



2nd Edition
2019

THE FIRST LINE OF DEFENSE

**LITIGATION FOR LIBERTY
AT THE STATE LEVEL**

**Timothy
Sandefur**

EXECUTIVE SUMMARY

The Goldwater Institute's 2007 report *The First Line of Defense: A Blueprint for Constitutional Litigation to Expand Freedom*¹ urged state-based policy organizations that focus on individual freedom to add litigation to their tools for advancing liberty. This revised edition takes a new look, in light of a decade's worth of experiences, to explain how and why state-level litigation should be part of an overall strategy for freedom.

The reason is simple: The U.S. Constitution creates a structure of checks and balances that enables the people to govern themselves while still protecting individual freedom. Probably the most ingenious part of that system is the way it balances federal and state governments. Washington lawmakers' few powers are concerned mainly with national matters, while state governments have general power to legislate for the public good within their boundaries, as long as they respect the basic minimum of federal protections for individual rights. This allows states to try novel policies and devise unique solutions to local problems, and more importantly, to establish protections for individual freedom that are stronger than those the federal Constitution provides. As James Madison put it, this federalist system provides "a double security ... to the rights of the people": The federal government shields people from state wrongdoing, while state governments provide more specific protections for individual freedom.²

Yet the potential power of state constitutions is often neglected. The news is dominated by what happens in Washington, D.C., despite the fact that most of the political and legal questions that affect our lives are decided in state capitals. And while national watchdog groups monitor federal officials and work to enforce the federal Bill of Rights, what happens at the state level is sometimes ignored. Until recent years, few organizations took the effort to speak for individual liberty to state courts or took advantage of legal protections in state constitutions.

That has changed in recent years, thanks in part to increased focus on state legal and political change by liberty-oriented reformers. But much work still remains. This paper aims to help organizations to seize the opportunity to advance liberty in the ways that affect Americans most, through a combination of three tools: policy analysis, legislative advocacy, and litigation, at the state level.★

HOW STATE CONSTITUTIONS PROTECT MORE BROADLY

The federal government has limited powers, relating primarily to national subjects such as international diplomacy and interstate trade. Matters not entrusted to the federal government are reserved to the states, meaning states have what *The Federalist Papers* calls “numerous and indefinite” powers over “the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.”³

With greater power comes the need for greater protection. So state constitutions also provide more security against government abuse than the federal Constitution does. The federal Constitution creates a basic minimum of legal security for rights such as free speech, due process, and security against searches and seizures—a “floor” below which the states may not fall. But states can provide increased protections, and most states do just that, at least on paper. Throughout American history, they have often revised their constitutions in response to historical experiences that proved the need for stronger guarantees.

The most important of these experiences came during the 19th century, when state governments allowed powerful railroad corporations to enrich themselves with taxpayer subsidies and use eminent domain to seize land to lay tracks. These abuses led people—especially in the West—to demand new rules barring corporate welfare or the taking of property by private businesses. State constitutions have also been amended to prevent excessive taxation, guarantee the right to an education, and provide stronger protections for free speech, among other things. The effort to expand freedom with state constitutions received another boost in the 1970s, when several states added references to the right to privacy to their fundamental laws. In short, state constitutions are a flexible and powerful means of providing greater security to liberty. ★

STATE CONSTITUTIONS MATTER IN COURT...OR SHOULD

State constitutions often use different language than the federal version because they’re designed to be read more expansively. For example, while the federal First Amendment provides that Congress “shall make no law ... abridging the freedom

THE FIRST LINE OF DEFENSE

of speech, or of the press,” the California Constitution provides that “every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right.”⁴ State courts have interpreted this more expansive language as “providing greater protection than the First Amendment.”⁵ But even when state constitutions contain language that is identical or similar to the U.S. Constitution, there may be good reasons to interpret them more broadly than their federal counterpart.⁶

Different state courts have different answers to when and how they should interpret their own constitutions differently from the federal Constitution,⁷ but all state courts apply some degree of independent judgment when doing so, meaning there’s usually an opportunity for expanding protections for individual freedom at the state level. This is particularly true when federal and state constitutions use different words. One example is the Washington Constitution’s “Private Affairs” clause, which reads, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”⁸ Written in 1889, this provision is entirely different from the federal Fourth Amendment, and was written under different circumstances than the federal warrant requirement a century before. Washington State courts have therefore interpreted the state clause as providing stronger protections against warrantless searches than the federal Constitution provides—in fact, in ways that provide Washingtonians with some of the nation’s strongest legal protections against government monitoring.

It’s right for state courts to do this. The U.S. Constitution was meant to be a superstructure within which states would take the primary governing role. Federal protections are supposed to serve only as fallback measures—the last line of defense when state law fails to protect individual freedom.⁹ State governments are meant to address the most common concerns Americans face, and state bills of rights are designed to be more specific than the broadly worded protections that appear in the federal Constitution. Some state constitutions even predate their federal counterpart and served as models for the nation’s founders. It’s certainly illogical in those cases for state courts to copy federal constitutional theories when interpreting their state constitutions.

Yet some state judges insist on copying legal theories devised by *federal* courts when interpreting *state* constitutions, which gets the process backward. Citizens expect

their judges to apply their independent legal judgment to questions of state law—not to outsource state constitutional issues to federal judges. Far better are those state courts that focus primarily on questions of state law and exercise their own judgment, relying on federal jurisprudence only where necessary. ★

STATE CONSTITUTIONAL PROTECTIONS

Consider some examples of how state constitutions protect freedom more strongly than the federal Constitution. Many states have provisions in their fundamental laws that forbid the exploitation of taxpayers and the injustice of corporate welfare, matters on which the U.S. Constitution is largely silent.

Corporate welfare has a long and odious history in America: In the 1830s, so many states invested so much taxpayer money in railroad and canal companies that an economic collapse late in the decade bankrupted eight entire states. Many responded by revising their constitutions to forbid such risky practices—but eventually states were at it again, and throughout the 1870s and 1880s, they gave railroads countless taxpayer dollars in hopes of generating economic improvements. This resulted in waves of corruption and waste, and the injustice of workers being forced to subsidize businesses that made profits for politically well-connected insiders. Nearly half of the states held constitutional conventions between 1875 and 1900, and many included provisions designed to prevent in such abuses. These include gift clauses, which forbid the state from giving or lending taxpayer money to private entities; uniformity clauses, that require taxes to apply equally to everyone, instead of being targeted to specific groups; special law clauses, which bar the legislature from passing laws that target specific beneficiaries instead of legislating for the general public; and restrictions on indebtedness, which forbid states from taking on certain amounts of debt without voter approval.

- ***Gift clauses*** are found in the constitutions of most states, and although each has its own wording, they generally forbid the government from giving money or lending credit to the benefit of private enterprises. What differentiates a forbidden gift from a proper expenditure of public funds, however, is often up to courts—and in many states, courts have answered that question in ways that essentially rob the gift clause of its power. Pennsylvania courts, for example, have held that the government may give or lend taxpayer money to private businesses whenever

THE FIRST LINE OF DEFENSE

doing so is “reasonably designed to combat a problem within the competence of the legislature and if the public will benefit from the project,”¹⁰ despite the fact that the state constitution forbids the legislature from “pledg[ing] or [lending]” its “credit” to “any individual, company, corporation or association” for any reason.

Other states, however, have applied their gift clauses more strictly. Arizona’s constitution, for example, forbids the government from giving or lending credit or “mak[ing] any donation or grant, by subsidy or otherwise” to any private entity.¹¹ Not only are outright grants forbidden, but when the government spends money on something in a way that appears to be a gift, courts require evidence that the government has received something in exchange for the money, and that the value of the thing received is not “grossly disproportionate” to the amount the government has spent. In 2010, the Arizona Supreme Court ruled that the clause was violated when the government gave a developer more than \$97 million to build a luxury shopping center. City officials said they were paying the developer to construct a parking lot, but the court found it “difficult to believe” that the 3,000 parking spaces had “a value anywhere near” that amount, concluding that the project violated the gift clause.¹²

- ***Uniformity clauses***, which forbid a state from singling out special categories of taxpayers for special treatment, are another provision meant to bar favoritism. One way to subsidize specially favored private interests is to exempt them from taxes that others must pay, and as the Pennsylvania Supreme Court explained in a 2017 case, state legislatures in the 19th century routinely gave railroad corporations “indirect subsidies by bestowing upon these industries preferential tax treatment.” This reached such an extreme that “in 1861, the [Pennsylvania] legislature voted to exempt them entirely from taxation.”¹³ Uniformity clauses were fashioned to put an end to such special favors, and now virtually all states have such clauses.

Still, uniformity clauses give state legislatures flexibility to distinguish among groups of taxpayers, with the result that lawsuits involving uniformity typically turn on the question of whether the legislature acted reasonably in treating one group of taxpayers differently from another. And because “reasonable” is an extremely loose standard, some state courts have allowed lawmakers to grant special tax exemptions to private interest groups despite what the clause requires. The Minnesota Supreme Court, for example, allowed the state

to exempt a professional baseball team from taxation by applying the virtual rubber stamp of “rational basis” review. “Assisting in-state industry by providing special tax benefits is a legitimate legislative purpose,” the court declared, even though uniformity clauses were designed to forbid such practices.¹⁴

Other states have been more effective at barring the legislature from handing out tax breaks. Wisconsin has long been one of the most active enforcers of the uniformity requirement.¹⁵ In a 1967 case called *Gottlieb*,¹⁶ the state’s supreme court held that the state violated the constitution by exempting redevelopment corporations (semi-private entities charged with economic redevelopment in “blighted” neighborhoods) from property taxes. And in 1978, the court found that a law giving special tax breaks to particular property owners was not unconstitutional under the federal Constitution, but did violate the state’s uniformity clause because “laudable as the declared purpose of the ... law may be,” it resulted in “an unequal tax burden” between similar property owners.¹⁷

On the other hand, advocates of government subsidies to private industry have fashioned ingenious mechanisms for avoiding the uniformity requirement, and even the Wisconsin Supreme Court recently signaled a retreat from strict enforcement of the rule. In 2018, it upheld a law that gave private developers an up-front cash grant, estimated to total what the developers’ taxes would amount to, in order to foster economic development.¹⁸ In practice, zeroing out someone’s taxes, and paying those taxes for the person, amount to the same thing. But the court found that this simple device enabled the government to escape the prohibition of the uniformity clause.¹⁹

- ***Special law clauses***, like uniformity clauses, forbid the legislature from passing laws that target special groups for differential treatment, by forcing lawmakers to word their laws in general terms rather than singling out specific individuals or groups. This is complicated, because the legislature may have good reason to treat some groups differently from others—and it can be easy to make a special law look general by defining the targeted group in words that appear broad but aren’t. For example, a law that imposes a restriction on only one restaurant in the city would clearly be a special law, but if the law applies to “all restaurants east of Main Street with a square footage of more than 1,000 square feet but less than 1,500 square feet”—it will look general even though it only describes a single business.²⁰

THE FIRST LINE OF DEFENSE

In some states, courts have robbed the special law clause of its effectiveness by employing the essentially meaningless rational basis test.²¹ Courts in Illinois, for example, began applying this test in cases involving the special law clause three decades ago, ignoring the fact the two things have no relationship to one another: The state's prohibition on special laws was written in 1870, while the rational basis test was invented by federal courts in the 1930s as a way of applying the due process clause, which addresses different legal matters.²² But thanks to this mismatched test, the state legislature is today free to target particular groups for favored treatment whenever lawmakers claim there is good reason for doing so—precisely the evil the clause was written to prevent.²³

Arizona courts, by contrast, have fashioned strict rules for applying the special law prohibition: A law is deemed “special” if it divides up citizens in a way that is unreasonable, or if the law's beneficiaries aren't similarly situated, or if the law creates an “inelastic” classification, meaning that people can neither become eligible for the benefit nor lose that benefit.²⁴ Using these tests, Arizona courts set some of the nation's strongest precedent on “special laws” and have struck down tax laws that gave special exemptions to²⁵ specific businesses or imposed unequal burdens on them.²⁶

- ***Debt limitation clauses.*** Even a state as indebted as California has a constitutional provision seeking to limit how much debt the state can carry. Voter approval is required whenever the state seeks to take on a debt above \$300,000. Unfortunately, the clause is rarely used. Still, in 2007, when California's then-Governor Arnold Schwarzenegger sought to issue more than \$560 million in bonds to cover the state's pension obligations, attorneys with the Pacific Legal Foundation went to court and won because the state had not asked voters first.²⁷ In cases like these, in which government seeks to fund larger government programs simply by borrowing—meaning, pushing the cost to future generations—nobody would speak for the taxpayer were it not for state-based public-interest organizations.

State constitutions provide critical protections for individual rights that would otherwise go unenforced. Like the proverbial falling tree in the forest that makes no sound because there is no one to hear it, the protections of freedom in state constitutions will remain silent unless someone acts to vindicate them. ★

GREATER PROTECTIONS FOR ALL RIGHTS

Even when state constitutions refer to rights that are also specified in the federal Constitution, they frequently provide stronger legal protections for those rights—or would, if properly enforced. Consider:

Free Speech

Free speech is one area in which state courts have aggressively built stronger protections. States from New York²⁸ to California²⁹ have declared that their constitutions provide more security to freedom of expression than does the First Amendment. State courts have even held that their broader speech protections allow people to engage in free speech in shopping malls or other places where the First Amendment does not apply.³⁰ And state courts have also applied federal law with an eye to unique state circumstances. In 1985, for example, the Colorado Supreme Court held that the “community standards” factor—which federal courts use in cases involving alleged “obscenity”—required an approach based on “tolerance” rather than censorship. The judges held that other states may take a less protective view of free speech, but because “our constitution provides broader free speech protection,” based in large part on the historical and cultural differences between Colorado and other states, “the tolerance test is required.”³¹ In short, free speech is not just about the First Amendment: It’s a central concern of state law as well.

In coming years, speech by business owners will play an important role in the struggle for stronger state-level speech protections. Under the doctrines of “commercial speech” (which applies to advertisements) and “professional speech” (which applies to communications between a professional and a client), federal courts have frequently asserted that the full protections that the First Amendment applies to other types of speech are unavailable. But in recent cases, the U.S. Supreme Court has emphasized that all speech enjoys First Amendment protection, even if associated with businesses. In 2018, it largely repudiated the “professional speech” theory,³² and it has also held, in a case called *Reed*, that any law treating speech differently based on what that speech says or based on the speaker’s “commercial” motive³³ are “content-based” restrictions of speech—and those are virtually never constitutional. Distinguishing between “commercial” speech and other kinds of speech requires considering the content of the speech, and therefore must be unconstitutional.

THE FIRST LINE OF DEFENSE

And even if that's not true under the First Amendment, the stronger protections accorded to speech under state constitutions must make it true as a matter of state law.³⁴

Even where a state's constitution doesn't provide stronger protections, states can still enact new laws that do so. Recent years have witnessed a wave of incidents on college campuses nationwide in which controversial speakers have been "disinvited," shouted down, or even violently attacked, on account of their opinions. In response, a dozen states have adopted new laws aimed at better protecting free-speech rights on college campuses. Probably the strongest of these is North Carolina's, which forbids the state's colleges from restricting student free speech if that speech is protected by the First Amendment; the law also requires colleges to discipline anyone attacking or shouting down a person engaged in free speech.³⁵ Other states have chosen to enact less protective measures that still aimed to secure free-speech rights on campus. Once again, one of federalism's great strengths is that it lets states fashion protections they believe necessary to preserve individual freedom given their circumstances.

Bureaucracy and the Right to Earn a Living

Economic liberty is a fundamental human right, protected by the federal Constitution and the constitutions of every state. Yet for decades, both federal and state courts have failed to give this right the protection it deserves, usually by applying so-called deference doctrines whereby courts allow elected legislators or unelected bureaucratic agencies to restrict economic freedom essentially whenever they see fit.

In theory, deference doctrines are supposed to ensure "judicial restraint," by preventing judges from second-guessing the decisions of officials who have authority to make important political choices. But in practice, they typically mean that courts refuse to enforce legal protections—including constitutional provisions—that were written for the very purpose of blocking those officials from making certain kinds of decisions. Perhaps the most infamous deference decision in recent years is *Kelo v. New London*,³⁶ the eminent domain case in which the U.S. Supreme Court refused to enforce the Fifth Amendment's protections for property rights, instead deferring to state officials who chose to seize private homes and transfer the land to a private company in order to promote "economic development."

The version of deference used in *Kelo* was the rational basis test. Courts using that test ask only whether government officials might have their actions would benefit the public. That “test” is so lenient that almost anything government does, no matter how unreasonable, will be upheld. The result is that government routinely violates private property rights and economic liberty with impunity.

That test was invented by federal courts in the 1930s, when they chose to overturn precedents set in the 1900s, but many state courts have copied it, often without considering whether it makes sense when applied to *state* constitutions, that in many cases were written to *preserve* those 1900s precedents. Fortunately, state courts seem to be showing greater skepticism toward the federal court’s near abandonment of economic freedom. The trend is slow but unmistakable. Alabama Supreme Court Justice Tom Parker observed in a 2007 case, for example, that it was unreasonable for the state’s courts to follow federal rational-basis precedents from the 1930s, given that the Alabama Constitution was written in 1901. “Although later [federal] cases ... give less protection to economic liberties and more deference to such state interests as health and safety,” he wrote, Alabama courts had “never denied that the liberty of contract is a constitutionally protected right.”³⁷ Texas Supreme Court Justice Don Willett made a similar observation in a 2015 case, urging his colleagues not to interpret the state constitution’s “due course of law” clause as if it were identical to the federal Due Process of Law Clause. “Texas judges should instead conduct a genuine search for truth,” he wrote. “When constitutional rights are imperiled, Texans deserve actual scrutiny of actual assertions with actual evidence” rather than the anything-goes attitude of the federal rational basis test.³⁸ In 2017, the Pennsylvania Supreme Court made a point of emphasizing that while state courts use a version of the rational basis test, the state version “differs significantly” from the federal version, because while federal courts virtually always uphold challenged laws, state courts are more skeptical: “Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.”³⁹

Still, state courts frequently allow legislatures and bureaucracies to deprive people of economic liberty through occupational licensing laws or other types of regulation that limit people’s ability to earn a living for themselves and their families. Some states have taken action, therefore, by passing new statutes to provide entrepreneurs with a fairer process when they go to court to defend their rights. Arizona and Tennessee,

THE FIRST LINE OF DEFENSE

for instance, recently enacted state Right to Earn a Living Acts, which require state agencies to provide stronger justifications whenever they impose regulations that restrict economic freedom. These agencies must now demonstrate their regulations are “necessary to specifically fulfill a public health, safety, or welfare concern.”⁴⁰ This overrides the deference doctrines that judges previously used and requires them to exercise their own independent judgment when considering whether limits on a person’s economic choices are justified. The Act also provides a procedure for anyone affected by a regulation to force the agency to repeal or change it.

There are other ways states can protect people from bureaucratic overreach. In 2015, Arizona adopted a law that bars regulatory agencies from adopting any new restriction on economic liberty except where approved by the legislature.⁴¹ And in 2018, Arizona lawmakers approved a bill that would reform the state’s permit requirements so that (a) an applicant for a permit would be entitled to an answer within a specified time period, (b) the criteria for getting a permit would be clear and unambiguous, and (c) the applicant would have the right to go to court if wrongfully denied a permit.⁴²

Another deference doctrine under which state courts often fail to enforce constitutional guarantees is the so-called *Chevron* doctrine. Named for a 1983 U.S. Supreme Court decision, the doctrine provides that when a bureaucratic agency interprets a law, that interpretation will be upheld by the courts except in rare instances in which the agency has acted unreasonably. It’s been embraced by both federal and state courts. But giving unelected officials power to interpret laws governing their own authority runs a dangerous risk of enabling them to expand that authority far beyond what lawmakers—let alone voters—intended. In recent years, *Chevron* has come under increasing criticism at the federal level, but state courts have also employed it. Fortunately, states appear also to be recognizing the dangerous consequences of giving agencies such broad power.

In 2018, the Wisconsin and Mississippi Supreme Courts largely abandoned their versions of *Chevron* deference in decisions that warned that it is—in the words of the Wisconsin court—an “abdication of core judicial power.” That abdication is especially “problematic” in cases in which people are brought before agencies instead of judges for hearings on allegations of law-breaking.⁴³ Since agency hearings are presided over not by judges but by officials who work for agencies themselves,

there’s “a great risk of actual bias.”⁴⁴ This and the fact that “the court, not the agency, [is] the law-declaring body,” persuaded the Wisconsin judges to throw out their deference rule and declare that courts must apply independent judgment in the courtroom rather than deferring to agency decisions.⁴⁵ Their Mississippi colleagues agreed, noting that for the judicial branch to defer to agencies that are part of the executive branch undermines the separation of powers. “In deciding no longer to give deference to agency interpretations,” the court observed, “we step fully into the role the [Mississippi] Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.”⁴⁶

Once again, even if courts have not taken action, state legislatures can reassert the independence of the judiciary. Only weeks before the Wisconsin decision was announced, Arizona passed a bill instructing state courts to apply their own independent judgment when a person appeals an administrative agency’s decision, rather than deferring to the agency’s opinion about what the law means.⁴⁷

Arizona shows how legislatures can protect people against bureaucratic overreach in other ways as well. In 2015, it adopted a law that bars agencies from creating new rules that would increase constraints on property rights or economic freedom.⁴⁸ A year later, it enacted the Regulatory Bill of Rights, a state law that forbids agencies and city governments from encouraging people to “voluntarily” waive their rights, or “bas[ing] a licensing decision in whole or in part on licensing conditions or requirements that are not specifically authorized” by law, or from engaging in other unauthorized conduct.⁴⁹ The same law also provides procedures whereby people affected by regulations can challenge them in court.

Education, the Fruits of One’s Labor, and Other Rights

Because state governments have broader responsibilities than the federal government, their constitutions are longer and more detailed, and the rights protected by them are more explicit. Many state constitutions provide “positive” rights to state-provided services such as taxpayer-funded schools. Others provide more express protection to such things as “the enjoyment of the gains of [one’s] own industry” (which is referred to in the constitutions of Missouri,⁵⁰ North Carolina,⁵¹ and others) or prohibitions on monopolies (found in the constitutions of Georgia, New Hampshire, Tennessee, and several other states).⁵²

THE FIRST LINE OF DEFENSE

Most of these clauses have suffered from disuse, but they still have the potential to provide meaningful security for individual freedom. For example, in 2014, the North Carolina Supreme Court struck down a city ordinance that restricted the fees certain tow-truck companies could charge, on the grounds that this violated the state constitution's guarantee of the "right to the fruits of one's own labor." "Allowing Chapel Hill to engage in price setting under the general and undefined rubric of 'welfare,'" said the court, "could subject other enterprises not only to price setting but also to officious and inappropriate regulation of other aspects of their businesses."⁵³

State constitutional provisions that grant "positive rights" to citizens can also prove significant in promoting individual freedom. Some have argued that state constitutional provisions guaranteeing the right to an education should be interpreted as including a right to school choice, because a state that requires parents to send their children to school, but allows those wealthy enough to do so to send their children to private schools, thereby discriminates against parents who can't afford that option. The state, they've argued, must also provide funding for school choice by parents who want those opportunities for their children.⁵⁴ ★

FIGHTING FOR FREEDOM: A MULTILAYERED APPROACH

As we've seen, state governments have tools to protect freedom in ways the federal government doesn't. To see how those tools can best be used, consider the nationwide backlash in the wake of the U.S. Supreme Court's controversial *Kelo* decision in 2005. That case, which held that government could use eminent domain to condemn private property and transfer it to another owner for private profit, sparked a nationwide outcry—and state courts and legislatures responded. In the backlash that ensued, policy analysis, litigation, and legislative reforms all played a role. Policy scholars, including economists, lawyers, and historians, published research on the economics of redevelopment takings and historical examples of failed redevelopment efforts, and designed proposals for more effective ways to improve local economies without using eminent domain.⁵⁵ Those arguments helped support the push for new laws that would restrict eminent domain powers and helped make the case for state courts either to declare it unconstitutional under the state constitution to use eminent domain for private economic development,⁵⁶ or to strengthen legal protections, including procedural rules, in cases involving such takings.⁵⁷

The strongest state law protecting property owners in the wake of *Kelo* was Arizona's Property Rights Protection Act (Proposition 207). That Act not only forbade the seizure of property for economic development, but also protected property owners against the more common and more insidious "regulatory" takings, in which government forbids owners from using their land but then denies them just compensation on the theory that the land wasn't technically "taken."⁵⁸ Although property owners are supposed to receive just compensation for these kinds of takings, adverse court opinions had made it virtually impossible for owners to get compensation in most cases. The new Act targeted reforms to protect home and business owners against wrongful takings while still allowing the government to take property when truly necessary for protecting the public.

Arizona’s reform epitomizes the progress that can be made when litigation, policy analysis, and legislative reform work together. The *Kelo* decision was announced shortly after a headline-grabbing lawsuit called *Bailey v. Myers*, in which city officials in Mesa sought to condemn a car-repair business so as to transfer the land to a hardware store owner instead.⁵⁹ The property owner won, thanks to the fact that Arizona’s constitution provides stronger protections for property owners than the federal Constitution by specifying that “private property shall not be taken for private use.” But because state court judges often follow the lead of their federal counterparts, Arizonans feared that the *Kelo* decision might lead to the overturning of the *Bailey* precedent. Backed by scholarship on the dangers of eminent domain and the unfairness of regulatory takings and other types of property-rights restrictions, and supported by legal arguments from state-based policy groups, the Prop. 207 campaign succeeded in providing Arizonans with the strongest property protections in the nation.

Since its enactment, the Act has proven an effective tool against takings. In 2008, officials in Tucson tried to forbid a property owner from renovating his property and offering it for rent. When the Goldwater Institute filed suit on his behalf, the city sought to get the case thrown out of court—and when the court said no, the case ended in a settlement. In 2012, the city of Sedona tried to forbid property owners from renting out their homes for periods of under 30 days, claiming that this was a “public safety” measure exempt from Prop. 207. The Arizona Court of Appeals rejected that argument, however, holding that the city was not allowed to

THE FIRST LINE OF DEFENSE

merely assert the existence of a “public safety” need. Instead, it was obligated “to demonstrate” that its “public safety” claims are “grounded in actual fact.”⁶⁰

But while these cases have demonstrated the effectiveness of state-level reform, what’s even more telling is the relative rareness of such lawsuits. Arizona’s Private Property Rights Protection Act did not result in the landslide of litigation that its opponents predicted: On the contrary, most property-rights disputes have been resolved in settlements—or in the government letting people use their property.

Prop. 207 hasn’t always succeeded. In a 2011 case, Arizona courts effectively shortened the statute of limitations period by three months,⁶¹ and efforts to remedy this by amending the law have so far proven unsuccessful. But a new version of the proposition, called the Property Ownership Fairness Act, has been proposed, which fixes this and other technical problems with the original Act.

Eminent domain is just one of the many examples of how questions of freedom are front and center at the state level. In fact, *Kelo*-style takings virtually always occur at the state level, and eminent domain is almost entirely a matter of state law. The reaction to *Kelo* at the state level shows how litigation, policy analysis, and legislative reform can work together to expand legal protections for individual liberty. ★

LITIGATION, LEGISLATION, AND LIBERTY

The many freedom-protecting tools available at the state level mean that disputes can often be resolved in ways that don’t lead to lawsuits or headlines but still have positive results for liberty. Here’s a good example:

In 2015, cities throughout Arizona began outlawing home-sharing (the use of platforms like Airbnb and HomeAway to rent one’s home on a nightly or weekly basis). Such prohibitions violate the property rights of homeowners who have the right to choose whether to let people stay in their homes, as long as they aren’t bothering their neighbors. In response, Arizona legislators passed a new law that lets cities penalize nuisances but bars them from enacting across-the-board bans on home-sharing. That wasn’t enough for some cities, though, particularly tourist towns that wanted to give an unfair advantage to the hotel industry by forbidding alternatives like home-sharing. When one city proposed to require home-sharers to

get a special license, Goldwater Institute attorneys sent a letter to the city council explaining why that proposal violated state law, offering to meet with them to craft better solutions. Shortly afterward, the state's attorney general also warned the city that its proposal would violate state law—and result in a reduction in state funding. The city agreed to withdraw the proposal. No lawsuit ensued, but property owners in the city remain free to use their property as they see fit, so long as they don't harm others.⁶² Resolving disputes in this way is win-win. It's faster and cheaper for taxpayers as well as policy organizations than the sometimes slow and expensive process of litigation, and it results in a vindication of constitutional rights.

Policy organizations must never forget the value of legal scholarship. Scholarly analysis of existing laws and well-informed designs for new legislation can influence legislative debates and electoral decisions, but legal scholarship can influence how courts decide crucial issues on everything from the constitutionality of takings to case-defining matters about statutes of limitations. And it can work on a long timeline—a legal issue that seems abstruse today can become the central focus of national attention in the future, whereupon lawyers and judges will scramble to find scholarship that’s already been published on that issue. So while the impact of legal scholarship may be hard to measure in the short run, its impact can be extraordinary. The legal theories that the U.S. Supreme Court uses in takings cases and privacy rights cases, and even the rule courts use in cases involving searches of computer information, all originated in legal journal articles that were published years or even decades earlier. ★

GOVERNMENT TRANSPARENCY AND “LITIGATION BY LETTERHEAD”

Transparency is one of the most critical yet overlooked ways state law can help protect citizens against government wrongdoing. State versions of the Freedom of Information Act and similar disclosure laws require state and local governments to turn over documents to individuals and organizations that keep an eye on the activities of local officials. And when government fails to comply with these demands, litigation is often needed to ensure that the public gets the information to which it is entitled. In the past, this role was often played by newspapers, whose legal teams were poised to back up state document-production requirements with lawsuits if necessary. But drastic rollbacks of traditional media in recent years are throwing

THE FIRST LINE OF DEFENSE

this obligation increasingly on nonprofit organizations. If watchdog groups don't monitor what happens at city hall or the state legislature, nobody else will.

It isn't always necessary to go to court, however. As noted above, letters and negotiations between lawyers can often result in victories without resorting to court. And state and local governments acting in good faith often need guidance about the meaning of complex areas of law—which requires input from groups that focus on protecting individual liberty. “Litigation by letterhead”—legal advice backed by the willingness to go to court if necessary—often proves as successful in resolving potential conflicts as actual lawsuits. This can also be effective in cases where administrative agencies overstep their bounds. For example, agencies will frequently issue “guidance letters” or “handbooks” that create what are in effect new regulations, but which are issued without going through the required procedures for creating new regulations. This results in a profusion of regulations that can be confusing and burdensome, but which the public never has an opportunity to object to. Challenging such rules—or seeking clarification—by letter is often enough for policy organizations to push back against overreaching bureaucracies. ★

ADMINISTRATIVE PROCEEDINGS

Participating in administrative agency proceedings is also an important and often overlooked opportunity for pro-freedom organizations. An enormous amount of law—at the federal, state, and local levels—is created by these agencies, that govern everything from the use of pesticides to the time limits for certain scholarship applications. When agencies adopt new regulations, they're typically required to go through a process that allows the public to comment, object to proposals, or immediately challenge new regulations in court. Pro-freedom organizations can provide valuable expertise or exert significant political influence in the public-comment process—and those comments become part of the record if a lawsuit ensues. Comments are typically informal; like amicus briefs, they can be filed even by policy organizations that do not have litigators on staff, and usually do not need to be signed by an attorney. Given the importance of these rules, freedom-oriented groups should make it a point to participate in this process.

In addition to rulemaking, regulatory agencies often hold hearings in individual cases of alleged law-breaking, which presents liberty-minded organizations with an important opportunity to participate in the process. When an agency accuses a person of violating a law, it often forces the person to participate in a hearing that is presided over not by a judge, but by a bureaucrat who works for that agency. These hearings are often “informal,” meaning there are few rules of procedure to protect the accused, and evidence that would not be allowed in a courtroom can be admitted. People who show up for such hearings without a lawyer are often misled into thinking that because the hearing is “informal,” they have a fair chance as a layperson of obtaining a reasonable resolution—only to discover that they’ve unknowingly waived their rights or unknowingly admitted to breaking the law. And when they appeal the agency’s decision to an ordinary legal court, they are often barred from introducing their own evidence or contradicting the agency’s factual findings. Worse, without paying careful attention to what arguments are made in the administrative hearing, the person may afterward be prohibited from making important legal arguments on appeal. In short, not having a lawyer for

A WARNING ABOUT “LOCALISM”

It’s a common myth that “local is better.” In fact, while in general it’s best for local governments to make local decisions, those local governments can also pose a serious threat to individual freedom—a threat sometimes called “grassroots tyranny.” Just as the U.S. Constitution uses federal power to block the danger of state tyranny, so state governments must oversee county and city governments and intervene to prevent violations of individual rights by local officials. Even in places where local governments enjoy broad autonomy under a charter or home-rule system, state governments still have full power to rein in abuses by local officials. And state courts are typically the best place to obtain protection against local governments.

One way state governments can protect against local malfeasance is through legislation that allows the state attorney general to challenge city officials who violate state law. In 2017, Arizona enacted a law empowering the attorney general—when asked by a state legislator—to withhold funds from city governments that violate state law. This provides a powerful tool for residents whose rights are violated by illegal city actions, and a means by which watchdog groups can seek protection against municipalities that disregard state law. ★

THE FIRST LINE OF DEFENSE

an administrative hearing can prove a disastrous mistake, not just for the person but for those seeking to affect the law by making arguments to appellate courts. By participating in administrative hearings, freedom-oriented groups can help preserve the opportunity to make these arguments and change the law. ★

ORGANIZING A LEGAL ARM

Policy analysis, legislative advocacy, and litigation each have a role to play in effective advocacy for liberty—and each has its own demands. Adding litigation to the menu may require a significant investment in time and resources for any state-based policy group. Here are a few of the more important considerations:

What will it cost? Lawyers aren't cheap, but they also aren't as expensive as is sometimes believed. The \$300/hr.+ rates charged by big law firms typically include an enormous amount of overhead that's not part of the deal for nonprofit public-interest litigation. By having in-house lawyers, a litigation center's principal expenses are salaries, which are high but nothing like the hourly fees of private practice, and the direct costs of litigation, which are usually modest. Most important, the incentives of public-interest law differ from those in private practice: Public-interest lawyers are motivated to minimize costs, to avoid disputes or tangential legal issues that spend time and money not advancing the mission of the litigation. Adequate support staff, including a paralegal, is also essential to ensuring that litigation is done in a timely and competent manner. While this can be expensive, fees for attorney and paralegal time can often be recovered at the end of successful litigation. Even where no explicit law provides for it, many courts allow plaintiffs in cases of significant public importance to obtain attorney fees when they win. Costs of litigation can also be recovered, including filing fees. While public-interest litigation won't pay for itself, and attorney fees should never be relied upon for budgeting, they can provide enormous leverage for a legal center's resources, as well as a crucial incentive for the government to comply with the law.

The costs of filing fees, depositions, trial, and even expert witnesses are relatively modest, particularly if an organization is careful about selecting cases. Probably the biggest single investment other than salaries is tools for legal research, particularly computer databases such as Westlaw and Lexis that are indispensable to litigators. But the benefits of access to this research are incalculable. For other research needs,

lawyers often rely on law clerks or externs—students who provide assistance for class credit, for an hourly wage, or through an internship program that pays them from outside sources.

We estimate that for an experienced lawyer plus a less-experienced lawyer or a paralegal, along with a regular supply of law clerks, a litigation center with four ongoing cases should cost between \$300,000 and \$500,000 annually. That's a rough estimate, and it will vary with location, but it includes salary, research costs, bar dues, and travel costs. In some lawsuits, litigation might be more expensive, and in some less, but the costs can be balanced out by savings gained by affiliating with a policy center. (For example, if the policy center's experts can act as expert witnesses or help review technical evidence in a case.) And litigation can be an attractive investment for donors, who often value the tangible results as well as the human causes that are championed.

Choosing cases. Not everything can or should be a lawsuit. In fact, one of the most important jobs of any public-interest litigator is knowing when to reject a potential case. As the old saying has it, “hard cases make bad law.” Not only can a time-consuming, evidence-heavy case prove a drain on resources, but it might backfire and result in a bad legal precedent. More important, public-interest litigators are often deluged with requests for help by people who have legitimate cases—but a policy organization must commit itself to pursuing its own agenda, not reacting to every request for assistance. Otherwise, the organization will quickly find itself swamped or perpetually fighting on defense, instead of advancing an agenda that seeks to set important new precedent.

Cases should be chosen based on the potential to set significant precedent, the costs and difficulty of litigation, and the importance of the issues involved, rather than immediate advantage or a desire for media attention. Cases that are likely to be bogged down in highly technical details are poor opportunities for litigation. So too are cases where private entities have a strong incentive to vindicate an important principle on their own. If a legal issue is the subject of frequent litigation by businesses that can afford expensive lawyers, it's less likely to be a worthwhile subject of litigation for a nonprofit state-based policy organization; a better choice is an issue that—while of broad importance—is commonly faced by people who can't afford attorneys, and is considered so “settled” that the legal community rarely

THE FIRST LINE OF DEFENSE

bothers making the argument. And be wary of dramatic cases that involve a great deal of emotion. These cases can cause lawyers to have what astronauts call “Go Fever”—a desire to act quickly that causes one to overlook possibly dangerous technical problems.

Choosing the right client is important, too: Lawsuits involving important constitutional questions are likely to generate significant media attention, and clients must be able to accept that and be effective representatives of their cause. The ideal case, as always, presents a clear David-and-Goliath situation that hinges on an easily understood question of legal significance and without factual complications.

Direct litigation or amicus curiae? Sometimes it’s not necessary to file a lawsuit to have an influence in the courts. Public policy organizations often have an important role to play as “friends of the court” by filing amicus briefs in cases involving important questions. These briefs can give judges economic, social, historical, or legal insights that the parties to the case may not have addressed. Amicus briefs have sometimes proven invaluable to courts; perhaps the most famous is the 1963 case of *Gideon v. Wainwright*, in which an amicus brief urged the Supreme Court to adopt the rule requiring states to provide criminal defendants with a public defender. It’s hard to measure the influence amici have, in part because courts sometimes don’t specifically say if their thinking was affected by a friend of the court brief. But it would be shortsighted to downplay the value of a well-written and insightful amicus brief—particularly in trial courts or in intermediate courts of appeal, where amicus briefs are less common and therefore more likely to have an influence. Amicus briefs are also a way of building a reputation for knowledge on certain legal subjects, and advertising a group’s willingness to litigate on those subjects in the future. On the other hand, groups participating as amici should take care they don’t file “me too” briefs that say nothing not already covered by other amici or the parties to the lawsuit. If an organization has nothing unique to say about a case, it should sign on to a brief by another organization, instead of adding clutter to a judge’s desk. Groups that get reputations for filing briefs that lack insight or uniqueness quickly find that judges tune them out.

Avoid political partisanship. A litigator’s reputation matters, and a legal organization that stands for principle rather than doing the bidding of a political party will gain respect accordingly. A policy organization, especially one that

litigates, should not opportunistically support legal principles only when they serve the interests of one party over another. While it may be tempting to sue when one's own "side" faces an apparent disadvantage, and to disregard that same disadvantage when faced by the opposing party, that kind of partisanship will ruin an organization's credibility and undermine its effectiveness in the long run.

What’s your alternative? This is one area where policy analysis plays a critical role. Litigators should always be prepared to answer the question “What’s your alternative?” Be ready to explain how, for instance, economic development can be accomplished without unjustly taking away someone’s property, or how an industry should be regulated if not by the specific rule you’re challenging.

Be in it for the long haul. It has been four centuries since Shakespeare wrote of “the law’s delay,” but little has changed. Litigation can be a slow process, particularly when the bigger and more important issues are at stake. Once a litigation priority is selected, it make take many cases and many years to achieve a result—but the ultimate precedent is worth it. Public-interest litigation often requires nibbling away at a legal principle, both with lawsuits and with policy analysis and legislative reforms. It took the NAACP more than 50 years and countless cases in state and federal court to get *Plessy v. Ferguson* overruled. Although courts can move very fast at times, litigation for a cause is not a game for the impatient. And major court victories are almost always the result of long, tedious, and redundant labor. Any organization hoping to make a difference in the law must be prepared to take on many cases that address the same issues over and over, knowing that they may end in judgments that only move the ball a little bit.

Give lawyers the freedom they need. Public-interest litigators can often double as policy analysts, which can give rise to the temptation to divert their work toward non-litigation tasks. But litigation can be time-consuming, stressful, and sometimes hard to predict. An organization's legal team facing a court deadline may be unable to assist with urgent demands for policy analysis or lobbying. Lawyers must be given time and resources needed to work on litigation tasks. It can also be tempting for a policy organization to ask a staff attorney to work as the organization's own lawyer on an ordinary legal task—reviewing the organization's contracts, for instance—but that can distract from the attorney's work litigating on behalf of clients to achieve legal change and might even cause conflicts of interest. The two should be kept separate.

THE FIRST LINE OF DEFENSE

Be conscious of lawyers' ethical obligations. Public-interest litigation raises two principal ethical issues. Properly handled, neither should present an obstacle. First, even though a public-interest lawyer is paid by a nonprofit organization, ethical obligations are always to the client. If circumstances occur that make the client's best interests differ from the interests of the organization, the client's needs must take priority. The best ways to avoid conflicts of interest between the organization and the client are to (a) carefully evaluate cases before filing them, and (b) precisely specify the roles of the parties and the objectives of the case in a client retainer agreement that identifies the extent of the representation (e.g., through trial court, postponing until later whether to also do an appeal), the goals of the litigation, the nature of the legal arguments, and the conditions under which the representation can cease. The clearer the agreement among the sponsoring organization, the attorney, and the client, the less likely the chances for conflict. Even then, sometimes the organization's interest will diverge from the client's. For instance, in an eminent domain case, an attorney is duty-bound to convey to the client any offers of compensation or possibility of settlement, and it may be in the client's interest to accept a settlement even if that ends a case before an important precedent can be obtained. Careful client selection—choosing clients who share the organization's principles and objectives—should minimize such conflicts.

Relatedly, non-lawyers may not control the conduct of litigation. Non-lawyer boards or committees may approve litigation and funding, but they cannot make decisions regarding the course of litigation. If a nonprofit group wants to exert ongoing control over the litigation, it should create a legal review committee composed entirely of lawyers and thoroughly explain its role to the client.

One benefit public-interest lawyers enjoy is that they are usually not subject to constraints that limit the ability of private lawyers to solicit clients. Public-interest lawyers are free to advise people that their constitutional rights have been violated and to offer to represent them. Public-interest representation is not limited to indigent clients, but while tax-exempt nonprofit organizations may represent clients who could afford to pay for legal representation, they may only do so if the case raises significant public-interest issues. A good test is to ask whether the client would find it financially worthwhile to take a case to court without the nonprofit's involvement. And from the standpoint of public perception, it may be unwise to represent affluent clients unless no others could raise the issues equally well.

Structuring the litigation program. Public-interest litigation falls squarely within the 501(c)(3) tax-exempt, tax-deductible status of most public policy organizations. Such organizations will rarely need to alter their tax status at all to engage in public-interest litigation. Contributions to public-interest litigation are also fully tax deductible, although public-interest firms must put into place safeguards that ensure that tax-deductible donations are not used in ways that advance the private interests of the specific donor.

The major structural decision that must be made is whether the litigation program should be carried out within an existing organization or as a separate entity. That decision depends on how the sponsoring organization and supporters view the most comfortable fit. An integrated structure—adding a litigation component to an existing policy organization—offers the benefits of capturing significant economies of scale and providing greater heft to the organization’s policy agenda. This can also avoid start-up costs, because the litigation arm of the organization can share personnel and rely on existing development and communications resources. What’s more, attorneys bring credibility and “heft” to public policy organizations, particularly in the many areas where public policy and the law overlap. This may be particularly helpful in efforts to explain to lawmakers that an existing law is unconstitutional. On the other hand, given the unique ethical obligations imposed on lawyers, and the complexities of the legal environment, it can also make sense to set up a litigation group as a separate organization. As mentioned above, lawyers are generally forbidden from allowing non-lawyers to supervise their work and are required to keep certain information confidential in ways that don’t apply to investigators or policy analysts. Some groups may therefore find it makes more sense for the legal team to be set up as a separate but allied organization, with a separate board of directors. (Of course, any organization creating a litigation branch should be aware of applicable ethical requirements.)

STRATEGIC ADVANTAGES TO STATE COURT

Because attorneys are often trained on the federal court model, and sometimes view federal courts as more prestigious, they're sometimes quick to assume that litigation on liberty-related issues should take place in federal court. But state courts have a number of advantages. First, federal judges are often reluctant to become involved in what they see as local issues, such as zoning disputes that raise important property rights questions. Also, some legal doctrines, such as abstention, sovereign immunity, or restrictions on legal standing, can bar federal courts from even considering certain kinds of cases. Many of these rules don't apply in state court.

Plaintiffs in state court may raise both state and federal constitutional issues (and generally should to preserve the possibility of appealing an adverse federal constitutional issue to the U.S. Supreme Court), while the converse generally is not true. Moreover, lawsuits in federal court can virtually never make progress toward reversing bad legal precedent at the state level. And while federal courts have a reputation for being more protective of individual liberty on some issues than state courts, the reverse is also frequently true. Deciding whether to file a case in state or federal court is an important strategic decision in any case, but state courts should typically be the first recourse for freedom-oriented litigation. ★

THE FIRST STEPS

Once a policy organization decides to add litigation to its program, it should take the crucial first steps:

Choose litigation priorities and create a case-selection process. Select a few, clearly defined significant principles and legal issues to focus on. The broader and vaguer the program, the more likely an organization is to squander precious resources chasing after fads instead of focusing on a long-term litigation project. This can be done in different ways. The Pacific Legal Foundation has a list of legal policy objectives, such as “The civil justice system should promote responsibility and redress actual, significant individual injuries, rather than functioning as a social insurance system by providing the means to redistribute wealth from ‘deep pockets’ to opportunistic litigants, or allowing judges to exercise policy-making functions more properly

performed by representatives accountable to the people.” The Institute for Justice has four “pillars” (economic liberty, private property, free speech, and school choice). The Goldwater Institute has a list of litigation priorities that include the gift clause and protecting the privacy rights of donors to nonprofits. However it’s structured, an organization’s list of objectives should govern the selection of cases to ensure that the organization is actively pursuing its own legal mission rather than being distracted by opportunistic, off-message cases or playing defense.

Once those objectives are chosen, an organization should design a process to weed out potential cases that, compelling as they may be, don't fit within the chosen priorities. Some organizations have regular staff meetings to decide collaboratively whether to take potential cases. Others use an evaluation process that assigns numerical values to different considerations.

Legal organizations should avoid becoming one-person shops, in which the legal program is dictated by a single individual, or partisan organizations that take politically expedient cases at the expense of broader principles. Just as important, board members must strive to keep their personal views—and their business interests—separate from the best interests of the organization. More than one litigation group has harmed its credibility by choosing its battles in ways that serve the private interests or personal opinions of board members or donors rather than advancing the principles the institution purports to endorse. Standing for the constitution means taking consistent and principled positions and sticking to them.

Choose your team. In addition to the legal staff, any effective litigation group must include public relations as well as policy and development staff. They should be brought together early in the process to ensure that the organization has a consistent message and a focus for litigation and any necessary proposals for legislative reforms. The team should develop both the litigation mission, against which strategic decisions will be tested and success measured, and strategic overriding communications objectives to keep team members—and clients—on message.

Know the community. Today's robust free-market litigation movement includes national and state-based lawyers advocating for freedom on a wide variety of subjects. And there are organizations like the Federalist Society, freedom-friendly legal clinics like the Pacific Legal Foundation's clinic at Chapman University and the

THE FIRST LINE OF DEFENSE

Institute for Justice Entrepreneurship Clinic at the University of Chicago, and centers for constitutional scholarship such as Georgetown's Center for the Constitution, New York University's Classical Liberal Center, and the Center for the Study of Constitutional Originalism at the University of San Diego. Getting to know these and other organizations and individuals in the legal community can prove essential to obtaining legal assistance and drawing attention to an ongoing lawsuit. Failing to keep in touch with allied organizations increases the risk of accidentally interfering with another group's plans, obstructing their carefully planned efforts, or creating personal friction among individuals who should be working as friends and allies.

Be patient and prepared: Filing a lawsuit is exciting, and it's natural to feel what astronauts call "Go Fever." But good litigation means careful preparation. Before a case is filed, the lawyers should have a carefully written complaint and a clear idea of their legal theory and how they expect to prove the necessary facts. Working with communications staff, they should have drafted a media backgrounder that explains the case in sufficient detail to get reporters, who may have no familiarity with the legal issues, up to speed in a hurry. They should also have prepared press releases and op-eds for local newspapers to explain those issues to the general public.

Launch your first case: A litigation center should never announce its existence by telling the world what it plans to do. Instead, it should file its first lawsuit, which not only will speak for itself but also show that the center means business. Hence, the first case should reflect the paradigm of what the organization wants to accomplish, and it should be as close to the ideal case as the organization can make it. As soon as possible thereafter, the center should file its second case, preferably in an area different from the first, to further define its mission and to demonstrate momentum. Two cases probably are plenty for the first several months—if the litigation team does its job, the cases will create substantial buzz. During this period, the lawyers need to concentrate on effective legal advocacy. The center should never let the well go dry; cases can disappear quickly for reasons both positive and negative, and case development can take considerable time. As a result, new product development always should be in the pipeline. ★

THE AMERICAN FREEDOM NETWORK

Not every nonprofit policy organization will have the resources to start its own litigation arm. But there's an alternative: partnering with the Goldwater Institute's American Freedom Network (AFN). The AFN was started in 2016 as a means to expand the power of litigation beyond the capacities of in-house attorneys at organizations such as the Goldwater Institute by recruiting litigators seeking to devote pro bono hours to advance principles they believe in.

AFN lawyers are vetted by the Goldwater Institute and eligible for special training in public-interest litigation. These private-sector attorneys can participate in ways that work best for their practice: by overseeing direct litigation with Goldwater's assistance, by serving as local counsel on cases led by Goldwater litigators, by offering research and moot court assistance, and by contributing in many other ways. Some AFN cases and projects have involved demands for public records. Others have involved taxpayer protections or seeking administrative reforms to better protect the right to earn a living. Still others have focused on property rights and freedom of speech.

State-based organizations know what's happening in their own states better than outside organizations do. They're in the best position to identify cases and issues that affect their missions. Once those issues are identified, the Goldwater Institute may be able to identify an attorney who is willing and able to assist through the AFN.

A state-based policy group that wants to file a lawsuit but doesn't have the resources for an attorney may be able to partner with the AFN to advance freedom with little expense to themselves. ★

THE BENEFITS—AND JOYS—OF LITIGATING FOR LIBERTY

Two well-known slogans sum up the message for organizations seeking to advance the cause of freedom more effectively. One is the saying that “Eternal vigilance is the price of liberty.” There will never be a final victory for the principles of private property, economic freedom, or other constitutional rights; rather, it is our obligation—and, frankly, our joy—to promote and advance the principles of individual liberty as long

THE FIRST LINE OF DEFENSE

as we are able, to pass those freedoms on to the next generation—with perhaps even a little more. We’re remarkably fortunate to have a constitutional system that not only provides a “double security” for our freedoms, but empowers us to expand those protections still further over time. The great advantage of promoting freedom at the state level is that states are more flexible, more responsive to the people, and better situated to fashion remedies against new types of government abuses.

The second slogan comes from Saturday morning TV commercials: “Part of this complete breakfast.” Litigation, legislative reform, and policy analysis all play essential roles in the mission of promoting liberty. Litigation can reveal the need for legislative reform; new legislation can provide opportunities for further litigation to enforce constitutional guarantees; and policy analysis can strengthen both of these efforts by providing the evidence and arguments needed to advocate for change. All three should be part of a complete strategy for promoting freedom.

Nothing could be more rewarding. ★

WORKS CITED

1. *The First Line of Defense* by Clint Bolick (Goldwater Institute, 2007). This second edition incorporates some of the wording of the original.
2. The Federalist No. 51 at 351 (J. Cooke, ed. 1961).
3. Id. No. 45.
4. Cal. Const. art. I sec. 2.
5. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910 (1979).
6. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M.L. Rev. 199, 203 (1998).
7. State courts have devised four different approaches to this question: the “lockstep,” “interstitial,” “sovereignty,” and “primacy” approaches. Robert F. Utter, *Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts*, 1 Emerging Issues in State Constitutional Law 217-224 (1988).
8. Ariz. Const. Art II sec. 8.
9. Richard Saunders, *Battles for the State Constitution: A Dissenter’s View*, 37 Gonzaga L. Rev. 1, 3 (2002).
10. *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 10 (1975) (quoting *Basehore v. Hampden Indus. Dev. Auth.*, 433 Pa. 40, 48 (1968)).
11. Ariz. Const. art. IX sec 7.
12. *Turken v. Gordon*, 223 Ariz. 342, 351 (2010).
13. *Nextel Commc’ns of Mid-Atl., Inc. v. Commonwealth, Dep’t of Revenue*, 171 A.3d 682, 694–95 (Pa. 2017), cert. denied sub nom. *Nextel Commc’ns of the Mid-Atl., Inc. v. Pennsylvania Dep’t of Revenue*, 138 S. Ct. 2635 (2018). See also *New Jersey State League of Municipalities v. Kimmelman*, 105 N.J. 422, 428–29 (1987).
14. *Metro. Sports Facilities Comm’n v. Cty. of Hennepin*, 478 N.W.2d 487, 490 (Minn. 1991).
15. Jack Stark, *The Uniformity Clause of the Wisconsin Constitution*, 76 Marq. L. Rev. 577, 600–01 (1993).
16. *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408 (1967).
17. *State ex rel. La Follette v. Torphy*, 270 N.W.2d 187, 194 (Wis. 1978).
18. *Voters with Facts v. City of Eau Claire*, 913 N.W.2d 131 (Wis. 2018).
19. Joe Kreye, *The Uniformity Clause*, Reading the Constitution vol. 1 no. 2 (Wisconsin Legislative Reference Bureau, Oct. 2016), <https://docs.>

THE FIRST LINE OF DEFENSE

legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_1_2.pdf.

20. In *RUI One v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), for instance, the court upheld a minimum-wage requirement that was carefully designed to apply to only one business in the whole city. Lawyers in that case, however, invoked only federal constitutional arguments, and did raise a uniformity clause claim.
21. For an explanation of why “rational basis” is essentially a meaningless gesture, see Judge Janice Brown’s separate opinion in *Hettinga v. United States*, 677 F.3d 471, 480–83 (D.C. Cir. 2012) (Brown, J., concurring).
22. *Illinois Polygraph Soc. v. Pelligrano*, 414 N.E.2d 458, 462–63 (Ill. 1980).
23. *Gen. Motors Corp. v. State Motor Vehicle Review Bd.*, 862 N.E.2d 209, 229 (2007).
24. *Gallardo v. State*, 236 Ariz. 84, 88 (2014).
25. *State v. Levy’s*, 119 Ariz. 191 (1978).
26. *Tucson Elec. Power Co. v. Apache Cty.*, 185 Ariz. 5 (Ct. App. 1995).
27. *California Fiscal Recovery Fin. Auth. v. Fullerton Ass’n of Concerned Taxpayers*, No. C048368 (Sacramento County Superior Court, 2003).
28. *Goetz v. Kunstler*, 164 Misc. 2d 557, 561 (N.Y. Sup. Ct. 1995).
29. *Prigmore v. City of Redding*, 211 Cal. App. 4th 1322, 1336 (2012).
30. *Pruneyard Shopping Center*, *supra* note __; *State v. Schmid*, 423 A.2d 615 (N.J. 1980); *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981).
31. *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 361 (Colo. 1985).
32. *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).
33. *Sorrell v. IMS Health*, 131 S.Ct. 2653 (2011).
34. Jared Blanchard & Adi Dynar, *Heed Reed: Goldwater Institute’s Guideposts for Amending City Sign Codes* (Goldwater Institute, 2016), <https://goldwaterinstitute.org/wp-content/uploads/2016/04/Heed-Reed-downloadable-PDF.pdf>.
35. N.C. H.B. 527 (Session Law 2017-196).
36. 545 U.S. 469 (2005).
37. *State v. Lupo*, 984 So. 2d 395, 408 (Ala. 2007) (Parker, J., concurring).
38. *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 112 (Tex. 2015).
39. *Shoul v. Commonwealth, Dep’t of Transportation, Bureau of Driver Licensing*, 173 A.3d 669, 677 (Pa. 2017) (quoting *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954)).

40. See Clint Bolick, *The Right to Earn a Living* (Goldwater Institute, 2016), <https://goldwaterinstitute.org/wp-content/uploads/2016/01/Right-to-Earn-a-living-1.pdf>.
41. A.R.S. § 41-1038.
42. Timothy Sandefur, *Permit Freedom* (Goldwater Institute, 2018), https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/14/Tim%20Rela%20paper%20FINAL%20.pdf. Unfortunately, Governor Doug Ducey vetoed the bill.
43. *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*, 382 Wis. 2d 496, 547, 552 (2018).
44. *Id.* at 553.
45. *Id.* at 560.
46. *King v. Mississippi Military Dep’t*, 245 So. 3d 404, 408 (Miss. 2018).
47. A.R.S. § 12-910(E).
48. A.R.S. § 41-1038.
49. A.R.S. § 9-832.
50. Mo. Const. art. I sec. 2.
51. N.C. Const. art I sec. 1.
52. See Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol’y 983, 1075–95 (2013).
53. *King v. Town of Chapel Hill*, 367 N.C. 400, 409 (2014).
54. Gary J. Simson, *School Vouchers and the Constitution—Permissible, Impermissible, or Required?*, 11 Cornell J.L. & Pub. Pol’y 553, 557 (2002); Greg D. Andres, *Private School Voucher Remedies in Education Cases*, 62 U. Chi. L. Rev. 795 (1995).
55. Benjamin Barr & Tim Keller, “This Land is My Land: Reforming Eminent Domain after *Kelo v. City of New London*” (Goldwater Institute, 2006); Timothy Sandefur, “Gradual and Silent Encroachments: How the Missouri Supreme Court Expanded the Power of Eminent Domain,” (Show Me Institute, 2009); Dana Berliner, *Public Power, Private Gain* (Institute for Justice 2003); Samuel R. Staley & John P. Blair, “Eminent Domain, Private Property, and Redevelopment: An Economic Analysis,” (Reason Foundation, Feb. 2005).
56. *Wayne County v. Hathcock*, 471 Mich. 445 (2004); *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Bd. of Cty. Comm’rs of Muskogee Cty. v. Lowery*, 136 P.3d 639 (Okl. 2006).

57. *Mayor & City Council of Baltimore City v. Valsamaki*, 916 A.2d 324 (Md. 2007).
58. Timothy & Christina Sandefur, *Protecting Private Property Rights: The Property Ownership Fairness Act*, (Goldwater Institute 2016).
59. 206 Ariz. 224 (Ct. App. 2003).
60. *Sedona Grand, LLC v. City of Sedona*, 229 Ariz. 37, 43 (Ct. App. 2012).
61. *Aspen 528, LLC v. City of Flagstaff*, No. 1 CA-CV 11-0512, 2012 WL 6601389 (Ariz. Ct. App. Dec. 18, 2012).
62. Howard Fischer, “AG: Sedona Cannot License Short-Term Rental Homes,” *Arizona Capitol Times*, May 7, 2018, <https://azcapitoltimes.com/news/2018/05/07/ag-sedona-cannot-license-short-term-rental-homes/>.
Blanchard & Adi Dynar, Heed Reed: Goldwater Institute’s Guideposts for Amending City Sign Codes (Goldwater Institute, 2016), <https://goldwaterinstitute.org/wp-content/uploads/2016/04/Heed-Reed-downloadable-PDF.pdf>.



500 E Coronado Rd, Phoenix, AZ 85004
602-462-5000 ★ info@goldwaterinstitute.org