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SPEECH

STATE CONSTITUTIONS AS A BULWARK FOR FREEDOM

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I. INTRODUCTION

My first encounter with state constitutional law occurred during a period of great anxiety early in my career as a lawyer. Education reform has always been one of my great passions, particularly the cause of school vouchers for educationally disadvantaged schoolchildren. One of my principal motivations for attending law school was a desire to defend the constitutionality of school-choice programs. There was only one problem: There were no school-choice programs to defend.

That changed in 1990, when Wisconsin enacted a small school-choice program for economically disadvantaged children in Milwaukee.¹ The program allowed eligible children to use a percentage of the state funds allocated for their education as full payment of tuition in

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1. WIS. STAT. ANN. § 119.23 (West 2009–2010).

participating nonsectarian private schools.² I expected that a legal challenge would follow and offered my services to families who wanted their children to participate in the program. We were ready to intervene to defend the program as soon as the lawsuit was filed.

Ready, that is, in all ways except one: We had no idea what the basis of the legal challenge would be. Because the program was limited to nonsectarian schools,³ the constitutional issue that everyone was contemplating in the context of school vouchers—the Establishment Clause of the First Amendment⁴—was not implicated by the Milwaukee program. So, the legal challenge would have to arise from somewhere else.

The most logical basis for a challenge, of course, was the Wisconsin Constitution. The trouble was that neither I nor anyone I was working with had any idea what might be in the Wisconsin Constitution or any other state constitution for that matter. And in that regard, I suspect I was not unlike most lawyers. After all, I am not aware of a single law school in which state constitutional law is a required course. When law students take the mandatory course in constitutional law, it typically pertains exclusively to the Federal Constitution, as if no other constitutions exist. When law schools do offer elective courses in state constitutional law, in my experience only a handful of students sign up. As a result, most lawyers, myself included at that time, are utterly ignorant about the contents of state constitutions. So as we anticipated a legal challenge to the Milwaukee Parental Choice Program based on the Wisconsin Constitution, we were a bit like Christopher Columbus setting sail for the New World: We were sure something was out there, but we had no idea where or what it might be.

Finally the complaint arrived, and it contained three causes of action: the state constitution's uniformity clause,⁵ the private or local bill clause,⁶ and the public purpose doctrine.⁷ I had faint familiarity with the

2. *Id.* § 119.23(4)(b).

3. WIS. STAT. ANN. § 119.23(2)(a) (West 1993–1994), *amended by* Assemb. B. 150, 1995–1996 Leg., Reg. Sess. (Wis. 1995).

4. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

5. WIS. CONST. art. X, § 3.

6. *Id.* art. IV, § 18.

7. *Town of Beloit v. Cnty. of Rock*, 657 N.W.2d 344, 350 (Wis. 2003) (“Although there is no specific clause in the Wisconsin Constitution establishing the public purpose doctrine, this court has recognized that the doctrine is firmly accepted as a basic

uniformity clause, for such provisions have provided a basis for courts invalidating school-finance systems in several states.⁸ And the public purpose doctrine seemed straightforward enough: Any expenditure of public funds must be accompanied by sufficient accountability to ensure that they are spent on the public purpose.⁹ But what the heck was a “private or local bill”?

Delving into the caselaw—which, in the prehistoric era of law in which the case took place, required burrowing through stacks of Midwestern Reporters rather than navigating a computer screen—shed little light on the subject. That was not a good thing because the plaintiffs were seeking an injunction to halt the program, which meant we had to figure everything out on the fly. By the time we argued the case in a rare Saturday hearing in the Dane County Circuit Court, our entire argument on the private or local bill issue amounted to one page in our brief. Somehow we prevailed in the trial court, and the program opened on schedule in August. But the plaintiffs predictably appealed, which meant we had to figure out the private or local bill clause.

And thus began my epiphany. It turns out that private or local bill clauses—or special law clauses as they are called in some state constitutions¹⁰—are designed to prevent the pernicious legislative practice of logrolling: that is, combining unrelated provisions in a single bill to increase the chances of passing provisions that would not prevail if they were presented by themselves.¹¹ The Milwaukee Parental Choice Program had been passed as part of the state budget rather than as a stand-alone bill and thus was susceptible to challenge.¹²

For the next two years, the private or local bill clause was the bane of my existence. The program was struck down on that ground by the court

constitutional tenet of the Wisconsin Constitution and the United States Constitution, mandating that public appropriations may not be used for other than public purposes.” (citing *State ex rel. Bowman v. Barczak*, 148 N.W.2d 683, 684 (Wis. 1967)).

8. *See, e.g.*, *Washakie Cnty. Sch. Dist. v. Herschler*, 606 P.2d 310, 337 (Wyo. 1980); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815–16 (Ariz. 1994).

9. *Hopper v. Madison*, 256 N.W.2d 139, 142 (Wis. 1977) (“Public funds may be expended for only public purposes.” (quoting *State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780, 795 (Wis. 1973))).

10. *See, e.g.*, PA. CONST. art. III, § 32; MINN. CONST. art. XII, § 1.

11. *Davis v. Grover*, 480 N.W.2d 460, 465 n.7 (Wis. 1992).

12. *Id.* at 466.

of appeals.¹³ By the time we reached the Wisconsin Supreme Court, our argument was well-developed and consumed over twenty pages of our brief. Happily, the Wisconsin Supreme Court sustained the program in *Davis v. Grover*,¹⁴ and the kids in the program have thrived ever since, despite a second round of litigation under both the state and federal constitutions after the program was expanded to include religious schools.¹⁵

Amidst the torturous journey of defending the Milwaukee voucher program, a funny thing happened: I realized that I actually liked the private or local bill clause after all. I have a profound distrust of government at every level; and it turns out, the framers of many state constitutions did too. They filled state constitutions chock full of limitations on government power and protections of individual rights that are nowhere found in the U.S. Constitution.¹⁶ If only we had a private or local bill clause in the Federal Constitution, we would not see legislative earmarks like the Bridge to Nowhere or other provisions buried inside federal legislation that serve special interests rather than the broader public interest. So that even while I was fighting to narrow the construction of the private or local bill clause in the context of the Milwaukee school voucher litigation, the seed of an idea was germinating—namely, how nifty it would be to harness the clause to limit the power of government. And I silently vowed that one day I would get a law struck down under a private or local bill clause.

But that day would have to wait. Following the adoption of the Milwaukee Parental Choice Program, other states adopted a variety of school-choice programs, all of them drawing legal challenges.¹⁷ For a dozen years, my colleagues and I defended those programs, almost always in state courts.¹⁸ In essence, the teacher unions that mobilized the

13. *Davis v. Grover*, 464 N.W.2d 220, 228 (Wis. Ct. App. 1990), *rev'd*, 480 N.W.2d 460 (Wis. 1992).

14. *Davis*, 480 N.W.2d at 477.

15. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

16. For a look at some of those provisions and decisions implementing them, see CLINT BOLICK, *DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY* 139–55 (2007) and Clint Bolick, *Brennan's Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 TEX. REV. L. & POL. 137 (2007).

17. See, e.g., *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 130–31 (Me. 1999); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 542–43 (Vt. 1999).

18. I have recounted those efforts in CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* (2003).

lawsuits schooled me on state constitutional law. Ultimately, we won the federal constitutional battle in *Zelman v. Simmons-Harris* in 2002.¹⁹ As we approached that decision, I debated my frequent adversary, Robert Chanin, general counsel of the National Education Association, at a forum in New York.²⁰ I will never forget his words. He said that even if the U.S. Supreme Court upheld school choice under the First Amendment, opponents still had plenty left in their “bag of tricks”—specifically, what he referred to as “Mickey Mouse provisions” of state constitutions.²¹

I resented that characterization, not only because it denigrates state constitutional provisions, but because it besmirches the venerable Mickey Mouse, who loves children and, I am certain, favors school choice. But Chanin was right. Even after the U.S. Supreme Court upheld vouchers in *Zelman*, the Florida Supreme Court struck down vouchers under the uniformity provision of its state constitution;²² the Colorado Supreme Court invalidated vouchers under the local-control provision of its constitution;²³ and the Arizona Supreme Court ruled that vouchers violated the so-called Blaine Amendment of its state constitution.²⁴ If these are indeed Mickey Mouse provisions, they demonstrate that Mickey is one muscular dude.

II. THE POWER OF STATE CONSTITUTIONS

It was liberals who first discovered the potency and efficacy of state constitutions. The patron saint of state constitutional activism, of course, is the namesake of this lecture series, the brilliant late Justice William Brennan. Recognizing that the days of the Warren Court were numbered, he authored a pair of perceptive law-review articles in 1977 and 1986, urging activists to recourse to state constitutions to protect

19. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

20. Clint Bolick, Vice President, Inst. for Justice & Robert Chanin, Gen. Counsel, Nat’l Educ. Ass’n, Choice and the Constitution: Questions Old and New on the Constitutionality of Vouchers, Panel Discussion at the Manhattan Institute’s New York City Conference on School Choice (Dec. 2000) (transcript available at <http://www.manhattan-institute.org/pdf/mics4.pdf>).

21. *Id.*

22. *Bush v. Holmes*, 919 So. 2d 392, 410 (Fla. 2006).

23. *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 938 (Colo. 2004) (en banc).

24. *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (en banc).

rights that he perceived were eroding under the Federal Constitution.²⁵ Advocates heeded his call with gusto.²⁶ In the latter article, Brennan identified more than 250 decisions in the prior sixteen years in which state courts had interpreted their constitutions more broadly than their federal counterpart.²⁷

Justice Brennan observed that not only do state constitutions have protections that do not exist in the U.S. Constitution, but that state courts are free to interpret the same language in their own constitutions more broadly than federal courts construe federal provisions.²⁸ I call this a one-way ratchet: State courts can interpret identical language to provide greater protections than the U.S. Constitution, but not less. To put it mildly, that feature is very appealing to advocates of freedom.

Justice Brennan recognized that state constitutions are a two-way street: They contain provisions that liberals like, as well as provisions conservatives like.²⁹ For those of us who consider ourselves libertarian and tend to like both the liberal and conservative provisions, state constitutions are a treasure trove. As Brennan aptly noted, the “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.”³⁰ Conservatives in particular, he added, should applaud that “state laboratories are once again open for business.”³¹

And yet, despite the proliferation of conservative public-interest law firms since the 1980s,³² until recently there has been little systematic focus by conservatives on state constitutions. I think the explanation is two-fold. First, the movement has had finite resources, so it has concentrated them on federal courts, whose opinions have broad

25. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; 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) [hereinafter Brennan, *The Bill of Rights and the States*].

26. See *State v. Hunt*, 450 A.2d 952, 959 (N.J. 1982); *State v. Kennedy*, 666 P.2d 1316, 1319–20 (Or. 1983); *Heitman v. State*, 815 S.W.2d 681, 685–86 (Tex. Crim. App. 1991) (en banc); *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6 (Iowa 2004).

27. Brennan, *The Bill of Rights and the States*, *supra* note 25, at 548.

28. Brennan, *State Constitutions*, *supra* note 25, at 495.

29. Brennan, *The Bill of Rights and the States*, *supra* note 25, at 550.

30. *Id.*

31. *Id.*

32. See ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 16 (2008).

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precedential effect. Second, conservatives increasingly have dominated the federal courts, especially the U.S. Supreme Court, offering bright prospects for legal victories in that venue.

Still, it is more than a bit ironic that a movement that extols the virtues of federalism has emphasized federal litigation and largely ignored the state courts. The approach also is short-sighted for multiple reasons. First, conservative influence in the federal courts is fleeting, just as liberal influence was when Justice Brennan urged his compatriots to turn their sights to state constitutional litigation. Second, although the precedential effect of state-court decisions is limited to the individual states, constitutions in various states share similar or identical provisions, and courts in one state often look to decisions from other states to guide their own analysis. State-court precedents, in a word, can be contagious, amplifying the effect of successful litigation.

But beyond all else, the best reasons for freedom advocates to focus on state constitutional litigation are both substantive and procedural. The first I already have touched on: State constitutions contain far more tools to limit the power of government and to protect individual rights than the Federal Constitution.³³ Second, access to state courts typically is far more expansive than access to federal courts. In particular, taxpayers usually have standing to challenge unlawful government expenditures and actions in state courts, whereas they rarely do in federal courts.³⁴ This is hugely important because a great deal of government action that is unchallengeable in federal courts can be challenged in state courts. Moreover, a number of doctrines exist in state-law jurisprudence that reduce the odds against successfully challenging government power. For instance, many states, cities, and other political subdivisions of the state possess only such powers as are expressly granted to them by their constitution or statutes.³⁵ That rule places the burden on local governments to demonstrate the sources of authority that they are exercising, which helps to prevent or redress instances of what I call grassroots tyranny. All of which makes the paucity of conservative legal advocacy in state courts a very puzzling and, to me, troubling

33. Brennan, *State Constitutions*, *supra* note 25, at 491.

34. *See, e.g.*, *Goldman v. Landside*, 552 S.E.2d 67 (Va. 2001); *N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154 (Fla. 1985).

35. *See Shipp v. Se. Okla. Indus. Auth.*, 408 P.2d 1395, 1398 (Okla. 1972); *City of Chicago v. Barnett*, 88 N.E.2d 477, 479 (Ill. 1949); *Kan. Power & Light Co. v. City of Great Bend*, 238 P.2d 544, 547 (Kan. 1951).

phenomenon.

III. BLAZING NEW CONSTITUTIONAL TRAILS

If there was one episode that stripped the scales from the eyes of many conservatives to reveal the importance of state constitutional advocacy, it was the battle over eminent domain abuse, waged primarily by my former colleagues at the Institute for Justice. All across the country, governments at every level were deploying eminent domain to transfer property from one private property owner to another.³⁶ Two Institute for Justice cases on this issue, the latter of which I had the honor of litigating, illustrate vividly the potential for invoking state constitutional protections of individual liberty beyond those available under existing federal constitutional jurisprudence.³⁷

The practice of taking private property for private use would appear to violate the Fifth Amendment's limitation of the power of takings for "public use."³⁸ But like so many federal constitutional protections, the public use requirement was eroded over time, being transformed in a series of U.S. Supreme Court decisions into the far more permissive requirement of "public benefit."³⁹ That metamorphosis, combined with a reflexive deference by the courts to government power in the realm of property regulation, unleashed governments to run roughshod over private property in the name of economic development. So when a redevelopment agency decided to bulldoze a working-class neighborhood to allow the building of amenities to benefit the local Pfizer facility in New London, Connecticut, the U.S. Supreme Court effectively rubber-stamped the action by a 5-4 vote in the infamous *Kelo v. City of New London* decision in 2005, essentially repealing the public use clause.⁴⁰

But at the same time as Susette Kelo was losing her home in Connecticut, a man who faced similar circumstances was having a better

36. See *Kelo v. City of New London*, 545 U.S. 469, 472 (2005); *Bailey v. Myers*, 76 P.3d 898, 900 (Ariz. Ct. App. 2003).

37. *Kelo*, 545 U.S. 469; *Bailey*, 76 P.3d 898.

38. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

39. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-16 (1984); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242-44 (1984).

40. *Kelo*, 545 U.S. at 473, 489-90.

time in Mesa, Arizona.⁴¹ Randy Bailey owns a brake shop at a prime intersection.⁴² The city wanted to take his property, along with other shops and homes, to allow a hardware store to expand.⁴³ Fortunately for Bailey and his neighbors, article 2, § 17 of the Arizona Constitution is more specific than the Fifth Amendment, decreeing that “[p]rivate property shall not be taken for private use.”⁴⁴

Like the Fifth Amendment, however, that protection had eroded over time, and Bailey lost his case in trial court.⁴⁵ But the Arizona Court of Appeals reversed the decision, reinvigorating the property rights protection of the Arizona Constitution and striking down the city’s attempted seizure of Randy Bailey’s property.⁴⁶ As a result of that decision, I am happy and proud to say that if you happen to be driving in Mesa, Arizona, and encounter brake problems, you can still purchase brakes that stop on a dime at Bailey’s Brake Service.

The *Bailey* case is a good illustration of the potential human impact of state constitutional guarantees. If we had challenged Mesa’s abuse of eminent domain solely under the Federal Constitution, or if we had just paid lip service to the state constitutional provision, Randy Bailey would have lost his business. Instead, he can now pass the family business down to his son, just as his father passed it down to Randy. It is frustrating in some ways that you have to live in Arizona to enjoy the fruits of that decision, but fortunately courts in other states, such as Michigan and Ohio, have reached similar decisions,⁴⁷ so that at least there are some states in which government, by virtue of the vigorous application of state constitutional provisions, cannot play Robin Hood in reverse.

The experience of the *Bailey* case was a major motivation in launching the first litigation center within a state-based, market-oriented policy organization in 2007: the Goldwater Institute’s Scharf-Norton

41. *See Bailey*, 76 P.3d 898.

42. *Id.* at 899.

43. *Id.* at 899–900.

44. ARIZ. CONST. art. 2, § 17.

45. *Bailey*, 76 P.3d at 900.

46. *Id.* at 904–05.

47. *See* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 788 (Mich. 2004) (holding that a condemnation of land for a business and technology park was unconstitutional); Norwood v. Horney, 853 N.E.2d 1115, 1146 (Ohio 2006) (holding that the city could not take private property and transfer it to a developer as part of urban renewal of deteriorating property).

Center for Constitutional Litigation.⁴⁸ Since creating our center, at least ten similar centers have been started in other states based to varying degrees on the Goldwater Institute model.⁴⁹

Most of our cases focus on provisions of the Arizona Constitution that provide limits on government power that do not exist in the Federal Constitution, or that can provide greater protection for individual liberty than similar provisions in the Federal Constitution. The first category includes cases under the gift clause and the private or local bill clause; the latter category includes cases under the free speech, equal privileges and immunities, and contracts clauses. While most of our cases focus primarily on state constitutional claims, we file federal lawsuits on issues with a particular Arizona angle. This year, we won our first U.S. Supreme Court decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, which struck down matching funds provisions of our public-campaign finance system.⁵⁰

Our first lawsuit to reach the Arizona Supreme Court illustrates the type of cases that are uniquely possible under state constitutions. In recent years, Arizona local governments were engaged in costly subsidy wars, attempting to lure retail developers to build within particular city boundaries in order to capture sales-tax revenues.⁵¹ The result of the subsidy wars was that government funds were ending up in developers' pockets rather than municipal coffers. The competition was so out of hand that one local city agreed to give a developer a quarter of a billion dollars to locate a mall within its boundaries.⁵²

The Arizona Constitution was crafted by framers who deeply distrusted the combination of political and corporate power, and they inserted several provisions designed to prevent abuses. One of those

48. Press Release, Goldwater Inst., Goldwater Institute Announces \$1 Million Gift to Launch Litigation Center (June 19, 2007), available at <http://107.20.138.12/article/goldwater-institute-announces-1-million-gift-launch-litigation-center-0>.

49. See Marc Lacey, *NY Times Profiles Goldwater Institute: "A Watchdog for Conservative Ideals,"* GOLDWATER INST. (Dec. 26, 2011), <http://goldwaterinstitute.org/article/ny-times-profiles-goldwater-institute-watchdog-conservative-ideals>.

50. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011), *rev'g* *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).

51. *Arizona Lawmakers Pledge to Ban Big-Box Subsidies*, NEW RULES PROJECT (Nov. 10, 2005), <http://www.newrules.org/retail/news/arizona-lawmakers-pledge-ban-bigbox-subsidies>.

52. See Kristena Hansen, *Scottsdale Quarter - Through CEO's Eyes*, AZCENTRAL.COM (Aug. 4, 2011, 1:01 PM), <http://www.azcentral.com/community/scottsdale/articles/2011/08/04/20110804scottsdale-quarter-through-ceos-eyes.html>.

provisions is the gift clause, which prohibits gifts of public funds, by subsidy or otherwise, to private individuals or corporations.⁵³ Unfortunately, that provision rarely had been vigorously enforced during Arizona's first century as a state.

We looked around for a good test case to challenge retail subsidies and found it in our home city of Phoenix. The city agreed to give a Chicago developer a \$97.4 million subsidy to build a luxury shopping center called CityNorth.⁵⁴ The scheme was so grandiose and the design so opulent that we dubbed it the Taj Ma-Mall. We challenged the deal on gift clause grounds.⁵⁵ We lost in the trial court and won in the court of appeals.⁵⁶ In *Turken v. Gordon*, the Arizona Supreme Court ruled that the gift clause forbids such subsidies, although it gave the city a mulligan for this particular deal because the court's prior decisions on the subject might have caused confusion.⁵⁷ But what the supreme court declined to do by striking down the deal, the market corrected on its own, as the developer went bankrupt and the shopping mall remains largely vacant.⁵⁸ It stands now as Arizona's newest ghost town, a monument to the folly of government planners trying to improve upon the wisdom of the marketplace.

Meanwhile, the ruling put an end to the destructive subsidy wars. And it demonstrates that while taxpayers have no standing to challenge corporate bailouts or Solyndra-style scandals under the Federal Constitution, taxpayers in Arizona and in other states with gift clauses can challenge corporate subsidies under state constitutions.

IV. AMENDING STATE CONSTITUTIONS

The final substantive area I want to touch upon emanates from another insight from Justice Brennan: that state constitutions are not finished products and generally are far easier to amend than the Federal

53. ARIZ. CONST. art. 9, § 7.

54. *Turken v. Gordon*, 224 P.3d 158, 160–61 (Ariz. 2010).

55. *Id.* at 161.

56. *Turken v. Gordon*, CV 2007-013766, 2008 WL 5800414 (Maricopa Cnty. Super. Ct. Ariz. Apr. 2, 2008), *aff'd in part, rev'd in part*, 207 P.3d 709 (Ariz. Ct. App.), *vacated*, 224 P.3d 158 (Ariz. 2010).

57. *Turken*, 224 P.3d at 166, 168.

58. Catherine Reagor, *CityNorth Development in Phoenix in Foreclosure*, AZCENTRAL.COM (Jan. 5, 2010, 12:00 AM), <http://www.azcentral.com/community/northvalley/articles/2010/01/04/20100104citynorthonline0105.html>.

Constitution—sometimes too easy.⁵⁹ I received my legal education in California, where the constitution more resembles a phone book than an organic law. But it is important to bear in mind that when the need arises, additional protections of individual rights and constraints on government power may be added to state constitutions. A variety of circumstances may give rise to constitutional change, from the failure of state and federal courts to enforce existing guarantees, to threats against freedom by government. In the case of Arizona, federalism clashes between Arizona and the federal government have inspired new guarantees of rights under the state constitution.

In 2010, the Goldwater Institute proposed two constitutional amendments that were added to our state constitution by voter ratification.⁶⁰ The first was the Health Care Freedom Act, which guarantees the right of individuals to determine whether or not to participate in health-insurance programs and to determine their own lawful medical treatment and choice of providers.⁶¹ The Health Care Freedom Act was adopted as a statute or constitutional amendment in several other states.⁶² The measures have figured prominently in legal challenges to the federal health-care law.⁶³

Similarly, efforts to enact federal “card-check” legislation, which would displace the right to secret-ballot elections in the formation of unions, motivated the Goldwater Institute to draft a proposed constitutional amendment called Save Our Secret Ballot, which preserves the right to secret ballot in establishing unions.⁶⁴ The amendment was adopted by large majorities in 2010 in Arizona,⁶⁵ Utah,⁶⁶ South Carolina,⁶⁷ and South Dakota.⁶⁸ Although the federal card-check law was not adopted, the National Labor Relations Board has challenged the

59. Brennan, *The Bill of Rights and the States*, *supra* note 25, at 551.

60. See ARIZ. CONST. art. 27, § 2; *id.* art. 2, § 37.

61. *Id.* art. 27, § 2.

62. See, e.g., IDAHO CODE ANN. § 39-9003 (2011); TENN. CODE ANN. § 56-7-1016 (Supp. 2011).

63. See, e.g., Florida v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011).

64. ARIZ. CONST. art. 2, § 37.

65. *Id.*

66. UTAH CONST. art IV, § 8.

67. S.C. CONST. art. II, § 12.

68. S.D. CONST. art. 6, § 28.

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Arizona Save Our Secret Ballot Act on federal preemption grounds.⁶⁹ The Goldwater Institute has intervened to defend the law on behalf of workers who want to preserve their right to secret ballot.

These constitutional amendments were designed to create a federalism firewall against overreaching by the federal government. Over the past decade, the U.S. Supreme Court has been increasingly solicitous of state autonomy, upholding Oregon's right-to-die statute,⁷⁰ Arizona's English-immersion law,⁷¹ and Arizona's employer-sanctions statute against federal preemption challenges.⁷² Those decisions provide hope that state efforts to protect individual freedom will not find a hostile audience in the U.S. Supreme Court.

V. CONCLUSION

I hate to leave loose ends, so I will tie one up: my vow, long ago, to win a case under a private or local bill clause. Recently, we challenged a local school district's decision to divert bond proceeds from the uses approved by the voters. Previously, state law prohibited such a diversion.⁷³ But the school district went to the legislature to enact a statute that purported to allow a very small number of districts to do so.⁷⁴ The trial court agreed with our argument that a statute benefitting only a finite number of school districts is an unconstitutional special law.⁷⁵ For good measure, the court also found that the diversion of funds violated an implicit contract with the voters.⁷⁶ I do not know of too many decisions that actually have held politicians to keep their promises, so this is a ruling to treasure.

I have painted a fairly optimistic picture of the vast untapped potential for vindicating state constitutional limits on government power

69. Complaint for Declaratory Judgment at 1, Nat'l Labor Relations Bd. v. Arizona, No. 11-CV-00913-FJM (D. Ariz. May 6, 2011).

70. *Gonzales v. Oregon*, 546 U.S. 241, 274–75 (2006).

71. *Horne v. Flores*, 129 S. Ct. 2579, 2607 (2009).

72. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

73. ARIZ. REV. STAT. ANN. § 15-491 (Supp. 2011).

74. H.B. 2725, 49th Leg., 2d Reg. Sess. § 34 (Ariz. 2010); Christina Sandefur, *Court Teaches School District a Lesson – Do What You Promised*, GOLDWATER INST. (Nov. 28, 2011), <http://goldwaterinstitute.org/article/court-teaches-school-district-lesson>.

75. *Friedman v. Cave Creek Unified Sch. Dist.*, No. CV 2011-007925 (Ariz. Super. Ct. Sept. 12, 2011).

76. *Id.*

and protections of individual rights. Certainly, such lawsuits filed under state constitutions are generally more likely than similar lawsuits filed under the Federal Constitution to have happy endings.

That generalization is subject to one important caveat: The state judiciary considering such claims must be honest, professional, and competent. One advantage of federal over state courts is the greater likelihood of encountering judges who exhibit a high degree of integrity and professionalism. My experience litigating in state courts from coast to coast leads me to believe that the quality of state courts is much more uneven. Much seems to depend on the method of judicial selection and retention, which varies greatly from state to state. When judges owe their jobs to the political establishment, they can be expected to greet challenges to the political establishment less than warmly. My colleagues and I are lucky to practice in Arizona, whose merit selection of judges, despite some flaws, tends to produce professional, independent, high-quality judges. I have practiced in other states where the bench is outstanding but also in states where some judges appear to be political hacks who determine the outcome long before hearing evidence or arguments. My point is that in order for state constitutions to serve their intended purpose of providing a double security for the rights of the people, the judges implementing them must be above reproach. All of us, lawyers and nonlawyers, have an important role to play in ensuring the integrity of judicial appointments.

But beyond that, in order to vindicate precious state constitutional guarantees, we must engage them. We must present courts with carefully developed arguments about constitutional history and intent. Remember, these provisions are as unfamiliar to many judges as they are to the lawyers practicing before them.

I have often asked state supreme court justices whether they are interested in the independent interpretation of state constitutional law. Whatever their philosophical orientation, their answers have been the same: Yes, but we can only do it if lawyers present us with the opportunity to do so. Too often, lawyers do not develop state constitutional arguments separate and apart from federal constitutional claims, even if they raise them in the first place.

State constitutional claims are not throw-away arguments. Our state constitutions were intended to be the principal legal bulwarks for the

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Bulwark for Freedom

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protection of freedom.⁷⁷ When we seek to protect individual rights or challenge unlawful government action, we leave very important tools on the table if we do not vigorously assert valid state constitutional claims. When we fail to do so, we do a disservice not only to our clients but to the rule of law. Constitutional guarantees are rendered worthless when they are ignored, forgotten, or inadequately argued.

Not only that, but advocating state constitutional claims is fun, and it is challenging. There is not a great deal of unexplored terrain in the law. If ever you wanted to be an explorer, a trailblazer, or a champion of basic ideals, this is the place to make your mark.

77. See generally Brennan, *State Constitutions*, *supra* note 25.