Always in the Direction of Liberty

The Rule of Law and the (Re)emergence of State Constitutional Jurisprudence

By Albert M. Rosenblatt

Hon. Albert M. Rosenblatt served as a Judge of the New York Court of Appeals from 1999-2006. He now teaches at NYU Law School and is counsel to McCabe and Mack.

What homeowner in his or her right mind would place all design plans in the hands of two architects with competing visions? By way of analogy this is federalism, the American enterprise housing two legal systems – state and federal – under one roof. For better or worse (mostly for the better, I submit) federalism is an American birthright and a cornerstone of our Rule of Law, integral to our allocation of powers. We might define it as a manual of how we get on with our government.

Often, and inevitably, the federal and state systems bump into one another and we have robed referees to make the calls and keep the peace.

Since our founding, states' rights and federal rights have each taken turns in ascendancy. My point in this article is that we may be entering an epoch in which states' constitutional rights will increasingly offer expanded liberties not accorded under the U.S. Constitution. Under federalism, state courts can expand rights under state constitutions when federal courts restrict or contract them. This state constitutional role is not only compatible with the Rule of Law but is indeed one of federalism's strengths.[1]

At the Founding: The Scope of Federal Power

Had we a clean slate when we created ourselves politically in 1788, a unitary system with some accommodation for home rule would have been more orderly. But the slate had a lot of history on it, given that we consisted of separate colonies with different cultures and ideas of governance.

When breaking free we at first saw ourselves more as Virginians or New Yorkers, or the like, than as "Americans." Our newborn experience was exclusively with state government; after all, state constitutions were not thrust on us by some alien or higher authority. With no template to speak of, state citizens created founding documents under which we lived for a decade through the Articles of Confederation before undertaking union. In fashioning a national Rule of Law the federal Constitution's framers would naturally look to their state constitutions as models.

Meshing our state and national character lies at the heart of federalism. We retain our dual identities, now and again placing one above the other as a manifestation of our Rule of Law. This has gone on for well over two centuries. As long as we are the United States it will continue.

In creating a national Constitution the framers well understood the need for horizontally separating powers within a single federal government as a foundation for a workable Rule of Law. This accounts for the Constitution's three main articles separating powers under legislative, executive, and judicial branches.[2]

Separating powers into three branches within a single government is difficult enough, but allocating powers as between two governments – state and federal – adds another layer of complexity.

When starting out after the Revolutionary War, the citizenry had become used to seeing their state governments as keepers of the Rule of Law. The population proved willing to unite under one polity but unwilling to endanger the Rule of Law by allowing an unfamiliar entity – a national government – to win too much power. If there was any question about that, the framers made their objective clear in the Tenth Amendment to the U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This is the essence of states' rights – and with it, federalism.

It is also no accident that the First Amendment begins with the words: "Congress shall make no law . . . ." Further Amendments follow, constituting a Bill of Rights – conceived as a vehicle to keep the federal government

from stripping away rights that grew up under common law, state statutes, and state constitutions. As an element of our Rule of Law, if federal rights or constitutional interpretations cramp freedoms, the state constitutions have offered, and will continue to offer, expanded recourse in state courts. Judicial decisions grounded on adequate and independent state constitutional grounds have unreviewable finality.[3]

This of course applies when state courts employ their own constitutions to accord rights greater than those afforded under comparable federal constitutional provisions.[4]

The Historical Background: State Constitutional Powers Under the Rule of Law

States' rights have been a part of American political discourse from the outset.

The phrase is often and aptly associated with slavery but has recurrently been invoked as a vehicle for the very opposite: protections under the Rule of Law beyond those afforded under the U. S. Constitution.

The Brennan Article as Promoting a New Era of State Constitutional Rights

A century later we saw a similar resurgence in states' rights. One powerful writing, U.S. Supreme Court Justice William Brennan's 1977 article, often is credited with playing a prime role in the movement. He wrote:

> State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.

And why is this necessary? He explained:

> These state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the Boyd principle [Boyd v United States, 116 U.S. 616 (1886)] with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.[7]

We may be entering an epoch in which states' constitutional rights will increasingly offer expanded liberties not accorded under the U.S. Constitution.

Early in our history it became clear that the Bill of Rights was obligatory on the federal government but not the states. The Supreme Court made the point in 1833, in *Barron v. Baltimore*.[5]

That condition did not change until the Fourteenth Amendment declared that "[n]o *State* shall . . . deprive any person of life, liberty, or property, without due process of law." From that moment forward, it was the federal Constitution that courts relied on to interdict errant state practices. Slowly several protections under the federal Bill of Rights were absorbed by the states under the Fourteenth Amendment.

But federalism is a two-way street. States looked to their own courts and constitutions for protection, not only at our founding but in later eras. The federal Constitution's Fugitive Slave Clause (Art. IV, §2) contemplates the return of runaway slaves to their owners. Congress implemented that provision, enacting the Fugitive Slave Acts for the capture and return of runaway slaves. In the name of states' rights, northern states passed "personal liberty laws" or "anti-kidnapping laws," using jury trials and habeas corpus remedies to protect formerly enslaved people from overzealous or forcible federal law enforcement.[6]

Further supporting Justice Brennan's thesis, states have constitutional rights with no federal counterpart. Considering that the U.S. Constitution is in a sense a "negative document,"[8] which is to say, restraining government, there are state constitutional rights that accord positive protections. In New York, for example, there are actionable state constitutional rights concerning environment conservation (Article XIV), the right to a sound basic education (Article XI), and care of the needy (Article XVII).[9]

In the succeeding 40 years, state courts, taking a cue from Justice Brennan, have come to rely increasingly on state constitutions to compensate for what they see as shortcomings in the federal Constitution or its interpretation. That is not to suggest that most state courts casually reject federal constitutional law in favor of their own. But a remarkable state court jurisprudence has emerged. Consider:

With respect to every one of the two dozen rights listed in the first 10 amendments, some state court at some time has under its own state constitution given one of the rights a broader or more protective application than under federal law.

State Constitutional Rulings According Broader or More Protective Rights Than Under Federal Law: A Sampling

It would take a large volume to list and discuss every ruling in which a state court has relied on its own constitution to accord broader protection than under federal constitutional law. A few examples from New York will make the point.

First Amendment Cases

The First Amendment free press provision is a good place to start. The N.Y. Court of Appeals explained its stance in the case of *O'Neill v. Oakgrove Constr., Inc.*:

> The expansive language of our State constitutional guarantee (*compare*, NY Const, art I, § 8, *with* US Const 1st Amend), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States . . . and the consistent tradition in this State of providing the broadest possible protection to "the sensitive role of gathering and disseminating news of public events". . . all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.[10]

In other cases, the Court of Appeals accorded expanded rights under the state Constitution, affirming that "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution."[11] Moreover, as held in *Branzburg v. Hayes*,[12] the First Amendment of the U.S. Constitution does not shield the confidential sources of reporters. New York's Constitution does.[13] The same broader protection in New York exists in obscenity prosecutions and in free exercise of religion involving prisoners.[14]

Criminal Law

A good many of the state constitutional cases that broaden rights enunciated or interpreted under the federal Constitution involve criminal law. The Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution enunciate important rights and protections in criminal law. Respectively, they protect against unreasonable searches and seizures, double jeopardy, and self-incrimination. They provide for grand jury, speedy and public trials by jury, a right of confrontation against witnesses, compulsory process, a right to counsel, protection against cruel and unusual punishment, and bail.

And yet, in each of these domains, state constitutional application, by one state or another, has broadened these fundamental constitutional protections.

New York has had its share of these cases.

In *People v. Bigelow*,[15] the Court of Appeals departed from the U. S. Supreme Court's good-faith exception to the warrant requirement. In *People v. Scott*,[16] the Court declined to adopt the U.S. Supreme Court's holding that areas outside a home's curtilage enjoy no Fourth Amendment protection.

The N.Y. Court applied similar protections beyond those afforded by the Fourth Amendment in criminal cases involving automobile searches, closed containers, the plain touch doctrine, canine sniffing, and Payton violations (requiring a warrant to make an arrest at one's home).[17]

The same holds true for New York's broader constitutional freedom from self-incrimination concerning un-Mirandized statements, post-arrest silence, double jeopardy, as well as those under state due process.[18]

New York has also invoked the state constitutional right to counsel in hosts of cases going back to 1885 through the present, often emphasizing its historical and more expansive roots,[19] and affirming recently that it offers more expansive application than the federal test.[20]

As for jury trials in criminal cases, the U.S. Supreme Court has interpreted the Sixth Amendment as allowing six-member juries in felony trials,[21] whereas New York calls for 12.[22] Also, New York constitutionally requires unanimity in criminal case jury verdicts,[23] while under federal law a state may, compatibly with the Sixth Amendment, authorize non-unanimous verdicts.[24]

Due Process in "Takings" Cases

The Takings Clause of the Fifth Amendment limits the power of eminent domain by requiring that just compensation be paid for private property taken for public use. Some states have interpreted comparable clauses in their own state constitutions as providing more protection to owners and requiring compensation not required by federal precedents.[25]

Beyond the rights listed in the first 10 amendments to the U.S. Constitution, there are other species of rights that state courts have expanded upon by way of state constitutional interpretation, notably in the realm of equal protection.

Equal Protection

The Rule of Law, however defined, must include equal protection, which limits how governments can classify people or groups of people. Uttering the word "classification" seems almost antithetical to equal protection and immediately sets off constitutional alarms. The "*Carolene Products* footnote," now 80 years old, cautions us to be extra vigilant when dealing with a classification based on race, alienage, or national origin or ethnicity. Be on guard, the footnote warns, for "prejudice against discrete and insular minorities." It calls for a "correspondingly searching judicial inquiry" when it comes to classification.[26]

Thirty-five years later the Supreme Court began using the phrase "suspect class" to describe a politically weak minority. What began as a caution modestly expressed has grown into an elaborate equal protection protocol with levels of scrutiny gauged to the powerlessness of

the group. To survive strict scrutiny – reserved for the most vulnerable class – a law must be narrowly tailored to further a compelling governmental interest.[27]

Under federal law, gender classification calls for "intermediate scrutiny"[28] and most other non-race, religion or ethnicity-based classifications (the "rational basis" category) will be upheld if there is a rational relationship between the disparity of treatment and a legitimate governmental purpose.[29]

> We retain our dual identities, now and again placing one above the other as a manifestation of our Rule of Law.

These classifications and scrutiny levels have not been lost on state courts.

State constitutions typically contain provisions guaranteeing equal protection using language much like the Fourteenth Amendment. One commentator has catalogued state court decisions throughout the country, tallying the large number of state court rulings explicitly holding that their states' equal protection affords greater protections than under federal law.[30] This is a vast area of jurisprudence, enough to fill a large volume.

Illustrative is a Minnesota case in which the court found that crack cocaine is used predominantly by blacks and cocaine powder predominantly by whites. The penalties for crack cocaine were harsher, leading to an equal protection/discriminatory impact challenge. The Supreme Court of Minnesota began by announcing that "[n]othing prevents this court from applying a more stringent standard of review as a matter of state law under our state constitutional equivalent to the equal protection clause."[31] It continued:

> To harness interpretation of our state constitutional guarantees of equal protection to federal standards and shift the meaning of Minnesota's constitution every time federal case law changes would undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens.[32]

This case provides powerful reaffirmation of state courts' conception and application of the rule of law through their own state constitution.

Gender Classification

Another important facet of equal protection deals with gender. Some state courts have treated gender classification to a higher level of scrutiny than accorded under federal law. This is true, for example, in Maryland, drawing on its state Equal Rights Amendment.[33] The Supreme Court of New Mexico explained its justification for applying the higher (strict) standard of scrutiny in gender cases, also citing its state Equal Rights Amendment.[34] The state of Washington's Supreme Court, too, has interpreted its Equal Rights Amendment to prohibit classifications based on gender.[35]

As early as 1977 the Supreme Court of Massachusetts put it plainly in an opinion to its legislature, applying strict scrutiny to invalidate exclusion of girls from state-approved contact sports: "We believe that the application of the strict scrutiny-compelling State interest test is required in assessing any governmental classification based solely on sex."[36]

Illinois also applied strict scrutiny to invalidate a statute that permitted 17-year-old boys to be charged as adults but precluded like treatment of 17-year-old girls.[37] The Pennsylvania Supreme Court has stated that gender can no longer be accepted as an exclusive classifying tool.[38]

Conclusion

The Rule of Law has a great many definitions but there are some basic ingredients on which most people would agree: fairness (both substantive and procedural), consistency, equality, decency, and a predictable adherence to established universal norms, in recognition of our common humanity and morality.

In employing federalism as the prime vehicle in carrying out the rule of law, the framers could not have imagined every turn in the road. In shaping the contours of our rule of law, federalism – given its dual personality – has shown itself to be adaptable rather than static. Restraint of government, be it state or federal, is an essential ingredient to the rule of law. Our history reveals that when either the state or federal government acts as to restrict liberty, the other gains strength to defend liberty.

A recent chapter in federalism played out in the 1990s when the Supreme Court restrained the federal government for overstepping its bounds by passing legislation properly within the realm of the states[39] and when Congress sought to require states to act as agents in carrying out federal initiatives.[40]

This latter jurisprudence may empower the states in current times in dealing with what they may regard as federal inaction or adverse actions when it comes to the environment or immigration enforcement, for example. These will be interesting cases for students and scholars of federalism to watch.

Our federalist system means that the U.S. Constitution demarcates the "floor" below which no state may go, when it comes to rights and liberties established under federal law. On the other hand, neither the federal government nor its courts may construct a "ceiling" for the states. They are free to design their own, however high.

It is in effect, a one-way street, always in the direction of liberty.

1. A computer search reveals heaps of definitions and types of "federalism":

> horizontal federalism, vertical federalism, new federalism, cooperative federalism, dual federalism, interstitial federalism, nonbinary federalism, preemptive federalism, competitive federalism, fifty-labs federalism, comparative federalism, dualist federalism (different from dual federalism), symbiotic federalism, corporate federalism, foreign relations federalism, antitrust federalism, democratic federalism, overlapping federalism, asymmetrical federalism, not to mention anti-federalism and uncooperative federalism.

I speak of the federalism involved in the reliance on state as opposed to federal constitutional law, often referred to as new judicial federalism.

2. Montesquieu is credited with describing the concept in his classic work. He wrote it in 1748, a mere three decades before our constitutions were composed. Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) ("All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.").

3. *Michigan v. Long*, 463 U.S. 1032 (1983).

4. *Cooper v. California*, 386 U.S. 58, 62 (1967).

5. 32 U.S. (7 Pet.) 243, 247.

6. Thomas D. Morris, Free Men All, The Personal Liberty Laws of the North (1780-1861), Johns Hopkins University Press (1974).

7. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). *See also* 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 (1986). For a thoughtful discussion on point, see Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41 (2006).

8. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

9. *See, e.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1135 (1999).

10. 71 N.Y.2d 521, 528–29 (1988).

11. *See, e.g.*, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (involving state constitutional protection for pure opinion) and *Chapadeau v. Utica-Observer Dispatch, Inc.*, 38 N.Y.2d 196 (1975) (holding that a defamed party could recover only by showing that the publisher acted with gross irresponsibility, a broader protection of speech than the negligence standard required by the Supreme Court).

12. 408 U.S. 665 (1972).

13. *Holmes v. Winter*, 22 N.Y.3d 300, 320 (2013) (noting that Article I, § 8 of the N.Y. Constitution was adopted in 1821, well before the First Amendment became obligatory on the states). The drafters chose not to model the provision after the First Amendment, deciding instead to adopt broader language:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press. (NY Const, art I, § 8)

14. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986); *People ex rel Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557–58 (1986) (obscenity cases). For a seemingly more expansive ruling than the federal interpretation under the Free Exercise clause, see *Rivera v. Smith*, 63 N.Y.2d 501(1984) (involving the claim of a Muslim prisoner to be free from a search by a female guard).

15. 66 N.Y.2d 417, 426–27 (1988).

16. 79 N.Y.2d 474 (1992).

17. *See People v. Class*, 67 N.Y.2d 431 (1986); *People v. Torres*, 74 N.Y.2d 224 (1984); *People v. Marsh*, 20 N.Y.2d 98 (1967) (automobile searches); *People v. Jiminez*, 22 N.Y.3d 717 (2014) (closed containers); *People v. Diaz*, 81 N.Y.2d 106 (1993) (plain touch doctrine); *People v. Dunn*, 77 N.Y.2d 19, 25–26 (1990) (canine sniffing); and *People v. Harris*, 77 N.Y.2d 434 (1991) (Payton violation consequences).

18. *People v. Bethea*, 67 N.Y.2d 364 (1986) (un-Mirandized statements); *People v. Pavone*, 26 N.Y.3d 629 (2016) (post- arrest silence) and double jeopardy claims in *People v. Michael*, 48 N.Y.2d 1 (1979), as well as those under state due process protection in *People v. Isaacson*, 44 N.Y.2d 511, 519 (1978) (police conduct) and *People v. LaValle*, 3 N.Y.3d 88 (2004) (capital case jury deadlock instructions).

19. The Court of Appeals drew on its history in *People v. Witenski*, 15 N.Y.2d 392, 413 (1965):

An eloquent 1885 Special Term opinion [giving citation] sets out the historical data proving that, even "While the territory now embraced by the State of New York was a colony of Great Britain, it was a part of the common law that counsel should be assigned by the court for the defense of poor persons accused of crime" and that before there was any applicable statute it was the practice and the duty of the courts to make such assignments.

20. "Moreover, our state standard . . . offers greater protection than the federal test, we necessarily reject defendant's federal constitutional challenge" (*People v. Clark*, 28 N.Y.3d 556, 565 (2016)).

21. *Williams v. Florida*, 396 U.S. 78 (1970).

22. N.Y. Const. art. VI, § 18a.

23. *People v. DeCillis*, 14 N.Y.2d 203 (1964).

24. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

25. *See, e.g.*, *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001) (recognizing that the Alaska Constitution offers property owners broader protection than under the U.S. Constitution); *Avenal v. State*, 886 S.2d 1085, 1103–08 (La. 2004) (recognizing that the Louisiana Constitution requires compensation for property "damaged" as well as "taken"); *Gilich v. Miss. State Highway Comm'n*, 574 So.2d 8, 11, 12 (Miss. 1990) (holding that the Mississippi Constitution offers broader protection than the U.S. Constitution for property "taken or damaged"); *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, 709 N.W.2d 841, 846 (S.D. 2006) (recognizing that the South Dakota Constitution imposes stricter "public use" requirements than the U.S. Constitution and requires compensation when property is "taken" or "damaged").

26. *United States v. Carolene Products Co.*, 304 U.S. 144, 152,153 n. 4 (1938).

27. *Johnson v. California*, 543 U.S. 499 (2005).

28. *Craig v. Boren*, 429 U.S. 190 (1976).

29. *Clark v. Jeter*, 486 U.S. 456, 461(1988).

30. For the full catalogue of states and cases, see *Randall S. Jeffrey: Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law & Ineq. 239, 254 (1999). For a fine textbook, see Robert A. Williams and Lawrence Friedman, State Constitutional Law: Cases and Materials. Equal protection and scrutiny levels are covered expansively in Shaman, Jeffrey M., Equality and Liberty in the Golden Age of State Constitutional Law, New York: Oxford University Press (2008).

31. *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461, 66 L. Ed. 2d 659, 101 S. Ct. 715 n.6 (1980)).

32. *Id.* at 889.

33. In Maryland, courts will review classifications based on sex under a *strict* scrutiny standard of review. Md. Decl. of Rts. Art. 46; *State v. Burning Tree Club, Inc.*, 315 Md. 254, 294–96, 554 A.2d 366, *cert. denied*, 493 U.S. 816, 110 S. Ct. 66, 107 L. Ed. 2d 33 (1989); *Murphy v. Edmonds*, 325 Md 342, 357 n.7, 601 A.2d 102 (1992); *Conaway v. Deane*, 401 Md. 219, 276 n.38, 932 A.2d 571 (2007).

34. *N.M. Right to Choose/Naral, Abortion & Reprod. Health Servs., Planned Parenthood of the Rio Grande v. Johnson*, 1999-NMSC-005, ¶ 37, 126 N.M. 788, 800–01, 975 P.2d 841, 853–54.

35. *Darrin v. Gould*, 85 Wash.2d 859, 540 P.2d 882 (1975); *Welfare of Jeffrey Lee Hauser*, 15 Wash. App. 231, 548 P.2d 333 (1976).

36. *Op. of Justices to House of Representatives*, 374 Mass. 836, 839–40, 371 N.E.2d 426, 428 (1977).

37. *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974).

38. *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851 (1974).

39. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995).

40. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).