more easily amended than the federal Constitution.

“This rebirth of interest in state constitutional law should be greeted with equal enthusiasm by all those who support our federal system, liberals and conservatives alike,” Brennan observed, though he quipped tellingly that “[a]s state courts assume a leadership role in the protection of individual rights and liberties, the true colors of purported federalists will be revealed.” Pro-freedom organizations may not like the outcomes of some state court cases, but it is difficult to forestall them when only one side is engaged in the battle. As my Alliance for School Choice colleague Scott Jensen often reminds me, a bedrock rule of contests is that you have to be present to win.

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