

BRENNAN’S EPIPHANY: THE NECESSITY OF INVOKING STATE CONSTITUTIONS TO PROTECT FREEDOM

CLINT BOLICK*

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* Director of the Goldwater Center for Constitutional Litigation in Phoenix, Arizona; of counsel with the Rose Law Group in Scottsdale, Arizona. B.A. 1979, Drew University; J.D. 1982, University of California at Davis. Bolick previously co-founded and served as litigation director for the Institute for Justice. This essay is adapted in part from CLINT BOLICK, DAVID’S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY (2007).

I. INTRODUCTION

Thirty years ago, Justice William J. Brennan Jr., in a seminal *Harvard Law Review* article, issued a clarion call to liberal activists to couple their litigation efforts in federal courts with similar efforts in state courts to seek expansive interpretation of state constitutional provisions.¹ Brennan was concerned that the activism of the Warren Court was coming to an end, to be replaced by an era of retrenchment in the rights recognized under the federal Constitution. He pointed out that state constitutions provide an additional layer of constitutional rights and in many cases more expansive protection for those rights.² The federal Constitution provides the baseline for protection of constitutional rights that state courts are free to surpass in construing their own constitutions.³ Brennan urged 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.”⁴ Liberal activists heeded the call, with such success that between 1970 and 1984, by Brennan’s own count in a second law review article in 1986, state courts “handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.”⁵

Although Brennan was a liberal, his prescription transcends ideological lines. Today, conservatives and libertarians who have litigated gainfully under the federal Constitution since the 1980s⁶ find themselves in a situation similar to the one Justice Brennan occupied in 1977, when it appeared that the federal jurisprudential trends he favored might have run their course. Curiously, although most

1. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977).

2. *Id.*

3. *Id.*

4. *Id.* at 491.

5. 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).

6. For an insightful review of the history, goals, and tactics of the conservative and libertarian public interest law movement, see Ann Southworth, *Conservative Lawyers and the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223 (2005), and for an overview from the movement’s leaders, see BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT (Lee M. Edwards ed., Heritage Books 2004).

conservative and libertarian legal activists are strong proponents of federalism, the overwhelming majority of cases filed by lawyers of that philosophical bent have been federal lawsuits under the federal Constitution, with state litigation relegated largely to afterthought.

Those who seek greater protection of private property rights and economic liberties may find state constitutions to be more congenial to their aims than the federal Constitution as interpreted by the U.S. Supreme Court. Many constitutions provide greater textual protections of individual rights than the federal Constitution, as well as greater constraints on government power.⁷ But those state constitutional guarantees are unlikely to be fully vindicated unless legal advocates are prepared to systematically engage them. Justice Brennan's call to action to liberal activists in 1977 applies with equal, if not greater, weight to conservative and libertarian activists three decades later.

II. BRENNAN'S EPIPHANY

It is rare for legal advocates on the right to look to Justice Brennan for insight and inspiration. But conservatives and libertarians would do well to examine carefully his writings about the proper and vital role of state courts and constitutions in protecting individual rights in our federal system. His views are well-grounded in constitutional history and practical experience, and although his words initially were directed at liberal activists, by 1986 he was speaking directly to conservatives as well, with tremendous prescience.

Justice Brennan was one of the foremost architects of the Warren Court's expansion of rights under the Bill of Rights, applied to the states under the Due Process and Equal Protection Clauses of the Fourteenth Amendment—an amendment he aptly considered a “modern Magna Carta.”⁸ For many years, he focused heavily on federal constitutional rights and on the duty of state as well as federal courts to enforce those rights. In a law review article written in 1964, during the heyday of the Warren era, Brennan urged state courts to broadly interpret federal law, because “the fundamental obligation to

7. See, e.g., James A. Gardner, *State Constitutional Rights as a Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 *Geo. L.J.* 1003, 1031 (concluding that some states have given much more protection to individuals than the “floor” mandated by the federal Constitution).

8. Brennan, *supra* note 5, at 538.

administer federal law rests on both [federal and state] courts,” which possess an “identity of underlying purpose.”⁹

But thirteen years later, although Brennan continued to extol the broadened application of federal constitutional rights, he believed those rights now were threatened by the federal judiciary. He cited an array of federal court decisions he perceived as retreating on the guarantees of the Bill of Rights and the Fourteenth Amendment in both the criminal and civil contexts.¹⁰ Accordingly, he shifted his focus to the role of state courts in interpreting their own constitutions more expansively than the federal Constitution. Of late, he observed, “more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.”¹¹ That development “is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.”¹² Brennan remarked that, like him, “these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from . . . application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.”¹³

Said Brennan, “Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts.”¹⁴ He pointed out that the Framers of the U.S. Constitution considered state constitutions, rather than the federal Constitution, to provide the principal legal bulwark for individual liberties. The federal Bill of Rights was patterned after similar preexisting provisions in state constitutions, and until the Fourteenth Amendment, the federal Bill of Rights was held inapplicable to the states.¹⁵ Consequently, “decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”¹⁶

As a result, Brennan noted, state court decisions made on independent state constitutional grounds “not only cannot be overturned by, they indeed are not even reviewable by, the Supreme

9. William J. Brennan Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 959 (1964).

10. Brennan, *supra* note 1, at 496–98.

11. *Id.* at 495.

12. *Id.*

13. *Id.*

14. *Id.* at 502.

15. *Id.* at 501–02.

16. *Id.* at 502.

Court of the United States.”¹⁷ Moreover, state courts deciding state law “need not apply principles of standing and justiciability that deny litigants access to the courts.”¹⁸ In other words, not only can state courts protect rights more broadly than federal courts, but more people in more circumstances can turn to those courts for protection. Brennan urged that state constitutional litigation was especially appropriate given the fact that, as James Madison repeatedly warned, there is “more danger of [government] powers being abused by state governments than by the government of the United States.”¹⁹

When he returned to the topic nine years later, Brennan was even more alarmed about the course of the U.S. Supreme Court, which he charged was “involved in a new curtailment of the Fourteenth Amendment’s scope,”²⁰ which he viewed as “a plain invitation to state courts to step into the breach.”²¹ Brennan reported that state courts had heeded his call, issuing more than 250 decisions since 1970 that applied their own constitutional provisions more broadly than their federal counterparts.²²

This time, Brennan addressed his argument to conservatives as well as liberals. “This rebirth of interest in state constitutional law,” Brennan asserted, “should be greeted with equal enthusiasm by all those who support our federal system, liberals and conservatives alike.”²³ Conservatives, in particular, should applaud that “the state laboratories are once again open for business.”²⁴ Indeed, quipped Brennan, “[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.”²⁵ In particular, Brennan noted the “substantial irony” of federal courts taking action to “upset state court decisions protecting individual rights.”²⁶ Concerns among conservatives about state court judicial activism were misplaced, Brennan persuasively insisted:

17. *Id.* at 501.

18. *Id.*

19. *Id.* at 504. I have made a similar case in CLINT BOLICK, *LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY* (2004), and CLINT BOLICK *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* (1991).

20. Brennan, *supra* note 5, at 546.

21. *Id.* at 548.

22. *Id.*

23. *Id.* at 550.

24. *Id.*

25. *Id.*

26. *Id.*

[T]hose who regard judicial review as inconsistent with our democratic system—a view I do not share—should find constitutional interpretation by the state judiciary far less objectionable than activist intervention by their federal counterparts. It cannot be denied that state court judges are often more immediately “subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.” Federal judges are guaranteed a salary and lifetime tenure; in contrast, state judges often are elected, or, at the least, must succeed in retention elections. . . . Moreover, state constitutions are often relatively easy to amend; in many states the process is open to citizen initiative. Prudential considerations requiring a cautious use of the power of judicial review, though not insignificant, should “weigh less heavily upon elected state judges than on tenured federal judges.”²⁷

Brennan’s points are spot-on. If conservatives and libertarians truly believe in federalism in other than situational fashion—that is, devolution of legitimate governmental authority to the level of government closest to the people²⁸—they must be prepared to accept constitutional provisions with which they disagree, so long as they do not contravene federal constitutional provisions. For instance, many state constitutions expressly guarantee a right to public education, sometimes of a particular quality; and when they do, those guarantees should be enforced.²⁹ At the same time, conservatives and libertarians should not sit idly by when state constitutional provisions are interpreted in ways contrary to their original meaning.

Liberals have engaged in the making of state constitutional jurisprudence for several decades. Conservatives and libertarians cannot afford to cede that territory.

27. *Id.* at 551. Curiously, in my experience, conservatives are far less involved in democratic mechanisms to influence judicial selection and tenure at the state level than they are at the federal level, an oversight that I believe operates seriously to the detriment of state constitutional jurisprudence.

28. See generally CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* (1991) (explaining the intent of the Framers to diffuse governmental power between the federal branches and between federal, state, and local governments).

29. See, e.g., N.C. CONST. art. I, § 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”); FLA. CONST. art. IX, § 1 (“Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . .”).

III. EXAMPLES OF THE BRENNAN DOCTRINE IN PRACTICE

Though Justice Brennan focused largely on state judicial protection of rights of criminal defendants that he believed federal courts had eviscerated,³⁰ state courts followed his prescription in civil cases as well. A paradigm example was the issue of free speech protection for protesters in privately owned shopping centers. In *Lloyd Corp. v. Tanner*,³¹ the U.S. Supreme Court, in a 5-4 decision from which Justice Brennan dissented,³² overturned an injunction against the owners of a shopping mall preventing them from excluding antiwar protesters from distributing leaflets.³³ Although the mall was open to the public, the Court reasoned, it was not so dedicated to public use as to require the owners to permit the protesters' exercise of speech.³⁴ "[I]t must be remembered," wrote Justice Lewis F. Powell for the majority, "that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."³⁵ In dissent, Justice Thurgood Marshall disagreed, stating that the mall was "clearly the equivalent of a public business district."³⁶

When a factually similar case went before the California Supreme Court, however, it embraced the dissenters' view in *Lloyd Corp.* construing the state constitution's free speech guarantees.³⁷ Acknowledging that *Lloyd Corp.* controlled disposition of the federal constitutional issues, the Court observed that "states are free to establish greater rights under their constitutions than those guaranteed by the federal Constitution."³⁸ The court proceeded to do just that, holding that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."³⁹

The property owners appealed to the U.S. Supreme Court, arguing that the decision by the California Supreme Court violated their

30. Brennan, *supra* note 5, at 547-48.

31. 407 U.S. 551 (1972).

32. *Id.* at 570 (Marshall, J., dissenting).

33. *Id.* (majority opinion).

34. *Id.*

35. *Id.* at 567. (emphasis added).

36. *Id.* at 576 (Marshall, J., dissenting). Justice Brennan himself cited this decision as an example of cases in which the Court had "pull[ed] back from . . . application of the federal Bill of Rights." Brennan, *supra* note 1, at 495-96.

37. *Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979).

38. *Id.* at 343.

39. *Id.* at 347.

federal constitutional property rights.⁴⁰ The opinion by Justice William H. Rehnquist, who was in the majority in *Lloyd Corp.*,⁴¹ rejected their claims, illustrating the salience of Brennan's argument for state court activism.⁴² For Rehnquist, as stalwart a defender of property rights as any justice, valued federalism even more. Acknowledging that there has literally been a "taking" of the shopping center owners' "right to exclude others," Rehnquist concluded that a state may "exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."⁴³ That decision, in turn, led Justice Thurgood Marshall in concurrence to "applaud the court's decision, which is part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution."⁴⁴ Though many conservatives and libertarians (including me) would argue that the California Supreme Court's cavalier disregard of private property rights should have been corrected by the U.S. Supreme Court, this case illustrates the tremendous potential that exists for independent interpretation of state constitutions.

Perhaps the most significant and successful example of liberal state court activism in the face of federal constitutional abstinence is the phenomenon of educational equity litigation. In its 1973 decision in *San Antonio Independent School District v. Rodriguez*,⁴⁵ the U.S. Supreme Court, over dissent by Justice Brennan and others,⁴⁶ rejected a challenge to unequal public school funding and held that the federal Constitution does not confer an affirmative right to education.⁴⁷ Heeding Brennan's call to take to state courts, educational equity advocates did so with astounding success, convincing many state courts to decree that education is a fundamental state constitutional right and that funding inequities violate that right.⁴⁸ Again, conservatives and libertarians might disagree with the premise and the

40. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

41. 407 U.S. at 551.

42. *PruneYard Shopping Center*, 447 U.S. at 88.

43. *Id.* at 81–83.

44. *Id.* at 91 (Marshall, J., concurring).

45. 411 U.S. 1 (1973).

46. *Id.* at 62 (Brennan, J., dissenting).

47. *Id.* at 59 (majority opinion).

48. Indeed, two state courts did so before or immediately after the *San Antonio* decision. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). See generally Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

remedy. But such cases illustrate that state constitutional guarantees unknown to the federal Constitution can provide fertile ground for creative litigators.

Plainly, Brennan's state court revolution worked well to advance what Brennan called "the aspiration to social justice" and "egalitarianism."⁴⁹ The remaining question is whether conservatives and libertarians might gainfully look to state constitutions to protect such freedoms as private property rights and economic liberty.

The answer resounds in the affirmative.

IV. A TALE OF TWO PROPERTY OWNERS

Susette Kelo and Randy Bailey live nearly a continent apart, but in recent years found themselves in a similar predicament. In both cases, local government entities coveted their property—in Kelo's case, her home in New London, Connecticut;⁵⁰ and in Bailey's case, his family business in Mesa, Arizona⁵¹—to make way for economic development. Because neither Kelo⁵² nor Bailey⁵³ wished to sell their property, the governments resorted to eminent domain. Both Kelo⁵⁴ and Bailey⁵⁵ went to court to stop the takings because they were for private rather than public use.

Despite strikingly similar factual scenarios, Bailey prevailed but Kelo did not. The reason for the divergent outcomes was that although the U.S. Supreme Court held in Kelo's case that takings for economic redevelopment are permissible under the Takings clause of the Fifth Amendment,⁵⁶ the Arizona Court of Appeals found that its state constitution precluded such a taking in Bailey's case.⁵⁷ The starkly different results illustrate why those who believe in greater judicial protection for property rights and economic liberties should vigorously pursue state constitutional claims.

In Kelo's case, a redevelopment agency proposed to use eminent domain to acquire a number of homes and businesses to develop

49. William J. Brennan Jr., Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 11 (The Federalist Soc'y ed., 1986).

50. *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

51. *Bailey v. Myers*, 76 P.3d 898, 899 (Ariz. Ct. App., Div. 1, Department D 2003).

52. *Kelo*, 545 U.S. at 475.

53. *Bailey*, 76 P.3d at 899.

54. *Kelo*, 545 U.S. at 475.

55. *Bailey*, 76 P.3d at 899.

56. *Kelo*, 545 U.S. at 479–80.

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

retail, parking, and other amenities to complement a local Pfizer plant as part of a proposed neighborhood revitalization.⁵⁸ Kelo and her neighbors argued, among other things, that because the property would be given to private developers for purposes of redevelopment, the taking was not for a public use as required by the federal and state constitutions.⁵⁹ The Connecticut Supreme Court ruled against Kelo, holding that the proposed taking satisfied the public use requirements of both the state and federal constitutions.⁶⁰

The U.S. Supreme Court agreed to review the decision, but unfortunately for Kelo, the Court in prior decisions had eviscerated the public use limitation.⁶¹ Likewise, the Court upheld the New London takings. The Court acknowledged that in the early years of the republic the words “public use” in the Takings Clause was construed to mean actual public use. But “that narrow view steadily eroded over time,” because “it proved to be impractical given the diverse and always evolving needs of society.”⁶² Instead, the Court looked to whether there was a “public purpose” for the takings, and noted that “our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”⁶³

Had Randy Bailey been forced to pursue his objection to the taking of his brake shop in federal court, there is little doubt the outcome would have been the same as in *Kelo*. But fortunately for Bailey, the Arizona Constitution is more explicit than its federal counterpart, decreeing in art. 2, § 17 that “Private property shall not be taken for private use”⁶⁴ The Court of Appeals held accordingly, “The federal constitution provides considerably less protection against eminent domain than our Constitution provides Not every combination of perceived public benefits and advantages will satisfy the ‘public use’ requirement of our Constitution.”⁶⁵ As a result,

58. *Kelo*, 545 U.S. at 473.

59. The federal and state constitutional provisions are similar. The federal Constitution provides, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Connecticut Constitution provides, “The property of no person shall be taken for public use, without just compensation therefor.” CONN. CONST. art. I, § 11.

60. *Kelo v. City of New London*, 843 A.2d 500, 531 (Conn. 2004).

61. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (“Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.”); *Berman v. Parker*, 348 U.S. 26, 34 (1954) (allowing Congress to exercise its eminent domain power once the object is within its authority).

62. *Kelo*, 545 U.S. at 479.

63. *Id.* at 480.

64. ARIZ. CONST. art. II, § 17.

65. *Bailey v. Myers*, 76 P.3d 898, 903 (Ariz. Ct. App., Div. 1, Department D 2003).

Randy Bailey can continue to sell brakes in the same building his family has operated for more than two decades.

Although the Arizona Constitution contains a more expansively worded takings provision than the Fifth Amendment's, state courts are free to interpret their own constitutional provisions more broadly even when they are identically worded. The Michigan Supreme Court recently revisited its notorious 1981 decision in *Poletown Neighborhood Council v. City of Detroit*,⁶⁶ in which it had upheld the use of eminent domain to demolish a neighborhood so that General Motors could construct an automobile plant that ultimately was never built.⁶⁷ In *County of Wayne v. Hathcock*, the Michigan Supreme Court overturned *Poletown*, construing the public use provision of the Michigan Constitution, which uses the same language as the Fifth Amendment.⁶⁸ Instead of applying federal constitutional law, however, the Court looked to the original intent of its own state constitutional provision, and found that at the time of its ratification it was clear that "the constitutional 'public use' requirement worked to prohibit the state from transferring condemned property to private entities for a *private* use."⁶⁹ Because *Poletown* marked a "radical and unabashed departure" from the original understanding, the decision could no longer be given the force of law.⁷⁰

It would be nice if the U.S. Supreme Court had applied the Fifth Amendment's Takings Clause in a way that established a uniform national standard preventing the use of eminent domain for private use, but it did not. Failing that, we are fortunate to have recourse to the constitutions of fifty states. So although the citizens of Connecticut do not have protection against eminent domain abuses, at least the people of Arizona and Michigan do.⁷¹

From the eminent domain example, we can see why conservatives and libertarians cannot afford to ignore state constitutions in their efforts to protect private property rights and other basic freedoms. Nor is that example an aberration. To the contrary, by their nature, state constitutions offer great opportunities to conservatives and libertarians. The potential is vast and largely untapped.

66. 304 N.W.2d 455 (Mich. 1981).

67. CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM 111–13 (1991).

68. 684 N.W.2d 765, 787 (Mich. 2004).

69. *Id.* at 781.

70. *Id.* at 785.

71. The Ohio Supreme Court also recently struck down the use of eminent domain for private use in *City of Norwood v. Horney*, 853 N.E. 2d 1115 (Ohio 2006).

V. ABUNDANT PROTECTIONS OF RIGHTS AND LIMITS ON GOVERNMENT POWER

Owing to their pedigrees, state constitutions often contain express rights and constraints on government power that do not exist, or are not as explicit, in the U.S. Constitution.⁷² The original state constitutions and those created from the Northwest Ordinance are imbued with the natural rights ideology of the founding era.⁷³ Constitutions adopted during the Progressive Era likewise embody skepticism about government power (particularly in combination with private wealth) that dominated during that period.⁷⁴ And, of course, even where state constitutional provisions mirror their federal counterparts, they may be applied more vigorously by state courts.⁷⁵

Among promising state constitutional doctrines and provisions found in multiple jurisdictions are the following:

- *Taxpayer standing*: It is a maxim of federal constitutional law that taxpayers as such generally do not have standing to challenge governmental actions because they suffer no particularized injury.⁷⁶ As a result, there are many cases, such as excessive government spending, in which *no one* has standing to challenge unconstitutional government actions. By contrast, many state courts have recognized taxpayer standing to enjoin unlawful governmental expenditures and related actions, based on the taxpayers' equitable ownership of funds and their liability to replenish the treasury for misappropriations.⁷⁷ The doctrine of taxpayer standing opens up myriad avenues to challenge government actions at the state and local levels. That is why, for example, one may challenge municipally funded sports stadiums or other projects in state courts, whereas similar federal government projects typically are unchallengeable by taxpayers.
- *General liberty provisions*: A number of state constitutions,

72. CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 144 (2007).

73. *Id.*

74. *Id.*

75. The Washington Supreme Court, in particular has developed a sophisticated process for determining when it should interpret its state constitution independently of the federal Constitution. *State v. Gunwall*, 720 P.2d 808, 811–13 (Wash. 1986).

76. *See* *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007) (explaining that it has long been established that taxpayers do not generally have standing to challenge governmental action).

77. *See, e.g.,* *Ethington v. Wright*, 189 P.2d 209, 212 (Ariz. 1948) (citing cases from other jurisdictions and distinguishing federal law).

especially the older ones, begin with statements of general principles that resemble the Declaration of Independence, particularly in their explicit protections of life, liberty, the pursuit of happiness, and property. The Washington Constitution, for instance, declares, "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."⁷⁸ Kentucky's Bill of Rights provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."⁷⁹ Such provisions can establish the common law underpinnings of state constitutional rights and, at the very least, can be cited as background principles that create a presumption in favor of liberty.

- *Right of free labor:* Several state constitutions explicitly protect the freedom to pursue a livelihood, which provides greater textual support for economic liberty than the U.S. Constitution.⁸⁰ The Alaska Constitution, for example, states that "[t]his constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry"⁸¹ Similarly, many constitutions safeguard the privileges and immunities of citizens, which state courts are free to interpret more expansively than the federal courts with regard to protecting economic liberty.⁸² Several state courts also have interpreted their due process and equal protection clauses to protect economic liberty.⁸³

78. WASH. CONST. art. I, § 1.

79. KY. CONST. § 2. The Wyoming Constitution contains a provision nearly identical to that of Kentucky. WYO. CONST. art I, § 7.

80. See, e.g., FLA. CONST. art. I, § 2 ("All natural persons . . . have unalienable rights . . . among which are . . . to be rewarded for industry."); MONT. CONST. art. II, § 3 ("All persons . . . have certain unalienable rights. They include the right to . . . acquiring, possessing, and protecting property . . ."); N.C. CONST. art. I, § 1 ("[P]ersons . . . are endowed . . . with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits for their own labor and the pursuit of happiness.").

81. ALASKA CONST. art. I, § 1.

82. See David Schuman, *The Right to 'Equal Privileges and Immunities': A State's Version of 'Equal Protection'*, 13 VT. L. REV. 221, 223 n.15 (1988) (examples of state constitutions' guarantees of equal privileges and immunities). See, e.g., CAL. CONST. art. I, § 7(b) (privileges and immunities must be granted on the same terms to all citizens); ORE. CONST. art. I, § 20 (privileges and immunities must be granted equally to all citizens).

83. See, e.g., *State v. Cromwell*, 9 N.W.2d 914 (N.D. 1943) (holding that a North Dakota statute "unreasonably curtails the right to engage in the business of photography" and therefore

- *Anti-monopoly provisions:* Closely related are express prohibitions of government monopolies contained in several constitutions.⁸⁴ The North Carolina Constitution is typical in providing, “Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.”⁸⁵ Such provisions could be applied to prevent government from conferring exclusive monopolies or creating barriers to entry into businesses and professions, while not foreclosing market power legitimately garnered by competitors without government assistance.
- *Contract clauses:* The U.S. Supreme Court largely has eviscerated the federal constitution’s contract clause as a limitation on state government interference with private contracts.⁸⁶ Most state constitutions prohibit interference with contracts.⁸⁷ Those prohibitions could be applied more expansively than their federal counterpart to constrain economic regulations that interfere with the obligations of contracts.
- *Anti-forfeiture provisions:* Many state constitutions contain provisions forbidding forfeiture of estates in criminal cases, excessive fines, and cruel and unusual punishment.⁸⁸ Such provisions, along with due process guarantees, could be wielded against abusive government civil asset forfeiture

violated the due process and equal protection clauses of the North Dakota constitution.); *Buehman v. Bechtel*, 114 P.2d 227 (Ariz. 1941) (holding that an Arizona statute prohibiting unlicensed individuals from taking pictures and selling them is unconstitutional because it is repugnant to the due process clause of the state and U.S. Constitution).

84. *See, e.g.*, ARK. CONST. art. II, § 19 (“Perpetuities and monopolies . . . shall not be allowed”); TEX. CONST. art. I, § 26 (“Perpetuities and monopolies . . . shall never be allowed”); WYO. CONST. art. I, § 30 (“Perpetuities and monopolies . . . shall not be allowed”).

85. N.C. CONST. art. I, § 34.

86. *See, e.g.*, *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (holding that the power of the state to give temporary relief from enforcement of contracts exists when an urgent public need exists).

87. *See, e.g.*, CAL. CONST. art. I, § 9 (“[L]aw impairing the obligation of contracts may not be passed.”); FLA. CONST. art. I, § 10 (“No . . . law impairing the obligation of contracts may be passed.”); ILL. CONST. art. I, § 16 (“No . . . law impairing the obligation of contracts . . . shall be passed.”).

88. *See, e.g.*, ALA. CONST. art. I, § 19 (“[N]o conviction shall work corruption of blood or forfeiture of estate.”); IOWA CONST. art. I, § 17 (“[E]xcessive fines shall not be imposed and cruel and unusual punishment shall not be inflicted.”); NEV. CONST. art. I, § 6 (“Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted”); OKLA. CONST. art. II, § 15 (“No conviction shall work corruption of blood or forfeiture of estate”); WASH. CONST. art. I, § 15 (“No conviction shall work corruption of blood, nor forfeiture of estate.”).

practices⁸⁹ and possibly used to limit excessive awards in tort cases.

- *Gift clauses*: Several state constitutions prohibit state governments from providing gifts.⁹⁰ Such provisions could be used to prevent various types of corporate welfare, especially direct subsidies.⁹¹
- *Private or local bill clauses*: Most state constitutions prohibit state legislatures from conferring benefits upon a specific private or local interest that is not enacted as separate, stand-alone legislation.⁹² Such provisions could prevent “log-rolling” and “pork-barrel” spending (if only the national Constitution contained such a provision!). Budget bills containing all manner of new programs that were not subjected to separate legislative votes are prime targets for such provisions.
- *Tax and borrowing restrictions*: Many constitutions limit government taxation⁹³ and borrowing.⁹⁴ Taxpayers could enforce constitutional constraints against governmental entities from expanding the amount of sources of funding.
- *Victim rights*: Criminal law ordinarily pits the defendant against the state as if the crime were committed against society rather than against the victim. The process provides no formal standing to the victim, no matter how aggrieved. As a result of legal reforms, over half of state constitutions now provide constitutional protections to crime victims, such as the right to participate in sentencing decisions, the right to be informed about parole hearings, and the right to

89. See, e.g., *Aravanis v. Somerset County*, 664 A.2d 888 (Md. 1995) (statute providing for forfeiture of items used in connection with drug activities is a punitive statute the purpose of which is to require direct payment to the sovereign as punishment for an offense); *Commonwealth v. 4029 Beale Ave.*, 680 A.2d 1128 (Pa. 1993) (“[T]he court should inquire as to the *relationship* of the offense to the property.”).

90. See, e.g., ARIZ. CONST. art. IX, § 7 (forbidding a subdivision of the state from loaning its credit or making a donation except as authorized by law); N.D. CONST. art. X, § 18 (“[N]either the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation. . . .”).

91. See, e.g., *Frohliger v. Richardson*, 218 P. 497 (Cal. Ct. App., 1st App. Dist., Div. 1 1923) (the state constitution forbids appropriations for the benefit of any institution not under state management or control.).

92. See, e.g., PA. CONST. art. III, § 32 (“[T]he General Assembly shall not pass any local or special law.”).

93. See, e.g., CAL. CONST. art. XII, § 22 (property tax limit).

94. See, e.g., ARIZ. CONST. art. IX, § 5 (borrowing limit).

restitution.⁹⁵ Several groups now are seeking to enforce those rights by providing independent legal representation to victims in criminal prosecutions.⁹⁶

- *Municipal ultra vires*: Generally federal courts apply to governmental action a presumption of constitutionality so that they will examine the constitutional or statutory text to determine whether government is forbidden from taking certain actions rather than searching for the requisite power and striking down the governmental action unless such power is found. Under most state constitutions, however, municipal governments (including cities, school boards, and other local entities) are considered corporations that possess only such powers as are expressly conferred by the state constitution or statute.⁹⁷ Hence, taxpayers may challenge municipal power not only as a violation of constitutional rights but also on the ground that the power exceeds the entity's corporate powers.

The examples cited above barely scratch the surface of state constitutional provisions that can effectively be wielded by creative hands to protect individual rights and constrain government power. Some have argued any such enterprise should begin with a rigorous survey of pro-freedom constitutional provisions in the particular state.⁹⁸ Given that the federal Bill of Rights did not apply against state governments until incorporation,⁹⁹ it should be no surprise to find that state constitutions are full of provisions, both general and specific, that can be used to protect and expand liberty. What remains is for the freedom movement to invest them with their intended vitality.

95. See, e.g., ARIZ. CONST. art. II, § 2.1 (Victim's Bill of Rights); N.C. CONST. art. I, § 37 (list of victim's rights is similar to the Arizona Victim's Bill of Rights).

96. See, e.g., Arizona Voice for Victims www.voiceforvictims.org (last visited Dec. 16, 2007) (victims rights group). Some libertarians disagree that victims' rights protections serve the ends of freedom. I make a case that they do in CLINT BOLICK, TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT 144–46 (1998) (crime victims advocacy).

97. See generally Bryant v. Village of Sherman, 561 N.E.2d 1320 (Ill. App. Ct. 1990) (holding that municipalities could not impose a tax or license on overweight trucks); EUGENE MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS §126 (2nd ed. 1928) (explaining the treatment of state subdivisions by the states). An exception to the rule is "home rule" municipalities, which are invested with broader powers. City of Boca Raton v. State, 595 So. 2d 25, 27 (Fla. 1992).

98. See, e.g., Benjamin Barr, *Defining the Fundamental Principles of the Arizona Constitution: A Blueprint for Constitutional Jurisprudence*, GOLDWATER INST. POLICY REP. NO. 214 (Goldwater Institute, Phoenix, Ariz.) Oct. 30, 2006 (exploring the fundamental principles the Arizona Constitution embodies), available at <http://www.goldwaterinstitute.org/AboutUs/ArticleView.aspx?id=1167>.

99. The first case to incorporate part of the Bill of Rights was not until 1925. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

VI. STATE CONSTITUTIONS IN THE HANDS OF CONSCIENTIOUS
JUDGES

Many liberal state judges, such as retired Arizona Supreme Court Justice Stanley Feldman¹⁰⁰ and Wisconsin Chief Justice Shirley Abrahamson,¹⁰¹ took seriously Justice Brennan's call for state constitutional activism and blazed new legal trails in their states. More recently, judges reflecting a more libertarian or conservative perspective have begun to seriously examine the protections of individual liberty and limits on government power that abound in state constitutions.

Two exemplars of that trend are Washington Supreme Court Justice Richard Sanders and former California Supreme Court Justice Janice Rogers Brown (who now serves on the U.S. Court of Appeals for the D.C. Circuit). They are exemplary for several reasons. Both are students of their state constitutions and advocates of independent state constitutional review. Both faithfully interpret their constitutions in accordance with plain meaning and original intent. And both read state constitutional protections broadly, regardless of whether the liberty is invoked by a property owner or a criminal defendant.

Many of Justice Sanders' best opinions are dissents, but his powerful vision of the state constitution has moved the Washington Supreme Court in a more libertarian direction on such issues as economic liberty and religious freedom. In one case, Justice Sanders helped move the Court back from the precipice of interpreting Washington's Blaine Amendment, which forbids funding for religious purposes, in a manner that exhibits hostility toward religion. At issue was a voluntary chaplaincy program in a sheriff's office. In upholding the program, Justice Sanders noted that the Washington constitution, like its federal counterpart, "both affirm the individual's right to free religious exercise while (or by) denouncing governmental involvement as a means to that end."¹⁰² But such clauses are "complementary, not contradictory," for both "promote . . . religious freedom."¹⁰³

In conducting an independent analysis of the state constitutional provisions, Sanders observed that "[a]ppropriate constitutional

100. See John P. Frank, *Tribute: Justice Stanley G. Feldman*, 45 ARIZ. L. REV. 269 (2003) (detailing the impact of Justice Feldman on the Arizona Supreme Court).

101. See Ronald M. George, *A Dedication to Shirley S. Abrahamson*, 67 ALB. L. REV. 647 (2004) (noting the influence Chief Justice Abrahamson has had in shaping Wisconsin law).

102. *Malyon v. Pierce County*, 935 P.2d 1272, 1274 (Wash. 1997).

103. *Id.*

analysis begins with the text and, for most purposes, should end there as well.”¹⁰⁴ The Court’s “objective is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.”¹⁰⁵ In this case, the analysis was straightforward: the Constitution prohibits appropriations, none of which were made. The plaintiff “has simply not been compelled to furnish contributions of money to propagate opinions with which he disagrees,” so there was no constitutional violation.¹⁰⁶

A few years later, Justice Sanders found himself in dissent in a case construing the religious liberty guarantee of the state constitution, in which the Court upheld a zoning ordinance requiring churches to obtain a conditional use permit in order to operate.¹⁰⁷ The Court examined the ordinance under both the First Amendment and the Washington Constitution.¹⁰⁸

For Sanders, the law was problematic both because it imposed a bureaucratic obstacle to the free exercise of religion and because it vested unbridled discretion in local officials.¹⁰⁹ Because freedom of religion under the Washington Constitution is “absolute,” Sanders argued that the burden of persuasion rested with the county.¹¹⁰ Because there was no showing that the county’s objectives could not be satisfied by neutral, less-restrictive regulations, the ordinance was “blatantly unconstitutional.”¹¹¹

Sanders urged his colleagues to “examine the facts before us, and measure them by the timeless principles and mandatory standard our constitution has provided.”¹¹² Doing so, he noted, one finds that although the otherwise absolute language was tempered by specific limited exceptions, there “is no zoning law exception to that constitutional guarantee of religious freedom so clearly incorporated in our constitutional text.”¹¹³ The majority concluded that the state’s and its subdivisions’ inherent regulatory powers trumped the constitutional guarantee. Sanders declared, “I disagree: if religious

104. *Id.* at 1281.

105. *Id.* at 1282.

106. *Id.* at 1284.

107. *Open Door Baptist Church v. Clark County*, 995 P.2d 33 (Wash. 2000) (Sanders, J., dissenting).

108. *Id.* at 36, 38.

109. *Id.* at 48–49.

110. *Id.* at 48.

111. *Id.* at 49.

112. *Id.* at 50.

113. *Id.*

liberty, or any civil liberty for that matter, is at the mercy of the police power it is no civil liberty at all.”¹¹⁴

Justice Sanders also dissented from a decision striking down an initiative creating legislative term limits. Turning to the plain language of the relevant constitutional provision that set qualifications for legislative officeholders, Sanders charged that the “majority errs when it concludes negative constitutional language which sets a minimum exclusively sets a maximum as well.”¹¹⁵ Other state constitutions used exclusive language, but the framers of the Washington Constitution did not.¹¹⁶ Such restrictions were consistent not only with plain meaning, original intent, subsequent legislative practice, and the interpretation of similar language in other states, but also with the “spirit of our constitution,” whose “very nature” is “to limit government.”¹¹⁷ As Sanders explained, “Term limits, which ensure our legislators remain citizen legislators, not career state employees, are generally consistent with this constitutional framework and specifically consistent with our citizen’s historically populist mistrust of the legislature.”¹¹⁸

In *State v. Ladson*, the Court examined the use of “pretextual stops” by police officers—that is, where a motorist is stopped for a minor traffic offense so that the police can look for evidence of more serious crimes.¹¹⁹ In this case, officers recognized the defendant as a reputed drug dealer, and stopped him on the grounds that his license tags had expired five days earlier.¹²⁰ Then they discovered his driver’s license was suspended and arrested him.¹²¹ A search revealed a handgun, several bags of marijuana, and \$600 in cash.¹²²

The U.S. Supreme Court had sanctioned such stops, but in a majority opinion by Justice Sanders, the Washington Constitution determined such stops were forbidden by the state constitution.¹²³ The Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”¹²⁴

114. *Id.* at 51.

115. *Gerberding v. Munro*, 949 P.2d 1366, 1378 (Wash. 1998) (Sanders, J., dissenting).

116. *Id.* at 1382.

117. *Id.* at 1386.

118. *Id.*

119. 979 P.2d 833 (Wash. 1999).

120. *Id.* at 836.

121. *Id.*

122. *Id.*

123. *Id.* at 842.

124. WASH. CONST. art. I § 7.

Finding that the state constitutional proscription was broader than its federal counterpart, Sanders concluded that it “forbids use of pretext as a justification for a warrantless search or seizure because [it] requires that we look beyond the formal justification for the stop to the actual one.”¹²⁵

In a 2004 decision, the Washington Supreme Court upheld an ordinance forbidding the posting of signs on public utility poles. Dissenting, Justice Sanders noted the sweeping nature of the state constitution’s free-speech guarantee, noting that “today’s majority denies [defendant] the right to speak, write, and publish in a manner utilized since statehood.”¹²⁶ The majority followed federal precedent,¹²⁷ ignoring the fact that under Washington State law, public utility poles are public forums, on which speech may be regulated in a reasonable and nondiscriminatory manner but not prohibited. “Regardless of what previously transpired in federal First Amendment litigation,” Sanders urged, “it cannot rob our state constitution of its independent life and vitality.”¹²⁸

Two states to the south, Justice Brown worked as well to broadly construe the state constitution’s protected liberties and limits on government power. In *Aguilar v. Avis Rent A Car System*, the California Supreme Court upheld an injunction forbidding an employee for using racial epithets in the workplace.¹²⁹ Justice Brown dissented, noting that the California Constitution provides, “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”¹³⁰ The provision clearly forbids prior restraint on speech, Brown reasoned. “In permitting speech, but requiring the speaker to pay damages for injurious speech, the California Constitution preserves both the freedom of the speaker and the equal dignity of the audience.”¹³¹

In a rhetorical flourish that characterizes Justice Brown’s writing, she underscored the vital principles underlying the constitutional protection. Acknowledging the speech at issue as “offensive and abhorrent,” Brown observed “[o]ne of the truths we hold to be self-

125. *State v. Ladson*, 979 P.2d 833, 839 (Wash. 1999).

126. *City of Seattle v. Mighty Movers, Inc.*, 96 P.3d 979, 990 (Wash. 2004) (Sanders, J., dissenting).

127. *Id.* at 990.

128. *Id.* at 992.

129. 980 P.2d 846, 848 (Cal. 1999) (Brown, J., dissenting).

130. *Id.* at 859–60.

131. *Id.* at 894.

evident is that a government that tells its citizens what they may *say* will soon be dictating what they may *think* I can conceive no imprisonment so complete, no subjugation so absolute, no abasement so abject as the enslavement of the mind.”¹³²

Writing for the Court in the first case applying Proposition 209, the state constitutional amendment that banned racial preferences in government employment, education, and contracting, Justice Brown found that the provision’s plain language and intent prohibited a local government minority subcontractor set-aside program.¹³³ Moreover, Brown noted that while the federal Constitution as construed by the U.S. Supreme Court does not create an absolute prohibition against racial preferences, “[i]t does not, however, preclude a state from providing greater protection” against discrimination.¹³⁴ Unlike the federal Equal Protection Clause, Brown explained, the California Constitution “prohibits discrimination and preferential treatment. Its literal language admits no ‘compelling state interest’ exception; we find nothing to suggest the voters intended to include one *sub silentio*.”¹³⁵

In *San Remo Hotel L.P. v. City and County of San Francisco*, the Court sanctioned the city’s requirement that a hotel seeking to move from short-term to long-term residential use replace the units that were available to daily tenants.¹³⁶ Dissenting, Justice Brown remarked that “private property, already an endangered species in California, is now entirely extinct in San Francisco.”¹³⁷ Brown noted that the purpose of the law was to provide affordable housing for low-income residents. “The most egalitarian way to achieve this goal would be to distribute the cost of subsidies as broadly as possible,” she observed, “but the forces attacking private property in California—though claiming the moral high ground—have proved themselves anything but egalitarian in their approach.”¹³⁸ Though the requirement clearly was unconstitutional under the Fifth Amendment, it also violated the California Constitution, Brown argued. “This is *not* a tough case. . . . San Francisco has expropriated the property and resources of a few hundred hotel owners in order to ameliorate—off

132. *Id.* at 895.

133. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1070 (Cal. 2000).

134. *Id.* at 1087.

135. *Id.*

136. 41 P.3d 87, 91 (Cal. 2002).

137. *Id.* at 120 (Brown, J., dissenting).

138. *Id.*

budget and out of sight of the taxpayer—its housing shortage.”¹³⁹ Brown lamented that “[t]heft is [still] theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government.”¹⁴⁰

Justice Brown also dissented from a decision upholding a statute that required employers to cover contraceptives in their health insurance policies, even if they objected on religious grounds.¹⁴¹ Brown found that the mandate not only violated the First Amendment but also the religion provisions of the California Constitution.¹⁴² The state constitution has independent force, Brown argued, which “is true even when the language is identical to the federal Constitution, but is particularly true when the language differs.”¹⁴³ Whatever the outcome under the U.S. Constitution, Brown believed that the Court should have applied the more sweeping state constitutional language to prevent the coercion.¹⁴⁴

Though Justices Sanders and Brown are found too often on the dissenting side of cases, that is only natural because they are legal pioneers, seeking to rediscover and vigorously apply the principles underlying the constitutions that set forth the first principles of our republican government. Their bold and principled decisions, as well as the underlying constitutional provisions themselves, underscore the realm of the possible for those who seek greater judicial protection for liberty. But a metamorphosis in state constitutional law can occur only if the freedom movement files cases and makes arguments to vindicate the great untapped promise of state constitutions.

VII. PROPITIOUS TIMING

When Justice Brennan called upon liberal activists to recourse to state courts to protect the jurisprudential victories produced during the New Deal and Warren Court, he perceived that the halcyon days of liberal judicial action in the federal courts were waning. It remains to

139. *Id.* at 125–26.

140. *Id.* at 128.

141. *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 85 P.3d 67, 98 (Cal. 2004) (Brown, J., dissenting).

142. *Id.* at 99, 107.

143. *Id.* at 107.

144. Though Justice Brown has moved on to a federal appellate court that deals largely with administrative law, Tom Brune, *After Delay, Judge Wins Confirmation*, *NEWSDAY*, June 9, 2005, at A26, I hope that she will continue to exhibit the healthy skepticism toward abuses of government power that characterized her tenure on the California Supreme Court—a skepticism that is embodied not only in the federal Constitution but in most if not all state constitutions.

be seen whether conservatives and libertarians may be witnessing a similar end-game of the federal judicial counter-revolution that produced important gains for freedom during the Rehnquist Court.

Certainly the ardor of the Rehnquist Court in that regard cooled in its waning days. The Court that struck down racial preferences in cases such as *City of Richmond v. J.A. Croson Co.*¹⁴⁵ and *Adarand Constructors, Inc. v. Peña*¹⁴⁶ ended up sustaining a racial preference at the University of Michigan Law School.¹⁴⁷ The same Court that found bounds to congressional power under the Commerce Clause in *United States v. Lopez*¹⁴⁸ and *United States v. Morrison*¹⁴⁹ retreated in *Gonzales v. Raich*.¹⁵⁰ The same Court that upheld the constitutionality of school voucher programs in *Zelman v. Simmons-Harris*¹⁵¹ failed to remove a pernicious obstacle to school choice in *Locke v. Davey*.¹⁵² The Court that reined in overzealous local government regulation of private property in such cases as *Lucas v. South Carolina Coastal Council*¹⁵³ and *Dolan v. City of Tigard*¹⁵⁴ sustained such abuses in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*¹⁵⁵ and, of course, in *Kelo*.¹⁵⁶ If the judicial counter-revolution has run its course at the federal level, the freedom movement needs to heed Justice Brennan's wisdom and seek to preserve and extend its legacy in state courts. In any case, state constitutions provide safeguards for individual rights and constraints on government power that even the most expansive interpretation of the federal Constitution would not yield.

The appointments of Chief Justice John Roberts¹⁵⁷ and Justice Samuel Alito¹⁵⁸ may re-energize efforts to protect constitutional rights and restrict government to the rightful bounds of its authority. If so, a focus on both federal and state constitutional litigation will

145. 488 U.S. 469 (1989).

146. 515 U.S. 200 (1995).

147. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

148. 514 U.S. 549 (1995).

149. 529 U.S. 598 (2000).

150. 545 U.S. 1 (2005).

151. 536 U.S. 639 (2002).

152. 540 U.S. 712 (2004).

153. 505 U.S. 1003 (1992).

154. 512 U.S. 374 (1994).

155. 535 U.S. 302 (2002).

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

157. Charles Hurt, *Roberts Confirmed to High Court; Senate OKs 17th Chief Justice*, THE WASHINGTON TIMES, Sept. 30, 2005, at A1.

158. David Espo, *Alito Confirmed to Supreme Court*, THE COURIER-JOURNAL (Louisville, Ky.), Feb. 1, 2006, at 3A.

accomplish exactly what the founders desired: a double security for the rights of the people.

Federalism's greatest proponents have been too often absent from systematic litigation in state courts. There is much to be gained for freedom in seeking to reinvigorate the plentiful yet largely moribund protections of individual liberty and limits on government power that repose in state constitutions. Though the original architect of that movement was Justice William H. Brennan, conservatives and libertarians no less than liberals should heed his wisdom. Absence from the vital arena of state constitutional litigation will leave the field entirely to those for whom freedom is not a paramount value.

Despite my legal training, I am not a fan of Latin phraseology. But there is one Latin maxim that ought to guide conservatives and libertarians as we ponder the proper course of action in vindicating state constitutional guarantees: *carpe diem!*